IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JEFFERY HARGETT; KIM A. OVERLIN; JIMMIE SMITH; LOREN K. WALKER; on behalf of themselves and all others similarly situated,	
Plaintiffs,	
v.	**No. 02 C 1456**
CAROL ADAMS, Secretary of the Illinois Department of Human Services, TIMOTHY BUDZ, Facility Director of the Sexually Violent Persons Unit at the Joliet Correctional Center, RAYMOND WOODS, Clinical Director, and SHAN JUMPER, Associate Clinical Director,	**Judge Leinenweber** **Magistrate Judge Schenkier**
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO FED. R. CIV. P. 59(e)

Plaintiffs submit the following memorandum in support of their motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter and amend the Memorandum and Order (the "Order") entered in this matter on January 14, 2005.

INTRODUCTION

The Plaintiffs request this Court to alter or amend the Order by vacating that Order and, further, entering a new order granting judgment in favor the Plaintiffs with respect to one narrow issue: whether the Defendants' administration of arousal-reducing medication violates accepted professional judgment, practices and standards as set forth by the Supreme Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982).

The Plaintiffs respectfully submit that the Court has misapprehended the evidence at trial. Specifically, both of the Plaintiffs' psychiatric experts testified at

trial that the Defendants' practices concerning informed consent for arousal-reducing medication substantially violated accepted professional judgment practices, and standards for the treatment of sexual offenders. The Defendants did not call a single expert witness qualified to refute these assertions. Indeed, the Court properly granted the Plaintiffs' *Daubert* Motions with respect to the opinions of Drs. Dvoskin and Schlank regarding medication, finding the Defendants' experts unqualified to discuss the issue. Tr. 1093-96, 1135, 1490-95.[1] The Defendants also elected not to call either of the two DHS psychiatrists on their witness list.

As discussed more fully below, the Court's conclusions about the TDF's practices regarding arousal-reducing medication omit crucial, unrebutted evidence about the Defendants' violations of accepted professional judgment, practice and standards regarding informed consent and rely in part on testimony that the Court itself ruled inadmissible. The Plaintiffs, therefore, respectfully request that the Court alter or amend its judgment pursuant to Fed. R. Civ. P. 59(e).

ARGUMENT

I. STANDARD OF REVIEW

Rule 59(e) "enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div.*, 51 F.3d 746, 749 (7th Cir. 1995). As the Seventh Circuit has recognized:

> A motion for reconsideration performs a valuable function where the Court has *patently misunderstood a party*, or has made a decision *outside the adversarial issues presented* to the Court by the parties, or has made an error not of reasoning but of apprehension.

Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir.

[1] All cites to "Witness, page" refer to testimony given at the trial in this case. All cites to "PX ___" or "DX ___" refer respectively to Plaintiffs' and Defendants' trial exhibits.

1990) (emphasis added). *See also Popovits v. Circuit City Stores, Inc.*, 185 F.3d 726, 730 (7th Cir. 1999) ("if an issue arises to which a party does not have the opportunity to respond, granting the motion to amend may be appropriate").

A motion to alter or amend can and should be granted whenever the Court has made a "*manifest error of law or fact.*" *Russell*, 51 F.3d at 749 (emphasis added). *See also William E. Black Investments, Inc. v. Eric Envt'l, Inc.*, 1998 WL 801837 (N.D. Ill. Nov. 12, 1998) (granting motion to reconsider where movant contended the Court had "misapprehended the conclusions which could have been drawn from the undisputed facts"). For the reasons stated below, the Plaintiffs respectfully request the Court to do so here.

II. THE CONSTITUTIONAL STANDARD

When a state deprives a person of his or her liberty in order to treat a mental disorder, those patients are entitled to "reasonable care," and "reasonably nonrestrictive confinement conditions." *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). As to the test for liability, the Supreme Court, in *Youngberg*, held that "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." *Id.*, 457 U.S. at 323.

Applying *Youngberg*, the Seventh Circuit has made clear that it is unacceptable for a defendant to argue that "no decision by a person with an advanced degree is open to question in litigation" or that "holders of [advanced] degrees never need fear liability, even if the whole medical profession and every published scholarly article are against them." *West v. Schwebke*, 333 F.3d 745, 749 (7th Cir. 2003) (affirming denial of summary judgment on qualified immunity issues relating to civilly committed sex offenders in Wisconsin). The Seventh

Circuit has also stated that professional judgment is *not* "synonymous with a decision made by a person 'competent, whether by education, training or experience, to make the particular decision at issue.'" *Id.* (citation omitted) *A judgment is not 'professional' if it is not based on a view as to how best to operate a mental health facility.*" *Johnson v. Brelje*, 701 F.2d 1201, 1209, fn. 9 (7th Cir. 1983) (emphasis added)

III. THE PLAINTIFFS' EVIDENCE

A. Every Patient For Whom Anti-Androgen Medication Is Appropriate Should Receive Accurate Information About That Option.

The Plaintiffs' experts testified that accepted standards regarding informed consent require that every patient should be evaluated by a properly credentialed professional to determine the full range of appropriate treatment options, should receive accurate information about each of those options (including the risks and benefits of each), and, in collaboration with the professional, should have the opportunity to choose which options to pursue. *See* PX 6, p.9; Metzner, 358-60; Berlin, 617-18, 641-42. The Defendants did not contest this testimony.

In addition, the Court found--relying on Drs. Metzner and Berlin--that anti-androgen medication is an important treatment option for many sex offenders. *See* Slip Op., at 22-23; Metzner, 359-60; Berlin, 614, 616, 632-33, 639; Schlank, 1182. This fact was corroborated at trial by an exhibit prepared by Dr. Bednarz, the TDF's own psychiatrist. PX 131. In that document, Dr. Bednarz acknowledged that Depo-Lupron, the most frequently recommended arousal-reducing medication, has been shown substantially to reduce recidivism. PX 131; *see also* Berlin, 628-31, 637.

Accordingly, accepted professional judgment, practices and standards require that every patient be screened to determine whether such medications are

an appropriate treatment option. *See* Berlin, 641-42, 647-48. All patients for whom this medication is appropriate should receive accurate information about the risks and benefits, along with information about other appropriate treatment options, and should have the opportunity to make an informed choice (in consultation with their physician), about which treatments they will pursue. *See* Berlin, 641-42; PX 8, pp. 12-13; PX 6, p. 9.

B. The TDF Has Violated Accepted Standards Of Informed Consent By Failing Properly To Evaluate Patients And Provide Essential Information About Anti-Androgen Medication.

The Defendants have never provided most of the patients at the TDF with the opportunity to make an informed choice about whether to consent to treatment with anti-androgen medication. *See* Metzner, 359-60; PX 6, p. 9; Berlin, 612, 617-18, 638-42, 645-50, 753-55; PX 8, pp. 12-13; PX 179, pp. 2-3. Not a single patient was receiving anti-androgen medication as of 2002, and none of the handbooks or forms distributed to patients referred to this accepted course of treatment. Berlin, 638; PX 6, p. 9. Although a handful of patients were receiving anti-androgen medications by the trial in this case in 2004, the TDF still had no system in place to screen patients and provide essential information about anti-androgen medication. *See* Berlin, 645-50.

In fact, Dr. Wood himself acknowledged that the TDF's policies with respect to medication did not fundamentally change in the weeks leading up to trial. Wood Dep. 9/16/04, pp. 8-9. Moreover, Dr. Bednarz, the TDF's part-time psychiatrist, admitted in his deposition that, like his predecessors, he has no intention to meet with every patient to discuss the risks and benefits of anti-androgen medication -- instead, he will rely on word of mouth for patients to hear about its virtues. *See* Bednarz Dep. 9/20/04, pp. 36-37. This approach falls short of meeting accepted

standards of informed consent. *See* Berlin, 617-18, 645-46; PX 8, pp. 12-13; PX 178, p. 2; PX 179, pp. 2-3.

C. The Court's Finding That There Was A "Reasonable Professional Disagreement" Is Not Supported By The Record.

The Court found that there is "reasonable professional disagreement as to the timing, dosage and type of medications that are most effective in reducing deviant sexual arousal," and that these "bona fide professional disagreements" cannot amount to constitutional violations. Slip Op. at 43-44. Yet, the Plaintiffs did not challenge *individual* medical decisions to prescribe (or not prescribe) a particular kind of medication to a particular patient. Instead, the Plaintiffs' constitutional challenge focuses on the *systemic* failure to provide the opportunity for the patients to make an informed choice about medication. The record reveals no real disagreement regarding the need to provide patients with sufficient information about the range of available treatment options, including anti-androgen medication, to enable them to make an informed treatment decision.

Dr. Berlin testified that many patients at the TDF who could benefit from anti-androgen medication had never received adequate information about this highly effective treatment option. Berlin, 640-48. He concluded that this failure to provide informed consent was his "primary objection" to the Defendants' practices concerning this medication. Berlin, 612. Dr. Metzner likened the TDF's failure to discuss these medications with a large number of patients to treating a person with schizophrenia without mentioning anti-psychotic medications as an available treatment option. *See* Metzner, 359-60.

After the testimony of the Plaintiffs' experts, which established that the Defendants' provision of anti-androgen medication does not meet the *Youngberg* test, the burden of going forward shifted to the Defendants. The Defendants, however, offered no competent evidence to the contrary to the testimony of the

Plaintiffs' experts. In fact, the Court specifically ruled that neither Dr. Schlank nor Dr. Dvoskin – the only two retained experts who even attempted to address the issue of medication – was competent to provide expert testimony about this issue. Tr. 1093-96, 1135, 1489-95. Although the TDF's psychiatrist, Dr. Bednarz, and DHS' head psychiatrist, Dr. Fitchtner, appeared on the Defendants' witness list, neither psychiatrist was called at trial. Therefore, the expert opinions of Drs. Metzner and Berlin that the former and current practices at the TDF violate accepted professional judgment, standard and practice remain uncontradicted and unrebutted by any competent evidence. Indeed, the Plaintiffs' have reviewed the record and were unable to locate any competent testimony that supports the notion that there is a reasonable professional disagreement in the medical field on this issue. [2]

D. The Defendants' Adjustments Of Convenience Do Not Satisfy *Youngberg*

Apparently recognizing the weakness of their proof on this issue, the Defendants modified their Consent to Treatment form twice during trial, adding, and then amending, a section generally listing arousal-reducing medication as a treatment option. [3] PX 181; DX 206. This belated adjustment of convenience falls

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[2] The Court's opinion stated that Dr. Berlin "represents one end of the professional continuum on the use of anti-androgen medications" and that his testimony "coupled with that of Defendants' experts, fairly shows nothing more than bona fide professional disagreements." Slip Op., at 43-44. The Court's conclusion appears to be based on the testimony of Defendants' expert Dr. Anita Schlank, who commented that some psychiatrists "say that treatment is mainly cognitive" while others "rely very heavily on medications." Schlank, 1181. The Court found, however, that Dr. Schlank was not qualified to testify regarding the use of medication to treat sex offenders. In any event, as discussed above, the relevant question is not which treatment modality is better. Rather, the relevant question is whether the Defendants have advised patients about the risks and benefits of, and permitted them to make an informed choice regarding, all appropriate options. Tr. 1135.

[3] Included in the Defendants adjustments of convenience distributed just prior to trial was a memorandum dated September 1, 2004, entitled Arousal Reducing Medication Treatment Options. The memorandum outlined the TDF's intended

far short of rendering Plaintiffs' claims moot regarding this issue. *See* Slip Op. at 32-34 ("To prevail on their claim of mootness, Defendants face a heavy burden: they must show that subsequent events have 'made it absolutely clear that the allegedly wrong behavior could not reasonably be expected to recur.'") (citation omitted).

In addition, Plaintiffs' experts made clear that informed consent for an important treatment option of this kind requires more than a passing reference in a consent form. *See generally* Berlin, 617-18, 641-42. The Defendants' method of providing information about this important treatment option still depends largely on the comprehension and initiative of the patients – many of whom are uneducated or even cognitively impaired – and falls far short meeting accepted standards concerning informed consent. *See* Exhibit 5 to PX 6, p. 2 (describing high percentages of patients with developmental and other disabilities)

E. The Defendants' Argued Against Propositions That Were Not Asserted By The Plaintiffs

The Defendants have attempted to distract the Court with a number of red herrings because of their complete failure of proof on this issue. First, the Defendants argued that anti-androgen medication should never be the sole treatment option, and that patients should be discouraged from over-relying on

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plan for educating patients about medications, including a proposed revision to the resident handbook. DX 156. This revision appears in a draft handbook which apparently was not given to patients by the time of trial. *See* DX 201 (described in the Defendants' Exhibits as "draft" handbook and dated August 2004). Dr. Bednarz indicated that he had begun to implement at least one of the proposed changes -- that he was now discussing medication with new patients admitted to the TDF -- but that he had no intention of having such discussions with all of the nearly 200 current patients. *See* Bednarz Dep. 9/20/04, pp. 34-36.

Clearly, these last minute, partial changes, which at the time of trial at best only affected a minority of patients, do not moot Plaintiffs' claims concerning the absence of informed consent for anti-androgen medication. Even if these changes had been fully implemented and had addressed the problem, which they did not, the Plaintiffs still would be entitled to a Declaratory Judgment concerning this issue. *See* Slip. Op. at 40 (discussing declaratory relief with respect to the TDF's practices concerning Special Management Status).

medications as a cure-all for offending behavior. *See* Defendants' Trial Brief at the Conclusion of the Evidence ("Def. Br.") at 39; *see also* Slip Op. at 23. The Defendants have set up a straw man. Plaintiffs' experts never argued that medication should be used in isolation from other appropriate treatment or that it was a cure-all for the patients at the TDF. *See* Metzner, 359-60; Berlin, 633.

Second, the Defendants argued that in addition to anti-androgens, other medications such as selective serotonin reuptake inhibitors ("SSRIs") may be appropriate to suppress the sexual appetites of some patients. Def. Br. at 39. Dr. Berlin made clear that anti-androgen medications are a much more appropriate option for most of the patients at the TDF. Berlin, 639-41. *See* Slip Op. at 23 (SSRIs "may also have some utility in the treatment of sexual offenders, although their effectiveness on reducing deviant sexual arousal is likely to be less than anti-androgen medication."). Whether the TDF also should provide information about SSRIs and recommend them in appropriate circumstances is simply irrelevant to Plaintiffs' claims.[4] The relevant issue is whether the TDF provides to its patients adequate information about anti-androgen medication, an important treatment option for this group of patients, as well as an opportunity for informed consent. As discussed above, the answer clearly is no. *See* Metzner, 358-60; Berlin, 612, 617-18, 638-42, 645-50.

Third, the Defendants vigorously defend their now-abandoned practice of requiring patients to complete a program of "arousal reconditioning" before they receive anti-androgen medication. Def. Br. at 39-40. Dr. Berlin questioned this practice, pointing to strong scientific evidence that supports the effectiveness of

[4] In another attempt at distraction, the Defendants endeavored for Dr. Berlin to overstate the risks of using anti-androgen medication. However, despite the fact that any medication may produce certain side effects, Dr. Berlin testified that on the spectrum of medications that doctors prescribe to produce changes in behavior, the risks presented by anti-androgens are not particularly high. Berlin, 755-56.

anti-androgen medication and the lack of scientific evidence supporting arousal reconditioning; however, he did note that a few clinicians continue to use the latter approach. *See* Slip Op. at 22. The Defendants' argument again misses the point: Even if the TDF wished to recommend to patients – contrary to the relevant research – that they consider attempting arousal reconditioning before medication, the TDF cannot withhold from patients vital information about medication and deny them the opportunity to participate in an informed decision about available treatment options. No expert at trial supported the notion that the TDF had the right unilaterally to impose its choices about treatment options on patients without providing any opportunity for informed consent. *See* PX 6, p. 9; Berlin, 612, 617-18, 638-42; 645-50; 753-55; PX 8, pp. 12-13; PX 179, pp. 2-3.

CONCLUSION

The Plaintiffs' presented credible and uncontroverted evidence at trial that anti-androgen medication is an important treatment option for sexual offenders, and that the TDF fails to provide most patients with sufficient information about anti-androgen medication for them to participate in an informed decision this on treatment option. This failure violates accepted professional judgment, practices and standards.

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