In the

United States Court of Appeals

For the Seventh Circuit

No. 25-1556

LAWRENCE GREGORY BURNS,

Plaintiff-Appellant,

v.

STERLING POLK and JOHN PROEBER,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 23-cv-1266 — **Nancy Joseph**, *Magistrate Judge*.

ARGUED NOVEMBER 12, 2025 — DECIDED AUGUST 18, 2026

Before ROVNER, PRYOR, and KOLAR, *Circuit Judges*.

PRYOR, *Circuit Judge*. Lawrence Gregory Burns, previously a pretrial detainee, sued Sterling Polk and John Proeber (collectively "Defendants"), corrections officers at the Milwaukee County Jail under 42 U.S.C. § 1983. He alleged Defendants violated his Fourteenth Amendment rights when they failed to provide him with medical attention during a COVID-19 episode. After being served with Burns's complaint, Defendants moved for summary judgment on the grounds that Burns

failed to exhaust his administrative remedies within the jail. S*ee* 42 U.S.C. § 1997e(a). The district court agreed and granted summary judgment to Defendants. On the record before us, Burns has raised a genuine dispute of material fact as to whether the grievance appeals process was available to him. So, we reverse the district court's entry of judgment and remand for proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

We present the following facts in the light most favorable to Burns, the non-moving party. *Breyley v. Fuchs*, 156 F.4th 845, 846 (7th Cir. 2025).

Burns was a pretrial detainee at the Milwaukee County Jail in Milwaukee, Wisconsin from August 1, 2020, to November 27, 2023. On December 24, 2021, Burns experienced chest pain and shortness of breath. Because of his distress, he used his in-cell intercom to call for help. Despite being on duty, Defendants did not answer Burns's call.

Later that day, Officer Polk was doing his rounds with a nurse. Burns flagged them to his cell. Burns reported to the nurse that he had a history of asthma, but was now "having problems seeing, … having bad chest pains and was weak and having trouble walking." The nurse administered a COVID-19 test to Burns. She told him that if the result was positive, she would call Officer Polk and that Officer Polk would relay the information to him. Officer Polk stood by the nurse during the entirety of her interaction with Burns.

As instructed, Burns waited, but no one contacted him about the result of his COVID-19 test. Defendants were assigned to the officer's station that the nurse would have called

with the test results, but neither informed Burns of the test results nor checked on him.

While waiting, Burns's condition worsened, and he pressed the medical alert button in his cell. Burns eventually passed out. When found, several officers carried him to the jail's dayroom and placed him in a wheelchair. The jail's medical staff called for an ambulance. Once onsite, the paramedics assessed Burns as almost having a stroke or heart attack due to high blood pressure and asthma complications. Burns was transported to a hospital where he tested positive for COVID-19. Later that night, Burns was medically cleared and returned to the jail.

B. Burns's Grievances

The Milwaukee County Jail's handbook provides the procedures an inmate must take for the jail to process his grievance. It requires a prisoner to:

1. Complete grievance in the Kiosk. If you need help, ask the officer, or request the assistance of an advocate.
2. The grievance will be reviewed and answered by a Jail Representative.
3. If you are dissatisfied with the result[,] you may appeal the decision by writing supporting documentation including full names of witnesses. The appealing Jail Representative will review and rule on your appeal.
4. Once the appealing representative has ruled, and more evidence is available[,] you may make one final appeal to the Jail Commander or his/her designee. This appeal must include all previous writings and supporting testimony

> and evidence and the new-found information/evidence. This decision/action is final.[1]

The procedure imposes no time limit for filing a grievance or appealing one. According to Defendants, an inmate can complete each grievance step at the kiosk.

A week after his medical emergency, on December 31, 2021, Burns submitted his first grievance, alleging Defendants did not respond to his medical emergency on December 24, 2021, when he first called for medical assistance. While still waiting for a response, Burns updated his grievance on January 6, 2022. He added that he "could have died" and "almost had a heart attack." On January 21, 2022, jail staff responded, "Mr. Burns, Officer Poke [sic] was dealing with a situation in the other sub pod in 4B." The grievance was then "closed."

On March 10, 2022, Burns submitted another grievance regarding the lasting effects of his December medical incident. Specifically, he complained of vision problems and that he had not yet received his glasses. On March 11, 2022, jail staff responded that he had not been denied medical attention and that his glasses had been ordered.

C. Procedural History

Based on the events that transpired on December 24, 2021, Burns, proceeding pro se, sued Defendants in federal court, under 42 U.S.C. § 1983, claiming they had failed to provide adequate medical attention. *See Miranda v. County of Lake*, 900 F.3d 335, 350 (7th Cir. 2018) (noting that pretrial detainees have a constitutional right to adequate medical treatment).

---

[1] District Court Dkt. 29-1 at 3.

Before discovery, Defendants moved for summary judgment, arguing Burns failed to exhaust his administrative remedies. Burns opposed Defendants' motion. He argued the grievance process was "inadequate to prevent irreparable injury" because "[he] already went to the [h]ospital" due to the "[n]egligence of [the] [s]taff." Burns also contended that he was not allowed to appeal because "the appeal has to be granted by the designee who has reviewed the grievance," and, he claims, his grievance and corresponding response had not been forwarded to the responsible or proper designee. Therefore, he was not provided with the option to appeal his grievance.

Without holding an evidentiary hearing on the exhaustion issue, the district court granted Defendants' motion and dismissed Burns's claims. First, the district court found it was undisputed that Burns did not appeal the relevant grievances even though the Prison Litigation Reform Act mandates that prisoners exhaust their administrative remedies before seeking relief in federal court. Second, the district court concluded that Burns's administrative remedies were available despite his affidavit claiming otherwise. In the district court's view, Burns misunderstood the grievance procedures but misunderstanding the procedures did not excuse failing to exhaust them.

Burns timely appealed.

II. ANALYSIS

Burns challenges the district court's conclusion that he failed to exhaust his administrative remedies. In the alternative, he argues the district court incorrectly concluded that he

failed to raise a genuine material fact issue as to whether the administrative remedies were available to him.

We review a district court's decision to grant summary judgment on whether a defendant exhausted his administrative remedies under the Prison Litigation Reform Act de novo. *Breyley*, 156 F.4th at 847. Because exhaustion is an affirmative defense, the jail bears the burden to demonstrate Burns failed to exhaust his administrative remedies. *Williams v. Ortiz*, 937 F.3d 936, 941 (7th Cir. 2019).

A. Legal Background

The Prison Litigation Reform Act requires incarcerated individuals to exhaust available administrative remedies prior to filing lawsuits in federal court under § 1983. *Pozo v. McCaughtry*, 286 F.3d 1022, 1023–24 (7th Cir. 2002); 42 U.S.C. § 1997e(a). To properly exhaust administrative remedies, prisoners must complete the administrative grievance review process in accordance with the prison's grievance procedural rules, which are not prescribed by the Act itself. *Jones v. Bock*, 549 U.S. 199, 218 (2007).

A defendant can assert failure to exhaust administrative remedies under the Act and move for summary judgment on that basis. *Breyley*, 156 F.4th at 847. To succeed "the defendant must lay out the elements of the defense, cite the facts which the defendant believes satisfies these elements, and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the plaintiff on the defense." *Jones v. Lamb*, 124 F.4th 463, 467 (7th Cir. 2024) (citation modified). When applying the summary judgment standard in the exhaustion context, "a defendant prison official must demonstrate that the plaintiff prisoner failed to exhaust the

applicable grievance procedures and that those procedures were available to him as a matter of law." *Id.* "If genuine factual disputes exist related to the availability of remedies, summary judgment is inappropriate." *Breyley*, 156 F.4th at 848 (quoting *Hernandez v. Lee*, 128 F.4th 866, 869 (7th Cir. 2025)).

In this vein, a prisoner need only exhaust administrative remedies that are "actually 'available'" to him. *Smallwood v. Williams*, 59 F.4th 306, 313 (7th Cir. 2023) (quoting *Ross v. Blake*, 578 U.S. 632, 642 (2016)); *Hernandez*, 128 F.4th at 869 ("[A] prisoner need not exhaust remedies that are unavailable."). "Administrative remedies are 'available' if they are 'capable of use to obtain some relief for the action complained of'" by the prisoner. *Gooch v. Young*, 24 F.4th 624, 627 (7th Cir. 2022) (per curiam) (quoting *Ross*, 578 U.S. at 642).

"[W]hether a remedy is available to exhaust is a fact-specific inquiry." *Smallwood*, 59 F.4th at 314. The Supreme Court in *Ross* provided several examples to guide courts in determining when "an administrative remedy, although officially on the books," is unavailable. 578 U.S. at 643. First, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* Second, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Id.* Third, an administrative remedy is unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 644. As a result, attacks, threats, or intimidation to a prisoner can "transform[] … remedies from available to unavailable." *Kaba v. Stepp*, 458 F.3d 678, 686 (7th Cir. 2006).

Likewise, a prison official's refusal to allow a prisoner to access the mechanism for filing a grievance or failure to process a prisoner's grievance amounts to unavailability. *See Gooch*, 24 F.4th at 627 ("Evidence of the appropriate official's refusal to give a prisoner an available form is sufficient to permit a finding that the administrative remedies were not available." (citation modified)); *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006).

Given the fact-intensive nature of the availability inquiry, disputed factual questions not intertwined with the merits bearing "on exhaustion can be resolved by a district court judge … as a preliminary matter, in what is known as a '*Pavey* hearing.'" *Smallwood*, 59 F.4th at 315 (citing *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008)); *Hernandez*, 128 F.4th at 869–71 (explaining when genuine factual disputes exist related to exhaustion the district court must hold an evidentiary hearing); *see also Perttu v. Richards*, 605 U.S. 460, 479 (2025) (holding that factual disputes bearing on exhaustion intertwined with the merits of a claim are to be resolved by a jury). "In short, if there are contested facts as to whether a prison grievance process was available (keeping in mind that the burden of proof is on the defendants to show a lack of exhaustion), summary judgment is not appropriate." *Smallwood*, 59 F.4th at 315.

B. Availability of the Jail's Grievance Procedures

Burns lodges two objections to the district court's summary judgment ruling. But we need only address his second: whether a genuine dispute of fact precludes finding as a matter of law that the jail's grievance procedures were available to him.

Burns argues that the district court erred in granting summary judgment because his sworn declaration, written when he was pro se, established that there was a factual dispute about whether his administrative remedies—meaning the appeal process—were available. Burns contends he proffered evidence that he was unable to access the jail's grievance appeals process through his sworn declaration stating, "due to the grievance system in the jail, [it] was not forwarded to the responsible or proper designee, and no appeal was granted to further pursue this grievance."

Once Burns made that showing, the burden of proof shifted to Defendants to show administrative remedies were in fact available. *Gooch*, 24 F.4th at 627. Defendants posit that the jail's handbook and the kiosk inmates use to file their grievances clearly explain occupants are entitled to appeal a response as a matter of right. They argue that Burns provided no evidence that "he ever attempted to file an appeal." Plus, Defendants contend Burns's proffered statement in his declaration indicates that he had a "misunderstanding of the [grievance] process" if he thought he needed approval to file a grievance appeal.

While the handbook text shows the jail had a procedure for handling grievances, it alone is insufficient evidence to prove the appeals process was "actually available" to Burns. *Smallwood*, 59 F.4th at 313 (citation modified). An administrative remedy can be "officially on the books" but still unavailable because it is "incapable of use *in practice*." *Miles v. Anton*, 42 F.4th 777, 780 (7th Cir. 2022) (citing *Ross*, 578 U.S. at 643–44) (emphasis in original). "[W]hen prison officials prevent inmates from using the administrative process detailed in the

[policy], the process that exists on paper becomes unavailable in reality." *Kaba*, 458 F.3d at 684.

What's more, a genuine dispute about the availability of remedies can be raised by sworn affidavits and supporting documentation. *See Jackson v. Esser*, 105 F.4th 948, 957–58 (7th Cir. 2024); *Hernandez*, 128 F.4th at 869–70; FED. R. CIV. P. 56(c)(1)(A). Here, the district court reviewed Burns's affidavit and inferred Burns misunderstood the grievance appeal procedure. With that inference in mind, the district court granted summary judgment to Defendants. That was error. *See Taylor v. City of Milford*, 10 F.4th 800, 806 (7th Cir. 2021) ("On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts." (quoting *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003))).

Burns stated in a sworn declaration that "due to the grievance system in the jail[,] [it] was not forwarded to the responsible or proper designee[,] and no appeal was granted to further pursue this grievance." Defendants, for their part, proffered evidence that the grievance process was available and operating. This "swearing contest" creates a dispute of fact as to whether the grievance appeals system was available to Burns. *Roberts v. Neal*, 745 F.3d 232, 234 (7th Cir. 2014) (noting that a "swearing contest requires an evidentiary hearing to resolve"). Construing Burns's affidavit in the light most favorable to him, a reasonable factfinder could conclude the jail's grievance process was unavailable to him—not that he misunderstood the process. *See, e.g.*, *Hernandez*, 128 F.4th at 869–70. In other words, the district court erred by making an improper inference that Burns's statement meant that he misunderstood the grievance appeal procedure without first asking

him for an explanation. *Ingram v. Watson*, 67 F.4th 866, 871 (7th Cir. 2023) (holding a court "cannot disbelieve statements in affidavits without holding a hearing").

In sum, the grant of summary judgment in favor of Defendants was inappropriate because a genuine dispute of material fact exists as to whether the grievance appeal process was available to Burns. *Smallwood*, 59 F.4th at 315. "The vehicle for deciding what happened during a prisoner's effort to exhaust the grievance process" is typically a "*Pavey* hearing." *Ingram*, 67 F.4th at 871. But after the briefs in this case were submitted, the Supreme Court in *Perttu v. Richards* held "parties are entitled to a jury trial on [Prison Litigation Reform Act] exhaustion when that issue is intertwined with the merits of a claim protected by the Seventh Amendment." 605 U.S. at 479. We leave it to the sound judgment of the district court to evaluate in the first instance whether the issue of exhaustion here is intertwined with the merits of Burns's claims needing resolution by a jury or, instead, can be resolved by a judge in a *Pavey* hearing. *See Breyley*, 156 F.4th at 849.

III. CONCLUSION

For these reasons, we VACATE the judgment of the district court and REMAND for proceedings consistent with this opinion.