

tees have a liberty interest in adequate treatment. Although insanity acquittees may face new criminal charges while hospitalized, *Anderson* held that they do have rights that preclude transfer from a psychiatric facility to prison without the necessary due process.

Disclosures of financial or other potential conflicts of interest: None.

## Application of Qualified Immunity in Patient Death

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### State-Run Psychiatric Emergency Room Technicians, Nurses, Doctors, and Supervisors' Entitlement to Qualified Immunity

In *Pena v. Givens*, 2015 WL 7434253 (5th Cir. 2015), Onie Pena, representative of the deceased, George Cornell, sued the treating doctor, nurse, and two emergency room technicians, as well as the hospital supervisors at Parkland Memorial Hospital (Parkland; Dallas, TX), which is operated by the state, alleging violations of Mr. Cornell's Fourth and Fourteenth Amendment rights before his death. In response, the defendants filed a motion for summary judgment on the grounds of qualified immunity, but the United States District Court for the Northern District of Texas denied the motion. The defendants then filed an interlocutory appeal with the Fifth Circuit Court of Appeals, who reversed the district court's decision.

#### *Facts of the Case*

In February 2011 after he arrived at a fire station complaining of being chased, police apprehended and transported Mr. Cornell, in accordance with Texas state law, to the Parkland psychiatric emergency room, where the doctor authorized his admission for paranoia; he believed that people had stolen his lottery ticket and were chasing him. During the

admission, Mr. Cornell reported he had tachycardia. A technician, took Mr. Cornell's vital signs, which revealed hypertension and tachycardia. The technician attempted to recheck Mr. Cornell's vital signs, but he became agitated and refused cooperation, resulting in no further cardiac treatment. Mr. Cornell then attempted to elope. Two technicians placed Mr. Cornell in a seclusion room and restrained him on the floor for about five minutes (accounts varied on the exact length of the restraint) while the nurse injected Mr. Cornell with haloperidol, lorazepam, and diphenhydramine, to control his behavior.

While alone in the seclusion room, Mr. Cornell became agitated again. He ripped up a vinyl tile from the floor and banged it against the door. Because he had damaged the room, three technicians transferred him to a new room. During the transfer, Mr. Cornell again physically resisted the technicians. They held him on the floor, and he received a second injection of haloperidol, lorazepam, and diphenhydramine. Testimony regarding the length of time the technicians held him was conflicting, although Ms. Pena stated the technicians held Mr. Cornell on his stomach for 15 minutes after the injection. The technicians were trained to not hold a patient prone for more than 1 minute, because of the risk of asphyxiation. After the technicians left the room, a nurse later found Mr. Cornell cyanotic and lying prone on the floor. He was transferred to the main emergency room and pronounced dead. The medical examiner found the cause of death to be undetermined and listed three possible causes: mechanical compression; underlying heart disease; or effects of the medication he received.

In 2008, the Centers for Medicare and Medicaid Services (CMS) sent a letter to the CEO, stating that Parkland's deficiencies in providing medical screening were a serious threat to patients who come to Parkland with emergent medical conditions. A CMS report after Mr. Cornell's incident noted that, at the time of the incident, the nurse's restraint-and-seclusion training had lapsed, and his nursing supervisors should have been aware of this. After Mr. Cornell's death, Parkland was "under near constant surveillance and investigation" by CMS and the Texas Department of State Health Services because of the high number of complaints, injuries, and deaths at the hospital.

Ms. Pena, representing Mr. Cornell's estate, filed a complaint in the Texas district court alleging that

technicians used excessive force and violated his Fourth Amendment and substantive due process rights. Ms. Pena further alleged that the nurse and psychiatrist violated his due process right by denying medical care for his cardiac condition. Ms. Pena asserted that the nurse supervisors and the CEO contributed to the violation of Mr. Cornell's rights because of inadequate supervision of the emergency room personnel. Parkland removed the case to federal court, and the defendants moved for summary judgment based on qualified immunity. The district court denied. The defendants then filed an interlocutory appeal.

#### *Ruling and Reasoning*

The Fifth Circuit Court of Appeals reversed the district court's denial of qualified immunity and rendered summary judgment for the appellants. The appeals court addressed each claim and stated that Ms. Pena had the burden to establish the inapplicability of qualified immunity for each defendant.

In an excessive force claim, the plaintiff must first show that Mr. Cornell was seized pursuant to the Fourth Amendment before showing that an injury resulted for an unreasonable use of force according to *Flores v. City of Palacios*, 381 F.3d 391 (5th Cir. 2004). The Fifth Circuit relied on *Peete v. Metropolitan Government of Nashville & Davidson County*, 486 F.3d 217 (6th Cir. 2007), to state that the technicians' actions were made in an attempt to provide medical treatment and not made in a law-enforcement capacity. Therefore, the technicians' restraint of Mr. Cornell did not constitute a seizure pursuant to the Fourth Amendment, and they were entitled to qualified immunity on the excessive-force claim.

Ms. Pena further argued that the technicians violated their restraint training and the use of restraints was "grossly disproportionate to the need for action under the circumstances," *Petta v. Rivera*, 143 F.3d 895, p 902 (5th Cir. 1998). The Fifth Circuit stated "no reasonable jury" would find the technicians' actions were grossly disproportionate to the need for action, given Mr. Cornell's physical resistance, or find they acted out of malice. The appeals court stated Ms. Pena "gives too much weight" to the technicians violating their training. In *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), the Supreme Court stated that an individual acting contrary to his training "does not itself negate qualified immunity where it would otherwise be warranted" (p

1777). Thus, the technicians were entitled to qualified immunity on the substantive due process claim.

The Fifth Circuit used the standard of "deliberate indifference" for denying medical care to those with mental illness held involuntarily set by *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002). The lack of treatment for Mr. Cornell's cardiac condition occurred due to Mr. Cornell's refusal and physical resistance to care. The nurse's and physician's failure to provide treatment in the face of physical refusal was not evidence of knowing and disregarding the need for treatment. Therefore, the appeals court determined that the nurse's and doctor's actions did not amount to deliberate indifference, and they were also entitled to qualified immunity on the Fourteenth Amendment due process claim.

In regard to the hospital supervisors' violation of Mr. Cornell's rights, the Fifth Circuit relied on *Aterberry v. Nocono Gen. Hosp.*, 430 F.3d 245 (5th Cir. 2005), to state that "supervisory liability requires a constitutional violation by a subordinate" (p 255). If no underlying violation of Mr. Cornell's due process rights by the technicians, nurse, and doctor existed, the supervisors were not liable and were entitled to qualified immunity on this claim, as per the above analysis.

#### *Discussion*

Qualified immunity protects state employees from liability regarding the violation of an individual's constitutional rights unless a reasonable person would have known that the action was a clear violation. In *Pena v. Givens*, state hospital employees acted within their roles in the emergency room in the treatment of an agitated patient resisting medical care.

This case first outlined the use of restraints in the emergency room. When used to aid in providing subsequent medical care and not in a law-enforcement capacity, physically restraining an agitated patient absent malicious intent did not violate a patient's constitutional substantive due process right or his right against the use of excessive force.

*Pena v. Givens* further determined the standard for the denial of medical treatment to persons with mental illness held involuntarily, but before formal commitment proceedings, to be deliberate indifference. The appeals court found that the failure to treat a medical condition after a patient refuses care and physically resists attempts at treatment did not meet

the standard of deliberate indifference. As such, this failure to provide care did not constitute a violation of the patient's due process rights. The state employees in *Pena v. Givens* did not clearly violate the patient's constitutional rights, and qualified immunity was applicable to the technicians, the nurse, the doctor, and their supervisors. The implication of this case involves a level of protection from tort claims involving involuntarily held, but not committed patients, especially those who may be uncooperative with treatment and assessment.

Disclosures of financial or other potential conflicts of interest: None.

## Sell Requirements in Georgia

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### Necessity of Specific Treatment Plans to Establish Elements of the Sell Test

In *Warren v. State*, 778 S.E.2d 749 (Ga. 2015), Mr. Warren challenged the lower court's decision that he be forcibly medicated for the purpose of restoration of competency to stand trial on four counts of murder as well as other charges related to a mass shooting. The state filed a motion requesting forced administration of medications to restore fitness to proceed. The trial court granted the motion. On appeal, the Supreme Court of Georgia vacated that order and remanded the case for further proceedings.

#### Facts of the Case

On January 12, 2010, Jesse James Warren allegedly shot multiple persons at a business in Cobb County, Georgia, killing four individuals and paralyzing a fifth victim. In early 2013, Mr. Warren filed a special motion of mental incompetence to stand trial, after which the trial court ordered a psychiatric evaluation to be performed at the Georgia Department of Behavioral Health and Developmental Disabilities (GDBH). Two expert evaluators, Drs. Brian Schief and Don Hughey, submitted reports to the

court indicating that Mr. Warren lacked fitness to proceed, but he may be restored to fitness with treatment. The trial court then ordered Mr. Warren's commitment to GDBH for observation, evaluation, and treatment. On November 18, 2013, the state filed a motion to force medications for the purpose of rendering Mr. Warren competent to stand trial.

On June 25, 2014, the trial court held an evidentiary hearing, during which the state presented testimony from the two expert witnesses. Dr. Schief, a psychiatrist, testified that Mr. Warren held the delusion that he was an "emperor," rendering him unable to assist his attorney effectively and unfit to proceed. Dr. Schief stated that Mr. Warren had not been offered antipsychotic medications in "quite some time," and had refused medications when they were last offered. Dr. Schief further stated that there was a substantial probability of improvement if Mr. Warren took medications, that other forms of treatment would not likely improve his fitness, and that taking medications would not interfere with his ability to assist in court. Finally, Dr. Schief testified that while he did not recommend any specific medication, administration in the hospital setting could maximize Mr. Warren's safety during treatment because of the amount of monitoring that occurs during inpatient treatment. Dr. Hughey concurred with Dr. Schief's testimony, adding that Mr. Warren had received legal education, individual therapy, and group therapy but remained as delusional as on admission.

Mr. Warren presented three expert witnesses: Dr. Francis Kane, Jr., Dr. Norris Currence, and Dr. Alexander Morton. Dr. Kane, Mr. Warren's treating physician, testified that Mr. Warren had a delusional disorder, which is often difficult to treat. Dr. Kane further testified regarding the possible side effects of antipsychotic medications and that Mr. Warren had experienced various side effects while on ziprasidone and haloperidol. Dr. Kane testified that the reasons he stopped Mr. Warren's antipsychotic medications were his significant comorbid medical illnesses that may be exacerbated by antipsychotic medications, his preference not to be on medications, and Mr. Warren's lack of disruptive or injurious behaviors. Dr. Currence, Mr. Warren's treating psychologist, agreed with Dr. Kane's testimony, adding that he had seen psychotherapy help change the behavior of some delusional persons. Dr. Morton, a consulting pharmacologist, concurred with Dr. Kane's assess-