

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Ft. Pierce Division

Case No. 02-14331-Civ-Paine/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.)
_____)

**PLAINTIFF'S REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS'
RESPONSES TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Defendants Wexford, Rowe and Moore have improperly framed the issue before this Court on plaintiff's motion for a preliminary injunction. All defendants would like to characterize the issue as whether the "propriety of a certain course" or "type of treatment" is actionable under § 1983 as an 8th Amendment violation. That mischaracterizes the facts as alleged in the verified complaint and plaintiff's medical records, and could well lead this Court into error, not to mention shorten plaintiff's life span due to defendants' continued intentional delay in his obtaining medication.

- 1. Three Doctors Employed by the Defendants Have Recommended Treatment; All to be Denied by Dr. Rowe For Monetary -- Not Medical -- Reasons.**

The factual record to date demonstrates -- and defendants have not produced one scintilla of evidence to refute it -- that three doctors, all employed by these defendants, have recommended that Mr. Brash be retreated for Hepatitis C. Thus, the argument is not over the "type" or "propriety of treatment" the plaintiff desires or needs, it is over whether the plaintiff is getting the very treatment that his treating physicians have recommended.

It bears repeating here which treating physicians have recommended that Mr. Brash should be retreated, only to have their recommendations denied by Dr. Rowe. First, Dr. Shah, a Gastroenterologist at the North Florida Reception Center employed by the Florida Department of Corrections, charted that the plaintiff should be scheduled to see a Gastroenterologist by December 10, 2001. Before plaintiff could see a Gastroenterologist, Mr. Brash was transferred to Okeechobee Correctional Institution. (Comp., ¶ 13).

Plaintiff then came under the medical care of defendant Wexford and its prison doctor, Dr. Bhadja, at Okeechobee Correctional Institution. Another Gastroenterologist Consult was recommended for the plaintiff on January 23, 2002, this time by Dr. Bhadja. The consult recommendation was denied by defendant David Rowe on January 28, 2002.

On June 12, 2002, Dr. Robert Smith, defendant Wexford's Regional Medical Director in Miami, recommended that Mr. Brash be retreated with Pegasys plus Ribavirin. Indeed, it is charted in Mr. Brash's medical records on June 12, 2002, that Dr. Bhadja,

Wexford's Medical Director at Okeechobee Correctional Institution, that the plaintiff receive "Peginterferon and Ribavirin," just as Dr. Smith had ordered. See, Exhibit A, attached prescription form.¹ Then just 6 days later on June 18, 2002, there is another entry in the medication and prescription orders to "hold Ribavirin and Interferon until further order from Dr. Smith." Id. No further order to dispense Ribavirin and Interferon has been forthcoming. This prescription order, just like the order of Dr. Brash to see a Gastroenterologist, was countermanded by Dr. Rowe, Wexford's Corporate Vice President and Medical Director, purely for cost saving reasons. In short, Mr. Brash has not received any medical care or treatment for his Hepatitis C since he arrived at OCI in December 2001.

The Eleventh Circuit has consistently held that "knowledge of the need for medical and the intentional refusal to provide it constitutes deliberate indifference to one's serious health care needs." Ancata v. Prison Health Services, 769 F.2d 700, 703-704 (11th Cir. 1985). "A core principle of Eighth Amendment jurisprudence in the area of medical care is that prison officials with knowledge of the need for care may not, by failing to provide care, delaying care, or providing grossly inadequate care, cause a prisoner to needlessly suffer the pain resulting from his or her illness." McElligott v. Foley, 182 F.3d 1248,

¹This prescription form and all plaintiff's medical records were previously filed on December 6, 2002. DE 5.

1257 (11th Cir. 1999). The failure to follow the recommendations of treating physicians is clearly recognized as rising to the level of a constitutional claim. Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (refusal of Department of Corrections' doctors to follow the recommendations of treating physicians from the Veterans Administration). And failure to provide or to delay medical care for non-medical reasons [costs] makes out a case for deliberate indifference. Ancata, 769 F.2d 704.

2. Defendants Wexford and Rowe Fail to Counter the Actions of Dr. Rowe Through the Submissions of Expert Declarations and a Memo

Defendants Wexford's and Rowe's submission of three experts fail to counter the actions of Dr. Rowe's denial of medical treatment. Each submission is fraught with glaring omissions and problems.

First, defendants Wexford and Rowe submitted as Exhibit A to their Response a memo of Dr. Robert Smith dated April 2, 2002. It should first be noted that this is simply a memo, not an affidavit or declaration. More importantly, as set forth above and in the verified complaint at bar, Dr. Smith changed his opinion after writing this April memo. On June 12, 2002 he ordered the plaintiff be retreated with Peg interferon with Ribavirin, only later to have his recommendation countered by Dr. Rowe on June 18, 2002. Dr. Smith could not submit an affidavit or declaration countering or calling into question what the

plaintiff alleged in the verified complaint without committing perjury.

Second, defendant Rowe submits his own self-serving declaration as Exhibit B to defendants' Response to Plaintiff's Motion for a preliminary Injunction. Dr. Rowe's declaration fails to challenge the verified complaint's allegations that he countered Dr. Bhadja's recommendations for further treatment on not one, but two occasions, and that he has refused to provide Mr. Brash with Pegintron with Ribavirin solely to save money. Instead, he attempts to justify his decision that Mr. Brash does not need treatment for Hepatitis C. As the Rebuttal Declaration of Dr. Cecil being filed contemporaneously with this submission attests:

Dr. Rowe's statement that "there is no factual evidence in Mr. Brash's records to suggest that his current condition may lead to cirrhosis of the liver, cancer of the liver, and death. This is purely hypothetical," is simply incorrect. It is indicative of Dr. Rowe's lack of knowledge of Hepatitis C, Mr. Brash's condition, and his immediate need for treatment. If the progression of this disease were not of any concern, or "purely hypothetical" as Dr. Rowe suggests, then one has to answer the question why did Dr. Shah put Mr. Brash on interferon and Ribaviron for 11 months from September 2000 to August 2001?

Rebuttal Declaration of Dr. Bennet Cecil, February 13, 2003, ¶
6.²

²Dr. Cecil it should be noted feels so strongly that Mr. Brash is an excellent candidate for retreatment, he has provided his services here to date *pro bono* and has agreed to consult *pro bono* on Mr. Brash's retreatment if so ordered by the court.

Third, defendants Wexford and Rowe later filed the declaration of Dr. Michael Fried. Dr. Fried's declaration is also faulty and extremely questionable. It contains improper conclusory statements about the NIH Consensus Panel Statement's factors concerning the "retreatment of patients" which should be stricken. As Dr. Cecil points out in his declaration, the NIH Statement lists five factors which a doctor should consider in determining whether a patient needs retreatment. See Declaration of Dr. Cecil, ¶ 4. Dr. Fried notes the existence of these factors in the Panel Statement and then leaps to the conclusion that Mr. Brash is not deserving of retreatment. Conclusory statements are improper. Dr. Cecil then goes through the five factors, weighs the plaintiff's status as to each factor, and then concludes Mr. Brash is a curable patient who if not treated in the very near future will suffer an early death as the result of Hepatitis C and the associated medical problems, including liver cancer and liver failure, that it causes. Id. He concludes that "[t]ime is of the essence in Mr. Brash's instance, and retreatment with Pegasys with Ribavirin should be started right away." Id. Based on the reasons set forth in Dr. Cecil's declaration, Dr. Fried's declaration should be ignored if not stricken.³

**3. Plaintiff Has Satisfied the Four Prongs Required for
the Issuance of a Preliminary Injunction**

³Plaintiff is filing contemporaneously with this Reply a Motion to Strike Dr. Fried's Declaration as being conclusory.

Plaintiff has met the four requirements for the issuance of a preliminary injunction. And, if there is still any doubt, plaintiff would welcome an evidentiary hearing as requested on December 6th's Motion for a Prompt Hearing.

Defendants are really just arguing over the preliminary injunction requirements of one and two -- likelihood of success on the merits, and irreparable injury. As to the first prong, likelihood of success on the merits, there can be no doubt that the plaintiff has not received the first ounce of medical treatment for Hepatitis C since he arrived at OCI in December 2001. The only treatments which were recommended were (1) that he receive a Gastroenterologist consult, ordered on January 23, 2002, and (2) that he receive peg intron and Ribavirin, ordered on June 12, 2002. Both treatments were denied by Dr. Rowe.

Thus, all of the defendants' statements that this is really just an argument over the "propriety" and "type of treatment" is simply hot air. The same is true for their statement that he has received "some" medical treatment since arriving at OCI. Instead, this is a lawsuit about a man who will die an early death if he does receive the very medical treatment the defendants' three treating physicians have recommended.

As to the second prong -- irreparable injury will be suffered unless the injunction issues -- there can be no doubt that Hepatitis C is a deadly disease. And if Mr. Brash is not treated in the very near future, he will suffer an early death as the result of Hepatitis C and the associated medical problems,

including liver cancer and liver failure, that it causes. As Dr. Cecil states "time is of the essence in Mr. Brash's instance, and retreatment with Pegasys with Ribavirin should be started right away." Id. He can not wait until the "completion of specific studies in the field of treatment of Hepatitis C" as Dr. Fried suggests in ¶ 12 of his Declaration. For Mr. Brash does not have any alternatives. He can not just walk out of prison and be treated with Pegasys with Ribavirin. If this Court does not issue a preliminary injunction, Mr. Brash will suffer an early death.

For the reasons set forth above and in the other pleadings filed herein, plaintiff requests the issuance of a preliminary injunction ordering that he receive treatment and medication for his Hepatitis C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document and any attachments have been furnished to Mitchel Chusid, Esq., Ritter Chusid Bivona & Cohen, L.L.P., 7000 West Palmetto park Road, Suite 305, Boca Raton, Florida 33433, counsel for the defendants Wexford and Rowe, and Valerie Martin, Esq., Assistant Attorney General, Florida Department of Legal Affairs, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401, counsel for defendant Moore by Fed Ex overnight mail on February 17, 2003.

Randall C. Berg, Jr., Esq.