STATE OF MICHIGAN
IN THE SUPREME COURT

WAYNE COUNTY JAIL INMATES, et. al.,

Plaintiffs-Appellants,

MSC No.
COA No. 354075
Trial Court No. 71-173217-CZ

v

WILLIAM LUCAS, et. al.,

Defendants-Appellees.

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PLAINTIFFS-APPELLANTS' EMERGENCY BYPASS APPLICATION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

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STATEMENT OF APPELLATE JURISDICTION

On June 19, 2020, the Honorable Timothy M. Kenny entered the order on appeal denying Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Appendix A – 6/19/20 Circuit Court Order). On June 16, 2020, the court entered a related order on appeal, granting Defendants' Motion to Strike the inspection report of Dr. Fred Rottnek (Appendix B – 6/16/20 Circuit Court Order). Under MCR 7.305(C)(1)(a), this Honorable Court has jurisdiction to grant Plaintiffs' application for leave to appeal both Orders because neither Order is a final judgment appealable by right. This application for leave to appeal, filed within 21 days of the dates the Circuit Court entered each Order, is timely, pursuant to MCR 7.305(C)(1)(a) and MCR 7.305(B)(4)(a).

STATEMENT OF QUESTIONS PRESENTED

I. DID THE CIRCUIT COURT ERR WHEN IT DENIED PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WHERE IT 1) IGNORED THE FACTUAL RECORD, 2) INCORRECTLY APPLIED THE FEDERAL CONSTITUTIONAL STANDARD; 3) DECLINED TO APPLY MICHIGAN'S CONSTITUTIONAL STANDARD; AND 4) RELIED ON UNSUBSTANTIATED EXTRAJUDICIAL INFORMATION?

The Circuit Court answers, "No."

Plaintiffs answer, "Yes."

II. DID THE CIRCUIT COURT ERR WHEN IT GRANTED DEFENDANTS' MOTION TO STRIKE THE INSPECTION REPORT OF DR. FRED ROTTNEK WHEN THE CIRCUIT COURT ORDERED THE REPORT BY DR. ROTTNEK TO INCLUDE "OBSERVATIONS" AND "RECOMMENDATIONS" ON THE "CONDITIONS" IN THE JAIL, AND DR. ROTTNEK HAS TWENTY YEARS OF SPECIALIZED KNOWLEDGE AND EXPERIENCE WORKING IN CORRECTIONAL HEALTHCARE?

The Circuit Court answers, "No."

Plaintiffs answer, "Yes."

GROUNDS FOR GRANTING APPLICATION FOR LEAVE TO APPEAL AND RELIEF SOUGHT

Detainees at the Wayne County Jail ("Plaintiffs") asked the Wayne County Circuit Court for protection against unconstitutionally dangerous Jail conditions during the COVID-19 pandemic. It declined. The Circuit Court's order denying Plaintiffs' request for injunctive relief constituted an abuse of discretion which must be overturned because the court:

1. Ignored the factual record;
2. Incorrectly applied the federal constitutional standard;
3. Declined to apply Michigan's constitutional standard; and
4. Relied on unsubstantiated extrajudicial information.

The COVID-19 pandemic has created a health crisis unmatched in living memory, and people incarcerated in jails and prisons are particularly vulnerable to infection and the accompanying risks of serious illness and death. The subject of the instant appeal and the basis for Plaintiffs' emergency request for relief is the need for this Court's ***immediate*** intervention to protect plaintiffs from the unconstitutionally dangerous conditions throughout this ongoing and life-threatening public health crisis. See MCR 7.305(B)(4)(a). Although preliminary discussion of these issues is set forth in the instant application, the issues at bar are of sufficient magnitude and complexity to warrant this Court's full review and the parties' full briefing.

Part and parcel of the Circuit Court's decision to deny injunction relief was its separate decision to strike the inspection report of Dr. Fred Rottnek, a physician with two decades of experience working in correctional healthcare, who conducted a court-ordered inspection of the Jail on May 16, 2020 that revealed that Plaintiffs are living in unconstitutionally dangerous

conditions. But the Circuit Court's decision to strike the inspection report was based upon its misreading and misapplication of the Michigan Rules of Evidence, as well as state and federal jurisprudence governing the admissibility of expert and lay testimony. If this decision is not reversed immediately, Plaintiffs will suffer substantial harm because they will be denied a full and complete opportunity to present their case on the merits, which includes critical evidence that, because the Jail's conditions and medical care are so deficient, detainees remain at a heightened risk for contracting COVID-19. This Court's immediate intervention is required.

INTRODUCTION

For nearly forty years, the Jail has required intervention from all levels of Michigan's judicial system—including this Court—to create conditions of confinement that are sanitary and safe for those incarcerated. Now, in the face of an ongoing global pandemic, the Jail, once again, requires judicial intervention to create conditions of confinement that are sanitary and safe for those inside. The Jail is filthy, medical care is insufficient, and detainees have no ability to take the most basic precautions against COVID-19 infection that are regularly available to those outside the Jail, such as social distancing, hand washing, wearing personal protective equipment ("PPE"), and frequently disinfecting high-touch surfaces. Plaintiffs thus asked the Circuit Court for equitable relief in the form of a temporary restraining order and preliminary injunction to remedy the deplorable, life-threatening conditions inside the Jail.

The Circuit Court was presented with a virtually uncontested factual record showing that the Wayne County Sherriff's Office, the Wayne County CEO, and the Wayne County Commission (collectively, "Defendants") have been deliberately indifferent to the grave risks facing detainees during the COVID-19 crisis by failing to promulgate and implement policies necessary to mitigate the risk of transmission of COVID-19. The Circuit Court, however, ignored the facts, relied on unsubstantiated extrajudicial information, and declined to intervene, summarily concluding: "Defendants' response to the risks posed by COVID-19, coupled with proactive measures ordered by this Court, has been reasonable." This was an abuse of discretion that must be remedied immediately in order to protect Plaintiffs' health and safety.

In support of their motion for emergency preliminary relief, Plaintiffs filed ***thirty*** declarations sworn by detainees between March and mid-June.[1] The conditions described by detainees were corroborated by the findings of a court-ordered inspection by Dr. Fred Rottnek, a correctional health expert and physician. The inspection included a seven-hour tour of all three Jail divisions, during which Dr. Rottnek interviewed *forty* detainees, as well as nursing staff. The report, which documented Dr. Rottnek's first-hand observations and summarized these detainee and staff interviews, confirmed what Plaintiffs already knew: that Defendants failed to implement or follow policies necessary to mitigate the risk of transmission of COVID-19, in deliberate indifference to the dangers that Plaintiffs are facing inside the Jail. The sworn declarations and Dr. Rottnek's report were confirmed shortly thereafter by the results of Jail-wide testing, which showed that the infection rate inside the Jail that was ten to twenty times that in the local community.

In addition to their first-hand evidence from the Jail, Plaintiffs submitted two affidavits from Dr. Adam Lauring, a virologist and infectious diseases physician-scientist at the University of Michigan who diagnosed the state's first case of COVID-19 and operates two COVID-19 research facilities. After reviewing detainee declarations, Dr. Rottnek's report, and the test results, Dr. Lauring agreed that conditions in the Jail are unconstitutionally dangerous.

In response to this damning evidence provided by Plaintiffs, Defendants filed nine policy documents they promulgated in response to COVID-19, as well as three affidavits: two from health

[1] Because Plaintiffs initially filed an action in the United States District Court for the Eastern District of Michigan (*Russell, et al. v. Wayne County, et al*., case no. 20-cv-11094), pursuant to 28 U.S.C.§ 1746, in lieu of submitting affidavits, Plaintiffs submitted sworn declarations.

care providers who both discussed the aforementioned policies but never stepped foot inside the Jail, and one from a health care administrator who, according to Dr. Lauring, presented a misleading analysis of the test results. Defendants presented no evidence that any of their policies have been implemented, are being followed, or are otherwise adequate to mitigate the spread of COVID-19. On the contrary, the undisputed record evidence showed that Defendants are non-compliant with their own policies and procedures, and, in many cases, their policies fail to even comply with even basic guidelines promulgated by the Centers for Disease Control and Prevention ("CDC"). It was on this heavily lopsided record that the Circuit Court—without ever addressing the dozens of detainee declarations, Dr. Rottnek's personal observations from inside the Jail, or Dr. Lauring's affidavits—decided that Plaintiffs were unlikely to succeed on their claims and denied the emergency injunctive relief requested.

In a similarly puzzling avoidance of the conditions in the Jail, the Circuit Court granted Defendants' motion to strike the report of the inspection—the same one the Circuit Court itself had ordered—finding that Dr. Rottnek was unqualified to opine on the conditions inside the Jail. The Circuit Court's order striking the report underlies its erroneous decision on the motion for injunctive relief and represents an additional abuse of discretion. Dr. Rottnek followed *exactly* the Circuit Court's order to provide "observations" and "recommendations," and he has more than sufficient experience to opine on medical care in the Jail, including decades of experience as a director and lead physician in a major urban jail dealing with the transmission of communicable diseases.

The COVID-19 pandemic is far from over and, if current trends hold, will get worse. All the while, presumptively innocent pre-trial arrestees, detainees, and staff will keep cycling in and

out of the Jail, creating an ever-present danger that COVID-19 will continue spreading both inside and out as long as this crisis goes on. Jail staff have already died; over a quarter of the Jail's detainees have already contracted COVID-19. Any further outbreak at the Jail will have devastating consequences for Plaintiffs and could overwhelm the Detroit metropolitan health care system. Plaintiffs—and the public at large—cannot afford to wait for final judgment before taking an appeal. Plaintiffs respectfully urge this Court to accept their appeal, reverse the Circuit Court's order striking the inspection report, and immediately enter an order granting the emergency injunctive relief that was erroneously denied below.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

COVID-19 has wreaked havoc at the Jail and will only continue to get worse.

That COVID-19 has already infiltrated the Jail is undisputed. As of May 11, 2020—the only time that Defendants have undertaken facility-wide testing of all detainees since this crisis began in March—171 of 689 detainees (25%) had either an active COVID-19 infection or COVID-19 antibodies in their blood, meaning that they were previously infected with the virus. (Appendix F - Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction, at 1.) As of May 8, 2020, at least 206 employees of the Wayne County Sherriff's Office had tested positive for COVID-19. (*Id.*) Four members of the Jail's staff have died from COVID-19 complications, including the contracted Jail medical director and another Jail physician. (*Id.* at 15.) One detainee who tested positive at the Jail was sent home with nothing but a bus pass and died at home. (*Id.* at 17, n 15.)

Detainees reported that, despite this high rate of infection and these untimely deaths, conditions inside of the Jail remained deplorable. In thirteen sworn declarations, detainees reported that they were unable to engage in social distancing—the single-most important precaution anyone can take to protect themselves against COVID-19—because they were being forced to double bunk and otherwise share cells, bathrooms, and other common spaces. (*Id.* at 10.) They explained that many bathrooms were so dirty with mold, bugs, and feces that detainees were unable to take the basic precaution of regularly washing their hands. (*Id.* at 14.) They explained that they were not being provided with basic personal protective equipment ("PPE"), like masks, with sufficient regularity to protect against infection, and that Jail staff were not consistently wearing PPE, either. (*Id.* at 15.) And, most egregiously, they reported that the Jail was failing to

render medical care to detainees who were diagnosed with or suspected to have COVID-19 by failing to quarantine symptomatic detainees, or worse, placing them in solitary confinement; refusing to test others; and failing to provide basic medication. (*Id.* at 16-17.) Each of these deficiencies goes against the recommendations of the CDC and other medical experts. (Appendix G – Defendants' Response to Plaintiffs' Motion for a Temporary Restraining Order – Exhibit 8.)

The Circuit Court ordered an inspection of the Jail.

Though Plaintiffs initially filed this suit in federal court,[2] the parties mutually agreed that Plaintiffs could litigate their constitutional claims, related to their confinement at the Jail during the COVID-19 pandemic, in the Circuit Court because of an existing Consent Order to which all parties must abide. The COVID-19 pandemic revealed that conditions inside the Jail required more immediate—and significant—intervention than the Consent Order provided. Upon request of the parties, the Circuit Court entered a stipulated order temporarily modifying the Consent Order to include limited measures agreed to by Defendants in response to COVID-19. (Appendix C – 5/18/20 Circuit Court Order.) This Order entitled both parties to propose two candidates to conduct an inspection of the Jail and prepare an accompanying report, but Defendants declined to submit any candidates. (*Id.* at 3.) The Circuit Court ordered Fred Rottnek, MD, MAHCM, a physician

[2] On May 4, 2020, six detainees at the Jail filed a putative class action lawsuit in the United States District Court for the Eastern District of Michigan against various officials of the Wayne County Sheriff's Office, alleging violations of 42 U.S.C. § 1983 and bringing a simultaneous petition for writ of habeas corpus under 28 U.S.C. § 2241. (Appendix F – Exhibit 2). These detainees concurrently filed a motion for temporary restraining order and preliminary injunction, asking the court to enter an order (1) releasing medically vulnerable detainees and (2) requiring the Jail to undertake various measures to mitigate the spread of COVID-19 inside its facilities. See *id*. The court there encouraged the parties to discuss whether the claims could be litigated in the Wayne County Circuit Court, as the Circuit Court was already overseeing the Consent Order in the instant case. After Plaintiffs filed their TRO motion in the Circuit Court, Plaintiffs moved to stay the federal case, *Russell, et al. v. Wayne County, et al*., case no. 20-cv-11094, and Defendants did not oppose the motion. In an apparent error, the Circuit Court, in its order denying Plaintiffs' TRO motion, stated that the federal case had been dismissed. (Appendix A, at 3.)

and correctional health expert candidate proposed by Plaintiffs, to conduct the inspection. In this order, the Court directed Dr. Rottnek to inspect and report on various "areas" of the Jail and other COVID-19-related issues, including: conditions of housing units; conditions of and access to bathrooms, and dining and laundry facilities; the availability of cleaning supplies and PPE; communications to detainees regarding COVID-19; and social distancing measures inside the Jail. (Appendix D – 5/15/20 Circuit Court Order.) The Court also dictated the "format" of Dr. Rottnek's inspection report, requiring him to provide both "[o]bservations" and "[r]ecommendations." (*Id.*)

At no time prior to the inspection did the Defendants nor the Circuit Court take issue with Dr. Rottnek's qualifications. Dr. Rottnek, a professor of medicine at St. Louis University, formerly served as the Medical Director and Lead Physician of the St. Louis County Jail for fifteen years, where he successfully contained an outbreak of Methicillin-Resistant Staphylococcus Aureus ("MRSA") in the facility.[3] (Appendix J – Plaintiffs' Opposition to Defendants' Motion to Strike the Report of Fred Rottnek, M.D., MAHCM, at 4.) He is now the Medical Director of Family Courts and Juvenile Detention for the 22nd Judicial Court of St. Louis. (*Id*.)

Pursuant to the Circuit Court's order, Dr. Rottnek conducted an inspection of the Jail on May 16, 2020 and submitted a report on May 19, 2020. (*Id.* at 5-6.) Most significantly, he recommended that Defendants immediately close Division II, the oldest, most decrepit, and most crowded of the three divisions, because the facility's conditions were in such disrepair that it could

[3] Dr. Rottnek was recently qualified as an expert to opine on conditions inside the East Baton Rouge Parish Prison in a similar case filed in the U.S. District Court for the Middle District of Louisiana. The case is *Belton, et al. v. Gautreaux, et al.*, Civil Action No. 3:20-cv-000278-BAJ-DSJ.

not be cleaned and disinfected adequately to mitigate the spread of COVID-19. (Appendix E – Wayne County Jail Inspection Report, at 12.) He also recommended that the Jail undertake various measures aligned with the CDC's Guidelines for Jails and Prisons to mitigate the spread of COVID-19 within the Jail and lessen the risk to Plaintiffs. (*Id*. at 11.)

Plaintiffs move for immediate injunctive relief.

On May 28, 2020, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, asking the Circuit Court to enter an order (1) requiring Defendants to immediately close Division II; (2) requiring Defendants to undertake other measures to mitigate the spread of COVID-19 at the Jail, consistent with Dr. Rottnek's and Dr. Lauring's recommendations; and (3) appointing a monitor to oversee the Jail's compliance with these measures.[4] (Appendix F.)

Among numerous other exhibits, Plaintiffs filed: (1) thirteen sworn declarations from Jail detainees, chronicling the Jail's subpar conditions and Plaintiffs' dangerously insufficient access to cleaning supplies, medical care, PPE, and information about COVID-19, (Appendix F – Exhibits 7-20); and (2) an affidavit from Adam Lauring, MD, PhD, a physician-scientist at the University of Michigan who studies the evolution and transmission of RNA viruses, like COVID-19, diagnosed the first COVID-19 case in Michigan, and operates two COVID-19 research facilities at the University of Michigan. (Appendix F – Exhibit 6.)

Defendants filed their opposition to Plaintiffs' TRO Motion on June 5, 2020. (Appendix G.) Defendants did not challenge the factual record as presented through the detainees'

[4] Plaintiff-Appellants' TRO Motion incorporated by reference the complaint filed in *Russell*, as well as its accompanying exhibits.

declarations, Dr. Rottnek's report, and Dr. Lauring's affidavit; they also conceded that "discussions to cease the use of Division II have been on-going among County officials for several months." (Appendix G, at 17.) Instead, Defendants argued that they had promulgated various policies in response to COVID-19, as had their for-profit medical services provider, Wellpath. (Appendix G – Exhibits 2-3.) Defendants also noted that the Jail population has been reduced since the start of the COVID-19 pandemic in March through an Administrative Judicial Release ("AJR") process,[5] but not through any actions undertaken by Defendants. (Appendix G – Exhibit 4.) Defendants also filed affidavits from a correctional health physician, a nurse, and the regional director of Wellpath—none of whom had ever visited the Jail. (Appendix G – Exhibit 6; Appendix K; Appendix L.) Affiant Mark Morrissey, MSN, RN, the regional Director of Operations for Wellpath, stated that the infection rate within the Jail was only 10% and lower than the infection rate of the general population. (Appendix G – Exhibit 6.)

Plaintiffs filed a reply in support of their TRO motion on June 11, 2020, alongside seventeen sworn declarations from additional detainees that showed that Defendants were still, one month after Plaintiffs filed their federal action, failing to implement basic measures to reduce to the risk of transmission of COVID-19 or implement their own policies. (Appendix H – Exhibit 3.) Plaintiffs also filed a second affidavit from Dr. Lauring that specifically addressed the findings of Dr. Rottnek's report and the statements made in the three affidavits submitted by Defendants. (Appendix H – Exhibit 4.) Dr. Lauring emphasized that Plaintiffs, particularly those housed in Division II, would remain at "high risk of suffering from preventable infection, serious illness, and

[5] The AJR process is overseen by the Circuit Court judge who issued both orders on appeal.

death" if Dr. Rottnek's recommendations were not soon implemented. (*Id*. ¶ 17(b).) He stated that Defendants' affiants' statements as to the rate of infection inside the Jail were "misleading"—specifically because the rate of infection was 25%, not 10%, and thus much higher than the rate of infection in the general population.[6] (*Id*. ¶¶ 18-31.) And Dr. Lauring noted that Defendants' policies and directives, see Ex. 2 to Opp. to TRO Motion, were "dangerously inadequate." (*Id*. ¶¶ 32-33.)

As Plaintiffs' TRO motion was pending, Defendants moved to strike Dr. Rottnek's report on the basis that he was not qualified to testify because he is not an expert in infectious diseases. (Appendix I – Defendants' Motion to Strike the Report of Fred Rottnek, M.D., MAHCM.) Plaintiffs opposed this motion, arguing that Dr. Rottnek's substantial prior experience in correctional healthcare as the Medical Director and Lead Physician of the St. Louis County Jail qualified him to opine on the Jail's response to COVID-19, particularly in light of Dr. Rottnek's experience guiding that facility during an outbreak of MRSA, an incredibly contagious infectious disease. (Appendix J, at 7-10.) Plaintiffs further argued that, independent of Dr. Rottnek's qualifications, his first-hand observations were admissible. The Circuit Court subsequently heard oral argument on both motions on June 11 and 12, 2020.[7]

The Circuit Court struck the court-ordered inspection report and denied injunctive relief.

The Circuit Court granted Defendants' motion to strike Dr. Rottnek's report, finding that Dr. Rottnek was not an infectious disease expert. (Appendix B.) The Circuit Court did not provide

[6] Dr. Lauring also clarified that, even if the infection rate inside the Jail were only 10%, that would *still* be ten times higher than what has been reported in the general population. (Appendix H – Exhibit 4, ¶ 21.)
[7] Expedited copies of transcripts of both hearings have been ordered.

any explanation for striking factual information in the report regarding "conditions" in various "areas" of the Jail, which the court ordered to be included in the inspection. Three days later, the court denied Plaintiffs' TRO motion, finding that Plaintiffs were unlikely to succeed on their claims. (Appendix A.) The court held that Defendants had "responded reasonably to the risk of exposure to COVID-19" because they had "issued policies and directives." (*Id*. at 14.) In reaching this conclusion, the court also credited Defendants with reducing the Jail population by releasing detainees. (*Id*.) The court's analysis does not refute or otherwise discuss any record evidence put forth by Plaintiffs. While the Circuit Court acknowledged the original thirteen detainee declarations filed alongside Plaintiffs' TRO Motion, it made no effort to grapple with these reported facts from inside the Jail. The Circuit Court did not acknowledge or otherwise refer to Dr. Lauring's declarations or the additional seventeen detainee declarations filed alongside Plaintiffs' reply in support of their motion. It also did not acknowledge any of the observations made by Dr. Rottnek in his report that were independent of any of his recommendations.

Plaintiffs now seek leave to appeal both of these orders.

DISCUSSION

As discussed more fully below, as to Plaintiffs' TRO motion, the Circuit Court erroneously concluded that "Plaintiffs are unlikely to succeed on the merits of their constitutional claims." (Appendix A, at 14.) Not only have Plaintiffs clearly demonstrated that (1) they are likely to succeed on the merits of their constitutional claims, they have also demonstrated—and it was uncontested below—that (2) they are likely to suffer irreparable harm in the absence of relief; (3) the balance of equities weighs in their favor; and (4) an injunction is in the public interest. See *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008). The Circuit Court abused its discretion in denying Plaintiffs' TRO motion.

The record evidence demonstrates that Defendants have been deliberately indifferent to the undisputed risk of harm—COVID-19—that Plaintiffs are facing inside the Jail. Though Defendants have promulgated various policies in response to COVID-19, these policies are facially inadequate to combat the spread of COVID-19 inside the Jail. And even if these policies *were* sufficient, the record evidence unequivocally shows that these policies were not implemented and are not being followed. Moreover, the Circuit Court failed to consider—or even acknowledge—evidence in the record that Division II is unsafe for Jail staff and detainees alike during the COVID-19 pandemic. For all of these reasons, Plaintiffs are likely to succeed on the merits of their Eighth and Fourteenth Amendment claims.

As to Defendants' motion to strike, the Circuit Court erroneously decided that Dr. Rottnek was not qualified to opine on the spread of COVID-19 inside the Jail under MRE 702 because he is not an expert in infectious diseases or virology. (Appendix B, at 9.) The Circuit Court missed the mark entirely. Dr. Rottnek was appointed by the Circuit Court to expressly evaluate the

conditions inside the Jail and make recommendations, as to what extent those conditions magnify or mitigate the risk of infection. (Appendix D.) Dr. Rottnek's extensive experience in carceral health care uniquely qualifies him to opine on that topic under MRE 702. Dr. Rottnek properly applied this specialized knowledge of correctional medicine and experience directing the medical care for a county jail to the first-hand observations he made during the inspection, rendering his report reliable. And the contents of his report—which opined on the same issues enumerated in the Circuit Court's May 15 order—were undoubtedly relevant. (Appendix E.)

The Court of Appeals therefore should grant Plaintiffs' application for leave, reverse the Circuit Court's June 16 and 19 Orders, and order the emergency relief sought by Plaintiffs to ameliorate the conditions and prevent the spread of COVID-19 in the Jail.

I. THE CIRCUIT COURT ERRED WHEN IT DENIED PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WHERE IT 1) IGNORED THE FACTUAL RECORD, 2) INCORRECTLY APPLIED THE FEDERAL CONSTITUTIONAL STANDARD; 3) DECLINED TO APPLY MICHIGAN'S CONSTITUTIONAL STANDARD; AND 4) RELIED ON UNSUBSTANTIATED EXTRAJUDICIAL INFORMATION.

> **Standard of Review:** This Court reviews de novo the denial of a fundamental constitutional right. See *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534, 543 (2007). A trial court's denial of a preliminary injunction is reviewed for an abuse of discretion. *Davis v. Detroit Financial Review Team*, 296 Mich App 568, 612; 821 NW2d 896 (2012). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*. The trial court's factual findings are reviewing for clear error. *Ross v. Auto Club Grp*., 478 Mich. 902, 732 N.W.2d 529 (2007). Preserved claims of constitutional error are reviewed de novo. *People v. Pipes*, 475 Mich. 267, 274; 715 NW2d 290 (2006).

Plaintiffs are likely to succeed on their claims because Defendants are deliberately

disregarding the risk that Plaintiffs will contract COVID-19 due to the current conditions at the Jail in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 16, of the Michigan Constitution. See US Const, Amends 8, 14; Mich Const 1963, art 1, § 16. Defendants' failure to implement the basic steps recommended by health experts, the CDC, and Governor Gretchen Whitmer—including access to soap and water so that those detained can wash their hands after touching objects or other people, the ability to clean and disinfect all surfaces touched by multiple people at least daily, access to information about COVID-19, and, above all, allowing Plaintiffs sufficient space to remain at least six feet away from others at all times—when they are well aware of the extreme risks posed by this virus constitutes deliberate indifference.

In support of their argument that their response to the COVID-19 pandemic has been reasonable, Defendants—in a section titled, "What Wayne County officials have done to mitigate the spread of COVID-19 at the jail"—improperly credited themselves with the actions of others: court-ordered testing, court-ordered releases, and an inspection by the Michigan Department of Corrections (about which little is known). (Appendix G, at 7-11.) The sole purported action which defendants can claim as their own, and, thus, their sole argument regarding the reasonableness of their response to the COVID-19 pandemic, is the promulgation of various policies and directives to mitigate the spread of COVID-19 at the Jail. They offered ***no*** evidence, however, demonstrating that these policies were implemented or are actually being followed. Meanwhile, the evidence offered by Plaintiffs, including ***thirty*** mutually corroborating declarations from detainees housed in all three of the Jail's facilities over the course of multiple months, shows precisely the opposite: Defendants have failed to implement and follow their own (facially insufficient) policies.

The Circuit Court erroneously concluded that Defendants' mere *promulgation* of these policies, without more, compels a finding that Defendants are not deliberately indifferent to serious risk of illness and death posed to Plaintiffs. The Circuit Court's error was then compounded when it improperly credited its own extrajudicial actions—instituting a process to release detainees and reduce the Jail population—to Defendants (notwithstanding the fact that the reduction of the Jail population does not, as a constitutional matter, allow Defendants to disregard the grave danger facing those detainees still incarcerated). Its error was *further* compounded by its own failure to consider any of the evidence that Division II is unsafe for Jail staff and detainees during the COVID-19 pandemic. This was a clear abuse of discretion. See *Barak v. Drain Com'r for Cty of Oakland*, 246 Mich App 591, 603; 633 NW2d 489 (2001) ("The trial court's role was to examine the record as it existed in the present case, and it erred in considering information outside the record.").

A. The federal and state constitutions protect Plaintiff-Appellants from Defendants' unreasonable and deliberately indifferent response to the COVID-19 pandemic.

The government has a constitutional duty to protect those it detains from "a substantial risk of serious harm." *Farmer v Brennan*, 511 US 825, 834; 114 S Ct 1970; 128 L Ed 2d 811 (1994). This right arises under the Eighth Amendment post-conviction, see *id.*; *Estelle v Gamble*, 429 US 97, 104; 97 S Ct 285; 50 L Ed 2d 251 (1976), and under the Fourteenth Amendment's Due Process Clause pre-conviction, see *City of Revere v Mass Gen Hosp*, 463 US 239, 244; 103 S Ct 2979; 77 L Ed 2d 605 (1983); *Richko v Wayne Cty, Mich*, 819 F3d 907, 915 (CA 6, 2016). To demonstrate a violation of the Eighth Amendment, convicted persons must show both an objectively substantial risk of serious harm and that prison officials subjectively "acted with deliberate indifference"

towards the hazardous condition in question. *Brown v Bargery*, 207 F3d 863, 867 (CA 6, 2000).

The Michigan Constitution affords Plaintiffs even more protection than the Eighth Amendment. The Michigan Supreme Court has been clear that "the Michigan Constitution's prohibition against 'cruel *or* unusual' punishment may be interpreted more broadly than the Eighth Amendment's prohibition against 'cruel and unusual' punishment."[8] *Carlton v Dept of Corr*, 215 Mich App 490, 505; 546 NW2d 671 (1996); see also *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992) ("holding that a particular criminal penalty violated the Michigan constitution even though the United States Supreme Court had previously held that that same provision did not violate the Eighth Amendment in *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991)). The Eighth and Fourteenth Amendment standards, as well as any requirements under the Michigan Constitution, are satisfied here: Defendants are violating Plaintiffs' constitutional rights by incarcerating them in conditions that Defendants know fail to adequately address the risk of COVID-19 at the Jail.

B. The Circuit Court erred by denying injunctive relief to pre-trial detainees.

The Circuit Court found, and Defendants did not contest, that Plaintiffs "easily satisfie[d] the objective prong of 'deliberate indifference.'" (Appendix A, at 14.) Because pre-trial detainees

[8] The Circuit Court also erred by failing to consider Plaintiffs' argument under the Michigan Constitution after holding that Plaintiffs were unlikely to prevail on their federal constitutional claims. Plaintiffs recognize that when both federal and state constitutional claims are raised, this Court first analyzes the claims under the more rigid federal constitutional standard, as provided herein, which is subsumed into the state court analysis. But where the court finds no federal constitutional violation, and plaintiffs raise state constitutional claims, it must analyze whether there is a violation under the more protective state constitution. See *Sitz v Dept of State Police*, 443 Mich 744, 762; 506 NW2d 209 (1993) ("It would be a mistake, however, to view federal law as a floor for state constitutional analysis; principles of federalism prohibit the Supreme Court from dictating the content of state law. In other words, state courts are not required to incorporate federally-created principles into their state constitutional analysis.").

need only satisfy the objective prong of the deliberate indifference inquiry, the Circuit Court erred in denying injunctive relief to pre-trial detainees within the Jail. See *Kingsley v Hendrickson*, 576 US 389, 396-97; 135 S Ct 2466; 192 L Ed 2d 416 (2015); *Bell v Wolfish*, 441 US 520, 535, 538-39; 99 S Ct 1861; 60 L Ed 2d 447 (1979); *Malam v Adducci*, __ F Supp 3d __, 2020 WL 3512850 at *15 (ED Mich, 2020) (holding that *Bell*'s Due Process standard, and not the Eighth Amendment's deliberate indifference standard, prohibits punishment of pre-trial detainees and "does not require consideration of Defendants' subjective evaluation of Plaintiffs' conditions of confinement.").

C. The Circuit Court erred because Defendants have acted and continue to act with subjective indifference towards Plaintiffs' substantial risk of harm.

The evidence in the record shows that since as early as mid-March, Defendants have been aware of, but continue to disregard an excessive risk to detainees' health and safety. *Wilson v Seiter*, 501 US 294, 303; 111 S Ct 2321; 115 L Ed 2d 271 (1991). With respect to a deadly infectious disease like COVID-19, jail officials demonstrate deliberate indifference when they "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," even when "the complaining inmate shows no serious current symptoms." *Helling v. McKinney*, 509 US 25, 33 (1993); see also *Hope v Pelzer*, 536 US 730, 738; 122 S Ct 2508; 153 L Ed 2d 666 (2002) (court "may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious") (citing *Farmer*, 511 US at 842).

Courts need not "await a tragic event" to find that Defendants are maintaining unconstitutional conditions of confinement amid a global pandemic. *Helling*, 509 US at 33. So long as the risk of serious harm is "likely," as it is here, the Eighth Amendment is violated, even

if "the complaining inmate shows no serious current symptoms," even if it is "not alleged that the likely harm would occur immediately," and even if "the possible infection might not affect all of those exposed." *Id.*

Here, there is no dispute regarding Defendants' subjective awareness of the risk posed by the novel coronavirus, as evidenced by the nine policies and directives Defendants issued in response to the ongoing pandemic. (Appendix G – Exhibit 2). It is precisely in the face of this awareness that Defendants demonstrated failure to implement adequate measures to mitigate the spread of COVID-19 constitutes deliberate indifference. See *Farmer*, 511 US at 847 ("Failing to take reasonable measures to abate [risk]" demonstrates disregard of a known risk). First, Defendants' policies and directives responding to COVID-19 are facially inadequate to actually mitigate the spread of the virus. Second, the record evidence shows that Defendants failed to *implement* the policies they did promulgate. Third, the record clearly demonstrates that Defendants *know* that Division II is unsafe, yet they continue to house detainees there and require Jail staff to work there. For these reasons, Defendants' deliberate indifference is clear, and the Circuit Court abused its discretion in denying the immediate relief Plaintiffs seek.

1. Defendants' COVID-19 policies are inadequate.

The relevant guidance and insight from medical professionals that is in the record plainly illustrates that Defendants' policies are facially unreasonable. (Appendix G, at 14.) The only relevant medical guidance in the record is (1) the CDC's Guidelines for Jails and Prisons (Appendix F, at 31; Appendix G – Exhibit 8) and (2) the two affidavits submitted by Dr. Lauring

(Appendix F – Exhibit 6; Appendix H – Exhibit 4).[9] The consensus from both the CDC and Dr. Lauring is that certain minimal measures must be taken to protect detainees from the grave risks associated with COVID-19. But Defendants failed to promulgate policies adopting even these ***minimal*** measures. This failure alone establishes that Defendants' deliberate indifference because they have denied detainees the "***minimal*** civilized measure of life's necessities" during a global health emergency. *Farmer*, 511 US at 834.

As a threshold matter, the record evidence shows that Defendants have wholly failed to promulgate (and therefore implement) protocols for critical, minimal measures to prevent the spread of COVID-19. Defendants have not established a *single* directive that directs detained persons to practice social distancing inside the Jail, even though social distancing is the single-most important and effective precaution that can be taken to prevent the spread of COVID-19.[10] (Appendix G – Exhibit 2; Appendix H – Exhibit 4, ¶ 33(a).) Further, Defendants have issued no policies or directives regarding widespread testing of detainees, which means they are unable to reliably identify pre-symptomatic and asymptomatic infected persons. (Appendix H – Exhibit 4, ¶ 33(f).) This is significant because 40% of infections result from asymptomatic infected persons. Thus, although widespread testing is not a replacement for enacting social distancing[11] and other

[9] While Defendants submitted affidavits from Mark Morrisey, MSN, RN, a Wellpath employee (Appendix G – Exhibit 6); Dr. Louis Shicker, an epidemiologist (Appendix L); and Bridgette Jones (Appendix K), these affidavits did not address any of Plaintiffs' allegations regarding the conditions inside the Jail during the COVID-19 pandemic, including the provision of medical care. Notably, Dr. Shicker nor Ms. Jones have ever been inside of the Jail nor have they spoken with any Jail staff or detainees. (Appendix K; Appendix L.)

[10] The record shows that despite ample available bed space at the Jail, Defendants are still double bunking detainees, which makes it impossible for detainees to practice social distancing. (Appendix H, at 5, 22).

[11] Establishing COVID-19 precautions without ensuring social distancing is, by itself, inadequate. See *Malam*, 2020 WL 3512850 at *8 (quoting *Savino v. Souza*, Case No. 1:20-10617-WGY (D Mass, 2020), ECF No. 225 (analogizing a lack of social distancing precautions to "a NASCAR driver who spurns a seatbelt and helmet because she plans not to crash")).

necessary measures, regular, widespread testing would at least provide the Jail with better information on the spread of the virus within the Jail. The results of the only population-wide testing conducted by Wellpath nearly two months ago on May 7–9, 2020 indicated that the infection rate was 10-20 times higher in the Jail than in the general Wayne County population.[12] (*Id*. ¶ 20); see also *Malam*, 2020 WL 3512850 at *6 (ED Mich, 2020) (granting injunctive relief to immigration detainees because an infection rate more than twice that of Michigan as a whole presented an impermissible risk of harm). Notwithstanding that the testing results revealed a serious outbreak in the Jail, the Jail has failed to update its policies or directives or even to implement the existing, outdated policies. Since the Jail-wide testing in mid-May, the only regular testing the Jail has conducted is the testing of newly-booked detainees, pursuant to the Circuit Court's Order dated June 2, 2020.[13] Because of the 7-day incubation period, the intake testing policy, which requires the Jail to test newly booked detainees within the three-day quarantine period, is also ineffective in reliably identifying infection. (Appendix H – Exhibit 4, ¶ 33(f).) Indeed, the CDC recommends "[r]egular (e.g., weekly) testing" of everyone residing or working in a jail. *Overview of Testing for SARS-CoV-2*, Centers for Disease Control and Prevention,

[12] The infection rate is 20 times higher in the Jail if detainees who tested positive for antibodies are included. 90 of the 116 individuals who tested positive for antibodies detainees who tested positive for antibodies are included. 90 of the 116 individuals who tested positive for antibodies had been confined in the Jail before the first COVID-19 case was reported in Michigan on March 10, 2020, which indicates that these individuals contracted COVID-19 while confined in the Jail. (Appendix H, at 3.) Even if none of the detainees who tested positive for antibodies contracted COVID-19 while in the Jail, the infection rate is still 10 times higher in the Jail than in the general Wayne County population.

[13] The Circuit Court did not permit Plaintiffs' counsel for the *Russell* litigation to participate in the status conference that led to the entry of the June 2 Order. The court reasoned that this Order did not relate to the issues raised in the May 18 Order. By the court's own reasoning, it was therefore inappropriate for the court to consider court-ordered testing when determining whether to grant the requested injunctive relief. According to the court itself, that Order was not part of any facts relevant to this litigation. See *In re Krueger Estate*, 176 Mich App 241, 251; 438 NW2d 898 (1989) (finding an abuse of discretion where the "judge in this case apparently went outside the record in making his determination").

https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html (last updated June 13, 2020). Testing records Defendants provided on June 15, 2020 indicate that the Jail promptly fails to test all newly-booked detainees. (Appendix A, at 5-6.) And even if all newly-booked detainees are tested, such testing does not measure the rate at which the virus spreads from Jail personnel to incarcerated persons, or among incarcerated persons. Further, without jail-wide testing, Defendants testing of only newly-booked detainees completely fails to identify those detainees who may have contracted COVID-19 while in the Jail but are asymptomatic.

Even where Defendants have promulgated policies that address measures discussed in CDC and other medical guidance, those policies are woefully inadequate. For example, Defendants' intake policy fails to account for the COVID-19's incubation period and how asymptomatic carriers of the virus can spread it to other individuals. Directive COJAC-20-07 requires that all new detainees booked into the jail will be quarantined for 72 hours. (Appendix G – Exhibit 2.) The CDC Guidance, in contrast, urges all jails to "quarantin[e] all new intakes for 14 days before they enter the facility's general population." (Appendix G – Exhibit 8); cf. *Cameron v Bouchard*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued June 11, 2020 (Case No. 20-3547), 2020 WL 3100187, at *2-3 (granting Defendants motion to stay preliminary injunction where the defendants quarantined all new inmates for 14 days). Because the incubation period for COVID-19 is 7 days, the Jail's 72-hour initial intake quarantine period "may not assist in reliably identifying infection [n]or will it assist with identifying pre-symptomatic or asymptomatic infected persons." (Appendix H – Exhibit 4, ¶ 33(f).)

Defendants' PPE policies are also plainly inadequate. Directive COJAC-20-03 requires

detainees to wear surgical masks, and Directive COJAC-20-10 requires Defendants to issue new surgical masks to detainees every two weeks. (Appendix G – Exhibit 2.) But surgical masks are made for ***single use*** and only prevent or mitigate the spread of infection for up to two days, (Appendix H – Exhibit 4, ¶ 33(b)), and the CDC recommends that masks "should be changed at least daily, and when visibly soiled or wet." (Appendix G – Exhibit 8.) Defendants' PPE policies thus far fall below what the medical guidance and expertise in the record deems is necessary.

Defendants' policies also do not require enhanced cleaning and ***disinfecting*** of high-touch areas and surfaces, as recommended by medical experts and the CDC, to reduce transmission of COVID-19—and Plaintiffs' declarations demonstrate that they have not done so. Directive COJAC 20-09 requires Jail staff to ensure "all areas and surfaces are stringently cleaned on a regular and continuous basis[,] includ[ing] frequently touched surfaces." (Appendix G – Exhibit 2.) But this policy does not mention disinfecting high-touch areas and surfaces in the facility. And it fails to specify how often these surfaces are to be cleaned, nor does it specify which type of cleaning solution will be used to clean these surfaces. The CDC recommends that jail staff clean and disinfect frequently touched surfaces "several times per day" using "EPA-registered disinfectants effective" against the coronavirus. (Appendix G – Exhibit 8); cf *Cameron*, 2020 WL 3100187, at *2-3 (staying preliminary injunction where the defendants used an ultraviolet disinfecting machine to clean and sanitize cells more frequently and gave detainees access to a disinfectant that is effective against COVID-19). Dr. Lauring opined that this policy "fail[s] to ensure detainees have access" to these crucially necessary sanitation supplies. (Appendix H – Exhibit 4, ¶ 33(e).)

Moreover, the undisputed facts in the record show that, throughout the Jail, Defendants are

failing to provide adequate and timely medical care as it relates to testing and treating inmates who show symptoms of COVID-19 and are categorically failing to address detainees' urgent non-COVID-19 related medical needs. See, e.g., Appendix F – Exhibit 7 ¶ 13; Exhibit 17 ¶ 14; Exhibit 19 ¶¶ 7, 9, 11; Exhibit 20 ¶¶ 2-4; see also Appendix D at 9-10. Defendants put forth no specific evidence showing that they are immediately responding to and testing detainees who have symptoms of COVID-19. Wellpath's general policies, which purportedly require them to test symptomatic patients, say nothing about the timing of these tests and how quickly Wellpath must respond to detainees' complaints. (Appendix G – Exhibit 3.) Given the fact that other county jails have conducted regular population-wide COVID-19 testing, Defendants' failure to test all detainees in the jail is unreasonable and constitutes deliberate indifference to Plaintiffs' health and safety. Cf *Cameron*, 2020 WL 3100187, at *2-3 (staying injunction where the defendants "provid[ed] access to COVID-19 testing to the entire inmate population.").

Although courts give some latitude to jail officials to decide what actions are "reasonable" to ensure safety within facilities, COVID-19 is a threat to detainees' health and safety of a magnitude unseen in recent history that demands an aggressive response. By failing to issue ***minimally necessary*** policies and directives that would *actually* prevent and mitigate the spread of COVID-19 in the Jail, Defendants are knowingly exposing Plaintiffs, Jail staff, and the public at large—especially those that are medically vulnerable—to the serious risk of a painful and lethal disease. This risk is unacceptable and unconstitutional. On this basis alone, the Circuit Court erred in finding that Plaintiffs are unlikely to succeed on their constitutional claims.

2. Defendants failed to implement their inadequate policies.

Even assuming Defendants' policies and directives *were* designed to reasonably prevent

and reduce the spread of COVID-19 in the Jail, the factual record before the Circuit Court clearly shows that Defendants have not implemented their policies or otherwise acted to prevent the spread of COVID-19. This further establishes Defendants' deliberate indifference (and would be sufficient to establish deliberate indifference alone). Defendants did not put forth any evidence that they have actually implemented these policies nor any evidence that they trained or supervised Jail staff as how to implement these policies. The Circuit Court did not cite to ***any*** evidence in the record which establishes that Defendants are following their own policies—nor could it. See Appendix A at 14 (asserting only that "Defendants have issued policies and directives . . ."). In contrast, the declarations of ***thirty*** detainees across different divisions at the Jail and the personal observations of Dr. Rottnek during his inspection[14] confirm that these policies are not being followed. See also Appendix H – Exhibit 4 ¶¶ 21, 25.

Defendants' failure to implement their own promulgated policies when the risk of harm is great constitutes deliberate indifference. *Phillips v Roane Cty, Tenn*, 534 F3d 531, 541 (CA 6, 2008) (concluding that the officials' failure to comply with the protocols and transport the inmate to the medical center, for over two weeks, sufficed to show evidence of deliberate indifference); *cf. Wilson v Williams*, __ F3d __, 2020 WL 3056217, *2, 8, 9, 10-11 (CA 6, 2020) (finding no deliberate indifference where evidence showed that the prison updated and implemented COVID-19 policies). For example, Directive COJAC-20-09 requires Jail staff to ensure that signage reflecting the importance of social distancing, handwashing, and personal hygiene are

[14] Though the Circuit Court did not find Dr. Rottnek to be a qualified expert, the Circuit Court nonetheless failed to consider his relevant observations as those of a fact witness. Compare Opp. to Motion to Strike at 19 with June 19 Order.

posted throughout the Jail. (Appendix G – Exhibit 2.) But all the record evidence from inside the Jail demonstrates that Defendants have not posted signage in places frequented by detainees. (Appendix F – Exhibit 8 ¶ 10; Exhibit 9 ¶ 13; Exhibit 12 ¶ 13; Exhibit 10 ¶ 4; Exhibit 17 ¶ 16; see also Appendix E at 14, 17 (finding that signage at Jail is outdated, inaccurate, does not mention COVID-19, and does not define social or physical distancing).) While Defendants claim that signage is posted throughout the Jail, see Appendix G at 17, the pictures they put forth into the record do not at all indicate *where* in the three Jail facilities, each of which has multiple floors, these three sets of signs are posted, and Dr. Rottnek's report and the detainee declarations state that signage is not posted in high-traffic areas. (Appendix G – Exhibit 8.) Defendants' failure to comply with their own policy issued in April and the CDC's *most basic* recommendation, despite having notice of this deficiency since *at least* the filing of *Russell* complaint on May 4, 2020, constitutes deliberate indifference. See *Farmer*, 511 US at 842 ("it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.").

Despite Defendants' General Order U/S 20-08 requiring all Jail staff to wear masks, (Appendix G – Exhibit 2), the record shows that, throughout the Jail and in all three divisions, Jail staff are failing to wear PPE. (Appendix F – Exhibit 7, ¶ 9; Exhibit 8, ¶ 11; Exhibit 11, ¶¶ 6-7, 22; Exhibit 13, ¶ 11; Exhibit, 12 ¶ 8; Exhibit 15, ¶ 7; Exhibit 17, ¶¶ 8, 11; Exhibit 18, ¶ 10; see also Appendix E at 6, 14.) Defendants' ***only*** response is that they have agreed to ensure that all Jail staff wear PPE under the Temporary Stipulation to the Consent Order. See Appendix G at 19. But, once again, Defendants did not and could not cite to any record evidence showing their actual compliance with this provision of the stipulation. Defendants *again* failed to put forth any evidence to refute Plaintiffs' claims and Dr. Rottnek's observations inside the Jail. It is therefore

undisputed that Jail staff do not wear consistently masks or other PPE. This undisputed fact by itself establishes that Defendants have not responded reasonably to the risk of COVID-19 at the Jail.

As discussed, Directive COJAC 20-09 states that "Jail maintenance staff ***shall*** ensure that ***all*** areas and surfaces are stringently cleaned on a regular and continuous basis," including "frequently touched surfaces." Not only is the directive deficient, *supra* at Part I(C)(1), but Defendants are failing to appropriately clean all areas and surfaces, including those that are frequently touched and used, like showers and telephones. (See Appendix H – Exhibit 3, Laws Decl. ¶¶ 13, 14, 16, 19; Cochran Decl. ¶ 9; Card Decl. ¶ 9, 11; Coleman-Smith Decl. ¶¶ 6-8; Edwards Decl. ¶¶ 3, 17-22; Lynn Decl. ¶¶ 8-12; Ghist Decl. ¶¶ 11, 13, 17, 23; S. Johnson Decl. ¶ 6; Crothers Decl. ¶ 7; Black Decl. ¶ 5, 12; Long Decl. ¶¶ 3-4; Campbell Decl. ¶¶ 3-4, 8; Epps Decl. ¶¶ 9, 14; Anthony Decl. ¶¶ 5-6, 9.) And while the same directive states that "[a]ll staff ***shall*** continuously practice and encourage social distancing where possible, meaning a distance of at least six feet between people (staff and inmates)," the record shows, again, that this is not happening and, in many places inside the Jail, is, in fact, impossible. (See *id*., Laws Decl. ¶¶ 6, 8, 11; Cochran Decl. ¶ 10; Card Decl. ¶ 8; Lynn ¶ 6; Ghist Decl. ¶¶ 15, 20; S. Johnson Decl. ¶ 8; T. Johnson Decl. ¶¶ 9, 10; Black Decl. ¶¶ 7, 9, 10, 16; Long Decl. ¶ 7; Campbell Decl. ¶ 9; Epps Decl. ¶ 14.)

Without any evidence to the contrary—and there is none—these are undisputed facts, and the Circuit Court's failure to apply the law to these undisputed facts requires reversal. See *Clemons v Bd of Ed of Hillsboro, Ohio*, 228 F2d 853, 857-58 (CA 6, 1956) (finding an abuse of discretion where "the evidence was undisputed, and it was undisputed that defendants ignored the statutory

and constitutional rights of these plaintiffs."); see also *Young v Nationwide Mut Ins Co*, 693 F3d 532, 536 (CA 6, 2012) ("An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment."). The record is filled with undisputed facts confirming that Defendants are not following their own policies and are otherwise failing to take the basic steps necessary to mitigate the spread of COVID-19 inside the Jail.

Wilson v Williams, __ F3d __, 2020 WL 3056217 (CA 6, 2020), upon which the Circuit Court relied, establishes that a jail must actually promulgate and follow policies in order for their COVID-19 response to pass constitutional muster. The Circuit Court's failure to apply this elementary principle further highlights its abuse of discretion. In *Wilson*, the Sixth Circuit reversed a preliminary injunction issued against the Bureau of Prisons ("BOP") and held that the district court erred in finding that detainees had demonstrated a likelihood of success on their Eighth Amendment claims. See 2020 WL 3056217, at *11. There, the court recognized the BOP's "ongoing and dynamic response" to the threat of COVID-19 that "evolved as new guidance emerged." *Id.* at *10-11. The court held that the plaintiffs failed to show deliberate indifference because the BOP had "in fact put in place and updated its protocols" to prevent and mitigate the spread of the disease at the prison. *Id.* at *11. The Sixth Circuit has also stayed an injunction granted in a case alleging similar claims based on the conditions at the Oakland County Jail. See *Cameron*, 2020 WL 3100187. In Oakland County, the court found that defendants implemented preventative measures, which included: "quarantining new arrestees for 14 days; . . . using a UVI disinfecting machine and sanitizing cells more frequently; giving all inmates access to a disinfectant called DMQ, which is effective against COVID-19; promoting social distancing by

reducing cell numbers depending upon inmate classification; and providing access to COVID-19 testing to the entire inmate population." *Id.* at *2.

Thus, in both *Wilson* and *Cameron*, the BOP and the Oakland County Jail, respectively, presented voluminous evidence demonstrating that they had in fact promogulated, implemented, and were compliant with measures to prevent and mitigate the spread of COVID-19 at those facilities. Here, as explained above, nothing in the record shows that Defendants have actually implemented their COVID-19 protocols. Moreover, there is no evidence showing that Defendants have ever attempted to update their policies and directives as scientific knowledge about the coronavirus has evolved. The most recent policy memo Defendants put into the record is signed and dated April 23, 2020. (Appendix G – Exhibit 2.) The most recent directive in the record, Directive COJAC 20-03, is signed and dated on April 10, 2020. (*Id*.) Directive COJAC 20-06 reflects the ***only*** instance in the record where Defendants assert that they updated their policies. But this directive was signed and dated on March 21, 2020 two days prior to the issuance of the CDC guidance for jails and correctional facilities. (*Id.*; Exhibit 8, at 7.) Defendants put forth no evidence that they updated this directive per the CDC recommendations denoted in that Guidance.

In sum, there cannot be any dispute that Defendants have failed to "update" and "evolve" their coronavirus-related policies, or otherwise provide an "ongoing and dynamic response" to the substantial risk of harm that threatens Plaintiffs. *Wilson*, 2020 WL 3056217, at *10-11. The Circuit Court's finding that Defendants have reasonably acted "to avert the risk as much as possible and to adjust to the new scientific knowledge as it has been publicized" therefore is erroneous.[15]

[15] Defendants also argued that their compliance with MDOC's COVID-19 protocols means they have responded reasonably to the threat that the disease poses to Plaintiffs. (Appendix G, at 9.) Although the Circuit Court relied on

(Appendix A, at 14.) Because this conclusion is "not supported by the evidence," it constitutes an abuse of discretion and requires reversal. *McManamon v Redford Charter Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006).

D. The Circuit Court erred by failing to address evidence that Division II is unsafe for Plaintiffs and Jail staff alike during the COVID-19 pandemic.

In denying injunctive relief, the Circuit Court did not so much as mention, let alone address *or* analyze, Plaintiffs' claim and supporting evidence that the conditions of disrepair in Division II make it unsafe for use to confine detainees during the pandemic. It also did not mention, address, or analyze the evidence in the record showing that Defendants have refused to use (or otherwise give any reason for their failure to use) ample bed space in the other Jail facilities (Division I and III) that could safely house detainees. The failure to address this argument was alone an abuse of discretion. It is plainly outside the range of reasonable and principled outcomes to have concluded

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this information, this argument too must fail. First, neither Defendants nor the Circuit Court determined that the MDOC's protocols are sufficiently comprehensive to comport with the recommendations of medical experts and infectious disease experts. For example, those protocols, as amended on May 26, 2020, do not require that the Jail provide access to disinfectants and sanitization supplies that can kill the coronavirus. See *Director's Office Memorandum 2020 – 30R3*, Michigan Department of Corrections, https://www.michigan.gov/documents/corrections/DOM_2020-30R3_Final_692025_7.pdf (last updated May 20, 2020). The MDOC's intake procedures do not require jails to take preventative measures regarding possibly asymptomatic detainees. Its intake procedures also do not account for the virus's 14-day incubation period. Second, and more importantly, the MDOC's inspection of the Wayne County Jail occurred on May 12, 2020. (Appendix A, at 7.) This was days before Dr. Rottnek's inspection where he observed that Jail staff were not sufficiently responding to the COVID-19 threat. For instance, he observed that Jail staff were not always wearing a mask, which shows a disregard to the health of safety of the detainees and directly violates the MDOC's COVID-19 Protocols. (Appendix F, at 8-9.) He noted that social distancing was not being practiced at the Jail, despite being required by the MDOC's protocols and being the single most effective preventative measure against the spread of COVID-19. (*Id.* at 5.) The detainee declarations filed with Plaintiffs Reply brief again independently corroborated Dr. Rottnek's personal observations. Detainees reported that they had no way to social distance inside the Wayne County Jail. (Appendix H, at 11.) Jail staff were *still* not following the very basic requirement to always wear a mask. (*Id.*, at 13.) These few examples alone demonstrate that, regardless of what was reported in the MDOC inspection, just days later, Defendants were not in compliance with the MDOC's protocols nor the recommendations of medical experts. Further, there is no evidence that Defendants have updated their policies to comport with the MDOC's amended standards which were promulgated approximately two weeks *after* MDOC's inspection of the Jail.

that Defendants continued use of Division II to confine detainees during the pandemic, despite ample beds pace in less destitute facilities at the Jail, did not evince deliberate indifferent for the health and welfare of detainees. See *Shawl v. Spence Bros., Inc.*, 280 Mich App 213, 221 (2008) (An abuse of discretion occurs when the circuit court's ruling "falls outside the range of reasonable and principled outcomes.").

The record below clearly established that (1) Division II cannot be safely used to confine detainees (and staff) during the Covid-19 Pandemic[16] and (2) Defendants have failed to use the ample bed space available in Divisions I and III to mitigate the risk of harm that is likely to occur from continuing to confine detainees in Division II. First, Dr. Rottnek found that social distancing was impossible in Division II and the conditions of disrepair in the facility (which include irregular surfaces, rust, paint peeling and chipping, mildew, and mold), make it impossible to clean the facility.[17] Based on these facts, Dr. Rottnek and Dr. Lauring both concluded that detainees could not be safely confined in Division II during the pandemic. As Dr. Lauring explained, the inability to properly clean Division II, combined with its poor ventilation and the Jail's deficient medical care creates a "grave risk of serious illness or death."[18] (Appendix H – Exhibit 4, ¶ 35.)

[16] Indeed, Defendants conceded in their opposition that not only should detainees not be housed in Division II during the current pandemic, but that Division II should have been closed "well before the current health crisis." (Appendix G at 17). Wayne County Jail Sheriff Robert Dunlap has publicly noted the decrepit conditions in Division II. See *Claims of 'inhumane' conditions fuel bid for new Wayne County jail*, The Detroit News (June 6, 2018), https://www.detroitnews.com/story/news/local/wayne-county/2018/06/06/claims-inhumane-conditions-fuel-bid-new-wayne-county-jail/653117002/ ("It doesn't afford inmates the level of decency that a human being should have").

[17] As discussed below, *infra* Part II(A), these are facts that Dr. Rottnek observed during his inspection, and irrespective of his expert qualification, must have been included as part of the record.

[18] Defendants submitted two declarations that concluded otherwise. But neither of the declarants' opinions were based on the facts as they currently exist in Division II and therefore do not rebut the testimony of Dr. Rottnek and Dr. Lauring. In other words, Defendants' declarants did not conclude that Division II can safely be used to confine detainees, despite the inability to socially distance and adequately clean and disinfect the facility.

Second, Defendants did not contest that they continued to confine detainees in Division II—which they themselves concede is in deplorable condition—despite having ample space in other facilities at the Jail. The uncontested record evidence established that were over 450 beds available across multiple floors that were not being used in Division III (one of two other facilities Defendants use to confine detainees). (Appendix H at 4, 16, 18-19). Defendants did not mention this fact in their opposition brief, let alone explain why these facilities are were being used to confine detainees, in lieu of confining them in the dangerous conditions of Division II.

These two facts alone sufficed in establishing that Defendants were deliberately indifferent to Plaintiffs' constitutional rights. See *Cameron*, 2020 WL 2569868, at *23. The Circuit Court's refusal to consider the facts related to Division II and conclude, based on uncontested record evidence, that Division II was unsafe and Defendants' continued use of the facility constituted deliberate indifference, was an abuse of discretion. See *id*.; see also *Jones v. Johnson*, 781 F2d 769, 771-72 (CA 9, 1986) (holding that pretrial detainee stated a cause of action for deliberate indifference where record showed no explanation for denial of medical care other than budgetary concerns), overruled on other grounds by *Peralta v. Dillard*, 744 F3d 1076 (CA 9, 2014); *Harris v. Coweta County*, 21 F3d 388, 393 (CA 11, 1994) (the trier of fact may infer deliberate indifference "when prison guards ignore without explanation" facts that are "known or obvious to them").

II. THE CIRCUIT COURT ERRED WHEN IT GRANTED DEFENDANTS' MOTION TO STRIKE THE INSPECTION REPORT OF DR. FRED ROTTNEK WHEN DR. ROTTNEK HAS TWENTY YEARS OF SPECIALIZED KNOWLEDGE AND EXPERIENCE WORKING IN CORRECTIONAL HEALTHCARE.

> **Standard of Review:** This Court reviews for an abuse of discretion a trial court's determination of the qualifications of a proposed expert witness. *Woodard v. Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). This Court likewise reviews for an abuse of discretion a trial court's decision whether to admit evidence. *Craig v. Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). The interpretation of an evidentiary rule is reviewed de novo "in the same manner as the examination of the meaning of a court rule or a statute." *Waknin v. Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Rules of evidence are construed in the same way as statutes. *Craig*, 471 Mich at 78.

The Court of Appeals should grant leave because in granting Defendants' Motion to Strike, the Circuit Court largely ignored Dr. Rottnek's significant experience working in correctional medicine and successfully handling an infectious disease and ignored the highly relevant facts on the conditions in the Jail set forth in Dr. Rottnek's report. The Michigan Rules of Evidence allow a witness to provide expert testimony if the witness is qualified "by knowledge, skill, experience, training, or education." MRE 702.[19] Dr. Rottnek reliability applied his specialized knowledge of corrections healthcare and extensive experience—which includes his successful containment of an outbreak of a highly contagious infectious disease inside a county jail. His findings and recommendations are clearly helpful to the trier of fact in this case, as Michigan law also requires.

A. The inspection report's contains relevant factual findings independent of Dr. Rottnek's qualification as an expert witness and therefore must remain in the record.

[19] Although "the party proposing to call an expert bears the burden to show that his or her expert meets these qualifications," see *Gay v Select Specialty Hosp*, 295 Mich App 284, 293; 813 NW2d 354 (2012), Plaintiffs did not retain Dr. Rottnek to offer expert testimony in the manner typically done by civil litigants, i.e., via a paid retainer agreement. Here, the Circuit Court selected Dr. Rottnek and ordered him to conduct the inspection and submit a report to the court and the parties, providing detailed guidance on what Dr. Rottnek was to inspect, how he could interact with detainees, and the format of this report. (Appendix D.) Prior to the entry of the Inspection Order, the court reviewed Dr. Rottnek's curriculum vitae. (*Id*. at 2) (noting a status conference held on May 14, 2020, at which Plaintiff-Appellants provided the Court with Dr. Rottnek's curriculum vitae.) Defendants-Appellees, like Plaintiffs, had the opportunity to depose Dr. Rottnek to challenge his qualifications and chose not to do so. (*Id*. ¶ 5.)

All relevant evidence is generally admissible. MRE 402. Evidence is relevant if it is material and has probative value. See *People v Sabin*, 463 Mich 43, 57-58; 614 NW2d 888 (2000) (explaining MRE 401). Evidence is material if it relates to "any fact that is of consequence to the action," and it is probative when it tends to make the existence of any such fact "more or less probable than it would be without the evidence." *Id.* at 58. The threshold of relevancy is "minimal." *People v Denson*, 500 Mich 385, 402; 902 NW2d 306 (2017).

Independent of the fact that Dr. Rottnek can offer relevant expert testimony, his report contains relevant facts from the inspection of the Jail—as ordered by Circuit Court in its May 15 order—that warrant admission. Plaintiffs have alleged that they do not have sufficient access to adequate sinks, showers, toilets, clean laundry, medical care, cleaning supplies, or PPE. Plaintiffs have alleged that Jail staff do not properly clean Jail facilities or wear PPE themselves. And Plaintiffs have alleged that their current conditions of confinement render impossible social distancing—the single-most important precaution anyone can take to prevent the spread of COVID-19. (Appendix F at 41-42.)

Separate from any expert opinions or recommendations, as required by the inspection order, Dr. Rottnek memorialized in his report his first-hand observations, including but not limited to: the design and cleanliness of the Jail; the number and quality of sinks, toilets, and showers; the provision of medical, laundry, and dining services; and whether he witnessed Jail staff and detainees wearing personal protective equipment (PPE) and practicing social distancing. (Appendix D, ¶ 5.) Dr. Rottnek therefore is as much a fact witness as he is an expert witness, and his observations of the conditions at the Jail are both material and have probative value. See *Sabin*, 458 Mich at 57 ("A material fact is one that is 'in issue' in the sense that it is within the range of

litigated matters in controversy."). It is clear that Dr. Rottnek's personal observations regarding the conditions of the jail are within the range of litigated issues in this action, and the Circuit Court erred by striking the report in its entirety.

B. Dr. Rottnek is qualified to offer testimony on the issue of medical care at the Jail.

As noted above, the Michigan Rules of Evidence allow a witness to provide expert testimony if the witness is qualified "by knowledge, skill, experience, training, or education." MRE 702. MRE 702 incorporates the standards of reliable expert testimony set forth by the United States Supreme Court in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed2d 469 (1993). See *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 782; 685 NW2d 391 (2004). *Daubert* was meant to "relax the admissibility requirements" for expert testimony, not increase them. *United States v Jones*, 107 F3d 1147, 1158 (CA 6, 1997). An expert who is experienced in the subject matter of the litigation is qualified to provide expert testimony on that topic. See *Elher v Misra*, 499 Mich 11, 24; 878 NW2d 790 (2016) ("There is no doubt that Priebe, plaintiff's sole expert regarding the standard of care, was qualified to testify as an expert based on his extensive experience."). An expert need not have a specialty in the exact topic of the litigation to provide expert opinion in the case. See *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008) (finding expert qualified to offer an opinion about whether seven-year-old children are sufficiently mature to commit suicide because of his experience as a medical examiner who had performed thousands of autopsies). An expert's substantial years of professional and teaching experience involving the general topic at issue qualifies him to give expert testimony on this topic. See *Mulholland v DEC Int'l Corp.*, 432 Mich 395, 408-09; 443 NW2d 340 (1989) (holding that witness experienced in milk manufacturing was qualified to give expert opinion on whether a

machine defect caused disease in plaintiffs' herd of cows even though he was not an expert in animal disease). And an expert need not have published articles on the specific topic at issue to opine on it. See *In re Noecker*, 472 Mich 1, 11; 691 NW2d 440 (2005) (qualifying expert witness "although [he] had not recently published or presentations on the topic.").

Here, Dr. Rottnek's experience in correctional healthcare plainly qualifies him to give expert testimony in this case as to the measures being taken at the Jail to prevent the spread of the novel coronavirus. For fifteen years, Dr. Rottnek served as the Medical Director and Lead Physician at the Saint Louis County Jail. (Appendix J, at 4.) He has conducted court-ordered inspections, and other courts have qualified him as an expert witness in similar cases. (*Id*. at 5.) He has received multiple Correctional Health Professional certifications and is a member of the Society of Correctional Physicians and has recently been a member of the Academy of Correctional Health Professionals. (*Id*. at 4-5.) For years, he has lectured and presented on the topic of correctional healthcare, including the effects of a decreased jail population on the prevalence of infection. (*Id*.) He has published numerous articles on correctional healthcare. (*Id*. at 5.) And he has even testified on many occasions *on behalf of* county prosecutors and other county counsel. (*Id*.) All of this information was before the Circuit Court, but it went seemingly ignored.

Courts around the country have rejected the ***exact*** rationale employed by the Circuit Court. A decision out of the Middle District of Georgia found that a physician who had spent 9 years working in jails was "clearly qualified to offer expert testimony in the field of correctional medicine," even though his expertise was not infectious diseases. See *Goforth v Paris*, opinion of the United States District Court for the Middle District of Georgia, issued March 30, 2017 (Case

No. CIVA 5:02CV94 HL), 2007 WL 988733, at *5. In a case "involv[ing] complex issues of infectious disease, public health, and correctional medicine," a court in the Southern District of New York appointed an expert witness because of his "first-hand experience with correctional medicine." *Reynolds v Goord*, unpublished opinion of the United States District Court for the Southern District of New York, issued June 26, 2000 (Case No. 98 CIV 6722 (DLC)), 2000 WL 825690, at *2. Dr. Rottnek has fifteen years of first-hand experience working in correctional medicine, serving as the lead physician and medical director at the Saint Louis County Jail, and he will begin a new role with the Saint Louis Courts in July. (Appendix J, at 4.)

The Circuit Court's finding that "Dr. Rottnek's credentials . . . ha[ve] no connection to infectious disease, virology, and immunology and the manifestations of Covid-19" ignores Dr. Rottnek's direct experience handling an infectious disease and virus in a correctional facility. (Appendix B, at 10.) In his role as Medical Director at the Saint Louis County Jail, he assisted in developing policies, procedures, and protocols to address the spread of to contain and mitigate an outbreak of MRSA in the facility. (Appendix J, at 4.) MRSA is an extremely contagious infectious disease that can live on surfaces for days and go undetected in its hosts, like COVID-19. (*Id*. at 8); see also *Stoudemire v Michigan Dept of Corr*, 22 F Supp 3d 715, 721 (ED Mich, 2014) ("It is well understood that MRSA presents serious risks to the carrier and can be a source of community acquired infections."). In order to successfully contain the outbreak, he helped develop an educational video shown daily to all the housing pods explaining transmission, prevention, and proper hand-washing to mitigate spread of the bacteria. (Appendix J, at 4.) He assisted with creating protocols for institutional cleaning, including cleaning schedules and instructions for detainees to effectively sanitize their own cells with disinfecting wipes and workers to mop floors

and properly sanitize high-touch surfaces and shared spaces. (*Id*.) And he helped develop medical protocols to standardize antibiotic prescribing based on Bureau of Prisons recommendations. (*Id*. at 8-9.) Under his leadership, MRSA infections decreased to one-eighth of the rate of infection at its peak. (*Id*. at 9.) Because the interventions Dr. Rottnek undertook to mitigate the spread of MRSA largely overlap with those required to mitigate the spread of COVID-19—including coordinated testing, adequate cleaning, and educating detainees and Jail staff, he is particularly qualified him to opine on Defendants' response to COVID-19 at the Wayne County Jail. The court's failure to consider Dr. Rottnek's experience with infectious diseases warrants reversal.

The novelty of the COVID-19 pandemic does not bar Dr. Rottnek from offering an expert opinion on how to mitigate the spread of the disease at the Jail. See *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354 (2012) (stating that trial courts cannot "apply an overly narrow test of qualifications in order to preclude a witness from testifying as an expert"); see also *Nelson v Am Sterilizer Co*, 223 Mich App 485, 492; 566 NW2d 671 (1997) ("As long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel."). Regardless, any perceived lack of expertise in COVID-19 certainly did not warrant the striking of his inspection report because shortcomings in an expert's experience go to the weight, not admissibility, of his testimony. See *People v. Yost*, 278 Mich App 341, 395, 749 N W 2d 753, 787 (2008) (holding a pathologist could offer an opinion about whether children of the victim's age have the mental capacity to commit suicide, reasoning, "Although medical doctors are not necessarily experts on the development of the human brain, medical training clearly includes a basic understanding of brain development. Thus, Virani was minimally qualified…

Consequently, any limitations in his experience and training were properly a matter of weight rather than admissibility."); see also *In re Noecker*, 472 Mich 1, 12; 691 NW2d 440, 446 (2005) ("the extent of Dr. Ager's experience with alcoholics go to the weight to be given his testimony."); *Grow v W.A. Thomas Co*, 236 Mich App 696, 714; 601 NW2d 426 (1999) ("qualifications are relevant to the weight, not the admissibility, of [expert's] testimony."). While the Circuit Court's June 16 Order implies that Dr. Rottnek has no experience or knowledge relevant COVID-19, he in fact is currently working with the City of St. Louis to help safely re-open their courts in the midst of the pandemic. (Appendix J, at 9.) Dr. Rottnek has also been invited to give presentations on how to mitigate risk during the COVID-19 pandemic for direct patient care. (*Id*.) The court therefore erred in finding that Dr. Rottnek was not qualified to offer expert testimony in this case.

C. Dr. Rottnek's report is reliable because he reviewed relevant materials and facts made available to him.

A qualified expert's testimony is admissible if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702. A "trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co v Carmichael*, 526 US 137, 152; 119 S Ct 1167; 143 L Ed 2d 238 (1999). A court must admit an expert's testimony if the expert "sufficiently explained how his experience led to his opinions." *Lenawee Co v Wagley*, 301 Mich App 134, 163-64; 836 NW2d 193 (2013). Experts qualified on the grounds of their experience need not provide a specific scientific basis on which their opinions rely. See *Yost*, 278 Mich App at 395 (holding that an expert witness who was qualified by experience and training was not

required by MRE 702 to offer data in support of his opinion because this kind of expert opinion "need only be based on the actual facts admitted into evidence and his general training and experience."). Expert testimony is reliable if the expert reaches his conclusion by applying his experience in the relevant field. See, e.g., *Ruiz v Johnson*, 37 F Supp 2d 855, 890-91 (SD Tex, 1999), rev'd on other grounds 243 F3d 941 (CA 5, 2001) ("Expert Allen Breed's decades of experience evaluating prisons all across the country, for example, cannot be disregarded based on quibbles over his methodology. In evaluating the conditions of a prison system, having extensive experience in and around the cellblocks of this country is a paramount qualification.").

Dr. Rottnek relied on his immense experience in correctional medicine to make the recommendations and opinions in the inspection report. Courts around the country consistently admit expert testimony that is based on the expert's "knowledge and experience." *Hangarter v Provident Life & Acc. Ins. Co.*, 373 F3d 998, 1018 (CA 9, 2004); see also *United States v Hankey*, 203 F3d 1160, 1169 (CA 9, 2000) ("the witness had devoted years working with gangs, knew their 'colors,' signs, and activities. He heard the admissions of the specific gang members involved. . . . 702 works well for this type of data gathered from years of experience and special knowledge).; *United States v Jones*, 107 F3d 1147, 1160 (CA 6, 1997) (finding that handwriting analysis expert's testimony was reliable because of his substantial experience examining and comparing handwriting samples); *Buechel v United States*, unpublished opinion of the United States District Court for the Southern District of Illinois, issued August 2, 2012 (Case No. 08-CV-132-JPG), 2012 WL 3154962, at *3 ("[H]e has the experience and training in correctional medicine and infectious diseases. As a result, the Court finds that the reasoning and methodology

Dr. Greifinger used to develop his opinion is reliable."). Here, Dr. Rottnek has years of experience, training, and specialized knowledge in correctional healthcare on which to base his recommendations. (Appendix J, at 8-9.) He also relied on his personal observations of the Jail. (*Id*. at 13.)

In its decision to strike the inspection report, the Circuit Court relied on inapplicable law, and this alone constitutes an abuse of discretion. See *Gay*, 295 Mich App at 292 ("when a trial court admits or excludes evidence on the basis of an erroneous interpretation or application of law, it *necessarily* abuses its discretion.") (emphasis in original). The court below held that it "must" consider the factors listed in MCL 600.2955. (Appendix B, at 8.) But this statute is inapplicable for several reasons. First, by its plain language, the statute applies to tort actions and expressly states that it only applies "in an action for death of a person or injury to a person or property." MCL 600.2955(1). Plaintiffs have not brought a tort claim against Defendants; they allege that Defendants response to COVID-19 at the Wayne County Jail demonstrates deliberate indifference to their health and safety and therefore does not meet the minimum standards required by the Eighth and Fourteenth Amendments.

Second, the statute reflects the Michigan legislature's codification of the reliability factors enunciated in *Daubert*, but *Daubert* specifically applies to the admissibility of expert *scientific* testimony. See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 590 n 8; 113 S Ct 2786; 125 L Ed 2d 469 (1993) ("Our discussion is limited to the scientific context"). Nevertheless, the Court erroneously and unexplainedly found that the CDC's guidance and recommendations was not "supporting literature" under MCL 600.2955(1), on which Dr. Rottnek relied. The CDC is *the* national public health institute for the United States; its guidance has been followed and widely

accepted. The guidance is, therefore, precisely the type of text which "will meet the trustworthy requirements of MRE 803(24)," the catch-all hearsay exception because "[i]n order to be useful to the experts who utilize these references, the texts must be objective, thorough, accurate, and current." *Yost*, 278 Mich App at 391. Thus, Dr. Rottnek's reliance on the CDC guidelines, coupled with his experience in correctional medicine, his specialized knowledge, and his personal observations make his reported findings sufficiently reliable for admission. See *Yost*, 278 Mich App at 395. The court erred in finding the court-ordered inspection report to be unreliable.

D. The inspection report's recommendations and factual findings regarding the current conditions at the Jail are relevant to the constitutional violations Plaintiffs have alleged.

Expert testimony is admissible if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue," MRE 702, and is otherwise legally relevant. *People v Peterson*, 450 Mich 349, 363; 536 NW2d 857 (1995). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." MRE 401. An expert's testimony is relevant if it helps resolve an issue in the case. *Mulholland*, 432 Mich at 344 n 3.

The United States Supreme Court has made clear that inspection reports that explain the conditions inside a jail are relevant when plaintiffs allege constitutional violations related to their conditions of confinement. In *Brown v Plata*, 563 US 493, 522; 131 S Ct 1910; 179 L Ed 2d 969 (2011), the Supreme Court affirmed a court's reliance on expert testimony in a case alleging Eighth Amendment violations at a prison because the experts' reports "based their conclusions on recent observations of prison conditions." 563 US at 522. Other courts have similarly admitted expert testimony on the ground that it assisted the trier of fact in understanding the evidence presented.

See, e.g., *Walker v Schult*, 365 F Supp 3d 266, 288 (NDNY, 2019) ("Applying expert knowledge to a given set of facts is precisely the sort of thing experts are expected to do. Dr. Gilligan appears to have reasonably applied his expertise as a doctor and psychiatrist intimately familiar with the psychological effects of a prison setting to Walker's specific claims"); *Braggs v Dunn*, 317 FRD 634, 651 (MD Ala, 2016) ("Dr. Burns's expert evidence will be helpful . . . because she will bring to bear her experience, and the results of her investigation in this case, to help the court to understand the seriousness of the risk of harm posed by the challenged policies and practices"); *Hadix v Johnson*, unpublished opinion of the United States District Court for the Western District of Michigan, issued September 14, 2005 (Case No. 4:92-CV-110), 2005 WL 2243091, at *6 (finding that a family medicine board-certified physician who had previously worked as the chief medical officer of a prison had provided credible expert testimony in a suit alleging Eighth Amendment violations with regard to fire safety).

Here too, Plaintiffs have alleged constitutional violations rooted in Defendants' failure to maintain sufficiently safe conditions at the Jail during the COVID-19 pandemic. The Circuit Court erroneously concluded that Dr. Rottnek's opinions were not sufficiently tied to the facts of this case and could not assist the court in determining whether to issue a temporary restraining order because he lacks specialized knowledge in infectious disease, virology, or immunology. (Appendix B, at 10-11.) As explained in Part II(A), *supra*, the court ignores the fact that Dr. Rottnek, a licensed physician, has become a resource for mitigating the spread of COVID-19 in Saint Louis County and has significant experience managing healthcare in correctional facilities—including an outbreak of a very contagious infectious disease.

The Circuit Court offered no analysis as to whether Dr. Rottnek's experience as the lead

physician in a county jail can assist the trier of fact in determining whether Defendants are offering adequate medical care in the midst of a global health emergency. Moreover, the Circuit Court did not and could not explain how Dr. Rottnek's expertise in correctional healthcare and his personal observations of current conditions at the Jail lack any connection to the facts of this case. This failure to apply any law to the fact constitutes an abuse of discretion. See *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 267; 833 NW2d 331 (2013) ("A trial court by definition abuses its discretion when it inappropriately interprets and applies the law."). Dr. Rottnek's report, which contains factual findings based on personal observations and recommendations based on his experience as a county jail physician, is relevant to the Circuit Court's ultimate determination of whether immediate emergency measures are needed to ameliorate the constitutional issues that Plaintiffs have raised in this lawsuit and should have been considered as part of the analysis on Plaintiffs' motion for injunctive relief.

This Court therefore must grant leave for appeal and reverse the Order striking the inspection report.

CONCLUSION AND RELIEF SOUGHT

Plaintiffs ask this Court to grant their concurrently filed request for immediate hearing, to reverse the June 16 and 19 decisions, and enter a preliminary injunction to protect Plaintiffs from the substantial risk of harm caused by Defendants' inadequate response to the COVID-19 pandemic.

Respectfully submitted,

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DATED: July 6, 2020

STATE OF MICHIGAN
IN THE SUPREME COURT

WAYNE COUNTY JAIL INMATES, et. al.,

Plaintiffs-Appellants,

v

WILLIAM LUCAS, et. al.,

Defendants-Appellees.

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PROOF OF SERVICE

Allison L. Kriger, certifies that on July 6, 2020, she served by electronic mail the foregoing Emergency Bypass Application for Leave to Appeal and Proof of Service on the Wayne County Corporation Counsel, 500 Griswold Street, 30th Floor, Detroit, Michigan 48226.

/s/ Allison L. Kriger_____
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