2009 WL 10681182
Only the Westlaw citation is currently available.
United States District Court, C.D. Illinois.

Edward J. ROE,[1] Anthony P. Stasiak, Timothy J. Stephen, Jackson Walker, Plaintiffs,
v.
Willard O. ELYEA, in his individual capacity, and Michael Puisis, in his official capacity as Medical Director of the Illinois Dep't of Corrections [2], Defendants.

06–3034
|
Signed 02/18/2009

Attorneys and Law Firms

David Stevens, Law Offices of David Stevens, Charleston, IL, H. Kent Heller, Heller Holmes & Associates PC, Mattoon, IL, for Plaintiffs.

Joseph N. Rupcich, Cassiday Schade LLP, Springfield, IL, for Defendants.

Order Granting and Denying Post–Trial Motion

HAROLD A. BAKER, UNITED STATES DISTRICT JUDGE

***1** A jury trial was held on February 14–15, 2008, on the plaintiffs' claims that Defendant Dr. Elyea (IDOC's former Medical Director), individually and in his official capacity as Medical Director of the Illinois Department of Corrections, had been deliberately indifferent to the plaintiffs' serious medical needs by establishing a policy which denied them needed treatment and testing for their Hepatitis C solely because they had less than two years left on their sentences.[3] The jury returned a verdict against Defendant Elyea, awarding each plaintiff twenty thousand dollars in compensatory damages and two million dollars in punitive damages.

Before the Court is the defendant's motion for a new trial or for judgment as a matter of law (d/e 52). Federal Rule of Civil Procedure 50(a)(1) permits judgment as a matter of law against a party on an issue if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue...." Fed. R. Civ. P. 50(a)(1). The test is " 'whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed.' " *Susan Wakeen Doll Co., Inc., v. Ashton–Drake Galleries*, 272 F.3d 441, 449 (7th Cir. 2001)(*quoting Goodwin v. MTD Prods., Inc.*, 232 F.3d 600, 606 (7th Cir. 2000)(additional citations omitted)). "In considering a motion for judgment as a matter of law, a court must review all the evidence in the record; it must 'draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.' " *Equal Employment Opportunity Commission v. Bd of Regents*, 288 F.3d 296, 301 (7th Cir. 2002), *quoting Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 122, 150 (2000). The court " 'must disregard all evidence favorable to the moving party that the jury is not required to believe.' " *Id.*

The test for determining whether to grant a new trial under Fed. R. Civ. P. 59(a) is whether " 'the verdict is against the weight of the evidence, the damages are excessive [or insufficient], or if for other reasons the trial was not fair to the moving party.' " *Shick v. Illinois Dep't of Human Serv.*, 307 F.3d 605, 610 (7th Cir. 2002)(brackets in original)(quoted and other cites omitted). "Only when a verdict is contrary to the manifest weight of the evidence should a motion for a new trial challenging the jury's assessment of the facts carry the day." *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 424 (7th Cir. 2000).

Analysis

Dr. Elyea and His Policy

I. Dr. Elyea can be liable for money damages in his individual capacity for an unconstitutional IDOC-wide policy that he personally devised and implemented.

***2** Dr. Elyea argues that money damages against him are barred by Eleventh Amendment sovereign immunity because this case was against him in his official capacity only.

It is true that money damages against Dr. Elyea in his official capacity as (former) Medical Director are barred. *See Wynn v. Southward*, 251 F.3d 588, 591 (7th Cir. 2001). But this case was also against Dr. Elyea in his *individual* capacity. Defendant Elyea personally devised and implemented the IDOC's testing and treatment policy for inmates with Hepatitis C. Since he was personally responsible for devising and implementing that policy, he is liable individually if that policy amounted to deliberate indifference to the plaintiffs' serious medical needs. *Armstrong v. Squadrito*, 152 F.3d 564, 581 (7th Cir. 1998)(state actor can be liable individually if he or she "personally devised a deliberately indifferent policy that caused a constitutional injury").[4]

II. There was sufficient evidence that the plaintiffs had serious medical needs.

Dr. Elyea maintains that the evidence did not permit an inference that the plaintiffs had serious medical needs. A serious medical need is " 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.' " *Chapman*, 241 F.3d at 845, *quoting Zentmyer v. Kendall County* 220 F.3d 805, 810 (7th Cir. 2000)(*quoting Gutierrez v. Peters* 111 F.3d 1364, 1373 (7th Cir. 1997)).

Here, the guidelines upon which Dr. Elyea said he based his policy create a reasonable inference that Hepatitis C is a serious medical condition that requires specific monitoring and, when certain parameters are met, treatment. The guidelines do acknowledge that Hepatitis C is asymptomatic for most, with about one-third having no liver disease evident. (2003 guidelines pp. 24–25; 2005 guidelines p. 39). However, the guidelines also recognize that 10–15% of persons with chronic Hepatitis C "develop progressive fibrosis of the liver leading to cirrhosis." (2005 guidelines p. 25; 2003 guidelines p. 39). "Once cirrhosis develops ..., the risk of hepatocellular carcinoma (HCC) is approximately 1% to 4% per year." (2005 guidelines p. 39; 2003 guidelines p. 25). The guidelines recommend detailed testing and monitoring of all inmates with chronic Hepatitis C, in order to identify those with possible liver disease and those in need of the anti-viral treatment. Thus, under the guidelines embraced by Dr. Elyea, the plaintiffs' Hepatitis C is a serious medical condition.

III. There was sufficient evidence that Dr. Elyea's two year policy directly contradicted the federal guidelines that he testified were the accepted professional standard upon which he purported to base his policy. A rational juror could have concluded that Dr. Elyea's explanation for the two year requirement was not based on the exercise of his professional judgment. A rational juror could have also concluded that Dr. Elyea knew, based on his knowledge of the federal guidelines on which he purportedly relied, that his two year policy would deliberately ignore the serious medical needs of inmates with Hepatis C who needed a liver biopsy and/or antiviral treatment and who could finish the antiviral treatment before their release.

***3** Dr. Elyea argues that the plaintiffs presented no expert testimony that his policy amounted to deliberate indifference. Expert testimony was needed, he posits, to establish that his policy was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate ... [that he] did not base the decision on such a judgment." *Estate of Cole v. Pardue*, 94 F.3d 254, 261–62 (7th Cir. 1996); *see also Collingnon v. Milwaukee County*, 163 F.3d 982, 989 (7th Cir. 1998).

Dr. Elyea was the Agency Medical Director for the IDOC from July 1, 2002 to April 30, 2007. He was responsible for establishing and devising IDOC policies regarding medical treatment for inmates, though his policies needed approval by the Director of the IDOC before implementation. He devised and implemented the IDOC policy on the treatment of inmates with Hepatitis C that is at issue in this case.

Dr. Elyea testified that he based his policy on the Federal Bureau of Prison's Clinical Practice Guidelines for the Prevention and Treatment of Viral Hepatitis. He relied on the federal guidelines, which he said were based on guidelines from the U.S. Centers for Disease Control, because he felt they were sound. The 2003 and 2005 versions of the federal guidelines upon which Dr. Elyea purportedly based his policy, were admitted into evidence by Plaintiff, as Defendant's exhibits three and four.

Strangely, no written IDOC policy was admitted into evidence by either party, so the jury had to piece Dr. Elyea's policy together with the testimony and evidence presented at the trial.[5] The part of his policy primarily at issue here regarded an inmate's required length of remaining sentence in order to obtain certain testing (namely, a liver biopsy) and be considered for and receive antiviral treatment for Hepatitis C.

Dr. Elyea testified that his policy required inmates with Hepatitis C to have at least 18 months left to serve in the

IDOC before they received any treatment or testing. He testified that he arrived at the eighteen month figure by allowing six months for work-up (during which time inmates had to have at least two elevated enzyme levels in lab tests), and one year for the antiviral treatment. If an inmate had less than 18 months to serve, no testing or work up was done because there was not enough time for treatment.

It is not clear, however, if the actual policy was 18 months or two years.[6] There was evidence that inmates were required to have two years left in the IDOC before being considered for a liver biopsy and antiviral treatment. For example, the plaintiffs testified that they were told by medical staff that they had to have two years remaining on their sentences to be considered for treatment. At least one memo from Dave Huffman, the Health Care Administrator at Logan, confirmed that an inmate:

> has to be on the Hepatitis C chronic clinic for 1 year and meet various criteria based on lab test results during that time and then he must have at least 12 months left to serve in the prison setting before he is eligible for treatment. This criterion has been established by the Agency Medical Director and is in concert with guidelines being followed by the Federal Bureau of Prisons.

***4** (4/19/04 Memorandum by David Huffman re Plaintiff Stephen, in Defendants' group exhibit 5). A juror could have reasonably concluded the policy, in practice, was actually two years, so the Court refers to the policy as two years (though documents submitted after the trial indicate 18 months, see footnote 4). In any event, the difference (18 months or two years) would not affect the conclusions herein.

Dr. Elyea argues that there was no evidence that this two year policy amounted to deliberate indifference to the plaintiffs' serious medical needs. Dr. Elyea is correct that the federal guidelines do not set the constitutional standard. However, in this case Dr. Elyea *chose* to base his policy on those federal guidelines-the federal guidelines were *his* evidence that he had exercised his professional judgment when devising the policy. In this case the guidelines, therefore, were the barometer of acceptable professional judgment per Dr. Elyea's own testimony.

The problem is that Dr. Elyea's two year policy did not follow the federal guidelines upon which he purported to base his policy. In fact, the federal guidelines give rise to an inference that the two year policy was a substantial departure from accepted protocol and was not based on acceptable professional judgment. Dr. Elyea's own testimony further supported an inference that the two year policy was based not on professional judgment, but instead on ease of administration and cost.

For example, contrary to Dr. Elyea's testimony, the federal guidelines do not recommend against testing for inmates with less than two years to serve on their sentences. The federal guidelines recommend against starting antiviral therapy for inmates whose detention is too short to complete that treatment. (2003 guidelines p. 41: inmates on "short-term detention" "should ordinarily not be started on antiviral therapy. Treatment decision should be deferred until the inmate is sentenced and redesignated or released.")(2005 guidelines at 26: "Inmate candidates for hepatitis C treatment entering BO short-term detention facilities, including pre-trial and nonsentenced federal detainees, should ordinarily **not** be started on antiviral therapy. The potential for interrupted antiviral therapy for Hepatitis C places the inmates at risk for a number of undesirable outcomes, including treatment failure if the course of treatment is not completed, and adverse effects from medications if the inmate does not receive the required laboratory and clinical monitoring upon release or transfer.").

Thus, the federal guidelines contain no across-the-board sentence length for testing or for antiviral treatment. Instead, the guidelines recommend a battery of tests, monitoring and baseline evaluations, which in turn determine who is a good candidate for liver biopsy and/or antiviral therapy. For example, the guidelines recommend that *all* inmates with chronic Hepatitis C be evaluated for "*at least* the following":

-Targeted history and physical examination to evaluate for signs and symptoms of liver disease ...

-Serum ALT, AST, bilirubin, alkaline, phosphatease, albumin, prothrombin time, ...

-CBC with differential and platelet count;

-Renal function assessment ...;

-Anti–HIV by immunoassy;

-HbsAg;

* * *

(2005 guidelines pp. 40, 62; 2003 guidelines pp. 25, 72).[7] The guidelines recommend periodic monitoring of inmates with Hepatitis C, with the frequency of the monitoring depending on an individualized assessment of each inmate. (2005 guidelines p. 41)("Inmates with chronic HCV infection should be monitored periodically in chronic care clinics. The frequency of monitoring should be based on patient-specific facts including candidacy for treatment, the degree of liver disease, and co-morbid conditions."). The guidelines recommend a comprehensive approach to establish a baseline, monitor possible progression, and identify those needing treatment. (*See* 2005 guidelines, Appendix 8: "Step-wise Approach for Evaluating and Treating Chronic Hepatis C"; 2003 guidelines, Appendix 10: "Evaluation Strategy for Treatment of Chronic Hepatitis C"). In contrast, Dr. Elyea testified that, under his policy, inmates received *no* testing unless they had 18 months to serve.[8]

***5** Put another way, the federal guidelines recommend that testing and treatment decisions of this complicated condition be made on an individual basis. Dr. Elyea's two year policy removed any chance of an individualized assessment of an inmate's need for testing and treatment, if that inmate had less than two years to serve.

Dr. Elyea also testified that there was no such thing as a 12 week antiviral treatment, but that is not what the guidelines say. The length and effectiveness of treatment depends on the patient's genotype. Patients with genotypes 2 and 3 can be treated in 12 to 24 weeks. (2005 guidelines pp. 31, 34)(the 2003 guidelines say 24 weeks). It is genotype 1 that takes 48 weeks of treatment. (2005 guidelines p. 31). Genotypes 2 and 3 also have higher response rates to the antiviral treatment than genotype 1. Accordingly, antiviral treatment can be initiated without a liver biopsy for genotypes 2 and 3. (2005 guidelines pp. 28–29)("Persons with genotypes 2 or 3 have a 76–82 % response rate ..., compared to persons with genotype 1 who have a 40–45% response rate.")("Liver biopsy can be deferred and antiviral therapy empirically initiated for certain inmates with genotypes 2 and 3 due to the high response rates to treatment for those patients").

Dr. Elyea's two year policy was across the board for all genotypes, even though genotypes 2 and 3 can be treated in 12–24 weeks without a liver biopsy. Thus, Dr. Elyea's two year policy, as applied to an inmate with less than two years to serve, removed any chance of an individualized assessment of that inmate's need for testing, his need for treatment, and his ability to complete that treatment. That meant than an inmate with genotype 2 and 3 would not get treatment *regardless* of need, even though the treatment could be completed in 12 to 24 weeks.

Dr. Elyea testified that the reason for the across-the-board rule was to have a consistent and simple IDOC-wide policy. That, however, is not professional judgment, it is administrative convenience. Administrative convenience is a legitimate factor, but not at the expense of an inmate's serious medical needs.

Dr. Elyea testified that treating all inmates with Hepatitis C would be cost prohibitive. Cost is a legitimate factor: "... [I]t is difficult to generalize about the civilized minimum of public concern necessary for the health of prisoners except to observe that this civilized minimum is a function of both objective need and cost." *Gil v. Reed*, 381 F.3d 649, 662 (7th Cir. 2004)(citations omitted). But treating all inmates is not what is at stake and is not recommended by the federal guidelines upon which Dr. Elyea purported to base his policy. At stake in this case was that subset of inmates who needed treatment and who could have finished it before their release.

In short, a juror could have reasonably concluded that Dr. Elyea's two year policy directly contradicted the federal guidelines which Dr. Elyea embraced as the accepted professional standard. A juror could have reasonably concluded that Dr. Elyea's explanation for varying from the federal guidelines by requiring two years left to serve was not based on the exercise of acceptable professional judgment, and could have also concluded that Dr. Elyea knew, based on his knowledge of those guidelines, that his two year policy would deliberately disregard inmates who could finish the treatment before their release and for whom the treatment was recommended by the guidelines.

IV. Dr. Elyea is not entitled to qualified immunity.

***6** Dr. Elyea asserts qualified immunity, on the grounds that his policy was "less restrictive" than the federal government's policy. (d/e 54, p. 5). Defendant argues that he "could not be on notice that by following the recommendations of the federal government and actually adopting a less-restrictive policy he was violating Plaintiffs' constitutional rights." *Id.*

First, contrary to Dr. Elyea's assertion, the federal guidelines do not recommend against treating all detainees. The federal guidelines state only that non-sentenced inmates who are asymptomatic and "highly mobile" should ordinarily not be screened "unless clinically indicated." (2005 guidelines p. 23). The

guidelines thus recommend, as they consistently do, an individualized determination. In any event, this case is not about detainees. As discussed above, this case is about inmates who *could have* completed treatment before their release. Dr. Elyea's two-year policy for this class of inmates is not less restrictive than the federal guidelines, it is more restrictive. The jury could have reasonably concluded that Dr. Elyea knew that his two year policy would deliberately disregard the serious medical needs of these inmates. Given that, qualified immunity is not appropriate.

Application of Dr. Elyea's policy to the plaintiffs

V. As discussed above, the jury could have reasonably concluded that Dr. Elyea's two year policy was deliberately indifferent to the serious medical needs of certain inmates. That conclusion does not end the analysis. The plaintiffs had to prove that Dr. Elyea (through his policy or otherwise) was deliberately indifferent to their particular serious medical needs. And, they had to prove that they suffered injury from that deliberate indifference.

A. Plaintiff Roe: There was sufficient evidence that Dr. Elyea's policy, as applied to Plaintiff Roe, amounted to deliberate indifference to Plaintiff Roe's serious medical needs. There was sufficient evidence to support the compensatory damage award of $20,000 to Roe. However, the punitive damage award of $2 million to Roe is plainly excessive and should be reduced to $20,000.

1. Evidence of Deliberate Indifference

Plaintiff Roe was first incarcerated for about ten years from 1991 to 2002. Dr. Elyea did not become Medical Director until July 2002, and Roe was released from his first incarceration just a month later.

Roe testified that he was diagnosed with Hepatitis C in 1998, though his medical records indicate that he had reported Hepatitis C infection since the 1970s. Roe was back in prison for about two months in 2003 and eight months in 2004. Roe was unable to obtain treatment for his Hepatitis C when he was out of prison because he could not afford it, did not qualify for government assistance, and the free clinic's waiting list was too long. Roe's final incarceration was from July 17, 2007, until he died in prison in June 2008 (about three months after the trial), apparently from cirrhosis of the liver. (d/e's 62, 63).

Roe's prison medical records indicate that in June 2002, a "Hep C Genotype & viral load" were ordered. (Def. Ex. 1, Roe's 6/9/02 Medical Progress Note). Those results show ALT and AST levels elevated more than twice normal (100 for each, reference range 0–40).[9] The results also identified Roe's Hepatitis genotype as "3a". (Roe's LabCorp test results dated 6/8/02 and 7/2/02, pages marked 1–257, 259, 260). The Hepatitis C was verified again in tests reported on July 22, 2002.[10] According to the 2003 federal guidelines, Roe's genotype 3a indicated that he was a possible candidate for the 24–week antiviral treatment (2003 guidelines p. 46) and, according to the 2005 guidelines, a 12–24 week antiviral treatment.

***7** Labs were again run during Roe's 2003 incarceration, again showing high AST and ALT levels. Labs again were run in January 2004, when Roe was again incarcerated, again showing elevated AST (105) and ALT levels (98), more than twice normal. (Roe's Medical Records, 1/22/04 lab report, pages marked 1–308, 310). More labs relating to the Hepatitis C were ordered on February 3, 2004, and the medical records reflect that Roe was referred to the Hepatitis Clinic in February 2004 and was being followed there. (2/26/04, 3/1/04 Progress Notes). A March 29, 2004 progress note from the "Hep C Clinic" indicates that Roe was examined, his liver was soft and not enlarged, labs were drawn and that Roe had abnormal lab values. An April 21, 2004, an RN note states "call from labcorp critical for review. Lab values platelets 99 AST–182, ALT 182."

Roe was released from prison on October 1, 2004, and incarcerated again over 2½ years later on July 17, 2007. He was unable to obtain treatment during his release. By the time of Roe's 2007–08 incarceration, Dr. Elyea was no longer Agency Medical Director (having stepped down about two months earlier, in April 30, 2007), but his policy was apparently still in force. A liver profile run by the prison in October 2007 showed nearly all of Roe's test markers out of range, including his ALT and AST. (Roe's Medical Records, 10/20/07 Univ. Of Illinois Lab Report, marked as page D220, D2&b). Genotype testing again showed type "3A." (Roe's Medical Records, 12/5/07 Univ. Of Illinois Lab Report, marked as D220). Further labs on January 10, 2008, again showed most test markers out of range. (Roe's medical records, 1/3/2008 Univ. Of Illinois Lab Report). The medical records show a liver biopsy was ordered in January 2008. At the jury trial in February 2008, Roe testified that he had received a liver

biopsy the week prior but had not yet been given the results. Roe was visibly quite ill with a distended abdomen at the trial. He died about three months later in prison, apparently from cirrhosis.

As to Roe's 2004 incarceration, there was sufficient evidence for the jury to rationally conclude that Dr. Elyea's two year policy was deliberately indifferent to the Roe's serious medical needs.[11] The federal guidelines upon which Dr. Elyea purportedly based his policy (the 2003 guidelines, at that time) indicated that a decreased platelet count and an AST/ ALT ratio greater than one "may indicate underlying liver disease and warrant further evaluation," which is what Roe consistently showed. (2003 guidelines p. 42). Those guidelines also indicated that an ALT level higher than two times normal should be confirmed and then the inmate referred for a liver biopsy. (2003 guidelines p. 43). Roe's ALT and AST levels were consistently more than twice normal and had been since 2002. Under the 2003 guidelines, given Roe's long history of elevated AST/ ALT levels in his prison medical records, the jury could have reasonably inferred that Roe should have received a liver biopsy and should have been worked up for antiviral treatment, particularly since, given Roe's genotype, a 24 week antiviral treatment could have been successfully completed before his release.[12] Under Dr. Elyea's policy, though, no liver biopsy was done, even though Roe had genotype 3, because Roe had less than two years to serve.

As for Roe's 2007–08 incarceration, the medical records show that Roe did receive a liver biopsy, though not until shortly before the trial, about seven months after his incarceration began. Roe's genotype, however, had already been tested and Roe had a long, documented history of elevated enzyme levels. Under the guidelines in effect, Roe should have at least been considered a candidate for 12–24 week antiviral therapy shortly after his incarceration began in July 2007, without having to wait the six months to repeat the enzyme tests and then waiting for the results of a liver biopsy. (The 2005 guidelines state the "Liver biopsy can be deferred and antiviral therapy empirically initiated for certain inmates with genotypes 2 and 3 due to the high response rates to treatment for these patients.") Thus, the jury could have drawn the permissible inference that Dr. Elyea's policy was deliberately indifferent to Roe's serious medical needs during his 2007–08 incarceration too (though that would not increase the damages available, given the lack of expert testimony).

2. *Evidence of Injury & Causation*

***8** Dr. Elyea contends that expert testimony was required to establish that the failure to consider Roe for a liver biopsy and/or antiviral treatment caused Roe to suffer any of the symptoms Roe described at trial, such as stomach pain and distension. Dr. Elyea further argues that there was no evidence that the antiviral treatment would have lowered Roe's risk of cirrhosis or liver cancer. "To satisfy section 1983, ... [Plaintiff] must demonstrate not only that ... [Defendants] violated his constitutional rights, but also that the violation caused ... [Plaintiff] injury or damages." *Harris v. Kuba*, 486 F.3d 1010, 1014 (7th Cir. 2007).

Dr. Elyea testified that Hepatitis C is generally asymptomatic unless at end stage, but he said nothing about the symptoms of cirrhosis. As the guidelines explain, 10–15% of Hepatitis C sufferers will develop cirrhosis. The court believes that the jury could have reasonably concluded that Roe suffered pain and damage to his health by not being considered for treatment in 2004, even without his own expert. All the plaintiffs testified to the same symptoms–stomach pain and distension (which they all visibly had, except Walker, who had received treatment), and all the plaintiffs had Hepatitis C. No other serious medical condition was identified at trial or in their medical records that might explain their common symptoms. Further, Plaintiff Walker testified how poorly he felt before the antiviral treatment and how much better he felt after it. In any event, Plaintiff should have been considered for antiviral therapy in 2004 and 2007 based on his genotype and enzyme levels, even if he had no symptoms. An inference arises from the guidelines alone that the antiviral treatment would have likely reduced Plaintiff's viral load and thus improved his condition, regardless of symptoms. Roe's lack of expert testimony may have significantly reduced the amount of damages he was able to prove (see below), but it did not completely doom his case.

3. *Amount of Damages*

The jury awarded Roe $20,000 in compensatory damages and $2 million in punitive damages.

Dr. Elyea argues that the amount of the compensatory award, $20,000, is unsupported by the evidence and represents not compensation for damages, but the amount of money the IDOC saved from not providing the treatment. Dr. Elyea testified at the trial that the antiviral treatment cost from $15,000 to $20,000 per year. As discussed above, the evidence allowed a reasonable inference that Roe had a serious medical need for the antiviral treatment under the federal guidelines upon

which Dr. Elyea based his policy, and that he could have completed the treatment before his release. The amount, $20,000, stands not only for what IDOC saved, but arguably what it would have cost Roe to pay for his own treatment. Thus, it can be seen as an effort to make Roe whole–to enable him to receive the treatment he should have received in prison. The Court accordingly believes sufficient evidence exists for the compensatory damages award to stand.

Some punitive damages are also warranted, but two million dollars is too much.

"While 'it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary ... [t]he proper judicial function is to police a range, not a point.' " *Houskins v. Sheahan* 549 F.3d 480, 496 (7th Cir. 2008), *quoting Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003). "Guideposts" for reviewing punitive damages are: the "degree of reprehensibility"; the "disparity between the harm or potential harm suffered ... and [the] punitive damages award;" and, the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 575; *Kunz v. DeFelice*, 538 F.3d 667 (7th Cir. 2008)("reprehensibility of the action in question, the ratio between the compensatory and punitive damages, and the parallel remedies available.")(citing *Gore*). "Evaluating reprehensibility involves inquiry into whether the injury was physical, whether it evinced a reckless disregard for the health of the target, whether the target had a financial vulnerability, and whether the injury was clearly intentional." *Kunz*, 538 F.3d at 679, *citing State Farm*, 538 U.S. at 419.

***9** Dr. Elyea's conduct in devising the policy does support an award of punitive damages. Dr. Elyea personally devised this policy, which (a juror could infer) amounted to reckless indifference to the serious medical needs of inmates like Roe, who needed antiviral treatment and who, because of their genotype, could complete that treatment before their sentence was up. *Smith v. Wade*, 461 U.S. 30, 56 (1983)(punitive damages available where "evil motive or intent, or ... reckless or callous indifference to the federally protected rights of others.").

However, the court believes the punitive damages, in large part, reflect the jury's disgust that Roe still had not received any treatment at the time he testified at trial, despite his obvious illness, and Dr. Elyea's attitude at trial, which could have been perceived as dismissive. Punitive damages cannot be awarded based on sympathy or dislike. The Court also believes that the size of the punitive damages are due in part to Health Care Administrator Huffman's callous memos referencing the "Medical Director" and refusing the plaintiffs' pleas for treatment.[13] There was no evidence that Dr. Elyea was aware of these memos and he was not the "Medical Director" referred to in them, which could have been confusing to the jury. And, Dr. Elyea cannot be punished for Roe's inability to obtain treatment while on release for 2½ years. Roe did suffer harm from his lack of treatment in prison, but he also suffered harm from his inability to obtain treatment while on release. Roe's lack of an expert does make the specific harm Roe suffered in prison hard to parse from the harm received outside of prison, beyond missing out on the antiviral treatment in prison, which is already covered by the compensatory damages.

As to the ratio of compensatory damages to punitive damages, the Supreme Court has noted that "few awards exceeding a single-digit ratio ... will satisfy due process." *State Farm v. Campbell*, 538 U.S. 408, 425 (2003); *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2626 (2008). Higher ratios, however, may be justified, for example, for " 'particularly egregious' " conduct or conduct that is " 'hard to detect.' " *Kunz*, 538 F.3d at 679, *quoting Gore*, 517 U.S. at 582 and *Exxon*, 128 S.Ct. at 2622. In this case, two million dollars in punitive damages is one hundred times the compensatory damages of $20,000—a ratio of 100 to one. In some egregious cases, that ratio might be appropriate. But here, it far exceeds what is necessary for deterrence and punishment. The cases cited by Defendant comparing awards also supports the conclusion that two million is excessive.

The punitive damages therefore need to be reduced. After careful consideration, the Court believes the punitive damages should be reduced to $20,000—a one to one ratio. Roe will be given an opportunity to accept the reduction or have a new trial limited to punitive damages. *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1983)(proper procedure of correcting excessive damages is to give party choice of remittitur or new trial on damages).

B. Plaintiff Walker: There was sufficient evidence of deliberate indifference to the serious medical needs of Plaintiff Walker. However, there was no evidence that the deliberate indifference was caused by application of Dr. Elyea's policy to Plaintiff Walker. There was also no evidence that Dr. Elyea bore any personal responsibility for that deliberate indifference.

***10** Walker has been incarcerated since 1995 and remains

so. Walker testified that he was diagnosed with Hepatitis C in 2003 but received no testing or treatment until 2006, after he gave his deposition in this case. After his deposition, he received a liver biopsy and antiviral treatment. He testified that he felt much better after receiving the anti-viral treatment.

Walker's case is not about the two year policy. Walker was not subject to that policy because of his long sentence. Defendant Elyea admitted at trial that Walker *did* qualify for treatment under the policy. Walker's case is about the failure to follow that policy—the denials of testing and treatment from 2003 to his treatment in 2006. His case against Dr. Elyea depends on whether Defendant Elyea bears any personal responsibility for that failure.

Dr. Elyea testified that he did not know why Walker had not been treated before 2006. He testified that the doctor at Walker's prison had not notified Dr. Elyea's office of Walker's need for the anti-viral treatment. Dr. Elyea also testified that he had not reviewed any of the grievances filed by the plaintiff Walker.

Walker's medical records show that, in October 2003, Walker tested positive for Hepatitis C, with elevated ALT and AST levels.[14] A medical note in November 2003 reflects that Walker was referred to the hepatitis clinic and that the tests would be repeated in 3 months. In December 2003 Walker filed an emergency grievance complaining of "dizziness, skin rashes, throat redness and soreness, painful urination, ..." He asked to be seen by a Hepatitis specialist. A memorandum in response is in the record, authored by Dave Huffman, the health care unit administrator.[15] The memorandum states: "I/M has to be on the Hepatitis C chronic clinic for 1 year and meet specific lab test results in order for treatment to begin. After 1 year, if he meets the criterion, treatment will be started."[16]

Walker had elevated enzyme levels again in May 2004, and his medical records bear a notation that he was being followed by the "clinic." In June 2004 the plaintiff filed another grievance seeking treatment for Hepatitis C and reporting "black outs, skin rashes, throat problems, headaches for days, stomach aches, numb feet, urination pains, chest pain and other problems ..." Another memo from Huffman replied:

- I/M is on the chronic clinic appropriate for his disease process. I/M has not met the criteria for treatment as of yet. His medical issue is a disease process that progresses very slowly. Just because a person has the disease that person has to meet treatment criteria.

* * *

- The medical unit is not playing games with the health of this I/M as stated. It is important to remember this disease process was caught by the I/M because of his own behaviors prior to incarceration. The Medical Director is monitoring the disease process appropriately.

Labs in December 2004 and June 2005 again came back abnormal. Plaintiff Walker testified at trial that he had nose bleeds, cramps, headaches and felt sick. He testified that he asked for help with his Hepatitis C 20–30 times to no avail. He testified that his grievances went all the way up to Dr. Elyea, and that Dr. Logan had told the plaintiff that he would not receive treatment because it was too expensive.

***11** The memos by Huffman do give rise to an inference that the "Medical Director" was responsible for the denials. However, there is an "Agency Medical Director," which was Dr. Elyea, and a separate Medical Director for each prison. The Agency Medical Director is IDOC-wide; then there is an on-site Medical Director for each prison.[17] Dr. Elyea testified that it was the doctor on site, or the medical director on-site, that would have notified Dr. Elyea of the need for a liver biopsy or antiviral treatment. There was no testimony from Huffman about who he meant when he wrote "Medical Director", but in the absence of any other evidence, the only reasonable inference that arises is that he meant the medical director on site, not the agency medical director. There was no evidence that Dr. Elyea was aware of Huffman's memos or grievances. None of the grievances and responses are not copied to Dr. Elyea on their face, and none of Walker's medical records have Dr. Elyea's name on them, as far as the Court can tell. Plaintiff testified that his grievances went all the way to Dr. Elyea, but he had no first hand knowledge for that conclusion.

Walker argues that Dr. Elyea's knowledge can be imputed from the filing of this lawsuit. Yet Walker received a liver biopsy and antiviral treatment within a relatively short time after Elyea filed his Answer in this case. Walker argues that he did not receive any testing or treatment until a few weeks before the trial in 2008, but that is not true. Walker testified at trial that he received a liver biopsy and antiviral treatment after his deposition, which was in April 2006, five months after Dr. Elyea filed his Answer in this case. The final pretrial order shows Walker's antiviral treatment was completed by December 2006. Thus, Walker received the treatment he sought within a few months of filing his lawsuit. If Dr. Elyea's knowledge of Walker's situation came only from the lawsuit, no inference of deliberate indifference arises against him.

Plaintiff Walker also testified that he had received no follow-up testing after the anti-viral treatment to monitor the efficacy of the treatment. Dr. Elyea did not discuss what the policy was on post-treatment monitoring, but he did testify that the policy was based on the guidelines. The guidelines recommend a blood test to measure enzyme levels "every 2 months for 6 months after completion of effective therapy". (2005 guidelines p.73). They also recommend that the viral load be measured 6 months after completion of the antiviral therapy. *Id.* Re-treatment considerations for inmates who do not demonstrate a sustained viral response[18] is considered on a case-by-case basis depending on many factors. *Id.* at 35. Thus, Walker should have received these tests during Dr. Elyea's tenure, and Walker still had not received them by the time he testified at trial. (He did, however, receive them later, as discussed below). An inference of deliberate indifference arises from the denial of these post-treatment blood tests. Again, though, Walker did not prove that Elyea was responsible for those denials. There was also no injury shown from the denial of post-treatment testing.

In sum, the Court must conclude that Plaintiff Walker has not met his burden of proof on his case against Dr. Elyea. Based on the evidence presented at trial, no rational juror could have concluded that Dr. Elyea was personally responsible for Walker's delay in receiving a liver biopsy, antiviral treatment or follow up tests. Accordingly, judgment as a matter of law must be granted to Dr. Elyea on Walker's claim.

4. Plaintiff Walker: Injunctive relief is moot

After the trial, Walker filed a motion for injunctive relief (d/e 83), asking for three things: 1) post-treatment testing of his viral load, in accordance with the federal guidelines, to determine whether the treatment had been successful; 2) further treatment in accordance with the guidelines if necessary; and 3) a transfer back to Logan Correctional Center (he alleged he had been transferred out in retaliation for grieving his treatment).

***12** In September 2008, as part of his routine physical, the plaintiff received blood tests which showed no detectable Hepatitis C viral load, and also showed liver enzymes in the normal range. (d/e 85, Ex. 1, aff. of Colleen Gray ¶ 6, bates stamp ## 76–77). His request for post-treatment testing is therefore moot. As for his other requests, they are outside the scope of this lawsuit and belong in a new case, if the plaintiff intends to pursue them. His motion for permanent injunctive relief will therefore be denied.

C. Plaintiff Stasiak: Stasiak failed to prove that Dr. Elyea (through his policy or otherwise) was deliberately indifferent to Stasiak's serious medical needs.

Stasiak's relevant incarceration ran from August 21, 2003 to December 8, 2004. He testified that he was diagnosed with Hepatitis C in 2003 and that he made numerous requests for a liver biopsy and antiviral treatment, complaining of stomach pains, including sending a grievance to Dr. Elyea. He testified that he was told he had to be in prison for two years before he could receive treatment. Stasiak filed grievances asking the prison to follow the federal guidelines by doing tests, a biopsy and starting antiviral treatment. Huffman, the Health Care Unit Administrator, responded that the inmate had been evaluated several times by the "Medical Director" and that Stasiak did not meet the guidelines for treatment (i.e., his out date was too soon).

Stasiaks's medical records show that labs were run in December 2003 and reported an ALT of 91, AST of 54. (12/29/03 and 1/8/04 progress note). The plan was to repeat the tests in 3 months, but it was noted that Stasiak was scheduled to leave in December 2004. A January 27, 2004 note stated that Stasiak had an ALT of 112 and an AST of 62, which is confirmed by the LabCorp report of January 23, 2004. A February 5, 2004 progress note indicates that the inmate wanted treatment for his Hepatitis C but that he would not meet the criteria since his out date was 2004. A June 21, 2004 note indicated that the "Hep C Clinic" was "discussed at length" with Stasiak, and a July 2004 note states that the liver enzymes were up, but that the "minimum stay needed is at least 1 year." In August 2004, Stasiak's ALT and AST levels had dropped considerably according to the progress note: ALT was 53, AST was 30. A LabCorp report dated 9/24/04 reports an ALT of 99, but a normal AST of 40. All the other markers were within the normal range. Stasiak's genotype is not in the record as far as the Court can tell.

Since Stasiak's release from prison in December 2004, he testified that he continued to suffer from stomach pain. He has also had stomach swelling, vomiting, and back aches. He testified that he was unable to afford any testing or treatment after his release and was unable to get social security or medicaid for the treatment.

Stasiak presented no expert of his own, relying only on

the guidelines. Unlike Roe, though, it is not clear what the guidelines recommended in Stasiak's situation. Stasiak did appear to receive the baseline work-up recommended by the guidelines, and Stasiak never had an AST/ALT ratio greater than one, which might indicate liver disease. (2003 Guidelines p. 43). It does appear that Stasiak's ALT levels were elevated more than twice the normal on several occasions, but his AST levels were not. His ALT level was near normal in August 2004, just a few months before his release. Without expert testimony, Stasiak was unable to prove he had a serious medical need for a liver biopsy or antiviral treatment, because the guidelines do not do so. Thus, there was no evidence that the two year policy amounted to deliberate indifference to Stasiak's serious medical needs. Accordingly, judgment as a matter of law must be granted to Defendant Elyea on Stasiak's claim.

D. Plaintiff Stephen: Plaintiff Stephen did not prove deliberate indifference to his serious medical needs during his 2004 or 2007 incarceration. In contrast, Stephen did prove that Dr. Elyea's two year policy was deliberately indifferent to Stephen' serious medical need for genotype testing and a liver biopsy during his 2005 incarceration. However, Stephen failed to show that he could have completed the antiviral treatment during his 2005 incarceration. Stephen thus failed to show that he suffered injury or damage from not getting genotype testing and a liver biopsy in 2005.

***13** Plaintiff Stephen's relevant incarcerations were seven months in 2004 (February 2, 2004 to September 2, 2004); seven months in 2005–06 (June 13, 2005 to January 26, 2006); and two months in 2007 (January 19, 2007 to March 23, 2007). Plaintiff was diagnosed with Hepatitis C in March 2004.

Stephen's prison medical records show highly elevated enzyme levels in March 2004–an AST of 256 and an ALT of 310–and again in April 2004 (AST=204, ALT=288). A July 19, 2004 progress note states that "liver biopsy and treatment cannot be accomplished. He need [sic] to stay at least 12–15 months here." Stephen's 2004 incarceration ended on September 2, 2004.

Stephen was again incarcerated in June 2005. In August 2005, Stephen's AST was 416, his ALT was 310. The levels were again high in September 2005 (AST=267, ALT=329) and November 2005 (AST=157, ALT=157). A memorandum from Maggie Brian dated November 18, 2005, then the Health Care Unit Administrator at Lawrence Correctional Center, stated that "Offender has not been in IDOC for one full year of incarceration for treatment start and stop." Stephen was released from prison in January 2006. Stephen was not tested for his genotype while he was in prison, nor did he submit any evidence of his genotype at the trial.

Stephen was incarcerated again about one year later for two months (January 29, 2007 to March 23, 2007). The court does not see any medical records from that time period in the exhibits submitted to the jury.

Stephen testified at the trial that, at some point after his release, he was hospitalized because of the swelling in his stomach, and that three liters of fluid were drained from his stomach. Stephen testified that he was seeing a physician and that a liver biopsy had been planned, but had to be cancelled because of the swelling.

Stephen failed to prove that he had a serious medical need for a liver biopsy and antiviral treatment during his 2004 incarceration. He was not diagnosed with Hepatitis C until March 2004. The 2003 guidelines recommend that inmates with ALT levels twice normal have it repeated at least twice over a six month period before a referral for a liver biopsy, which would have taken him essentially to his out date before a liver biopsy would be recommended.

The jury could have rationally concluded that Stephen had a serious medical need for a liver biopsy during his 2005 incarceration. By that time, he had accumulated a history of elevated levels, and continued to have elevated levels in 2005. The guidelines recommend a liver biopsy in that situation and genotype testing would have revealed whether Stephen was a candidate for the 12–24 week treatment.

Unlike Roe, however, Stephen presented no evidence of his genotype, though he presumably could have done so. Without his genotype, there can be no conclusion that Stephen might have been a candidate for the shorter treatment for genotypes 2 and 3. Thus, there can be no conclusion that Stephen could have completed the antiviral treatment during his 2005 incarceration, even if he needed antiviral treatment. The guidelines recommend against starting antiviral therapy if it cannot be completed during incarceration. The court must therefore conclude that Stephen failed to prove he suffered injury or damage from not receiving genotype testing and a liver biopsy during his 2005 incarceration. Judgment as a matter of law must be granted to Dr. Elyea and against Stephen.

Jury Instructions

VI. Deliberate Indifference Instruction

***14** Dr. Elyea tendered a proposed jury instruction on the definition of deliberate indifference that added a statement about professional judgment:

> 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 did not base the decision on professional judgment.

(Defendants' proposed # 17, d/e 46).

Dr. Elyea argues that, for medical professionals, the deliberate indifference instruction is incomplete without the professional judgment language. He contends that, "The failure to give this instruction prejudiced Defendant because Defendant was deprived of deference and presumptive validity of his medical judgment, ..." Yet there is no presumption that a doctor's decision is presumptively correct or entitled to deference. The standard for deliberate indifference is the same whether the defendant is medically trained or not. Including the professional judgment language was, in the court's opinion, unnecessary and would have been confusing to the jury.

Dr. Elyea next challenges the "reasonable response" language in the court's instruction on deliberate indifference, arguing that it amounts to a negligence standard. The court's instruction, based on the Seventh Circuit pattern instructions, read "... deliberate indifference means that the defendant, with actual knowledge of a substantial risk of serious harm to the plaintiff's health, consciously disregarded this risk by failing to take reasonable measures to deal with it." The reasonable response language finds support in the venerable case of *Farmer v. Brennan*, 511 U.S. 825, 837 (1994): ... [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." Seventh Circuit case law is the same: "Prison officials who had actual awareness of a substantial risk to the health or safety of an inmate incur no liability if they 'responded reasonably to the risk, even if the harm ultimately was not averted, because in that case it cannot be said that they were deliberately indifferent.' " *Guzman v. Sheahan*, 495 F.3d 852, 857 (7th Cir. 2007). The "reasonable response" language is actually to Dr. Elyea's benefit–for he cannot be held deliberately indifferent even if an inmate suffered harm from a known, serious risk, so long as Dr. Elyea took reasonable action in the face of that risk.

VII. Punitive Damages Instruction

Dr. Elyea argues that the punitive damages instruction should have informed jurors that punitive damages can only be assessed if a defendant knew he was violating the law. His proposed instruction had the sentence, "An action is in reckless disregard of Plaintiff's rights if taken with knowledge that it may violate the law." Punitive damages may be awarded under § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Conduct is reckless when it "reflects a complete indifference to risk such that we can infer the actor's knowledge or intent." *Weinberger v. State of Wis.*, 105 F.3d 1182, 1186 (7th Cir. 1997). Dr. Elyea's proposed instruction incorrectly imposes a higher standard than recklessness. Further, reckless disregard of another's rights necessarily encompasses reckless disregard to that person's health or safety. *Estate of Moreland v. Dieter*, 395 F.3d 747, 756–57 (7th Cir. 2005)(in reviewing punitive damages, court considers "whether the conduct evinced an indifference to or reckless disregard for the health or safety of others"); *Seventh Circuit Pattern Jury Instruction 7.24* ("Conduct is in reckless disregard of one's rights if, under the circumstances, it reflects complete indifference to Plaintiff's safety or rights.").

***15** Dr. Elyea's proposed "knowledge" instruction, in the court's opinion, is an incorrect gloss on the law and would have been confusing to jurors. In any event, looking back now, the punitive damages instruction the court gave arguably unfairly *favored* Dr. Elyea by requiring the jury to find that Dr. Elyea intended to punish the plaintiff and cause him harm. Thus, Dr. Elyea could not have suffered any prejudice from the instruction given.

IT IS THEREFORE ORDERED:

1) Defendant Elyea's motion #53 is granted in part and denied in part as follows:

a) Judgment as a matter of law is GRANTED in favor of Dr. Elyea and against Plaintiffs Walker, Stephen and Stasiak. The clerk is directed to vacate the judgment entered February 19, 2008, as to Plaintiffs Walker, Stephen and Stasiak. The clerk is directed to enter judgment in favor of Defendant Dr. Elyea and against Plaintiffs Walker, Stephen and Stasiak.

b) Dr. Elyea's motion, to the extent it seeks judgment as a matter of law/a new trial is DENIED as to Plaintiff Roe. Defendant Elyea's motion, to the extent it seeks a remittitur of the compensatory damages awarded against Plaintiff Roe, is DENIED.

c) Defendant Elyea's request for remittitur of the punitive damages award to Plaintiff Roe is GRANTED. The Court proposes a remittitur of the punitive damages award to $20,000. Plaintiff Roe (now Sandy Roe, as Administrator of his Estate) shall file a pleading within 14 days of the entry of this order stating whether she accepts or rejects the proposed remittitur of the jury's punitive damage award. Failure to file said pleading shall be deemed an acceptance of the remittitur. If accepted, a punitive damage award of $20,000 against Dr. Elyea will be entered in the judgment. If the proposed remittitur is rejected, the Court will order a new trial on the issue of punitive damages.

2) Plaintiff Walker's request for injunctive relief is denied (d/e 83).

All Citations

Not Reported in Fed. Supp., 2009 WL 10681182

Footnotes

1 Edward Roe is deceased. Sandy Roe, as Administrator of Edward Roe's Estate, has been substituted for Edward Roe.

2 Michael Puisis (IDOC's current Medical Director) was substituted for Defendant Elyea in his official capacity for purposes of injunctive relief. (2/20/08 Court Order).

3 Dr. Elyea testified that the time was 18 months (six months for work up and one year for treatment), but there was evidence that the actual policy was two years. The final pretrial order identified the policy as one year.

4 The Seventh Circuit remarked in *Armstrong*: "[I]f Squadrito or Dill personally formulated the questionable will call policy, or if they personally formulated the policy or custom of refusing written complaints regarding the will call list, then they might face personal liability. In *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), the court explained that § 1983 held a supervisor liable only for individual wrongdoing. As an example of such misconduct, the court mentioned "evidence ... that [the supervisor] rewrote the guards' manual to eliminate some safety precaution in the event of fire." Id. In other words, if the supervisor personally devised a deliberately indifferent policy that caused a constitutional injury, then individual liability might flow from that act."

5 A written policy was submitted after the trial, in regard to the injunctive relief sought (d/e 74, Ex. 1), but it is not clear if that was Dr. Elyea's written policy. In any event, that document was not submitted to the jury.

[6] The final pretrial order states one year.

[7] Dr. Elyea testified that there was no testing or treatment for inmates who had less than 18 months to serve, but the medical records show that the plaintiffs did receive lab tests periodically that tested their ALT and AST levels, among other markers. It is not clear, then, what Dr. Elyea meant when he said no testing. He may have meant no genotyping or liver biopsies.

[8] The plaintiffs' medical records do show that they received regular lab tests and were seen at the "Hepatitis C Clinic," so it is not entirely clear if Dr. Elyea meant no lab tests at all when he said no testing. It is clear, though, that he did mean no genotyping, no liver biopsy, and no antiviral treatment.

[9] AST and ALT are blood tests that reveal the level of enzymes (AST and ALT) present that in turn indicate the existence of liver damage.

[10] Dr. Elyea testified that before he became Agency Medical Director in July 2002, inmates with Hepatitis C received nothing, but Roe did receive these tests in June 2002, including genotyping, even though Roe was to be released the next month.

[11] No deliberate indifference by Dr. Elyea can be inferred for Roe's first incarceration or for his 2003 incarceration. Dr. Elyea was Agency Director for only one month in 2002, before Roe's release, and Roe was incarcerated only two months in 2003.

[12] The 2005 guidelines say 12–24 weeks for Roe's genotype, but the 2003 guidelines are the relevant ones for Roe's 2004 incarceration.

[13] For example, in a March 24, 2004 memo from Huffman rebuking Plaintiff Roe's efforts to obtain treatment, Huffman wrote "I agree with the I/M that he should be charged punitive damages for filing a grievance full of false information."

[14] It is not clear when or if the levels were elevated twice normal in a six month period, but Dr. Elyea's testimony supports an inference that Walker did meet the policy guidelines for a liver biopsy.

[15] Huffman was not named as a defendant, nor was he called to testify.

[16] Dr. Elyea testified that the work-up time was 6 months, which conflicts with the memo's one-year statement.

[17] The IDOC outsources inmate medical care to private entities.

[18] A sustained viral response "is the absence of detectable HCV RNA in the serum 24 weeks after treatment is completed, ..." (2005 guidelines p. 45).

End of Document