

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

<b>JUAN COLON,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 16-cv-01188-NJR</b>
	)	
<b>TERRENCE CASEY, M.D.,</b>	)	
<b>TRAVIS NOTTMEIER, and</b>	)	
<b>KIMBERLY GARVER,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM AND ORDER**

**Rosenstengel, District Judge:**

Plaintiff Juan Colon is currently being held in the Lake County, Illinois jail awaiting trial. For all times relevant to this Complaint, Plaintiff was a pre-trial detainee at Chester Mental Health Center (“CMHC”). He was sent to CMHC for a determination of mental fitness to stand trial.

On October 27, 2016, Plaintiff, proceeding *pro se*, filed this action seeking damages for deprivations of his constitutional rights pursuant to 42 U.S.C. § 1983. Plaintiff alleged Defendants violated his constitutional rights by prescribing Lithium which caused hypothyroidism. Plaintiff’s original Complaint was dismissed for failure to state a claim. (Doc. 8). In the Order of Dismissal, the Court recruited counsel to assist Plaintiff and directed that a First Amended Complaint be filed. Counsel complied, filing a First Amended Complaint on May 1, 2017. (Doc. 13). The amended pleading asserts claims against Terrence Casey (psychiatric physician at CMHC), Travis Nottmeier (unit director at CMHC), and Kim Garver (nurse/social worker at CMHC).

The First Amended Complaint is now before the Court for a preliminary review pursuant to 28 U.S.C. § 1915A, which provides:

- (a) **Screening** – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
- (b) **Grounds for Dismissal** – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint
  - (1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or
  - (2) seeks monetary relief from a defendant who is immune from such relief.

An action or claim is frivolous if “it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolousness is an objective standard that refers to a claim that any reasonable person would find meritless. *Lee v. Clinton*, 209 F.3d 1025, 1026-27 (7th Cir. 2000). An action fails to state a claim upon which relief can be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The claim of entitlement to relief must cross “the line between possibility and plausibility.” *Id.* at 557. At this juncture, the factual allegations of the *pro se* complaint are to be liberally construed. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009).

### **The First Amended Complaint**

Plaintiff arrived at CMHC on January 6, 2016. (Doc. 13, p. 3). On February 23, 2016, Plaintiff met with Casey and Nottmeier regarding his care and mental status. *Id.* Defendants told Plaintiff that he must start taking the medication Lithium. *Id.* Plaintiff objected, but Defendants indicated that he did not have a choice. *Id.* Defendants told Plaintiff that if he refused to take the medication, Defendants would use their emergency powers and force the medication on Plaintiff.

*Id.* Plaintiff was fearful of being forced to take the medication. Accordingly, Plaintiff agreed to take the Lithium, but he maintains that his “agreement” was extracted under duress and absent informed consent. *Id.*

At the time, Plaintiff was given an informational print-out regarding Lithium. *Id.* The print-out did not include hypothyroidism as a possible side effect. *Id.* Additionally, Casey told Plaintiff “not to worry” about the side effects. *Id.*

Subsequently, Plaintiff expressed concerns to Garver regarding Lithium. (Doc. 13, p. 4). Plaintiff indicated he did not want to continue taking the medication. *Id.* Garver told Plaintiff that if he refused to take Lithium they would crush the drug up in his food. *Id.* As a result of this coercion, Plaintiff continued taking Lithium. *Id.*

On August 18, 2016, Plaintiff was diagnosed with hypothyroidism. *Id.* Hypothyroidism is a known adverse effect of Lithium. *Id.* At the time of filing, Plaintiff’s thyroid levels remain abnormal, and he must take daily medication for his hypothyroidism. *Id.* Plaintiff’s hypothyroidism may be permanent. *Id.*

### **Discussion**

The First Amended Complaint asserts the following counts:

- Count 1 -** Fifth, Eighth, and Fourteenth Amendment claims against Defendants for disregarding Plaintiff’s right to refuse treatment and/or right to informed consent.
- Count 2 –** State law claim for medical negligence against Casey.
- Count 3 –** State law claim for battery against Casey, Nottmeier, and Garvey.

### **Count 1**

The United States Supreme Court has recognized that there is a general liberty interest in refusing medical treatment.<sup>1</sup> See *Cruzan by Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278–79 (1990). See also *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (prisoners possess significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment). Several Circuits have held that the right to refuse medical treatment necessarily includes a right to informed consent. See *Pabon v. Wright*, 459 F.3d 241, 249–50 (2d Cir. 2006); *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990); *Rainwater v. Alarcon*, 268 F. App'x 531, 534 (9th Cir. 2008). After all, the right to refuse medical treatment is meaningless without sufficient knowledge about the risks associated with the proposed course of treatment.

In *Pabon v. Wright*, 459 F.3d 241 (2d Cir. 2006), the Second Circuit provided the following formulation for alleging a cause of action premised on this right:

[T]he Fourteenth Amendment's recognized liberty interest in an individual's right to refuse medical treatment carries with it a concomitant right to such information as a reasonable patient would deem necessary to make an informed decision regarding medical treatment. To establish a violation of this right, a prisoner must show that (1) government officials failed to provide him with such information; (2) this failure caused him to undergo medical treatment that he would have refused had he been so informed; and (3) the officials' failure was undertaken with deliberate indifference to the prisoner's right to refuse medical treatment. Because prisoners have the right to refuse medical treatment, courts

*Pabon*, 459 F.3d at 246.

The Seventh Circuit has commented on this theory of liability on two occasions. See *Phillips v. Wexford Health Sources, Inc.*, 522 F. App'x 364, 367 (7th Cir. 2013) (“*Phillips*”); *Cox*

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<sup>1</sup> The Court notes that Plaintiff has not alleged he is being forced to take Lithium. Further, the exhibits attached to the Complaint indicate that Plaintiff may stop taking Lithium at any time. That being said, stopping ingestion of Lithium at this point would not reverse Plaintiff's hypothyroidism. The damage has already been done. Plaintiff's claim, to the extent he has one, seems to rest on whether medical staff provided Plaintiff with sufficient information regarding Lithium's risks prior to prescribing it and whether Plaintiff is able to allege the other elements of an informed consent claim (as defined by other circuits).

*v. Brubaker*, 558 F. App'x 677, 678–79 (7th Cir. 2014) (“*Cox*”). In *Phillips*, the Seventh Circuit stated, in the context of an Eighth Amendment deliberate indifference claim, that it has “adopted a general rule that is consistent with these circuits.” *Phillips*, 522 F. App'x at 367. Subsequently, in *Cox*, the Seventh Circuit applied the elements of a Fourteenth Amendment due process claim for lack of informed consent—as set forth by other circuits—to affirm a district court’s grant of summary judgment in favor of medical staff. *Cox*, 558 F. App'x at 679. The Seventh Circuit declined, however, to endorse or decide the scope of such a claim. *Id.* (“the case does not require us to recognize, or decide the scope of, this due-process right”).

Here, Plaintiff alleges Defendants acted with deliberate indifference to his right to refuse medical treatment and/or his right to informed consent by failing to provide him with adequate information regarding the medication and by coercing Plaintiff to take the medication. Considering the authority described above, the Court finds that Count 1 survives preliminary screening.

Accordingly, Count 1 shall receive further review as to Casey, Nottmeier, and Garvey.

## **Count 2**

Count 2 asserts a state law claim for medical negligence against Casey, based on the same conduct detailed above. Where a district court has original jurisdiction over a civil action such as a § 1983 claim, it also has supplemental jurisdiction over related state law claims pursuant to 28 U.S.C. § 1367(a), so long as the state claims “derive from a common nucleus of operative fact” with the original federal claims. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 936 (7th Cir. 2008). “A loose factual connection is generally sufficient.” *Houskins v. Sheahan*, 549 F.3d 480, 495 (7th Cir. 2008) (citing *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294,

1299 (7th Cir. 1995)). While this Court has supplemental jurisdiction over this state-law claim pursuant to 28 U.S.C. § 1367, that is not the end of the matter.

Under Illinois law, a Plaintiff “[i]n any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice,” must file an affidavit along with the complaint, declaring one of the following: 1) that the affiant has consulted and reviewed the facts of the case with a qualified health professional who has reviewed the claim and made a written report that the claim is reasonable and meritorious (and the written report must be attached to the affidavit); 2) that the affiant was unable to obtain such a consultation before the expiration of the statute of limitations, and affiant has not previously voluntarily dismissed an action based on the same claim (and in this case, the required written report shall be filed within 90 days after the filing of the complaint); or 3) that the plaintiff has made a request for records but the respondent has not complied within 60 days of receipt of the request (and in this case the written report shall be filed within 90 days of receipt of the records). *See* 735 Ill. Comp. Stat. §5/2-622(a) (West 2017).<sup>1</sup> A separate affidavit and report shall be filed as to each defendant. *See* 735 Ill. Comp. Stat. §5/2-622(b).

Failure to file the required certificate is grounds for dismissal of the claim. *See* 735 Ill. Comp. Stat. § 5/2-622(g); *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000). Whether such dismissal should be with or without prejudice, however, is up to the sound discretion of the court. *Sherrod*, 223 F.3d at 614. “Illinois courts have held that when a plaintiff fails to attach a

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<sup>1</sup> The August 25, 2005 amendments to a prior version of this statute were held to be unconstitutional in 2010. *Lebron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010) (Holding P.A. 94-677 to be unconstitutional in its entirety). After *Lebron*, the previous version of the statute continued in effect. *See Hahn v. Walsh*, 686 F. Supp. 2d 829, 832 n.1 (C.D. Ill. 2010). The Illinois legislature re-enacted and amended 735 ILL. COMP. STAT. §5/2-622 effective January 18, 2013 (P.A. 97-1145), to remove any question as to the validity of this section. *See* notes on Validity of 735 ILL. COMP. STAT. §5/2-622 (West 2013).

certificate and report, then ‘a sound exercise of discretion mandates that [the plaintiff] be at least afforded an opportunity to amend her complaint to comply with section 2-622 before her action is dismissed with prejudice.’” *Id.*; see also *Chapman v. Chandra*, Case No. 06-cv-651-MJR, 2007 WL 1655799, at \*4-5 (S.D. Ill. June 5, 2007).

In this case, Plaintiff has failed to file the necessary affidavits or reports. Therefore, the claim in Count 2 shall be dismissed. The dismissal shall be without prejudice at this time, however, and Plaintiff shall be allowed 35 days to file the required affidavit(s), if he desires to seek reinstatement of this claim. The certificate(s) of merit must also be filed, in accordance with the applicable section of §5/2-622(a). Should Plaintiff fail to timely file the required affidavits/certificates, the dismissal of Count 2 may become a dismissal **with prejudice**. See Fed. R. Civ. P. 41(b).

### **Count 3**

Count 3 asserts a claim for battery under Illinois law against Casey, Nottmeier, and Garvey. This Count is also premised on the conduct at issue in Count 1. Accordingly, the Court has supplemental jurisdiction over Count 3.

Under Illinois law, a battery is an intentional tort defined as the unauthorized touching of the person of another. *Curtis v. Jaskey*, 759 N.E.2d 962 (Ill. App. Ct. 2001) (citing *Gaskin v. Goldwasser*, 520 N.E.2d 1085 (Ill. 1988)); *Bakes v. St. Alexius Medical Center*, 55 N.E.2d 78 (Ill. App. Ct. 2011). Medical battery “focuses on the plaintiff’s consent. Thus, in a medical battery case, the plaintiff may recover by establishing a total lack of consent to the procedure performed, that the treatment was contrary to the patient’s will, or that the treatment was at substantial variance with the consent granted.” *Fiala v. Bickford Sr. Living Grp., LLC*, 43 N.E.3d 1234, 1240 (Ill. App. Ct. 2015) (internal citations and quotation omitted).

Considering this authority, Plaintiff's state law claim for medical battery survives preliminary screening.

Accordingly, Count 3 shall receive further review as to Casey, Nottmeier, and Garvey.

**Disposition**

**IT IS HEREBY ORDERED** that **COUNT 1** shall **PROCEED** against **CASEY, NOTTMEIER, and GARVEY.**

**IT IS FURTHER ORDERED** that **COUNT 2** is **DISMISSED** without prejudice. If Plaintiff wishes to move the Court to reinstate the medical negligence claim in **COUNT 2** against Defendant **CASEY**, Plaintiff shall file the required affidavit pursuant to 735 Ill. Comp. Stat. §5/2-622, within 35 days of the date of this order. Further, Plaintiff shall timely file the required written report/certificate of merit from a qualified health professional, in compliance with §5/2-622. Should Plaintiff fail to timely file the required affidavits or reports, the dismissal of **COUNT 2** may become a dismissal with prejudice.

**IT IS FURTHER ORDERED** that **COUNT 3** shall **PROCEED** against **CASEY, NOTTMEIER, and GARVEY.**

**IT IS FURTHER ORDERED** that as to **COUNTS 1 and 3**, the Clerk of Court shall prepare for **CASEY, NOTTMEIER, and GARVEY**: (1) Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons), and (2) Form 6 (Waiver of Service of Summons). The Clerk is **DIRECTED** to mail these forms, a copy of the Complaint, and this Memorandum and Order to each defendant's place of employment as identified by Plaintiff. If any defendant fails to sign and return the Waiver of Service of Summons (Form 6) to the Clerk within 30 days from the date the forms were sent, the Clerk shall take appropriate steps to effect formal service on



that defendant, and the Court will require that defendant pay the full costs of formal service, to the extent authorized by the Federal Rules of Civil Procedure.

With respect to a defendant who no longer can be found at the work address provided by Plaintiff, the employer shall furnish the Clerk with the defendant's current work address, or, if not known, the defendant's last-known address. This information shall be used only for sending the forms as directed above or for formally effecting service. Any documentation of the address shall be retained only by the Clerk. Address information shall not be maintained in the court file or disclosed by the Clerk.

Plaintiff shall serve upon each defendant (or upon defense counsel once an appearance is entered) a copy of every pleading or other document submitted for consideration by the Court. Plaintiff shall include with the original paper to be filed a certificate stating the date on which a true and correct copy of the document was served on the defendant or counsel. Any paper received by a district judge or magistrate judge that has not been filed with the Clerk or that fails to include a certificate of service will be disregarded by the Court.

Defendants are **ORDERED** to timely file an appropriate responsive pleading to the Complaint and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this action is **REFERRED** to United States Magistrate Judge Donald G. Wilkerson for further pre-trial proceedings. Further, this entire matter shall be **REFERRED** to United States Magistrate Judge Donald G. Wilkerson for disposition, pursuant to Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *if all parties consent to such a referral*.

If judgment is rendered against Plaintiff, and the judgment includes the payment of costs under Section 1915, Plaintiff will be required to pay the full amount of the costs, despite the fact that his application to proceed *in forma pauperis* has been granted. *See* 28 U.S.C.

§ 1915(f)(2)(A).

Finally, Plaintiff is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than **7 days** after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* FED. R. CIV. P. 41(b).

**IT IS SO ORDERED.**

**DATED: July 14, 2017**

A handwritten signature in black ink that reads "Nancy J. Rosenstengel". The signature is written in a cursive style and is positioned above a horizontal line.

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**NANCY J. ROSENSTENGEL**  
**United States District Judge**