

his parents were not, which would disqualify them from being his surrogate decision-maker. Providence argued based on this affidavit that it satisfied all the conditions for immunity under the HCDA.

After the court accepted Providence's argument and granted summary judgment to the hospital on all of Mr. Bohn's claims, he moved for reconsideration, which was denied by the superior court. Mr. Bohn appealed to the Supreme Court of Alaska.

Ruling and Reasoning

The Supreme Court of Alaska ruled that Providence was not entitled to immunity under the HCDA, reversing the grant of summary judgment and remanding for further proceedings. The court explained its reasoning by first examining *Alaska Stat.* § 13.52.080(a), which provides:

A health care provider or health care institution that acts in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for . . .

(3) declining to comply with a health care decision of a person based on a good faith belief that the person then lacked authority.

The Supreme Court of Alaska noted that the lower court had accepted the argument advanced by Providence that its doctors had the following good faith beliefs: that Mr. Bohn's parents were not acting in his best interest; that because his parents were not acting in his best interest, they were disqualified to act as health care surrogates; and that because Mr. Bohn's parents were disqualified to act as health care surrogates, they lacked authority. The Supreme Court of Alaska ruled that the lower court failed to differentiate between the good faith required in the first clause of *Alaska Stat.* § 13.52.080(a), and the second reference to "good faith" in sub-section (a) (3). As subsection (a)(3) requires a second level of good faith related to Providence believing the surrogate lacked authority, the Supreme Court of Alaska noted that Providence's belief that Mr. Bohn's parents were stripped of authority because they were not acting in his best interest is not sufficient under subsection (a)(3).

The court explained that under Providence's interpretation any provider who disagreed with a surrogate's direction could plausibly assert a good faith belief that the surrogate is not acting in the patient's best interest. From the provider's perspective, if the surrogate were acting in the patient's best

interest, the surrogate would have made the same decision as the provider. And if the surrogate did not make the same decision, the provider would then be able to assume that because the surrogate was not acting in the patient's best interest, that person lacked authority to direct the patient's care. As a result, any provider in that situation would be free to ignore any direction from the surrogate without fear of liability.

The court further ruled that Providence was not entitled to immunity for failing to transfer Mr. Bohn under the HCDA, as a health care provider "must cooperate and comply" to transfer the patient elsewhere upon the request of the patient or surrogate. The court also ruled that Providence had violated another section of the HCDA by appointing itself as a surrogate as the HCDA in *Alaska Stat.* § 13.52.030(k)(2008) does not allow a surrogate to be an owner, operator, or employee of the health care facility where the patient is receiving care.

Discussion

In *Bohn v. Providence Health Services—Washington*, a health care provider or entity in Alaska cannot use a paternalistic argument to satisfy immunity protection from liability afforded by Alaska's HCDA. Merely stating a patient (or patient's surrogate in the event of the patient's incapacity) is not making a decision in the patient's best interest does not automatically confer immunity. As with similar judicial decisions in other jurisdictions involving consent to treatment, an appropriate basis would be needed to override a patient's or patient's surrogate's wishes.

Challenges of Litigating While Incarcerated

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Lower Courts Must Adhere to Standards When Determining Whether to Appoint Counsel to Incarcerated Plaintiffs

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In *Eagan v. Dempsey*, 987 F.3d 667 (7th Cir. 2021), the Seventh Circuit Court of Appeals vacated and remanded a U.S. district court's decision to deny the claimant's motions for recruitment of counsel for an Eighth Amendment claim against his prison physician. The court affirmed the district court's decision to deny the claimant's motions for appointment of counsel for his Eighth Amendment claims against prison officers. In justifying the decision against the prison physician, the Seventh Circuit relied on an earlier case in the circuit in which it was established that an Eighth Amendment case against a physician would require sophisticated legal maneuvers that warrant the appointment of an attorney.

Facts of the Case

On November 30, 2014, Shawn Eagan, then incarcerated at Pontiac Correctional Center (Pontiac) in Illinois, repeatedly banged his head to quiet auditory hallucinations while under suicide watch. Mr. Eagan has psychiatric diagnoses of schizophrenia, major depressive disorder, and bipolar disorder. His head wound was initially treated with wound treatment alone. After continued head banging, he received a forced injection of haloperidol and diphenhydramine. Mr. Eagan reported that, after this injection, he experienced dystonic symptoms (stiffness). His requests for treatment of this symptom were ignored, including a request for acetaminophen to treat the associated pain. He added that this experience left him with residual jaw soreness and popping.

From July 2015 to March 2017, Mr. Eagan filed seven motions for court-appointed counsel, citing the complexity of his case; the handicap of his serious mental illness; his eighth-grade education; his repeated, documented, unsuccessful efforts to obtain counsel; and his dependence on a fellow inmate acting as a "jailhouse lawyer." In later filings, he cited his transfer from Pontiac to a different facility that did not provide e-filing, legal envelopes, or consistent law library access. The district court denied all of Mr. Eagan's requests for counsel. In their first denial, the court stated that Mr. Eagan had not provided records of his efforts to

obtain counsel even though he had. In another denial, the court stated that his serious mental illness could not have been much of a handicap because his filings were clear enough, ignoring his stated reliance on a jailhouse lawyer. In a later denial, the court stated that Mr. Eagan's case was not too complex for him to litigate on his own.

While requesting the services of counsel, Mr. Eagan submitted requests to preserve evidence from Pontiac. He also submitted motions to court regarding the defendants: for affidavits and to compel interrogatories and discovery. In addition, he moved for status updates and for memoranda opposing summary judgment. The district court denied his request to preserve evidence because the defendants denied that any existed. In Mr. Eagan's motion after his transfer from Pontiac, he discussed the challenges of litigating his case from a location different from the facility where the incident in question occurred. The court gave no comment on this.

Ultimately, the district court granted the defendants' motions for summary judgment, holding that Mr. Eagan had "failed to identify any admissible evidence showing that any defendant displayed deliberate indifference toward his serious mental health or medical needs or any defendant failed to protect him" (*Eagan*, p 681). They also stated that Michael Dempsey, the treating physician, was entitled to summary judgment because Mr. Eagan did not demonstrate that he experienced any ensuing serious medical condition; moreover, Dr. Dempsey's treatment was "appropriate." Prison crisis logs and notes from Dr. Dempsey do not show evidence of dystonic symptoms or significant distress on the part of Mr. Eagan.

Mr. Eagan appealed to the Seventh Circuit Court of Appeals, claiming the district court abused their discretion by denying his motions for recruitment of counsel. Thereafter, he was represented by a *pro bono* lawyer.

Ruling and Reasoning

In their decision, the Seventh Circuit cited an earlier decision, *Pruitt v. Mote*, 472 F.3d 484 (7th Cir. 2006), that created a framework for lower courts to determine whether to appoint counsel to indigent litigants. When plaintiffs have made efforts to obtain counsel and are not competent to litigate their cases on their own, the court should appoint a lawyer. The court stated that there were no fixed criteria for assessing competence to litigate one's own case, but that considerations should include the plaintiff's literacy, communication skills,

and psychiatric history. Courts also must consider the complexity of advanced stages of litigation; of constitutional claims that invoke state of mind (e.g., Mr. Eagan's claim of deliberate indifference); and cases that include complex medical problems. Critically, in *Pruitt*, the Seventh Circuit specified that it is an abuse of discretion for a court to not consider whether a person had been using a jailhouse lawyer or had been transferred to a different facility where the plaintiff's challenges would include inability to gather evidence.

The Seventh Circuit found that the district court clearly abused their discretion in their deviation from *Pruitt*. But, also as per *Pruitt*, the Seventh Circuit would reverse a lower court's failure to appoint counsel only if doing so could create a reasonable likelihood of a different outcome.

Regarding Mr. Eagan's Eighth Amendment claim against Dr. Dempsey, the Seventh Circuit's cited precedent showed that inadvertent failures, negligence, and mistakes made by medical professionals are not Eighth Amendment violations. In this case, in contrast, Mr. Eagan is making a claim about Dr. Dempsey's state of mind on November 30 when Dr. Dempsey initially declined to provide psychiatric treatment. Mr. Eagan stated that he and the man in the neighboring cell recalled Dr. Dempsey suggesting that he was withholding treatment as punishment for Mr. Eagan's behavior, and that Mr. Eagan seemed to be exaggerating symptoms. The Seventh Circuit agreed with Dr. Dempsey that it was reasonable for him to offer Mr. Eagan an opportunity to control his behavior before ordering forced medication. They stated that even the most favorable interpretation for Mr. Eagan includes the fact that Dr. Dempsey evaluated Mr. Eagan and concluded that his complaints were not due to haloperidol and were generally not severe. They also stated that reluctance to encourage headbanging by administering pain killers like acetaminophen is a reasonable judgment for a psychiatrist to make; and that questions of whether a physician made a good decision under contemporary medical standards is reserved for malpractice claims. Mr. Eagan, however, claims that Dr. Dempsey's decision to leave him in significant and prolonged pain to teach him a lesson does not involve a mere choice of medical remedies and if true, would violate the Eighth Amendment. The Seventh Circuit held that there is a reasonable chance that litigating this claim that relates to Dr. Dempsey's state of mind would benefit from legal counsel.

Dissent in Part

Judge Easterbrook disagreed with the majority decision that appointment of counsel could create a reasonable likelihood of a different outcome in Mr. Eagan's claim against Dr. Dempsey because Mr. Eagan would have to show that Dr. Dempsey exhibited a "complete abandonment of medical judgment" to make a constitutional claim that would be viable (*Eagan*, p 699). The judge opined that appointing counsel in what he believed to be "doomed" cases like this one was irresponsible because of the limited resource of volunteer lawyers, and, quoting a previous case, wondered why a judge should "ask lawyers to devote less of their time to people with strong cases and more to people with weak ones" (*Eagan*, p 699).

Discussion

This case demonstrates the enormous challenges facing incarcerated individuals with mental illness who are seeking legal redress for perceived injustice or civil rights violations. Mr. Eagan has an eighth-grade education and severe mental illness. He recognized his limitations and fought with the help of a jailhouse lawyer to repeatedly petition for appointment of counsel to litigate his case. The district court declined all his requests.

Still, even if it is determined that a lower court abused their discretion in denying appointment of counsel, the Seventh Circuit will only reverse those actions if they themselves determine that doing so could lead to a different outcome. The desire to reverse sparingly is understandable because, as Judge Easterbrook pointed out, courts are obligated to be thoughtful stewards of the limited resource of volunteer lawyers. Nevertheless, the subjectivity of the decision of whether to reverse demonstrated in *Eagan* could lead to arbitrary outcomes. In this case, the majority decided that an astute attorney's review of Dr. Dempsey's clinical notes (with help from an expert witness) and prison charts, along with vigorous cross-examination could yield different results. One could imagine, however, the Seventh Circuit reviewing a similar case with poorer filings and arriving at a different result.

Given that Mr. Eagan was able to submit timely filings of good quality, this case demonstrates the importance of access to prison libraries and the unfortunate necessity of jailhouse lawyers for under-resourced incarcerated. It also demonstrates the inequities of the distribution of these resources. Fortunately, there are advocacy organizations that aim to improve these inequities. For

example, Prisoners' Resources of Massachusetts sends attorneys to meet with and guide incarcerated people. NYU's National Jailhouse Lawyer's Initiative aims to make general guidance and paralegal training available to incarcerated people. These initiatives are laudable, but the circumstances that cause indigent incarcerated to rely on jailhouse lawyers are unfortunate.

Administration of Involuntary Medication to Restore Competence to Stand Trial

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Defendant's Rights Are Not Violated When Administrative Agencies Rather than Criminal Courts Authorize Involuntary Medication to Restore Competence to Stand Trial

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In *Johnson v. Md. Dep't of Health*, 236 A.3d 574 (Md. 2020), the Court of Appeals of Maryland considered whether involuntary medication for competency restoration could be authorized using an administrative procedure rather than a hearing before the criminal court. The court held that Maryland's separation of powers and a defendant's due process rights are not violated when an administrative law judge authorizes such medication.

Facts of the Case

In 2010, Gregory Johnson began believing that people were harassing and tracking him, causing him to move his place of residence frequently. In 2018 and 2019, Mr. Johnson became suspicious that one of his neighbors was breaking into his apartment to have sexual relations and steal his belongings. Mr. Johnson confronted his neighbor on May 15, 2019, allegedly stabbing the neighbor with a knife in his

stomach and torso, causing serious injury. Mr. Johnson was subsequently charged with attempted first-degree murder and several related offenses.

In July 2019, after the court found Mr. Johnson not competent to stand trial, he was committed to Clifton T. Perkins Hospital Center (Perkins) for treatment and restoration to competence. At Perkins, Mr. Johnson was diagnosed with unspecified schizophrenia spectrum and other psychotic disorder, and he was prescribed antipsychotic medications. He was nonadherent with the medications and continued to exhibit psychotic symptoms, which led Perkins to convene a clinical review panel (CRP) to authorize involuntary medication.

Under Maryland law at the time, involuntary medication could be authorized by a CRP if a patient would, without the medication, continue to experience symptoms of the disorder that led to the hospital commitment, pose a danger within the hospital, or pose a danger if released from the hospital (Md. Code Ann., Health-Gen. § 10-708 (2019)). On August 15, 2019, the CRP heard Mr. Johnson's case and approved the administration of involuntary medications. The CRP concluded the proposed medication regimen was appropriate to treat Mr. Johnson's illness and that all three justifications for involuntary medication were applicable in his case.

Soon afterward, Mr. Johnson appealed the CRP's decision, requesting a *de novo* hearing before an administrative law judge (ALJ) from the Office of Administrative Hearings. After hearing testimony from Mr. Johnson and his treatment providers, the ALJ concluded that Perkins had met all requirements to administer involuntary medication under Md. Code Ann., Health-Gen. §10-708. The ALJ found that Mr. Johnson required medication because, without it, he would continue to experience the symptoms that resulted in his hospitalization and would pose a danger if released from the hospital. The ALJ also noted that the state had satisfied the four criteria set forth in *Sell v. United States*, 539 U.S. 166 (2003) to administer involuntary medication for the purpose of competency restoration.

Mr. Johnson appealed the decision to the circuit court, which upheld the ALJ's order. He then appealed to the Maryland Court of Appeals, arguing that the ALJ had exceeded the authority of that position by ordering involuntary medication to restore competence to stand trial. The court granted *certiorari* to consider this question.