

Plaintiffs Ronald Allen Smith (Smith) and William Gollehon (Gollehon) have moved for Summary Judgment on their claim that pentobarbital is not an ultra-fast-acting barbiturate within the meaning of Mont. Code Ann. § 46-19-103(3). Plaintiffs' motion should be denied because they have failed to sustain their burden to establish the absence of any genuine issue of material fact, and that they are entitled to judgment as a matter of law. *Tin Cup County Water v. Garden City Plumbing & Heating*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.

INTRODUCTION

Smith was sentenced to death for the murder of two young men, Harvey Madman, Jr., and Thomas Running Rabbit, Jr., in 1982. Gollehon was sentenced to death for the murder of another inmate at Montana State Prison, Gerald Pileggi, in 1990. The Montana Supreme Court has upheld the death sentences of both Plaintiffs.

This case was originally filed on April 2, 2008. Most recently, on May 7, 2014, this Court issued its Order on Cross-Motions for Summary Judgment (Order) denying Plaintiffs' motion for summary judgment and granting summary judgment to the State on each and every one of the claims set forth in Plaintiffs' second amended complaint except for the "disputed issue of material fact as to what the Montana legislature meant by using the words 'ultra-fast-acting barbiturate' and, further, whether pentobarbital is an ultra-fast-acting barbiturate." (Order at 16.) The Court found that at that stage of the proceedings there was a disputed issue of material fact between the expert declarations of Plaintiffs' expert, Dr. Heath, and the State's expert, Dr. Dershwitz. The Court thus

determined that the above issue remained for the Court to decide at trial. (*Id.*) Trial is currently scheduled for July 27, 2015.

SUMMARY OF THE ARGUMENT

1. Plaintiffs' Motion for Summary Judgment is based on their erroneous assertion that following Dr. Dershwitz's withdrawal, the State no longer has an expert to refute Dr. Heath. Therefore, Plaintiffs contend, there is no longer a disputed issue of material fact, and they are entitled to summary judgment. However, on March 13, 2015, the State filed the Declaration of R. Lee Evans, Pharm. D., which refutes Dr. Heath's declarations. Dr. Evans states that pentobarbital has an almost immediate onset of action, less than one minute. The onset for thiopental is 10 to 40 seconds. In Dr. Evans' opinion, there is no meaningful difference between pentobarbital and thiopental in the time it takes to render a person comatose. Plaintiffs have failed to meet their burden on summary judgment and their motion should be denied.

2. In its May 7, 2014 Order, this Court stated that there remained the issue of what the Montana Legislature meant when it used the words "ultra-fast-acting barbiturate." The legislative history indicates that the Legislature intended that the lethal injection process be quick and humane. The Legislature did not specify that only thiopental may be used. Since the onset of pentobarbital is almost immediate, less than one minute, and there is no meaningful difference between thiopental and pentobarbital in the time it takes to render a person comatose, the use of pentobarbital complies with legislative intent that the execution by lethal injection be quick and humane.

Pentobarbital is an ultra-fast acting barbiturate within the meaning of Mont. Code Ann. § 46-19-103.

3. Dr. Heath opines in this case that pentobarbital has a slower onset than thiopental, but he does not state how much slower. Plaintiffs insist that Dr. Heath's statement means that pentobarbital is not an ultra-fast-acting barbiturate. However, when Dr. Heath appeared as an expert witness in Florida, he stated there is no information available that would allow an accurate prediction of how much slower pentobarbital would be than thiopental. Dr. Evans states that the onset of pentobarbital is almost immediate, less than one minute, and that there is no meaningful difference between pentobarbital and thiopental in the time it takes to render a person comatose. Plaintiffs have failed to establish the absence of a genuine issue of material fact and their motion should fail.

4. Dr. Heath cites a medical reference in his expert disclosure in this case to show that the term "ultra-fast-acting" is used in reference to barbiturates. This reference states that both thiopental and pentobarbital have an almost immediate onset of action, and that the maximum effects for both thiopental and pentobarbital are achieved within one minute. Additionally, this reference states that "ultra-fast acting" barbiturates are those that have an onset of one minute or less following intravenous administration. Therefore, Dr. Heath's own medical reference establishes that thiopental and pentobarbital are virtually the same in terms of speed of onset, and that both thiopental and pentobarbital are "ultra-fast-acting barbiturates."

Plaintiffs' Motion for Summary Judgment should be denied.

I. SMITH AND GOLLEHON ARE INCORRECT THAT DR. DERSHWITZ'S WITHDRAWAL MEANS THERE IS NO LONGER A DISPUTED ISSUE OF MATERIAL FACT THUS ENTITLING THEM TO SUMMARY JUDGMENT.

Plaintiffs insist they are now entitled to summary judgment because there is no longer a disputed issue of material fact because Dr. Dershwitz has withdrawn from the case, leaving the State without an expert witness to refute Dr. Heath. Plaintiffs are incorrect. On March 13, 2015, the State timely filed the Expert Witness Disclosure of R. Lee Evans, Pharm. D., attached hereto for the Court's convenience as Exhibit 1.

As set forth in Dr. Evans' Declaration, he has a Doctor of Pharmacy degree, he is Board-certified by the Board of Pharmaceutical Specialties, he is currently the Dean of Pharmacy at Auburn University Harrison School of Pharmacy, he holds the rank of Professor in the Department of Pharmacy Practice, and he participates on a community-based patient care team. Dr. Evans is licensed in the State of Georgia as a pharmacist. Dr. Evans has testified as an expert witness in approximately 35 cases involving the pharmacological effect of drugs, both for the prosecution and for the defense, since 1984. He has testified in three States regarding the medications used, and their pharmacologic effects, in the States' lethal injection protocols. Dr. Evans is familiar with pharmaceuticals that affect the central nervous system, including sodium thiopental and sodium pentobarbital. (Dr. Evans' Decl. at 1-2, ¶¶ 1, 2, 4, 5.)

Dr. Evans states, to a reasonable degree of scientific certainty, that under Montana's current lethal injection protocol for administration of pentobarbital, the pharmacodynamic effects from the dose and rate of administration will have a profound

and rapid effect on consciousness and respiratory and cardiovascular functions. (*Id.* at 5, ¶ 11.) Sodium pentobarbital has an almost immediate onset of action, less than a minute. When the pharmacokinetic properties of sodium pentobarbital and sodium thiopental are compared, the onset of action for the two drugs is almost identical for normal doses used during induction of anesthesia. The onset of sodium pentobarbital is less than one minute, and the onset of thiopental is ten to forty seconds. (*Id.* at 5-7, ¶¶ 10, 12, 15.) In Dr. Evans' opinion, there is no meaningful difference between sodium pentobarbital and sodium thiopental in the time it takes to render a person comatose. (*Id.* at 7, ¶ 15.) In Dr. Evans' opinion, considering the quantity and speed of administration, sodium pentobarbital possesses the desired pharmacological properties to induce coma and death. (*Id.* at 8, ¶ 16.)

Dr. Evans notes that as indicated in Missouri Director of the Division of Adult Institutions Dave Dormire's affidavit, in eight executions in Missouri from November 20, 2013, to July 16, 2014, death from lethal injection using a single drug, sodium pentobarbital, occurred in less than ten minutes. (*Id.* at 8, ¶ 17, and Exhibits B and C.)

Dr. Evans is not aware of the origin of the term "ultra-fast-acting" in Montana law. In his education and experience, the term is not used in standard pharmacology text and compendia. (*Id.* at 6, ¶ 14.)

Dr. Evans' Declaration refutes Dr. Heath's Declarations and thus Plaintiffs have failed to sustain their burden to establish the absence of any genuine issue of material fact and that they are entitled to judgment as a matter of law. Plaintiffs' Summary Judgment Motion should be denied.

II. THE LEGISLATIVE HISTORY OF MONT. CODE ANN. § 46-19-103 INDICATES THAT THE LEGISLATURE INTENDED THAT THE LETHAL INJECTION PROCESS BE QUICK AND HUMANE. THE LEGISLATURE DID NOT SPECIFY THAT THIOPENTAL MUST BE USED. THE USE OF PENTOBARBITAL COMPLIES WITH THE LEGISLATIVE INTENT THAT DEATH BE QUICK AND HUMANE. PENTOBARBITAL IS AN ULTRA-FAST-ACTING BARBITURATE WITHIN THE MEANING OF MONT. CODE ANN. § 46-19-103.

Attached hereto as Exhibit 2 is the legislative history of 1983 Mont. Laws, ch. 411, which is the session law that first enacted lethal injection as an option to the execution of prisoners sentenced to death, and that first contained the phrase “ultra-fast-acting barbiturate” in Mont. Code Ann. § 46-19-103. The State requests that the Court take judicial notice of the legislative history under Mont. R. Evid. 202.

Senate Bill (S.B.) 394 was sponsored by Senator Bob Brown. John Maynard, Assistant Attorney General, was the primary proponent of the bill. Assistant Attorney General Chris Tweeten also testified as a proponent. Under the bill, a person under a death sentence would have a choice between hanging and lethal injection. The bill also changed the place of execution to the state prison under the authority of the warden, as opposed to the county sheriff, and provided for retroactive application and an immediate effective date.

The minutes of the hearings on the bill and exhibits to those hearings indicate that the impetus behind the bill was to eliminate appeals on the basis that hanging constituted cruel and unusual punishment. John Maynard testified that the sources of the bill were lethal injection laws from Oklahoma, Texas, New Mexico, Idaho, Washington, Massachusetts, and a pending bill in Utah. However, of the six states that had previously

adopted lethal injection, none of them adopted a law that required the use of an “ultra-fast-acting barbiturate,” which was the language in S.B. 394:

1977 Oklahoma Laws, Ch. 41, sec 1: by continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until such convict is dead.

1977 Tex. Gen. Laws, Ch. 138, sec. 1: by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead.

1978 Idaho Sess. Laws, Ch. 70, sec. 1: by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death until the defendant is dead.

1979 New Mexico Laws, Ch. 50, sec. 8: by administration of a continuous, intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.

1981 Wash. Laws, Ch. 138, sec. 18: by continuous intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician.

1982 Mass. Laws, Ch. 554, sec. 60: by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such prisoner is dead.

The Utah law that was passed in 1983 did not contain the phrase “ultra-fast-acting barbiturate” either. *See* 1983 Utah Laws, ch. 113, § 3 (shall each administer a continuous

intravenous injection, one of which shall be of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death).

The minutes from the Montana legislative hearings on S.B. 394 show that the discussion on what the Legislature meant by the phrase “ultra-fast-acting barbiturate” is limited to describing the type of drugs talked about as “fast-acting lethal drugs.” See Hr’g on S.B. 394 Before the H. Jud. Comm., Mont. 48th Leg. Sess., at 14 (Mar. 16, 1983, stmt. of Rep. Iverson) (“the type of drugs you are talking about here are not the type that people would buy for dispensing for sale in the prison as these are fast-acting lethal drugs”).

Unlike the Washington Legislature which specifically required in its 1981 law that sodium thiopental be used for lethal injections, the Montana Legislature did not state that sodium thiopental must be used. The only explanation of the phrase “ultra-fast-acting barbiturate” during the 1983 Montana legislative session was that the drugs described are “fast-acting lethal drugs.”

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, **not to insert what has been omitted** or omit what has been inserted. . . .” Mont. Code Ann. § 1-2-101 (emphasis added); *State v. Hicks*, 2013 MT 50, ¶ 19, 369 Mont. 165, 296 P.3d 1149 (“We do not insert that which the legislature omitted, nor do we omit that which the legislature has inserted”).

Since the Montana Legislature did not require that sodium thiopental be used for lethal injections, this Court cannot insert that requirement into the statute.

The legislative history indicates that the Legislature intended a quick and humane death by lethal injection. The use of pentobarbital complies with this intent. The onset of pentobarbital is almost immediate, less than one minute, and there is no meaningful difference between thiopental and pentobarbital in the time it takes to render a person comatose. Pentobarbital is an ultra-fast acting barbiturate within the meaning of Mont. Code Ann. § 46-19-103.

III. DR. HEATH HAS STATED IN OTHER CASES THAT THERE IS NO INFORMATION AVAILABLE THAT WOULD ALLOW AN ACCURATE PREDICTION OF HOW MUCH SLOWER PENTOBARBITAL WOULD BE THAN THIOPENTAL.

In an attempt to support their claim that there is no genuine issue of material fact that pentobarbital is not an ultra-fast acting barbiturate, Plaintiffs point to Dr. Heath's opinion in this case that "Pentobarbital has a slower onset and a longer duration than thiopental." (See Plaintiff's Expert Witness Disclosure, submitted May 18, 2013, ¶ 10; Brief in Support of Mot. at 4.) Dr. Heath does not state in this case how much slower pentobarbital is than thiopental. In *Pardo v. Florida*, however, attached hereto as Exhibit 3 for the Court's convenience, Dr. Heath states there is no information available that would allow an accurate prediction of how much slower pentobarbital would be than thiopental.

In *Pardo v. Florida*, 108 So. 3d 558 (2012), Pardo raised an Eighth Amendment challenge relating to the substitution of pentobarbital for thiopental in Florida's lethal injection protocol. Pardo contended that while his expert, Dr. Heath, asserted that

pentobarbital has a substantially slower onset than thiopental, the State did not modify the protocol to account for that alleged fact, meaning that Pardo may not be fully anesthetized before the injection of the second and third drugs in the lethal injection sequence. In rejecting Pardo's argument because it was based on pure speculation and conjecture, the Florida Supreme Court quoted from a declaration Dr. Heath provided in that case:

There is no literature regarding the timeframe with which pentobarbital would produce anesthesia if it were to be used for induction. Based on its chemical properties *it is predictable* that its onset of action would be slower than that of thiopental. In other words, the time it takes for a patient to transit from consciousness to unconsciousness would be longer with pentobarbital than with an equivalent dose of thiopental. *But there is no information available that would allow an accurate prediction of how much slower it would be.*

Pardo v. Florida, 108 So. 3d at 564 (emphasis provided by the Court). The Florida Court noted that nothing in Dr. Heath's declaration alleged that Pardo would not be unconscious or that he would be insufficiently anesthetized when the other two drugs are introduced.

Dr. Heath also stated that there is no information available that would allow an accurate prediction of how much slower pentobarbital would be than thiopental in at least one other case. *See Ferguson v. Palmer*, 2012 U.S. Dist. LEXIS 177860,*15, Exhibit N, attached hereto as Exhibit 4, page 5, ¶ 38. In Exhibit N, Dr. Heath also states that in every instance of which he was aware, the use of a single drug procedure of thiopental or pentobarbital has led to the "rapid death" of the prisoner. (*Id.* at 2, ¶ 21.)

Dr. Evans states that the onset of pentobarbital is almost immediate, less than one minute, and that there is no meaningful difference between pentobarbital and thiopental in the time it takes to render a person comatose. Plaintiffs have failed to establish the absence of a genuine issue of material fact and their motion should be denied.

IV. A MEDICAL REFERENCE RELIED UPON BY DR. HEATH IN THIS CASE ESTABLISHES THAT PENTOBARBITAL IS AN ULTRA-FAST-ACTING BARBITURATE.

In Dr. Heath's Rebuttal Expert Disclosure submitted in this case on June 24, 2013, he cites examples in medical literature in which the term "ultra-fast-acting" is used in reference to barbiturates. Dr. Heath states that these examples are listed in the appendix to the disclosure. (Plaintiffs' Rebuttal Expert Disclosure, at 2, ¶ 3.) The Errata to Plaintiffs' Rebuttal Expert Disclosure, submitted on July 2, 2013, contains the appendix referred to by Dr. Heath which was inadvertently not attached to the filed document. The last reference in the appendix provided by Dr. Heath is as follows:

<http://toxnet.nlm.nih.gov/cgi-bin/sis/search/a?dbs+hsdb:@term+@DOCNO+3286>

NIH National Library of Medicine

TOXNET Toxicology Data Network

Amobarbital

Section M) 1)

"ultra-fast acting"

A copy of the above document is attached hereto as Exhibit 5.

This reference states that both thiopental and pentobarbital have an almost immediate onset of action, and the maximum effects for both thiopental and pentobarbital are achieved within one minute. (Ex. 5 at 16-17) (“the onset of action ranges from almost immediately for methohexital, pentobarbital, and thiopental to 5 minutes for phenobarbital. Maximum effects of thiopental or pentobarbital are achieved within about 1 minute, while as much as 30 minutes may be required with administration of phenobarbital”).

Additionally, Section M) 1) of the reference states that “ultra-fast acting” has an onset of one minute or less following intravenous administration as follows:

M) PHARMACOKINETICS

1) Generally, rapid absorption. Onset of action is usually 15 to 30 minutes for short-acting barbiturates; ultra-fast acting has an onset of one minute or less following intravenous administration and 2 to 10 minutes following intramuscular administration; and intermediate-acting has an onset of 45 to 60 minutes.

(Ex. 5 at 11.)

Dr. Heath’s own reference establishes that thiopental and pentobarbital are virtually the same in terms of speed of onset, and that both thiopental and pentobarbital are “ultra-fast-acting barbiturates.”

Plaintiffs’ claim that there is no genuine issue of material fact that pentobarbital is not an ultra-fast-acting barbiturate should be rejected.

CONCLUSION

Plaintiffs’ Motion for Summary Judgment should be denied.

Respectfully submitted this 25th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Response in Opposition to Plaintiffs' Motion for Summary Judgment to be mailed, first class postage prepaid, to:

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