IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT M. KRUTKO,	:	
	:	**Case No. 2:11-cv-610**
Plaintiff,	:	
	:	**JUDGE ALGENON L. MARBLEY**
v.	:	
	:	
FRANKLIN COUNTY, OHIO, *et al.*,	:	**Magistrate Judge Norah M. King**
	:	
Defendants.	:	
	:	

OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court pursuant to the Sixth Circuit's remand order issued upon resolution of Defendants' interlocutory appeal. Defendants filed a Motion for Summary Judgment on August 31, 2012, (Doc. 34). On June 13, 2013, this Court denied that motion with respect to Plaintiff's conditions of confinement claims brought under 42 U.S.C. § 1983 and Ohio Revised Code ("O.R.C.") § 2744 against jail guards Tressa Lawler, Carol Turner, Teresa Hatzer, Kristopher Koller, John Penix, and Jeffrey Harrow (collectively, the "Deputies"), finding the Deputies were not protected by qualified or state law immunity. Subsequently, the Sixth Circuit vacated the Court's ruling as to the Deputies and remanded the case to this Court to conduct an "individualized analysis," assessing the culpability of each of the Deputies individually. (Doc. 46). For the reasons stated herein, Defendants' Motion is **DENIED**.

II. BACKGROUND

Plaintiff, Robert M. Krutko ("Krutko" or "Plaintiff"), was incarcerated in Franklin County Corrections Center II ("FCCCII") from November 4, 2009 to February 13, 2010. (Doc. 34 at 3). Plaintiff's original action was brought against the following Defendants: (1) Franklin

County, Ohio; (2) Franklin County Sheriff Zach Scott; (3) Franklin County Director of Public Facilities Management James Goodenow; (4) the Deputies, employed by FCCCII, sued in their official and individual capacities; and, (5) Mental Health Liaison, Douglas Hahn, also employed by FCCCII. (*Second Am. Compl.*, Doc. 30). The Deputies are the only remaining Defendants. (*Opinion and Order*, Doc. 43). From November 17 to November 20, 2009, Plaintiff was held in an area of FCCCII called "1 South 9," colloquially known to staff and inmates as "the Hole." (Doc. 30 at 3). The Hole is a temporary holding cell designed, for the purpose of infectious disease control, as a negative air flow space. It is also used to house inmates with other medical or mental health issues. (Doc. 34 at 3).

Plaintiff avers that on one of the days, unspecified, while he was in the Hole, the toilet in the cell "rapidly began to overflow with sewage and human excrement." (Doc. 38 at 4). As the toilet overflowed, spewing sewage onto the wall and floor of the cell, Plaintiff was asleep on the floor of the cell. (*Id*.). He was awakened by the shouts of his two cellmates, but by the time he arose, "most of his body and clothing were covered with the sewage." (*Id*.). The three inmates pounded on the door for help as the sewage rose to nearly two inches in certain areas of the cell.

Plaintiff alleges the Deputies – jail guards Lawler, Turner, Hatzer, Koller, Penix, and Harrow – came to the cell door multiple times and cursed, laughed, and insulted the three inmates as the cell filled with sewage. (Doc. 30 at ¶ 26; Doc. 38 at 4). He also claims the Deputies did not release him from the cell for approximately 25 minutes following the overflow, and did so only after the cellmates pushed the sewage under the cell door into the hallway. (Doc. 30 at ¶ 28-29; Doc. 38 at 4). Once Plaintiff was removed from the cell, he was transferred to another cell that smelled of excrement. (Doc. 38 at 4). He maintains that he begged the guards for a shower or soap, requests that were denied. Instead, he only was brought a new smock to

wear. After he retched, which he attributes to being covered head-to-toe in excrement, he was transferred to the medical department where he was again denied soap and permission to shower. (*Id*.). After "about five or six days," Plaintiff was returned to the general population and was allowed to shower for the first time since the incident occurred. (*Id.* at 5).

Defendants' records from the facility do not corroborate Plaintiff's account in multiple instances. First, Defendants' maintenance records do not show any instance of a plumbing malfunction in "1 South 9" on the dates indicated by Plaintiff. Second, Defendants' records show Plaintiff spent only three days in the Hole, from November 17 to November 20, when he was returned to the general population. (Doc. 34-2 at ¶ 7). Third, Defendants' records contain no mention of Plaintiff spending "about five or six days" in the "medical department," or any other specialized unit on or about the dates in question. Fourth, although Plaintiff's pleadings allude to "constant sewage back-ups" and "[Defendants'] policy and custom of not thoroughly cleaning the cells . . . after sewage backups and overflows," Plaintiff neither cites specific examples nor provides evidence of those allegations. (Doc. 30 at 5).

Plaintiff brought claims against the Deputies under 42 U.S.C. § 1983, claiming deliberate indifference to his conditions of his confinement in violation of his constitutional rights, and negligence and intentional infliction of emotional distress in violation of Ohio law.[1]

On August 31, 2012, the Deputies moved for summary judgment on the grounds that Plaintiff's § 1983 claim is barred by qualified immunity and his state law tort claims are barred by Ohio statutory immunity. (Doc. 34). In an opinion issued on June 13, 2013, the Court denied the Deputies' motion on both grounds, holding that the Deputies' alleged actions violated Plaintiff's clearly established constitutional rights and constituted reckless conduct. S*ee Harlow*

[1] Krutko also brought various claims against the other original Defendants, but this Court granted summary judgment to each of the Defendants except the Deputies. (*See* Doc. 43). Plaintiff did not appeal the Court's grant of

v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Ohio Rev. Code § 2744.03.

On May 16, 2014, the Sixth Circuit Court of Appeals issued its Opinion, (Doc. 46), vacating this Court's Opinion and Order denying qualified immunity and Ohio statutory immunity for the Deputies (Doc. 43). The Court of Appeals held that this Court "failed to assess the individual culpability of each defendant" and thus remand was necessary in order for this Court to "set forth with precision the basis for its decision" to deny the Deputies qualified and state law immunity. (Doc. 46 at 4). Specifically, the Sixth Circuit held that this Court must identify the evidence demonstrating each Deputy's indifference to Krutko's position to show that each individual had a sufficiently culpable state of mind. (*Id*.).

Accordingly, on August 20, 2014, the Court ordered the Parties to submit briefing addressing the issues of qualified immunity and Ohio statutory immunity, including, specifically, "whether each individual defendant had a sufficiently culpable state of mind." (Doc. 49) (quoting Doc. 46 at 4). The parties submitted simultaneous cross-briefs on September 10, 2014, followed by simultaneous response briefs filed on September 24, 2014. This matter is now ripe for review.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides, in relevant part, that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." A fact is deemed material only if it "might affect the outcome of the lawsuit under the governing substantive law." *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir.1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)).

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summary judgment with respect to his other claims.

The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339–40 (6th Cir. 1993). The suggestion of a mere possibility of a factual dispute is insufficient to defeat a movant's motion for summary judgment. *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir. 1992) (citing *Gregg v. Allen–Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). Summary judgment is inappropriate, however, "if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

The necessary inquiry for this Court in determining whether summary judgment is appropriate is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251–52). In evaluating such a motion, the evidence must be viewed in the light most favorable to the nonmoving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *See Anderson*, 477 U.S. at 251; *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995).

Rule 56(e) requires that affidavits submitted in support of, or in opposition to motions for summary judgment include facts based on personal knowledge, and that personal knowledge "must be evident from the affidavit." *Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F.Supp.2d 948, 956 (S.D. Ohio 2000). Affidavits at the summary judgment stage also may not rely upon inadmissible hearsay because inadmissible hearsay "cannot create a genuine issue of material fact." *North American Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 83 (6th Cir. 1997).

IV. LAW AND ANALYSIS

A. Qualified Immunity

To state a claim under 42 U.S.C. § 1983, a plaintiff must set forth facts that, when construed in his favor, demonstrate the deprivation of a right secured by the Constitution or laws of the United States caused by a person acting under the color of state law. *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006) (citing *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)). The doctrine of qualified immunity shields government officials performing discretionary functions from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *see also Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 538-39 (6th Cir. 2008).

To determine if the Deputies are entitled to qualified immunity, the question is whether the facts, viewed in the light most favorable to Plaintiff, show a violation of a clearly established constitutional right. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001)); *Phillips*, 534 F.3d at 538–39. Plaintiff bears the burden to demonstrate as much. *See Rodriguez v. Passinault*, 637 F.3d 675, 689 (6th Cir. 2011).[2]

1. Whether There Was A Constitutional Violation

The Deputies argue that, even construing facts in the most favorable light for Plaintiff, Plaintiff's allegations do not amount to a constitutional violation. In *Koch v. County of Franklin*, No. 2:08-cv-1127, 2010 WL 2386352 (S.D. Ohio, June 10, 2010), another case involving

[2] "[I]n a suit against government officials for an alleged violation of a constitutional right, the court—not the jury—must consider the 'threshold question' of whether 'the facts alleged show the officer's conduct violated a constitutional right.'" *Phillips v. Roane Cnty., Tenn.*, 534 F.3d 531, 539 (6th Cir. 2008) (citing *Saucier*, 533 U.S. at 201, noting that "[D]eny[ing] summary judgment any time a material issue of fact remains on the [deliberate indifference claim]…could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." (internal quotations omitted)).

allegations of unsanitary conditions in a Franklin County detention facility, this Court summarized the relevant standards, established by the Supreme Court and Sixth Circuit case law, by which to determine whether a constitutional violation relating to conditions of confinement has occurred:

> A claim for failure to prevent harm will succeed where prison officials act with "deliberate indifference" towards conditions at the prison that created a substantial risk of serious harm. *Farmer*, 511 U.S. at 834; *Woods v. Lecureux*, 110 F.3d 1215, 1222 (6th Cir.1997) ("To establish liability under the Eighth Amendment for a claim based on a failure to prevent harm to a prisoner, appellant must prove that appellees acted with "deliberate indifference" to a substantial risk of serious harm."). This test involves both an objective and subjective component. "First, the deprivation alleged must be, objectively, 'sufficiently serious,'; a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities,'" *Farmer*, 511 U.S. at 834 (internal citations omitted). . . . To satisfy the subjective component, "an inmate must show that prison officials had "a sufficiently culpable state of mind." *Id*. Although the deliberate indifference standard "describes a state of mind more blameworthy than negligence," this standard is satisfied if "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. at 835, 837…."Additionally, the prisoner must demonstrate that the risk is one which society deems so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Talal v. White*, 403 F.3d 423, 426 (6th Cir.2005) (quotation and emphasis omitted).

Koch, 2010 WL 2386352 at *12-13. Deliberate indifference to a substantial risk of harm "is the equivalent of recklessly disregarding that risk." *Phillips*, 534 F.3d at 541 (quoting *Farmer*, 511 U.S. 825, 836 (1994)).

The Court will discuss both the objective and subjective components of the deliberate indifference test in turn.

a. Objective Component

The objective component requires Plaintiff to show that the alleged cruel condition was "sufficiently serious," meaning that the condition resulted in the denial of "the minimal civilized measures of life's necessities." *See Koch*, 2010 WL 2386352 at *12. Plaintiff alleges that he was deprived of proper conditions of confinement and subjected to a substantial risk of serious harm in deliberate indifference to his health and safety as a result of his extended exposure to unsanitary conditions. In unsanitary conditions cases, to resolve the inquiry of whether the prison officials' acts or omissions are sufficiently serious, the Court must examine the length of time of the allegedly cruel condition – in this case, exposure to the unsanitary conditions. *Dyer v. Hardwick*, No. 10-CV-10130, 2011 WL 4036681, at *9 (E.D. Mich. Aug. 1, 2011) *report and recommendation adopted*, No. 10-CV-10130, 2011 WL 3918412 (E.D. Mich. Sept. 7, 2011). Courts have also found that, while the length of time of exposure is one factor of the inquiry, "equally important is the degree of filth endured." *McBride v. Deer*, 240 F.3d 1287, 1291–92 (10th Cir.2001); *Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir.1994)).

Viewed in the light most favorable to Plaintiff, the facts show that, because Plaintiff was initially lying on the floor when the sewage began flowing from the toilet, raw sewage covered and soaked his clothes and body. Plaintiff describes the smell as "noxious" and avers that it "burned [his] nostrils" and caused him to gag. (Doc. 30 at 4). Indeed, he retched "violently" as a result of being covered in the filth and sewage. Despite being covered in excrement, Plaintiff was denied personal hygiene items to clean himself, including soap and a toothbrush. Although Plaintiff was given a new smock to wear, he was denied access to a shower for several days. Plaintiff developed scratches and scabs as a result of trying to remove the sewage from his body. From this, the Court concludes that, because of the degree of filth Plaintiff endured, and the fact

that the filth festered for several days, the conditions of Plaintiff's confinement were sufficiently serious and resulted in the denial of the minimal civilized measures of life's necessities.

The Court notes decisions from other Circuits which have found exposure to unsanitary conditions for limited duration does not rise to the level of a constitutional violation. *See, e.g.*, *White v. Nix*, 7 F.3d 120 (8th Cir. 1993) (Court of Appeals held there was no constitutional violation where inmate was housed in a cell with reduced ventilation for eleven days and magistrate found the cell was not covered with feces as plaintiff had alleged.); *Harris v. Fleming*, 839 F.2d 1232, 1235-36 (7th Cir. 1988) (Court of Appeals held there was no constitutional violation where plaintiff had not received certain hygienic items, such as toilet paper, for four days and cell contained cockroaches because Defendants had not acted with deliberate indifference and had taken steps to correct the problems.). In addition, courts have held that the denial of personal hygiene products for a limited duration of time does not necessarily rise to the level of a constitutional violation. *See, e.g.*, *Flanory v. Bonn*, 604 F.3d 249, 254 (6th Cir. 2010) ("Courts have not found the objective component satisfied where the deprivation of hygiene items was temporary."); *Crump v. Janz*, No. 1:10–cv–583, 2010 WL 2854266, at *4 (W.D.Mich. July 19, 2010) (holding complaint failed to plead an Eighth Amendment violation where inmate asserted "lack of deodorant, toothbrushes, toothpaste, postage, typing and carbon paper, and legal envelopes for 35 days").

Plaintiff's case is distinguishable, however, because his situation compounded an extensive degree of filth – being covered head-to-toe in excrement for three to five days – with the deprivation of a shower or other hygiene products that would allow him to rid himself of the filth in which he was covered. For these reasons, the Court concludes that the cruel condition Plaintiff has alleged was sufficiently serious to satisfy the objective component of the deliberate

indifference test.

b. Subjective Component

To succeed on a claim of deliberate indifference to conditions of confinement, Plaintiff must show that, when the facts are viewed in the light most favorable to him, each Deputy "subjectively perceived facts from which to infer substantial risk [to Krutko], . . . in fact dr[e]w the inference, and . . . then disregarded that risk." *Krutko v. Franklin Cnty., Ohio, et al*. 559 F. App'x 509, 511-12 (6th Cir.2014), Doc. 46, (quoting *Phillips*, 534 F.3d at 540). Thus, this Court is tasked to "consider whether each individual defendant had a sufficiently culpable state of mind." *Phillips*, 534 F.3d at 542. *See also Bishop v. Hackel*, 636 F.3d 757, 768 (6th Cir. 2011) ("[W]e must focus on whether each individual Deputy had the personal involvement necessary to permit a finding of subjective knowledge."); *Bennett v. Schroeder*, 99 Fed. Appx. 707, 712-13 (6th Cir. 2004) ("To state a cognizable § 1983 claim, the plaintiff must allege some personal involvement by [sic] each of the named defendants.") (internal quotations omitted); *Koch*, 2010 WL 2386352 at *12. Although the requisite state of mind involves something "more than mere negligence," Plaintiff is not required to show that the deputies acted with the "very purpose of causing harm or with knowledge that harm [would] result." *Phillips*, 534 F.3d at 540, (citing *Farmer v. Brennan*, 511 U.S. at 842).

Generally, officials do not readily admit the subjective component, of course. For that reason, "it is permissible for reviewing courts to infer from circumstantial evidence that a prison official had the requisite knowledge." *Phillips*, 534 F.3d at 541. While a Plaintiff must put forth more than broad and conclusory allegations showing each Deputy possessed the necessary knowledge or mental state, in the Sixth Circuit, there is no "rule that plaintiffs cannot present general allegations to prove that each individual defendant has the requisite knowledge for

deliberate indifference." *Id.* at 542. In *Phillips*, for example, the Sixth Circuit determined that there was sufficient evidence to allow a trier of fact to infer that each individual corrections officer was aware of the seriousness of an inmate's ailment, based in part on the fact that the inmate's deteriorating physical condition was obvious. *Id.*

Defendants argue that Plaintiff is unable to show that Deputy each of the Deputies had "any, let alone enough" personal involvement with him to be subjectively aware of the conditions of his confinement. (Doc. 34 at 10; Doc. 50 at 12-13). According to Defendants, the three female deputies – Lawler, Turner, and Hatzer – were prohibited from directly monitoring male inmates as per Franklin County Sherriff's Office policy. (*Id*. at 3-4). In addition, Deputy Koller, Defendants maintain, did not work the same shift as the other five deputies and his duties during his shift "had nothing to do with the area where Krutko was housed." (*Id*. at 5). Moreover, Defendants argue that from November 17 to 19, 2009, each Deputy was either not on duty, assigned to areas separate from the "1 South 9" building where Plaintiff was housed during the alleged sewage overflow, and/or were responsible for tasks unrelated to Plaintiff's confinement or location. (*Id*. at 3-5). Each Deputy submitted an affidavit indicating he or she had no involvement with Plaintiff during the relevant time period. (*See* Doc. 34, Exhibits 4-8, 10).

Plaintiff claims that "[g]uards, including HATZER, LAWLER, KOLLER, HARROW, PENIX, and TURNER" came up to the door to the 'hole' several times and laughed at the Plaintiff and other inmates. Plaintiff also claims that "[t]he guards also cursed at the three inmates and called them numerous insulting names while the room continued to fill with sewage and excrement." (Doc. 30 at ¶ 26). After approximately 25 minutes in the Hole while sewage was "continuously flowing," Plaintiff avers that Deputy Hatzer, Deputy Lawler, Deputy Koller,

Deputy Harrow, Deputy Penix, and Deputy Turner "angrily removed the Plaintiff and the other prisoners," only after Plaintiff and his cellmates had pushed the raw sewage under the cell door into the lobby. (*Id*. at ¶ 28-29). Thus, Plaintiff's allegations state personal involvement and knowledge by each of the individual named Deputies. Although Plaintiff does refer to "the guards," he does so after naming each of the six Deputy Defendants by name and specifying their involvement with and knowledge of his predicament. (*See, e.g.*, Doc. 30 at ¶ 26, ¶ 29).

In the light most favorable to Plaintiff, the facts show that Deputy Lawler, Deputy Turner, Deputy Hatzer, Deputy Koller, Deputy Penix, and Deputy Harrow each individually knew of, and was recklessly indifferent to, Plaintiff's predicament. Each Deputy demonstrated indifference by taking part in cursing at and insulting the inmates, and by delaying in removing the inmates from the cell. Forcing Plaintiff and his cellmates to remain covered in sewage, a predicament that would be obvious to any observer simply by looking at Plaintiff and from smelling the vile odor that undoubtedly would be emanating from the area, and denying provision of personal hygiene products thereafter demonstrates that each named Deputy possessed a sufficiently culpable state of mind under the deliberate indifference standard. Although Plaintiff's allegations may be general, the Sixth Circuit allows Plaintiff to present general allegations to demonstrate individual defendants had the requisite knowledge to prove deliberate indifference. *Phillips*, 534 F.3d at 542 (finding that there is no rule that "plaintiffs cannot present general allegations to prove that each individual defendant has the requisite knowledge for deliberate indifference.").

To be sure, there is evidence that indicates Plaintiff's version of events is unlikely. For instance, Plaintiff has named Deputy Lawler, Deputy Turner, and Deputy Hatzer as Defendants even though, as female guards, they are prohibited from directly overseeing male inmates and

were not assigned to the area of the prison where he was housed. Also, none of the shift or maintenance logs where deputies would usually record an incident such as an overflowing toilet, which would lead them to remove inmates from a cell, contains any mention of such an incident. Additionally, Deputy Koller was working a separate shift from the others.

Even so, the Court cannot say that a reasonable jury might not accept Plaintiff's testimony as true. In addition, Plaintiff's wife states in her affidavit that during a visit to FCCCII on or around November 20, 2009, she could "see that [Plaintiff's] skin and clothing contained dried material and stains which resembled urine and feces." (*Aff. of Laura Krutko*, Doc. 38-2 at 2). In light of the testimony of Plaintiff and his wife, a jury could conclude, for example, that FCCCII's records are incomplete or falsified, or that Deputy Lawler, Deputy Turner, Deputy Hatzer, Deputy Penix, and/or Deputy Koller had been called in, even against protocol, to observe the inmates' predicament or to assist in the situation. The parties' contradictory affidavits raise disputed issues of material fact.

This Court concludes that Plaintiff has attested that Deputy Lawler, Deputy Turner, Deputy Hatzer, Deputy Koller, Deputy Penix, and Deputy Harrow, each of the named deputies, were personally and individually involved Plaintiff's alleged injury, an injury that, if Plaintiff's account is believed, is a constitutional violation.

2. Whether The Right Is Clearly Established

A right is clearly established if the contours of the right are sufficiently clear that a reasonable government official would understand that what he is doing violates that right. *Harris v. City of Circleville*, 583 F.3d 356, 366–67 (6th Cir. 2009) (citation omitted). To determine whether a right is clearly established such that a reasonable government official should have known that what he did violated that right, the Supreme Court has instructed courts

to look to "cases of controlling authority" or to "a consensus of cases of persuasive authority." *Ashcroft v. al-Kidd*, _ U.S. _, 131 S. Ct. 2074, 2086, 179 L.Ed.2d 1149 (2011) (internal quotation marks omitted).

The Sixth Circuit has recognized that the following conditions can violate the Eighth Amendment: denial of adequate access to shower facilities, threats to safety, vermin infestation, inadequate lighting, inadequate ventilation, unsanitary eating conditions, and housing inmates with known dangerous individuals. *See Wilson v. Seiter*, 893 F.2d 861, 864-65 (6th Cir.1990) (citations omitted), vacated on other grounds by 501 U.S. 294 (1991); *see also Walker v. Mintzes*, 771 F.2d 920, 928 (6th Cir. 1985) (recognizing that inmates have a constitutional right to have the opportunity to bathe).

Moreover, various other Circuits have held that unsanitary conditions of confinement and denial of access to showers and hygiene products may also violate the Eighth Amendment. *See, e.g.*, *Middlebrook v. Tennessee*, No. 07-2373, 2008 WL 2002521, at *11 (W.D. Tenn. May 6, 2008) (finding that sanitation problems, including raw sewage coming from toilets, exposure to mold, and deprivation of hygienic materials and lack of showers and toilets, among other alleged conditions of confinement, "may have violated the Plaintiff's clearly established statutory or constitutional rights."); *Woodward v. Weberg*, No. 2:06-cv-284, 2008 WL 746852, at *7 (W.D. Mich. Mar. 18, 2008) ("It is the opinion of the undersigned that the right to minimally adequate sanitary conditions and hygiene, including the right to toilet paper, has been clearly established."); *Gillis v. Litscher*, 468 F.3d 488, 493 (7th Cir.2006) (determining that a lack of heat, ventilation, proper clothing, utilities, hygienic materials and sanitation can violate the Eighth Amendment) (citations omitted); *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir.1980) (finding that heat, hot and cold water, light, and plumbing must be provided by the state).

In the case *sub judice*, the facts, reviewed in the light most favorable to the Plaintiff, show that he was subjected to significant exposure to unsanitary conditions and extreme filth – namely, being covered head-to-toe in human excrement spewing from an overflowing toilet. Thereafter, despite being covered in sewage, Plaintiff allegedly was denied hygiene items to clean himself or access to a shower for several days. As evidenced by Sixth Circuit precedent and the precedent of other Circuits, a consensus of courts have found that exposure to unsanitary conditions, and denial of access to hygiene products and shower facilities may violate a clearly established constitutional right. The soundness of such a finding is apparent, especially in a case such as this, where Plaintiff's degree of exposure to the unsanitary conditions at issue – human sewage and bodily excrement - was extreme.

Moreover, this Court considers that society deems it a violation of contemporary standards of decency to allow a prisoner to be covered in raw sewage, to delay removing him from the affected area while taunting him, and then to prevent him from cleaning himself for days. To allow an inmate to be covered in sewage for days would meet the very definition of "deliberate indifference." It is unnecessary to explain the potentially serious medical hazards of exposure to raw sewage for an extended period; suffice it to say that the health concerns are significant. If these events transpired as the Plaintiff attests, this Court would find a clear constitutional violation, as such activity is a constitutional violation not merely of recent vintage. The conduct Plaintiff alleges would amount to cruel and unusual punishment, even had it occurred in the early days of this republic. Therefore, Plaintiff's allegations satisfy the *Saucier* test and qualified immunity does not apply to Defendants. To determine whether Plaintiff's account is correct is a question for a trier of fact.

Defendants' Motion for Summary Judgment on Plaintiff's § 1983 claims against Deputy

Lawler, Deputy Turner, Deputy Hatzer, Deputy Koller, Deputy Penix, and Deputy Harrow is, thus, **DENIED**.

B. State Law Immunity

The Sixth Circuit also remanded this matter to the Court to address each Deputy's individual culpability for purposes of determining whether Ohio state law immunity applies to each Deputy. *See Krutko v. Franklin Cnty., Ohio, et al*. 559 F. App'x 509, 511-12 (6th Cir. 2014), Doc. 46, (citing *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 571 (6th Cir.2013)). Ohio law provides an exception to general immunity for "an employee of a political subdivision" when "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code § 2744.03(A)(6)(b).

Under Ohio law, "malice" is the willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified. *See Cook v. Cincinnati*, 103 Ohio App. 3d 80, 90-91, 658 N.E.2d 814, 821 (1995). "Bad faith" involves a dishonest purpose, conscious wrongdoing, the breach of a known duty through some ulterior motive or ill will, as in the nature of fraud, or an actual intent to mislead or deceive another. *Cook*, 103 Ohio App. 3d at 90-91. "Wanton misconduct" is the failure to exercise any care whatsoever toward one to whom a duty of care is owed in circumstances where there is great probability that harm will result. *Anderson v. Massillon*, 134 Ohio St. 3d 380, 387-88, 983 N.E.2d 266, 272 *reconsideration denied*, 2012-Ohio-6209, ¶ 23, 133 Ohio St. 3d 1511, 979 N.E.2d 1289. (citing *Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977)); *see also Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31, 35 (1994). Finally, "reckless conduct" involves the "conscious disregard of or indifference to a known or obvious

risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson*, 132 Ohio St. 3d 380 at 388.

The Deputies urge that the state law claims against them should be dismissed under the immunity offered by O.R.C. § 2744. If Plaintiff's account of events is believed, however, Deputy Hatzer, Deputy Lawler, Deputy Koller, Deputy Harrow, Deputy Penix, and Deputy Turner individually observed, and thus were aware, that Plaintiff was covered in excrement. Further, Deputy Hatzer, Deputy Lawler, Deputy Koller, Deputy Harrow, Deputy Penix, and Deputy Turner each individually laughed at and cursed at Plaintiff and his fellow inmates, delayed in removing Plaintiff from a cell filling with raw sewage, subsequently refused to allow Plaintiff to clean himself and withheld personal hygiene items to do so. Such behavior, at a minimum, constitutes "reckless" conduct by each of the individual Deputies - Deputy Hatzer, Deputy Lawler, Deputy Koller, Deputy Harrow, Deputy Penix, and Deputy Turner. The risk of harm from exposure to toxic human excrement, especially when Plaintiff was not merely exposed to it, but was covered in it, would be obvious to any reasonable person. Moreover, it would be difficult to imagine a purpose for such conduct that was not malicious.

The Court, however, need not decide this inquiry. Ohio courts have held that summary judgment on state law immunity is improper when fact questions remain. *See, e.g., Sampson v. Cuyahoga Metro. Housing Auth.*, 188 Ohio App.3d 250, 935 N.E.2d 98, 107 (2010) ("Factual determinations as to whether conduct has risen to the level of wanton or reckless is normally reserved for trial."); *Alley v. Bettencourt*, 134 Ohio App.3d 303, 730 N.E.2d 1067, 1075 (1999); *Ruth v. Jennings*, 136 Ohio App.3d 370, 736 N.E.2d 917, 921 (1999).

In this case, the parties dispute the conduct and level of involvement of each individual Deputy. Contradictory affidavits have been presented by the Plaintiff and Plaintiff's wife, and

each of the Deputies named. Thus, because issues of fact remain as to each individual Deputy's involvement, it is improper to grant the Deputies immunity under O.R.C. § 2744. Whether each individual Deputy acted with "malicious purpose, in bad faith, or in a wanton or reckless manner" is a question for the trier of fact. *See Cline v. Myers*, 495 F. App'x 578, 583 (6th Cir. 2012) (affirming the district court's denial of summary judgment on Ohio state law immunity grounds where the district court concluded that, under Ohio law, whether the officer acted with "malicious purpose, in bad faith, or in a wanton or reckless manner" was a fact question for the jury.).

For these reasons, Defendants' Motion for Summary Judgment on Plaintiff's state law claims against individual deputies is **DENIED**.

V. CONCLUSION

For the reasons stated above, Plaintiff has raised disputed issues of material fact with regard to the Deputies, Defendants Lawler, Turner, Hatzer, Koller, Penix, and Harrow. Whether each Deputy individually engaged in conduct which caused Plaintiff's alleged injury is a question for a trier of fact. The Motion for Summary Judgment with respect to those six Defendants is, hereby, **DENIED**. Plaintiff's claims against them may proceed to trial.

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: November 26, 2014