REASONABLE RESPONSE: THE ACHILLES’ HEEL OF THE SEVENTH CIRCUIT’S “DELIBERATE INDIFFERENCE” ANALYSIS

MEAGHAN A. SWEENEY*


INTRODUCTION

United States penitentiaries housed 2,224,400 prisoners in 2014.¹ This prison population suffers from higher rates of mental illness, chronic medical conditions, and infectious diseases compared with the general United States population² due to factors such as substance and alcohol abuse, poverty, and poor preventative healthcare. More than eight in ten prisoners receive medical care after becoming incarcerated.³ The most recent data shows prison health care spending

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totaling $7.7 billion in 2011, a reduction from previous years.\(^4\) Medically-related costs for guarding and transporting one inmate can exceed $2000 per day.\(^5\) The ever-growing prison population and increased risk of health complications has renewed national concern for the quality of prison healthcare.\(^6\)

A constitutional violation may arise under the Eighth Amendment if a prisoner’s medical treatment, or lack thereof, is found to constitute “cruel and unusual punishment.”\(^7\) However, claims of deficient medical care do not always constitute Eighth Amendment claims.\(^8\) Negligence in diagnosis or medical treatment, normally addressed in medical malpractice actions, does not become a constitutional violation simply because the victim is a prisoner.\(^9\)

The Supreme Court of the United States, in *Estelle v. Gamble*, developed the “deliberate indifference” standard to analyze whether medical treatment of a prisoner rises to the level of an Eighth Amendment violation.\(^10\) To establish deliberate indifference, a court must first find that the plaintiff suffered from an objectively serious medical condition.\(^11\) Then, the court will analyze whether the

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\(^5\) *Id.*


\(^8\) *Estelle*, 429 U.S. at 97.

\(^9\) *Id.*

\(^10\) *Id.*

defendant knew of and disregarded a substantial risk to the prisoner’s health. To show this, the defendant must: 1) have been aware of facts from which she could infer the existence of a substantial risk of serious harm and 2) have actually drawn that inference. Even objective recklessness—failing to act in the face of an unjustifiably high risk that is so obvious that it should be known—is insufficient to support an Eighth Amendment violation.

Circuits are split on exactly what physician behavior constitutes deliberate indifference. In Petties v. Carter, Tyrone Petties, a prisoner, argued that Dr. Imhotep Carter was deliberately indifferent when he failed to give Petties a foot splint and promptly arrange an appointment with a specialist. In not prescribing a splint, Petties argued, Dr. Carter exacerbated the injury. Dr. Carter, on the other hand, argued that although he was aware that the protocol for treating a ruptured Achilles tendon recommended use of a splint, he used his professional judgment in deciding to immobilize Petties’ foot through use of crutches while also approving lay-in meals and a lower bunk assignment. In a 6-3 decision, following a rehearing en banc, the United States Court of Appeals for the Seventh Circuit reversed the district court’s grant of summary judgment to the defendants. The majority reasoned that even if Dr. Carter denied knowing that he was exposing Petties to a substantial risk of serious harm, there was sufficient evidence from which a reasonable jury could infer that Dr. Carter knew he was providing deficient treatment and, consequently, summary judgment was not appropriate. The dissent argued that a decision to provide palliative medical treatment suffices under Eighth Amendment standards even if the treatment was not ideal and,

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12 Id.
13 Id. at 837.
15 Estelle, 429 U.S. at n. 14.
16 Lay-in meals enabled Petties to eat his meals in his cell, as opposed to risking further injury by walking to and from the cafeteria. Petties, 836 F.3d at 726.
17 Id.
therefore, Petties should pursue any claim of deficient medical treatment under state medical malpractice law. 18

This article will analyze the soundness of the Seventh Circuit’s decision in light of precedent and public policy. Part I contains the legal standards applicable to claims of insufficient medical care brought under 42 U.S.C. §1983 and the legal differences between these claims and state-law medical malpractice claims. Part II discusses the factual and procedural background of Petties v. Carter. Part III argues that physicians who show a reasonable response to risk should be shielded from liability at the summary judgment stage. It further argues that public policy reasons support respect for case-specific decisions by medical professionals, and concludes that standard claims of deficient medical care should be addressed under state medical malpractice law.

BACKGROUND AND STANDARDS

The Supreme Court has found that the government has a duty to provide medical care for those it is punishing through incarceration. 19 42 U.S.C. § 1983 provides a cause of action for prisoners allegedly subjected to cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment. 20

A. 42 U.S.C. § 1983 and Medical Malpractice

A prisoner’s claim of inadequate medical care does not always constitute an Eighth Amendment claim. 21 Medical malpractice claims alleging negligence in diagnosis or treatment of a medical condition are not transformed into Eighth Amendment claims.

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18 Petties, 836 F.3d at 734 (Easterbrook, J., dissenting).
19 Estelle, 429 U.S. at 103.
21 Estelle, 429 U.S. at 105.
Amendment claims simply because the victim is a prisoner.\textsuperscript{22} Courts agree that mere allegations of malpractice do not support an Eighth Amendment violation. However, the exact distinction between medical malpractice law and Eighth Amendment violations in the medical context is less clear.

State law medical malpractice is designed to assess a claim of professional negligence through a peer-reviewed evidentiary standard.\textsuperscript{23} In most jurisdictions, a claim for medical malpractice must be supported by the opinion of an expert licensed in the same field of medicine.\textsuperscript{24} This opinion must set out the standard of care required, the care actually provided, how the standard of care was violated, and how the violation damaged the plaintiff.\textsuperscript{25}

In addition to state law medical malpractice claims, physicians treating prisoners are vulnerable to Eighth Amendment claims brought under 42 U.S.C. §1983.\textsuperscript{26} The practical differences between these two types of claims are considerable. An Eighth Amendment claim does not require the support of an expert, thus avoiding significant costs at the pleading stage.\textsuperscript{27} Further, whereas in most states medical malpractice claims impose a cap on damages and prohibit punitive damages, Eighth Amendment claims have no such cap or prohibition.\textsuperscript{28} In fact, a successful Eighth Amendment claim entitles the plaintiff to recover

\textsuperscript{22} Id. at 106.
\textsuperscript{26} 42 U.S.C. §1983.
\textsuperscript{27} See Joel H. Thompson, Today’s Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs, 45 HARV. C.R.-C.L. L. REV. 635, 651-52 (2010).
\textsuperscript{28} See Chapman Law Group, supra note 25.
attorneys’ fees in addition to compensatory damages. Finally, some medical malpractice insurance policies and contracts between prisons and private healthcare groups do not cover liability or indemnification for willful, wanton, or intentional acts, and thus will not cover a judgment against a physician under 42 U.S.C. §1983.

Decreased litigation costs and the prospect of uncapped damages create an attractive incentive for prisoners to file under 42 U.S.C. §1983 rather than under medical malpractice law in state court. This hypothetically increases the number of lawsuits filed under 42 U.S.C. §1983 against prison physicians as compared to alternative actions under state medical malpractice law. The enhanced potential to be named in a civil suit coupled with personal liability for judgments under 42 U.S.C. §1983 creates a hazard for health professionals who provide services in prisons. Given this, the courts attempt to balance this disincentive by requiring a higher burden of proof for alleged Eighth Amendment violations. Plaintiffs filing under 42 U.S.C. §1983 must prove “deliberate indifference,” a significantly higher burden of proof than ordinary medical negligence.

B. History of Cruel and Unusual Punishment

In establishing the constitutional prohibition against “cruel and unusual punishment,” the primary concern of the drafters was to

prevent torture and other barbarous methods of punishment. Initially, the Eighth Amendment ban on cruel and unusual punishment was limited to a strict interpretation of the phrase. Courts, for example, declined to extend Eighth Amendment claims to arguments that sentences were disproportionate to their crimes. However, in 1910, the Supreme Court extended Eighth Amendment protections beyond torture and barbarous acts, finding that the protection included excessive punishment. In extending the interpretation of the Eighth Amendment, the Court said, “a principle to be vital must be capable of wider application than the mischief which gave it birth.” Thus, the Eighth Amendment has become a subject of progressive interpretation, closely linked to societal views on prison conditions, ethical punishment and human dignity.

Prison officials have a duty to provide medical treatment to a prisoner “who cannot, by reason of the deprivation of his liberty, care for himself.” Punishment by imprisonment coupled with deprivation of medical care results in a punishment in excess of the sentence, and this may constitute cruel and unusual punishment. It is clear that the Eighth Amendment prevents affirmative punishment and lack of treatment which is “shocking to the conscience.” Yet, it is unclear what level of medical care beyond a total deprivation of treatment is constitutionally required.

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33 Estelle, 429 U.S. at 102; Stuart Klein, Prisoners’ Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment’s Cruel and Unusual Punishment Clause, 7 FORDHAM URBAN L.J. 1, 3 (1978).
34 Estelle, 429 U.S. at 102; Klein, supra note 33.
35 Estelle, 429 U.S. at 102; Klein, supra note 33.
37 Id. at 373, Klein, supra note 33.
38 Klein, supra note 33.
39 Estelle, 429 U.S. at 104.
40 Klein, supra note 33.
41 Id.
Courts began analyzing constitutionally permissible treatment in prisons in light of “evolving standards of decency.” Due to the vagueness of this guideline, different standards were proposed and adopted for analyzing claims of cruel and unusual punishment resulting from inadequate medical care. Proposed standards included “abuse of discretion,” “deprivation of basic elements of adequate medical treatment,” and “deliberate indifference.”

The Supreme Court, in *Estelle v. Gamble*, settled on the standard of “deliberate indifference.” The Court explicitly rejected the Fourth Circuit’s broader standard of “reasonable care.” Instead, the *Estelle* Court reasoned that “in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.”

*Estelle* involved a prisoner, J. W. Gamble, who was engaged in prison work when a bale of cotton fell on him. He experienced immediate and on-going pain, and was seen by a prison physician. The physician prescribed a pain reliever, a muscle relaxant, and in-cell meals. Gamble nevertheless continued to complain of pain. He was subject to administrative segregation for refusing to work due to the

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42 Klein, supra note 33.
43 Klein, supra note 33.
44 See Flint v. Wainwright, 433 F.2d 961 (5th Cir. 1970); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Klein, supra note 33.
46 Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969); Klein, supra note 33.
47 *Estelle*, 429 U.S. at 106 (“A complaint must allege that medical treatment provided was not supported by any competent, recognized school of medical practice, and that the treatment was a denial of medical care. However, short of this, the prisoner is left to his state tort remedies.”).
49 Id. at 99-101.
50 Id.
51 Id.
pain.\textsuperscript{52} Gamble visited prison physicians seventeen times within a three-month period.\textsuperscript{53}

The District Court dismissed Gamble’s complaint for failure to state a claim upon which relief could be granted.\textsuperscript{54} The Court of Appeals, however, found that the alleged insufficiency of the medical treatment required reinstatement of the complaint.\textsuperscript{55} The Supreme Court resolved the dispute by finding that while deliberate indifference to a prisoner’s serious medical condition constitutes cruel and unusual punishment in violation of the Eighth Amendment, Gamble’s complaint was insufficient to state a cause of action.\textsuperscript{56}

Gamble contended that more should have been done for him by way of diagnosis and treatment—there were a number of medical treatment options that were not pursued.\textsuperscript{57} Yet, the Court held that the decision not to order additional diagnostic techniques or forms of treatment is a medical decision, and such a decision is not cruel and unusual punishment.\textsuperscript{58} Furthermore, inadvertent failure to provide adequate medical treatment does not constitute “unnecessary and wanton infliction” and is not “repugnant to the conscience of mankind.”\textsuperscript{59} The \textit{Estelle} Court made an effort to distinguish medical malpractice from Eighth Amendment violations by pointing out that claims of medical malpractice do not become a constitutional violation merely because the victim is a prisoner.\textsuperscript{60}

The Court revisited the deliberate indifference standard in \textit{Farmer v. Brennan}.\textsuperscript{61} In \textit{Farmer}, a transsexual inmate accused prison officials of being deliberately indifferent to the substantial risk of sexual

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{52} Id. at 100.
\item\textsuperscript{53} Id. at 107.
\item\textsuperscript{54} \textit{Estelle}, 429 U.S. 97, 98.
\item\textsuperscript{55} Id.
\item\textsuperscript{56} Id. at 104.
\item\textsuperscript{57} Id. at 107.
\item\textsuperscript{58} Id.
\item\textsuperscript{59} \textit{Estelle}, 429 U.S. at 105-6.
\item\textsuperscript{60} Id.
\item\textsuperscript{61} See generally \textit{Farmer v. Brennan}, 511 U.S. 825 (1994).
\end{enumerate}
\end{footnotesize}
violence against him while in the penitentiary. Though this case did not involve medical treatment by a physician, the Court followed the same line of analysis. The Court clarified that a constitutional violation occurs only where the deprivation alleged is objectively serious, and the prison official has acted with “deliberate indifference” to inmate health or safety. Courts will therefore analyze the seriousness of the alleged deprivation objectively, but the Supreme Court expressly rejected an objective test for determining deliberate indifference. Instead, the Court clarified that an Eighth Amendment violation requires proof that an official was both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and, in fact, drew that inference. Under this standard, an official’s failure to alleviate a significant risk that she should have perceived but failed to perceive is not an infliction of punishment. Importantly, an official who actually knew of a substantial risk to inmate health may be found free from liability if she responded reasonably to the risk, even if the harm was not ultimately averted.

PETTIES V. CARTER

A. The Facts

In January 2012, Tyrone Petties was walking up the stairs in Stateville prison when he suffered a rupture in his Achilles tendon.

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62 Dee Farmer, biologically born a male, took several medical steps to transition but ultimately did not complete sex reassignment. Pronouns referencing Farmer correspond with those used by the Court in order to avoid confusion.

63 Id. at 829.

64 Id. at 834 (citing Wilson v. Seiter, 501 U.S. 294 (1991)).

65 Id.

66 Id. at 837.

67 Id.

68 Farmer, 511 U.S. at 838.

69 Id. at 844.

He had previously suffered a partial rupture in his Achilles tendon in 2010, which had not fully healed. A rupture in the Achilles tendon is a tear, which causes great pain and limits mobility. Walking on the ruptured tendon increases the tear, and thus exacerbates the injury and pain. Immobilization of the foot prevents further tearing and allows scar tissue to form.

Dr. Imhotep Carter was medical director of Stateville’s health clinic, though he was employed by Wexford Health Sources, a private contractor of medical services to correctional facilities. Dr. Carter’s role in Stateville’s health clinic was to implement Wexford’s medical policies and procedures. Wexford’s protocol for ruptured Achilles tendons specified that patients receive a splint, crutches, antibiotics if there were lacerations to the site of injury, and a follow-up with a specialist for further treatment.

Petties was first seen by a physician in the prison infirmary who noted tenderness and abnormal reflex in the left Achilles tendon. He observed that Petties could not bear weight on that foot. He prescribed Vicodin and crutches and authorized lay-in meals so that Petties did not have to walk to and from the cafeteria. Later that same day, Petties was seen by Dr. Carter, who opined that Petties had suffered an Achilles tendon rupture. He directed that Petties be scheduled for an MRI and examination by an orthopedist, noting that

71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
76 Petties, 836 F.3d at 726.
77 Id.
78 Petties v. Carter, 795 F.3d 688, 689 (7th Cir. 2015), reh’g granted, 836 F.3d 722 (7th Cir. 2016) (en banc).
79 Id.
80 Id.
81 Petties, 836 F.3d at 726.
these additional steps were “urgent.” However, the appointment with
the orthopedist did not take place for almost six weeks. Dr. Carter later alleged that the delay was due to security issues.

Despite Wexford’s protocol for ruptured Achilles tendons, Dr. Carter did not provide Petties with a splint. At a follow-up appointment, Petties complained of increased pain. Dr. Carter renewed prescriptions for crutches, pain medication, lay-in meals, and assignments to a lower bunk. Dr. Carter still did not prescribe a splint.

In March 2012, Petties had an MRI which confirmed the diagnosis of Achilles tendon rupture. A week later, he saw an orthopedic specialist, Dr. Anuj Puppala, who noted that the lack of a cast was potentially creating a gap at the tendon rupture site. He gave Petties an orthopedic boot to prevent further gapping and to alleviate pain. Due to the gapping, Dr. Puppala thought that surgery might be necessary. He referred Petties to an ankle specialist. Petties returned to Stateville where he was again seen by Dr. Carter. Dr. Carter authorized use of the boot, along with crutches, ice, and lower bunk assignment. Petties alleged that Dr. Carter said he would not order surgery because it was too costly.

82 Petties v. Carter, 795 F.3d 688, 690 (7th Cir. 2015), reh’g granted, 836 F.3d 722 (7th Cir. 2016) (en banc). [CAN SHORT CITE SINCE CITE TO THIS CASE IS LESS THAN 5 CITES AGO]
83 Petties, 836 F.3d at 726.
84 Id. at 733.
85 Id.
86 Id.
87 Id.
88 Id. at 727.
89 Petties, 836 F.3d at 727.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Petties, 836 F.3d at 727.
In July 2012, Petties saw an ankle specialist, Dr. Samuel Chmell. Dr. Chmell prescribed a second MRI, physical therapy, stretching exercises, and follow-up treatment.

In August 2012, Dr. Carter was replaced by Wexford employee Dr. Saleh Obaisi. Dr. Obaisi approved the order for a second MRI. He did not authorize physical therapy. Petties alleged that Dr. Obaisi also said that surgery was too expensive.

In September 2012, Petties had his second MRI, which showed a partial tear in his tendon, but indicated some healing. Yet, Petties complained of continued pain. Dr. Obaisi prescribed Tylenol, a low bunk permit, and continued use of a boot. Dr. Obaisi renewed prescriptions for the low bunk permit and boot in November and the following June. Petties alleged that he experienced continued pain as late as March 2014.

B. District Court Opinion

In November 2012, Petties filed a lawsuit under 42 U.S.C. § 1983 against Dr. Carter and Dr. Obaisi. Petties alleged that Dr. Carter and Dr. Obaisi acted with deliberate indifference in violation of the Eighth Amendment. The district court granted summary judgment for both defendants. The court reasoned that Dr. Carter’s decision to wait

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96 Id.
97 Id.
98 Id.
99 Id.
100 Id.
101 Petties, 836 F.3d at 727.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Petties, 836 F.3d at 727.
108 Id.
eight weeks before prescribing a boot or splint could not have constituted deliberate indifference because the various physicians that Petties had seen in and out of the prison infirmary held different opinions about whether a boot or splint was necessary in Petties case. The court further found that a reasonable jury could not find that Dr. Obaisi’s rejection of recommendation for physical therapy constituted deliberate indifference because Petties had learned physical therapy exercises from his previous injury and could have performed those on his own.

C. Appeal to Seventh Circuit

The Court of Appeals for the Seventh Circuit, rehearing this case en banc, reviewed the district court’s grant of summary judgment de novo, “viewing the record in the light most favorable to Petties, and drawing all inferences in his favor.”

The majority considered “when a doctor’s rationale for his treatment decisions supports a triable issue as to whether that doctor acted with deliberate indifference under the Eighth Amendment.” They reversed the district court’s grant of summary judgment, concluding that, “even if a doctor denies knowing that he was exposing a plaintiff to a substantial risk of serious harm, evidence from which a reasonable jury could infer a doctor knew he was providing deficient treatment is sufficient to survive summary judgment.”

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109 Petties v. Carter, 795 F.3d 688, 691 (7th Cir. 2015), reh'g granted, 836 F.3d 722 (7th Cir. 2016) (en banc).
110 Id.
111 Petties, 836 F.3d at 727.
112 Id. at 726.
113 Id.
1. Judge Williams’ Majority Opinion

Reviewing the record in the light most favorable to Petties, the majority found that Petties produced sufficient evidence for a jury to conclude that the doctors knew the care they were providing was insufficient.\textsuperscript{114} Judge Williams quoted the Supreme Court’s decision in \textit{Farmer v. Brennan} stating: “The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones.”\textsuperscript{115}

Judge Williams acknowledged that not all claims of inadequate medical treatment are Eighth Amendment claims.\textsuperscript{116} Citing \textit{Farmer}, Judge Williams suggested that in determining Eighth Amendment violations in the “prison medical context,” the Court performs a two-step analysis.\textsuperscript{117} First, the Court examines whether a plaintiff suffered an objectively serious medical condition.\textsuperscript{118} Then, the Court determines whether the individual defendant was deliberately indifferent to that condition.\textsuperscript{119} Generally, litigation arises over the second line of analysis.

In analyzing the first step, the parties agreed that an Achilles tendon rupture was an objectively serious condition.\textsuperscript{120} Therefore, the Court was left to analyze whether the defendants acted with deliberate indifference.\textsuperscript{121} The Court began this analysis by looking to the defendant’s subjective state of mind.\textsuperscript{122} Judge Williams reiterated that mere negligence, and even objective recklessness, would not be enough.\textsuperscript{123} Further, the defendants in this case could successfully

\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 727.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Petties}, 836 F.3d at 728.
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Petties}, 836 F.3d at 728.
avoid liability by proving they were unaware of even an obvious risk to Petties’ health or safety.\footnote{124}{Id.}

Judge Williams pointed out that proof of actual knowledge in these cases is rare. Because of this, she suggested that a narrower question faced the court: How bad does an inmate’s care have to be to create a reasonable inference from circumstantial evidence that a doctor was aware of and disregarded a substantial risk of harm?\footnote{125}{Id.}

Judge Williams concluded from precedent that deliberate indifference can be found where medical judgment is “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.”\footnote{126}{Id. at 729.} This can be shown through proof that “no minimally competent professional would have so responded under those circumstances.”\footnote{127}{Id.} Yet, evidence that merely some medical professionals would have chosen a different course of treatment is insufficient to make out a constitutional claim.\footnote{128}{Id.}

Judge Williams acknowledged the difficulty in proving a substantial departure from accepted professional standards due to the nature of medical judgments being patient and fact-specific.\footnote{129}{Petties, 836 F.3d at 729 (citing Steele v. Choi, 82 F.3d 175, 179 (7th Cir. 1996)).} Because of this, it is hard to draw a line between poor medical judgment and deliberate indifference.\footnote{130}{Petties, 836 F.3d at 729.} Judge Williams examined cases which have attempted to draw this line and pointed to a Tenth Circuit case finding deliberate indifference when a doctor fails to follow an existing protocol.\footnote{131}{Id.} She concluded by finding that the following situations can amount to deliberate indifference: 1) a departure from minimally competent medical judgment where a prison
official persists in a course of treatment known to be ineffective, 2) where a prison doctor chooses an “easier and less efficacious treatment” without exercising professional judgment, 3) an inexplicable delay in treatment which serves no penological interest.  

In response to the dissent’s anticipated argument, Judge Williams asserted that the Court has repeatedly rejected the idea that simply providing some medical care means that the physician has met the basic requirements of the Eighth Amendment. She argued that a jury is entitled to weigh a physician’s claim that he lacked knowledge that his treatment decisions could cause harm against clues that the doctor did in fact know. Judge Williams suggested the policy consideration that allowing physicians’ claims of ignorance to immunize them from liability would allow a free pass to ignore prisoners’ medical needs. Specifically in regard to Petties’ case, Judge Williams found there to be sufficient evidence that Dr. Carter acted with deliberate indifference when he 1) failed to immobilize Petties’ ruptured tendon for six weeks, 2) delayed Petties’ appointment with a specialist, and 3) refused to order surgery to repair the tendon. This finding was based on evidence including the deposition testimonies of Dr. Carter, Dr. Puppala and Dr. Chmell. Judge Williams concluded that this established a reasonable inference that Dr. Carter knew that failing to immobilize an Achilles rupture would result in further pain and injury to Petties. Judge Williams acknowledged that some of Dr. Carter’s testimony suggested that he believed crutches served the same purpose as a boot. Yet, ultimately she found this to be a triable issue where a jury could reasonably infer from conflicting testimony that Dr. Carter acted with deliberate indifference.

132 Id. at 729-30.
133 Id. at 731.
134 Id.
135 Petties, 836 F.3d at 731.
136 Id. at 731.
137 Id. at 732.
138 Id.
139 Id. at 726, 732.

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In addition to the immobilization issue, Petties asserted that Dr. Carter was responsible for the delay in treatment by a specialist. Judge Williams found this issue of whether the delay was the result of negligence or deliberate indifference to be a question for the jury. Further, Judge Williams found that if a jury were to believe that Dr. Carter cited cost as the reason for refusing treatment, a jury could similarly find deliberate indifference.

Regarding Dr. Obaisi, Judge Williams found that his testimony was at odds with the evidence in this case. She concluded that a jury was entitled to determine whether Dr. Obaisi was “deliberately indifferent, rather than simply incompetent.”

2. Judge Easterbrook’s Dissent

Judge Easterbrook began his dissent by characterizing his colleagues’ understanding as being that “the Constitution entitled Petties to an orthopedic boot” immediately after his injury. He argued that the appropriate analysis in this case should instead begin with the question: Was there a cruel and unusual punishment? Only after finding a cruel and unusual punishment should the courts analyze the defendant’s mental state. Judge Easterbrook pointed out that the Supreme Court’s only decision addressing palliative medical treatment under the Eighth Amendment is *Estelle v. Gamble*. Judge Easterbrook defined palliative medical treatment to mean pain relief without an effort at cure.
Judge Easterbrook asserted that the Fifth Circuit in *Estelle*, prior to the Supreme Court’s decision, interpreted the constitution to require not only palliation, but also a medically competent effort to cure. Judge Easterbrook reiterated that despite the wretched care that the plaintiff received, Supreme Court precedent dictated that claims based on deficient care are to be addressed through state medical-malpractice law.

Finding support in *Estelle*, Judge Easterbrook therefore concluded that Petties was provided with medical care. Judge Easterbrook noted that Petties was provided with more, and better, care than Gamble received; and yet, even Gamble’s claim for deficient medical care was defeated at the summary judgment stage. Judge Easterbrook contended that *Farmer* stands for the proposition that a constitutional claim is supported when no response is provided for a serious medical condition, and the actors are deliberately indifferent. Beyond this, *Estelle* allows legal action for harmful interventions. However, Petties did not claim that he received no care, and did not claim that the care he received was harmful as compared with no care at all.

Judge Easterbrook suggested that one way to distinguish medical malpractice from a constitutional violation would be to determine whether the prison official exercised medical judgment. Again, citing *Estelle*, Judge Easterbrook argued that Petties did not deny that the defendants exercised medical judgment, but rather Petties asserted

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150 *Id.* at 735.
151 *Petties*, 836 F.3d at 735 (Easterbrook, J., dissenting).
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*
157 *Petties*, 836 F.3d at 735 (Easterbrook, J., dissenting).
158 *Id.*
that their judgment was poor.\textsuperscript{159} Since \textit{Estelle} held that poor medical care must fall under medical malpractice law, Judge Easterbrook contends that Petties’ claim must be addressed through a medical malpractice action.\textsuperscript{160}

Judge Easterbrook concluded by pointing to the circuit split on the issue of whether a prisoner received some treatment in contrast to the issue of whether the treatment was inferior.\textsuperscript{161} Finally, Judge Easterbrook urged that courts consider the implications of federalizing the law of medical malpractice before finding a “competent medical judgment” standard in the Constitution.\textsuperscript{162}

\textbf{ANALYSIS}

The Seventh Circuit majority opinion incorrectly decided \textit{Petties v. Carter} because it failed to appropriately consider a critical Supreme Court precedent finding that prison officials can avoid liability by demonstrating a reasonable response to risk.\textsuperscript{163} By failing to take into account evidence suggesting a reasonable medical response to Petties, the Seventh Circuit arrived at the wrong conclusion. Precedent and public policy demand an analysis of the totality of medical care when assessing whether an Eighth Amendment claim of deliberate indifference ought to survive summary judgment.

To survive summary judgment, a plaintiff pursuing an Eighth Amendment claim must allege an objectively serious medical condition.\textsuperscript{164} A plaintiff must also show facts from which a reasonable factfinder could conclude that the prison official knew of and disregarded a substantial risk to the prisoner’s health.\textsuperscript{165} Notwithstanding these allegations (taken in the light most favorable to

\begin{footnotes}
\textsuperscript{159} \textit{Id.} at 735-36.
\textsuperscript{160} \textit{Id.} at 736.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.}
\textsuperscript{164} See \textit{id.}
\textsuperscript{165} See \textit{id.}
\end{footnotes}
the plaintiff), a defendant may be found free from liability if she responded reasonably to the risk, even if the harm was, in the end, not averted.\textsuperscript{166} It therefore follows that if there is no factual dispute that a defendant responded reasonably to the risk, despite the eventual harm, the defendant is entitled to judgment as a matter of law.

\subsection*{A. The Seventh Circuit Failed to Consider Physicians’ Reasonable Response to Risk}

Petties’ objectively serious medical condition was the two-centimeter gap at the site of his already ruptured Achilles tendon.\textsuperscript{167} Wexford’s protocol for treating ruptured Achilles tendons was use of a splint, crutches, antibiotics if there were lacerations to the site of injury, and an appointment with a specialist.\textsuperscript{168} Dr. Carter approved the use of crutches, ice, and pain medication, and authorized lay-in meals, an assignment to a lower bunk and a referral to an orthopedist.\textsuperscript{169} Petties alleged that he did not receive a splint, and was not seen by the orthopedist in an adequate amount of time following his injury.\textsuperscript{170} The orthopedist opined that surgery might be necessary.\textsuperscript{171} Yet, Petties alleged that Dr. Carter and Dr. Obaisi would not authorize surgery for Petties due to cost concerns.\textsuperscript{172} The Seventh Circuit therefore concluded that there was sufficient evidence for a reasonable jury to conclude that the doctors knew the care that they were providing was insufficient.\textsuperscript{173} However, the Seventh Circuit cut their analysis short by failing to fully consider precedent set forth in \textit{Farmer v. Brennan},

\begin{itemize}
\item \textsuperscript{166} See \textit{id.}
\item \textsuperscript{167} Petties v. Carter, 795 F.3d 688, 690 (7th Cir. 2015), \textit{reh’g granted}, 836 F.3d 722 (7th Cir. 2016) (en banc).
\item \textsuperscript{168} Petties, 836 F.3d at 726.
\item \textsuperscript{169} \textit{id.}
\item \textsuperscript{170} \textit{id.}
\item \textsuperscript{171} \textit{id.} at 727.
\item \textsuperscript{172} \textit{id.}
\item \textsuperscript{173} \textit{id.} at 726.
\end{itemize}
which demands consideration of the physician’s response to an alleged risk.\footnote{See Farmer v. Brennan, 511 U.S. 825, 844 (1994).}

The Seventh Circuit is committed to examining the totality of an inmate’s medical care when considering whether that care reflects deliberate indifference to serious medical needs.\footnote{Cavalieri v. Shepard, 321 F.3d 616, 625–26 (7th Cir. 2003); Dunigan ex rel. Nyman v. Winnebago County, 165 F.3d 587, 591 (7th Cir. 1999). See also Gutierrez v. Peters, 111 F.3d 1364, 1375 (7th Cir. 1996) (holding that isolated instances of neglect “cannot support a finding of deliberate indifference”).} Where a prisoner alleges a few isolated incidents of delay or neglect during a course of treatment, but it is clear that the defendant provided meaningful treatment throughout the inmate’s recovery and thus did not disregard a serious medical risk, the Seventh Circuit has held that the defendant has not acted with deliberate indifference.\footnote{See Walker v. Peters, 233 F.3d 494, 501 (7th Cir. 2000); Dunigan ex rel. Nyman v. Winnebago Cnty., 165 F.3d 587, 591 (7th Cir. 1999); Gutierrez v. Peters, 111 F.3d 1364, 1375 (7th Cir. 1997).} Proving disregard of a substantial risk requires showing that a medical professional’s treatment decisions are “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.”\footnote{Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).} But mere disagreement with a doctor’s medical judgment is not enough to prove deliberate indifference.\footnote{Berry v. Peterman, 604 F.3d 435, 441 (7th Cir.2010); Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006); Norfleet v. Webster, 439 F.3d 392, 397 (7th Cir. 2006).}

In upholding the commitment to examine the totality of an inmate’s medical care, this standard cannot be fairly examined without assessing the reasonableness of the physician’s response to the existing risk. Considering the facts in the light most favorable to Petties, Wexford’s protocol for treatment of Achilles tendon ruptures was met by the defendant doctors except for use of a splint, and delay in
arranging an appointment with an orthopedist. The majority in Petties relied upon a Tenth Circuit decision in contending that Dr. Carter’s failure to follow protocol and immobilize Petties’ foot with a splint provided circumstantial evidence that he knew of a substantial risk of serious harm. Indeed, Dr. Carter did not contest the risk posed by failing to immobilize Petties’ foot. Yet, he contended that he addressed that risk in a way supported by Petties’ unique case and backed by Dr. Carter’s medical training and experience. Dr. Carter testified, on the basis of his professional opinion as well as on the basis of having been the treating physician for Petties’ specific injury, that crutches and other immobilization accommodations served the same purpose as a splint. Petties alleged that Dr. Carter failed to meet Wexford’s protocol for treating an Achilles tendon rupture, and thus exacerbated Petties’ injury. Yet, Dr. Carter went beyond the protocol to treat Petties’ individual case by authorizing lay-in meals and a lower bunk assignment.

Further, despite deeming it a jury question and finding it supportive of an Eighth Amendment claim, the Seventh Circuit’s opinion failed to identify any evidence suggesting that Dr. Carter was

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180 Id. at 729 (citing Mata v. Saiz, 427 F.3d 745 (10th Cir. 2005)).
181 Id. at 731 (“He explained the purpose of immobilization, stating, “in the acute phase of healing, you are generating an immune system response in the body,” and when asked if keeping the tendon in one place enables this healing process to go forward favorably, he replied, “Correct. And if you're continuously injuring it, it hinders that process.”).
182 See id. at 732 (“Some of his testimony suggests that he believed crutches served the same purpose as a boot.”); Petties v. Carter, 795 F.3d 688, 692 (7th Cir. 2015), reh’g granted, 836 F.3d 722 (7th Cir. 2016) (en banc). (“Although Dr. Carter acknowledged that treatment for a complete Achilles tear typically includes immobilizing the ankle to minimize putting weight on the ankle, he also explained that he did not employ a splint initially because he believed that giving Petties crutches and minimizing his time on his feet was an effective treatment plan.”).
183 Id.
184 Petties, 836 F.3d at 726.
185 See id.
responsible for an intentional delay regarding Petties’ appointment with the orthopedist. On the contrary, Dr. Carter had directed, upon initially seeing Petties, that he be scheduled for an MRI and examination by an orthopedist, characterizing these orders as “urgent.” The majority found fault in Dr. Carter’s failure to issue an “emergency override” in Petties’ case. However, the majority failed to indicate a basis under which Petties, or any prisoner, is entitled to an “emergency override.” Consequently, the majority’s argument as to the delay in treatment by a specialist fell significantly short of establishing a basis for finding “cruel and unusual punishment.”

The issue facing the Seventh Circuit should have been whether Dr. Carter’s use of other immobilization methods – aside from a splint – constituted a reasonable response, even if exacerbation of the injury was, in the end, not avoided. Considering the totality of Petties’ care, it is hard to imagine a reasonable fact finder concluding that Dr. Carter’s treatment plan was so unreasonable that it amounted to cruel and unusual punishment.

B. Public Policy Supports Respect for Case-Specific Medical Judgment, and Deferral to State Medical Malpractice Remedies

Both the majority and dissent in Petties reiterated the importance of case-specific medical judgment and availability of treatments. Further, the American College of Physicians Ethics Manual sets out ethical considerations for the care of prisoners, emphasizing a physician’s ultimate responsibility to care for the individual patient. This professional standard of care places significant weight on the

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186 See id. at 733.
187 Petties v. Carter, 795 F.3d 688, 690 (7th Cir. 2015), reh'g granted, 836 F.3d 722 (7th Cir. 2016) (en banc).
189 Petties v. Carter, 836 F.3d 722, 729 (7th Cir. 2016), as amended (Aug. 25, 2016) (citing Roe v. Elyea, 631 F.3d 843 (7th Cir. 2011)).
190 AM. COLL. OF PHYSICIANS ETHICS MANUAL 6TH ED., www.acponline.org (last visited Nov. 21, 2016).
physician’s medical judgment in her capacity as a certified health care professional. 191 Though professional judgment may vary from one physician to the next in treatment of the same patient, a physician’s ethical obligations are fulfilled by the honest commitment to treat the patient in the way she deems most medically beneficial to the patient. 192 The law reflects this ethical standard by finding evidence that some medical professionals would have pursued a different course of treatment insufficient to support a claim of deliberate indifference. 193 However, as interpreted by the Seventh Circuit in Petties v. Carter, the “deliberate indifference” standard in some cases might demand more than a physician’s ethical obligations. 194

Forgoing authorization for a splint in favor of other treatment options designed to immobilize the foot, such as crutches, lay-in meals, and lower bunk authorization, is a professional medical judgment. Yet, the majority in Petties suggested that Dr. Carter’s conscious, professional decision to exclude use of a splint, despite the variety of other treatments prescribed, could lead a reasonable jury to conclude that withholding the splint constituted “cruel and unusual punishment” and that Dr. Carter was deliberately indifferent to the pain of Petties’ ruptured Achilles tendon by doing so. 195 But Supreme Court precedent is clear in stating: “the question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court...” 196

Along those lines, a finding that Dr. Carter had a duty to prescribe a splint, but failed to do so, does not rise to the level of “cruel and

191 See id.
192 See id.
193 Steele v. Choi, 82 F.3d 175, 179 (7th Cir. 1996).
195 See generally id.
unusual punishment." \(^{197}\) By extension, Dr. Carter admitting to this duty and breach still does not create an Eighth Amendment claim, as the Seventh Circuit has previously held that even admitted medical malpractice is not sufficient to show that a doctor acted with deliberate indifference. \(^{198}\) The majority attempted to offset this by further qualifying their finding with the suggestion that Dr. Carter’s medical decision “has no support in the medical community.” \(^{199}\) However, it would be illogical for a reasonable jury to find that Dr. Carter’s treatment decisions had no support in the medical community and were such that “no minimally competent professional would have so responded under those circumstances,” when the record contained evidence that several other physicians treating Petties similarly debated the necessity of a splint. \(^{200}\)

1. Consideration of Cost, as a Factor in Medical Decision-Making, is Not Necessarily Evidence of Deliberate Indifference

When deciding a course of treatment for any patient, a physician considers many factors including risks, benefits, and cost. Case-specific facts are applied to these factors, and interpreted to come up with an individualized plan of treatment. Consideration of cost is part

\(^{197}\) Cf. Purtill v. Hess, 489 N.E.2d 867, 872 (1986) (“In a negligence medical malpractice case, the burden is on the plaintiff to prove the following elements of a cause of action: the proper standard of care against which the defendant physician's conduct is measured; an unskilled or negligent failure to comply with the applicable standard; and a resulting injury proximately caused by the physician's want of skill or care.”).

\(^{198}\) McGee v. Adams, 721 F.3d 474, 481 (7th Cir. 2013); Norfleet v. Webster, 439 F.3d 392, 397 (7th Cir. 2006).

\(^{199}\) Petties, 836 F.3d at n. 2.

\(^{200}\) Petties v. Carter, 795 F.3d 688, 691 (7th Cir. 2015), reh'g granted, 836 F.3d 722 (7th Cir. 2016) (en banc). (“The district court granted the doctors' motion for summary judgment. Dr. Carter's decision to wait eight weeks before immobilizing Petties's ankle in a cast or boot could not have constituted deliberate indifference, the court reasoned, because Petties's several physicians in and out of prison held different opinions about whether a boot or cast had been necessary.”).
of professional decision-making, and is not necessarily evidence of deliberate indifference.

In fact, under the American Medical Association Code of Medical Ethics, physicians are ethically required to “choose the course of action that requires fewer resources when alternative courses of action offer similar likelihood and degree of anticipated benefit compared to anticipated harm for the individual patient but require different levels of resources.”\(^{201}\)

The Constitution does not entitle incarcerated individuals to all suggested or possible medical treatment for a specific diagnosis without cost consideration. Selecting a more cost-effective course of treatment is not in and of itself deliberate indifference. For instance, “ankle sprain” is the diagnosis used to describe a spectrum of symptoms and intensities experienced by different patients suffering from an ankle sprain. A patient with a mild sprain may be effectively treated with rest, ice, compression and elevation, while a patient with a more severe sprain might require a splint and physical therapy.\(^{202}\) It is surely more cost effective, and in fact the treating physician’s duty as a prudent steward of health care resources, to forgo the cost of a splint for the patient with a mild sprain who can be effectively treated through self-care.\(^{203}\)

Disincentivizing cost-conscious decision-making pits physicians’ ethical obligations against their desire to avoid professional liability. In practice, this might lead to overuse of tests and procedures, creating an inefficient healthcare model, with little gain in benefit accompanied by greatly increased costs.


2. State Medical Malpractice Law is Better Suited to Address Claims of Deficient Medical Care

The Supreme Court, in *Estelle*, held that claims of substandard care belong in state medical malpractice lawsuits.\(^{204}\) Specific to this case, Petties did not allege that he received no care—he received crutches, ice, pain medication and living accommodations. Rather, he argued that he received poor care. This is a classic claim of medical malpractice.

In disputes concerning adequacy of treatment, “federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.”\(^{205}\) State medical malpractice laws are often better equipped to evaluate these claims by requiring the support of an expert familiar with the specialty.\(^{206}\) The policy underlying this requirement is that experts familiar with the field are able to testify that the defendant failed to conform to the applicable standard of care for that field.\(^{207}\) However, critics argue that retaining an expert may be prohibitively expensive for an inmate.\(^{208}\) If the inmate cannot retain an expert, she cannot file a medical malpractice action.\(^{209}\) The court is not authorized to offer financial assistance to hire expert witnesses for inmates, as they are not similarly authorized to do so for non-prisoners.\(^{210}\) Therefore, in


\(^{205}\) *Westlake v. Lucas*, 537 F.2d 857, 860 n. 5 (6th Cir. 1976); *Layne v. Vinzant*, 657 F.2d 468, 474 (1st Cir. 1981); United States ex rel. *Walker v. Fayette County*, 599 F.2d 573, 575 n. 2 (3d Cir. 1979); *Harris v. Thigpen*, 941 F.2d 1495, 1507 (11th Cir. 1991).

\(^{206}\) 735 ILCS 5/2-622.


\(^{208}\) See *Chapman Law Group*, *supra* note 25.

\(^{209}\) See 735 ILCS 5/2-622.

\(^{210}\) See 28 U.S.C.A. § 1915; *Gaviria v. Reynolds*, 476 F.3d 940, rehearing en banc denied, certiorari denied (2007) (District court did not abuse its discretion, in medical malpractice action brought against surgeons by patient/arrestee who had
pursuing a state medical malpractice action, prison inmates are left to pursue avenues such as contingency fee arrangements with plaintiffs’ attorneys.

There is no expert witness affidavit requirement for federal claims of deliberate indifference under 42 U.S.C. § 1983. Unfortunately, this leads to many frivolous and unwarranted lawsuits against prison health care workers that have no support in law or medicine. Furthermore, prison physicians facing potential liability under the deliberate indifference standard risk being held personally financially accountable for the judgment, as insurers often do not cover deliberate or intentional acts. The prospect of facing personal financial liability may, in turn, serve as a disincentive for competent physicians, seeking to protect themselves from liability, to avoid working in the prison health care system. In the long term, disincentivizing competent physicians from practicing in prisons may create lower quality and less efficient prison healthcare system.

CONCLUSION

The defendants in Petties v. Carter have filed a petition for writ of certiorari. Should the Supreme Court decide to hear argument on this case, it presumably will be mindful that an essential purpose of

suffered broken jaw during arrest, by denying patient's motion to appoint expert witness, even though patient qualified for appointment of counsel under in forma pauperis statute and expert testimony was required for medical malpractice prima facie case; appointed counsel, who specialized in medical malpractice claims, had been unable to unearth substantiating evidence, and Bureau of Prisons' medical evidence contradicted malpractice claim); Pedraza v. Jones, 71 F.3d 194 (1995) (District courts have no authority to appoint expert witnesses to assist plaintiff proceeding under in forma pauperis statute.); Boring v. Kozakiewicz, 833 F.2d 468, certiorari denied (1987) (There is no statutory authority to courts to authorize payment of expert witness fees in civil suits for damages brought by indigents.).

211 See Chapman Law Group, supra note 25.

212 See e.g., Chapman Law Group, supra note 25; Harris, supra note 30; AHC Media, Not all claims covered by med/mal policies, https://www.ahcmedia.com/articles/64652-not-all-claims-covered-by-med-mal-policies (last visited Nov. 29, 2016).
summary judgment is to provide a method by which defendants can curtail meritless claims at a relatively early stage as a matter of law. This avenue of relief should surely be available to defeat wrongful claims of “cruel and unusual punishment” brought by prisoners displeased with the particulars of the medical treatment they received. Such prisoners can and should be able to pursue standard medical malpractice claims based on allegedly negligent medical services; however, the fact that they are prisoners does not automatically create a legitimate constitutional issue. It should be quite difficult to elevate such prisoner claims into constitutional violations and, properly understood, the “deliberate indifference” standard was intended to address that by establishing a high hurdle.

 Courts considering alleged violations of constitutional rights should therefore not easily discount or second-guess the decisions of medical professionals who have reasonably responded in some way to the medical problems of prisoners. An imperfect tactical decision by such a physician is substantially different than “deliberate indifference” leading to “cruel and unusual punishment,” and in such cases, the physician should be entitled to a judgment as a matter of law.