MEMORANDUM DECISION

APPELLANT, PRO SE

Lee Evans Dunigan
Carlisle, Indiana

ATTORNEYS FOR APPELLEES

Thomas R. Benton
Heather T. Gilbert
Marley G. Hancock
Cassiday Schade, LLP
Merrillville, Indiana

IN THE COURT OF APPEALS OF INDIANA

Lee Evans Dunigan,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 19, 2022

Court of Appeals Case No. 22A-CT-947

Appeal from the Hendricks Superior Court

The Honorable Robert Freese, Judge

Trial Court Cause No. 32D01-2201-CT-3

Vaidik, Judge.

Case Summary

[1] Lee Evans Dunigan, an inmate in the Indiana Department of Correction (DOC), appeals the trial court's Indiana Trial Rule (12)(B)(6) dismissal of his civil complaint against four DOC medical providers. We affirm.

Facts and Procedural History

[2] In June 2020, Dunigan was sentenced to forty-two years in the DOC. *See* Cause No. 79D05-1810-F1-11. In January 2022, Dunigan, pro se, filed a complaint against Dr. Robert Lipsey, Dr. Robert Somesan, Dr. Paul Talbot, and Loice Mukoma ("the Providers") in Hendricks Superior Court. Dunigan's complaint alleges that the Providers acted in deliberate indifference to his "objectively serious medical condition" in violation of the Eighth Amendment to the U.S. Constitution. Appellees' App. Vol. II p. 3. Specifically, Dunigan claims that in July and August 2020, when he was at the DOC's Reception Diagnostic Center in Plainfield, he requested treatment for "painful blister-like bumps on the back of his tongue" (which he "believe[d]" to be herpes); however, the Providers "depriv[ed] [him] of needed treatment and further testing." *Id.* at 3, 4, 7. Dunigan further claims that the Providers were "shown" and "told about" test results from October 2019 (when he was in jail awaiting trial), but they still "did not prescribe needed treatment or order needed testing." *Id.* at 3, 8. The 2019 test results, which were from a gram-stain culture from Dunigan's pharynx, showed "Few Polymorphonuclear leukocytes," "Rare epithelial cells," "Many Gram positive cocci," "Many Gram negative bacilli," and "No anaerobes

isolated." *Id.* at 13. Dunigan sought money damages and a "Restraining Order."[1] *Id.* at 10.

[3] The Providers moved to dismiss Dunigan's complaint under Trial Rule 12(B)(6), and the trial court granted the motion.[2]

[4] Dunigan, pro se, now appeals.

Discussion and Decision

[5] Dunigan argues the trial court erred by granting the Providers' motion to dismiss. A civil action may be dismissed under Trial Rule 12(B)(6) for "failure to state a claim upon which relief can be granted." A 12(B)(6) motion "tests the legal sufficiency of the plaintiff's claim, not the facts supporting it." *Residences at Ivy Quad Unit Owners Ass'n, Inc. v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 981 (Ind. 2022) (quotation omitted). To overcome a 12(B)(6) motion, the complaint must allege facts that demonstrate the "possibility of relief." *Id.* at 980. We review a 12(B)(6) dismissal de novo. *Id.* at 981. We take the facts alleged in the

---

[1] Dunigan's complaint sets forth two counts, but they are both for deliberate indifference under the Eighth Amendment. Although Dunigan uses the phrases "medical malpractice" and "Restraining Order" in his complaint, he does not set forth separate claims. We therefore treat his complaint as alleging one claim for deliberate indifference.

[2] It is unclear from the record whether the trial court conducted an initial review of Dunigan's complaint as required by Indiana Code section 34-58-1-2 ("A court shall review a complaint or petition filed by an offender and shall determine if the claim may proceed."). We also note that Dunigan has already had cases dismissed under Section 34-58-1-2. *See Dunigan v. State*, 191 N.E.3d 851, 853 (Ind. Ct. App. 2022) (recognizing the "mounting burden" that Dunigan—"a prolific, abusive litigant" who has filed "some forty-nine different suits"— is "placing on our court system" and finding "it appropriate to impose sanctions"), *reh'g denied*.

complaint as true, consider all complaint allegations in the light most favorable to the nonmoving party, and draw every reasonable inference in that party's favor. *Id.*

[6] "Prison physicians will be liable under the Eighth Amendment if they intentionally disregard a known, objectively serious medical condition that poses an excessive risk to an inmate's health." *Gonzalez v. Feinerman*, 663 F.3d 311, 313 (7th Cir. 2011). To establish liability, a prisoner must satisfy both an objective and subjective component by showing: (1) his medical need was objectively serious and (2) the defendant acted with deliberate indifference to that medical need. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). A medical need is "serious" if it is one that a doctor has diagnosed as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. *Greeno*, 414 F.3d at 653.[3]

[7] Dunigan doesn't allege a serious medical need. Rather, he alleges that in 2020 he had "painful blisterlike bumps on the back of his tongue." Appellees' App. Vol. II p. 3. But bumps and pain do not rise to the level of an objectively serious medical need. *See Murphy v. Neal*, Cause No. 3:21-CV-954-DRL-MGG, 2022 WL 3368798 (N.D. Ind. Aug. 16, 2022) (dismissing some of plaintiff's

[3] Although Dunigan does not cite 42 U.S.C. § 1983 in his complaint or on appeal, this appears to be the way a deliberate-indifference claim under the Eighth Amendment is brought. *See, e.g.*, *Gonzalez*, 663 F.3d at 312; *Williams v. Ind. Dep't of Corr.*, 142 N.E.3d 986, 1000 (Ind. Ct. App. 2020).

deliberate-indifference claims for failure to state a claim because he did not "allege[] a serious medical need"; although plaintiff alleged he needed cream for his skin graft, he did "not say how recently he received the skin graft," and he didn't allege any harm "besides discomfort from not having access to his skin cream . . . for about three months"). The trial court properly dismissed Dunigan's complaint under Trial Rule 12(B)(6).

[8] Affirmed.

Riley, J., and Bailey, J., concur.