

plied findings to a commitment order that was prepared before the hearing and before the parties could put forth facts and have their positions heard.

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Clinician Immunity Against Claims of Malpractice and Constitutional Violations

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Parameters of Sovereign and Qualified Immunity When Insanity Acquittee Raised Malpractice and Civil Rights Violations on the Basis of His Confinement Against State Hospital Clinicians

In *Montin v. Moore*, 846 F.3d 289 (Eighth Cir. 2017), John Maxwell Montin appealed to the U.S. Court of Appeals for the Eighth Circuit after his claims of medical malpractice and violation of his constitutional rights to be free from unnecessary confinement and free from retaliation for seeking access to courts were dismissed in the district court.

Facts of the Case

Mr. Montin was committed to the Lincoln Regional Center (LRC), a state psychiatric hospital, on August 13, 1993, as an individual who had been found not responsible by reason of insanity on two felony charges. On July 16, 2013, Mr. Montin was released unconditionally after he was found no longer dangerous to himself or others by the state court. In July 2014, Mr. Montin brought a lawsuit in federal district court against employees of the LRC, including psychiatrists, psychologists, and others who rendered professional health care services and forensic services to Mr. Montin, including administering psychological testing, formulating and implementing treatment plans, and providing annual court reports. In his claim, he asserted that the defendants failed to use forensic tools appropriately, failed to

score and interpret psychological tests correctly, and submitted misleading reports.

Mr. Montin alleged that LRC employees committed medical malpractice under Nebraska State Law and claimed that the defendants failed to meet the standard of care in their respective disciplines under Nebraska state law by incorrectly labeling Mr. Montin as having a mental illness and subjecting Mr. Montin to unnecessary and inappropriate treatment and confinement. Mr. Montin also asserted under 42 U.S.C. § 1983(1996), that the defendants violated his federal civil right to be free from unnecessary confinement by creating unreliable evaluations and reports and failing to evaluate and treat Mr. Montin properly. Mr. Montin claimed that the failure to evaluate and treat him adequately violated his fundamental right to freedom from physical restraint. Mr. Montin further asserted that the defendants violated his federal civil rights by retaliating against him for seeking relief in state and federal courts. The defendants' motion to dismiss these claims was granted by the district court on various grounds. Under the Nebraska State Tort Claims Act (STCA), the claim was barred by sovereign immunity and it had not been waived by Nebraska. The district court also dismissed Mr. Montin's federal civil rights claims, having determined that qualified immunity applied to the defendants. Mr. Montin appealed the district court's dismissal of his claims.

Ruling and Reasoning

First, the Eighth Circuit addressed the state law malpractice claim, which was reviewed *de novo*. The court re-examined the background of sovereign immunity, which they noted bars any suits against states and their employees in their official capacities. Sovereign immunity can be abrogated by Congress, as is seen in claims filed pursuant to 42 U.S.C. § 1983, or can be waived by states in particular cases. Therefore, without an abrogation or waiver, sovereign immunity bars all suits against state officials acting in their official capacity.

In this case, Mr. Montin asserted that the state claim was against the defendants in their individual capacities (as opposed to their official state capacities) and thus, sovereign immunity did not apply. According to Nebraska law, however, if a state official was acting within the scope of his employment at the time of an alleged tort, then he must be sued in his official capacity. Although Mr. Montin's claims were

against individual defendants, all their actions related to Mr. Montin's hospital course were within the scope of their state employment. Therefore, the court ruled that the defendants were operating in their official capacity, and thus Mr. Montin's claim against them in their official capacities was barred unless Nebraska had waived sovereign immunity in this matter. The court also concluded that even if Nebraska had waived its sovereign immunity, any waiver of that immunity would not extend to the actions brought in federal court. The court noted the requirements set forth by the STCA and ruled that Mr. Montin did not comply with the STCA when he filed his state law malpractice claim in federal court. The court, therefore, affirmed the dismissal of his claim by the lower court.

Next, the court addressed the unnecessary confinement civil rights claim. The defendants argued that they were entitled to qualified immunity in this case, and the court reviewed these assertions *de novo*. The court noted that immunity from liability protects a state official unless there is a clearly established constitutional or statutory right that was violated by an official, when a reasonable official would have known that it was a violation. To determine whether a public official should be entitled to qualified immunity, the court examined whether the officials violated the plaintiff's constitutional or statutory right and whether the right in question was clearly established at the time of its alleged violation. The court reasoned that qualified immunity would attach if either of those conditions were not present.

Mr. Montin claimed that his unnecessary confinement was a due process violation (and an Eighth Amendment deliberate-indifference claim through the Fourteenth Amendment) and that the alleged defendants' actions were negligent. However, conduct that is merely negligent or grossly negligent does not implicate the protections under the Due Process Clause of the Fourteenth Amendment. Mr. Montin alleged that the plaintiffs were aware that their action would result in his confinement and that the confinement was unnecessary and a violation of his right to liberty. In addition, Mr. Montin's allegations included that the defendants exaggerated mental illness findings and that they relied on a false belief that he had been found not responsible by reason of insanity. However, he did not provide facts to support his conclusions. He argued that the Supreme Court has established the right to due process, which prevents

the state from "constitutionally confin[ing] without more a nondangerous individual who is capable of surviving safely in freedom by himself" (citing *O'Connor v. Donaldson*, 422 U.S. 563 (1975)), and that a "committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous" (citing *Jones v. United States*, 463 U.S. 354 (1983)). The court ruled that Mr. Montin's claims are different from ones outlined in the *O'Connor* case because the defendants in his case held a subjective belief that Mr. Montin had a mental illness and was dangerous to himself or others. This was contrasted with Mr. Donaldson's case, where the defendant testified that he had no knowledge that the plaintiff had committed a dangerous act. Therefore, in Mr. Montin's case, the defendants' beliefs, even if erroneous, refute the allegation that they maliciously intended to deprive Mr. Montin of his constitutional rights. The appeals court thus determined that Mr. Montin's claims only included claims of negligence, or at worst, gross negligence, but not malicious intent. The court of appeals, therefore, affirmed the decision of the lower court.

The court also addressed the retaliation civil rights claim, but dismissed this claim because it was not raised sufficiently in Mr. Montin's opening brief. The court of appeals thereby affirmed the decision of the lower court in this matter.

Discussion

Sovereign immunity protects federal and state governments and their employees from being sued without the state's consent, while qualified immunity protects government officials from liability for civil damages. However, qualified immunity protects government officials only if their conduct does not violate statutory or constitutional rights of which a reasonable person would have known. Thus, although working as a state official can offer some protections against negligence claims, this case illustrates the importance of mental health professionals being familiar with their institutions' policies and guidelines and acting within the scope of their clinical roles. Also, while providing patient care or conducting forensic assessments, mental health professionals should make sure that their clinical and forensic services are indicated and reconcile with established standards. Intentional deviation from existing policies and protocols that may be construed as having nefarious motives, or the provision of nonindicated

services that rise to the level of maliciously intended actions greatly increases the chance of a successful lawsuit, even against government employees. In cases involving individuals involuntarily committed for treatment, questions about proper conduct of forensic assessment and services can be raised. Thus, it behooves clinicians working in those contexts all the more to confer and consult where questions about standards of practice arise.

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Rights to Reasonable Medical Treatment and Consideration of Race-Related Treatment Outcomes

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Clinicians' Medical Decisions that Incorporate Race-Related Treatment Outcomes Are Subject to Strict Scrutiny when Challenged by Civilly Committed Persons

In the case of *Mitchell v. Washington*, 818 F.3d 436 (9th Cir. 2016) the district court considered whether refusal to treat a patient's chronic illness violated his constitutional right to reasonable medical care and whether incorporation of race-related outcome data infringed upon his right to equal protection under the Fourteenth Amendment. The district court provided summary judgment in favor of the defendants, finding that patient's rights were not violated. On appeal, the Ninth Circuit Court of Appeals ruled that government officials' decisions regarding medical treatment are subject to strict scrutiny when data are used that assess treatment outcomes in different racial or ethnic groups.

Facts of the Case

George Mitchell was a 59-year-old African-American man who had been diagnosed in 2000 with hepatitis C before his civil commitment in June 2003 to

Washington States' Special Commitment Center (SCC) as a sexually violent person (SVP). During the first two years of his commitment, he had been evaluated by a consulting physician at SCC, W. Michael Priebe, and they discussed potential administration of interferon and ribavirin. Mr. Mitchell agreed at the time to delay the treatment until he lost weight, given that one's weight affects the dosage of these medications. He was later evaluated in May 2009 by Thomas Bell, medical director of the SCC, at which time the defendant requested the previously proposed treatment. Dr. Bell informed Mr. Mitchell that his infection had not advanced to the point that the potential risks of the treatment outweighed the benefits. In addition, he had reviewed the specifics of Mr. Mitchell's case, and informed him that studies of this combination therapy for his genotype had been unsuccessful in African-American men.

Mr. Mitchell later received the treatment in November 2012 without clinical success.

In August 2012, Mr. Mitchell filed an action for injunctive relief and damages under 42 USC § 1983(1996) against Dr. Bell, along with other parties at SCC and the state of Washington. In the suit, he alleged violation of his Fourteenth Amendment rights on two grounds: (1) that the denial of treatment violated his constitutional right to reasonable medical care, and (2) that the consideration of race in treatment recommendations violated equal protection rights. The magistrate judge ruled on various points, including that the defendants were entitled to qualified immunity, given that Mr. Mitchell had not asserted in his complaint a constitutional violation. The magistrate ruled that Mr. Mitchell had not provided evidence that his treatment did not meet the appropriate standard of care, nor, with regard to the claims of racial discrimination, did he show intent or purpose to discriminate in said treatment. The district court adopted the magistrate's ruling and entered summary judgment against Mr. Mitchell.

The U.S. Court of Appeals for the Ninth Circuit reviewed the district court's granting of summary judgment *de novo*, to determine whether there were questions of material fact and whether the lower district court was correct in its application of the relevant substantive law.

Ruling and Reasoning

Before addressing the merits of Mr. Mitchell's claims, the Ninth Circuit Court of Appeals consid-