ATTACHMENT

7th CIRCUIT COURT OF APPEALS ORDER

NONPRECEDENTIAL DISPOSITION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 May 26, 2023*
Decided June 16, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 22-1989

ARMIN WAND, III,
Plaintiff-Appellant,

v.

BECKY KRAMER, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 18-cv-500-wmc

William M. Conley,
Judge.

ORDER

In February 2018 Armin Wand, a Wisconsin prisoner, repeatedly told prison staff that he was experiencing severe abdominal pain. The prison waited two days before sending him to an emergency room, where he underwent surgery for a ruptured appendix and spent several weeks recuperating. Wand sued several prison staff members for negligence and deliberate indifference to his medical needs. The district

* 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).

court dismissed most of his claims at screening and summary judgment and denied his requests for court-recruited counsel at trial. After trial, a jury returned a verdict for the defendants on the remaining claims.

We affirm the district court's dispositive rulings on all of Wand's claims except for his deliberate indifference and medical negligence claims against Becky Kramer, a nurse practitioner. With respect to the claims against Nurse Kramer, we provide instructions in a separate order for further briefing and argument by recruited counsel.

I

A

In 2018 and while incarcerated at the Wisconsin Secure Program Facility, Wand began experiencing severe stomach pain and vomiting. He testified that he told Correctional Officer Leonard Johnson about his symptoms on the night of February 12. But Johnson allegedly took no action. For his part, Johnson said he did not remember interacting with Wand that night, but acknowledged it was possible that Wand asked for help. The applicable unit logbook contains no evidence showing Wand requested medical help or otherwise sought Officer Johnson's assistance.

On February 13, a guard contacted the health services unit after Wand again requested medical attention. Nurse Kramer examined Wand that afternoon. Wand testified that he told Kramer something was "seriously wrong" with his stomach, rated his pain as a 10 out of 10, and identified his appendix as the source of the pain. In his deposition, Wand also recalled telling Kramer that the pain came from the right side of his abdomen. But Kramer testified that she believed Wand's symptoms were caused by stomach flu or dehydration because his abdominal assessment was within normal limits, he had no rebound tenderness, and he never mentioned his appendix. Kramer prescribed Pepto Bismol, Tylenol, and ice chips; put him on a liquid diet; limited work and recreation for two days; and scheduled a follow-up appointment for two days later.

Wand's pain worsened overnight, and after repeatedly requesting medical assistance, he saw Nurse Kramer again the next afternoon. Kramer observed that Wand had difficulty walking; had sharp, localized pain on the lower right side of his abdomen; and was guarding that area. She contacted the on-call doctor who instructed her to send Wand to the emergency room.

On February 14, Wand underwent an appendectomy at the local hospital and experienced complications. His doctors first converted his surgery from a laparoscopic procedure to open surgery after discovering that his appendix had burst and that fluid was building up in his abdominal cavity. Wand then developed an infection. So medical professionals inserted a chest tube, placed an abdominal drain, and administered antibiotics. Two weeks later, Wand returned to the prison, where he received additional treatment without incident from Dr. James Patterson, Jolinda Waterman, and Sandra McArdle.

B

Wand invoked 42 U.S.C. § 1983 and sued a host of prison officials and staff, alleging deliberate indifference in violation of the Eighth Amendment and medical negligence under Wisconsin law.

The district court dismissed several of Wand's claims after screening the complaint. See 28 U.S.C. § 1915A. Wand did not allege personal involvement by some of the defendants, so they were properly dismissed. Other named defendants responded to Wand's requests to receive treatment from members of the facility's health services unit. Those defendants, the district court determined, likewise could not be held responsible for violating Wand's rights. But the district court allowed Wand to proceed with his negligence and deliberate indifference claims against Correctional Officer Johnson, Nurse Kramer, and defendants Waterman, McArdle, and Dr. Patterson.

After Dr. Patterson failed to respond to the summons and complaint, the district court entered a default against him. Three months later, Dr. Patterson moved to set aside the entry of default, explaining that he did not realize until several weeks after receiving the default notice that neither the Wisconsin Attorney General nor his former employer were representing him. At that point, Dr. Patterson retained private counsel. The district court determined that the circumstances warranted setting aside the entry of default.

The district court also granted summary judgment for the remaining defendants on several of Wand's claims. The claims against McArdle and Dr. Patterson could not proceed to trial, the district court concluded, because Wand had not properly exhausted his administrative remedies by filing a timely grievance about McArdle and Dr. Patterson's conduct. See 42 U.S.C. § 1997e(a) (requiring prisoners to exhaust the prison's administrative remedies before bringing lawsuits over prison conditions under

§ 1983 or any other federal law). The district court also entered judgment for every non-medical defendant on Wand's negligence claims because he did not follow state notice procedures for those defendants. See WIS. STAT. § 893.82. And the court concluded there was no triable issue of fact on the merits of several of Wand's claims, including all of his claims against Waterman. All that remained for trial were Wand's deliberate indifference claims against Correctional Officer Johnson and Nurse Kramer and his state law medical negligence claim against Kramer.

Over the course of the proceedings in the district court, Wand filed five motions to recruit counsel. The district court denied the first three but granted the fourth, recruiting counsel for the limited purpose of assisting Wand with mediation for his surviving claims against Correctional Officer Johnson and Nurse Kramer. The district court acknowledged that Wand likely required expert testimony about the standard of care for his claims against Kramer, and that "the difficulty of litigating this case exceeds Wand's abilities." When the mediation failed, the district court allowed Wand's counsel to withdraw.

Wand moved to recruit counsel for a fifth and final time as trial approached. He argued that his case involved complex issues beyond his capabilities and explained how his impediments—legal blindness and a "severe" stutter—made it difficult for him to read printed materials quickly or to say even simple phrases.

The district court denied the motion, concluding that an expert was unnecessary to demonstrate what Wand told Johnson and Kramer, the "most crucial" issues in the case. Instead of recruiting counsel or a neutral medical expert (Wand's alternate request), the district court suggested that Wand elicit medical testimony from Kramer, a trained registered nurse, as an adverse expert. The court also recognized Wand's vision and speech limitations but resolved to "grant Wand the time and leniency he needs to explain himself" and "instruct the jurors about the nature of Wand's limitations."

A three-day trial ensued and resulted in the jury returning a verdict for Correctional Officer Johnson and Nurse Kramer, with the district court then entering judgment in their favor.

Wand now appeals.

II

Among myriad issues, Wand challenges (1) the screening and summary judgment orders that reduced his claims and the pool of defendants; (2) various discretionary rulings; and (3) the denial of his motions for recruitment of counsel.

A

After taking our own fresh look at Wand's complaint, we agree that the district court properly dismissed some of the claims and defendants at screening. See *Schillinger v. Kiley*, 954 F.3d 990, 994 (7th Cir. 2020). Wand failed to plead facts showing that particular defendants were personally involved in treating him. Nor did Wand allege that any of the supervisory officials facilitated, approved, or turned a blind eye to his mistreatment. See *Stockton v. Milwaukee County*, 44 F.4th 605, 619 (7th Cir. 2022). Wand also named in his complaint prison guards who timely contacted the medical staff, rather than disregarding his cries for help. Those guards responded reasonably and therefore could not be held liable. See *Farmer v. Brennan*, 511 U.S. 825, 844 (1994).

B

We also see no abuse of discretion in the district court's revocation of the entry of default against Dr. Patterson. See *VLM Food Trading Int'l., Inc. v. Ill. Trading Co.*, 811 F.3d 247, 255 (7th Cir. 2016). The district court may set aside an entry of default upon a showing of good cause for inaction, prompt steps to correct the default, and an arguably meritorious defense. See FED. R. CIV. P. 55(c); *Parker v. Scheck Mech. Corp.*, 777 F.3d 502, 505 (7th Cir. 2014). The standard is "lenient" when, as here, the district court has not entered judgment on the default. See *Parker*, 777 F.3d at 505.

Dr. Patterson met all three requirements for setting aside the entry of default. He reasonably believed that the State or his former employer was representing him. When he learned that he was mistaken, he acted promptly to retain counsel and to set aside the default. And he had a meritorious defense (which we turn to next). The district court committed no error in setting aside the entry of default.

C

We conduct our own independent review of the district court's grant of summary judgment for Dr. Patterson and McArdle. See *Crouch v. Brown*, 27 F.4th 1315, 1319 (7th Cir. 2022). All sides agree that Dr. Patterson and McArdle did not treat Wand until after he had returned from the hospital following the emergency appendectomy.

But when Wand filed his only timely grievance with the prison, he did not discuss his post-surgery treatment. Instead, he limited the scope of the grievance to the events leading up to his emergency hospital admission and surgery—before Dr. Patterson and McArdle entered the picture. He therefore did not properly exhaust his administrative remedies for the claims against Dr. Patterson and McArdle. See *Schillinger*, 954 F.3d at 995–96 (explaining that a prisoner must comply with the prison's grievance requirements to exhaust his administrative remedies before filing suit); WIS. ADMIN. CODE § DOC 310.07 (requiring the prisoner to "clearly identif[y]" the issue underlying the grievance).

D

Wand also appeals several case management orders, mostly extensions of time, but the district court has broad authority to manage its docket. See *Dietz v. Bouldin*, 579 U.S. 40, 47 (2016). The district court did not abuse its discretion when it made case management decisions without allowing Wand an opportunity to respond.

Nor did the district judge abuse its discretion in denying Wand's motion for recusal. Wand referenced only the district court's adverse rulings to justify his request. But adverse rulings alone are not a basis for recusal, and the record supplies no reason whatsoever to question the district judge's impartiality. See *Liteky v. United States*, 510 U.S. 540, 555 (1994); *Thomas v. Dart*, 39 F.4th 835, 844 (7th Cir. 2022).

Wand provides only single-sentence statements about 17 other errors he advances. These arguments are wholly undeveloped and therefore waived. See *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012).

E

That leaves us with only one issue to resolve—Wand's requests for recruited counsel. We review the district court's denial of Wand's motions for abuse of discretion, considering whether (1) Wand made reasonable efforts to retain counsel or had been precluded from doing so; (2) the difficulty of the case exceeded Wand's abilities; and (3) if Wand was not able to litigate the case himself, recruiting counsel would have made a difference in the outcome. See *Pruitt v. Mote*, 503 F.3d 647, 654, 658 (7th Cir. 2007) (en banc).

The district court did not abuse its discretion in denying the first four motions for recruited counsel. The court applied the correct standard and reasonably concluded that

Wand was sufficiently competent to litigate this case through summary judgment. See *James v. Eli*, 889 F.3d 320, 329 n.3 (7th Cir. 2018) (observing that district courts will often have good reason to deny requests for recruited counsel toward the outset of litigation).

Nor did the district court err in denying Wand's final request for recruited counsel for his claim against Correctional Officer Johnson. Recall that Johnson allegedly ignored Wand's cries for help the night before he saw Nurse Kramer. The complexity of this claim did not exceed Wand's abilities. As a prison guard, Johnson did not have an obligation to treat or diagnose Wand. See *Arnett v. Webster*, 658 F.3d 742, 755 (7th Cir. 2011). So Wand did not need expert evidence that Johnson violated a medical standard of care, simplifying the claim considerably. See *James*, 889 F.3d at 328 (explaining that plaintiffs often need expert medical testimony when they receive some care). Instead, Wand needed to prove that Johnson knew of and ignored his cries for help. It was not beyond Wand's ability to recount his interactions with Johnson on a single night, even though counsel might have strengthened the presentation of his testimony.

Nor would recruited counsel have changed the outcome of the claim. See *Pruitt*, 503 F.3d at 660. With the benefit of a trial record, we can discern that Wand fell short on the merits of this claim. Suppose the jury agreed with Wand's version of events and found that Johnson ignored Wand during his overnight rounds. Wand still lacked evidence that Johnson's conduct was anything more than negligent, which is a far cry from the high standard of deliberate indifference. And Johnson's liability would necessarily end later that afternoon when Wand had his first appointment with Nurse Kramer, who assumed responsibility for his medical care and, more specifically, initially determined that Wand did not require emergency care. See *Arnett*, 658 F.3d at 655 (explaining that a non-medical defendant can rely on the expertise of medical personnel).

Wand's final request for recruited counsel for his claims against Nurse Kramer presents a much closer question, which we cannot resolve without the benefit of further briefing. Wand may have required expert medical testimony to try these claims, making it much more difficult for him to litigate without counsel. See *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014) (acknowledging the need for expert testimony for deliberate indifference claims with complex medical issues at stake); *Wilson v. Adams*, 901 F.3d 816, 823 (7th Cir. 2018) (discussing evidentiary standards for medical negligence under Wisconsin law). His physical limitations—legal blindness and a severe speech impediment—would only compound the difficulties of participating in a

trial. See *Pennewell v. Parish*, 923 F.3d 486, 491 (7th Cir. 2019) (recruiting counsel for legally blind prisoner). But we have also acknowledged the scarcity of pro bono lawyers and the deference owed to the district court. See *McCaa v. Hamilton*, 959 F.3d 842, 845 (7th Cir. 2020).

Nor on the briefing before us are we able to resolve whether the denial of recruited counsel prejudiced Wand at trial. See *Pruitt*, 503 F.3d at 660. Wand emphasizes the difficulties at trial of presenting evidence and securing an expert witness. Indeed, the trial transcripts reveal that the district court had to assist Wand at many stages and indeed during his opening statement. But the parties' briefing does not fully address the merits of Wand's claim, leading us to conclude that the proper course is to resolve this claim after receiving counseled briefing from Wand.

We therefore will issue a separate order opening a new appeal limited to Wand's claims against Nurse Kramer and recruiting appellate counsel solely for those particular claims and the related appeal. We direct recruited counsel to brief and argue the issue of whether the district court abused its discretion in its final order denying recruitment of counsel for the deliberate indifference and medical negligence claims against Nurse Kramer.

For these reasons, we AFFIRM the judgment with respect to defendants BOUGHTON, WINKLESKI, JAEGER, KARTMAN, LATHROP, KUSHMAUL, LOOMUS, MACDANIEL, WATERMAN, PATTERSON, BROWN, MCARDLE, and JOHNSON. Judgment shall issue in this appeal in the normal course, and the normal deadlines for post-judgment motions shall apply.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 20, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

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Appeal from the United States District Court for the Western District of Wisconsin.

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William M. Conley, *Judge.*

ORDER

Plaintiff-appellant filed a petition for rehearing and rehearing en banc on July 5, 2023. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing en banc is therefore DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PROOF OF SERVICE

CASE NAME:Armin Wand III v. Leonard Johnson et al.,
CASE NUMBER:

I certify that i am an inmate confined in an institution. Today,June 30,2023,i am depositing **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** [redacted] **AND ATTACHMENT** UN THIS CASE IN THE INSTITUTION"S INTERNAL MAIL SYSTEM. First-Class postage is being prepaid either by me or the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct. Pursuant to 28 U.S.C.§1746.

Executed on 6.30.23

A. Wand III

Armin Wand III #380173
Declarant