PETITION APPENDIX TABLE OF CONTENTS

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File Name: 22a0180p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF SETH MICHAEL ZAKORA; BRANDY ZAKORA, in her capacity as the Personal Representative of the Estate of Seth Michael Zakora,

Plaintiffs-Appellants,

v.

No. 21-1620

TROY CHRISMAN; MATTHEW HUNTLEY; CHADWICK MOBLEY; STEVE JOHNSON; BONITA J. HOFFNER; STEVE RIVARD; HEIDI E. WASHINGTON; BRANDON OAKS; RUSSELL RURKA; HEATHER LASS; JAMES WOLODKIN; JAMES COLEMAN; UNKNOWN PARTY, named as Jane Doe,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.

No. 1:19-cv-01016—Janet T. Neff, District Judge.

Argued: April 27, 2022

Decided and Filed: August 10, 2022

Before: SUTTON, Chief Judge; GILMAN and MOORE, Circuit Judges.

COUNSEL

ARGUED: Madeline M. Sinkovich, JOHNSON LAW, PLC, Detroit, Michigan, for Appellants. Kyla L. Barranco, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for the MSP Appellees. James T. Farrell, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for the MDOC Appellees. **ON BRIEF**: Madeline M. Sinkovich, Christopher Patrick Desmond, JOHNSON LAW, PLC, Detroit, Michigan, for Appellants. Kyla L. Barranco, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for the MSP Appellees. James T. Farrell, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for the MDOC Appellees.

GILMAN, J., delivered the opinion of the court court in which MOORE, J., joined. SUTTON, C.J., (pp. 36–45), delivered a separate opinion concurring in part and dissenting in part.

RONALD LEE GILMAN, Circuit Judge. Seth Michael Zakora died from an overdose of fentanyl in his prison cell at the Lakeland Correctional Facility

(Lakeland) in Michigan. His mother, Brandy Zakora, as the personal representative of his estate, brought this lawsuit against a number of employees and officials with the Michigan Department of Corrections (MDOC) and the Michigan State Police (MSP), asserting multiple claims under 42 U.S.C. § 1983.

The claims in essence allege that the defendants are responsible for Zakora's death because (1) they failed to protect him from the allegedly rampant problem of drug smuggling at Lakeland, and (2) they failed to promptly investigate two other incidents of drug overdoses in Zakora's small unit that occurred within two days of his own death. Zakora's estate (the Estate) also alleges that two corrections officers were deliberately indifferent to Zakora's serious medical needs by not heeding verbal warnings from other inmates about Zakora's dire health status immediately before he died.

The district court granted the defendants' motions to dismiss or, in the alternative, for summary judgment. For the reasons set forth below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

On the morning of January 22, 2017, Zakora was found lying unresponsive in his bunk in the C-Unit of Lakeland by defendant Steven Johnson, a corrections officer at the facility. Responding officers determined

that Zakora was already dead due to the presence of rigor mortis, and the cause of death was later found to be accidental fentanyl toxicity. Earlier that morning, another prisoner allegedly told Johnson and/or defendant Chadwick Mobley (another corrections officer at Lakeland) to "check on Mr. Zakora because he was not doing well or because there appeared to be something wrong with him." The complaint alleges that these warnings went unheeded, and that Zakora was never checked on, foreclosing the possibility of any lifesaving medical treatment.

Mobley worked the night shift in Zakora's housing unit from 10:00 p.m. on January 21 until 6:00 a.m. the next morning, at which time Johnson's shift started. Both Johnson and Mobley stated in unrebutted affidavits that they had no knowledge either before or during the night shift that Zakora possessed, ingested, or intended to ingest illegal drugs. Mobley stated that he did not speak with Zakora during that shift, and no one advised him to check on Zakora or to watch Zakora closely. According to Johnson's affidavit, he discovered Zakora dead in his bunk on January 22 at 7:58 a.m., only seconds after a prisoner who was exiting the unit said that Zakora was not "doing too good" or "words to that effect." Johnson also asserts that no one advised him that he should check on Zakora or watch him closely prior to that time.

The C-Unit of Lakeland is a single enclosure that houses between 12 to 16 prisoners. Two other prisoners in the C-Unit were hospitalized from drug overdoses in the two days prior to Zakora's death, but no immediate investigation was undertaken. After Zakora's death, the MSP brought a drug-detection dog

into the facility. The dog's alerts gave positive indications of contraband in the C-Unit.

Zakora's overdose, according to the complaint, was the consequence of a longstanding problem of drug smuggling into Lakeland and other Michigan state prisons. At the time of Zakora's death, illegal drugs were allegedly being smuggled into Lakeland in basketballs that were thrown over the facility's fence. This scheme was allegedly orchestrated by defendant Jane Doe—an unidentified female corrections officer—and a prisoner with whom she was romantically involved.

According to the complaint, an unidentified prisoner had informed defendant Troy Chrisman, an inspector at Lakeland, about the drug-smuggling ring "on more than one occasion prior to Zakora's death, . . . provid[ing] information to the officers with details of how the drugs were coming in and who was providing them." Chrisman allegedly relayed this information to another inspector at Lakeland, defendant Matthew Huntley, but neither took any action nor undertook any investigation. This information was then allegedly passed on by Chrisman and Huntley to their supervisors, defendant Bonita Hoffner (the Warden at Lakeland) and defendant Steve Rivard (the Assistant Deputy Director of the MDOC), but they allegedly either ignored the information or instructed Chrisman and Huntley to not investigate the accusations. Defendant Russell Rurka (the Administrative Assistant to the Warden of Lakeland) and defendant Heather Lass (a detective with the MSP) allegedly told Brandy Zakora that they knew about the scheme involving the drug-filled basketballs, but that they had not been

able to catch the perpetrator. The prisoner who gave the information to the inspectors was subsequently charged with and convicted of smuggling drugs into Lakeland, allegedly to avoid any internal investigation into the female corrections officer who was involved in the smuggling.

As alleged in the complaint, drug smuggling by corrections officers is a chronic problem throughout the Michigan state prisons. The complaint recounts two incidents from 2016 when MDOC employees reported drug smuggling by corrections officers, but no investigation was undertaken. One of the employees allegedly sent his report to the MSP, and the other emailed his concerns directly to defendant Heidi Washington, the Director of the MDOC. Both of these employees were allegedly fired, only to be reinstated after instituting litigation and a civil-service hearing, respectively.

B. Procedural history

The operative first amended complaint was filed in December 2019. Of the 13 defendants, 9 are current or former MDOC employees: MDOC Director Heidi Washington, Assistant Deputy Director Steve Rivard, former Lakeland Warden Bonita Hoffner, Lakeland Inspector Troy Chrisman, former Lakeland Inspector Matthew Huntley, former Administrative Assistant to the Warden Russell Rurka, Lakeland Corrections Officer Steven Johnson, Lakeland Corrections Officer Chadwick Mobley, and Lakeland Corrections Officer Jane Doe (who allegedly orchestrated the drug-smuggling scheme) (collectively, the MDOC Defendants). The remaining four defendants are MSP employees:

Trooper Brandon Oaks, Trooper James Wolodkin, Lieutenant James Coleman, and Detective Heather Lass (collectively, the MSP Defendants).

Four claims were asserted in the first amended complaint. Count I alleged that all defendants except Johnson and Mobley failed to protect Zakora from illegal drugs that entered Lakeland, in violation of Zakora's Eighth Amendment rights. Similarly, Count II alleged that all defendants except Johnson and Mobley violated Zakora's Fourteenth Amendment rights under the state-created-danger doctrine by failing to investigate allegations of drug smuggling. Count III alleged that MDOC defendants Washington, Rivard, and Hoffner failed to train and supervise their subordinates with regard to preventing the smuggling of drugs into the prison, in violation of Zakora's Fourteenth Amendment rights. Finally, in Count IV, the Estate alleged an Eighth Amendment deliberate-indifference claim against MDOC Defendants Johnson and Mobley for failing to promptly check on Zakora after a prisoner allegedly told them that something was wrong with Zakora.

The MDOC Defendants and the MSP Defendants filed separate motions to dismiss or, alternatively, for summary judgment. These motions were accompanied by declarations and affidavits from some of the defendants that attested to their involvement in the events at issue as well as by other documents from the MSP investigation into Zakora's death.

After those motions were fully briefed, the Estate filed a motion for leave to file a second amended complaint, which sought to identify MDOC defendant Jane Doe as former Corrections Officer Tammy Blair.

Its proposed second amended complaint also added two new MDOC defendants: current Corrections Officer Thomas Ivany and former Corrections Officer Chase White, both of whom, the Estate alleged, were engaged in smuggling drugs into Lakeland either jointly with or separately from Blair. The Estate asserted in its motion that, on April 30, 2021, the Estate's counsel had "received information from a person who was employed at the MDOC on the date of Seth's death" that included the names of the three aforementioned individuals who were allegedly involved in the drug smuggling at Lakeland.

In July 2021, the assigned magistrate judge issued a report recommending that both of the defendants' motions be granted. The report first concluded that the Estate had abandoned Count II (the state-created-danger claim), then analyzed the other claims against the MSP Defendants and the MDOC Defendants separately.

As for the MSP Defendants, the magistrate judge recommended dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the deliberate-indifference claim of Count I (the only count pursued against the MSP Defendants). The magistrate judge noted that the only relevant factual allegation made against the MSP Defendants was the statement from Lass to Brandy Zakora that the MSP knew that the drug-filled basketballs were being thrown over the fence, but that they were unable to catch the perpetrator. Because the MSP Defendants had each submitted unrebutted declarations demonstrating their lack of involvement in Zakora's death, the report concluded

that they were also entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The report rejected the Estate's argument that summary judgment was improper because the Estate had not yet been able to conduct discovery. Although the Estate's counsel submitted a declaration attesting that "[t]he information to be discovered includes documentary and testimonial evidence to support the allegations in the Complaint," the report concluded that counsel's declaration was too broad and did "not even minimally demonstrate[] that discovery would enable [it] to defeat summary judgment."

Moving to the MDOC Defendants, the report concluded that they too were entitled to dismissal under Rule 12(b)(6) on each of the claims asserted against them. The magistrate judge recommended that the failure-to-protect claim of Count I should be dismissed because the Estate did not plausibly allege that the MDOC Defendants were subjectively aware of the risk that Zakora specifically would ingest drugs. Count III's failure-to-train claim should likewise be dismissed, the report concluded, because government officials may not be held liable for the unconstitutional conduct of their subordinates unless the supervisors were directly involved in the wrongful conduct, and there was no allegation that the MDOC Defendants were aware of any specific risk to Zakora. Finally, the report concluded that the deliberate-indifference claim against Johnson and Mobley in Count IV should be dismissed because the complaint did not indicate the approximate time that Zakora died, or the approximate time that Johnson or Mobley were informed that Zakora might need help. This caused the

magistrate judge to conclude that the complaint had shown only that Johnson and Mobley possibly, rather than plausibly, violated Zakora's Eighth Amendment rights.

The magistrate judge's report construed the MDOC Defendants' motion for summary judgment as limited to Johnson and Mobley because they were the only MDOC Defendants to submit affidavits. Their respective unrebutted testimony established that they were each unaware that Zakora had ingested any drugs or was in distress for any other reason, which entitled them to summary judgment on Count IV. Again, the report noted that the declaration submitted by the Estate's counsel in support of his request for discovery "lacks both details and specificity as to what discovery might yield," so the Estate had "failed to meet [its] burden under Rule 56(d)."

Finally, the report denied the motion for leave to file a second amended complaint. The statute of limitations on the § 1983 claims had expired, and the report explained that the proposed second amended complaint did not "relate back" to the first amended complaint under Rule 15 of the Federal Rules of Civil Procedure.

Timely objections to the report were filed by the Estate, but the district court rejected those objections and, in September 2021, adopted the report in full. Judgment was therefore entered in favor of the defendants, and this timely appeal followed.

II. ANALYSIS

The Estate does not contest the district court's conclusion that it has abandoned Count II of its complaint. Our analysis is therefore limited to Counts I, III, and IV of the first amended complaint.

A. Standard of review

We review de novo the district court's dismissal of the Estate's lawsuit for failure to state a claim for relief. *See Frank v. Dana Corp.*, 646 F.3d 954, 958 (6th Cir. 2011). To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). We view the complaint in the light most favorable to the Estate as the nonmovant, accepting the complaint's well-pleaded factual allegations as true and drawing all reasonable inferences in favor of the Estate. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 440 (6th Cir. 2020).

"As a general rule, a court considering a motion to dismiss must focus only on the allegations in the pleadings." Id. (citation and internal quotation marks omitted). But if the court does consider matters outside the pleadings, then "the motion must be treated as one for summary judgment under Rule 56," and

"[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

We also review de novo the district court's grant of summary judgment. *Wheat v. Fifth Third Bank*, 785 F.3d 230, 236 (6th Cir. 2015). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When evaluating a summary judgment motion, we "must construe the facts in the light most favorable to the non-movant." *Gillis v. Miller*, 845 F.3d 677, 683 (6th Cir. 2017). A party opposing a properly supported summary-judgment motion, however, "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks omitted).

We review a claim that summary judgment was prematurely entered because additional discovery was needed under the abuse-of-discretion standard. *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002) (citing *Vance v. United States*, 90 F.3d 1145, 1149 (6th Cir. 1996)). The nonmovant, however, "bears the obligation to inform the district court of its need for discovery." *Id.* Finally, we review the denial of a motion for leave to amend the complaint under the abuse-of-discretion standard, "except when the denial was due to futility, in which case we review [the denial] de novo." *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 850 (6th Cir. 2012).

B. Qualified immunity

All of the defendants raised the defense of qualified immunity below. Notably, however, the MDOC Defendants do not pursue that argument on appeal. To overcome a defendant's qualified-immunity defense, a plaintiff must plausibly allege facts, and ultimately prove, "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Ashcroft, 563 U.S. at 741 (citation, internal alterations, and internal quotation marks omitted). Legal principles are "clearly established" when they "have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). This does not "require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Supreme Court has "repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Wesby*, 138 S. Ct. at 590 (quoting *Plumhoff v. Rickard*,

572 U.S. 765, 779 (2014)). "A rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that [the rule] was firmly established." *Id.* (alteration in original) (citation and internal quotation marks omitted). But "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). "Thus, when 'no reasonable correctional officer could have concluded' that the challenged action was constitutional, . . . there does not need to be a case directly on point." *Moderwell v. Cuyahoga County*, 997 F.3d 653, 660 (6th Cir. 2021) (quoting *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020)).

Courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Estate does not cite to any Supreme Court or Sixth Circuit precedent suggesting that an inmate has an Eighth Amendment right to be protected from the unfettered flow of drugs into a prison. Two factors lead us away, however, from deciding this case under the "clearly established" prong of qualified immunity for the first time on appeal.

First, the MDOC Defendants have forfeited the argument as an appellate issue. *See Watkins v. Healey*, 986 F.3d 648, 667 (6th Cir. 2021). The MDOC Defendants did not make any argument at all as to the "clearly established" prong in their appellate brief, insisting only that the Estate did not plausibly allege a

constitutional violation. Indeed, the words "clearly established" do not appear a single time in that brief. Our dissenting colleague, however, notes that a forfeiture argument can itself be forfeited, citing *United States v. Shultz*, 733 F.3d 616, 619 (6th Cir. 2013). But unlike in criminal-sentencing cases, in which the basis for the district court's sentencing is necessarily clear from the sentencing record, the district court here did not address the "clearly established" or "obviousness" issues at all. We cannot, however, undertake our own analysis without input from either party, when the "clearly established" prong depends on factual issues that were not before the district court, as discussed in more detail below.

Second, the resolution of the Estate's response to the defendant's qualified-immunity defense turns on facts that the parties have not yet developed. The Estate argues that this is the rare, "obvious case where the unlawfulness of the officer's conduct is sufficiently clear." *Wesby*, 138 S. Ct. at 590 (citation and internal quotation marks omitted). In the Estate's view, no reasonable official could have concluded that failing to investigate the drug smuggling at Lakeland, despite the documented risk of harm, was constitutional. But the district court did not reach the "obviousness" issue because, once it decided that the Estate had not shown that a constitutional violation had occurred, there was no need for the court to address the second prong of the qualified-immunity defense.

For us to opine on this issue now would thus violate "the general rule that a federal appellate court does not consider an issue not passed upon below." *Haywood v. Hough*, 811 F. App'x 952, 962 (6th Cir.

2020) (quotation omitted); see also *Coble v. City of White House*, 634 F.3d 865, 871 (6th Cir. 2011) ("In light of its conclusion that Coble failed to show the violation of a constitutional right, the district court did not consider the second prong of the qualified immunity analysis. We leave consideration of whether the right was clearly established for determination by the district court in the first instance.").

We of course have discretion to deviate from the general rule in "exceptional cases" or to avoid "a plain miscarriage of justice." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557, 558 (1941)). For example, in some cases on appeal from a summary-judgment decision, we have exercised our discretion to examine on our own whether the law was clearly established. *See, e.g., Gossman v. Allen*, 950 F.2d 338, 342 (6th Cir. 1991). That is a logical decision when the facts are fully developed below and the question at the heart of the qualified-immunity analysis is a "purely legal" one. *Id.*

But we see no similar reason to exercise our discretion here. To the contrary, any consideration of the "obviousness" argument at the motion-to-dismiss stage, where there has been virtually no factual development as to the MDOC Defendants' actions or inactions, would contravene the reasoning behind this court's stated preference for deciding a defendant's entitlement to qualified immunity at summary judgment as opposed to under Rule 12(b)(6). *See Guertin v. State*, 912 F.3d 907, 917 (6th Cir. 2019) ("The reasoning for our general preference is straightforward: 'Absent any factual development beyond the

allegations in a complaint, a court cannot fairly tell whether a case is 'obvious[.]'" (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring))).

Our dissenting colleague describes our refusal to address the "clearly established" prong as a "deus ex machina" (whatever that means), arguing that we are improperly saving the Estate's claim from defeat. Dissent at 41. But our decision is not based on some obscure technicality. The Estate makes serious allegations of misconduct within Lakeland. Consider, for example, the Estate's allegations that top prison officials instructed their subordinates not to investigate known drug smuggling at Lakeland and that other officials were themselves involved in supplying the lethal drugs to Zakora. Accepting these allegations as true, as we must at this stage in the proceedings, the Estate has at least a colorable argument that "the unlawfulness of the [officials'] conduct is sufficiently clear even though existing precedent does not address similar circumstances." *See Wesby*, 138 S. Ct. at 590 (citation omitted).

This issue, however, was not addressed by the district court nor adequately briefed on appeal, so consideration by us in the first instance would be inappropriate. *See Hart v. Hillsdale County*, 973 F.3d 627, 645 (6th Cir. 2020) ("Without the benefit of an initial determination by the district court or any developed argument on appeal, we are unable to decide in the first instance whether Hart received the process he was due or whether his right to that process was clearly established."). And because there has been no factual

development regarding these disturbing allegations, this issue is best left to the district court to address in the first instance at the summary-judgment stage. *See Watkins*, 986 F.3d at 668 ("In sum, Healy has forfeited the issue of qualified immunity at this stage of the proceedings. Should Healy raise qualified immunity in a motion for summary judgment, . . . that would be the more appropriate time for this court to address that issue."); *see also Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc) ("Defendants may still assert the [qualified-immunity] defense in later proceedings on remand, even though they did not properly preserve it in the district court for purposes of this appeal.").

For these reasons, we review only the district court's conclusion that the Estate did not plausibly allege a constitutional violation. We do not consider nor express any view as to whether the alleged constitutional violation was obvious for the purposes of a qualified-immunity analysis.

C. The MSP Defendants

Although Count I was asserted against both the MSP Defendants and the MDOC Defendants, the allegations supporting the claim differ as to each group. We therefore follow the district court's lead in analyzing the sufficiency of the allegations separately as to the MSP Defendants and the MDOC Defendants.

Count I asserted that the MSP Defendants violated Zakora's Eighth Amendment rights by failing to protect Zakora from "the introduction, spread, and usage of dangerous drugs in prison." The Eighth Amendment's prohibition of cruel and unusual punishments

requires prison officials to "ensure that inmates receive adequate food, clothing, shelter, and medical care, and [to] take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citation and internal quotation marks omitted).

To establish an Eighth Amendment failure-to-protect claim, an inmate must show that prison officials acted with "deliberate indifference" to "a substantial risk of serious harm." *Id.* at 828 (citation omitted). A viable claim has both an objective and a subjective prong, requiring the plaintiff to demonstrate that "(1) the alleged mistreatment was objectively serious; and (2) the defendant subjectively ignored the risk to the inmate's safety." *Bishop v. Hackel*, 636 F.3d 757, 766 (6th Cir. 2011) (citing *Farmer*, 511 U.S. at 833).

As the district court observed, the complaint made very limited allegations against the MSP Defendants. The complaint alleged that the MSP Defendants "were involved with the drug smuggling ring and/or a cover up of Mr. Zakora's death," and that the MSP Defendants "knew that a 'cop/officer' was the person bringing suboxone and heroin into the facility but did not investigate the allegation in determining the source of the drugs that caused Mr. Zakora's death." In addition, the complaint alleged that the MSP Defendants "knew [of] and . . . participated in the drug smuggling and knew of the risks and harm associated with dangerous illegal drugs." The complaint also faulted the MSP Defendants for failing to bring a drug-detecting dog in to investigate the presence of contraband in the C-Unit before Zakora's death despite the two prior drug overdoses.

These allegations are insufficient to state an Eighth Amendment failure-to-protect claim against the MSP Defendants. The complaint failed to explain with any specificity how any of the MSP Defendants were involved in the drug-smuggling scheme or how each (or any) of them knew that a police officer was responsible for the operation. Nor did the Estate plausibly allege how any of the MSP Defendants came to obtain any knowledge about the prevalence of drugs at Lakeland, how they ignored that knowledge, or how they failed to curb the introduction, spread, and usage of drugs at Lakeland.

The allegation that MSP Detective Lass and MDOC Defendant Rurka told Brandy Zakora that drug-filled basketballs had been thrown over the fence before Zakora's death, but that "they couldn't catch the perpetrator," does not support the inference that Detective Lass or any other MSP Defendant was deliberately indifferent to the drug-smuggling problem. This allegation is ambiguous regarding who "they" are and does not specify when "they" knew and why "they" could not catch the perpetrator. If anything, it suggests that the MSP Defendants were actively trying to root out the drug-smuggling problem at Lakeland.

The allegation that the MSP Defendants did not bring in a drug-sniffing dog to Lakeland until after Zakora's death is also insufficient to state a claim. Responsibility for rooting out drug smuggling at Lakeland fell primarily to the MDOC, and we find nothing in the record to suggest that the MSP had any responsibility with regard to Lakeland unless the MSP was made aware of a reason to investigate.

As the district court determined, virtually all of the allegations against the MSP Defendants were "legal conclusions couched as facts." *See 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013) ("[A] plaintiff cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the complaint that the defendant violated the law."). The district court therefore properly dismissed Count I against the MSP Defendants. We consequently have no reason to consider whether summary judgment was properly granted to the MSP Defendants on this claim.

D. The MDOC Defendants

The remainder of the claims were asserted against the MDOC Defendants. Because Johnson and Mobley were the only two MDOC Defendants who submitted affidavits, the district court construed the motion for summary judgment as limited to those two. Johnson and Mobley were named as defendants only in Count IV, so the court construed the MDOC Defendants' motion as to Counts I and III as a motion to dismiss. Although the MDOC Defendants as a group submitted more evidence than just Johnson's and Mobley's affidavits, the district court was not required to consider that evidence. *See Scheid v. Fanny Farmer Candy Shops*, 859 F.2d 434, 436 (6th Cir. 1988) ("When a motion to dismiss under Rule 12(b)(6) is accompanied by matters outside the pleadings, as in this case, it is within the district court's discretion to consider such matters and decide the motion as one for summary judgment under Rule 56."). And because there is no indication that the court considered other evidence when deciding the motion to dismiss as to

Counts I and III, it was not required to convert the motion into one for summary judgment. See Fed. R. Civ. P. 12(d) (stating that a "motion must be treated as one for summary judgment under Rule 56" only when "matters outside the pleadings are presented to and not excluded by the court").

1. The allegations state a failure-to-protect claim under the Eighth Amendment

Count I alleges that the MDOC Defendants failed to protect Zakora from the dangers of illegal drugs by failing to "do anything to curb the introduction, spread, and usage of dangerous drugs in prison, despite their direct knowledge from prisoners snitching to them and from two previous overdoses." For the reasons set forth below, the complaint's allegations establish both the objective and subjective prongs of a failure-to-protect claim.

a. The objective prong

"To establish a constitutional violation based on failure to protect, a prison inmate first must show that the failure to protect from risk of harm is objectively 'sufficiently serious.'" *Bishop v. Hackel*, 636 F.3d 757, 766 (6th Cir. 2011) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). The risk to inmate health or safety must be "excessive." *Farmer*, 511 U.S. at 837. This objective prong "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling v. McKinney*, 509 U.S.

25, 36 (1993) (emphasis in original). "In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id.*; see also *Farmer*, 511 U.S. at 834 (explaining that "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities'" (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))).

Even where a serious injury occurs, the objective prong of a failure-to-protect claim requires an analysis of the risk to the injured party before the alleged injury occurred. This analysis must consider the likelihood of harm to the injured party in the context of the circumstances that led to the injury. *See Reedy v. West*, 988 F.3d 907, 909, 912–14 (6th Cir. 2021) (concluding that, although the plaintiff had suffered a "brutal assault" at the hands of his cellmate, the objective prong was not met because general disagreements between the cellmates before the incident did not present a substantial risk of harm); *see also Schack v. City of Taylor*, 177 F. App'x 469, 472 (6th Cir. 2006) ("Schack in fact sustained a serious injury [after falling inside a detoxification cell], but this does not necessarily indicate a substantial risk of such an injury" because "[p]lacing an intoxicated man, even a highly intoxicated man, in a detoxification cell while awaiting booking does not violate contemporary standards of decency."). Zakora's death from a drug overdose in Lakeland does not, therefore, independently establish the objective prong.

The complaint plausibly alleges, however, that Zakora was at a substantial risk of that injury before it occurred due to the widespread presence of drugs at

Lakeland, and in the C-Unit specifically. Fentanyl unquestionably poses a severe danger to anyone who comes in contact with it. There is also no question that "[t]he inherent danger of drugs is magnified when introduced to a controlled environment like a prison." *United States v. Colon*, 246 F. App'x 153, 156 (3d Cir. 2007).

According to the Bureau of Justice Statistics, incarcerated individuals are about 12 times more likely to exhibit drug dependence or misuse than the general population. Jennifer Bronson, et al., U.S. Dep't of Just., Bureau of Just. Stat., Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009, at 3–4 (2017), https://www.bjs.gov/content/pub/pdf/ dudaspji0709.pdf (finding that about 58 percent of people in state prisons and about 63 percent of those sentenced to serve time in jails meet the definition for drug dependence or misuse, compared to 5 percent of the general population). Isolation and sheer boredom further complicate prisoners' efforts to resist drugs within prison walls. *See* Beth Schwartzapfel & Jimmy Jenkins, *Inside the Nation's Overdose Crisis in Prisons and Jails*, The Marshall Project (July 15, 2021), https://www.themarshallproject.org/2021/07/15/inside-the-nation-s-overdosecrisisin-prisons-and-jails (quoting Leo Beletsky, Professor of L. & Health Scis., NE. U. Sch. of L.).

Overdose fatalities in prisons have indeed climbed dramatically in recent years. From 2001 to 2018, the number of people who died of drug or alcohol intoxication in state prisons increased by more than 600%, according to an analysis from the Bureau of Justice Statistics. E. Ann Carson, U.S. Dep't of Just., Bureau of

Just. Stat., Mortality in State and Federal Prisons, 2001-2018, at 6 (2021), https://bjs.ojp.gov/content/pub/pdf/msfp0118st.pdf.

Given these unique vulnerabilities, the risk of injury from unfettered access to deadly drugs inside a prison "is not one that today's society chooses to tolerate." *See Helling*, 509 U.S. at 36. And that is precisely what the Estate alleges here. Drugs were allegedly so prevalent inside Zakora's C-Unit that two other inmates in his 12-to-16-person unit had overdosed in the two days prior to Zakora's death, yet the complaint asserts that no investigation was undertaken until after Zakora died. Only after Zakora's death did MDOC officials order a full investigation and have the MSP bring a drug dog into the C-Unit to check for drugs.

Whether harm to a prisoner is from environmental factors such as second-hand smoke, *Helling*, 509 U.S. at 35, or from an assault by another inmate, *Bishop*, 636 F.3d at 766, the point is that prisoners may not be knowingly exposed to a sufficiently serious risk of harm. Here, failing to investigate the presence of drugs after the first two overdoses in Zakora's C-Unit raises the inference that the risk to inmate health from those drugs was "sufficiently serious," such that Zakora was "incarcerated under conditions posing a substantial risk of serious harm." *See Farmer*, 511 U.S. at 834 (citing *Helling*, 509 U.S. at 35).

The MDOC Defendants respond by arguing that an inmate who suffers an overdose from drugs that he voluntarily ingested cannot establish an Eighth Amendment claim because the "intentional and criminal decision to take the drugs" severs the causal

connection between the defendants' actions and the inmate's death. But this court's Eighth Amendment jurisprudence does not support such a broad rule.

An Eighth Amendment claim has been held viable against prison officials who are deliberately indifferent to dangers that are brought about by voluntary actions on the part of an inmate, most notably an inmate's risk of suicide. *See, e.g., Troutman v. Louisville Metro Dep't of Corr.*, 979 F.3d 472, 482–83 (6th Cir. 2020). The objective prong is met in that context if the plaintiff can plausibly establish "that the inmate showed suicidal tendencies during the period of detention." *Id*. at 483 (citations omitted). So, even though the voluntary action in taking one's own life does not bar the claim of a decedent's estate under the Eighth Amendment, courts must still assess the decedent's risk of taking that action before the suicide occurred.

Similarly, an inmate who suffers a drug overdose will not automatically lose a failure-to-protect claim simply because he voluntarily ingested the drugs. Such a claim is cognizable if the inmate alleges, and ultimately establishes, that he was at serious risk of injury from the presence of drugs before the injury occurred. Here, the Estate has met its burden by alleging the widespread presence of drugs that resulted in two prior overdoses in Zakora's small C-Unit in the days immediately preceding his own death.

The MDOC Defendants also argue that the objective prong cannot be met because "Zakora does not contend that the risk of exposure to drugs was greater inside [Lakeland] than outside of state custody." In their view, "to find that the MDOC Defendants violated Zakora's constitutional rights by failing to

monitor him in prison would be to conclude that inmates are constitutionally entitled to greater protection from the effects of illicit drugs than nonincarcerated citizens." But this argument misunderstands the responsibility incumbent on the state when it takes an inmate into its custody.

"[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199– 200 (1989) (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)). "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200 (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

This means that incarcerated persons are entitled to some protections that nonincarcerated persons do not receive. In the present case, the state of Michigan placed Zakora in custody and thereby restrained his liberty such that he did not have the freedom to distance himself from a dangerous environment. The state consequently assumed a responsibility to provide for his reasonable safety, which meant not allowing him unfettered access to deadly narcotics.

We emphasize that simple exposure to drugs, without more, does not violate contemporary standards of decency and thus does not satisfy the objective prong. Prison officials are not required to show that they have prevented all drugs from entering their

facility in order to be protected from liability. Instead, we hold that unfettered access to drugs in a prison, as evidenced here by the officials' failure to promptly investigate the two prior overdoses in Zakora's C-Unit, is sufficiently serious to satisfy the objective prong of an Eighth Amendment claim.

b. The subjective prong

We now turn to the subjective prong. "Under this subjective deliberate-indifference standard, a prison official cannot be found liable under the Eighth Amendment 'unless the official knows of and disregards an excessive risk to inmate health or safety[.]'" *Rhodes v. Michigan*, 10 F.4th 665, 674–75 (6th Cir. 2021) (internal alterations omitted) (quoting *Mingus v. Butler*, 591 F.3d 474, 480 (6th Cir. 2010)). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

Such awareness can be demonstrated through "inference from circumstantial evidence, . . . and a fact-finder 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) (citations omitted). Because each official's liability must be based solely on that official's own knowledge and actions, we consider the subjective prong for each defendant separately. *Garretson v. City of Madison Heights*, 407 F.3d 789, 797 (6th Cir. 2005).

The district court held that the subjective prong was not met because the complaint failed to show that

any of the MDOC Defendants knew that Zakora specifically was at risk due to the influx of drugs. But that reasoning is too narrow a construction of the subjective element. The Supreme Court has made "clear that the correct inquiry is whether [the defendant] had knowledge about the substantial risk of serious harm to a particular class of persons, not whether he knew who the particular victim turned out to be." *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir. 1995) (internal alterations omitted) (citing *Farmer*, 511 U.S. at 843). Therefore, for the purposes of assessing an official's deliberate indifference, "it does not matter whether . . . a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Farmer*, 511 U.S. at 843.

The two drug overdoses in the relatively small C-Unit of Lakeland that occurred in the two days prior to Zakora's fatal overdose presented a sufficiently obvious risk to infer that the MDOC Defendants who worked within Lakeland (i.e., Chrisman, Huntley, Hoffner, and Rurka) had knowledge of a substantial risk of harm to the other inmates in the C-Unit. Yet they failed to conduct a prompt investigation in an effort to rid the space of the drugs, thereby ignoring the risk of harm to the other prisoners within that space. The MDOC Defendants thus cannot escape liability by showing that they knew of a suspected risk of harm to inmates generally, but not to Zakora specifically. *See Moderwell v. Cuyahoga County*, 997 F.3d 653, 664–65 (6th Cir. 2021) (holding that the complaint adequately alleged that corrections officials were aware that their policies posed an excessive risk to all detainees, even though the complaint did not allege that the officials

were aware of a risk to the particular detainee in question).

In addition, the complaint alleges that Inspector Chrisman knew of such a risk to Zakora in particular from the uncontrolled flood of drugs into Lakeland. Specifically, a prisoner allegedly told Inspector Chrisman "of the drug smuggling ring on more than one occasion prior to Mr. Zakora's death and provided information to the officers with details of how the drugs were coming in and who was providing them," giving "step by step details of how and when drugs were entering the facility and . . . about the individuals supplying large amounts of drugs to Mr. Zakora." Inspector Chrisman, in turn, allegedly relayed this information to his colleague, Inspector Huntley, and to his supervisors, Warden Hoffner and Assistant Deputy Director Rivard, all of whom likewise failed to act. The prisoner's detailed warning, considered in conjunction with the two prior overdoses, allows us to draw a "reasonable inference" that MDOC Defendants Chrisman, Huntley, Hoffner, Rivard, and Rurka knew of a substantial risk of harm to Zakora. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

But the same cannot be said for Director Washington. The complaint alleges generally that she "had notice that corrections officers were smuggling drugs into prisons." To support this allegation, however, the Estate offers only two alleged incidents from 2016 when MDOC employees at *other* Michigan correctional facilities reported drug smuggling by corrections officers, but where no investigations were undertaken. Director Washington was allegedly contacted directly by the whistleblower at one of these other

facilities, but this does not support the inference that Director Washington was actually aware of any substantial risk of harm at Lakeland.

In sum, the allegations in the complaint are sufficient to establish the objective and subjective prongs of the failure-to-protect claim against MDOC Defendants Chrisman, Huntley, Hoffner, Rivard, and Rurka, but not against Director Washington. The district court therefore erred in dismissing the Count I claim against all of the MDOC Defendants.

Our dissenting colleague's contrary view is summed up in his opening paragraph with his clever-sounding but somewhat mocking critique that two wrongs (Zakora's prior criminal conduct and his voluntary drug overdose in prison) "apparently make a constitutional right." Dissent at 36. That is clearly not what we are saying. In the first place, Zakora's criminal conduct that landed him in prison is totally irrelevant to the issues before us. All inmates are in prison because they engaged in antisocial behavior, but surely that does not deprive them of all their constitutional rights once they are incarcerated. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) ("[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.").

Secondly, we acknowledge that the Estate would have no claim if this were simply a run-of-the-mill drug-overdose case. It is not. Instead, the Estate claims that the relevant prison officials knew of

Zakora's heavy drug use, knew that two of his immediate cellmates had been hospitalized in the 48 hours prior to Zakora's death due to drug overdoses, and yet they failed to initiate a timely investigation to remove the lethal substances from that cell that would have saved Zakora's life. Because the relevant defendants allegedly knew that Zakora was at risk and ignored that risk, this is directly comparable to the suicide "deliberate-indifference" cases where this court has allowed the claim to proceed beyond the pleading stage. *See, e.g., Moderwell*, 997 F.3d at 665 (holding that the administrator of a suicide victim's estate adequately stated a deliberate-indifference claim against prison officials by alleging that the officials knew about numerous detainee deaths by suicide at the facility in question and yet ignored those risks).

Our dissenting colleague responds by listing numerous hypothetical scenarios that purportedly expose the illogic of the Estate's claim. We find none of those examples on point, but the most egregious is his questioning whether, "[i]f a prisoner contracts a bloodborne disease from injecting heroin with an unsanitary needle, have officials imposed cruel and unusual conditions because they did not provide clean needles?" Dissent at 42. That is not remotely close to the situation alleged here.

The Estate is not contending that "cleaner" drugs should have been provided to Zakora. To the contrary, it is arguing that MDOC officials—equipped with the knowledge that drugs were flowing unimpeded into the facility, that Zakora was a heavy drug user, and that those drugs had just caused two overdoses in the C-Unit—should have taken immediate measures to

investigate and remove those drugs from the cell. Requiring that prison officials respond to a serious drug problem of which they are aware hardly means requiring them to institute a needle-sharing program. But if prison officials are aware that a prisoner has access to dangerous substances, they are "not free to let the state of nature take its course" by standing by and allowing further harm to ensue. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

2. The allegations state a claim for supervisory liability against Hoffner and Rivard, but fail to state such a claim against Washington

We next turn to Count III, where the Estate alleged that defendants Washington, Hoffner, and Rivard failed to train and supervise Jane Doe and other prison employees to prevent the entry of illegal drugs into Lakeland and other MDOC facilities. It also alleged that these defendants failed to adequately supervise their subordinates by acquiescing in the subordinates' failure to take any remedial action to address the drug problem at Lakeland.

The complaint states that Washington, Hoffner, and Rivard are being sued in their "individual and supervisory capacity." In the Estate's response to these defendants' motion to dismiss, the Estate clarified that these individuals were also being sued in their official capacities. But the complaint seeks only money damages against these defendants, so these claims cannot be brought against them in their official capacities due to the Eleventh Amendment to the U.S. Constitution.

The Eleventh Amendment protects a state official from suit for monetary damages in his or her official capacity because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citations omitted); see also *Harper v. [Unknown] Arkesteyn*, No. 19-1928, 2020 WL 4877518, at *2 (6th Cir. Apr. 28, 2020) ("Harper's claims against the defendants in their official capacities are essentially claims against the governmental entity they represent, in this case the Michigan Department of Corrections. The defendants are therefore immune from suit for monetary damages in their official capacities."). Consequently, the Count III claim is cognizable against these defendants only in their individual capacities.

Turning to the adequacy of the complaint's allegations, individual liability on a failure-to-train or supervise theory "must be based on more than respondeat superior, or the right to control employees." *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (citation omitted). A simple failure to act, without "a showing of 'direct responsibility' for the actions of the individual officers," will not suffice to establish supervisory liability. *Hays v. Jefferson County*, 668 F.2d 869, 873-74 (6th Cir. 1982) (quoting *Rizzo v. Goode*, 423 U.S. 362, 376 (1976)). Instead, "supervisory liability requires some 'active unconstitutional behavior' on the part of the supervisor." *Peatross v. City of Memphis*, 818 F.3d 233, 241 (6th Cir. 2016) (quoting *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir. 1999)).

As relevant here, a supervisor may be liable if he or she "abandons the specific duties of his [or her] position in the face of actual knowledge of a breakdown in the proper workings of the department." *Winkler v. Madison County*, 893 F.3d 877, 898 (6th Cir. 2018) (citation and internal alterations omitted). The supervisor must have abdicated his or her job responsibility, and the "*active performance* of the [supervisor's] individual job function" must have directly resulted in the constitutional injury. *Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006) (emphasis in original). This means that, "at a minimum, the plaintiff must show that the defendant at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Peatross*, 818 F.3d at 242 (citation and internal quotation marks omitted). The subjective prong is the same as it is for the subordinate officers: "The supervisor need not have known of the substantial risk to the injured party but rather must have possessed knowledge of potential danger to a particular class of persons." *Troutman v. Louisville Metro Dep't of Corr.*, 979 F.3d 472, 488 (6th Cir. 2020) (citation omitted).

In dismissing this claim, the district court stated that "a supervisor's inaction will give rise to liability only where the plaintiff challenges 'ongoing conditions of confinement.'" The court held that the "claim here is not an ongoing conditions-of-confinement claim," but is instead "a failure-to-protect claim, for which they must show that Defendants were subjectively aware of a risk that Zakora would ingest the illegal drugs." Because the court held that the allegations were insufficient to show the defendants' knowledge

of the risk to Zakora personally, it concluded that the claim failed.

But this characterization of the law is misguided. There is no functional difference between a conditions-of-confinement claim and a failure-to-protect claim, and the subjective requirement applies no matter how the claim is framed. See *Rhodes v. Michigan*, 10 F.4th 665, 673 (6th Cir. 2021) ("[A] plaintiff challenging the conditions of their confinement under the Eighth Amendment—whether based on inadequate medical care, a failure to protect the plaintiff from other inmates, or some other cognizable basis—must show that the prison officials acted with deliberate indifference to a substantial risk of serious harm." (citation and internal alterations and quotation marks omitted)).

The framing of the claim also has no bearing on whether a supervisor's inaction will give rise to liability; that is determined only by whether the supervisor had direct responsibility for the inaction such that the "*active performance* of the supervisor's individual job function directly result[ed] in the constitutional injury." Winkler, 893 F.3d at 899 (emphasis in original) (alterations omitted); *see also Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988) ("Once an official is [] notified [of alleged constitutional violations by his subordinates], either actually or constructively, it is reasonable to infer that the *failure* to take [affirmative] steps [to correct the violations] . . . constitutes a choice 'from among various alternatives.'" (emphasis in original) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986))).

This case highlights the different circumstances under which inaction may and may not serve as the basis for supervisory liability. The Estate claims that the defendants exhibited deliberate indifference by either failing to order a prompt investigation into drug smuggling at Lakeland or by failing to promulgate additional or alternative policies aimed at preventing drug smuggling altogether. With regard to Director Washington, this claim fails. As explained above, the complaint does not adequately allege that Washington knew of the drug problem at Lakeland generally or of the two prior overdoses specifically, which is not surprising considering that the overdoses occurred just two days prior to Zakora's death. There is thus no basis to infer that Washington abdicated her job responsibilities in failing to order a prompt investigation or to take any other action at Lakeland.

The Estate is thus left with the assertion that Washington knew of a drug-smuggling problem throughout MDOC facilities. But to support this, the complaint alleges only that Director Washington was aware of two accusations of officer-involved smuggling at other MDOC facilities, which is insufficient to show a substantial risk of harm to all MDOC inmates. *See D'Ambrosio v. Marino*, 747 F.3d 378, 388 (6th Cir. 2014) (recognizing that a county's knowledge of only three prior instances of constitutional violations by its prosecutors could not establish notice of habitually unconstitutional conduct in support of a failure-to-train claim). Even coupled with the complaint's allegation that "anti[-]overdose drugs have been used approximately 150 times" over the past two years, the allegations are insufficient because the figure is unaccompanied by any context that would allow us to infer

that the problem was so severe that Washington "must have known" that all MDOC inmates were at a substantial risk of serious harm. *See Farmer v. Brennan*, 511 U.S. 825, 842–43 (1994). The complaint therefore does not adequately allege that Washington was deliberately indifferent by failing to promulgate additional or alternative policies in MDOC facilities.

Defendants Hoffner and Rivard, however, allegedly did have knowledge of the risk of harm at Lakeland and abdicated their job responsibilities in failing to take steps to abate that risk. The complaint alleges that Warden Hoffner and MDOC Assistant Deputy Director Rivard were told by Inspectors Chrisman and Huntley about the drug-smuggling problem at Lakeland, but Hoffner and Rivard allegedly either ignored the information or instructed Chrisman and Huntley not to investigate the accusations. In either scenario, a plausible claim is stated for failure to train or supervise their subordinates.

Hoffner and Rivard, as supervisors of the inspectors at MDOC, are directly responsible for giving orders to the inspectors. Failing to order an investigation into the drug smuggling, particularly after the two overdoses inside the C-Unit on consecutive days, could be found to constitute "knowing acquiescence" to the constitutional violation of exposing the inmates in the C-Unit to a substantial risk of serious harm. *See Howard v. Knox County*, 695 F. App'x 107, 115 (6th Cir. 2017) (holding that the plaintiff stated a claim for supervisory liability against a school principal by alleging that the principal "made no efforts to investigate, report, train, or terminate" a teacher who abused students, even after receiving complaints

about the teacher); *see also Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 654 (1999) (concluding that a complaint alleging that a school board "made no effort whatsoever either to investigate or to put an end" to sexual harassment by a classmate "suggests that petitioner may be able to show . . . deliberate indifference on the part of the Board").

When supervisors responsible for inmate health and safety ignore known threats to those inmates, they are more than simply failing to act. In *Hill v. Marshall*, 962 F.2d 1209, 1213 (6th Cir. 1992), this court held that that a medical official could be held liable in his supervisory capacity for failing to respond to an inmate's medical needs because he personally ignored the inmate's complaint of not getting medication, and instead referred the complaint to the head nurse whom he knew was altering and destroying the inmate's prescriptions. The court rejected the medical official's argument that his mere "failure to act" was an insufficient basis to hold him liable for the violations of his employee because his actions in ignoring the inmate's complaint meant that he had "abandon[ed] the specific duties of his position." *Id.*

So too here. The complaint adequately alleged that Hoffner and Rivard, in the face of a known threat to inmate safety "*personally* had a job to do" in ordering an investigation into the known presence of drugs at Lakeland (and inside the C-Unit specifically), "and [they] did not do it." *Id.* (emphasis in original). This alleged failure could be found to have directly resulted in a violation of Zakora's Eighth Amendment right to be free from the substantial risk of harm. The Estate

has therefore stated a claim for failure to supervise against defendants Hoffner and Rivard.

3. The district court erred in holding that the allegations failed to state a claim against defendants Johnson and Mobley for deliberate indifference to Zakora's serious medical needs, but the court properly awarded summary judgment to the defendants on this claim

In Count IV, the Estate alleged that Defendants Johnson and Mobley were deliberately indifferent to Zakora's serious medical needs when they failed to check on him after a prisoner, at some point during the "night/early morning" of January 22, 2017, informed them that Zakora was "not doing well" or that "there appeared to be something wrong with him." According to the complaint, Zakora could have received lifesaving medical treatment had Johnson and Mobley timely checked on him.

The district court first held that this claim should be dismissed under Rule 12(b)(6) because "[w]ithout some indication of the approximate time Zakora died and the approximate time the alleged prisoner spoke to Mobley or Johnson—to show saving him was still a possibility—there is no *plausible* claim that either Defendant violated Zakora's Eighth Amendment rights." (emphasis in original). This was in error.

For the objective prong of a claim for deliberate indifference to a serious medical need, "the plaintiff must show that the medical need is 'sufficiently serious.'" *Brawner v. Scott County*, 14 F.4th 585, 591 (6th

Cir. 2021) (citing *Farmer*, 511 U.S. at 834). There is no doubt that Zakora's overdose, which caused his death, satisfied the objective prong.

To satisfy the subjective prong, a complaint must allege facts showing that the defendant knew that the inmate faced "a substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. "An Eighth Amendment claimant, however, 'need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.'" *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008) (quoting *Farmer*, 511 U.S. at 842).

The complaint alleged that Johnson and/or Mobley were asked to "check on Mr. Zakora because he was not doing well or because there appeared to be something wrong with him" at a time when there had been two drug overdoses over the prior two days. Despite these warnings, the complaint alleges, neither Johnson nor Mobley investigated at all. This suffices to state a claim for deliberate indifference to a serious medical need. *See Amick v. Ohio Dep't of Rehab. & Corr.*, 521 F. App'x 354, 363 (6th Cir. 2013) (reversing the dismissal of a complaint for deliberate indifference where the guards allegedly took thirty minutes to respond to cries for help from other inmates upon the breakout of a fight).

The complaint did not need to allege that Johnson and Mobley were aware of exactly what was ailing Zakora, just that they disregarded a known risk of substantial harm. See *Farmer*, 511 U.S. at 842–43; *see*

also Estate of Kowalski v. Shrader, No. 21-cv-00827, 2022 WL 19422, at *11 (D. Colo. Jan. 3, 2022) (explaining that, to hold otherwise, "would be to incentivize prison officials to actively avoid responding to emergency calls or answering requests for help so as to ensure that they could later rely upon their own ignorance of any materialized medical harm to escape liability").

Despite this error, summary judgment was properly awarded to Johnson and Mobley on this claim because they submitted affidavits, which caused the district court to consider whether to award summary judgment under Rule 56. The affidavits established that neither Johnson nor Mobley were made aware at any time before Zakora's death that he had, or was planning to, ingest drugs. Moreover, Mobley attested that no one ever told him to check on Zakora, and Johnson checked on Zakora "only seconds" after another inmate first alerted him to a problem.

This evidence, which was unrebutted, established that neither Johnson nor Mobley were aware that Zakora was suffering from a serious medical condition before he died, and they acted appropriately once they were made so aware. *See Weaver v. Shadoan*, 340 F.3d 398, 411 (6th Cir. 2003) (finding that "it can hardly be said that the Officers acted with deliberate indifference" when "the Officers did not see, or otherwise have knowledge, that [the inmate] ingested cocaine" and, "[w]hen [the inmate] appeared to become ill, the Officers immediately summoned the paramedics"). Summary judgment was therefore properly granted to Johnson and Mobley on Count IV.

E. The district court did not abuse its discretion in granting summary judgment before the Estate conducted discovery

The next issue is whether the district court erred in ruling on the defendants' motions for summary judgment without allowing any discovery to be conducted by the Estate. Rule 56(b) of the Federal Rules of Civil Procedure permits either party to file a motion for summary judgment "at any time until 30 days after the close of discovery." The Rule therefore "contemplates that a defending party may move for summary judgment even before any discovery has been taken." *Short v. Oaks Corr. Facility*, 129 F. App'x 278, 280 (6th Cir. 2005). Importantly, though, "[t]he general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery." *Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996) (citation omitted).

Rule 56(d) reconciles this situation by allowing the nonmovant to show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," after which the court may "(1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." So, when a nonmovant believes that it needs more time for discovery before it can respond to a motion for summary judgment, "the non-movant must file an affidavit pursuant to Fed. R. Civ. 56[(d)] that details the discovery needed, or file a motion for additional discovery." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002). "Beyond the procedural requirement of filing

an affidavit, Rule 56[(d)] has been interpreted as requiring that a party making such a filing indicate to the district court its need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000) (citation omitted).

The Estate, seeking the opportunity to take discovery before responding to the defendants' motions for summary judgment, filed a Rule 56(d) affidavit. In its affidavit, the Estate posits that "[t]he information to be discovered includes documentary and testimonial evidence to support the allegations in the Complaint that, as demonstrated in Plaintiff's response brief, are also documented in other public sources and official documentation." This is plainly insufficient to be granted additional time for discovery. As this court has previously explained,

> [i]t is not an abuse of discretion for the district court to deny the discovery request when the party "makes only general and conclusory statements in its affidavit regarding the need for more discovery and does not show how an extension of time would have allowed information related to the truth or falsity of the document to be discovered." *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir. 1999). It is also not an abuse of discretion to reject a Rule 56[(d)] affidavit as insufficient to support further discovery when the affidavit lacks "any details" or "specificity." *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989).

Ball v. Union Carbide Corp., 385 F.3d 713, 720 (6th Cir. 2004) (alterations omitted).

The affidavit submitted here did not attempt to describe with any specificity what discovery the Estate sought or how that discovery would support its claims. "Fairness does not blindly require a district court to grant a non-movant an opportunity for discovery where, as here, the non-movant does not in any detail describe what discovery she needs or what material facts she hopes to discover." *Short*, 129 F. App'x at 283. "It is not enough to state that discovery is needed without explaining why it is needed." *Id.* (emphasis in original). Because the Estate fell far short of meeting its burden of explaining the need for discovery, the district court did not err in ruling on the summary-judgment motion when it did.

F. The district court properly denied the Estate's motion for leave to amend its complaint

This leaves, as the final issue before us, the propriety of denying the motion for leave to file a proposed second amended complaint. The Estate's proposed second amended complaint would identify MDOC Defendant Jane Doe as Corrections Officer Tammy Blair and add two new MDOC Defendants—Corrections Officer Thomas Ivany and former Corrections Officer Chase White—who were also allegedly engaged in smuggling drugs.

In denying the motion for leave to file an amended complaint, the district court read the magistrate judge's report as giving two reasons for denying the motion. The first reason was that the proposed second

amended complaint was futile because it could not withstand a motion to dismiss, and the second reason was that the claims were time-barred and did not meet the requirements of Rule 15 of the Federal Rules of Civil Procedure. Because the district court agreed that the proposed amendment would be futile, it affirmed the magistrate judge's decision to deny the motion without addressing the second reason.

The district court's reliance on the first reason was erroneous. Beyond adding the new parties and identifying Jane Doe, the proposed second amended complaint essentially mirrors the first amended complaint. The amendment would thus not have been futile because it could "withstand a Rule 12(b)(6) motion to dismiss" for the reasons explained above. *See Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000).

We therefore must consider whether the proposed amendment "relates back" under Rule 15, which is necessary because the applicable statute of limitations for these claims has expired. *See Wolfe v. Perry*, 412 F.3d 707, 714 (6th Cir. 2005) (explaining that the statute of limitations for § 1983 claims brought in Michigan is the state's three-year statute of limitations for personal-injury claims). Rule 15(c)(1)(C) states that an amendment that changes a defendant but arises out of the same conduct as the original complaint "relates back" if the new defendant "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

The magistrate judge correctly ruled that the claims against Ivany and White cannot be saved by Rule 15 because Ivany and White are entirely new parties. This court has repeatedly held that "an amendment which adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations." *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313, 318 (6th Cir. 2010) (quoting *Leitch v. Lievense Ins. Agency, Inc.* (*In re Kent Holland Die Casting & Plating, Inc.*), 928 F.2d 1448, 1449 (6th Cir. 1991)). Accordingly, the claims against Ivany and White are time-barred.

The amended claim that seeks to substitute Blair for Jane Doe, on the other hand, is viable so long as it meets the requirements of Rule 15(c)(1)(C). But the Estate has not shown that it would have named Blair "but for a mistake" concerning her identity.

Various district courts have commented that there is a "split in authority" in this court's jurisprudence as to whether an amendment naming a previously unknown Doe defendant can constitute a "mistake" under Rule 15(c)(1)(C). See *Reiner v. Canale*, 301 F. Supp. 3d 727, 736 (E.D. Mich. 2018) (collecting cases). This purported "split," which the magistrate judge explored below, is between two of our cases: *Berndt v. Tennessee*, 796 F.2d 879 (6th Cir. 1986), and *Cox v. Treadway*, 75 F.3d 230 (6th Cir. 1996).

In *Berndt*, this court upheld the district court's determination that the two named defendants in the action—a state mental-health institution and the state of Tennessee itself— were immune from suit on Eleventh Amendment grounds, but remanded the case to allow the plaintiff to amend his complaint by naming

certain officials of the institution as defendants. 796 F.2d at 882–83. After acknowledging that any such amendments would likely be outside of the statute of limitations, the court set forth guidance for the district court's determination on whether an amendment would relate back under Rule 15(c). *Id*. at 883–84.

The court explained that constructive rather than actual notice to the new defendants would be sufficient to satisfy the notice prong of Rule 15(c), and that the new defendants' status as officials of the original defendants could itself be enough to impute notice to them. *Id*. at 884. As to the mistaken-identity prong, the court stated that it was "a patently factual inquiry [] left to the district court," and cautioned that "although the principles it announced [were] appropriate considerations for the district court, they [were] only guides." *Id*. The court thus did not actually analyze the mistaken-identity prong of Rule 15(c)(1)(C)(ii). But because it suggested that the amendment could "relate back" under these circumstances, several district courts have interpreted *Berndt* as "mak[ing] clear that naming Doe defendants after the expiration of the applicable limitations period could satisfy it." *Reiner*, 301 F. Supp. 3d at 735. The Estate, unsurprisingly, urges us to rely on *Berndt*.

In *Cox*, this court answered the question more directly. That case involved an excessive-force action in which the plaintiff had included four "unnamed police officers" among the defendants in his original complaint and subsequently named them after the statute of limitations had run. 75 F.3d at 239–40. The court concluded that replacing named parties for "John Does" does not satisfy the "mistaken identity"

requirement because the newly named parties are considered new parties to the suit rather than a mere substitution of parties. *Id.* at 240.

Several reasons convince us to reaffirm the rule from *Cox* today. The first is that *Berndt* made clear that it was not deciding the Rule 15(c) question, 796 F.2d at 883–84, so the language from that case is necessarily dicta. Second, in the years since *Cox*, this court "has consistently cited *Cox* in unpublished cases . . . to hold that naming previously unnamed defendants does not satisfy the mistaken identity prong of Rule 15(c)(1)(C)(ii) because a lack of knowledge as to the identity of a defendant does not constitute a 'mistake' within the meaning of the Rule." *Reiner*, 301 F. Supp. 3d at 736 (collecting cases).

Finally, our decision on this issue comports with the definition of "mistake" under Rule 15. The Supreme Court has defined "mistake" as used in Rule 15 by its plain meaning: "[a]n error, misconception, or misunderstanding; an erroneous belief." *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 548 (2010) (quoting Black's Law Dictionary 1092 (9th ed. 2009)). An absence of knowledge about whom to sue is not a misunderstanding and thus is not a mistake for the purposes of Rule 15.

Applying this rule here, the claim against Blair clearly does not "relate back" under Rule 15(c)(1)(C)(ii). The Estate goes to great lengths to convince us that Blair had constructive knowledge of the suit, but this argument fails to appreciate the difference between the notice requirement of Rule 15(c)(1)(C)(i) and the mistake requirement of Rule 15(c)(1)(C)(ii). Even if Blair had notice that the Estate

might sue her, the amended complaint relates back only if Blair knew that it was due to a mistake that she was not sued. *See Metris-Shamoon v. City of Detroit*, 545 F. Supp. 3d 506, 516 (E.D. Mich. 2021) ("Although Plaintiffs may satisfy the notice requirement, . . . they cannot satisfy the 'but for a mistake' requirement." (citations omitted)).

The Estate makes no effort to identify any sort of error, misconception, or misunderstanding as to Blair's identity before the statute of limitations expired. Instead, it offers only that it could not have discovered Blair's identity before an MDOC employee telephoned the Estate's counsel to offer that information. This means that the Estate "did not make a mistake about which defendant to sue; [it] simply did not know whom to sue or opted not to find out within the limitations period." *Smith v. City of Akron*, 476 F. App'x 67, 69 (6th Cir. 2012) (citing Cox, 75 F.3d at 240).

"Rule 15(c) offers no remedy for this problem. The Rule allows relation back for the mistaken identification of defendants, not for defendants to be named later through 'John Doe,' 'Unknown Defendants' or other missing appellations." *Id.* And although "this bright-line rule may bar some cases where a justification for the delay exists, equitable tolling should serve as an adequate safety valve for those plaintiffs with good excuses." *Brown v. Cuyahoga County*, 517 F. App'x 431, 435 (6th Cir. 2013). The Estate, however, has made no such argument here. For these reasons, the magistrate judge correctly concluded that the claims in the proposed amended complaint do not "relate back" under Rule 15 and are thus time-barred.

III. CONCLUSION

We hold today that the Estate has adequately stated claims under the Eighth Amendment for failure to protect and failure to supervise that survive the MDOC Defendants' motion to dismiss as a matter of law. But we express no view as to the merits, where the Estate will bear the burden of proving the allegations in the complaint at the summary-judgment stage and at trial. Nor do we express any view as to whether the complaint states a violation of "clearly established" law, an issue that is best left for the district court to consider in the first instance.

In sum, we **AFFIRM** the judgment of the district court as to the dismissal of the complaint against the MSP Defendants and against MDOC Defendant Washington. We also **AFFIRM** the grant of summary judgment to MDOC Defendants Johnson and Mobley, and we agree with the district court's decision to deny the Estate's motion for leave to file a proposed second amended complaint. But we **REVERSE** the dismissal of Count I of the first amended complaint as to MDOC Defendants Chrisman, Huntley, Hoffner, Rivard, and Rurka, and the dismissal of Count III against MDOC defendants Hoffner and Rivard. We therefore **REMAND** the case to the district court for further proceedings consistent with this opinion regarding the remaining Count I and Count III claims.

CONCURRING IN PART AND DISSENTING IN PART

SUTTON, Chief Judge, dissenting in part and concurring in part. Federal judges see all manner of conditions-of-confinement claims by inmates. But in nearly twenty years on the bench, I have never seen one like this. Here's the theory: Prison officials "inflicted" "cruel and unusual punishment[]" on Seth Zakora by failing to prevent him from voluntarily engaging in prohibited conduct—ingesting opioids—while serving his sentence for second degree criminal sexual conduct. Two wrongs—committing an initial felony outside of prison then consuming contraband in prison—apparently make a constitutional right. And clearly so at that. One can feel considerable remorse for what happened to Mr. Zakora and his family without altering the law. As Judge Neff correctly held, this sequence of events does not create a federal constitutional claim for money damages. Least of all does it create a clearly established right. The Court seeing it differently, I respectfully dissent.

A few facts orient the case. In January 2017, three prisoners in a unit at Lakeland Correctional Facility in Michigan suffered drug overdoses during the weekend. The first two prisoners overdosed on Friday and Saturday, and they survived. The third, Seth Zakora, overdosed on Saturday night and died from fentanyl toxicity on Sunday morning. The three inmates obtained access to the fentanyl, according to the complaint, when drug distributors tossed fentanyl-filled basketballs over the prison fence and yet-to-be-

identified individuals recovered the drugs and apparently distributed them to inmates.

After her son's death, Brandy Zakora filed this lawsuit against four members of the Michigan State Police, two prison guards, and six administrators at the Department of Corrections. She also sued an unnamed corrections official.

Three counts remain. Each one invokes the Eighth (and Fourteenth) Amendment's guarantee that the States may not "inflict[]" "cruel and unusual punishments" on individuals. The first alleges that the prison administrators and state police breached a duty to protect Zakora's son from using dangerous illegal drugs. The second claims that the prison administrators should be liable as supervisors for failing to protect her son. The third contends that two guards exhibited deliberate indifference to her son's serious medical needs after the overdose occurred.

The defendants moved to reject each claim as a matter of law under qualified immunity. The district court granted their motion.

The Court affirms some of its rulings, holding that Zakora failed to establish a plausible constitutional violation with respect to the serious medical needs claim as well as the failure-to-protect claims against the state police and the head of the corrections department. It also affirms the denial of her motion for leave to amend her complaint. I agree in each respect.

But the Court then permits the failure-to-protect claim against the prison guards and administrators to proceed as a cognizable constitutional violation at

prong one of the qualified immunity inquiry. As to prong two of the qualified immunity inquiry, the Court simultaneously says that the defendants forfeited the argument and remands the issue for the district court to decide it in the first instance. I cannot agree.

If ever a claim was designed for qualified immunity, this is it. Zakora has not identified any court in the country, anytime anywhere, that has recognized such a claim. No hints, no dicta, no holdings. The point of the defense is to protect "all but the plainly incompetent" so "long as their actions could reasonably have been thought consistent with" the U.S. Constitution. *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987) (quotation omitted). A claimant thus may not obtain relief unless he shows (1) that state officials violated the U.S. Constitution and (2) that the right was clearly established at the time of the incident. Because the defense seeks to avoid exposing state officials to "the burdens of litigation," *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam), they may promptly appeal interlocutory decisions that reject it, *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014). In such appeals, we may resolve the defense in any sequence, whether by saying that the claimant failed to establish a threshold constitutional violation or the violation of a clearly established right. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). In both settings, the imperative is to resolve the claims sooner rather than later.

Not today. The Court takes three distinct paths instead, each off course in ways difficult to reconcile with these tenets. The Court determines that the

state officials forfeited prong two of the claim of qualified immunity in this appeal. It decides that Zakora has raised a cognizable constitutional claim. And it remands the case to the district court to decide the clearly established ruling in the first instance—even though it cannot identify a single case that has ever recognized such an unorthodox claim. This winding approach defies convention. While I am confident that the prison officials did not violate the U.S. Constitution, I am certain that their qualified immunity defense remains in the case and certain that they did not violate clearly established law.

No forfeiture. The state officials raised qualified immunity at every relevant point. In their first pleading before the district court, they asked the court to grant relief "based on qualified immunity." R.37 at 11. To overcome that immunity, they explained, Zakora bore the burden of proving that their conduct "violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 27–28 (quotation omitted). They argued that Zakora failed to allege that they violated the Constitution. And they argued that she could not show that their "actions were objectively unreasonable in light of clearly established law." *Id.* at 28 (quotation omitted). In support, they cited Supreme Court and Sixth Circuit qualified immunity cases, some holding that claimants failed to allege a constitutional violation, some holding that claimants failed to allege the violation of a clearly established right. *Hunter v. Bryant*, 502 U.S. 224, 228–29 (1991) (per curiam); *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Dickerson v. McClellan*, 101 F.3d 1151, 1160 (6th Cir. 1996). The prison officials

reiterated the point in their reply, emphasizing that Zakora "does not cite binding precedent" supporting her claim and that "[w]ithout such clearly established law, [she] has failed to sustain her burden of showing the defendants are not entitled to qualified immunity." R.45 at 4. In their opposition to Zakora's motion to amend her complaint, they repeated, "Plaintiff's proposed amendment . . . does not change the theory of the case, which defendants have shown in their motions fails to establish that plaintiff's decedent's clearly established rights were violated." R.49 at 5.

No surprise, given the oddities of this claim, the district court granted relief to the prison officials. The magistrate judge first recommended this outcome. Her analysis noted that the state defendants "raise[d] the issue of qualified immunity." R.53 at 6. The judge then observed that Zakora's case citations were "not directly applicable" before concluding that she failed to allege a constitutional violation. Id. at 14. The district court agreed with this recommendation. Judge Neff ruled that the officials won on prong one of the qualified immunity claim—that no constitutional violation occurred as a matter of law—holding that the "allegations about drug smuggling do not state any plausible constitutional violation." R.60 at 4. Because she found that no constitutional violation occurred, it follows, she did not think that state officials violated a clearly established right. A right cannot be "beyond debate" if it does not exist. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation omitted).

The qualified immunity defense—the key issue in the case—remained front and center on appeal. The losing party below, Zakora, appreciated that she had

to clear this hurdle. In her opening appellate brief, she acknowledged that the prison officials had argued below that, even if a constitutional violation occurred, "they cannot be held liable because it is not clearly established." Appellant's Br. 45. Having confessed to the existence of the defense, Zakora tried to avoid its application by insisting that the officials were not entitled to qualified immunity because they violated the constitution and "[n]o reasonable state officials" could conclude otherwise. *Id*. In their brief, the state officials disagreed. In view of the dearth of caselaw in support of this novel claim, they stressed that the district court correctly found that no constitutional violation occurred, a prong-one argument that necessarily swept in failures at prong two. In support, the officials cited several cases holding that the claimants had failed to plead an Eighth Amendment violation on similar facts, whether at prong one or prong two of the qualified immunity defense. *See Shrader v. White*, 761 F.2d 975 (4th Cir. 1985); *Smith v. Connections CSP*, Inc., No. 17-1733, 2018 WL 1433840 (D. Del. Mar. 20, 2018); *Alexander v. Padvaiskas*, No. 14-13675, 2015 WL 10433618 (D. Mass. Dec. 2, 2015); *Nunez v. Salamack*, No. 88 CIV. 4587, 1989 WL 74940 (S.D.N.Y. June 26, 1989). "One does not forfeit a qualified immunity defense by making arguments that, if accepted, establish the defense." *McNeal v. Kott*, 590 F. App'x 566, 569 (6th Cir. 2014).

Consistent with this briefing, the Court asked the lawyers about the qualified immunity defense at oral argument. We asked Zakora's lawyer, "What's your best case on the clearly established prong for this kind of voluntary conduct by inmates?" The lawyer cited *Rhodes v. Michigan*, 10 F.4th 665, 676 (6th Cir. 2021),

in which a prisoner brought a failure-to-protect claim after she applied to work as a laundry porter and suffered severe injuries when a 400- pound cart fell on her. But what about "voluntarily engaging in illegal conduct," we followed up, "what's the case that establishes that?" The attorney admitted that Zakora did not "have a case that specifically establishes that." We asked her why that doesn't pose a "problem on the clearly established prong," noting it is "a pretty significant . . . doctrinal point." She did not mention another case. Oral Arg. 10:55–13:00.

When it came time for the lawyer for the corrections officials to take the podium, we asked whether it made sense to address the prong-one question: "Why not just make this easier and go to prong two of qualified immunity?" He said such an approach would be "exactly correct" and that he would "agree" with it. *Id.* at 16:10–20. When asked whether an inmate has a right to a safe prison environment, he conceded as much, but said that this definition was "too broad," and that for qualified immunity "you have to look at the constitutional right in the somewhat narrow context of the case." *Id.* at 20:00–20. He stressed that he has yet to see "any cases, one case" holding that a prisoner has a "constitutional right to a drug-free environment" or that officials must "protect[]" a prisoner "from himself" if he voluntarily takes drugs. *Id.* at 20:35–56.

On rebuttal, Zakora's lawyer identified more cases that purported to show that a violation occurred or that it was clearly established. Through it all, no lawyer and no judge raised the possibility that the qualified immunity defense had been forfeited—whether

below, in the briefs on appeal, or at the appellate argument.

Even so, the Court saves the day by invoking forfeiture on its own. But a case is not a Greek play in which all-seeing judges, unbidden, come to the rescue by creating solutions that the parties do not seek. The qualified immunity defense does not go to our subject matter jurisdiction, giving us no license to raise forfeited issues in connection with it on our own. Making matters worse, the Court does not apply the rules of forfeiture evenly. A court sensitive to forfeiture in one direction ought to be sensitive to it in the other. A party may forfeit a forfeiture after all. *United States v. Shultz*, 733 F.3d 616, 619 (6th Cir. 2013). But Zakora never argued that the defendants forfeited anything. Just as we must treat like individuals alike in our cases, we must treat like defenses alike. To compromise the one invariably compromises the other. This is not a forfeiture; it is a deus ex machina.

No constitutional violation. On the merits of prong one of the qualified immunity defense, this conditions-of-confinement case strikes a few dissonant chords. By its terms, the voluntary and illegal nature of Zakora's activity pushes the claim outside the Eighth Amendment's ambit. The provision says that cruel and unusual punishments "shall not be . . . inflicted." U.S. Const. amend. VIII. How could corrections officials *inflict* this harm on Zakora when prison rules, state law, and federal law prohibit it—and Zakora violated those rules and laws?

Traditional conditions-of-confinement cases arise in a markedly different context from today's case. When a State removes an inmate from society and

restricts his freedom, it has obligations to him. Having "stripped" inmates of "virtually every means of self-protection and foreclosed their access to outside aid," prison "officials are not free to let the state of nature take its course." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). Incarceration prevents prisoners from obtaining their own food, so the prison must provide food. They cannot go to the doctor, so the prison must provide medical care. The State thus cannot lock someone up then deny him "essential food, medical care, or sanitation." *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). Because life's basic necessities include physical safety, officials also cannot leave prisoners at the mercy of dangerous physical conditions, whether by incarcerating a person alongside an inmate hellbent on violence or exposing a prisoner to dangerous levels of secondhand cigarette smoke. *Farmer*, 511 U.S. at 833–34; *Helling v. McKinney*, 509 U.S. 25, 31–32 (1993).

One feature of these decisions deserves special mention because it is uniformly present in the caselaw and conspicuously absent in this case. The types of risks that give rise to Eighth Amendment claims are those an inmate cannot reasonably be expected to avoid on his own. Consider the inmate who is jailed with a violent cellmate, *Bishop v. Hackel*, 636 F.3d 757, 766 (6th Cir. 2011), locked up next to a chain smoker, *Helling*, 509 U.S. at 28, required to use hazardous facilities, *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000), or subjected to dangerously low temperatures, *Spencer v. Bouchard*, 449 F.3d 721, 727–29 (6th Cir. 2006). In each circumstance, he has no way out.

But how could that be so here? Zakora never argues that her son consumed fentanyl involuntarily. What was true outside prison was true inside prison. Any risk from the availability of drugs did not become serious until he chose to use them.

Think about it this way. What if Zakora's claim concerned exposure to cigarette smoke? Sure, involuntary exposure to cigarette smoke in a prison violates the Eighth Amendment. *Helling*, 509 U.S. at 27–28. But how would we think about the claim if Zakora had been the one smoking—and had been smoking in violation of prison rules? And how would we think about the claim if Zakora had insisted on being jailed with a known violent cellmate (*Bishop*), or had insisted on using hazardous facilities (*Brown*), or had turned the temperature down himself in violation of prison rules (*Spencer*)?

Think about the Court's new rule in other settings. Does it really make sense to conclude that a prison official subjects an inmate to cruel and unusual conditions of confinement by failing to prevent him from voluntarily engaging in conduct, especially prohibited conduct? If a prisoner tries to escape by climbing a fence, have officials imposed cruel and unusual conditions if he falls and breaks his leg? If a prisoner contracts a bloodborne disease from injecting heroin with an unsanitary needle, have officials imposed cruel and unusual conditions because they did not provide clean needles? Asking is answering. The Eighth Amendment does not cover this claim.

No clearly established constitutional right. What ought to create a stop sign at step one of qualified immunity generates a grinding halt at step two. Recall

that to overcome qualified immunity, Zakora must prove not only that the officials violated the Eighth Amendment but that they also violated clearly established Eighth Amendment law. That requires her to show that the law on the books at the time of this incident left the illegality of the officials' actions "beyond debate." *Wesby*, 138 S. Ct. at 589 (quotation omitted).

That is not remotely so. Start with what ought to be an end-of-the-story reality. No case holdings support the claim. None at all. That by itself should bring this dispute to a close.

There is more anyway. Consider the reality that drug abuse in prisons is not new. It has long plagued this country's prisons. *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003). Yet Zakora has not identified a single decision holding that officials' failure to stem the flow of illegal drugs alone exposes them to liability for overdoses. The screeching silence of precedent seriously undermines this claim.

Even if we climb a few rungs up the level of generality of this claim, that does not improve the view. The claimant does not cite any circuit court case allowing a prisoner to sue for harm suffered as a result of his own misconduct. Is it really possible that two inmates living in the same cell could face such different circumstances? The one is caught with fentanyl and properly punished before he uses it. The other uses fentanyl and successfully sues the prison for injuries caused by its ingestion. No case creates such a ground-breaking rule.

Notable too is Zakora's inability to cite a case in this area about a prisoner's voluntary conduct. The

rationale undergirding conditions-of-confinement claims—that inmates cannot escape dangerous conditions imposed by officials—disintegrates when the inmate himself takes on the risk of the illegal conduct. Zakora's mother responds by arguing that *Rhodes v. Michigan*, the laundry-porter case, clearly establishes the irrelevance of this distinction. In *Rhodes*, as she points out, we noted that Eighth Amendment "caselaw does not call for [an] inquiry into voluntariness." *Rhodes*, 10 F.4th at 676. But multiple points of distinction separate that case from this one. Start with the facts. Rhodes' decision to work as a laundry porter, and to stand in the wrong place at the wrong time when a guard allegedly hurled a heavy cart off a truck, cannot reasonably be compared to the decision to use illegal drugs. The voluntary act in *Rhodes* was attenuated from the harm that occurred. Not so here, where it was the most direct cause of the harm.

Move to the law. The language about voluntariness in *Rhodes* does not clearly establish anything for this case. The decision came more than four years after Zakora died. And the cited language evaporated as dicta when the Court explained that *Rhodes* did not volunteer for the dangerous aspects of her job, id. at 676–77, precluding the case from establishing anything about voluntariness on prong one or two of the qualified immunity inquiry.

Zakora's remaining cases do no better. The suicide cases all have something Zakora conspicuously lacks: a warning that the inmate was a suicide risk. Suicidal tendencies qualify as a "serious medical need[]." *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001) (quotation omitted). The Eighth Amendment covers

them because an inmate, isolated from society, "must rely on prison authorities" for treatment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). But no case applies this rationale to the voluntary consumption of illegal drugs banned within a prison. To use this caselaw here is to extend it, not to apply it. What of inmates suffering from addictions to alcohol or drugs when they enter prison and go through withdrawal? Here too the condition counts as a serious medical need. *Kindl v. City of Berkley*, 798 F.3d 391, 401 (6th Cir. 2015). But here too the cases are at least one step removed. No one claims that Mr. Zakora was suffering from withdrawal at the time of this incident.

Also unhelpful are cases to the effect that drugs are dangerous or that prison officials have an interest in keeping drugs out of prisons. *See, e.g., Overton, 539 U.S. 126; Block v. Rutherford*, 468 U.S. 576 (1984); *Hudson v. Palmer*, 468 U.S. 517 (1984). They just concern the types of searches prison officials may conduct and the sorts of restrictions they may impose on visitors. That an interest suffices to support an action by corrections officials does not transform the failure to pursue that interest into an Eighth Amendment violation.

Nor does Zakora profit from three district court cases. Two of them arise from drug smuggling in prisons but neither one speaks to today's case. *Cooks v. Guterrez*, No. C-10-363, 2011 WL 832469, at *3 (S.D. Tex. Mar. 3, 2011) (holding that a prisoner stated an Eighth Amendment claim by alleging that he was threatened after he reported guard-condoned drug smuggling); *Mark v. Hickman*, No. H-17-2784, 2019 WL 5653631, at *6 (S.D. Tex. Oct. 29, 2019) (allowing

an Eighth Amendment claim to proceed when an inmate alleged that a guard who smuggled drugs into the prison orchestrated a gang to beat him up). One of them deals with a prison's failure to treat an inmate promptly after he ingested illegal drugs. *Turner v. Cook Cnty. Sheriff's Off.*, No. 19 CV 5441, 2020 WL 1166186, at *5 (N.D. Ill. Mar. 11, 2020). The Eighth Amendment claim turned on treating a suffering inmate too slowly, not on preventing him from voluntarily ingesting illegal drugs in the first place. Even if I ignored the reality that out-of-circuit district court cases cannot clearly establish a proposition for our purposes, *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020), they offer no help by their own lights.

Trying to overcome the problem of fitting square pegs into round holes, Zakora reaches for *Hope v. Pelzer*, 536 U.S. 730 (2002). That case like this one, she claims, is "the rare obvious case" so egregious that a plaintiff can prevail without the aid of precedent. *Moderwell v. Cuyahoga County*, 997 F.3d 653, 660 (6th Cir. 2021) (quotation omitted). But the facts of *Hope v. Pelzer* show why it does not apply. In 1995, Alabama allowed prison officials to handcuff prisoners to "hitching posts" to punish them for misbehavior in work squads, a practice unique in the country. *Hope*, 536 U.S. at 733–34. After Hope misbehaved at a worksite, guards left him hitched to the post for seven hours in the sun with no shirt. Id. at 734–35. The sun burned his skin, and guards honored his requests for water just twice and his requests to use the restroom not at all. *Id*. The court of appeals concluded that punishing Hope with the hitching post violated the Eighth Amendment but held that the absence of a case with "materially similar" facts prevented Hope from

overcoming a qualified immunity defense. *Id*. at 736 (quotation omitted). The Supreme Court reversed, rejecting the notion that an official action is protected "unless the very action in question has previously been held unlawful." *Id*. at 739. The "obvious cruelty inherent in this practice," it reasoned, violated the Eighth Amendment. *Id*. at 741, 745.

Hope does not further Zakora's case. It covers situations at most about whether a factual situation satisfies a general legal threshold: Was an infliction of pain wanton? Was a use of force excessive? But that is not how Zakora uses the case. She invokes it to extend the Eighth Amendment to a new category of duties and risks. Hope's case and Zakora's case occupy different planes and different registers.

Because no forfeiture occurred, because no constitutional violation occurred, and because no clearly established violation occurred, the prison guards and administrators "should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau*, 543 U.S. at 198. I respectfully dissent from the Court's contrary decision.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-1620

FILED
Aug 10, 2022
DEBORAH S. HUNT, Clerk

ESTATE OF SETH MICHAEL ZAKORA; BRANDY ZAKORA, in her capacity as the Personal Representative of the Estate of Seth Michael Zakora,

Plaintiffs - Appellants,

v.

TROY CHRISMAN; MATTHEW HUNTLEY; CHADWICK MOBLEY; STEVE JOHNSON; BONITA J. HOFFNER; STEVE RIVARD; HEIDI E. WASHINGTON; BRANDON OAKS; RUSSELL RURKA; HEATHER LASS; JAMES WOLODKIN; JAMES COLEMAN; UNKNOWN PARTY, named as Jane Doe,

Defendants - Appellees.

Before: SUTTON, Chief Judge; MOORE, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgments of the district court are AFFIRMED IN PART, REVERSED IN PART, and REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE ESTATE OF SETH MICHAEL ZAKORA, et al.,

Plaintiffs,

v. Case No. 1:19-cv-1016
HON. JANET T. NEFF

TROY CHRISMAN, et al.,

Defendants.
_____/

OPINION AND ORDER

Plaintiffs initiated this action pursuant to 42 U.S.C. § 1983 against employees of the Michigan Department of Corrections (MDOC) (Defendants Chrisman, Huntley, Mobley, Johnson, Doe, Hoffner, Rurka, Rivard, and Washington) (collectively "the MDOC Defendants") and the Michigan State Police (MSP) Department (Defendants Oaks, Lass, Wolodkin and Coleman) (collectively "the MSP Defendants"). The MDOC and MSP Defendants filed motions to dismiss or for summary judgment (ECF Nos. 33, 36 & 39), and Plaintiffs moved for leave to file a second amended complaint (ECF No. 47). The matter was referred to the Magistrate Judge, who denied Plaintiffs' motion and recommended that this Court grant Defendants' motions (ECF No. 53). Plaintiffs have since filed a document titled "Objection to Magistrate Beren's Report and Recommendation" (ECF No. 54), which the Court has construed as not only objections to the Report and

Recommendation (R&R), *see* W.D. Mich. LCivR 72.3(b) (Review of case dispositive motions), but also an appeal from the Magistrate Judge's Order denying their motion for leave to file a second amended complaint, *see* W.D. Mich. LCivR 72.3(a) (Appeal of non-dispositive matters). Defendants filed their respective responses to Plaintiffs' submission (ECF Nos. 55 & 57). For the following reasons, the Court denies the objections, denies the appeal, and issues this Opinion and Order.

I. OBJECTIONS TO REPORT AND RECOMMENDATION

A. Standard of Review

28 U.S.C. § 636 governs the jurisdiction and powers of magistrate judges. *See also* FED. R. CIV. P. 72; W.D. Mich. LCivR 72.1. Magistrate judges generally have authority to enter orders regarding non-dispositive pre-trial motions, *see* 28 U.S.C. § 636(b)(1)(A), but they must submit report and recommendations on case-dispositive matters, *see* § 636(b)(1)(B). The statute further provides that within fourteen days after being served with a copy of a magistrate judge's report and recommendations on a case-dispositive matter, "any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court." 28 U.S.C. § 636(b)(1). An objecting party is required to "specifically identify the portions of the proposed findings, recommendations or report to which objections are made and the basis for such objections." W.D. Mich. LCivR 72.3(b).

The court's task is to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." W.D. Mich. LCivR 72.3(b). However, district courts need not provide de novo review of frivolous, general, or conclusive objections. *Weiler v. U.S. Dep't of Treasury-Internal Revenue Serv.*, No. 19-3729, 2020 WL 2528916, at *1 (6th Cir. Apr. 24, 2020) (Order); *Bell v. Huling*, 52 F.3d 324, at *1 (6th Cir. 1995); *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (per curiam).

B. Analysis

The Magistrate Judge determined that the MSP Defendants are entitled to dismissal because Plaintiffs failed to state any plausible constitutional violation by the MSP Defendants (R&R, ECF No. 53 at PageID.530), or alternatively, because "Plaintiffs have not even minimally demonstrated that discovery would enable them to defeat summary judgment" (*id.* at PageID.533).

The Magistrate Judge determined that the MDOC Defendants are likewise entitled to dismissal because Plaintiffs fail to state any plausible constitutional violations by the MDOC Defendants (ECF No. 53 at PageID.536, 539), or alternatively, because "Plaintiffs have failed to meet their burden under Rule 56(d)" (*id.* at PageID.541).

Plaintiffs pose two objections to the Magistrate Judge's analysis. First, Plaintiffs argue that the Magistrate Judge "erred in determining that Plaintiff[s] failed to state a claim under the Eighth Amendment

against Defendants where Plaintiff[s]' well-pled complaint includes sufficient facts that show constitutional violations by Defendants" (ECF No. 54 at PageID. 561). According to Plaintiffs, the Magistrate Judge "fail[ed] to consider the large majority of the allegations contained in the complaint" (*id.* at PageID.586), specifically, "Plaintiff[s]' well-pled allegations against the Defendants regarding their knowledge of drug smuggling in the MDOC" (*id.* at PageID.565). Second, Plaintiffs argue that the Magistrate Judge "erred in granting summary judgment to the MSP Defendants and MDOC Defendant Mobley Johnson where Plaintiff[s] ha[ve] not had the opportunity to conduct discovery on their well[-]pled claims" (*id.* at PageID.577).

Plaintiffs' objections do not warrant rejection of the Report and Recommendation. As Defendants point out in their respective responses (ECF Nos. 55 & 57), Plaintiffs' objections merely reiterate the arguments they presented to the Magistrate Judge. Further, Plaintiffs' objections do not identify any error in the Magistrate Judge's analysis or her ultimate conclusion that Defendants are entitled to dismissal under either Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure. As the Magistrate Judge pointed out, Plaintiffs' allegations about drug smuggling do not state any plausible constitutional violation; rather, the allegations, at most, show that "law enforcement officers were aware of a mode of smuggling but were unable to catch the perpetrator" (ECF No. 53 at PageID.531). The Magistrate Judge also properly concluded that "Plaintiffs have not even minimally demonstrated that discovery would enable them to defeat summary judgment" (*id.* at

PageID.532-533). Consequently, the Court will deny the objections and approve and adopt the Report and Recommendation as the Opinion of the Court.

II. APPEAL TO DISTRICT COURT

A. Standard of Review

"When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision." FED. R. CIV. P. 72(a) (Nondispositive Matters). "A party may serve and file objections to the order within 14 days after being served with a copy." *Id. See also* W.D. Mich. LCivR 72.3(a) (Appeal of nondispositive matters).

This Court will reverse an order of a magistrate judge only where it is shown that the decision is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also* FED. R. CIV. P. 72(a); W.D. Mich. LCivR 72.3(a). A factual finding is "clearly erroneous" when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). And "[a]n order is 'contrary to the law' when it 'fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *Bisig v. Time Warner Cable, Inc.*, 940 F.3d 205, 219 (6th Cir. 2019) (citation omitted).

B. Analysis

After dispositive motion briefing was complete, Plaintiffs filed their motion for leave to file a second amended complaint that would identify MDOC Defendant Jane Doe and add two new MDOC Defendants, whom Plaintiffs allege were also engaged in smuggling drugs (ECF No. 47). In denying Plaintiffs' motion, the Magistrate Judge first determined that the proposed amendment "adds nothing of substance to alter the recommendations" to grant Defendants' dispositive motions, rendering Plaintiffs' proposed claims against the three defendants "futile" for the reasons the Magistrate Judge previously set forth (ECF No. 53 at PageID.542-543). Additionally, the Magistrate Judge pointed out that the claims against the two new parties would be time-barred inasmuch as claims against new parties create a new cause of action that do not relate back to an original filing for purposes of the now-expired limitations period (*id.* at PageID.543-544). Last, with regard to MDOC Defendant Jane Doe, the Magistrate Judge pointed out that Plaintiffs had not even addressed, let alone satisfied, the requirement of Federal Rule of Civil Procedure 15(c)(1)(C)(*ii*) to show "a mistake concerning the proper party's identity" (*id.* at PageID.544-546).

In their appeal, Plaintiffs address only the second basis for the Magistrate Judge's decision. Plaintiffs argue that the Magistrate Judge erred in "finding that Plaintiff[s]' claims against the drug smuggling officers do not relate back under FRCP 15(c)" (ECF No. 54 at PageID.580). Plaintiffs reiterate the argument they presented to the Magistrate Judge that the Sixth Circuit's decision in *Berndt v. Tennessee*, 796 F.3d 879 (6th Cir. 1986), "supports relation back in this case for

all the drug smuggling officers defendants" (*id.* at PageID.581-582). The Magistrate Judge rejected Plaintiffs' reliance on *Berndt,* thoroughly explaining that under more recent precedent, a plaintiff's initial lack of knowledge as to a defendant's identity does not constitute a "mistake" under Rule 15(c)(1)(C)(*ii*) (ECF No. 53 at PageID.545-546). Even assuming arguendo that Plaintiffs' continued reliance on *Berndt* has merit, Plaintiffs wholly fail to address the Magistrate Judge's threshold determination that the proposed amendment would be futile. "A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000). Therefore, Plaintiffs have not demonstrated that the Magistrate Judge abused her discretion in denying their motion, and their appeal from her decision is properly denied.

Accordingly:

IT IS HEREBY ORDERED that Plaintiffs' objections (ECF No. 54) are DENIED, and the Report and Recommendation of the Magistrate Judge (ECF No. 53) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendants' Motions for Summary Judgment (ECF Nos. 33, 36 & 39) are GRANTED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that Plaintiffs' appeal (ECF No. 54) from the Magistrate Judge's Order denying their motion for leave to file a second amended complaint (ECF No. 53) is DENIED.

Because this Opinion and Order resolves all pending claims in this case, a Judgment will also be entered consistent with this Opinion and Order. *See* FED. R. CIV. P. 58.

Dated: September 10, 2021

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

The Estate of SETH MICHAEL ZAKORA, and BRANDY ZAKORA, in her capacity as the Personal Representative of the Estate of Seth Michael Zakora,

Plaintiffs, Hon. Janet T. Neff
v. Case No. 1:19-cv-1016

TROY CHRISMAN, et al.,

Defendants.
_____/

REPORT AND RECOMMENDATION

Plaintiffs the Estate of Seth Michael Zakora and Brandy Zokora, the Personal Representative of the Estate of Seth Michael Zakora, have sued several employees and officials with the Michigan Department of Corrections (MDOC) and with the Michigan State Police (MSP) pursuant to 42 U.S.C. § 1983. Plaintiffs' claims arise out of the drug-overdose death of Seth Zakora while in the custody of the MDOC at Lakeland Correctional Facility (LCF). Plaintiffs sue the following MDOC Defendants: LCF Inspectors Troy Chrisman and Matthew Huntley; LCF Corrections Officers Chadwick Mobley, Steve Johnson, and Jane Doe; LCF Warden (at the time of the incident) Bonita Hoffner and her Administrative Assistant Russell Rurka; MDOC Assistant Deputy Director Steve Rivard; and MDOC Director Heidi Washington. Plaintiffs sue the

following MSP Defendants: Troopers Brandon Oaks and James Wolodkin; Detective/Sergeant Heather Lass; and Lieutenant James Coleman.

This matter is now before me on the MSP Defendants' Motion to Dismiss or, alternatively, Motion for Summary Judgment (ECF No. 33) and the MDOC Defendants' (Corrected) Motion to Dismiss and for Summary Judgment (ECF Nos. 36 and 39). In addition, Plaintiffs have filed a Motion for Leave to File a Second Amended Complaint. (ECF No. 47.) Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that Defendants' motions be **GRANTED**. In addition, Plaintiff's motion to amend is **DENIED**.

I. Background

On January 22, 2017, Seth Michael Zakora died from a drug overdose in the C-Unit of LCF. (ECF No. 3 at PageID.33.) Defendant Johnson found Zakora lying unresponsive in his bunk in the C-5 housing unit at 7:58 a.m. (ECF No. 37-2 at PageID.220.) Responding officers observed that Zakora was obviously deceased due to rigor mortis. (*Id.*) The cause of death was determined to be fentanyl toxicity by accident. (EFC No. 37-3.) In the two days prior to Zakora's death, two other prisoners housed in C-Unit overdosed on drugs. (ECF No. 3 at PageID.34.) Plaintiffs allege that, at the time of Zakora's death, illegal drugs were in abundance at LCF and were being smuggled in by a female corrections officer and a prisoner who were romantically involved with each other. (*Id.*) Plaintiffs also allege, however, that Defendants Rurka and Lass told Zakora's mother, Brandy Zakora, that prior to the death, drugs were being smuggled into the

prison inside basketballs that were thrown over the fence, but they could not catch the perpetrator. (*Id.* at PageID.36.) Following Zakora's death, the MSP made a full investigation and brought a drug dog into the facility that alerted to contraband in the C-Unit. (*Id.*)

Plaintiffs allege that a prisoner had informed Defendant Chrisman and LCF's Inspector office about the drug smuggling ring on more than one occasion prior to Zakora's death, providing information about how drugs were coming in and who was supplying them. Plaintiffs further allege that Chrisman relayed this information to another Inspector, Defendant Huntley, but neither took any action to stop the flow of drugs into the facility. Defendants Chrisman and Huntley allegedly told their supervisors, Defendants Hoffner and Rivard, about the drug smuggling, but they either ignored the information or instructed Chrisman and Huntley to ignore it or to not to investigate the accusations. Plaintiffs also allege that Rurka knew about the drug smuggling and knew that drugs were being smuggled into the facility inside basketballs. (*Id.* at PageID.34–35.) The prisoner who related the information to the inspectors was charged and convicted of smuggling drugs into LCF, allegedly to avoid an internal investigation into the female corrections officer who was involved in the smuggling. (*Id.* at 36.)

Plaintiffs also claim that MSP Defendants Oaks, Lass, Wolodkin, and Coleman "were involved with the drug smuggling ring and/or a cover up of Mr. Zakora's death." (*Id.* at PageID.37.) Plaintiffs further allege that "Defendant Troopers knew and or participated in the drug smuggling and knew of the risks and harm

associated with dangerous illegal drugs." (*Id.* at PageID.40.) Plaintiffs state that the MSP Defendants "knew that a 'cop/officer' was the person bringing suboxone and heroin into the facility but did not investigate the allegation in determining the source of the drugs that caused Mr. Zakora's death." (*Id.* at PageID.37.) Plaintiffs allege that, in spite of this knowledge of drugs being smuggled into LCF, Defendants "did not do anything to curb the introduction, spread, and usage of dangerous drugs in prison, despite their direct knowledge from prisoners snitching to them and from two previous overdoses." (*Id.* at PageID.41.) Thus, Plaintiffs contend, all Defendants "facilitated this drug ring by knowingly permitting it to happen within the facilities and/or participating in the drug ring." (*Id.* at PageID.42.)

II. Motion Standards

A Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted tests the legal sufficiency of a complaint by evaluating its factual assertions in a light most favorable to the plaintiff to determine whether it states a claim that is plausible on its face. *See In re NM Holdings Co., LLC*, 622 F.3d 613, 618 (6th Cir. 2010). Pursuant to Rule 12(b)(6), a claim must be dismissed for failure to state a claim on which relief may be granted unless the "[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). As the Supreme Court has instructed, to survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to

relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). This plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the complaint simply pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* As the Court further observed, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678-79. In reviewing the sufficiency of a complaint, a court "need not accept as true legal conclusions or unwarranted factual inferences," or "legal conclusions masquerading as factual allegations." *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009).

Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Material facts are facts that are defined by substantive law and are necessary to apply the law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if a reasonable jury could return judgment for the non-moving party. *Id.*

The court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Where, as here, a defendant moves for dismissal and for summary judgment as an alternative ground and the plaintiff responds by submitting materials outside the record, the court need not give notice that it might treat the motion as one for summary judgment. *See Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004).

III. Discussion

Plaintiffs allege four claims. In Count I, they allege that all Defendants except Mobley and Johnson failed to protect Zakora from illegal drugs that entered LCF in violation of the Eighth Amendment. In Count II, Plaintiffs allege all Defendants violated Zakora's Fourteenth Amendment rights under the state-created-danger doctrine by failing to investigate allegations of drug smuggling. In Count III, Plaintiffs allege that MDOC Defendants Washington, Rivard, and Hoffner failed to train and/or supervise their subordinates with regard to not permitting officers to sell drugs in prison, or had a policy permitting corrections officers to smuggle drugs into prison and sell them to prisoners, in violation of the Fourteenth Amendment. Finally, in Count IV, Plaintiffs allege an Eighth Amendment deliberate indifference claim against MDOC Defendants Mobley and Johnson for failing to check on Zakora after a prisoner told them that something was wrong with Zakora.

Because Plaintiffs state in their response that they do not contest Defendants' motions to dismiss the Fourteenth Amendment claim in Count II, (ECF No. 42 at PageID.372 n.4), and they offer no argument in response to Defendants' arguments for dismissal of

that claim, the Court may conclude that Plaintiffs have abandoned Count II. *See Karmol v. Ocwen Loan Servicing, LLC*, No. 1:16-CV1178, 2016 WL 7188742, at *2 (W.D. Mich. Dec. 11, 2016) (treating the plaintiff's failure to respond to a complaint as a waiver or abandonment of claims). Therefore, I recommend that this claim be dismissed.

A. Qualified Immunity

Both sets of Defendants raise the issue of qualified immunity. "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Phillips v. Roane Cnty.*, 534 F.3d 531, 538 (6th Cir. 2008) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Once a defendant raises the qualified immunity defense, the burden shifts to the plaintiff to demonstrate that the defendant officer violated a right so clearly established "that every 'reasonable official would have understood that what he [was] doing violate[d] that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The analysis entails a two-step inquiry. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013). First, the court must "determine if the facts alleged make out a violation of a constitutional right." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Second, the court asks if the right at issue was "'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated it." *Id.* (citing

Pearson, 555 U.S. at 232). A court may address these steps in any order. *Id.* (citing *Pearson*, 555 U.S. at 236). A government official is entitled to qualified immunity if either step of the analysis is not satisfied. *See Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 440 (6th Cir. 2016).

Although the Sixth Circuit has observed that "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity," *Wesley v. Campbell*, 779 F.3d 421, 433–44 (6th Cir. 2015), it has also said that, when the "pleadings in th[e] case are not ambiguous," and "it is clear that no violation of a clearly established constitutional right could be found under any set of facts that could be proven consistent with the allegations or pleadings," the Court acts well within its discretion in granting a pre-answer motion to dismiss on the basis of qualified immunity. *Jackson v. Schultz*, 429 F.3d 586, 589–90 (6th Cir. 2005).

B. MSP Defendants' Motion

Plaintiffs' sole claim against the MSP Defendants is that they violated his Eighth Amendment rights by failing to protect him from a substantial risk of harm.

The Eighth Amendment imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be "barbarous," nor may it contravene society's "evolving standards of decency." *Rhodes v. Chapman*, 452 U.S. 337, 345–46 (1981). Prison officials' conduct that involves the "unnecessary and wanton infliction of pain" is thus unlawful. *Ivey v. Wilson*, 832 F.2d 950, 954 (6th

Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). An Eighth Amendment claim includes both objective and subjective components. *Curry v. Scott*, 249 F.3d 493, 506 (6th Cir. 2001). The objective component requires the harm to be "sufficiently serious." *Id.* at 506 (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 1977 (1994)). Under this component, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* The subjective element focuses on whether a prison official knows that an inmate faces "a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. A prison official must exhibit more than lack of due care for a prisoner's safety before an Eighth Amendment violation will be found. *Id.* at 835. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. It is not enough that the official "should" have perceived a significant risk but did not. *Id.*

Inmates also have a constitutionally protected right to personal safety grounded in the Eighth Amendment. *Id.* at 833. Prison staff are thus obliged "to take reasonable measures to guarantee the safety of the inmates" in their care. *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984). A failure-to-protect claim requires the same showing: the prisoner-plaintiff faced a sufficiently serious risk to his health or safety and the defendant official acted with "'deliberate indifference' to [his] health or safety." *Mingus v. Butler*, 591 F.3d 474, 479–80 (6th Cir. 2010) (citing *Farmer*, 511 U.S. at 834); *see also Hudson*, 468 U.S. at 526–27; *Helling v. McKinney*, 509 U.S. 25, 35 (1993). The

defendant must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Farmer*, 511 U.S. at 837. In the context of physical harm, for example, a prisoner need not prove that he has been the victim of an actual attack, but he must at least establish that he reasonably fears such an attack. *Thompson v. Cnty of Medina*, 29 F.3d 238, 242–43 (6th Cir. 1994) (holding that plaintiff has the minimal burden of "showing a sufficient inferential connection" between the alleged violation and inmate violence to "justify a reasonable fear for personal safety").

Because the MSP Defendants move for dismissal on alternate procedural grounds, I will address both.

1. Rule 12(b)(6)

The MSP Defendants contend that the first amended complaint is subject to dismissal because its allegations as to them are wholly conclusory, and it fails to allege facts showing their personal involvement in the alleged constitutional violation.

"[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. When a plaintiff fails to allege facts showing how a particular defendant was involved in the alleged constitutional violation, the complaint is properly dismissed as to that defendant. *See Gilmore v. Corrections Corp. of Am.*, 92 F. App'x 188, 190 (6th Cir. 2004) (dismissing the complaint where the plaintiff failed to allege how any named defendant was involved in the violation of his rights); *Frazier v.*

Michigan, 41 F. App'x 762, 764 (6th Cir. 2002) (dismissing the plaintiff's claims where the complaint did not allege with any degree of specificity which of the named defendants were personally involved in or responsible for each alleged violation of rights); *Griffin v. Montgomery*, No. 00–3402, 2000 WL 1800569, at *2 (6th Cir. Nov. 30, 2000) (requiring allegations of personal involvement against each defendant).

As to the MSP Defendants, Plaintiffs allege the following:

- "[T]he three officers who no longer work for the Michigan State Police, Defendant Brandon Oaks, Defendant Heather Lass, Defendant James Wolodkin, and Defendant James Coleman, were involved with the drug smuggling ring and/or a cover up of Mr. Zakora's death.[1] (ECF No. 3 at PageID.37.)

- The MSP Defendants "knew that a cop/officer" was the person bringing suboxone and heroin into the facility but did not investigate the allegation in determining the source of the drugs that caused Mr. Zakora's death." (*Id.*)

- "Defendant Lass told Ms. Brandy Zakora that prior to her sons' [sic] death there had been basketballs of drugs thrown over the fence frequently but they couldn't catch the perpetrator." (*Id.* at PageID.36.)

[1] Plaintiffs allege "three officers who no longer work for the Michigan State Police," but list all four MSP Defendants.

- "Defendant Troopers knew and or participated in the drug smuggling and knew of the risks and harm associated with dangerous illegal drugs." (*Id.* at PageID.40.)

These bare-bones allegations do not state a constitutional violation against the MSP Defendants. With the exception of the allegation that Defendant Lass told Zakora's mother about the basketballs, which occurred after the death, there is no factual allegation that specifically mentions what any MSP Defendant did that amounts to an Eighth Amendment violation, and the allegation regarding Defendant Lass fails to support an Eighth Amendment claim. Plaintiffs' allegations are nothing more than legal conclusions couched as facts.

Plaintiffs contend that they allege sufficient facts to support a claim because "Defendants' own documents demonstrate that they had notice that a cop/officer was alleged to be involved in the drug-smuggling operation," and Defendants failed to investigate this tip and instead focused their investigation only on the prisoner-informant. (ECF No. 42 at PageID.386.) The document Plaintiffs reference, ECF No. 37-4, was submitted by the MDOC Defendants in support of their motion. Regardless, it shows only that a prisoner told Defendant Wolodkin during the investigation *after* Zakora's death that a "cop/officer" was involved in bringing drugs into the facility. (ECF. No. 37-4 at PageID.317.) The MSP Defendants could not have violated Zakora's Eighth Amendment rights based on this allegation. Plaintiffs also contend that Defendant Lass's statement to Brandy Zakora about the basketballs being thrown over the fence creates a reasonable

inference that an MSP Trooper had knowledge of the drug smuggling or was involved in the drug smuggling. (ECF No. 42 at PageID.386.) The allegation creates no basis to infer that the MSP Defendants violated Zakora's Eighth Amendment rights. At most, it shows that law enforcement officers were aware of a mode of smuggling but were unable to catch the perpetrator. This is not a constitutional violation.

Therefore, the MSP Defendants are entitled to dismissal pursuant to Rule 12(b)(6).

2. Rule 56

In support of the summary judgment portion of their motion, Defendants submit declarations attesting to their involvement in the events in this case. Defendant Coleman states that his only involvement was conducting a routine property destruction of evidence associated with the Zakora case on March 18, 2018. (ECF No. 34-1 at PageID.167.) Defendant Wolodkin states that his only involvement with the case was investigating and processing the crime scene following Zakora's death. (ECF No. 34-2 at PageID.171.) Defendant Lass states that her only involvement with the case was conducting interviews of various prisoners for the investigation at LCF. (ECF No. 34-3 at PageID.175.) Finally, Defendant Oaks states that his only involvement was during the investigation, in which he interviewed prisoners and staff at LCF, searched Zakora's personal property, prepared and reviewed reports, and submitted MSP's findings to the Branch County Prosecutor's office. (ECF No. 34-4 at PageID.179.) These declarations demonstrate that the MSP Defendants did not violate Zakora's clearly established constitutional rights.

Plaintiffs contend that summary judgment is improper because they have not had an opportunity to conduct discovery. Indeed, the Sixth Circuit has observed that "the plaintiff must receive 'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment." *Short v. Oaks Corr. Facility*, 129 F. App'x 278, 281 (6th Cir. 2005) (quoting *Anderson*, 477 U.S. at 257). Therefore, "[a] grant of summary judgment is improper if the nonmovant is given an insufficient opportunity for discovery." *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231–32 (6th Cir. 1994). Rule 56(d) provides the non-moving party a mechanism to obtain sufficient discovery when faced with a motion for summary judgment. However, a party's submission of an affidavit or declaration pursuant to that rule is not an automatic guarantee of additional discovery. "'A party invoking [the] protections [of Rule 56(d)] must do so in good faith by affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact.'" *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 623 (6th Cir. 2014) (quoting *Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir. 1975)). The party seeking discovery must "indicate to the district court its need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000). In other words, the party offering the affidavit must, with "details" and "specificity," explain why additional discovery will enable the party to rebut the movant's showing of the absence of a genuine issue of material fact. *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989).

Here, although Plaintiffs' counsel has submitted a declaration, it states only that "[t]he information to be discovered includes documentary and testimonial evidence to support the allegations in the Complaint that, as demonstrated in Plaintiff's response brief, are also documented in other public sources and official documentation." (ECF No. 42-3 at PageID.440) Counsel's declaration lacks the detail and specificity required to make a proper showing under Rule 56(d). For example, prior to filing this case, counsel must have had *some basis*—beyond the speculation asserted in the amended complaint and Plaintiffs' response—to conclude that the MSP Defendants were connected to the smuggling operation in some manner that could render them liable for violating Zakora's Eighth Amendment rights, and he could have cited that information to demonstrate a good-faith basis for discovery, but he did not do so. Accordingly, Plaintiffs have not even minimally demonstrated that discovery would enable them to defeat summary judgment.

C. MDOC Defendants' Motion

The MDOC Defendants also move for dismissal and, alternatively, for summary judgment. Because only Defendants Johnson and Mobley have submitted affidavits, I construe the motion for summary judgment as limited to those Defendants. As with the MSP Defendants' motion, I will address both bases for dismissal.

1. Rule 12(b)(6) Motion

a. Count I

Plaintiffs assert their Eighth Amendment failure-to-protect claim against Defendants Chrisman, Huntley, Hoffner, Rurka, Rivard, and Washington.

Defendants contend that Plaintiffs fail sufficiently to allege facts establishing the objective and subjective components of their claim. Defendants further contend that, even if Plaintiffs can establish both components of their claim, they are entitled to dismissal because Zakora's own voluntary decision to take illegal drugs, rather than their deliberate indifference, was the proximate cause of his death, Defendants contend that Plaintiffs cannot establish the objective component because inmates are not constitutionally entitled to greater protection from the effects of illicit drugs than unincarcerated citizens, and the Eighth Amendment does not guarantee the right to be incarcerated in a drug-free facility. The cases Defendants offer for these propositions are generally distinguishable from this case and are not binding on this Court. For example, *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985), was a class action regarding various conditions of confinement at a state facility, including unreasonable exposure to the threat of violence and drugs. *Id.* at 977. Following a bench trial, the district court concluded that the rate of assaults was not unreasonable compared to that of other facilities and that, while there was a problem regarding drug use among a small group of inmates, the "[r]isk of exposure to illegal drugs . . . seem[ed] no greater than the risk of exposure on the outside." *Id.* at 981. *Shrader* was not a failure-to-protect case and, more importantly,

implicitly acknowledged the possibility that drug use could be so pervasive in a prison facility as to violate the Eighth Amendment. *Nunez v. Salamack*, No. 88 CIV. 4587, 1989 WL 74940 (S.D.N.Y. June 26, 1989), also involved a conditions-of-confinement claim in which the plaintiff alleged that the failure to provide him with a drug-free environment violated the Eighth Amendment. *Id.* at 81. The court found that "[t]he alleged failure to provide Nunez with a drugfree environment does not state a claim against Salamack. Merely being exposed to illegal drugs in prison did not constitute the unnecessary and wanton infliction of pain, even if the effect of such exposure was to hinder Nunez' rehabilitation." *Id.*; *see also Smith v. Connections CSP, Inc.*, No. 17-1733, 2018 WL 1433840, at *4 (D. Del. Mar. 20, 2018) (rejecting the plaintiff's conditions of confinement claim because exposure "to illegal drugs in a prison does not violate his constitutional rights"). Here, though, Plaintiffs are not simply complaining about Zakora's exposure to illegal drugs. Finally, *Alexander v. Padvaiskas*, No. 14-13675, 2015 WL 10433618 (D. Mass. Dec. 2, 2015), like this case, involved the death of a prisoner who overdosed on illegal drugs smuggled into prison. Citing *Shrader* and *Nunez*, the court found that the plaintiff failed to establish the objective component because he did not allege "that the risk of exposure to drugs was greater inside the Thorndike Street lockup than outside of state custody," and that failing to monitor the plaintiff in prison "would be to conclude that inmates are constitutionally entitled to greater protection from the effects of illicit drugs than unincarcerated citizens." *Id.* at *3. The court further said that "the right to be protected from voluntary consumption of illicit drugs is well beyond the 'minimal civilized measures of life's

necessities.'" *Id.* (quoting *Rhodes*, 452 U.S. at 347). It appears, however, that the court did not analyze the claim as one of failure to protect.

Plaintiffs' cases are also not directly applicable. In *Cooks v. Guterrez*, No. C-10, 2011 WL 832469 (S.D. Tex. Mar. 3, 2011), the plaintiff's failure-to-protect claim alleged that the defendants failed to protect the plaintiff from threats to his safety after he complained of contraband smuggling, which he alleged the defendants condoned. *Id.* at *3. The plaintiff's claim in *Turner v. Cook County Sheriff's Office*, No. 19 CV 5441, 2020 WL 1166186 (N.D. Ill. Mar. 11, 2020), was deliberate indifference to the deceased prisoner's serious medical needs after she overdosed on smuggled drugs. *Id.* at *1–2. Finally, in *Mark v. Hickman*, 2019 U.S. Dis. LEXIS 189487 (S.D. Tex. Oct. 31, 2019, the plaintiff alleged a failure to protect claim that concerned an assault by a prisoner who was smuggling drugs with the assistance and knowledge of a corrections officer. The alleged failure in the instant case is protection from the drugs themselves that have entered the prison.

At least one court has recognized that a prisoner might be able to maintain a failure-to-protect claim based on exposure to illegal drugs, but concluded that the plaintiff failed to allege sufficient facts supporting both components of the claim. *James v. Bartow Cnty.*, No. 1:16-cv- 1381, 2017 WL 748738, at *6–7 (N.D. Ga. Feb. 27, 2017). In a different, but related, context, the Sixth Circuit has held that prison officials may be held liable for deliberate indifference to a suicidal inmate's risk from self-harm. *See Comstock v. McCrary*, 273 F.3d 693, 703–05 (6th Cir. 2001). If a prison official

has a duty to protect a suicidal inmate from self-harm, perhaps the Eighth Amendment would compel a prison official to protect a prisoner from self-harm resulting from taking illegal drugs.

Even if a cause of action could be established under these circumstances, however, Plaintiffs cannot establish the subjective component as to each Defendant. "[I]t is not enough to generically allege an influx of drugs into the jail, Plaintiff's Complaint must also demonstrate that each individual . . . Defendant subjectively knew of the risk of [Zakora]'s ingesting the illegal drug from the influx." *James*, 2017 WL 748738, at *7. Plaintiffs' allegations on this issue are exceedingly thin, and the closest they come is their allegation of what a prisoner allegedly told Defendant Chrisman about Zakora receiving drugs. But even that allegation falls far short of showing that Defendant Chrisman was subjectively aware of facts indicating a risk that Zakora would ingest illegal drugs and that he actually drew the inference. (ECF No. 3 at PageID.34–35.) The allegations as to the remaining Defendants—based on what Defendant Chrisman knew and told them or simply their awareness that drugs were being smuggled into the facility—are too conclusory and bereft of factual content to satisfy the *Twombly*/*Iqbal* pleading requirements. They do not establish a plausible claim that Defendants were subjectively aware of the risk that Zakora would ingest drugs.

b. Count III

In Count III, Plaintiffs allege that Defendants Washington, Rivard, and Hoffner failed to train and supervise Jane Doe and other prison employees to prevent the entry of illegal drugs into LCF and other

MDOC facilities. As the MDOC Defendants point out, Plaintiffs allege this claim as a Fourteenth Amendment claim, which Plaintiffs acknowledge is inapplicable in the prison setting.

In any event, assuming that Plaintiffs had intended to assert an Eighth Amendment supervisory liability claim, it would nonetheless fail for two reasons. First, government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Iqbal*, 556 U.S. at 676; *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009). A claimed constitutional violation must be based upon active unconstitutional behavior. *Grinter v. Knight*, 532 F.3d 567, 575-76 (6th Cir. 2008); *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002). The acts of one's subordinates are not enough; nor can supervisory liability be based upon the mere failure to act. *Grinter*, 532 F.3d at 576; *Greene*, 310 F.3d at 899. Supervisory liability attaches only if the plaintiff shows that the defendant "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending [defendant]." *Peatross v. City of Memphis*, 818 F.3d 233, 242 (6th Cir. 2016) (internal quotation marks omitted). "[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676. As set forth above, Plaintiffs fail to plead any fact demonstrating that Defendants Washington, Rivard, and Hoffner were personally involved in the alleged constitutional deprivation. There is simply no factual allegation showing that they were aware that Zakora

was at risk for ingesting illegal drugs. Even assuming that Defendants were aware of the prior overdose incidents at LCF—occurring, at most, two days before Zakora overdosed—is not enough to impose liability on Defendants.

Second, Plaintiffs' allegations are couched in terms of policies, lack of policies, and failures to train, classic *Monell* liability allegations. As explained in *Parsons v. Caruso*, 491 F. App'x 597 (6th Cir. 2012), unconstitutional policy or practice claims may be brought against municipalities and other local governmental bodies but not against state officials. *Id.* at 609; *see also Phillips v. Ballard*, No. 5:17-CV-301, 2019 WL 2359571, at *19 (E.D. Ky. June 4, 2019) ("As a threshold matter, an assertion that supervisory government officials failed to adequately train or supervise their subordinates typically arises not as a free-standing claim but as one of several ways for a plaintiff to show that a policy or custom of a city or county caused the plaintiff's injury, so that municipal liability may attach." (citing, among others, *Shadrick v. Hopkins Cnty.*, 805 F.3d. 724, 737 (6th Cir. 2015)).

While Plaintiffs apparently concede that Defendants Washington, Rivard, and Hoffner did not engage in any active unconstitutional behavior, they contend that these Defendants can still be held liable for inaction. It is true, as Plaintiffs argue, that in certain instances, supervisory personnel may be held liable for failing to act. *See Spencer v. Bouchard*, 449 F.3d 721 (6th Cir. 2006). As the court explained in *Allen v. Caruso*, No. 08-14252, 2009 WL 6409365 (E.D. Mich. Aug. 28, 2009), *report and recommendation adopted in part and rejected in part*, 2010 WL 1755395 (E.D.

Mich. Apr. 30, 2010), however, a supervisor's inaction will give rise to liability only where the plaintiff challenges "ongoing conditions of confinement." *Id.* at *4 (quoting *Spencer*). Plaintiffs' claim here is not an ongoing conditions-of-confinement claim. Rather, it is a failure-to-protect claim, for which they must show that Defendants were subjectively aware of a risk that Zakora would ingest the illegal drugs. As explained above, Plaintiffs fail to allege sufficient facts in that regard.

c. Count IV

Plaintiffs allege in Count IV that Defendants Mobley and Johnson were deliberately indifferent to Zakora's serious medical need when they failed to check on him after a prisoner, at some point during the "night/early morning" of January 22, 2017, informed them that he was "not doing well" or that "there appeared to be something wrong with him." (ECF No. 3 at PageID.33, 45.) Plaintiffs allege that had Defendants, who worked different shifts, checked on Zakora, he could have received lifesaving medical treatment. (*Id.* at PageID.45.)

Although the Sixth Circuit has "long held that prison officials who have been alerted to a prisoner's serious medical needs are under an obligation to offer medical care to such a prisoner," *Comstock*, 273 F.3d at 702, Plaintiffs fail to allege a plausible claim against Defendants Mobley or Johnson. Their allegations establish no more than a "sheer possibility," as opposed to a plausible assertion, that Defendants acted unlawfully. *Iqbal*, 556 U.S. at 678. The first amended complaint says only that Zakora died as a result of an overdose sometime on January 22, 2017,

and that sometime during the night/early morning that day an unknown prisoner told either Mobley, Johnson, or both of them to check on Zakora because he was "not doing well" or because "there appeared to be something wrong with him." Without some indication of the approximate time Zakora died and the approximate time the alleged prisoner spoke to Mobley or Johnson—to show saving him was still a possibility—there is no *plausible* claim that either Defendant violated Zakora's Eighth Amendment rights. It is no more than a possibility.

2. Rule 56 Motion

In support of their summary judgment motion, Defendants Mobley and Johnson submit declarations, the autopsy report, and the MDOC critical incident report. According to the autopsy report, the time of death was unknown. (ECF No. 37-3 at PageID.289.) In his declaration, Mobley states that he worked the third shift, beginning on January 21, 2017 from 10:00 p.m., until 6:00 a.m. on January 22, 2017, in the C-5 housing unit. (ECF No. 37-8 at PageID.347–48.) He further states that he had no knowledge either before or during that shift that Zakora possessed, ingested, or intended to ingest illegal drugs. Mobley also states that he did not speak with Zakora during that shift, and no one advised him to check on Zakora or to watch him closely or that Zakora was having any medical issues. Mobley states that, although he did his hourly rounds through the C-5 unit, it was quiet, and he was unaware of any issue. (*Id.* at pageID.348–49.) In his declaration, Johnson states that he worked the first shift on January 22, 2017, beginning at 6:00 a.m. in the C- 5 housing unit. (ECF No. 37-7 at PageID.343–

44.) Johnson states that he no knowledge, either before or during that shift, that Zakora had previously used, possessed, or ingested illegal drugs. Johnson further states that he discovered Zakora deceased in his bunk that morning at 7:58 a.m., only seconds after a prisoner who was exiting the cube said that Zakora was not "doing too good" or words to that effect. (*Id.* at PageID.344.) Prior to that time, no one advised Johnson that he should check on Zakora or watch him closely. (*Id.*)

As Defendants note, the Sixth Circuit has held in overdose cases that officers are not liable for violating the Eighth Amendment when they lack knowledge that the decedent ingested drugs. *See*, *e.g.*, *Weaver v. Shadoan*, 340 F.3d 398 (6th Cir. 2003); *Watkins v. City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001). Here, Defendants' evidence, which is unrebutted, shows that Mobley and Johnson were both unaware that Zakora had ingested drugs. Plaintiffs' attempt to distinguish *Weaver* and *Watkins* fails, as the point of those cases is that a defendant who lacks knowledge that a prisoner has ingested drugs cannot be considered deliberately indifferent. Plaintiffs' assertion that, regardless, Defendants still should have checked on Zakora does not alter the outcome. There is no basis to conclude that they were deliberately indifferent.

Finally, as noted above, although Plaintiffs' counsel has submitted a declaration pursuant to Rule 56(d) requesting discovery, it lacks both details and specificity as to what discovery might yield. This is particularly important, as counsel fails to identify what evidence might be obtained that would reveal the time Zakora died. If this cannot be established, Plaintiff's

claim would depend entirely upon speculation. Similarly, Plaintiffs fail to indicate what discovery they believe they can obtain that would contradict Mobley's and Johnson's declarations that they had no knowledge of Zakora's need for medical care prior to the time Johnson found him deceased in his bed. Plaintiffs have failed to meet their burden under Rule 56(d).

Accordingly, I recommend that Defendants Mobley and Johnson are entitled to summary judgment on Plaintiffs' claims against them.

D. Plaintiffs' Motion for Leave to Amend

After the present motions were fully briefed, Plaintiffs filed a motion for leave to amend to identify MDOC Defendant Jane Doe as former Corrections Officer Tammy Blair and to add two new MDOC Defendants, current Corrections Officer Thomas Ivany and former Corrections Officer Chase White, both of whom, Plaintiffs allege, engaged in smuggling drugs into LCF either jointly with Blair or separately. Plaintiffs assert that they learned of Blair's identity on April 30, 2021, and learned of the two additional proposed defendants at or after that time. (ECF No. 47 at PageID.468.)

Pursuant to Fed. R. Civ. P. 15(a)(2), "a court should freely give leave [to amend] when justice so requires." A court may deny leave "in cases of undue delay, undue prejudice to the opposing party, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or futility." *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (citing *Foman v. Davis*, 371 U.S. 178, 182

(1962)). "Ordinarily, delay alone, does not justify denial of leave to amend." *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002). A motion to amend is considered futile if it could not withstand a motion to dismiss pursuant to Rule 12(b)(6). *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).

The MDOC and MSP Defendants oppose the motion, arguing that it should be denied on grounds of undue delay, particularly because counsel had 39 months since Zakora's death to discover the identities of the smugglers, and he has provided no explanation for why he was unable to learn of those individuals until after the motions were fully briefed. They further argue that they will be prejudiced because of the time and effort expended in briefing the dispositive motions, and amendment would be futile for the reasons cited in their motions and supporting briefs.

First, as for the effect on the pending motions, Plaintiffs do not argue, and I do not find, that the proposed amendment in any way interferes with the pending motions by adding additional factual matter pertinent to the claims against the MSP and MDOC Defendants. In fact, Plaintiffs limit their request to adding three new parties. Indeed, based on my review of the proposed amendment, it adds nothing of substance to alter the recommendations set forth above. Thus, any amendment would be allowed only to the extent it asserts claims against the three proposed Defendants.

Although there is some question of delay—and Plaintiffs have not explained the reason for the substantial delay—there is no indication of bad faith or that Plaintiffs assert the amendment for an improper

purpose. Moreover, because, as noted, any amendment, if permitted, would be limited solely to claims asserted against the three newly-identified parties, there is no prejudice to the MDOC or MSP Defendants. In fact, Plaintiffs will not be granted leave to file an amended pleading including the claims against the MSP and MDOC Defendants who have appeared because such claims are futile for the reasons set forth in the above recommendations.

Because the applicable statute of limitations expired in January 2020, *see Wolfe v. Perry*, 412 F.3d 707, 714 (6th Cir. 2005) (Section 1983 claims brought in Michigan is the state's three-year statute of limitations for personal injury claims); *see also* ECF No. 47 at PageID.473–74, the real question is whether Plaintiffs' proposed amendment relates back to the date of their original complaint. Federal Rule of Civil Procedure 15(c) specifies that a pleading relates back when:

> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Fed. R. Civ. P. 15(c).

The parties Plaintiffs seek to add are not all in the same boat. First, they seek to substitute Blair for Jane Doe, who is already a named Defendant in the case. Second, they seek to add two entirely new parties, Ivany and White, who were never mentioned in any prior pleading.

I begin with Ivany and White. Plaintiffs' analysis as to these two individuals proceeds as if Rule 15(c)(1)(C) applies. It does not. They are new parties because the amendment, as to them, does not "change[] the party or the naming of the party against whom a claim is asserted." Fed. R. Civ. P. 15(c)(1)(C). The Sixth Circuit has affirmed time and again that claims against additional parties do not relate back. As stated in *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313 (6th Cir. 2010): "[T]he precedent of this circuit clearly holds that 'an amendment which adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations.'" *Id.* at 318 (quoting *In re Kent Holland Die Casting & Plating, Inc.*, 928 F.2d 1448, 1449 (6th Cir. 1991) (quoting *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064 (6th Cir. 1973)); *see also Ham v. Sterling Emergency Servs. of the Midwest, Inc.*, 575 F. App'x

610, 615 (6th Cir. 2014) ("This court has held that claims against *additional* parties do not relate back." (italics in original)); *Puskas v. Delaware Cnty.*, No. 2:19-cv-2385, 2021 WL 1575285, at *3–4 (S.D. Ohio Apr. 22, 2021) ("Here, the Amended Complaint does not substitute Lt. Buttler for any original defendant, nor does the record indicate that Mrs. Puskas failed to name him in the original Complaint by dint of mistake as to his identity. Although Mrs. Puskas may have been unaware of Lt. Buttler's supervisory authority over the DSCO K-9 program, her failure to earlier discover that fact— whether by her own fault or the Defendants'—does not justify the assertion of claims against Lt. Buttler after the limitations period closed." (citing *DeBois v. Pickoff*, No. 3:09cv230, 2011 WL 1233665, at *10 (S.D. Ohio Mar. 28, 2011)). Accordingly, the proposed claims against Ivany and White do not relate back and are time-barred.

Plaintiffs' claim against Blair, which seeks to substitute her for Jane Doe, is governed by Rule 15(c)(1)(C). *See Brown v. Cuyahoga Cnty.*, 517 F. App'x 431, 433 (6th Cir. 2013) ("Replacing a 'John Doe' defendant with a new, previously unknown party is considered a change of parties and must comply with the requirements of Rule 15(c)(1)(C) when the change is made after the expiration of the applicable statute of limitations."). There is no question that the requirements of subsection (B) are satisfied because the amendment as to Blair asserts the same claim set out against Jane Doe. However, Plaintiffs must still satisfy conditions (i) and (ii) set forth in subsection (C). *Id.* This they cannot do with regard to the second condition, which requires that they show "a mistake concerning the proper party's identity." Plaintiffs do not

even address this issue in their brief. The Sixth Circuit has held that lack of information about the identity of a party does not constitute a mistake as to identity. *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996); *see also Wiggins v. Kimberly-Clark Corp.*, 641 F. App'x 545, 549 (6th Cir. 2016) (stating that even if two proposed new defendants knew or should have known that the plaintiff would bring the "John Doe" claims against them, the plaintiff "failed to establish that his lack of knowledge of their identities was due to a 'mistake' as the Rule requires"); *Ham*, 575 F. App'x at 616 ("We have distinguished a plaintiff's *mistake* concerning the identity of a party from a plaintiff's mere *failure to find out* a party's identity." (italics in original)); *Brown*, 517 F. App'x at 433–34 ("We have previously held that an absence of knowledge is not a mistake, as required by Rule 15(c)(1)(C)(ii)).

Here, Plaintiffs admit that they did not learn of Blair's identity until April 30, 2021. Pursuant to the above cited cases, Plaintiff's lack of prior knowledge does not constitute a mistake for purposes of Rule 15(c)(1)(C)(ii). Plaintiffs rely on *Berndt v. State of Tennessee*, 796 F.2d 879 (6th Cir. 1986), for much of their argument, and *Berndt* could be read to relax with the mistake requirement in certain circumstances. *Id.* at 884. *Berndt* was decided a decade before *Cox*, and some courts have suggested a possible split between the two cases. As the court in *Reiner v. Canale*, 301 F. Supp. 3d 727 (E.D. Mich. 2018), thoroughly and persuasively explained, however, the bulk of recent Sixth Circuit authority, although unpublished, adheres to *Cox*'s distinction between a lack of knowledge and a mistake about an intended party's identity. *Id.* at 734–39. Summing up, the *Reiner* court said that

"[a]lthough there is arguably conflicting Sixth Circuit case law on the issue of whether an initial lack of knowledge as to the identity of a defendant constitutes a 'mistake' under Rule 15(c)(1)(c)(ii), the weight of authority clearly favors a finding that it does not." *Id.* at 739. I find this analysis compelling and therefore adopt it. *See Moore v. Tennessee*, 267 F. App'x 450, 455 (6th Cir. 2008) ("Our circuit precedent is fatal to Moore's argument. In this court, a plaintiff's lack of knowledge pertaining to an intended defendant's identity does not constitute a "mistake concerning the party's identity" within the meaning of Rule 15(c)). Accordingly, Plaintiffs' proposed amendment does not relate back under Rule 15(c).

IV. Conclusion

For the foregoing reasons, I recommend that Defendants' motions to dismiss/for summary judgment (ECF Nos. 33, 36, and 39) be **granted**.

In addition, **IT IS ORDERED** that Plaintiffs' motion for leave to file second amended complaint (ECF No. 47) is **denied**.

NOTICE

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within 14 days of the date of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Dated: July 23, 2021

/s/ Sally J. Berens
SALLY J. BERENS
U.S. Magistrate Judge

No. 21-1620

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 3, 2022
DEBORAH S. HUNT, Clerk

ORDER

ESTATE OF SETH MICHAEL ZAKORA; BRANDY ZAKORA, IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SETH MICHAEL ZAKORA,
Plaintiffs-Appellants,
v.
TROY CHRISMAN; MATTHEW HUNTLEY; CHADWICK MOBLEY; STEVE JOHNSON; BONITA J. HOFFNER; STEVE RIVARD; HEIDI E. WASHINGTON; BRANDON OAKS; RUSSELL RURKA; HEATHER LASS; JAMES WOLODKIN; JAMES COLEMAN; UNKNOWN PARTY, NAMED AS JANE DOE,
Defendants-Appellees.

BEFORE: SUTTON, Chief Judge; GILMAN and MOORE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF SETH MICHAEL ZAKORA; BRANDY ZAKORA, in her capacity as the Personal Representative of the Estate of Seth Michael Zakora, Plaintiff/Appellants, -vs- TROY CHRISMAN; MATTHEW HUNTLEY CHADWICK MOBLEY; STEVE JOHNSON BONITA J. HOFFNER; STEVE RIVARD; HEIDI E. WASHINGTON; BRANDON OAKS; RUSSELL RURKA; HEATHER LASS; JAMES WOLODKIN; JAMES COLEMAN; UNKNOWN PARTY named as Jane Doe, Defendant/Appellees.	)	File No. 21-1620

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.
No. 1:19-cv-01016-Janet T. Neff, District Judge.

Argued: April 27, 2022

Before: Jeffrey Sutton, Chief Judge;

Ronald Gilman and Karen Moore, Circuit Judges

Transcribed by: Melinda Nardone

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By
KYLA L. BARRANCO, J.D.

On behalf of MSP Defendants.

[Page 3]

THE CLERK: Case Number 21-1620, the Estate of Seth Michael Zakora, et al. V Troy Chrisman, et al. 15 minutes for the plaintiff, 15 minutes to be shared by the defendants. Ms. Madeline Sinkovich for the appellants.

JUDGE SUTTON: Good morning.

MS. SINKOVICH: Good morning, Your Honors, Madeline Sinkovich on behalf of the plaintiffs, which is the Estate of Seth Michael Zakora, and the personal representative, his mother, Brandy Zakora.

And while I know the briefing is rather lengthy in this case plaintiff's points can boil down into three points. First, prison guards that smuggle illegal drugs in the prisons pose an obvious and a substantial risk of harm to the inmates that are incarcerated therein. Second, prison officials who have knowledge that staff are involved in drug smuggling in prisons and fail to act reasonably in response can be subject to liability under the Eighth Amendment of the United States Constitution. And, three, the allegations in plaintiffs' complaint here do state a plausible claim for relief against the named defendants for the deliberate

indifference to a substantial risk of serious harm that was presented by uncontrolled, staff involved drug smuggling in the Michigan prisons. Accordingly the

[Page 4]

district court erred in dismissing plaintiffs' complaint.

A brief summary of the facts in this case. Like I said, the lawsuit was brought by Ms. Brandy Zakora after the untimely death of her son, Seth Michael Zakora. He was incarcerated in the Michigan Department of Corrections, the MDOC for short, and passed away in 2017. He was only 21 years old at the time of his death and did pass away from fentanyl toxicity. However, prior to his death the MDOC had several problems with drug smuggling in the prisons.

JUDGE SUTTON: Can I ask you, so the weekend -- so the weekend before two people die?

MS. SINKOVICH: Two people overdose that same weekend in Lakeland.

JUDGE SUTTON: Okay.

MS. SINKOVICH: During the year prior --

JUDGE SUTTON: Go ahead, you're getting to what was the --

JUDGE MOORE: Did they die?

MS. SINKOVICH: These two did not die in Lakeland, they overdosed and were sent to the hospital. In the year prior, in the MDOC facilities in general, two employees --

JUDGE SUTTON: Well, wait, this prison?

[Page 5]

MS. SINKOVICH: No.

JUDGE SUTTON: Okay, well, how about this prison, what does the evidence show or the complaint show for the prior year in this prison?

MS. SINKOVICH: In this prison there were the two overdoses that recently happened --

JUDGE SUTTON: Right.

MS. SINKOVICH: -- that I just mentioned as well --

JUDGE GILMAN: Did those people die or not?

MS. SINKOVICH: No, they did not die.

JUDGE GILMAN: I thought there were two over--

MS. SINKOVICH: They were hospitalized.

JUDGE GILMAN: Oh, okay, because I thought --

MS. SINKOVICH: There were two overdoses in Lakeland the weekend prior to Seth's death.

JUDGE GILMAN: Right.

MS. SINKOVICH: In the MDOC in general there was a problem with drug smuggling where two employees did come forward with evidence of this, and

after the first employee came forward two inmates who were involved in the drug smuggling were killed. So those are the two deaths that I think I might be confusing --

[Page 6]

JUDGE SUTTON: Okay, we'll just -- I guess I'll start, you can tell me why I'm wrong about this, but I'll start with this prison. And one thing I might wonder about your claim is let's just say hypothetically there's a world in which there could be an Eighth Amendment violation for prisons not paying attention to drug smuggling and not paying attention to people overdosing or worse dying. If in that prison you just have two overdoses the weekend before, and if I'm understanding you correctly there's no evidence as to what had been going on in that prison, I'm only focusing on that prison, you can tell me why I'm wrong, but for now only that prison, it's hard for me to understand the theory of that claim.

In other words, there's not really time, if it's the weekend before, to solve a systemic problem of, you know, how you going to do it. You don't know how it came in. The basketball theory didn't come till later, so how does that kind of show how cruel and unusual or unreasonable the prison's being if it's only the weekend before that it happens and there hadn't been prior overdoses or deaths in that prison.

MS. SINKOVICH: Well, the basketball theory, while it was only told to Ms. Brandy Zakora after her son's death, that information that it was frequent that

[Page 7]

basketballs full of drugs were being thrown over would suggest that the time was farther in the history than just those two days.

JUDGE SUTTON: Okay, so --

MS. SINKOVICH: Additionally --

JUDGE MOORE: Also you have paragraph 29 where you say that another prisoner informed Lakeland Correctional inspector, specifically Defendant Chrisman, and the inspector's office of the drug smuggling ring.

MS. SINKOVICH: Exactly. So I'm not sure exactly when he came forward with this information, but it was more than just the weekend before. I think the complaint alleges that it was prior to all three overdoses that he came forward and --

JUDGE SUTTON: But there were overdoses before the weekend before?

MS. SINKOVICH: No.

JUDGE SUTTON: It's not just evidence of drug smuggling, the cruel and unusual problem arises, I mean it could be stupidity, bad prison management, but in terms of protecting the health of the inmates, the real tip is people getting hurt, right?

MS. SINKOVICH: Correct. But you don't need to wait until someone gets hurt to have an Eighth Amendment violation. You could have a substantial risk

[Page 8]

of serious harm without someone dying before you can bring that claim. So I think, to answer your question, the environment that allows guards to smuggle drugs creates in itself a substantial risk of harm to all the inmates. So if officials know that illegal drugs are being smuggled into the prison there's in general a --

JUDGE SUTTON: What's funny about this is, you know, the thing that -- one thing that makes an Eighth Amendment claim salient is the government restricts the inmate's liberty, they put them in a cell, they have restrictions. And so when they are involuntarily subjected to conditions, are not looked at -- their medical needs are not looked after, you know, that makes some sense because the government took away their liberty, they can't protect themselves, and you can understand that world. But here it's a voluntary decision, like it's not guards saying take the fentanyl, it's not guards coercing someone into injuring themselves, it's a voluntary decision. That's what seems different to me about this case from other Eighth Amendment cases.

MS. SINKOVICH: Agreed. But, however, Your Honor, this would be similar to a suicide case whereas an individual who has harmed themselves, but also in the Rhodes case --

[Page 9]

JUDGE SUTTON: But those cases only get somewhere when someone -- you know, the way prisons lose those cases is there's a serious medical need. It's almost as if, you know, someone comes in and has to

have insulin every day, they are supposed to give them their insulin every day. Once someone's tipped off someone's suicidal -- I mean usually prisons don't get in trouble for a suicide where there's no suggestion the person is suicidal. So here there's -- that's not part of the claim, right, that this particular individual couldn't be around drugs? I mean they are illegal so that makes the whole thing a little strange anyway, but this isn't a serious medical needs case.

MS. SINKOVICH: No, it's not a serious medical needs case, it's a general danger in the prison case. So the condition of confinement where there's illegal drugs that are being smuggled in by guards, that created -- that is what plaintiffs said create the dangerous condition in the prison, that is a substantial risk of harm to inmates because there's guards bringing in illegal drugs and inmates -- there's no -- in the complaint it didn't allege that Seth took the drugs, that he ingested the drugs on his own, that is -- we don't know whether he took those drugs on his own. We know he died from drugs.

[Page 10]

JUDGE GILMAN: There's nothing in the records saying anybody forced the drugs down his throat?

MS. SINKOVICH: No.

JUDGE MOORE: No, but you do have a lot of different allegations from paragraphs 28 through 34 that suggest information pertaining to Zakora himself. So paragraph 30 says that this prisoner specifically gave Defendant Chrisman information about individuals supplying large amounts of drugs to Mr. Zakora,

that's one of your allegations. Then apparently in 34 you say two corrections officers told Zakora that he'd gotten himself into this mess, i.e. into the drug problem at Lakeland, and now it was his problem to deal with. So it sounds like -- I'm skipping over several other paragraphs, but you have tied Zakora's situation to the drugs coming in and to knowledge that Chrisman had pertaining to Zakora himself.

MS. SINKOVICH: Yes, Your Honor. And plaintiff would argue that those kites are going -- if they are going straight to Inspector Chrisman, that the other inspector also had knowledge as well as the warden because if there's information being given to the inspectors, the inspectors are the criminal and security investigators for the entire prison, if they are getting tips that guards are committing illegal acts and putting

[Page 11]

prisoners at risk of overdose, the chain of command would allow an inference that Warden Hoffner as well as the other inspector were also aware of this information and failed to act in response to their knowledge that there was uncontrolled (inaudible) smuggling in there and posing risks to plaintiff of overdose.

And drugs in prison do give a serious risk of overdose to prisoners, they are --

JUDGE GILMAN: For all prisoners or only those who are known to be drug abusers? I mean what class does your client Zakora fit into, just because he was --

MS. SINKOVICH: Well, for example --

JUDGE GILMAN: -- generally a prisoner in unit C?

MS. SINKOVICH: For example, when the -- in one of the unrelated and one of the incidents not in Lakeland, when the employee went forward and told supervisory officials that, you know, this inmate told me that there's guards smuggling drugs and here's the name of the other inmate. Well, later those two inmates were killed. And they weren't doing drugs, but the fact is that illegal drug smuggling and drug trafficking is inherently dangerous, and not only to people for overdosing but because of the violence that comes with

[Page 12]

drug trafficking. And so does that answer your question, Your Honor?

JUDGE GILMAN: I guess -- well, is part of your allegations that Zakora -- that these officials should have known that Zakora in particular was somebody who was at risk because of these rampant drugs in the prison, as you say?

MS. SINKOVICH: Yes, as a result of the prisoner informing the inspector that these drugs are being smuggled in and given directly to Seth. So they had specific knowledge that these drugs were coming in through him, which would put him as a target of violence and a risk of overdose if he's using any of these drugs. And it is -- the prison officials do have an obligation to provide reasonable safety. And so reasonable

safety would include doing something in response to knowing that there's illegal activity by your employees in the facility.

JUDGE SUTTON: What's your best case on the clearly established prong for this kind of voluntary conduct by inmates?

MS. SINKOVICH: Well, this is a voluntariness issue. Recently in Rhodes verse Michigan this court actually addressed the voluntariness issue, and in that case there was an -- it's an Eighth

[Page 13]

Amendment claim --

JUDGE SUTTON: That's the employment one where the person takes a job --

MS. SINKOVICH: Yes.

JUDGE SUTTON: -- right, and then something falls on them?

MS. SINKOVICH: She's pushing the laundry cart and it falls and --

JUDGE SUTTON: Yeah, but what I mean by voluntar- -- I should put it differently. Voluntarily engaging in illegal conduct, what's the case that establishes that?

MS. SINKOVICH: I don't have a case that specifically establishes that, Your Honor.

JUDGE SUTTON: Why isn't that a problem on the clearly established prong? I mean that's not -- that's a pretty significant rule. That's not asking for a case decided on a Tuesday at three o'clock, that's a pretty significant rule and doctrinal point.

MS. SINKOVICH: Yes, Your Honor, however, the Supreme Court has gone through for many years and discussed how drugs aren't allowed in prisons and prison officials do have to combat drugs in prisons. And then in the circuits, there have been some circuit courts that discuss also the dangers of drugs in prisons, so --

[Page 14]

and given the illegal nature of smuggling them into prisons --

JUDGE SUTTON: Well, the more drugs in prisons the more there are cases saying stop the drugs from getting in the prisons the more you would expect a cognizable Eighth Amendment claim where an estate sues the prison for letting these drugs get in and their child dying from an overdose.

MS. SINKOVICH: I understand, Your Honor. However, just because there's not a case, a specific case, where this has happened before with egregious behavior of illegal conduct happening by state employees in prisons, smuggling these drugs in to create a dangerous environment, I think that would be an obvious case following -- well, there's Moderwell verse Cuyahoga County in the sixth circuit that said if any reasonable official would determine that the conduct was unconstitutional you don't need a case on point.

And that's following Supreme Court precedent like Hope verse Pelzer. And plaintiff would argue here that the illegal nature of smuggling drugs in and the inherent dangers in illegal drugs generally, not just in prisons but generally, through violence and overdose make this an obvious case.

JUDGE SUTTON: Well, I get your obviousness

[Page 15]

point in part because I get the point that it's obvious prisons should not be allowing drugs in, it's obvious if they know about it that they should stop it. What's not obvious is the person that voluntarily engages in the illegal conduct. You know, this would be a different case if the person arrived and they are going through detox, I mean that would strike me as a slightly different case. They've been addicted to something, say fentanyl, they come in and they are getting access. That's a special needs situation, they are particularly vulnerable to something, that I could start to see. But here it's -- they are not supposed to be doing this, and that seems to me a very significant difference from those cases so I don't consider that frankly obvious that you have a cognizable Eighth Amendment claim.

It's a little bit like you're not supposed to have cigarettes in the prison, somehow they are there, you're not supposed to be smoking them, someone smokes them and then they sue the prison for lung cancer. You're voluntarily --

MS. SINKOVICH: Well, that's what happened Helling verse McKinney.

JUDGE SUTTON: What's that?

MS. SINKOVICH: That's what happened in Helling verse McKinney, the Supreme Court case

[Page 16]

determined that a cognizable claim could potentially be stated from a secondhand environmental -- or secondhand smoke and they remanded that case back down to determine --

JUDGE SUTTON: I don't know the case, but I want to make sure you listen to what I said before you say it's the same case. I'm talking about someone who voluntarily smokes the cigarettes in a prison, they are not supposed to be smoking them in the prison, they get lung cancer, not secondhand smoke, they are the ones smoking them.

MS. SINKOVICH: I understand.

JUDGE SUTTON: They are the ones engaging in the illegal conduct and they sue the prison for lung cancer. That seems to me extraordinary, and that's not that case, I don't think.

MS. SINKOVICH: No, that case is -- no, I misunderstood your question. The secondhand smoke could create a viable Eighth Amendment claim for --

JUDGE SUTTON: No, that's a totally different line of cases, I agree, because that's the -- you're stuck, you can't go anywhere. That's the whole point of that line of cases.

MS. SINKOVICH: You're stuck there. And I would argue the same thing counts as he can't leave the

[Page 17]

prison, he can't go get any help and he did want help. There's allegations that he called his grandma, he said he's scared, he's not going to be able to leave --

JUDGE SUTTON: Wouldn't he have been just as vulnerable to fentanyl overdoses outside the prison?

MS. SINKOVICH: There was no one -- no one outside the prison was smuggling drugs to him specific -- or giving him drugs specifically. He wasn't in prison on a drug charge so --

JUDGE SUTTON: I'm just making --

JUDGE MOORE: What was he in prison for?

MS. SINKOVICH: I believe something with criminal sexual conduct.

JUDGE SUTTON: All right, we'll give you your full rebuttal.

MS. SINKOVICH: Thank you.

JUDGE SUTTON: We'll hear from I guess there are two lawyers on the other side. Mr. Farrell.

MR. FARRELL: Good morning. May it please the Court, my name is Jim Farrell from the Michigan Attorney General's office on behalf of the eight Michigan Department of Corrections defendants. I'm going to

split my time with my co-defendant, I'll take eight minutes and she's going to take seven minutes for our 15 minutes.

[Page 18]

I don't have a lot to say. As appellees, obviously, you know, we support the rationale of the lower court --

JUDGE SUTTON: Why don't you make this easier and just go to prong two of qualified immunity, clearly established?

MR. FARRELL: That's exactly correct, I agree with that. You know, it's interesting the lower court neither the magistrate judge who wrote a very well researched report recommendation nor the district judge ever mentioned or went through the qualified immunity analysis.

JUDGE SUTTON: Well, be careful with that, this is a mistake people make all the time. You're always doing the qualified immunity analysis when you do the constitutional ruling, do you understand that? This is what leads to all kinds of confusion throughout the Court.

MR. FARRELL: Yes.

JUDGE SUTTON: That is part of the qualified immunity analysis, it's just the first prong, and you can win on the first prong and you can win on the second prong, so be careful how you say that.

MR. FARRELL: It's interesting you say --

JUDGE SUTTON: But anyway, why did they do

[Page 19]

it on prong one, why didn't they do prong two? What was going on? It seems like that was an easier way to do it.

MR. FARRELL: Well, it's interesting, the lower court granted -- so both defendants filed motions to dismiss under Rule 12 and motions for summary judgment, you know, combined motions under Rule 56. The Court, if you -- you know, it seems to me the Court granted the motions to dismiss on Rule 12, that there was failure to plead a claim, that there was plausibility issues, Iqbal and Twombly plausibility problems. So it sounded like a Rule 8 dismissal of the case, yet the order says motion for summary judgment granted. So it's a little confusing how the case comes up to the Court.

JUDGE MOORE: Why isn't the complaint sufficient vis-a-vis Defendant Chrisman?

MR. FARRELL: Because what's alleged against Chrisman is that an unknown person at an unknown time told Mr. Chrisman, who is the facility inspector, who is essentially the sheriff of the facility, that Zakora was mixed up with drugs. There's no allegation that Mr. Chrisman actually inferred that this was a serious risk to his health, that he might -- or his -- to his safety, that he might overdose on fentanyl.

[Page 20]

JUDGE MOORE: Wouldn't it be logical if there are a lot of drugs coming into prison and if the drugs in particular are -- large amounts of drugs are being supplied to Zakora, wouldn't there be a logical inference that there is a serious risk of harm to people like Zakora and including Zakora?

MR. FARRELL: Not necessarily, Your Honor. There's a lot of reasons why someone might have drugs.

JUDGE MOORE: In prison?

MR. FARRELL: In prison, to sell them, to make a profit. Now, the inference here that he needs to draw for her -- for plaintiff to make a viable Eighth Amendment claim is that he drew this inference that it was a serious risk of overdose.

JUDGE MOORE: You're getting to the subjective harm. Do you concede that there is an objective risk here?

MR. FARRELL: No, I don't. And the reason why is that's the one -- that's another thing that troubled me with the lower court's decision. I mean generally I agree with it because we won, but on the first prong, you know, is there a constitutional right that was violated? Is there a constitutional violation?

I have yet to see any case that has said that a prisoner has a constitutional right to a drug

[Page 21]

free prison environment or that there was -- there would be a violation of his Eighth Amendment rights by him taking a voluntary drug overdose. I mean there's no constitutional law on either one of those points. They make a very --

JUDGE MOORE: Does a prisoner have an Eighth Amendment right to have a safe environment in the prison?

MR. FARRELL: Yes, that's correct, but that's too broad. I think as we know in qualified immunity you have to look at the constitutional right in the somewhat narrow context of the case. Now of course the Supreme Court, the Sixth Circuit, every circuit has said there's a right -- you know, there's a requirement to protect against known serious risks to a prisoner's safety. But in the specific context of this case I have yet to see any cases, one case, that has said that there is a constitutional right to a drug free environment or that there is a -- that a prisoner has a constitutional right to be protected from himself voluntarily taking --

JUDGE GILMAN: How about the fact of the two prior overdoses just within 48 hours, though, of this overdose?

MR. FARRELL: I'm sorry, what was the question?

[Page 22]

JUDGE GILMAN: I mean weren't there two prior overdoses in C unit?

MR. FARRELL: Yes, there was, it occurred on January 20th, 21st, and then -- so there's an OD on Friday the 20th, on Saturday the 21st, and then Mr. Zakora died Sunday morning at six a.m.

JUDGE GILMAN: So why after the first death -- or not death but overdose, or the second overdose, why weren't these officials including Chrisman immediately investigating what's going on in C unit?

MR. FARRELL: Well, we --

JUDGE GILMAN: Bring the dog in to sniff it out then or to do some invest- --

MR. FARRELL: I could discuss that but there's no record in the case. We haven't -- you know, I could --

JUDGE MOORE: But this is a dismissal on failure to state a claim so there wouldn't be any evidence. The question is is the allegation sufficient to allow the case to go forward.

MR. FARRELL: No, because the allegations are not plausible against any of the defendants, particularly against the six high ranking defendants, I think it's a different claim of deliberate indifference --

[Page 23]

JUDGE MOORE: Well, the allegations on Chrisman are that Chrisman was told about the drug smuggling ring prior to Zakora's death and Chrisman was told that individuals were supplying large amounts of drugs to Mr. Zakora, that Chrisman didn't do anything to investigate even when the two other inmates

had overdosed in the two days prior. I'm just reading from the complaint.

The complaint also says that while Zakora died from fentanyl overdose it was not determined whether Mr. Zakora intentionally took those drugs. So that's leaving that open to determine with proper discovery, which never occurred here.

MR. FARRELL: Well, there's -- if I understand the question is why aren't those allegations sufficient --

JUDGE MOORE: Right.

MR. FARRELL: -- to state a claim for the case to go forward?

JUDGE MOORE: Vis-a-vis Chrisman.

MR. FARRELL: Well, again, it's implausible that -- there's no allegation, I should say, that Chrisman drew the inference that there was a serious risk of an overdose death by Zakora, by Seth Zakora, simply because he has a connection to a drug smuggling

[Page 24]

ring inside the prison.

JUDGE MOORE: How would a person such as Zakora's estate be able to get that kind of information about whether Chrisman drew the inference without having discovery?

MR. FARRELL: Well, that's an interesting point. Certainly they could take his deposition, but -- and even then, I mean --

JUDGE MOORE: How could they get it otherwise than through discovery?

MR. FARRELL: Well, I suppose they could -- I haven't thought of that, but how could they find if he drew an inference –

JUDGE MOORE: Right.

MR. FARRELL: -- that there was a risk of harm specifically to Zakora for an overdose?

JUDGE MOORE: Uh-huh.

MR. FARRELL: I don't know. I guess you'd have to look at --

JUDGE MOORE: Because you're putting it in a position, the estate in a position where they cannot possibly win by any complaint unless they have somehow information that fell into their laps about --

MR. FARRELL: Well, one of the problems is --

[Page 25]

JUDGE SUTTON: Unless you emphasize prong two of qualified immunity, which they have all the information they need, just read the law.

MR. FARRELL: Of course. But to answer your question, Judge Sutton -- or Judge Moore, you know, I mean, the magistrate judge addressed that in the RNR. You know, there's a mechanism under Rule 12(d) if you need -- you know, in response to a motion, if you need discovery, you don't have the information, you need discovery --

JUDGE GILMAN: That's if it's converted to summary judgment, but he did this on Rule 12(b)(6) as to all the MDOC people other than Mobley and Johnson, which are different people. But how big is unit C by the way, I mean are there 100 prisoners --

MR. FARRELL: Oh, no, this was just a room, they call it a cube, and I think there were six bunk beds, six or eight bunk beds, so there's either 12 or 14 or 16 men in this room in bunk beds.

JUDGE GILMAN: Okay. So you already have two that overdosed one day and two days before Zakora, that's getting -- so you'd be thinking something is going on in that little quad.

MR. FARRELL: I'm sure, and I would be speculating here because we don't have a record, but I

[Page 26]

think they did think that, and I think there was action taken.

JUDGE GILMAN: Yeah, after Zakora died.

MR. FARRELL: Well, it was over a weekend. You know, I don't know exactly -- you know, again, we haven't done discovery and I don't know exactly what steps anybody took on Friday night when the first -- when the first man overdosed, I think he was taken to the hospital. The second man overdosed the next day, he was not taken to the hospital, they gave him a shot of Narcan and he said in the facility. And then that night, really it was that night, Saturday night, that

Zakora passed away in his bunk and he was found on Sunday morning, you know, at seven a.m.

JUDGE SUTTON: Thank you.

MR. FARRELL: Thank you.

JUDGE SUTTON: Ms. Barranco? Good Morning.

MS. BARRANCO: Good morning, Your Honors, may it please the Court, Assistant Attorney General Kyla Barranco on behalf of the defendants/appellees for MSP, which would be Heather Lass, James Wolodkin, James Coleman, and Brandon Oaks. And I've reserved seven minutes for oral argument.

As to plaintiffs' single claim against the MSP defendants this Court should affirm the district

[Page 27]

court for two reasons. First, plaintiffs' complaint contains only conclusory allegations, which is insufficient to maintain a claim under Rule 12(b)(6), and, second, and alternatively, Your Honors, the district court properly concluded that the MSP defendants were entitled to qualified immunity because plaintiffs did not allege a constitutional violation occurred and because there's no clearly established law to demonstrate that a constitutional right exists.

As to the Rule 12(b)(6) motion, Your Honors, plaintiffs' complaint falls short of the pleading standards set forth in both Iqbal and Twombly. Those standards require both plausible and nonconclusory allegations, which plaintiffs failed to plead against

MSP defendants. For example, plaintiffs assert that the MSP defendants, and I quote, knew and/or participated in the drug smuggling and knew of the risks and harm associated with dangerous illegal drugs. So, while plaintiffs assert that this allegation is indeed a fact and it is actually a conclusion, all plaintiffs have done is set forth a standard for deliberate indifference, knowledge of a risk, and failure to take reasonable steps to abate it and nothing more, Your Honors, and that's consistent with the other sparse allegations against the MSP defendants.

[Page 28]

As to the qualified immunity issue, Your Honors, plaintiffs cite not a single case below that stands for the proposition that there's a clearly established right to have police officers protect inmates.

JUDGE SUTTON: In her defense she's saying, okay, fine, there are no cases, that's not helpful and clearly established, but then she's relying on the Hope versus Pelzer line of cases that says you don't need an exact case if it's sufficiently obvious. Isn't it obvious that you should keep drugs out of prisons; isn't it obvious there are risks if you don't keep drugs out of prisons. I think that's her prong two argument.

MS. BARRANCO: Well, it's interesting, Your Honor, all of those cases cited by plaintiff and below they relied exclusively on Farmer versus Brennan. It was all prison officials that had a duty to protect the prisoners. And in this case -- I believe there are a few cases in which perhaps sheriff's officers when they run the prison who have a duty to protect prisoners, those are really the only cases that involve police officers

having an affirmative duty to protect. There's been no cases cited that police officers, who have no duty to run the prison, have that obligation.

JUDGE SUTTON: Are police officers -- I feel

[Page 29]

like I've seen police officers involved in detox cases where people die after being arrested and they are being processed and they are detoxing and, you know, they run into problems. I guess I feel like I've seen officers in that setting.

MS. BARRANCO: Your Honor, I'm not aware of any, but in those cases it seems akin to the suicide cases as relates to failure to protect or deliberate indifference as to a medical condition. And in those cases what is required is not just a general awareness that there's a drug problem in prison but a subjective awareness that that prisoner has a drug problem or is of a suicide risk and that they are aware of that problem and they fail to abate it. And here we don't have those facts.

JUDGE MOORE: So I'm trying to figure out what the facts are that are alleged in the complaint, and what I'm seeing is paragraph 41, which lists the MSP officers and says that the troopers knew that an officer was the person bringing Suboxone and heroin into the facility but didn't investigate the allegation in determining the source of drugs that caused Mr. Zakora's death. Is that the essence of the claim against your clients?

MS. BARRANCO: Correct, Your Honor. And as

[Page 30]

to paragraph 41, by plaintiffs' own admission, that was told to one of the officers after Mr. Zakora's death, not before.

JUDGE SUTTON: Is that the sole theory by which the drugs got into the prison through help of an officer?

MS. BARRANCO: Yes, Your Honor, I believe the sole theory is that an officer helped by throwing basketballs filled with fentanyl and heroin over the fence.

JUDGE GILMAN: So you're saying that because your clients, the MSP officers, didn't know about this till after Mr. Zakora's death they couldn't be liable?

MS. BARRANCO: Correct, Your Honor. And they were aware on January 20th that there was as overdose in the prison. So on January 20th there was a critical incident report filed with MSP and there was an investigation open into that fact, but they were not aware --

JUDGE SUTTON: Well, why not -- why isn't the possibility that one of the officers is the basketball thrower?

MS. BARRANCO: Well, Your Honor, plaintiff has actually in their briefing indicated that's an MDOC officer.

[Page 31]

JUDGE MOORE: That was the Jane Roe person?

MS. BARRANCO: Correct.

JUDGE GILMAN: Now there's a subsequent amendment that was denied as futile or something that named who that Jane Doe was?

MS. BARRANCO: That is correct, Your Honor. However, even in plaintiffs' brief in support -- or, I'm sorry, brief in opposition to defendants' motion for summary disposition below they cited to -- or actually they included exhibits which showed that in the MSP report that they were only told after the fact that a cop, officer, was the one bringing these drugs into the prison.

JUDGE GILMAN: Well, did the -- the MSP defendants, did they file affidavits or --

MS. BARRANCO: They did below.

JUDGE GILMAN: Okay, so was it summary judgment really more than 12(b)(6) as far as your clients are concerned?

MS. BARRANCO: We argued alternatively for a qualified immunity summary judgment and the district court, it adopted, of course, the report and recommendation. The report and recommendation said that the Defendant MSP's motion to dismiss/motion for summary judgment was granted.

[Page 32]

JUDGE MOORE: But did the magistrate judge look at any evidentiary material or did the magistrate judge decide this simply on the basis of the complaint?

MS. BARRANCO: There were two separate analyses, one under 12(b)(6) where they did not look at any evidentiary material and one under Rule 56 where they did, in fact, look at the evidentiary material.

JUDGE MOORE: Vis-à-vis your clients?

MS. BARRANCO: Vis-a-vis my clients as well as what plaintiffs submitted in response to our motion for summary judgment, which was a significant critical incident report from the Michigan State Police outlining what they found out during their investigation.

JUDGE GILMAN: It sounds like they did find out during their subsequent investigation that there was an officer involved, right?

MS. BARRANCO: In fact, what they found out was that a prisoner had supplied the drugs to Mr. Zakora and he was subsequently arrested.

JUDGE GILMAN: Right, but that one who was supplied -- was getting the drugs from some officer presumably sending it in over with basketballs.

MS. BARRANCO: I believe that's unclear, but to the extent any officer was bringing the drugs into the prison it was an MDOC officer, not an MSP official.

[Page 33]

JUDGE GILMAN: Oh.

MS. BARRANCO: I'm happy to answer any questions Your Honors have, but otherwise I would thank you and ask you to affirm.

JUDGE SUTTON: Great, thank you. All right, Ms. Sinkovich, you've got your rebuttal.

MS. SINKOVICH: I want to respond to a couple points made by my opposing counsel. First of all, for drawing the inference under this second prong of the deliberate indifference analysis, in Farmer verse Brennan the Court did explain that whether a prison official has knowledge of a substantial risk can be drawn from circumstantial evidence and a factfinder may conclude that a prison official knew of substantial risk from the very fact that the risk was obvious. And so that would be our response to how Chrisman did have subjective knowledge of the risk of harm to Seth. Whether or not he drew that inference, that's a difficult question really, however, it's obvious here that the risk was -- that there was lots of evidence of the risk and the circumstantial evidence allows a factfinder to conclude that the defendant did know because the risk was obvious.

And then as to the voluntariness that has been raised a few times, I just wanted to read the quote

[Page 34]

from Rhodes which is, a prison official's deliberate indifference to a substantial risk of harm violates the Eighth Amendment, as simple as that. The case law does not call for an inquiry into voluntariness or compulsion.

And then I also wanted to point the Court to a Seventh Circuit case that I cited in the brief that states that prison officials have an obligation to intervene when they know a prisoner suffers from self-

destructive tendencies, and that would be in this case taking illegal drugs.

JUDGE SUTTON: So just on that one, does the complaint refer to special needs, special medical needs, your complaint?

MS. SINKOVICH: No.

JUDGE SUTTON: That sounds like a special medical needs situation.

MS. SINKOVICH: Self destructive tendencies –

JUDGE SUTTON: Right, so suicide.

MS. SINKOVICH: Well, here Chrisman knew that the large -- drugs were being given to Seth, so I would compare that potentially to that case where there's a risk of harm to him.

JUDGE SUTTON: Or that he's a dealer.

[Page 35]

MS. SINKOVICH: There's no -- that's not been alleged at all and there's been no discovery so there's really no way that we knew that. I don't think that there's any evidence or allegations that he was giving the drugs to anybody else. However, that there were drugs being smuggled in by officers was so obvious to people in prison that actually a previous lawyer in this case, I did explain in the briefing, received a call during dispositive motions from a prison official, a prison guard, who said here are the names of the three people who were involved in smuggling the drugs that killed Seth, and those three people are named as Tammy

Blair, Chase -- I can't remember the two other names right now, but Jane Doe was named. A prison official did call and tell us like I have to give this information, this is what I know, and did inform counsel of the names of those Jane Does -- the Jane Doe and the two people she was working with, which allowed plaintiff to file that motion for leave to amend the complaint to include those names.

And I also wanted to note that the informant, the prisoner, who came forward to Inspector Chrisman, in the documentation it states that he was a documented informant. So he wasn't just like a random person who was giving information to try to confuse

[Page 36]

people or to get maybe get himself out of trouble, he was a documented informant in the MDOC who'd discussed drugs with inspectors in the prisons before. And the critical incident report that we attached to our response to their motions was something that we received through FOIA, that's the only information that we were able to receive was the critical incident report done by the MDOC and MSP individuals in this case.

And I also wanted to -- my time is up, I apologize Your Honors. Thank you.

JUDGE SUTTON: Okay, thanks to both of -- all three of you for your arguments and briefs, we appreciate it. The case will be submitted.

(End of recording.)

[Page 37]

STATE OF MICHIGAN)
) SS
COUNTY OF INGHAM)

I, Melinda Nardone, Certified Shorthand Reporter and Notary Public in and for the County of Ingham, State of Michigan, do hereby certify that the foregoing recording was transcribed with computer-aided transcription, produced under my direction and supervision, and that the foregoing is a correct transcript of the recording to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of November, 2022.

Melinda S. Nardone, CSR-1311,
Certified Shorthand Reporter and Notary Public, County of Ingham, State of Michigan.
My Commission Expires: 10-24-24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

The Estate of SETH MICHAEL ZAKORA, and BRANDY ZAKORA, in her capacity as the Personal Representative of the Estate of Seth Michael Zakora,

Plaintiffs,

Case No.: 19-cv-01016
v. Hon. Janet T. Neff

TROY CHRISMAN; MATTHEW HUNTLEY; CHADWICK MOBLEY; STEVE JOHNSON; BONITA HOFFNER; STEVE RIVARD; HEIDI WASHINGTON; BRANDON OAKS; RUSSELL RURKA; HEATHER LASS; JAMES WOLODKIN; JAMES COLEMAN; JANE DOE,

Defendants.
_____/

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FIRST AMENDED COMPLAINT AND JURY DEMAND

NOW COMES Plaintiffs, by and through their attorneys, EXCOLO LAW, PLLC, complaining of Defendants, and respectfully alleges as follows:

JURISDICTION AND VENUE

1. This is a civil rights action in which the Plaintiffs seeks relief for the violation of rights secured by 42 U.S.C. § 1983, the Eighth and Fourteenth Amendments, and Michigan state law.

2. Jurisdiction of this Court is found upon 28 U.S.C. § 1331.

3. The events that give rise to this lawsuit took place in the Lakeland Correctional Facility of the Michigan Department of Corrections.

4. Venue is appropriate in the Western District of Michigan pursuant to 28 U.S.C § 1391(b) since the acts providing the legal basis for this complaint occurred in the City of Coldwater, County of Branch, State of Michigan.

PARTIES

5. Plaintiff the Estate of Seth Michael Zakora is the estate of Seth Michael Zakora ("Mr. Zakora"), a deceased person who was formerly in the custody of the Michigan Department of Corrections ("MDOC").

6. Plaintiff Brandy Zakora ("Ms. Zakora") is Mr. Zakora's mother, and is the personal representative of the Estate of Seth Michael Zakora. Ms. Zakora is a resident of the City of Charlotte, Eaton County, Michigan.

7. Defendant Troy Chrisman ("Chrisman") was, at all times relevant to this complaint, employed by MDOC as an Inspector at the Lakeland Correctional Facility. Defendant Chrisman is being sued in his individual and supervisory capacity.

8. Defendant Matthew Huntley ("Huntley") was, at all times relevant to this complaint, employed by MDOC as an Inspector at the Lakeland Correctional Facility. Defendant Huntley is being sued in his individual and supervisory capacity.

9. Defendant Chadwick Mobley ("Mobely") was, at all times relevant to this complaint, employed by MDOC as an Officer at the Lakeland Correctional Facility. Defendant Mobely is being sued in his individual capacity.

10. Defendant Steve Johnson ("Johnson") was, at all times relevant to this complaint, employed by MDOC as an Officer at the Lakeland Correctional Facility. Defendant Johnson is being sued in his individual capacity.

11. Defendant Bonita Hoffner ("Hoffner") was, at all times relevant to this complaint, employed by MDOC as the Warden at the Lakeland Correctional Facility. Defendant Hoffner is being sued in her individual and supervisory capacity.

12. Defendant Steve Rivard ("Rivard") was, at all times relevant to this complaint, employed by MDOC as the Assistant Deputy Director. Defendant Rivard is being sued in his individual and supervisory capacity.

13. Defendant Heidi Washington ("Washington") was, at all times relevant to this complaint, employed by MDOC as the Director. Defendant Washington is being sued in her individual and supervisory capacity.

14. Defendant Brandon Oaks ("Oaks") was, at all times relevant to this complaint, employed by the Michigan State Police, "MSP", as a Trooper. Defendant Oaks is being sued in his individual capacity.

15. Defendant Russell Rurka ("Rurka") was, at all times relevant to this complaint, employed by MDOC as the Administrative Assistant to the Warden at Lakeland Correctional Facility. Defendant Rurka is being sued in his individual capacity.

16. Defendant Heather Lass ("Lass") was, at all times relevant to this complaint, employed by MSP as a Detective/Sergeant. Defendant Lass is being sued in her individual and supervisory capacity.

17. Defendant James Wolodkin ("Wolodkin") was, at all times relevant to this complaint, employed by MSP as a Trooper. Defendant Wolodkin is being sued in his individual capacity.

18. Defendant James Coleman ("Coleman") was, at all times relevant to this complaint, employed by MSP as a Lieutenant. Defendant Coleman is being sued in his individual and supervisory capacity.

19. Defendant Jane Doe ("Jane Doe"), was, at all times relevant to this complaint, employed by the MDOC as a corrections officer at the Lakeland Correctional Facility. Defendant Jane Doe is being sued in her individual capacity. Defendant Jane Doe is the

female corrections officer who was dating an inmate and participating in smuggling drugs into Lakeland Correctional Facility. Plaintiffs do not know the true identity of defendant but believe the information will be acquired through the course of discovery.

20. When discussed together, Defendants Oaks, Lass, Wolodkin, and James will be referred to as the "Defendant Troopers."

STATEMENT OF FACTS

21. At all times relevant, Mr. Zakora was in the custody of the MDOC and resided at Lakeland Correctional Facility in Coldwater, Michigan.

22. On January 22, 2017, Mr. Zakora passed away from an overdose of drugs.

23. It was determined Mr. Zakora died from a fentanyl overdose, but it was not determined whether Mr. Zakora intentionally took these drugs.

24. Upon information and belief, the night / early morning when Mr. Zakora died, a prisoner had told Defendant Mobely and/or Defendant Johnson to check on Mr. Zakora because he was not doing well or because there appeared to be something wrong with him. Upon information and belief, Defendant Mobely and/or Defendant Johnson never checked on Mr. Zakora and foreclosed any possible lifesaving medical treatment.

25. When he was found in his bunk the next morning, he was completely covered, head-to-toe, by his bed sheets and was in advanced rigor mortis.

26. Mr. Zakora had signs of postmortem lividity on the right side of his body on which he was found.

27. Upon information and belief, at the time of Mr. Zakora's death, drugs were in abundance and being smuggled into Lakeland Correctional Facility. Upon information and belief, Defendant Jane Doe, a female corrections officer, and a prisoner with whom she was romantically involved orchestrated the drug smuggling and selling.

28. On January 20, 2017 and January 21, 2017, two other inmates had overdosed on drugs before Mr. Zakora's death on January 22, 2017. Upon information and belief, these three inmates all resided in the same C-Unit at Lakeland Correctional Facility. A few days prior, another individual incarcerated at Lakeland Correctional passed away.

29. Upon information and belief, another prisoner had informed Lakeland Correctional Inspectors, specifically Defendant Chrisman and the Inspector's Office, of the drug smuggling ring on more than one occasion prior to Mr. Zakora's death and provided information to the officers with details of how the drugs were coming in and who was providing them.

30. Upon information and belief, this prisoner explained his involvement in other facilities and gave step by step details of how and when drugs were entering the facility and specifically gave Defendant Chrisman information about the individuals supplying large amounts of drugs to Mr. Zakora.

31. Upon information and belief, Defendants Chrisman told Defendant Huntley, another Inspector,

but neither did anything to investigate or stop the drugs flowing into the facility, even when two other inmates had overdosed in the two days prior. Upon information and belief, Defendants also told their supervisors, Defendants Hoffner and Rivard, and they either ignored and/or instructed them to ignore the information and/or not investigate the accusations.

32. Upon information and belief, Defendant Hoffner's administrative assistant, Defendant Rurka, knew about the drug smuggling and specifically knew that drugs were being smuggled into the facility via basketballs filled with drugs being thrown over the facility's fence.

33. Prior to his death, Mr. Zakora was moved to C-Unit. He also spent some time in segregation. While in segregation Mr. Zakora feared for his life and told his grandmother what was happening in the prison, how drugs were coming in from the outside, and how he was afraid he would not make it out alive.

34. Upon information and belief, when Mr. Zakora was escorted from segregation to his unit, the two corrections officers taking him said that he had gotten himself into this mess, i.e. into the drug problem at Lakeland, and now it was his problem to deal with.

35. Upon information and belief, prior to his death, Mr. Zakora was scared for his life and had requested protection from MDOC but his request was denied.

36. Upon information and belief, after the death of Mr. Zakora, the prisoner who relayed the information to the inspectors was charged and convicted of

smuggling the drugs into Lakeland Correctional Facility to avoid an internal investigation of the accusations against the corrections officer involved.

37. Upon information and belief, there was no investigation into Defendant Jane Doe, the female corrections officer who was accused of working with an inmate to bring and sell drugs in Lakeland Correctional Faculty.

38. Upon information and belief, Defendants Hoffner, Washington, Rivard, Rurka, Chrisman, and Huntley knew of the previous overdoses but did not order a full investigation until after Mr. Zakora died. After his death, MSP brought a drug dog into the facility. According to the reports, the dog made positive indications for contraband in C-Unit.

39. At 10:30 AM on January 22, 2017, Defendant Huntley called Judy Zakora, Mr. Zakora's grandmother, and stated that her grandson was involved in an "incident" that was under investigation with the MSP and that he was deceased.

40. Defendant Rurka and Defendant Lass told Ms. Brandy Zakora that prior to her sons' death there had been basketballs of drugs thrown over the fence frequently but they couldn't catch the perpetrator.

41. Upon information and belief, out of the four MSP Troopers who investigated Mr. Zakora's death, only one of the four officers are still employed by the State of Michigan. Upon information and belief, the three officers who no longer work for the Michigan State Police, Defendant Brandon Oaks, Defendant Heather Lass, Defendant James Wolodkin, and

Defendant James Coleman, were involved with the drug smuggling ring and/or a cover up of Mr. Zakora's death. Upon information and belief, Defendant Troopers knew that a "cop/officer" was the person bringing suboxone and heroin into the facility but did not investigate the allegation in determining the source of the drugs that caused Mr. Zakora's death.

Drug Smuggling in the MDOC

42. According to public information, in the months prior to Mr. Zakora's death, the MDOC, specifically Heidi Washington, had notice that corrections officers were smuggling drugs into prisons, maintaining a dangerous drug ring, and retaliating against those who came forward, officers and inmates alike.

43. One corrections officer reported another officer for smuggling drugs into an MDOC facility, the Gus Harrison Correctional Facility. His lawsuit states that MDOC directed the facility inspectors to investigate the claims. After no investigation occurred, the officer reported the smuggling to the MSP. Mere days after reporting to the MSP, the drug smuggling evidence disappeared from the evidence locker at the facility.

44. Upon information and belief, only MSP has access to remove the evidence locker.

45. The lawsuit continues that the officer proceeded to report the disappearance of evidence and lack of investigation to MDOC Internal Affairs. On this same day, the prisoner who confessed to the officer about the drug smuggling, was beaten to death while in MDOC custody at a different facility. Two weeks later, on October 14, 2016, another prisoner

who was named by the confessing prisoner as involved in the ring, was killed in MDOC custody.

46. The officer was fired from his position and rehired after he brought the litigation detailed in part above. Upon information and belief, MDOC paid $175,000 to this officer in a settlement.

47. At around the same time period, another MDOC employee who was a Resident Unit Manager ("RUM") at the time, a supervisor at a different facility, came forward with allegations of an officer smuggling drugs into the G. Robert Cotton Correctional Facility. On October 23, 2016, after nothing was done about his allegations and he began to experience retaliation from staff, he emailed Defendant Heidi Washington, director of MDOC, and other top officials voicing his concerns. He detailed the risks to him, his family, and the prisoners who trusted him with this information.

48. According to the Detroit Free Press, the officer smuggling in the drugs was not placed on suspension for over 15 months after the officer alerted Defendant Washington in October 2016. During this same time, the RUM who came forward was fired by MDOC. He succeeded in a civil service hearing and was rehired to G. Robert Cotton Correctional Facility with full back-pay.

49. Upon information and belief, drug smuggling is a significant problem inside the Michigan state prison system and in less than two years anti overdose drugs have been used approximately 150 times.

50. Upon information and belief, Defendants Washington, Hoffner, Rurka, Chrisman, Huntley, and Rivard knew of and permitted the drug smuggling operation and inherent dangers yet did nothing in response and permitted the MDOC facilities to operate in a such a manner as to tolerate its officers, state employees, to work with other prisoners to smuggle drugs and contraband into the facilities, creating an even more dangerous environment that led to the overdoses of the three individuals in CUnit, the death of Mr. Seth Michael Zakora, and the deaths of the inmates who provided information about the drug smuggling operations of MDOC officers. Accordingly, Defendants either permitted illegal drugs to be smuggled into the facilities, or failed to train and supervise MDOC employees when alerted of a widespread issue.

51. Defendants' actions were done intentionally, maliciously, knowingly, wantonly, recklessly, sadistically, with gross negligence, through deliberate indifference, and without any objective reasonableness.

52. Plaintiff suffered harm as a direct result of Defendants actions and inactions.

COUNT I
VIOLATION OF CIVIL RIGHTS UNDER 42 USC § 1983 Eighth Amendment – Failure to Protect

(Defendants Chrisman, Huntley, Hoffner, Rurka, Rivard, Washington, Oaks, Lass, Wolodkin, and Coleman)

53. Plaintiffs incorporate herein all prior allegations.

54. At all times relevant, Mr. Zakora was incarcerated with the MDOC and because he was in their custody, the facility assumed a duty to protect Mr. Zakora from known serious risks to his health and safety.

55. Defendants knew Plaintiff was vulnerable to overdose and/or injury do to his involvement with drugs at Lakeland Facility and/or the pervasive drug smuggling problem at Lakeland Facility and/or the MDOC.

56. Defendants knew that two inmates in the same unit had overdosed from the drugs and knew Mr. Zakora had involvement with those drugs.

57. Defendant Troopers knew and or participated in the drug smuggling and knew of the risks and harm associated with dangerous illegal drugs.

58. Defendants ignored their knowledge and did not do anything to curb the introduction, spread, and usage of dangerous drugs in prison, despite their direct knowledge from prisoners snitching to them and from two previous overdoses.

59. In fact, Defendants waited until after Mr. Zakora died to bring drug dogs into Lakeland, despite their explicit knowledge of drugs prior to Mr. Zakora's death and the overdose of the other two prisoners in C-Unit.

60. Defendants' refusal to act constitutes deliberate indifference to Mr. Zakora's vulnerable state.

61. Defendants' actions and inactions constitutional a violation of Plaintiffs rights under 42 U.S.C. § 1983 and under the Eighth Amendment to the United States Constitution to be free from cruel and unusual punishment, which resulted in his death.

COUNT II
VIOLATION OF CIVIL RIGHTS UNDER 42 USC § 1983 Fourteenth Amendment - State Created Danger

(Defendants Jane Doe, Washington, Rivard, Hoffner, Rurka, Chrisman, Huntley, Oaks, Lass, Wolodkin, and Coleman)

62. Plaintiffs incorporate herein all prior allegations.

63. The Due Process Clause to the Fourteenth Amendment prohibits state officials from engaging in conduct that renders an individual more vulnerable to harm.

64. MDOC and/or MSP employees orchestrated and participated in a dangerous drug ring in MDOC prisons and at Lakeland Correctional Facility. Defendants facilitated this drug ring by knowingly permitting it to happen within the facilities and/or participating in the drug ring.

65. Defendant Washington and Rivard, through their high-level positions and emails from other corrections officers describing the drug smuggling from officers and the retaliation against staff and prisoners, knew there was a drug smuggling problem in the MDOC where state employees were bringing in drugs

to MDOC facilities and selling them to prisoners, and knew drugs were a severe problem in MDOC facilities and anti over dose drugs had been used often.

66. Defendants permitted MDOC corrections officers to bring drugs into MDOC facilities and thereby facilitated illegal drug use and sales in MDOC prisons.

67. Defendants knew prisoners known to be involved in snitching on the officers for smuggling drugs into MDOC prisons were killed in MDOC facilities.

68. Defendants Chrisman and Huntley knew there was a drug smuggling problem at Lakeland Correctional and had been informed of those involved. Defendants Chrisman, Huntley, and Hoffner knew there were two overdoses in Mr. Zakora's unit within 48 hours before his death.

69. Defendants permitted illegal drugs to be sold and used in Lakeland Facility and thereby facilitated dangerous drug use and sales.

70. Defendants actions of permitting illegal drugs to be sold and used made Mr. Zakora more vulnerable to harm and constituted deliberate indifference to a serious risk of harm, as officers knew he was scared due to his involvement with drugs and they would not provide him any protection. Further, Defendants knew that two individuals in his unit had overdosed from dangerous drugs. Mr. Zakora was exposed to harm when he overdosed on the drugs Defendants permitted to be smuggled into the facility.

71. Defendants' actions and inactions constitutional a violation of Plaintiffs rights under 42 U.S.C. § 1983 and under the Fourteenth Amendment to the United States Constitution, which resulted in his death.

COUNT III
VIOLATION OF CIVIL RIGHTS UNDER 42 USC § 1983 Failure to Train & Supervise

(Defendants Washington, Rivard, Hoffner)

72. Plaintiffs incorporate herein all prior allegations.

73. Supervisory state officials are prohibited from enacting or maintaining unconstitutional policies, practices or customs with deliberate indifference to the consequences.

74. A supervisor is liable if they at least implicitly authorized, approved of or knowingly acquiesced in the unconstitutional conduct of a subordinate.

75. Defendants Washington and Rivard maintained a policy that permitted corrections officers to smuggle drugs into prisoners and sell the dangerous drugs to incarcerated individuals.

76. Defendants knew that drugs in prisons had lead to overdoses, retaliation and/or deaths of incarcerated individuals.

77. In the alternative, Defendants did not have a policy that permitted officers to sell drugs in prison, but had a policy that failed to properly train and

supervise their subordinates despite their knowledge of unlawful conduct.

78. Defendants Hoffner, Chrisman, and Huntley knew unlawful drugs were being smuggled into the facility and had a policy that permitted this conduct.

79. Defendants knew drugs were an issue at Lakeland Correctional and knew who was bringing them in.

80. In the alternative, Defendants did not have a policy that permitted drugs to be smuggled and sold in Lakeland Correctional, but had a policy that failed to train and supervise Defendant Jane Doe, the female corrections officer bringing the drugs into the facility and failed to train and supervise Defendants Chrisman and Huntley who knew about the drugs but did nothing to address the problem.

81. Defendants' actions and inactions constitutional a violation of Plaintiffs rights under 42 U.S.C. § 1983 and under the Fourteenth Amendment to the United States Constitution, which resulted in his death.

COUNT IV
VIOLATION OF CIVIL RIGHTS UNDER 42 USC § 1983 Eighth Amendment - Deliberate Indifference

(Defendants Mobely and Johnson)

82. Plaintiffs incorporate herein all prior allegations.

83. The Eighth Amendment to the United States Constitution prohibits state official from exhibiting deliberate indifference to a serious medical need of prisoners.

84. Defendant Mobely knew during his shift that Mr. Zakora was not doing well, there appeared to be something wrong with him, and he should be checked on.

85. Defendant Mobely did not check on Mr. Zakora.

86. Defendant Johnson, who worked his shift after Defendant Mobely, also knew something was wrong with Mr. Zakora but did not check on him until several hours in and he was already deceased.

87. Had Defendants checked on Mr. Zakora earlier when they first learned of his condition, Mr. Zakora could have received lifesaving medical treatment.

88. Defendants actions and inactions exhibited deliberate indifference to Mr. Zakora's serious medical condition, in violation of his right under 42 U.S.C. § 1983 and the Eighth Amendment to the United States Constitution to be free from cruel and unusual punishment, which resulted in his death.

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

a. Full and fair compensatory damages in an amount to be determined by a jury;

b. Punitive damages in an amount to be determined by a jury;

c. Reasonable attorney's fees and costs of this action;

d. Award the Estate of Seth Michael Zakora, pursuant to Mich. Comp. Laws § 600.2922, fair and equitable damages, including, but not limited to, reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for Mr. Zakora's pain and suffering, while conscious, during the intervening period between the time of his injuries and his death; and damages for the loss of Mr. Zakora's financial support, society, and companionship; as well as any other damages cognizable under law; and

e. Any such other relief as appears just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury of all triable issues, per Fed. R. Civ. P. 38(b).

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Respectfully Submitted,

EXCOLO LAW, PLLC

Dated: December 4, 2019

By: */s/Solomon M. Radner*
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