No. 19-7050

IN THE

United States Court of Appeals for the Tenth Circuit

DUSTIN LANCE

Plaintiff-Appellant,

v.

CHRIS MORRIS, ET AL.

Defendants-Appellees.

On Appeal from the U.S. District Court for the
Eastern District of Oklahoma, No. CIV-17-378-RAW
Hon. Judge Ronald A. White

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Lance spent *three days* in severe pain from priapism, but Smead, Harper, D. Morgan, and E. Morgan blocked his access to medical care. Their attempts to deny deliberate indifference turn on material disputes of fact that a jury must resolve. Smead argues that he did not know priapism posed a serious risk of harm—but that conclusion requires ignoring evidence that Lance repeatedly told him he was in pain, and that Lance actually showed Smead his penis. Harper and D. Morgan argue that they did not perceive the risk of harm despite evidence that it was obvious. E. Morgan argues that he was specifically told about the condition just once despite evidence that he saw and heard Lance in pain other times that weekend. And all of them ignored Lance's ordeal even though its severity was obvious to detainees and other staff.

Next, they urge this Court to grant them qualified immunity, arguing that Lance defines the relevant constitutional rule too generally. But Lance's formulation of the clearly established right tracks this Court's caselaw: denying medical care to a detainee in severe pain and exhibiting serious symptoms constitutes deliberate indifference.

With respect to the *Monell* claims, the County obfuscates the relevant issues by discussing medical practices unrelated to the deficiencies identified by Lance. The County also raises a series of factual disputes—concerning the training it

provided, the "medical own recognizance" policy, and what Dr. Lee told the officers at McAlester Regional Health Center (MRHC)—that merely underscore the need for jury resolution.

ARGUMENT

I. A Reasonable Jury Could Find The Officers Deliberately Indifferent To Lance's Serious Medical Needs.

The officers do not contest that Lance's condition was sufficiently serious to satisfy the objective component of the deliberate indifference analysis. A.781. They argue only that they were unaware of Lance's medical needs and the attendant risk of harm. The district court rejected that argument as to Smead, Harper, and D. Morgan. This Court should affirm those findings. It should reverse as to E. Morgan because his deliberate indifference also presents a genuine issue of material fact.[1]

A. Mike Smead

At this stage of the litigation, Smead admits that he (1) knew Lance took a pill, had a prolonged erection, and had to see the nurse; (2) heard directly about the condition from Lance; (3) actually saw Lance's penis several times; (4) "laughed in Lance's presence;" and (5) confessed contemporaneous knowledge of the condition to Nurse Crawford. Smead 18-19. At least for "purposes of this appeal," then, he

[1] The response brief filed by E. Morgan and Smead is cited as "Smead [page number]." The response brief filed by Morris, D. Morgan, and Harper is cited as "Morris [page number]."

concedes that he knew about Lance's prolonged erection and nonetheless failed to act. *Id*. at 18.[2]

Smead then makes a series of arguments that depend entirely on construing facts in his favor. First, he posits that he "did not see Lance's erection," *id*. at 19, even though the district court found that "[Lance] showed Smead his penis a couple of times," A.783. Second, he says he "did not see any obvious indicators of pain," Smead 19, even though Lance "specifically told" Smead about his "extreme pain," A.661, and three detainees said it "was obvious that [] Lance was continuously in pain," A.411-13. Third, he argues that Lance did not tell him "what caused the erection," Smead 19, even though the district court determined that Lance "told Smead that he took a pill," A.782. Smead may not ask this Court to reject the district court's factual determinations and construe facts in his favor at summary judgment.

Smead then insists he cannot be liable because he did not know how long the erection had persisted "at any given point" and did not know when a prolonged erection "became a medical emergency." Smead 19-20. While Smead may not have known *exactly* how long the erection had persisted at any given time, the evidence shows that he knew it persisted for days. Lance showed Smead his penis "throughout

[2] Indeed, construing the facts in the light most favorable to Lance—in particular, the testimony from Lance, Nurse Crawford, and Officer Walker that Smead knew about the priapism—means Smead was lying when he denied contemporaneous knowledge of it in his deposition. *See* Opening. Br. 7.

the weekend," A.472, including at "[e]very med pass." A.475; A.585. As to Smead's subjective knowledge about the dangers of a prolonged erection, he himself "agreed" that "if somebody had an erection that wouldn't go away[,] delaying medical care could expose that inmate to medical or bodily harm." A.593. Moreover, three detainees submitted declarations stating that Lance's pain was obvious, A.411-13, and where "the need for medical attention appear[s] obvious to [cellmates], the factfinder could reasonably infer that the need for medical attention would also have been obvious to [jail officials]," *Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 652 (10th Cir. 2017).

At this stage of the litigation, Smead concedes that he knew about Lance's prolonged erection, Smead 18-19, and that he knew delaying medical care to someone with a prolonged erection could expose that person to harm, A.593. As such, the district court determined that there were "material issues of fact as to whether Smead was deliberately indifferent." A.783. This Court should reach the same conclusion.

B. Daniel Harper and Dakota Morgan

As with Smead, the district court determined that there are genuine issues of material fact as to whether Harper and D. Morgan knew of Lance's erection and were indifferent. A.784-85. Their arguments to the contrary are without merit.

First, they argue that while the risk of harm may have been obvious, that "is not conclusive" because "a prison official may show that the obvious escaped him." Morris 33 (quoting *Rife*, 854 F.3d at 647). At the summary judgment stage, however, Lance is not required to conclusively prove that they were aware of the risk of harm—he must simply submit evidence showing that there is a genuine dispute as to that fact. In that regard, the Supreme Court has long held that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). Evidence of obviousness is therefore sufficient at this stage. Harper and D. Morgan remain free to argue that the obviousness of the risk escaped them—but they must do so at trial.

Even *Rife*, the case Harper and D. Morgan cite for their view of the law, *see* Morris 33, makes clear that obviousness is sufficient at this stage. In *Rife*, a detainee alleged that two officers were deliberately indifferent to his medical needs. 854 F.3d at 641. His cellmate submitted a declaration explaining that he had been making "loud moaning and groaning noises, 'obviously' suffering from pain, and repeatedly complaining of stomach pain." *Id.* at 652. Because "the need for medical attention appeared obvious to [cellmates]," this Court explained, "the factfinder could reasonably infer that the need for medical attention would also have been obvious to [the jail officials]." *Id.*

This case presents a nearly-identical situation. Here, not just one, but three detainees said Lance had a clearly visible erection and was obviously in pain. A.411-13. Other detainees even used the intercom to request help on his behalf. A.451. Thus, a jury "could reasonably infer that the need for medical attention would also have been obvious" to Harper and D. Morgan, *Rife*, 854 F.3d at 652, when they served meals, worked in the tower, and performed welfare checks, A.784-85.

Contrary to defendants' contention, *see* Morris 35, this does not change simply because Lance did not provide specific testimony about speaking with D. Morgan and Harper. As the district court noted, D. Morgan worked two shifts during Lance's ordeal, spent six hours in the tower during which time Lance called the tower, and performed seven sight checks of the pod; and Harper worked one shift, served meals, worked in the tower, and performed welfare checks. A.784-85. So, even if Lance did not provide "specific testimony" about speaking with D. Morgan and Harper, the lower court explained, there is a "genuine issue of material fact" as to whether they learned about the erection while performing their duties and were deliberately indifferent in ignoring it anyway. *Id.*

C. Edward Tyler Morgan

E. Morgan argues Lance only told him about the condition once and therefore he cannot be deliberately indifferent. Smead 8-9. While Lance specifically mentioned speaking with E. Morgan over the intercom on December 16, A.782,

there is sufficient evidence that E. Morgan encountered Lance and observed his condition many other times that weekend. E. Morgan worked three night shifts during the relevant period. A.384, A.605, A.608. He testified that during these shifts he was expected to "move around" and "make [his] presence known in the booking [area]" and "in the pods." A.614. He also spent time in the tower and conducted sight checks of the pods from there. A.614-15, A.618-19. Construing the facts in favor of Lance, a reasonable jury could find that E. Morgan was specifically informed of Lance's condition on December 16 and then continued to see and hear Lance in pain throughout the weekend.

E. Morgan insists that he was unaware of Lance's condition and that any argument to the contrary is "speculation" and "supposition." Smead 17. But what he calls speculation is the product of reasonable inferences Lance is entitled to at this stage of the proceedings—inferences based on E. Morgan's own testimony. It was E. Morgan *himself* who testified that he worked three shifts during Lance's ordeal, A.608, and that he was to "make [his] presence known in the booking [area]" and "in the pods" during those shifts, A.614. On top of this, three detainees said that Lance's pain was "obvious." A.411-13. Of course, E. Morgan may argue at trial that he ignored his duties and did not walk through the pods and so did not see Lance in "obvious" pain, but that is not the only reasonable inference from the record.

Next, E. Morgan asks this Court to ignore the photo taken from the tower. Smead 16. The photo shows a clear view of the pods from inside the tower. Where an officer can see "through the large rectangular window providing visual access" to various parts of the jail, "a jury c[an] reject [the officer's] testimony and infer that he too saw [the] [p]laintiff." *Durkee v. Minor*, 841 F.3d 872, 876 (10th Cir. 2016). E. Morgan argues the photo should be ignored because it depicts the housing pod when the lights were on. Smead 16. He is correct that we do not know precisely how dark the pod was when the lights were off and he may argue to a jury that he could not see into it at night—but then he would have to explain how he conducted *sight checks* from the tower between 11pm and 6am. A.618-19.

Finally, E. Morgan seeks to distinguish the plaintiffs in *Sealock v. Colorado*, 218 F.3d 1205 (10th Cir. 2000), and *McCowan v. Morales*, 945 F.3d 1276 (10th Cir. 2019), arguing that the former had "overt presentation of visible symptoms" and the latter had "a prior history" of shoulder injuries. Smead 11-12. But "prior history" is hardly a requirement for receiving medical care; the *McCowan* Court referenced it because the plaintiff told the officer about it—just as Lance told E. Morgan about his condition. E. Morgan's *Sealock* argument can also be quickly dispensed with: it is absurd to conclude that Lance did not have a "visible" symptom when he took off his pants and walked around "with a clearly visible penile erection." A.424; A.411-13.

II. The Officers Are Not Entitled To Qualified Immunity.

A. The officers are not entitled to qualified immunity because clearly established law forbids ignoring severe pain and serious symptoms.

Contrary to defendants' argument, Lance's formulation of the clearly established right tracks this Court's caselaw. This Court has explained time and again that denying or delaying access to medical care for a person in severe pain constitutes deliberate indifference—especially where there are corroborating symptoms. *See, e.g.*, *McCowan*, 945 F.3d at 1292 (holding that officer may be liable for "delaying . . . medical care" where the detainee "repeatedly told the officer that he was in excruciating shoulder pain"); *Sealock*, 218 F.3d at 1210-11 (holding that officer who "delayed [plaintiff's] receipt of medical treatment" when he complained of chest pain may be liable); *Al-Turki v. Robinson*, 762 F.3d 1188, 1194 (10th Cir. 2014) (holding that the "decision to ignore" detainee's "repeated complaints of severe [] pain" fell "squarely within this [Court's] clearly established law"); *Burke v. Regalado*, 935 F.3d 960, 993 (10th Cir. 2019) ("We have found deliberate indifference when jail officials confronted with serious symptoms took no action to treat them."). Thus, defendants take issue not with Lance's formulation of the clearly established right, but with this Court's formulation.

Defendants emphasize the "salience of symptoms in jurisprudence." Smead 31. But they never explain why Lance's symptoms are not sufficiently "severe" or "overt." *Id*. This is a glaring omission since Lance exhibited a symptom that was

both exceptionally serious and incredibly visible—*an erection that would not go away*. Lance "couldn't wear pants," A.483, and several detainees "observed [Lance] walking around the pod with a clearly visible penile erection for several days," A.411-13. In light of this evidence, defendants are wrong to suggest that a person who is "pale, sweating, and ha[d] been vomiting," as in *Sealock*, has more "overt" or "concerning" symptoms than a person with a days-long erection. *See* Smead 29.

McCowan clarifies this point. There, the plaintiff complained of a shoulder injury that was not visible to the officer. 945 F.3d at 1293 n.14. Nonetheless, this Court determined that the officer could be liable for delaying access to medical care. *Id*. at 1292. Defendants argue that *McCowan* is irrelevant to the clearly established inquiry because it was decided after the events in this case. Morris 41; Smead 28. But the decision specifically said the relevant "constitutional violation was clearly established by August 2015." *McCowan*, 945 F.3d at 1292. That is more than one year *before* the events in this case transpired. So, at the relevant time, clearly established law prohibited the denial of medical care to a detainee who "repeatedly" complained of "excruciating [] pain." *Id*. As set forth in *McCowan*, this principle was established in *Olsen v. Layton Hills Mall*, where an officer was liable for his failure to act after a detainee "twice told" him that he was having panic attacks. 312 F.3d 1304, 1317 (10th Cir. 2002).

Mata and *Al-Turki* also clearly establish the relevant law, albeit with respect to medical personnel.[3] They make clear that an officer is deliberately indifferent when he denies access to medical care for a person who complains of severe pain and has corroborating symptoms. In *Mata v. Saiz*, this Court held that a gatekeeper must "follow the required protocols, contact the appropriate medical personnel, and/or attempt to assist [the detainee]." 427 F.3d 745, 758 (10th Cir. 2005). And in *Al-Turki*, the Court denied immunity to the defendants, explaining that they "violated clearly established law by choosing to ignore Plaintiff's repeated complaints of severe abdominal pain and requests for medical assistance." 762 F.3d at 1195.[4]

Perhaps because the law does not help them, the officers revert to policy considerations, warning that there would be "a host of practical problems" if jailers were required to alert medical professionals when a detainee is in severe pain. Smead

[3] Where, as here, the question is one of gatekeeper liability, this Court has frequently applied an identical standard to medical and non-medical defendants. *See, e.g.*, *Sealock*, 218 F.3d at 1210-12 (holding that jailer who refuses to drive prisoner with chest pain to the hospital and physician assistant who refuses to call an ambulance for same prisoner may *both* be deliberately indifferent).

[4] Smead and E. Morgan argue that *Al-Turki* addressed only the objective prong of the analysis. Smead 28. Actually, it decided whether the plaintiff had "a sufficiently serious medical need to satisfy the objective prong" *and* "whether Defendant's alleged actions violated clearly established law." *Al-Turki*, 762 F.3d at 1191. The second inquiry is clearly relevant here.

30. They posit that severe pain does not trigger gatekeeper duties because pain is "inherently private" and cannot be "verified." *Id.* at 30-31.

That argument makes no sense in this case because Lance's pain was tied to an obvious and visible symptom—an erection spanning days on end. Lance not only reported "extreme pain" and requested medical care, A.661; A.475; A.485-86, but also walked around "with a clearly visible penile erection for several days." A.411-13. He "couldn't wear pants" and so frequently wore only boxers. A.483. And his penis was "purple and engorged." A.555.

In any case, contrary to defendants' argument, it is clearly established that an officer's duty not to ignore a detainee's severe pain exists regardless of whether the pain results from visible or verifiable symptoms.[5] Here, the fact that the source of Lance's suffering was no mystery makes defendants' indifference all the more blatant.

[5] In *McCowan*, this Court rejected an officer's "assertion that he could not have violated [the prisoner's] constitutional rights because [he] did not have any *verifiable* information, apart from [the prisoner's] 'self-serving' statements, that [the prisoner] was at risk." 945 F.3d at 1293 n.14 (emphasis in original). It relied on *Olsen* and *Sealock* to reject this argument, explaining that a jury could find deliberate indifference even if "the pain [the detainee] suffered was not visible to [the officer]." *Id*. at 1293 & n.14. In *Olsen*, this Court made the same point, noting that some conditions "do[] not manifest … as visibly as a bloody nose" and are "more capable of being described by the sufferer than noticed by an outsider." *Olsen*, 312 F.3d at 1317. Thus, it was enough that the prisoner in *Olsen* "twice told" the officer about his condition. *Id*.

B. The officers are not entitled to qualified immunity because the constitutional violation was obvious.

Aside from the clearly established legal rule that correctional staff show deliberate indifference when they ignore severe pain and corroborating symptoms, there is a second reason to deny qualified immunity—the defendants' actions were obviously unlawful. As then-Judge Gorsuch explained, the fair warning approach has an intuitive logic: "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability" only because it "happen[s] so rarely." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.).

Harper and D. Morgan argue that this approach has been "gradually disfavored" since *Hope v. Pelzer*, 536 U.S. 730 (2002) was decided. Morris 43. But the three cases they cite are far from conclusive. One says the Court "might" be emphasizing different portions of earlier decisions. *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016). Another says the approach "may arguably" conflict with recent precedent. *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017). The third is unpublished and says the approach "appears" to have fallen out of favor. *N.E.L. v. Douglas Cty., Colo.*, 740 F. App'x 920, 928 n.18 (10th Cir. 2018).

This Court should deny immunity because none of these decisions prohibit the "fair warning" approach, and because the officers offer no other argument concerning the obviousness of the violation. *See* Morris 43. Indeed, Smead and E.

Morgan do not address the obviousness of the violation or the "fair warning" approach to qualified immunity at all. *See* Smead 22-32.

* * *

In sum, many of this Court's cases—*Sealock*, *Olsen*, *Al-Turki*, *Mata*, and *McCowan*—confirm that the defendants violated clearly established law when they denied Lance medical care. Some of these cases found constitutional violations where the plaintiff reported pain or another serious medical need, but displayed no visible injuries; others found violations where the plaintiff was in severe pain and exhibited visible symptoms. Here, Lance not only reported "extreme pain" and requested medical care, but also walked around "with a clearly visible penile erection" that was "purple and engorged." A.661; A.475; A.485-86; A.411-13; A.555. No matter which formulation of the clearly established law is adopted here, the officers are not entitled to immunity. Moreover, in light of the obvious pain and visible symptoms, they should be denied immunity under the "fair warning" approach.

III. *Kingsley* Governs Deliberate Indifference Claims.

The individual defendants urge this Court to ignore the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and apply the subjective deliberate indifference standard to Lance's claims. Morris 16-30; Smead 21-22. In so arguing, defendants rely heavily on a single dissent, *see* Morris 23-24,

28, and ignore several reasoned decisions by federal appellate courts. This Court should reject defendants' arguments and instead follow the Second, Seventh, and Ninth Circuits, which have all read *Kingsley* to require an objective standard for deliberate indifference claims.[6]

A. The objective standard applies to claims of deliberate indifference.

Defendants argue that *Kingsley* was limited to excessive force claims, Morris 17, but in fact the decision spoke more generally about the difference between claims brought under the Due Process Clause and the Cruel and Unusual Punishments Clause. "The language of the two Clauses differs, and the nature of the claims often differs," the Court explained, "[a]nd, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Kingsley*, 135 S. Ct. at 2475. Accordingly, the assertion that *Kingsley* altered the standard only for excessive force cases has been roundly rejected by sister circuits.

The Second Circuit explained that "*Kingsley*'s broad reasoning extends beyond the excessive force context" and that "[c]onsistency" with the decision "dictates that deliberate indifference be measured objectively in due process cases."

[6] This issue was preserved below and is relevant here for two reasons. First, awarding qualified immunity is all the more inappropriate as the law is developing a more protective standard for pretrial detainees. Second, in the event this Court remands any of these claims for trial, resolving the issue will clarify the appropriate jury instruction. *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (explaining it is "appropriate to address the proper standard" because "the answer may make a difference in the retrial").

Darnell v. Pineiro, 849 F.3d 17, 36 (2d Cir. 2017). Other circuits have also rejected the argument that an objective standard should be applied to excessive force claims, but not to deliberate indifference claims, explaining that there is "nothing in the logic the Supreme Court used in *Kingsley* that would support this kind of dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause." *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *see also Castro v. Cty. of L.A.*, 833 F.3d 1060, 1069, 1070 (9th Cir. 2016) (noting the "broad wording of *Kingsley*" and explaining that *Kingsley* "did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally").

B. *Bell* and *Farmer* support applying an objective standard to claims by pretrial detainees.

Defendants argue that applying *Kingsley* to deliberate indifference claims would contravene *Bell v. Wolfish*, 441 U.S. 520 (1979). Morris 29-30. But *Kingsley*'s discussion of *Bell* cuts against defendants' position and in favor of an objective deliberate indifference standard. Indeed, *Kingsley* was unequivocal on this point: "The Court did not suggest in any [prior] cases, either by its words or its analysis, that its application of *Bell*'s objective standard should involve subjective considerations." *Kingsley*, 135 S. Ct. at 2474. It clarified that "*Bell*'s focus on 'punishment' does not mean that proof of intent (or motive) to punish is required for a pretrial detainee to prevail." *Id*. at 2473. "Rather, as *Bell* itself shows … a pretrial detainee can prevail by providing only objective evidence." *Id*.

Other circuits have thus determined that *Bell* supports an objective deliberate indifference standard: "The [*Kingsley*] Court reasoned that its interpretation" of the Fourteenth Amendment "was consistent with its prior precedents, including *Bell* [], where the Court had held that a pretrial detainee can prevail on a claim brought under the Fourteenth Amendment challenging 'a variety of prison conditions' . . . solely by proffering objective evidence." *Darnell*, 849 F.3d at 34 (quoting *Kingsley*, 135 S. Ct. at 2473); *see also Castro*, 833 F.3d at 1068, 1069 (explaining that "the *Kingsley* Court expressly rejected" the idea that *Bell* "require[d] proof of punitive intent for [non-force] claims").

Defendants are also wrong to suggest that *Farmer* supports their position. They argue that claims premised on failures to act (like deliberate indifference) require proof of actual knowledge even if claims premised on affirmative acts (like excessive force) do not. Morris 24-25. To support this view, defendants mistakenly rely on a portion of *Farmer* discussing *subjective* deliberate indifference. *Id*. at 24 (quoting *Farmer*, 511 U.S. at 837-38). The Supreme Court, however, was clear in *Farmer* that "deliberate indifference can be viewed either subjectively or objectively." *Darnell*, 849 F.3d at 35 (quotation marks omitted). And it explained that an objective deliberate indifference standard would be satisfied when an official "fails to act in the face of an unjustifiably high risk of harm that is either known *or so obvious that it should be known*." *Farmer*, 511 U.S. at 836 (emphasis added).

Thus, by defining an objective deliberate indifference standard that may be satisfied without proof of actual knowledge, the *Farmer* Court rejected the very argument now advanced by defendants.[7]

In sum, *Bell* applied an objective standard to non-force claims about treatment in pretrial detention and *Farmer* made it clear that deliberate indifference could be defined objectively or subjectively. Defendants' resort to arguments about these cases simply shows the lack of Supreme Court precedent supporting their position. Indeed, the Supreme Court has *never* applied a subjective standard to a case about treatment in pretrial detention—a fact defendants do not dispute. Morris 26-27.

C. This Court has already applied the objective *Kingsley* standard outside the excessive force context.

Defendants contest the impact of this Court's decision in *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019), on this case. Morris 17-21. To be clear, *Colbruno* is relevant here because it demonstrates the applicability of an objective standard to claims outside the excessive force context. Defendants attempt to cast *Colbruno* as "akin to an excessive force" case by arguing that "some amount of force must necessarily have been used … to walk the plaintiff through the hospital naked." *Id.* at 19. But the *Colbruno* Court described the issue before it as concerning "personal

[7] *Farmer* rejected this objective standard for claims arising under the Eighth Amendment, *Farmer*, 511 U.S. at 841, but said nothing about its application to claims brought by pre-trial detainees under the Fourteenth Amendment.

privacy." 928 F.3d at 1164. Indeed, even defendants note elsewhere that *Colbruno* was about the "constitutional right to privacy." Morris 17.

There is no question, then, that "the Tenth Circuit has joined those [circuits] that apply *Kingsley*'s objective inquiry to a claim other than excessive use of force." *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019). This Court should take the next logical step by applying an objective standard to Lance's deliberate indifference claims.

D. The objective deliberate indifference standard requires more than mere negligence.

Although defendants argue that an objective deliberate indifference standard would approach a negligence standard, Morris 27-28, every circuit to adopt the objective standard has concluded otherwise. *Miranda*, 900 F.3d at 353 ("[C]ourts of appeals that have applied *Kingsley* to detainees' claims in contexts other than excessive force . . . recognize that it will not be enough to show negligence."). The only opinion that defendants cite for the contrary position is a *dissent*. Morris 28. In fact, the objective standard is not equivalent to negligence because it requires ignoring an obvious risk. *Miranda*, 900 F.3d at 353; *Darnell*, 849 F.3d at 36; *Castro*, 833 F.3d at 1071.[8]

[8] Defendants also misinterpret *Kingsley* as "expressly declin[ing] to determine whether recklessness would suffice as a basis for imposing liability" in cases concerning pretrial detention. Morris. 27-28. Defendants forget that *Kingsley* concerned "two separate state-of-mind questions." *Kingsley*, 135 S. Ct. at 2472. The

IV. A Reasonable Jury Could Find Pittsburg County Liable Under *Monell*.

A. A reasonable jury could find the county liable for failing to train its officers.

The failure-to-train claim must be viewed in the relevant context: officers were responsible for medical decision-making on weekends and evenings when there was no medical staff on site. The County ignores this context and discusses training in a vacuum. *See* Morris 45-48. Even then, it only points to a few incredibly generic training programs: "state mandated training," "on-the-job training," "jailers mentoring new jailers," and "monthly staff safety meetings." *Id*. at 47. The paucity of these training programs is only emphasized by the County's inclusion of "staff safety meetings" and "mentoring" in the list.

More importantly, the County does not suggest these trainings have anything to do with the specific deficiencies identified by Lance. There is no claim that

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language they reference is from the Court's discussion of the first question, which concerned "state of mind with respect to the bringing about of certain physical consequences in the world." *Id*. In *Kingsley*, the relevant conduct was the use of force, and there was no dispute that it was intentional. *Id*. Here, the relevant conduct was failing to address Lance's medical needs, and there is no dispute that the officers' inaction was intentional (that is, the officers do not contend they failed to act because they were hurt, got pulled into an urgent meeting, or otherwise *accidentally* (as opposed to intentionally) failed to seek medical care for Lance). The second question discussed by the *Kingsley* Court concerns "the defendant's state of mind with respect to the proper *interpretation*" of the challenged conduct—*that* evaluation is entirely objective. *Id*. In *Kingsley*, the evaluation of the defendant's use of force was objective, just as here the evaluation of the defendants' failure to act must be objective.

officers were trained to follow up on complaints of pain, to ask whether the person had previously experienced the complained-of condition, or to note how long the condition persisted. Nowhere does the County claim that officers were trained to recognize a medical emergency requiring a call for medical care. It therefore fails to address the "specific deficiency" that "caused [the jailers] to act with deliberate indifference." *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999).

Next, the County tries to foist three requirements onto Lance that have no basis in the law. First, it argues that Lance must show "that priapism is a frequent medical condition." Morris 46. It seeks to "distinguish" *Olsen*, a similar case, because that case concerned OCD, which occurs with greater frequency than priapism. *Id*. But the relevant question is whether the County trained its employees "in specific skills needed to handle recurring situations." *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998). In *Olsen*, OCD-specific training was warranted because the "recurring situation" and risk of harm was related to OCD. 312 F.3d at 1319-20. Here, the recurring situation is not that detainees will frequently suffer from priapism, but that officers will routinely have to make decisions about the need for emergent medical care on evenings and weekends.[9] The requisite training, then,

[9] For this reason, Lance has never argued that officers must be trained on priapism specifically. Opening Br. 48. It is nevertheless worth noting that Nurse Crawford previously encountered priapism while working at an inpatient mental health facility. A.521-22; A.555-56; Morris Supp.App.112. There, she explained, the

is not about how to treat priapism, but how to decide when a healthcare provider is needed.

Second, the County argues that Lance must show that the sheriff "knew of and disregarded" the risk of inadequate training and the risk of harm. Morris 46-47. But the County is conflating the standard for deliberate indifference claims brought against *individual defendants* under the Eighth Amendment with the standard for deliberate indifference claims brought against *municipalities*. *Id*. It is beyond debate that deliberate indifference "is defined differently for Eighth Amendment and municipal liability purposes." *Barney*, 143 F.3d at 1307 n.5. "In the municipal liability context, deliberate indifference is an objective standard which is satisfied if the risk is so obvious that the official should have known of it." *Id*.; *see also Farmer*, 511 U.S. at 841 (explaining that municipal liability is objective and may be premised on "obviousness or constructive notice").

Third, the County argues that Lance must provide evidence of a "persistent and widespread pattern" that would have alerted the sheriff to "the need for additional or different training." Morris 47-48. But a pattern is only one way of showing deliberate indifference by a municipality. *Barney*, 143 F.3d at 1307-08. A plaintiff may also show that violation of a federal right is a "highly predictable"

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condition was diagnosed "right away" because the facility was staffed with medical personnel. Morris Supp.App.112.

consequence of a municipality's inaction, "such as when a municipality fails to train an employee in specific skills needed to handle recurring situations." *Id*. at 1308. Here, there is no question that the jailers confronted a "recurring" situation because the County does not contest that officers made threshold medical decisions every weekend and evening. In this context, a jury could conclude a violation was a "highly predictable" consequence of failing to train the officers to recognize medical emergencies.

Ultimately, the County's brief is most notable for the arguments it does not make. It does not contest (1) that the jail has no on-site medical staff on weekends and weeknights; (2) that detainees receive medical care at these times only if an officer phones an off-site provider; or (3) that officers are not trained to recognize emergency medical conditions. Morris 45-48. On top of this, there was a marked lack of supervision at the jail, making the risk of harm from the County's failure-to-train all the more obvious. Opening. Br. 47. A reasonable jury could thus find the County liable.

B. A reasonable jury could find the county liable for its "medical own recognizance" policy.

A separate basis for *Monell* liability stems from the County's "medical own recognizance" ("medical OR") policy. Pursuant to this policy, officers disregarded a physician order to take Lance to the specialist. Instead, they brought Lance back to the jail, held him while processing paperwork, and then released him.

The County tries to distract from this policy by discussing other aspects of its medical care system. For instance, it explains that outside medical resources from MRHC were available to inmates, that detainees were made aware of the process for accessing healthcare services, and that Lance was taken to MRHC. Morris 50-52. All that is beside the point when considering the medical OR policy. The policy is about what happens if MRHC is unable to provide treatment: at that point, the policy requires bringing detainees to the facility, filling out paperwork, and only then releasing them to seek emergency care on their own. Opening Br. 51-54. Thus, arguments like "Lance ignores the fact that he was taken to Dr. Lee by transport officers," Morris 51-52, are irrelevant. The relevant question is what officers did when Dr. Lee told them to take Lance to the specialist—and the answer is they ignored Dr. Lee and took Lance back to the jail because the policy dictated as much.

Then, getting to the crux of the issue, the County argues that this Court's decision in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), should not govern because Lance is bringing an individual claim rather than a class action. Morris 51. As discussed above, in non-class contexts, a plaintiff may show that a violation of a federal right is a "highly predictable" consequence of a municipality's action. *Barney*, 143 F.3d at 1308. So, while *Ramos* concerned a class action, that does not change the validity of its pronouncement that where "medical staff must [] rely on medical services provided by civilian health care facilities . . . an integral part of the

prison health care program is the transportation of inmates to and from the locations where the medical care is given." 639 F.2d at 577. That logic is no less persuasive here.

The County then raises a series of factual disputes that must be resolved by a jury. First, it states that "while Lance alleges that jail employees refused to follow Dr. Lee's orders, the hospital discharge form shows otherwise." Morris 52. The County appears to be noting that the hospital discharge form does not indicate the method of transportation to St. Francis. Morris Supp.App. 66. But this does not contradict Lance's position at all. Whatever the discharge form said, Dr. Lee's notes indicate that he told the officers they needed to take Lance directly to the specialist and was "assur[ed] by the officers that they would take him directly." A.273.

Next, the County relies on testimony from Nurse Crawford to claim that detainees were not always held at the jail while release paperwork was being completed. Morris 52. Officer Sparks said otherwise. He testified that detainees had to return to the jail before being released on medical OR. A.655. This shows a genuine dispute of material fact. It is for the jury to weigh competing testimony and determine whether the policy prohibited officers from taking Lance directly to the specialist as Dr. Lee ordered.

Finally, the County argues that Lance has not shown that the relevant policy exists. Morris 52. In fact, the jail's own employees concede its existence. Officer

Sparks was asked if "somebody has to come back to the jail to be medically ORed." A.655. He responded: "Yes, they do." *Id.* In explaining what likely happened to another detainee in need of higher-level care, he explained that he "would have been transported back to the jail and then the [medical OR] process would have took [*sic*] place." *Id.* Sheriff Kerns was asked: "If the doctor had recommended that [Lance] be transported directly from the ER to the hospital, would there be a reason why the jail would prevent that from happening?" A.537. And he responded: "Yeah, . . . we don't release people to go to other facilities." *Id.* The suggestion that Lance has not submitted evidence of a "widespread pattern," Morris 52, is unconvincing in light of testimony from its own employees.

A reasonable jury could find that the jail has a medical OR policy that delays urgent care by requiring a return trip to the jail and making no allowances for emergencies or for individuals who cannot secure transportation to the hospital upon release. It could also find that this practice caused Lance severe harm by delaying his access to medical care.

CONCLUSION

The Court should reverse and remand the case for a trial on the merits.

Respectfully submitted,

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I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 6,471 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman 14-point font.

Dated: April 21, 2020

/s/ Megha Ram
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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

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Dated: April 21, 2020

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CERTIFICATE OF SERVICE

I certify that on April 21, 2020, I filed a true, correct, and complete copy of the foregoing *Reply Brief of Appellant* with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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