

On June 27, 1995, someone covered the inside of a SCP inmate's cell with human feces. *See* Am. Compl. (Doc. No. 33, Ex. A) ¶ 6. Todd Setlock, a SCP corrections officer, suspected that Charowsky was responsible for the incident. *See id.* ¶ 9. After Setlock reported the incident to his supervisor, David Wapinsky, Wapinsky ordered Charowsky to clean the cell. *See id.* ¶ 10. Under protest, Charowsky cleaned the cell. *See id.* ¶ 12. Because he was not provided with the appropriate protective clothing and equipment, Charowsky's skin came into contact with feces. *See id.* ¶ 14. At the time he was ordered to clean the cell, Charowsky was aware of the possibility that the feces might have come from inmates with HIV or hepatitis C. *See id.* ¶ 11. Therefore, when he developed a body rash, Charowsky feared that he had contracted a virus. *See id.* ¶ 15. As a result, Charowsky requested that his blood be tested for the presence of HIV and hepatitis C. *See id.* On December 10, 1997, Charowsky was diagnosed with hepatitis C. *See id.*

PROCEDURAL BACKGROUND

On July 24, 1995, less than one month after being ordered to clean the feces-covered cell, Charowsky filed a § 1983 lawsuit against Setlock and Wapinsky. *See* Def.'s Designation of Additional Docs. for Consideration in Def.'s Mot. for Summ. J. (Doc. No. 42), Ex. A at 1. Although Charowsky did not know whether he had contracted hepatitis C at the time he filed the suit, he sought damages from Setlock and Wapinsky for injuries stemming from the cell-cleaning incident. *See id.* at 3; Am. Compl. (Doc. No. 33, Ex. A) ¶ 18. On July 14, 1998, Magistrate Judge Charles B. Smith entered judgment as a matter of law in favor of the Setlock and Wapinsky. *See Charowsky v. Wapinsky et al.*, No. 95-CV-4481, 1997 WL 407972 (E.D. Pa. July 17, 1997)), *aff'd*, 159 F.3d 1350 (3d Cir. 1998), *cert. denied*, 525 U.S. 1074 (1999).

On September 21, 1998, Charowsky filed a pro se civil rights complaint against Kurtz. *See* Compl. (Doc. No. 1) at 1. Although Kurtz was personally served with the complaint, he failed to appear, plead, or otherwise defend this action. *See* Return of Service (Doc. No. 8); Aff. for Entry of Default (Doc. No. 11). Consequently, on April 20, 1999, the Clerk of Court entered a default against Kurtz. Charowsky filed a motion for entry of a default judgment which I denied in order to hold a hearing on damages. *See* Mot. for Default J. (Doc. No. 12); Order of June 1, 1999 (Doc. No. 13). On June 11, 1999, the Assistant Solicitor for Schuylkill County filed a motion on behalf of Kurtz to set aside the default on the basis that the County Solicitor's Office was not aware of the existence of the suit until it received notice of the damages trial. *See* Mem. of Law in Supp. of Def.'s Mot. to Set Aside Entry of Default under Fed. R. Civ. P. 55(c) (Doc. No. 15) at 1. On February 1, 2000, I set aside the entry of default. *See* Order of Feb. 1, 2000 (Doc. No. 28).

On February 14, 2000, Kurtz filed an answer to Charowsky's complaint and a motion for judgment on the pleadings. *See* Answer to Compl. (Doc. No. 29); Mot. of Def. for J. on the Pleadings (Doc. No. 30). After responding to Kurtz's motion for judgment on the pleadings, Charowsky filed a motion for leave to file an amended complaint. *See* Pl's Resp. to Def.'s Mot. for J. on the Pleadings (Doc. No. 31); Mot. for Leave to File Am. Compl. (Doc. No. 33). On April 6, 2000, after considering Charowsky's motion and Kurtz's response in opposition, this court allowed Charowsky to file the amended complaint. *See* Resp. by Def. to Mot. for Leave to File Am. Compl. (Doc. No. 35); Order of Apr. 6, 2000 (Doc. No. 36). Kurtz filed an answer to Charowsky's amended complaint, and, by letter, the parties asked this court to reinstate their filings concerning Kurtz's motion for judgment on the pleadings. *See* Answer to Am. Compl.

(Doc. No. 38).

Charowsky's amended complaint asserted two causes of action. Count II, his sole federal claim, asserted a civil rights claim under 42 U.S.C. § 1983. *See* Am. Compl. (Doc. No. 33, Ex. A). As I noted in my July 31, 2000 order, the plaintiff did not specify which of his constitutional rights were violated. *See Charowsky* 2000 WL 1052986, at *3 n.2. However, because the plaintiff alleged that Kurtz deprived him of his constitutional rights through "deliberate indifference," Am. Compl. (Doc. No. 33, Ex. A). ¶ 34, 36, I interpreted his claim to be seeking relief for a violation of his Eighth Amendment rights.

In his motion for judgment on the pleadings, Kurtz argued that Charowsky's claim was barred by the doctrine of collateral estoppel, the statute of limitations, and the Governmental Immunity Act, 42 Pa. C.S.A. 8542. *See* Mot. of Def. for J. on the Pleadings (Doc. No. 30). Because I found that Charowsky's § 1983 claim was barred by the statute of limitations, I did not reach Kurtz's other two arguments. *See Charowsky* 2000 WL 1052986, at *3.

As noted above, Charowsky was ordered to clean the feces covered cell on June 27, 1995 and the complaint in this case was filed on September 21, 1998. The relevant statute of limitations for a § 1983 claim in Pennsylvania is two years. *See* 42 Pa. Cons. Stat. §§ 5524(1)-(2), (7). This statute of limitations begins to run "as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994).

The parties disagreed as to when the statute of limitations began to run. Kurtz argued that the statute of limitations began to run no later than July 24, 1995, the day Charowsky filed his lawsuit against Setlock and Wapinsky. *See* Br. in Supp. of Def.'s Mot. for J. on the Pleadings

(Doc. No. 30), at 6. Charowsky contended that the discovery rule prevented the statute of limitations from beginning to run until he was diagnosed with hepatitis C on December 10, 1997. *See* Pl.'s Resp. to Def.'s Mot. for J. on the Pleadings (Doc. No. 31) ¶ 12.

I agreed with Kurtz's argument because, by July 24, 1995, the date on which the complaint was filed in the lawsuit against Setlock and Wapinsky, Charowsky was clearly aware that he had suffered an injury when he was forced to clean, without protective clothing or equipment, the feces covered cell. *See Charowsky*, 2000 WL 1052986, at *4. When Charowsky was diagnosed with hepatitis C, he learned nothing more than the full extent of that injury. As a result, I determined that the statute of limitations began to run on July 24, 1995. *See id.* Because Charowsky did not assert his § 1983 claim against Kurtz prior to July 23, 1997, I concluded that it was barred by the statute of limitations. *See id.* Because Charowsky's sole federal claim was Count II, I dismissed the remaining count for lack of jurisdiction. *See id.*

Charowsky was represented by counsel from June 16, 1999 to August 29, 2000. On June 16, 1999, this court signed an order appointing Thomas C. Zipfel, Esq. as counsel for Charowsky. *See* Order of June 16, 1999 (Doc. No. 17). On December 21, 1999, Zipfel withdrew as counsel but, on the same day, Douglas K. Jenkins, Esq. entered an appearance on behalf of Charowsky. *See* Order of December 21, 1999 (Doc. No. 25). On August 29, 2000, I granted Jenkins' motion for leave to withdraw as counsel. Order of August 29, 2000 (Doc. No. 46). As a result, the motion to vacate judgment that is pending before the court was filed by Charowsky pro se. *See* Pl.'s Mot. to Vacate J. (Doc. No. 47).

DISCUSSION

In order to determine whether Charowsky's motion should be evaluated under Rule 59(e) or 60(b), I will first analyze the substance of Charowsky's motion to vacate judgment. Because I conclude that Charowsky's motion to vacate judgment functions as a Rule 59(e) motion to alter or amend judgment, I will evaluate Charowsky's motion under Rule 59(e). Ultimately, I conclude that Charowsky's Rule 59(e) motion is untimely, and, even if it were timely, it fails to establish a ground upon which relief can be granted. Because Charowsky filed this motion pro se, I take the additional step of evaluating his motion under Rule 60(b). However, I also conclude that Charowsky's motion fails to provide a basis for relief from judgment under Rule 60(b). As a result, Charowsky's motion to vacate this court's July 31, 2000 order must be denied.

I. The Substance of the Motion to Vacate Judgment

In his memorandum of law in support of his motion to vacate the July 31, 2000 order, Charowsky claims that this court's conclusion that the statute of limitations barred his § 1983 claim was based on an error of law. Charowsky claims that his § 1983 claim was based on Kurtz's repeated refusals to provide him with appropriate medical treatment. *See* Mem. of Law in Supp. of Mot. to Vacate J., at 1 ("The basis for the Plaintiff's Complaint is Fact [sic] he was reFused medical attention, he was denied and turned away without treatment. [sic] By warden David Kurtz. thereof [sic] he contracted Hepatitis-C. PlaintiFF was denied Full and complete testing For inFectious diseases until December 10, 1997 At which time he was diagnosed with Hepatitis-C."). In particular, Charowsky claims that Kurtz violated his right to appropriate medical treatment by repeatedly refusing to grant Charowsky's requests to be tested for hepatitis

C. *See id.* at 3 (“Plaintiff requested Medical Attention aFter said incident. Which he was reFused By the DeFendant. This has allways [sic] Been a [sic] Issue at SCP.”). Charowsky claims that Kurtz’s repeated refusals constituted a continuing violation of Charowsky’s right to appropriate medical treatment, and, therefore, the statute of limitations for his § 1983 claim did not begin to run until he was finally tested for hepatitis C on December 10, 1997. *See id.* (citing *Estelle v. Gamble*, 429 U.S. 97 (1976); *Durmer v. O’Carroll*, 991 F.2d 64 (3d Cir. 1993); *Aswegan v. Bruhl*, 965 F.2d 676 (8th Cir. 1992); *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); *Boring v. Kozakiewicz*, 833 F.2d 468, 472 (3d Cir. 1987)).

II Whether the Motion to Vacate Judgment Should be Evaluated under Rule 59(e) or 60(b)

Although Charowsky’s motion to vacate judgment is clearly labeled as being filed pursuant to Rule 59(e), *see* Pl.’s Mot. to Vacate J. (Doc. No. 47), the function of a motion, and not the motion’s caption, dictates which Rule applies. *See Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988)(citing *Turner v. Evers*, 726 F.2d 112, 114 (3d Cir. 1984)). As a result, I will considered whether Charowsky’s motion should be construed as a motion to alter or amend judgment under Rule 59(e) or as a motion for reconsideration pursuant to Fed. R. Civ. P. 60(b).

Rule 60(b) allows for relief from judgment based on: mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud, misrepresentation, or other misconduct of an adverse party; a judgment being void; a judgment being satisfied, released or discharged; or any other reason justifying relief. *See* Fed. R. Civ. P. 60(b)(1)-(6).

Charowsky does not explicitly allege any of the grounds for relief under Rule 60(b).

Instead, as noted above, Charowsky appears to be claiming that this court made an error of law in reaching its decision of July 31, 2000. Because Charowsky's motion to vacate judgment only claims legal error, it not only possesses all the formal trappings of a Rule 59(e) motion, it serves the purpose of one as well. *See Smith*, 853 F.2d at 158-59. The Third Circuit has held that "a Rule 60(b) motion may not be used as a substitute for appeal, and that legal error, without more, cannot justify granting a Rule 60(b) motion." *Id.* at 158. Instead, a Rule 59(e) motion is the proper device a litigant should use to "to relitigate the original issue." *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R.*, 824 F.2d 249, 253 (3d Cir. 1987). Therefore, I will evaluate Charowsky's motion to vacate judgment under Rule 59(e).

III. Evaluating the Motion to Vacate Judgment Under Rule 59(e)

Charowsky's motion to vacate judgment was filed approximately forty-five days after the July 31, 2000 order was entered.

To be timely, the Rule 59(e) motion must be served within ten days of entry of judgment. The "ten day period is jurisdictional, and 'cannot be extended in the discretion of the district court.'" *de la Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d 63, 65 (3d Cir. 1983) (per curiam)(quoting *Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. 1980)(per curiam)). . . . The ten day limit for filing a Rule 59 motion is clearly set forth in the Rule. It is equally clear that a district court may not extend or waive the ten day limit. Fed. R. Civ. P. 6; *de la Fuente*, 703 F.2d at 65.

Smith, 853 F.2d at 157. Because Charowsky's motion was filed over one month after the last day on which a timely 59(e) motion could have been filed, it must be denied as untimely.

Although the "ten day period is jurisdictional, and 'cannot be extended in the discretion of the district court,'" because Charowsky was a prisoner when he filed this motion pro se, I have

considered whether the untimeliness may be excused. However, even if I possessed the discretion to extend the ten day period, I would not do so in this case. First, Charowsky clearly labeled his motion a Rule 59(e) motion and Rule 59(e) explicitly states that “[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.” Fed. R. Civ. Pro. 59(e). Unlike more obscure provisions of the Federal Rules of Civil Procedure, a litigant does not need legal training to interpret this clearly phrased mandate. Second, despite the clear mandate of Rule 59(e), Charowsky offered no explanation for the lateness of his motion. Third, although there are some references in the record to poor communications between Charowsky and his appointed counsel, he was represented by counsel during the ten day period. Furthermore, it was not until August 21, 2000– well after the Rule 59(e) motion would have had to have been filed in order to be timely– that Charowsky sent a letter to chambers informing me that he had difficulties communicating with his court-appointed attorney. *See* Letter from Charowsky to Chambers of 8/21/00 (“I will need a [sic] extension of time in this case. Sir I did ask Atty Jenkins to file a motion to vacate judgment. Because I did not know ok [sic] my injury on till [sic] I was transfered [sic] back to SCI-Retreat.”).¹ Finally, although Charowsky is proceeding pro se, he has had experience filing complaints and timely motions. *See, e.g.*, Notice of Appeal (Doc. No. 51).

Even assuming that Charowsky had timely filed this motion to vacate judgment pursuant to 59(e), he would still not be able to satisfy the burden of showing that reconsideration is proper. Under Federal Rule of Civil Procedure 59(e), a party seeking to alter or amend a judgment must

¹ In response to Charowsky’s letter, I extended, by 30 days, the deadline for filing an appeal of my July 31, 2000 order. *See* Order of August 29, 2000 (Doc. No. 45).

establish one of the following grounds for reconsideration: “(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max’s Seafood Café, by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)(citing *North River Ins., Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)).

Charowsky argues that this court made a clear error of law in holding that the statute of limitations barred his § 1983 claim. However, this is the first time that this court has heard the argument that Charowsky has raised in his motion to vacate judgment. In fact, Charowsky’s motion to vacate judgment presents an entirely different set of facts and legal arguments than was presented in his amended complaint.

In presenting his claim that Kurtz violated his Eighth Amendment rights, Charowsky’s amended complaint focused almost *exclusively* on the June 27, 1995 event. First, the “factual allegations” of the amended complaint make no mention of Charowsky’s alleged repeated requests for medical treatment and Kurtz’s alleged repeated denial of those requests. Instead, Charowsky only mentions that he was denied treatment once and that denial of treatment appears to have occurred in the days immediately following the June 27, 1995 event. *See* Am. Compl. (Doc. No. 33, Ex. A) ¶ 15 (“Plaintiff subsequently developed a rash over his body and requested medical attention, [sic] he was either denied or turned away without treatment.”)

Furthermore, although the § 1983 claim presented in Count II of the amended complaint is very broadly stated, it does not allege that Kurtz denied Charowsky appropriate medical treatment. Instead, the amended complaint claims that Kurtz failed to implement appropriate

procedures for removing human excrement from cells, train his personnel on proper decontamination procedures, and safeguard the rights of prisoners. *See id.* ¶ 34.² Even in its most expansive description of the § 1983 claim, the amended complaint does not state that Charowsky is basing his § 1983 claim on the fact that he was wrongfully denied medical treatment. Instead, this section of the amended complaint focuses on Kurtz’s failure to adopt grievance procedures or to train personnel on how to interact with prisoners in an appropriate manner. *See id.* ¶ 36.³

² ¶ 34 reads as follows:

- A. Failing to adopt or implement systems or procedures to ensure that persons who were involved in the cleanup and decontamination resulting from the “bombings” were properly protected from the transmission of Hepatitis, AIDS, and other diseases transmitted via human excrement;
- B. Failing to provide training to personnel regarding proper decontamination procedures;
- C. Inadequate[ly] supervisi[ng] and training [] personnel in observing the rights of individuals while involved in unusual, but frequent prison activities of maintaining a safe and healthful environment for inmates as evidenced by the unprotected cleanup following this “bombing”[:];
- D. Permitting, tolerating and/or encouraging and participating in a pattern and course of conduct by their personnel of unreasonable practices, disregarding the rights guaranteed by the Constitution of the United States, in violation of plaintiff’s civil rights;
- E. Permitting, tolerating and/or encouraging and participating in chronically inadequate and deficient standards in maintaining a safe and healthful environment as evidenced by the unprotected cleanup.

³ ¶ 36 reads as follows:

- A. Failing to adopt, implement or enforce systems or procedures:
 - 1. to ensure that persons who were charged with misconduct violations with potential for disciplinary lockup were afforded the due process rights to hearing noted in the Rules and Regulations and Prison policies;
 - 2. to ensure that persons with grievances concerning prison treatment, conditions or other matters, had an effective means of resolving those grievances other than [by] filing federal court actions;
 - 3. to ensure the humane treatment and meaningful communication

In fact, at no point in his amended complaint did Charowsky give this court any indication that the basis for his amended complaint is, as he now claims, that Kurtz repeatedly denied him appropriate medical treatment. There simply is no reading of the amended complaint that could possibly yield that interpretation. This is particularly true when it is considered that the amended complaint was filed by counsel in order to “more specifically and clearly state the Plaintiff’s cause of action against the Defendant.” Mot. for Leave to File Am. Compl. (Doc. No. 33) ¶ 5. *See* Pl.’s Mem. of Law in Supp. of Pl.’s Mot. to Am. Compl. (Doc. No. 33), at 3 (“The Amended Complaint is essentially a clarification of the first Complaint written and filed by Plaintiff’s appointed counsel.”). As a result, I must conclude that Charowsky’s motion to vacate judgment is not based, as he claims, on legal error, but, instead, it is based entirely on a recasting

free of obscenities and vulgarities and particularly, prohibiting retaliatory conduct against inmates;

4. to ensure appropriate execution and delegation of authority, supervision of workers, and oversight of conduct of employees, prison workers and prisoners;

B. Failing to provide training to personnel regarding proper grievance resolution, disciplinary procedures, and professional conduct toward prison inmates;

C. Inadequate[ly] supervisi[ng], control[ling] and training [] personnel in observing the rights of individuals whether involved in day-to-day contact, grievance situations, or disciplinary procedures. Defendants have a policy, practice or custom that discourages the investigation of prison complaints of Correction Officer misconduct, or have failed to institute adequate prisoner grievance procedures;

D. Permitting, tolerating and/or encouraging a pattern and course of conduct by personnel of unreasonable practices in their disciplinary procedures allowing untrained and poorly supervised personnel unfettered discretion in the application of discipline and resolution of grievances, thus disregarding rights guaranteed by the Constitution of the United States, in violation of plaintiff’s civil rights;

E. Permitting, tolerating and/or encouraging and participating in chronically inadequate and deficient standards in observing professional conduct in the treatment of inmates.

of his complaint and a new legal argument.

“A Rule 59(e) motion may not be used to raise argument that could have been made prior to entry of judgment.” *U.S. v. The Mun. Auth. of Union Township*, 181 F.R.D. 290, 293 (M.D. Pa. 1996), *aff’d*, 150 F.3d 259 (3d Cir. 1998). *See Fort Washington Res., Inc. v. Tannen*, 858 F. Supp. 455, 462 (E.D. Pa. 1994)(“Parties are not free to relitigate issues that the Court has already decided, nor should parties make additional arguments which should have been made before judgment.”). Because Charowsky has used his motion to vacate judgment to present a legal argument that he did not raise prior to the filing of my July 31, 2000 order, I would have denied Charowsky’s motion to vacate judgment even if it had been timely filed under Rule 59(e).

IV. Evaluating the Motion to Vacate Judgment Under Rule 60(b)

Because Charowsky filed this motion pro se, I will take the additional step of evaluating his motion under Rule 60(b). Even giving Charowsky’s motion to vacate judgment a generous reading, only the Rule 60(b)(1) and 60(b)(6) grounds for reconsideration could plausibly apply. Although the motion to vacate judgment would be timely under Rule 60(b)(1) or 60(b)(6), the motion would still have to be denied.

Under Rule 60(b)(1), the court may relieve a party from a final judgment if the party demonstrates that the judgment is the result of “mistake, inadvertence, surprise, or excusable neglect.” Relief under Rule 60(b)(6) may only be granted under extraordinary circumstances where, without relief, an extreme and unexpected hardship would occur. *See Lasky v. Continental Prod. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986). It is only under such extraordinary circumstances “that the ‘overriding interest in finality and repose of judgments may properly be

overcome.” *Harris v. Martin*, 834 F.2d 361, 364 (3d Cir. 1987)(quoting *Martinez- McBean v. Government of the Virgin Islands*, 562 F.2d 908, 913 (3d Cir. 1977))(quotation omitted).

Charowsky’s motion to vacate judgment could be read as implicitly alleging that the failure of his court-appointed attorney to raise a denial of medical treatment argument constitutes “excusable neglect.” However, the carelessness of an attorney is not a ground for relief under Rule 60(b)(1). See *DeFeo v. Allstate Ins. Co.*, No. 95-244, 1998 WL 328195, at *4 (E.D. Pa. June 19, 1998).

Charowsky’s motion to vacate judgment may also be read as implicitly alleging that the failure of his court-appointed attorney to raise a denial of medical treatment argument constitutes the type of “extraordinary circumstance” where, without relief, an extreme and unexpected hardship would occur. Although “[g]ross neglect by counsel amounting to abandonment may justify relief under Rule 60(b)(6),” *DeFeo*, 1998 WL 328195, at *4 (citing *Boughner v. Secretary of HEW*, 572 F.2d 976, 978 (3d Cir. 1978)), in this case, the level of neglect arguably demonstrated by counsel does not rise to the level of abandonment. A finding of abandonment is generally reserved for those unusual cases where an attorney inexcusably fails to answer an opposing party’s motion. See, e.g., *Boughner*, 572 F.2d at 978 (3d Cir. 1978). In this case, Charowsky is simply claiming that his attorney could have more effectively answered Kurtz’s motion.

In retrospect, it is clear to this court that, in some of the pleadings and correspondence involved in this lawsuit, Charowsky hinted at the possibility of a denial of medical treatment

claim.⁴ However, because Charowsky's amended complaint did not set forth a denial of medical attention basis for his § 1983 claim, I cannot now consider such an argument in this motion to vacate judgment. If the amended complaint had been filed pro se, it is possible that such an oversight would have been excusable. *See, e.g., Jubilee v. Horn*, 959 F. Supp. 276, 280 (E.D. Pa. 1997)(granting reconsideration to address a new argument raised by a pro se plaintiff). However, in a case such as this one, where a plaintiff seeks to raise a legal argument in a motion to vacate judgment that was not raised by counsel in the amended complaint, that motion to vacate judgment must be denied.

CONCLUSION

Charowsky's motion to vacate judgment is untimely under the clear directive of Rule 59(e). In addition, even if the motion had been timely filed under Rule 59(e), the motion would still have to be denied for failing to present a ground upon which Rule 59(e) relief could be granted. Finally, even if the motion could have been interpreted as falling within the more

⁴ *See, e.g.,* Pl.'s Mem. of Law in Supp. of Pl.'s Mot. to Am. Compl. (Doc. No. 33), at 1 ("Although Plaintiff had previously received testing for the HIV virus he was denied full and complete testing for infectious diseases until December 10, 1997 at which time he was diagnosed with Hepatitis C."); Br. in Supp. of Pl.'s Resp. to Def.'s Mot. for J. on the Pleadings (Doc. No. 31), at 3 ("In the instant action, despite numerous complaints to prison officials, Plaintiff was not tested for Hepatitis C until December 10, 1997."); Aff. of Statement (Doc. No. 12), at 1 ("Since I was involved in a [sic] incident [sic] at Schuylkill County prison, I wrote [sic] a number of request slips to Warden Kurtz. He has never answer [sic] one of them. Warden Kurtz told the Nurse to Look at me and she seen [sic] I had a rash, and she told me not to worry about it. I wrote Warden Kurtz and ask [sic] him to take me to the Hosp. Again he refuse [sic] me."); Compl., Ex. B, at 1 ("I wrote A number of request [sic] to the Warden. He ReFuse [sic] to answer them.") & 2 ("I was test [sic] for HIV AIDS. But no other Diseases. On Dec. 10th, 1997 I was Transferred Back to SCI Retreat at this time I was Tesed [sic] For all Infection [sic] (Diseases). I was tested for Hepatitis C and Test [sic] (Postive) [sic].").

generous time constraint of Rule 60(b), the motion would still have to be denied. As a result, Charowsky's motion to vacate this court's July 31, 2000 order granting Kurtz's motion for judgment on the pleadings must be denied.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Richard Charowsky,
Plaintiff

v.

David Kurtz, Warden,
Defendant

:
: CIVIL ACTION
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:
: NO. 98-CV-5589
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ORDER

AND NOW, this day of February, 2001, upon consideration of Charowsky's motion to vacate judgment and Kurtz's response in opposition, IT IS HEREBY ORDERED that Charowsky's motion to vacate this court's July 31, 2000 order is DENIED.

William H. Yohn, Jr., J.