

sanity at the time of offense. The latter evaluation, in which it is sometimes necessary to detail a defendant's (often incriminating) account of the events leading to arrest, changes the dynamic, making it difficult for the forensic evaluator to withhold potentially prejudicial information from a report, given that such information may be essential to supporting an expert opinion regarding sanity at the time of the alleged offense.

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Farmer Progeny

Deliberate Indifference Not Found in a Case in Which a Prisoner Was Placed in Conditions That Exacerbated His Psychosis and Caused Him Severe Distress

In *Scarver v. Litschser*, 434 F.3d 972 (7th Cir. 2006), the Seventh Circuit Court of Appeals affirmed a lower district Wisconsin court ruling that Wisconsin prison officials neither subjected the plaintiff to cruel and unusual punishment nor were they deliberately indifferent to his needs when they placed him in conditions that exacerbated his psychotic illness and caused the plaintiff severe distress.

Facts of the Case

Christopher Scarver, the plaintiff, was an extremely dangerous man with diagnosed schizophrenia, who murdered three people; two of his three victims were murdered during his incarceration at Wisconsin's Columbia Correction Institution in 1994. One of his victims was Jeffrey Dahmer, the notorious cannibal murderer of 17 young men. Mr. Scarver was actively psychotic while he was incarcerated and had continuous auditory hallucinations and psychotic delusions. He believed God had ordered him to commit the murders. In addition, Mr. Scarver attempted suicide twice (once by setting himself on fire) while incarcerated at Columbia Correctional In-

stitution. Wisconsin prison officials believed that they could not adequately provide for the safety of other inmates or staff. Arrangements were made to transfer Mr. Scarver to a more secure setting.

After being briefly detained in the U.S. Medical Center for Federal Prisoners for a psychiatric evaluation, he was transferred to the most secure prison in the Federal system at Florence, Colorado. Mr. Scarver was detained at the Federal prison in Florence for five years without incident and was surprisingly well behaved. He was given audiotapes to quell the auditory hallucinations, and he was permitted daily contact with the other inmates.

At the request of Wisconsin prison officials, Mr. Scarver was transferred to the then newly built Wisconsin Secure Program Facility, a "Supermax" prison, at Boscobel, Wisconsin. Such facilities are designed to house particularly violent or disruptive inmates whose behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates. The Wisconsin prison officials were reportedly unaware of the improved behavior of Mr. Scarver at the federal prison in Florence, Colorado, and thus did not take this information into account in determining his management at the Supermax. The Supermax facility had a restrictive classification system that inmates were subjected to on entering the facility. All inmates are given Level 1 (the most restrictive) status for at least the initial 30 days. Inmates could then progress to higher (less restrictive) levels after behavioral criteria were met and could transfer out of the Supermax facility to a less restrictive prison if they moved beyond Level 5.

Level 1 status entailed being confined all but four hours per week in a small, windowless, constantly illuminated cell with little or no contact with other human beings. The cells had no air conditioning and were extremely hot during the summer months. Mr. Scarver decompensated in this environment. The heat of his cell reportedly interacted with his antipsychotic medications. The constant illumination and inability to use his audiotapes exacerbated his psychosis. While at the facility, Mr. Scarver engaged in self-injurious behavior such as banging his head against the wall and cutting his wrists and head with a razor in attempts to remove the voices that were inside his head. In addition, he attempted to commit suicide on two separate occasions by overdosing on

antipsychotic medications and then a large number of Tylenol tablets.

Mr. Scarver was unable to progress beyond Level 1 during his three-year imprisonment at the Supermax facility. The defendants attributed Mr. Scarver's bizarre behavior and his inability to progress beyond Level 1 to his being uncooperative and difficult and allegedly failed to make arrangements to address the ongoing underlying problem, his psychosis. Mr. Scarver was eventually transferred to a state prison in Colorado where he was allowed to mingle with other inmates. He was not considered a management problem by staff at this facility.

Mr. Scarver filed a civil rights suit alleging that the officials of the Wisconsin Secure Program Facility violated his constitutional right not to be subjected to cruel and unusual punishment. The district judge, after dismissing charges against several of the defendants, held that a jury could reasonably find that the remaining defendants had violated Mr. Scarver's constitutional right by subjecting him to conditions of confinement that had significantly aggravated his mental illness. However, she granted summary judgment for the remaining defendants on the ground of "qualified immunity." She ruled that settled law did not establish the "unlawfulness" of their behavior. Mr. Scarver appealed.

Ruling and Reasoning

The appeals court affirmed the lower court's ruling without addressing the "qualified immunity" issue. The court opined that there was no evidence that the officials knew that the conditions at the high security prison would exacerbate his illness and cause him severe distress. Officials were aware of Mr. Scarver's distress; however, they did not attribute his distress to his confinement conditions. In other words, because there was no conscious awareness by the prison officials that the conditions to which they subjected Mr. Scarver exacerbated his illness and caused him to suffer, they could not be found to be deliberately indifferent toward Mr. Scarver. Thus, Mr. Scarver's claim of being subjected to cruel and unusual punishment could not be substantiated.

Deliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions. The appeals court found that there was evidence that the Wisconsin Secure Program Facility acted in Mr. Scarver's best interest to the best

of their ability. They cited that Mr. Scarver was given "constant psychiatric attention," given anti-psychotic medication, and watched closely by prison staff. Since the prison was reportedly unaware of the conditions of Mr. Scarver's improved behavior at the federal prison in Florence, Colorado, the court reasoned that the prison officials were not privy to better, more appropriate alternatives for Mr. Scarver's incarceration. Ironically, Judge Posner indicated that if Mr. Scarver's lawyers had argued that prison officials were aware of widely disseminated correctional literature concerning the effects of isolation and severe conditions on the mentally ill, a much stronger argument could have been made that the officials did know of the risk to Mr. Scarver and were thus deliberately indifferent to Mr. Scarver's plight.

In addition, the appeals court observed that Mr. Scarver's history of mental illness and his murdering two inmates while in a less restrictive environment created a scenario that complicated his treatment. Reasonable measures undertaken by prison officials to protect other inmates and staff may aggravate psychotic illness of individuals like Mr. Scarver. In such cases, they opined these actions are not unconstitutional, as prison officials must be given "considerable latitude" in designing measures for controlling the violently psychotic inmate. Prison officials should not go beyond what is necessary for security. Finally, they observed that the Constitution does not directly address prison conditions and that management of prison is best left to state authorities, not federal judges.

Discussion

The court cited *Farmer v. Brennan*, 511 U.S. 825 (1994), when it discussed the standard it used to determine if the prison officials were deliberately indifferent to Mr. Scarver's plight at the Supermax facility. *Farmer* established that in order for a prison official to be found deliberately indifferent, the official must actually know the risk of harm to an inmate and disregard that risk by failing to act appropriately to protect the inmate from that circumstance. The appellate court opined that the prison officials should have known that a person like Mr. Scarver would decompensate if placed into a harsh environment like that of the Supermax prison. *Farmer* firmly established that proving a prison official should have known of the risks to

an inmate is not enough to prove deliberate indifference, and this case followed the rationale and logic outlined in that ruling.

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Malpractice Action Stemming From Court-Ordered Independent Medical Examination

Medical Malpractice Claim in the Context of a Court-Ordered Independent Medical Examination Is Actionable According to the Supreme Court of Virginia

In the case of *Harris v. Kreutzer*, 624 S.E.2d 24 (Va. 2006), the Supreme Court of Virginia considered whether a cause of action for medical malpractice and/or intentional infliction of emotional distress existed in a case involving a claim brought by an evaluatee against a clinical psychologist who conducted a court-ordered independent medical examination (IME) of her. The court held that a cause of action regarding medical malpractice can exist, but the circumscribed nature of IMEs limits the duty solely to not causing harm to the “patient” in actual conduct of the examination. The court set a much higher bar to establish a cause of action under the guise of intentional infliction of emotional distress, pointing out that, among other things, the conduct of an evaluator must be “outrageous” and lead to distress “so severe that no reasonable person could be expected to endure it.”

Facts of the Case

Nancy J. Harris brought a personal injury suit in 1992, seeking damages for a traumatic brain injury that she alleged resulted from an automobile acci-

dent. The trial court granted her request and required her to undergo an IME pursuant to the Supreme Court of Virginia Rule 4:10, to determine the nature and extent of the alleged injury. Although she initially refused the “Rule 4:10 examination,” Ms. Harris later acceded to the examination, and the jury ultimately awarded her damages totaling \$419,769.66. She subsequently filed a motion for judgment against Dr. Kreutzer, the clinical psychologist who had examined her by order of the court, alleging medical malpractice, defamation, and intentional infliction of emotional distress arising from the IME conducted by him on January 19, 1996.

Regarding the claim of medical malpractice, Ms. Harris contended that Dr. Kreutzer, in undertaking the Rule 4:10 examination, owed a duty to her to exercise reasonable and ordinary care and to avoid causing her harm in the conduct of the examination. She argued that Dr. Kreutzer breached his duty by not complying with the applicable standard of care for his profession and claimed that he was “deliberately abusive” and acted “with disregard for the consequences of his conduct” which led her mental and physical health to drastically deteriorate. She noted specific examples of such conduct, alleging Dr. Kreutzer “verbally abused [her], raised his voice to her, caused her to break down in tears in his office, stated she was ‘putting on a show,’ and accused her of being a faker and malingerer.” She also contended that Dr. Kreutzer had prior knowledge of her underlying fragile health, citing traumatic brain injury from the automobile accident, being a victim of armed robberies with subsequent PTSD, and being suicidal.

Regarding the claim of intentional infliction of emotional distress, Ms. Harris claimed that Dr. Kreutzer’s conduct during the IME was “intentionally designed to inflict emotional distress upon [her] or was done with reckless disregard for the consequences when he knew or should have known that emotional distress would result.” She further claimed his conduct was “outrageous” and her subsequent emotional distress was “severe.”

Dr. Kreutzer filed a demurrer to the motion for judgment, specifically arguing that “a Rule 4:10 examination did not create a physician-patient relationship, so he owed no legally cognizable duty to Harris,” and thus there was “no claim for medical malpractice as a matter of law.” Furthermore, he stated that even if a physician-patient relationship