Illinois Association of Defense Trial Counsel
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IDC Quarterly | Volume 24, Number 3 (24.3.15)

Civil Rights Update

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Fourth Amendment Protections Applied to Medical Care Provided to Pre-*Gerstein* Arrestees

Last year, the Seventh Circuit Court of Appeals handed down a significant decision applying the Fourth Amendment's objectively unreasonable standard to medical care provided by contracted physicians and nurses to an arrestee who had not yet had his *Gerstein* probable cause hearing. In *Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013), the court not only expanded its prior rulings, which held that the Fourth Amendment's standard applied to jailers and prison guards under such facts, but it further hinted that it might, in future cases, refuse to apply the qualified immunity defense to private medical providers. This article examines the *Currie* decision's implications to medical care providers as a result of this extension of the Fourth Amendment and further explores the court's comments respecting the availability of qualified immunity to contractors who provide medical services to the state.

Factual Background

This case involved a section 1983 claim filed by the estate of Philip Okoro, decedent, against Williamson County, Health Professionals, Ltd., Dr. Jogendra Chhabra, and a nurse Marilyn Reynolds. *Currie*, 728 F.3d at 628. The original complaint alleged the defendants were deliberately indifferent to Okoro's allegedly serious medical needs. It did not plead a state law claim for medical malpractice. *Id.* at 627-628. Under established law, the Eighth Amendment applies to prisoners, but not pretrial detainees, while the Fourteenth Amendment applies to pretrial detainees from the time of their *Gerstein* hearing (a judicial determination of probable cause) until trial; neither amendment applies to pre-*Gerstein* arrestees. *Id.* at 628. Both amendments utilize a deliberate indifference standard. Inmates awaiting a *Gerstein* hearing are protected by the Fourth Amendment's objectively unreasonable standard. *Id.*

Okoro was arrested without a warrant at his residence in October 2008 on suspicion of having committed a misdemeanor crime. *Id.* at 627. He was detained at the Williamson County jail, a facility that contracted with Health Professionals to provide medical care for arrestees and inmates held at the county jail. *Id.* Dr. Chhabra and Nurse Reynolds were employed by Health Professionals.

Almost immediately after Okoro's arrest, his family notified the jail officials that Okoro had type I diabetes and was schizophrenic. *Id.* According to the complaint, this latter disease compromised Okoro's ability to monitor and care for his diabetes. While at the jail, Okoro was under the care of Dr. Chhabra and Nurse Reynolds. *Id.* at 628. On December 23, 2008, Okoro collapsed in his cell and later died of diabetic ketoacidosis, a buildup of acidic ketones in the bloodstream that occurs when the body runs out of insulin. *Id.*

The case proceeded through discovery on the deliberate indifference claim until the plaintiff, in response to Williamson County's motion for summary judgment, argued for the first time that the Fourth Amendment's objectively unreasonable standard applied. *Id.* At that time, the plaintiff revealed that Okoro had not received his *Gerstein* hearing. The plaintiff settled with Williamson County and then moved to amend her complaint against the remaining defendants based on a violation of Okoro's Fourth Amendment rights. *Id.*

Chhabra, Reynolds, and Health Professionals moved for summary judgment, arguing that the Fourth Amendment did not apply to the provision of medical services, and that even if it did, the right was not clearly established at the time of Okoro's death, making qualified immunity proper. *Id.* The district court denied the motion, and Chhabra and Reynolds filed an appeal on the denial of qualified immunity. *Id.*

The Court of Appeals' Ruling

The Seventh Circuit affirmed the denial of summary judgment, finding that the Fourth Amendment applied to contracted medical services provided to a prison inmate who had yet to receive his *Gerstein* hearing. *Id.* at 633. According to the court, prior case law has applied the Fourth Amendment to the provision of medical services in a pre-*Gerstein* setting. *Id.* at 629-630. Specifically, the court pointed to its 1992 decision in *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992), where it held that "the Fourth Amendment governs the period of confinement between arrest without a warrant and the [probable cause determination]." The court also included a litany of cases in which it had since applied the Fourth Amendment's "objectively unreasonable" standard to both "conditions of confinement" and "medical care" claims brought by arrestees who had not yet had a *Gerstein* hearing. *Id.* at 629 (citing *Ortiz v. City of Chicago*, 656 F.3d 523 (7th Cir. 2011) (medical care); *Williams v. Rodriguez*, 509 F.3d 392 (7th Cir. 2007) (medical care); *Sides v. City of Champaign*, 496 F.3d 820 (7th Cir. 2007) (medical care); *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir. 2006) (conditions of confinement)).

The court refused to adopt the defendants' cogent distinction that none of these cases had specifically dealt with the provision of medical care by physicians or nurses, but rather involved medical care provided by jailers or guards. *Currie*, 728 F.3d at 630. The court also stated that from the perspective of the arrestee, "it matters not a whit whether it is the jailer or the doctor whose conduct deprives him of life-saving medical care." *Id.* The court concluded, "[t]his is why our Fourth Amendment cases speak broadly of claims involving the 'provision of medical care,'. . . not simply the '*denial* of medical care by a jailer.'" *Id.* (quoting *Ortiz*, 656 F.3d at 538).

The court further failed to appreciate the fact that physicians and nurses, unlike jailers and guards, already have an obligation under state negligence law to provide reasonable care. Indeed, physicians and nurses are always subject to such state law claims, even when they face allegations of deliberate indifference. *See, e.g.*, *Moss v. Miller*, 254 Ill. App. 3d 174 (4th Dist. 1993).

In response to the concerns voiced by the defendants at oral argument, the court stated, "[i]f jail officials fear that this framework might impose too onerous a burden on them or their agents, there is an obvious solution: the responsible officials can ensure that arrestees receive a prompt determination of probable cause, as the Fourth Amendment already requires." *Id.* at 631.

While this solution might be feasible for the jail itself, how could a contracted medical service provider ever do so? In fact, looking closely at the *Currie* decision, it appears the court confused the Fourth Amendment claim against the jail, for failing to provide Okoro with a *Gerstein* hearing, and the claims against the medical providers. Whether the jail is liable for Fourth Amendment violations is a separate question from whether the physician and nurse are liable. Nevertheless, the court of appeals found that the Fourth Amendment applied to medical treatment provided by a physician or nurse to arrestees who had yet to receive their *Gerstein* hearing. *Id.* at 633.

Next, the court addressed the defendants' argument that even if their conduct violated Okoro's Fourth Amendment rights, qualified immunity was proper because no previous decision had "applied the Fourth Amendment to analyze the reasonableness of health care provided by contracted medical professionals to arrestees being held by the police in jail." *Id.* (internal quotation marks omitted). According to the court, "[t]he contours of Okoro's Fourth Amendment rights were 'sufficiently clear that a reasonable official would understand that what he is doing violates that right' throughout the period of Okoro's detention." *Id.* at 632 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The court rejected the defendants' argument that previous Fourth Amendment medical care cases "spoke only of 'officers' (and not 'medical care providers')," stating, "[t]hat is too slender a reed for us, particularly since officials can be on notice that their conduct violates established law even in the absence of earlier cases involving fundamentally similar [or] materially similar facts." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)) (internal quotation marks omitted).

The court emphasized that "nothing in our opinions hints at some special Fourth Amendment exemption for health care professionals; we discussed wrongdoing by 'officers' and 'lockup keepers' because those were the positions the defendants held." *Id.* Moreover, the court asserted it had rejected "an argument much like Chhabra and Reynolds' in *Ortiz*, where the defendants urged that in 2004 (the time of the alleged wrongdoing in that case) no decision had applied the Fourth Amendment to analyze the reasonableness of the provision of medical care to arrestees." *Id.* (citing *Ortiz*, 656 F.3d at 538) (internal quotation marks omitted).

Even so, the principle underscoring qualified immunity is that the constitutional right in question must be clearly apparent. Given that a state law medical malpractice claim is always available as a remedy for the provision of negligent medical services, regardless of the inmate's status, the physician and nurse were reasonable in assuming that the previous cases involving jailers and guards did not apply to them.

Availability of Qualified Immunity to Private Medical Providers

In addressing the availability of qualified immunity, specifically the application of the Fourth Amendment to medical care provided to pre-*Gerstein* arrestees by physicians and nurses, the *Currie* court made an interesting ancillary finding beyond the issues of the case. *Id.* at 631-632. The court stated, "[i]f there is any lack of clarity in our previous cases, . . . it is only with respect to the threshold issue whether the defense of qualified immunity is *ever* available to private medical care providers like the defendants." *Id.* at 631. According to *Currie*, while the Supreme Court's decision in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), held that section 1983 immunity "should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis," the Supreme Court nonetheless reaffirmed its prior holding in *Richardson v. McKnight*, 521 U.S. 399 (1997), which "categorically reject[ed] immunity for private prison employees," relying instead on the market place to protect employees. *Id.* at 631-32. *Currie* noted that the Sixth Circuit Court of Appeals had recently interpreted *Filarsky's* ruling and held that a doctor providing psychiatric services to inmates at a state prison was not entitled to assert qualified immunity as a defense. *Id.* at 632 (citing *McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2012)).

Although the court found *McCullum's* reasoning persuasive, it did not definitively decide the issue because even if the defendants were entitled to seek qualified immunity as a general matter, "we would conclude that the defense is not applicable here." *Id.* While certainly *dicta*, the court's seeming agreement with *McCullum* on the unavailability of qualified immunity to private contractors working with the state should be noted by defense counsel practicing within the Seventh Circuit.

Conclusion

While the precise ruling of *Currie* will have limited impact on physicians, given that most jails provide arrestees with *Gerstein* hearings in a timely manner, private medical contractors nevertheless have reason for concern. A medical negligence claim with constitutional parameters is now a potential consideration when providing medical care to prisoners. As noted above, prison physicians and nurses often do not know the status of the individuals they are treating. Previously, all physicians were well-aware of the potential for a medical malpractice claim if their treatment was negligent. Yet, there was never the potential for attorneys' fees, costs, or punitive damages. See, e.g., 735 ILCS 5/2-1115. Moreover, any plaintiff alleging a state law claim for medical malpractice is required to file a certificate of merit in accordance with 735 ILCS 5/2-622. Moving forward, medical providers treating pre-*Gerstein* arrestees may face the potential for attorneys' fees and costs for medical malpractice claims, and whether the plaintiff must comply with the certificate of merit requirement has not been determined.

But, perhaps the most concerning aspect of *Currie* is that the court found the reasoning in *McCullum* persuasive. While *dicta* in *Currie*, if this reasoning is adopted by future courts, all contracted medical service providers will have to re-examine their contracts and possibly adjust their fee schedules to reflect the added risk associated with no longer being able to assert qualified immunity. *Currie* is clearly a shot across the bow for counsel representing physicians and other medical service providers that contract with state entities, especially prisons.

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