THE CONSTITUTIONALIZATION OF MEDICAL MALPRACTICE IN THE SEVENTH CIRCUIT

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INTRODUCTION

> *Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.*
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> —*Estelle v. Gamble*[1]

The tortious act of providing inadequate medical care may be a source of civil liability in several ways, depending on the context and setting in which the inadequate care was provided. If the inadequate medical care was administered to a state or federal prisoner, that prisoner might have a valid claim under both a state medical malpractice law[2] and the Eighth Amendment to the U.S. Constitution.[3] Alternatively, a healthcare professional treating a pretrial detainee may be liable for medical malpractice and for an impermissible deprivation under the Fourteenth Amendment Due Process Clause.[4] The multiple causes of action, however, are based on separate and distinct legal theories. Medical malpractice sounds in negligence, while an Eighth Amendment claim is reserved for deliberate indifference amounting to the "unnecessary and wanton infliction of pain."[5] As the Supreme Court made clear in *Farmer v.*

1. 429 U.S. 97, 106 (1976).

2. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-1704 (2019) ("As used in this Part, 'medical malpractice action' means any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice.").

3. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

4. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *see also Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010) (noting that pretrial detainees were "entitled to the same basic protections under the Fourteenth Amendment's due process clause" as convicted prisoners, to include adequate medical care); *Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017) (noting that after a probable-cause determination but prior to conviction, a detainee's right to adequate medical care is guaranteed by the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment's proscription of cruel and unusual punishments).

5. *Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

Brennan,[6] the *Estelle* Court intentionally described the standard as *deliberate* indifference in order to distinguish it from common negligence.[7] Similarly, the standard for proving a Fourteenth Amendment violation requires a greater showing than mere negligence.[8]

Besides the legal jargon separating the causes of action, what is the practical distinction between constitutional claims of inadequate medical care and medical malpractice? "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment."[9] In terms of obligation, this prohibition requires that state and federal governments "provide medical care for those whom it is punishing by incarceration."[10] In short, the Eighth Amendment's proscription of cruel and unusual punishments creates an affirmative duty that state actors provide adequate medical care to prisoners.[11] Correspondingly, the U.S. Supreme Court held in *Youngberg v. Romeo*[12] that the Due Process Clause of the Fourteenth Amendment provides a constitutional guarantee of adequate medical care for pretrial detainees.[13] These are constitutional mandates, the violations of which are actionable under 42 U.S.C. § 1983[14] or through a *Bivens* suit.[15]

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6. 511 U.S. 825 (1994).

7. *Id.* at 835 ("In considering the inmate's claim in *Estelle* that inadequate prison medical care violated the Cruel and Unusual Punishments Clause, we distinguished 'deliberate indifference to serious medical needs of prisoners' . . . from 'negligen[ce] in diagnosing or treating a medical condition,' . . . holding that only the former violates the Clause." (citations omitted)).

8. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

9. *Estelle*, 429 U.S. at 104 (quotations omitted).

10. *Id.* at 103.

11. *Farmer*, 511 U.S. at 832 ("The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care; and must 'take reasonable measures to guarantee the safety of the inmates.'" (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984))).

12. 457 U.S. 307 (1982).

13. *Id.* at 315, 324 (noting that detainees retain "a right to adequate food, shelter, clothing, and medical care" under the Fourteenth Amendment).

14. 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

15. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971) ("That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition.").

Medical malpractice is also based on the breach of a duty to provide adequate medical care.[16] The real difference between malpractice and deliberate indifference is the requisite mental state that a plaintiff has the burden to show. Although the Eighth and Fourteenth Amendments impose upon state and federal officials a duty to provide adequate medical care to inmates and detainees, a breach of that duty does not, by itself, support a constitutional claim. To prove a violation of the Eighth Amendment, a prisoner plaintiff must show that the defendant knew of the serious risk to plaintiff's health or safety and consciously disregarded knowledge of that risk.[17] In the medical context, that required showing becomes a conscious disregard for a serious medical need, such as medication, treatment, or surgery.[18] Under the Fourteenth Amendment, a plaintiff must make a similar showing that "focuses on the intentionality of the individual defendant's conduct" and "asks whether the medical defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [plaintiff's] case."[19]

On the other hand, under medical malpractice, a negligent breach of duty resulting in harm is enough to create liability; subjective knowledge is irrelevant.[20] The greater burdens of proving a defendant's actual awareness and conscious disregard distinguish constitutional claims from medical malpractice.[21] Negligent conduct simply does not rise to the level of a constitutional violation under the Eighth or Fourteenth Amendment.[22]

This distinction, however, is not as sharply defined in practice as the crisp definitions might lead practitioners to believe. Specifically, when a plaintiff persuasively argues that the substandard care itself is evidence that a defendant medical provider actually knew and consciously disregarded knowledge of plaintiff's serious medical need, what actually

16. 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 331 (2d ed. 2022).

17. *Farmer*, 511 U.S. at 837 ("We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

18. *See Saylor v. Nebraska*, 812 F.3d 637, 644 (8th Cir. 2016).

19. *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018) (further noting that "[a] showing of negligence or even gross negligence will not suffice" (quoting *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018))).

20. *See Saylor*, 812 F.3d at 644 (citation omitted).

21. *Wilson v. Seiter*, 501 U.S. 294, 305 (1991) (noting that "mere negligence" does not satisfy the deliberate indifference standard).

22. *See id.* at 297 ("'It is only such indifference' that can violate the Eighth Amendment; allegations of 'inadvertent failure to provide adequate medical care,' or of a 'negligent . . . diagnosis' simply fail to establish the requisite culpable state of mind." (quoting *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976))); *see also Daniels v. Williams*, 474 U.S. 327, 336 (1986) (holding that negligent conduct does not violate the Due Process Clause of the Fourteenth Amendment).

separates deliberate indifference from medical malpractice? This Article examines the reasoning behind the Supreme Court's distinction, the waning border between the causes of action, and how courts can reassert the division by enforcing the individual standards carefully in light of the principles guiding their creation.

For several administrative and logistical reasons, a medical malpractice claim might be untenable for prisoner plaintiffs, even for those with meritorious claims. Numerous states, for example, require some form of expert opinion as early as the pleadings stage to support a claim of medical malpractice.[23] Many prisoners do not have legal representation for their civil cases, let alone the requisite access or resources to consult with a qualified medical professional regarding their potential legal claims.[24] Without that access, their medical malpractice claims are doomed before they can be brought. Lacking a viable alternative, those plaintiffs might seek to vindicate their rights by alleging deliberate indifference under the Eighth Amendment. Although deliberate indifference is a higher standard than negligence, it does not require expert testimony to prove.[25]

This places courts in the unenviable position of adjudicating myriad pro se inadequate medical care claims without the benefit of expert medical testimony. The professional judgment standard guides those courts in determining whether a medical professional's discretionary treatment decisions are entitled to deference as a matter of law.[26] Under the professional judgment standard, a court should defer to a medical professional's discretionary treatment decisions unless "no minimally competent professional would have so responded under those

23. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-622 (2013) (requiring healing art malpractice plaintiffs to include, with their complaints, a report from a qualified health professional who has determined that "reasonable and meritorious cause for the filing of the action" exists); *see also* Stephanie Taormina & Clarence Watson, *Deliberate Indifference and Negligence Claims in a Correctional Facility*, 47 J. AM. ACAD. PSYCHIATRY & L. 254, 256 (2019) ("In the majority of cases, expert testimony is necessary to explicate the standard of care and whether a deviation from it resulted in damages to a patient.").

24. 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) ("Prisoners generally lack the wherewithal to locate a willing expert and the funds to retain her as an expert witness.").

25. *See, e.g.*, *Roe v. Elyea*, 631 F.3d 843, 865 (7th Cir. 2011) (affirming jury verdict for plaintiff despite plaintiff's failure to present expert medical testimony at trial); *see also* Vikram Iyengar, *The Relevance of Expert Testimony to Claims of "Deliberate Indifference" Under the Eighth Amendment*, 52 CRIM. L. BULL. 43 (2016).

26. *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998) ("A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances.").

circumstances."[27] This high standard reflects the culpable state-of-mind requirement for constitutional claims, as contrasted with mere negligence.[28] More than any other legal requirement, the professional judgment standard is what separates medical malpractice claims from constitutional claims and ensures that a plaintiff cannot obviate the requirements of a malpractice claim by merely alleging inadequate medical care under the Eighth or Fourteenth Amendment. When the professional judgment standard is relaxed, eroded, or ignored, the boundary between the two legal theories is equally relaxed, eroded, or ignored. While this diminished boundary benefits plaintiffs in the short-term, it ultimately runs counter to the American civil legal system. Simply stated, it is anathema to the rule of law to compensate for the rigid procedural requirements of medical malpractice by relaxing the substantive legal requirements of constitutional claims—and thereby conflating the discrete legal doctrines into a single, nebulous canon.

I. A CONSTITUTIONAL CLAIM OF INADEQUATE MEDICAL CARE IN CONTRAST WITH STATE-LAW MEDICAL MALPRACTICE

A. The Legal Requirements

The easiest and most direct means by which to distinguish the standards is to observe the legal requirements for proving a claim of Eighth Amendment deliberate indifference, Fourteenth Amendment objective unreasonableness, and medical malpractice. Each species of claim requires that plaintiff show they suffered some kind of injury caused by defendant's allegedly tortious conduct.[29] Further, in each cause of action, the allegedly tortious conduct was some form of inadequate medical care, whether that

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27. *Id.*; *see also Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008) ("A medical professional acting in his professional capacity may be held to have displayed deliberate indifference only if the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment." (quotations omitted)).

28. *See Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (holding "that deliberate indifference entails something more than mere negligence"); *see also Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011) (noting that "negligence or inadvertence will not support a deliberate indifference claim"); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) ("Deliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts.").

29. *See Jackson v. Pollion*, 733 F.3d 786, 790 (7th Cir. 2013) ("No matter how serious a medical condition is, the sufferer from it cannot prove tortious misconduct (including misconduct constituting a constitutional tort) as a result of failure to treat the condition without providing evidence that the failure caused injury or a serious risk of injury. For there is no tort—common law, statutory, or constitutional—without an injury, actual or at least probabilistic." (first citing *Rozenfeld v. Med. Protective Co.*, 73 F.3d 154, 155–56 (7th Cir. 1996); then citing *Buckley v. Fitzsimmons*, 20 F.3d 789, 796 (7th Cir. 1994); and then citing *Pepper v. Village of Oak Park*, 430 F.3d 805, 810 (7th Cir. 2005))).

was a complete lack of treatment, insufficient treatment, or improper treatment techniques.[30] The defining distinction between constitutional claims of inadequate medical care and professional negligence is the state of mind requirements for each. To state a claim under the Eighth or the Fourteenth Amendment, a plaintiff must produce evidence sufficient for a reasonable jury to conclude that the defendant actually knew of and consciously disregarded a serious medical need.[31] Under a theory of malpractice, a defendant's liability turns not on a culpable state of mind, but rather on the breach of an applicable professional standard of duty and resultant injury.[32]

1. DELIBERATE INDIFFERENCE UNDER THE EIGHTH AMENDMENT

To prevail on an Eighth Amendment claim of inadequate medical care, a prisoner has the burden of showing that a medical provider was deliberately indifferent to a serious medical need.[33] The deliberate indifference standard is comprised of both an objective and a subjective element. First, a plaintiff must show that the medical need was objectively serious.[34] A medical need is objectively serious if it either is diagnosed by a physician as requiring treatment or is a need so obvious that even a layperson would recognize the need for professional medical attention.[35] An important signal of objective seriousness is that if the need were left untreated, the patient would suffer significant harm or unnecessary pain.[36]

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30. *See Purtill v. Hess*, 489 N.E.2d 867, 872 (Ill. 1986) (indicating that medical malpractice requires "an unskilled or negligent failure to comply with the applicable [medical] standard"); *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (noting that plaintiff's claim was "based solely on the lack of diagnosis and inadequate treatment of his back injury"); *McCann v. Ogle County*, 909 F.3d 881, 887 (7th Cir. 2018) (recognizing that the Fourteenth Amendment gives pretrial detainees a potential claim for injuries stemming from "inadequate medical care").

31. *Compare Farmer*, 511 U.S. at 837 ("[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."), *with Miranda v. County of Lake*, 900 F.3d 335, 349–50 (7th Cir. 2018) (reversing summary judgment under the Fourteenth Amendment's objective reasonableness test where there was sufficient evidence to support a finding that "the medical defendants knew that [plaintiff] was at great risk of death" but failed to reasonably respond).

32. *Purtill*, 489 N.E.2d at 872.

33. *See Farmer*, 511 U.S. at 837.

34. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

35. *See Hayes v. Snyder*, 546 F.3d 516, 522 (7th Cir. 2008); *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005); *Foulker v. Outagamie County*, 394 F.3d 510, 512 (7th Cir. 2005).

36. *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997) (noting that indications of a serious medical need included "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment;

The existence of an underlying serious medical condition, however, will not always satisfy this objective element. "In the medical care context, this objective element is satisfied when an inmate demonstrates that his medical *need* itself was sufficiently serious."[37]

As the Seventh Circuit has cautioned, courts must distinguish between the existence of objectively serious underlying medical *conditions* and objectively serious medical *needs*.[38] In *Jackson v. Pollion*,[39] a plaintiff suffering from early-stage hypertension did not receive his prescribed medication for a three-week span.[40] The district court found that the plaintiff, Jackson, could "present evidence permitting a reasonable inference that he had experienced a serious medical condition as a consequence of the interruption of his medication," but the court granted summary judgment on other grounds.[41] On appeal, the Seventh Circuit chastised both the lower court and the trial attorneys for failing to genuinely address whether the plaintiff had presented evidence of an injury stemming from the deliberate indifference to an objectively serious medical need.[42] The court of appeals noted that although hypertension was an objectively serious medical condition, the analysis should have been focused more narrowly—namely, on whether the three-week interruption was likely to cause any harm.[43] In other words, the Seventh Circuit asked whether the plaintiff had an objectively serious medical *need* for his hypertension medication during the three-week span in which he did not receive it. Even with an underlying serious medical condition, if a brief interruption in medication or treatment is unlikely to cause any lasting harm, the interruption does not satisfy the constitutional requirement of a serious medical need.

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the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain").

37. *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011) (emphasis added) (citing *Gutierrez*, 111 F.3d at 1369).

38. *Jackson v. Pollion*, 733 F.3d 786, 790 (7th Cir. 2013) ("But if they were going to venture an opinion on the 'objective seriousness' of the plaintiff's 'medical condition,' they had to get the condition right—which was not hypertension but the medical consequences, in fact negligible, of a three-week deprivation of medicine for mild, early-stage hypertension.").

39. *Id.* at 786.

40. *Id.* at 788.

41. *Id.* at 787.

42. *Id.* at 790 ("To determine the effect on the plaintiff's health of a temporary interruption in his medication, the lawyers in the first instance, and if they did their job the judges in the second instance, would have had to make some investment in learning about the condition.").

43. *Id.* at 789–90 ("Hypertension is a serious medical condition because of the long-term damage that it can do. But the issue in this case is whether the withholding of treatment during a brief period in the early stages of the condition in an otherwise healthy man in his mid-twenties was likely to cause serious, or indeed any, harm.").

Next, Eighth Amendment claims require the plaintiff to prove that the defendant had the requisite subjective state of mind.[44] To show that the defendant had a sufficiently culpable state of mind, the subjective element requires a plaintiff to prove two distinct facts: the defendant had actual knowledge of a plaintiff's serious medical need or risk to health and consciously disregarded that knowledge.[45]

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[46]

It is not enough to show that a defendant prison official *should* have known of a serious need or risk to a prisoner's health or safety; the defendant must have actually known that the prisoner would suffer harm.[47] "The requirement of subjective awareness tethers the deliberate-indifference cause of action to the Eighth Amendment's prohibition of cruel and unusual punishment."[48] A "showing [of] mere negligence is not enough . . . [e]ven objective recklessness . . . is insufficient to make a claim."[49] Actual awareness and conscious disregard are necessary to prove *deliberate* action as opposed to merely negligent action.

Proving actual knowledge is an inherently difficult burden to carry, as few defendants are likely to admit to actual knowledge of a plaintiff's serious medical need.[50] Plaintiffs can prove actual knowledge, however, by presenting evidence that a defendant was exposed to facts and circumstances from which the defendant very likely inferred the existence of the serious medical need.[51] Such evidence needs to be compelling, though, because triers of fact must be able to reasonably conclude that the defendant actually knew of a plaintiff's serious medical need, not that the defendant should have known.[52] The presence of serious symptoms and germane diagnoses are relevant, though not dispositive, circumstantial

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44. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662 (7th Cir. 2016).
49. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016).
50. *Id.* ("The difficulty is that except in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely if ever will an official declare, 'I knew this would probably harm you, and I did it anyway!'").
51. *Farmer*, 511 U.S. at 837.
52. *Id.*

evidence that a defendant had actual knowledge of a serious medical need.[53] Conscious disregard, on the other hand, is evidenced by a failure to reasonably respond to that serious medical need, once known.[54] A reasonable response and a conscious disregard are mutually exclusive: a reasonable response precludes conscious disregard. Consequently, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted."[55] Stated more succinctly, a prison official who "act[ed] reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."[56]

Importantly, "[u]nder the Eighth Amendment, [a prisoner] is not entitled to demand specific care. [The prisoner] is not entitled to the best care possible. [The prisoner] is entitled to *reasonable* measures to meet a substantial risk of serious harm to her."[57] The Constitution "does not mandate comfortable prisons,"[58] and "[m]edical professionals cannot guarantee pain-free lives for their patients."[59] Only an "extreme deprivation" is sufficient to state an Eighth Amendment claim.[60] "Mere dissatisfaction or disagreement with a doctor's course of treatment is generally insufficient" to give rise to an Eighth Amendment claim.[61] Most lawyers, judges, and jurors, however, are not medical professionals. They lack the training, education, and experience necessary to determine whether and which course of treatment is medically indicated or reasonable at any given time. As such, the question of whether a medical professional's response was "reasonable" at the time it was administered takes on a curious, and sometimes capricious, quality.[62] Because a reasonable response and conscious disregard are mutually exclusive, many judgments turn on a jury's determination of whether a medical response was reasonable under the circumstances. To avoid arbitrary results or judgments based on passion, confusion, or sympathy rather than reason, the reasonableness of any course of medical treatment at issue in a constitutional claim must be analyzed under the professional judgment standard.[63]

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53. *Id.* at 834.

54. *Id.* at 837–39.

55. *Id.* at 844.

56. *Id.* at 845.

57. *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) (emphasis added).

58. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

59. *Norwood v. Ghosh*, 723 F. App'x. 357, 365 (7th Cir. 2018).

60. *Turner v. Miller*, 301 F.3d 599, 603 (7th Cir. 2002).

61. *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) (citing *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996)).

62. *See infra* Section IV.A (discussing the professional judgment standard).

63. *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) ("[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is

2. OBJECTIVE REASONABLENESS UNDER THE FOURTEENTH AMENDMENT

Like prisoners, pretrial detainees also are guaranteed adequate medical care under the U.S. Constitution.[64] Unlike prisoners, detainees are protected by the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment's proscription of cruel and unusual punishment.[65] The U.S. Supreme Court has not directly ruled on whether courts should analyze detainees' Fourteenth Amendment claims of inadequate medical care under the Eighth Amendment's deliberate indifference model. But the Court has noted in a separate context that "[t]he language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"[66] Building on that, the Seventh Circuit held that courts should adjudicate Fourteenth Amendment claims of inadequate medical care under the *Kingsley* objective reasonableness standard rather than the Eighth Amendment deliberate indifference standard.[67]

Like deliberate indifference, the *Kingsley* standard has objective and subjective elements. To show that the defendant had the requisite subjective mental state, a plaintiff must prove that "the medical defendants acted purposefully, knowingly, or perhaps even recklessly."[68] As in an Eighth Amendment deliberate indifference claim, a plaintiff must show that the defendant had actual knowledge of plaintiff's serious medical need and consciously disregarded it.[69] This showing mirrors Eighth Amendment deliberate indifference, as some degree of deliberate action is

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not appropriate for the courts to specify which of several professionally acceptable choices should have been made." (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980))).

64. *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010).

65. *Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017); *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law").

66. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015) (citing *Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977)).

67. *Miranda v. County of Lake*, 900 F.3d 335, 346–47, 350–52 (7th Cir. 2018).

68. *Id.* at 353 (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015)).

69. *Id.*; *see also McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018) ("The first step, which focuses on the intentionality of the individual defendant's conduct, remains unchanged and 'asks whether the medical defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [plaintiff's] case.' A showing of negligence or even gross negligence will not suffice." (quoting *Miranda*, 900 F.3d at 353)).

necessary for liability to attach—"negligent conduct does not offend the Due Process Clause."[70]

The detainee plaintiff also must show that the defendant's medical treatment decision was objectively unreasonable.[71] A court will look to a medical professional's response to a plaintiff's serious medical need in order to determine, based "on the totality of facts and circumstances faced by the individual alleged to have provided inadequate medical care," whether the care provided was objectively reasonable.[72] This analysis is based only on the information available to the defendant at the time and not with the benefit of hindsight.[73] The Seventh Circuit has not clearly articulated what separates a reasonable response under the Eighth Amendment from an objectively reasonable response under the Fourteenth Amendment. The professional judgment standard, however, should guide both.[74] In this regard, the Eighth and Fourteenth Amendment standards are arguably the same.

3. STATE-LAW MEDICAL MALPRACTICE

Lastly, medical malpractice is based not on a constitutional mandate but rather on common-law negligence. Every state handles the substantive and procedural elements of professional negligence claims slightly differently,[75] but they all are rooted in common-law negligence.[76] Under state law, to state a claim for negligence, a plaintiff must show that the defendant owed a duty of care to plaintiff, the defendant breached that duty

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70. *Miranda*, 900 F.3d at 353 (citing *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986)) (holding that under the Fourteenth Amendment's Due Process Clause, "mere negligence could not '[work] a deprivation in the *constitutional* sense'" (quoting *Parratt v. Taylor*, 451 U.S. 527, 548 (1981))).

71. *Id.* at 354.

72. *McCann*, 909 F.3d at 886.

73. *Dixon v. County of Cook*, 819 F.3d 343, 349–50 (7th Cir. 2016).

74. The progenitor of the professional judgment standard, *Youngberg v. Romeo*, 457 U.S. 307 (1982), was a Fourteenth Amendment case. Since then, the doctrine has migrated to Eighth Amendment deliberate indifference jurisprudence and seemingly fallen out of use in the context of Fourteenth Amendment inadequate medical care claims. *See, e.g.*, *Stone v. Evangelidis*, 507 F. Supp. 3d 366, 372–73 (D. Mass. 2020). However, as the U.S. Supreme Court has not expressly overruled *Youngberg*, it should still apply with equal force to inadequate medical care claims brought under either Amendment.

75. *Compare* 735 ILL. COMP. STAT. 5/2-622(a) (2021) (generally requiring medical malpractice plaintiffs to include with their complaint a written report from a qualified health professional attesting to the viability of the claim), *with* IND. CODE § 34-18-10-22(a) (2021) (charging a Medical Review Panel with the responsibility of "express[ing] the panel's expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint").

76. *See generally* Comment, *Professional Negligence*, 121 U. PA. L. REV. 627 (1973).

of care, and that breach proximately caused injury to the plaintiff.[77] Just as ordinary persons are held to an ordinary duty of care, physicians are held to a professional duty of care—that is, "to possess and to apply that degree of knowledge, skill, and care which a reasonably well-qualified physician in the same or similar community would bring to a similar case under similar circumstances."[78] A plaintiff in a medical malpractice action must prove "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."[79]

Notably, medical malpractice does not require a plaintiff to show that a defendant acted with "purposeful, knowing, or reckless disregard of the consequences."[80] In fact, a medical malpractice plaintiff is not required to submit evidence of any subjective knowledge or intent on the part of a defendant. Once a plaintiff has shown that a defendant owed a professional duty of care, breached the duty, and caused harm to the plaintiff as a result, the plaintiff has carried their burden.[81] The applicable standard of care and the breach of that standard usually must be established through expert testimony.[82] Expert testimony is not required, however, when "the professional's conduct is so grossly negligent or the treatment so common that a lay juror could readily appraise it."[83] The general requirement of expert testimony in malpractice claims is also the biggest *practical* distinction between such claims and constitutional claims of inadequate medical treatment. An aversion to, or the impracticability or impossibility of, retaining expert witnesses arguably forces many plaintiffs to allege constitutional violations for their inadequate medical care as opposed to state-law medical malpractice claims.

77. *Espinoza v. Elgin, Joliet & E. Ry.*, 649 N.E.2d 1323, 1326 (Ill. 1995).

78. *Purtill v. Hess*, 489 N.E.2d 867, 872 (Ill. 1986).

79. *Id.* at 872.

80. *Miranda v. County of Lake*, 900 F.3d 335, 354 (7th Cir. 2018) (noting plaintiff's burden to prove defendant's culpable mental state under the Fourteenth Amendment).

81. *Purtill*, 489 N.E.2d at 872.

82. *Jones v. Chi. HMO Ltd.*, 730 N.E.2d 1119, 1130 (Ill. 2000) ("The rationale for requiring expert testimony is that a lay juror is not skilled in the profession and thus is not equipped to determine what constitutes reasonable care in professional conduct without the help of expert testimony.").

83. *Id.*

B. Practical Considerations

1. MEDICAL MALPRACTICE CLAIMS GENERALLY REQUIRE EXPERT TESTIMONY

State-law medical malpractice plaintiffs usually require expert testimony to prove their cases, whereas plaintiffs claiming constitutional violations do not[84]; "[g]enerally, expert testimony is needed to support a charge of malpractice because jurors are not skilled in the practice of medicine and would find it difficult without the help of medical evidence to determine any lack of necessary scientific skill on the part of the physician."[85] Expert testimony is required to show both the professional duty of care that a medical provider owes to a person who was in plaintiff's position and how the defendant medical provider breached that professional duty of care.[86]

Not every medical professional is competent to testify on the professional standard of care owed by every other medical professional. In Illinois, for example, an expert witness must be "a licensed member of the school of medicine about which the expert proposes to testify; and that . . . expert must be familiar with the methods, procedures, and treatments ordinarily observed by other health-care providers in either the defendant's community or a similar community."[87] This is an additional burden on the plaintiff, who must "affirmatively establish[] the expert's qualifications and competency to testify."[88] If a plaintiff cannot offer competent expert testimony, summary judgment in favor of the defendant is not only proper, but also necessary, regardless of the merits of the case.[89] The only exception to this requirement is when a medical provider's "negligence

84. *Walski v. Tiesenga*, 381 N.E.2d 279, 282 (Ill. 1978) ("[T]he plaintiff in a medical malpractice action generally must establish the standard of care through expert testimony."); *see also Purtill*, 489 N.E.2d at 872 ("Unless the physician's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant physician's deviation from that standard.").

85. *Walski*, 381 N.E.2d at 282.

86. *Weekly v. Solomon*, 510 N.E.2d 152, 155 (Ill. App. Ct. 1987) ("In a medical malpractice action, plaintiff must show, through expert testimony, the standard of care applicable to the defendant physician and the failure of defendant to conform to the standard.").

87. *Sullivan v. Edward Hosp.*, 806 N.E.2d 645, 655 (Ill. 2004); *see also Dolan v. Galluzzo*, 398 N.E.2d 13, 16 (Ill. 1979) ("We therefore hold that, in order to testify as an expert on the standard of care in a given school of medicine, the witness must be licensed therein.").

88. *Weekly*, 510 N.E.2d at 155.

89. *Paquet v. Steiner*, 607 N.E.2d 615, 619 (Ill. App. Ct. 1993) ("As a final matter, the summary judgment granted to defendants must stand because plaintiff cannot maintain an action sounding in medical malpractice without expert testimony on matters related to the doctor's deviation from the relevant standard of care.").

[was] so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson."[90]

Like other state legislatures, Illinois has codified this requirement in its Healing Art Malpractice Act[91]:

> (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:
>
> (1) That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action.
>
> (2) That the affiant was unable to obtain a consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until 30 days after being served with a certificate required by paragraph 1.
>
> (3) That a request has been made by the plaintiff or his attorney for examination and copying of records pursuant to Part 20 of Article VIII of this Code and the party required to comply under those Sections has failed to produce such records within 60 days of the receipt of the request. If an

90. *Purtill v. Hess*, 489 N.E.2d 867, 872 (Ill. 1986).

91. 735 ILL. COMP. STAT. 5/2-622 (2019).

> affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days following receipt of the requested records. All defendants except those whose failure to comply with Part 20 of Article VIII of this Code is the basis for an affidavit under this paragraph shall be excused from answering or otherwise pleading until 30 days after being served with the certificate required by paragraph 1.[92]

An affidavit, often referred to as a certificate of merit, and a reviewing health professional's written report for each defendant must be included with plaintiff's complaint.[93] The failure to include a certificate of merit is grounds for dismissal.[94] The Illinois Supreme Court has upheld the Act's requirements amid challenges to its constitutionality under both the state constitution and the Federal Constitution.[95] The court reasoned that the Act was permissible because it simply enforced an already existing legal requirement—namely, expert testimony—before legal costs to both parties mounted.[96] The Act was designed to quickly and efficiently screen those malpractice claims that, as a matter of law, had no chance of success, and Illinois courts have enforced it with that in mind.[97]

Conversely, under Indiana's approach, a potential malpractice claimant first must present their proposed complaint to a medical review panel comprised of health experts and receive an opinion by the panel prior to commencing the action.[98] All medical review board members are healthcare providers who "hold a license to practice in their profession."[99] A plaintiff can avoid this requirement only if the damages they seek total

92. *Id.* § 2-622(a).

93. *Id.* § 2-622(b) ("Where a certificate and written report are required pursuant to this Section a separate certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time.").

94. *Id.* § 2-622(g) ("The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619.").

95. *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139, 1143 (Ill. 1992) (upholding the state and federal constitutionality of Illinois's certificate of merit pleading requirement).

96. *Id.* at 1142 ("Section 2-622 is designed to reduce the number of frivolous suits that are filed and to eliminate such actions at an early stage, before the expenses of litigation have mounted.").

97. *See, e.g.*, *Woodard v. Krans*, 600 N.E.2d 477, 484 (Ill. App. Ct. 1992) (noting that "section 2-622 is intended primarily to foreclose frivolous medical malpractice suits at the pleading stage").

98. IND. CODE § 34-18-8-4 (2021).

99. *Id.* § 34-18-10-5.

less than $15,000 or if all parties agree, in writing, to proceed without first presenting the complaint to the panel.[100]

In Wisconsin, the question of whether expert testimony is required is not codified but rather turns on whether the underlying issue is "within the realm of the ordinary experience of mankind."[101] Expert testimony generally is required to establish the applicable professional standard of care, as it is not usually "within the realm of the ordinary experience of mankind." This includes "professional nursing or professional hospital care."[102] Expert testimony is not required, on the other hand, to establish applicable standards of care for "nonmedical, administrative, ministerial or routine care."[103] The distinction will turn not on the profession of the provider but rather on the nature of the decision or act that gave rise to the claim.[104]

State law controls what and when expert testimony is required to carry a medical malpractice claim and varies state by state, but the mere *specter* of the requirement likely incentivizes potential litigants with limited resources to pursue constitutional claims instead.

2. MEDICAL MALPRACTICE DAMAGES MAY BE CAPPED BY STATE LAW

Plaintiffs bring Eighth and Fourteenth Amendment inadequate medical care claims under 42 U.S.C. § 1983, which does not limit compensatory or punitive damages.[105] Further, these claims can entitle

100. *See id.* § 34-18-8-5 ("Notwithstanding section 4 of this chapter, a claimant may commence an action in court for malpractice without the presentation of the claim to a medical review panel if the claimant and all parties named as defendants in the action agree that the claim is not to be presented to a medical review panel."); *id.* § 34-18-8-6(a) ("Notwithstanding section 4 of this chapter, a patient may commence an action against a health care provider for malpractice without submitting a proposed complaint to a medical review panel if the patient's pleadings include a declaration that the patient seeks damages from the health care provider in an amount not greater than fifteen thousand dollars ($15,000).").

101. *State v. Kandutsch*, 799 N.W.2d 865, 872 (Wis. 2011) (quoting *Cramer v. Theda Clark Mem. Hosp.*, 172 N.W.2d 427, 428 (Wis. 1969)).

102. *Kujawski v. Arbor View Health Care Ctr.*, 407 N.W.2d 249, 252 (Wis. 1987).

103. *Id.*

104. *Id.* (holding that expert testimony was not required to establish a standard of care applicable to the decision whether to restrain a patient in a wheelchair, even though Wisconsin law required that a physician make the decision).

105. *See* 42 U.S.C. § 1983; *see also Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) ("Title 42 U.S.C. § 1983 provides that '[e]very person' who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages."); *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 . . . .").

successful plaintiffs to reasonable attorney's fees.[106] The Prison Litigation Reform Act (PLRA),[107] however, does limit attorney's fee awards to an hourly rate based on 150% of the rate established for court-appointed counsel in 18 U.S.C. § 3006A.[108] As a further pseudo-limitation, the award of attorney's fees must be deducted from the judgment, not to exceed 25% of the judgment amount.[109] The U.S. Supreme Court has held that this section of the PLRA requires that courts awarding fees to successful plaintiffs apply up to 25% of the total judgment to satisfy any award of attorney's fees before requiring a defendant to contribute additional funds.[110] Although pretrial detainees technically are not prisoners under the Eighth Amendment, they are included in the PLRA's definition of "prisoner"; therefore, the cap on attorney's fees also applies to their Fourteenth Amendment inadequate medical care claims brought under 42 U.S.C. § 1983.[111] Despite the cap on attorney's fees that may discourage lawyers from representing plaintiffs with constitutional claims, the prospect of uncapped compensatory and punitive damages almost certainly appeals to the plaintiffs themselves.

States, on the other hand, can and do limit damage awards for medical malpractice claims. There is wide variance in states' approaches to

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106. *See* § 1988(b) ("In any action or proceeding to enforce a provision of sections [1983, et al], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

107. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 (codified as amended in scattered titles and sections of the U.S.C.).

108. § 1997e(d)(3) ("No award of attorney's fees . . . shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 [United States Code] for payment of court-appointed counsel."); *see also Johnson v. Daley*, 339 F.3d 582, 598 (7th Cir. 2003) ("If the American Rule is constitutional, which it is, there can be no doubt about the validity of the PLRA, which does not impose a 'litigation tax' on prisoners but simply reduces the extent to which defendants must underwrite prisoners' suits.").

109. § 1997e(d)(2) ("Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.").

110. *Murphy v. Smith*, 138 S. Ct. 784, 790 (2018) ("In cases governed by § 1997e(d), we hold that district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees.").

111. § 1997e(h) ("'Prisoner' defined. As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program."); *see also Kingsley v. Hendrickson*, 576 U.S. 389, 402 (2015) ("[W]e note that the Prison Litigation Reform Act of 1995, 42 U.S.C. §1997e, which is designed to deter the filing of frivolous litigation against prison officials, applies to both pretrial detainees and convicted prisoners."); *Kalinowski v. Bond*, 358 F.3d 978, 979 (7th Cir. 2004) (holding that civilly committed individuals detained under the Illinois Sexually Dangerous Persons Act are prisoners under the PLRA, at least when "held on unresolved criminal charges").

permissible damage awards in malpractice claims, but most states do statutorily limit or even prohibit certain types of damages in some fashion.[112] Illinois, for example, formerly defined "noneconomic damages" as "damages which are intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society."[113] On the other hand, Illinois defined economic damages as "all damages which are tangible, such as damages for past and future medical expenses, loss of income or earnings and other property loss."[114] In Illinois, prior to 2010, noneconomic damages in medical malpractice cases were limited to $500,000 against an individual doctor or nurse and $1,000,000 against a hospital.[115] The Illinois Supreme Court held that the law violated the Illinois Constitution, specifically the separation-of-powers clause.[116] At present, the Illinois legislature has not sought to reassert a new cap on noneconomic damages, and economic damages remain uncapped. Although Illinois does not currently cap compensatory damages, it has expressly prohibited recovery of punitive damages in malpractice claims.[117]

In Wisconsin, the Wisconsin Injured Patients and Families Compensation Fund guarantees all economic damages in malpractice claims but only up to $750,000 in noneconomic damages.[118] The compensation limit does not technically cap damage awards, but it has the same practical effect as one because successful plaintiffs can recover from the fund only those damage awards exceeding the defendants' required

112. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-1115.2(b) (1995).

113. *Id.*, *invalidated by Lebron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010).

114. 5/2-1115.2(a), *invalidated by Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997).

115. 735 ILL. COMP. STAT. 5/2-1706.5 (2005), *invalidated by Lebron*, 930 N.E.2d at 914.

116. *Lebron*, 930 N.E.2d at 914 ("We hold that the limitation on noneconomic damages in medical malpractice actions set forth in section 2-1706.5 of the Code violates the separation of powers clause of the Illinois Constitution . . . and is invalid." (citation omitted)).

117. 735 ILL. COMP. STAT. 5/2-1115 (2021) ("In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.").

118. *See* WIS. STAT. § 893.55(4) (2019–20) ("The limit on total noneconomic damages for each occurrence under par. (b) on or after April 6, 2006, shall be $750,000."); *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 914 N.W.2d 678, 685 (Wis. 2018) ("In regard to those injured by medical malpractice, the Fund guarantees payment of 100 percent of all settlements and judgments for economic damages arising from medical malpractice. However, payments by the Fund for noneconomic damages are limited to $750,000 for each claim.").

liability insurance policy limits.[119] The Wisconsin Supreme Court has upheld the $750,000 limit as constitutional.[120] Like Illinois, Wisconsin does not allow for recovery of punitive damages in medical malpractice cases.[121]

Indiana also has statutorily created a malpractice victim's compensation fund—the Patient Compensation Fund.[122] Under Indiana law, malpractice plaintiffs may recover economic and noneconomic compensatory damages.[123] Further, Indiana law does not prohibit an award of punitive damages in malpractice cases.[124] Although Indiana does not limit damage awards categorically, it does limit the total amount recoverable to $1,800,000 for any single act of malpractice that occurred after June 30, 2019.[125] Of the total damage award, a liable healthcare provider is responsible for paying the first $500,000 of the damage award, and the Patient Compensation Fund is responsible for contributing the remainder.[126] Attorney's fees also are available for a successful plaintiff's attorney but may not exceed thirty-two percent of the total recovery.[127]

While individual states can limit damage awards for malpractice claims and prohibit categories of recoverable damages, sometimes in very complicated ways, damages for constitutional claims brought under 42 U.S.C. § 1983 are not capped.[128] Illinois does not limit compensatory

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119. *Wis. Med. Soc'y v. Morgan*, 787 N.W.2d 22, 27 (Wis. 2010) ("In other words, the Fund is liable for payments 'after a health care provider's statutorily mandated liability coverage limits are exceeded.'" (quoting *Wis. Patients Comp. Fund v. Wis. Health Care Liab. Ins. Plan*, 547 N.W.2d 578, 583 (1996))).

120. *Mayo*, 914 N.W.2d at 697.

121. *See* § 893.55(5) (listing categories of recoverable awards in malpractice claims but not including punitive damages); *see also Lund v. Kokemoor*, 537 N.W.2d 21, 25 (Wis. Ct. App. 1995) (finding that by failing to specifically include punitive damages as a recoverable class of damages, the Wisconsin legislature had intended to preclude them).

122. IND. CODE § 34-18-6-1 (2021).

123. *See* § 34-18-14-3.

124. *Cacdac v. West*, 705 N.E.2d 506, 510–11 (Ind. Ct. App. 1999) ("Nothing in the Indiana Medical Malpractice Act prohibits the award of punitive damages, and we know of no reason physicians or other medical personnel who engage in such conduct should be immune from such damages.").

125. § 34-18-14-3(a)(5) ("The total amount recoverable for an injury or death of a patient may not exceed . . . [o]ne million eight hundred thousand dollars ($1,800,000) for an act of malpractice that occurs after June 30, 2019.").

126. § 34-18-14-3(b)(3).

127. § 34-18-18-1(2).

128. *See* 42 U.S.C. § 1983; *see also Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) ("Title 42 U.S.C. § 1983 provides that '[e]very person' who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages."); *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 . . . .").

damages for malpractice claims but prohibits punitive damages.[129] Wisconsin also prohibits punitive damages and practically limits recovery of noneconomic compensatory damages to $750,000.[130] Indiana permits an award of punitive damages but limits the total amount recoverable to $1,800,000.[131] The uncapped compensatory and punitive damages, as well as reasonable attorney's fees, recoverable in successful constitutional claims likely appeal to litigants seeking to vindicate their rights in the wake of perceived inadequate medical treatment.

II. THE STANDARDS COMPARED AND DISTINGUISHED

A. Both the Eighth and Fourteenth Amendment Standards Require Deliberate Action to Hold Medical Defendants Liable for Inadequate Medical Care

Although the Constitution places affirmative duties on state and federal actors to provide adequate medical care for their prisoners and detainees, it does not automatically attach civil liability to the negligent breach of those duties.[132] The Supreme Court has held that the Eighth Amendment's proscription of cruel and unusual *punishments* and the Fourteenth Amendment's proscription of *deprivations* without due process denote voluntary action.[133] Thus, only deliberate actions depriving prisoners and detainees of adequate medical care implicate the Eighth and

129. 735 ILL. COMP. STAT. 5/2-1115 (2021) ("In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.").

130. WIS. STAT. § 893.55(4)(d) (2019–20).

131. *See* IND. CODE § 34-18-14-3(a)(5) (2021).

132. *See Farmer v. Brennan*, 511 U.S. 825, 844–45, 847 (1994) ("Accordingly, we reject petitioner's arguments and hold that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."); *see also Daniels v. Williams*, 474 U.S. 327, 330–31 (1986) (holding that under the Fourteenth Amendment's Due Process Clause, "mere negligence could not '[work] a deprivation in the *constitutional sense*.'" (quoting *Parratt v. Taylor*, 451 U.S. 527, 548 (1981))).

133. *See Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) ("Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'"); *Farmer*, 511 U.S. at 837–38 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"); *Daniels*, 474 U.S. at 331 ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property." (first citing *Davidson v. New Orleans*, 96 U.S. 97 (1878); then citing *Rochin v. California*, 342 U.S. 165 (1952); then citing *Bell v. Burson*, 402 U.S. 535 (1971); then citing *Ingraham v. Wright*, 430 U.S. 651 (1977); and then citing *Hudson v. Palmer*, 468 U.S. 517 (1984))).

Fourteenth Amendments, respectively. In Eighth Amendment cases, the Court has held that criminal recklessness is the threshold mental state—that is, actual knowledge of a serious medical need coupled with a conscious disregard.[134]

In the recent case of *Walker v. Wexford Health Sources, Inc.*,[135] the Seventh Circuit described the evidentiary standard for the subjective element that a plaintiff must meet to survive summary judgment in an Eighth Amendment deliberate indifference claim:

> To establish the subjective component, [plaintiff] must show that [defendant] knew of facts from which he could infer that a substantial risk of serious harm existed, and that he did, in fact, draw that inference. . . . "[E]vidence of medical negligence is not enough to prove deliberate indifference," but evidence that a medical professional "knew better than to make the medical decision[] that [he] did" is enough to survive summary judgment. . . .
> In practice, "[s]tate-of-mind evidence sufficient to create a jury question might include the obviousness of the risk from a particular course of medical treatment; . . . persistence in a course of treatment known to be ineffective; or proof that the defendant's treatment decision departed so radically from accepted professional judgment, practice, or standards that a jury may reasonably infer that the decision was not based on professional judgment."[136]

The distinction between presenting evidence of inadequate medical treatment and presenting evidence of *deliberately* inadequate medical treatment is crucial to constitutional claims of inadequate medical treatment. That is why the Seventh Circuit emphasized the knowledge requirement in *Walker*.[137] A medical provider who provides inadequate medical care might be negligent, but a defendant who knowingly provides inadequate medical care is deliberately indifferent, if not malicious. A

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134. *Farmer*, 511 U.S. at 838–39 ("To be sure, the reasons for focusing on what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be), differ in the Eighth Amendment context from that of the criminal law. Here, a subjective approach isolates those who inflict punishment; there, it isolates those against whom punishment should be inflicted. But the result is the same: to act recklessly in either setting a person must 'consciously disregard' a substantial risk of serious harm." (citing MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST., Official Draft and Revised Comments 1985))).

135. 940 F.3d 954 (7th Cir. 2019).

136. *Id.* at 964 (citations omitted) (first citing *Farmer*, 511 U.S. 825, 837 (1994); then citing *Petties v. Carter*, 836 F.3d 772, 728 (7th Cir. 2016) (en banc); and then quoting *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662–63 (7th Cir. 2016)).

137. *Walker*, 940 F.3d at 964.

plaintiff who alleges that medical care was so inadequate as to offend the Eighth Amendment must show that the defendant provided that inadequate medical treatment with, at the very least, a conscious disregard of the consequences.[138] This echoes the *Farmer* Court's holding that conscious disregard is the minimal level of culpable deliberate action necessary to state an Eighth Amendment inadequate medical care claim.[139]

In Fourteenth Amendment claims, the Supreme Court has found that purposeful or knowing action displays the requisite culpable state of mind, but the Court has left the door open for reckless action (i.e., actual awareness and conscious disregard) as well.[140] In *Miranda v. County of Lake*,[141] the Seventh Circuit adopted a "purposeful, knowing, or reckless" state-of-mind requirement for Fourteenth Amendment inadequate medical care claims.[142] The court went on to distinguish purposeful, knowing, or reckless conduct from merely negligent conduct:

> A properly instructed jury could find that [defendants] made the decision to continue observing [plaintiff] in the jail, rather than transporting her to the hospital, with purposeful, knowing, or reckless disregard of the consequences. (The jury could also reject such a conclusion.) It would be a different matter if, for example, the medical defendants had forgotten that [plaintiff] was in the jail, or mixed up her chart with that of another detainee, or if [defendant] forgot to take over coverage for [another doctor] when he went on vacation. Such negligence would be insufficient to support liability under the Fourteenth Amendment, even though it might support state-law liability. Here, there is evidence that [defendants] deliberately chose a "wait and see" monitoring plan, knowing that [plaintiff] was neither eating nor drinking nor competent to care for herself . . . . Because the Estate does not claim merely negligent conduct,

138. *Id.*; *see also Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010) (stating that plaintiff must show "a conscious, culpable refusal to prevent the harm").

139. *Farmer*, 511 U.S. at 838–39.

140. *Kingsley v. Hendrickson*, 576 U.S. 389, 396 (2015) ("Whether [the recklessness] standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.").

141. 900 F.3d 335 (7th Cir. 2018).

142. *Id.* at 346, 353–54 ("As applicable here, the first of those inquiries asks whether the medical defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [plaintiff's] case." (citing *Kingsley*, 576 U.S. at 396)).

> a jury must decide whether the doctors' deliberate failure to act was objectively reasonable.[143]

In the Seventh Circuit, to support a Fourteenth Amendment claim for inadequate medical treatment, an allegedly tortious act or omission must be deliberate—that is, chosen with at least reckless disregard for its consequences.[144] If an act or omission was not deliberate—not chosen with knowledge of its potentially harmful consequences—then the act or omission was, at worst, merely negligent and cannot support a constitutional claim.[145]

B. Professional Negligence Does Not Require Deliberate Action

By contrast, professional negligence claims require a showing merely of negligent acts or omissions rather than deliberate action. Illinois's pattern jury instruction for professional negligence claims is instructive in distinguishing medical malpractice from constitutional claims:

> A [medical provider] must possess and use the knowledge, skill, and care ordinarily used by a reasonably careful [medical provider]. The failure to do something that a reasonably careful [medical provider] [practicing in the same or similar localities] would do, or the doing of something that a reasonably careful [medical provider] would not do, under circumstances similar to those shown by the evidence, is "professional negligence."
> The phrase "deviation from the standard of [care][practice]" means the same thing as "professional negligence."
> The law does not say how a reasonably careful [medical provider] would act under these circumstances. That is for you to decide. In reaching your decision, you must rely upon opinion testimony from qualified witnesses [and] [evidence of professional standards] [evidence of by-laws/rules/regulations/policies/procedures] [or similar evidence]. You must not attempt to determine how a reasonably careful [medical provider] would act from any personal knowledge you may have.[146]

The operative language for establishing a claim of medical malpractice is summarized in the second sentence of the first paragraph: "The failure to

143. *Id.* at 354 (citations omitted) (citing *Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372, 380, 382 (7th Cir. 2017)).

144. *Id.* at 353–54.

145. *Id.* at 354.

146. ILLINOIS PATTERN JURY INSTRUCTIONS-CIV. § 105.01, at 3 (SUP. CT. COMM. ON JURY INSTRUCTIONS IN CIV. CASES 2020) [hereinafter IPJI CIVIL (2020)].

do something that a reasonably careful [medical provider] [practicing in the same or similar localities] would do, or the doing of something that a reasonably careful [medical provider] would not do, under circumstances similar to those shown by the evidence, is 'professional negligence.'"[147] There is no requirement that the medical provider knows and consciously disregards knowledge of the harmful consequences of the act or omission.[148]

C. The Standards Must Be Applied in Order to Distinguish Between Deliberate and Negligent Conduct

The Supreme Court has repeatedly reiterated that negligent conduct does not state a constitutional claim for inadequate medical care under the Eighth or Fourteenth Amendments.[149] To give effect to this important difference, lower courts must carefully distinguish between evidence of negligence and evidence of actual awareness coupled with conscious disregard. Only in the latter instance can a plaintiff show that a defendant acted *deliberately* and carry their burden of proof for a constitutional claim. As medical defendants are unlikely to admit to having been actually aware of a plaintiff's serious medical need and having consciously disregarded knowledge of harm when electing a course of treatment (or lack thereof), a plaintiff might be able to present only medical records as evidence of a constitutional violation.[150] As expert testimony is not required to carry an Eighth or Fourteenth Amendment claim, courts in

147. *Id.*

148. *Compare id.* ("The failure to do something that a reasonably careful [medical provider] [practicing in the same or similar localities] would do, or the doing of something that a reasonably careful [medical provider] would not do, under circumstances similar to those shown by the evidence, is 'professional negligence.'"), *with* FED. CIV. JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT NO. 7.15, at 165 (THE COMM. ON PATTERN CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR. 2017) ("Defendant was aware of this strong likelihood that Plaintiff would be seriously harmed . . . . Defendant consciously failed to take reasonable measures to prevent [additional] harm from occurring."), *and* FED. CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR. NO. 7.17, at 171 (THE COMM. ON PATTERN CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR. 2017) ("Defendant was aware that Plaintiff had a serious medical need . . . . Defendant consciously failed to take reasonable measures to provide treatment for the serious medical need.").

149. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) ("In considering the inmate's claim in *Estelle* that inadequate prison medical care violated the Cruel and Unusual Punishments Clause, we distinguished 'deliberate indifference to serious medical needs of prisoners' . . . from 'negligen[ce] in diagnosing or treating a medical condition,' . . . holding that only the former violates the Clause." (citations omitted) (first quoting *Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976); and then quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986))).

150. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) ("The difficulty is that except in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely if ever will an official declare, 'I knew this would probably harm you, and I did it anyway!'").

such instances must be able to evaluate the reasonableness of a medical defendant's professional discretionary treatment choices without competent evidence that a professional standard of care was ever even breached.

Constitutional claims brought under the Eighth and Fourteenth Amendments require courts to make a legal determination of whether a medical professional's treatment decision was reasonable at the time it was made, often unaided by expert testimony.[151] This is somewhat paradoxical, as most states require expert medical testimony to establish that a medical professional breached a professional standard of care.[152] The United States Supreme Court, aware that most legal professionals and jurors were not medical professionals, adopted the professional judgment standard for courts to employ in evaluating the reasonableness of professional discretionary judgments for constitutional purposes[153]:

> In determining what is "reasonable" . . . we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. . . . For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.[154]

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151. *Farmer*, 511 U.S. at 844 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted."); *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018) ("This standard requires courts to focus on the totality of facts and circumstances faced by the individual alleged to have provided inadequate medical care and to gauge objectively—without regard to any subjective belief held by the individual—whether the response was reasonable.").

152. *See, e.g.*, *Jones v. Chi. HMO Ltd.*, 730 N.E.2d 1119, 1130 (Ill. 2000) ("The rationale for requiring expert testimony is that a lay juror is not skilled in the profession and thus is not equipped to determine what constitutes reasonable care in professional conduct without the help of expert testimony."); *Kujawski v. Arbor View Health Care Ctr.*, 407 N.W.2d 249, 252 (Wis. 1987) (noting that expert testimony is required to establish applicable standards of care related to "professional nursing or professional hospital care").

153. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

154. *Id.* at 322–23 (citations omitted) (first citing *Parham v. J. R.*, 442 U.S. 584, 607 (1979); and then citing *Bell v. Wolfish*, 441 U.S. 520, 544 (1979)).

This is necessarily a deferential standard, because courts are poorly positioned to second-guess medical treatment decisions, especially without the benefit of a qualified expert testifying to the appropriate professional standard of care.[155] Under this standard, a medical professional's discretionary treatment decision is presumptively reasonable unless the treatment decision "was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances."[156] Because a reasonable response precludes liability under both the Eighth and Fourteenth Amendments and a medical professional's discretionary treatment decisions are presumptively reasonable, a court should grant a defendant's motion for summary judgment on these grounds unless a plaintiff can offer evidence from which a reasonable trier of fact could conclude that "no minimally competent professional would have so responded under those circumstances."[157] When utilized appropriately, that is a high hurdle to clear.[158]

III. THE SEVENTH CIRCUIT INCONSISTENTLY APPLIES THE PROFESSIONAL JUDGMENT STANDARD

The Constitution does not prohibit negligent medical treatment—only deliberately indifferent medical treatment under the Eighth Amendment[159] and objectively unreasonable medical treatment under the

155. *See id.* at 324–25 ("A single professional may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day. The administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages.").

156. *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998).

157. *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (noting that a genuine dispute of material fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); *Youngberg*, 457 U.S. at 322–23 ("For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."); *Collignon*, 163 F.3d at 989 ("A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances.").

158. *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011) ("The burden is high on a plaintiff making such a claim: 'Deliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts.'" (quoting *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008))).

159. *Farmer v. Brennan*, 511 U.S. 835, 835 (1994) ("In considering the inmate's claim in *Estelle* that inadequate prison medical care violated the Cruel and Unusual Punishments Clause, we distinguished 'deliberate indifference to serious medical needs of

Fourteenth Amendment.[160] Courts faced with claims from prisoners and detainees alleging constitutionally inadequate medical treatment must evaluate the reasonableness of medical professionals' discretionary treatment decisions, often without the benefit of expert medical testimony. To distinguish between potentially deliberate and merely negligent conduct, courts must evaluate discretionary medical decisions, at least for constitutional purposes, under the professional judgment standard established in *Youngberg*.[161] When used properly, the professional judgment standard separates potentially meritorious constitutional claims from instances of merely negligent medical treatment. When the standard is improperly used or ignored, the boundary between negligent conduct and constitutionally violative behavior is weakened—or worse, forgotten.

A. Petties v. Carter*, 836 F.3d 722 (7th Cir. 2016)*

In January 2012, Tyrone Petties suffered a ruptured Achilles tendon.[162] Petties was a prisoner at the Stateville Correctional Center in Illinois at the time, and his doctor (later a defendant) was Dr. Imhotep Carter.[163] When Dr. Carter saw Petties later that day, he theorized that Petties had suffered a tear in his left Achilles tendon.[164] Dr. Carter gave Petties "crutches, ice, and Vicodin," "authorized one week of 'lay-in' meals, which meant that Petties did not have to walk to the cafeteria, but could eat in his cell," and "referred Petties to a specialist."[165] In the six weeks between his initial visit with Petties and Petties's eventual appointment with an orthopedic specialist, Dr. Carter notably "did not provide Petties with a splint, boot, cast, or other device that would immobilize his foot."[166] An ankle MRI in March 2012 revealed the torn Achilles tendon and "a gap between the torn ends of the tendon that

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prisoners' . . . from 'negligen[ce] in diagnosing or treating a medical condition,' . . . holding that only the former violates the Clause." (citations omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 106 (1976))).

160. *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986) (holding that under the Fourteenth Amendment's Due Process Clause, "mere negligence could not '[work] a deprivation in the constitutional sense.'" (quoting *Parratt v. Taylor*, 451 U.S. 426, 548 (1981))).

161. *Youngberg*, 457 U.S. at 323 ("For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." (first citing *Parham v. J. R.*, 442 U.S. 584, 607 (1979); and then citing *Bell v. Wolfish*, 441 U.S. 520, 544 (1979))).

162. *Petties v. Carter*, 836 F.3d 722, 726 (7th Cir. 2016).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

measured approximately 4.7 centimeters."[167] Dr. Puppala, Petties's orthopedic specialist, theorized that the lack of a stabilizing device had possibly created the gap and that surgery might be necessary to correct it.[168] Dr. Puppala gave Petties a boot to stabilize his ankle, which Dr. Carter subsequently authorized for use in the prison.[169] Dr. Carter also authorized crutches, ice, and a lower-bunk permit, but not corrective surgery.[170] In August 2012, Dr. Obaisi replaced Dr. Carter as Petties's physician and authorized a second MRI, but not physical therapy or corrective surgery.[171] The second MRI revealed Petties's ankle had healed somewhat but not completely, and Petties continued to complain of ankle pain.[172] Dr. Obaisi subsequently "gave him Tylenol, approved a low bunk permit, and continued his use of the boot."[173] Petties filed suit against Drs. Carter and Obaisi in November 2012, alleging deliberate indifference to his serious medical needs under the Eighth Amendment.[174]

The district court granted summary judgment for the defendants, Drs. Obaisi and Carter, on the grounds that Petties had failed to produce evidence that the defendants were actually aware that their treatment decisions were likely to harm Petties and consciously disregarded that knowledge.[175] On appeal, the Seventh Circuit focused on the subjective element of deliberate indifference, namely, whether plaintiff had presented sufficient evidence for a reasonable jury to conclude that the defendants actually knew plaintiff was likely to suffer harm but consciously disregarded that knowledge.[176] Specifically, the court expounded on what level of circumstantial evidence of deliberate indifference—"often originating in a doctor's failure to conform to basic standards of care"—is necessary to allow a plaintiff to survive summary judgment[177]:

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167. *Id.* at 727.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Petties v. Carter*, 795 F.3d 688, 691 (7th Cir. 2015) ("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. The court further concluded that a jury could not reasonably find that Dr. Obaisi's rejection of the recommendation for physical therapy had constituted deliberate indifference because, according to the judge, Petties had learned physical therapy exercises a year earlier (when he ruptured his right Achilles tendon) and could have performed those same exercises on his own.").

176. *Petties*, 836 F.3d at 728.

177. *Id.* ("Most cases turn on circumstantial evidence, often originating in a doctor's failure to conform to basic standards of care. While evidence of medical malpractice often forms the basis of a deliberate indifference claim, the Supreme Court has

> [H]ow bad does an inmate's care have to be to create a reasonable inference that a doctor did not just slip up, but was aware of, and disregarded, a substantial risk of harm? We must determine what kind of evidence is adequate for a jury to draw a reasonable inference that a prison official acted with deliberate indifference.[178]

The court noted several examples of such evidence, including "a prison official's decision to ignore a request for medical assistance,"[179] "when a doctor refuses to take instructions from a specialist,"[180] when a prison official "fails to follow an existing protocol,"[181] "where a prison official persists in a course of treatment known to be ineffective,"[182] "[when] a prison doctor chooses an 'easier and less efficacious treatment' without exercising professional judgment,"[183] and "an inexplicable delay in treatment which serves no penological interest."[184] The court stated that a reasonable jury could, based on such evidence, conclude that a medical professional was aware of a serious risk to a plaintiff's health but consciously disregarded it.[185] In sum,

> [w]hen a doctor says he did not realize his treatment decisions (or lack thereof) could cause serious harm to a plaintiff, a jury is entitled to weigh that explanation against certain clues that the doctor did know. Those context clues might include the existence of documents the doctor regularly consulted which advised against his course of treatment, evidence that the patient repeatedly complained of enduring pain with no modifications in care, inexplicable delays or departures from common medical

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determined that plaintiffs must show more than mere evidence of malpractice to prove deliberate indifference.").

178. *Id.*

179. *Id.* at 729 (citing *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976)).

180. *Id.* (first citing *Arnett v. Webster*, 658 F.3d 742, 753 (7th Cir. 2011); and then citing *Jones v. Simek*, 193 F.3d 485, 490 (7th Cir. 1999)).

181. *Id.* ("While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm." (quoting *Mata v. Saiz*, 427 F.3d 745, 757 (10th Cir. 2005))).

182. *Id.* at 730 (citing *Walker v. Peters*, 233 F.3d 494, 499 (7th Cir. 2000)).

183. *Id.* (quoting *Estelle*, 429 U.S. at 104 n.10).

184. *Id.* (first citing *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008); and then citing *Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007)).

185. *Id.* at 731 ("Rather, the context surrounding a doctor's treatment decision can sometimes override his claimed ignorance of the risks stemming from that decision.").

> standards, or of course, the doctor's own testimony that indicates knowledge of necessary treatment he failed to provide.[186]

Ultimately, the Seventh Circuit reversed the district court's grant of summary judgment because Dr. Carter's failure to immobilize Petties's injured foot and deposition testimony supported "a reasonable inference that Dr. Carter knew that failure to immobilize an Achilles rupture would impede Petties's recovery and prolong his pain."[187] Similarly, Dr. Obaisi's failure to follow the advice of a specialist by ordering physical therapy was evidence of deliberate indifference from which a reasonable jury could find for the plaintiff.[188]

In *Petties*, the Seventh Circuit erred by failing to account for the *Farmer* Court's instruction that "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."[189] The Seventh Circuit cited several seemingly per se examples of evidence of deliberately indifferent medical decisions without accounting for the deferential professional judgment standard.[190] The problem, of course, is that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made."[191]

In analyzing the reasonableness of a discretionary medical decision, "courts must show deference to the judgment exercised by a qualified professional," as "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions."[192] Consequently, a discretionary medical decision "is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[193] This extremely high standard is not even necessarily overcome by competing expert testimony, as "evidence that some medical professionals would have chosen a different course of treatment is insufficient to make out a constitutional claim."[194] The Seventh Circuit displayed no such deference

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186. *Id.*

187. *Id.* at 732.

188. *Id.* at 733.

189. *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

190. *Petties*, 836 F.3d at 729–31.

191. *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980).

192. *Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982) (first citing *Parham v. J. R.*, 442 U.S. 584, 607 (1979); and then citing *Bell v. Wolfish*, 441 U.S. 520, 544 (1979)).

193. *Id.* at 323.

194. *Petties*, 836 F.3d at 729 (citing *Steele v. Choi*, 82 F.3d 175, 179 (7th Cir. 1996)).

in evaluating the performance of Drs. Carter and Obaisi. Absent the professional judgment standard, any inadequate medical care, or even a simple disagreement about medical care, could be taken as evidence of deliberate indifference.

This stance is especially perplexing in light of the court's repeated insistence on the danger of allowing medical laypersons to pass judgment on the adequacy of medical treatment.

> In the medical context, . . . obviousness of a risk can be obscured by the need for specialized expertise to understand the various implications of a particular course of treatment. So we have found in those cases where unnecessary risk may be imperceptible to a lay person that a medical professional's treatment decision must be "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."[195]
>
> Even among the medical community, the permissible bounds of competent medical judgment are not always clear, particularly because "it is implicit in the professional judgment standard itself . . . that inmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of his condition, the likelihood and imminence of further harm and the efficacy of available treatments." . . . So it can be challenging to draw a line between an acceptable difference of opinion (especially because even admitted medical malpractice does not automatically give rise to a constitutional violation), and an action that reflects sub-minimal competence and crosses the threshold into deliberate indifference.[196]

Had the Seventh Circuit focused on the reasonableness of Drs. Carter and Obaisi's discretionary medical decisions, the analysis would have been much different. The court would not initially have asked whether a jury could reasonably conclude, based on Petties's medical treatment, that the defendants were deliberately indifferent. Rather, the court would have asked whether Petties had produced evidence sufficient for a reasonable jury to conclude that "no minimally competent professional would have so responded under those circumstances."[197] More specifically, the court

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195. *Id.* (quoting *Estate of Cole v. Fromm*, 94 F.3d 254, 261–62 (7th Cir. 1996)).

196. *Id.* (citations omitted) (quoting *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 1996)).

197. *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998); *see also Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008) ("A medical professional acting in his professional capacity may be held to have displayed deliberate indifference only if the decision by the professional is such a substantial departure from accepted professional

should have analyzed whether Dr. Carter's treatment of Petties's ankle injury with "crutches, ice, and Vicodin," his "authoriz[ing] one week of 'lay-in' meals," and his "refer[ing] Petties to a specialist"—but "not provid[ing] Petties with a splint, boot, cast, or other device that would immobilize his foot"[198]—was so inadequate that "no minimally competent professional would have so responded under those circumstances."[199] As for Dr. Obaisi, the court should have analyzed whether Petties produced evidence that "no minimally competent professional"[200] would have authorized a second MRI, dispensed Tylenol, "approved a low bunk permit, and continued his use of the boot" *without* approving physical therapy or corrective surgery.[201] Because the court did not analyze the reasonableness of the defendants' treatment decisions, it is impossible to know the outcome of such an analysis.

B. Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658 (7th Cir. 2016)*

Only a few months after the Seventh Circuit decided *Petties*, the court issued its opinion in another Eighth Amendment deliberate indifference case—*Whiting v. Wexford Health Sources, Inc*.[202] Calvin Whiting was an inmate in an Illinois prison who, in October 2010, reported developing "nodules" and "pain in his left jaw, left ear, and groin."[203] Whiting's treating physician, Dr. David, working under the belief that Whiting's pain originated from an infection, elected to treat Whiting with two regimens of antibiotics before a December 21, 2010, biopsy revealed that Whiting actually had a rare type of non-Hodgkin's lymphoma.[204] The following January, Whiting began chemotherapy.[205] Between October 2010 and January 2011, Whiting received Motrin and Tylenol for his pain.[206] Whiting later filed suit against Dr. David, alleging "that the decision to postpone the biopsy and continue to treat him for an infection forced him to endure severe pain during this two-month period."[207] The district court granted summary judgment for Dr. David, accepting the argument that

judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment." (quotations omitted)).

198. *Petties*, 836 F.3d at 726.
199. *Collignon*, 163 F.3d at 989.
200. *Id.*
201. *Petties*, 836 F.3d at 727.
202. 839 F.3d 658 (7th Cir. 2016).
203. *Id.* at 660.
204. *Id.* at 660–61, 663.
205. *Id.* at 661.
206. *Id.* at 660–61.
207. *Id.* at 661.

"the evidence was insufficient to support an inference that he acted with the necessary culpable state of mind."[208]

On appeal, the Seventh Circuit affirmed the district court's ruling after applying the professional judgment standard.[209] The court concisely summarized why a treatment decision precluded liability under the Eighth Amendment:

> By definition a treatment decision that's based on professional judgment cannot evince deliberate indifference because professional judgment implies a choice of what the defendant believed to be the best course of treatment. A doctor who claims to have exercised professional judgment is effectively asserting that he lacked a sufficiently culpable mental state, and if no reasonable jury could discredit that claim, the doctor is entitled to summary judgment.[210]

The court noted that Dr. David's professional treatment decisions, even if objectively incorrect, were entitled to deference unless and until the plaintiff overcame the professional judgment standard by presenting evidence that "defendant's treatment decision departed so radically from 'accepted professional judgment, practice, or standards' that a jury may reasonably infer that the decision was not based on professional judgment."[211] Whiting, however, presented no evidence to support an inference that Dr. David knew his course of treatment would be ineffective.[212] In fact, the court went further by pointing out that "no expert testified that Dr. David's chosen course of treatment was a substantial departure from accepted medical judgment, and the decision was not so obviously wrong that a layperson could draw the required inference about the doctor's state of mind without expert testimony."[213]

The Seventh Circuit's reference to expert testimony establishing a "substantial departure from accepted medical judgment" except when "the decision was . . . so obviously wrong that a layperson could draw the required inference" mirrors the requirement for expert testimony in most state-law medical malpractice claims.[214]

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208. *Id.*

209. *Id.* at 664.

210. *Id.* at 662 (quoting *Zaya v. Sood*, 836 F.3d 800, 805 (7th Cir. 2016)).

211. *Id.* at 663 (quoting *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016)).

212. *Id.*

213. *Id.*

214. *Compare id.*, *with Walski v. Tiesenga*, 381 N.E.2d 279, 282 (Ill. 1978) ("[T]he plaintiff in a medical malpractice action generally must establish the standard of care through expert testimony."), *and Purtill v. Hess*, 489 N.E.2d 867, 872 (Ill. 1986) ("Unless the physician's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required

C. Roe v. Elyea*, 631 F.3d 843 (7th Cir. 2011)*

In *Roe v. Elyea*,[215] four current and former inmates in the Illinois Department of Corrections (IDOC) who had been diagnosed with hepatitis C during or prior to their incarceration alleged that Dr. Willard Elyea had been deliberately indifferent to their serious medical needs.[216] Each plaintiff claimed that during his incarceration, he was refused treatment for his hepatitis C or his treatment was delayed as a result of IDOC's protocol for diagnosing and treating hepatitis C.[217] Dr. Elyea, the IDOC medical director, was responsible for instituting the allegedly tortious protocol.[218] Under the IDOC protocol, "[i]n order to allow for a work-up and for a forty-eight-week period of treatment, IDOC would not consider further testing, biopsy or therapy unless an inmate had at least eighteen months remaining in his sentence."[219] "According to Dr. Elyea, the limitation was necessary in order to ensure that inmates received an uninterrupted course of therapy" because "interrupted antiviral therapy for hepatitis C place[d] inmates at risk for a number of undesirable outcomes, including treatment failure . . . and adverse effects from medications if the inmate does not receive the required laboratory and clinical monitoring upon release or transfer."[220] After a jury awarded over $8,000,000 to the plaintiffs, the district court granted judgment as a matter of law in favor of Dr. Elyea as to the three remaining plaintiffs but upheld the jury's verdict as to one plaintiff, subject to remittitur.[221] All parties filed cross-appeals.[222]

As in *Petties*, the Seventh Circuit did not analyze Dr. Elyea's conduct under the deferential professional judgment standard. Unlike in *Petties*, however, the Seventh Circuit appropriately did not defer to Dr. Elyea's decisions because the allegedly tortious conduct did not involve discretionary medical decision-making.[223] Under the IDOC policy, "inmates were denied further testing and treatment for HCV infection *categorically* based on the expected length of their continued incarceration in an IDOC facility."[224] A categorical approach to medical treatment,

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to establish the standard of care and the defendant physician's deviation from that standard.").

215. 631 F.3d 843 (7th Cir. 2011).

216. *Id.* at 847.

217. *Id.*

218. *Id.*

219. *Id.* at 850 (footnote omitted).

220. *Id.* (quotations omitted).

221. *Id.* at 853.

222. *Id.* at 854.

223. *Id.* at 863 ("Given Dr. Elyea's own testimony, this is simply not a case where the jury was required to conclude that Mr. Roe's care plan was a result of a 'deliberate decision by a doctor to treat a medical need in a particular manner.'" (quoting *Jackson v. Kotter*, 541 F.3d 688, 698 (7th Cir. 2008))).

224. *Id.* at 862.

without considering an "individual inmate's condition," "constitutes a 'substantial departure from accepted professional judgment, practice, or standards, [such] as to demonstrate that the person responsible actually did not base the decision on such a judgment.'"[225] In this case, the professional judgment standard did not mandate a deferential stance toward Dr. Elyea's decision because "Dr. Elyea's action constituted a failure to exercise medical—as opposed to administrative—judgment."[226] Unlike discretionary medical decisions, discretionary administrative decisions are not entitled to deference.[227]

D. Norwood v. Ghosh*, 723 F. App'x 357 (7th Cir. 2018)*

Kelvin Norwood, a prisoner in the IDOC, "suffered from chronic right-knee pain for many years, leading to two surgeries, the second of which was a total replacement of his right knee with an artificial joint."[228] In his suit against his medical providers, Norwood "alleged that the defendants violated the Eighth Amendment prohibition on cruel and unusual punishment by ignoring his need for treatment," specifically, pain medication.[229] After the district court granted summary judgment in favor of defendants, Norwood appealed.[230] The Seventh Circuit, "viewing the evidence through the proper summary judgment lens . . . assume[d] that Norwood ha[d] been the victim of serious institutional neglect of, and perhaps indifference to, his serious medical needs over at least eight years."[231]

Initially, Norwood visited the Stateville prison infirmary for knee pain in May 2006.[232] The treating physician ordered an x-ray and prescribed Motrin and an elastic knee bandage.[233] Four months later, Norwood, without ever receiving an x-ray, returned to the infirmary with continued knee pain.[234] At that time, Norwood was seen by Physician Assistant (PA) Williams, who "assessed crepitus (friction between bone and cartilage) in that knee and reduced range of motion caused by pain."[235] PA Williams "reordered the X-ray, prescribed an elastic knee support, and referred Norwood for evaluation by Dr. Ghosh, the medical director."[236]

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225. *Id.* at 862–63 (quoting *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008)).
226. *Id.* at 863.
227. *See id.*
228. *Norwood v. Ghosh*, 723 F. App'x 357, 359 (7th Cir. 2018).
229. *Id.* at 360.
230. *Id.*
231. *Id.*
232. *Id.* at 361.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*

Norwood would return to the infirmary twice more, in September 2007 and July 2009, with additional complaints of knee pain.[237] On July 16, 2009, Norwood saw (for the first time) Dr. Ghosh, who ordered an MRI of Norwood's injured knee.[238] The MRI revealed "a lateral meniscal tear, a full-thickness cartilage defect, effusion (fluid in the joint), and a partially ruptured cyst."[239] After "years of chronic knee pain," Norwood underwent a knee surgery on April 27, 2009.[240] Norwood's surgeon, Dr. Chmell, prescribed him Vicodin following the surgery, but Dr. Ghosh only "prescribed Tylenol 3 (with codeine) instead of Vicodin, and Norwood received that medicine."[241] After his discharge from the prison infirmary, Norwood was prescribed Motrin for his pain but later claimed to have never received it.[242] Norwood continued to experience knee pain in the following years and, after repeated visits with multiple prison healthcare providers, underwent a full knee replacement surgery in September 2014.[243]

After Norwood filed suit against his prison medical providers in 2011, the district court granted summary judgment in favor of defendants.[244] Notably, the district court found that Dr. Ghosh could not be found liable for deliberate indifference because the "decision to prescribe Tylenol 3 with codeine instead of Vicodin had not amounted to deliberate indifference but instead was an exercise in professional judgment."[245] In affirming the district court's ruling, the Seventh Circuit also relied on the professional judgment standard:

> Norwood . . . argues that Dr. Ghosh showed deliberate indifference to his pain by prescribing Tylenol 3 with codeine instead of Vicodin after the 2010 surgery. The district court correctly reasoned that Dr. Ghosh's decision to substitute Tylenol 3 with codeine for Vicodin was a matter of medical judgment, and nothing in the record suggests it was against professional standards of care. . . . Vicodin is a mixture of acetaminophen (the same drug in Tylenol) and hydrocodone. While codeine is less potent than hydrocodone, both medications are opioid pain relievers. . . . Norwood offers no evidence indicating that Dr. Ghosh's view was so far outside the bounds

237. *Id.* at 361–62.
238. *Id.* at 362.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 363.
244. *Id.*
245. *Id.*

> of professional judgment that a jury could infer that he did not actually exercise his professional judgment.[246]

The court also affirmed summary judgment in favor of PA Williams because "treating pain allows considerable room for professional judgment," and "[m]edical professionals cannot guarantee pain-free lives for their patients."[247] Ultimately, Norwood had not presented evidence that PA Williams's course of treatment was so "obviously inadequate" as to overcome the professional judgment standard.[248] The Seventh Circuit notably summarized its reasoning as follows:

> When a medical professional persists in a course of treatment known to be ineffective or that departs so far from accepted professional judgment, practice or standards as to support an inference that the decision was not actually based on even a mistaken professional judgment, a judge or jury can infer deliberate indifference. . . . In this case, Norwood's evidence might well support one or more malpractice claims, but we agree with the district court that his evidence does not support an inference of deliberate indifference.[249]

Norwood affirms the proposition that prison medical providers' professional discretionary treatment decisions are entitled to deference—and preclude constitutional liability—even if those treatment decisions amounted to professional negligence.

246. *Id.* at 364 (citations omitted).

247. *Id.* at 365.

248. *Id.* at 365–66.

249. *Id.* at 361 (citation omitted) (citing *Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662 (7th Cir. 2016)).

IV. REESTABLISHING THE DISTINCTION BETWEEN MEDICAL MALPRACTICE AND DELIBERATE INDIFFERENCE

A. The Necessity of the Professional Judgment Standard

In treating an inmate or detainee, a medical provider "who act[ed] reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."[250] Similarly, an objectively reasonable response precludes liability under the Fourteenth Amendment.[251] Legal professionals, however, are medical laypersons and generally cannot competently distinguish between reasonable and unreasonable medical responses—in most cases. The professional judgment standard, as articulated in *Youngberg*, is the lens through which medical laypersons can gauge the reasonableness of a discretionary medical decision.[252] Under *Youngberg*, medical providers who are named as defendants in Eighth and Fourteenth Amendment inadequate medical care claims are entitled to deference for their professional discretionary treatment decisions.[253] "[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made."[254]

> Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. . . . For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.[255]

Plaintiffs, therefore, bear the evidentiary burden of producing sufficient evidence for a reasonable jury to conclude that their medical providers' treatment decisions were not based on professional judgment. The Seventh Circuit has noted that the inadequacy of medical care, if

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250. *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

251. *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018) ("This standard requires courts to focus on the totality of facts and circumstances faced by the individual alleged to have provided inadequate medical care and to gauge objectively—without regard to any subjective belief held by the individual—whether the response was reasonable.").

252. *Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982).

253. *Id.*

254. *Id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980)).

255. *Id.* at 322–23 (citations omitted) (first citing *Parham v. J. R.*, 442 U.S. 584, 607 (1979); and then citing *Bell v. Wolfish*, 441 U.S. 520, 544 (1979)).

severe enough, may be evidence that the defendant medical provider did not exercise professional judgment and therefore is not entitled to deference.[256] The level of inadequacy to establish as much, however, has not been sharply defined. Trial courts will routinely need to determine whether there is a "genuine dispute of material fact" based on evidence that a plaintiff's medical care was so inadequate as to support an allegation of constitutional violation.[257] Both the Eighth and Fourteenth Amendments require evidence of a defendant's culpable state of mind to state a claim.[258] To ensure that merely negligent, or even grossly negligent, medical decisions cannot be used as evidence of a sufficiently culpable state of mind to satisfy a constitutional claim, courts must consistently apply the professional judgment standard.[259]

As evidenced by the divergent approaches in *Petties* and *Whiting*, despite their temporal proximity, the Seventh Circuit Court of Appeals has not consistently applied the professional judgment standard to constitutional claims of inadequate medical care.[260]

B. The Professional Judgment Standard as a Means to Distinguish Between Innocent, Though Harmful, Mistakes and Culpable Action

The professional judgment standard distinguishes deliberate or reckless actions from merely negligent mistakes. The Seventh Circuit articulated this conceptual distinction well when it stated, "By definition a treatment decision that's based on professional judgment cannot evince deliberate indifference because professional judgment implies a choice of what the defendant believed to be the best course of treatment."[261] This

256. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016).

257. *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

258. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind." (quotations omitted)); *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018) ("The defendants here worry that an objective-reasonableness standard will impermissibly constitutionalize medical malpractice claims, because it would allow mere negligence to suffice for liability. A careful look at *Kingsley*, however, shows that this is not the case; the state-of-mind requirement for constitutional cases remains higher.").

259. *See Wilson v. Seiter*, 501 U.S. 294, 305 (1991) (noting that "mere negligence" does not satisfy the deliberate indifference standard); *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018) (noting that "[a] showing of negligence or even gross negligence will not suffice" to satisfy a Fourteenth Amendment inadequate medical care claim (citing *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018))).

260. *Compare Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662–64 (7th Cir. 2016) (applying the professional judgment standard), *with Petties*, 836 F.3d at 732–34 (failing to analyze defendants' medical decisions in light of the professional judgment standard).

261. *Zaya v. Sood*, 836 F.3d 800, 805 (7th Cir. 2016).

reinforces the Supreme Court's multiple admonitions that negligent medical care does not violate either the Eighth or the Fourteenth Amendment.[262] Simply put, an exercise of professional judgment, even if erroneous, is a per se reasonable response, and a reasonable response precludes liability in a *constitutional* claim.[263]

The ultimate question under the professional judgment standard is whether the defendant exercised their discretionary professional judgment. If the defendant did so, then they cannot be liable because a defendant who exercised professional judgment could not have had a sufficiently culpable state of mind to support a constitutional claim.[264] Discretionary medical decisions are "presumptively valid"[265] and justify dismissal unless plaintiff can overcome that presumption.[266] In order to rebut the presumption and overcome this standard, a plaintiff must show that the treatment decision was not, in fact, based on professional judgment.[267] To do so, a plaintiff must present evidence that "no minimally competent professional would have so responded under those circumstances."[268]

That, however, prompts the question: How would a "minimally competent professional" have responded under the circumstances? It seems axiomatic, but a "minimally competent professional" is likely a professional whose performance, at a minimum, accords with an applicable professional duty of care. Put another way, to show that a defendant's conduct was not based on professional judgment and is therefore not protected from liability, a plaintiff alleging constitutionally inadequate medical care must show that the defendant, at the very least, *breached* an applicable professional duty of care. Professional duties of

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262. *See Wilson*, 501 U.S. at 297 ("'It is *only* such indifference' that can violate the Eighth Amendment . . . ; allegations of 'inadvertent failure to provide adequate medical care' . . . or of a 'negligent . . . diagnosis' . . . simply fail to establish the requisite culpable state of mind." (citations omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976))); *Daniels v. Williams*, 474 U.S. 327, 335–36 (1986) (holding that negligent conduct does not violate the Due Process Clause of the Fourteenth Amendment).

263. *See Farmer*, 511 U.S. at 844 (noting that "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted"); *McCann*, 909 F.3d at 886 (holding that a defendant will be liable under the Fourteenth Amendment only if the response was objectively unreasonable).

264. *See Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) ("[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."); *Zaya*, 836 F.3d at 805 ("By definition a treatment decision that's based on professional judgment cannot evince deliberate indifference because professional judgment implies a choice of what the defendant believed to be the best course of treatment.").

265. *Youngberg*, 457 U.S. at 323.

266. *Zaya*, 836 F.3d at 805.

267. *Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998).

268. *Id.*

care and the breach thereof are also elements in medical malpractice claims but usually require expert testimony to prove.[269] This interpretation, however, would create a paradox within the professional judgment standard. The standard exists to allow medical laypersons to distinguish reasonable from unreasonable professional conduct but would seemingly allow plaintiffs to offer negligent conduct as evidence of more serious culpability.

To avoid this arguably absurd outcome, courts should interpret the "minimal competency" standard as requiring a higher showing than a mere breach of a professional duty of care. To overcome the standard, a plaintiff should have to show that a defendant's decisions were so outrageously and obviously inadequate that *any* minimally competent professional *could not* have come to the same conclusion. That high standard, however, is not being applied. At least it has not been applied consistently. *Petties* is evidence enough of that: the Seventh Circuit, as medical laypersons, determined that treatment of a ruptured Achilles tendon with "crutches, ice, and Vicodin," "one week of 'lay-in' meals," "refer[ral] to a specialist," but "not . . . a splint, boot, cast, or other device that would immobilize [a] foot," was sufficiently inadequate medical treatment to constitute evidence of a defendant's culpable state of mind.[270] That decision simply does not accord with the deferential standard articulated by the Supreme Court in *Youngberg*.[271]

C. A Heightened Evidentiary Standard Would Produce More Reliable Results, Consistent with Constitutional Jurisprudence

Plaintiffs who allege that their medical care was so woefully inadequate to evidence a defendant's culpable state of mind should have to support their assertions with expert medical testimony unless the treatment was so obviously inadequate that a layperson would recognize it as such. This required showing would accord with the heightened level of the professional judgment standard, as compared to professional negligence, without insulating truly culpable defendants from liability. Where the inadequacy is obvious even to a layperson, no expert testimony would be required, similar to malpractice law.[272] On the other hand, where the adequacy of the medical decision is not readily apparent to laypersons, it should not be admissible as evidence of a culpable state of mind, absent

269. Stephanie Taormina & Clarence Watson, *Deliberate Indifference and Negligence Claims in a Correctional Facility*, 47 J. AM. ACAD. PSYCHIATRY & L. 254, 256 (2019) ("In the majority of cases, expert testimony is necessary to explicate the standard of care and whether a deviation from it resulted in damages to a patient.").

270. *Petties v. Carter*, 836 F.3d 722, 726 (7th Cir. 2016).

271. *Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982).

272. *See, e.g.*, *Purtill v. Hess*, 489 N.E.2d 867, 872 (Ill. 1986).

expert testimony that the decision was "'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.'"[273] A plaintiff, after all, generally must offer expert testimony to define a professional duty of care in malpractice claims.[274] How "a minimally competent" medical professional would have responded under a certain set of circumstances is outside the ken of a typical layperson, to include the overwhelming majority of judges and jurors routinely tasked with adjudicating constitutional claims of inadequate medical care.

Of course, this also would set back plaintiffs, many of whom might have meritorious claims but little access to resources such as expert medical testimony. This already is, however, an unfortunate reality for incarcerated or detained plaintiffs with potential malpractice claims. Allowing those plaintiffs to pursue constitutional claims in place of malpractice claims by artificially lowering the substantive requirements of the former ultimately creates inconsistencies in constitutional jurisprudence. It also lowers the standard for stating a constitutional claim of inadequate medical care, despite the heightened mental state requirements for culpability. Plaintiffs alleging inadequate medical care under the Eighth and Fourteenth Amendments face a higher burden to carry their claims past summary judgment and toward a favorable verdict. As such, similarly heightened evidentiary showings are warranted. To do otherwise simply allows plaintiffs to obviate the requirements of a malpractice claim by alleging a constitutional violation in its stead. This works a mischief on the constitutional jurisprudence, as the Supreme Court has routinely held that negligent conduct does not violate either the Eighth or the Fourteenth Amendment.[275]

CONCLUSION

The Supreme Court has clearly distinguished constitutional claims of inadequate medical care brought under the Eighth and Fourteenth Amendments from medical malpractice claims.[276] By framing the culpable

273. *Collignon*, 163 F.3d at 988 (quoting *Youngberg*, 457 U.S. at 322–23).

274. Taormina & Watson, *supra* note 269, at 256.

275. *See Farmer v. Brennan*, 511 U.S. 825, 835 (1994) ("In considering the inmate's claim in *Estelle* that inadequate prison medical care violated the Cruel and Unusual Punishments Clause, we distinguished 'deliberate indifference to serious medical needs of prisoners' . . . from 'negligen[ce] in diagnosing or treating a medical condition,' . . . holding that only the former violates the Clause." (citations omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 106 (1976))); *Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

276. *See Estelle*, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

state-of-mind requirement as deliberate indifference in Eighth Amendment claims, the Court intentionally laid out a requirement for conscious act or omission.[277] Similarly, the Seventh Circuit has held that Fourteenth Amendment inadequate medical care claims require a plaintiff to show that "defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [plaintiff's] case."[278] Each heightened standard reflects the bedrock principle that negligence cannot state a claim for constitutionally inadequate medical treatment. This delineation, however, is endangered when plaintiffs are permitted to offer treatment itself as evidence of a culpable state of mind.

This is perhaps a necessary compromise, as defendants are rarely likely to admit to making treatment decisions based on malice or reckless disregard of their consequences.[279] The problem, however, is that foolish medical decisions are merely circumstantial—and arguably weak—evidence of a culpable state of mind. This problem is compounded by the fact that plaintiffs are not required to present expert testimony to show that a defendant's treatment decision was medically inappropriate. Legal professionals and jurors, an overwhelming majority of whom are medical laypersons, are poorly positioned to pass judgment on the adequacy of medical treatment, let alone infer the existence of a culpable state of mind based on a lay opinion of the treatment's inadequacy.

In order to prevent the constitutionalization of medical malpractice, courts should strictly enforce the professional judgment standard. Any professional discretionary medical judgment should be presumed reasonable[280] and therefore preclude liability under the Eighth[281] and Fourteenth Amendments,[282] unless a plaintiff can produce proof from

277. *Farmer*, 511 U.S. at 837 ("We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

278. *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018) (further noting that "[a] showing of negligence or even gross negligence will not suffice" (citing *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018))).

279. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) ("The difficulty is that except in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely if ever will an official declare, 'I knew this would probably harm you, and I did it anyway!'").

280. *See Youngberg v. Romeo*, 457 U.S. 307, 322–23 (1982); *Zaya v. Sood*, 836 F.3d 800, 805 (7th Cir. 2016).

281. *Farmer*, 511 U.S. at 845 ("Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.").

282. *McCann*, 909 F.3d at 886 ("This standard requires courts to focus on the totality of facts and circumstances faced by the individual alleged to have provided

which a reasonable jury could conclude that "no minimally competent professional would have so responded under those circumstances."[283] Most states require malpractice plaintiffs to present expert evidence of applicable professional duties of care, because "a lay juror is not skilled in the profession and thus is not equipped to determine what constitutes reasonable care in professional conduct without the help of expert testimony."[284] Just as laypersons are not competent to determine a "reasonable care in professional conduct," they are equally unequipped to determine how a "minimally competent professional" would respond under any given circumstances. Although the professional judgment standard requires a greater showing than mere negligence to overcome, plaintiffs claiming inadequate medical care under the Eighth and Fourteenth Amendments are presently held to a lesser evidentiary standard to do so. At a minimum, plaintiffs should be required to present expert testimony to overcome the high hurdle that the professional judgment standard rightfully sets. Otherwise, prisoners and detainees dissatisfied with their medical treatment (some rightfully so) will continue to use constitutional claims to plead what, at best, might be a malpractice claim.[285]

Although the burden to prove medical malpractice may be prohibitively high for numerous prisoners and detainees, the solution cannot be to lower the threshold for stating a constitutional claim. Negligent conduct does not offend the Eighth Amendment or the Fourteenth Amendment. Pleading and evidentiary requirements must be enforced to ensure that clear separation.

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inadequate medical care and to gauge objectively—without regard to any subjective belief held by the individual—whether the response was reasonable.").

283. *See Collignon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998).

284. *See, e.g.*, *Jones v. Chi. HMO Ltd*., 730 N.E.2d 1119, 1130 (Ill. 2000).

285. *See, e.g.*, *Petties v. Carter*, 836 F.3d 722 (7th Cir. 2016).