Appendix A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 26, 2024

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-2405

MARK A. VANDENBOOM,
Plaintiff-Appellant,

v.

ROBERT STROHMEYER,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:22-cv-02006-MPB-MJD

Matthew P. Brookman,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc, * and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is **DENIED**.

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* Circuit Judge Joshua P. Kolar did not participate in the consideration of this matter.

APPENDIX B

No. 23-2405

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Mark VandenBoom,

Plaintiff-Appellant,

v.

ROBERT STROHMEYER sued in his individual capacity,

Defendant-Appellee.

Appeal from the United States District Court

For the United States District Court for the Southern District of Indiana

PETITION FOR REHEARING AND

REHEARING *EN BANC*

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RULE 35(b)(1) STATEMENT IN SUPPORT OF REHEARING EN BANC

The Plaintiff respectfully petitions the Court to grant rehearing and rehearing *en banc* pursuant to Fed. R. App. P. 35(b). A panel of this Court upheld decisions of the lower court to dismiss a case without call for evidence. Rehearing *en banc* is warranted, because "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions" (Fed. R. App. P. 35(b)(1)(A)). Call for evidence prior to dismissal of the case is required and noted by several U.S. Supreme Court rulings, namely Goldberg v. Kelly (1970), Mathews v. Eldridge (1976), Cleveland Board of Education v. Loudermill (1985), Erickson v. Pardus, 551 U.S. 89, 94 (2007), Phillips v. Prudential Ins. Co. of Am., 714 F.3d 1017, 1020 (7th Cir. 2013).

Rehearing *en banc* is also warranted, because the decision presents a "question of exceptional importance," (Fed. R. App. P. 35(b)(1)(B)), namely whether a pro se litigant is barred from exercising their right to due process by Indiana Court Procedures.

INTRODUCTION

The panel did not address key points related to Supreme Court decisions that justified all of the plaintiff's requests to this court. This failure not only warrants rehearing *en banc*, but warrants a reinstatement of the case itself for hearing of evidence and trial.

Those unaddressed points include the judge's failure to call for evidence prior to dismissal of the case as required and noted by several U.S. Supreme Court rulings. See Goldberg v. Kelly (1970), Mathews v. Eldridge (1976), Cleveland Board of Education v. Loudermill (1985), Erickson v. Pardus, 551 U.S. 89, 94 (2007), Phillips v. Prudential Ins. Co. of Am., 714 F.3d 1017, 1020 (7th Cir. 2013). If evidence has not been called for and reviewed, the case cannot be decided. Without this call for evidence, the judge and panel failed to address complete evidence for equitable tolling of dates and

doctrine of continuing harm as the defendant was being sued for actions that were outside of his scope that violated the plaintiff's civil right to due process (Malley v. Briggs, 475 U.S. 335 (1986)).

The plaintiff's pro se status was disregarded, which is reason enough to re-open the case so that evidence may be considered by an impartial judge and jury. Permissive application of the rules governing the form of pleadings should be afforded a pro se individual.

If the panel forgoes rehearing, the full Court must step in. The majority opinion disregards Supreme Court precedent and continues to allow pro se litigants to be denied their civil right to due process in the state of Indiana.

BACKGROUND

The Plaintiff filed a Complaint on January 27, 2016, with the Indiana Department of Insurance (IDOI), claim# 1016992. Medical panel review of the case was initiated. Many material facts were presented to panelists related to abandonment and denial of care following botched and negligent medical procedures under false pretenses. These material facts included 23 linked violations of Indiana Standards of Conduct for Medical Professionals 844 IAC 5 Standards of Professional Conduct and Competent Practice of Medicine, most of which can be easily understood by a lay person. This case was dismissed via summary judgement in January 2018 without the Plaintiff being given opportunity or option to question the medical review panel members.

The current case at issue is a 1983 color of law concern for deviations from standard procedure on the part of the panel chair that led to denial of due process and bias related to the Medical Review Panel members. The Plaintiff seeks restoration of the denied right to cross examination of panelists in front of a jury, a review of all supporting evidence and recovery of damages for actions found to be outside the scope of their immunity.

The current case at hand relates to a violation of due process, bias and perjury by medical review panel experts to deprive a highly traumatized citizen of their access to the courts and enforcement of their civil right to due process. Violations of due process are protected under The Constitution of the United

States. Amendment 14, as well as the right to meaningful compensation. As the 14th Amendment takes priority over The Constitution of the United States, Amendment 11, the state of Indiana is not afforded sovereign immunity in such cases (Fitzpatrick v. Bitzer (1976), 427 U.S. 445).

This topic is best covered in Reconciling State Sovereign Immunity with the Fourteenth Amendment - Harvard Law Review, FEB 10, 2016, 129 Harv. L. Rev. 1068 available from harvardlawreview.org/2016/02/reconciling-state-sovereign-immunity-with-the-fourteenth-amendment.

REASONS FOR GRANTING THE PETITION

I. The panel did not address the judge's failure to call for evidence prior to dismissal of the case as required and noted by several U.S. Supreme Court rulings; panel rehearing is warranted to address this oversight.

The Plaintiff well more than met required civil procedure and the courts agreed, which is why the case was accepted into the court in the first place. The court reviews claims and rejects any that do not pass muster. The Plaintiff's claim was accepted in this regard. The judge initially assigned to the case did not throw out the case, however that judge was removed from the case for reasons unknown by the Plaintiff and replaced by a judge whose initial act was to provide final judgment without call for or review of evidence.

Although specific facts were provided in initial case documents, they were not necessary at that stage of the process. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.' Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). The Court does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007).

The Supreme Court recently clarified the appropriate pleading standard in Ashcroft v. Iqbal, setting forth a two-pronged approach for courts deciding a motion to dismiss. See 129 S.Ct. at

1937. The Court instructed district courts to first "identify [] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 1950. Though "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Id. Second, if a complaint contains "well-pleaded factual allegations [,] a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. "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. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. at 1949 (quoting and citing Twombly, 550 U.S. at 556-57) (internal citations omitted).

Moreover, as the Second Circuit recently emphasized in Sealed Plaintiff v. Sealed Defendant 537 F.3d 185, 191 (2d Cir. 2008), "[o]n occasions too numerous to count, we have reminded district courts that when [a] plaintiff proceeds pro se, . . . a court is obliged to construe his pleadings liberally. . . . This obligation entails, at the very least, a permissive application of the rules governing the form of pleadings. . . . This is particularly so when the pro se plaintiff alleges that [his] civil rights have been violated. Accordingly, the dismissal of a pro se claim as insufficiently pleaded is appropriate only in the most unsustainable of cases." 537 F.3d 185, 191 (2d Cir. 2008) (citations and quotation marks omitted); see Sharpe v. Conole, 386 F.3d 483, 484 (2d Cir. 2004); see also Weixel v. Bd. of Educ. of the City of N.Y., 287 F.3d 138, 145-46 (2d Cir. 2002) (holding that when a plaintiff is appearing pro se, the Court shall "'construe [the complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests.'") (quoting Cruz v. Gomez, 202 F.3d 593, 597 (2d Cir. 2000) (alterations in original)). Cruz v. Reilly, No. 08-CV-1245 (JFB) (AKT), 2-3 (E.D.N.Y. Aug. 18, 2009)"

U.S. Supreme Court rulings fully support the plaintiff's right for and expectation that a call for evidence would occur and that the provided evidence would be considered prior to any dismissal of the case or motions impacted by evidence. Due to the disregard for the challenges a pro se individual faces in the court system and the expected leeway the U.S. Supreme Court and codes of conduct state a pro se individual should be afforded, such as plain language and clear direction.

The court cannot force a plaintiff to have an attorney. An individual may represent themselves and dismissing the case without conducting the case in a manner appropriate for a pro se individual, is effectively punishing the Plaintiff for failing to have an attorney. This is in violation of several U.S. Supreme Court rulings. (State v. Penderville, 2 Utah 2, 272 P.2d 195 (Utah 1964); Moore v. Michigan. 355 U.S. 155, 78 S. Ct. 191 (1957)).

II. The panel did not address the fact that the judge's failure to call for evidence prior to dismissal of the case resulted in failure to recognize that equitable tolling of dates and doctrine of continuing harm apply in this case, but were not considered, because there was no call for or review of evidence.

Equitable tolling of dates and doctrine of continuing harm apply to this case and must be considered since trauma from this event has continued to deeply affect the plaintiff and unfold in unexpected ways. The Judge and Panel errored when they assumed past and current medical records would not support continued harm to the plaintiff. Without expertise or review of medical records to confirm, they assumed a history of continued wrongs had not existed.

The plaintiff is unable to go to doctors without explaining what occurred inside his chest and abdomen. Not only have the initial adhesions created a painful situation for the plaintiff, it is traumatic to go to a new doctor and build trust with them. On multiple occasions doctors continue to refuse meaningful care. While the reasoning clearly varies, the threat of being blamed for unaccounted damage is often mentioned by doctors. Evidence of this most recently includes IU doctors who "missed" the plaintiff having developed diabetes, fatty liver and other issues. In this case the Plaintiff had to go to another local doctor who immediately detected these issues and others, which was making the plaintiff too sick to work. As statements in medical records are lacking or deeply concerning for doctors, the Plaintiff is having trouble finding doctors to assist, which has resulted in significant additional costs in finding assistance.

Further, the Plaintiff has been experiencing memory and focus issues which impair his ability to even complete this very document which also relates to CPTSD and emotional flashbacks. Each time the Plaintiff attempted to work on this document his focus continuously shifts away from it making progress

very difficult. Until more recently, with no help, research to find supporting laws was virtually impossible. Required breaks between attempts to work on court documents is similar to starting fresh each time and cannot always be avoided. While the plaintiff does well as long as nothing reminds him of how situations felt related to this matter, his life is a mine field of re-experiencing past trauma resulting in weeks of a dysregulated nervous system. A dysregulated nervous system leaves a person feeling everything as if they were hyper aware and vigilant. As his mind naturally tries to protect itself by blocking out memories from the resulting harm, it further blocks him from reasonably pursuing this case as pro se. He has consistently sought legal assistance and until recently did not realize how much his mind was blocking memories as demonstrated by one of his doctors assisting with related chronic pain issues. He has in the past and is currently being treated to assist with damage related to this case. Only in the past couple months did he learn four surgical clips were implanted during an earlier gall bladder removal surgery, which extensive allergy testing shows he is allergic to. In the next weeks he will undergo yet another surgery to remove those clips and further remediate adhesions, related to surgeries at issue in this case. He is also being treated for adrenal fatigue, which multiplies the reasons for his inability to consistently work or effectively pursue his rights as it causes severe joint pain and inflamation.

III. The *En Banc* Court should consider whether the state of Indiana's procedures violated this pro se plaintiff's constitutional right to due process, as well as systemically violated due process rights.

When consideration is given to the fact that this case and those related to it have been dismissed with prejudice at least three or more times, the larger picture is certainly remarkable. Those who have viewed the evidence of the plaintiff's case and are aware that the group most responsible has been implicated in Stark Law violations by the DOJ (United States and the State of Indiana ex rel. Thomas Fischer v. Community Health Network, Inc., et al. No. 1:14-cv-1215 (RLY-DKL) (S.D. Ind.)), are now seriously questioning our legal system. This is especially true with an IN-Attorney General defending the very people who are accused of covering for the medical group being pursued by the DOJ while in-state judges and medical review panels continue to deny evidence from being presented.

The same people in this case reframed the Plaintiff's actions to obey the first judge's request for the Plaintiff to fill out a form when considering whether to help the Plaintiff find legal representation, have construed this as a request to file the case *in forma paupris* and somehow indicate the Plaintiff was gaming the system when he complied with the request. All court fees were paid by the Plaintiff prior to the forms being filled completed.

Harm continues for the Plaintiff as it did in the initial trial where final rulings show the judge required an expert even though an expert is not required when the issue at hand is something a lay person can understand. The claim was made in the only court hearing that some of the complaints could be understood by lay individuals. "However, expert medical witness testimony is not required in every medical malpractice case." Culbertson v. Mernitz, 602 N.E.2d 98, 104 (Ind. 1992).

Over the past 20 years, statistically the state of Indiana has retained an average of $340,500,432 each year, which totals to $6.8 billion just from this obviously flawed process, assuming each claimant otherwise received the maximum of $1.2 million. In 2018 the INDOI had to return money to doctors in the state of Indiana since so few cases resulted in them having to pay out on malpractice complaints. It was said that no insurance company ever existed with such few payouts vs. claims made. While the state is not on trial here, it is clear this could not happen if the panel review process was working as defendants have claimed and in-state judges appear to believe. In the Plaintiff's case, the medical panel approved actions that countered procedures for that situation recommended by other healthcare providers, medical tests, the doctor performing the procedure and even CHATGPT which doctors also now use for advice.

The case history and previously stated facts around the medical review panel process preclude any ability for courts to claim their impartiality as required by due process. "A private individual may be subject to 1983 liability 'If he or she willfully collaborated with an official state actor in the deprivation of the federal right.'" (Dwares vs City of New York, 985 F.2d 94,98 (2d Cir. 1983)).

CONCLUSION

The petition for rehearing and rehearing *en banc* should be granted.

Respectfully submitted,

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

January 29, 2024

Before

DIANE S. SYKES, *Chief Judge*
MICHAEL B. BRENNAN, *Circuit Judge*
DORIS L. PRYOR, *Circuit Judge*

No. 23-2405	MARK A. VANDENBOOM, Plaintiff - Appellant v. ROBERT STROHMEYER, Defendant - Appellee
Originating Case Information:	
District Court No: 1:22-cv-02006-MPB-MJD Southern District of Indiana, Indianapolis Division District Judge Matthew P. Brookman	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

Clerk of Court

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 16, 2024*
Decided January 29, 2024

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-2405

MARK A. VANDENBOOM,
Plaintiff-Appellant,

v.

ROBERT STROHMEYER,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:22-cv-02006-MPB-MJD

Matthew P. Brookman,
Judge.

ORDER

In his lawsuit under 42 U.S.C. § 1983, Mark VandenBoom alleged that an Indiana medical review panel violated his civil rights when it concluded that he was not the victim of medical malpractice. The district judge dismissed his complaint because it was

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

untimely and because the alleged violations of state law could not amount to a deprivation of due process under the federal Constitution. We affirm.

We draw the following facts, which we accept as true, from VandenBoom's operative complaint. *Dix v. Edelman Fin. Servs., LLC*, 978 F.3d 507, 511 (7th Cir. 2020). In 2016 following a medical procedure that he alleges was "botched," VandenBoom brought a malpractice claim under Indiana law against medical providers involved in the procedure. Under the Indiana Medical Malpractice Act, before he could proceed with his claim in court, a medical review panel had to review its merit and opine on whether the defendants were negligent. IND. CODE § 34-18-8-4. Robert Strohmeyer, an attorney, presided over the panel, which also included three medical providers. The panel found in the defendants' favor.

Four years later VandenBoom sued Strohmeyer in his individual capacity under § 1983, alleging that Strohmeyer was biased against him and violated state procedural laws, depriving him of due process. He added a medical-malpractice claim under Indiana law. VandenBoom moved to proceed in forma pauperis and for court-recruited pro bono counsel. Strohmeyer, for his part, filed a motion to dismiss, arguing that VandenBoom's suit was untimely and failed to state a claim for relief.

The judge addressed both motions in a single order. He denied VandenBoom's motion to proceed in forma pauperis as both moot (VandenBoom had already paid the filing fee) and utterly meritless (he reported an annual household income of $288,000). The judge also declined to recruit pro bono counsel because VandenBoom was neither indigent nor incapable of litigating his claims on his own.

Turning to the motion to dismiss, the judge agreed with Strohmeyer that the suit was untimely under the two-year statute of limitations, which had expired more than two years before VandenBoom filed his complaint. *See Brademas v. Ind. Hous. Fin. Auth.*, 354 F.3d 681, 685 (7th Cir. 2004) (borrowing for suits under § 1983 the two-year statute of limitations for personal-injury claims under IND. CODE § 34-11-2-4); IND. CODE § 34-18-7-1 (two-year statute of limitations for medical-malpractice claims). And although VandenBoom appeared to invoke equitable defenses to the statute of limitations—for example, by saying that his health complications had rendered him "disabled"—the judge reasoned that these allegations were merely conclusory.

In the alternative, the judge also addressed the sufficiency of VandenBoom's allegations, holding that the complaint failed to state a claim for relief. VandenBoom

alleged only that Strohmeyer had violated state law, which is insufficient to state a claim for a violation of his rights under the federal Due Process Clause. The judge noted that the state-law claim was barred for an additional reason: under the Medical Malpractice Act, Strohmeyer was immune from suit for his actions in the course of his duties as a review panelist. IND. CODE § 34-18-10-24. The judge accordingly dismissed the suit in its entirety.

We review the dismissal order de novo. *Dix*, 978 F.3d at 512. To begin, VandenBoom has not meaningfully contested the main reason his suit was dismissed: untimeliness. He continues to hint, without much elaboration, that equitable tolling or a similar doctrine should apply and excuse him from the time-bar. For § 1983 claims, we borrow tolling principles from state law. *See Behav. Inst. of Ind., LLC v. Hobart City of Common Council*, 406 F.3d 926, 932 (7th Cir. 2005). Indiana recognizes disability as grounds for tolling, and that ground appears closest to what VandenBoom alleged in his complaint and argues now. But he has not developed this argument sufficiently for us to apply the exception.

Though we have no reason to question the judge's primary rationale for dismissing the suit, there is no shortage of other reasons listed in his decision, all of which were sound. To withstand the motion to dismiss, VandenBoom's complaint needed to include allegations plausibly suggesting that Strohmeyer deprived him of an interest protected by the Constitution without due process. *See Rock River Health Care, LLC v. Eagleson*, 14 F.4th 768, 773 (7th Cir. 2021). There is no plausible claim for a violation of the federal Constitution based on the facts alleged.

VandenBoom invoked the Fifth Amendment, but the judge correctly explained that the Fifth Amendment's Due Process Clause applies only to federal actors, so the Fourteenth Amendment is the source of the right that VandenBoom asserts here. U.S. CONST. amends. V, XIV; *see Bolling v. Sharpe*, 347 U.S. 497 (1954). He accuses Strohmeyer of violating state procedures and laws, but "the procedures required by state or local law do not define the constitutional requirements of notice and an opportunity to be heard." *Rock River Health Care, LLC*, 14 F.4th at 773. VandenBoom has not alleged any misconduct by Strohmeyer beyond the alleged failure to faithfully apply the Medical Malpractice Act's procedures. *See Lavite v. Dunstan*, 932 F.3d 1020, 1032–33 (7th Cir. 2019). And although VandenBoom has a right to an unbiased decisionmaker, we presume that the medical review panel acted impartially, *see Hess v. Bd. of Trs. of S. Ill. Univ.*, 839 F.3d 668, 675 (7th Cir. 2016), and VandenBoom offers no

specific allegations undermining that presumption. Procedural missteps (even if there were any) do not raise an inference of bias. *See id.*

Regarding the state-law claim, which the judge understood to arise under the Medical Malpractice Act, VandenBoom has not developed any argument contesting the application of the statutory immunity provision, § 34-18-10-24. That's a waiver. *See Pack v. Middlebury Cmty. Schs.*, 990 F.3d 1013, 1021 (7th Cir. 2021).

VandenBoom appears to challenge the judge's refusal to recruit pro bono counsel for him. But his reported earnings vastly exceeded any measure of poverty, which disqualified him from proceeding in forma pauperis. 28 U.S.C. § 1915(a)(1) (IFP status available to those "unable to pay"); *see Coleman v. Lab. & Indus. Rev. Comm'n of Wis.*, 860 F.3d 461, 467 (7th Cir. 2017) (explaining that a plaintiff seeking IFP status must "demonstrat[e] that she is unable to pay the required fees"). And judges can recruit counsel only for indigent litigants. 28 U.S.C. § 1915(e)(1); *see Pickett v. Chi. Transit Auth.*, 930 F.3d 869, 871 (7th Cir. 2019). VandenBoom's assertion on appeal that he is now unemployed does not affect our conclusion. The judge ruled based on the information in front of him at the time, and his decision is unassailable.

Finally, VandenBoom argues that the case should have been heard outside of Indiana because the State has a financial interest in the case—presumably, its interest in not paying damages for the misconduct of a panelist on the state review board. Because he raises this argument for the first time on appeal, we could rightly consider it waived. *See Wonsey v. City of Chicago*, 940 F.3d 394, 398–99 (7th Cir. 2019). Still, the venue rules seek to preserve a plaintiff's choice of forum, and VandenBoom chose to sue in Indiana federal court. *See In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 601 (7th Cir. 2014). Moreover, the Southern District of Indiana is not an "Indiana" court; it is part of a separate federal judicial system and has no financial interest in avoiding VandenBoom's claimed damages. *See generally* U.S. CONST. Art. III § 1; 28 U.S.C. § 132.

AFFIRMED

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARK A. VANDENBOOM, Plaintiff, v. ROBERT STROHMEYER sued in his individual capacity, Defendant.	)	No. 1:22-cv-02006-MPB-MJD

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

Pursuant to the Court's order on this date, the Court now enters **FINAL JUDGMENT** in this action. Mark Vandenboom's claims against Robert Strohmeyer are **DISMISSED with prejudice.**

SO ORDERED

Date: June 28, 2023

Matthew P. Brookman, Judge
United States District Court
Southern District of Indiana

Roger A.G. Sharpe, Clerk

BY: Tricia M. Blanford
Deputy Clerk, U.S. District Court

Electronically distributed to all ECF-registered counsel of record.

Distributed via certified mail to:
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARK A. VANDENBOOM, Plaintiff, v. ROBERT STROHMEYER sued in his individual capacity, Defendant.	)	No. 1:22-cv-02006-MPB-MJD

ORDER ON PENDING MOTIONS

This matter comes before the Court on Plaintiff's Motion to Add Panelists to List of Defendants (Docket No. 15) and Defendant's Motion to Dismiss (Docket No. 16), as well as Plaintiff's Motions for Assistance with Recruiting Counsel (Docket No. 28) and for Leave to Proceed in Forma Pauperis (Docket No. 29). For the reasons set forth below, Plaintiff's Motions to Add Panelists to List of Defendants, for Assistance with Recruiting Counsel, and for Leave to Proceed *in Forma Pauperis* are **DENIED** and Defendant's Motion to Dismiss is **GRANTED**.

I. Background

Plaintiff Mark Vandenboom initially filed this action bringing claims for violations of his right to due process under the Fifth and Fourteenth Amendments and claims for violation of the Indiana Medical Malpractice Act against the Indiana Department of Insurance, Robert Strohmeyer, and Robert Dempsey in their official capacity. (Docket No. 1; Docket No. 2). The Court dismissed this complaint at the screening stage for failure to state a claim upon which relief may be granted, given the claims against each defendant were equivalent to a suit against the state itself, and thus barred by the Eleventh Amendment. (Docket No. 4). The Court, however, provided Vandenboom an opportunity to amend his complaint. (*Id.*). In his second

attempt, Vandenboom amended his complaint to bring the above claims against Strohmeyer, again, but this time in his individual capacity. (Docket No. 6). Vandenboom alleges that between 2016 and January 4, 2018, Strohmeyer deviated from prescribed state rules and procedures as chairman of a medical malpractice review panel. (*Id.*). Vandenboom alleges Strohmeyer improperly interfered with panel selection and prevented Vandenboom from questioning panelists and experts. (*Id.*). Moreover, in his motion to add defendants, Vandenboom seeks to add Dempsey and two other panelists to this litigation in their individual capacities. (Docket No. 15). The Court construes Vandenboom's motion as a Motion to Amend the Complaint. The Court now addresses each of the pending motions in turn.

II. Motions for Assistance with Recruiting Counsel and to Proceed *in Forma Pauperis*

The Court may allow a plaintiff to commence a civil suit without prepayment of the filing fee. 28 U.S.C. § 1915(a). In the present case, Vandenboom has paid his filing fee, and has also submitted an "Application to Proceed Without Prepaying Fees or Costs on Appeal"[1] (Docket No. 29) to support his Motion for Assistance with Recruiting Counsel. (Docket No. 28). As Vandenboom has already paid the filing fee, the Court denies the Motion to Proceed *in Forma Pauperis* as moot.

Even if Vandenboom had not paid the filing fee, his motion would be denied on its merits. Vandenboom states that he and his wife each receive around $12,000 a month. (Docket No. 29 at ECF p. 2). This works out to an annual household income of $288,000. The Seventh Circuit has held that "[t]he privilege to proceed without [paying] costs and fees is reserved to the many truly impoverished litigants who, within a district court's discretion, would remain without

[1] Vandenboom has submitted an application to proceed *in forma pauperis* on appeal, rather than an application to avoid paying the initial filing fee in this Court. To the extent Vandenboom is seeking to waive the appeal fee, such a request is premature.

legal remedy if such privilege were not afford to them." *Brewster v. North Am. Van Lines, Inc.*, 461 F.2d 649, 651 (7th Cir. 1972). Courts frequently use the Federal Poverty Guideline (available at https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines) as a threshold for determining whether to allow a civil plaintiff to proceed in forma pauperis. *See Shoutlz v. Illinois State University*, No. 10-cv-1046-JBM, 2010 WL 744576 at *1 (C.D. Ill. Feb. 26, 2010). The poverty guidelines for 2023 set the applicable poverty level for a household of four at $30,000. Vandenboom's household income is well above this line. Consequently, the Court denies Vandenboom's motion to Proceed *in Forma Pauperis*.

Litigants in civil cases do not have a constitutional or statutory right to counsel. *Walker v. Price*, 900 F.3d 933, 938 (7th Cir. 2018). However, courts may "request an attorney to represent any person unable to afford counsel." 29 U.S.C. § 1915(e). The Seventh Circuit has held that when considering a motion under § 1915(e), district courts are "to make the following inquires: *(1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself.*" *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007). As discussed above, however, the Court has determined Vandenboom is not indigent, and thus does not pass the threshold question. As such, the Court declines to seek representation for Vandenboom.

Even if Vandenboom had shown that he was unable to afford counsel, the Court would not seek representation on his behalf. Vandenboom has contacted hundreds of attorneys across five states between September 20, 2022, and November 17, 2022. These efforts are sufficient to meet the first inquiry under *Pruitt*. The second inquiry requires courts to determine a plaintiff's competence to litigate his own case, taking into consideration "the plaintiff's literacy, communication skills, education level, and litigation experience" as well as "any evidence in the

record bearing on the plaintiff's intellectual capacity and psychological history". *Pruitt*, 503 F.3d at 655. Here, Vandenboom holds a bachelor's degree, an MBA, and several trade certificates, however Vandenboom also suffers from physical and mental injuries that have made it difficult for him to speak with attorneys and doctors. (Docket No. 28 at ECF p. 7-8). Despite the challenges these injuries may present, they do not appear to have impacted Vandenboom's paper filings, which have been comprehensible to the Court. Vandenboom has not shown that he is unable to litigate this case himself.

III. Motion for Leave to Amend Complaint and Motion to Dismiss

a. Legal Standard

Plaintiffs in federal court are entitled to amend their complaint once as a matter of course, if they do so within a timely manner. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "The terms of the rule, however, do not mandate that leave should be granted in every case." *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007). The court may deny leave for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, and futility of amendment." *Ray v. Nelson & Frankenberger, P.C.*, No. 4:13-cv-00114-SEB, 2014 WL 4385128 at *4 (S.D. Ind. Sept. 3, 2014). An amendment is futile if "the complaint, as amended, would fail to state a claim upon which relief could be granted" under Rule 12(b)(6). *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997).

Rule 12(b)(6) permits a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To state such a claim, the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In order to survive a motion to dismiss for failure to state a claim, the complaint must first "describe the claim in sufficient detail to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting *Bell Atlantic Corp v. Twombly*, 550 U.S. 554, 127 S.Ct. 1955, 1964, 167. L.Ed.2d 929 (2007)). Second, the complaint's allegations "must plausibly suggest that the plaintiff has a right to relief" to a degree that is beyond mere speculation. *Id.*; *see also Babchuk v. Indiana University Health, Inc.*, 299 F.R.D. 591, 592 (S.D. Ind. 2014). *Pro se* complaints are construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015).

When a defendant moves to dismiss under this rule, the Court accepts as true all factual allegations in the complaint and draws all reasonable inferences in favor of the plaintiff. *Bielanski v. County of Kane*, 550 F.3d 632, 633 (7th Cir. 2008). "A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusion, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). "Ordinarily, however, a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend," however the court may refuse to grant leave to amend "[w]here it is clear that the defect cannot be corrected so that amendment is futile". *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago and Northwest Indiana*, 786 F.3d 510, 519-20 (7th Cir. 2015).

IV. Discussion

Vandenboom seeks to amend his complaint to add three additional panelists from the medical malpractice review at issue as defendants in their individual capacities. Strohmeyer argues that adding additional defendants would be futile for the same reasons Vandenboom's claims against him should be dismissed. Strohmeyer asserts that Vandenboom's claims are barred by the relevant statutes of limitations, by the Indiana Medical Malpractice Act's immunity provisions, and that the complaint fails to comply with the pleading requirements of Rule 8. Additionally, Strohmeyer argues that Vandenboom's Fifth Amendment claim is improper against a state official. Because Strohmeyer's motion to dismiss has significant implications for the potential futility of Vandenboom's proposed amendment, the Court will consider each of Strohmeyer's arguments in turn.

a. Statute of Limitations

A statute of limitations defense is appropriately raised in a Rule 12(b)(6) motion where "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense, such as when a complaint plainly reveals that action is untimely under the governing statute of limitations." *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 847 (7th Cir. 2008). 42 U.S.C. § 1983 "provides a mechanism for enforcing individual rights . . . secured by the Constitution and laws of the United States." *Gonzaga University v. Doe*, 536 U.S. 273, 285, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). As § 1983 does not specify a statute of limitations, claims "brought under § 1983 are subject to the statute of limitations for personal injury claims of the state where the alleged injury occurred." *Brandemas v. Indiana Housing Finance Authority*, 354 F.3d 681, 685 (7th Cir. 2004). Under Indiana law, personal injury claims have a two-year statute of limitations. Ind. Code § 34-11-2-4. Vandenboom alleges the injuring events "took place

between 2016 and Jan. 4th, 2018" (Docket No. 6) and initially filed the present action on October 12, 2022. (Docket No. 1).[2] This is well past the statutory limit, and as such, Vandenboom's constitutional claims under § 1983 are barred.

b. Indiana Medical Malpractice Act

The Indiana Medical Malpractice Act "provides for the establishment of medical review panels to review proposed medical malpractice complaints against health care providers." Ind. Code § 34-18-10-1. The statute of limitations for a claim under this act is two years "after the date of the alleged act, omission, or neglect". Ind. Code § 34-18-7-1. As discussed above, Vandenboom filed the present motion well past the statutory limit, and as such his claims under the Indiana Medical Malpractice Act are barred. Moreover, a member of a medical malpractice review panel "has absolute immunity from civil liability for all communications, findings, opinions, and conclusions made in the course and scope" of their duties as a panelist. *Ind. Code § 34-18-10-24.* As such Strohmeyer and the other panelists Vandenboom seeks to add as defendants enjoy immunity for their actions under the act. *See Rogers v. Indiana Supreme Court*, No. 1:16-cv-364-TLS, 2017 WL 2214968 at *3 (N.D. Ind. May 17, 2017). Vandenboom has provided no factual basis indicating that any individual involved in the panel at issue took any actions outside the scope of their responsibilities that could defeat this immunity. Therefore, Vandenboom's claims under the Indiana Medical Malpractice Act must be dismissed.

[2] Vandenboom argues the doctrines of continuing fraud and continuing harm apply, tolling the statute of limitations. (Docket No. 19). However, he does not develop this argument beyond mere conclusory statements, which nevertheless misunderstand these doctrines. "For a continuing harm, the statute of limitations begins to run on the last occurrence of the harm." *Smith v. Reagle*, No. 1:20-cv-03151 JPH, 2021 WL 2401898, at *2 (S.D. Ind. June 9, 2021) ("[D]efendants could no longer be responsible for any harm to the plaintiff after he was transferred away from their facility.").

c. Pleading Requirements

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint "must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 775 (7th Cir. 1994). A plaintiff "must provide only enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and through his allegations show that it is plausible, rather than merely speculative that he is entitled to relief." *Campbell v. City of Indianapolis*, No. 1:11-cv-1079-JMS, 2011 WL 1134314 at *1 (S.D. Ind. Mar. 25, 2011) (citing *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008)).

In the present case, Vandenboom alleges Strohmeyer "deviated from prescribed state procedures in panel selection" and "intentionally obstructed [Vandenboom]'s ability to question the panelists." (Docket No. 6 at ECF p. 1). These conclusory statements are the full extent of Vandenboom's factual pleadings. While federal notice pleadings requirements impose a low threshold, "legal conclusions" in a complaint "must be supported by factual allegations." *Ashcroft*, 556 U.S. at 664. Vandenboom's failure to provide any factual support for his pleadings renders his complaint insufficient under Rule 8, and therefore dismissal under Rule 12(b)(6) is appropriate.

d. Fifth Amendment

"The Fifth Amendment's due process clause applies only to acts of the federal government and does not limit actions of state officials." *Wrinkles v. Davis*, 311 F.Supp.2d 735, 738 (N.D. Ind. 2004). It is undisputed that Strohmeyer, in his role as chairman of the medical review panel at issue, was a state official. Vandenboom invocation of the Fourteenth

Amendment to save this due process claim is imprecise. "The Fourteenth Amendment creates a due process right against the states . . . while the Fifth Amendment guarantees due process by the federal government." *Massey v. Wheeler*, 221 F.3d 1032, 1036 n. 1 (7th Cir. 2000). As discussed above, Vandenboom's due process claim under the Fourteenth Amendment is barred by the statute of limitations, and his claim under the Fifth Amendment fails as it is improperly directed against a state official.

V. Conclusion

For the foregoing reasons, Plaintiff's Motion for Leave to Proceed *in Forma Pauperis* (Docket No. 29) is **DENIED as moot** and his Motion for Assistance with Recruiting Counsel (Docket No. 28) and Motion to Add Panelists to List of Defendants (Docket No. 15)[3] are **DENIED**. Defendant's Motion to Dismiss (Docket No. 16) is **GRANTED**. Plaintiff's claims are dismissed with prejudice, as Plaintiff has already had an opportunity to amend following a Rule 12(b)(6) dismissal, and it is clear that the complaint's defect cannot be corrected. Final judgment will issue separately.

SO ORDERED

Date: June 28, 2023

Matthew P. Brookman, Judge
United States District Court
Southern District of Indiana

Served electronically on all ECF-registered counsel of record.

Served via certified mail to:
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[3] This motion also fails to comport with S.D. Ind. Local Rule 15-1(b), in that it does not replead the entire complaint, as amended.

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