

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHAUN MATZ,

Plaintiff,

v.

GABRIEL GALLOWAY,

Defendant.

OPINION and ORDER

Case No. 18-cv-748-wmc

Plaintiff Shaun Matz filed a proposed civil complaint, bringing a Wisconsin professional malpractice claim against his former attorney, Gabriel Galloway. Because Matz is incarcerated and proceeding without prepayment of the filing fee, the court must screen the complaint under 28 U.S.C. §§ 1915A, 1915(e)(2) to determine whether he may proceed with the case. For the reasons that follow, Matz will be allowed to proceed on a Wisconsin law professional malpractice claim against Galloway.

ALLEGATION OF FACT¹

Plaintiff Shaun Matz is a citizen of Wisconsin, currently incarcerated by the Wisconsin Department of Corrections (“DOC”) at Waupun Correctional Institution (“Waupun”). Defendant Gabriel Galloway is a citizen of Illinois and was licensed to practice law in both Wisconsin and Illinois during the relevant time period.

¹ In addressing any pro se litigant’s complaint, the court must read the allegations generously, drawing all reasonable inferences and resolving ambiguities in plaintiff’s favor. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

In 2010, Matz filed a *pro se* civil rights lawsuit in the Western District of Wisconsin, claiming that various DOC officials violated his Eighth Amendment rights in handling his serious mental illness. *See Matz v. Vandebrook*, No. 3:10-cv-668 (W.D. Wis.) On December 2, 2011, District Judge Barbara Crabb recruited Galloway to represent Matz in that lawsuit.

Matz alleges that he provided Galloway with various documents that he believed supported his claims, including: written statements of a DOC psychiatrist who commented that Matz's segregation increased the risk of self-harm; expert reports describing Matz's serious mental health issues, with a discussion of the impact of continued confinement in segregation; and affidavits of several other inmates who were willing to testify about the conditions of confinement Matz experienced. Galloway filed a motion for a preliminary injunction on behalf of Matz, relying on some of those documents.

On September 25, 2012, an order was entered granting Galloway's request to retain an expert to support Matz's case. However, Galloway never actually retained an expert to gather evidence for purposes of summary judgment or trial. On May 24, 2013, the defendants filed a motion for summary judgment with respect to the DOC defendants. In Matz's opposition brief, Galloway argued that defendants had not carried their burden. Judge Crabb granted defendants' motion for summary judgment, reasoning that, even at summary judgment it is plaintiff's burden to prove his case, and no reasonable jury could find in his favor. According to Matz, there were multiple points in the opinion at which Judge Crabb commented that the opposition brief referenced the wrong burden of proof, and Judge Crabb also commented that Matz had not come forward with any expert

testimony supporting his claims. Matz's remaining claims went to trial, during which Galloway did not seek to admit testimony from the other inmates who had prepared affidavits for Matz, and, like at the summary judgment stage, Galloway did not present any expert testimony. The jury came back with verdicts for defendants.

Matz filed a notice of appeal to the Court of Appeals for the Seventh Circuit. On May 7, 2014, after the court denied Matz's request for assistance in recruiting counsel, Matz filed a *pro se* motion seeking to dismiss his appeal. *Matz v. Vandenbrook*, No. 13-3448, dkt. #26 (7th Cir. May 7, 2014). That same day, the court dismissed the appeal pursuant to Federal Rule of Appellate Procedure 42(b). *Id.*, dkt. #25.

OPINION

Matz claims that if Galloway had presented testimony from the other inmates and/or used Matz's documentation from experts about the impact of segregation on his mental health, he would have succeeded at summary judgment and trial. He thus seeks to proceed against Galloway on a Wisconsin legal malpractice claim.

For a state law claim like that asserted here, this court may hear a case if the parties are citizens of different states and the amount in controversy is greater than \$75,000. 28 U.S.C. § 1332. Since plaintiff alleges that Galloway is a citizen of Illinois, he is a citizen of Wisconsin, and that the amount in controversy in this case exceeds \$250,000, the court is satisfied that it may exercise jurisdiction over his claim under § 1332.

Plaintiff's malpractice claim against Galloway is governed by Wisconsin law. To prevail on a legal malpractice claim under Wisconsin law, plaintiff must show that

defendants: (1) had a lawyer-client relationship with plaintiff; (2) committed acts or omissions constituting negligence; and (3) the alleged negligence caused plaintiff injury. *Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271, 276 N.W.2d 284, 287 (1979); *Tallmadge v. Boyle*, 2007 WI App 47, ¶ 15, 300 Wis. 2d 510, 730 N.W.2d 173. To establish causation and damages in a legal malpractice action, a plaintiff must prove that “but for” the attorney’s negligence, the plaintiff would have prevailed on the underlying litigation. *Talmage v. Harris*, 354 F. Supp. 2d 860, 864-65 (W.D. Wis. 2005) (citing *Harris v. Bowe*, 178 Wis. 2d 862, 868, 505 N.W.2d 159 (Ct. App. 1993)). Practically speaking, this requires the plaintiff to prove a case-within-a-case, that is, that he would have prevailed on the merits of the underlying litigation. *Id.* (citing *Lewandowski*, 88 Wis. 2d at 277, 276 N.W.2d at 287).

Plaintiff alleges that Galloway’s failure to (1) apply the proper burden of proof in opposing defendants’ motion for summary judgment, (2) pursue an expert report or testimony related to the impact of segregation on Matz’s mental health and (3) call certain witnesses was negligent and caused him to lose his lawsuit. While plaintiff faces an uphill battle of proving that his case could have succeeded at trial, at this stage it is not apparent from the record that his claims could not have succeeded. Indeed, neither the trial court nor the Seventh Circuit had the opportunity to actually evaluate the impact of plaintiff’s supposed expert and lay witness testimony that plaintiff asserts would have substantially improved his chance of succeeding. For that reason, the court will grant him leave to proceed against Galloway.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Shaun Matz is GRANTED leave to proceed on a legal malpractice claim against defendant Gabriel Galloway.
- 2) The clerk's office will prepare summons and the U.S. Marshal Service shall affect service upon defendant.
- 3) For the time being, plaintiff must send defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendant, he should serve the lawyer directly. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendant or to defendant's attorney.
- 4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- 5) If plaintiff is transferred or released while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court is unable to locate him, his case may be dismissed for failure to prosecute.
- 6) Plaintiff's motions for screening (dkt. ##11, 12) are DENIED as moot.

Entered this 12th day of October, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge