UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 02-14331 CIV-PAINE
Magistrate Judge: Lynch

ALLEN BRASH,

Plaintiff,

v.

WEXFORD HEALTH SOURCES, INC., a Florida corporation, DAVID ROWE, and MICHAEL MOORE, in his official capacity as Secretary of the Florida Department of Corrections,

Defendants.
_____/

DEFENDANTS' WEXFORD HEALTH SOURCES, INC. and DAVID ROWE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR A PROMPT HEARING

Defendants, WEXFORD HEALTH SOURCES, INC. ("Wexford") and DAVID ROWE ("Rowe"), by and through undersigned counsel, hereby file their Memorandum in Opposition to Plaintiff's Motion Preliminary Injunction and Motion for Prompt Hearing, and state the following:

I. INTRODUCTION

Plaintiff, Allen Brash, is currently incarcerated at Okeechobee Correctional Institution. Plaintiff seeks to enjoin Defendants by ordering them to refer Plaintiff to a Gastroenterologist so that he may be restarted on Interferon plus Ribavirin for the treatment of his Hepatitis C.

In support of his motion, Plaintiff alleges that while he was an inmate at Union Correctional Facility, he received Interferon and Ribaviron for an eleventh month period (July 2000 to August

2001), which did not eliminate the virus, but lowered his viral count to 600IU/ml. In August of 2001, Plaintiff's Interferon treatment was terminated and Dr. Shah, a Board Certified Internist, stated that he should be rechecked in six months, according to Plaintiff, "presumably [to] be restarted on a treatment regimen for Hepatitis C." Additionally, Dr. Shah charted that Plaintiff should be seen by a gastroenterologist by December 10, 2001. See Plaintiff's Verified Complaint, ¶13.

Plaintiff was transferred to Okeechobee Correctional Institution in December of 2001. Plaintiff alleges that Wexford and Rowe have refused to refer him to a Gastroenterologist and restart his Interferon treatment and that said refusal amounts to a deliberate indifference to Plaintiff's serious medical needs and is in violation of the Eighth Amendment of the United States Constitution. Defendant submits the opinion of Dr. Robert Smith, Regional Director of Wexford, who opined that Plaintiff is not a candidate for further Interferon treatment because Plaintiff has subtype 1b Hepatitis C (which is very resistant to Interferon), his biopsy revealed early cirrhosis of the liver (responds poorly to treatment) and eight months following treatment, Plaintiff suffered from rebounding viral loads to pretreatment levels.

II. **STANDARD FOR PRELIMINARY INJUNCTION**

In order to warrant a preliminary injunction, Plaintiff bears the burden of proving four separate elements: (1) a substantial likelihood of the success on the merits; (2) irreparable harm if an injunction does not issue; (3) the threatened injury outweighs any harm that might result to the Plaintiff; and (4) that public interest will not be served. See Cuban American Bar Association v. Christopher, 43 F. 3d 1412, 1424 (11th Cir.) cert. denied, 515 US 1142 (1995); Church v. City of Huntsville, 30 F. 3d 1332, 1341-42 (11th Cir. 1994), NNADI v. Richter, 976 F. 2d 682, 690 (11th Cir. 1992); Northeastern Florida Chapter Association General Contractors of America v. City of

Jacksonville, 896 F.2d 1283, 1284 (11th Cir. 1990). If any one of these elements is not met, the Court need not address the other elements and should deny injunctive relief. See Church, 30 F. 3d at 1342.

As the granting of a preliminary injunction is "an extraordinary and drastic remedy", plaintiff must demonstrate that the irreparable harm he will suffer is actual and imminent, and not remote or speculative. See Tucker Anthony Realty Corp. v. Schesinger, 888 F2d 969, 973 (2nd Cir. 1989). A preliminary injunction must be the only way of protecting a plaintiff from harm. See Rey v. Guy Gannett Publishing Co., 766 F.Supp. 1142 (S.D.Fla. 1991). "The possibility that adequate . . . corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against the claim for irreparable harm." Samson v. Murray, 415 U.S. 61, 90 (1974).

II. PLAINTIFF CANNOT MEET HIS BURDEN OF PROOF

An Eighth Amendment claim of denied of medical care requires a showing that the acts or omissions were sufficiently harmful to evidence deliberate indifference to serious medical needs or the unnecessary and wanton infliction of pain. See Estelle v. Gamble, 429 U.S. 97 (1976). See also, Brown v. USA, 894 F.2d 1533 (11th Cir. 1990)(an action under 42 U.S.C. 1983 for denial of adequate medical care will be dismissed if it does not allege sufficient facts which would support a charge with deliberate indifference to serious medical needs); Payne v. Monroe Company, 779 F.Supp. 1330 (S.D.Fla. 1991); Vaughn v. Kerley, 897 F.Supp 1413 (M.D.Fla. 1995). It is well established that the courts are hesitant to find an Eighth Amendment violation once an inmate has received medical care. See Hamm v. DeKalb County, supra. Actions or inactions involving medical treatment violate the Eighth Amendment only if they involve "something more than a medical judgment call, an accident, or an inadvertent failure," Murrell v. Bennett, 615 F.2d 306, 310

n. 4 (5th Cir. 1980). It must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." Rogers v. Evans, supra at 1058.

The courts have long recognized that a difference of opinion between an inmate and the prison medical staff regarding medical matters, including the diagnosis or treatment which the inmate receives, cannot in itself rise to the level of a cause of action for cruel and unusual punishment. **The propriety of a certain course of medical treatment is not a proper subject for review in a civil rights action.** Estelle v. Gamble, supra, at 107 (matters of medical judgment do not give rise to a §1983 claim). See also, Ledoux v. Davies, 961 F.2d 1536 (10th Cir. 1992) (inmate's belief that he needed additional medication other than that prescribed by treating physician was insufficient to establish constitutional violation); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)(difference of opinion between inmate and prison medical staff regarding treatment or diagnosis does not itself state a constitutional violation); Burns v. Head Jailor of LaSalle County Jail, 576 F.Supp. 618, 620 (N.D. Ill., E.D. 1984) (exercise of prison doctor's professional judgment to discontinue prescription for certain drugs not actionable under §1983). See also, Christy v. Robinson, 216 F.Supp.2d 398, 416 (D.C.N.J. 2002), wherein the court held that **"the Constitution does not guarantee that every prisoner will receive every type of treatment he desires, or even may need."**

It cannot be disputed that the Plaintiff has received medical care. According to Dr. Robert Smith, Regional Director of Wexford Health Sources, Plaintiff was diagnosed with Chronic Hepatitis C, Grade II (Mild Periportal Inflammation) and Stage III (Early Septal Fibrosis)(See Memorandum from Dr. Robert Smith to T.R. Sucher, III attached hereto as Exhibit "A"). Testing also revealed the Genotype to be 1b. (Exhibit "A".) Dr. Rowe states that this type of Hepatitis is

very resistant to treatment with Interferon, has a higher failure rate and requires longer periods of treatment. (See Declaration of Dr. Rowe attached hereto as Exhibit "A".) Further, Plaintiff's liver biopsy revealed pathologic changes indicating that he had early cirrhosis. (Exhibit "A".) Patients with cirrhosis or advanced fibrosis respond poorly to treatment. (Exhibit "A".) Nonetheless, Plaintiff was treated by Dr. Shah, an internist, for eleven months September 2000 to August 2001 with Interferon and Ribaviron. Dr. Smith opined that Plaintiff's treatment more than met the established standards of care for his condition and in fact, should have been discontinued at six months since Plaintiff had detectable serum levels in virus. (Exhibit "A".)

Eight months post treatment, a Hepatitis C Virus Ribonucleic Acid (HCV RNA) viral load test was markedly positive. (Composite Exhibit "B".) These results mean that Plaintiff was an end of treatment responder (ETR), but relapsed as evidenced by rebounding viral load pretreatment levels. (Composite Exhibit "B".) Plaintiff is not a candidate for further re-treatment in the form of Pegylated Interferon Ribaviron therapy for his Hepatitis C condition. (Composite Exhibit "B".)

Plaintiff files the Affidavit of Dr. Richard Stone, a Board Certified Internist. Dr Stone is not a Board Certified Gastroenterogist and according to his Curriculum Vitae, he has no education or training relevant to treating Hepatitis. There is nothing in the record to support Dr. Stone's opinion that unless Plaintiff receives PEG intron and ribaviron therapy, Plaintiff will die a premature death due to liver failure. In fact, this opinion is quite different from Dr. Stone's letter to the Plaintiff' sister dated March 27, 2002, wherein Dr. Stone states that based on a review of Plaintiff's medical records, "I find him to be a candidate for PEG intron and ribaviron therapy. His viral load responded, albeit, transiently to intron. Although he failed treatment on intron – PEG intron therapy would still be indicated in his case." (A copy of said letter is attached hereto as Exhibit "C".) This

is far a cry from Dr. Stone's plea for Plaintiff's life. Furthermore, there is nothing in Plaintiff's medical records to suggest Dr. Shah's ever recommended that Plaintiff would be restarted on Interferon treatment as suggested by Plaintiff.

Plaintiff has also filed the affidavit of Dr. Bennet Cecil. While Dr. Cecil does have experience in the area of Hepatitis C, his declaration is vague in several regards. In paragraph (3) three of his declaration, Dr. cecil opines that "Hepatitis C left untreated may lead to cirrhosis of the liver, cancer of the liver and death." Dr. Cecil's use of the term "may" illustrates the speculative nature of his opinion. In paragraph (6) Six of the Declaration, Dr. Cecil contends that if Plaintiff is "not provided the FDA approved PEG Interferon w/ Ribarvin combination therapy, there is a 50%-50% chance that he will not survive another 10 years." In a light most favorable to Plaintiff, this aspect of Dr. Cecil's opinion clearly does not warrant the granting of a Preliminary Injunction. In Paragraphs (9) nine and (10) ten, Dr. Cecil, discusses sustained viral responses to the treatment as well as the use of recent and soon to be FDA approved uses of a combination of drugs. He completely fails to address the fact that Plaintiff relapsed following his initial treatment of ribaviron and interferon. The failure to institute recently and soon to be FDA approved combination of drug treatment does not come close to rising to the level of "deliberate indifference." Additionally, Dr. Cecil never examined Plaintiff while he was in fact examined by physicians from Wexford.

This amounts to nothing more than a difference of opinion of how to properly treat Plaintiff's Hepatitis C condition. As differences of opinion do not rise to the level of deliberate indifference to serious medical needs under the Eighth Amendment of the Constitution, Plaintiff cannot establish that there is a substantial likelihood he will prevail on the merits. Where some medical attention has been provided, allegations of inadequate or improper treatment are insufficient to constitute "cruel

and unusual punishment." Englerth v. Hetrick, 1988 WL 11660 (S.D. Pa.) quoting Estelle, supra at 107. Furthermore, as previously stated, Plaintiff is a non-responder and that further treatment is simply not indicated. There is nothing in the record to suggest that Plaintiff's current condition may lead to cirrhosis of the liver, cancer of the liver, or death. This is purely hypothetical.[1]

IV. MOTION FOR A PROMPT HEARING

Pursuant to Local Rule 7.1B, the granting of a hearing is discretionary and any request shall set forth in detail the reasons why a hearing is desired. Plaintiff has failed to allege circumstances that warrant a prompt hearing or any hearing for that matter. Plaintiff has failed to allege how a hearing will aid the court. Instead, Plaintiff merely alleges that a prompt hearing is necessary because Defendants will not provide the Plaintiff with the medication regimen he desperately needs. Defendants respectfully submit that a hearing is not necessary as the written submissions by the parties have adequately addressed all of the issues in this case.

WHEREFORE, Defendants Wexford and Rowe respectfully request this Court enter an

[1]In that Plaintiff has failed to establish the two of the elements for a preliminary injunction, it is unnecessary to address the last two requirement (i.e., that the threatened injury outweighs any harm that might result to the plaintiff and that the public interest will not be served).

Order denying Plaintiff's Motion for Preliminary Injunction and denying Plaintiff Motion for a Prompt Hearing, together with any and other relief this Court deems just and proper.

Respectfully submitted,

RITTER CHUSID BIVONA & COHEN LLP
Attorneys for Wexford and Rowe
7000 W. Palmetto Park Road, Suite 305
Boca Raton, Florida 33433
Telephone: (561) 394-2180
Facsimile: (561) 394-2582

By: _____
MITCHEL CHUSID, ESQUIRE
Fla. Bar No: 879282
PATRICK PATRISSI, ESQUIRE
Fla. Bar No: 302996

CERTIFICATE OF SERVICE

WE HEREBY CERTIFIED that a copy of the foregoing was mailed, postage prepaid, this ____ day of January, 2003, to: Randall C. Berg, Jr., Esq., Florida Justice Institute, Inc., 2870 Wachovia Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2309; and Valerie Martin, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401.

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MITCHEL CHUSID, ESQUIRE
Fla. Bar No: 879282
PATRICK PATRISSI, ESQUIRE
Fla. Bar No: 302996