

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

ANDREW WALKER,

Petitioner,

v.

COVANCE CLINICAL RESEARCH
UNIT INC; MERCK & CO., INC.;
and DR. STEVEN,

Respondents.

OPINION AND ORDER

08-cv-493-slc¹

Petitioner Andrew Walker participated in a 45-day medical research study conducted by respondent Covance Clinical Research Unit, Inc. and using drugs manufactured by respondent Merck & Co., Inc. Petitioner contends that each of the respondents was

¹Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

negligent in providing care to him during the study.

Petitioner seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915. In an order dated September 17, 2008, dkt. #8, I concluded that petitioner was unable to prepay the filing fee. In addition, I concluded that jurisdiction was present under 28 U.S.C. § 1332 because petitioner had alleged that his citizenship is different from all three defendants and the amount in controversy is greater than \$75,000. (In the September 17 order I assumed that respondent Covance was incorporated in Wisconsin because petitioner alleged that it was “licensed to do business in Madison, Wisconsin as a corporation,” which is not quite the same thing as being incorporated in this state. It appears from a document attached to petitioner’s complaint that Covance may have been incorporated in Florida rather than Wisconsin. Because petitioner is a citizen of Missouri, the difference does not affect the existence of diversity jurisdiction.)

In addressing any pro se litigant’s complaint, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the action is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. §1915(e)(2). Having reviewed petitioner’s complaint, I conclude that he may proceed with his negligence claim against respondent Covance but that the complaint must be dismissed with respect to the other respondents for his failure to state a claim upon

which relief may be granted.

In his complaint petitioner fairly alleges the following facts.

ALLEGATIONS OF FACT

On June 29, 2008, petitioner Andrew Walker began participation in a medical research study conducted by respondent Covance Clinical Research Institute, Inc. in Madison, Wisconsin. The study involved a 45-day stay at a Covance facility during which petitioner took an “experimental drug.” The drug was manufactured by respondent Merck & Co.

A few days after the study began, petitioner began suffering from a number of symptoms, including “flu like symptoms,” “urinating blood from his penis,” “severe pain” and “head problems.” On July 7, “defendants” took petitioner to a hospital emergency room, where the doctors told petitioner he should return to the hospital if his symptoms persist or worsen. When petitioner’s back pain later worsened, he told respondent Covance’s staff, but they refused to take him to the hospital for the remainder of his 45-day stay. As a result, petitioner suffered physical and emotional pain and suffering and incurred additional medical expenses, among other injuries.

During the study, respondent Dr. Steven, a psychologist and employee of respondent Covance, attempted to gather information from petitioner over the course of two days, even

though petitioner told Steven that he did not want to talk about his injuries.

DISCUSSION

I understand petitioner to be raising two claims: (1) respondents Covance and Merck were negligent when they failed to take him to the emergency room after he complained of worsening back pain; and (2) respondent Steven caused petitioner emotional distress when Steven continued to ask him for information despite petitioner's statement that he did not want to talk. In Wisconsin, to prevail on a claim for negligence, the plaintiff must show: (1) the existence of a duty of care on the part of the defendant; (2) a breach of that duty of care; (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury; and (4) actual loss or damage resulting from the injury. Hornback v. Archdiocese of Milwaukee, 2008 WI 98, ¶16, – Wis. 2d. – , 752 N.W.2d 862. (I do not understand petitioner to be raising a claim that any of the respondents were negligent by giving him the drugs. Presumably, petitioner assumed the risk of side effects when he agreed to participate in the study.)

All of petitioner's claims must be dismissed with the exception of his claim against respondent Covance. With respect to respondent Steven, asking for information is not grounds for a negligence claim. Although petitioner does not say so explicitly, it appears that he may believe that respondent Steven is liable for intentional infliction of emotional

distress. The standard for prevailing on such a claim is high and petitioner cannot meet it.

In Wisconsin, damages for intentional infliction of emotional distress are available only if the defendant's conduct is so "extreme and outrageous" that "the "average member of the community" would view the defendant's treatment of the plaintiff "as being a complete denial of the plaintiff's dignity as a person." Alsteen v. Gehl, 21 Wis. 2d 349, 358, 124 N.W.2d 312, 317 (1963).

Although Steven's questions may have been unpleasant for petitioner, under no stretch of the imagination could it be said that they denied petitioner's dignity as a person. Wisconsin courts have found much more serious conduct to be insufficient to state a claim for intentional infliction of emotional distress. E.g., Alsteen, 21 Wis. 2d at 360; 124 N.W.2d at 318 (refusing to find building contractor acted in sufficiently outrageous fashion despite his leaving job half-done, exposing his elderly client to elements); Laska v. Steinpreis, 69 Wis. 2d 307, 319, 231 N.W.2d 196, 203 (1975) (affirming trial court finding that plaintiff had not stated claim for intentional infliction of emotional distress when he alleged that defendant had spied on plaintiff's domestic activities and driven his car at high speed onto lawn of leased property, causing plaintiff's children to scatter; alleged conduct was neither extreme nor outrageous).

With respect to petitioner's claim that respondents failed to take him to the emergency room, Wisconsin courts generally do not recognize a duty to "protect others from

hazardous situations.” State v. Williquette, 125 Wis. 2d 86, 90, 370 N.W.2d 282, 285 (Ct. App. 1985). However, there is an exception “[w]hen a special relationship exists between the parties.” Lloyd v. S.S. Kresge, Co., 85 Wis. 2d 296, 303, 270 N.W.2d 423, 426 (Ct. App. 1978). Because petitioner was taking part in a study conducted by respondent Covance at the time he needed treatment and he was under Covance’s care, petitioner might be able to show that such a special relationship existed. In addition, because petitioner alleges that respondent Covance was aware that he needed medical treatment but failed to provide it, petitioner may be able to prove that Covance breached its duty of care to petitioner and caused him injury.

Another potential obstacle for petitioner in prevailing on his claim against Covance is his own negligence. Wisconsin is a comparative negligence state. Wis. Stat. § 895.045(1). This means that petitioner cannot recover for respondent Covance’s negligence if his own negligence is greater than that of Covance’s. Bain v. Tielens Construction, Inc., 2006 WI App 127, ¶ 5, 294 Wis.2d 318, 718 N.W.2d 240. Petitioner does not explain in his complaint why he did not seek treatment on his own behalf. Although it may be that petitioner’s ability to care for himself was limited while he was participating in the study, this is an issue that respondent Covance may raise at summary judgment or at trial.

Petitioner has not stated a claim upon which relief may be granted against respondent Merck. He was not under Merck’s care at the time of the incident and there is no indication

in petitioner's complaint that Merck knew or should have known that petitioner was not receiving needed medical treatment.

Petitioner appears to believe that Merck may be held liable because the drug Covance gave petitioner was manufactured by Merck. But petitioner has not raised a claim regarding Merck's manufacture of the drug; his claim is that respondents failed to respond appropriately after he experienced side effects from the drug. Merck cannot be held liable for any acts or inactions of Covance over which Merck had no control. WIS JI-CIVIL 4000 ("To find a principal vicariously liable for the tort of his or her agent, the relationship must be that the agent is an agent-servant who is controlled by the owner or is subject to the owner's right to control the agent in the performance of his or her services.") (citing Arsand v. City of Franklin, 83 Wis. 2d 40, 264 N.W.2d 579 (1978)).

ORDER

IT IS ORDERED that

1. Petitioner Andrew Walker's request to proceed in forma pauperis, dkt. #3, is GRANTED. Petitioner may proceed with his claim that respondent Covance Clinical Research Unit, Inc. was negligent in failing to provide appropriate medical care for petitioner.

2. Petitioner's claims against respondents Dr. Steven and Merck & Co., Inc. are

DISMISSED for petitioner's failure to state a claim upon which relief may be granted.

3. For the remainder of this lawsuit, petitioner must send respondent a copy of every paper or document that he files with the court. Once petitioner learns the name of the lawyer that will be representing respondent, he should serve the lawyer directly rather than respondent. The court will disregard documents petitioner submits that do not show on the court's copy that he has sent a copy to respondent or to respondent's attorney.

4. Petitioner should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5. I am sending copies of petitioner's complaint and this order to the United States Marshal for service on respondent.

Entered this 26th day of September, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge