

No. 22-7547

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

MAY - 5 2023

OFFICE OF THE CLERK

Carl Lee Ashley

— PETITIONER

(Your Name)

vs.

Mary Boayue, et al

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carl Lee Ashley #136985

(Your Name)

141 First Street, Lakeland Correctional Facility

(Address)

Coldwater, MI 49036

(City, State, Zip Code)

unknown

(Phone Number)

QUESTION(S) PRESENTED

DID THE COURT OF APPEALS ERR IN FINDING THAT PETITIONER COULD NOT ESTABLISH THE OBJECTIVE PRONG OF HIS EIGHTH AMENDMENT CLAIMS.

LIST OF PARTIES

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

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

Sirena Landfair
Lana McCarthy
]Kimberly Schaub
David Brazee
Don Spaulding
Mary Arends

RELATED CASES

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

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

OPINIONS BELOW

For cases from **federal courts**:

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

reported at No: 22-1295 (6th Cir 2023); or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

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

reported at No: 2:19-cv-10484 (E.D. Mich 2021); or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

For cases from **state courts**:

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

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[] is unpublished.

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

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[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 1/10/2023.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 2/06/2023, and a copy of the order denying rehearing appears at Appendix B.

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

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

For cases from **state courts**:

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment right to be free from cruel and unusual punishment.

NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARL LEE ASHLEY - Petitioner,

vs

MARY BOAYUE, et al - Respondents.

REASONS FOR GRANTING
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner (Ashley), was diagnosed with bladder cancer, and on January 26, 2016, underwent surgery for a procedure which is referred to as cystoproctectomy (surgical removal of the bladder and prostate). After recovery, Ashley was discharged from the University of Michigan (U of M) Hospital on January 29, 2016. Ashley's treating Urologist (Dr. Hafez), issued a treatment plan which included monthly urostomy supplies: 20 each Hollister New Image Skin Barrier (Flat shaped) with Floating Flange and Tape Border; 20 each Hollister New Image Urostomy Pouch Transparent, Lock and Roll; Coloplast leg Bag; and Night Drainage Bag. (ECF No. 1-1, PageID.52).

On February 10, 2016, Ashley met with Defendant Boayue and discussed the treatment plan of Dr. Hafez related specifically to "urostomy supplies, pants with belt loop and/or stoma guard, detergent and decrystallizer for overflow urine bag, odor stop spray." (ECF No. 73-2, PageID.802-803).

The Flat-shaped skin barriers ordered by Dr. Hafez on January 29, 2016, were determined by Dr. Hafez to be ineffective in controlling urine leakage and on February 24, 2016, Dr. Hafez, on a trial basis, replaced the ineffective Flat-shaped skin barriers with Convex-shaped skin barriers to assist in controlling urine leakage. (ECF No. 73-2, PageID.833, 944). The Convex-shaped skin barriers were effective in controlling urine leakage, and on March 10, 2016, Dr. Hafez issued a new treatment plan and ordered 20 each Hollister New Image Skin Barriers, Convex-shaped; and, 20 each Urostomy Pouches, to be provided monthly. The other medically prescribed urostomy supplies ordered on January 29, 2016, remained the same. (ECF No. 1-1, PageID.64).

On 3/17/2016, Ashley was seen by Defendant Boayue on a "Provider Visit-Scheduled" for "evaluation of changing urostomy supply concerns and to discontinue snack detail". Under "Assessment/Plan: Patient urostomy supplies were reviewed and reconciled with current supplies and U of M orders." (ECF No. 73-2, PageID.841).

Nine (9) days later, on 3/26/2016, Ashley sent a Health Care Request (HCR) requesting the Convex-shaped skin barriers and the status of the order that was issued by Dr. Hafez on 3/10/2016. (ECF No. 1-1, PageID.64). This HCR was forwarded to Defendant McCarthy, and she did not provide the Convex-shaped skin barriers.

On 4/14/2016, Ashley sent a HCR regarding Convex-shaped skin barriers, leg bags, night drainage bag, and solution to clean the night bag and leg bag, or a schedule for exchange of the old night bag and leg bags to prevent infection. (ECF No. 1-1, PageID.66). This HCR was forwarded to McCarthy. McCarthy did not provide the Convex-shaped skin barriers or the other supplies requested.

On 4/26/2016, Ashley spoke to Defendant Landfair and requested that the Convex-shaped skin barriers be provided. She stated that she could not do that without a Doctor's order. Ashley explained that Dr. Hafez had already ordered the Convex-shaped skin barriers, and Landfair stated that she did not have to follow an outside doctor's orders. (Complaint, page 14, para 54).

Because the Convex-shaped skin barriers were not being provided, Ashley sent a HCR on 4/30/2016, for more of the ineffective Flat-shaped skin barriers because of leakage, and stating "urine eats through the Flat-shaped phalanges and past very quickly." (ECF No. 1-1, PageID.69). Ashley sent HCR's on 7/6/2016, 7/13/2016, 7/19/2016, 7/29/2016, requesting more Flat-shaped skin barriers because he uses them every two days due to leakage. (Id., PageID.95, 102, 107,

110). "[T]hese Flat-shaped phalanges are causing UTI/kidney infections." (Id., PageID.116), and, "These are not the proper shaped phalanges and allows urine to pool at the stoma site causing infections." (Id., PageID.116); and, "... they are not the proper shape, leak easily, and cause skin irritations and UTI/kidney infections." (Id., PageID.120). Kite response of 8/4/2016, states "Because this seems to be a continuing issue for you I am forwarding your concerns and request to the Medical Provider [Boayue] and HUM [McCarthy] for review of the amount of supplies you are getting and using. Perhaps they will be able to increase the amount or obtain the Convex-shaped bags as ordered." (Id., PageID.112). Between the date of the treatment plan issued by Dr. Hafez (March 10, 2016), and August 15, 2016 (5 months), there were no orders placed by Boayue, Landfair, or McCarthy for Convex-shaped skin barriers. (ECF No. 87, PageID.1266).

On June 30, 2016, approximately 2½ months after the Convex-skin barriers were ordered by Dr. Hafez, Dr. Hafez stated:

"He is changing his ostomy appliance every 2 days. He has had an issue with obtaining the Convex-shaped phalange previously recommended by our ostomy RN to help alleviate leakage issues. He has been using what is available to him which includes a Flat-shaped phalange and paste. He notes that he can spring unexpected leakage during the night. Our ostomy RN did speak with the PA [Boayue] at the prison and re-faxed the order for appropriate supplies and possible alternatives. He had a UTI 2 months ago." (ECF No. 1, PageID.85-86).

In the "PLAN" section of the 6/30/2016 Memorandum, Dr. Hafez's treatment plan included:

#7.

Recommendations regarding ostomy supplies were sent back with Mr. Ashley for Corizon Michigan Department of Corrections to assist him in obtaining the correct ostomy supplies in order to prevent unexpected leakage and peristomal irritation. He requires a Convex-shape 2 piece Hollister ostomy pouching system. Our ostomy RN, Jane Theriault had previously addressed this issue with Mary [Boayue], PA. She mentioned that the Hollister Convex-

shaped barriers were on order but they were awaiting delivery. In the interim, the patient must use what is available at the prison. Jane re-faxed orders along with a list of other possible pouch substitutes patient could used." (ECF No. 1-1, PageID.92).

Also on June 30, 2016, U of M Ostomy Department sent an Authorization letter to Boayue which stated "Ostomy appliance issues w/peristomal irritation. Needs Convex-shaped 2 piece Hollister Pouching System per Ostomy RN recommendations." (ECF No. 73-2, PageID.928).

Also, in the "PLAN" section of the 6/30/2016 Memorandum of Dr. Hafez, it states: "#6. Consider cranberry tablets or cranberry juice daily for urine acidification for UTI prophylaxis." (ECF No. 1-1, PageID.92). Ashley sent numerous HCR's requesting cranberry juice or tablets to "help fight off UTI/kidney infections." (Id., PageID.97); "Cranberry tablets could reduce the chances of developing future UTI's. Please order cranberry tablets." (Id., PageID.101); (Requesting cranberry tablets as ordered by Dr. Hafez). (Id., PageID.108). Cranberry tablets or cranberry juice were never provided to Ashley while under the care of Boayue, Landfair, and McCarthy.

On August 15, 2016, Boayue acknowledged that "Ashley is experiencing breakdown at the site of the ostomy with inappropriate leakage through [] the wafer connecting the ostomy appliance. He is currently awaiting the correct ostomy appliance and supplies that have been ordered." (ECF No. 73-2, PageID.911 (Quoted at ECF No. 87, PageID.1262)).

LEG/NIGHT DRAINAGE BAGS

Ashley was provided with one leg bag and one night drainage bag by U of M Hospital upon discharge on 1/29/2016. Although Ashley's treatment plan of 1/29/2016 and 3/10/2016 both ordered one leg bag and one night drainage bag per month, Ashley was required to re-use these initial bags received from U of M

from 1/29/2016 through August 15, 2016, without replacement, and without any cleaning solutions for the bags in his possession. U of M Nursing Services Instructions stated that if cleaning solution (vinegar) was not provided, "He may need to trade out his night drain pouch/leg pouch more frequently." (ECF No. 73-2, PageID.967). These mandated leg/night drainage bags were not provided until 7 months after they were ordered by Dr. Hafez. There were no cleaning solutions provided by Boayue, Landfair, or McCarthy for the leg/night bags for the entire time Ashley was at their facility.

URINARY TRACT INFECTIONS

On 5/1/2016, 7/3/2016, 7/6/2016, 7/9/2016, 7/27/2016, 8/24/2016, and 9/12/2016, Ashley sent HCR's stating, in part: "I am having back pains on both sides of my lower back, right where the kidneys are. My urine also has a stronger odor, and I felt a little nauseous this morning." (ECF No. 1-1, PageID.72, 94,96, 99, 109, 121, 131). Kite response of 9/13/2016, states "You are already scheduled to follow up for this health problem with your care provider [Boayue] approx 9/15/2016." (Id., PageID.132). This appointment on 9/15/2016 with Boayue was cancelled for unknown reasons.

On July 16, 2016, Ashley filed a grievance stating:

On 7/12/2016, I was diagnosed with a UTI/kidney infection. This infection has been caused by the failure of PA Boayue, HUM McCarthy, and RN Landfair. Their failure/refusal to provide the proper urostomy flange has allowed the urine to pool around the stoma site. The pooling of urine allows bacteria to grow, infect the ileal conduit, ureters, and the kidneys, weakness due to infection and being nauseous, and could possibly cause kidney damage." (JCF/2016/07/1466/12D3 (ECF No. 1-1, PageID.103).

On September 21, 2016, Ashley had an appointment with Boayue for "result of U/A [] and confirmation of received urostomy supplies." (ECF No. 72-3,

PageID.727); (ECF No. 87, PageID.1263)). Boayue asked Ashley during this appointment what his symptoms were regarding the on-going urinary tract infection. Ashley explained that, since early July 2016, he has had a very strong odor in his urine, back pain over both kidneys, feeling nauseous, fatigued all the time, sharp pain under the stoma site, vomited once "about three weeks ago", and had blood in his urine "about four weeks ago." Boayue stated that she did not believe Ashley had a kidney infection, did not believe he was having pain over the kidneys, did not believe he vomited three weeks ago, and refused to provide any further treatment for those symptoms.

On 3/20/2017, approximately seven months after Ashley was transferred from CCF where he was having leakage, UTI, and skin irritation problems from 2/10/2016 through 9/27/2016, a CT Scan was completed at Mercy Health Muskegon. This CT Scan was evaluated by Daniel C. Vickers, DO, Radiology Department of Mercy Health Muskegon. Under "Solid Organs", the report stated in part "very short segment of the right distal ureter nonopacification, otherwise the right ureter is normal. The left proximal and his ureter is normal. Unfortunately, a slightly longer segment of the left distal ureter is not opacified precluding its accurate evaluation." (ECF No. 1-1, PageID.47-48). (Non-opacification is caused by scar tissue in the ureters. The scar tissue is caused by infection, and the scarred tissue does not allow for proper absorption of the contrast dye used in CT Scans.).

On 2/26/2021, Ashley was advised by his then-Medical Provider at the Lakeland Correctional Facility that he has Stage III Kidney Disease. "Advised pt. has stage 3 kidney disease CRetaine 1.51 and eGFR of 49. He has had elevated renal functions for some time." (ECF No. 79, "Plaintiff's Response to Defendant's Motion for Summary Judgment", Exhibit A-1 thru A-4, and, Exhibit B-1 to B-2).

Stage III Kidney Disease has a eGFR (estimated glomerular filtration rate) between 30 and 59. (kidneyfund.org).

BELT LOOP PANTS

On February 14, 2017, Dr. Decker developed a treatment plan and issued an order (Special Accommodation Notice (SAN)) for belt loop pants. (ECF No. 1-1, PageID.139). MCF Defendants (Schaub, Brazee, Spaulding, and Arends) refused to provide belt loop pants that were proper fitting. MDOC Policy Directive outlines the ministerial duty of these Defendants, in that, when their Quartermaster inventory does not have the clothing item needed, and it cannot be provided by Michigan State Industries within 30 calendar days, the item "shall be immediately ordered from another source.", which they did not do. Pants were eventually ordered as per policy and delivered after an 11 month delay in complying with the treatment plan and order of Dr. Decker for belt loop pants. During this 11 month period, Ashley was diagnosed and treated with antibiotics for eight (8) urinary tract infections.

More specific facts are provided in the following arguments.

CONCISE ARGUMENT

A. THE SIXTH CIRCUIT ERRED BY CONCLUDING THAT PETITIONER COULD NOT ESTABLISH THE OBJECTIVE PRONG OF HIS EIGHTH AMENDMENT CLAIMS.

The Eighth Amendment jurisprudence clearly establishes that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'" that is violative of the Constitution. Estelle v Gamble, 429 US 97, 104, 97 S Ct 285, 50 L Ed 2d 251 (1976). For this reason, "deliberate indifference to a prisoner's serious illness or injury states a cause of action under §1983." Id., at 105. A prisoner bringing a claim of deliberate indifference must meet two requirements to succeed. See Farmer v Brennan, 511 US 825, 834, 114 S Ct 1970, 128 L Ed 2d 811 (1994). The first requirement -- the objective factor - requires that the alleged deprivation be of a sufficiently serious need. Id. As to the objective component, a serious medical need for medical care, Farmer requires only that "an inmate show that he is incarcerated under conditions posing a substantial risk of serious harm;" 511 US at 834, so as to avoid the "unnecessary and wanton infliction of pain." Id.

As this Court has held, the test for deliberate indifference is whether there exists a "substantial risk of serious harm," Farmer, 511 US at 834, and does not require actual harm to be suffered. See also Smith v Carpenter, 316 F2d 178, 189, n 15 (2d Cir 2003) (observing that "actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation," and declining to adopt a per se rule that such injury is required) (citing, in part, Helling v McKinney, 509 US 25, 35, 113 S Ct 2475, 125 L Ed 2d 22 (1993)). Under Helling, a serious medical complaint is one that "is sure or very likely to cause serious illness and needless suffering," 509 US at 33.

The Magistrate in this case (Ashley v Boayue, 2:19-cv-10484, E.D. Mich) issued his Report and Recommendation (R&R) on 11/22/2021, (ECF No.87), recommending that summary judgment be granted to all Defendants in this case. The Court stated "Notably, during the October 27th hearing, the MDOC Defendants cited to the Sixth Circuit's recently published decision in Phillips v Tangilag, 14 F4th 524 (6th Cir 2021), as controlling in this case. After careful review, the Court agrees that MDOC Defendants and Boayue are entitled to summary judgment under Phillips." (ECF No. 87, PageID.1265).

The R&R quoted Phillips regarding the objective component of the deliberate indifference standard:

"To prove [an] objectively serious harm in the health context, prisoners must first establish that they have 'serious medical needs.' They can do so, for example, by showing that a doctor has diagnosed a condition as requiring treatment or that the prisoner has an obvious problem that any layperson would agree necessitates care. A serious medical need alone can satisfy this objective element if doctors effectively provide no care for it. More frequently, doctors provide some care and prisoners challenge their treatment choices as inadequate. To establish the objective element in this common situation, prisoners must show more." (ECF No. 87, PageID.1265)(quoting Phillips, 14 F4th at 534-36)).

The district court then went on to find that:

"Upon thorough review of the record, the Court finds that Ashley cannot 'get past the objective stage' of his deliberate indifference claims 'because he lacks any expert medical evidence showing that he received grossly inadequate care' for his ostomy needs based on defendants' handling of flanges, drainage bags, belt loop pants, and UTIs. Id. at 536.) (ECF No. 87, PageID.1268).

Ashley appealed the district court decision to the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) (Ashley v Boayue, Case no: 22-1295) claiming that the district court abused it's discretion and applied the wrong legal standard.

Ashley argued that in Phillips v Tangilag, 14 F4th 524, 530-531 (6th Cir 2021), Phillips complained of a mass on his leg. Dr. Tangilag (prison doctor) ordered an ultrasound which revealed "soft tissue mass" on his calf "with good blood flow" but "no definite clearcut margins[.]" This was inconclusive and a Ct Scan was ordered. A "fluid collection" was found in the location of the "plantaris muscle", with no evidence of bone fracture or lesion and the "visualized tendons and ligaments appear[ed] to be intact." Phillips was then evaluated by a Specialist who agreed with the other doctors that the plantaris was ruptured. Phillips was informed that the surgeons do not typically fix this type of rupture by surgically repairing the tendon because people do not need their plantaris to function normally. Dr. Tangilag informed Phillips that she had spoken with the Specialist and they both decided against the surgical route because the hematoma was going away. Phillips wanted more. Because Phillips did not have a diagnosis from a physician or a Specialist mandating surgery, he, appropriately, "in [that] common situation [no diagnosis from a physician mandating treatment], [Phillips] must show more" to meet the objective prong. Phillips, 14 F4th at 534-536.

In Ashley's case there was a diagnosis from a physician mandating treatment. Dr. Hafez developed a treatment plan for Convex-shaped skin barriers to replace the ineffective Flat-shaped skin barriers being used. Replacing the Flat-shaped skin barrier was of such importance that Dr. Hafez and Jane Theriault (Ostomy Nurse) contacted Defendant Boayue and questioned why the Convex-shaped skin barriers had not been provided as ordered. Dr. Hafez emphasized that the Convex-shaped skin barriers were the appropriate or "correct" treatment to prevent "unexpected leakage and peristomal irritation." (ECF No. 1, PageID.92). Jane Theriault also contacted Boayue at the prison and emphasized the importance of

the Convex-shaped skin barriers. Theriault suggested two other brands of the Convex-shape that could be used to assure that Ashley received the Convex-shaped skin barriers. (*Id.* PageID.92).

Ashley had two treatment plans from Dr. Hafez for ostomy supplies for aftercare of his ostomy. The district court agreed that the treatment plan was not followed "... the parties do not dispute that U of M Dr. Hafez prescribed certain supplies for ostomy care ... that were not promptly ordered and issued to him as was specifically prescribed." (ECF No. 87, PageID.1266). Because Ashley has this diagnosis mandating treatment, the "common situation" in Phillips does not apply to Ashley's circumstances.

The district court held that Ashley "cannot 'get past the objective stage' of his deliberate indifference claims 'because he lacks any expert medical evidence' ...". (ECF No. 87, PageID.1267-68). The Court declined "to separately consider [qualified immunity]." (ECF No. 87, PageID.1254), and did not "consider the subjective component." (*Id.* PageID.1275).

Therefore, Ashley only addresses the objective component of his Eighth Amendment claims in this Petition.

B. OBJECTIVE COMPONENT

The objective component "requires the existence of a serious medical need." Broyles v Corr Med Servs, Inc, 478 F App'x 971, 975 (6th Cir 2012). A serious medical need is one that: "has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would recognize the necessity for a doctor's attention." Blackmore v Kalamazoo Cty, 390 F3d 890, 897 (6th Cir 2004)(emphasis in original). An injury is sufficiently serious to satisfy the objective component if a reasonable doctor or patient would find it "important and worthy of comment or treatment;" if it "significantly affects an

individual's daily activities"; or if it's existence causes "chronic and substantial pain." Sarah v Thompson, 109 F App'x 770, 771 (6th Cir 2004).

Other district and circuit courts agree that an ostomy is sufficient to establish the serious medical need, and that an ostomy itself satisfies the criteria for the objective prong of an Eighth Amendment claim.

In Reed v Lackawana Cty, 2019 US Dist LEXIS 16965 (M.D. Penn Sept 30, 2019, * 5, the Court held that "the use of a colostomy can constitute a serious medical need as there are obvious 'risks inherent in a colostomy, including, but not limited to, irritation, infection, and herniation. Without a doubt, a colostomy requires a doctor's attention on occasion and significantly affects an individual's daily activities.'" (citing Williams v Erickson, 962 F Supp 2d 1038, 1042 (N.D. Ill 2013); Jones v Gaetz, 2017 U.S. Dist LEXIS 44590, 2017 WL 1132560, * 3 (S.D. Ill 2017); See Frebee v Cejas, 161 F3d 1 (4th Cir 1998) (unpublished) (alleged need for colostomy bags constitutes serious medical need)).

In Jackson v Corizon, 2022 U.S. Dist LEXIS 61242 (E.D. Mich Mar 31, 2022), the Court stated that the "serious need here is demonstrated by the colostomy itself, which 'even a lay person would recognize as creating a serious medical need for attention.'" (Jackson, * 16 (quoting Baker v Blanchette, 186 F Supp 2d 100, 105 (D. Conn 2001) ("[V]iewing the evidence in a manner most favorable to the plaintiff, a reasonable jury could find that his colostomy constituted a serious medical condition.").

Courts also agree, contrary to the lower courts in this case, that the ostomy itself satisfies the objective prong of a deliberate indifference claim. "This [Ostomy] is sufficient to satisfy the objective prong ...". (Jackson, * 17; (see e.g., Shadrick v Hopkins Cty, Ky, 805 F3d 724, 737 (6th Cir 2015) (the objective

prong was satisfied based on a physician's diagnosis mandating treatment.).

Without a doubt, an ostomy, like Ashley's, requires a doctor's attention on occasion and significantly affects an individual's daily activities. See Williams v. Erickson, 962 F Supp 2d 1038, 1042 (N.D. Ill 2013) (concluding that daily management of a colostomy bag constitutes a serious medical need).

Here, Ashley has alleged an obvious need for medical treatment - Dr. Hafez diagnosed Ashley with a sufficiently serious medical need that mandated treatment with Convex-shaped skin barriers.

Ashley's allegations about Defendants' refusal to follow the prescribed treatment plan is not simply a "dispute ... over the adequacy of the treatment." Ascenzi v. Diaz, 247 F App'x 390, 391 (3rd Cir 2007). On the contrary, Ashley's many requests for Defendants to provide the Convex-shaped skin barriers, cleaning supplies, leg/night drainage bags, and proper fitting belt-loop pants, were "reasonable request[s] for medical treatment", the denial of which "expose[d] [Ashley] to undue suffering or the threat of tangible residual injury." Monmouth Cty Correctional Inst'l Inmates v. Lanzaro, 834 F2d 326, 346-47 (3d Cir 1987) (Emphasis added).

Also, the district court was in error when it stated "it is undisputed that the record contains a litany of evidence demonstrating the extensive care he received throughout his stay at CCF between January and September 20[16]." (ECF No. 87, PageID.1266). The district court in this case focuses entirely on the overall treatment that Ashley received while at CCF under the care of Boayue, Landfair, and McCarthy.

On appeal, the United States Court of Appeals for the Sixth Circuit referenced the "extensive care" Ashley received and stated:

"When there is a disagreement about the provided treatment between a medical provider and the prisoner, in a

situation where the prisoner received extensive care for a medical need" (Order, pg 7) (Emphasis added).

The Court's terminology of "extensive care", is not an accurate reflection of the facts. Ashley is challenging the fact that Dr. Hafez issued a treatment plan on March 10, 2016, and all of the treatment plan by Dr. Hafez was not followed by the CCF Defendants.

To be clear, Ashley's claims in this action are:

1. Defendant's Boayue, Landfair, and McCarthy intentionally interfered with the treatment plan of Dr. Hafez by not providing any treatment with the Convex-shaped Skin Barriers between March 10, 2016, and August 15, 2016.

In fact, there were no Convex-shaped Skin Barriers even ordered until August 2016. "[T]he parties do not dispute that U of M Dr. Hafez prescribed certain supplies for ostomy care ... that were not promptly ordered and issued to him as was specifically prescribed." (ECF No. 87, PageID.1266).

2. Defendant Boayue, Landfair, and McCarthy intentionally interfered with the treatment plan of Dr. Hafez by not providing any treatment with the leg bag and night bag which were ordered on January 29, 2016, until August 15, 2016.

3. Defendant's Boayue, Landfair, and McCarthy intentionally interfered with the treatment plan of Dr. Hafez by not providing any cleaning solutions to decontaminate the one leg and night bags in his possession from January 29, 2016, through September 27, 2016.

4. Defendants' Schaub, Brazee, Spaulding, and Arends intentionally interfered with the treatment plan of Dr. Decker when he diagnosed a serious medical need for belt loop pants to facilitate proper drainage of urine to avoid contamination and infections. Although there were attempts to comply with Dr. Decker's plan, it took eleven months to provide proper fitting belt loop pants that would not cause harm.

From March 10, 2016, through August 15, 2016, Ashley was not provided with the Convex-shaped skin barriers that were ordered by Dr. Hafez on March 10, 2016. Instead, Defendants continued Ashley on the Flat-shaped skin barriers that had been deemed ineffective in controlling the urine leakage which would cause "peristomal irritation." Boayue, Landfair, and McCarthy also interfered with

the treatment plan by not providing any of the ordered leg/night drainage bags from January 29, 2016 through August 15, 2016, and did not provide any cleaning solutions for the entire time Ashley was under their care. This was not "extensive care", this was a failure to fully comply with Dr. Hafez's orders.

MCF Defendants (Schaub, Brazee, Spaulding, Arends) did not comply with Dr. Decker's treatment plan for belt-loop pants for an eleven (11) month period, knowingly exposing Ashley to conditions that could cause substantial injury. (See e.g., Greeno v Daley, 414 F3d 645, 654 (7th Cir 2005) ("the defendants' contention that Greeno's claim fails because he received some treatment overlooks the possibility that the treatment Greeno did receive was 'so blantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate' his condition").

C. TREATMENT PLAN

It is well established in the Sixth Circuit that an incarcerated individual has a "right to adherence to a treatment plan." Murray v Dep't of Corr, 29 F4th 779, 791 (6th Cir 2022). In Richmond v Hug, the Sixth Circuit reversed a grant of summary judgment on qualified immunity and stated that "this Circuit's precedent is clear that neglecting a prisoner's medical need and interrupting a prescribed plan of treatment can constitute a medical violation." 885 F3d at 947-48 (citing Terrance v Northville Reg'l Psychiatric Hosp, 286 F3d 834, 844-45 (6th Cir 2002)).

In Foreman v United States, 2023 US Dist LEXIS 248 (E.D. Mich Feb 14, 2023), * 19, Foreman had an order from a physician for 30 days of rehabilitation treatment of which he received only one day of treatment. Foreman's complaint was not "a disagreement with a 'treatment choice', however. Rather, he complains that prison officials ignored the doctor's 'treatment choice' for non-medical reasons." Id, at * 19

In Watson v Jansen, 2019 U.S. Dist LEXIS 162554 (E.D. Mich Sept 24, 2019), Watson had foot surgery and the Specialist issued specific instructions mandating post-surgery care. The Magistrate in Watson, as did the Magistrate in Ashley's case, recommended granting summary judgment to the defendants because

"... Plaintiff failed to meet the "objective component" of the deliberate indifference analysis because (i) Plaintiff did not show that the 'ongoing treatment' 'was so grossly incompetent as to shock the conscience;'" (Watson, 2019 U.S. Dist LEXIS 162584, * 13).

The Judge in Watson rejected the Magistrate's recommendations, and stated:

"Notably, in this case, Plaintiff need not show that the 'ongoing treatment' 'was so grossly incompetent as to shock the conscience.' As the Sixth Circuit previously explained, such a showing is not required when a plaintiff shows that

the medical need was 'diagnosed by a physician as mandating treatment' and the defendant failed to provide such treatment, Rhinehart v Scutt, 894 F3d 721, 737 (6th Cir 2018) (quoting Blackmore v Kalamazoo County, 390 F3d at 897." Watson, at 20-21.

In Watson, the prisoner was diagnosed by a physician with a condition mandating post-surgery treatment, and those Defendants followed some of the treatment plan, but did not follow all of the treatment plan. See Gil v Reed, 381 F3d 649, 663-64 (7th Cir 2004) (evidence of a prison doctor who ignored a portion of the specialist's treatment plan demonstrated there was a genuine issue of material fact).

Ashley has met the objective prong because he has shown that the medical need was "diagnosed by a physician as mandating treatment" and all Defendants in this case "failed to provide such treatment." Watson, at 20-21.

All CCF Defendants continued Ashley on the Flat-shaped skin barriers, a treatment known to be ineffective. Gulley v Ghosh, 864 F Supp 2d 725, 729 (N.D. Ill (2012) ("Even if a prison medical official provided treatment, a prisoner has a claim for deliberate indifference if the official continues the prisoner on a course of treatment known to be ineffective.").

In Darrah v Krisher, 865 F3d 361, 370 (6th Cir 2019), the Court reversed the grant of summary judgment for a physician because the plaintiff demonstrated a genuine dispute as to whether medication used to treat his condition -Methotrexate - was "so ineffective ... that it was essentially the equivalent of no treatment at all." And, "[a]lthough the record indicated that [defendant doctor] monitored Darrah for infections during the period he was on Methotrexate, the question of whether it was reasonable to keep him on a drug that had been proven to be ineffective and whether the course of treatment constituted deliberate indifference [was] a question best suited for the jury."

Id.

Like Darrah, the question in Ashley's case is whether it was reasonable to keep Ashley on a treatment that was deemed ineffective, which had been replaced by Dr. Hafez's new treatment plan issued on March 10, 2016, and the elastic-waisted pants which had been replaced with the belt-loop pants, and whether these are "question[s] best suited for the jury."

In this case, Defendants' Boayue, Landfair, and McCarthy were informed that the Flat-shaped skin barriers were ineffective, was given a new treatment plan which included the effective Convex-shaped skin barriers, was cautioned by two professionals that it was the "appropriate" treatment, and without that treatment there would be "peristomal irritations."

Also, MCF Defendants created conditions that placed Ashley at risk of substantial injury by not complying with Dr. Decker's treatment plan for belt loop pants.

D. BELT LOOP PANTS

On February 14, 2017, Dr. Decker developed a treatment plan and ordered belt loop pants. (ECF No. 1, PageID.139). Dr. Decker

"determined that the elastic waisted state issued pants were not allowing the urine to properly drain away from the stoma site. He made a medical diagnosis that Ashley's condition mandated treatment in the form of belt loop pants, and issued a Special Accommodation Notice ordering those pants." (Complaint, pg 29, ¶ 120).

Defendants Schaub, Brazee, Spaulding, and Arends (MCF Defendants), were required to provide these medically necessary pants because a physician had diagnosed Ashley with a medical need that mandated treatment with belt loop pants to facilitate proper drainage of the urine.

Michigan Department of Corrections (MDOC) Policy Directive (PD) 04.07.110, "State Issued Items and Cell/Room Furnishings"), states:

"If a prisoner requests an item in an unusual size ... and the item cannot be provided by Michigan State Industries within 30 calendar days of the request, the item shall be immediately ordered from another source. (Id, Section C).

Defendant Schaub stated in her affidavit "I had been in contact with MSI, Michigan State Industries, to see if pants could be ordered. At that time, MSI was not producing prisoner pants." (ECF No. 72-4, PageID.735). With the knowledge that MSI was not producing prisoner pants, the only option open to MCF Defendants was to "immediately order[] from another source." (PD 04.07.110, Section C).

The Sixth Circuit stated:

"Although Ashley described some of the pants he tried on as uncomfortable, he rejected most of the pairs offered by MCF Defendants based on aesthetics, believing it was 'humiliating' or 'embarrassing' to wear modified pants that sometimes left his ankles and lower shins exposed." (Order, pg 8).

The lower courts have focused on the fact that Ashley rejected the offered pants by the MCF Defendants, and because of Ashley's refusal, MCF Defendants are faultless in not complying with the treatment plan that was issued by Dr. Decker.

This is inaccurate. The first pair of pants were cobbled together by prisoner Webb (See Affidavit of Timothy Webb [#220901], dated 4/26/2017; Complaint, Attachment UUU). These are the pants that Defendants said they would sew extensions onto the legs to make them longer, and these are the only pants that Ashley said would be humiliating or embarrassing. Ashley never seen those pants again. Instead, MCF Defendants cobbled together another pair of pants with extensions sewn onto the legs. These pants were rejected, not because they had extensions sewn onto the legs, but because they were so tight in the waist, hips and buttocks that they would cause more damage than the elastic waisted pants.

(Complaint, pg 32, ¶ 133).

On December 4, 2017, Health Unit Manager (HUM) Michael Wilkerson (Registered Nurse) was present and observed that the newly cobbled together pants were not proper fitting and would cause further damage. (Complaint, pg 37, ¶ 158). On December 19, 2017, HUM Wilkerson was again present and agreed that the newly cobbled together pants were not proper fitting. (Complaint, pg 37, ¶ 160). These pants were rejected by HUM Wilkerson, not only Ashley, as improper fitting and not being in compliance with Dr. Decker's treatment plan.

On January 24, 2018, eleven (11) months after Dr. Decker developed a treatment plan and mandated belt loop pants as a medical necessity, Ashley received proper fitting belt loop pants which were provided by Michigan State Industries. (Complaint, pg 38, ¶ 164).

Again, Ashley had a diagnosis from a physician mandating treatment of a serious medical need with belt loop pants. The MCF Defendants' only duty was to comply with the treatment plan of the physician. To facilitate carrying out that treatment plan, PD 04.07.110 clearly mandates that if a clothing item cannot be provided within 30 calendar days, the "item shall be immediately ordered from another source." (Id, Section C).

Because the MCF Defendants intentionally interfered with Dr. Decker's treatment plan, and did not provide the belt loop pants within "30 calendar days" of Dr. Decker's order, their failure placed Ashley at risk of substantial harm by creating conditions causing eight urinary tract infections during the time that they refused to comply with Dr. Decker's treatment plan and by not following their own mandatory policy directive ("immediately ordered from another source"). Although violation of a state policy directive is not a constitutional violation, "intentionally interfering with the treatment once

prescribed," can establish a constitutional violation. Estelle v Gamble, 429 US 97,104, 97 S Ct 285, 50 L Ed 2d 251 (1976).

In the Sixth Circuit, a prison officials' failure to provide prescribed treatment or comply with a medical treatment plan violates the Eighth Amendment. Boretti v Wiscomb, 930 F2d 1150, 1154-55 (6th Cir 1991). "Complying with a doctor's prescription or treatment plan is a ministerial function, not a discretionary one." Boretti, 930 F2d at 1156.

Ashley has a "right to the adherence of a treatment plan." Murray, 29 F 4th at 791.

E. GROSSLY INADEQUATE CARE

Even assuming that Ashley is required to show "grossly inadequate care", Grissom v Corizon, LLC, No: 2:19-cv-420-RAH-KFP, 2022 WL 4290748 (N.D. Ala Sept 16, 2022), effectively established that standard for Ashley. Grissom was ordered Convex-shaped skin barriers which were not provided for five months after the order. Because Grissom was not provided the Convex-shaped skin barriers, and developed "excoriation" of the skin, the Court held that she had established her Eighth Amendment claims. Ashley submitted Grissom as supplemental authority to the Sixth Circuit. The Sixth Circuit rejected Grissom's reasoning and stated there were two things that distinguish Ashley's case from Grissom:

"First, in Grissom, a wound specialist who examined plaintiff 'declared that it would be grossly negligent or willfully indifferent to the well-being' of the plaintiff if she was not given the deeply Convex-shaped ostomy bags. Grissom, 2022 WL 4290748, * 3. This declaration is the kind of medical evidence that Ashley needs, but lacks, to support the objective component of his own claims." (Order, pg 9).

E(1). GROSSLY NEGLIGENT OR WILLFULLY INDIFFERENT TO THE WELL-BEING OF PLAINTIFF

The Sixth Circuit stated that a wound specialist in Grissom, "declared it would be 'grossly incompetent or willfully indifferent to the well-being'" of Grissom if she was not given the deeply Convex-shaped ostomy bags. (Order, pg 9).

There is no reason for a different outcome here ... Whether it be Grissom, Ashley, or any other ostomy patient, if Convex-shaped skin barriers were part of the treatment plan ordered by a specialist, and prison staff did not provide those Convex-shaped skin barriers, their behavior would be "grossly negligent or willfully indifferent to the well-being" of any ostomy patient, including

Ashley. Just because Ashley's treating Urologist did not use the magic words "grossly negligent or willfully indifferent to the well-being" of Ashley, and instead stated "to prevent unexpected leakage and peristomal irritations", the effect of not providing the mandated Convex-shaped skin barriers has the same effect on Ashley as they did on Grissom.

It is not the "magic words" ("grossly negligent or willfully indifferent") that is in issue here. Failure to provide mandated Convex-shaped skin barriers is the issue, and what happens to any ostomy patient that does not get that mandated treatment.

E(2). EXCORIATION/STRIPPING OF THE SKIN

The Sixth Circuit's second distinguishing reason for not applying the reasoning in Grissom to Ashley's circumstances was:

"Second, the plaintiff in Grissom, suffered from severe negative consequences, such as in the form of skin excoriation, soiled clothing, and social ostracization, that were obviously and directly attributed to defendants' conduct. The link between the conduct of defendants here and in Ashley's own health problems is not obvious,"
(Order, pg 9).

"The link between the conduct of defendants [in Grissom] and in Ashley's own health problems" is obvious. Both in Grissom and Ashley, Convex-shaped skin barriers were mandated as part of the treatment plan. Defendants in both cases failed to provide that treatment for months, causing skin excoriation, or in Ashley's case, this "excoriation" was described as "stripping" of the peristomal skin.

There is no difference between "excoriation" and "stripping". In fact, Webster's Unabridged Dictionary (August 22, 2009), defines "excoriation" as "to strip or wear off the skin of"; And, "strip" is defined as "7. To pull or tear off, as a covering; to remove; to wrest away; as, to strip the skin from a

beast."

After prolonged exposure to the urine which was leaking onto Ashley's skin, the peristomal skin became irritated, infected, with rash. Ashley complained to CCF Defendants about the skin irritations/stripping multiple times: "the urine ... seeping out under the adhesive ... has caused skin irritation with a rash ... and a yeast infection.;" "requesting the [Convex-shaped] prescription be filled as ordered to prevent further infections ... provide both leg and night drainage bags with solution for cleaning and disinfecting the bags to prevent bacteria from causing a kidney infection." (ECF No. 1, PageID.71); "improper flanges ... has exposed the peristomal skin to unnecessarily high amounts of urine, causing skin infections and rashes." (Id, PageID.76); "These Flat-shaped flanges are causing UTI/kidney infections." (Id, PageID.114); "Not the proper shaped phalanges ... allows urine to pool at the stoma site causing infections." (Id, PageID.116); "Flat flanges ... they are not the proper shape, leak easily, and cause skin irritations and UTI/kidney infections." (Id, PageID.120); "Flat flanges causes skin irritations." (Id, PageID.133).

In Ashley's Complaint he defined "stripping" for the Court as

"When the peristomal skin is irritated from exposure to urine or frequent removal of the skin barriers. Pieces of skin will strip away with the adhesive when removing the skin barrier." (Complaint, pg 5, ¶ 17).

Ashley had many instances of skin irritation or rash. Some of which were:

On April 26, 2016, Ashley complained "that urine is eroding the adhesive of the Flat-shaped skin barriers very quickly ..."; [Ashley] requested that the prescription be filled as ordered to 'prevent further infections ...', (Complaint, pg 15, ¶ 57); and, "improper flanges has ... exposed the peristomal skin to unnecessarily high amounts of urine causing skin irritations and rashes." (Complaint, pg 16, ¶ 63).

* * *

On August 20, 2016, Ashley complained that "the Flat-shaped ones are leaking easily, causing skin irritations and UTI/kidney infections." (Complaint, pg 24, ¶ 102).

In Ashley's Complaint, under FIRST CAUSE OF ACTION, Ashley's claim against all Defendants was:

"i) All Defendants by their delay or refusal to comply with the orders of medical professionals caused Plaintiff pain and suffering from multiple peristomal infections, including stripping, and the pain, nausea, and general sickness from multiple urinary tract infections." (Complaint, pg 39, ¶ 167 (i)) (Emphasis added).

The link between Grissom and Ashley is that the treatment plan mandated the correct medical appliance which was not provided when ordered. Additionally, another link is provided not only by the failure to provide the medical appliance in a timely manner, but also the resulting skin excoriation or stripping. This failure created a condition that put Grissom and Ashley at substantial risk of serious future health complications.

F. DENIAL OF COUNSEL IN DISTRICT COURT

In this case (Ashley v Boayue, No: 2:19-cv-10484, E.D. Mich), Ashley filed a "Motion for Appointment of Counsel" (ECF No. 53). Ashley relied upon Tabron v Grace, 6 F3d 147, 155 (3d Cir 1993), and the seven factors outline by that Court in assessing the need for appointment of counsel. Of those factors, Ashley addressed factors (4)-(6), as follows:

"(4) Plaintiff's ability to perform factual investigations/discovery is very limited because of his prisoner status, as well as Plaintiff's ability to investigate and to learn the discovery rules, which are hindered due to his status as a prisoner.

(5) The issues will definitely turn on the credibility of medical experts, and (6) medical experts will definitely be required for a complete understanding of the complex nature of the illegal conduit that Plaintiff has, so the procedure and all of its ramifications can be understood by the Court or jury." (ECF No. 53, page 5).

The Magistrate denied the motion for appointment of counsel stating the following:

"Third, Ashley has not identified any type of investigation or discovery he will be unable to conduct based on his incarcerated status and limited access to the law library. Indeed, the relevant evidence in this case is fairly well-cabined, and principally includes Ashley's medical records and the defendant's decisions, communications, and actions regarding the same. Fourth, while Ashley argues that the case will involve medical experts, the appointment of counsel would not guarantee him the ability to engage an expert. And, given that Ashley was treated by a physician, it is unclear whether he would actually need to retain an expert witness," (ECF No. 55, PageID.542).

The Magistrate then granted summary judgment to all Defendants because:

"Upon thorough review of the record, the Court finds that Ashley cannot 'get past the objective stage' of his deliberate indifference claims 'because he lacks any expert medical evidence' ...". (ECF No. 87, PageID.1267-68).

On appeal, the Sixth Circuit affirmed the Magistrate's recommendation and based their affirmance upon Ashley's lack of medical evidence: "This showing [objective component] requires some form of medical evidence, 'typically in the form of expert testimony.'" "Ashley offered no such evidence ...". (Order, page 7). "The absence of necessary medical evidence also dooms the claim based on care Ashley received with respect to urine pouches." "Nevertheless, without medical evidence that explicitly connects the inadequate care provided ...". "Ashley does not offer the medical evidence that is necessary to create an Eighth Amendment issue out of the belt loop pants." (Pg 8). "This declaration is the type of medical evidence that Ashley needs ...". (Pg 9). "The link between the conduct of defendants here and Ashley's own health problems is not as obvious, and the evidence for causation is not robust enough ...". (Pg 9). "Nevertheless, in the absence of medical evidence assessing the quality of his post-operative care ...". (Pg 10).

Ashley attempted to gain the assistance of counsel to obtain medical evidence or expert testimony, and was told by the Magistrate that "the appointment of counsel would not guarantee him the ability to engage an expert. And, given that Ashley was treated by a physician, it is unclear whether he would actually need to retain an expert witness," (ECF No. 55, PageID.542). The Magistrate then granted summary judgment to all Defendants **solely because** Ashley did not present any expert medical evidence.

In Donnal v Patel, 2016 U.S. Dist. LEXIS 205741 (N.D. Ohio July 11, 2016), the Court explained the reasons why counsel would be necessary for an incarcerated plaintiff to obtain the opinion of a medical expert:

"[C]ontrarily, success in Plaintiff's case most likely depends on the deposition of Defendant and the opinion of a medical expert who would testify that Defendant was deliberately indifferent to Plaintiff's serious medical

condition. For an incarcerated Plaintiff, the ability to obtain these items is problematic."

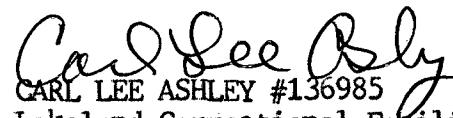
The Donnal Court appointed counsel and concluded "... the potential merit of the case can only be determined through further discovery, much of which will be unavailable to Plaintiff without the assistance of counsel."

In this case the medical evidence or expert medical opinion were readily available through Ashley's treating Urologist and the Ostomy Clinic at U of M. However, Ashley was told "given that Ashley was treated by a physician, it is unclear whether he would actually need to retain an expert witness." (ECF No. 55, PageID.542).

WHEREFORE, for the foregoing reasons, Ashley respectfully requests this Honorable Court to grant certiorari, find that Ashley has established the objective component of his Eighth Amendment claims, and remand for further proceedings.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on May 01, 2023.

Respectfully submitted,


CARL LEE ASHLEY #136985
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036