

No. 18-8771

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

APR - 2 2019

OFFICE OF THE CLERK

Timmy Barr — PETITIONER
(Your Name)

Rebecca Pearson, et al. vs.
Rebecca Pearson — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the 8th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Timmy Barr #529815
(Your Name)
Jefferson City Correctional Center
8200 W Main Street
(Address)

Jefferson City, MO 65101
(City, State, Zip Code)

NIA
(Phone Number)

QUESTION(S) PRESENTED

1. Does the 8th circuit federal court of appeals, have the authority to supersede the standards and precedent set by the United States Supreme Court in prisoner's civil cases? Whereas the 8th circuit court has created a standard of review, clearly in violation of both Erickson and Crawford-El, wherein the U.S Supreme Court has condemned re-characterizing the law as it relates to the burden of proof in prose litigation, thereby making this procedure an worthy question to be heard before this honorable court?
2. Whether the 8th circuit court of appeals violated petitioner's due process rights when they appointed counsel on appeal, and failing to remand the case to the district court, for the purpose of amending the lawsuit, so any appeal taken could be based on the amended complaint, so that the case could not be reviewed on a deficient record???
3. Whether or not the lower courts unlawfully saddled petitioner with a burden that violated petitioner's rights to a jury trial, because such factual finding should be heard and decided by a jury, and not a judge, as demanded by the 7th amendment to the United States Constitution?
4. Does the 8th circuit federal court of appeals, have the authority to supersede standards and precedent set by the United States Supreme Court in prisoner's civil cases? Whereas the 8th circuit court has created a standard of review, clearly in violation of both Erickson and Crawford-El, wherein the us supreme court has condemned re-charactering the law as it relates to the burden of proof in pro-se litigation, this unlawful procedure usurps both Erickson and Crawford-El, thereby making this an worthy question to be heard before this honorable court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ~~A-3~~^{C-10} to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix A-7B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 17, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10/10/19, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The district court had jurisdiction under 28 U.S.C. § 1331 because Appellant asserted claims against the defendants for the violation of his Eighth Amendment rights pursuant to 42 U.S.C. § 1983. The district court entered summary judgment in favor of the defendants on December 13, 2017. Appellant filed his notice of appeal on December 19, 2017. This Court has jurisdiction over this timely appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

At all times relevant to this appeal, Appellant Timothy Barr was an inmate at Southeast Correctional Center ("SECC") in Charleston, Missouri, which is operated by the Missouri Department of Corrections ("MDOC"). 1 Addendum (Add.) at 3. Corizon, LLC, the employer of the named defendants, contracted with the state of Missouri to provide medical care to those incarcerated at MDOC facilities. Id.

On May 21, 2014, Barr was seen by outside neurologist Dr. Sudhir Batchu, who diagnosed him with multiple sclerosis ("MS"). Dkt. 72-2 (hereinafter Med. Rec.) at 1-3. Dr. Batchu recommended that Barr's MS be treated with Avonex and that a follow-up visit be scheduled in three months. Id. Dr. Batchu provided Barr with several items: informational documents, a USB drive, and a pen. Barr maintained that the pen was an Avonex self-injection pen, while the defendants maintained that it was an ink pen. Add. at 3. Upon Barr's return to SECC, nurse Rebecca Pearson confiscated and disposed of some or all of those items. Id.

On May 22, 2014, Dr. Mina Massey requested approval for Barr to have a follow-up appointment with Dr. Batchu in three months. That request was approved the following day. Id. On May 27, 2014, Dr. Massey prescribed Avonex

Barr is now incarcerated at the Jefferson City Correctional Center, where he was transferred on March 15, 2016. See Dkt. 34-1. for Barr's MS. Id at 3-4. On June 11, 2014, Barr began receiving Avonex injections, which were subsequently administered by various named defendants. Id at 4. Barr maintained that the injections were administered into his bicep, while the defendants maintained that the injections were administered into Barr's deltoid. Id. Barr had a follow-up visit with Dr. Batchu on September 2, 2014, at which

time Dr. Batchu recommended that Barr continue receiving Avonex. Med. Rec. at 31.

From June 11, 2014 until early October 2014, Barr regularly received Avonex injections. Add. at 4. In early October, the defendants ceased administering the injections. Id. Barr's medical records contain nurse and physician notes stating that the defendants stopped administering Avonex on October 10 because Barr refused to continue taking it. Med. Rec. at 39-40, 43. While an October 10 entry states that Barr signed a written refusal form, id at 39, that form was not included in the summary judgment record. Barr's medical records also contain an October 7, 2014 nurse entry stating that Barr "does not have a current order for Avenox (sic) inj." Id at 37. Barr maintained that he did not refuse to continue taking Avonex and that the defendants had stopped ordering it for him on or about October 8, 2014. See Dkt. 83 ¶ 17; Dkt. 83-3 ¶ 4.

Another entry dated October 10, 2014 indicates that nurse Nina Hill met with Barr to discuss his diagnosis with MS and provided materials concerning the side effects of Avonex. Med. Rec. at 39-40. Hill made a mental health referral and maintained Barr's upcoming appointment with Dr. Kimberly Birch. Id. Barr did not receive any further Avonex injections after October 10, 2014. Add. at 4.

On October 22, Barr met with Dr. Birch. Med. Rec. at 40-41. Dr. Birch discussed Barr's condition with him for approximately 45 minutes. Id. The notes further state that Dr. Birch had unsuccessfully attempted to reach Dr. Batchu to discuss Barr's case. Id. Dr. Birch planned to speak to her colleagues and request a referral to a different neurologist. Id. An entry by an optometrist or ophthalmologist on October 28, 2014 states that Barr was being followed "for high suspicion of multiple sclerosis" and referred to Barr as a "questionable MS patient." Id. at 43. The medical records submitted by the defendants end on November 4,

II. Procedural History

Barr, acting pro se, filed this action on May 18, 2015. After initial processing, Barr filed a Second Amended Complaint (hereinafter "Complaint") on March 30, 2016. The Complaint named Rebecca Pearson, Dana Degens, Brandi Juden, David Helman, J. Cofield, Dr. Mina Massey, Dr. G. Babich, Dr. Kimberly Birch, and Nina Hill as defendants and sought damages and declaratory relief. In the Complaint Barr alleged that the defendants were deliberately indifferent to his medical needs due to MS in violation of the Eighth Amendment. Barr alleged that the defendants were deliberately indifferent in three ways: (1) maintained Barr's upcoming appointment with Dr. Kimberly Birch. Id. Barr did not receive any further Avonex injections after October 10, 2014. Add. at 4.

On October 22, Barr met with Dr. Birch. Med. Rec. at 40-41. Dr. Birch discussed Barr's condition with him for approximately 45 minutes. Id. The notes further state that Dr. Birch had unsuccessfully attempted to reach Dr. Batchu to discuss Barr's case. Id. Dr. Birch planned to speak to her colleagues and request a referral to a different neurologist. Id. An entry by an optometrist or ophthalmologist on October 28, 2014 states that Barr was being followed "for high suspicion of multiple sclerosis" and referred to Barr as a "questionable MS patient." Id at 43. The medical records submitted by the defendants end on November 4, 2014. Id. at 46. At that time, Barr had not seen a second neurologist.

II. Procedural History

Barr, acting pro se, filed this action on May 18, 2015. After initial processing, Barr filed a Second Amended Complaint (hereinafter "Complaint") on March 30, 2016. The Complaint named Rebecca Pearson, Dana Degens, Brandi Juden, David Helman, J.

Cofield, Dr. Mina Massey, Dr. G. Babich, Dr. Kimberly Birch, and Nina Hill as defendants and sought damages and declaratory relief. In the Complaint Barr alleged that the defendants were deliberately indifferent to his medical needs due to MS in violation of the Eighth Amendment. Barr alleged that the defendants were deliberately indifferent in three ways: (1) delaying initial treatment until June 11, 2014; (2) administering Avonex injections into his bicep rather than into his deltoid; and (3) improperly stopping his Avonex injections. Add. at 5.

On June 20, 2016, the district court dismissed Barr's official capacity claims against the defendants without prejudice. Dkt. 37. The court subsequently dismissed Barr's claims against Rebecca Pearson without prejudice because Barr could not locate her for service. Dkt. 60.

On May 12, 2017, the remaining defendants moved for summary judgment. In support they submitted Barr's prison medical records from May 21 to November 4, 2014 and a copy of the Complaint. See Dkt. 72. The defendants argued that Barr could not prove that he had an objectively serious medical condition, that the defendants knew about it, or that they deliberately disregarded Barr's medical needs. Dkt. 71 at 3-4. With respect to Barr's claim that they had improperly stopped administering Avonex, the defendants argued that the evidence established that Barr had refused to continue taking it. Dkt. 71 at 2, 4; Dkt. 72 ¶¶ 17, 20.

On August 4, 2017, Barr filed his opposition. Dkt. 83. He submitted several personally sworn affidavits, affidavits from other inmates, personal notes concerning his treatment at SECC, medical texts on muscle groups, paperwork on Avonex, and certain medical records. See id. Barr argued that there were disputed factual issues that precluded summary judgment. Dkt. 83-1 at 3. In reply, the defendants argued that Barr's personal notes and the affidavits from other inmates were inadmissible, irrelevant, and

should not be considered. Dkt. 86 at 2-4. The reply did not specifically address Barr's claim concerning the stoppage of Avonex injections. See id. at 4-5. The defendants never disputed that Barr has MS, and they did not claim to have doubted that diagnosis.

On December 13, 2017, the district court entered summary judgment in favor of the defendants on all of Barr's claims. Dkt. 88-89. With respect to Barr's claim concerning the delay in treatment, the court concluded that Barr had failed to submit verifying medical evidence concerning how the delay adversely affected him. Add. at 6-8. It alternatively concluded that Barr had failed to establish a dispute of fact as to whether the defendants were deliberately indifferent. Id. at 8.

As to Barr's claim concerning the method of administration, the district court concluded that even if the defendants had administered the Avonex into Barr's bicep rather than into his deltoid, such conduct was at worst negligent, and did not establish that they had been deliberately indifferent. Id. at 9-10. In addition, the court concluded that Barr had failed to submit evidence concerning how the improper administration of Avonex had adversely affected him. Id.

Finally, the district court entered summary judgment in favor of the defendants on Barr's claim that they had improperly stopped giving him Avonex injections on the ground that Barr could not establish deliberate indifference. Id. at 11-12. Initially, the court appeared to base its determination on the fact that Barr's medical records indicate that he voluntarily refused further injections. Id. at 11. Alternatively, assuming that Barr had not refused further injections, the court concluded that the defendants were not deliberately indifferent because they "properly exercised their professional medical judgment in managing Barr's complex disorder" by "continu[ing] to actively treat Barr's complicated medical condition" after stopping the injections. Id.

REASONS FOR GRANTING THE PETITION

The Eighth Amendment imposes an obligation on state prison officials to provide inmates with medical care. *Laughlin v. Schriro*, 430 F.3d 927, 928 (8th Cir. 2005) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Where prison officials are deliberately indifferent toward an inmate's serious medical needs, they engage in cruel and unusual punishment prohibited by the Eighth Amendment. *Popoalii v. Correctional Med. Servs.*, 512 F.3d 488, 499 (8th Cir. 2008).

To make out a claim for deliberate indifference, a plaintiff must establish that (i) he suffered from an objectively serious medical need and (ii) prison officials actually knew of the need, but (iii) were nevertheless deliberately indifferent to the need. *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006). "An objectively serious medical need is one that either has been diagnosed by a physician as requiring treatment, or is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *McRaven v. Sanders*, 577 F.3d 974, 982 (8th Circuit 2009) (internal quotation marks omitted). Deliberate indifference is a mental state comparable to criminal recklessness, or disregarding a known risk to the inmate's health. *Gordon*, 454 F.3d at 862. "Medical care so inappropriate as to evidence intentional maltreatment or a refusal to provide essential treatment violates the Eighth Amendment." *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990).

Defendants' general assertion that Barr did not suffer from an objectively serious medical condition could not support summary judgment. It is undisputed that Barr suffers from MS and that Dr. Batchu diagnosed him with the disease on

May 21, 2014. . MS is a degenerative, auto-immune disease of the

brain and spinal cord that results in uncoordinated movement, weakness, muscle spasms, speech problems, numbness, vision problems, tremors, and pain. See, e.g., *Young v. Apfel*, 221 F.3d 1065, 1067 n.3 (8th Cir. 2000); *Hammond v. Sowers*, 2014 WL 253435, at *2 n.3 (D. Md. Jan. 22, 2014); *Carter v. Mich. Dep't of Corrections*, 2013 WL 588926, at *1 n.2 (E.D. Mich. Jan. 10, 2013). MS and its attendant symptoms are undoubtedly an objectively serious medical condition warranting treatment. See *Clay v. Morgan*, 79 F. App'x 940, 941 (8th Cir. 2003); *Rodriguez v. Cty. of Westchester*, 2017 WL 118027, at *9 (S.D.N.Y. Jan. 11, 2017); see also *McDonald v. Hardy*, 821 F.3d 882, 888-89 & n.25 (7th Cir. 2016); *Yarbaugh v. Roach*, 736 F. Supp. 318, 319 (D.D.C. 1990). Thus, the first element of Barr's deliberate indifference claim is plainly established by the record.

It is also undisputed that the defendants were aware of Barr's MS. His medical records documented Dr. Batchu's May 21, 2014 diagnosis and September 2, 2014 recommendation that treatment continue. Med. Rec. at 1-3, 31. Indeed, the defendants administered Avonex to Barr for approximately four months. Add. at 4. The defendants did not claim to doubt Dr. Batchu's diagnosis and recommended treatment. They certainly did not establish as a matter of law that Dr. Batchu's diagnosis and recommended treatment were mistaken. Thus the second element for a claim for deliberate indifference — that prison officials actually knew of the need — also is established by the record.

Barr, therefore, is entitled to recover for deliberate indifference to his serious medical need if he can establish that the defendants were nevertheless deliberately indifferent to that need. Here there at the very least is a factual dispute on this element. The defendants argued below that, although they in fact stopped giving him the injections that Dr. Batchu had recommended, they were not deliberately indifferent toward Barr's medical needs

because Barr allegedly had refused those injections. Dkt. 71 at 4. That Barr's medical records contain entries that might be consistent with that argument is not sufficient to support summary judgment against Barr. Here, Barr maintained that he did not refuse the injections. Dkt. 83 ¶ 17. Rather, he stated in his sworn affidavit that the defendants had stopped administering Avonex injections on October 8, 2014. Dkt. 83-3 ¶ 4. His affidavit further stated that he was told by appellees nurse Hill and Dr. Birch that the defendants simply did not believe he had MS. Id. ¶ 5. Thus, on this point, there clearly was a factual dispute.

Worse, the medical records certainly support the reasonable inference that the defendants' claim that Barr had refused injection was a pretense – an inference that must be drawn in Barr's favor. Rooney, 878 F.3d at 1115. For instance, an October 10, 2014 entry stated that Barr had signed a written refusal form. Med. Rec. at 39. Yet the defendants did not submit a copy of that alleged form in support of their summary judgment motion. Further, the medical records submitted by the defendants include an entry on October 7, from nurse Pearson, claiming that Barr did not have a current order for Avonex – not that he allegedly had refused the injection. Id. at 37. And, consistent with Barr's affidavit, an October 28 entry referred to Barr as a "questionable MS patient." Id. at 43.

There was a dispute of fact as to whether Barr had refused to continue taking Avonex as the defendants claimed, or whether the defendants simply refused Barr's medication because they did not believe his diagnosis, as is suggested by Barr's medical records. Summary judgment could not be entered against Barr based on the claim that Barr refused his injections. See Fed. R. Civ. P. 56(a) (barring summary judgment where there are material facts in dispute). Notably, that was the sole basis for the defendants' summary judgment motion.

Nevertheless, the district court proceeded to enter summary judgment in favor of the defendants, identifying as an alternative ground the following (which the defendants did not raise or develop in their summary judgment pleadings): Even assuming Barr's version of the events is true, Barr's allegations do not show deliberate indifference. Barr's complaints of side effects from the Avonex are documented in the medical record. The record reveals that Defendants acted immediately to address Barr's complaints of adverse symptoms, and provided counseling and treatment, including a referral to a specialist. Barr's complaint that Defendants stopped the injections arbitrarily to deny him care is not supported by the record. To the contrary, Defendants properly exercised their professional medical judgment in managing Barr's complex disorder. After stopping the injections, Defendants continued to actively treat Barr's complicated medical condition.

Add. at 11.

Then, citing Dulany v. Carnahan, 132 F.3d 1234 (8th Cir. 1997), the district court reasoned that Barr could not create a question of fact "by merely stating that he did not feel that received adequate treatment." Id. at 12. Elsewhere, the court noted that an inmate cannot establish deliberate indifference through mere disagreement with a doctor's selected treatment. Id. at 9. Neither of these new theories, however, supports the entry of judgment as a matter of law against Barr.

The record below does not support the conclusion that Barr simply felt he received inadequate treatment or that he disagreed with the doctor's selected treatment, much less establish those propositions as a matter of law. Indeed, as the defendants did not advance this argument, the record on the issue is not developed.

Further, as the defendants' sole position below was that Barr had refused Avonex injections, there also is nothing in the record below to suggest that the defendants properly exercised independent

professional judgment by, for example, deciding on an alternative course of treatment. There is no evidence, such as (for instance) physician affidavits, that counseling Barr about the side effects of MS was an appropriate alternative to providing the treatment that Dr. Batchu had recently reaffirmed Barr should receive. There certainly was no summary judgment evidence that a reasoned medical opinion by a qualified physician is the reason for stopping the injections that had been recommended by Dr. Batchu.

The judgment below cannot be defended on the basis of the entry in the medical records in which Dr. Birch documented her intent to seek a referral to a second neurologist and discuss the case with her colleagues. Med. Rec. at 41. The medical records do not suggest that Dr. Birch questioned Dr. Batchu's diagnosis or that she decided to cease administering Avonex until a second opinion could be obtained. There is also no evidence that Dr. Birch was qualified to assess Barr's MRI results or second-guess the neurologist who had twice examined Barr.

Thus, the district court's reliance on Dulany was misplaced. In Dulany this Court explained: "In the face of medical records indicating that treatment was provided and physician affidavits indicating that the care provided was adequate, an inmate cannot create a question of fact by merely stating that she did not feel she received adequate treatment." Dulany, 132 F.3d at 1240 (emphasis added). Dulany is inapposite here because in this case there is no physician affidavit, or any other evidence for that matter, demonstrating that: (1) the defendants exercised independent professional judgment, or had any medical reason to stop Avonex injections or pursue different treatment; (2) that the defendants were qualified to second-guess Dr. Batchu's diagnosis and recommended treatment; or (3) that providing counseling about MS was an adequate response to MS or an acceptable alternative to medication. See Croft v. Hampton, 286 F. App'x 955, 956 (8th Cir.

2008) (finding record raised trialworthy issue where it was unclear whether prison official actually exercised independent medical judgment); Smith, 919 F.2d at 93 (reversing grant of summary judgment where the record failed to disclose whether physician was qualified to treat mental illness).

In sum, the only evidence in the record concerning the treatment that should have been provided to Barr was Dr. Batchu's May 21, 2014 recommendation that Barr be treated with Avonex and his September 2, 2014 recommendation that the injections continue. Construing the record in the light most favorable to Barr and drawing all reasonable inferences in his favor leads to the conclusion that the defendants chose to stop Barr's Avonex treatment because they simply disbelieved his diagnosis, not that any qualified physician had concluded that a different course of treatment was appropriate.

THE UNITED STATES COURT OF APPEALS, HAS DECIDED A CASE
THAT ITS RULING IS IN CONFLICT OF THE RULING OF THE
UNITED STATES RULING AND PRECEDENTLY

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dunphy Barr

Date: 3-30-19