No. 21-6408

IN THE

SUPREME COURT OF THE UNITED STATES

James A. Harnage — PETITIONER
(Your Name)

vs.

Janine Brennan, et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Second Circuit Court of Appeals From District of Connecticut
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James A. Harnage #149472
(Your Name)

Corrigan CI, 986 Norwich-Newlondon Tpke.
(Address)

Uncasville, CT. 06382
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether A state Violates The Express Terms of A Settlement Agreement By Failing To Inform The Decision Maker of Their Authority To Grant Approvals That Cannot Be Unreasonably Withheld.

2. Whether A state Violates The Material Terms of A Settlement Agreement By Failing To Inform A Decision Maker of The Standard To Be Applied In Considering To Grant Approvals That Cannot Be Unreasonably Withheld.

3. Whether A state Violates The Implied Covenant of Good Faith And Fair Dealing By Arbitrarily And Irrationally Withholding Approvals That Cannot Be Unreasonably Withheld In Implementation Of A Settlement Agreement without Reason.

4. Whether A State That Breaches Material Terms of A Settlement Agreement May still Rely On The Release And Waiver Clause of The Agreement, To Benefit Third Party State Employee

5. Whether The Court Was Clearly Erroneous In It's Findings of Facts As To The Evaluations And Testimonies of Valletta And Ruiz.

LIST OF PARTIES

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

[X] 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:

1. James A. Harnage, Pro Se, 986 Norwich-Newhondon Tpk., Uncasville, CT. 06382
2. Janine Brennan - AAG Stephen Finucane, 110 Sherman St., Hartford, CT. 06105
3. Dr. Johnny WU, individually and for Correctional Managed Healthcare, - AAG, Stephen Finucane, 110 Sherman St., Hartford, CT. 06105
4. Nurse Laura - AAG, Stephen Finucane, 110 Sherman St., Hartford, CT. 06105
5. Correctional Managed Healthcare - AAG, Stephen Finucane, 110 Sherman St, Hartford CT 06105
6. Jane Does 1-5 - AAG, Stephen Finucane, 110 Sherman St, Hartford, CT. 06105
7. Cynthia L'Hereaux - AAG, Stephen Finucane, 110 Sherman St, Hartford, CT. 06105

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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

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

The opinion of the United States court of appeals appears at Appendix A1 to the petition and is

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

The opinion of the United States district court appears at Appendix A83-96 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.
[X] Petitioner is unable to determine publication status

[ ] 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

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

The date on which the United States Court of Appeals decided my case was July 9, 2021.

[X] No petition for rehearing was timely filed in my case. A Motion To File Late Has Not Been Timely Ruled On (See A446 - A459)

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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).

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

I. Facts[1]:

The plaintiff-petitioner, James A. Harnage (Harnage), is an inmate incarcerated within and for the State of Connecticut (the state), in the custody and care of the Department of Correction (D.O.C.). Harnage brought suit naming numerous staff members of the Correctional Managed Healthcare (CMHC), responsible for the provision of healthcare services to the inmates of the D.O.C.; for their failure and continued refusals to provide Harnage refills and renewals of his prescribed medications necessary to treat the plaintiff's chronic medical conditions. These claims and defendants, however, are not relevant to the instant dispute and petition.

Instead, on or about May 28, 2019, the state intervened, on behalf of the named defendants, and entered into a "Settlement Agreement and Release" (A319 - A323), with Harnage (the agreement) to resolve the action. In the agreement, the plaintiff agreed to release the defendants for a number of concessions from the state, including, inter alia, that:

> "Harnage **shall** be permitted to purchase and obtain the following items if he is approved for the items for medical reasons or justifications... Both parties agree that... that approval will not be unreasonably withheld:
> a. a second pillow, and;
> b. approved sneakers and/or diabetic footwear" Id.
> (emphasis added) (A320, ¶3 A(iv)(a) and (b)).

FN1: Further facts shall be set forth below as necessary.

The plaintiff negotiated, in good faith, for these concessions to address his concerns he is an indigent inmate who cannot purchase sneakers from the prison's commissary due to extensive obligations to his inmate account. (A182:18 - A183:9; A213 - A216; A259 - A261; A141:2-4). Harnage is also a diabetic (A172:1-3; A110:19; A111:4; A135:10-13; A225:7-23; A240:20 - A242:7), and must be extremely cautious with his feet, due to his very small veins in his feet and legs; and is at an extremely heightened risk of ulcers, lesions and foot amputations. (A172:4 - A174:2; A111:4 - A115:13; A227:4-12; A240:20 - A242:7).

Plaintiff currently owns a pair of black Reebok sneakers, (A181:14-15)(the Reeboks). The Reeboks were purchased by Harnage on or about November, 2012, nearly nine (9) years ago (A181:18) The Reeboks are falling apart and in a serious state of disrepair. The cushioning around the ankle, the insole down the whole center of the sneaker and under the toes; has broken down completely, exposing the hard interior "form" of the sneaker. (A184:20 - A185:10)(see also, A172:24 - A173:5; A182:3-11) This deterioration is causing plaintiff irritation, discomfort and impairing his ability to ambulate freely. (A172:24 - A173:25; A182:3-11; A184:20 - A185:10) (see also, A186:24 - A190:4). Harnage wears the Reeboks daily. (A181:21 - A182:2).

The Reeboks deterioration makes them nearly unusable. Despite this breakdown and the irritation and discomfort, Harnage continues to use the Reeboks because he cannot go around barefoot. (A182:14 - A167:13-14) Otherwise, Harnage would be forced to utilize the state issued, slip-on, sneakers known as "Jackie Chans" (the Jackie Chans) (A185:19 - A186:14; A167:10-14) Harnage has worn the Jackie Chans on several occasions prior to his 2012 purchase of

the Reeboks. (A185:19 - A186:14) The Jackie Chan's are very uncomfortable, because they are made of a thin, rough, canvas material, attached to a thin sole. The canvas material is stiff and has no cushioning to it, causing it to rub against the ankle, heel, achilles tendon and top of the foot. The sole, is so thin it feels like walking on hard stone. (A185:19 - A186:14)

Harnage is extremely fearful of being relegated to using the Jackie Chans because the canvas rubbing and lack of cushioning irritates the skin and will imminently cause lesions, ulcers and blisters, the very things that doctors have warned Harnage to prevent, due to the extreme risks of foot amputations from the loss of blood flow through Harnage's "very thin" veins. (A189:20 - A190:4) (see also, A114:8 - A115:13). The defendants do not dispute the plaintiff's claims that the Reeboks are in a state of total and complete disrepair (A185:8-10). The Reeboks have degraded more since the hearing on August 25, 2020.

In an attempt to proactively mitigate the imminent risk of serious physical injury, including foot amputations; Harnage entered into the agreement (A171; A198 - Ad04), with the state. The agreement was intended to afford Harnage, inter alia, the ability to have sneakers sent to him from family and friends outside the facility (A192:11-25; A213:9-24; A214:22 - A215:14). This clause of the agreement only required that Harnage be "approved for the items for medical reasons or justifications" but promised that Harnage "shall be permitted" and that the "approval will not be unreasonably withheld." (A199:3-6; A201:24 - A202:2) This concession held significant value for Harnage, who took less money in making the agreement, and acted as an inducement for Harnage to resolve the

action. (A203:6-24).

However, when Harnage was sent for the medical approval, Dr. Gerald Valletta (Valletta), was never informed of the agreement, never informed of the standard that the approval "shall be permitted" and would "not be unreasonably withheld". Valletta was never informed that he was supposed to be evaluating Harnage for regular "sneakers and/or diabetic footwear", or a pillow; nor, that Valletta was supposed to be looking for "medical reasons or justifications" for granting the approval, or even that he had the authority to consider Harnage for the regular sneakers. (A240:20-A242:7) Instead, Valletta considered Harnage the same as any other inmate, who did not have an agreement; and never even considered whether Harnage would benefit from a new pair of regular sneakers. (A238:7-18; A241:14-242:18; A242:22-25). As a result of the state's failures, Valletta unreasonably withheld the approval.

On November 29, 2019, plaintiff gave defendants a second chance to correct the matter and was examined by Dr. Ricardo Ruiz (Ruiz) (A105 - A168) Yet again, Ruiz was not informed of the agreement and its operative standard. (A133:9-11) Ruiz solely considered whether Harnage had a medical necessity for "specialty footwear" or "diabetic footwear". (A121:12-23; A132:7-10; A132:25 - A133:8; A133:25 - A134:15; A140:1 - 21; A141:24 - A142:4; A158:22-25; A168:7-8). Applying the same standard to Harnage, as he would to any other inmate without an agreement. (See, A131:3-8; A133:14-22; A148:3-7; A159:1-3) In fact, instead of looking for the medical reasons and justifications for granting the approval, Ruiz went into the examination considering only "specialty shoes" which Ruiz

admits he specifically "tried to rule out". (A168:7-8).

More importantly, Ruiz said repeatedly that he never would consider an inmate for regular sneakers (A140:1-21; A141:14-22; A141:24-A142:4; A168:7-8). Further, although Ruiz "made a determination that [Harnage] did not require any other type of shoe... [and that] general sneakers were fine" [A122:6-8], he never approved the "general sneakers" and unreasonably withheld such approval. Multiple times Ruiz testified that "regular sneakers is what [Harnage] would require" (A132:13-15) and approved that Harnage "can purchase regular sneakers" (A140:21). Yet, when asked "[I]f Mr. Harnage had a pair of sneakers available to him... do you have a medical opinion on whether or not he should... be able to use those new sneakers?"; Ruiz stated he had "No medical opinion on that. Basically, it's his subjective choice." (A141:14-22).

The whole purpose of Ruiz's involvement in the examination was to render his medical opinion on the reasons and justifications for Harnage obtaining new sneakers. Notably, neither Valletta or Ruiz are podiatrists or specialize in feet or diabetics. Since Ruiz unreasonably withheld that medical opinion on sneakers, Harnage is denied the sneakers he paid for, by a friend, which currently sit on a shelf in the custody of D.O.C. staff. Ruiz declared that "there's nothing [he's] going to offer [Harnage] in terms of sneakers" (A142:3-4). Despite his acknowledgments that new sneakers could be more comfortable, alleviate pain and that "**there would be no medical reason to say someone cannot get a new pair of sneakers...**" (A143:17-A144:7).

II. ARGUMENT:

1. A State Violates The Express Material Terms of A Settlement Agreement By Failing To Inform The Decision Maker Of The Standard And Authority To Grant Discretionary Approvals That Cannot Be Unreasonably Withheld

The court below failed to recognize that because the doctors were not informed of the standard to be applied in considering the approvals, including the "justifications" clause, which is a material term of the agreement; and that the doctors were not informed that they were required to consider Harnage for regular sneakers; Valletta and Ruiz could not look for and evaluate the justifications to grant the approvals for regular sneakers and a second pillow. These justifications include, but are not limited to: that Harnage is indigent and cannot purchase sneakers from the prison commissary, that plaintiff's Reeboks are in such a state of disrepair that they could not possibly last the entirety of Harnage's remaining 25 years of incarceration; or that the disrepair and continued use of the Reeboks could cause the very ulcers, lesions and ultimate amputations that Harnage bargained to prevent, as could the jackle chans should he be forced to rely on their usage.

Instead, the doctors examined Harnage and determined that Harnage did not require "special" or "diabetic" footwear, because at the time of the exams, Harnage had not yet suffered any physical injury, rather than looking toward the prevention of those injuries. See, Valletta A233:19-A235:4 ("since there was no evidence of any kind of damage from footwear to his feet..."); A242:4-8 ("If he was developing ulcers or any other kind of

lesion on the bottom of his feet... that therefore he would need some sort of special footwear..."). See also, Ruiz: A117:5-18 ("... no masses... no amputations... No calluses, no ulcerations, and no signs of infections... signs of infection... gross masses... amputations..."); A120:15 - A121:6 ("I'm looking... for deformities of the foot, if they've had clubfoot or amputations... If there are... ulcers... a large callous... an ulceration... That's when I would try to get some either molded shoes or deep shoes. These are not sneakers. These are shoes... that are made for patients who are diabetic."); A134:19-24.

None of these injury deficencies were good cause to withhold the approval. Neither the requirement that Harnage be suffering an ulcer, infection, clubfoot, gross mass, amputation, or any such other, was a condition required for the approval. Primarily, because it was not supposed to be a consideration solely for "specialty shoes", but, also of regular sneakers. However, Valletta and Ruiz were never informed of this simple fact. An injury, is not a prerequisite to an individual wearing sneakers. In fact, the opposite, wearing sneakers and proper footwear is intended to proactively prevent injury.

The court below, was clearly erroneous when it made a finding of fact, stating that:

> "Dr. Ruiz's opinion, based on his medical judgment, was that the plaintiff... had no medical need for new, non-specialty sneakers or footwear,..." (ECF 242, A90)(emphasis added).

However, this is in stark contrast and contradiction to the express testimony of Ruiz, who testified:

"

Q: If Mr. Harnage had a pair of sneakers available to him -- regular sneakers now, ... do you have a medical opinion on whether or not he should get those -- be able to use those new sneakers? ...

A: No medical opinion on that. Basically, it's his subjective choice." (A141: 14-22)

In fact, Ruiz repeatedly advocated that Harnage should have regular non-specialty sneakers. See, A128: 6-8 ("General shoes, general sneakers were fine."); A133: 25 - A134: 15 ("... regular sneakers is what he would require."); A140: 1-21 ("he can purchase regular sneakers"); A144: 4-7 ("Q: So there would be no medical reason to say someone cannot get a new pair of sneakers, right, that fit correctly? A: Yes.") Yet, defendants still unreasonably withheld the approvals.

The courts conclusions were clearly erroneous in weighing the testimony presented to it, in light of the issues involved in resolution of the dispute surrounding the settlement agreement. "Generally, we review questions of law de novo, questions of fact for clear error, and matters of discretion for abuse of discretion. Accordingly, the district court's factual findings regarding the [testimony of witnesses and factual elements of the agreement] are reviewed for clear error, but it's conclusions about their [application to law] are reviewed de novo. see, United States vs Millan, 4 F.3d 1038, 1043 (2d Cir. 1883)("We review the district court's findings of historical facts in this case for clear error, but we review its ultimate resolution of the ... issue de novo.")(internal quotation marks, brackets and citations omitted) Benjamin v. Fraser, 343 F.3d 35, 43 (2d Cir. 2003).

"Yet, [in the present action], this fact/law dichotomy may be somewhat too blunt a tool for the delicate task of reviewing the [many] issues at hand, since some of the conclusions we must review do not involve questions exclusively of law or fact. Many rest squarely within the district court's duty as fact finder; yet some ostensibly factual findings implicate [legal] conclusions." Benjamin vs Fraser, supra, 343 F.3d at 43.

"Our standard of review of a trial court's finding and conclusions in connection with a motion to [enforce a settlement agreement] is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record... where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision...," and the facts of the testimony at issue. State v. Jenkins, 82 Conn. App. 111 (2004), quoting State vs Bjorklund, 79 Conn. App. 535, 548 (2003)(internal brackets omitted).

"A district court may abuse its discretion when it relies on clearly erroneous findings of fact or an error of law in ruling on the..." Motion to Enforce Settlement Agreement. Covino vs Patrissi, 967 F.2d 73, 77 (2d Cir 1992). "A settlement normally embodies a compromise; the parties economize on costs and eliminate risks and, for those values, give up something which each might have gained in taking the litigation to its conclusions ... The purpose of the [agreement] must be gleaned from it's four corners, and the decree reflects the understanding of the parties, and deference is paid to the plain meaning of the language... and the normal usage of the terms selected. The terms of the agreement in this case are clear and unambiguous and must be accorded their normal import."

(Internal quotation marks omitted)

regular sneakers, they failed, and in fact refused, to have applied their medical opinion and judgment on plaintiff's medical needs and justifications for obtaining a new pair of sneakers, and the state breached the terms of the agreement, when it agreed to make the consideration and medical opinion and then refused saying "No medical opinion on that." (see, A140:1-4; A140:11-22; A141:14-22; A142:2-4).

The agreement thus granted Harnage the right to obtain sneakers and a second pillow if he had a medical need for these items **OR** if there were any justifications for the sneakers and pillow. (A330, ¶3A(iv))("Harnage shall be permitted to... obtain the following items if he is approved for the items for medical reasons **or** justifications...)(emphesis added). This approval, could not be "unreasonably withheld". Id. If the approval was withheld because the doctors were not informed of their authority to consider and grant approval for regular sneakers, just because "doctors don't [normally] prescribe sneakers" (A140:1) Both doctors refused to consider Harnage's need or justifications for obtaining new, regular sneakers; and their testimonies clearly reflect that position. This refusal to grant that consideration is a breach of the agreement. The state's doctors failed to apply the "justifications" standard, and relied exclusively on the medical necessity standard applicable to all inmates, because they were not informed of the agreements clause authorizing the reduced approval threshhold, and the state therefore breached the agreement.

The refusal to consider Harnage for regular sneakers, or render a medical opinion on plaintiffs needs and justifications for obtaining regular sneakers and a second pillow, based upon the reduced "justifications" threshhold

inmates, and thus, withheld approval of the pillow and sneakers unreasonably. Even worse, the doctors never ever considered Harnage for the regular sneakers and the court's conclusion to the contrary was erroneous.

standard, constitutes as a breach of the implied covenant of good faith and fair dealing. According to the state's own witnesses, the approval of a new pair of regular sneakers and a second pillow, contemplated by the agreement was in fact impossible to obtain from the doctors that examined Harnage. The state's failures and inaction created a condition where Harnage could only obtain a second pillow and sneakers if state doctors determined those items were strictly medically necessary. However, the state doctors testified that they categorically consider pillows and regular sneakers, (as opposed to specialty diabetic footwear), to be "comfort items" that are never medically necessary under any circumstances. In fact, the doctors testified that there was "no reason to even entertain" the request for approval because "[d]octors don't prescribe sneakers... No doctor is going to say this is a must..." (A 242:13-21; A 140:1-4) The "reason" to entertain the request for approval was the Settlement Agreement that the doctors were never informed of as authorizing the authority. By promising to provide a pillow and and sneakers subject to approval, and then making that approval impossible to obtain, the state breached the covenant of good faith implicit in every contract.

2. The state Breached The Express Material Terms of the Agreement And Violated The Implied Covenant of Good Faith And Fair Dealing By Arbitrarily And Irrationally Withholding Approvals Unreasonably

A settlement agreement is a contract which should be interpreted according to general principles of contract law. Goldman vs Comm'r of Internal Revenue, 39 F.3d 402, 405 (2d cir. 1994) ("As the settlement agreement constituted a contract, general principles of contract law must govern its interpetation");

Brandt vs MIT Dev. Corp., 552 F. Supp. 2d 304, 309 (D. Conn. 2008). It is a basic principle of contract law that the provisions of a contract must be given effect according to their terms. Murtha vs City of Hartford, 303 Conn. 1, 9 (2011).

Ample justifications supported approval of Harnage for regular sneakers and a second pillow. The state and its doctors acted unreasonably when considering whether to approve the promises in the settlement agreement. Pursuant to the terms of the agreement, Harnage "shall be permitted to purchase and obtain" a second pillow and regular sneakers, subject to medical approval. (A320, ¶3A(iv)) Approval was therefore required if there were any "medical reasons or justifications", and that approval "will not be unreasonably withheld". Id. Although this promise was "contingent upon the medical approval and evaluation of Harnage by D.O.C. medical officials", this approval was not to "be unreasonably withheld" Id. However, Harnage was never "evaluated" by the doctors for regular sneakers, in violation of the agreement. Harnage had a right under this provision, to the pillow and sneakers if they were Medically necessary OR otherwise "justified". Id.

Instead of applying these standards in good faith, at least one of the doctors predetermined that it would be proper if he "tried to rule out", Harnage for even the diabetic specialty shoes. (see, A168:7-8) This itself demonstrates the bad faith intent of the "evaluations" and provides sufficient grounds upon which to find a breach. Moreover, that both Valletta or Ruiz failed to apply the "justifications" standard, and refused consent without the proper information, and without a reasonable basis; precisely because the state never informed the doctors of an agreement, breaches the good faith of the agreement.

Within the Second Circuit, when a contract, such as the Settlement Agreement, contains a provision that approval cannot be unreasonably withheld, any withholding of consent is evaluated on an "objective" basis that considers "what would be acceptable from the viewpoint of a reasonable person." IGT vs. High5Games, LLC., 380 F.Supp.3d 390, 400 (S.D.N.Y. 2019). Where there is no sound basis for a decision to withhold approval, courts in this circuit order that approval be given or deemed given. See, e.g., Brown vs Nationscredit commercial, No. 3:99-CV-592 (EBB), 2000 WL 888507, at *4 (D. Conn, June 23, 2000). Defendants have offered no reasonable basis upon which they denied approval, because they never considered regular sneakers. The basis for the denial of protective "diabetic footwear", was given as, that Harnage had not yet, suffered any injury or amputations!

A party "acts arbitrarily and therefore in violation of the consent clause" when it refuses approval "without fair, solid and substantial cause or reason." Buck Consultants Inc., vs Glenpointe Assocs., No. CIV A 03-454 JLL, 2004 WL 5370571, at *5 (DNJ), July 23, 2004); see also, Dalton v. Educational Testing service, 87 N.Y.2d 384, 389 (1995)(where a contract requires approval, "this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion.") It is unreasonable to withhold approval based on a snap judgment or preconceived determinations without taking relevant information into account or after failing to learn pertinent facts through investigation. Amber Ref., Inc., vs Occidental Oil & Gas Co., 961 F.2d 225, 234 (Temp. Emer. Ct. App. 1992)(finding withholding approval unreasonable where party failed to consider numerous relevant factors and made no investigation to determine key facts). Moreover, it is not reasonable to withhold approval merely because of vague notions of

appropriateness, without specific supporting basis. McCoy vs. Belmont, No. 3:85-cv-465 (EBB), 2007 WL 2736020, at *18 (D. Conn. July 10, 2007), aff'd sub nom. McCoy ex. rel. McCoy v. Belmont, No. 07-3403-cv, 2008 WL 2951954 (2d Cir. July 30, 2008) (holding party in contempt for unreasonably refusing consent where the only reason given for withholding approval of hiring two individuals was that she "didn't think they were appropriate".).

The evidence at trial showed that there existed many known reasons or justifications warranting approval of the sneakers and pillow under the agreement. As to the sneakers, Valletta and Ruiz testified they knew Harnage has diabetes. (A110:19; A225:7-23) Individuals with diabetes are particularly susceptible to foot injuries, that include amputations. (A114:8-A115:13; A227:2-12). Dr. Ruiz observed, in 2019, that Harnage's pair of sneakers had soles that were worn down "[t]he whole way from the heel down". (A119:10) (see, also A184:20-A185:10) ("objection... we do not necessarily disagree with the extent to which Mr. Harnage has described any disrepair.") Harnage bought the Reeboks nearly 9 years ago and has been wearing them most every day, for at least five (5) hours per day; since 2012. (A181:16-A182:2)

Harnage experiences "burning" and "tingling" in his feet, which is made worse wearing the Reeboks. (A172:24-A173:5) In fact, he described having to wear the deteriorated Reeboks as feeling "like walking on rocks". (A172:24-A173:5) Harnage is indigent and cannot purchase new sneakers from the prison commissary. Any money he receives - including the funds he received under the agreement - is automatically captured to pay for unrelated liabilities. (A214:22-A215:15) Obtaining sneakers by mail

is the only option available to him, but doing so requires the special permission or approval bargained for in the agreement. (A259:13 - A261:11). The state would provide free shoes to indigent inmates, but the evidence showed those are a poor choice for Harnage, due to his diabetes, because they are "very uncomfortable", have no cushioning, and create an extremely high risk of blisters, and other diabetic foot issues; including amputations. (A186:1-14; A189:20 - A190:9) These facts, provide ample "justification" to approve Harnage to obtain regular sneakers by mail, consistent with the bargained for intent of the settlement agreement.

As to a second pillow, Dr. Ruiz testified that a second pillow "might have provided some comfort and relief" to Harnage. (A154:24 - A155:1). Harnage's X-rays showed "mild degenerative disease, which is basically arthritis, in his lumbar area". (A125:6-7) Harnage suffers from chronic hip and back pain, which is not fully relieved, to a bearable level; by his prescribed medications. (A174:3-17) He also suffers congestion that affects his ability to sleep. (A174:24-A175:8) Both Valletta and Ruiz knew Harnage has a history of chronic pain in his back and hips and suffers from congestion and allergies. (A135:14-A135:25). And, both doctors were aware that Harnage was prescribed medicines to alleviate pain in his back and reduce congestion. (A136:1-15; A139:16 - A140:14) It is not advisable that Harnage receive more pain medications because the doctors recognize that "overtreating patients with medications and other things can be potentially devastating". (A156:21-22) "[T]he reason we had such an opiate problem is people were getting too much medication, which is the other side of pain control." (A157:25-A158:4). Any of these reasons alone were sufficient "justification" for the doctors to grant the approval. A second pillow would provide Harnage significant

comfort, back or body support, a more comfortable body alignment, and help in easing breathing distress at night by elevating Harnage's head. Had the state and its doctors been following the standards set out in the agreement, they would have found ample justifications for the approvals.

Indeed, the state doctors admitted that they had no medical reason for stopping Harnage from obtaining a pillow and sneakers. For example, Ruiz acknowledged that a pillow was "not medically contraindicated" (A155:5-9). He has "**no medical opinion**" on whether Harnage should be able to use his new sneakers. (A141:14-22)(emphasis added). Dr. Ruiz even admitted that there is "no medical reason to say someone cannot get a new pair of sneakers." (A144:4-7)(emphasis added).

In addition, the doctors failed to reasonably investigate or learn relevant facts. For example, Valletta wrote in his notes that he would order X-rays before deciding whether to approve the promises related to a pillow. But, the approval was withheld before he even looked at those X-ray results (A244:23-25); (Joint stipulation, ECF 234-1, pp 12-13). Thus, he withheld approval without knowing the condition of Harnage's spine and hip. For his part, Ruiz did not know or ask Harnage how old his sneakers were, how often he wore them, or how many hours per day he wore them. (A138:25-A139:10). Yet, the doctors withheld the approvals without having any medical reason to deny Harnage the promised items.

The evidence clearly shows approval was unreasonably withheld, and the court below was clearly erroneous in its conclusions.

3. The state Violated The Implied Covenant of Good Faith And Fair Dealing Inherent In Any Settlement Agreement When Its Failure To Inform The Decision Maker Prevented Execution of A Material Term.

"[I]t is axiomatic that the... duty of good faith and fair dealing is a covenant implied into a contract or contractual relationship." Rafalko v. University of New Haven, 129 Conn. App. 44, 51 (2011). The duty of good faith is "a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended..." PSE Consulting, Inc. vs Frank Mercede & sons, Inc., 267 Conn. 279, 302 (2004).

Perhaps the most common - and most important - application of the implied covenant is in cases where, as here, "what is in dispute is a party's discretionary application or interpretation of a contract term." Geysen vs Securitas Sec. Services USA, Inc., 322 Conn 385, 399 (2016); accord Landry vs Spitz, 102 Conn. App. 34, 47 (2007)("the claim [that the covenant has been breached] must be tied to an alleged breach of a specific contract term, often one that allows for discretion on the part of the party alleged to have violated the duty"). Bad-faith conduct may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain." Geysen, 322 Conn. at 400. "[W]hen one party performs the contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, there is a breach of the covenant of good faith and fair dealing." Landry, 102 Conn App at 44.

The state's conduct in this action, amounts to exactly the sort of unjustified application of a discretionary contractual responsibility that is "unfaithful

to the purpose" of the settlement agreement and contrary to Harnage's "justified expectations". See, id. The state in this case, promised Harnage that he would be permitted to obtain a second pillow and regular sneakers, subject to approval that would not be unreasonably withheld. But, according to the defendants, the joke was on Harnage, because no state doctor would ever approve those items, because the state failed to tell they were authorized to approve the items for Harnage. Defendants take the position that in order to obtain approval, Harnage had to demonstrate a medical need for the items. And, the state's doctors testified that they would never conclude that an inmate has a medical need for comfort items like a second pillow or new, regular sneakers. This perception and position makes it impossible for Harnage to get approval for the items he was promised.

The testimony establishes that the state doctors never would approve a second pillow or regular sneakers as "medically necessary". For example, the doctors testified that there was "no reason to even entertain" the request for approval because "[d]octors don't prescribe sneakers... No doctor is going to say this is a must...". (A242:13-21; A140:1-4) Ruiz specifically testified that: "[i]f [Harnage] did not require medical shoes, then there's nothing [he's] going to offer him in terms of sneakers." (A142:2-4). Valletta testified that it was not his role to determine whether obtaining new sneakers would reduce pain or increase comfort. (A241:19 - A242:8), or whether a second pillow could increase comfort (A243:5-8). Regular sneakers are not a "specialty medical equipment" (A242:13-21). In fact, Valletta chose not to consider "whether there would be a benefit from just a new pair of regular shoes." (A242:22-25). Essentially, the doctors testified that they would not approve requests related to regular sneakers or a pillow because

dealing with such everyday non-medical items is not their role. Yet, the state made it the doctor's role to sign-off on the non-medical requests, without telling the doctors of their role in the agreement. If that is not an "evasion of the spirit of the bargain" and Harnage's justified expectations, then nothing is, such an evasion. See, Geysen, 322 Conn. at 408.

In addition, Valletta and Ruiz refused to approve the "diabetic footwear", (because they never considered regular sneakers at all); and the second pillow, based on a standard of strict medical necessity that is contrary to the agreement's text and would render it's terms meaningless. The testimony in this case established that any inmate at all can see a doctor and obtain a specialty medical device or item, at state expense; if the item is a medical necessity. Harnage certainly did not need to bargain for this right! Ruiz testified that if any inmate at all, with or without a settlement agreement; writes to be seen by a doctor, they will be seen. (A131:23-A132:6). And, if any inmate at all has a "medical necessity" for a particular item, the state doctors will do their best to get the inmate what he needs (A200:10-24). This standard applies to every inmate, with or without a settlement agreement. The state's position in this case, and the findings of the court below; thus turns section 3A(iv) of the agreement into a dead letter - an empty, illusory promise to provide, nor do, nothing more than what existing prison standards and practices already require.

But, that is not what §3A(iv) of the agreement intended. It was intended to create a different standard and process, and to provide Harnage with something more than what is already available to every other

the parties intended the word "justification" to have a meaning different than "medical need". (A200:22 – A201:1) However, the defendants have been allowed to evade the spirit of that bargain, by simply not telling the decision makers.

The evidence in this case establishes that the state doctors applied the wrong standard. Ruiz testified that he applied the same standard to Harnage, in relation to the diabatic footwear as he "would for any other inmate." (A133:3-8; A133:14-22). He also applied the same standard as to the second pillow, that he would have as to any other inmate requesting an item. (A238:3 – A238:18). In fact, because neither doctor was even aware that Harnage had entered a settlement agreement or that any promises had been made to Harnage, they could not apply a different standard than that which they routinely are authorized. That routine authorization, does not allow the doctors to approve mailed in regular sneakers, or a second pillow. Unless, of course, a settlement agreement with the state grants such authority.

In other words, by not telling the doctors, the state interpreted the agreement to mean that Harnage got nothing that was not already available to any other inmate, which has no value to an agreement. The Courts should have rejected the defendants efforts to drain the state's obligations under §3A(iv) of all meaning, and it should have rejected the defendants release and waiver defenses. However, instead, the courts clearly erroneous findings of fact and conclusions of the defendants obligations under the agreement, including that of informing the doctors of the standards to

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"It is well settled that a release, being a contract whereby a party abandons a claim to a person against whom that claim exists, is subject to rule governing the construction of contracts ... The intention of the parties, therefore, controls the scope and effect of the release, and this intent is discerned from the language used and the circumstances of the transaction." Embalmers' Supply Co. v. Glannetti, 103 Conn. App. 20, 42-43 (2007)(internal quotation marks and citations omitted). "Under contract law, it is well settled that a material breach by one party discharges the other party's subsequent duty to perform on the contract." Weiss vs Smulders, 313 Conn. 227, 263 (2014)[2] This same principle means that releases in a settlement agreement do not become operational until the other party performs the obligations that constitute the consideration for the releases. Bernstein vs Nemerger, 213 Conn. 665, 672-73 (1990)("[A]n uncured material failure of performance by one contracting party" discharges obligations or burdens upon the other party.).

FN2: The defendants here, as third party beneficiaries of the settlement agreement, cannot enforce the releases if the state (the party that signed the settlement agreement) would not be able to do so due to its breach of contract. Chestnut Hill Dev. Corp. vs Otis Elevator Co., 653 F. supp. 927, 931 (D. Mass. 1987)("where ... a third party beneficiary seeks to enforce a contract, it stands in the shoes of the promisee and is subject to any of the defenses available against the promisee."); 17B C.J.S. Contracts § 853 ("The rights of a third person to enforce a contract made for his or her benefit depend on its terms, and are no greater than if it were being enforced between enforced between the original parties. The third person is in no

In addition to being established law that a party breaching a settlement agreement cannot rely on a release in that same settlement, the language of the settlement agreement, in this action, also supports the conclusion that the releases have no effect until the state performs, in good faith, its obligations. The release provisions in the settlement agreement were made "in consideration of the agreements by the state set forth in section 3(A)". (See, A320, Settlement Agreement § 3(B)). Those agreements that are explicitly a consideration for the releases include the promises that Hannage "shall" be permitted to obtain a pillow and sneakers.[3] (A320 § 3(A); A206:19-A207&10).

There is no merit to any claim that the release became effective upon delivery of the settlement payment, solely. That reading ignores the broader introductory language of section 3(B) expressly stating that the releases are made "in consideration of the agreements by the state set forth in section 3(A)." A settlement agreement containing a release "must be read as a whole rather than isolating a certain phrase, sentence, or section of the agreement." Bazan v. State Farm Lloyds, No: 7:17-CV-00402, 2018 WL 1518552, at *3 (S.D. Tex. Mar. 28, 2018). It also must be read in accord with the duty of good faith implicit in all contracts. The courts holding

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better position than the contracting party through whom he or she claims.").

FN3: Essentially, and in effect, the courts decision below, has opened the door to allow the state of Connecticut to freely enter into settlement agreements with a similar clause, perform on that clause and void any and all of its other obligations under the agreement.

below, is such that the state is free to pick and choose one promise to perform while ignoring the other promises it made and still receive all of the benefits of the settlement agreement. That is not a reasonable interpretation. In that line of thinking, the state would have incentive to promise inmates anything under the sun to induce them into settlements, evade their obligations, and be rewarded by enjoyment of the release. Harnage had no duty to provide a stipulation of dismissal, and the releases are not effective, until the state's breach of the settlement agreement is cured.

Therefore, the courts conclusions of law and fact were clearly erroneous and plaintiff prays this court grant his petition to define clear boundaries of any settlement agreements that end federal litigation.

III. Conclusion:

When inmates first arrive in prison, they are allowed to keep their own sneakers from outside the prison as long as the sneakers meet D.O.C. guidelines.[4] For instance, arriving inmates are permitted sneakers from outside that are black, gray, or white; cost around $100.00, and do not have steel toes. Once those initial sneakers wear out, inmates with money in their Inmate

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FN4: The D.O.C. has a list of requirements for sneakers that may be worn by inmates. The D.O.C. Administrative Directive 6.10 (available at https://portal.ct.gov/DOC/AD/AD-Chapter-6). For example, the sneakers must be black, white or gray, cost approximately $100.00 or less, and cannot have steel toes. The settlement agreement's reference to "approved" sneakers (A320) is in relation to meeting this directive (A193-A198). Harnage's sneakers being held by the D.O.C. meet this directive.

Trust Accounts are allowed to purchase new sneakers from the D.O.C. commissary that meet the same guidelines. Harnage has no money in his trust account and therefore cannot buy sneakers from the D.O.C. commissary. In the settlement agreement, Harnage bargained for and was promised permission to obtain substantially the same sneakers by mail instead of having to purchase sneakers from the state's commissary. Once the settlement agreement was executed, Harnage arranged for a friend to mail him sneakers - sneakers that comply with the D.O.C. guidelines.

Instead of allowing Harnage to have the sneakers that were mailed to him and that he was promised, the D.O.C. took the sneakers into custody and has refused to hand them over to Harnage. According to the state's logic, if Harnage were new to prison, he could bring his sneakers with him; if he had money in his trust account, he could buy essentially the same sneakers from the commissary; but, if the state promises that he can obtain sneakers, and he makes arrangements to do so, the D.O.C. doctors can arbitrarily refuse to let Harnage, have the same sneakers any other inmate could keep or buy, with or without a medical approval or with or without a settlement agreement. That, is patently unreasonable!

For all these reasons herein above, plaintiff prays this court grant this petition, and upon briefing, reverse with proper direction.

By _____
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REASONS FOR GRANTING THE PETITION

The court should grant this petition to safeguard the judicial interests in preservation of the integrity of pretrial resolutions between the states and its citizens, including inmates. To encourage the viability of good faith in settlement Agreements, and the enforcability of those agreements when the state attempts to evade it's obligations and decides to pick and choose which of its promises and commitments to keep. The court should grant this petition to strive to enact clear standards for the acceptance of testimony properly presented and the findings of facts essential thereto.

Despite Ruiz's clear testimony that he had "No medical opinion" (A141:14-22) on whether or not Harnage could obtain "new sneakers", consistent with his Settlement Agreement; and Ruiz's insistence that he never did or would consider Harnage's need for "regular sneakers" (A121:12-23; A132:7-10; A132:25 - A133:8; A133:25 - A134:15; A140:1-21; A141:24 - A142:4; A158:22-25; A168:7-8), because he did not know there existed an agreement authorizing such a consideration (A133:9-11); the court still concluded that in "Dr. Ruiz's opinion, based on his medical judgment, was that the plaintiff... had no medical need for new, non-specialty sneakers or footwear,..." (A90). This is in clear contrast to the doctor's testimony.

Ruiz testified clearly that he <u>ONLY</u> considered Harnage for "specialty footwear", or "diabetic footwear" (A121:12-23)(A132:7-10)(A132:25-A133:8)(A133:25-A134:15)(A140:1-21)(A141:24-A142:4)(A158:22-25)(A168:7-8), which Ruiz "tried to rule out" (A168:7-8). In fact, Ruiz testified "there would be no medical reason to say someone cannot get a new pair of sneakers..." (A143:17-A144:7).

The courts clearly erroneous findings have allowed the state to evade its obligations and import bad faith into the settlement agreement. Further, portions of Ruiz's testimony actually appears to support the grant of approval for regular sneakers saying Harnage "can purchase regular sneakers" (A140:1-21) because "... regular sneakers is what he would require." (A133:25 - A134:15) However, the state still refused to grant the approvals it promised under the agreement. The courts findings, aided the state in that unreasonably withheld approvals.

This court should protect the interests in pretrial resolutions being entered into and implemented in good faith under a Covenant of fair dealing, by granting this petition.

Certification of Service

I hereby declare under penalty of perjury that the foregoing petition and attached appendix was deposited into my prison mail system on 9/29/21 Re-served 11/17/21 with postage to be paid by the state, and copies mailed to:

AAG, Stephen Finucane, 110 Sherman St, Hartford, CT. 06105

AAG, James W. Donahue, 110 Sherman St, Hartford, CT. 06105

By Plaintiff - Appellant
James A. Harnage