

tion, it found that the circuit court's exclusion of Dr. Wendt's testimony disregarded the tenets of MRE 403, in that the circuit court simply speculated that the entirety of Dr. Wendt's testimony would be irrelevant. Hence, the circuit court abused its discretion because it failed to weigh adequately the psychological testing and other elements of Dr. Wendt's testimony on the probative side. Accordingly, the Michigan Supreme Court reversed portions of the lower courts' rulings and remanded the matter to the circuit court with the caveat that the relevant testimony of Dr. Wendt should also meet the requirements of MRE 702 and 403.

Finally, in regard to Mr. Kowalski's claim that any exclusion of proposed witness testimony was a violation of his rights under the Sixth Amendment, the Michigan Supreme Court compared MRE 702 to the "nearly identical" Federal Rule of Evidence 702, which requires that "any and all scientific testimony and evidence admitted [be] not only relevant, but reliable." Ultimately, the Michigan Supreme Court endorsed that "courts are vested with the gatekeeping authority to apply MRE 702 on a case-by-case basis. . . . Consequently, we hold that proper application of MRE 702 in this case does not deny defendant his constitutional right to present a defense" (*Kowalski*, p 35).

Dissenting Opinion

The single dissenting justice concluded that expert testimony regarding false confessions is not beyond the common knowledge of the average juror and is thus inadmissible under MRE 702. Also, he found that Dr. Wendt's testimony regarding Mr. Kowalski's psychological characteristics was irrelevant, since Dr. Wendt himself admitted that none of the psychological tests made it "more probable or less probable" that Mr. Kowalski's confession could be either true or false. The dissenting justice focused on how the experts' testimony would not offer jurors "any actual assistance in determining whether *defendant's* confession was, in fact, false" (*Kowalski*, p 39, italics in original). He strongly argued that introducing experts not only risked distracting the jury but also would cause them to "subordinate their own commonsense judgments" (*Kowalski*, p 39). Finally, in his wariness over expert testimony on false confession, the justice warned of the possibility of an increasing number of false-confession experts attempting to undermine defendants' confessions, de-

fendants choosing not to testify and relying on experts to show that their confessions were false, prosecutors having to bring in their own experts regarding the truthfulness of confessions, and criminal trials dissolving into debates between battling experts rather than a "search for the truth."

Discussion

The Michigan Supreme Court appeared to agree with the trial and appellate court in their critical application of MRE 702 to the proffered evidence of Dr. Leo, noting the poor reliability of the scientific principles and methodology. The court did not find the exclusion of most of the proffered expert testimony to be an abuse of discretion. In fact, it affirmed the gatekeeping authority of the trial courts in assessing the reliability of specific false-confession testimony. However, it rebuked the lower courts' presumption that the average juror possesses sufficient knowledge to evaluate false confessions without making a commonsense inquiry under MRE 702. Furthermore, the Michigan Supreme Court reminded the lower courts that each aspect of expert witness testimony must be assessed for its reliability rather than summarily rejecting all expert testimony when only certain elements were questionable. By dismissing the entirety of Dr. Wendt's testimony, the lower courts failed to consider separately the reliability of his other relevant testimony. Finally, the circuit court's holding that it should reject the entirety of the false-confession testimony because it had no evidence to the contrary failed to weigh the probative value of Dr. Wendt's psychological testing against any prejudicial concerns under MRE 403.

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When Does a Plaintiff's Deliberate Indifference Claim Survive Summary Judgment?

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To Survive Summary Judgment Under 42 U.S.C. § 1983, Plaintiff's Eighth Amendment Deliberate Indifference Claim Requires an Initial Factual Showing of Defendants' Knowing or Wanton Negligence

In *Leavitt v. Corr. Med. Serv. Inc.*, 645 F.3d 484 (1st Cir. 2011), the U.S. Court of Appeals for the First Circuit reviewed the decision of the U.S. District Court, District of Maine regarding a plaintiff's 42 U.S.C. § 1983 (2000) action alleging a violation of his Eighth Amendment rights for failure to provide treatment for his HIV infection. The lower court had granted summary judgment in favor of the defendant, Mr. Cichon, a family nurse practitioner who served as a health care services contractor for the county jail. The lower court had also granted summary judgment to various other health care providers at the Maine State Prison (*Leavitt v. Corr. Med. Serv.*, 2010 U.S. Dist. LEXIS 18453 (D. Me., 2010)).

Facts of the Case

The plaintiff, Raymond Leavitt, was incarcerated in the Wayne County Jail (WCJ) for approximately six months, from September 6, 2006, through February 17, 2007, and was subsequently moved to the Maine state prison (MSP). On October 5, 2006, he was seen at WCJ by the family nurse practitioner, Alfred Cichon, who concluded that Mr. Leavitt's health was normal. Mr. Leavitt told Mr. Cichon that he was HIV positive and was experiencing symptoms of night sweats, chills, fever, nausea, and vomiting. He requested antiretroviral medications. Mr. Cichon informed Mr. Leavitt that he could not reinstate the drugs or refer him to an infectious disease expert without first obtaining his current CD4 cell count and viral load. Mr. Cichon allegedly told Mr. Leavitt that HIV medications would not be provided because of their expense, but would be provided when he was in prison. Mr. Cichon was also the president of the medical contract health care service organization at the WCJ and owned a quarter of its stock.

After the clinic visit, Mr. Cichon obtained Mr. Leavitt's medical records and laboratory results. Prior tests had shown an undetectable viral load (<75 copies/mL) and an abnormally low CD4 cell count (355 cells/ μ L of blood; normal range is 500 to 1,000 and treatment is considered below 350). However, laboratory reports from the initial evaluation in jail showed that Mr. Leavitt had an increased viral load of 143,000, a lower than normal CD4 cell count, and an increase in CD8 cell count, supporting an immu-

nodeficiency state. In later testimony, Mr. Cichon claimed that he had no memory of seeing these results, but admitted that his initials were on the first page. He acknowledged that a viral load of 143,000 would have prompted him to refer Mr. Leavitt to an infectious disease specialist. Mr. Cichon never saw Mr. Leavitt again and did not follow up on his HIV condition.

On February 17, 2007, Mr. Leavitt was transferred to the Maine State Prison (MSP) where he received medical care by Correctional Medical Services (CMS). At his first clinical appointment, Mr. Leavitt stated that he was HIV positive and asked to resume antiretroviral treatment. Blood work revealed an abnormal CD4 cell count of 460 and an elevated viral load over 97,000. An immediate appointment with an infectious disease expert was ordered.

Mr. Leavitt had his first consultation in May 2007 by a team of HIV experts at the Virology Treatment Center (VTC). They sent a consultation report to CMS that reported that a CD4 cell count of 460 left Mr. Leavitt with adequate immunological reserve to protect against opportunistic infections or other complications of HIV. VTC's medical director thus postponed restarting antiretroviral treatment.

Subsequently, Mr. Leavitt's clinical condition declined, as he complained of rash, fatigue, thrush, leukoplakia, and dermatitis. He was not seen at the VTC, however, for 6 months. At that point, VTC reported that his immunologic condition had declined from HIV and that he met Department of Health and Human Services (DHHS) guidelines for starting antiviral therapy.

Treatment was still not initiated, however. The note from VTC was not initially requested. When it was received and reviewed, it recommended treatment with medications, but instead of treatment, updated bloodwork was performed. The viral load had escalated to 297,562 and the CD4 count had declined to 296. Treatment was not initiated despite further clinical decline, and Mr. Leavitt had an AIDS-defining illness with thrush on his tongue and swollen nodes in his neck.

Finally, Mr. Leavitt restarted antiretroviral therapy on July 7, 2008, a full seven months after VTC determined his eligibility under the DHHS guidelines. By December 2008, his CD4 cell count had rebounded to 550. In June 2009 Mr. Leavitt's HIV disease stabilized and he reached a healthy weight of

170 pounds. However, he still complained of worsening fatigue, warts, and rashes, and he expressed fear about his future risk of infections and cancer.

Mr. Leavitt filed his initial complaint against several defendants in the federal district court, claiming a violation of his Eighth Amendment rights under 42 U.S.C. § 1983 (*Leavitt*, 2010 U.S. Dist. LEXIS 18453). The defendants moved for a summary judgment, and hearings were held before a Federal Magistrate. At those hearings Mr. Leavitt's expert testified that the interruption of Mr. Leavitt's antiretroviral therapy from September 2006 to July 2008 constituted a "continuum of harm" that placed Mr. Leavitt at significantly greater risk for opportunistic infections and or cancer in the future. At the conclusion of the hearings, the Magistrate recommended that summary judgment be granted to all defendants. The district court granted summary judgment to all defendants, and Mr. Leavitt appealed the decision to the First Circuit Court of Appeals.

Ruling and Reasoning

Regarding Mr. Leavitt's claim alleging the defendants' deliberate indifference, the First Circuit Court of Appeals commented that HIV is a serious medical condition and that the condition could be life threatening if not properly treated (citing *Brown v. Johnson*, 387 F.3d 1344 (11th Cir. 2004) and *Montgomery v. Pinchak*, 294 F.3d 492, 500 (3d Cir. 2002)). The First Circuit noted that, in contextualizing the "serious medical need" prong, it was important to focus on Mr. Leavitt's case against Mr. Cichon regarding Mr. Cichon's failure to review and to follow up on the results of the viral load test. The court of appeals argued that it was undisputed that Mr. Cichon initialed Mr. Leavitt's 2006 CD4 report. Next, the court stated that a jury could infer that Mr. Cichon had a financial interest in not confirming Mr. Leavitt's imminent risk. In addition, the court contended that this oversight led to the worsening severity of Mr. Leavitt's short- and long-term medical status. It reasoned that a fact finder could conclude that Mr. Cichon's deprivation of care could lead to grave harm in the form of serious illness and unnecessary suffering in the future. This prospective harm could form the basis of an Eighth Amendment claim. Therefore, the court of appeals concluded that Mr. Leavitt had established a material factual dispute

as to whether Mr. Cichon had acted with deliberate indifference.

Discussion

This case serves to illustrate how courts manage 42 U.S.C. 1983-based suits that allege that medical mismanagement constitutes a violation of the Eighth Amendment's protection against cruel and unusual punishment. To succeed in such claims, the plaintiff must show that the defendant's behavior went beyond mere negligence; instead, in these cases, plaintiffs face the much higher burden of having to prove actual wanton or deliberate indifference, which is a subjective state of mind of the defendant. This higher standard is in contrast to medical malpractice claims where the plaintiff need only show negligence and, by an objective standard of care, breach of that objective standard of care and harm to the plaintiff caused by that breach. The stringent threshold for liability under Eighth Amendment-based claims explains and provides an interesting contrast between the court's treatment of the various defendant-medical providers caring for Mr. Leavitt. For all defendants except Mr. Cichon, the court upheld the grant of summary judgment, notwithstanding that the medical care Mr. Leavitt received at the state prison was beset by errors that resulted in significant delays in treatment, even after Mr. Leavitt met the guidelines for initiation of treatment of his AIDS infection. The court noted that treatment had fallen short, but the various errors were insufficient to meet the stringent deliberate indifference standard. Those providers did not deliberately delay or prevent treatment.

While under the care of Mr. Cichon, Mr. Leavitt did not meet guidelines for reinstating antiviral medication; he met those guidelines only after his condition had deteriorated in prison. However, Mr. Cichon allegedly made a statement about the expense of the medications, and thus he had a financial interest in keeping costs down. Further, there was evidence that he had seen the viral count from the laboratory that he testified would have prompted him to take further steps. These facts sufficiently raised the possibility that he had made a conscious decision to withhold treatment. This possibility created the need for a jury determination. The court also took detailed note of Mr. Cichon's history of licensure problems and the various disciplinary actions taken against

him by the state's medical board. While not expressly relating their reinstatement of the claim against him to his past problems, the recitation of his past medical lapses makes the court's judgment all the more compelling.

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Claim of Ineffective Assistance of Counsel: Failure to Raise Competence-to-Stand-Trial, Insanity, and Diminished Capacity Defenses

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Defense Attorney's Failure to Raise the Question of Defendant's Competency to Stand Trial or to Mount Insanity or Diminished Capacity Defenses Does Not Constitute Ineffective Assistance of Counsel, Even When the Defendant Subscribes to Bizarre or Irrational Beliefs

In *Robidoux v. O'Brien*, 643 F.3d 334 (1st Cir. 2011), the court denied *habeas corpus* relief to inmate Jacques Robidoux, who was serving a life sentence for first-degree murder. On appeal, Mr. Robidoux claimed ineffective assistance of counsel, arguing that his defense counsel should have raised competency to stand trial, as well as criminal responsibility and diminished capacity as trial defenses.

Facts of the Case

In the years leading up to March 1999, Mr. Robidoux and his wife Karen had been involved in a small religious sect led by Mr. Robidoux's father Roland. In early March, one of Mr. Robidoux's sisters informed the group that she had received a leading, interpreted by the group as a direct instruction from God. According to the leading, Mr. Robidoux and Karen were to stop feeding their infant son, Samuel, all solid food. Instead, Karen was to begin breastfeed-

ing Samuel for 10 minutes from each breast every hour. Mr. Robidoux and the rest of the sect went along with the leading. Over the next 52 days, it became apparent that Samuel was becoming severely malnourished; however, none of the group took him to see a doctor. The Massachusetts Supreme Judicial Court opined that the group had become influenced by the author Carol Balizet and had rejected what they believed were "Satan's seven counterfeit systems," which included medical care and the legal system (*Commonwealth v. Robidoux*, 877 N.E.2d 232 (Mass. 2007)). Instead, Mr. Robidoux called a special meeting of the group in April 1999 and they prayed for Samuel. The next day, he died. In the aftermath of his death, his body was concealed in a casket for several months in the bulkhead of a home. Later, in October 1999, Mr. Robidoux and three other group members buried the casket in a remote area, where it went undiscovered until a member of the group told police where to find it one year later.

In June 2002, Mr. Robidoux was tried for murder. In the trial hearings, he requested to proceed *pro se*, but withdrew his request after being engaged by the trial judge in an extended colloquy. However, the next day he nonetheless submitted a handwritten, *pro se* motion to change his plea. Judge Boudin described the plea as "long, rambling, and (judged by conformity to legal principles) almost incoherent" (*Robidoux*, p 339). Mr. Robidoux's motion was rejected on several grounds. Throughout the remainder of the trial, he was defended by his attorney.

At trial, the defense's main strategy was to dispute the cause of death. The defense called a pediatric forensic pathologist who testified that Samuel might have died of several other causes. However, the state called several witnesses who testified in support of starvation as the cause of death. Mr. Robidoux also testified in the trial. In the closing arguments, the defense argued "that the cause of death remained debatable, and that, given his candor, Mr. Robidoux [is] no hardened criminal" (*Robidoux*, p 337).

The jury convicted Mr. Robidoux of first-degree murder, and he was sentenced to life imprisonment without the possibility of parole. Notably, throughout the trial, and at his insistence, Mr. Robidoux was never examined by a psychologist or a mental health professional. Neither his competency nor criminal responsibility was explicitly raised in the trial. In a later affidavit he stated that he had discussed the possibility of the insanity defense with his lawyer but