22-5444

In the

Supreme Court of the United States

August Term, 2022

Robert JW McCleland

Petitioner,

v.

Rick Raemisch et al.,

Respondents.

Petition for a writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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QUESTIONS PRESENTED

1. Does requiring an expert witness to present medical information, pursuant to Fed.R.Evid. Rule 201 Judicial Notice, create an undue burden on the courts and unfairly prejudice pro se, indigent litigants?

2. May a lower court deny a request for Judicial Notice pursuant to Fed.R.Evid. Rule 201 (b) by claiming that the Defendants would be precluded from offering contrary evidence, even when the request was made to rebut evidence given by the defendants in support of their Summary Judgment Motion?

3. When a lower court requires a pro se, indigent litigant to employ a medical expert to submit medical information pursuant to Fed.R.Evid. Rule 201, does the court abuse its discretion when it denies the appointment of an expert pursuant to Fed.R.Evid. Rule 706 to meet the requirement?

4. If the defendants in a lawsuit provide false expert declarations to the court in order to mislead the court about the medical standard of care for the hepatitis c virus, does the misrepresentation meet the requirements of a Fed.R.Civ.P. Rule 60(b)(3) Motion?

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PETITION FOR A WRIT OF CERTIORARI

Robert JW McCleland (hereinafter "Petitioner") petitions for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit which judgment affirmed the denial by the district court of his Fed.R.Civ.P. Rule 60(b) Motion (hereinafter "60(b) motion") and his requests for Judicial Notice of facts pursuant to Fed.R.Evid. Rule 201 and an exper witness pursuant to Fed.R.Evid. Rule 706.

OPINIONS BELOW

The opinions of the Court of Appeals are attached as Appendix 1 ("App.1").

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 2022 (App.1). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This Petition is timely filed pursuant to 28 U.S.C. 2101(c).

COURT RULES INVOLVED

The court rules involved in this Petition are provided in pertinent part below.

Fed.R.Civ.P Rule 60(b)(3):

> "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:...(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."

Fed.R.Evid. Rule 201(b):

> "the court may judicially notice a fact that is not subject to reasonable dispute because it: (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned... (c) The court: (2) must take judicial notice if a party requests it and the court is supplied with the necessary information... (d) the court may take judicial notice at any stage of the proceeding..."

Fed.R.Evid. Rule 706(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 and may ask the parties to submit nominations..."

STATEMENT OF CASE

This is a medical deliberate indifference lawsuit brought by an indigent pro se prisoner in the Colorado Department of Corrections ("CDOC"). This case was dismissed at summary judgment for Petitioner's failure to provide evidence that the CDOC's delay in providing him hepatitis c virus ("HCV") treatment caused his chronic kidney disease ("CKD"). The details of this case can be found in Appendix 1.

The defendants filed a motion for summary judgment relying on expert declarations that, at best, there is an association between HCV and CKD but that no studies have establsished causation. The experts acknowledged that Petitioner has been diagnosed with CKD of unknown cause. The Petitioner responded to the summary judgment motion by providing the court with citations to medical literature indicating a causal link between HCV and CKD. He also submitted two expert declarations that had been filed in other lawsuits. The district court declined to consider Petitioner's medical literature, citing

that he offered no expert to interpret it and he lacked the expertise to do so himself. Therefore, the lower courts have held that the defendant's evidence was undisputed and granted summary judgment.

During the pendency of this case, Petitioner sought and received leave to depose the defendants. However, the Petitioner was unable to do so because he is incarcerated and the defendants had either moved out of state or were unable to travel to the correctional facility where the Petitioner is housed. Petitioner attempted written depositions but the timeframe for discovery would not be extended. Petitioner also filed four motions for the appointment of counsel, citing the need for depositions and expert witnesses, and later filed his first motion for the appointment of an expert witness. Petitioner argued on appeal that the defendant's expert reports were faulty and, therefore, summary judgment was improper. The Appellate court refused to address the issue of the faulty expert reports by reasoning that, since it was Petitioner's duty to provide evidence supporting his claim, the issue was moot. Petitioner also alleged that the district court erred by refusing to appoint him counsel or an expert witness. The lower courts ruled that Petitioner's case was not complex enough for the appointment of counsel or experts and upheld the grant of summary judgment: "The district court did not abuse its discretion when it refused to appoint counsel or an expert, in turn, it properly granted summary judgment to defendants because McCleland lacked evidence necessary to prove the causation element of his case." See McCleland I, 2021 U.S. App. Lexis 29490, 2021 WL 4469947, at*6.

Petitioner filed a motion in the district court asking for relief from its summary judgment order pursuant to Fed.R.CivP. 60(b)(2) and (b)(3). The defendants did not respond to the 60(b) motion for relief. In Petitioner's motion for relief, he requested that judicial notice be taken under Fed.R.Evid.

Rule 201(b) and provided the court with the proper medical information by quoting and citing the medical literature. Petitioner also made his second request for an expert witness under Fed.R.Evid. Rule 706 to help the court understand the medical information. The district court rejected his request for relief because it depended on the court taking judicial notice of various medical texts, which the court refused to do. The court also rejected his request for a medical expert as a renewed argument the court had already rejected.

Petitioner appealed the denial of his Rule 60(b) motion. On appeal Petitioner argued that the district court abused its discretion by refusing to take judicial notice of medical facts which directly disprove the defendant's expert declarations and which,in turn, prove that relief from summary judgment was proper based upon misrepresentation by the defendants. Petitioner alleged that the defendants intentionally mislead the court as to the mediacl community's common knowledge of the causal link between HCV and CKD, and to the community standard of care developed for HCV based upon HCV's effect on a patient's kidneys. Also on appeal, the Petitioner alleged that the district court abused its discretion by requiring him to employ an expert witness in order to submit medical information for judicial notice and then denying his request for the appointment of an independent expert to do so. The Tenth Circuit upheld the denial of Petitioner's 60(b) motion. (See App. 1)

REASONS FOR GRANTING THE PETITION

1. The Tenth Circuit's current ruling in Petitioner's case conflicts with prior rulings from this circuit and with rulings from other circuits. It has created an unnecessary burden for the lower courts and indigent, pro se litigants. The current ruling of Fed.R.Evid. Rule 201 by this court has mandated that, if an indigent, pro se party intends to request judicial notice

of medical facts, then the party must employ a medical expert to do so. This approach by the Tenth Circuit eliminates the judicial expedience that Rule 201 was designed to give the courts and places an undue burden on indigent, pro se litigants who either cannot afford an expert or cannot consult with an expert without an attorney. Clarification is needed from this Court as to whether or not this approach is in the interests of justice, and to guide the courts on the application of Rule 201.

2. The Tenth Circuit's current ruling on Fed.R.Evid. Rule 201 has opened the door for defendants in a civil lawsuit to put forth unreasonable factual disputes simply to prohibit the court from acknowledging a well known medical fact through judicial notice. Rule 201 needs to be available to indigent, pro se litigants and courts in order to refute unreasonable factual assertions and avoid unjust findings of fact fatal to a litigants case.

3. The Tenth Circuits current ruling on Fed.R.Evid. Rule 201 restricts the ability of any party of a civil lawsuit to utilize the rule to present contrary evidence in response to a motion for summary judgment.

4. The Tenth Circuit's ruling on Petitioner's Fed.R.Civ.P. Rule 60(b)(3) motion is contrary to other rulings from this circuit.

I. The Tenth Circuit's current ruling on Fed.R.Evid. Rule 201 conflicts with prior rulings made by the circuit and with rulings from other circuits.

a. Fed.R.Evid. Rule 201 does not require the use of medical experts to submit information for purposes of judicial notice.

The notes for U.S.C.S. Fed.R.Evid. 201 (Lexis, accessed 7/22/22) explain the thought process behind the development of the rule. The notes explain the typical procedures for the introduction of evidence which Rule 201 is designed to circumvent. "The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of

witnesses. If particular facts are outside of reasonable contraversy, this process is dispensed with as unnecessary. A high degree of indisputability is the prerequisite."

Contrary to what the defendants alleged in their expert reports in support of summary judgment, it is indisputable that there are, at least, twenty four years of peer reviewed medical research journals, college medical text books, and medical treatises for practicing physicians which conclude that untreated HCV infections can and do cause kidney dysfunction and diseases of the kidney. It is further indisputable that the American Association for the Study of Liver Disease and the Infectious Diseases Society of America ("AASLD/IDSA"), the two organizations that have set the standard of care for HCV in the United States, recognize kidney dysfunction/disease as an objectively serious reason to treat a patient's HCV infection. (See D'Amico, Renal Involvement In Hepatitis c Infection: Cryoglobulinemic Glomerulonephritis, Kidney International Vol. 54 (1998) PP. 650-671; M.Papakadis and S.McPhee, 2016 Medical Diagnosis & Treatment, PP 924-25, SS 6-8 and their associated medical studies: See also WWW.HCVguidelines.org for the AASLD/IDSA HCV guidelines)

The Tenth Circuit has created a new requirement in this ruling that medical literature may not be judicially noticed by the courts unless it is presented by an expert witness. (App. 1, at*8) This defeats the entire purpose of Rule 201. This ruling is inconsistent with rulings from other circuits and rulings from this Circuit. See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347 (5th Cir 1982)"As the Court itself concedes, rule 201 relates to medical facts not subject to reasonable dispute." See also Hines on behalf of Sevier v. Sec'y of Dep't of Health & Human Services, 940 F.2d 1518, 1526 (Fed. Cir 1991) "Well-known medical facts are the types of matters of which judicial notice may be taken..." Cf Vasquez v. Davis, 226 F.Supp. 3d 1189, 1208 (D.Colo. 2016)

"...the permanence of the scarring characterizing cirrhosis (and the resulting drop in liver function), is a question that 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed.R.Evid. Rule 201(b)(2)"; Fenner v. Suthers, 194 F.supp. 2d 1146 (10th cir 2002) "The court should take judicial notice of **any** fact 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' FedR.Evid. 201(b)"; Merideth v. Beech Aircraft Corp., 18 F.3d 890 (10th Cir 1994) "Judicial notice is when a judge recognizes the truth of certain facts, which from their nature are not properly the subject of testimony, or which are universally regarded as established by common knowledge. The recognition of certain facts by the judge is proper without proof because such facts are not subject to reasonable dispute."

Clarification is needed from This Court as to whether or not the Tenth Circuits new policy which requires medical experts for Rule 201 is proper.

b. Unreasonable factual disputes do not prohibit the use of Fed.R.Evid. Rule 201.

The defendants in Petitioner's case were able obtain summary judgment by the use of expert declarations. The defendants in this case moved for summary and submitted expert declarations which alleged that the absence of common knowledge in the medical community. The declarations were made to allege the absence of the required causation component of Petitioner's deliberate indifference claim. In other words, the defendants claimed that Petitioner's CKD/V could not have been cause by his HCV since no medical studies have proven that that can happen. The defendants simply claimed that something didn't exist; specifically, that the CDOC's medical policies, developed by defendant Tiona, did not need to consider treating a prisoner's HCV infection when he showed signs of CKD, because "there was, at best, an association between HCV and non-

liver disease, (but) no studies had established causation." (App. 1 at*3) A minor inquiry into this subject would have revealed that this assertion simply was not true.

On appeal, the Tenth Circuit found that courts could not use judicial notice to investigate this assertion, or Petitioner's medical information, because "the fact's Mr. McCleland wishes the court to take judicial notice of are very much in dispute." (App. 1 at*7) However, Petitioner here argues that the fact that HCV can cause CKD is common knowledge in the medical community, the consensus has been established for over twenty four years, and it can be easily and readily determined from sources whose accuracy can not be reasonably questioned."

The Petitioner's request for judicial notice and the submission of the medical information were unopposed by the defendants. (App. 1 at*5) Courts have found that "when parties are in agreement that the court may take judicial notice of certain matters... the court need not make as searching an inquiry as when notice or admissibility is disputed." Korematsu v. U.S., 584 F.Supp. 1406, 16 Fed.R.Evid. Serv. (CBC) 1231, 1984 U.S. Dist, Lexis 17410 (N.D.Cal. 1984) The fact that the defendants did not oppose the Petitioner's request for judicial notice, and the facts that the Petitioner wishes the court to take notice of are easily verifiable, means that these facts are not the type that are subject to reasonable dispute as to their existence or their applicability.

c. The Tenth Circuit's current ruling on Fed.R.Evid. Rule 201 prohibits the ability of any party of a civil lawsuit to utilize the rule to present contrary evidence in response to a motion for summary judgment.

Petitioner's request for judicial notice was made in **response** to the defendant's expert declarations made for summary judgment. However, the Tenth Circuit has ruled that it cannot resolve issues of fact with judicial notice, because:

"(t)ak(ing) judicial notice of a facts whose application is in dispute... raises doubt as to whether the parties received a fair hearing." citing U.S. V. Boyd, 289 F.3d 1254,1258 (10th Cir 2002) However, the part of the Boyd rationale that justified the ruling, and the part that is pertinent to the Petitioner's case, was omitted by the court here. The Boyd ruling on Rule 201 in its entirety reads that "in applying FRE 201 we are mindful that 'if a court takes judicial notice of a fact whose application is in dispute, the court removes the ()weapons (of rebuttal evidence, cross examination, and argument) from the parties and raises doubt as to whether the parties received a fair hearing!" citing General Elec. Capital Corp., v. Lease Resolution Corp., 128 F.3d 1074, 1083 (7th Cir 1997) "The effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence, and in effect, directing a verdict against him as to the fact noticed."

The Tenth Circuit cannot apply Boyd to Petitioner's motion for judicial notice because doing so creates the prejudice for Petitioner that the Boyd and General opinions were trying to eliminate. The Tenth Circuit used Boyd to prohibit the Petitioner from submitting rebuttal evidence to the expert declarations the defendants used in their motion for summary judgment. In doing so, the Petitioner's case was dismissed, and his Fed.R.Civ.P. Rule 60 (b)(3) motion was denied.

d. Fabrication of evidence by an expert witness justifies the granting of relief under Fed.R.Civ.P. Rule 60(b)(3)

Fed.R.Civ.P. Rule 60(b) sets out a number of remedies available to parties who have had rulings made against them. Rule 60(b)(3) allows a court to relieve a party from a final judgment based on "fraud... misrepresentation, or misconduct by an opposing party." "(T)he party relying on Rule (60(b)(3) must, by adequate proof, clearly substantiate the claim of... misrepresentation...

(by) clear and convincing proof..." Campbell v. Merideth Corp., 345 Fed.Appx. 323,326 (10th Cir 2009)

In the Petitioner's case, defendant Tiona was accepted as an expert witness to make declarations about the policies she developed and promulgated for the CDOC concerning the medical treatment for prisoners with chronic hepatitis c infections. As part of her qualifications, defendant Tiona listed numerous other lawsuits she has participated in as an expert witness and her testimony to the state legislature concerning prison medical policies. Her credentials assured her knowledge of requirements of expert reports and declarations.

In Petitioner's Rule 60(b)(3) motion, he alleged that defendant Tiona provided false expert reports and declarations. He alleged that her declaration was mere conjecture that purposely misrepresented the common knowledge of the medical community by asserting that no studies have established causation between HCV infections and kidney diseases. Defendant Tiona further mislead the court by alleging that, because the medical community had not established causation between HCV and kidney disease, the community standard of care for HCV did not require physicians to treat a patient's HCV even when it was causing a patient's kidney disease. Furthermore, Defendant Tiona intentionally omitted any reference to the AASLD/IDSA guidelines or references to any other organization listing the standard of care for HCV from her reports.

A cursory glance at the AASLD/IDSA guidelines in place during 2016 would have shown that defendant Tiona's expert report was outrageous. The guidelines provided by Petitioner, but refused to be noticed by the court, clearly lists HCV-associated renal disease as a top reason to treat a patient's HCV infection. Defendant Tiona clearly took advantage of her status as an expert witness to mislead the court and support her motion for summary judgment with a fraudulant expert report.

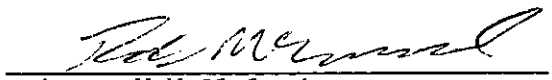
There is ample caselaw from the Supreme Court (See Daubert V. Merrell Dow Pharms., 509 U.S. 579, 589-95 (1993)) and from the Tenth Circuit which have established the requirements for expert reports, declarations, or affidavits. "We have long held that 'conclusory allegations without specific supporting facts have no probative value.'" Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134,1143 (10th Cir 2005) (denying summary judgment to defendants who submitted insufficient expert reports), citing Nichols v. Hurley; 921 F.2d 1101, 1113 (10th Cir 1990). Therefore, an attorney advising a defendant who is also testifying and providing expert declarations, has a duty to ensure that her client provide truthful, accurate and compliant reports to the court, because "summary judgment cannot rest on purely conclusory statements either in pleading or affidavit form." Morgan v. Willingham, 424 F.2d 200, 201 (10th Cir 1970) However, the defendants, here, chose to misrepresent several key facts to the court with their sworn, unsubstantiated, expert declarations.

The Tenth Circuit has found that "the fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court." Zurich N. Am. v. Matrix Serv., 426 F.3d 1281, 1291 (10th Cir 2005) citing 11 Wright & Miller, Federal Practice and Procedure, §§ 2860, 1870 (2d Ed. 2005) While this rationale applies to a scenario "in which an attorney is implicated", the same standard should apply to an expert witness who fabricates an expert report with the intent to mislead the court into granting them summary judgment. Petitioner's Rule 60 (b) motion should have been granted on these grounds and the case remanded back to the district court with instructions to appoint the Petitioner counsel and/or an expert witness.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully Submitted,



Robert JW McCleland
8/15/22

CERTIFICATE OF MAILING

I, Robert JW McCleland, certify that on 8/15/22 I placed this copy of my Petition for a writ of certiorari in the outgoing legal mail of the BVMC legal mail system.

Appendix 1