FILED
United States Court of Appeals
Tenth Circuit

September 30, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT JW MCCLELAND,

Plaintiff - Appellant,

v.

RICK RAEMISCH; RENAE JORDAN; SUSAN TIONA; DEBORAH BORREGO; JOANNE MCGREW; DAYNA JOHNSON,

Defendants - Appellees.

No. 20-1390
(D.C. No. 1:18-CV-00233-PAB-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

Robert JW McCleland, a Colorado prisoner proceeding pro se, alleges that various employees of the Colorado Department of Corrections (CDOC) violated the Eighth Amendment when they delayed treating his hepatitis C infection for about two years. The district court granted summary judgment in favor of all defendants. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. BACKGROUND

McCleland contracted the hepatitis C virus (sometimes abbreviated "HCV") before his incarceration. HCV can cause liver cirrhosis, liver cancer, and ultimately liver failure, but only about 16% of infected persons develop symptoms this severe. Even among those persons, "[l]iver damage from HCV can progress slowly, taking up to two or three decades." *Vasquez v. Davis*, 882 F.3d 1270, 1272–73 (10th Cir. 2018).

McCleland entered the Colorado prison system in August 2011 and has been housed at CDOC's Buena Vista Correctional Complex since October 2015. Beginning in June 2016 and continuing for the next two years, McCleland visited or corresponded with numerous medical professionals at Buena Vista, complaining of abdominal cramping, bladder pain, painful urination, night sweats, severe itching, shortness of breath, general malaise, and various other symptoms. McCleland believed these were extrahepatic (non-liver) manifestations of HCV, so he requested antiviral therapy to eradicate HCV from his system.

At that time, CDOC's policy for hepatitis C antiviral therapy required an inmate to score higher than 0.7 on a blood test known as the aspartate aminotransferase to platelet ratio index (APRI), which roughly indicates the extent of liver scarring. Buena Vista nurses Deborah Borrego and Joanne McGrew checked McCleland's APRI at least three times between June 2016 in December 2017, but it never rose higher than 0.422, so they denied antiviral therapy each time he requested it.

McCleland grieved these outcomes. Borrego and Dayna Johnson (a Buena Vista healthcare administrator who never treated McCleland) denied these grievances based on CDOC policy. The policy acknowledged that HCV may be associated with extrahepatic conditions such as "hematologic disease," "autoimmune disorders," "renal disease," and "dermatologic conditions," but deemed them "beyond the scope of this standard." R. vol. I at 274.

On July 1, 2018, CDOC revised its hepatitis C treatment policy, lowering the APRI threshold to 0.5. Apparently McCleland had recently received a blood test, and it showed an APRI of 0.502. On July 5, Borrego called McCleland to the medical clinic to tell him that he now qualified for antiviral therapy. Borrego began administering the antiviral therapy in late July 2018 and McCleland completed the course of treatment about three months later. Lab tests in January 2019 showed that he was clear of HCV.

II. PROCEDURAL HISTORY

McCleland filed this pro se lawsuit in early 2018, about five months before the CDOC policy change that made him eligible for antiviral therapy. He accused Borrego, Johnson, and McGrew of being deliberately indifferent to his medical needs, in violation of the Eighth Amendment. McCleland also sued Rick Raemisch (CDOC's then-executive director), Renae Jordan (CDOC's then-director of clinical correctional services), and Susan Tiona (CDOC's then-chief medical officer). McCleland argued that these three were responsible for CDOC's policy of

conditioning antiviral therapy on the inmate's APRI score, regardless of extrahepatic manifestations.

As noted, McCleland began receiving antiviral therapy in July 2018 and he was confirmed to be free of the virus in January 2019, about a year after filing suit. The focus of the action thus shifted from whether the defendants should be ordered to administer antiviral therapy to whether the delay in administering that therapy caused an actionable injury. McCleland claims the delay led to chronic kidney disease, Sjogren's syndrome (an autoimmune disorder that often causes dry eyes and a dry mouth), and shortened lifespan.

Early in the lawsuit and as the case proceeded through discovery, McCleland filed three motions for appointment of counsel. Perhaps assuming that appointed counsel was the gateway to obtaining expert witnesses, each motion emphasized the need for expert medical testimony. A magistrate judge denied these motions. McCleland filed a Federal Rule of Civil Procedure 72(a) objection to the second denial (which the district court overruled), but he filed no objection to the other two.

After the third denial, McCleland moved under Federal Rule of Evidence 706 for appointment of "an independent expert witness" to establish defendants' deviation from the standard of care and the resulting damage to his kidneys. Supp. R. at 35, 36–37. He named four expert witnesses he had written to (apparently to solicit their services), but stated he "ha[d] not heard from any of them." Supp. R. at 35.

The magistrate judge denied McCleland's Rule 706 motion, concluding that he was not seeking an independent expert to assist the court, but rather an expert to

support his interpretation of the evidence. The magistrate judge also found no mechanism under Rule 706 or elsewhere for paying such an expert's fees on McCleland's behalf. McCleland did not file a Rule 72(a) objection to this order.

McCleland then filed a fourth motion for appointment of counsel, pointing out that defendants were currently preparing their expert disclosures and that he needed expert testimony to counter what defendants' experts would likely assert. The magistrate judge construed this as a motion to reconsider her denial of McCleland's third motion for counsel and denied it, finding no new circumstances that would merit reconsideration.

Eventually defendants moved for summary judgment, with heavy reliance on expert declarations, particularly from Tiona (CDOC's former chief medical officer). In her opinion, the community standard of care for HCV infections has been evolving based on new research and new treatment, but CDOC's treatment policy has always adhered to that standard. As for extrahepatic manifestations, she asserted that "[n]o studies have proven that HCV causes specific extra-hepatic disease; at best, there is association, but no established causation." R. vol. I at 477, ¶ 10.

Defendants also relied on an expert declaration from CDOC's current chief medical officer (not a party here), who opined that various laboratory tests conducted on McCleland were mostly inconclusive or unremarkable for the conditions and diseases that McCleland believes were caused by the delay in his treatment. The expert acknowledged, however, that a nephrologist diagnosed McCleland with chronic kidney disease "of unknown etiology" in October 2019, months after

McCleland completed antiviral therapy. *Id.* at 386, ¶ 34; *see also id.* at 428.

McCleland responded by submitting medical literature that, at least as of 2019, expressed more confidence than defendants' experts about a causal relationship between HCV and diseases such as "[a]utoimmune disorders" and "[r]enal disease." *Id.* at 675. McCleland obtained this literature mostly from a website referenced in the 2015 version of CDOC's hepatitis C guidelines. (The versions in effect when McCleland sought care do not reference that website.) McCleland also attached two expert declarations filed in other lawsuits. These declarations assert that, at least as of 2017 or 2018, antiviral treatment was the standard of care for all chronic HCV patients, regardless of the degree of liver scarring.

The district court referred the summary judgment motions to the magistrate judge. In her recommendation, the magistrate judge found that she could not consider McCleland's medical literature because he offered no expert competent to interpret it and he did not possess the expertise himself. As for expert declarations from other lawsuits, the magistrate judge stated she could take judicial notice of their existence but could not consider them for the truth of the matters asserted. Thus, given McCleland's lack of medical evidence, she deemed defendants' evidence undisputed on the threshold question of whether the delay in receiving antiviral therapy caused any objectively sufficiently serious injury. The magistrate judge also recommended, alternatively, that McCleland could not carry his burden to show that defendants were subjectively aware of and disregarded the risks of not treating him sooner. For these reasons, the magistrate judge recommended summary judgment in

defendants' favor.

McCleland filed a timely Rule 72(b)(2) objection, contesting the magistrate judge's analysis point by point and generally arguing that his lack of expert evidence should not be held against him when he repeatedly moved for and was denied appointment of counsel and an expert. In its order resolving the objection, the district court stated that the issues of appointing counsel and an expert were "not properly before the Court" because McCleland never filed a Rule 72(a) objection to the order denying appointment of an expert and the court had already overruled an objection to an order denying appointment of counsel. R. vol. I at 931. But, "for purposes of completeness," the district court chose to "address[] plaintiff's expert-based objection" on the merits. *Id.*

On this issue, the district court found that it needed no independent expert to help it understand the evidence because defendants had submitted expert testimony "explaining plaintiff's medical records, his medical conditions, and his course of treatment." *Id.* at 932. As for McCleland's argument "that he needs an expert witness to rebut the defendants' arguments concerning the adequacy of his care, 'it cannot follow that a court must therefore appoint an expert under Rule 706 whenever there are allegations of medical malpractice.'" *Id.* (quoting *Rachel v. Troutt*, 820 F.3d 390, 398 (10th Cir. 2016)). The district court thus overruled McCleland's as-construed objection. It further adopted the magistrate judge's recommendation that McCleland could not prove he suffered any objectively sufficiently serious injury on account of the delay in receiving antiviral therapy. The district court

granted the defendants' summary judgment motions on that basis alone, finding that it did not need to address the magistrate judge's alternative recommendation about defendants' subjective awareness of McCleland's alleged need for care.

III. ANALYSIS

The district court held that without a medical expert, McCleland could not meet his burden on causation and therefore he had failed to identify a material issue of disputed fact. Given this, McCleland raises what he denominates as two issues:

- the magistrate judge erred when she denied his motions to appoint counsel and his Rule 706 motion; and
- the district court erred when it granted summary judgment based on defendants' expert testimony alone.

Under the circumstances, the second issue stands or falls with the first. Although McCleland argues that defendants' experts' opinions were flawed and therefore unworthy of being accepted as expert testimony, that is beside the point because he bears the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that summary judgment must enter, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). If McCleland needs expert testimony to prove his claims—and he has never argued otherwise—then his failure to present expert causation testimony at summary judgment mandated judgment in defendants'

favor.[1] Our analysis below accordingly focuses on whether the district court should have appointed an expert, or should have appointed counsel who might have retained an expert.

A. Firm Waiver

McCleland filed no Rule 72(a) objection to the magistrate judge's orders denying appointment of counsel and an expert witness, except for the order denying his second motion for appointment of counsel. Defendants accordingly argue that McCleland has waived all counsel- and expert-related challenges other than the appointment-of-counsel question as presented at the time of his second motion.

"Under the firm waiver rule, a party who fails to make a timely objection to the magistrate judge's ruling waives appellate review of both factual and legal questions." *Sinclair Wyo. Refin. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 781 n.23 (10th Cir. 2021) (internal quotation marks and brackets omitted). We may apply the firm waiver rule even if a district court *sua sponte* reexamines a magistrate judge's order, *see Vega v. Suthers*, 195 F.3d 573, 579–80 (10th Cir. 1999), as the district

[1] In the Summary of Argument section of his brief, McCleland asserts, without elaboration, that his medical literature was judicially noticeable. *See* Aplt. Opening Br. at 3. "[S]tray sentences like these are insufficient to present an argument," *Eizember v. Trammell*, 803 F.3d 1129, 1141 (10th Cir. 2015), so we do not address this contention further. In a similar vein, McCleland argues that, "[t]hrough questioning, [the] medical literature could have been authenticated at trial, or during depositions." Aplt. Opening Br. at 6. Presumably he means through questioning of defendants' experts. Even if true (and we express no opinion on that), he does not explain how the relevant literature could be admitted for the truth of the matters asserted in his case-in-chief. And without this evidence as part of his case-in-chief, his claim fails. *See Celotex*, 477 U.S. at 323 (equating the summary-judgment and directed-verdict standards).

court did here with the magistrate judge's Rule 706 order.

But firm waiver is not jurisdictional, *see Sinclair*, 989 F.3d at 781–83, and "does not apply . . . when . . . a *pro se* litigant has not been informed of the time period for objecting and the consequences of failing to object," *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005). McCleland is pro se and none of the magistrate judge's relevant orders contained the necessary warning. We therefore reject defendants' firm-waiver assertion and turn to the merits of McCleland's arguments.

B. Appointment of an Expert Witness

We address the expert-witness question first because the analysis informs the appointed-counsel question.

Rule 706(a) states, "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 . . . ." We review Rule 706 rulings for abuse of discretion. *Rachel*, 820 F.3d at 397.

The details of Rule 706 make clear that an appointed expert's role is to assist the court, not the parties. *See id.* 706(b) ("The court [*i.e.*, not a party] must inform the expert of the expert's duties."); *id.* 706(b)(1)–(2) ("The expert . . . must advise the parties of any findings the expert makes . . . [and] may be deposed by any party . . . ."); *id.* 706(e) ("This rule does not limit a party in calling its own experts."). Here, however, McCleland asked the district court to appoint an expert to testify about "the standard of medical care for the treatment of hepatitis C infection," and "that the defendants deviated from it, [causing] damage to [his] kidneys." Supp. R.

at 36–37. The district court did not abuse its discretion in finding that this was an inappropriate use of Rule 706.

In addition, McCleland does not address the problem of compensating the expert. In civil cases such as this, the rule requires the parties to pay the appointed expert's fee "in the proportion and at the time that the court directs—and the compensation is then charged like other costs." Fed. R. Evid. 706(c)(2). The district court permitted McCleland to bring his suit *in forma pauperis*, so this rule would effectively require the district court to apportion the entire expert's fee to defendants. The district court did not abuse its discretion in concluding that this case was not so extraordinary that it justified requiring one party to pay an expert to advocate the opposing party's position. Nor has McCleland given us any reason to reject the longstanding consensus that the court itself may not pay an *in forma pauperis* plaintiff's witness fees. *See Malik v. Lavalley*, 994 F.2d 90, 90 (2d Cir. 1993) (per curiam) (citing and agreeing with decisions on this issue from the First, Third, Sixth, Seventh, Eighth, and Ninth Circuits).

McCleland cites *Spann v. Roper*, 453 F.3d 1007, 1009 (8th Cir. 2006) (per curiam), which deemed it "incongruous that the district court denied [the prisoner-plaintiff's] motion for an expert witness and then granted summary judgment in part based on [his] failure to provide verifying medical evidence that the delay had detrimental effects." *Spann* does not provide any details about the plaintiff's motion, so we cannot say whether we agree with *Spann*'s reasoning as

applied to that case.[2] That said, we recognize that McCleland filed a Rule 706 motion and was denied, then lost his case at summary judgment because he lacked expert testimony. The outcome is understandably upsetting, but we see no incongruity. Rule 706 was not designed to fill in the gaps for a party who cannot find or afford an expert. We assume the district court could use that rule to solicit an independent second opinion in a case like this (further assuming an appropriate arrangement for compensating the expert), but we hold it was not an abuse of discretion to decline to do so.

Indeed, as the district court recognized, our *Rachel* decision is essentially dispositive here. *Rachel* was likewise an Eighth Amendment denial-of-medical-care case in which the prisoner argued that "he needed expert testimony to rebut the defendants' arguments about the alleged adequacy of his medical treatment." 820 F.3d at 398. We responded, "[I]t cannot follow that a court must therefore appoint an expert under Rule 706 whenever there are allegations of medical malpractice." *Id.* (internal quotation marks omitted).

For these reasons, we reject McCleland's argument that the district court should have appointed an expert.

C. Appointment of Counsel

"There is no constitutional right to appointed counsel in a civil case," *Durre v.*

[2] The Eighth Circuit did not reverse the denial of the motion to appoint an expert, but instead held that a lay jury could decide the relevant issue. *See id.*

Dempsey, 869 F.2d 543, 547 (10th Cir. 1989), but "[t]he court may request an attorney to represent any person unable to afford counsel," 28 U.S.C. § 1915(e)(1).[3] "[T]he factors to be considered in deciding whether to appoint counsel[] includ[e] the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims." *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995). "We review the denial of appointment of counsel in a civil case for an abuse of discretion," *id.*, although abuse of discretion in this context is even more deferential than usual: "Only in those extreme cases where the lack of counsel results in fundamental unfairness will the district court's decision be overturned," *McCarthy v. Weinberg*, 753 F.2d 836, 839 (10th Cir. 1985).

Momentarily setting aside the question of whether appointed counsel was the gateway to obtaining an expert witness, we see no abuse of discretion. McCleland's filings in the district court and on appeal show he is a capable pro se litigant. He understands court procedure, writes cogently and concisely, and he knows how to find relevant cases and other authorities.

McCleland asserts, nonetheless, that "[o]ther courts have held that taking depositions, witness examinations, and applying the rules of evidence [are] needs [justifying] the appointment of counsel." Aplt. Opening Br. at 4 (citing extra-circuit cases). But these considerations mostly relate to trial skills. When McCleland

[3] Thus, when we refer to appointing counsel, we really refer to a request that an attorney take the case *pro bono*.

moved for appointment of counsel, the magistrate judge did not know if the case would go to trial, so we cannot say she abused her discretion by not taking the challenges of trial practice into account. *Cf. Perez v. Fenoglio*, 792 F.3d 768, 785 (7th Cir. 2015) (stating that the appointment-of-counsel calculus changes as the case reaches "advanced-stage litigation activities"). As for taking depositions (and the comparatively minimal need to apply the Rules of Evidence in that setting), the record convinces us that McCleland is intelligent and resourceful enough to discharge this task adequately.[4]

The question, therefore, is whether McCleland's need for an expert witness materially changes the analysis. His theory appears to be that his failure to retain an expert through his own efforts limited his "ability to present his claims," *Rucks*, 57 F.3d at 979, and appointed counsel would have had a better chance, *cf. 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.").

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 "fundamental[ly] unfair[]," *McCarthy*, 753 F.2d at 839, to refuse to appoint

[4] McCleland says he "was granted leave to depose the witnesses but he was never able to do so." Aplt. Opening Br. at 2. He offers no further explanation.

counsel merely to provide a better chance at finding an expert. Stated slightly differently, when all other factors weighed against granting McCleland's motions, it was within the district court's discretion to conclude that those factors were not outweighed by the need for a better opportunity to secure expert testimony—even if McCleland's case would fail but for expert testimony. We thus reject McCleland's argument that the district court should have appointed counsel.

IV. CONCLUSION

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. For these reasons, we affirm the district court's judgment.

Entered for the Court

Carolyn B. McHugh
Circuit Judge