

Civil Rights Update

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Accrual of Deliberate Indifference Claims Premised on Medical Treatment Errors

The Eighth Amendment’s ban on “cruel and unusual punishments” requires prison officials to take reasonable steps to ensure the safety of inmates, including the provision of adequate medical care. U.S. Const. amend. VIII; *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Minix v. Canarecci*, 597 F.3d 824, 830 (7th Cir. 2010). A claim alleging inadequate medical care by a prisoner under the Eighth Amendment requires proof of two elements: (1) that the prisoner suffered an objectively serious harm that presented a substantial risk to his or her safety; and (2) that the defendants were deliberately indifferent to that risk. *Farmer*, 511 U.S. at 834; *Minix*, 597 F.3d at 831. Those who practice in the area of civil rights defense are likely to encounter Eighth Amendment claims by prisoners, as well as the Fourteenth Amendment equivalent employed by pre-trial detainees. The typical focus of these cases is whether the defendants exhibited “deliberate indifference” to an objectively serious medical need. The recent Seventh Circuit opinion in *Devbrow v. Kalu*, No. 12-2467, 2013 WL 376297 (7th Cir. Feb. 1, 2013), addresses a more fundamental question: When does such a claim accrue?

Facts and Procedural History

Eugene Devbrow, an inmate incarcerated in the Indiana prison system, filed an Eighth Amendment deliberate indifference suit against two prison doctors and a nurse practitioner pursuant to 42 U.S.C. § 1983. *Devbrow*, 2013 WL 376297 at *1. The relevant facts, construed by the court in the light most favorable to Devbrow, are straightforward. Prior to his incarceration, a prostate-specific antigen (“PSA”) test informed Devbrow that he was at risk of developing prostate cancer. His physician advised him to have a follow-up test in two to four years. *Id.* Upon his arrival at prison in 2000, he advised the intake physician of his doctor’s advice. Four years later, on February 3, 2004, a test revealed that Devbrow’s PSA level was significantly elevated. As a result, the defendant nurse practitioner requested a urology consultation. This request was denied by one of the defendant doctors, who served as the Regional Medical Director for Prison Health Services. *Id.* The same PSA test was repeated a week later, with the same results. *Id.* at *2. Armed with this information, the other defendant doctor examined Devbrow, found his prostate to be enlarged, and again requested a urology consultation. The Regional Medical Director again denied the request, but told the requesting doctor to obtain Devbrow’s previous medical records. The Regional Medical Director thereafter refused a third request for urology consultation in early March 2004, and instead treated Devbrow for benign prostate hyperplasia. *Id.*

Devbrow was given another PSA test approximately a year later, on February 10, 2005. The results showed that Devbrow’s PSA level had again increased. Devbrow was finally taken to see a urologist on April 27, 2005. A biopsy taken that day revealed that Devbrow had a precursor to prostate

cancer. Approximately six months later, on October 21, 2005, a follow-up biopsy showed that Devbrow did, in fact, have prostate cancer. A bone scan administered two months later revealed that the cancer had advanced to Devbrow's spine and was no longer operable. *Id.* Devbrow filed his Eighth Amendment claim on October 19, 2007. He alleged that delays by the two doctors and the nurse practitioner prevented the discovery of the prostate cancer until it was too late to prevent it from metastasizing. *Id.* The three defendants argued that the suit was untimely under the statute of limitations, two by way of a motion for summary judgment and the third through a motion to dismiss. *Id.* It was undisputed that the applicable limitations period was two years pursuant to state law. The district court examined the timeline of events and ruled that the defendants ceased being indifferent to Devbrow's serious medical needs on April 27, 2005, the date his biopsy was taken at the hospital. *Id.* In other words, the district court believed Devbrow's constitutional claim accrued on that date. Accordingly, it held that Devbrow filed his suit approximately six months late. *Id.*

The Accrual of Section 1983 Claims Is Determined by Federal Common Law

On appeal, a unanimous Seventh Circuit panel rejected the district court's determination that Devbrow's claim accrued on April 27, 2005. *Id.* at *4. Limitations and tolling periods for Section 1983 claims are borrowed from those applicable to state law personal injury claims. *Id.* at *2. In this case, Indiana's two-year limitations period for personal injury lawsuits (the same as Illinois') applied. *Id.*; see also 735 ILCS 5/13-202. Accrual rules, on the other hand, "are governed by federal law 'conforming in general to common-law tort principles.'" *Id.* (quoting *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007)). The closest analog to a deliberate indifference claim based on medical error is the common law tort of medical malpractice. *Id.* at *3.

The court discussed its recent holding in *Richards v. Mitcheff*, 696 F.3d 635 (7th Cir. 2012) to illustrate its point. *Devbrow*, 2013 WL 376297 at *3. In *Richards*, a prisoner complained to prison doctors of abdominal pain and blood in his stool beginning in January 2008 but was assured that he was "fine." *Id.* (quoting *Richards*, 696 F.3d at 636). In October 2008, he was finally referred to a specialist, who diagnosed ulcerative colitis and determined that the only treatment still available was the removal of the prisoner's lower digestive tract. *Id.* The prisoner sued the prison doctors in December 2010. The district court granted the defendants' motion to dismiss based on the two-year statute of limitations. *Id.* On appeal, the Seventh Circuit reversed. *Id.* Although its ruling was predicated upon tolling principles and pleading standards, the court's opinion discussed how federal law defines the accrual of medical malpractice claims brought pursuant to the Federal Tort Claims Act. Citing *United States v. Kubrick*, 444 U.S. 111 (1979), the *Richards* court stated that a federal claim for a medical error accrues "when a person knows his injury and its cause." *Id.* (quoting *Richards*, 696 F.3d at 637). Consequently, the limitations period in *Richards* began to run when the plaintiff received his ulcerative colitis diagnosis in October 2008.

In light of its earlier observations in *Richards*, the *Devbrow* court declared that "the relevant injury for statute-of-limitations purposes is not the intangible harm to the prisoner's constitutional rights but the physical injury caused by the defendants' indifference to the prisoner's medical needs." *Id.* Thus, "[a] § 1983 claim to redress a medical injury arising from deliberate indifference to a prisoner's serious medical needs accrues when the plaintiff knows of his physical injury and its cause. . . . even if the full extent or severity of the injury is not yet known." *Id.*

The Rationale for the Seventh Circuit's Reversal

With this general rule in hand, the Seventh Circuit panel in *Devbrow* had little difficulty reversing the district court's ruling. Devbrow was not aware of his physical injury until he was told that he had prostate cancer on October 21, 2005. *Id.* at *4. He was subsequently informed that the cancer had

metastasized—possibly due to lack of treatment—on December 16, 2005. Since both dates were within two years of the suit’s October 19, 2007 filing date, the action was timely filed. *Id.*

The defendants argued that Devbrow’s claim accrued on April 27, 2005—the date of his first biopsy—because that is when any “deliberate indifference” on their part must have ended. After all, it was on that date that they performed a necessary medical procedure to determine his cancer status. The defendants further argued that April 27, 2005 also marked the date of accrual for a potential Eighth Amendment claim for nominal damages or presumed damages in the absence of a manifested physical injury. *Id.* Such claims exist, and Devbrow could have filed a claim against the defendants for creating a likelihood of future harm. *Id.*; see *Helling v. McKinney*, 509 U.S. 25, 31-35 (1993) (prisoner could predicate Eighth Amendment claim on possible future injury caused by environmental tobacco smoke). The court acknowledged that Devbrow could have pursued such a claim; however, he did not. Devbrow instead sought redress “for a concrete physical injury,” not for some amorphous future harm or “abstract injury” for which nominal damages were the available remedy. *Id.* His specific claim was that the defendants’ deliberate indifference delayed his cancer diagnosis until after it had metastasized, and he could not have known of that injury until at least October 21, 2005. *Id.*

The *Devbrow* decision contains a few important lessons for the civil rights defense bar. Although state law controls the length of the limitations period for § 1983 claims, federal law defines the moment of accrual. Unless a prisoner chooses to roll the dice on an early suit for an as-yet undeveloped physical harm, the federal accrual standard dictates that Illinois’ two-year clock for a deliberative indifference claim will only begin to run when the prisoner discovers an actual physical injury and its cause. *Id.* at *3. A thorough understanding of this rule may prevent the undue expenditure of time and effort on a doomed motion to dismiss.

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