IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, et al., PAULETTE BOSCH, DENISE VOS, CRISA BROWN, LATRECE BAKER, TAMMY SPEERS, LONDORA KITCHENS, STASHIA COLLINS, ANDREA DORN, JUDY PAULEY, and DELILAH WICKLIFFE individually and on behalf of all similarly situated persons,

Plaintiffs,

vs.

MUSKEGON COUNTY, a municipal corporation; DEAN ROESLER, in his official capacity as Muskegon County Sheriff; LT. MARK BURNS, in his official capacity as Jail Administrator; CORRECTIONAL OFFICERS IVAN MORRIS, GREVE, DEJONG, and DAVID GUTOWSKI, in their individual capacities; and UNKNOWN CORRECTIONAL OFFICERS, in their individual capacities,

Defendants.
_______________________________________/

Case No. 1:14-cv-01245-JTN

HON. JANET T. NEFF

ORAL ARGUMENT REQUESTED

PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS[*]

[*] Although Defendants title their motion a "Motion for Summary Judgment," this Court's order dated April 22, 2015, Dkt. # 42, and the substance of Defendants' brief reflects that they are seeking judgment on the pleadings pursuant to Rule 12(c), not summary judgment under Rule 56. Further, the substance of Defendants' motion reflects that they seek judgment as to some, but clearly not all, of Plaintiffs' claims. Plaintiffs therefore construe Defendants' filing as a motion for partial judgment on the pleadings and title their response brief accordingly.

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INTRODUCTION AND FACTUAL OVERVIEW

Plaintiffs are eleven women who have suffered under the terrible conditions of confinement and degrading mistreatment of female inmates at the Muskegon County Jail (MCJ). In this class action lawsuit they challenge Defendants' unconstitutional customs, policies, and practices that have led to systemic, ongoing violations of Plaintiffs' constitutional rights.

As alleged in Plaintiffs' First Amended Complaint, Dkt. #18, and documented in Plaintiffs' Motion for Preliminary Injunction, Dkt. #2, conditions at MCJ threaten inmates' health and safety. Plaintiffs are routinely exposed to raw sewage and bodily fluids, infestations of vermin and mold, a crumbling infrastructure, and uncontrolled outbreaks of disease. Defendants do not provide for inmates' basic human needs, such as access to adequate hygiene products, rudimentary sanitation, or drinking water. Women inmates are denied out-of-cell exercise and locked down in tiny cells virtually 24 hours a day, seven days a week. Defendants allow male guards routinely and without any penological purpose to view female inmates naked while they are showering, changing, using the toilet, or attending to the sanitary needs related to menstruation, a policy that is degrading and dangerous.

Plaintiffs' complaint seeks redress on four counts: (1) systematic cross-gender viewing in violation of female inmates' right to privacy and bodily integrity; (2) systematic denial of out-of-cell exercise for female inmates; (3) systematic denial of basic hygiene items for female inmates; and (4) unsafe and unsanitary conditions for all inmates.[2] The factual allegations, as related to each of these four sets of claims, will be discussed in more detail below. The following table summarizes the claims, their constitutional basis, and the relevant allegations:

[2] A fifth count, related to the unlawful incarceration of Plaintiff Michelle Semelbauer, is not challenged in Defendants' motion.

Count	Constitutional Rights Violated	Legal Standard	Allegations in Amended Complaint
I. Cross-Gender Viewing	Fourth, Eighth and Fourteenth Amendments	Involuntary exposure of naked bodies without penological justification. *Everson v. Mich. Dep't of Corrs.*, 391 F.3d 737, 757 (6th Cir. 2004).	¶¶ 7, 9, 14–16, 56–86, 134, 179-97, 224, 234, 242–68.
II. Denial of Exercise	Eighth and Fourteenth Amendments	Total or near total deprivation of exercise or recreational activity; must provide exercise sufficient to maintain reasonably good physical and psychological health, *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983).	¶¶ 10-11, 14-16, 87–107, 179–97, 224, 234, 242–59, 269–74.
III. Denial of Hygiene Items	Eighth and Fourteenth Amendments	Deliberate indifference to basic hygiene needs of prisoners. *Carver v. Bunch*, 946 F.2d 451, 452 (6th Cir. 1991).	¶¶ 8-9, 14-16, 108–29, 179-97, 224, 234, 242–29, 275–78.
IV. Unsafe Conditions	Eighth and Fourteenth Amendments	Deliberate indifference to conditions of confinement that pose a substantial risk of serious harm to health and safety. *Farmer v. Brennan*, 511 U.S. 825 (1994). Failure to provide for basic human needs or for the minimal civilized measure of life's necessities. *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).	¶¶ 3-6, 12–16, 130–33, 135–97, 224, 234, 242–59, 279–84.

Defendants' motion for judgment on the pleadings, although somewhat difficult to parse, appears to seek complete dismissal of Plaintiffs' claims under Counts II, III, and IV. Count I would proceed, but only under the Fourth Amendment. Defendant Gutowski also asks for dismissal of Plaintiff Vos's individual Count I cross-gender viewing claim against him.

On a Rule 12(c) motion for judgment on the pleadings, Plaintiffs' factual allegations must be taken as true and viewed in the light most favorable to them. Applying that standard here, Plaintiffs' allegations more than adequately support their claims of involuntary exposure of their naked bodies to male guards without penological justification, total or near-total deprivation of

exercise, and Defendants' deliberate indifference to their basic hygiene needs and to other conditions of confinement that pose a substantial risk of harm to the health and safety of inmates. Therefore, Plaintiffs must be permitted to develop an evidentiary record in support of these claims and present their proofs to the court. Defendants' present motion, accordingly, should be denied.

LEGAL STANDARD FOR JUDGMENT ON THE PLEADINGS

"The standard of review for a judgment on the pleadings is the same as that for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *EEOC v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001). The court must "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true," *id.*, "draw all reasonable inferences in favor of the plaintiff," *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007), and may grant the motion only if the moving party is nonetheless entitled to judgment as a matter of law, *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007). The court may not look beyond the pleadings, *Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 503 (6th Cir. 2006), but rather must determine whether the complaint "state[s] a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The motion must be denied if, viewed in a light most favorable to the plaintiff, the "pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2007).

LAW AND ARGUMENT

I. THE CONSTITUTIONAL FRAMEWORK FOR EVALUATING JAIL CONDITIONS

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Jails have an affirmative obligation

under the Eighth and Fourteenth Amendments[3] to provide for inmates' "basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety." *Helling v. McKinney*, 509 U.S. 25, 32 (1993). Inmates are entitled to "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). In addition, jails cannot restrict inmates' rights without penological justification; the Supreme Court has "insisted that prisoners be accorded those [constitutional] rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer*, 468 U.S. 517, 523 (1984).

Farmer v. Brennan reaffirmed the principle that the Eighth Amendment "imposes duties on [jail] officials, who must provide humane conditions of confinement," meet prisoners' basic needs, and take reasonable measures to guarantee inmate health and safety. 511 U.S. 825, 832 (1994). The concept of an affirmative duty stems from *DeShaney v. Winnebago County Department of Social Services*, in which the Court noted that "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the [Constitution]." 489 U.S. 190, 200 (1989).

Additionally, the Supreme Court has recognized that exposure to excessive risk of sufficiently serious harm violates the Eighth Amendment, even without additional injury. *Helling*, 509 U.S. at 33–34 (rejecting argument that threat of harm is not actionable under the Eighth Amendment); *see also Brown v. Plata*, 131 S. Ct. 1910, 1925 n.3 (2011) (rejecting argument that plaintiffs had to show actual harm from each example submitted as evidence of

[3] "Pretrial detainee claims, though they sound in the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, are analyzed under the same rubric as Eighth Amendment claims brought by prisoners." *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). In this case, an Eighth Amendment "conditions of confinement" analysis will be used, although technically pretrial detainees at MCJ derive their analogous constitutional protections from the Fourteenth Amendment.

deficient health care, since the plaintiff class based its claims on system-wide deficiencies).

In *Rhodes*, *Farmer* and, more recently, *Plata*, the Supreme Court has also emphasized that excessive risk to prisoners can stem from multiple interacting structural deficiencies. *See Rhodes*, 452 U.S. at 347 (prison conditions "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities"); *Farmer*, 511 U.S. at 843 (an unreasonable risk of harm sufficient to violate the Eighth Amendment may stem from multiple causes and affect multiple prisoners); *Plata*, 131 S. Ct. at 1936-37 (comparing Eighth Amendment violations regarding prison conditions to a "spider web" because of the interdependence of the conditions that produce the violation and stating that in such cases "only a multifaceted approach aimed at many causes" will produce a solution). The Supreme Court has recognized that "some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

In this case, Defendants suggest that this Court consider each of the many problems and incidents at MCJ in isolation, rather than looking at the central question of whether those problems and incidents, alone or in combination, demonstrate that Plaintiffs are being systematically deprived of basic human needs. Defs.' Br. at 8–9. Defendants' piecemeal approach is analytically incorrect. The Sixth Circuit has made clear that Eighth Amendment analysis **"require[s] consideration of all the prison's conditions and circumstances, rather than isolated conditions and events."** *Walker v. Mintzes*, 771 F.2d 920, 925 (6th Cir. 1985) (emphasis added). While courts may not simply look at "overall conditions," *Wilson*, 501 U.S. at 305, or at the "totality of the circumstances" completely unmoored from human needs, *Walker*, 771 F.2d at 925, courts **must** look at the ways in which different conditions intersect to deprive

inmates of basic necessities or endanger their health and safety. *Id.*; *see also Gillis v. Litscher*, 468 F.3d 488, 493–94 (7th Cir. 2006) (deprivations can combine to violate the Eighth Amendment); *Craig v. Eberly*, 164 F.3d 490, 496 (10th Cir. 1998) (same); *Williams v. Griffin,* 952 F.2d 820, 825 (4th Cir. 1991) (same); *Blackmon v. Garza*, 484 F. App'x 866, 872 (5th Cir. 2012) (same); *Sampson v. Berks Cnty. Prison*, 171 F. App'x 382, 385 (3d Cir. 2006) (same).

Determining whether an Eighth Amendment violation has occurred requires a "fact-intensive inquiry." *Gillis*, 468 F.3d at 492; *Leamer v. Fauver*, 288 F.3d 532, 547 (3d Cir. 2002) (same); *Chandler v. Baird*, 926 F.2d 1057, 1064 (11th Cir. 1991) (same). In Eighth Amendment litigation, "it is particularly important to develop an adequate record on factual disputes related to the seriousness and length of the alleged deprivations, for these are essential elements of a conditions of confinement claim." *Craig*, 164 F.3d at 496; *see also Williams*, *supra*, 952 F.2d at 825 n.1 (whether unsanitary conditions combined with overcrowding rendered confinement unconstitutional and deprived inmates of a specific human necessity was a fact question which precluded judgment as a matter of law where complaint alleged overcrowding, standing sewage, infestation of insects and vermin, and lack of shower access).

Here, of course, the facts have yet to be developed, as discovery has not begun. Plaintiffs must now be permitted to develop a record, as the allegations in their complaint clearly state a plausible claim that the basic human needs of inmates at MCJ are not met, creating substantial risks to their health, safety and welfare.

II. PLAINTIFFS HAVE PLEADED VIABLE CLAIMS BASED ON UNSAFE CONDITIONS AND DENIAL OF BASIC HUMAN NEEDS.

A. Inmates Have a Constitutional Right to Conditions of Confinement That Do Not Create a Substantial Health or Safety Risk or Deprive Them of Basic Human Needs.

"The Constitution does not mandate comfortable prisons, but neither does it permit

inhumane ones." *Farmer*, 511 U.S. at 832 (citation omitted). Jail officials may not ignore conditions of confinement that pose a substantial risk of serious harm to the health and safety of inmates, *id*. at 834, or deprive them of basic human needs, *Helling*, 509 U.S. at 32.

Sanitation is a basic human need because unsanitary living conditions, particularly when coupled with overcrowding, create an intolerable risk of illness and disease. *See Plata*, 131 S. Ct. at 1933 (describing the risks of incarcerating large numbers of people in unsanitary conditions). "Inoperable plumbing systems contribute to both the risk of conveying waterborne disease and vermin infestation, and thus implicate constitutional violations." *Carty v. Farrelly*, 957 F. Supp. 727, 736 (D.V.I. 1997). A cell flooded with sewage and foul water is a "clear violation of the Eighth Amendment." *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991); *see also Williams v. Adams*, 935 F.2d 960, 962 (8th Cir. 1991) (reversing grant of summary judgment where toilet regularly leaked waste on to floor); *Williams v. Griffin*, 952 F.2d 820, 824–25 (4th Cir. 1991) (reversing district court's dismissal of complaint where inmate alleged regular standing sewage and water, and few working showers); *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985) (Eighth Amendment violated where plumbing "in such disrepair as to deprive inmates of basic elements of hygiene and seriously threaten their physical and mental well-being").

Vermin infestations can also violate the Eighth Amendment. *Gates v. Cook*, 376 F.3d 323, 340 (5th Cir. 2004); *Hoptowit*, 753 F.2d at 783 (vermin infestation is "inconsistent with the adequate sanitation required by the Eighth Amendment"); *Carty*, 957 F. Supp. at 736 ("Conditions that generate infestation of vermin . . . do not comport with minimal civilized measures concerning a person's basic welfare."); *Griffin*, 952 F.2d at 824–25 (reversing dismissal of complaint that alleged vermin infestation).

Small cells and overcrowding, moreover, can compound the danger of unsanitary

conditions. *Plata*, 131 S. Ct. at 1933; *Ramos v. Lamm*, 639 F.2d 559, 569–70 (10th Cir. 1980) (cataloging combination of small cells, plumbing problems, vermin infestations, mold, and crumbling infrastructure; "the record as a whole" demonstrated that conditions of confinement were "grossly inadequate and constitutionally impermissible"). Jails must also provide adequate sleeping conditions. *See Spencer v. Bouchard*, 449 F.3d 721, 729 (6th Cir. 2006) (plaintiff slept on mattress on floor exposing him to leaks and cold); *Francis v. Altiere*, 491 F. App'x 539 (6th Cir. 2012) (prisoner forced to sleep on concrete floor without mattress); *Cano v. City of New York*, 44 F. Supp. 3d 324 (E.D.N.Y. 2014) (plaintiffs forced to sleep without bedding in overcrowded cells infested with insects and rodents and exposed to other inmates' feces, urine and vomit without adequate water or ability to clean themselves). In addition, locking down inmates in their cells exacerbates the Eighth Amendment violation. *Campbell v. Cauthron*, 623 F.2d 503, 506 (8th Cir. 1980) ("[C]rowded conditions constitute cruel and unusual punishment for . . . inmates who are kept in their cramped cells for all but a few hours each week.").

B. Plaintiffs Have Alleged Conditions of Confinement That Pose a Substantial Risk to Their Health and Safety and Deprive Them of Basic Human Needs.

Plaintiffs allege:

- Lack of basic sanitation, resulting in routine exposure to raw sewage, vomit, and blood. First Am. Compl. ¶¶ 5, 148–50 (inmates regularly exposed to human feces, urine, blood and vomit; toilets routinely spill human waste in cells; standing liquid containing human waste on cell floors); ¶¶ 157–58 (MDOC inspection report describes sanitation failures as creating a "serious potential health hazard").

- Showers are inoperable, unsanitary, or dangerously hot, and shower access is completely denied while inmates are in the holding tanks. *Id.* ¶¶ 3, 130–44 (inmates held in holding tank for days without access to shower); ¶ 135 (Speers not allowed to shower for seven days though covered in vomit and feces); ¶¶ 6, 151–52 (showers inoperable for days; must shower in standing water from other inmates); ¶¶ 153–55 (shower water scalding so must collect water in totes to cool down; Bosch burned when tote tore; Speers scalded by shower, needing medical attention); ¶ 187 (Brown burned by shower water); ¶¶ 157–58 (MDOC inspection report describes "extremely hot" shower water as creating "a potential hazard to the user").

- Unchecked contagious diseases and routine exposure to bodily fluids of ill inmates. *Id.* ¶¶ 5-6, 151 (to shower inmates must stand in pools of water from other inmates who have contagious infections or are menstruating); ¶ 4 (extended confinement in holding cell with vomiting inmates); ¶ 184 (Bosch not given adequate treatment for MRSA infection in her C-section, though MRSA is highly contagious).

- Infestations of vermin and insects. *Id.* ¶¶ 5, 146 (infestations of sewer bugs, water bugs, silver fish, spiders, ants, other insects, and mice); ¶¶ 157-58 (MDOC inspection report describing bugs in sleeping areas).

- Denial of beds, or even a place to sleep, for extended periods. *Id.* ¶¶ 3, 130–44, 177 (inmates locked in holding tanks for days, where they must sleep on concrete benches or the concrete floor; when the holding cells are overcrowded, there is not enough room even to lie down); ¶ 137 (Speers forced to lie on floor of holding tank next to leaking toilet with ants crawling over her and up her nose); ¶ 177 (inmates forced to sleep on cell floors or on cots in common areas).

- Crumbling infrastructure and mold. *Id.* ¶¶ 5, 145 (walls, floors, windows, and showers covered in mold); ¶¶ 157-158 (MDOC inspection report describing mold on air vents and showers); ¶ 147 (falling ceiling tiles).

- Denial of drinking water, cleaning supplies, and opportunity to wash hands (e.g. before eating or after using toilet). *Id.* ¶¶ 133, 135, 144 (inmates held for extended periods in holding tank without ability to wash hands or drink water); ¶ 195 (inadequate cleaning supplies).

As demonstrated above, Plaintiffs have alleged facts from which a reasonable factfinder could plausibly infer that conditions of confinement at MCJ pose a substantial risk to their health and safety. MCJ inmates are held in extremely unsanitary conditions and routinely exposed to raw sewage, bodily fluids, vermin, mold, a crumbling infrastructure, and unchecked contagious diseases, but are unable even to clean themselves due to inoperable plumbing. Plaintiffs have also alleged facts from which a reasonable factfinder could plausibly infer that Defendants deprive them of basic human needs, including basic sanitation (which is essential for human hygiene and health), and adequate, safe places to sleep.

C. Overcrowding at MCJ Causes Many of the Unconstitutional Conditions.

While the fact that a jail exceeds design capacity is not, in and of itself, a constitutional violation, *Johnson v. Hefron*, 88 F.3d 404, 407 (6th Cir. 1996), the Supreme Court has clearly

held that overcrowding can be the "primary cause of the constitutional violations" because it "create[s] unsanitary and unsafe conditions" and "overtake[s] the limited resources of prison staff." *Plata*, 131 S. Ct. at 1923, 1934; *see also Hutto v. Finney*, 437 U.S. 678, 688 (1978) (noting "the interdependence of the conditions producing the [Eighth Amendment] violation," including overcrowding); *Williams v. Griffin*, 952 F.2d 820, 824–25 (4th Cir. 1991) ("[O]vercrowding accompanied by unsanitary and dangerous conditions can constitute an Eighth Amendment violation, provided an identifiable human need is being deprived.").

Here Plaintiffs' allegations regarding the severe overcrowding at MCJ—including the chronic failure to meet state-law requirements and the repeatedly declaration of overcrowding emergencies—are both evidence of and a likely cause of unsafe, unsanitary, and inhumane conditions. First Am. Compl. ¶¶ 159–78. Indeed, Plaintiffs specifically allege that "[d]ue to severe overcrowding, coupled with inadequate staffing, the MCJ is unable to maintain basic sanitation, provide basic medical care, or ensure the health and safety of inmates." *Id.* ¶ 178.

D. Defendants Cannot Defeat Plaintiffs' Claims at the Pleadings Stage.

Instead of analyzing Plaintiffs' complaint under the standards set out in *Farmer*, *Helling*, and *Rhodes*, Defendants seek to redefine the issues as whether inmates have a right to luxuries such as raised beds or perfect plumbing. *See* Defs.' Br. at 15–19. Plaintiffs claim no such rights. Rather, as set forth above, they allege facts from which a reasonable factfinder could plausibly infer that the abysmal conditions at MCJ jeopardize their health and safety, and deprive them of basic human needs.

Contrary to Defendants' suggestion, the court must consider whether the alleged conditions "in combination" place inmates' health and safety at risk and deprive them of basic human needs, *Wilson*, 501 U.S. at 304, and must examine "all [of] the prison's conditions and circumstances, rather than isolated conditions and events," *Walker*, 771 F.2d at 925. Thus, the

question is not, as Defendants suggest, whether inmates have the right to water of a particular temperature, but instead whether non-functioning or scalding showers and exposure to raw sewage and other inmates' bodily fluids combine to deprive Plaintiffs of their constitutional right to basic hygiene. Similarly, rather than isolate the allegations that inmates must sleep on concrete floors, the court must consider whether (a) sleeping on the floor is safe, given the overflowing toilets, standing water, vermin, and insect infestations; and (b) denying inmates in overcrowded holding tanks a place to lie down for days at a time deprives them of their basic human need for adequate, safe sleep. *See, e.g.*, *Cano v. City of New York*, 44 F. Supp. 3d 324 (E.D.N.Y. 2014).

Because Defendants improperly invite the court to view Plaintiffs' allegations selectively and in isolation, they rely largely on inapposite (and mostly nonprecedential) case law that involves temporary, *de minimis* deprivations, restrictions imposed on individual inmates as punishment for their misconduct, and other incidents that neither seriously threatened inmate health and safety nor systematically deprived inmates of basic human needs.[4] At this stage of the proceedings, the court must reject Defendants' effort to essentially re-write Plaintiffs' complaint. Viewed in the light most favorable to Plaintiffs and drawing all reasonable inferences in their favor, Plaintiffs' allegations state a claim for unsanitary and unsafe conditions that violate their Eighth and Fourteenth Amendment rights.[5]

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[4] *See, e.g.*, *Hubbard v. Taylor*, 538 F.3d 229, 235 (3d Cir. 2008) (record did not demonstrate that sleeping on floor exposed inmates to unhygienic conditions); *Grissom v. Davis*, 55 F. App'x 756 (6th Cir. 2003) (punishment for destroying a mattress); *Hartsfield v. Vidor*, 199 F.3d 305, 310 (6th Cir. 1999) (punishment of for destroying cell); *Anthony v. Bradley Cnty. Justice Ctr.*, No. 1:12-CV-303, 2015 WL 1206620, at *4, 9 (E.D. Tenn. Mar. 17, 2015) (toilet backups merely exposed inmates to unpleasant odor); *Taylor v. Luttrell*, No. 06-25220-An/V, 2008 WL 4065927, at *10 (W.D. Tenn. Aug. 27, 2008) (no undue delay in repairing problems).

[5] Defendants also argue that those Plaintiffs who were incarcerated at the time of filing must prove physical injury under the Prison Litigation Reform Act (PLRA). Defs.' Br. at 19. But the Sixth Circuit recently held that the PLRA's physical injury requirement applies only in cases where a plaintiff seeks damages for "mental or emotional injury," and *not* to "claims brought to

III. PLAINTIFFS HAVE PLEADED VIABLE CLAIMS BASED ON DENIAL OF OUT-OF-CELL EXERCISE.

A. Inmates Have a Constitutional Right to Regular Out-of-Cell Exercise.

The Sixth Circuit has held that out-of-cell exercise is a constitutional requirement:

> It is generally recognized that a total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees. Inmates require regular exercise to maintain reasonably good physical and psychological health.

Patterson v. Mintzes, 717 F.2d 284, 289 (6th Cir. 1983). Other circuits have similarly held that regular out-of-cell exercise is constitutionally required.[6] *See, e.g.*, *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982) ("[C]onfinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment."); *Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996) (reversing dismissal of complaint where plaintiff alleged he was not allowed to exercise outside his housing area for more than an hour every two weeks); *Pierce v. County of Orange*, 526 F.3d 1190, 1211–12 (9th Cir. 2008) (only 90 minutes of out-of-cell

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redress constitutional injuries." *King v. Zamiara*, __ F.3d __, Nos. 13-1766/1777, 2015 WL 3448699 at *3, slip op. at 6 (6th Cir. June 1, 2015). Additionally, it is universally recognized that the PLRA's physical injury requirement pertains only to claims for compensatory damages and has no effect on claims for injunctive relief. *See Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (listing cases). Finally, the relevant section of the PLRA reads: "No Federal *civil action* may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e) (emphasis added). Therefore, even absent the recent ruling in *Zamiara*, the incarcerated Plaintiffs can bring a "Federal civil action" here because they have in fact pleaded physical injury, muscle atrophy and general deconditioning. First Am. Compl. ¶¶ 104-107.

[6] District courts in this circuit also routinely recognize the right to adequate exercise. *See Hollins v. Curtin*, No. 1:13–cv–8, 2013 WL 1703880, at *7 (W.D. Mich. Apr. 19, 2013) (Neff, J.) ("The Eighth Amendment entitles prisoners to sufficient exercise to maintain reasonably good physical and mental health."); *Gilland v. Owens*, 718 F. Supp. 665, 685 (W.D. Tenn. 1989) (violation where "at best most inmates are currently participating in recreation no more than once a month"); *Mawby v. Ambroyer*, 568 F. Supp. 245, 252 (E.D. Mich. 1983) (plaintiff permitted out-of-cell exercise only twice in seven months); *O'Bryan v. Saginaw Cnty.*, 437 F. Supp. 582, 588-89 (E.D. Mich. 1977) ("The opportunity for frequent exercise and recreation . . . [is] essential for the mental, physical, and emotional well being of inmates who are confined for extended periods within a jail facility.").

exercise per week, even with access to a common day room, violates Eighth Amendment).

B. Plaintiffs Have Alleged a Total or Near-Total Deprivation of Exercise.

Plaintiffs have alleged that:

- Women inmates "rarely if ever receive out-of-cell exercise opportunities" and "are essentially locked in their cells 24 hours per day, 7 days per week." First Am. Compl. ¶ 87; *id.* ¶ 10; ¶ 93 (Bosch allowed exercise twice in five months); ¶ 94 (Vos allowed exercise twice in over seven months); ¶ 95 (Semelbauer never allowed exercise in 30 days); ¶ 96 (Brown allowed only 30 minutes exercise in three months); ¶ 97 (Kitchen not given a single gym visit in eight months); ¶ 99 (Baker never allowed gym time during either of her incarcerations); ¶ 100 (Collins only given one gym visit in four months); ¶ 101 (Dorn allowed exercise twice in three months); ¶ 102 (Pauley allowed exercise only three times in eight months); ¶ 103 (Wickliff given only two gym visits in two months).

- MCJ has an indoor gym where "Plaintiffs and other women inmates could be and could have been, but are not and were not, brought . . . for regular out-of-cell exercise." Women are "rarely if ever allowed to access the exercise equipment in the gym." *Id.* ¶¶ 89–90.

- "Plaintiffs have suffered physical injuries including muscle atrophy and weight gain due to lack of out-of cell exercise." *Id.* ¶ 104; ¶ 105 (Collins gained weight and lost muscle mass); ¶ 106 (impact of lack of exercise on Dorn, who recently gave birth); ¶ 107 (Pauly needs regular exercise to prevent pain and stiffness in ankle with nine screws).

As demonstrated above, Plaintiffs have alleged facts from which a reasonable factfinder could plausibly infer that they have suffered a total or near-total deprivation of exercise, and have not been provided with sufficient exercise to maintain their physical and mental health.

C. Defendants Cannot Defeat Plaintiffs' Claims at the Pleadings Stage.

Despite the overwhelming case law on the right to out-of-cell exercise and despite Plaintiffs' clear allegations of a total or near-total deprivation of such exercise, Defendants argue for dismissal based on Defendants' mere assertion that inmates can get adequate exercise in their cells. Whether it is even possible for inmates to exercise in their overcrowded, unsanitary cells (or cramped dayrooms), and whether any such in-cell exercise is sufficient to maintain physical and mental health, are questions of fact that cannot be decided at the pleadings stage. *See Pressley v. Brown*, 754 F. Supp. 112, 117 (W.D. Mich. 1990) ("Determinations of the

constitutionality of prison exercise restrictions are properly made following the presentation of evidence, either in trial or in support of a motion for summary judgment."); *Gumpl v. Seiter*, 689 F.Supp. 754 (S.D. Ohio 1987) (discovery needed to determine amount of yard time necessary for inmate well-being and to evaluate asserted penological interests for restricting exercise)[7].

The cases cited by the Defendants are largely irrelevant, because they concern limitations on **outdoor exercise**, not denials of **out-of-cell** exercise.[8] While outdoor exercise is constitutionally required in some circumstances, *see*, *e.g.*, *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979), Plaintiffs here request something much more modest: sufficient out-of-cell exercise to maintain "reasonably good physical and psychological health." *Patterson*, 717 F.2d at 289. Because they are being deprived of that basic need, Defendants' motion should be denied.

IV. PLAINTIFFS HAVE PLEADED VIABLE CLAIMS BASED ON FAILURE TO PROVIDE BASIC HYGIENE ITEMS.

A. Inmates Have a Constitutional Right to Basic Hygiene.

"The Eighth Amendment prohibits deliberate indifference to needs of prisoners, including the basic elements of hygiene." *Carver v. Bunch*, 946 F.2d 451, 452 (6th Cir. 1991); *see also Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980) (state must provide adequate hygienic materials); *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir. 2006) ("life's necessities

[7] Defendants' reliance on *Koubriti v. Rojo*, No. CIV.A. 05-cv-74343, 2007 WL 2178331 (E.D. Mich. July 27, 2007), is thus misplaced. That court, noting that the "constitutional inquiry under the Eighth amendment is fact-based," carefully reviewed the record developed during discovery, including evidence on cell size, time spent outside the cell, and the justifications for exercise restrictions, and concluded that the record did not support a finding of total or near-total deprivation of exercise. *Id.* at *7. Here, there is no record for the court to review.

[8] *See Rahman X v. Morgan*, 300 F.3d 970, 973 (8th Cir. 2002) (restriction on outdoor exercise for inmate who escaped from cell and murdered guard was permissible where he was allowed three hours per week in a room with exercise equipment to make up for lack of yard time); *Grzelak v. Ballweg*, No. 2:14–cv–31, 2014 WL 5101333, at *4 (W.D. Mich. Oct. 10, 2014) (allegations of infrequent outdoor exercise did not state Eighth Amendment claim because plaintiff was able to exercise inside the jail).

include . . . hygiene items”); *Maxwell v. Mason*, 668 F.2d 361, 365 (8th Cir. 1981) (deprivation of clothing, which is a “basic necessity of human existence,” is actionable because it violates both the “requisites of hygiene” and human dignity).

Specifically, jails are required to provide inmates with reasonable access to sanitary products such as toilet paper, feminine hygiene products, and underwear. “The failure to regularly provide prisoners with . . . toilet articles including . . . toilet paper . . . and sanitary napkins for female prisoners constitutes a denial of personal hygiene and sanitary living conditions.” *Atkins v. County of Orange*, 372 F. Supp. 2d 377, 406 (S.D.N.Y. 2005); *see also Dawson v. Kendrick*, 527 F. Supp. 1252, 1289 (S.D.W. Va. 1981) (failure to provide sanitary conditions, including the failure to regularly provide toilet paper and sanitary napkins, is an Eighth Amendment violation); *Holt v. Maury Cnty. Jail*, No. 1:13-CV-0102, 2013 WL 5306305, at *2 (M.D. Tenn. Sept. 20, 2013) (permitting Eighth Amendment claim to proceed based on allegation “that female inmates do not receive adequate sanitary supplies, including toilet paper and menstrual pads”).

The routine denial of basic toiletries not only denies inmates “the minimal civilized measure of life’s necessities,” *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and assaults the “essence of human dignity inherent in all persons,”[9] *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011), but also presents a clear risk to inmates’ health, *see Farmer*, 511 U.S. at 832. To prevent infection, the U.S. Department of Health and Human Services advises changing a menstrual pad

[9] *See* Chandra Bozelko, *Prisons that withhold menstrual pads humiliate women and violate basic rights*, The Guardian (June 12, 2015), http://www.theguardian.com/commentisfree/2015/jun/12/prisons-menstrual-pads-humiliate-women-violate-rights (discussing ways in which access to menstrual supplies is used to humiliate women in jails).

before it becomes soaked with blood.[10]

B. Plaintiffs Have Alleged that Defendants Deny Them Basic Hygiene.

Plaintiffs have alleged facts from which a reasonable factfinder could plausibly infer that Defendants have a custom, policy, or practice of failing to provide female inmates with basic hygiene items. Specifically, Plaintiffs allege:

- Plaintiffs and other women inmates at MCJ are not provided with adequate hygiene products, and do not receive sanitary napkins in a timely fashion, or in some cases at all. First Am. Compl. ¶¶ 8, 108–09, 275.

- Due to the denial of pads, Plaintiffs and other women inmates regularly bleed into their clothes, which they must then wear for as long as a week. *Id.* ¶¶ 110–11.

- Specific examples include situations where as many as 30 women were told to share a pack of 12 pads, *id.* ¶ 114, and incidents where Defendants ignored or mocked Plaintiffs' pleas for sanitary supplies, leaving them to go as long as two days without supplies and causing them to bleed into their clothes, *id.* ¶¶ 112–20.

- Plaintiffs and other women inmates have undergarments confiscated without replacement; are denied adequate clothing, particularly undergarments; and are forced to wrap themselves in towels or sheets on wash day. *Id.* ¶¶ 9, 121–29, 275.

These allegations are sufficient to state a claim that Defendants have denied Plaintiffs' basic human need for adequate hygiene supplies and clothing.

C. Defendants Cannot Defeat Plaintiffs' Claims at the Pleadings Stage.

Once again, Defendants attempt to frame Plaintiffs' claim as several individual and isolated instances of deprivation, rather than an overall policy and practice. Defs.' Br. at 12–13. Defendants cite a number of cases wherein inmates were temporarily denied toiletries on a single

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[10] U.S. Dep't of Health and Human Services, Menstruation and the Menstrual Cycle 4 (Oct. 21, 2009), https://www.womenshealth.gov/publications/our-publications/fact-sheet/menstruation.pdf; *see also* Sara House et al., WaterAid, Menstrual Hygiene Matters: A Resource for Improving Menstrual Hygiene Around the World 32-34 (2012) http://www.wateraid.org/what-we-do/our-approach/research-and-publications/view-publication?id=02309d73-8e41-4d04-b2ef-6641f6616a4f (poor menstrual hygiene creates serious health risks).

occasion as a disciplinary measure, *Sublett v. White*, No. 5:12CV-P180-R, 2013 WL 2303249 (W.D. Ky. May 24, 2013); because of unexpected shortages of resources, *Gilland v. Owens*, 718 F. Supp. 665 (W.D. Tenn. 1989); or because they were given an appropriate amount on a regular schedule, *Hunter v. Helton*, No. 1:10–cv–00021, 2010 WL 2405092 (M.D. Tenn. June 10, 2010). None of these describes the situation at MCJ. As alleged in Plaintiffs' complaint, women at MCJ are, as a matter of policy or practice, regularly ignored when they request toiletries including menstrual pads. Although they may eventually receive pads hours or days later, their dignity is undermined and their health is placed at significant risk. As pointed out in the very case relied on by Defendants, "frequent or long term deprivations of [hygiene] items . . . deprive inmates of constitutional rights." *Gilland*, 718 F. Supp. at 685. That is exactly what Plaintiffs allege here.

Additionally, Defendants' argument that they are not constitutionally required to provide "free underwear," Defs.' Br. at 14, ignores the way in which the denial of feminine hygiene products interacts with the denial of clean clothing to create an Eighth Amendment violation. *See Wilson*, 501 U.S. at 304 (describing how some conditions combine to have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need"). Here, Defendants not only fail to provide menstrual pads, but when this results in women bleeding into their clothes, Defendants fail to provide clean replacement clothing, exacerbating the humiliation and serious health risks Plaintiffs must endure.

V. PLAINTIFFS HAVE PLEADED VIABLE CROSS-GENDER VIEWING CLAIMS BASED ON THE FOURTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. Defendants Do Not and Cannot Dispute that Plaintiffs Have Pleaded a Valid Claim for Cross-Gender Viewing.

Female inmates at MCJ are routinely viewed while naked by male guards and male inmates when they are showering, dressing and undressing, using the toilet, and attending to their menstrual needs. First Am. Compl. ¶¶ 7, 56–86. No provisions are made to protect women from

cross-gender viewing, and when Plaintiffs have attempted to shield their privacy using sheets or plastic bags, they were stopped or punished. *Id.* ¶¶ 59–63, 75–83. Defendants concede that the facts pleaded by Plaintiffs—routine and unrestricted cross-gender viewing—are sufficient to state a claim. *See* Defs.' Br. at 23-24.

B. Cross-Gender Viewing Violates Plaintiffs' Rights Under the Eighth and Fourteenth Amendments, as Well as the Fourth Amendment.

While conceding that Plaintiffs' cross-gender viewing allegations state a claim for relief, Defendants insist that the claim is cognizable only under the Fourth Amendment and that the court should "dismiss" such claims insofar as they are brought under the Eighth and Fourteenth Amendments. *See* Defs.' Br. at 23. Defendants' position appears to be based on *Everson v. Michigan Department of Corrections*, 391 F.3d 737, 757 n.26 (6th Cir. 2004), which states that the Sixth Circuit "has found the 'privacy' right against the forced exposure of one's body to strangers of the opposite sex to be located in the Fourth Amendment." However, the Sixth Circuit also recognized that courts have found inmates' rights against unnecessary cross-gender viewing to be a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, and that "under certain circumstances, the invasion of an inmate's bodily 'privacy' can violate the inmate's Eighth Amendment rights." *Id.*

Indeed, in *Kent v. Johnson*, 821 F.2d 1220, 1227-28 (6th Cir. 1987), the Sixth Circuit allowed a prisoner's claim regarding cross-gender viewing to proceed under the Eighth Amendment in addition to the Fourth Amendment. Subsequently, in *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855, 862–64 (W.D. Mich. 2000), the court recognized that pretrial detainees are entitled to bring an analogous claim under the Fourteenth Amendment. Here, Plaintiffs allege not only routine cross-gender viewing, First Am. Compl. ¶¶ 56-86, but also that they are punished for attempting to protect their privacy, *id*. ¶¶ 75-83, and that they are told they

lost their right to privacy by getting arrested, *id*. ¶ 84. Therefore, in this case Plaintiffs should be permitted to proceed under the Fourth, Eighth and Fourteenth Amendments.

C. Denise Vos Has Pleaded a Viable Cross-Gender Viewing Claim Against Defendant Gutowski.

Defendants seek dismissal of Denise Vos's cross-gender viewing claim against Defendant David Gutowski because, they say, it is based on only a "single instance" and Gutowski's presence was for a "valid penological purpose" (passing out medication). Defs.' Br. at 25. This mischaracterizes Vos's claim and Plaintiffs' complaint.

First, the relevant inquiry is not whether passing out medication was a legitimate activity, but rather whether Gutowski had a legitimate penological purpose to walk into Vos's cell without announcing himself or waiting until female inmates were clothed or done using the toilet. *See* First Am. Compl. ¶¶ 72-74.

Stoudemire v. Michigan Department of Corrections 705 F.3d 560 (6th Cir. 2013) is instructive in this regard. The defendant was a correctional officer who strip-searched an inmate in full view of other inmates and prison personnel. In denying summary judgment, the Sixth Circuit acknowledged that the officer may have had a legitimate penological justification for searching the plaintiff. However, the court held that the officer violated the inmate's clearly established Fourth Amendment rights because there were no exigent circumstances that justified conducting the strip search in a location where others could view her naked. *Id*. at 573–74. Here, the same analysis applies. Viewing the complaint in the light most favorable to Vos, there were no *exigent* circumstances that justified Gutowski, a male officer, intruding upon Vos while she was using the toilet and completely naked.

Ms. Vos's claim against Gutowski is further supported by her allegations that Gutowksi repeatedly tore down sheets and toilet paper that she had erected in an effort to protect her

privacy while she was showering and using the toilet. First Am. Compl. ¶¶ 81, 83.[11] Thus, contrary to Defendant's argument, Ms. Vos's claim is not based on a "single instance."[12] She has alleged that Gutowski has repeatedly and intentionally deprived her of cross-gender privacy without penological purpose. Vos's claim against Gutowski should proceed.

VI. PLAINTIFFS HAVE ADEQUATELY PLEADED FACTS SHOWING DELIBERATE INDIFFERENCE.

Defendants also argue that Plaintiffs' claims fail the "subjective test" of the Eighth Amendment. *See* Defs.' Br. at 21. In *Farmer*, 511 U.S. 825, the Supreme Court held that to prevail on an Eighth Amendment claim, a plaintiff must prove a defendant's "deliberate indifference" to inmates' serious needs, which means proving that the defendant actually "knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. But since most defendants are not in the habit of announcing that they know of a risk and are disregarding it, *Farmer* provides the following guidance on how a plaintiff can prove knowledge:

> Whether a prison official had the requisite knowledge is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk . . . was longstanding, pervasive, well-documented or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Id. at 842-43 (quotation marks and citations omitted). *See also Spencer v. Bouchard*, 449 F.3d 721, 729 (6th Cir. 2006) (imputing knowledge to defendant because of "obviousness of the risk"

[11] Stashia Collins brings a similar individual claim against Defendant DeJong. First Am. Compl. ¶¶ 26, 78, 268. Defendants do not seek judgment on this claim in their motion or supporting brief.

[12] Moreover, a single instance of cross-gender viewing is sufficient to state a claim. *See Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992); *Stoudemire*, 705 F.3d 560.

where cell was wet and cold for months).

The Sixth Circuit has made clear that whether jail officials know of and disregard serious risks to inmate safety "is a question of fact." *Street v. Corrs. Corp. of Am.*, 102 F.3d 810, 816 (6th Cir. 1996); *see also Woods v. Lecureux*, 110 F.3d 1215 (6th Cir. 1997) (summary judgment inappropriate where there are questions of fact about whether defendant was aware of risk of serious harm). Moreover, on a motion to dismiss an Eighth Amendment claim, the Court "must assume . . . that [officials] knew about and deliberately disregarded the risk to . . . health and safety" if there were "repeated attempts to notify prison officials about the [jail] conditions." *Brown v. Bargery*, 207 F.3d 863, 868 (6th Cir. 2000).[13]

Additionally, both the Supreme Court and the Sixth Circuit have held that in cases seeking injunctive relief from an ongoing harm or risk of harm, officials are charged with knowledge of the harms and risks that are brought to their attention through the litigation itself:

> If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware could claim to be subjectively blameless for purposes of the Eighth Amendment . . . .

Farmer, 511 U.S. at 846 n.9. Or, put another way in *Hadix v. Johnson,* 367 F.3d 513, 526 (6th Cir. 2004):

> In this case, we are concerned with future conduct to correct prison conditions. If those conditions are found to be objectively unconstitutional, then that finding would also satisfy the subjective prong [of an Eighth Amendment claim] because the same information that would lead to the court's conclusion was available to the prison officials.

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[13] *See also Williams v. Griffin*, 952 F.2d 820, 826 (4th Cir. 1991) (reversing summary judgment where pre-lawsuit inspection reports and grievances evidenced officials' knowledge of inhumane prison conditions; judgment as a matter of law is "seldom appropriate in cases were particular states of mind are decisive as elements of [a] claim or defense" (citation omitted)); *Leamer v. Fauver*, 288 F.3d 532, 547 (3d Cir. 2002) (question of deliberate indifference can be fact-intensive and require development of record).

Applying these principles here, Plaintiffs have clearly alleged facts from which a reasonable factfinder could plausibly infer Defendants' deliberate indifference. Specifically:

- Defendants have known about the unsanitary and dangerous conditions at MCJ for years, including through written documentation of those problems by the Michigan Department of Corrections, Plaintiffs' counsel, and an expert report sent to Defendants approximately a year before this lawsuit was filed. First Am. Compl. ¶¶ 156–58, 244–53.

- Plaintiffs' counsel and their expert's report also documented the violation of female inmates' privacy and their lack of exercise/recreation opportunities. *Id.* ¶ 251.

- Defendants have repeatedly and deliberately ignored or discarded Plaintiffs' written grievances about the jail conditions challenged in this lawsuit. *Id.* ¶¶ 14–16, 182-197.

- Multiple overcrowding states of emergency have been declared by the sheriff and jail administrator, who have acknowledged a "persistent state of overcrowding" at MCJ but have not brought the jail population down to acceptable levels. *Id.* ¶¶ 167–78.

- Despite Defendants' knowledge of these abysmal conditions of confinement, they persist to this day. *Id.* ¶ 253.

These facts—which must be taken as true and viewed in the light most favorable to Plaintiffs—clearly belie any notion that Defendants are unaware of the systemic, widespread constitutional violations at MCJ. To the contrary, these facts state a plausible claim that Defendants have been and continue to be deliberately indifferent to such inhumane conditions.

Despite these allegations, Defendants argue in their brief that, because they are finally building a new jail, they are not deliberately indifferent to the conditions in the old jail. *See* Defs.' Br. at 21. This argument fails for multiple reasons. First, the prospect of a new jail is relevant only to Count IV (unsafe conditions). A new jail is neither necessary nor sufficient to remedy the constitutional violations alleged in Count I (cross-gender viewing), Count II (exercise), or Count III (hygiene items).

Second, Defendants "assert" that conditions will improve in the new jail and that building a new facility is "evidence" that they are not deliberately indifferent. Defs.' Br. at 21. Under

Rule 12(c)'s legal standard, the court cannot credit Defendants' "assertions" or "evidence." Rather, the court must accept Plaintiffs' allegations—which demonstrate that Defendants knew about but disregarded MCJ's unsafe conditions and denial of basic human needs—as true.

Third, Defendants essentially argue that because they are building a new jail, they should get a free pass, regardless of how horrendous the conditions have been over the last three and half years or will continue to be until the new jail is completed. In fact, a "prison official may be liable for substantial risk of serious harm to inmates in spite of efforts reasonably calculated to reduce the risk, if he intentionally refuses other reasonable alternatives and the dangerous conditions persist." *Tafoya v. Salazar*, 516 F.3d 912, 918 (10th Cir. 2008). While the new jail may in the future address some (but not all) of the problems with the current jail, the question before the court is whether Plaintiffs have alleged facts from which a factfinder could infer that Defendants were aware of but disregarded conditions at the current jail. Defendants could try to prove at trial that there was nothing they could do to remedy conditions at the current jail short of building a new jail. However, that is a question of fact (e.g., whether the plumbing was beyond repair, the vermin could not be eradicated, etc.) which cannot be decided at the pleadings stage.

In *Wright v. Stanley*, No. CIV-11-1235-C, 2015 WL 3606390, at *5 (W.D. Okla. June 8, 2015), the court rejected defendants' argument that construction of a new jail demonstrated that they were not deliberately indifferent: "While the new jail facility may have improved conditions for prisoners held after [opening of the new jail], there is no evidence that construction of the new jail improved conditions at the [old jail] for [plaintiff] and other prisoners held before the new facility's opening."[14] The same analysis applies here.

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[14] Because construction of a new jail does not remedy conditions at an existing jail, courts will enjoin ongoing unconstitutional conditions at existing jails while new jails are being built. *See*, *e.g.*, *Jackson v. Gardner*, 639 F. Supp. 1005, 1011-12 (E.D. Tenn. 1986) (ordering

In sum, Plaintiffs' alleged facts state plausible Eighth Amendment claims of deliberate indifference, and they must be permitted to develop a full record from which they can offer proofs at summary judgment or at trial.

VII. REMAINING ISSUES

For the reasons set forth above, Plaintiffs' claims for relief under Counts I through IV of their complaint must survive Defendants' motion for partial judgment on the pleadings. Several additional points in response to Defendants' motion are appropriate.

First, Defendants appear to be asking the court to "dismiss" claims that Plaintiffs have not brought, including supposed claims involving inadequate medical care, the lack of a functioning grievance system, failure to protect, and "general overcrowding" concerns or the violation of the state's overcrowding statute. *See* Defs.' Br. at 15-17, 19-21. Plaintiffs discussed these issues in the *factual* allegations section of their complaint because they lend support to the *legal* claims asserted in Counts I through IV. But these issues are not themselves independent legal claims asserted by Plaintiffs in their complaint. The court should deny Defendants' request for a judgment as to supposed legal claims that Plaintiffs have not brought.[15]

Second, Defendants ask the court to dismiss Plaintiffs' claims against Sheriff Roesler and Lt. Burns, who are sued in their official capacities, as duplicative of the claims against Muskegon County. Based on Defendants' representation that Muskegon County is the proper defendant for claims regarding the jail that would fall under the *Monell* doctrine, Plaintiffs are willing to

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injunctive relief to increase exercise time at current jail, pending completion of new jail); *Tate v. Kassulke*, 409 F. Supp. 651, 654 (W.D. Ky. 1975) (entering injunction on pest control and other issues while noting that construction of new jail should eliminate many of problems caused by advanced age of current jail).

[15] Similarly, Defendants ask the court to "dismiss" Plaintiffs' supposed claim for prospective relief regarding their uniforms. *See* Defs.' Br. at 24-25. Plaintiffs' complaint contains no request for prospective relief regarding uniforms, so no such "dismissal" is warranted.

stipulate to the dismissal of Roesler and Burns.

Third, Defendants have conceded that Plaintiffs have stated a Fourth Amendment claim against Muskegon County for cross-gender viewing under Count I (*see* Defs.' Br. at 24); Defendants have not sought judgment as to Michelle Semelbauer's individual claim under Count V (*see id.* at 1 n.1). Defendants' motion and brief never address Plaintiffs' individual claims for damages against Defendants Morris, Greve, or DeJong (*see* First Am. Compl. ¶¶ 26, 268, 278). Therefore, those claims necessarily survive Defendants' motion.

CONCLUSION

For the reasons set forth above, Defendants' motion for partial judgment on the pleadings should be denied.

Respectfully submitted,

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