

PARTIES

4. David Piergrossi is a 55-year-old male currently incarcerated in the custody of the Pennsylvania Department of Corrections (DOC) at the State Correctional Institution (SCI) at Fayette. At all times giving rise to the claims in this lawsuit Mr. David Piergrossi was suffering from chronic hepatitis C, cirrhosis of the liver, portal hypertension, esophageal varices, and thrombocytopenia. Defendants denied him treatment for more than two years during which his condition worsened.

5. Defendant Paul Noel, M.D. is the Chief of Clinical Services for the DOC's Bureau of Health Care Services (BHCS). In that capacity he has oversight over the delivery of health care services to inmates within the DOC. In addition, Dr. Noel sits on the Hepatitis C Treatment Committee that is responsible for implementing the DOC's hepatitis C protocol and makes decisions concerning which prisoners will receive hepatitis C treatment. Dr. Noel took part in determining the course of treatment for Plaintiff and as such he acted as a treating physician. He is sued in his individual capacity for damages and for medical malpractice. At all times relevant hereto defendant Noel acted under color of state law.

6. Defendant Dr. Michael Herbig is the Treating Physician at SCI Fayette. He is the physician assigned to SCI Fayette who is responsible for plaintiff David Piergrossi's health care. He is sued in his individual capacity for money damages and for medical malpractice. At all times relevant hereto the defendant acted under color of state law.

STATEMENT OF FACTS

7. This action seeks damages against defendants in their individual capacities for their unjustified delay in providing treatment to Plaintiff, David Piergrossi, with the Federal Drug Administration (FDA) approved hepatitis C direct-acting antiviral medications.

Hepatitis C

8. Hepatitis C (HCV) is a virus that infects cells of the liver. Approximately 75-85 percent of individuals infected with the HCV will develop chronic hepatitis C, causing progressive inflammation of the liver.¹
9. Inflammation caused by the virus can lead to scarring, known as fibrosis, and extreme scarring, known as cirrhosis, both of which affect liver functioning.
10. One of the ways liver inflammation is measured is on the Metavir scale. On that scale FO means no fibrosis and F4 means cirrhosis
11. Chronic hepatitis C patients with any liver scarring, i.e. greater than FO are at a greater risk of rapid disease progression.
12. At least twenty percent of chronic hepatitis C patients, and perhaps as high as fifty percent, will develop cirrhosis.²
13. Approximately 11-19% of those who develop cirrhosis will go on to develop liver cancer.³
15. In the United States, hepatitis C causes more deaths than all other infectious diseases combined.⁴
16. Chronic hepatitis C often causes complications outside of the liver, including anemia and diabetes.

¹ Center for Disease Control and Prevention, Hepatitis C FAQ for Health Professionals, accessed at: <https://www.cdc.gov/hepatitis/hcv/hcvfaq.htm>.

² Cutaneous Manifestations of Hepatitis C, Schwartz, et al., accessed at: <https://emedicine.medscape.com/article/1134161-overview#a2>.

³ *Id.*

⁴ Centers for Disease Control and Prevention. (2016, May 4). Hepatitis C Kills More Americans than Any Other Infectious Disease| CDC Online Newsroom | CDC. Accessed at: <https://www.cdc.gov/media/releases/2016/p0504-hepc-mortality.html>.

17. Between 20-40% of chronic hepatitis C patients have cutaneous (skin) manifestations of the disease. Among them are the relatively rare conditions of lichen planus and necrolytic acral erythema (NAE), and more common ones such as psoriasis, eczema and pruritus (persistent itching).

18. In or about 2013, new anti-viral drugs became available. These drugs have a 90-95% cure rate and few, if any, side effects. These drugs, two of which are Harvoni and Sovaldi, have become the standard of care in the medical community.

19. Because of the numerous benefits of early treatment, the American Association for the Study of Liver Diseases (AASLD), recommends that everyone with chronic hepatitis C be treated with those anti-viral drugs irrespective of disease stage on the Metavir scale or prognosis for progression.

20. The Center for Disease Control (CDC) has issued its own guidelines that state that the guidelines issued by the AASLD are the standard of care for the treatment of hepatitis C.

Hepatitis C and the Policy of The Pennsylvania DOC

21. The Pennsylvania Department of Corrections (DOC), through its Bureau of Health Care Services is charged with delivery of necessary medical care to prisoners under the jurisdiction of the DOC.

22. There are at least 5,400 prisoners under the jurisdiction of the DOC who have active, i.e. chronic, hepatitis C.

23. In 2013, when the current anti-viral drugs became available, the DOC, through its Bureau of Health Care Services and under the direction of defendant Noel, ceased treating all prisoners in the custody of the DOC who have active, i.e. chronic, hepatitis C.

24. This policy continued under the direction of defendant Noel throughout 2014 and most of

2015.

25. In late 2015, defendant Noel formulated and adopted a medical protocol concerning who would be treated and not treated with hepatitis C anti-viral drugs.

26. The hepatitis C protocol was added as Appendix 16-B to the Access to Health Care Procedures Manual of the Department of Corrections and is part of the DOC Policy Statement 13.1.1 entitled "Management and Administration of Health Care".

27. Under that policy, only prisoners with decompensated cirrhosis with esophageal varices are authorized to receive the anti-viral drugs.

28. When the disease has advanced to decompensated cirrhosis with esophageal varices, a person has already suffered irreversible damage to their health and is at grave risk of death.

29. In addition, before the disease has progressed to that stage, individuals suffering from it have suffered irreversible damage to their liver, decreased liver function, and are at a significantly higher risk of developing liver cancer. Many also suffer severe extra hepatic manifestations of the disease that adversely affect quality of life.

30. On August 31, 2016, the Honorable Judge Robert Mariani of the federal court for the Middle District of Pennsylvania held that the DOC's hepatitis C protocol constituted deliberate indifference to the serious medical needs of incarcerated patients with hepatitis C because it "fails to provide treatment for hepatitis C through the administration of DAA medications such as Harvoni, Sovaldi, and Viekira Pak until an inmate . . . has progressed to the stage of advanced compensated cirrhosis or early decompensated cirrhosis manifested by esophageal varices. The Court found that the interim Hepatitis C Treatment Protocol presents a conscious disregard of a known risk of advanced cirrhosis and death by esophageal hemorrhage." *Abu-Jamal v. Wetzel*, 2016 WL 4574646, *9 (M.D.Pa. 2016).

31. As discussed *infra*, Mr. Piergrossi was known to have advanced cirrhosis with esophageal varices at the time of his re-entering DOC custody in May 2015.

32. Despite Mr. Piergrossi's medical records indicating that he suffered from cirrhosis and esophageal varices, he was denied hepatitis C treatment for more than two years.

33. The DOC protocol for hepatitis C also includes a sub-section containing "medical exclusions" for treatment as well as "administrative exclusions" for treatment.

34. The non-medical, administrative exclusions include "documented positive drug screens during the previous twelve months of incarceration, resulting in a misconduct. An administrative exclusion is based on the result of the drug screen and the issuance of a misconduct alone, without any consideration of the medical impact that any particular drug may or may not have on treatment with direct-acting antiviral medications.

35. The protocol delegates determinations as to who will be treated to the Hepatitis C Treatment Committee.

36. Defendant Noel as BHCS Chief of Clinical Services and member of the Hepatitis C Treatment Committee is the principal decision-maker as to who will or will not receive treatment for their hepatitis C.

37. This policy was adopted and implemented by defendant Noel even though he knew that denying treatment to prisoners who did not fall under the protocol had no medical justification, causes harm to those inmate's health and places them at risk of death.

38. Defendant Noel adopted and implemented this protocol knowing that the standard of care in the community, as articulated by the AASLD and CDC is to treat all who have chronic hepatitis C.

39. After Judge Mariani's decision of August 31, 2016, in which he found the DOC's

hepatitis C protocol unconstitutional under the Eighth Amendment but denied relief on procedural grounds, the DOC revised its protocol.

40. The current protocol has been adopted as Section 20 of the DOC's 13.2.1 Access to Health Care Procedures Manual.

41. The policy still denies treatment until a patient has developed cirrhosis.

42. Although Mr. Piergrossi already had cirrhosis, as well as esophageal varices and drastically diminished platelet counts (a sign of disease progression), he was continuously denied treatment under this revised protocol.

46. On January 3, 2017, Judge Mariani found that the revised protocol violated the Eighth Amendment and he granted plaintiff's injunction for treatment with the direct-acting antiviral medications. *Abu-Jamal v. Wetzel*, 2017 WL 34700 (M.D.Pa. 2017).

47. This current protocol remained in effect and is administered and enforced by defendant Noel and Defendant Herbig as the doctor at SCI Fayette despite a federal court holding it unconstitutional.

The Plaintiff's Medical Care

48. David Piergrossi's history in the DOC, extending back more than 15 years, includes documentation of his chronic hepatitis C infection.

49. When Mr. Piergrossi re-entered DOC custody in May 2015,⁵ his Initial Reception Screening noted that he had hepatitis C, liver cirrhosis and hypertension.

50. A physical examination in June 4, 2015 found that Mr. Piergrossi had hepatitis C, end stage liver disease, and portal hypertension.

51. DOC records from September 2015 indicate that Mr. Piergrossi suffers from esophageal

⁵ Mr. Piergrossi had been incarcerated in the DOC on previous occasions.

varices, a condition of abnormally enlarged veins in the lower part of the tube running from the throat to the stomach caused by portal hypertension.

TRANSFER

52. DOC records from November 2015, stated “he has cirrhosis of the liver, extensive varices, splenomegaly, shunting, extensive coronary calcification, cholelithiasis, and mild structure at the left ureteropelvic junction [...] cirrhosis of the liver with portal hypertension, splenomegaly, and cholelithiasis”

53. Mr. Piergrossi’s diagnostic findings have been repeatedly noted throughout his medical records up to the present, showing he has had cirrhosis and other conditions caused by progression of his hepatitis C.

54. When the DOC issued its first hepatitis C protocol to permit treatment with the new direct-acting antiviral medications for hepatitis C, the only patients specifically authorized for treatment were those with cirrhosis and esophageal varices.

55. However, Mr. Piergrossi was not treated for hepatitis C after the enactment of the protocol, despite his being afflicted with cirrhosis and esophageal varices and qualifying for treatment under the DOC’s protocol.

56. Before March 2017, the reasoning for Mr. Piergrossi’s non-treatment was never explained to him or documented in his medical records.

HERBIK’S ROLE

57. In March 2017, nearly two years after he was re-incarcerated in the DOC, Mr. Piergrossi tested positive for use of a controlled substance, Suboxone, a narcotic that is administered orally.

58. Subsequently, Mr. Piergrossi was sentenced to solitary confinement in the Restricted Housing Unit (RHU) for a fixed amount of time. While in the RHU, he was notified that he was

being denied hepatitis C treatment due to his failure to pass the drug test.

59. In April 2017, the DOC received a letter from Dr. Barbara Zeller, Chief Clinical Officer of Brightpoint Health in New York City, stating, “there is no medical contraindication to use medications for people who are prescribed buprenorphine for the treatment of opioid use disorders [...] Sporadic use of opioids that does not pose an issue of non-adherence to the medication regimen is not a medical contraindication to treatment.”

60. In April 2017, the DOC also received a letter from Dr. Joseph Harris, plaintiff’s expert in the *Abu-Jamal* case, stating, “There is absolutely no clinical or medical justification for the denial of treatment. Past or current drug or alcohol use hasn’t been considered a contraindication to hep-C cure, especially given the clinical context of directly observed therapy, and strict monitoring in the prison setting. In addition, the new availability of direct-acting antivirals (DAAs), with their minimal risk of secondary effects, short duration, and tolerability, eliminates most of the compliance problems associated with alcohol or drug use.”

61. The DOC has not enacted policies and protocols requiring that individuals with chronic hepatitis C, such as Mr. David Piergrossi, automatically receive medically necessary treatment.

62. Defendants Noel and Herbik withheld treatment from Mr. Piergrossi exposing him to medical injury and risk of further harm, up to and including death.

PLAINTIFFS TREATMENT

63. The policy is enforced on the facility level by defendant Herbik, treating physician at SCI Fayette.

64. Plaintiff was denied medically necessary treatment, to wit, the anti-viral medication, due to this policy and the actions and omissions of the defendants in formulating, implementing, and enforcing the policy.

65. Defendants Noel and Herbig knew through correspondence from plaintiff's counsel, requests made by the plaintiff himself, and plaintiff's own DOC medical records, that their refusal to provide plaintiff with the anti-viral medication would cause plaintiff to suffer, irreversible damage to his health, and place him at risk of death.

66. Plaintiff received treatment with the direct acting antiviral medications on July 19th, 2017 after intervention from his counsel. Treatment concluded in October, with testing in early 2018 that will determine if it has been successful in curing Mr. Piergrossi's hepatitis C.

67. Before receiving treatment, plaintiff visited the Hepatitis C clinic on 6 different occasions seeking proper health care.

68. Plaintiff's treatment was delayed for more than two years after his medical screening in May 2015 which indicated that plaintiff had hepatitis C and cirrhosis and as such was eligible for treatment as a matter of DOC's policy, nonetheless he was denied treatment.

69. Plaintiff's treatment occurred only after counsel sent a letter stating the intent to obtain an injunction for plaintiff's treatment.

70. The DOC's previous refusals to treat plaintiff over the past two years has caused plaintiff to have ongoing and irreversible health problems.

71. Plaintiff now has esophageal and stomach varices that have continued to enlarge to a dangerous level over the years.

72. Plaintiff has increased liver damage and worsened cirrhosis.

73. Plaintiff has developed a rash, a common extrahepatic manifestation of hepatitis C.

74. Plaintiff also has ongoing difficulties with fluid retention, dizziness, loss of appetite, loss of weight, forgetfulness, depression, anxiety, and vision problems, all of which are caused or exacerbated by his severe hepatitis C infection.

75. The decline of plaintiff's health has caused him to struggle with anxiety and depression.

76. Mr. Piergrossi is now at a much higher risk of developing liver cancer due his treatment being delayed for more than two years without medical justification, allowing the disease to progress, placing him at a higher risk for developing hepatocellular carcinoma.

77. Plaintiff will have to live with the risks associated with esophageal varices, decreased liver function, and the risk of liver cancer for the rest of his life. All of these injuries and risks were made substantially worse by the defendants' refusal to treat him for more than two years despite his qualifying for treatment under the standard of care for hepatitis C treatment.

78. Excluding plaintiff from anti-viral drugs because of his positive drug test result was an administrative decision – as opposed to a medical decision – that was contrary to medical standards.

79. Defendants were knowingly putting Mr. Piergrossi at risk of dying from internal bleeding.

80. In fact, according to official DOC death records obtained via a Right-to-Know request approximately 40 prisoners died in DOC custody in 2015 and 2016 from hepatitis C, internal hemorrhage caused by esophageal varices, end-stage liver disease, or liver cancer. Hepatitis C is the leading cause of both end-stage liver disease and liver cancer.

81. These deaths occurred at a time when the DOC was providing no treatment for hepatitis C to anybody, or else denying it to such an extent that people were left to die from a curable illness.

82. Mr. Piergrossi suffered permanent damage to his health and his life was put in severe danger by the defendants' failure to provide medically necessary hepatitis C treatment for more than 2 years.

83. Plaintiff has no adequate remedy at law.

84. As the direct, proximate, and factual result of the conduct of the defendants, the Plaintiff, has suffered the following damages:

- a. Plaintiff has suffered physically and mentally by being forced to endure a curable condition;
- b. plaintiff has fear of cancer and shortened life expectancy;
- c. plaintiff's health may be permanently impaired and he has increased risk of terminal cancer;
- d. he has unnecessarily endured great pain, suffering, inconvenience, embarrassment, mental anguish, emotional and psychological trauma;
- e. he may be required in the future to incur expenses for medical treatment and care, medical supplies, medicines and other attendant services;
- f. he may sustain a loss in earning capacity;
- g. his general health, strength and vitality have been impaired;
- h. he has been and may in the future be unable to enjoy the various pleasures of life;
- i. he has in the past, and may continue in the future, to experience severe pain and suffering; and
- j. he has been required, and may continue in the future, to treat with various medical providers, physicians, surgeons and physical therapists.

CAUSES OF ACTION

Count I — Deprivation of Eighth Amendment Right to Medical Care for Hepatitis C

(Against defendants Noel and Herbig in their individual capacities for monetary relief.)

85. Plaintiff re-alleges paragraphs 1-84 as if fully stated herein.

86. Defendants Noel and Herbig at SCI Fayette violated plaintiff's Eighth Amendment right

to be free from cruel and unusual punishment through their deliberate indifference to his chronic hepatitis C. Through enactment and enforcement of a hepatitis C protocol that denied medically necessary treatment to plaintiff These defendants failed to treat his chronic hepatitis C for more than two years, exposing plaintiff to an excessive risk and harm to his health, causing Mr. Piergrossi serious injuries, pain, suffering, and risk of death.

Plaintiff's injuries and damages were a direct and proximate result of the acts and omissions of defendants in the following particulars;

- a. In failing to adopt, maintain or follow policies or practices with regard to diagnosing, assessing, treating or providing for the medical care of inmates;
- b. in failing to implement policies or practices with regard to the treatment of inmates such as Plaintiff;
- c. in failing to timely, properly and/or adequately monitor the availability and competency of the members of its medical staff, the availability of medical supplies and medications and the adequacy of their inmate care and treatment;
- d. in failing to investigate whether their employees and agents were complying with applicable policies and customs and/or violating inmate's constitutional rights;
- e. in failing to timely, properly and/or adequately have in place medical review procedures or medical request follow-up procedures so that they could obtain knowledge regarding the performance of their employees, doctors, nurses, physician assistants and healthcare personnel regarding the quality of their patient care, their availability, and their compliance with prison policies and procedures;

- f. systemically, regularly and continuously delaying the proper treatment of Plaintiff's condition;
- g. in failing to properly follow up with Plaintiff in light of his repeated medical requests, symptoms and complaints;
- h. in failing to give significance to the findings and/or diagnoses of others involved in Plaintiff's care and treatment;
- i. in failing to ensure and maintain a continuity of care and communication between health care professionals and their respective staffs with respect to Plaintiff and his medical condition.

Count II – Medical Malpractice for failure to treat Plaintiff's hepatitis C

87. Plaintiff re-alleges paragraphs 1-86 as if fully stated herein.

88. Defendants Noel and Herbig were negligent in their handling of Plaintiff's condition as described above and failed to provide medical care in accordance with the applicable standard of care within the medical profession.

89. Defendants Noel and Herbig were negligent in assisting the DOC to develop and implement a policy of treatment at odds with the reasonable standard of medical care in the community.

90. Plaintiff's injuries, including decreased liver function, enlarged varices, anxiety, depression, risk of cancer, the conditions listed above and other symptoms and conditions were directly, proximately and factually caused by the negligence of Defendant's in the manner described above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court grant the following relief:

- A. Award compensatory and punitive damages;
- B. Award attorneys' fees, litigation expenses and costs.
- C. Any further relief as the Court may deem proper.

Respectfully submitted,

/s/ Bret D. Grote

Bret D. Grote
PA I.D. No. 317273
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221
Telephone: (412) 654-9070
bretgrote@abolitionistlawcenter.org

s/Louis J. Kroeck

Louis J. Kroeck
PA ID No. 210045
lkroeck@ambylaw.com

1300 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219-1911
412-765-3700 Telephone
412-765-3730 Facsimile

Attorneys for Plaintiff