

## **Civil Rights Update**

*By: David A. Perkins*

*Heyl, Royster, Voelker & Allen, P.C., Peoria*

# **Failure to Discover Razorblade in Detainee’s Wallet Insufficient to Establish a Fourteenth Amendment Claim in *Rosario v. Brawn*, 670 F.3d 816 (7th Cir. 2012)**

Around midnight on May 8, 2008, Cornel Rosario called the Washington County, Wisconsin Sheriff’s Department to report that his son, Marc Rosario, was possibly a danger to himself or others and had just departed the family home. *Rosario*, 670 F.3d at 817. Deputy Daniel Brawn responded to the call and located Marc, who explained that he was undergoing a transformation into a “fireflying serpent.” *Id.* at 818. Concerned with Marc’s mental state, Deputy Brawn determined that Marc Rosario should be taken to the Acute Care Services Division of the Washington County Department of Human Services (“ACS”) for further evaluation. *Id.* Deputy Brawn placed Marc in handcuffs and used two sets of handcuffs connected together to make Marc more comfortable. *Id.* Before placing Marc in the squad car, Deputy Brawn searched Marc and confiscated a pocketknife. *Id.* After the search, and in an effort to pacify Marc, it was agreed that Marc would be transported to the Holy Hill Basilica so that Marc could speak with the priest. *Id.*

Before Marc was placed back in the squad car he was given a moment to stretch his legs. *Id.* While outside the car in handcuffs, Marc repositioned his hands in such a way that allowed him to break his eyeglass lenses. *Id.* Marc used the broken lens in an attempt to cut his wrist. *Id.* Deputy Brawn restrained Marc before he could harm himself. *Id.* At that point, Deputy Brawn was convinced that Marc should be involuntarily detained.

Marc was transported to St. Joseph’s Hospital for a preliminary medical screening. *Id.* at 819. Marc was taken into an examination room and both of his wrists were handcuffed to the bed rails. *Id.* During the medical examination, Marc motioned to his rear pants pocket. *Id.* Deputy Winkler discovered and removed a wallet, which was not discovered earlier during Deputy Brawn’s previous pat down search. *Id.* Deputy Winkler removed the contents of the wallet and discovered a small, silver, foil packet but did not discover that the packet contained the words “surgical blade.” *Id.* Deputy Brawn commented that the foil packet resembled a band aid and the deputies never actually opened the foil packet. *Id.* Had Deputy Winkler opened the foil packet he would have discovered a small surgical blade. *Id.* Deputy Winkler then placed the item back in the wallet. *Id.* Before leaving for the hospital, Marc regained possession of his wallet, and therefore the razorblade. The parties did not dispute that the Sheriff’s Department formally disciplined Deputies Brawn and Winkler for allowing Marc to regain possession of the wallet and the razorblade. *Id.*

The Winnebago Mental Health Institute (“Institute”) in Oshkosh agreed to accept Marc for admission and Deputy Schwitz assisted Deputy Brawn with Marc’s transport to Oshkosh. *Id.* Before

leaving, the deputies placed Marc in a belly chain, the type of restraint where individual cuffs are attached to a steel chain placed around the detainee's waist. *Id.* The officers did not search Marc's body before leaving for Oshkosh. *Id.* During the trip to the Institute, Deputy Schwitz operated the squad car and Deputy Braun occupied the front seat. *Id.* Marc sat in the rear of the squad car which was divided by a steel partition and a sliding plexiglass and mesh panel. *Id.* at 820. The deputies were unable to observe Marc's hands during the transport because of the solid steel divider, but they could observe his upper body. *Id.* On one occasion, Deputy Brawn observed Marc leaning to one side of the squad car but he considered that movement normal on longer trips. *Id.* Neither officer noticed any unusual behavior from Marc until he slumped over in the backseat. *Id.* At that point, Deputy Schwitz noticed that Marc's face and neck were covered in blood. *Id.* Deputy Schwitz notified the Winnebago County Sheriff's Department to call for an ambulance, and the officers drove to the Winnebago County Sheriff's Department. *Id.* Upon arrival, they attempted to place a large gauze bandage on an open wound on Marc's neck but Marc resisted their efforts. *Id.* Marc ultimately died in the parking lot of a self inflicted wound to his neck. *Id.* It was later determined that Marc had used the razorblade from the foil packet in his wallet to cut himself. *Id.*

Cornell Rosario brought a 42 U.S.C. § 1983 claim against Deputies Brawn, Schwitz, and former Deputy Winkler. The Complaint alleged that the officers were deliberately indifferent to Marc's risk of suicide and therefore deprived him of his Fourteenth Amendment rights. Summary judgment was granted in favor of the defendants and Cornell Rosario appealed.

The Eighth Amendment applies to convicted persons, and pretrial detainees are entitled to the same basic protections under the Fourteenth Amendment's due process clause. In suicide cases, the claimant is required to prove that the defendants (1) subjectively knew that the prisoner was at substantial risk of committing suicide, and (2) intentionally disregarded that risk. The officers admitted that they subjectively knew Marc Rosario was a substantial risk of committing suicide so the only issue to be resolved on summary judgment was whether the officers intentionally disregarded Marc's risk of suicide. *Id.* at 821.

Rosario argued that the case of *Mombourquette v. Amundson*, 469 F. Supp. 2d 624 (W.D. Wis. 2007) supported his contention that the defendants could be found liable for their deliberate indifference if they were aware of a suicide risk and did not respond reasonably to that risk. Rosario further argued that the officers acted unreasonably when they: (1) failed to fully inspect the foil packet containing the razorblade, (2) allowed Marc to regain possession of the foil packet, and (3) failed to properly monitor Marc during the trip to the Institute. The Seventh Circuit quickly pointed out that although the term reasonableness was utilized in the *Mombourquette* opinion, an officer's actions are not judged according to a mere negligence standard. *Id.* To the contrary, the Seventh Circuit has consistently held that deliberate indifference requires a showing of more than mere or gross negligence. In short, a plaintiff must satisfy a higher standard and produce evidence approaching a total lack of concern for the prisoner's welfare in the face of a serious risk. *Id.*

The Seventh Circuit agreed with the trial court that Rosario fell short of producing evidence suggesting that the officers acted recklessly or that they deliberately ignored Marc's suicidal tendencies. *Id.* at 822. To the contrary, the court concluded that the officers acted with compassion and attempted to protect Marc from himself. *Id.*

The Seventh Circuit noted that the officers' actions were not perfect, in that they should have paid greater attention to the objects in Marc's wallet. *Id.* Nonetheless, the court believed that the officers did not act with deliberate indifference to Marc's safety, in that they:

1. Searched Marc and removed a pocket knife from his possession;
2. Transported Marc to Holy Hill Basilica in an effort to placate Marc;
3. Allowed Marc to stretch his legs at Holy Hill;
4. Summoned an ACS mental health specialist to the scene to evaluate Marc's condition;

5. Immediately sought medical attention when Marc displayed self-destructive behavior at Holy Hill;
6. Placed Marc in two sets of handcuffs and later belly chains during his transport to make his ride more comfortable and to protect Marc from himself;
7. Illuminated the dome light in the cruiser during the trip to St. Joseph's to better monitor Marc;
8. Asked Marc at St. Joseph's whether he was comfortable or whether he was feeling okay;
9. Occasionally asked Marc if he was okay during the trip to Oshkosh;
10. Immediately radioed for help when they discovered Marc's self-inflicted wound; and
11. Personally administered first aid to Marc despite his resistance. *Id.*

The Seventh Circuit reminded the parties that neither the Eighth Amendment nor the Fourteenth Amendment requires perfection. The court believed that the undisputed record did not support an inference that the officers acted recklessly with regard to Marc's safety even though there were "isolated missteps along the way." Since Rosario failed to demonstrate a constitutional violation, the court did not consider Rosario's second argument that the officers were not entitled to qualified immunity. *Id.* at 823.

It is an unfortunate fact that the police will continue to be called upon to confront individuals with mental health difficulties, and those same officers will likely make "missteps along the way" when assessing those patients and procuring proper treatment. The Seventh Circuit's opinion in this case demonstrates the court's continuing efforts to protect police officers from civil rights claims when the totality of the circumstances demonstrate that the officers were acting reasonably and in the best interest of the detainee.

## About the Author

**David A. Perkins** is a partner at *Heyl, Royster, Voelker & Allen*. Dave concentrates his practice in the areas of civil rights, municipal liability, first party property claims, and general tort litigation. He has spoken on a wide variety of subjects, including: civil rights liability, municipal liability, the investigation of fire losses and first party property claims. He is a member of the Peoria County, Illinois State, and American Bar Associations, as well as the Abraham Lincoln American Inns of Court, and the Illinois Association of Defense Trial Counsel.

## About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at [www.iadtc.org](http://www.iadtc.org).

Statements or expression of opinions in this publication are those of the authors and not necessarily those of the association. *IDC Quarterly*, Volume 23, Number 1. © 2013. Illinois Association of Defense Trial Counsel. All Rights Reserved. Reproduction in whole or in part without permission is prohibited.

Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, [idc@iadtc.org](mailto:idc@iadtc.org)