

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 State's 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-

ered two points: first, the court affirmed that the Eleventh Amendment bars damages claims against state officials acting in their official capacity (citing *Pena v. Gardner*, 976 F.2d 469 (9th Cir. 1992)), but not if the claims are against officials acting in their personal capacities. The court relied on *Romano v. Bible*, 169 F.3d 1182 (9th Cir. 1999), which held when a lawsuit is filed for damages, there is a presumption that the defendant is being sued in his personal capacity. The court held that, as a *pro se* litigant, Mr. Mitchell did not understand the distinction between suing an official in their personal versus official capacity. As a result, the court concluded that his damages claims against the defendants in their personal capacities were not barred by the Eleventh Amendment.

Second, the court considered whether Mr. Mitchell's claims were moot. A point for the court is considered moot when a plaintiff no longer intends to participate in the activity that prompted the initial claim for relief. In *Burke v. Barnes*, 479 U.S. 361, 363 (1987), a requirement was made that live controversy persist throughout all stages of litigation, not solely the initial filing. As Mr. Mitchell later received the treatment for his hepatitis and found that the treatment in fact did not help his illness, he no longer needed the treatment, and he was not reasonably expected to request it again. His claims for injunctive and declaratory relief were deemed by the court to be moot.

Finally, the court addressed Mr. Mitchell's civil rights claims under 42 U.S.C. § 1983 for damages against the defendant doctors in their personal capacities and the application of qualified immunity for them. Government officials are entitled to qualified immunity from civil damages, unless it can be shown that their conduct violated statutory or constitutional rights of which a reasonable person should have known (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). This assessment used the *Youngberg* professional judgment standard, which dictates that a decision "if made by a professional, is presumptively valid; liability may be imposed only when the decision . . . is a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment" (*Youngberg v. Romeo*, 457 U.S. 307 (1982)). This treatment standard for individuals involuntarily committed

was used and contrasted with the deliberate-indifference standard used in criminal confinement for punishment contexts.

Mr. Mitchell presented multiple excerpts from the medical literature to argue that the decision not to treat him with interferon and ribavirin violated the *Youngberg* standard of judgment. However, the court viewed the documents highlighting these preferred treatments as reflecting guidelines, as opposed to a clear standard of medical care. Furthermore, the evidence provided by Mr. Mitchell was not persuasive that the decision not to treat with these medications was unreasonable with respect to the plaintiff's individual clinical circumstances.

In the claim that Mr. Mitchell's equal-protection rights were violated, the court also assessed the role of race in medical decision-making. The court noted a general rule requiring strict scrutiny when a state official uses race as a factor in treating an individual; this standard is not specific to medical treatment. The court determined that strict scrutiny is appropriate with regard to reviewing the medical decision-making as well, as such situations are not exempt from unjust racial bias. As the defendants argued solely that race was not the primary factor in his decision-making, and did not offer compelling evidence to justify incorporation of racial information, the court of appeals determined that the district court was incorrect when deciding there was no constitutional violation with respect to the aspect of the case involving race.

Regarding qualified immunity, the standard for determining whether an official is entitled to such a defense is to determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). The court ruled that Mr. Mitchell did not provide case law that encompassed information on race-related treatment outcomes in clinical decision-making and that it was therefore not clearly established that a reasonable official would understand that the use of the data in medical decision-making is unconstitutional. The court therefore deemed a qualified-immunity defense as permissible. In conclusion, the court affirmed summary judgment in favor of the defendants.

Judge Clifton, Circuit Judge, concurred in part as well as in the judgment, raising concern that the court's ruling using a legal review determination in

the claim might leave an impression that the medical judgment of the physician was an insufficient justification for the treatment.

Discussion

In this case, the court addressed the question of whether a government physician had violated the Fourteenth Amendment rights of a man who was committed as an SVP in the state of Washington. There were two primary questions: (1) whether the denial violated the patient's right to reasonable medical care and (2) whether incorporation of race-based treatment outcomes violated the patient's right to equal protection.

In clinical practice, there is not always an indisputable treatment indicated, and providers must incorporate available information and perform risk-benefit analyses to make an informed treatment recommendation. The professional judgment standard recognizes that deference to these types of complex clinical decisions is sometimes warranted. In simpler terms, an available treatment should not always be prescribed solely on the consideration that it is available. In this case, the denial of proposed treatment was not to punish, but rather to protect the patient from an invasive treatment that was anticipated to be ineffective.

The consideration of race in treatment decision-making in this case raised other important and complicated questions. The court determined that officials acting in a medical capacity are required to demonstrate compelling evidence that incorporation of race is narrowly tailored to provide reasonable and appropriate recommendations. The court relied on a high standard of review in the legal consideration of violation of equal protection based on race. The court also cited the context of past known government medical experimentation on minority racial groups in history. In that vein, physicians are at times in the difficult position of looking at race-related data and using the information to help guide clinical decisions. That said, it is equally important for medical professionals to be aware of the risks of discrimination and biases in clinical decision-making and to scrupulously review any actions to ensure uniform and proper application of clinical judgment.

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Defining the Scope of the IDEA's Exhaustion Standard

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The Individuals with Disabilities Education Act's Exhaustion Standard Applies to Civil Suits Only When the Plaintiff's Claim Seeks Relief for Failure to Provide a Free Appropriate Public Education

In *Fry v. Napoleon Community Schools*, 137 S.Ct. 743 (2017), the U.S. Supreme Court vacated a Sixth Circuit Court of Appeals' dismissal of a suit, brought by Stacy and Brent Fry, parents of a child (E.F.) with severe cerebral palsy, under Title II of the American with Disabilities Act of 1990 and § 504 of the Rehabilitation Act of 1973. The case was based on a school administration's refusal to allow E.F.'s service dog to accompany her to class. The lower courts had dismissed the case for failure to exhaust the administrative procedures delineated in § 1415(l) of the Individuals with Disabilities Education Act (IDEA). The Supreme Court held that the IDEA's exhaustion standard applies only when the gravamen of a complaint is denial of a Free Appropriate Public Education (FAPE); only then can the IDEA provide a remedy. The Court remanded the case to the Sixth Circuit to determine whether the Frys were seeking relief for the denial of a FAPE.

Facts of the Case

Mr. and Mrs. Fry's child, E.F., had severe cerebral palsy that impaired her mobility and other motor skills. At her pediatrician's recommendation, the Frys obtained a trained service dog, Wonder, to assist E.F. Wonder allowed E.F. to gain a degree of independence, helping her open doors, transfer to and from the toilet, and perform other life activities.

The administration of Ezra Eby Elementary School in Napoleon, MI, denied the Fry's request to allow Wonder to accompany E.F. to kindergarten, claiming Wonder's presence was unnecessary because a human aide provided adequate one-on-one