Appendix-A
(Ex-A)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1761

SHARIFF BUTLER; JEREMEY MELVIN,
Appellants

v.

JOHN E. WETZEL, Secretary of the Department of Corrections; SHIRLEY MOORE SMEAL, Executive Deputy of the Department of Corrections; MELISSA ROBERTS, Former DOC Policy Coordinator; DIANE KASHMERE, Current DOC Policy Coordinator; TABB BICKELL, Executive Deputy Secretary for Institutional Operations; MICHAEL WENEROWICZ, Regional Deputy Secretary; DORINA VARNER, Chief Grievance Coordinator; KERI MOORE, Assistant Chief Grievance Coordinator; KEVIN KAUFFMAN, Superintendent at SCI-Huntingdon; LONNIE OLIVER, Former Deputy Superintendent for Facilities Management at SCI-Huntingdon; JOHN THOMAS, Former Deputy Superintendent for Centralized Services at SCI-Huntingdon; BYRON BRUMBAUGH, Current Deputy Superintendent for Facilities Management at SCI-Huntingdon; WILLIAM S. WALTERS; BRIAN HARRIS, Captain/Shift Commander at SCI-Huntingdon; MANDY SIPPLE, Former Major of Unit Management at SCI-Huntington; ANTHONY E. EBERLING, Security Lt. at SCI-Huntingdon; BRUCE EWELL, Facility Maintenance Manger III at SCI-Huntington; CONSTANCE GREEN, Superintendent's Assistant/Grievance Coordinator at SCI-Huntingdon; ROBERT BILGER, Safety Manger at SCI-Huntingdon; PAULA PRICE, Health Care Coordinator at SCI-Huntington; MICHELLE HARKER, Nurse Supervisor at SCI-Huntingdon; ANDREA WAKEFIELD, Records Supervisor at SCI-Huntingdon; GEORGE RALSTON, Unit Manager at SCI-Huntingdon; ALLEN STRATTON, Unit Counselor at SCI-Huntingdon; JOHN BARR, Correctional Officer at SCI-Huntingdon; J. REED, Correctional Officer at SCI-Huntingdon; T. EMIGH, Correctional Officer at SCI-Huntingdon

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 4:19-cv-02171)
District Judge: Honorable Matthew W. Brann

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 6, 2024
Before: BIBAS, PORTER, and MONTGOMERY-REEVES, Circuit Judges

(Opinion filed: March 8, 2024)

OPINION*

PER CURIAM

Appellants Shariff Butler and Jeremey Melvin, proceeding pro se, appeal from multiple District Court orders. For the following reasons, we will affirm.

I.

Butler and Melvin, inmates at SCI-Huntingdon, sued 27 defendants, including Department of Corrections administrators and prison employees, pursuant to 42 U.S.C. § 1983. Dkt. No. 1. They alleged violations of the First and Eighth Amendments and state law, stating that officials denied them single cells and recreation time, failed to mitigate fire safety risks and ventilation issues, subjected them to overcrowding, understaffing, and vermin infestations, and retaliated against Butler after he filed a grievance. Id. at 7-26. They sought declaratory, compensatory, and injunctive relief. Id. at 43-45.

The District Court sua sponte dismissed 14 defendants without prejudice and Butler's single-cell denial claim with prejudice. Dkt. No. 18. Appellants sought to

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

amend their complaint, Dkt. No. 42, but the District Court deemed their motion to amend withdrawn and struck their proposed amended complaint because they failed to follow local rules, Dkt. No. 64. The District Court denied Appellants' motion for an extension of time to comply with those rules and their motions for sanctions and to compel discovery. Dkt. Nos. 77, 86, 88, 89, 102, 108, 113.

Defendants moved for summary judgment, which the District Court granted as to all but Butler's retaliatory cell search claim. Dkt. No. 135. After Butler submitted evidence to support the claim, the District Court granted summary judgment to the defendants. Dkt. Nos. 141 & 160. Appellants filed a Rule 59(e) motion and a timely notice of appeal. Dkt. Nos. 166 & 168. The District Court denied that motion, and Appellants filed an amended notice of appeal. Dkt. Nos. 175 & 182.

II.

We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 265 (3d Cir. 2014). 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). A genuine dispute of material fact exists if the evidence is sufficient for a reasonable factfinder to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). We review for abuse of discretion the District Court's discovery rulings, its application of its local rules, and its denials of Rule 59(e) motions, motions for extensions of time, and motions for sanctions. In re Processed Egg Prods. Antitrust Litig., 962 F.3d 719, 729 n.7

(3d Cir. 2020) (Rule 59(e)); Weitzner v. Sanofi Pasteur Inc., 909 F.3d 604, 613 (3d Cir. 2018) (local rules); Drippe v. Tobelinski, 604 F.3d 778, 783 (3d Cir. 2010) (extensions of time); DiPaolo v. Moran, 407 F.3d 140, 144 (3d Cir. 2005) (sanctions); Gallas v. Supreme Ct. of Pa., 211 F.3d 760, 778 (3d Cir. 2000) (discovery).

III.

Appellants argue that the District Court erred in ruling that their Eighth Amendment claims regarding recreation time, ventilation, and vermin were time-barred because the wrongs against them were continuing. C.A. Dkt. No. 23 at 25 & 48-51. We disagree. The continuing violation doctrine does not apply when the plaintiff is aware of the injury at the time it occurred. Montanez v. Sec'y Pa. Dep't of Corr., 773 F.3d 472, 481 (3d Cir. 2014). Appellants became aware of the alleged conditions more than ten years before they filed the complaint, Dkt. No. 96-1 at 54 & 62 (Melvin deposition); Dkt. No. 96-3 at 15 & 27 (Butler deposition), so the statute of limitations began to run at that time and had expired long before they filed their complaint.[1] Accordingly, the District Court correctly concluded that the claims were time-barred.[2]

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[1] Appellants neither argue nor does the record reflect that they are entitled to equitable tolling on the claims.

[2] Despite Appellants' arguments otherwise, C.A. Dkt. No. 23 at 70-73, Butler's Eighth Amendment claim regarding the denial of his request for a single cell was also correctly dismissed as time-barred. That request was denied on August 28, 2017, Dkt. No. 10 at 12, and Butler filed a grievance about it 23 days later, on September 20, 2017, Dkt. No. 1 at 18. The filing of the grievance tolled the two-year statute of limitations period until December 19, 2017, when it was denied. Wisniewski v. Fisher, 857 F.3d 152, 157-58 (3d Cir. 2017). Accordingly, Butler had 697 days remaining in the limitations period, or until November 18, 2019, to file a complaint. He did not do so until December 15, 2019, so the District Court properly concluded that the claim was untimely.

Appellants also argue that the District Court erred in concluding that Melvin did not have standing to bring an Eighth Amendment claim regarding his desire to be housed in a single cell. C.A. Dkt. No. 23 at 51-54. To establish Article III standing, a plaintiff must demonstrate, inter alia, an injury-in-fact, which must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (internal quotations and citation omitted). Here, Melvin failed to demonstrate an injury-in-fact: although he asserted that he had a "right not to be double-celled," it was undisputed that, at the time Appellants filed the complaint and throughout litigation, Melvin was housed in a single cell. Dkt. No. 1 at 36; Dkt. No. 96-1 at 10-13. To the extent Melvin characterizes his claim as premised on his desire for a *permanent* placement in a single cell, C.A. Dkt. No. 23 at 52-54, there is neither a constitutional right to temporary or permanent placement in a single cell nor has Melvin demonstrated that the conditions of his confinement violate the Eighth Amendment, as discussed below. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

Appellants also challenge the District Court's grant of summary judgment to defendants on their Eighth Amendment claims that the fire safety risks, overcrowding, and understaffing in the prison constitute cruel and unusual punishment. C.A. Dkt. No. 23 at 54-62. To state an Eighth Amendment claim, a plaintiff must first allege that he was incarcerated under conditions imposing a substantial risk of serious harm. See Porter v. Pa. Dep't of Corr., 974 F.3d 431, 441 (3d Cir. 2020). As the District Court explained, beyond conclusory allegations and anecdotes, Appellants offered no evidence to show

that SCI-Huntingdon's fire protocols, population, or staffing created a substantial risk of serious harm. Dkt. No. 134 at 15-22; cf. Tillery v. Owens, 907 F.2d 418, 423-24 (3d Cir. 1990) (where extensive expert testimony included that "the poor level of fire protection made it likely that numerous inmates would die if a serious fire broke out"). Appellants' assertions are insufficient to create a genuine issue of material fact as to whether defendants violated the Eighth Amendment, so judgment in favor of the defendants on those claims was proper. See Nitkin v. Main Line Health, 67 F.4th 565, 571 (3d Cir. 2023) (explaining that a plaintiff "must point to concrete evidence in the record that supports each . . . essential element of his case" to withstand a motion for summary judgment) (quotations omitted).

Appellants also argue that the District Court erred in granting summary judgment to defendants on their First Amendment retaliation claims. C.A. Dkt. No. 23 at 62-68. To prevail on that claim, Appellants must prove that "(1) they engaged in constitutionally protected conduct, (2) defendants engaged in retaliatory action sufficient to deter a person of ordinary firmness from exercising their constitutional rights, and (3) a causal link [existed] between the constitutionally protected conduct and the retaliatory action." Palardy v. Township of Millburn, 906 F.3d 76, 80-81 (3d Cir. 2018). First, as to Butler's allegations that two defendants searched his cell in retaliation for his filing a grievance, the District Court correctly concluded that Butler provided no evidence that the two defendants were aware of that grievance, so he failed to prove a causal link.[3] See Daniels

[3] The District Court also correctly granted summary judgment to defendant Kauffman on Butler's free-standing retaliation claim against him. Dkt. No. 159 at 9. Appellants

v. School Dist. of Philadelphia, 776 F.3d 181, 196 (3d Cir. 2015). Second, as to Butler's allegations that defendants retaliatorily forged a grievance withdrawal form, Butler failed to prove that this action deterred him from exercising his constitutional rights. As the District Court explained, regardless of the veracity of Butler's forging allegations, it is undisputed that the grievance was reinstated, and Butler pursued it to the final stage of administrative review. Dkt. No. 10-3 at 21-24; Dkt. No. 95 at 6; Dkt. No. 123 at 10-11. Accordingly, defendants were entitled to judgment as a matter of law on Appellants' First Amendment retaliation claims.[4]

Finally, Appellants argue that the District Court abused its discretion by striking their proposed amended complaint for failure to follow M.D. Pa., L.R. 7.5, and by denying their request for an extension of time to comply with that rule. C.A. Dkt. No. 23 at 73-75. Despite proceeding pro se, Appellants were required to follow the same rules

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alleged that Kauffman denied Butler's grievance about the search after "(allegedly) reviewing camera footage of the event." Dkt. No. 1 at 42. Beyond general assertions, Appellants provided no evidence that the denial was a retaliatory action. Cf. Brightwell v. Lehman, 637 F.3d 187, 194 (3d Cir. 2011) (charging prisoner with misconduct report that was later dismissed for filing a false grievance does not rise to the level of "adverse action" for purposes of retaliation claim). To the extent Appellants attempted to bring a conspiracy claim against Kauffman, Dkt. No. 169 at 7-9; C.A. Dkt. No. 23 at 66-67, because defendants were entitled to judgment as a matter of law on the underlying First Amendment retaliation claim, the conspiracy claim fails. See In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 789 (3d Cir. 1999).

[4] Appellants also contend that the District Court erred in granting summary judgment to defendants on their breach of contract claim. C.A. Dkt. No. 23 at 68-70. But, as the District Court explained, Appellants neither provided evidence that they were parties to any contract at issue nor argued that they were entitled to enforce that contract under another legal theory. Dkt. No. 134 at 27-28.

as other litigants, see Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 245-46 (3d Cir. 2013), including M.D. Pa., L.R. 7.5, which requires a movant to file a brief in support of a motion within 14 days of the motion's filing. Defendants identified M.D. Pa., L.R. 7.5 in their opposition to Appellants' motion to amend, Dkt. No. 47, but Appellants did not request an extension to comply with that rule until two months later, Dkt. No. 73. In the interim, Appellants filed 12 other documents, including motions, exhibits, and briefs. Despite Appellants' contentions that COVID-19 restrictions limited their access to SCI-Huntingdon's law library, id., the District Court concluded that Appellants failed to establish that they acted with due diligence in pursuing the extension, Dkt. No. 82 at 3. Under these circumstances, we discern no abuse of discretion in the District Court's rulings.[5]

[5] Even if the District Court abused its discretion in striking Appellants' proposed amended complaint, Appellants were not harmed by that ruling because the amened complaint failed to address the issues identified in the District Court's without prejudice dismissal. See Dkt. Nos. 18 & 42. Appellants also challenge the District Court's denials of their three motions for sanctions, C.A. Dkt. No. 23 at 29-37 & 43-46; see Dkt. Nos. 77, 89, 92, 102, 108, 113, but we discern no abuse of discretion in those denials, see Simmerman v. Corino, 27 F.3d 58, 62 (3d Cir. 1994) (explaining that a district court abuses its discretion if it "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence" (citation omitted)). Appellants also failed to demonstrate that the District Court abused its discretion in denying their motions to compel. C.A. Dkt. No. 23 at 40-43; see Dkt. Nos. 86, 88, 102. As the District Court explained, the information Appellants sought was irrelevant, and it was undisputed that the defendant from whom they sought specific documents did not have them in his possession. Dkt. No. 102 at 3-4. To the extent they argue otherwise, we also discern no abuse of discretion in the District Court's denial of Appellants' Rule 59(e) motion. See In re Processed Eggs Prods. Antitrust Litig., 962 F.3d at 729.

Accordingly, we will affirm the judgment of the District Court.[6]

[6] Appellant's motion to exceed the page limitation for their argument in support of the appeal is granted, and their motion to correct the record is denied as moot. C.A. Dkt. Nos. 21 & 33.

Appendix-B
(Ex-B.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHARIFF BUTLER and JEREMEY MELVIN, Plaintiffs, v. KEVIN KAUFFMAN, *et al.*, Defendants.	No. 4:19-CV-02171 (Chief Judge Brann)

MEMORANDUM OPINION

JULY 27, 2022

Pro se Plaintiffs Shariff Butler ("Butler") and Jeremey Melvin ("Melvin"), who are incarcerated in the State Correctional Institution-Huntingdon ("SCI-Huntingdon"), allege various civil rights violations by SCI-Huntingdon officials. Defendants have moved for summary judgment. For the reasons that follow, the motion for summary judgment will be granted in part and denied in part.

I. BACKGROUND

Plaintiffs initiated this case through the filing of a complaint under 42 U.S.C. § 1983 on December 15, 2019, which the Court received and docketed on December 20, 2019.[1] The complaint raises civil rights claims arising from (1) SCI-Huntingdon's purported refusal to grant Plaintiffs single-cell status, (2) SCI-

[1] Doc. 1.

Huntingdon's alleged failure to mitigate fire safety risks, (3) SCI-Huntingdon's alleged denial of recreation time and time in the prison yard, (4) SCI-Huntingdon's allegedly inadequate ventilation system, (5) alleged overcrowding and understaffing in SCI-Huntingdon, (6) an alleged infestation of vermin in SCI-Huntingdon, and (7) alleged retaliation against Plaintiff Butler.[2] The complaint raises claims for violation of the First and Eighth Amendments as well as state law claims for breach of contract and "breach of duty."[3]

I dismissed the complaint in part on September 2, 2020.[4] Specifically, I dismissed all claims against Defendants Wetzel, Moore Smeal, Roberts, Kashmere, Bickell, Wenerowicz, Varner, Moore, Oliver, Thomas, Brumbaugh, Eberling, Harker, and Barr for Plaintiffs' failure to allege their personal involvement and dismissed Plaintiffs' claims relating to Butler's single-cell status as untimely.[5] I otherwise allowed the complaint to proceed and ordered service of process as to the remaining Defendants. Plaintiffs appealed my partial dismissal order to the United States Court of Appeals for the Third Circuit.[6] The Third Circuit dismissed

2 *Id.*
3 *Id.*
4 Doc. 18.
5 *Id.*
6 Doc. 23.

the appeal for lack of appellate jurisdiction on February 23, 2021.[7] Defendants then answered the complaint on May 7, 2021.[8]

Plaintiffs filed an amended complaint without leave of court or Defendants' consent on August 2, 2021.[9] I struck the amended complaint from the record for Plaintiffs' failure to comply with Federal Rule of Civil Procedure 15 on September 20, 2021.[10] I have additionally resolved numerous discovery and sanctions motions since the close of pleading in this case.[11] The case is presently before me on Defendants' motion for summary judgment, which was filed on January 20, 2022, after the close of discovery.[12] Briefing on the motion for summary judgment is complete and it is ripe for the Court's disposition.[13]

II. STANDARD OF REVIEW

Summary judgment is appropriate where "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."[14] "Facts that could alter the outcome are 'material facts,' and disputes are 'genuine' if evidence exists from which a rational person could

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7 Doc. 31.

8 Doc. 38. Given that Wetzel, Moore Smeal, Roberts, Kashmere, Bickell, Wenerowicz, Varner, Moore, Oliver, Thomas, Brumbaugh, Eberling, Harker, and Barr have been dismissed from the case, I will refer to the remaining Defendants simply as "Defendants" throughout the remainder of this opinion.

9 Doc. 42.

10 Doc. 64.

11 *See* Docs. 53, 65, 82, 102, 113.

12 Doc. 94.

13 *See* Docs. 97, 124.

14 Fed. R. Civ. P. 56(a).

conclude that the position of the person with the burden of proof on the disputed issue is correct."[15] "A defendant meets this standard when there is an absence of evidence that rationally supports the plaintiff's case."[16] "A plaintiff, on the other hand, must point to admissible evidence that would be sufficient to show all elements of a prima facie case under applicable substantive law."[17]

"The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."[18] Thus, "if the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on a lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[19] "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."[20] "The judge's inquiry, therefore unavoidably asks . . . 'whether there is [evidence] upon which a jury can properly proceed to find a

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15 *Clark v. Modern Grp. Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993) (first citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); and then citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

16 *Clark*, 9 F.3d at 326.

17 *Id.*

18 *Anderson*, 477 U.S. at 252.

19 *Id.*

20 *Id.*

verdict for the party producing it, upon whom the onus of proof is imposed."[21] The evidentiary record at trial, by rule, will typically never surpass that which was compiled during the course of discovery.

"A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact."[22] "Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied."[23]

Where the movant properly supports his motion, the nonmoving party, to avoid summary judgment, must answer by setting forth "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[24] For movants and nonmovants alike, the assertion "that a fact cannot be or is genuinely disputed" must be supported by: (i) "citing to particular parts of materials in the record" that go beyond "mere

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21 *Id.* (quoting *Schuylkill & Dauphin Imp. Co. v. Munson*, 81 U.S. 442, 447 (1871)).
22 *Celotex*, 477 U.S. at 323 (internal quotations omitted).
23 *Id.*
24 *Anderson*, 477 U.S. at 250.

allegations"; (ii) "showing that the materials cited do not establish the absence or presence of a genuine dispute"; or (iii) "showing . . . that an adverse party cannot produce admissible evidence to support the fact."[25]

"When opposing summary judgment, the non-movant may not rest upon mere allegations, but rather must 'identify those facts of record which would contradict the facts identified by the movant."[26] Moreover, "if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion."[27] On a motion for summary judgment, "the court need consider only the cited materials, but it may consider other materials in the record."[28]

Finally, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[29] "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."[30] "If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted."[31]

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25 Fed. R. Civ. P. 56(c)(1).
26 *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3d Cir. 2003).
27 Fed. R. Civ. P. 56(e)(2).
28 Fed. R. Civ. P. 56(c)(3).
29 *Anderson*, 477 U.S. at 249.
30 *Id.*
31 *Id.* at 249-50 (internal citations omitted).

III. MATERIAL FACTS

Local Rule 56.1 requires a party moving for summary judgment to submit "a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried."[32] In this case, Defendants filed a statement of material facts as required by Local Rule 56.1, and Plaintiffs have appropriately responded to the statement as required by Local Rule 56.1. The below statement of material facts is taken from the parties' statements. Where Plaintiffs have accepted or not contradicted a factual assertion made by Defendants, I will cite to the parties' statements directly.

Plaintiffs Butler and Melvin are both incarcerated in SCI-Huntingdon.[33] Butler has been incarcerated in the prison since 2003 and Melvin has been incarcerated in the prison since 2007.[34] Melvin is currently housed in a single cell without a cellmate and has been in a single cell since before he filed this lawsuit.[35]

There have been five fire incidents in SCI-Huntingdon during Butler and Melvin's incarceration, which occurred on May 3, 2013, February 28, 2019, April 14, 2020, August 30, 2020, and January 9, 2021.[36] Butler was evacuated from his

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32 M.D. Pa. L.R. 56.1.

33 Doc. 95 ¶¶ 1-2; Doc. 123 ¶¶ 1-2.

34 Doc. 95 ¶¶ 3-4; Doc. 123 ¶¶ 3-4.

35 Doc. 95 ¶¶ 5-6; Doc. 123 ¶¶ 5-6; Doc. 96-1 at 10-13.

36 *See* Doc. 95 ¶¶ 8; Doc. 123 ¶ 8. Defendants' statement of material facts only mentions three fire incidents, but Plaintiffs note that fires additionally occurred on May 3, 2013 and April 14, 2020. *Id.* I will view the facts in the light most favorable to Plaintiffs and accept their contention that there have been five fire incidents during their incarceration.

cell on January 9, 2021, but no evacuations occurred with respect to the February 28, 2019 and August 30, 2021 fire incidents.[37] Butler suffered smoke inhalation during the January 9, 2021 fire, but otherwise did not suffer any injuries during any of the fires.[38] He did not seek medical attention for the smoke inhalation.[39]

Butler has been aware of the ventilation issues that give rise to his Eighth Amendment claim for approximately seventeen years, but he did not file any grievance regarding the ventilation system until December 7, 2017.[40] Melvin has been aware of the ventilation issues that give rise to his claim since 2007, but did not file a grievance about the ventilation issues until March 11, 2018.[41] Melvin has also been aware of the bird and insect problems in SCI-Huntingdon that give rise to his Eighth Amendment claim since 2007.[42]

Butler acknowledges that he is given recreation time in SCI-Huntingdon.[43] Butler's allegation that he is not given a sufficient amount of recreation time is based on a state of affairs that has existed since he began his incarceration at SCI-Huntingdon in 2003.[44] Butler did not file a grievance complaining about the lack

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37 Doc. 95 ¶¶ 9-10; Doc. 123 ¶¶ 9-10. As noted above, Defendants' statement of material facts does not mention the May 3, 2013 or April 14, 2020 fires, and accordingly does not address whether evacuations occurred during those fires.

38 *See* Doc. 95 ¶ 11; Doc. 123 ¶ 11; Doc. 96-3 at 13-14.

39 *See* Doc. 95 ¶ 12; Doc. 123 ¶ 12; Doc. 96-3 at 14.

40 *See* Doc. 95 ¶ 13; Doc. 123 ¶ 13; Doc. 96-3 at 15.

41 *See* Doc. 95 ¶ 14; Doc. 123 ¶ 14; Doc. 96-1 at 52-53.

42 *See* Doc. 95 ¶ 36; Doc. 123 ¶ 36; Doc. 96-1 at 61-62.

43 Doc. 95 ¶ 19; Doc. 123 ¶ 19.

44 Doc. 95 ¶ 24; Doc. 123 ¶ 24; Doc. 96-3 at 27.

of recreation time until April 11, 2019.[45] Melvin claims that he has been denied yard time since 2007, but he has never filed a grievance about a lack of yard time.[46]

Butler filed a grievance on April 3, 2019 complaining that someone had filled in additional bubbles on his prison commissary sheet.[47] Defendant Administrative Officer Andrea Wakefield went to Butler's cell on May 23, 2019 to allow Butler to examine the relevant commissary sheet.[48] Butler disputes whether the commissary sheet that Wakefield brought with her was the original sheet that gave rise to Butler's grievance.[49] After Butler examined the commissary sheet, his grievance was withdrawn.[50] Butler subsequently requested that the grievance be reinstated.[51] The request was granted, and Butler then pursued the grievance through all stages of administrative review.[52] He was denied relief at all stages.[53]

IV. ANALYSIS

Plaintiffs' constitutional claims are brought under 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

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45 *Id.*
46 Doc. 95 ¶¶ 26-27; Doc. 123 ¶¶ 26-27.
47 Doc. 95 ¶ 28; Doc. 123 ¶ 28; Doc. 96-5 at 1.
48 Doc. 95 ¶ 29; Doc. 123 ¶ 29.
49 Doc. 123 ¶ 29.
50 Doc. 95 ¶¶ 30-31; Doc. 123 ¶¶ 30-31. Butler disputes whether he voluntarily withdrew the grievance or whether prison staff initiated the withdrawal. Doc. 123 ¶ 30.
51 Doc. 95 ¶ 31; Doc. 123 ¶ 31.
52 Doc. 95 ¶¶ 31-32; Doc. 123 ¶¶ 31-32.
53 *Id.*

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

"To establish a claim under 42 U.S.C. § 1983, [a plaintiff] must demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law."[54] "The first step in evaluating a section 1983 claim is to 'identify the exact contours of the underlying right said to have been violated' and to determine 'whether the plaintiff has alleged a deprivation of a constitutional right at all.'"[55]

Defendants argue that summary judgment is appropriate because Melvin's single cell claim is moot and Melvin lacks standing to raise the claim, because Plaintiffs' yard, recreation, ventilation, and vermin claims are untimely, and because Plaintiffs otherwise fail to establish constitutional violations.[56] Defendants additionally seek summary judgment with respect to Plaintiffs' state law claims. I address Defendants' arguments below.

A. Timeliness

Defendants seek summary judgment as to Plaintiffs' yard, recreation, ventilation, and vermin claims because the claims are untimely.[57] Defendants'

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[54] *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993).

[55] *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)).

[56] Doc. 97.

[57] Doc. 97 at 5-7.

argument is based on the fact that Plaintiffs were aware of these conditions when they began their incarceration in SCI-Huntingdon, which was well before the expiration of the statute of limitations.[58] Plaintiffs argue in opposition that the claims are timely under the continuing violations doctrine.[59] Plaintiffs additionally argue that the statute of limitations was tolled by their attempts to exhaust administrative remedies and that the limitations period therefore does not expire until "two years from the date that the final exhaustion of the administrative remedy process is rendered."[60]

I agree with Defendants that Plaintiffs' yard, recreation, ventilation, and vermin claims are untimely. Plaintiffs' claims are brought pursuant to 42 U.S.C. § 1983 and are therefore governed by Pennsylvania's two-year statute of limitations for personal injury actions.[61] The limitations period for a § 1983 claim begins to run from the point at which the plaintiff knew or should have known of the injury that gave rise to the claim.[62] The record reflects that Plaintiffs Butler and Melvin were aware of the facts giving rise to their yard, recreation, ventilation, and vermin claims at the time they began their incarceration in SCI-Huntingdon, in 2003 and

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58 *Id.*
59 Doc. 124 at 11-13.
60 *Id.*
61 *Wisniewski v. Fisher*, 857 F.3d 152, 157 (3d Cir. 2017).
62 *Id.* (citing *Sameric Corp. of Del. v. City of Phila.*, 142 F.3d 582, 599 (3d Cir. 1998)).

2007, respectively.[63] Plaintiffs did not file suit in this case until 2019, making their claims patently untimely.

Plaintiffs' reliance on the continuing violations doctrine is misplaced. The continuing violations doctrine recognizes that a plaintiff's claim is timely if the defendant's allegedly wrongful actions are part of a continuing practice, the last act of which occurred before the expiration of the limitations period.[64] The doctrine does not apply when the defendant's allegedly wrongful conduct has a "degree of permanence which should trigger his awareness of and duty to assert his rights"[65] or "when the plaintiff 'is aware of the injury at the time it occurred.'"[66] Both circumstances are present here: Plaintiffs' yard, recreation, ventilation, and vermin claims are based on circumstances that have existed since the beginning of Plaintiffs' incarceration in SCI-Huntingdon, and Plaintiffs have been aware of their alleged injuries during that entire period of time.

I also reject Plaintiffs' argument that the limitations period is tolled by their administrative exhaustion attempts. Plaintiffs are correct that the two-year limitations period for the filing of a § 1983 action is tolled while plaintiffs attempt

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63 *See* Doc. 95 ¶¶ 13-14, 19, 24, 26-27, 36; Doc. 123 ¶¶ 13-14, 19, 24, 26-27, 36; Doc. 96-1 at 15, 27, 52-53, 61-62.

64 *Montanez v. Sec'y Pa. Dep't of Corrs.*, 773 F.3d 472, 481 (3d Cir. 2014).

65 *Wisniewski*, 857 F.3d at 158 (internal alterations omitted) (quoting *Cowell v. Palmer Twp.*, 263 F3d 286, 292 (3d Cir. 2001)).

66 *Montanez*, 773 F.3d at 481 (quoting *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 417 n.6 (3d Cir. 2003)).

to exhaust administrative remedies.[67] But Plaintiffs' argument misconstrues the effect of tolling a limitations period: tolling a limitations period simply pauses it or holds it in abeyance; it does not restart the limitations period from zero.[68] The record here indicates that Plaintiffs were aware of the facts giving rise to their yard, recreation, ventilation, and vermin claims at the time they began their incarceration but did not file any grievances relevant to those claims until many years later in 2017, 2018, or 2019. Thus, because the limitations period for their § 1983 claims had already run years before they filed the grievances, any tolling arising from the grievances would not save their already untimely claims. Accordingly, I will grant Defendants' motion for summary judgment with respect to Plaintiffs' yard, recreation, ventilation, and vermin claims. Having reached this conclusion, I will not address Defendants' other arguments with respect to these claims.

B. Melvin's Single Cell Claim

Defendants argue they are entitled to summary judgment as to Melvin's claim seeking a single cell because he has a single cell and has had one throughout all stages of this litigation, including when he filed the complaint.[69] Defendants

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67 *See Pearson v. Sec'y Dept. of Corrs.*, 775 F.3d 598, 603 (3d Cir. 2015).

68 *Cf. Artis v. District of Columbia*, 583 U.S. __, 138 S. Ct. 594, 601 (2018) ("Ordinarily, 'tolled,' in the context of a time prescription like § 1367(d), means that the limitations period is suspended (stops running) while the claim is *sub judice* elsewhere, then starts running again when the tolling period ends, picking up where it left off."); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (noting that equitable tolling doctrine "pauses the running of" a statute of limitations).

69 Doc. 97 at 7-9.

argue that because Melvin has a single cell, he lacks standing to seek a single cell and his claim for a single cell is moot.[70]

I find that Melvin lacks standing to bring his single cell claim. To establish standing, a plaintiff must show (1) that he suffered an injury; (2) that the injury is fairly traceable to the conduct of the defendant; and (3) that the court could redress the injury.[71] In this case, I cannot grant Melvin any redress for his claim: he seeks a single cell and he has already been granted a single cell. Although Plaintiffs' complaint contains a generalized request for damages as to all of their claims,[72] the factual allegations giving rise to Melvin's single cell claim do not provide any basis for damages and instead focus only on the injunctive relief of Melvin obtaining a single cell.[73] Thus, I will grant summary judgment to Defendants as to Melvin's single cell claim because he lacks standing for this claim.

C. Remaining Deliberate Indifference Claims

Defendants seek summary judgment on the merits as to Plaintiffs' fire safety, overcrowding, and understaffing claims, all of which sound in deliberate indifference to Plaintiffs' conditions of confinement under the Eighth Amendment. To succeed on such a claim, a plaintiff must show that: "(1) he was incarcerated under conditions imposing a substantial risk of serious harm, (2) the defendant-

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[70] *Id.*
[71] *TransUnion LLC v. Ramirez*, 594 U.S. __, 141 S. Ct. 2190, 2204 (2021).
[72] *See* Doc. 1 at 44-45.
[73] *See id.* at 11-13.

official was deliberately indifferent to that substantial risk to his health and safety, and (3) the defendant official's deliberate indifference caused him harm."[74] I analyze these claims below.

1. Fire Safety Claim

Plaintiffs' fire safety claim is based on the allegedly "antiquated designs" of cells in SCI-Huntingdon and Plaintiffs' allegation that there was a fire in SCI-Huntingdon's dining hall kitchen on February 28, 2019.[75] Plaintiffs allege that no alarm was sounded during the fire, that inmates were locked in their cells during the fire, and that no evacuation took place.[76]

Defendants argue that they are entitled to summary judgment as to the fire safety claim because Plaintiffs cannot produce any evidence of a substantial risk of harm to Plaintiffs or any evidence that Defendants were deliberately indifferent to such a risk.[77] Plaintiffs argue to the contrary that they informed prison staff through grievances that SCI-Huntingdon was understaffed, that it lacked a universal/master locking system for the cells, that it had an inadequate ventilation system, that it did not have smoke exhaust fans, that it did not have any fire equipment to combat major fires in the prison, that it did not have an evacuation protocol for fires, that fire alarms sometimes did not sound, and that fire doors

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74 *See Bistrian v. Levi*, 696 F.3d 352, 367 (3d Cir. 2015).
75 *See* Doc. 1 at 13-16.
76 *Id.*
77 Doc. 97 at 10-11.

were non-functional.[78] Plaintiffs note that these conditions "are considered unconstitutional fire safety hazards" under the Western District of Pennsylvania and Third Circuit's opinions in *Tillery v. Owens*.[79] Plaintiffs also note that Defendants never denied that such fire safety hazards existed in responding to Plaintiffs' grievances.[80] Plaintiffs cite a number of declarations from themselves and other SCI-Huntingdon inmates as evidence to support their fire safety claim.[81]

I will grant the motion for summary judgment with respect to the fire safety claim. Assuming, *arguendo*, that all of the conditions alleged by Plaintiffs are actually present in SCI-Huntingdon, Plaintiffs have still not presented any evidence to show that these conditions create a substantial risk of serious harm. Plaintiffs have not presented any expert testimony or any other evidence as to what fire safety measures SCI-Huntingdon should implement or why the existing fire safety measures are inadequate, and absent such evidence there is no basis for a reasonable finder of fact to conclude that there is a substantial risk of serious harm.

Instead of offering expert testimony or other evidence as to what fire safety measures SCI-Huntingdon should implement, Plaintiffs appear to rely entirely on the findings of fact by the district court and affirmed by the circuit court in *Tillery*

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78 Doc. 124 at 16-18.

79 *See Tillery v. Owens*, 719 F. Supp. 1256 (W.D. Pa. Aug. 15, 1989); *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990).

80 Doc. 124 at 17-18.

81 *See* Doc. 124 at 18. Plaintiffs' brief cites the declarations as docket number 84, but Plaintiffs have subsequently noted that this citation was erroneous. *See* Docs. 128, 130. The declarations in support of Plaintiffs' claim are actually docketed at docket number 56. *See* Doc. 56.

v. Owens, where the court found that numerous fire safety hazards violated the Eighth Amendment.[82] That case, however, concerned the conditions of confinement in the State Correctional Institution-Pittsburgh ("SCI-Pittsburgh") in the late 1980s and early 1990s, and the court relied heavily on the testimony of an expert witness in reaching its factual conclusions. Findings of fact from a different case concerning the conditions of confinement in a different prison decades before the facts of this case cannot simply be transplanted to the present case, and nothing in the Western District or Third Circuit's opinions in *Tillery* create *per se* rules of constitutionality that must be followed in this case. Accordingly, because Plaintiffs have offered no evidence of a substantial risk of serious harm, I will grant the motion for summary judgment with respect to the fire safety claim.

2. Overcrowding and Understaffing

Defendants argue that they are entitled to summary judgment as to Plaintiffs' overcrowding and understaffing claims because Plaintiffs do not have any evidence of overcrowding or understaffing.[83]

With respect to the overcrowding claim, Plaintiffs argue that publicly available data from the Pennsylvania Department of Corrections indicates that SCI-Huntingdon has an inmate capacity of 1,700 inmates but that evidence of record shows that the prison housed more than 1,700 inmates in 2016, 2017, 2019,

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[82] *See* Doc. 124 at 16-18; *Tillery*, 719 F. Supp. at 1256; *Tillery*, 907 F.2d at 418.
[83] Doc. 97 at 12-13.

2020, and 2021.[84] Plaintiffs specifically cite an undated memo from SCI-Huntingdon's general manager Dianna Huffstickler to one of the prison's accountants, Elizabeth Stone, regarding cable TV charges for the inmate population in February 2016, which indicates that the prison had an average population of 2,200 inmates in that month.[85] Plaintiffs also cite monthly account statements for the years in question from Butler's prisoner trust fund account.[86] Plaintiffs contend that these account statements show that SCI-Huntingdon's population exceeded 1,700 prisoners during the relevant period, but this appears to be based solely on the page numbers on the account statements,[87] and Plaintiffs have not provided any evidence to support the inference that page numbers on monthly account statements correspond to the total population of the prison.

Plaintiffs cite several other exhibits in support of their overcrowding claim. First, they cite a legal brief that SCI-Huntingdon filed with the Pennsylvania Department of Labor and Industry in 1994, which states that SCI-Huntingdon had a population of approximately 2,100 inmates at that time.[88] Second, they cite a grievance that Butler filed in 2019 complaining about a lack of clean laundry in the prison and the prison's response to the grievance, which indicates that there was a temporary shortage of socks due in part to "higher than normal arrivals off the

[84] Doc. 124 at 23.
[85] *See id.*; Doc. 122-1 at 6.
[86] Doc. 124 at 23; Doc. 122-1 at 7-12.
[87] *See, e.g.*, Doc. 122-1 at 7 ("Page 536 of 2062").
[88] *See* Doc. 124 at 23-24; Doc. 122-6.

vans."[89] Third, they cite DOC statistics as to the number of fights and assaults in DOC facilities from January 1, 2015 through March 31, 2016, which indicate that SCI-Huntingdon had the most aggravated assaults, the most inmate fights, and the second most inmate assaults among all DOC facilities during that period.[90] Fourth, they cite declarations from themselves and several other SCI-Huntingdon inmates attesting to overcrowding in SCI-Huntingdon.[91] Finally, they cite unrelated court opinions in *Tillery*[92] and *Molina v. Dep't of Corrs.*[93]

I will grant the motion for summary judgment with respect to the overcrowding claim as Plaintiffs have not put forth sufficient evidence to establish unconstitutional overcrowding. To begin, Plaintiffs rely on publicly available information from the DOC to establish that SCI-Huntingdon's capacity is 1,700 inmates, but my review of publicly available information indicates that SCI-Huntingdon's capacity is actually 2,106 inmates.[94]

Plaintiffs have also not produced any evidence from which a reasonable finder of fact could conclude that the population of SCI-Huntingdon is

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89 *See* Doc. 124 at 24; Doc. 122-1 at 20.

90 *See* Doc. 124 at 24; Doc. 122-1 at 21. Plaintiffs contend that SCI-Huntingdon led in all three of these categories, *see* Doc. 124 at 24, but their attached exhibit indicates that SCI-Muncy had more inmate assaults than SCI-Huntingdon during the relevant period. *See* Doc. 122-1 at 21.

91 *See* Doc. 124 at 24; Doc. 120-3.

92 907 F.2d at 418.

93 No. 4:21-CV-00038, 2021 WL 4450016 (M.D. Pa. June 8, 2021) (Mehalchick, M.J.), *report and recommendation adopted*, No. 4:21-CV-00038, 2021 WL 4439486 (M.D. Pa. Sept. 28, 2021) (Brann, C.J.).

94 *See Pennsylvania Department of Corrections Monthly Population Report as of June 30, 2022*, DOC https://www.cor.pa.gov/About%20Us/Statistics/Documents/Current%20Monthly%20Population.pdf (last visited July 19, 2022).

unconstitutionally overcrowded: the population statistics they cite from 1994 and 2016 are outside the limitations period for their claim and are therefore irrelevant, and Plaintiffs have not produced any evidence to support the inference that the page numbers on Butler's monthly account statements indicate the prison's total population. DOC statistics on the number of fights and assaults in SCI-Huntingdon from 2015-2016 are irrelevant as that period of time is outside of the limitations period, and nothing in the statistics indicates that the number of fights and assaults is caused by, or indicative of, overcrowding.[95] Plaintiffs' attached declarations similarly do not establish overcrowding, as they do not provide any evidence beyond the declarants' conclusory assertions that the prison is overcrowded.[96] Although the grievance response indicating that there was a temporary shortage of socks due in part to "higher than normal arrivals off the vans" provides a scintilla of evidence in support of Plaintiffs' overcrowding claim,[97] this is not sufficient for the case to go to trial.[98]

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95 *See* Doc. 122-1 at 21.

96 *See* Doc. 120-3 at 5 (declaration of Shariff Butler) ("There is a deplorable overcrowding issue within SCI-Huntingdon"); *id.* at 21 (declaration of Jeremey Melvin) ("The understaffing issue is a bad pairing for overcrowding that only compound the issues"); *id.* at 36 (declaration of Raheem Henderson) ("All yards and line movements were called late due to overcrowding. . . "); *id.* at 42 (declaration of Tasai Betts) ("Due to overcrowding issues, all yards and line movements were called late. . . ."); *id.* at 48 (declaration of Vernon Robbins) ("Overcrowding of the prison also increases the difficulty of evacuation in the event of a fire emergency . . . [and] causes all line movements to be ran late").

97 *See* Doc. 122-1 at 20.

98 *Anderson*, 477 U.S. at 252.

Finally, the opinions in *Tillery* and *Molina* do not provide a sufficient basis to defeat Defendants' motion for summary judgment. As noted above, *Tillery* is irrelevant because it concerned the conditions of confinement in a different prison approximately three decades before the facts of this case.[99] *Molina* addressed a motion for class certification brought by several SCI-Huntingdon inmates on behalf of a putative class of all inmates who were incarcerated in SCI-Huntingdon after December 30, 2018.[100] United States Magistrate Judge Karoline Mehalchick recommended that the motion be denied because there were not questions of law or fact common to all members of the proposed class.[101] I adopted that recommendation and denied the motion.[102] Nothing in Judge Mehalchick's analysis nor my adoption of the report and recommendation could support an inference that SCI-Huntingdon is unconstitutionally overcrowded.

Even assuming, *arguendo*, that Plaintiffs' proffered evidence would be sufficient for a reasonable finder of fact to conclude that SCI-Huntingdon's inmate population exceeded its capacity, this fact alone would not be sufficient to establish a violation of the Eighth Amendment. A prison's inmate population exceeding its intended capacity is not by itself sufficient to violate the Eighth Amendment.[103]

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99 *See Tillery*, 907 F.2d at 418.
100 *Molina*, 2021 WL 4450016, at *1.
101 *Id.* at *1-3.
102 *Molina*, 2021 WL 4439486, at *1.
103 *See Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (stating that prison housing 38% more inmates than its design capacity was not sufficient to establish Eighth Amendment violation).

Thus, because Plaintiffs have not produced sufficient evidence for their overcrowding claim to go to trial, I will grant Defendants' motion for summary judgment with respect to that claim.

Plaintiffs' understaffing claim fares no better. Plaintiffs assert that understaffing in SCI-Huntingdon is "self-evident" based on the number of fights and assaults that occur in SCI-Huntingdon, the declarations from SCI-Huntingdon inmates, and the fact that Plaintiffs filed grievances complaining about understaffing.[104]

I disagree. Plaintiffs' attached declarations provide nothing more than a single conclusory assertion of understaffing,[105] there is no evidence indicating that the number of fights and assaults in the prison is caused by understaffing,[106] and the fact that Plaintiffs grieved the understaffing claim is not evidence of the truth of the claim. I will therefore grant summary judgment with respect to this claim.

D. Retaliation Claims

Plaintiffs bring two retaliation claims in this case, both arising from alleged retaliation against Plaintiff Butler. In Count 8 of the complaint, Plaintiffs allege that Defendants Wakefield and Stratton retaliated against Butler by forging and backdating a grievance withdrawal form in his name.[107] In Count 9, Plaintiffs

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[104] Doc. 124 at 24.

[105] *See* Doc. 120-3 at 21 (declaration of Jeremey Melvin) ("The understaffing issue is a bad pairing for overcrowding that only compounds the issues.");

[106] *See* Doc. 122-1 at 21.

[107] Doc. 1 at 41-42.

allege that Defendants Kauffman, Reed, Emigh, and Eberling retaliated against Butler by conducting a non-random search of his cell.[108]

A plaintiff alleging retaliation under 42 U.S.C. § 1983 must establish that (1) he engaged in constitutionally protected conduct; (2) the defendant took retaliatory action against the plaintiff that was sufficient to deter a person of ordinary firmness from exercising his constitutional rights; and (3) there was a causal connection between the plaintiff's protected conduct and the defendant's retaliatory action.[109] Causation may be established by showing either an unusually suggestive temporal proximity between the plaintiff's protected conduct and the defendant's allegedly retaliatory action or a pattern of antagonism coupled with timing.[110] Causation may also be implied by "the record as a whole."[111]

Plaintiffs' retaliatory grievance withdrawal claim arises from the grievance Butler filed on April 3, 2019 complaining that someone had filled in additional bubbles on his prison commissary sheet.[112] After Defendant Wakefield allowed Butler to examine the relevant commissary sheet, the underlying grievance was

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[108] Doc. 1 at 42. Eberling was previously dismissed from this case. *See* Doc. 18 at 4.
[109] *Javitz v. Cty. of Luzerne*, 940 F.3d 858, 863 (3d Cir. 2019).
[110] *Dondero v. Lower Milford Twp.*, 5 F.4th 355, 361-62 (3d Cir. 2021) (citing *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007)).
[111] *Id.* (citing *DeFlaminis*, 480 F.3d at 267).
[112] Doc. 95 ¶ 28; Doc. 123 ¶ 28; Doc. 96-5 at 1.

withdrawn.[113] The grievance was subsequently reinstated at Butler's request and pursued through all stages of administrative review.[114]

Defendants argue that they are entitled to summary judgment as to the grievance withdrawal claim.[115] Defendants assert that Plaintiffs cannot establish retaliation with respect to the withdrawal of the grievance and that Plaintiffs have not brought any claims with respect to the underlying issue of whether Defendants tampered with the original commissary sheet.[116] Plaintiffs argue to the contrary that there is sufficient evidence for the claim to go to trial.[117]

I agree with Defendants that Plaintiffs did not raise any claims with respect to the alleged tampering with Butler's commissary sheet. Count 8 of Plaintiffs' complaint is clearly limited to the alleged forgery of a grievance withdrawal form and does not allege tampering with a commissary sheet.[118] As for the merits of the grievance withdrawal claim, I find that Plaintiffs have not produced sufficient evidence of retaliation for the claim to go to trial. Specifically, there is no evidence that Defendants' alleged act of withdrawing Butler's grievance was sufficient to deter a person of ordinary firmness from exercising his constitutional rights, as it is undisputed that immediately after the grievance was withdrawn

[113] Doc. 95 ¶¶ 29-31; Doc. 123 ¶¶ 29-31.
[114] Doc. 95 ¶¶ 31-32; Doc. 123 ¶¶ 31-32.
[115] Doc. 97 at 15-18.
[116] *Id.*
[117] Doc. 124 at 28-30.
[118] *See* Doc. 1 at 41-42.

Butler requested that it be reinstated, that his request was granted, and that he subsequently pursued the grievance through all stages of administrative review.[119] Accordingly, I will grant summary judgment as to this claim.[120]

Turning to the retaliatory search claim raised in Count 9 of the complaint, Defendants do not raise any summary judgment arguments as to the merits of this claim.[121] Instead, they assert that "[t]here is no Count IX claim in the complaint."[122] Defendants' assertion appears to be based on the fact that the complaint was written with a typewriter but that the heading "Count 9 Violation of First and Eighth Amendment" was written in pen.[123]

I reject Defendants' contention that the complaint does not contain a Count 9. The header for Count 9 is clearly legible and prominently displayed on page 42 of the complaint, and the complaint clearly sets out the factual allegations and legal theories on which the count is based.[124] I will not disregard the count because of the trivial inconsistency of the header being written in pen as opposed to being typewritten. Having reached this conclusion, I am bound to deny the current motion for summary judgment as to the retaliatory search claim because

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[119] Doc. 95 ¶¶ 31-32; Doc. 123 ¶¶ 31-32.

[120] Defendants also seek summary judgment to the extent that Plaintiff attempts to raise an access to courts claim. Doc. 97 at 17-18. Plaintiffs concede that they did not intend to bring an access to courts claim. Doc. 124 at 30. I will thus not address this issue any further.

[121] *See* Doc. 124.

[122] *Id.* at 3.

[123] *See* Doc. 1 at 42.

[124] *See id.*

Defendants have not raised any summary judgment arguments with respect to the claim.[125]

Based on my review of the retaliatory search claim, however, it appears to me that the complaint fails to state a retaliation claim upon which relief may be granted because it does not allege a causal connection between Butler's allegedly protected conduct and Defendants' allegedly retaliatory actions.[126] Similarly, my review of the record suggests that Plaintiffs do not have any evidence from which a reasonable finder of fact could find a causal connection. Accordingly, I hereby provide notice of my intention to consider granting summary judgment to Defendants on this issue *sua sponte*.[127] I will give Plaintiffs an opportunity to come forward with all of the evidence they have in support of their retaliatory search claim.[128] A schedule for the submission of evidence will be imposed in the Order accompanying this Memorandum Opinion.

E. State Law Claims

Defendants seek summary judgment as to Plaintiffs' state law claims for breach of contract and "breach of duty."[129] With respect to the contract claim,

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[125] *See* Doc. 97.

[126] *See* Doc. 1 at 25-27, 42.

[127] *See* Fed. R. Civ. P. 56(f); *Celotex*, 477 U.S. at 326; *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 (3d Cir. 2018); *Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 222-25 (3d Cir. 2004).

[128] *See In re. SemCrude L.P.*, 864 F.3d 280, 296 (3d Cir. 2017); *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 280 (3d Cir. 2010).

[129] Doc. 97 at 19.

Defendants argue that they are entitled to summary judgment because the only contract allegedly breached is the DOC Code of Ethics, which is not a contract.[130] Defendants also argue that even if the Code of Ethics were considered a contract, Plaintiffs are not a party to it and any claim for breach of the contract would have to be brought before the Pennsylvania Board of Claims and not this Court.[131] Plaintiffs argue in response that by signing the Code of Ethics and agreeing to abide by it, Defendants "entered themselves in to a 'unilateral contract' that obligates them to abide by it."[132]

I will grant the motion for summary judgment with respect to the breach of contract claim. Assuming, *arguendo*, that the Code of Ethics can qualify as a contract under Pennsylvania law, there is still no evidence in the record indicating that Plaintiffs are parties to the contract. Plaintiffs do not directly address whether they are parties to the contract in their brief, but their argument that the Code of Ethics is a "unilateral contract" appears to be an argument that they do not need to be parties to the contract to be able to enforce its provisions.[133]

Plaintiffs' argument misconstrues the definition of a unilateral contract. A "unilateral contract" is not a contract that binds only one party; it is a contract

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130 *Id.*

131 *Id.*

132 Doc. 124 at 32.

133 *See id.* (arguing that Defendants "have entered themselves in to a 'unilateral contract' that obligates them to abide by it . . . [s]o according to the contract that all defendants read and signed, they do owe a duty to prisoners if the contract they signed says so").

formed by only one promise.[134] Thus, a unilateral contract is formed "when one party makes a promise in exchange for the other party's act or performance."[135] The factual situation in this case plainly does not show the existence of a unilateral contract.

Accordingly, because there is no evidence in the record from which a reasonable finder of fact could conclude that the Plaintiffs are parties to the Code of Ethics, I will grant summary judgment to Defendants as to the breach of contract claim. I will similarly grant summary judgment to the extent that the complaint attempts to raise a claim for "breach of duty."[136] The complaint does not state a separate legal theory on which the "breach of duty" claim is based, so the claim appears to also seek relief on a breach of contract theory. As noted above, nothing in the record indicates that Plaintiffs are parties to any relevant contract, so summary judgment is appropriate with respect to the breach of duty claim.

I will also grant summary judgment as to Plaintiffs' "Neglect to Prevent Deterrence from Violation of Eighth Amendment" claim, which Defendants characterize as a state law claim.[137] I have thoroughly addressed in this opinion why summary judgment is warranted on Plaintiffs' Eighth Amendment claims, and

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[134] *Giant Eagle, Inc. v. C.I.R.*, 822 F.3d 666, 673 (3d Cir. 2016).
[135] *Id.*
[136] *See* Doc. 1 at 43.
[137] *See* Doc. 1 at 36; Doc. 97 at 19.

summary judgment is likewise warranted as to this derivative Eighth Amendment claim.

F. Personal Involvement

Finally, a number of Defendants seek summary judgment for Plaintiffs' failure to establish their personal involvement.[138] These arguments are now moot. I have already granted summary judgment with respect to every claim other than Butler's retaliatory cell search claim. Defendants Kauffman, Reed, Emigh, and Eberling[139] are the only Defendants named with respect to the retaliatory search claim, and Defendants do not raise a personal involvement argument with respect to those Defendants.[140] Accordingly, I will not address the issue of personal involvement further.

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment will be granted as to all claims other than the retaliatory cell search claim raised in Count 9 of the complaint. As a result of this ruling, all Defendants other than Kauffman, Reed, and Emigh will be granted summary judgment, and Plaintiff Melvin will be terminated from the case. I will consider granting summary judgment as to the retaliatory cell search claim *sua sponte*, and the parties will be given an opportunity to respond on this issue.

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[138] Doc. 97 at 19-22.
[139] Eberling was previously dismissed from this case. *See* Doc. 18 at 4.
[140] *See* Doc. 1 at 42.

An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHARIFF BUTLER and JEREMEY MELVIN, Plaintiffs, v. KEVIN KAUFFMAN, *et al.*, Defendants.	No. 4:19-CV-02171 (Chief Judge Brann)

ORDER

JULY 27, 2022

In accordance with the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED** that:

1. Defendants' motion for summary judgment (Doc. 94) is **GRANTED IN PART AND DENIED IN PART.**
2. The motion for summary judgment is granted with respect to all claims other than the retaliatory cell search claim raised in Count 9 of the complaint. (*See* Doc. 1 at 42).
3. The Clerk of Court is directed to enter judgment in favor of Defendants Walters, Harris, Sipple, Ewell, Green, Bilger, Price, Wakefield, Ralston, and Stratton and dismiss those Defendants from the case.

4. The Clerk of Court is directed to dismiss Plaintiff Melvin from this case.

5. This case shall proceed only as to Plaintiff Butler's retaliatory cell search claim against Defendants Kauffman, Reed, and Emigh.

6. The Court hereby announces its intention to consider granting summary judgment to the remaining Defendants on the retaliatory cell search claim because it appears from the record before the Court that the complaint fails to allege a causal connection between Plaintiff Butler's allegedly protected conduct and Defendants' allegedly retaliatory actions and that there is no evidence from which a reasonable finder of fact could find a causal connection.

7. Within thirty days of the date of this Order, Plaintiff Butler shall produce to the Court all evidence that he has in support of his retaliatory cell search claim.

8. Within fourteen days of the date of Plaintiff Butler's submission, Defendants may submit any additional evidence that is relevant to the retaliatory cell search claim.

9. The Court shall consider granting summary judgment on the retaliatory cell search claim based on the evidence submitted by the parties and the record that is already before the Court. If no additional

evidence is submitted, the Court shall conduct its analysis based solely on the record that is presently before the Court.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

Appendix-C
(Ex.-C)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHARIFF BUTLER and JEREMEY MELVIN, Plaintiffs, v. KEVIN KAUFFMAN, *et al.*, Defendants.	No. 4:19-CV-02171 (Chief Judge Brann)

MEMORANDUM OPINION

MARCH 22, 2023

In this prisoner civil rights case, *pro se* Plaintiffs Shariff Butler ("Butler") and Jeremey Melvin ("Melvin"), who are incarcerated in the State Correctional Institution-Huntingdon ("SCI-Huntingdon"), have alleged various civil rights violations by SCI-Huntingdon officials. After over three years of litigation and numerous opinions and orders, the case has been narrowed to a single remaining claim of retaliation by Butler against Defendants Kauffman, Reed, and Emigh. I indicated an intention to *sua sponte* grant summary judgment to Defendants as to this claim and directed Butler to produce all evidence that he had in support of the claim. Upon review of the submitted evidence, and for the reasons that follow, I will grant summary judgment on the remaining claim and close this case.

I. BACKGROUND

Plaintiffs initiated this case through the filing of a complaint under 42 U.S.C. § 1983 on December 15, 2019, which the Court received and docketed on December 20, 2019.[1] The complaint raises civil rights claims arising from (1) SCI-Huntingdon's purported refusal to grant Plaintiffs single-cell status, (2) SCI-Huntingdon's alleged failure to mitigate fire safety risks, (3) SCI-Huntingdon's alleged denial of recreation time and time in the prison yard, (4) SCI-Huntingdon's allegedly inadequate ventilation system, (5) alleged overcrowding and understaffing in SCI-Huntingdon, (6) an alleged infestation of vermin in SCI-Huntingdon, and (7) alleged retaliation against Plaintiff Butler.[2] The complaint raises claims for violation of the First and Eighth Amendments as well as state law claims for breach of contract and "breach of duty."[3]

I dismissed the complaint in part on September 2, 2020.[4] Specifically, I dismissed all claims against Defendants Wetzel, Moore, Smeal, Roberts, Kashmere, Bickell, Wenerowicz, Varner, Moore, Oliver, Thomas, Brumbaugh, Eberling, Harker, and Barr for Plaintiffs' failure to allege their personal involvement and dismissed Plaintiffs' claims relating to Butler's single-cell status as untimely.[5] I otherwise allowed the complaint to proceed and ordered service of

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1 Doc. 1.
2 *Id.*
3 *Id.*
4 Doc. 18.
5 *Id.*

process as to the remaining Defendants. Plaintiffs appealed my partial dismissal order to the United States Court of Appeals for the Third Circuit.[6] The Third Circuit dismissed the appeal for lack of appellate jurisdiction on February 23, 2021.[7] Defendants then answered the complaint on May 7, 2021.[8]

Plaintiffs filed an amended complaint without leave of court or Defendants' consent on August 2, 2021.[9] I struck the amended complaint from the record for Plaintiffs' failure to comply with Federal Rule of Civil Procedure 15 on September 20, 2021.[10] Defendants moved for summary judgment on January 20, 2022, after the close of discovery.[11]

I granted the motion for summary judgment as to all claims and Defendants with the exception of Butler's retaliatory cell search claim against Defendants Kauffman, Reed, and Emigh on July 27, 2022.[12] In doing so, I announced my intention to consider granting summary judgment to the remaining Defendants as to this claim because it appeared that the complaint failed to state a retaliatory cell search claim upon which relief could be granted and because there did not appear to be any evidence of a causal connection between Butler's allegedly protected

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6 Doc. 23.
7 Doc. 31.
8 Doc. 38.
9 Doc. 42.
10 Doc. 64.
11 Doc. 94.
12 Docs. 134-35.

conduct and Defendants' allegedly retaliatory actions.[13] I directed Butler to submit all evidence that he had in support of his retaliatory cell search claim.[14] Butler timely responded and submitted evidence to the Court on August 26, 2022.[15]

Plaintiffs appealed my summary judgment ruling as to the other claims on August 24, 2022.[16] The Third Circuit dismissed the appeal for lack of appellate jurisdiction on January 4, 2023.[17] In light of the dismissal of this appeal, I now turn to the issue of whether summary judgment should be granted as to the remaining claim *sua sponte*. The issue is ripe for review.

II. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the defendants are entitled to judgment as a matter of law.[18] "Facts that could alter the outcome are 'material facts,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct."[19]

"The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of

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[13] *See* Doc. 134 at 26; Doc. 135 at 2.
[14] *Id.*
[15] Doc. 141.
[16] Doc. 137.
[17] Doc. 151.
[18] Fed. R. Civ. P. 56(a).
[19] *Clark v. Modern Grp. Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993) (first citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); and then citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

proof that would apply at the trial on the merits."[20] "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."[21] "The judge's inquiry, therefore unavoidably asks . . . 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."[22] The evidentiary record at trial, by rule, will typically never surpass that which was compiled during the course of discovery.

Parties opposing summary judgment "may not rest upon mere allegations, but rather must 'identify those facts of record which would contradict the facts identified by the movant."[23] Moreover, "if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed."[24] In considering whether to grant summary judgment, "the court need consider only the cited materials, but it may consider other materials in the record."[25]

Finally, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[26] "There is no issue for trial unless there

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20 *Anderson*, 477 U.S. at 252.
21 *Id.*
22 *Id.* (quoting *Schuylkill & Dauphin Imp. Co. v. Munson*, 81 U.S. 442, 447 (1871)).
23 *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3d Cir. 2003).
24 Fed. R. Civ. P. 56(e)(2).
25 Fed. R. Civ. P. 56(c)(3).
26 *Anderson*, 477 U.S. at 249.

is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."[27] "If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted."[28]

III. MATERIAL FACTS

Butler has been incarcerated in SCI-Huntingdon since 2003.[29] According to the allegations in Plaintiffs' complaint, he was washing his clothes in his cell on May 16, 2019, when Defendants Reed and Emigh, who were both employed as correctional officers in the prison, approached him and announced that they were going to search the cell.[30] Reed and Emigh then allegedly entered the cell, tossed Butler's legal papers around, and confiscated several documents from the cell.[31] They also allegedly searched Butler's cellmate's possessions and confiscated a bottle of prescription medication belonging to the cellmate.[32] The complaint alleges that this search was not random and was conducted in retaliation for Butler filing grievances against prison officials.[33] Butler filed a grievance about the search on June 6, 2019.[34] He pursued the grievance through all stages of the DOC's administrative review process, but was denied relief.[35]

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27 *Id.*
28 *Id.* at 249-50 (internal citations omitted).
29 Doc. 95 ¶ 3; Doc. 123 ¶ 3.
30 Doc. 1 ¶¶ 160-62.
31 *Id.* ¶ 164.
32 *Id.* ¶ 165.
33 *Id.* ¶ 168.
34 Doc. 10-3 at 26.
35 *Id.* at 26-37.

In response to my Order directing Butler to produce all evidence that supported his retaliatory cell search claim, Butler asserts that his filing of a grievance establishes a causal connection because there was a close temporal proximity between his filing of the grievance and Defendant Kauffman denying the grievance.[36] Butler also asserts that retaliation and causation are established by Defendants Emigh and Reed targeting his legal materials during the search.[37] Butler additionally argues that surveillance footage of the search would support his claim and asks the Court to conduct an *in camera* review of the footage.[38] Finally, Butler states it can be "inferred" that Kauffman sent Emigh and Reed to conduct the search based on the fact that Kauffman denied Butler's grievance.[39]

IV. ANALYSIS

Butler's remaining retaliatory cell search claim is brought under 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

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[36] Doc. 141 at 2.
[37] *Id.* at 3-4.
[38] *Id.* at 6-7.
[39] *Id.* at 9.

"To establish a claim under 42 U.S.C. § 1983, [a plaintiff] must demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law."[40] "The first step in evaluating a section 1983 claim is to 'identify the exact contours of the underlying right said to have been violated' and to determine 'whether the plaintiff has alleged a deprivation of a constitutional right at all.'"[41]

A plaintiff alleging retaliation under 42 U.S.C. § 1983 must establish that (1) he engaged in constitutionally protected conduct; (2) the defendant took retaliatory action against the plaintiff that was sufficient to deter a person of ordinary firmness from exercising his constitutional rights; and (3) there was a causal connection between the plaintiff's protected conduct and the defendant's retaliatory action.[42] Causation may be established by showing either an unusually suggestive temporal proximity between the plaintiff's protected conduct and the defendant's allegedly retaliatory action or a pattern of antagonism coupled with timing.[43] Causation may also be implied by "the record as a whole."[44]

I will grant Defendants summary judgment as to the remaining retaliatory cell search claim. Butler relies on the temporal proximity between him filing

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[40] *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993).
[41] *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)).
[42] *Javitz v. Cty. of Luzerne*, 940 F.3d 858, 863 (3d Cir. 2019).
[43] *Dondero v. Lower Milford Twp.*, 5 F.4th 355, 361-62 (3d Cir. 2021) (citing *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007)).
[44] *Id.* (citing *DeFlaminis*, 480 F.3d at 267).

grievances and Defendants Reed and Emigh searching his cell to establish a causal connection, but there is no allegation in the complaint nor evidence in the record that Reed and Emigh personally knew about Butler's grievances when they conducted the search. Plaintiffs cannot establish a causal connection between protected conducted and allegedly retaliatory actions "without some evidence that the individuals responsible for the adverse action knew of the plaintiff's protected conduct at the time they acted."[45] Temporal proximity alone "does not establish that the adverse actor had knowledge of the protected conduct before acting."[46] Butler's unsupported speculation that it can be "inferred" that Kauffman directed Reed and Emigh to search his cell based on Kauffman denying Butler's grievance[47] is "mere speculation" that is not sufficient to survive summary judgment.[48]

The retaliatory cell search claim also fails to the extent that it is based on a freestanding claim of retaliatory action by Defendant Kauffman. The only action alleged by Kauffman is that he denied Butler's grievance. "The denial of grievances is not an adverse action for retaliation purposes."[49]

Finally, I will deny Butler's request for *in camera* review of surveillance footage. Butler does not explain how the footage could establish that Defendants

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45 *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 196 (3d Cir. 2015).
46 *Id.* at 197.
47 *See* Doc. 141 at 9.
48 *See Daniels*, 776 F.3d at 197 (noting that "Daniels cannot justifiably rely on mere speculation that these adverse actors learned of her complaints from other employees in the school district" to establish that the adverse actors had knowledge of her protected activity).
49 *Owens v. Coleman*, 629 F. App'x 163, 167 (3d Cir. 2015) (internal quotation marks omitted).

Reed and Emigh had personal knowledge of his grievances,[50] and based on Butler's description of the footage, it does not appear to me that it could establish such a fact. *In camera* review of the footage therefore would not alter the conclusion that Defendants are entitled to summary judgment as to the retaliatory cell search claim.

V. CONCLUSION

For the foregoing reasons, I will *sua sponte* grant summary judgment to remaining Defendants Kauffman, Reed, and Emigh with respect to the sole remaining claim that those Defendants conducted a retaliatory search of Plaintiff Butler's cell.

An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

[50] *See* Doc. 141 at 6-7.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHARIFF BUTLER and JEREMEY MELVIN, Plaintiffs, v. KEVIN KAUFFMAN, *et al.*, Defendants.	No. 4:19-CV-02171 (Chief Judge Brann)

ORDER

MARCH 22, 2023

In accordance with the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED** that:

1. Summary judgment is **GRANTED** as to remaining Defendants Kauffman, Reed, and Emigh with respect to the sole remaining claim that those Defendants conducted a retaliatory search of Plaintiff Butler's cell.
2. The Clerk of Court is directed to enter judgment in favor of the remaining Defendants and close this case.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

UNITED STATES DISTRICT COURT

for the

Middle District of Pennsylvania

Shariff Butler
Plaintiff
v.
Kauffman, et al
Defendant

Civil Action No. 4:1-CV-2171

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☑ other: Judgment is entered in favor of Defendants Kauffman, Reed and Emigh.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Matthew W. Brann on Summary Judgment.

Date: 03/22/2023

CLERK OF COURT

s/ Emily C. Aikey

Signature of Clerk or Deputy Clerk

time, however, the only motion that is currently pending before the Court is Defendants' motion for summary judgment. By separate Order, I have already granted Plaintiffs an extension of time to file a brief in opposition to the motion for summary judgment, allowing them until May 4, 2022 to do so. It therefore does not appear that a stay is necessary or warranted given that I have already granted Plaintiffs ample time to respond to the motion for summary judgment. Accordingly, I will deny the motion to stay.

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' motion for extension of time (Doc. 111) is **GRANTED.** Plaintiffs' proposed reply brief is deemed timely filed.
2. Plaintiffs' motion to stay and motions for reconsideration (Docs. 107, 108, 110) are **DENIED.**

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

Appendix - D
(EX. - D)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHARIFF BUTLER and JEREMY MELVIN, Plaintiffs, v. KEVIN KAUFFMAN, *et al.*, Defendants.	No. 4:19-CV-02171 (Chief Judge Brann)

ORDER

MAY 5, 2023

AND NOW, upon consideration of Plaintiffs' motion for leave to exceed the local page limit (Doc. 170), **IT IS HEREBY ORDERED** that:

1. Plaintiffs' motion for leave to exceed the local page limit (Doc. 170) is **GRANTED**;
2. Plaintiffs' brief (Doc. 169) in support of their motion to alter or amend judgment is accepted by the Court as properly filed.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHARIFF BUTLER and JEREMY MELVIN, Plaintiffs, v. KEVIN KAUFFMAN, *et al.*, Defendants.	No. 4:19-CV-02171 (Chief Judge Brann)

ORDER

MAY 5, 2023

Before the Court are two motions to remove a seal filed by Plaintiffs. (Docs. 163, 167). Plaintiffs represent that they requested a copy of their Exhibit E filed in connection to their brief in opposition to Defendants' January 20, 2022 motion for summary judgment and that upon receiving the copy they noticed that pages 23, 25, and 27 of the exhibit were missing from the copy. (*Id.*) The relevant exhibit is docketed at Doc. 122-1. Plaintiffs purportedly contacted the Clerk's Office, at which time an employee told them that the missing pages were no longer in the Court's physical possession and that the exhibit was sealed. (Docs. 163, 167). Plaintiffs request that the exhibit be unsealed. (*Id.*)

This Court is unaware of any Order directing that the exhibit at issue be sealed, and the Court's independent review of the electronic docket of this case

indicates that the exhibit is not sealed. Accordingly, the Court will deny the motions as moot to the extent they seek to unseal Doc. 122-1.

The Court will also deny Plaintiffs' motions to the extent they seek to "remove any and all current seals placed on the record in the above captioned matter." (Doc. 163 at 2). Plaintiffs have not identified any other documents that are sealed, nor have they identified why there is good cause to lift the seals of those documents. Given the voluminous record of this case, the Court will not undertake the burden of independently reviewing every document to determine whether it is sealed and whether there is good cause to lift the seal in accordance with Plaintiff's request.

Thus, **IT IS HEREBY ORDERED** that Plaintiffs' motions to remove a seal (Doc. 163, 167) are **DENIED**.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SHARIFF BUTLER and JEREMEY MELVIN, Plaintiffs, v. KEVIN KAUFFMAN, *et al.*, Defendants.	No. 4:19-CV-02171 (Chief Judge Brann)

MEMORANDUM OPINION

MAY 5, 2023

In this prisoner civil rights case, *pro se* Plaintiffs Shariff Butler ("Butler") and Jeremey Melvin ("Melvin"), who are incarcerated in the State Correctional Institution-Huntingdon ("SCI-Huntingdon"), have alleged various civil rights violations by SCI-Huntingdon officials. All of Plaintiff's claims have been either dismissed or terminated on summary judgment in Defendants' favor, with the most recent judgment occurring on March 22, 2023, when I *sua sponte* granted Defendants summary judgment on the sole remaining retaliatory cell search claim.

Presently before me is Plaintiffs' motion to alter or amend judgment, which seeks to reopen this case based on a litany of errors purportedly made by the Court over the last three and a half years. I find that none of Plaintiffs' arguments to alter or amend judgment have merit and I will deny the motion on that basis.

I. BACKGROUND

Plaintiffs initiated this case through the filing of a complaint under 42 U.S.C. § 1983 on December 15, 2019, which the Court received and docketed on December 20, 2019.[1] The complaint raises civil rights claims arising from (1) SCI-Huntingdon's purported refusal to grant Plaintiffs single-cell status, (2) SCI-Huntingdon's alleged failure to mitigate fire safety risks, (3) SCI-Huntingdon's alleged denial of recreation time and time in the prison yard, (4) SCI-Huntingdon's allegedly inadequate ventilation system, (5) alleged overcrowding and understaffing in SCI-Huntingdon, (6) an alleged infestation of vermin in SCI-Huntingdon, and (7) alleged retaliation against Plaintiff Butler.[2] The complaint raises claims for violation of the First and Eighth Amendments as well as state law claims for breach of contract and "breach of duty."[3]

I dismissed the complaint in part on September 2, 2020.[4] Specifically, I dismissed all claims against Defendants Wetzel, Moore Smeal, Roberts, Kashmere, Bickell, Wenerowicz, Varner, Moore, Oliver, Thomas, Brumbaugh, Eberling, Harker, and Barr for Plaintiffs' failure to allege their personal involvement and dismissed Plaintiffs' claims relating to Butler's single-cell status as untimely.[5] I

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1 Doc. 1.
2 *Id.*
3 *Id.*
4 Doc. 18.
5 *Id.*

otherwise allowed the complaint to proceed and ordered service of process as to the remaining Defendants. Plaintiffs appealed my partial dismissal order to the United States Court of Appeals for the Third Circuit.[6] The Third Circuit dismissed the appeal for lack of appellate jurisdiction on February 23, 2021.[7] Defendants then answered the complaint on May 7, 2021.[8]

Plaintiffs filed an amended complaint without leave of court or Defendants' consent on August 2, 2021.[9] I struck the amended complaint from the record for Plaintiffs' failure to comply with Federal Rule of Civil Procedure 15 on September 20, 2021.[10] Defendants moved for summary judgment on January 20, 2022, after the close of discovery.[11]

I granted the motion for summary judgment as to all claims and Defendants with the exception of Butler's retaliatory cell search claim against Defendants Kauffman, Reed, and Emigh on July 27, 2022.[12] In doing so, I announced my intention to consider granting summary judgment to the remaining Defendants as to this claim because it appeared that the complaint failed to state a retaliatory cell search claim upon which relief could be granted and because there did not appear

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6 Doc. 23.
7 Doc. 31.
8 Doc. 38.
9 Doc. 42.
10 Doc. 64.
11 Doc. 94.
12 Docs. 134-35.

to be any evidence of a causal connection between Butler's allegedly protected conduct and Defendants' allegedly retaliatory actions.[13] I directed Butler to submit all evidence that he had in support of his retaliatory cell search claim.[14] Butler timely responded and submitted evidence to the Court on August 26, 2022.[15] Upon consideration of that evidence, I granted summary judgment to the Defendants on the retaliatory cell search claim on March 22, 2023.[16] The instant motion to alter or amend judgment followed on April 21, 2023.[17]

II. STANDARD OF REVIEW

To properly support a motion to alter or amend a judgment, often referred to as a motion for reconsideration, a party must demonstrate "at least one of the following: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice."[18] In reviewing for clear error, reconsideration is warranted only if the "[C]ourt is left with the definite and firm conviction that a mistake has been committed."[19] Thus, to warrant reconsideration, the moving party "must show more than mere

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13 *See* Doc. 134 at 26; Doc. 135 at 2.
14 *Id.*
15 Doc. 141.
16 Docs.
17 Doc. 168.
18 *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 87 (3d Cir. 2017) (cleaned up).
19 *Prusky v. ReliaStar Life Ins. Co.*, 532 F.3d 252, 258 (3d Cir. 2008) (internal quotation marks omitted).

disagreement with the earlier ruling" and must show that the court "committed a direct, obvious, or observable error, and one that is of at least some importance to the larger proceedings."[20]

Motions for reconsideration "cannot be used to reargue issues that the court has already considered and disposed of."[21] Additionally, a motion for reconsideration "may not be used to present a new legal theory for the first time" or "to raise new arguments that could have been made in support of the original motion."[22]

III. ANALYSIS

I will address Plaintiffs' arguments for reconsideration *seriatim*. Plaintiffs' first argument arises from three pages that are missing from one of their summary judgment exhibits.[23] The exhibit, the Pennsylvania Department of Corrections' Code of Ethics for DOC employees, was cited by Plaintiffs as a "unilateral contract" that gives rise to their state law breach of contract and "breach of duty"

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[20] *In re Energy Future Holdings Corp.*, 904 F.3d 298, 312 (3d Cir. 2018) (cleaned up).

[21] *McSparren v. Pennsylvania*, 289 F. Supp. 3d 616, 621 (M.D. Pa. 2018) (citing *Blanchard v. Gallick*, No. 1:09-CV-01875, 2011 WL 1878226 at *1 (M.D. Pa. May 17, 2011)).

[22] *MMG Ins. Co. v. Guiro, Inc.*, 432 F. Supp. 3d 471, 474 (M.D. PA. 2020) (citing *Vaidya Xerox Corp.*, No. 97-CV-00547, 1997 WL 732464, *2 (E.D. Pa. Nov. 25, 1997)).

[23] Doc. 169 at 7-10. The relevant exhibit is docketed at Doc. 122-1. It appears from the record that the pages in question were not scanned into the Court's electronic system after they were received in the mail from Plaintiffs due to the Clerk's Office employee who received the documents erroneously failing to realize that the document was printed double sided. The original copy of the document was not retained by the Court such that this scanning oversight could be corrected.

claims.[24] I granted summary judgment to Defendants on both claims on July 27, 2022, noting that Plaintiffs' argument misconstrued the definition of a unilateral contract and appeared to assert that they were entitled to enforcement of the contract even if they were not parties to the contract.[25] I explained that contrary to Plaintiffs' argument a unilateral contract was not a contract that bound only one party, but rather a contract formed by only one promise.[26] Thus, I granted summary judgment on the breach of contract and breach of duty claims because, even assuming *arguendo* that the Code of Ethics was a contract, Plaintiffs had not produced any evidence to show that they were parties to the contract.[27]

Plaintiffs argue that reconsideration is warranted because the missing pages of their exhibit indicate that DOC correctional officers are required to read, sign, and comply with the Code of Ethics.[28] This argument is without merit. A requirement that correctional officers were required to read, sign, and comply with the Code of Ethics at most indicates that correctional officers are parties to the Code of Ethics as a contract; it does not establish in any way that *Plaintiffs* were parties to the contract.

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[24] *See* Doc. 124 at 32.
[25] Doc. 134 at 27-28.
[26] *Id.*
[27] *Id.* at 28.
[28] Doc. 169 at 9.

Plaintiffs' second argument is that the missing pages of Doc. 122-1 also support reconsideration of the Court's Memorandum and Order granting summary judgment to Defendant Kauffman on the retaliatory cell search claim.[29] In the relevant portion of the Memorandum Opinion, I found that Kauffman was entitled to summary judgment because the only allegation against Kauffman was that he denied Butler's grievance about the allegedly retaliatory cell search, which was not a sufficiently adverse action to support a retaliation claim.[30] Plaintiffs argue that the retaliatory cell search claim against Kauffman is not based on his actions in denying Butler's grievance, but rather Kauffman's refusal to review video evidence from the incident.[31] Plaintiffs argue that the missing pages of the Code of Ethics would support this claim because it would show that Kauffman had an affirmative duty to review the video evidence under the Code of Ethics.[32]

This argument is without merit. Plaintiffs' complaint makes no allegation that Kauffman refused to review video evidence. To the contrary, the complaint alleges that Kauffman denied Butler's grievance after "(allegedly) reviewing camera footage of the event."[33] The obtuse and indirect parenthetical usage of "(allegedly)" was not sufficient to put Defendants or the Court on notice that

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[29] *Id.* at 10-12.
[30] Doc. 159 at 9.
[31] Doc. 169 at 11.
[32] *Id.*
[33] *See* Doc. 1 ¶ 283.

Plaintiffs were alleging that Kauffman refused to review video evidence. Accordingly, because Plaintiffs' second argument for reconsideration is based on a claim that was not properly pleaded in Plaintiffs' complaint, I will deny the argument.

Plaintiffs' third argument is that I did not have the authority to *sua sponte* grant summary judgment to Defendants on the retaliatory cell search claim.[34] This argument is meritless. District courts may grant summary judgment *sua sponte* as long as they have provided notice of the intention to do so and an opportunity to respond.[35] That is exactly what I did.[36]

Plaintiffs' fourth argument is that I erred by citing the summary judgment standards enumerated in *Anderson v. Liberty Lobby, Inc.*,[37] in granting summary judgment.[38] This argument is completely frivolous. *Anderson* is binding Supreme Court precedent, and as any first-year law student can attest, it is a foundational precedent for understanding summary judgment proceedings under Federal Rule of Civil Procedure 56.

Plaintiffs' fifth argument is that I erred in concluding that Plaintiffs' yard, recreation, ventilation, and vermin claims were untimely. In the relevant portion of

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34 Doc. 169 at 15-16.

35 *See, e.g.*, *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 (3d Cir. 2018).

36 *See* Doc. 134 at 26 (announcing intention to grant summary judgment *sua sponte* and directing plaintiffs to respond to and submit relevant evidence); Doc. 135 at 2 (same).

37 477 U.S. 242 (1986).

38 Doc. 169 at 17-18.

my opinion, I found that the claims were untimely because Plaintiffs were aware of the conditions giving rise to the claims since 2003 and 2007 but did not bring the claims until 2019.[39] I acknowledged Plaintiffs' reliance on the continuing violations doctrine, but found this reliance misplaced because the doctrine does not apply when the facts giving rise to the claim have a degree of permanence triggering the plaintiffs' duty to assert his rights or when the plaintiff is aware of his injury at the time it occurs, both conditions that I found were present in the instant case.[40] Plaintiffs argue, essentially, that these rules of law were overruled by the statement in *Randall v. City of Philadelphia*, that the continuing violations doctrine applies "when a defendant's conduct is part of a continuing practice."[41]

This argument is also meritless. *Randall* does not contradict the cases I relied on—*Wisniewski v. Fisher*[42] and *Montanez v. Sec'y Pa. Dep't of Corrs.*[43] All three cases define the continuing violations doctrine in an indistinguishable manner and nothing in *Randall* indicates an intention to question or overrule *Wisiewsnki or Montanez*.[44] *Wisniewski* and *Montanez* address exceptions to the doctrine that

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39 Doc. 134 at 11-12.

40 *Id.* at 12.

41 919 F.3d 196, 198-99 (3d Cir. 2019); *see also* Doc. 169 at 20 (arguing that the court's logic "can no longer stand" because it is "contradict[ed]" by *Randall*).

42 857 F.3d 152 (3d Cir. 2017).

43 773 F.3d 472 (3d Cir. 2014).

44 *See Randall*, 919 F.3d at 198 (stating that the continuing violations doctrine "postpone[s] the running of the statute of limitations . . . when a defendant's conduct is part of a continuing practice"); *Wisniewski*, 857 F.3d at 158 (noting plaintiff's argument that the continuing violations doctrine rendered his claims timely because "he suffered a continuing wrong"); *Montanez*, 773 F.3d at 481 (noting that under the continuing violations doctrine, "an action is

were not at issue in *Randall*.[45] The fact that *Randall* did not discuss those exceptions does not imply that it overruled the other cases; it simply indicates that the exceptions were not at issue.

Moreover, even if *Randall* did contradict *Wisniewski* and *Montanez*, it cannot overrule those cases because all three were decided by panels of the Third Circuit. A panel of the Third Circuit cannot overrule the decision of an earlier panel of the Third Circuit; the earlier decision can only be overruled by the Supreme Court or by the Third Circuit sitting *en banc*.[46]

Plaintiffs' sixth argument is that I erred in finding that Plaintiff Melvin lacked standing to pursue his single cell claim because I relied on *Transunion LLC v. Ramirez*[47] for a general statement on the law governing standing.[48] Plaintiffs assert that the standard cited from *Transunion* is "not found and/or not located at the case citing specified" and argue that the Court therefore committed a clear error of law by citing *Transunion*.[49]

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timely so long as the last act evidencing the continuing practice falls within the limitations period").

45 *See Wisniewski*, 857 F.3d at 158 (noting that doctrine did not apply because the defendants' actions "had a degree of permanence" that should have triggered plaintiff's awareness of duty to assert his rights (quoting *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001))); *Montanez*, 773 F.3d at 481 ("[T]he continuing violation doctrine does not apply when the plaintiff 'is aware of the injury at the time it occurred.'" (quoting *Morganroth & Morganroth v. Norris, McLaughlin &Marcus, P.C.*, 331 F.3d 406, 417 n.6 (3d Cir. 2003))).

46 *See* Third Circuit Internal Operating Procedure 9.1; *Pareja v. Att'y Gen. of U.S.*, 615 F.3d 180, 190 (3d Cir. 2010).

47 594 U.S. __, 141 S. Ct. 2190 (2021).

48 *See* Doc. 169 at 21.

49 *Id.*

This argument is frivolous. The Court's citation to *Transunion* in the July 27, 2022 Memorandum Opinion contained a minor typographical error; the rule of law cited from *Transunion* appears on page 2203 in the Supreme Court Reporter pagination rather than page 2204 as cited by the Court.[50] Plaintiffs are aware that the rule of law I cited appears on page 2203—they cite page 2203 of *Transunion* for the very same proposition on the very next page of their brief—but they nevertheless devote four pages of their brief to argue that I somehow misapplied *Transunion* by citing page 2204 of the opinion rather than page 2203. I will not disturb a judgment issued nearly a year ago based on a minor typographical error.

Plaintiffs' seventh argument is that Melvin did have standing to pursue his single cell claim based on principles enumerated in *Transunion*.[51] This argument could have been raised prior to my original ruling and I will accordingly not consider it here.[52]

Plaintiffs' eighth argument is that I erred in granting summary judgment on their fire safety claim based on a finding that Plaintiffs failed to present any evidence that the alleged fire safety hazards created a substantial risk of serious

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[50] *See* Doc. 134 at 14 n.71; *Transunion*, 141 S. Ct. at 2203 ("To establish . . . .standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.").

[51] Doc. 169 at 22-24.

[52] *See MMG Ins. Co.*, 432 F. Supp. 3d at 474 ("A motion for reconsideration may not be used to present a new legal theory for the first time.").

harm.[53] Plaintiffs argue that I abused my discretion by failing to cite any legal authorities in the paragraph in which I reached this conclusion.[54]

This argument is frivolous. It is hornbook law that a plaintiff opposing a motion for summary judgment must produce evidence in support of his claims and cannot rely simply on allegations to defeat the motion.[55] Plaintiffs' editorial opinions as to how frequently I should cite this law in my summary judgment rulings is not sufficient to grant reconsideration.

Plaintiffs' ninth argument takes issue with my statement regarding the district court and circuit court opinions in *Tillery v. Owens*.[56] In the relevant portion of the opinion, I stated the following:

> Instead of offering expert testimony or other evidence as to what fire safety measures SCI-Huntingdon should implement, Plaintiffs appear to rely entirely on the findings of fact by the district court and affirmed by the circuit court in *Tillery v. Owens*, where the court found that numerous fire safety hazards violated the Eighth Amendment. That case, however, concerned the conditions of confinement in the State Correctional Institution-Pittsburgh ("SCI-Pittsburgh") in the late 1980s and early 1990s, and the court relied heavily on the testimony of an expert witness in reaching its factual conclusions. Findings of fact from a different case concerning the conditions of confinement in a different prison decades before the facts of this case cannot simply be transplanted to the present case, and nothing in the Western District or Third Circuit's opinions in *Tillery* create *per se* rules of constitutionality that must be followed in this case. Accordingly, because Plaintiffs have offered no evidence of a substantial risk of

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[53] Doc. 169 at 24.
[54] *Id.*
[55] *See, e.g., Anderson*, 477 U.S. at 248-49.
[56] *See Tillery v. Owens*, 719 F. Supp. 1256 (W.D. Pa. Aug. 15, 1989); *Tillery v. Owens*, 907 F.2d 418 (3d Cir. 1990).

> serious harm, I will grant the motion for summary judgment with respect to the fire safety claim.[57]

Plaintiffs argue that this passage implies that no litigants may ever cite case law in support of their position.[58] They additionally argue they were not required to produce expert testimony at the summary judgment stage.[59] There is no merit to these arguments. The purpose of citing case law is to provide controlling rules of law to the court or to persuade the court by drawing attention to factually analogous cases; case law cannot be used to establish facts. My ruling simply stated that the existence of facts in *Tillery* did not establish (or even imply) that the same facts existed in the present case. *Tillery* could support Plaintiffs' position as a factually analogous case if they had introduced any factual support for their claim, but it cannot be imported to establish the facts in the first place.

As for Plaintiffs' argument regarding expert testimony, they are correct that they are not required to produce expert testimony at the summary judgment stage, but they still must produce some kind of evidence in support of their claim.[60] My reference to expert testimony was simply an example to indicate Plaintiffs' lack of evidence in support of their claim.[61]

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[57] Doc. 134 at 16-17.
[58] Doc. 169 at 25.
[59] *Id.*
[60] *See Anderson*, 477 U.S. at 248-49.
[61] *See* Doc. 134 at 16 ("Instead of offering expert testimony *or other evidence* as to what fire safety measures SCI-Huntingdon should implement Plaintiffs appear to rely entirely on the findings of fact by the district court and affirmed by the circuit court in *Tillery v. Owens* . . . ." (emphasis added)).

Plaintiffs could have defeated summary judgment by producing expert testimony or some other kind of evidence to support their claim, but they did not do so. Reconsideration is accordingly not warranted.

Plaintiffs' tenth and eleventh arguments state that I erred in granting summary judgment on their overcrowding and retaliation claims because contrary to my opinion, the evidence they cited is sufficient to defeat summary judgment.[62] I already considered this evidence and concluded that it was not sufficient to defeat summary judgment; I will not reconsider the evidence here.[63]

Plaintiffs' twelfth argument is that I erred in my definition of a unilateral contract with respect to Plaintiffs' breach of contract and breach of duty claims.[64] This argument is immaterial because, as I noted above and in my original opinion, Plaintiffs have not produced any evidence to show that they were parties to the contract even assuming that a unilateral contract existed.

Plaintiffs' thirteenth argument is that I erred in dismissing Butler's single cell claim as untimely.[65] Plaintiffs argue that the claim is timely because the limitations period was tolled while Butler pursued administrative remedies.[66] Plaintiffs accordingly argue they had two years from the date Butler completed the

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[62] *See* Doc. 169 at 26-30.

[63] *See McSparren*, 289 F. Supp. 3d at 621 (noting that motions for reconsideration "cannot be used to reargue issues that the court has already considered and disposed of.").

[64] Doc. 169 at 30-31.

[65] Doc. 169 at 31-32.

[66] *Id.* at 32.

administrative remedy process—December 19, 2017—to file the claim.[67] Thus, Plaintiffs argue, the claim is timely because it was filed on December 15, 2019, the date they submitted their original complaint to prison officials for mailing.[68]

Plaintiffs are correct that the two-year limitations period for the filing of a § 1983 action is tolled while plaintiffs attempt to exhaust administrative remedies.[69] But Plaintiffs' argument misconstrues the effect of tolling a limitations period: tolling a limitations period simply pauses it or holds it in abeyance; it does not restart the limitations period from zero.[70] Plaintiffs' complaint indicates that Butler was aware of the facts giving rise to his single cell claim no later than August 6, 2017,[71] but did not file a grievance related to those facts until September 20, 2017.[72] Thus, 45 days had already elapsed towards the end of the limitations period at the time Butler filed his grievance, meaning his complaint needed to be filed within 320 days of December 19, 2017, or no later than November 4, 2019, to be considered timely.

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67 *Id.*

68 *See id.* Plaintiffs state the complaint was filed on December 13, 2019, but the complaint indicates it was filed December 15, 2019. *See* Doc. 1 at 48.

69 *See Pearson v. Sec'y Dept. of Corrs.*, 775 F.3d 598, 603 (3d Cir. 2015).

70 *Cf. Artis v. District of Columbia*, 583 U.S. __, 138 S. Ct. 594, 601 (2018) ("Ordinarily, 'tolled,' in the context of a time prescription like § 1367(d), means that the limitations period is suspended (stops running) while the claim is *sub judice* elsewhere, then starts running again when the tolling period ends, picking up where it left off."); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (noting that equitable tolling doctrine "pauses the running of" a statute of limitations).

71 *See* Doc. 1 ¶ 35.

72 *See id.* ¶ 107.

The claim is therefore untimely because Plaintiffs' complaint was not filed until December 15, 2019. I will not reconsider my dismissal of the single cell claim as untimely.

Plaintiffs' fourteenth and final argument is that I erred by denying leave to amend in two orders issued in 2021.[73] In the first order, issued September 20, 2021, I deemed Plaintiffs' request for leave to amend their complaint withdrawn for failure to file a supporting brief as required by Local Rule 7.5.[74] In the second order, issued November 19, 2021, I denied Plaintiffs' motion for extension of time to file a brief in support of the motion, finding that Plaintiffs failed to establish good cause for the requested relief.[75] I acknowledged Plaintiffs' argument that the conditions of their confinement caused by the COVID-19 pandemic constituted excusable neglect for the initial failure to file a supporting brief, but rejected the argument, noting that Plaintiffs did not seek an extension of time until approximately one month after I deemed the motion withdrawn and that they filed three other motions in the interim.[76] "COVID-19," I reasoned, "cannot explain [Plaintiffs'] lack of urgency given the fact that Plaintiffs were able to file three other motions in the interim."[77] Thus, because Plaintiffs had not acted with

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[73] Doc. 169 at 32-33.
[74] Doc. 64 at 1-2.
[75] Doc. 82 at 2-3.
[76] *Id.* at 3.
[77] *Id.*

sufficient diligence, I found that they failed to establish good cause for the requested extension.[78]

Plaintiffs now argue that I gave short shrift to their COVID-19 argument and that COVID-19 did in fact establish good cause for the requested extension.[79] Plaintiffs could have provided this more complete argument before my original ruling, but did not do so. I will deny reconsideration on that basis.[80]

IV. CONCLUSION

For the foregoing reasons, I will deny Plaintiffs' motion to alter or amend judgment.

An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

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[78] *Id.*
[79] *Id.* at 32-33.
[80] *See MMG Ins. Co.*, 432 F. Supp. 3d at 474

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1761

SHARIFF BUTLER; JEREMEY MELVIN,
Appellants

v.

JOHN E. WETZEL, Secretary of the Department of Corrections; SHIRLEY MOORE SMEAL, Executive Deputy of the Department of Corrections; MELISSA ROBERTS, Former DOC Policy Coordinator; DIANE KASHMERE, Current DOC Policy Coordinator; TABB BICKELL, Executive Deputy Secretary for Institutional Operations; MICHAEL WENEROWICZ, Regional Deputy Secretary; DORINA VARNER, Chief Grievance Coordinator; KERI MOORE, Assistant Chief Grievance Coordinator; KEVIN KAUFFMAN, Superintendent at SCI-Huntingdon; LONNIE OLIVER, Former Deputy Superintendent for Facilities Management at SCI-Huntingdon; JOHN THOMAS, Former Deputy Superintendent for Centralized Services at SCI-Huntingdon; BYRON BRUMBAUGH, Current Deputy Superintendent for Facilities Management at SCI-Huntingdon; WILLIAM S. WALTERS; BRIAN HARRIS, Captain/Shift Commander at SCI-Huntingdon; MANDY SIPPLE, Former Major of Unit Management at SCI-Huntington; ANTHONY E. EBERLING, Security Lt. at SCI-Huntingdon; BRUCE EWELL, Facility Maintenance Manger III at SCI-Huntington; CONSTANCE GREEN, Superintendent's Assistant/Grievance Coordinator at SCI-Huntingdon; ROBERT BILGER, Safety Manger at SCI-Huntingdon; PAULA PRICE, Health Care Coordinator at SCI-Huntington; MICHELLE HARKER, Nurse Supervisor at SCI-Huntingdon; ANDREA WAKEFIELD, Records Supervisor at SCI-Huntingdon; GEORGE RALSTON, Unit Manager at SCI-Huntingdon; ALLEN STRATTON, Unit Counselor at SCI-Huntingdon; JOHN BARR, Correctional Officer at SCI-Huntingdon; J. REED, Correctional Officer at SCI-Huntingdon; T. EMIGH, Correctional Officer at SCI-Huntingdon

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(D.C. Civil No. 4:19-cv-02171)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES and CHUNG, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the the Court en banc, is denied.

BY THE COURT,

s/ David J. Porter
Circuit Judge

Date: May 14, 2024
Tmm/cc: Shariff Butler
Jeremey Melvin
Sean A. Kirkpatrick, Esq.

Additional material from this filing is available in the Clerk's Office.