

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WAYNE COUNTY JAIL INMATES et al.,

Case No. 71 173 217 CZ

Plaintiffs

Hon. Timothy M. Kenny

v

WILLIAM LUCAS et al.,

Defendants.

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO STRIKE THE REPORT OF FRED ROTTNEK, M.D.,
OR, IN THE ALTERNATIVE, TO REDACT**

1. INTRODUCTION.

The report of Plaintiff's expert, Fred Rottnek, M.D., must be stricken from the record in this case, or in the alternative, redacted because: 1) his report exceeds the scope of the Order governing the inspection and 2) because Dr. Rottnek's opinions are inadmissible. He lacks a specialty like infectious disease or immunology to provide expertise regarding COVID-19. Additionally, his opinions are not reliable or relevant. He did not review the measures that the Wayne County Jail had implemented to combat COVID-19. His opinions lack any relevance. His repeats allegations of Plaintiffs. He fails to connect his expertise to the facts of this case. An expert's opinions are not relevant if the expert acts merely as a conduit for other sources, such as CDC Guidelines and inmate statements. The Court, the jury, and the parties may consider these themselves. They don't require a witness with the Court's imprimatur afforded an "expert" to give an implication that the witness' additional weight to these sources.

2. FACTS AND PROCEDURAL HISTORY

After the May 14, 2020 status conference in this matter, this Court entered an order, dated May 15, 2020, governing the inspection of Plaintiff's chosen expert, Fred Rottnek, M.D. Dr. Rottnek was to evaluate "Jail conditions insofar as they directly relate to the health and safety of detainees in the context of COVID-19." ("The Order") **Ex A**, ¶ 3. The Order provided that, after his inspection, Dr. Rottnek was to submit a report to counsel for the parties and to the court. **Ex. A**, ¶ 4.

The Order further provided for the scope of Dr. Rottnek's Report. The Order provided:

The Report shall include:

- Conditions of the housing units during the COVID-19 pandemic;
- Conditions of and access to shower/bathroom facilities during the COVID-19 pandemic;
- Conditions of and access to medical, laundry, dining facilities and shared common areas during the COVID-19 pandemic;
- Availability and stock of cleaning supplies and personal protective equipment for inmates and Jail staff;
- Availability and stock of hygienic and disinfecting supplies for inmates and Jail staff;
- Availability of communications to inmates about COVID-19 including low-literacy and non-English-speaking people; and
- Social distancing measures.

Ex A, ¶ 7

Dr. Rottnek is neither board certified in immunology or in infectious disease. He is board certified in family medicine and addiction medicine. Dr. Rottnek is a fellow of the American Academy of Addiction Medicine and of the American Academy of Family Physicians. (**Ex B**, p 2). Admittedly, Dr. Rottnek has published and presented on the topic of a particular epidemic,

specifically, **opioid addiction**. **Ex B**. However, Dr. Rottnek has not published or presented on any type of virus, let alone a virus pandemic.

Predictably, then, Dr. Rottnek does not base his opinions upon any medical science. Instead, his sole source is the United States Center for Disease Control and Prevention's Interim Guidelines on the Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities. **Ex C**, ¶ 3(b). This publication lists guidelines to be implemented by jails and prisons. It does not provide hard and fast rules that must be followed by every facility across the country. The CDC recognizes the unique challenges presented by each facility in each community. The CDC begins its publication this way:

This document is intended to provide guiding principles for healthcare and non-healthcare administrators of correctional and detention facilities (including but not limited to federal and state prisons, local jails, and detention centers), law enforcement agencies that have custodial authority for detained populations (i.e., US Immigration and Customs Enforcement and US Marshals Service), and their respective health departments, to assist in preparing for potential introduction, spread, and mitigation of COVID-19 in their facilities....

This guidance will not necessarily address every possible custodial setting and may not use legal terminology specific to individual agencies' authorities or processes. **The guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions.** Facilities should contact CDC or their state, local, territorial, and/or tribal public health department if they need assistance in applying these principles or addressing topics that are not specifically covered in this guidance.

Ex D, p 1 (emphasis in original).

The CDC itself recognizes that its guidelines (i.e., not mandates) are to be adopted as needed by local officials based upon the physical layout of a jail, staffing levels, and jail population, among other factors.

Curiously, Dr. Rottnek did not take advantage (either prior to his inspection or after it), to review the directives issued and measures taken by the Jail to address the COVID pandemic.

Neither did Dr. Rottnek review the stipulated Order entered by this Court on May 18, 2020, regarding measures that the Jail had already adopted and that Plaintiffs' counsel requested be memorialized in an order of the court.

Dr. Rottnek completed his inspection of the Jail on May 16, 2020. Dr. Rottnek admits that he failed to perform one of the tasks required in the Order. He states in his report: "I did not explicitly ask to see stocks of cleaning supplies, hygienic supplies, or PPE, so I did not see the inventories. I apologize for this oversight." **Ex C**, ¶ 5(d)(i). Despite this admission, Dr. Rottnek provides opinions regarding these supplies, such as his statement that the "Simple Green" cleaner used by the jail is not approved for use in preventing COVID-19. If he would have looked at the stocks of cleaning supplies, he would have realized that this product was "Simple Green d Pro 3 Plus," a disinfectant approved by the EPA for use against COVID.

Dr. Rottnek's Report exceeds the scope of the Order. It includes his recommendation to: "stop housing inmates in Division II as soon as possible." **Ex C**, ¶ 7(i). This recommendation goes well beyond the risk of COVID-19 transmission and is based upon the "pervasive disrepair, irregular surfaces, rust, paint peeling..." etc. **Ex C**, ¶ 7(i). His report also considers the adequacy of medical care for diseases other than COVID-19. **Ex C**, ¶ 7(iv).

His report also includes personal identifying information that is private and protected by HIPAA. It lists names of inmates who are housed on the psychiatry floor and quarantine units. **Ex C**, ¶ 4.

3. LAW AND ARGUMENT

The Rules of Evidence, Michigan statutes, and case law universally mandate that trial courts rigorously exercise its role as gatekeeper for consideration of expert opinions. MRE 702;

MCL 600.2955; *Krohn v Home-Owners Ins Co*, 490 Mich 145, 167; 802 NW2d 281 (2011). The function must be exercised “at all stages of a proceeding.” *Krohn*, supra 490 Mich 167.

Because Dr. Rottnek fails to demonstrate an expertise in the subject he purports to render an opinion on (the spread of COVID-19). He fails to show that his opinions are reliable – they are based on a paucity of material and he fails to properly investigate the subjects of his recommendations. Dr. Rottnek’s opinions are also no relevant. They will not assist the Court or the trier of fact. They merely mimic the guidelines of the CDC, a document that all can read. His opinions also seek to amplify the allegations of Plaintiffs. Dr. Rottnek’s report contains complaints by Plaintiffs, inmates at the Wayne County Jail. These allegations should stand on their own, and not be repeated through the conduit of Dr. Rottnek. The problem with permitting an “expert” to relay the statements of the CDC or Plaintiffs themselves is that it provides an “imprimatur” by the Court upon a statement by the source. The statements of the CDC and the Plaintiffs should succeed or fail based on the statements themselves and should not be given extra credibility because they are echoed by Plaintiffs’ expert.

In the event that the Court does not strike his entire report from the docket, the Report must be redacted to exclude those recommendations that exceed the scope of the Order – namely, the recommendations that have no connection with COVID-19. The Report must also be redacted to exclude the personal identifying information of inmates at the Wayne County Jail, including the names of inmates on the mental health unit and in COVID quarantine.

A. This Court Must Exercise Its Gatekeeper Function Re Expert Opinions At All Levels of Proceedings.

Consistent with federal law, Michigan law demands that trial courts exercise its role as a gate-keeper to preclude the admission of opinion testimony that is not based upon adequate

expertise, that is not reliable or that is not relevant. The law regarding expert testimony is found in the Michigan Rules of Evidence, the Michigan Statutes, and in federal and state case law.

The Michigan Rules of Evidence provide:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise 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

This rule makes clear that the trial court must make two initial determinations. First, a trial court must determine if the “specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in evidence.” Then, the court must determine if the expert is “qualified ... by knowledge skill, experience, training, or education.” Only after these two threshold determinations are made, a court must only admit testimony that is reliable because it is 1) based on sufficient facts or data, 2) the product of reliable methods, and 3) because the witness applied the methods reliably to the facts at issue in the case.

As noted by the Michigan Supreme Court, “MRE 702 incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharms Inc*, 509 U.S. 579 ... (1993). *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016). MRE 702 demands a searching inquiry. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). “Each aspect” of an expert’s proffered testimony requires this inquiry. *Id* at 779.

Under *Daubert* and the MRE 702, there are two requirements for admissibility of each aspect of the purported expert testimony: it must be relevant, and it must be reliable.

Elher, supra, 499 Mich at 22-23. The proponent bears the burden to establish that the testimony is admissible. *Gilbert, supra*, 470 Mich at 781.

MCL 600.2955 provides guidance as to factors the trial court may consider in determining whether expert testimony is reliable. The statute provides:

- (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
 - (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
 - (b) Whether the opinion and its basis have been subjected to peer review publication.
 - (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
 - (d) The known or potential error rate of the opinion and its basis.
 - (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, “relevant expert community” means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
 - (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
 - (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

B. Dr. Rottnek May Be A Specialist in Addiction Medicine, not Infectious Disease or Other Expertise Related to COVID.

An examination of Dr. Rottnek's curriculum vitae fails to demonstrate that he has expertise in an areas of science that would assist the Court in evaluating the issues in this case. Thus, his purported expert testimony must be excluded because his testimony fails one of the threshold inquires in MRE 702: he is not qualified "by knowledge, skill, experience, training, or education" to render an expert opinion on COVID-19.

Dr. Rottnek currently serves as Professor of Family and Community Medicine at St. Louis University in St. Louis, Missouri. **Exhibit B**, p 1. His specialty appears to be addiction and recovery, especially as it relates to the opioid crisis. He serves as the Program Director of the St. Louis University Addiction Medicine Fellowship. *Id.* He is the Medical Director of the Assisted Recovery Centers of America. *Id.* He also serves as a consultant to the Missouri Department of Mental Health, Opioid State-Targeted Response, Opioid Crisis Management Team. *Id.* While Dr. Rottnek did serve as the contracted medical director and lead physician for the St. Louis County Department of Health: Corrections Medicine, there is nothing in his cv that would suggest that he is uniquely equipped to speak about the novel coronavirus 2019, how this specific coronavirus spreads and the science of combatting it. He lacks board certifications in infectious disease.

Dr. Rottnek is a board certified in addiction medicine and family medicine. He is a fellow of the American Academy of Addiction Medicine and of the American Academy of Family Physicians. **Ex B**, p 2. He is a Certified Correctional Health Professional by the National Commission on Correctional Health Care. *Id.* Dr. Rottnek is a member of the Association of Medical Education and Research in Substance Abuse, Physicians for Human Rights, the American Society of Addiction Medicine, the Society of Correctional Physicians, Heath Care for the Homeless Network, and the American Academy of Family Physicians. *Id.*, pp 2-3. He currently

teaches courses about the opioid epidemic, pain substance abuse and clinical interviewing. *Id*, p 6.

Dr. Rottnek's cv lists his research grant projects. He is currently researching Peer to Peer Recovery Community Service Program, Addiction Medicine, Opioid Workforce Expansion, and Assisted Recovery Centers of America. *Id* p 8. No coronavirus topics are listed as research projects past or present. Similarly, the cv also lists Dr. Rottnek's publications and presentations. While the publications and presentations listed appear to be mainly concerned with addiction and recovery, none of them appear to be about immunology, infectious diseases or coronaviruses.

The fact that an witness possess specialized knowledge in one area of scientific inquiry does not qualify him as an expert in unrelated subject. *Gilbert* 470 Mich at 789. In short, while Dr. Rottnek may qualify as an expert on the opioid epidemic, he lacks expertise on the matter he is put forward to render opinions on – the COVID-19 pandemic. Therefore, his testimony should be excluded and his report sticken.

C. Dr. Rottnek's Opinions Are Not Reliable.

In this case, Dr. Rottnek took a mere slice of the available information prior to conducting his inspection of the Jail and making her recommendations. Dr. Rottnek admits that the only two documents he relied upon were the Court's Order of May 15, 2020, and the CDC guidelines. Dr. Rottnek fail to review any of the material provided to Plaintiffs' Counsel regarding the measures taken by the Wayne County Sheriff's Department and Jail Medical to combat COVID-19. He relied exclusively on his observations and the allegations relayed to him by inmates he encountered during his tour. There was no inquiry to check the facts underlying the allegations.

Even a "supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method and are reliable and

relevant under the test set forth by the Supreme Court in *Daubert*.” *Clark v Takata Corp*, 192 F3d 750, 759, n 5 (CA7 1999).

Courts have noted that an expert’s failure to adequately account for obvious alternative explanations bears on the lack of reliability of an expert’s testimony and supports exclusion. *Clair v. Burlington NRR*, 29 F3d 499, 502 (CA 9 1994). In this matter, not only did Dr. Rottnek not account for the Jail’s actions, he failed to even inquire into them.

Further, by his own admission, Dr. Rottnek failed to even look at the jail’s “stocks of cleaning supplies, hygienic supplies, or PPE. I apologize for this oversight.” **Ex C**, ¶ 5(e), p 7. Therefore, no opinion he provides regarding these materials can be admitted. They are not based upon sufficient facts.

This unreliability is demonstrated by the fact that Dr. Rottnek erroneously states that the Jail uses simple green as a disinfectant. **Ex C**, ¶ 5(f)(ii), pp 7-8. If Dr. Rottnek has looked at the materials, he would have learned that the jail uses, Simple Green d Pro 3 Plus.

The methodology used by Dr. Rottnek to form his recommendations appears to be that he took the hearsay statements of the inmates at face value and applied them to the CDC guidelines. Where there is “too great an analytical gap” between the data and the opinion proffered, a court may exclude the testimony as unreliable. *Gen Elec Co v Joiner*, 522 US 136, 146 (1997).

D. Dr. Rottnek’s Opinions Are Not Relevant.

Additionally, Dr. Rottnek’s opinions are not relevant. In order to be admitted, the proffered expert testimony must be both reliable **AND** relevant. *Elher, supra*, 499 Mich at 22-23. An expert’s opinion testimony must be “relevant to the task at hand.” *Daubert v Merrell Dow Pharm Inc*, 43 F3d 1311, 1315 (CA 9, 1995) (“*Daubert II*”). Relevancy, or “fit” requires a “valid scientific connection” between the subject matter of the expert’s opinions and the factual issues to

be determined by the jury. *Jones v US*, 933 F Supp 894, 900 (ND Calif 1996). Here, Dr. Rottnek brings no expertise to the task at hand, whether the Defendants are deliberately indifferent to Plaintiffs' serious medical conditions. He functions merely as a conduit for other sources.

Dr. Rottnek relays guidelines by the CDC and allegations of inmates. He does not bring any of his purported expertise to bear on matter at issue in this case. It is improper to use an expert "as a conduit for hearsay testimony." *Hutchinson v Groskin*, 927 F2d 722, 725 (CA 2 1991). It is inappropriate for a witness to state the conclusions of one set of experts and testify that he merely agrees with them. *Thorndike v DaimlerChrysler Corp*, 266 FSupp2d 172, 185 (D Me 2003).

In his report, Dr. Rottnek merely concludes that the Jails should implement CDC guidelines. He is acting as a conduit for these guidelines. Of course, the trial court, the jury, and the parties can read the CDC guidelines for themselves. The imprimatur of an expert opinion giving unnecessary credibility and weight to these opinions is not warranted.

E. Dr. Rottnek's Report Exceeds the Scope of The Report Contained in The Order and Contains Personal Identifying Information.

Dr. Rottnek's Report exceeds the scope of the Order. It includes his recommendation to: "stop housing inmates in Division II as soon as possible." **Ex C**, ¶ 7(i). This recommendation is goes well beyond the risk of COVID-19 transmission and is based upon the "pervasive disrepair, irregular surfaces, rust, paint peeling..." etc. **Ex C**, ¶ 7(i). His report also considers the adequacy of medical care for diseases other than COVID-19. **Ex C**, ¶ 7(iv).

His report also includes personal identifying information that is private and protected by HIPAA. It lists names of inmates who are housed on the psychiatry floor and quarantine units. **Ex C**, ¶ 4.

Because Dr. Rottnek's report contains information and recommendations outside of COVID, these portions should be redacted, in addition to the names of inmates listed in his report.

WHEREFORE, Defendants respectfully request that this Honorable Court grant their motion and strike from the record Dr. Rottnek's report or, in the alternative, redact those portions of the report that provide opinions outside the scope of the Court's May 15, 2020 Order and that contain personal identifying information.

Respectfully submitted,

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