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IN THE COURT OF APPEALS OF INDIANA

MARLAN C. BONDS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 20A03-0701-CV-4
	)	
CARL NELSON RUTT, M.D., ALEX SWATSKY, DR. RHORE, DR. CARL NELSON,[1] and OAKLAWN COMMUNITY MENTAL HEALTH CENTER,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0603-CT-25

November 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

[1] While we use the caption from the appealed order, we have our doubts about the true names of the defendants. The captions on most of the filings simply refer to the defendants as "Dr. Carl N. Rutt, M.D. et al." When all of the parties are listed, "Dr. Rhore" is sometimes listed as "Dr. R. Hore." Moreover, considering that the chronological case summary (Appellant's App. at 154) lists Dr. Carl Nelson's address as "Unknown," we would not be surprised if "Dr. Carl Nelson" and "Carl Nelson Rutt" are one and the same.

Case Summary

Marlan Bonds, pro se, appeals an October 30, 2006 order dismissing his medical malpractice action. We affirm.

Issues

In his forty-plus-page, handwritten brief, Bonds includes a Statement of Issues that lists seven issues. Appellant's Br. at IV. His Summary of Argument section lists only three arguments, one of which he divides into two parts. *Id*. at XVI. It is challenging to discern how or whether the seven issues overlap with the three arguments. Moreover, the Argument sections, which constitute the bulk of Bonds' brief, do not necessarily correlate with the Summary section or even with the individual titles to the Argument sections. The sentence fragments, paucity of paragraphs, and general disorganization of Bonds' submissions have made it exceedingly difficult to wade through this appeal.

We acknowledge the general rule that pro se litigants are held to the same standard as attorneys admitted to the practice of law with regard to adhering to procedural rules. *Sumbry v. Boklund*, 836 N.E.2d 430, 432 (Ind. 2005). Bonds' appellate brief balances precariously close to the edge of waiver for lack of coherence. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring argument be supported by coherent reasoning with citations to authority); *Cooper v. State*, 854 N.E.2d 831, 842 (Ind. 2006) (observing that failure to present a cogent argument or citation to authority constitutes waiver of issue for appellate review). However, noting our preference for deciding issues on their merits when possible, *Kelly v. Levandoski*, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005), *trans. denied*, and believing we have extracted the relevant

arguments, we address Bonds' contentions concerning Indiana Code Sections 33-37-3-2 and -3, and Indiana Code Chapter 34-58-1.

Facts and Procedural History

Bonds is no stranger to the appellate system. The following excerpt details the factual background that set the stage for the current appeal and Bonds' other appeals.[2]

> In February 2003, Bonds married Jolene Trosper, who had a four-year-old daughter, M.T., from a previous relationship. Bonds had previously been diagnosed with "schizoaffective disorder, bipolar type, cocaine dependence, a history of marijuana abuse, and a history of alcohol abuse." Transcript at 189-90. Accordingly, Bonds was prescribed medication to control his symptoms.
>
> In September 2003, Trosper decided to go back to work and wanted to obtain day care for M.T. with financial assistance through a program called Step Ahead. In order to qualify for that assistance, Trosper was required to show that there was a reason that Bonds, who was unemployed, could not care for the child. Bonds asked his psychiatrist, Dr. Carl Rutt, to write a letter explaining that Bonds could not care for M.T. That letter stated in relevant part, "Marlan is on medication for a nervous condition and is not able to maintain adequate attention to his step-daughter's personal care needs. Therefore, it is not appropriate for him to provide that care at this time." State's Exhibit 1. Despite that letter, however, Trosper's request for assistance from Step Ahead was denied.
>
> On October 11, 2003, Trosper went to work and left M.T. in Bonds's care. At some time during that day, Bonds dipped M.T. into a bathtub containing scalding water, and M.T. sustained third-degree burns to one-fourth of her body. Bonds called Trosper, who came home from work early and obtained emergency medical treatment for M.T. Thereafter, M.T. underwent surgery to repair her extensive burns, including multiple skin grafts. M.T. will need new skin grafts periodically until she reaches adulthood.

[2] In a third appeal, Bonds asserted that the trial court erroneously determined that he failed to comply with the Tort Claims Act when he filed a complaint for fraud, theft and deception in the withdrawal of funds from his inmate account. *Bonds v. Books*, No. 20A04-0607-CV-368 (Ind. Ct. App. Jan. 9, 2007) (affirming summary judgment in favor of Elkhart County sheriff and captain), *trans. denied*.

The State charged Bonds with neglect of a dependent, battery, and being an habitual offender. Thereafter, on May 6, 2004, Bonds filed his Verified Motion to Waive Trial by Jury. During the bench trial, after the State rested, Bonds requested that he be permitted to fire his attorney and represent himself for the duration of the trial. The trial court denied that request after Bonds explained that his memory and "ability to reason" were adversely affected by his medications (Depakote and Seroquel). Transcript at 252. But the trial court continued the trial pending psychological evaluations to determine whether Bonds was competent to represent himself at trial.

Both physicians who evaluated Bonds concluded that he was competent to stand trial. Specifically, Dr. Salvador Ceniceros concluded:

> [I]t is apparent that [Bonds] is certainly competent to stand trial and help his defense attorney. He is actually quite competent to defend himself, if necessary, in the sense that he is very familiar with the legal system and the rules of evidence. There is no evidence at all that would suggest that the medication he is taking currently is in any way interfering with his cognition, with his ability to think, or his memory. If anything, they have cleared his memory quite nicely, and have cleared any symptoms that he may have had in the past. He appears to be quite stable at this time.

Appellant's App. at 458. And Dr. Gary Seltman concluded:

> At present, Mr. Bonds does not appear to suffer from any particular mental problem that would interfere with his ability to understand and participate in his own defense. He appears to be well aware of the nature of the charges against him, the possible consequences if found guilty, and is also well aware of the players involved in the judicial process. Some of his behavior appears to be a bit manipulative and possibly aimed at creating a diversion, and there is a fair amount of rationalization and projection of blame for the difficulties he is facing.

Id. at 461. Accordingly, the trial court permitted Bonds to represent himself for the remainder of his trial, with a standby attorney for assistance.

The trial court found Bonds guilty as charged and adjudicated him an habitual offender. At sentencing, the trial court identified six aggravators and a single mitigator and imposed a total executed term of fifty-three years.

Bonds v. State, No. 20A03-0412-CR-582 (Ind. Ct. App. Apr. 13, 2006) (affirming convictions and sentence), *trans. denied*.

On March 22, 2006, Indiana State Prison inmate Bonds, pro se, filed a medical malpractice complaint,[3] but failed to include a filing fee, an affidavit of indigency, or a certified copy of his prisoner's trust fund account statement. *See* Ind. Code §§ 33-37-3-2, -3; Appellee's App. at 14. In the complaint, Bonds alleged that employees of Oaklawn Community Mental Health Center had overmedicated him – despite concerns raised by Bonds and his then-wife, Trosper. Bonds further alleged, *inter alia*, that the overmedication caused him to hurt M.T., which ultimately led to his arrest, conviction, and incarceration. Despite the missing filing fee and deficiencies in the submission, the Elkhart Circuit Court allowed Bonds' filing and took the matter under review pursuant to Indiana Code Section 34-58-1-1.

On September 28, 2006 and October 5, 2006, the court directed Bonds to "comply with Indiana law with respect to filings, to-wit: I.C. 33-37-3-3; I.C. 33-37-3-2." Appellee's App. at 6. On October 23, 2006, Bonds filed an affidavit of indigency. It appears that Bonds attached to his affidavit an uncertified, six-page printout of his offender trust account dated from August 17, 2006 through October 17, 2006 and consisting of transactions in September and early October of 2006. *Id*. at 7, 95-102.

On October 30, 2006, the court issued an order denying Bonds' "motion for discovery, motion for appointment of counsel and all other requests filed herein in this matter" and dismissing the cause. *Id*. at 11. The court explained that once again Bonds had not complied with Indiana Code Section 33-37-3-3 and that a complaint is "properly dismissed when an inmate fails to attach required documents to *pro se* petition to proceed as indigent." *Id*. at 9

[3] Bonds titled his medical malpractice pleading, "Tort Claim Complaint." Appellee's App. at 14.

(citing *Sumbry v. Pera*, 795 N.E.2d 470 (Ind. Ct. App. 2003), *trans. denied*). In addition, the court cited the two-year statute of limitations for medical malpractice claims and the prerequisites to filing such claims that had not been fulfilled. The court went on to note, "the issues raised appear to have been decided already by the United States District Court Northern District of Indiana, South Bend Division in Cause No. 3:05-CV-604-JM rendering those issues *res judicata* and outside the jurisdiction of this Court." *Id.* at 10. Finally, the court concluded:

> Based on the aforementioned circumstances, which have been explained to Mr. Bonds previously, his claims lack an arguable basis in law and fact, and his continued litigation of them is frivolous. Furthermore, the claims Mr. Bonds persists on presenting are not claims upon which relief may be granted as noted above. A claim may not proceed once this determination has been made. *See* Indiana Code § 34-58-1-2(a). *See also Smith v. Huckins*, 850 N.E.2d 480 (Ind. Ct. App. 2006). Accordingly, in compliance with Indiana Code § 34-58-1-3, the Court hereby Orders that this claim may not proceed.

Id.

Discussion and Decision

I. Indiana Code Sections 33-37-3-2, -3

Indiana Code Section 33-37-3-2 provides:

> A person entitled to bring a civil action ... may do so without paying the required fees or other court costs upon filing in court, under oath and in writing, a statement:
>
> (1) declaring that the person is unable to make the payments or to give security for them because of the person's indigency;
>
> (2) declaring that the person believes that the person is entitled to the redress sought in the action; and
>
> (3) setting forth briefly the nature of the action.

(Formerly Ind. Code § 33-19-3-2).

Indiana Code Section 33-37-3-3 provides:

> (a) *When an offender commences an action or a proceeding without paying fees or other court costs under section 2 of this chapter, the offender shall obtain from the appropriate official of the correctional facility or facilities at which the offender is or was confined, a certified copy of the prisoner's trust fund account statement for the six (6) months immediately preceding submission of the complaint or petition. The offender shall file the trust fund account statement in addition to the statement required under section 2 of this chapter.*
>
> (b) The offender shall pay a partial filing fee that is twenty percent (20%) of the greater of:
>
> (1) The average monthly deposits to the offender's account; or
>
> (2) the average monthly balance in the offender's account:
>
> for the six (6) months immediately preceding the filing of the complaint or petition. However, the fee may not exceed the full statutory fee for the commencement of actions or proceedings.
>
> (c) If the offender claims exceptional circumstances that render the offender unable to pay the partial filing fee required by this section, in addition to the statement required by section 2 of this chapter and the statement of account required by subsection (b), the offender shall submit an affidavit of special circumstances setting forth the reasons and circumstances that justify relief from the partial filing fee requirement.
>
> (d) If the court approves the application to waive all fees, the court shall give written notice to the offender that all fees and costs relating to the filing and service will be waived. If the court denies the application to waive all fees, the court shall give written notice to the offender that the offender's case will be dismissed if the partial filing fee is not paid within forty-five (45) days after the date of the order, or within an additional period that the court may, upon request, allow. Process concerning the offender's case may not be served until the fee is paid.

(Emphasis added) (formerly Ind. Code § 33-19-3-2.5). A trial court may within its discretion dismiss without prejudice a defendant's complaint where he fails to comply with the above Indiana Code Sections that set out the indigency requirements. *See Sumbry*, 795 N.E.2d at 471-72.

Bonds did not include a filing fee when he filed his malpractice complaint in March 2006. The absence of a filing fee need not have been fatal. Indeed, had Bonds submitted an affidavit of indigency and a certified copy of his prisoner's trust fund account statement for

the six months immediately preceding submission of his complaint, the issue would have been resolved. In addition, he could have submitted an affidavit of exceptional circumstances. *See, e.g.*, *Zimmerman v. Hanks*, 766 N.E.2d 752, 754 (Ind. Ct. App. 2002) (discussing Ind. Code § 33-19-3-2, predecessor to Ind. Code § 33-37-3-2, statement of exceptional circumstances: Zimmerman has "been absolutely indigent and without any funds since July, 1998 ... [and his] prison trust fund account currently has over $300.00 in liens for photocopies made at the prison law library – and postage liens; and ... approximately $1,500.00 in liens against [it] for federal civil action filing fees and appellate fees."). However, Bonds submitted none of those documents with his complaint.

When six months had elapsed without Bonds submitting the required attachments, the court directed him to do so in an entry dated September 28, 2006. Again, Bonds failed to comply. The following month, the court issued another directive, once more reminding him to fulfill the requirements of Indiana Code Sections 33-37-3-2 and -3. This second order apparently prompted Bonds to take action. He filed an affidavit of indigency and attached a portion of his offender trust system transaction history inquiry. Unfortunately, the attachment was uncertified *and* did not include the activity in Bonds' account for the six-month period immediately preceding submission of his malpractice complaint. Rather, the report was dated from August 17, 2006 through October 17, 2006 and only contained listings of transactions that had occurred during September and early October of 2006. Appellee's App. at 7, 95-102. The initial omissions, coupled with the continued failure to cure – despite prodding by the trial court – lead us to conclude that a dismissal without prejudice was not an abuse of discretion. *See Sumbry*, 795 N.E.2d at 472.

II. Indiana Code Chapter 34-58-1

The more important question for Bonds is whether the dismissal under Indiana Code 34-58-1 was proper because, unlike the dismissal discussed *supra* under Indiana Code Sections 33-37-3-2 and -3, the Indiana Code Chapter 34-58-1 dismissal was with prejudice.

Indiana Code Chapter 34-58-1 provides a screening mechanism for offender litigation. An "offender" is defined for purposes of this chapter as "a person who is committed to the department of correction or incarcerated in a jail." Ind. Code § 34-6-2-89(b). When the court receives a complaint filed by an offender, the court is to docket the case but take no further action until the court has conducted the required review. Ind. Code § 34-58-1-1. The court is to review the complaint to determine whether the claim or claims made therein may proceed. Ind. Code § 34-58-1-2. A claim may not proceed if the court determines it "is frivolous; is not a claim upon which relief may be granted; or seeks monetary relief from a defendant who is immune from liability for such relief." *Id*. A claim is "frivolous" if it is made "primarily to harass a person" or lacks an arguable basis either in law or fact. *Id*. If the court determines that a claim may not proceed, it must enter an order explaining why the claim may not proceed and stating whether there remain any claims in the complaint that may proceed. Ind. Code § 34-58-1-3.[4] We review such determinations de novo. *See Smith v. McKee*, 850 N.E.2d 471, 474 (Ind. Ct. App. 2006). When conducting our review, we accept as true the well-pleaded facts in the complaint and determine whether the complaint contains

[4] Indiana Code Section 34-58-2-1 provides, "[i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under IC 34-58-1-2, the offender may not file a new complaint or petition unless a court determines that the offender is in immediate danger of serious bodily injury." There is no evidence that this provision is applicable in this case.

allegations concerning all the material elements necessary to sustain a recovery under some viable legal theory. *Abdul-Wadood v. Batchelor*, 865 N.E.2d 621, 623 (Ind. Ct. App. 2007), *trans. denied*.

Generally, an action against a health care provider may not be commenced in a court in Indiana before the claimant's proposed complaint has been presented to, and an opinion has been issued by, a medical review panel. Ind. Code § 34-18-8-4. Indeed, unless an exception applies, a state court will lack subject matter jurisdiction if a medical malpractice claimant skips the review panel stage. *See Albright v. Pyle, M.D.*, 637 N.E.2d 1360, 1363 (Ind. Ct. App. 1994). Having bypassed the review panel avenue, Bonds asserts that he falls within the following exception:

> Notwithstanding section 4 of this chapter, a patient may commence an action against a health care provider for malpractice without submitting a proposed complaint to a medical review panel if the patient's pleadings include a declaration that the patient seeks damages from the health care *provider in an amount not greater than fifteen thousand dollars ($15,000)*. In an action commenced under this subsection (or IC 27-12-8-6(a) before its repeal), the patient is barred from recovering any amount greater than fifteen thousand dollars ($15,000), except as provided in subsection (b).

Ind. Code § 34-18-8-6(a) (emphasis added).

In both his original and amended complaints, Bonds stated:

> It is respectfully requested that relief for punitive, physical and psychological damage be provided to the plaintiff, Establishing $15,000.00 dollars (Fifteen thousand dollars) as said relief, along with all cost of severe[al?] legal actions and, Court proceeding be placed on the defendants. Disciplinary action requested is not requested, Conceding discretion of the presiding judge. Petitioner prays for just fair and proper relief, Established for such damages Reasonable and complete.

Appellee's App. at 34, 71. As the excerpt above shows, Bonds requested more than $15,000. Specifically, he sought $15,000 for physical, psychological , and punitive damages, *along with* all costs of several legal actions; just, fair, and proper relief; *and* complete and reasonable damages. That Bonds later requested the court's assistance in presenting a proposed complaint to the medical review panel lends further support to the conclusion that he was actually pursuing a total award greater than $15,000. Again, the review panel would have been an unnecessary detour if the amount sought was truly less than $15,000.

Faced with these facts, the court correctly found that there were "prerequisites to commencing a medical malpractice claim" that Bonds "has never complied with." *Id*. at 10. Bonds' failure to first present his claim to the medical review panel deprived the trial court of subject matter jurisdiction. Lacking subject matter jurisdiction, the court correctly dismissed Bonds' malpractice action. *See Gorman v. Northeastern REMC*, 594 N.E.2d 843, 845 (Ind. Ct. App. 1992) ("When there is a lack of subject-matter jurisdiction, the court has been said to be without jurisdiction to do anything in the case except to enter an order of dismissal."), *clarified on denial of reh'g by* 597 N.E.2d 366, *trans. denied*.

Having concluded the court properly dismissed Bonds' action, we need not provide a lengthy dissertation regarding the expiration of the statute of limitations, which was also noted in the court's order. Appellee's App. at 10. Suffice it to say that Bonds complained of the alleged overmedication back in September 2003, committed the crime against the child in October 2003, yet did not file his medical malpractice claim until March 2006. This is beyond the applicable statute of limitation. *See* Ind. Code § 34-18-7-1(b) ("A claim ... may not be brought against a health care provider based upon professional services or health care

that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect[.]").

Similarly, given our resolution of the other issues *supra*, we touch only briefly on the appointment of counsel issue. In sum, the court did not err in not appointing counsel to Bonds. *See* Appellee's App. at 9; *Sumbry*, 795 N.E.2d at 473 (concluding that defendant's failure to pay filing fee and consequent dismissal rendered the appointment of attorney issue moot); *see also Schnell v. Hayes*, 710 N.E.2d 208, 211 (Ind. Ct. App. 1999) (concluding that court did not abuse its discretion in denying client's request to appoint pauper counsel to assist him in legal malpractice action against attorney who represented him at criminal sentencing proceeding, where client's claim was barred by statute of limitations), *trans. denied*.

Affirmed.

DARDEN, J., and MAY, J., concur.