No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY DASLER,

(and on behalf of his minor child T.D.) Plaintiff-Appellant

Petitioner,

V.

DALENE WASHBURN, Defendant-Appellee

Respondant,

On petition for Writ of Certiorari

to the 2nd Circuit Court of the US.

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

Timothy Dasler,
pro se, petitioner
488 NH Rt 10 Apt D
Orford, NH 03777

Dalene Washburn
and Counsel Jennifer McDonald
199 Main Street
PO Box 190 Burlington, VT 05401

MANDATE

23-1156-cv
Dasler v. Washburn

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of April, two thousand twenty-four.

PRESENT:

JOHN M. WALKER, JR.,
STEVEN J. MENASHI,
Circuit Judges,
ORELIA E. MERCHANT,
District Judge. *

Timothy P. Dasler, for himself and on behalf of T. D.,

Plaintiff-Appellant,

v. **23-1156**

Dalene Washburn,

Defendant-Appellee.

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* Judge Orelia E. Merchant of the United States District Court for the Eastern District of New York, sitting by designation.

MANDATE ISSUED ON 07/02/2024

FOR PLAINTIFF-APPELLANT: TIMOTHY P. DASLER, pro se, Orford, NH.

FOR DEFENDANT-APPELLEE: JENNIFER E. MCDONALD, Downs Rachlin Martin PLLC, Burlington, VT.

Appeal from a judgment of the United States District Court for the District of Vermont (Reiss, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Timothy Dasler, pro se on his own behalf and seeking to act on behalf of his minor child, T.D., sued Dalene Washburn, the therapist his ex-wife selected for T.D., claiming that Washburn was not acting in T.D.'s best interest. He asserted claims under 42 U.S.C. § 1985 and Vermont state law. The district court dismissed the lawsuit for failure to state a claim but permitted Dasler to move to amend his complaint. Dasler did not initially amend in time; instead, he moved after judgment was entered to file an amended complaint that raised additional claims under 42 U.S.C. § 1983 and state law. The district court denied leave to amend as futile, reasoning that Dasler failed to state a § 1983 claim and that the domestic relations exception to diversity jurisdiction applied.[1] We assume the parties' familiarity with the facts, the procedural history, and the issues on appeal.

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[1] We conclude that we have jurisdiction to review both the dismissal of the original complaint and the denial of leave to amend because we may liberally construe Dasler's district court submissions as seeking vacatur of the judgment and leave to amend his complaint, tolling his time to appeal. *See* Fed. R. App. P. 4(a)(4)(A)(iv)-(v); *see also Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) ("A party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Fed. R. Civ. P. 59(e) or 60(b).").

We review de novo the denial of leave to amend based on futility, applying the same standard used to evaluate a dismissal under Rule 12(b)(6). *See Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). We construe the complaint liberally, accept all of its well-pleaded factual allegations as true, and draw all reasonable inferences in the plaintiff's favor in order to determine whether the complaint states a plausible claim for relief. *See id.* On a judgment dismissing a complaint for lack of subject matter jurisdiction, we review factual findings for clear error and legal conclusions de novo. *Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 74 (2d Cir. 2008).

I. Dismissal of the Original Complaint

The district court properly dismissed the claims that Dasler brought on behalf of his child. A non-attorney may not bring claims on his child's behalf. *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990). While Dasler argues that the district court should have granted his requests to appoint counsel for T.D., there is no right to counsel in civil cases except when facing the prospect of imprisonment. *See Guggenheim Cap., LLC v. Birnbaum*, 722 F.3d 444, 453 (2d Cir. 2013). The discretionary denial of counsel was not an abuse of discretion because, as discussed below, Dasler's claims were not "likely to be of substance." *Hendricks v. Coughlin*, 114 F.3d 390, 392 (2d Cir. 1997) (quoting *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986)).

Dasler's claims were otherwise properly dismissed. He failed to plead race- or class-based animus, as required to state a § 1985 claim. *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1088 (2d Cir. 1993). Vermont common-law breach of patient confidentiality requires a doctor-patient relationship. *Lawson v. Halpern-Reiss*, 210 Vt. 224, 232-33 (2019). But Washburn was his child's doctor, not Dasler's.

Dasler did not otherwise meet Vermont's "high" bar of pleading "outrageous conduct" sufficient to support an intentional infliction of emotional distress claim. *Dalmer v. State*, 174 Vt. 157, 171 (2002). He alleged that Washburn

obstructed access to her practice by requiring Dasler to include his ex-wife on emails and by prohibiting him from bringing his child to sessions, amounting to an abuse of power. But, especially in the context of a divorce proceeding between Dasler and his ex-wife, Washburn's requests to have both parents copied on email communications about their child and to have the ex-wife bring the child to sessions were not outrageous.

II. Denial of Leave to Amend

Dasler challenges the district court's denial of leave to amend the complaint, but the denial was not erroneous. As discussed above, claims brought on behalf of the child were properly dismissed. Furthermore, Dasler did not add facts to his proposed amended complaint that would have cured the deficiencies identified in the district court's first order.

A. Section 1983 Claim

The district court properly concluded that Dasler failed to state a § 1983 claim. A § 1983 claim requires the violation of a federal right by a defendant acting under the color of state law. 42 U.S.C § 1983. But Washburn is a private individual, and a private individual acts under color of state law only when (1) the state compelled the individual's conduct, (2) the individual acted jointly with the state, or (3) the individual fulfilled a role that is traditionally a public function performed by the state. *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008).

Dasler did not allege facts demonstrating that Washburn, a private therapist, was compelled to act by the state, that she acted jointly with the state, or that she fulfilled a traditional public function. While he contends that Washburn was a state actor by virtue of being selected as the child's therapist by his ex-wife, who was authorized to do so by court order, the order did not appoint Washburn as the child's therapist. Instead, it merely authorized Dasler's ex-wife to select a private provider; she chose Washburn.

B. State Law Claims

We conclude that Dasler's proposed state law claims fail on the merits. *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 n.2 (2d Cir. 2018) (observing that we may affirm on any ground with support in the record).[2] In his proposed amended complaint, Dasler asserted state law claims for defamation, breach of contract, negligent infliction of emotional distress, and abuse of process.[3]

In Vermont, the elements of defamation—including libel and slander—are "(1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages." *Russin v. Wesson*, 183 Vt. 301, 303 (2008) (quoting *Lent v. Huntoon*, 143 Vt. 539, 546-47 (1983)). Dasler alleged that Washburn's clinical appointment notes contained a number of statements about his relationship with his child. But the notes recorded statements the child made during therapy, not statements made by Washburn about Dasler. Dasler also alleged that Washburn spread unspecified false allegations to childcare providers and other mutual contacts. But because Dasler failed to allege actual statements that were false and defamatory, Dasler's claim that Washburn made "false" statements about him to others must fail.

Dasler also failed to state a claim for breach of contract based on

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[2] We have subject matter jurisdiction because "the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree," and this case does not involve those matters. *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992).

[3] Dasler also asserted a claim styled "Duty of Care." It appears that Dasler is asserting that Washburn had a duty of care toward him as part of a negligence claim. Dasler did not assert any of the other elements of a negligence claim, so he fails to state a claim for negligence.

Washburn's failure to comply with a subpoena and the Vermont state court's failure to enforce it. "To prove breach of contract, [a] plaintiff must show damages." *Smith v. Country Vill. Int'l, Inc.*, 183 Vt. 535, 537 (2007). Dasler did not allege what damages he suffered from Washburn's failure to produce the documents. He stated that he was deprived of discovery before the Vermont court entered a final divorce decree. But he did not allege that the documents would have been essential to an element of his claims in state court.

The remaining state claims also fail. Negligent infliction of emotional distress requires physical peril or fear of injury, *see Brueckner v. Norwich Univ.*, 169 Vt. 118, 125 (1999), but Dasler pleaded neither. And abuse of process fails because Dasler did not plead facts suggesting an improper use of a court. *See Weinstein v. Leonard*, 200 Vt. 615, 625 (2015).

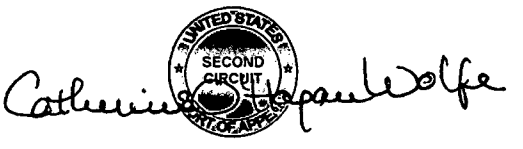
III. Unredacted Material

Finally, we note that Dasler's opening brief, reply brief, and appendix contain the full first name of his minor child, and the appendix recites the child's date of birth. Federal Rule of Appellate Procedure 25(a)(5), which incorporates Federal Rule of Civil Procedure 5.2, requires redaction of this information. Accordingly, the Clerk of the Court is directed to **SEAL** from public view documents 30, 31, and 70 on this court's docket. While we do not remand, the district court may wish to seal similar filings.

* * *

We have considered Dasler's remaining arguments, which we conclude are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of June, two thousand twenty-four,

Before: John M. Walker, Jr.,
Steven J. Menashi,
Circuit Judges,
Orelia E. Merchant,
District Judge.

Timothy P. Dasler, for himself and on behalf of T. D.,

Plaintiff - Appellant,

v.

Dalene Washburn,

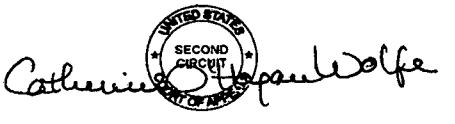
Defendant - Appellee.

ORDER
Docket No. 23-1156

Appellant Timothy P. Dasler having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

TIMOTHY DASLER, for himself and on behalf of T.D.,	)	
Plaintiff,	)	
v.	)	Case No. 2:21-cv-194
DALENE WASHBURN,	)	
Defendant.	)	

ENTRY ORDER
DENYING PLAINTIFF'S MOTION TO AMEND, DENYING DEFENDANT'S MOTION TO DISMISS AS MOOT, AND DISMISSING CASE
(Docs. 33, 39)

Plaintiff Timothy Dasler, representing himself, moves for leave to file an Amended Complaint alleging claims on his own and his minor daughter's behalf. (Doc. 33.) Defendant Dalene Washburn opposes the motion and also moves to dismiss the Amended Complaint. (Doc. 39.) Prior to filing his motion for leave to amend, Plaintiff filed a notice of interlocutory appeal seeking to challenge the court's November 18, 2022 Entry Order denying his motion for reconsideration and motion for permission for interlocutory appeal and dismissing the case due to his failure to file an Amended Complaint. His appeal was dismissed on March 29, 2023, and the court took Plaintiff's motion for leave and Defendant's unopposed motion to dismiss under advisement.

I. Background and Procedural History.

This case arises from the divorce of Plaintiff and Jennifer Knapp, who are the parents of minor child, T.D. On August 17, 2018, Ms. Knapp was granted primary parental rights in a Final Divorce Order issued by the Vermont Superior Court (the "Vermont Family Court"). On August 31, 2021, Plaintiff commenced this action on his own behalf and purporting to bring claims on behalf of his minor daughter against Defendant, the child's therapist.

On August 2, 2022, the court granted Defendant's motion to dismiss the original Complaint, dismissing the claims brought on the child's behalf without prejudice and granting Plaintiff until August 31, 2022 to file a motion for leave to file an Amended Complaint. Rather than do so, Plaintiff moved for reconsideration of the August 2 Opinion and Order (the "August O & O"). On October 25, 2022, the court issued an Entry Order (the "October EO") denying his motion for reconsideration, denying his request to take an interlocutory appeal, and granting in part and denying in part his request for an extension of time to file an Amended Complaint.

The court's October EO denied Plaintiff's request to appoint counsel for T.D because parties are not entitled to court-appointed counsel in civil matters. The court also denied reconsideration of the dismissal of Plaintiff's substantive claims and denied Plaintiff's request to take an interlocutory appeal because Plaintiff had not satisfied the standard for certification and because there were no exceptional circumstances.

Plaintiff was provided an extended deadline of November 14, 2022 to file an Amended Complaint. The court explained "[m]ore time is not warranted in the facts and circumstances of this case as Plaintiff has had ample notice of the right to seek leave to file an Amended Complaint and to draft the same." (Doc. 23 at 7.) He was warned: "FAILURE TO TIMELY FILE SHALL RESULT IN THE DISMISSAL OF THIS CASE." *Id.* at 8. On November 7, 2022, Plaintiff chose to again seek reconsideration rather than comply with the court's deadline to file an Amended Complaint.

On November 18, 2022, the court issued an Entry Order (the "November EO") denying Plaintiff's motion for reconsideration of the October EO, his application for permission for an interlocutory appeal, and his request for certification to the Vermont Supreme Court. The court declined to sua sponte grant a third extension of time for Plaintiff to file an Amended Complaint. Because no Amended Complaint had been filed by the deadline, in accordance with the warning in the October EO, the case was dismissed and a judgment was entered on November 23, 2022.

On December 2, 2022, Plaintiff filed his fifth motion for reconsideration[1] and to extend time to file an Amended Complaint which the court granted in part to address Plaintiff's argument that he had moved for leave to file an Amended Complaint. *See* Doc. 28 at 1 ("[Plaintiff] doesn't understand how the court does not recognize this as moving for leave to file an Amended Complaint."). In a December 5, 2022 Order, the court noted that it "disagrees that Plaintiff's request to complete an appeal prior to filing an Amended Complaint can reasonably be construed as a request to file an Amended Complaint," however, the court nonetheless granted a brief extension until December 19, 2022 for a proposed Amended Complaint. (Doc. 30 (text-only Order).) On December 13, 2022, Plaintiff responded with the filing of a "Notice of Interlocutory Appeal" of the court's November EO, Judgment, and December 5 Order.

Thereafter, on December 19, 2022, Plaintiff moved for leave to amend his complaint. Defendant opposes Plaintiff's motion and requests dismissal of this case.

II. Judicial Notice of Vermont Family Court Docket.

The court has taken judicial notice of the Vermont Family Court docket in *Jennifer Knapp (Dasler) v. Timothy Dasler*, 74-6-17 Oedm, Windsor Unit. *See* Doc. 23 (the October EO) at 3 (quoting Fed. R. Evid. 802(b)); *see also Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (explaining "docket sheets are public records of which [a] court [can] take judicial notice"). The docket reveals that Vermont Family Court proceedings have been pending between Ms. Knapp and Plaintiff since June 2017. On September 30, 2022, Plaintiff's motion to modify parental rights and responsibilities was denied. Plaintiff's request to depose Defendant Washburn in the Vermont Family Court case was denied on December 20, 2022. His April 5, 2023 motion to enforce was also denied. On April 18, 2023, Plaintiff filed a Notice of Appeal to the Vermont Supreme Court. The Vermont Family Court case remains pending. In May 2023, Plaintiff filed motions to complete the record, for contempt, and for reconsideration of the denial of his motion to enforce that remained pending as of late June.

[1] *See* Docs. 9, 14, 19, 24, 28.

III. The Proposed Amended Complaint.

The proposed Amended Complaint is forty-six pages and almost three hundred paragraphs. As required, Plaintiff has submitted a red-lined version of his proposed Amended Complaint highlighting the differences between it and his dismissed Complaint. *See* Doc. 33-3. In addition to claims on T.D.'s behalf, Plaintiff realleges claims for conspiracy under 42 U.S.C. § 1985, for breach of confidence, and for intentional infliction of emotional distress.

To Plaintiff's previously dismissed claims, he adds a new claim under 42 U.S.C. § 1983 for a violation of his constitutional right to access his child's medical care as well as claims under state law for "false light, defamation, slander and libel," for negligent infliction of emotional distress, for breach of contract, breach of the implied covenant of good faith and fair dealing, for professional negligence, and for abuse of process. Each of the foregoing claims is beyond the court's grant of leave to amend and lacks a good faith factual and legal basis. *See* Fed. R. Civ. P. 11; *see also Lipin v. Hunt*, 538 F. Supp. 2d 590, 605 ("Plaintiff's *pro se* status does not insulate her from the ambit of Fed. R. Civ. P. 11(b)[.]") (internal quotation marks and brackets omitted).

Plaintiff asserts this court has federal question subject matter jurisdiction under 28 U.S.C. § 1331 because he asserts claims under 42 U.S.C. §§ 1983 and 1985 and supplemental jurisdiction over his state law claims under 28 U.S.C. § 1367. He further asserts "the parties reside in different states . . . and the amount in controversy . . . exceeds $75,000." (Doc. 33-4 at 2, ¶ 6.) Plaintiff's new allegations in the "Jurisdiction" section of his proposed Amended Complaint pertain to developments in the Vermont Family Court case including an alleged "final" order issued on September 30, 2022. *See* Doc. 33-4 at 4-5, ¶¶ 18-22. He alleges that the Vermont Family Court found that he had a right to equal access to his child's medical providers but that the court could not order Defendant, as a non-party to the state court action, to provide equal access. Thus, he posits that "[s]hort of Federal court intervention, [his] right to access his child's medical services is effectively severed." *Id.* at 5, ¶ 23.

The proposed Amended Complaint also includes a new twelve-page Statement of Facts section in which Plaintiff details his version of Defendant's involvement with T.D.'s therapy during 2017 and 2018 and Defendant's participation in the Family Court proceedings. He asserts that:

> Due to the [state] court orders, [Defendant] is the only provider through which [he] may seek to vindicate his right to access his child's medical care. The state has delegated her in that role, and she acts as a gatekeeper with the discretion to sever his right to access his child's medical care. As such, her discretion to deny this right is enforce[d] with state power.

Id. at 13, ¶ 87.

Plaintiff asserts that he sought to depose Defendant in connection with the Vermont Family Court action and that she committed "abuse of process in delaying the deposition" so that he was unable to conduct it prior to a Family Court hearing. *Id.* at 14, ¶ 99. He alleges that Defendant "avoids scrutiny over her misconduct if she can keep [Plaintiff] from restoring access and obtaining information and Ms. Knapp [his ex-wife] avoids scrutiny over the alleged emotional/physical harm as well as severing [Plaintiff's] parental right, which was her goal since the parties' separation." *Id.* at 14-15, ¶ 101. Plaintiff contends that Defendant's "claims are concerning" and "suggest that she is continuing to collude with Ms. Knapp to lead the child to turn against [him]." *Id.* at 16, ¶ 117.

For relief, Plaintiff seeks that the court:

A) Order Summary Judgment /Injunction [Defendant] to immediately restore equal access to her practice and prevent her from obstructing equal access in any capacity.

B) Order [Defendant] to release to [Plaintiff] all correspondence between [Defendant] and other caregivers including correspondence through 3[rd] parties. If [Defendant's] policy as of October 2018 was to copy all parties on communication, then any communication from Ms. Knapp [Plaintiff's ex-wife] should be shared just as [Defendant] shared [Plaintiff's] communication.

C) Order [Defendant to cover [Plaintiff's] costs and pay punitive damages including [Plaintiff's] cost in [Vermont] Family Court enforcing the orders, the deposition of [Defendant] trying to collect information on the care, which she should have provided without legal action, and any other costs related to restoring access to his Parental Rights.

D) Order [Defendant] to pay damages related to [T.D.'s] dog bite, and scarring that resulted.

E) Grant [Plaintiff compensatory and punitive damages for the harm caused by her various tortious acts.

(Doc. 33-4 at 45-46.)

IV. Conclusions of Law and Analysis.

A. Motion to Amend.

"A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b) . . . , whichever is earlier." Fed. R. Civ. P. 15(a)(1). Because Plaintiff seeks to amend his Complaint well outside the time period for amendments as a matter of course, he is required to obtain the opposing party's written consent or leave of the court, which the court "should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2).

The court, however, need not grant leave to amend where the party's proposed amendments would be futile, including where such amendments "could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6)." *Lucente v. Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). In addition, if the court grants leave to amend on a limited basis, a party may not include claims beyond those allowed. *See Palm Beach Strategic Income, LP v. Salzman*, 457 F. App'x 40, 23 (2d Cir. 2012) ("District courts in this Circuit have routinely dismissed claims in amended complaints where the court granted leave to amend for limited purpose and the plaintiff filed an amended complaint exceeding the scope of the permission granted."). Plaintiff's willingness to persist in asserting claims on T.D.'s behalf demonstrates an unwillingness to comply with the court's orders.

In adjudicating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must "accept as true all of the allegations contained in a complaint" and decide whether the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). "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.* Plaintiffs must allege sufficient facts to "nudge[] their claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

To determine whether this standard is satisfied, the court employs a "two-pronged approach[.]" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (internal quotation marks omitted) (quoting *Iqbal*, 556 U.S. at 679). First, the court "must accept as true all of the [factual] allegations contained in a complaint" but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory allegations, do not suffice." *Iqbal*, 556 U.S. at 678. Second, the court analyzes whether the complaint's "'well-pleaded factual allegations' . . . 'plausibly give rise to an entitlement to relief.'" *Hayden*, 594 F.3d at 161 (quoting *Iqbal*, 556 U.S. at 679). The court does not "weigh the evidence" or "evaluate the likelihood" that a plaintiff will prevail. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017).

Courts afford pleadings filed by self-represented parties "special solicitude." *See Ceara v. Deacon*, 916 F.3d 208, 213 (2d Cir. 2019) (internal quotation marks omitted). The court is thus required to read a self-represented plaintiff's complaint liberally and to hold it "to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citation omitted). Nevertheless, self-represented litigants must satisfy the plausibility standard set forth in *Iqbal/Twombly*. *See Costabile v. N.Y.C. Health & Hosps. Corp.*, 951 F.3d 77, 80-81 (2d Cir. 2020).

B. Claims Alleged on T.D.'s Behalf.

The court has repeatedly explained that Plaintiff may not bring claims on his unrepresented minor daughter's behalf. The August O & O specifically advised that Plaintiff was not granted leave to amend to seek to allege claims on T.D.'s behalf. *See* Doc. 17 at 10 ("Plaintiff is warned that he may not seek to allege claims on T.D.'s behalf."). Because Plaintiff is not an attorney, *see Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124 (2d Cir. 1998) ("[I]n federal court[,] a non-attorney parent must be

represented by counsel in bringing an action on behalf of his or her child."), and because he was denied leave to amend to attempt to assert claims on his minor child's behalf, *see Salzman*, 457 F. App'x at 23, any claims purportedly alleged on behalf of the minor child T.D. in the proposed Amended Complaint are DISMISSED.

C. Federal Claims Alleged in Proposed Amended Complaint.

In addition to realleging his conspiracy claim under 42 U.S.C. § 1985, Plaintiff seeks to add a claim under 42 U.S.C. § 1983 in the proposed Amended Complaint alleging Defendant was acting under color of state law through her participation in Family Court proceedings. No court has recognized a § 1983 claim on this basis.

Congress enacted § 1983 to provide a statutory remedy for violations of the Constitution and federal laws. The statute is "not itself a source of substantive rights" but rather provides "a method for vindicating federal rights elsewhere conferred[.]" *Patterson v. Cnty. of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004) (internal quotation marks omitted). To state a claim under § 1983, a plaintiff "must allege (1) 'that some person has deprived him of a federal right,' and (2) 'that the person who has deprived [the plaintiff] of that right acted under color of state . . . law.'" *Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005) (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). Because the statute requires that "the conduct at issue must have occurred under color of state law . . . liability attaches only to those wrongdoers who carry a badge of authority of a State and represent it in some capacity." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (internal quotation marks omitted). Accordingly, private actors are not proper § 1983 defendants when they do not act under color of state law. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999) ("[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.").

Although Plaintiff alleges that Defendant was acting under the color of state law because the Vermont Family Court has "delegated" her, a non-party, as a "gatekeeper" to Plaintiff's access to T.D.'s medical records, *see* Doc. 33-4 at 13, ¶ 87, the Amended Complaint fails to plausibly allege that Defendant was a state actor or acted under color of state law on this basis. He cites no Family Court Order that granted Defendant the

right to disregard state law or to act as a "gatekeeper" to prevent him from exercising his rights. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323-34 (2d Cir. 2002) (requiring a plaintiff to allege that a private party's "challenged conduct constitutes state action[]" or that "the private entity acted in concert with the state actor to commit an unconstitutional act") (internal quotation marks omitted). Plaintiff acknowledges that Defendant is not employed by the Family Court but is a "private therapist" whom Ms. Knapp engaged on T.D.'s behalf. (Doc. 33-4 at 5-6, ¶ 26; at 41-42, ¶ 279.) Plaintiff's theory that Ms. Knapp's choice of Defendant as a medical provider renders Defendant a state actor under § 1983 is not plausible. *See Ciambriello*, 292 F.3d at 324 ("A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a § 1983 claim against the private entity.").

Plaintiff's assertion of the denial of his federal constitutional rights is also not plausible. A violation of a state statute does not alone provide the basis for a § 1983 case. *See Pollnow v. Glennon*, 757 F.2d 496, 501 (2d Cir. 1985) ("[I]t is unnecessary . . . to determine whether appellees violated any applicable state law. Clearly, a violation of state law is not cognizable under § 1983."); *see also Brown v. City of Barre*, 878 F. Supp. 2d 469, 495 (D. Vt. 2012) (noting "violations of Vermont law do not provide the basis for a § 1983 claim"). Moreover, a parent's right to his child's medical records is not a constitutional violation per se as the "constitutional privileges attached to the parent-child relationship . . . are hardly absolute." *United States v. Myers*, 426 F.3d 117, 125 (2d Cir. 2005).

The court has considered Plaintiff's § 1985(3) claim on prior occasions and the additional allegations of the Amended Complaint do not change the outcome: Plaintiff's allegations, accepted as true, do not establish an agreement between Defendant and another person to violate Plaintiff's civil rights.[2] *See Felder v. U.S. Tennis Ass'n*, 27 F.4th

[2] For the same reason, a conspiracy claim brought under § 1983 would also fail. To state a conspiracy claim under § 1983, Plaintiff must assert sufficient facts to plausibly allege: "'(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that

834, 841 (2d Cir. 2022) ("[P]ro se plaintiffs asserting civil rights claims cannot withstand a motion to dismiss unless their pleadings contain factual allegations sufficient to raise a right to relief above the speculative level.") (internal quotation marks omitted).

The Amended Complaint fails to state a claim upon which relief may be granted under either § 1983 or § 1985(3) and those claims are DISMISSED.

D. Whether the Court Should Exercise Supplemental Jurisdiction.

Plaintiff asserts the court should exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy[.]"). In the absence of a viable federal claim, however, the court should decline to exercise supplemental jurisdiction over claims brought under state law. *See id.* § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."). "In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well." *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 170 (2d Cir. 2014) (internal quotation marks omitted); *see also Kolari v. N.Y. Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (reversing district court's decision to exercise supplemental jurisdiction after dismissal of all federal claims). The determination whether to decline to exercise supplemental jurisdiction is left to the discretion of the district court. *Lundy v. Catholic Health Sys.*, 711 F.3d 106, 117 (2d Cir. 2013).

This case, despite its age, is at an early procedural stage. The parties have not begun discovery. Therefore, the court declines to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff's remaining state-law claims. *See Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7 (1988) ("[I]n the usual case in which all federal-

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goal causing damages.'" *Grega v. Pettengill*, 123 F. Supp. 3d 517, 541 (D. Vt. 2015) (quoting *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999)).

law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.").

E. Whether the Court has Diversity Jurisdiction

Plaintiff alleges that the parties reside in different states and that the amount in controversy exceeds $75,000. Thus, although Plaintiff does not cite the statute, the court will again consider whether it may exercise diversity jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1332. *See* Doc. 17 at 6-7 (discussing the exercise of diversity jurisdiction over Plaintiff's state law claims); *see also McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 158 (2d Cir. 2017) ("The failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Rather, factual allegations alone are what matters. That principle carries particular force where a [self-represented] litigant is involved.") (internal quotation marks and citations omitted). To invoke diversity jurisdiction, 28 U.S.C. § 1332 requires that the amount in controversy in the case exceeds $75,000, exclusive of interest and costs, and that the matter is "between . . . citizens of different States." 28 U.S.C. § 1332(a).

Before exercising diversity jurisdiction, however, the court must consider whether the domestic relations exception applies and whether Plaintiff is seeking to overturn state court rulings by bringing claims related to those rulings in federal court. *See Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (holding the domestic relations exception is an implied exception to Congress's grant of diversity jurisdiction in 28 U.S.C. § 1332). Contrary to Plaintiff's contention, Vermont Family Court proceedings remain ongoing and he has a pending appeal with regard to them brought in the Vermont Supreme Court

The domestic-relations abstention doctrine and comity dictate deference to the Vermont Family Court in the management of its own proceedings. *See Deem v. DiMella-Deem*, 941 F.3d 618, 624-25 & n.1 (2d Cir. 2019) (holding domestic-relations abstention may apply to diversity as well as federal-question jurisdiction cases). To the extent Plaintiff is seeking review of a state court ruling, this court does not sit as a court of appeals for the state courts. *See Skinner v. Switzer*, 562 U.S. 521, 532 (2011). Plaintiff's proper recourse is an appeal to the Vermont Supreme Court rather than to seek an

appellate ruling here. As a result of the operation of the domestic-relations exception and pursuant to the doctrines of comity and abstention, the court will not exercise subject matter jurisdiction over the state law claims Plaintiff seeks to allege in his Amended Complaint. The court has addressed this same issue in a more fulsome manner in Plaintiff's case against his ex-wife and adopts that analysis here. *See Dasler v. Knapp*, Case No. 2:21-cv-135, slip op. at 5-9 (D. Vt. Aug. 25, 2022).

CONCLUSION

For the reasons stated above, Plaintiff's motion for leave to file an Amended Complaint (Doc. 33) is DENIED. As a result, the Amended Complaint will not be docketed and Defendant's motion to dismiss the Amended Complaint (Doc. 36) is thus DENIED AS MOOT. Because Plaintiff's Complaint has been dismissed and his motion for leave to file an Amended Complaint has been denied, this case is DISMISSED. The court hereby certifies that under 28 U.S.C. § 1915(a)(3) any appeal would not be taken in good faith.[3]

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 18th day of July, 2023.

Christina Reiss, District Judge
United States District Court

[3] Plaintiff paid the filing fee for this action, however, on October 25, 2022, the court granted Plaintiff's subsequent motion for leave to proceed *in forma pauperis*. *See* Doc. 23.

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