No. 19-

In the

Supreme Court of the United States

DeWayne D. Knight,
Petitioner

v.

Thomas Grossman, Jr., M.D.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a claim for violation of a prisoner-patient's Fourteenth Amendment right to informed consent requires a showing of deliberate indifference and proof of refusal or whether the approach adopted by a majority of circuits should control, which applies a balancing test weighing, on one hand, the state's interests in providing for the basic needs of prisoners and, on the other hand, the prisoner's right to such information as is reasonably necessary to make an informed decision to accept or reject proposed treatment as well as a reasonable explanation of the viable alternative treatments available.

RELATED CASES STATEMENT

DeWayne D. Knight v. Thomas Grossman, Jr., M.D., No. 2:16-cv-01644, U.S. District Court for the Eastern District of Wisconsin. Judgment entered March 21, 2019.

DeWayne D. Knight v. Thomas W. Grossman, Jr., M.D., No. 19-1740, U.S. Court of Appeals for the Seventh Circuit. Judgment entered October 31, 2019. Petition for Rehearing En Banc denied December 17, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DeWayne D. Knight respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals for the Seventh Circuit, *DeWayne D. Knight v. Thomas W. Grossman, Jr., M.D.*, No. 19-1740, entered October 31, 2019, is reprinted at Appendix A. The decision and order of the district court, *DeWayne D. Knight v. Thomas Grossman, Jr., M.D.*, No. 2:16-cv-01644, entered March 21, 2019, is reprinted at Appendix B. The order of the court of appeals denying rehearing en banc, dated December 17, 2019, is reprinted at Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2019. The order denying rehearing en banc was entered on December 17, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution (U.S. Const. Amend. XIV) provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Clarity and uniformity among the circuits on a constitutional right is demonstrably needed to resolve a circuit split related to a prisoner's right to informed consent.

This petition arises from an unfortunate moment of surprise. Petitioner DeWayne Knight, a prisoner, learned that, unbeknownst to him, he had received an elective surgery which he had not discussed with a physician, had not consented to, and did not need.

To explain, Mr. Knight was experiencing significant knee pain. App. B at 21a. He was seen by Respondent Dr. Thomas Grossman and diagnosed with a torn anterior cruciate ligament (ACL). *Id.* Following a discussion with Dr. Grossman related to surgically repairing his supposedly torn ACL, Mr. Knight signed a consent form which authorized the ACL reconstruction and allowed Dr. Grossman to address "unforeseen conditions [that] ar[o]se" during the procedure only if "necessary and advisable." ECF No. 46-8.

Upon beginning surgery, Dr. Grossman observed a different condition than he had diagnosed: Mr. Knight's ACL was intact and functional. App. A at 3a. Dr. Grossman observed other issues with the knee, which he attributed to arthritis. *Id.* Dr. Grossman made the unilateral decision while Mr. Knight was under anesthesia to proceed with a different, elective, surgical procedure on Mr. Knight's knee, without discussing the new diagnosis or available treatment options with Mr. Knight. *Id.* Arthritis is not an emergency medical condition requiring immediate treatment,

nor is it life-threatening. ECF No. 46-1, at 100:23-101:6.

Mr. Knight filed suit under 42 U.S.C. § 1983, claiming violations of his Eighth and Fourteenth Amendment rights. Dr. Grossman moved for summary judgment on both claims, and the district court granted his motion. On appeal, the Court of Appeals for the Seventh Circuit affirmed and adopted, for the first time, a deliberate indifference standard from the Second Circuit without acknowledging its uniqueness from the analyses of other circuits. App. A at 11a-16a. Indeed, *no other circuit* requires a deliberate indifference standard when analyzing a violation of the right to informed consent. The Seventh Circuit also adopted the Second Circuit's requirement that the prisoner-patient prove he would have refused the medical treatment in question. *Id*. Mr. Knight now petitions for reversal to address the circuit split and correctly apply the proper standard to Mr. Knight's case.

REASONS FOR GRANTING THE PETITION

I. This Court Should Reject the Second and Seventh Circuits' Introduction of a Deliberate Indifference Standard to Informed Consent Doctrine

The majority of circuits that have addressed a prisoner-patient's Fourteenth Amendment right to informed consent—the Third, Fourth, Fifth, Ninth, and Tenth Circuits—employ the balancing test laid out by this Court in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). These circuits' approach addresses, on the one hand, the state's interests in providing for the basic needs of prisoners and, on the other hand, the prisoner's right to such information as is

reasonably necessary to make an informed decision to accept or reject proposed treatment as well as a reasonable explanation of the viable alternative treatments available.

In contrast, the minority of circuits—the Second and Seventh Circuits—employ a test with an extra requirement: a finding that the official's failure to obtain informed consent was undertaken with *deliberate indifference* to the prisoner's right to refuse unwanted medical treatment. This additional requirement should be rejected by this Court upon full briefing on the merits.

This Court's direction on the constitutional right to informed consent is therefore needed by courts on both sides of the circuit split to uniformly apply the proper test to determine whether this right has been violated.

II. The Seventh Circuit Now Sits Contrary to the Majority of Circuits in Its Informed Consent Analysis

Prior to Mr. Knight's case, the Seventh Circuit had not yet recognized or decided the scope of a due process right to informed consent. In the proceedings below, the Seventh Circuit held that, despite having a right to informed consent that includes (1) a right to refuse treatment and (2) a right to receive information required to decide whether to refuse treatment (both consistent with earlier decisions of this and other courts), these rights were not violated where Mr. Knight, while unconscious, received a nonconsensual, non-emergency surgery to address a diagnosis he had not yet received or discussed with the operating physician because the physician's failure to obtain Mr. Knight's informed consent was not undertaken

with deliberate indifference. In so holding, the Seventh Circuit adopted the test of a lone outlier in a circuit split. The Seventh Circuit's decision nullifies the right to informed consent for all prisoner-patients in the Seventh Circuit and must be reversed.

That is, in the Second and Seventh Circuits, despite having a supposed right to informed consent that includes a right to refuse treatment, a prisoner-patient may consent to one surgery and wake to find that the operating physician had unilaterally decided to perform a separate surgery for an unrelated and new diagnosis of a separate ailment so long as the physician claims he or she did not deliberately intend to cause harm. App. A at 10a, 16a. The constitutionally protected right to informed consent is inconsistent with this scenario, and the Seventh Circuit's holding below must be corrected as it furthers a circuit split that contradicts the precedent of this Court and the majority of circuits. *See Cruzan*, 497 U.S. at 269-70, 277-79 (recognizing a Fourteenth Amendment right to informed consent that includes a right to refuse treatment); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (holding that prisoners retain a liberty interest in refusing forced medical treatment while incarcerated); *White v. Napoleon*, 897 F.2d 103, 113 (3rd Cir. 1990) (holding that prisoners retain a limited right to refuse treatment and a related right to be informed of the proposed treatment and viable alternatives that is circumscribed by legitimate countervailing State interests); *United States v. Charters*, 829 F.2d 479, 484, 490-492 (4th Cir. 1987) ("We conclude that a mentally ill pretrial detainee has a constitutionally protected interest in deciding for himself whether to accept or forego medical treatment. Where the detainee is competent to consent to or refuse

medical care, his constitutional interest in making such decisions outweighs the government's interest in medicating him against his will."); *Sama v. Hannigan*, 669 F.3d 585, 591 n.13 (5th Cir. 2012) (recognizing a Fourteenth Amendment liberty interest in refusing unwanted medical treatment); *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002) ("the due process clause of the Fourteenth Amendment substantively protects a person's rights to be free from unjustified intrusions to the body, to refuse unwanted medical treatment and to receive sufficient information to exercise these rights intelligently." (internal citations omitted)); *Bee v. Greaves*, 744 F.2d 1387, 1392-94 (10th Cir. 1984) (holding that pretrial detainees retain a constitutional liberty interest in avoiding unwanted medication with antipsychotic drugs).

The Seventh Circuit now sits contrary to the Third, Fourth, Fifth, Ninth, and Tenth Circuits, and in accord with only the Second, in requiring deliberate indifference to a prisoner-patient's right to have information about and refuse medical treatment under the Fourteenth Amendment. The majority of circuits uniformly do not require a showing of deliberate indifference. Instead, these circuits hold that prisoners retain a limited right to refuse treatment and a related right to be informed of the proposed treatment and viable alternatives, subject to legitimate countervailing state interests. *White*, 897 F.2d at 113; *Charters*, 829 F.2d at 492-93; *Sama*, 669 F.3d at 591; *Benson*, 304 F.3d at 884; *Greaves*, 744 F.2d at 1394-95. Imposition of an additional deliberate indifference standard nullifies this right to informed consent and the right to refuse treatment recognized by this Court in *Cruzan* and *Washington*. *Cruzan*, 497 U.S. 261 at 269-70, 277-79; *Washington*, 494 U.S. at 221-22.

In the decision below, the Seventh Circuit incorporated a "deliberate indifference" standard—copied from the Second Circuit's decision in *Pabon v. Wright*, 459 F.3d 241 (2d Cir. 2006) and derived from the Eighth Amendment—to the Fourteenth Amendment right to informed consent, setting forth an unnecessarily heightened standard to find a violation of the right to informed consent. The adopted standard also requires that a patient prove they would have refused the treatment. App. A at 15a. Specifically, the test adopted by the Seventh Circuit requires:

> (1) the patient was deprived of information that a reasonable patient would deem necessary to make an informed decision about his medical treatment;
>
> (2) the defendant acted with deliberate indifference to the prisoner's right to refuse treatment; and
>
> (3) if the prisoner had received the information, he would have refused the treatment.

Id.

Following its adoption of this standard, the court found against Mr. Knight because the Seventh Circuit "question[ed] whether Knight has sufficiently shown that Dr. Grossman was deliberately indifferent to his right to refuse treatment," and because it found that Knight failed to show that he would have refused the procedure. *Id*. at 16a. These conclusions were in error because incorporating a deliberate indifference standard in a Fourteenth Amendment right to informed consent

is untenable, and the specific required proof of refusal as the nonmovant at summary judgment is improper.

III. The Seventh Circuit's Cursory Adoption of the Deliberate Indifference Standard Created an Impractical Legal Framework that is Contrary to *Cruzan*

Imposing a deliberate indifference standard on this right, as the Second and (now) Seventh Circuits do, is an unfair burden on prisoner-patients that runs contrary to the analyses of each other circuit and nullifies both the right to informed consent and the precedent of this Court. Indeed, the circuit minority's extra deliberate indifference requirement is unnecessary because the circuit majority's analysis already considers the interests of the physician/state and balances those interests, per *Cruzan*, against the prisoner-patient's right to receive medical information to decide, for his or herself, whether the treatment is desirable.

The decision below failed to clearly define or analyze a deliberate indifference standard in its holding, referring to it in dicta only as described in *Pabon*: as behavior that "shock[s] the conscience." *Id*. at 13a (citing *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 848-49 (1998); *McDowell v. Vill. of Lansing*, 763 F.3d 762, 766 (7th Cir. 2014)). This subjective definition is objectionable for its lack of clarity and misleading irrelevancy: *Pabon* referenced cases where executive action constituting abuse of power "shock[ed] the conscience," and contrasted this test with, "[b]y contrast, in situations where actual deliberation is possible…." *Pabon*, 459 F.3d at 251.

Ostensibly, the Seventh Circuit's definition of deliberate indifference is the same as that previously ascribed to the Eighth Amendment: requiring the official know "facts from which he could infer that a substantial risk of serious harm exists, and he must actually draw the inference." *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662 (7th Cir. 2016). Within the Eighth Amendment context, adoption of this definition is reasonable as the decision describes: "[a] physician is deliberately indifferent to a patient's right to refuse treatment if the doctor subjectively knows that the patient did not consent to the treatment or that the patient would want to know the medical information being withheld in order to decide whether to refuse the treatment." App. A at 14a.

But incorporation of this same standard in the Fourteenth Amendment context is impractical, requiring the official know facts from which he could infer that there exists a substantial risk of harm to a patient's right to informed consent. *Id.*; *Whiting*, 839 F.3d at 662. This requirement detracts from the Fourteenth Amendment right itself, as its only effect is to nullify what is otherwise sufficient for a Fourteenth Amendment violation (absent a countervailing state interest).

That is, after establishing that a patient was deprived of information he or she would reasonably deem necessary to make an informed decision (a per se violation of informed consent), that conclusion is ignored if the prisoner-patient does not prove that the physician was deliberately indifferent to this deprivation. In nearly all instances, this will negate a finding that a patient's right to informed consent under the Fourteenth Amendment was violated, a result in opposition to that which would be found in other circuits and in

the decisions of *Cruzan* and *Washington*. The perspective of the physician/official in determining what a reasonable patient would deem necessary to make an informed decision about their medical treatment should be relevant only insofar as it bears on countervailing state interests.

IV. Deliberate Indifference Analysis Nullifies the Right to Informed Consent

The Second and Seventh Circuits' misplaced analysis stands in stark contrast to the founding principles of informed consent and its "logical corollary," the right to refuse treatment. *Cruzan*, 497 U.S. at 169. As described in *Cruzan*: "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Cruzan*, 497 U.S. at 269 (quoting *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)). Allowing the physician/official's state of mind to negate the right to determine what shall be done with one's own body is inconsistent and offends the principle that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id*. at 342 n. 14 (citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). These fundamental rights are gutted by an amorphous analysis that defers to the intentions of the physician.

The Second and Seventh Circuit's adoption of a subjective deliberate indifference standard therefore nullifies the Fourteenth Amendment

right and the split should be resolved against these circuits. It is illogical to use a subjective standard from the doctor's point of view to determine whether a right constructed from the patient's point of view is violated. Patients depend on the right to receive information reasonably necessary to make an informed decision about their own medical treatment; it is inappropriate and unworkable to introduce a framework that allows the physician's intentions to negate that right. When this narrow standard is applied through the subjective lens of the doctor, the patient's original right to receive information and refuse treatment is lost.

As an example to illustrate how a deliberate indifference requirement is untenable, under the framework adopted by the Second and Seventh Circuits, a doctor who accidently performs the wrong surgery on a patient, of which the patient is unaware, has somehow preserved the patient's right to informed consent to that same procedure. This conclusion is incongruous with the right to informed consent.

As such, requiring deliberate indifference in the Fourteenth Amendment right to informed consent analysis is unworkable for its abrogation of the foundation of informed consent altogether. More disturbing, the Seventh Circuit's decision extends beyond hypotheticals. It failed to find that the physician was aware that a risk to informed consent might exist *even where a patient is unconscious*, despite a deliberate choice by the physician to operate without discussing the completely different procedure with the patient than the procedure to which the patient consented. It is difficult to imagine a more intuitive example where a physician/official could infer a substantial risk of harm exists to a patient's right to informed

consent than when the patient is unable to receive information about or refuse an elective treatment because he is unconscious.

The decision below renders the Fourteenth Amendment right to informed consent useless and should be reversed. Under the standard adopted by the Second and Seventh Circuits, violations of a patient's right to informed consent depend entirely on the doctor's perspective, and doctors could willfully avoid information that might lead them to become aware that a violation of the patient's right to informed consent might exist. Yet, whether or not the doctor is aware, there is a clear violation of "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" that underlies Fourteenth Amendment jurisprudence. *Cruzan*, 497 U.S. at 278; *see also Sama*, 669 F.3d at 591 n.13 (citing *Cruzan*). Therefore, this deliberate indifference escape valve is an injurious distortion of the law that nullifies a patient's Fourteenth Amendment right.

The decision below should be reversed on failing to find deliberate indifference, even if it applies, but its application to Fourteenth Amendment analysis effectively nullifies the right to informed consent altogether, a decision that will impact every prisoner-patient in the Seventh and Second Circuits. The Seventh Circuit's decision to incorporate a heightened deliberate indifference standard ultimately led to a deprivation of Mr. Knight's Fourteenth Amendment rights. *Id*. at 13.

In sum, the petition should be granted and the decision reversed for furthering a circuit split that undermines the Fourteenth Amendment right to informed consent.

V. Requiring an Affirmative Demonstration of Refusal at Summary Judgment Was Procedurally Improper

The Seventh Circuit's adoption of the *Pabon* framework also introduced as an element whether Knight would have refused the surgery in question. App. A at 15a. Reliance on this factor is misguided and improper. First, the factor is (outside *Pabon*) foreign to the informed consent analysis. The Second Circuit pulled this requirement from a discordant opinion "holding that, to state a claim for denial of the right to access the courts, a prisoner must demonstrate that 'the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.'" *Pabon*, 459 F.3d at 251 (citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996)). Such analysis should be left out of an informed consent framework. In addition, dismissal of Mr. Knight's claims is improper where the court required him to have proven, as the nonmoving party at summary judgment, an element of a test derived from the analysis of a different circuit. Even if the *Pabon* framework is applied, Mr. Knight need not have proffered this at summary judgment, considering the court at summary judgment must "draw all inferences in the light most favorable to" him. App. A at 2a. Therefore, in addition to disavowing a deliberate indifference standard, the lower courts' findings that Mr. Knight would not have refused the treatment must be reversed.

CONCLUSION

For the foregoing reasons, Petitioner DeWayne Knight respectfully requests this Court grant his petition for writ of certiorari.

RESPECTFULLY SUBMITTED, this 13th day of March, 2020

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APPENDIX

TO

PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 19-1740

DEWAYNE D. KNIGHT,

Plaintiff-Appellant,

v.

THOMAS GROSSMAN, JR., M.D.

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois,
No. 1:16-cv-01644 — **William E. Duffin**,
Magistrate Judge.

ARGUED SEPTEMBER 17, 2019
DECIDED OCTOBER 31, 2019

Before FLAUM, ROVNER, and SCUDDER, *Circuit Judges.*

SCUDDER, *Circuit Judge.* DeWayne Knight is a prisoner who went under the knife for one surgery and Dr. Thomas Gross-man, upon seeing during the operation that he made the wrong diagnosis, performed another. Knight brought suit un-der 42 U.S.C. § 1983, alleging that Dr.

Grossman acted with deliberate indifference to his medical needs in violation of the Eighth Amendment and disregarded his right to informed consent in violation of the Fourteenth Amendment. The district court entered summary judgment in Dr. Grossman's favor on both claims. In considering Knight's due process claim, the district court correctly observed that we have never endorsed a right to informed consent or pronounced a standard for proving a violation of that right. We do so now by adopting the standard the Second Circuit articulated in *Pabon v. Wright*, 459 F.3d 241 (2006). But because Knight did not sufficiently prove the elements of either of his claims, we a rm the district court's judgment.

I

The summary judgment record supplies the operative facts, and we draw all inferences in the light most favorable to Knight. See *Yochim v. Carson*, 935 F.3d 586, 588 (7th Cir. 2019).

While serving a sentence at the Waupun Correctional Institution, DeWayne Knight sought treatment for a basketball injury to his left knee. Prison staff referred Knight to Dr. Grossman, who worked at a hospital that contracted with the Wisconsin Department of Corrections to provide medical services to state prisoners. Dr. Grossman diagnosed Knight with a tear in his anterior cruciate ligament and performed reconstruction

surgery. This surgery was successful and is not at issue in this litigation.

A few years later, Knight reinjured his knee and returned to Dr. Grossman for treatment. Dr. Grossman examined Knight, ordered x-rays, and, without consulting an MRI, diagnosed him with a torn ACL revision. Dr. Grossman offered Knight the option of undergoing a revision procedure to repair the tear. In doing so, he issued a series of disclaimers, explaining that the surgery was elective and not strictly necessary, involved certain risks, and did not bring with it a promise that it would resolve Knight's pain. Knight agreed to the surgery and opted for a type of reconstruction procedure that would require Dr. Grossman opening both knees and transplanting tissue from Knight's healthy right knee into his left knee.

On the day of the surgery, Knight signed a consent form authorizing a "[r]evision left anterior cruciate reconstruction with donor site from right knee." The form also provided that if "unforeseen conditions" arose during the surgery which, in Dr. Grossman's judgment, required additional or different procedures, he had Knight's consent to take any further steps "deemed necessary and advisable." Upon opening Knight's left knee, Dr. Grossman was met with a different condition than he anticipated—Knight's ACL was intact and functional, not torn. But Dr. Grossman observed

other issues with Knight's left knee, including surface damage to the cartilage (grade three changes in the trochlea), narrowing of the space between the two bumps at the end of the thigh bone (dense stenosis on the lateral side on the intercondylar notch, with a small bone fragment), and bony overgrowths on the kneecap (patellar osteophytosis). An experienced surgeon, Dr. Grossman determined what he was seeing was consistent with degenerative joint disease or arthritis and would explain why Knight was experiencing renewed pain and discomfort in his left knee.

Dr. Grossman knew immediately how to treat Knight. He could continue operating by using the two small incisions that had already been made to Knight's left knee to perform a series of arthroscopic surgical procedures. In medical terms, a procedure known as a chondroplasty would remove the damaged tissue and a second procedure, a notchplasty, would enlarge the narrowed gap to address the thigh-bone issue. As for the kneecap, Dr. Grossman could perform an abrasion arthroplasty—a procedure that required (in simplified terms) shaving the bone to a degree that stimulated the bone marrow to generate new cartilage.

So Dr. Grossman found himself at a fork in the road: with Knight unconscious on the operating table, he could close Knight's knee and

end the operation or move forward with the alternative procedures he had not discussed with Knight but believed would help him. Dr. Grossman chose to keep operating. He later explained that he did so not only because he was confident the alternative procedures would address Knight's condition, but also because it was unclear if or when Knight, as a prisoner, would be available for surgery again.

Knight woke up in the recovery room to find that only his left knee had been operated on. No one told Knight that Dr. Grossman had changed course mid-operation and performed an alternative surgery—one they had never discussed. Upon Knight's discharge from the hospital, Dr. Grossman sent his operative note and recovery instructions to the prison's medical unit. The note explained what Dr. Grossman had observed, including Knight's intact ACL, and the procedures he performed, including the abrasion arthroplasty. Dr. Grossman instructed that Knight could stand and put whatever weight on his left knee he was able to tolerate, even though recovery from abrasion arthroplasty requires that the patient avoid putting any weight on the knee so that the new cartilage can mature. Three months after the surgery, Knight had a follow-up appointment with Dr. Grossman, where he finally learned the details of his surgery. Knight's knee has since gotten worse.

Litigation then followed. Knight brought suit against Dr. Grossman under 42 U.S.C. § 1983, claiming that the treatment he received for his knee violated his Eighth and Fourteenth Amendment rights. Dr. Grossman moved for summary judgment on both claims, and the district court granted his motion. Knight now appeals.

II

We start with Knight's claim that Dr. Grossman acted with deliberate indifference to his medical needs. We do so by taking our own fresh look at the record evidence, construing all facts in Knight's favor. See *Lavite v. Dunstan*, 932 F.3d 1020, 1027 (7th Cir. 2019).

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain," which includes "[d]eliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). To prevail on this claim, Knight must prove not only that he suffered from an objectively serious medical condition, but also that a state official responded with deliberate indifference to the condition. See *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662 (7th Cir. 2016).

Dr. Grossman does not dispute that Knight's knee condition is an objectively serious

medical condition or that he qualifies as a state official, leaving deliberate indifference the only contested element. A prison official is deliberately indifferent only if he "knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The inquiry is subjective and requires that the official know "facts from which he could infer that a substantial risk of serious harm exists, and he must actually draw the inference." *Whiting*, 839 F.3d at 662. "[E]vidence of medical negligence is not enough to prove deliberate indifference." *Id.*

Knight advances his Eighth Amendment claim by insisting that Dr. Grossman was deliberately indifferent to his right to informed consent. Framing the issue that way sends the parties down the wrong analytical path, however. Knight's Eighth Amendment claim is one for deliberate indifference to his serious medical needs, not deliberate indifference to a right to informed consent. Knight's liberty interest in informed consent to particular medical treatment is the province of the Fourteenth Amendment.

Take, for example, a prisoner with a malignant but treatable tumor. If a doctor discovers and removes the tumor while treating a hernia, nobody would say the doctor acted with deliberate indifference to the prisoner's medical needs. To the contrary, the physician, albeit without affording the prisoner the right to choose a

course of medical care, saved the inmate's life. Put another way, at least in this case, whether Knight consented to the abrasion arthroplasty is irrelevant to his Eighth Amendment claim for deliberate indifference to his medical needs.

On this record, we conclude that no reasonable jury could find that Dr. Grossman acted with deliberate indifference to Knight's knee condition. Nothing suggests, much less suffices to show, that Dr. Grossman knew of and disregarded a substantial risk to Knight's condition or somehow denied or delayed treatment. All evidence points the opposite way: Dr. Grossman came upon an unexpected diagnosis during surgery, identified an alternative treatment course, and then traveled that new path—all to help Knight.

Knight urges a different perspective on the view that Dr. Grossman provided the wrong treatment or even deficient care. Apart from finding no footing in the facts, this theory faces an uphill climb on the law, as, unlike in a malpractice tort claim, medical professionals receive significant deference when their judgments encounter challenges under the Eighth Amendment. See *Wilson v. Wexford Health Sources, Inc.*, 932 F.3d 513, 519 (7th Cir. 2019). The standard is not whether a reasonable medical professional would have made the same choice as Dr. Grossman, but instead whether "no minimally

competent professional" would have done so. *Id.* "[E]vidence that *some* medical professionals would have chosen a different course of treatment is insufficient to make out a constitutional claim." *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016) (en banc).

Knight failed to meet this demanding standard. The record does not support a finding that either the abrasion arthroplasty or the inadequate recovery instructions deviated from accepted medical standards. Knight's own expert opined only that Dr. Grossman's failure to obtain a new informed consent and discuss alternative treatment opinions deviated from professional standards. From there, though, the expert's opinions say nothing about whether the abrasion arthroplasty, the failure to tell Knight about it, or the recovery instructions aligned with medical standards, let alone whether those choices were such substantial deviations that a jury could find deliberate indifference.

To be sure, expert testimony is not always necessary. See *id.* Here, however, none of the alleged errors are so obvious that a lay juror could assess whether Knight carried his burden in challenging Dr. Grossman's treatment. In the end, all we can say is that Knight may have marshaled enough evidence to cast doubt on the wisdom of Dr. Grossman's choice to perform the abrasion arthroplasty—a procedure that, at least in some

circles, is considered controversial and outdated. But most medical treatments carry risk, and without evidence that Dr. Grossman's choices carried risk so high that no minimally competent doctor would have done the same, Knight cannot prevail. The district court was right to grant summary judgment on the Eighth Amendment claim.

III

We now venture into newer territory to address Knight's due process claim. The Fourteenth Amendment protects against deprivations of life, liberty, and property without due process of law. The Supreme Court has recognized that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990). So, too, has the Court held that prisoners retain a liberty interest in refusing forced medical treatment while incarcerated. See *Washington v. Harper*, 494 U.S. 210, 221–22 (1990).

From the interest in refusing unwanted treatment, some courts have inferred the existence of a corollary right—the right to receive information required to decide whether to refuse treatment. See, *e.g., Pabon v. Wright*, 459 F.3d 241, 249–50 (2d Cir. 2006); *Benson v. Terhune*, 304 F.3d 874, 884 (9th Cir. 2002); *White v. Napoleon*,

897 F.2d 103, 113 (3d Cir. 1990). On at least two occasions we have reserved judgment on the existence of this right. See *Cox v. Brubaker*, 558 F. App'x 677, 678–79 (7th Cir. 2014); *Phillips v. Wexford Health Sources, Inc.*, 522 F. App'x 364, 367 (7th Cir. 2013).

We now join all other circuits to have considered the question in holding that prisoners have a Fourteenth Amendment right to informed consent. The right to refuse medical treatment carries with it an implied right to the information necessary to make an informed decision about whether to refuse the treatment. Without crucial information about the risks and benefits of a procedure, the right to refuse would ring hollow. Together, the right to refuse treatment and the right to information required to do so constitute a right to informed consent. This due process entitlement has similarities to the familiar common law doctrine with which it shares its name, see *Cruzan*, 497 U.S. at 269–70 (describing the common law roots of informed consent), but its constitutional origin imposes different requirements than an informed-consent tort claim.

A

The Second Circuit confronted the requirements for what it termed a Fourteenth Amendment "right to medical information" claim in its 2006 decision in *Pabon v. Wright*, 459 F.3d

241. While incarcerated, William Pabon underwent a liver biopsy and medication therapy for Hepatitis C. *Id*. at 245. He claimed that he was not warned of the serious side effects and brought a § 1983 claim based on the violation of a Fourteenth Amendment right to medical information. *Id*. at 245–46. Relying on *Cruzan* and *Harper*, the Second Circuit recognized a constitutional entitlement to medical information but emphasized that it was "far from absolute." *Id*. at 249–50. The court highlighted four limitations on the right.

The first three limitations address what the prisoner must prove to establish a violation of his right to medical information. Two of the limitations are necessary because the logical source of the right to medical information is the right to refuse treatment, so the right to medical information exists only as far as needed to effectuate the right of refusal. *Id*. at 251. *First*, the prisoner "must show that, had he received information that was not given to him, he would have exercised his right to refuse the proposed treatment." *Id*. *Second*, "[t]he prisoner is entitled only to such information as a reasonable patient would deem necessary to make an informed decision." *Id*. at 250. This limitation avoids imposing an onerous burden of disclosing "all conceivable information" about a treatment and reduces the opportunity for the right to be used for "obstructionist" gain. *Id*.

Third, the prisoner must prove that the defendant acted with deliberate indifference to his right to refuse medical treatment. *Id.* at 251. Neither negligence nor gross negligence is enough to support a substantive due process claim, which must be so egregious as to "shock the conscience." See *County of Sacramento v. Lewis*, 523 U.S. 833, 848–49 (1998); *McDowell v. Vill. of Lansing*, 763 F.3d 762, 766 (7th Cir. 2014). In selecting deliberate indifference as the appropriate state of mind requirement as opposed to a more stringent intentionality standard, the Second Circuit relied on the Supreme Court's observation in *Lewis* that "liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." 523 U.S. at 853. The Court reasoned that in this context of "such extended opportunities to do better" and "protracted failure even to care, indifference is truly shocking." *Id.*

This element is the one Knight more vigorously contests, arguing that imposing a deliberate indifference requirement inappropriately "collapses the distinct right to informed consent granted under the Fourteenth Amendment into the prohibition against deliberate indifference to a prisoner's serious medical needs provided for under the Eighth Amendment." We

disagree. Knight's position misses a key distinction, which hinges on what the defendant must be deliberately indifferent to. In an Eighth Amendment claim, the question is whether the defendant was deliberately indifferent to the prisoner's serious medical need. But here, in a Fourteenth Amendment due process claim, we ask whether the defendant was deliberately indifferent to the prisoner's right to refuse treatment. Though both require deliberate indifference, the inquiries are distinct.

Stepping back illuminates the distinction. A physician is deliberately indifferent to a patient's right to refuse treatment if the doctor subjectively knows that the patient did not consent to the treatment or that the patient would want to know the medical information being withheld in order to decide whether to refuse the treatment. But a physician can be deliberately indifferent to a prisoner's right to refuse treatment without being deliberately indifferent to his medical needs. Our tumor example shows as much.

The final limitation the Second Circuit outlined in Pabon is a safety valve of sorts—allowing the right to medical information to give way when outweighed by a countervailing state interest. A prisoner's right to refuse medical treatment can be infringed by a prison regulation that is "reasonably related to legitimate penological interests." *Harper*, 494 U.S. at 246

(quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). A common example is when forced medication is needed to avoid the spread of contagious disease or to quell disruptive behavior. As the Second Circuit explained, "[i]f legitimate penological interests dictate that a particular treatment must be administered even if the prisoner would have refused it, then because there is no constitutional right to refuse treatment, there is no corollary right to be informed about the treatment." *Pabon*, 459 F.3d at 252.

B

We agree with the Second Circuit's reasoning and adopt the Pabon standard. A prisoner's claim of the violation of his right to informed consent is evaluated under a two-step inquiry. The prisoner must first establish that his right to informed consent was violated. To do this, the prisoner must prove that (1) he was deprived of information that a reasonable patient would deem necessary to make an informed decision about his medical treatment, (2) the defendant acted with deliberate indifference to the prisoner's right to refuse treatment, and (3) if the prisoner had received the information, he would have refused the treatment. If the prisoner establishes that his right to informed consent has been violated, we then take the second and final step of balancing the prisoner's right to informed consent against countervailing state interests. Liability

arises only if, in the end, the prisoner's right outweighs the state interests.

C

We question whether Knight has sufficiently shown that Dr. Grossman was deliberately indifferent to his right to refuse treatment, particularly given the scope of the consent form. But we can stop short of answering that question because, at the very least, Knight failed to show that he would have refused the only procedure he contests (the abrasion arthroplasty) had he been fully informed. Knight's express position below was that he "may well have" chosen a different treatment. Even if he had submitted that view in a sworn affidavit, which he did not, it would have fallen short: saying he may have refused treatment is not the same as saying he would have. With this failure of proof, the district court properly granted Dr. Grossman summary judgment.

For these reasons, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DEWAYNE KNIGHT,
Plaintiff,

v. Case No. 16-cv-1644

DR. THOMAS GROSSMAN, JR.,
Defendant

DECISION AND ORDER

Plaintiff DeWayne Knight is proceeding against defendant Dr. Thomas Grossman, Jr., on a claim that Dr. Grossman violated his Eighth and Fourteenth Amendment rights. Specifically, he claims that Dr. Grossman was deliberately indifferent to his serious medical need and violated his Fourteenth Amendment substantive due process rights by failing to get informed consent to perform a surgical procedure. The court recruited pro bono counsel to help Knight draft an amended complaint and then to represent him through discovery and summary judgment. Dr. Grossman has moved for summary judgment.

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter arises under federal statutes. Venue is proper under 28 U.S.C. § 1391. The parties have consented to United States magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and General Local Rule 73 (E.D. Wis.).

1. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Ames v. Home Depot U.S.A.*, Inc., 629 F.3d 665, 668 (7th Cir. 2011). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." See Anderson, 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those

> made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

2. Relevant Facts

This section is taken from both Knight's responses to Dr. Grossman's proposed findings of fact and Dr. Grossman's responses to Knight's proposed findings of fact. (ECF Nos. 47 and 54.)

At all times relevant, Dr. Grossman was licensed to practice medicine as an orthopedic surgeon in the state of Wisconsin. (ECF No. 47, ¶ 1; ECF No. 54, ¶ 1.) He was employed by Agnesian Healthcare at the time he performed the surgery at issue in this case. (ECF No. 47, ¶ 2.) Agnesian, which ran Waupun Memorial Healthcare, and the Wisconsin Department of Corrections (DOC) had a contract to provide medical care to DOC inmates.

(*Id.*, ¶¶ 94, 95, 106; ECF No. 54, ¶ 4.) Nearly 80 percent of Dr. Grossman's practice consisted of inmates of the DOC. (*Id.*, ¶ 4.)

The care of DOC inmate patients by outside consultant providers—like Dr. Grossman—is scheduled and approved by the inmate patient's DOC medical care provider. (ECF No. 47, ¶ 79.) Any medical "orders" Dr. Grossman issues in conjunction with his care of a DOC inmate patient are viewed as "recommendations" by the DOC, which might be implemented, ignored, or changed by an inmate patient's DOC medical provider at that provider's discretion. (*Id.*, ¶ 84.) Once an inmate patient is discharged and returned to the care of the DOC, the outside consultant has no further control over the care provided to that inmate patient. (*Id.*, ¶ 80.)

Knight saw Dr. Grossman for the first time on October 14, 2009, after injuring his knee playing basketball. (ECF No. 47, ¶ 6; ECF No. 54, ¶ 2.) After examination, Dr. Grossman offered Knight an elective knee surgery to reconstruct his anterior cruciate ligament (ACL). (ECF No. 47, ¶¶ 6-7.) Dr. Grossman referred Knight back to his institution for surgery approval. (*Id.*, ¶ 10.) Knight did not see Dr. Grossman again until July 8, 2010, when his DOC care providers referred him back for follow up. (*Id.*, ¶ 11.) Dr. Grossman reviewed the previously taken MRI study and examined Knight; he again concluded that ACL surgery was

appropriate. (Id., ¶ 12; ECF No. 54, ¶ 5.) This time, Knight was approved for surgery, which took place at Waupun Memorial Hospital on July 26, 2010. (ECF No. 47, ¶¶ 14-15.)

Knight says he had no residual pain or other problems with his knee until 2012. (ECF No. 54, ¶¶ 6-7.) Knight saw Dr. Grossman again on February 14, 2013, after being referred by his DOC medical providers for complaints of unsteadiness and popping in the knee after coming "down in an awkward way" while playing basketball in August 2011. (ECF No. 47, ¶¶ 21-22.) After reinjuring his knee, Knight underwent some conservative treatment, including physical therapy. (*Id*., ¶ 23.) When Knight saw Dr. Grossman in February 2013, Dr. Grossman ordered x-rays, performed a physical exam, and concluded that Knight had a torn ACL revision. (Id., ¶¶ 24-25.) He did not order an MRI. (ECF No. 54, ¶ 8.) Dr. Grossman offered Knight an elective revision procedure. (ECF No. 47, ¶ 25.) Dr. Grossman discussed Knight's graft options—allograft versus autograft—and offered no promises or guarantees that it would completely resolve his complaints. (*Id*., ¶ 27; see also ECF No. 54, ¶¶ 9-10.) In addition, Dr. Grossman offered his typical preoperative patient discussion, which, although not verbatim, would have been something like the following:

> I think you have an ACL tear. Nothing needs to be done. If we don't do anything, you will not die, and your leg will not fall off. This will be the way that it is. If you'd like to, there is an elective operation. It has risks which are separate and distinct from that of the anesthetic. The risks include, but are not limited to, bleeding, infection, damage to nerves and blood vessels, scar, swelling, stiffness, inability to relieve your complaints and the need for further interventions. I am not going to offer any specific promises or make any guarantees. If you'd like me to do this, I would be very interested in doing it for you. I will do the best I can. I will take care of you for as long as you want me to, but that's it. Surgeons don't make any promises, and I don't promise myself lunch anymore.

(ECF No. 47, ¶ 28.)

When Knight told Dr. Grossman that he wanted to proceed with the surgery (the autograft procedure), Dr. Grossman referred him back to his institution for DOC approval. (ECF No. 47, ¶ 29; ECF No. 54, ¶ 11.) Knight returned to Dr. Grossman on May 13, 2013, for the surgery. (ECF No. 47, ¶ 30.) As of that date, Knight had degenerative disc disease (particularly, patellofemoral joint disease) in his left knee, which can cause pain, stiffness, "grinding," "crushing,"

"clicking," and "popping," as well as difficulty squatting and bending. (*Id.*, ¶¶ 31-34.) Patients might also experience anterior knee pain, quadriceps weakness, and knee instability. (*Id.*, ¶ 35.)

Before surgery, Knight signed a consent form in which he consented to the following:

> I hereby authorize Thomas Grossman, M.D. and whomever they might designate as their assistants, to perform upon myself, DeWayne Knight, the following procedures: Revision left anterior cruciate reconstruction with donor site from right knee and to do such other diagnostic and therapeutic procedures as are in his/her and/or their professional judgment necessary and desirable. This includes but is not limited to procedures involving anesthesia, radiology and pathology. If any unforeseen conditions arise in the course of this procedure which in the professional judgment of the physician listed above requires procedures in addition to or different from those now contemplated, I further request and authorize them to do whatever is deemed necessary and advisable.

(ECF No. 47, ¶¶ 36, 38; *see also* ECF No. 54, ¶ 12.) The contemplated surgery, an ACL revision in the

left knee, required both of Knight's knees to be opened surgically and healthy tissue harvested from his unaffected right knee implanted in his damaged left knee. (ECF No. 47, ¶ 40.)

Once Dr. Grossman started the surgery, he found that Knight's ACL was not, in fact, torn. (ECF No. 47, ¶ 42.) Rather, he found a "constellation of pathology" that included grade three changes in the trochlea, significant patellar osteophytosis, and dense stenosis on the lateral side on the intercondylar notch with a small bone fragment that were consistent with degenerative joint disease or arthritis. (*Id*., ¶¶43-44; ECF No. 54, ¶ 13.) Dr. Grossman was aware that these findings would explain the symptoms of which Knight complained, including pain, clicking, and popping in the knee. (ECF No. 47, ¶ 45.) Knight's previous injury as a teenager made it more likely that he would experience degenerative joint changes. (*Id*., ¶¶46-47.)

Dr. Grossman knew, based on his experience as an orthopedic surgeon, that the pathology he observed for the first time intraoperatively could be addressed through a series of arthroscopic surgical procedures, performed through the two small incisions (approximately four to five millimeters in length) that were already in use. (ECF No. 47, ¶ 48.) He had to choose between attempting to address the observed pathology or closing the knee surgically

and returning Knight to his institution, with the pathology unaddressed. (*Id*., ¶ 52.) In deciding what to do, Dr. Grossman considered the fact that, because Knight was in DOC custody, Dr. Grossman could not control when or if Knight would again have access to surgery. (ECF No., 47 ¶ 53.) He decided to move forward, performing a chondroplasty of the trochlea, revision notchplasty, and abrasion arthroplasty of the patella. (*Id*., ¶ 49; ECF No. 54, ¶ 14.) Dr. Grossman did not conduct a separate informed consent discussion or explanation of the procedures with Knight before doing so. (ECF No. 54, ¶ 19.) Dr. Grossman cleaned loose cartilage flaps and abraded the damaged surface. (*Id*., ¶ 18.)

The parties dispute when Dr. Grossman made Knight aware that his ACL was intact and that he had found evidence of arthritis that he addressed during surgery. (ECF No. 47, ¶ 54.) Dr. Grossman contends that he told Knight after surgery that he had found no ACL tear but did find evidence of arthritis. (*Id*., ¶ 56; see also ECF No. 54, ¶ 35.) Knight contends that he was provided with no details about the procedures Dr. Grossman performed until his post-op follow up appointment in August 2013. (ECF No. 54, ¶ 39.)

On August 13, 2013, the DOC returned Knight for a surgical follow up visit with Dr. Grossman's nurse practitioner. (ECF No. 47, ¶ 59.) It's unclear whether Knight saw Dr. Grossman

during this visit. However, Knight was told (by whom the parties do not say) that Dr. Grossman found an intact ACL but also found signs of patellofemoral joint degenerative disease. (*Id*., ¶ 60.) The plan for Knight's further care was strengthening and physical therapy and to follow up in one month. (*Id*., ¶¶ 61-62.) Knight, however, elected not to return to see Dr. Grossman. (Id., ¶ 62.)

The parties agree that the diagnostic arthroscopy, the synovectomy (trimming of the synovium with a "sucker/shaver" device), and the debridement chondroplasty Dr. Grossman performed were reasonable under the circumstances and did not require additional informed consent. (ECF No. 47, ¶¶ 73-75.) However, Knight and his expert witness, Dr. Mark Hutchinson, contend that the abrasion arthroplasty was unreasonable and required an additional informed consent discussion. (*Id*., ¶ 75.)

3. Analysis

Upon screening of Knight's amended complaint the court allowed him to proceed with the following claims:

> Knight may proceed with a deliberate indifference claim against Grossman based on his allegations that he misdiagnosed Knight's injury, failed to inform Knight of

> the misdiagnosis, and unilaterally chose to perform procedures on Knight's knee without regard to the risks the procedures posed to Knight. Knight may also proceed on a substantive due process claim against Grossman based on his allegations that Grossman failed to obtain his informed consent before performing the procedures on his knee.

(ECF No. 25 at 5.)

3.1 Deliberate Indifference to a Serious Medical Need

Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when their conduct demonstrates "deliberate indifference to serious medical needs of prisoners." *Rasho v. Elyea*, 856 F.3d 469, 475 (7th Cir. 2017) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). "To determine if the Eighth Amendment has been violated in the prison medical context, we perform a two-step analysis, first examining whether a plaintiff suffered from an objectively serious medical condition, and then determining whether the individual was deliberately indifferent to that condition." *Petties v. Carter*, 836 F.3d 722, 727-28 (7th Cir. 2016.) Deliberate indifference requires that a defendant actually know about yet disregard a substantial risk of harm to an inmate's

health or safety. *Id.* at 728. "The standard is a subjective one: The defendant must know facts from which he could infer that a substantial risk of serious harm exists and he must actually draw the inference." *Zaya v. Sood*, 836 F.3d 800, 804 (7th Cir. 2016).

The Court of Appeals for the Seventh Circuit has "consistently held that neither a difference of opinion among medical professionals nor even admitted medical malpractice is enough to establish deliberate indifference." *Zaya*, 836 F.3d at 805. "By definition a treatment decision [that is] based on professional judgment cannot evince deliberate indifference because professional judgment implies a choice of what the defendant believed to be the best course of treatment. A doctor who claims to have exercised professional judgment is effectively asserting that he lacked a sufficiently culpable mental state, and if no reasonable jury could discredit that claim, the doctor is entitled to summary judgment." *Id.* "A medical professional acting in his professional capacity may be held to have displayed deliberate indifference only if the decision by the professional is such 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." *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008) (internal quotation marks omitted).

Dr. Grossman does not dispute that Knight had a serious medical condition. Thus, the only issue is whether he was deliberately indifferent to that condition. Dr. Grossman argues that Knight cannot show that any of his actions amounted to deliberate indifference. Specifically, he argues that his treatment decisions were within professional standards, that his decisions are owed deference, and that a disagreement between professionals as to the appropriate treatment does not constitute deliberate indifference.

Knight does not offer evidence that Dr. Grossman misdiagnosed his injury. It appears he has abandoned that claim. It does not appear that Knight has abandoned his claim that Dr. Grossman's failure to inform him of the alleged misdiagnosis until months after the surgery fell below the applicable standard of care. However, he offers no evidence to support that claim. His expert witness, Dr. Hutchinson, does not so opine, nor does any other witness. Thus, Dr. Grossman is entitled to summary judgment on those claims.

That leaves Knight's claim that Dr. Grossman acted with deliberate indifference by performing a different surgery than that to which he consented. Knight's position is that, upon learning that Knight's ACL was not torn, Dr. Grossman should have stopped the surgery so that he could have a discussion with Knight about the risks associated with abrasion arthroplasty to

address the arthritis that Dr. Grossman discovered. Knight does *not* contend that, had Dr. Grossman had that discussion with him, he would have refused to consent to the abrasion arthroplasty. He argues only that he "may well have chosen" more conservative treatment options for arthritis. (ECF No. 45 at 25.)

Knight's expert witness, Dr. Hutchinson, opines only that the failure to obtain Knight's informed consent to perform the abrasion arthroplasty constituted "a departure from accepted medical standards." (ECF No. 44-1 at 1.) But "[t]o infer deliberate indifference on the basis of a physician's treatment decision, the decision must be so far a field of accepted professional standards as to raise the inference that it was not actually based on a medical judgment." *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (internal citation omitted). Stated simply, the decision must "substantially depart from accepted medical practice." *Harper v. Santos*, 847 F.3d 923, 928 (7th Cir. 2017). Knight has presented no evidence that Dr. Grossman's decision to proceed with the abrasion arthroplasty without first getting Knight's consent substantially departed from accepted medical practice. *See Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662-63 (7th Cir. 2016) (affirming district court's grant of summary judgment for the defendant when "no expert testified that [defendant's] chosen course of treatment was a substantial departure from

accepted medical judgment, and the decision was not so obviously wrong that a layperson could draw the required inference about the doctor's state of mind without expert testimony.").

Without evidence that Dr. Grossman's decision to perform the abrasion arthroplasty substantially departed from accepted medical standards, Knight has only shown that Dr. Hutchinson disagrees with Dr. Grossman's decision. That is not enough to create a genuine issue of material fact as to whether Dr. Grossman was deliberately indifferent to Knight's serious medical need. *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010) (deliberate indifference claim requires more than disagreement with a doctor's medical judgment). And, as in *Whiting*, Dr. Grossman's decision to proceed with the surgery was not so obviously wrong that a layperson, without the benefit of expert testimony, could draw the required inference about Dr. Grossman's state of mind. Dr. Grossman states that he performed the abrasion arthroplasty to address the conditions he found during surgery, conditions that he concluded would explain the symptoms of which Knight was complaining. (ECF No. 37, ¶ 34.) In doing so, he considered a number of factors, including that Knight reported being in pain and that the degenerative joint disease could be addressed through a series of common procedures, each of which would be less invasive that the one (an ACL revision) that Knight had consented to.

(*Id*., ¶ 41.) Because Knight was in the custody of the DOC, Dr. Grossman had no control over when or if Knight would ever again have a chance to have the surgery that Dr. Grossman concluded he needed. (*Id*.)

In short, based on the record before this court, no reasonable jury could infer that Dr. Grossman's decision to proceed with the abrasion arthroplasty was made with the mental state necessary to show that he acted with deliberate indifference to Knight's serious medical needs. This court offers no opinion as to whether Dr. Grossman's conduct constituted medical malpractice. Rather, the court concludes here only that it did not violate Knight's Eighth Amendment rights. As a result, Dr. Grossman is entitled to summary judgment on Knight's Eighth Amendment claim.

3.2 Due Process

The Court of Appeals for the Seventh Circuit has not explicitly endorsed a due process claim based on a lack of informed consent, although it has discussed such a claim. *See Phillips v. Wexford Health Sources, Inc.*, 522 Fed. Appx. 364, 367 (7th Cir. 2013), and *Cox v. Brubaker*, 558 Fed. Appx. 677, 678–79 (7th Cir. 2014). In *Phillips*, the Seventh Circuit affirmed the dismissal of a claim based on the alleged lack of informed consent of side effects from a

particular drug, concluding that the plaintiff had not alleged that the risks of developing the side effects were substantial enough that a reasonable patient would be expected to be apprised of them. 522 Fed. Appx. at 367. *Cox* involved a claim for lack of informed consent regarding the side effects of the drug Pamelor. The Seventh Circuit stated that the facts of that case did not "require us to recognize, or decide the scope of, this due-process right because Cox supplies no evidence of the likelihood of Pamelor's side effects." *Cox*, 55 Fed. Appx. at 679. Thus, in neither case did the court decide whether to recognize a due process claim based on the lack of informed consent.

Dr. Grossman first argues that he is entitled to qualified immunity on Knight's due process claim. Contending that the Seventh Circuit has held that a private party may raise a defense of qualified immunity under certain circumstances, he states that "Knight's case clearly falls within the class of cases in which qualified immunity may be raised by a private defendant." (ECF No. 35 at 24.) Knight responds that the Seventh Circuit "has repeatedly held physicians of private corporations that contract with the state to provide medical care for prisoners are not entitled to assert qualified immunity." (ECF No. 45 at 17.)

In *Richardson v. McKnight*, 521 U.S. 399 (1997), the Supreme Court held that employees of

a private prison management firm are not entitled to invoke qualified immunity. In *Filarsky v. Delia*, 566 U.S. 377, 393–94 (2012), the Supreme Court held that an attorney hired by a municipality to conduct its business of investigating a potential wrongdoing was entitled to invoke qualified immunity. However, *Filarsky* did not overrule Richardson. According to the Seventh Circuit, "the *Filarsky* Court reaffirmed the holding of *Richardson* categorically rejecting immunity for the private prison employees there." *Currie v. Chhabra*, 728 F.3d 626, 631 (7th Cir. 2013), citing *Filarsky*, 566 U.S. at 392-94. The Seventh Circuit has held in other post-*Filarsky* cases that private medical personnel in prisons are not afforded qualified immunity. See, e.g., *Estate of Clark v. Walker*, 865 F.3d 544, 551 (7th Cir. 2017); *Rasho*, 856 F.3d at 479; *Petties*, 836 F.3d at 734. Thus, Dr. Grossman is not entitled to qualified immunity on Knight's due process claim.

Dr. Grossman next argues that Knight's due process claim must be dismissed because Knight consented in writing "to allow Dr. Grossman to take the actions that he did on May 15, 2013." (ECF No. 35 at 26.) Specifically, Dr. Grossman argues that the written consent form, authorizing him to perform whatever procedures which in his professional judgment were necessary, desirable and advisable, authorized him to perform the abrasion arthroplasty.

Knight argues that the abrasion arthroplasty procedure was not necessary, desirable, or advisable. According to Knight, abrasion arthroplasty is a controversial and outdated procedure with benefits and risks completely different than an ACL reconstruction. (ECF No. 45 at 16.) According to Knight's expert witness, Dr. Hutchinson, an abrasion arthroplasty is an elective procedure. (ECF No. 48, ¶ 30.) Knight contends that Dr. Hutchinson opines that an abrasion arthroplasty was not necessary or required (ECF No. 45 at 16), although the proposed finding of fact that he cites does not support such a statement.

The parties dispute the nature of abrasion arthroplasty, the level of invasiveness, whether it is considered controversial and outdated, the risks it carries, and the rehabilitation it requires. (ECF No. 54. ¶¶ 21-25.) Knight has established that a genuine issue of material fact exists as to whether the consent form he signed authorized Dr. Grossman to perform the abrasion arthroplasty—that is, whether the procedure was necessary, desirable, or advisable. As such, the court cannot grant Dr. Grossman summary judgment on Knight's due process claim on the ground that the consent form authorized him to perform the abrasion arthroplasty.

Dr. Grossman next argues that Knight's due process claim fails "because it is unsupported by

evidence sufficient to establish deliberate indifference." (ECF No. 35 at 28.) He acknowledges that, although the Seventh Circuit has not endorsed a due process right to informed consent, other circuits have. For example, as outlined in this court's screening order, the Second Circuit has formulated such a cause of action that requires a prisoner to "show that (1) government officials failed to provide him with such information; (2) this failure caused him to undergo medical treatment that he would have refused had he been so informed; and (3) the officials' failure was undertaken with deliberate indifference to the prisoner's right to refuse medical treatment." *Pabon v. Wright*, 459 F.3d 241, 246 (2nd Cir. 2006). If a plaintiff can show nothing more than negligence, his claim will be defeated. Id. at 250 ("The simple lack of due care does not make out a violation of either the substantive or procedural aspects of the Due Process Clause of the Fourteenth Amendment."). Dr. Grossman argues that because Knight cannot establish deliberate indifference, his due process claim must be dismissed. (ECF No. 35 at 29).

In response, citing Cox, Knight argues that it is not clear whether the Seventh Circuit requires a finding of deliberate indifference under the Fourteenth Amendment. (ECF No. 45 at 15.) In any event, he argues that Dr. Grossman's actions *do* meet the standard for deliberate indifference. (ECF No. 45 at 15.)

In *Cox*, the Seventh Circuit expressly stated that it was not deciding whether to join those circuits that recognize as a matter of the substantive component of due process that prisoners have a right to such information as is reasonably necessary to make an informed decision to accept or reject proposed treatment. 558 Fed. Appx. at 679. Nonetheless, to the extent the Seventh Circuit would recognize such a right, this court has no reason for concluding that it would use a different framework for showing a violation of that right than the framework used by the Second Circuit in *Pabon*. Applying that framework here, Knight's due process claim fails for two reasons. First, as discussed above, he has not submitted evidence establishing deliberate indifference. Second, he has not demonstrated that, had Dr. Grossman stopped the ACL surgery in order to discuss with Knight the abrasion arthroplasty risks and benefits, he (Knight) would have refused to proceed with the abrasion arthroplasty, all he says is that he *might have* refused. (ECF No. 45 at 25.) That is not enough.

Because Knight has not established that he would have refused to proceed with the abrasion arthroplasty had Dr. Grossman had a discussion with him about that surgery, and because Knight has not established that Dr. Grossman was deliberately indifferent in failing to have that discussion with him, he cannot sustain a claim

that Dr. Grossman violated his due process rights. Thus, Dr. Grossman is entitled to summary judgment on this claim as well.

Finally, the court will deny as moot Dr. Grossman's motion to exclude Knight's expert's—Dr. Hutchinon's—causation testimony.

IT IS THEREFORE ORDERED that Dr. Grossman's motion for summary judgment (ECF No. 34) is **GRANTED** and this case is dismissed. The Clerk of Court shall enter judgment accordingly.

IT IS ALSO ORDERED that Dr. Grossman's motion to exclude the causation testimony of plaintiff's expert (ECF No. 40) is **DENIED AS MOOT**.

This order and the judgment to follow are final. A dissatisfied party may appeal this decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within **30 days** of the entry of judgment. See Fed. R. App. P. 3, 4. I may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. *See* Fed. R. App. P. 4(a)(5)(A).

Under certain circumstances, a party may ask the court to alter or amend the judgment

under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within **28 days** of the entry of judgment. The court cannot extend this deadline. See Fed. R. Civ. P. 6(b)(2). Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of the judgment. The court cannot extend this deadline. See Fed. R. Civ. P. 6(b)(2).

Parties are expected to closely review all applicable rules and determine, what, if any, further action is appropriate in a case.

Dated at Milwaukee, Wisconsin this 21st day of March, 2019.

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WILLIAM E. DUFFIN
U.S. Magistrate Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 17, 2019

Before

JOEL M. FLAUM, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

No. 19-1740

DEWAYNE D. KNIGHT,
Plaintiff-Appellant,

v.

THOMAS GROSSMAN, JR., M.D.
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin,
No. 2:16-cv-01644
William E. Duffin, *Magistrate Judge*.

ORDER

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on November 14, 2019, and on December 2, 2019, defendant-appellee filed an answer to the petition. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing.

The petition for rehearing and rehearing *en banc* is therefore DENIED.