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En banc ruling allows inmate's suit to proceed

7th Circuit decision permits challenge to medical care under cruel and unusual punishment charge

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An inmate may proceed with his lawsuit alleging prison doctors provided improper care, charging their actions amounted to cruel and unusual punishment.

In a rare en banc ruling, the 7th U.S. Court of Appeals split 6-3 and reversed the district court's summary judgment and remanded the case.

Lawyers for the defendant doctors say they are considering an appeal to the U.S. Supreme Court.

Tyrone Petties, who has been imprisoned at Stateville Correctional Center in Crest Hill since 1998, alleged his doctors, Imhotep Carter and Saleh Obaisi, were deliberately indifferent to his serious medical condition.

Petties ruptured his left Achilles tendon while climbing the stairs in his cell house in January 2012. As his doctors later testified, the ankle must be immobilized so the tendon can rejoin and heal. Walking with a ruptured Achilles tendon will exacerbate the injury by increasing the gap between the two torn tendon pieces.

Carter, then an employee of Wexford Health Sources Inc. and the prison's medical director, testified that Wexford's policy for Achilles tendon ruptures was to give the patient a splint to immobilize the foot, crutches and antibiotics if there were lacerations and to send the patient to a specialist.

Carter's notes indicate he thought Petties' Achilles tendon was ruptured, but he did not follow all of Wexford's protocol. He did not

provide Petties with a splint and he delayed Petties' visit to a specialist for almost six weeks.

Petties did receive crutches, ice, Vicodin and permission to have meals delivered to his bed so he would not have to walk to the cafeteria.

The inmate reported back to the infirmary about a month later, saying the pain was "killing him." Again, Carter renewed the pain medication and "lay-in" meals but did not give him a splint.

In March 2012, Petties had an MRI taken that showed a 4.7-centimeter gap between the torn ends of the tendon. Petties testified he was in constant and severe pain and had trouble sleeping.

A week later, Petties met with an orthopedic specialist, Dr. Anuj Puppala, who said the lack of immobilization could be creating that painful gap. Puppala gave Petties an orthopedic boot to prevent further gapping and alleviate pain, said surgery may be necessary and referred Petties to an ankle specialist.

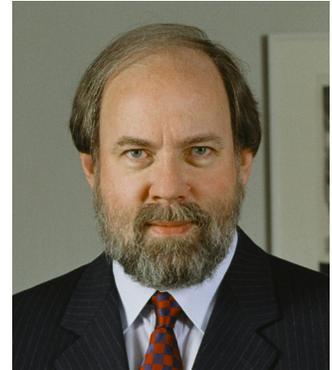
Petties alleges Carter said he would not order surgery because it would be too expensive.

In July 2012, about six months after the rupture and about four months after the orthopedic specialist made the referral, Petties saw an ankle specialist who ordered another MRI, physical therapy, gentle stretching exercises and follow-up treatment.

Dr. Saleh Obaisi replaced Carter as Stateville's medical director in August 2012. Obaisi approved the MRI but did not authorize physical therapy. Petties alleges Obaisi also said surgery was too expensive.



Ann Claire Williams



Frank H. Easterbrook

Petties had his second MRI in September 2012, about eight months after the rupture, which indicated some healing.

He filed his lawsuit against Carter and Obaisi in November 2012 under the Civil Rights Act, 42 U.S.C. Section 1983.

Petties returned for medical care and complained of pain, soreness and stiffness as late as March 2014, about two years and two months after the rupture.

The majority ruling, written by Judge Ann Claire Williams, reversed U.S. District Judge George M. Marovich's summary judgment in favor of Carter and Obaisi.

Williams cited the U.S. Supreme Court's 1976 ruling *Estelle v. Gamble*, which held the Eighth Amendment protects prisoners against a lack of medical care that "may result in pain and suffering which no one suggests would serve any penological purpose."

And she referenced *Farmer v. Brennan*, in which the Supreme Court found a plaintiff must prove an official knew of and disregarded a substantial risk of harm.

Officials, according to *Farmer*, can avoid liability by proving they weren't aware of risk to the person's health or safety, Williams wrote.

Citing the 1996 7th Circuit ruling in *Vance v. Peters*, 97 F.3d 987, 992, the panel found a plaintiff needs not show the doctor intended harm or believed harm would occur — rather, they merely need to show the doctor acted with deliberate indifference.

Williams was joined in the majority by Chief Judge Diane P. Wood and Judges Richard A. Posner, Ilana Diamond Rovner, Diane S. Sykes and David F. Hamilton.

"We're pleased with the result, and my client is looking forward to

advancing his claims," said Rami N. Fakhouri, an associate at Goldman, Ismail, Tomaselli, Brennan & Baum LLP who represented Petties.

The defense is considering appealing to the Supreme Court, according to Robert L. Larsen, a partner at Cunningham, Meyer & Vedrine P.C. who represented the Wexford doctors along with fellow Cunningham, Meyer & Vedrine partner Michael R. Slovis.

"While we respect their decision, we believe that it is in conflict with the existing law in other areas that we think should be the controlling law," said Larsen.

Larsen said the dissenting opinion points to different interpretations of the same law.

In the dissent, Judge Frank H. Easterbrook wrote that prisoners are not entitled to adequate treatment and that pain relief without an effort to cure the medical problem is not unconstitutional.

He also cited *Estelle v. Gamble*, but interpreted the case to conclude that a prisoner's constitutional rights have only been violated if deliberate indifference leads the staff to do nothing — as opposed to offering painkillers.

Easterbrook was joined in the dissent by Joel M. Flaum and Michael S. Kanne.

In a footnote, the majority opinion said that the dissent's ruling would render any treatment decision a doctor makes immune from scrutiny.

Petties has filed three other lawsuits alleging cruel and unusual punishment against individuals with Wexford and at the prison where he has so far represented himself, according to his lawyers.

The case is *Tyrone Petties v. Imhotep Carter, et al.*, No. 14-2674. edonovan@lbpc.com