**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

JOSEPH LOVERA,

Plaintiff,

v.

WEXFORD HEALTH SOURCES, INC., DR. KUL SOOD, DR. MARLENE HENZE, and DR. KURT OSMUNDSON,

Defendants.

Case No. 21-cv-6837

Judge Martha M. Pacold

## ORDER

Plaintiff Joseph Lovera, a former inmate in the custody of the Illinois Department of Corrections, alleges that Dr. Kul Sood, Dr. Marlene Henze, and Dr. Kurt Osmundson (together, the "individual defendants" or "the doctors"), physicians employed by defendant Wexford Health Sources, Inc. ("Wexford"), provided plaintiff with inadequate medical care while he was incarcerated. Specifically, plaintiff alleges that the doctors ignored his repeated complaints of abdominal pain, despite knowing that the symptoms plaintiff described were symptoms of potentially severe medical problems requiring prompt treatment. Plaintiff further alleges that this deficient care ultimately necessitated emergency surgery and the removal of part of his colon.

Plaintiff has filed claims against the individual defendants under 42 U.S.C. § 1983 for the violation of his constitutional rights and under Illinois law for medical malpractice. Plaintiff additionally contends that Wexford is liable under the doctrine of *respondeat superior* for the individual defendants' medical malpractice under Illinois law.

The individual defendants and Wexford move to dismiss plaintiff's second amended complaint. [35]; [36]. For the reasons that follow, both motions are denied.

## DISCUSSION

The individual defendants argue that plaintiff's complaint should be dismissed for three reasons: (1) for failure to comply with Rule 11(b)(3) and Rule 10(b); (2) for failure to state a claim under Rule 12(b)(6); and (3) for failure to

comply with an Illinois statute calling for plaintiff to attach certificates provided by a health professional. *See* [35].

Wexford's arguments mirror those of the individual defendants. Wexford first argues that it cannot be vicariously liable because—for the reasons stated in the individual defendants' motion to dismiss—plaintiff has failed to state a claim for direct liability against any individual defendant. Wexford additionally argues that plaintiff's complaint should be dismissed for failure to comply with the Illinois statute calling for plaintiff to attach certificates provided by a health professional.

The court first addresses the argument regarding the certificate required by Illinois law.

**I**

In general, Illinois law requires a plaintiff alleging medical malpractice to attach to his complaint an affidavit stating "there is a reasonable and meritorious cause" for the litigation. 735 ILCS 5/2-622(a). The affidavit must be accompanied by a report from a qualified physician who has reviewed the plaintiff's medical records and other relevant materials and agrees with that conclusion. *Id.* Subsection (b) of 5/2-622 requires that "[w]here a certificate and written report are required pursuant to this Section a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time." 735 ILCS 5/2-622(b).

Based on this provision, defendants argue that because the second amended complaint names three individual defendants yet attaches only one physician's report, the complaint must be dismissed. [35] at 8–10; [36] at 4–6.

However, the Seventh Circuit has held that "a complaint in federal court cannot properly be dismissed because it lacks an affidavit and report under § 5/2-622." *Young v. United States*, 942 F.3d 349, 351 (7th Cir. 2019); *see also Nartey v. Franciscan Health Hospital,* 2 F.4th 1020, 1025 (7th Cir. 2021) (citing *Young*, 942 F.3d at 351) ("We have instructed district courts not to dismiss a complaint at the pleading stage for failing to attach a 5/2-622 affidavit."), *cert. denied*, 142 S. Ct. 2770 (2022). This is because the affidavit-and-report requirement in § 5/2-622 constitutes a state procedural rule. *Young*, 942 F.3d at 351. But "federal, not state, rules apply to procedural matters—such as what ought to be attached to pleadings—in all federal suits, whether they arise under federal or state law." *Id.* (quoting *Cooke v. Jackson National Life Insurance Co.*, 919 F.3d 1024, 1027 (7th Cir. 2019)). Plaintiff's complaint therefore cannot be dismissed for attaching only one physician's report, even where the state rule requires one report per defendant.

## II

The individual defendants' other arguments for dismissal are all closely related. They first argue that plaintiff's complaint should be dismissed because it does not comply with Rules 11(b)(3) and 10(b). [35] at 2–5. Rule 11(b)(3) provides, in relevant part:

> By presenting to the court a pleading . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

Fed. R. Civ. P. 11(b). Rule 10(b) provides:

> A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

Fed. R. Civ. P. 10(b).

The individual defendants' argument under Rule 11(b)(3) and Rule 10(b) is based on paragraph seven of plaintiff's second amended complaint. *See* [35] at 2–5; *see also* [30] ¶ 7. In paragraph seven, plaintiff acknowledges that plaintiff cannot recall the name of the Wexford physician to whom he complained about abdominal pain. *See* [30] ¶ 7. In the rest of plaintiff's complaint, plaintiff then proceeds to allege in the alternative that each of the three individual defendants heard plaintiff's complaints, knew that the symptoms plaintiff described were symptoms of potentially severe medical problems requiring prompt treatment, and turned a blind eye to plaintiff's medical needs. *See id.* ¶¶ 8, 9–15 (Defendant Sood), 16–22 (Defendant Henze), and 23–29 (Defendant Osmundson). The individual defendants argue that plaintiff's admission that he does not recall the name of the treating physician renders plaintiff's complaint "insufficient pursuant to FRCP 11(b)(3) and 10(b)." [35] at 4.

The individual defendants do not explain how this alleged insufficiency warrants dismissal, however. They do not point to any language within Rule 11(b)(3) or Rule 10(b) that would provide a basis for the court to dismiss plaintiff's complaint under these circumstances. Indeed, neither rule directly discusses dismissal. Moreover, Rule 12, which enumerates the defenses that may be asserted by a motion to dismiss, makes no mention of Rules 11(b)(3) and 10(b). *See* Fed. R.

Civ. P. 12. And the individual defendants do not cite any cases that dismissed a complaint under Rules 11(b)(3) or 10(b) at all—let alone under circumstances similar to these.

To be sure, there may be some circumstances in which a court may dismiss a complaint under Rule 11. Rule 11(c) does provide that "the court *may* impose an appropriate sanction" for violations of Rule 11(b). Fed. R. Civ. P. 11(c) (emphasis added). And in the right case, dismissal of a complaint could be an appropriate sanction under Rule 11(c). But the individual defendants do not argue that Rule 11 sanctions are appropriate—nor would the court be inclined to impose sanctions here, where there is no indication that plaintiff's counsel has been anything other than honest and forthright in the drafting of plaintiff's complaint. Similarly, the court is not holding that a complaint may never be dismissed under Rule 10(b). The individual defendants simply have not articulated a basis for doing so in their motion to dismiss. The individual defendants' argument that the complaint should be dismissed under Rules 11(b)(3) and 10(b) is therefore unpersuasive.

**III**

The individual defendants also argue that plaintiff's complaint should be dismissed for failure to state a claim under Rule 12(b)(6). *See* [35] at 2–8. When reviewing a motion to dismiss under Rule 12(b)(6), the court accepts as true all factual allegations in the complaint and draws all permissible inferences in the plaintiff's favor. *Boucher v. Finance System of Green Bay, Inc.*, 880 F.3d 362, 365 (7th Cir. 2018). "To survive a motion to dismiss, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 365–66 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 366 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[T]he complaint's factual allegations must raise the claim above a mere 'speculative level.'" *Bell v. City of Country Club Hills*, 841 F.3d 713, 716 (7th Cir. 2016) (quoting *Twombly*, 550 U.S. at 555). The federal pleading standard "does not require 'detailed factual allegations,'" but it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Although the individual defendants brief their Rule 12(b)(6) arguments separately for plaintiff's § 1983 deliberate indifference claim and plaintiff's state-law negligence claim, the arguments are essentially identical. Like the individual defendants' argument under Rule 11(b)(3) and Rule 10(b), the individual defendants' Rule 12(b)(6) arguments depend on plaintiff's inability to name the physician who treated him. *See, e.g.*, [35] at 4 (arguing that plaintiff's inability to name the treating physician renders plaintiff's complaint "insufficient pursuant to FRCP 11(b)(3) and 10(b) and insufficient to state a claim on which relief can be granted pursuant to 12(b)(6)").

The individual defendants do not argue that plaintiff's allegations, if true, would be inadequate to state a claim. Indeed, the individual defendants make no attempt to analyze the specific facts alleged by plaintiff or to argue that those facts do not give rise to a claim under § 1983 or under Illinois negligence law. Instead, the individual defendants appear to contend that, because of plaintiff's inability to identify the doctor who treated him, plaintiff's allegations fail for lack of evidentiary support. *See id.* at 7 (arguing that plaintiff's inability to identify the name of the treating physician "renders all allegations against those Defendants conclusory and lacking evidentiary support" and that the complaint "fails to allege any *properly supported* facts as to any individual defendant to substantiate this claim" (emphasis added)); *id.* at 8 (arguing that plaintiff's state-law negligence claims fail "[f]or the same reasons cited *supra*" and because of "Plaintiff's allegation/judicial admission . . . stating that he lacks knowledge as to whom he made complaints").

This argument is not persuasive under Rule 12(b)(6). While a lack of evidence supporting plaintiff's allegations might be an appropriate basis to grant a motion for summary judgment, it is not a proper basis to grant a motion to dismiss under Rule 12(b)(6). *See Boucher*, 880 F.3d at 365–66 (indicating that when reviewing a motion to dismiss under Rule 12(b)(6), the court "accept[s] as true all factual allegations in the complaint and draw[s] all permissible inferences in [the plaintiff's] favor").

The primary case that the individual defendants discuss in connection with their argument is *Weddle v. Smith & Nephew, Inc.*, No. 14 C 09549, 2016 WL 1407634 (N.D. Ill. Apr. 11, 2016). But *Weddle* does not require dismissal here. First, contrary to the individual defendants' repeated references to *Weddle* as a Seventh Circuit decision, *Weddle* is a district court decision. Second, *Weddle* involved meaningfully different circumstances. In that case, the plaintiff alleged that a medical device had failed and injured her. *Id.* at *1. The device contained components manufactured by three different companies, however, and the plaintiff was apparently unaware of which component failed. *Id.* at *1–2. In her complaint, the plaintiff alleged that "the TRIGEN Hindfoot Fusion Nail ***and/or*** a Howmedica Component ***and/or*** a DePuy Component" failed. *Id.* at *2. The court concluded that the plaintiff's allegations were insufficient because she "fail[ed] to propound a plausible contention that a particular defendant's product failed." *Id.* at *3. The court specifically noted that plaintiff was not pleading in the alternative because the plaintiff had not actually alleged that any individual defendant caused her injuries. *Id.* at *4–5. *Weddle* thus aligns with this court's earlier decision to grant the defendants' motions to dismiss plaintiff's first amended complaint in this case. *See* [28] at 3 (dismissing plaintiff's claims against the individual defendants because plaintiff had alleged only that "one or more" defendants acted unlawfully and "ha[d] not alleged that any Individual Defendant engaged in conduct that allegedly violated [plaintiff's] constitutional rights").

In plaintiff's second amended complaint, however, plaintiff does not merely allege that "one or more" defendants engaged in unlawful behavior, nor does he rely on the "and/or" allegations that were rejected in *Weddle*. Instead, plaintiff specifically alleges that each individual defendant engaged in unlawful conduct. *See* [30] ¶¶ 9–34. *Weddle* therefore does not call for dismissal here.

Finally, even if the individual defendants' arguments under Rule 12(b)(6) are construed generously as a broader argument that plaintiff's allegations—regardless of their evidentiary support—are too conclusory to state a claim, the argument is not persuasive. As noted above, to survive a motion to dismiss under Rule 12(b)(6), a complaint must contain more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. A complaint must offer more than "labels and conclusions," a "formulaic recitation of the elements of a cause of action," or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 555, 557). But the plaintiff need not provide "detailed factual allegations." *Id.* (quoting *Twombly*, 550 U.S. at 555). Instead, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Boucher*, 880 F.3d at 366 (quoting *Iqbal*, 556 U.S. at 678).

Plaintiff's allegations satisfy this standard. Plaintiff has not merely alleged legal conclusions. He has alleged facts that, if true, could render the individual defendants liable for deliberate indifference under § 1983 and for negligence under Illinois law. "To state a claim for deliberate indifference for deficient medical care, the plaintiff 'must allege an objectively serious medical condition and an official's deliberate indifference to that condition.'" *Cesal v. Moats*, 851 F.3d 714, 721 (7th Cir. 2017) (quoting *Perez v. Fenoglio*, 792 F.3d 768, 776 (7th Cir. 2015)). "Objectively serious medical needs are those that have either been diagnosed by a physician and demand treatment, or are 'so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Id.* (quoting *King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012)). A plaintiff must also allege that "the official actually knew of, but disregarded, a substantial risk to the inmate's health." *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 836–38 (1994)). Further, under § 1983, "[l]awsuits against individuals require personal involvement in the constitutional deprivation to support a viable claim." *Gonzalez v. McHenry County*, 40 F.4th 824, 828 (7th Cir. 2022) (quoting *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003)).

To state a claim in a negligence action alleging medical malpractice under Illinois law, a plaintiff must allege "(1) the proper standard of care by which to measure the defendants' conduct; (2) a negligent breach of the standard of care; and (3) the resulting injury proximately caused by the defendants' lack of skill or care." *Bergman v. Kelsey*, 873 N.E.2d 486, 496 (Ill. App. Ct. 2007) (quoting *Clayton v. County of Cook*, 805 N.E.2d 222, 237 (Ill. App. Ct. 2004)).

Plaintiff alleges that he complained to each individual defendant about severe abdominal pain. *See* [30] ¶¶ 9–11, 16–18, 23–25. Plaintiff alleges that each individual defendant "knew that those complaints were signs and symptoms of bowel obstruction, perforated bowel, fistula formation, colon cancer with obstruction, acute appendicitis, ischemic colitis, infectious colitis, or inflammatory bowel disease, and required tests to rule out these serious medical conditions." *Id.* ¶¶ 12, 19, 26. And plaintiff alleges that each individual defendant failed to document plaintiff's complaints and turned a "blind eye" to the need to treat plaintiff, even though each individual defendant knew that turning a blind eye to plaintiff's medical conditions was likely to cause harm to plaintiff. *Id.* ¶¶ 13–15, 20–22, 27–29. Moreover, plaintiff specifically alleges that the standard of care for a physician receiving reports of the symptoms plaintiff described would require the physician to document the complaints and assess the plaintiff for a series of conditions, that each individual defendant turned a blind eye to plaintiff's complaints despite knowing that failing to comply with the standard of care would likely result in serious injury, and that plaintiff was injured as a direct and proximate result of the individual defendants' deliberate indifference and negligence. *Id.* ¶¶ 30–34.

Although the general lack of detail in plaintiff's allegations makes this somewhat of a close call, "detailed factual allegations" are not required. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Moreover, aside from plaintiff's inability to recall the identity of the treating physician or physicians, defendants identify no specific defect in plaintiff's allegations. These allegations, taken as true at this stage of the proceeding, "allow[] the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Boucher*, 880 F.3d at 366 (quoting *Iqbal*, 556 U.S. at 678). The individual defendants' motion to dismiss, [35], is therefore denied.

**IV**

Aside from Wexford's separate argument about the certificate required by 735 ILCS 5/2-622, which is unpersuasive for the reasons described above, Wexford's motion to dismiss depends almost entirely on the argument that plaintiff has not stated a claim against the individual defendants. *See* [36] at 4 ("Because Plaintiff fails to adequately establish a negligence cause of action for medical malpractice against the individual Defendants, he cannot then establish a cause of action against Defendant Wexford through *respondeat superior*"). Because plaintiff's complaint *does*, in fact, adequately allege a state-law medical malpractice claim against the individual defendants for the reasons just described, Wexford's argument is unpersuasive.

To the extent Wexford also raises a separate argument that plaintiff's allegations regarding Wexford are too conclusory, the argument is likewise unpersuasive. Plaintiff specifically alleges that the individual defendants were

"physicians employed and controlled by defendant Wexford," and that the actions that form the basis of plaintiff's complaint "were all taken within the scope of [the individual defendants'] employment for defendant Wexford, and under color of their authority as physicians providing medical services to prisoners confined in the Illinois Department of Corrections." [30] ¶¶ 4–5. Plaintiff directly alleges that these facts render Wexford liable under the doctrine of *respondeat superior*. *Id.* ¶ 35. Although these allegations are not especially detailed, they are sufficient at this stage—especially when, as here, Wexford's argument on this point is limited to a single sentence. *See* [36] at 4 ("Plaintiff also alleges in a conclusory manner the elements necessary to establish *respondeat superior* liability on the part of Defendant Wexford."). Wexford's motion to dismiss, [36], is therefore denied.

**V**

Finally, the court will address plaintiff's argument that he is permissibly pleading in the alternative by providing the same factual allegations with respect to all three individual defendants.

In general, plaintiffs undoubtedly are permitted to plead in the alternative under Rule 8(d)(2). *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); *see also Ollins v. O'Brien*, No. 03-cv-5795, 2005 WL 730987, at *10 (N.D. Ill. Mar. 28, 2005) ("Plaintiffs may plead inconsistent facts, as well as legal theories, as long as plaintiffs are 'legitimately in doubt about the facts in question.'" (quoting *American International Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996))); 5 Wright & Miller, Federal Practice and Procedure, §§ 1282, 1283, 1285 (4th ed. 2023).

That said, plaintiff has not cited any cases where a court allowed a plaintiff to apply that rule in the same way plaintiff is applying it here, by making identical allegations in the alternative against different defendants. The court would not be inclined to dismiss the case on that basis—and defendants have not raised any argument on that point regardless—but neither would the court be inclined to permit a defendant to be subjected to an extended suit based on a case of mistaken identity. With that in mind, the parties are encouraged to make all reasonable efforts to promptly verify the identity of the physician or physicians who treated plaintiff. If plaintiff at any time concludes that the allegations in the complaint are *not* true with respect to any individual defendant, the court expects that the parties will work to minimize the burden of this litigation on that defendant by whatever means appropriate—which may include amending the complaint to dismiss any claims against that defendant.

## CONCLUSION

The motions to dismiss, [35], [36], are denied. This case will be referred to the calendar of the Honorable Gabriel A. Fuentes to hold proceedings related to discovery supervision and scheduling, to set a deadline for any motions for leave to file amended pleadings, to set a dispositive motions schedule, and for settlement.

Dated: March 15, 2024 /s/ Martha M. Pacold