21-6675

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM 2021
No._____

ROBERT JW McCLELAND
PETITIONER,

AGAINST

RICK RAEMISCH, et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT JW McCLELAND #155317
BUENA VISTA MINIMUM CENTER
P.O. Box 2005
BUENA VISTA, CO 81211

QUESTIONS PRESENTED

1. Whether the appellate courts should apply case law established under Fed.R.Evid. 706, which denies the appointment of expert witnesses because of a party's IFP status, to an indigent party's request for the appointment of pro bono counsel pursuant to 28 U.S.C. §1915(e)(1).

2. Whether appellate courts are obliged to address a party's allegation that the opposing party's expert reports were faulty, regardless of the burden of proof at summary judgment, and whether faulty reports should be allowed to establish undisputed facts.

3. Whether lower courts should take judicial notice of medical facts at summary judgment, without the interpretation of an expert witness, when the court is supplied with the necessary information.

PARTIES

The Petitioner is Robert JW McCleland, an indigent, pro se prisoner in the Colorado Department of Corrections ("CDOC"). The Respondents are Rick Raemisch, former Director of the CDOC; Renae Jordan, former Director of Clinical Services for the CDOC; Susan Tiona, former Chief Medical Officer for the CDOC; Dayna Johnson, former Health Services Administrator for the Buena Vista Correctional Complex ("BVCC"); Deborah Borrego, former Medical Provider for the BVCC; and Joanne McGrew, former contract Medical Provider for the BVCC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Cont.

DECISIONS BELOW

The Order and Judgment of the U.S. Court of Appeals for the Tenth Circuit was filed on September 30, 2021 (NO. 20-1390; D.C. No. 1:18-cv-00233-PAB-NYW (D.Colo.)) and is unpublished. A copy is attached as Appendix A to this Petition (A.1). The Order denying Plaintiff's Petition for Rehearing is attached as Appendix B to this Petition (B.1). The Order of the Magistrate Judge Granting Summary Judgment to all Defendants is attached as Appendix C to this Petition (C.1).

JURISDICTION

The Order and Judgment of the U.S. Court of Appeals for the Tenth Circuit was entered on September 30, 2010 (A.1). An Order denying a Petition for Rehearing was entered on October 27, 2021 (B.1). Jurisdiction is conferred by 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves Amendment VIII to the United States Constitution, which provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Amendment is enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. §1915(e)(1) provides: The court may request an attorney to represent any person unable to afford counsel.

The District of Colorado's local Rules of Practice, D.C.Colo.LAttyR. 15, Civil pro bono Representation, provides in part:

> (e)(1) The following unrepresented parties are eligible for appointment of pro bono counsel:
> (B) After initial review of the complaint by the pro se division of the court, an unrepresented prisoner...
> (f)(1)(B) In deciding whether to appoint counsel, the judicial officer should consider all relevant circumstances, including, but not limited to, the following:
> (i) The nature and complexity of the action;
> (ii) The potential merit of the claims...of the unrepresented party;
> (iii) The demonstrated inability of the unrepresented party to retain an attorney by other means; and
> (iv) The degree to which the interests of justice, including the benefits to the court, will be served by appointment of counsel.
> (h)(2) ...If the unrepresented party is entitled to recover attorney fees or a monetary award or settlement, the attorney and the unrepresented party may enter into a fee agreement permitting the attorney to receive attorney fees that are earned.
> (i)(1) A member of the panel providing representation to an unrepresented party may apply to the FFA for reimbursement of litigation expenses.

42 U.S.C. §1997e(d)(2) provides:

> Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney fees awarded against the defendant. If the award of attorney fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

The Federal Rules of Evidence Rule 702, Testimony by Expert Witness, provides in part:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on scientific facts or data;...

The Federal Rules of Evidence, Rule 706, Court Appointed Expert witnesses, provides in part:

> (a) On a party's motion, or on its own, the court may order the parties to show cause why expert witnesses should not be appointed...
> (c) The expert is entitled to reasonable compensation, as set forth by the court. The compensation is payable as follows:

(2) In any other civil case, by the parties in the proportion and at the time the court directs – and the compensation is then charged like other costs.

The Federal Rules of Civil Procedure, Rule 26, provides in part:

An expert witness "...report must provide:"
(i) A complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them; ...

The Federal Rules of Evidence, Rule 201, provides in part:

(b) The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) The court: (1) May take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

STATEMENT OF THE CASE

This complaint arises pursuant to 42 U.S.C. §1983 alleging that the Colorado Department of Corrections ("CDOC") developed and promulgated a series of unconstitutional hepatitis c virus ("HCV") treatment policies which violated the Eighth Amendment. The complaint alleges that the CDOC intentionally delayed necessary HCV treatment to its inmates by basing treatment eligibility solely on the impact the virus was having on an infected person's liver, thereby showing deliberate indifference to inmates who were exhibiting "extrahepatic" manifestations of the virus, such as renal disease and autoimmunity. The original complaint sought injunctive treatment for Mr. McCleland's HCV and damages for the development of Mr. McCleland's chronic kidney disease ("CKD") and autoimmunity disorder caused by the delay in treating the virus. The complaint passed the initial screening requirements of the PLRA and largely survived two motions to dismiss.

Mr. McCleland's family physician recommended that he undergo treatment for his HCV, and working with a gastroenterologist, Mr. McCleland was about to undergo treatment just prior to his arrest. Upon his incarceration in 2011,

Mr. McCleland notified CDOC medical personnel of the treatment recommendation and requested treatment from the CDOC. Mr. McCleland was informed that, due to the HCV treatment policies of the CDOC, he was not eligible for HCV treatment. However, a 2017 lawsuit brought by the ACLU (Aarogon v. Raemisch, D.Colo. No. 1:17-cv-01744) changed the CDOC's HCV treatment policies and Mr. McCleland received treatment in September, 2018.

The two motions to dismiss limited Mr. McCleland's complaint to the CDOC's HCV treatment policies developed within two years of the filing of the complaint. (i.e. the 2015, 2016, and 2017 policies) Mr. McCleland's complaint alleged that, at least as early as 2010, the medical community had established that the HCV causes irreversible harm to an infected person's kidneys, and that, as early as 2015, the standard of care in the medical community called for treatment of patients who exhibited signs of renal dysfunction. The defendants admitted that Mr. McCleland's blood work, as early as 2014, showed that he was suffering from CKD stage 3a.

Early in the lawsuit and as the case proceeded through discovery, Mr. McCleland filed three motions for appointment of counsel, each emphasizing the need for expert medical testimony. (A.4) However, the Magistrate Judge denied the motions because she did not find the case to be complex. After three rulings denying counsel, Mr. McCleland moved for an expert witness under Fed.R.Evid. 706 The Magistrate Judge denied the Rule 706 motion, concluding that, because of MR. McCleland's in forma pauperis ("IFP") status, there was no mechanism under rule 706 or elsewhere for paying an experts fees on Mr. McCleland' behalf. (A.5) Mr. McCleland filed a fourth motion for appointment of counsel, pointing out that the Defendants were currently preparing their expert disclosures and that he would need expert testimony to counter what the defendants would likely assert. The fourth motion was denied because the

Magistrate Judge found no new circumstances that would merit the appointment of counsel. As such, the Magistrate Judge granted summary judgment to all defendants for Mr. McCleland's failure to provide expert testimony. (A.15) The appellate court conflates Mr. McCleland's request for counsel with his request for an expert witness, and affirmed the denial of appointment of counsel. (A.14)

In his complaint, Mr. McCleland cited several medical sources including the medical treatise, 2016 Current Medical Diagnosis & Treatment, which is used by physicians in clinical practice. The treatise explains the multiple pathways in which the HCV has been proven to cause renal damage, and cites the 2012, 2013, and 2014 medical research that establishes their conclusion. However, at summary judgment, Defendant Tiona, in her expert report, testified that renal damage from HCV at the time she developed her HCV policies (2015-17) was merely a postulate in the medical community, and therefore the policies for HCV treatment she developed for CDOC did not need to address HCV-associated renal damage. Relying almost exclusively on Defendant Tiona's expert report, the Magistrate Judge resolved factual issues that would have been proper for trial.

Mr. McCleland argued that Defendant Tiona's expert report was flawed because she failed to support her opinion with facts and data, and that it was merely conjecture on her part. The appellate court refused to address Mr. McCleland's allegation that Defendant Tiona's report was faulty, concluding that the faulty report was besides the point because Mr. McCleland bears the burden of proof at summary judgment. (A.8) The standard of care for HCV has never been established in this case, in part, because Defendant Tion's expert report does not cite any medical research or organizations which publish or

explain the proper standard, and partly because the court refused to take judicial notice of the medical documentation and treatises Mr. McCleland provided.

In his laymans attempt at establishing the standard of care for HCV and meet his burden of proof at summary judgment, Mr. McCleland submitted the professionally developed and published guidelines from the American Association for the Study of Liver disease, and the Infectious Diseases Society of America, together the "AASLD/IDSA" guidelines. The Magistrate refused to take judicial notice of the guidelines or any of the medical documents because Mr. McCleland offered no expert competent to interpret them, the district court ruled the sources to be inadmissible hearsay that needed expert interpretation, and the appellate found that they did not have to address the assertion that the lower courts should have taken judicial notice. (A.9, n.9)

In his discovery attempts, Mr. McCleland was granted leave to depose the Defendants but was told by Defendants counsel that several defendants had moved out of state or were otherwise unavailable to go to the Buena Vista Correctional Complex, where Mr. McCleland was confined, for depositions. Mr. McCleland was granted leave to take written depositions but was unable to do so in the time frame provided for by Fed.R.Civ.P. 31, and pursuant to orders from the Magistrate no extensions of time were to be granted.

REASONS FOR GRANTING THE WRIT

A. Question 1 - The current ruling conflicts with other courts of appeal on the same important issue and undermines 28 U.S.C. §1915(e)(1)

1. Precedent for the Appointment of Counsel

Upon establishing a party's in forma pauperis status pursuant to 28 U.S.C. §1915, a party may request the appointment of counsel pursuant to 28 U.S.C. §1915(e)(1) which states: "The court may request an attorney to represent

any person unable to afford counsel." Although, "an individual's eligibility for the appointment of an attorney under §1915(e)(1), standing alone, does not entitle him or her to that appointment." Rumbin v. Duncan, 856 F.Supp. 2d 422, 422; dismissed 2016 U.S. Dist. Lexis 18897 (D.Conn. Feb. 16, 2016)"The appointment of counsel should be given serious consideration if the (indigent) plaintiff has not alleged a frivolous or malicious claim and the pleadings state a prima facie case." Tabron v. Grace, 6 F.3d 147, 155 (3d Cir 1993), citing Rayes v. Johnson, 969 F.2d 700, 703 (8th Cir 1992) cert. denied 121 L.Ed. 2d 584 (1992) "In the exercise of its discretion to seek volunteer counsel in other civil cases, the court should consider: (1) the merits of the claim; (2) the nature of the factual issues raised by the claim; (3) the ability to present the claims; and (4) the complexity of the issues raised by the claim." Sandle v. Principi, 201 Fed.Appx. 579, 582 (10th Cir 2006) citing Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir 1995)

The Supreme Court Ruling Beard v. Banks, 548 U.S. 521, 536 (2006) supports the need for counsel in taking deposition by stating: "...it's not inconceivable that a Plaintiff's counsel, through rigorous questioning of officials by means of depositions, could demonstrate genuine issues of fact for trial." See also Montgomery v. Pintchak, 394 F.3d 492, 502 (3d Cir 2002); Hendricks v. Coughlin, 114 F.3d 390, 394 (2d Cir 1997) Precedent set across numerous circuits has found that the need for an expert witness fulfills the criteria worthy for the appointment of counsel. See Cato v. Anderson, 2007 U.S. Dist. Lexis 83469 *9 (D.Utah 2007), citing Rucks, supra (The district court appointed pro bono counsel for party who needed "additional discovery and expert witness testimony.") See also Greeno v. Daley, 414 F.3d 645, 658 (7th Cir 2005)(In reversing refusal to appoint counsel, appellate court stated that the district court was wrong in saying the case was "factually simple and legally straight

forward", since it involved medical records and inmate's complaints and requests over a period of two years, and requires an assessment of the adequacy of treatment, which will likely require expert testimony.); see Moore v. Mabus, 976 F.2d 268, 272 (5th Cir 1992); Steele v. Shah, 87 F.3d 1266, 1271 (11th Cir 1996); and Parham v. Johnson, 126 F.3d 454, 460 (3d Cir 1997)("We recognize that it still may be difficult for appointed counsel to obtain and afford an expert; yet, we believe that appointed counsel will have a much better opportunity to obtain an expert than would an indigent prisoner. Consequently, this factor tips towards appointing counsel.")

2. Precedent for denying appointment of expert witnesses

In contrast to a party's IFP status establishing eligibility for pro bono counsel, the courts have deemed IFP status as disqualifying for purposes of appointing an expert witness pursuant to Fed.R.Evid. 706. Under Rule 706, the court must compensate an appointed expert by apportioning the expert's fees to the parties. However, since "the district court permitted Mr. McCleland to bring his suit in forma pauperis, () this rule would effectively require the district court to apportion the entire expert's fees to the defendants." (A.11) Therefore, the appellate court applied the longstanding consensus that the court itself may not pay an in forma pauperis Plaintiff's witness fees. The court cited Malik v. Lavalley, 994 F.2d 90, 90 (2d Cir 1993)(per curiam)(citing and agreeing with decisions on the issue from the First, Third, Sixth, Seventh, Eighth and Ninth circuits)(A.11) The Tenth circuit here has determined that "Rule 706 was not designed to fill in the gaps for a party who cannot find or afford an expert." (A.12)

3. The importance of the question raised

The Tenth Circuit has created a conflict worthy of resolution by this court when it applied the long standing consensus that the court itself may not

pay an in forma pauperis Plaintiff's witness fees, to the long held belief that the need for an expert witness is a reason to appoint pro bono counsel. See A.14-15: "As we have noted in the Rule 706 context, the district court does not have a duty to make up for a party's inability to find an expert. In this light, we find it was not 'fundamentally unfair()', to refuse to appoint counsel merely to provide a better chance at finding an expert." (Citation omitted) The ruling here does not consider that the rationale behind the two beliefs conflict with one another.

Guidance is needed from this Court as to whether the need for an expert witness by an indigent party is still a reason for the lower courts to appoint counsel. This matter is of huge importance to indigent parties whose need for pro bono representation is based on the need for an expert witness.

B. Question 2 – The current ruling conflicts with other courts of appeal and the opinions of the Supreme Court.

1. The lower courts refused to address faulty expert witness reports. This question arises because the appellate court has found that "although McCleland argues that defendant's expert's reports were flawed and therefore unworthy of being accepted as expert testimony, that is besides the point because he bears the burden of proof." (A.8) This application of the Supreme Court ruling Celotex Corp. v. Catrett, 477 U.S. 317,322 (1986) has allowed the conjecture of Defendant Tion's expert report to resolve factual disputes that would have otherwise been suitable for a jury. This has created a paradox where, had the Defendant's expert's reports been held to the standards of Fed.R.Civ.P. 26(a)(2)(B) and Fed.R.Evid. 702(b), they would have established the proof Mr. McCleland needed to satisfy Celotex.

The Defendant's expert's reports were used to establish the undisputed

fact that the community standard of care for HCV in 2015-17 did not take into account renal disease as a reason to treat a person's HCV infection. The report falsely states that HCV associated renal disease was merely a postulate in the medical community, rather than a proven fact that the standard of care was based upon, and that Mr. McCleland would not be able to prove that delayed treatment of HCV can cause irreversible renal damage. Had Defendant Tion's reports established the standard of care for HCV or that the community standard of care was developed and published by the AASLD/IDSA, the report would have inadvertantly provided Mr. McCleland with the proof he needed to satisfy Celotex.

Several courts have found that faulty expert reports cannot support summary judgment. "The opinion of an expert, no matter how qualified, cannot simply be based on her say so... the gatekeeping function of the district court requires more than merely taking the expert's word for it." U.S. v. Zolot, 968 F.Supp. 2d 411, 429-430 (D.Mass. 2013) See also Fitzgerald v. C.C.A., 403 F.3d 1134, 1142-43 (10th Cir 2005)(an expert affidavit stating that the failure to treat Plaintiff's medical condition was appropriate, without explaining the basis for the conclusion, could not survive summary judgment even with no contrary evidence.)

2. The importance of the question raised.

The current ruling by the Tenth Circuit will allow parties to disregard Fed.R.Civ.P. 26(a)(2)(B) and Fed.R.Evid. 702(b), and establish factual findings on conjecture and misrepresentation. Guidance is needed from this court on how to apply the Celotex ruling to cases in which an alleged faulty expert report has been allowed to establish facts which were then used to justify summary judgment. Every case involving expert testimony is affected by the enforcement of these rules and, in certain cases, enforcement of these rules would foreclose summary judgment.

C. Question 3 – The current ruling conflicts with other courts of appeal and is antithetical to the purposes of Fed.R.Evid. 201

1. Judicial notice of facts

The notes of the advisory committee on Fed.R.Evid. 201 (lexis) provide:"when judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge." (Citing McKormick 712) "Well known medical facts are the types of matters which judicial notice may be taken." Vasquez v. Davis, 266 F.Supp. 3d 1189, 1208 (D.Colo. 2016) Aff'd in part, vacated in part, 882 F.3d 1270 (10th Cir 2018) citing Hines on behalf of Sevier v. Sec'y of Dep't of HHS, 940 F.2d 1518, 1526 (Fed. Cir 1991) Sources that courts have taken judicial notice from run the gamut and include: "standard medical treatises" Brannon v. Derwinski, 1 Vet.App. 314, 316 (1991); "The Amazon web page for Dubio's Lupus Erthematosis by Dr. Daniel Wallace et at." Wilbe v. Aetna Life Ins. Co., 375 F.Supp. 2d 956, 965-66 (C.D.Cal. 2005); "The MERCK Manual of Diagnosis and Therapy" Harris v. H & W Contr. Co., 102 F.3d 516, 522 (11th Cir 1996); "Exhibit offered by claimant as to fibromyalgia () bore the imprimatur of both National Institute of Arthritis and Muskoskelatal and skin Disease and National Institute of Health's Dep't of HHS... facts cited therin were not subject to reasonable dispute because sources could not be reasonably questioned." Garmon v. Liberty Life Assur. Co., 385 F.Supp. 2d 1184 (N.D.Ala. 2004)

Here, Mr. McCleland attempted to rebut Defendant Tiona's expert report by submitting scientific literature from the AASLD/IDSA and providing quotes from Current Medical Diagnosis & Treatment, 2016, and various other medical texts. However, the Magistrate Judge ruled that Mr. McCleland"...fails to offer any witness competent to interpret... the scientific literature..." (C.5, n. 3) The district court Judge ruled that the sources were inadmissible

hearsay that needed expert interpretation (Doc 226, at 10, citing Mack v. Friedmann, 2008 WL 11439337, at*10 n.2 (N.D.Cal. 2008), and the appellate court found that "...McCleland asserts, without elaboration, that his medical literature was judicially noticable... so we do not address this contention..." (A.9, n.1)

2. The importance of the question raised

The current ruling conflicts with rulings from various other districts and circuits which have found no hearsay in the types of materials Mr. McCleland has submitted here. This ruling will require parties utilizing Fed.R.Evid. 201 to submit their scientific literature through an expert witness. Rule 201 does not require an expert and to require one would be antithetical to the intent and purpose of the rule. As the Advisory Committee states, under rule 201, "this process is dispensed with as unecessary."

Guidance is needed from the Court to establish the consistent application of Rule 201, and to assure that its intent is upheld.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully Submitted,

Robert JW McCleland #155317
BVMC
P.O. Box 2005
Buena Vista, CO 81211

12/12/21

Appendix

A