

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Coal Township State Prison, :
Alan Joseph Himmelsbach, and :
Prison Health Services, Inc. :
 :
v. :
 :
Jimmy L. Lindsey, : No. 978 C.D. 2010
Appellant : Submitted: September 10, 2010

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM

FILED: November 19, 2010

Jimmy L. Lindsey (Lindsey) appeals from an order of the Court of Common Pleas of Northumberland County (common pleas court) that denied Lindsey's request to proceed in forma pauperis after a determination that his complaint was frivolous.¹

Lindsey is presently incarcerated at the State Correctional Institution at Coal Township (SCI-Coal Township). On March 30, 2009, Lindsey filed a complaint against Alan J. Himmelsbach (Himmelsbach), CRNP, Prison Health Services (PHS), and SCI-Coal Township and alleged:

1. On or around March 2, 2008, this Plaintiff (Lindsey) visited sick call department at SCI-Coal Township State

¹ Pa. R.C.P No. 240(j) provides:

If, simultaneous with the commencement of an action or proceeding or the taking of an appeal, a party has filed a petition for leave to proceed in forma pauperis, the court prior to acting upon the petition may dismiss the action, proceeding or appeal if the allegation of poverty is untrue or if it is satisfied that the action, proceeding or appeal is frivolous. (emphasis added).

Prison for a monthly review of previously described medications.

2. Plaintiff [Lindsey] was prescribed at this latest monthly medical review a different medication to treat his on-going skin condition. This [sic] a different medication to treat his on-going skin condition. This latest prescription was another experimental use of drugs by the Defendants. This latest incident was by the Physician's Assistant [Himmelsbach], who's [sic] objective was another experimental use of drugs, instead of his professional obligation to health care.

[3.] Previous medications that were used by Plaintiff [Lindsey] was discontinued by this Defendant [Himmelsbach] . . . [w]ithout no [sic] real explanation to Plaintiff [Lindsey].

4. Plaintiff [Lindsey] commenced with the use and application of this latest experimental medication on or around the above date of 3/2/07.

.....

10. Sometime around 1998, Plaintiff [Lindsey] noticed two small round patches of [sic] his hands. These small round patches frequently itched, causing Plaintiff [Lindsey] to scratch. Causing the skin surface area to swell with slight discoloration and discomfort to Plaintiff [Lindsey].

.....

12. The Defendant [Himmelsbach] then gave Plaintiff [Lindsey] some form of cream to rub on his hands.

13. The cream given to Plaintiff [Lindsey] stopped the itching and scratching to a degree; however Defendant [PHS] abruptly withheld this cream, thereby switching to another cream. This was the first use of experimental drugs. This second cream did nothing for Plaintiff's [Lindsey's] condition except to exasperate the present condition.

14. Shortly, thereafter, those small round patches spread from Plaintiff's [Lindsey's] hands onto his arms, and eventually it spread to his legs, back, and neck areas.

15. This initiated nine years of Defendant's [sic] [PHS's and Himmelsbach's] experimental use of drugs and mistreatment, misdiagnoses.

.....

22. Due to Defendant's [sic] [PHS's and Himmelsbach's] mistreatment, misdiagnoses and experimental use of drug [sic], Plaintiff's [Lindsey's] day to day life consisted of constant scratching and bleeding

23. This most recent injury, misdiagnoses and experimental use of drugs cause [sic] more vigorous scratching to all parts of Plaintiff's [Lindsey's] body, including but not limited to his face and head.

.....

26. Defendant's [sic] [PHS's and Himmelsbach's] failure to act properly in regards [sic] to Plaintiff [Lindsey] and his condition; instead of using experimental drugs, [h]armed this Plaintiff [Lindsey]. Any reasonable health care provider would not act in the manner of the Defendant [PHS]

.....

33. The fact of being forced into a contract with Defendant [SCI-Coal Township], he [m]ust provide meaningful and [g]ood health care, as [g]ood as if Plaintiff [Lindsey] were in charge of providing for his own health care; or Defendant [SCI-Coal Township] [m]ust destroy all contractual ties between the parties.

.....

35. Presented here is a clear breach of contract, when Defendant [SCI-Coal Township] failed to provide meaningful health care for Plaintiff [Lindsey], such non-performance constitutes the contractual breach.

Medical Malpractice/Breach of Contract, March 30, 2009, Paragraphs 1-4, 10, 12-15, 22-23, 26, 33, and 35 at 1-5; Certified Record (C.R.) at (28).

On August 13, 2009, SCI-Coal Township filed an answer and asserted new matter:

37. This action is not within any exceptions to immunity as set forth in 42 Pa. C.S. § 8522, and therefore is barred.

38. The Commonwealth Defendant [SCI-Coal Township] is not liable for harm caused by an act or omission of an independent contractor [PHS] or his [sic] employees.

39. By virtue of a contractual relationship, the contractor [PHS] agreed to indemnified [sic] and hold harmless the Commonwealth Defendant [SCI-Coal Township] from any judgment or actions.

40. This action is barred by the applicable statute of limitations.

....

42. The Commonwealth Defendant [SCI-Coal Township] avers that if negligence is found to exist on its part, said negligence was not the proximate cause of Plaintiff's [Lindsey's] alleged damages, injuries and/or losses.

43. The Commonwealth Defendant [SCI-Coal Township] is immune from claims grounded upon negligent supervision or employment.

Amended Answer and New Matter of Commonwealth Defendants, August 13, 2009, Paragraphs 37-40 and 42-43 at 6; C.R. at 16.²

² Also, on August 13, 2009, PHS and Himmelsbach filed an answer and stated that "PHS did nothing to cause the injury of the plaintiff, Jimmy L. Lindsey . . . [and] [a]t all times PHS provided appropriate medical care to Lindsey. At no time did it breach any duty to Lindsey." Answer of Defendants, Alan J. Himmelsbach, CRNP and Prison Health Services, Inc. to New Matter and Crossclaim of Coal Township, August 13, 2009, Paragraph 46 at 1; C.R. at 16. PHS and Himmelsbach also averred that "PHS has no duty of indemnity to the Commonwealth defendants since their liability, if found in this case, would be from their own actions and not from their legal relationship to PHS. A right of indemnity exists outside of contract under the common law of the Commonwealth . . . only when a party seeking indemnity has liability to the plaintiff solely because of his legal relationship to the party from whom he seeks indemnity . . ." Defendants Answer, Paragraph 47 at 1-2; C.R. at 16.

On October 1, 2009, PHS and Himmelsbach filed a notice of intention “to enter a judgment of non pros against you [Lindsey] after thirty (30) days of the date of the filing of this notice if a certificate of merit is not filed as required by Rule 1042.3.”³ Notice of Intention to Enter Judgment of Non Pros on Professional Liability Claim, October 1, 2009, at 1; C.R. at 25. On October 30, 2009, SCI-Coal Township also filed a notice of intention to enter Judgment of Non Pros pursuant to Pa. R.C.P. No. 1042.3. See Notice of Intention to Enter Judgment of Non Pros on Professional Liability Claim, October 30, 2009, at 1; C.R. at 28.

Lindsey responded that a “certificate of merit” does not apply because “expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim against these Defendants [SCI-Coal Township, PHS, and Himmelsbach] . . . [t]he allegations of error is [sic] proved by the past/present condition of Plaintiff [Lindsey] . . . [w]ho’s [sic] condition has become worse over the course of Defendant’s [sic] [PHS’ and Himmelsbach’s] treatment. This is when a wrong is a wrong, and such wrong is evidenced by the actual appearance;

³ Pa. R.C.P. No. 1042.3 provides:

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standardthe plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the . . . that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm

the damage of Plaintiff's [Lindsey's] largest [o]rgan: [h]is [s]kin." (emphasis added). Certificate of Merit, April 15, 2009, at 2; C.R. at 5. See also correspondence from Lindsey to Kat Strausser, August 12, 2009, at 1; C.R. at 15.⁴

The common pleas court denied Lindsey's petition to proceed in forma pauperis pursuant to Pa. R.C.P. No. 240(j) and concluded that without a Certificate of Merit and expert testimony Lindsey's medical malpractice action was without merit. Opinion of the Common Pleas Court, April 14, 2010, at 3.

On appeal, Lindsey, appearing *pro se*, failed to include a Statement of Questions Involved in his brief. Pa. R.A.P 2116 relevantly provides that the "[s]tatement of questions involved must state concisely the issues to be resolved . . . [n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby" (emphasis added). As a result there are no issues properly before the Court. Commonwealth v. Davis, 455 A.2d 725 (Pa. Super. 1983) (where a Statement of Questions Involved is omitted entirely, there are no issues properly before the Court).

However, Lindsey did assert in the Argument section of his brief that PHS and Himmelsbach committed medical malpractice when they mistreated his skin condition and that SCI-Coal Township and PHS breached the contract

⁴ Specifically, Lindsey stated that "[o]n August 7, 2009 I received a correspondence from Alan Gold, defendant's [sic] [PHS' and Himmelsbach's] attorney, informing me of his intentions to enter judgment of Non Pros on professional liability claim . . . [t]hat I have 31 days to file a 'Certificate of Merit' . . . [e]nclosed is my previously filed with this court certificate of merit" Letter from Lindsey to Kat Strausser, August 12, 2009, at 1; C.R. at 15.

between them because of the negligent treatment of Lindsey's skin condition. Again, issues briefed but not included in the Statement of Questions Involved are waived. Commonwealth of Pennsylvania v. Tielsch, 934 A.2d 81, 85 n.7 (Pa. Super. 2007).

Notwithstanding the waiver of these issues⁵ and subsequent dismissal of Lindsey's appeal, this Court has closely reviewed Lindsey's brief and finds that his arguments are without merit. Astutely, the common pleas court noted:

The incidents forming the basis of his Complaint arose from actions taken during his incarceration. Essentially, Plaintiff [Lindsey] has suffered from a skin condition for a number of years which causes him to scratch at his skin, often so much that he bleeds. Plaintiff [Lindsey] alleges that in the treatment of his condition, the Defendants [PHS and Himmelsbach] have used experimental drugs in an attempt to alleviate his condition, thus treated him as 'a lab rat' Defendant Himmelsbach is a physician's assistant employed by [PHS]. Plaintiff [Lindsey] alleges that all of the Defendants [PHS, Himmelsbach, and SCI-Coal Township] are guilty of medical malpractice because they permitted an unlicensed or unqualified individual to use harmful, experimental drugs on him. Plaintiff [Lindsey] never provides in his Complaint what standard of care he is alleging has been breached. As stated by the Court . . . the standard of care for treatment of Plaintiff's [Lindsey's] condition would have to be established by expert testimony. Treatment by a physician's assistant in and of itself, is not medical malpractice. The decision of what medication to use to treat a specified condition is

⁵ When reviewing a common pleas court's denial of an in forma pauperis petition, this Court is limited to a review of whether constitutional rights were violated or whether the common pleas court abused its discretion or committed an error of law. Thomas v. Holtz, 707 A.2d 569 (Pa. Cmwlt. 1998).

left to the treatment provider, and expert testimony would be required to establish that a certain treatment choice deviated from the accepted standard of care. Additionally, as pointed out by the Court, simply because the treatments have not been successful as Plaintiff [Lindsey] desires, this fact alone does not indicate medical malpractice has occurred [W]ithout a Certificate of Merit and expert testimony, the Medical Malpractice action is without merit. (emphasis added).

Opinion of the Common Pleas Court at 2-3.⁶

Accordingly, this Court dismisses Lindsey's appeal.

⁶ Also, the common pleas court noted that Lindsey "continually alleges that he has some sort of contract with all Defendants [PHS, Himmelsbach, and SCI-Coal Township] . . . Plaintiff [Lindsey] clearly misunderstands the accepted principles of Contract Law, as evidenced by another appeal he filed . . . in which he was suing the prison [SCI-Coal Township] for breach of contract, based on a Notice he sent to the prison [SCI-Coal Township]. According to Plaintiff [Lindsey] this Notice formed the basis of a contract with the prison [SCI-Coal Township]" Opinion of the Common Pleas Court at 1 n.1.

"A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999), citing General State Authority v. Coleman Cable & Wire Company, 365 A.2d 1347 (Pa. Cmwlth. 1976). Here, an examination of Lindsey's averments in his complaint indicated that he was not a party to any contract between SCI-Coal Township and PHS or that he was an intended third party beneficiary to that contract.

