

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

WAYNE COUNTY JAIL INMATES, et al,

Plaintiffs,

-v-

WILLIAM LUCAS, et al,

Defendants.

Case No. 71-173217-CZ

Hon. Timothy M. Kenny
Chief Judge

OPINION AND ORDER

At a session of said Court held in the Coleman A.
Young Municipal Center, Detroit, Wayne County,
Michigan
on this: **JUN 16 2020**

PRESENT: Hon. Timothy M. Kenny
 Chief Judge
 The Third Judicial Circuit Court of Michigan

This civil matter is before the Court on “Defendants’ Motion to Strike the Report of Fred Rottnek, M.D., or, in the Alternative, to Redact.” For the reasons stated below, the Court grants the motion to strike the report.

I. BACKGROUND

On May 28, 2020 Plaintiffs filed a motion for a temporary restraining order against Defendants in connection with the outbreak of the novel coronavirus, COVID-19. The parties agreed to have an inspection of the Wayne County Jail (“the Jail”) conducted by Dr. Fred Rottnek, MD, MAHCM.

Dr. Rottnek's extensive Curriculum Vitae ("CV") indicates that he is board certified in family medicine and in addiction medicine. He is a fellow of the American Academy of Addiction Medicine and of the American Academy of Family Physicians. He currently serves as a professor of family and community medicine at the Saint Louis University School of Medicine. Dr. Rottnek also currently serves on the staff of Saint Louis University Hospital. Prior to his professorship at Saint Louis University, from 2000 to 2009, for his primary employment, Dr. Rottnek served as Director of Community Medicine at the Institute for Family Medicine in St. Louis. At the same time, he served on a contract basis as the Medical Director and Lead Physician at the Saint Louis County Jail for an additional six years. At the Saint Louis County Jail, he was responsible for the general health of detainees and jail staff. In addition to his board certifications, Dr. Rottnek is a certified Correctional Health Care Physician through the National Commission on Correctional Health Care. He is also a member of the Society of Correctional Physicians and has recently been a member of the Academy of Correctional Health Professionals. His CV also indicates that he has given numerous presentations and published numerous articles on correctional health and addiction. According to Plaintiffs, Dr. Rottnek has collaborated with Saint Louis courts on "how to safely reopen" in response to the ongoing COVID-19 pandemic and he has given presentations on "how to mitigate risk in direct patient care."

Defendants dispute that Dr. Rottnek is qualified as an expert because he lacks specialized knowledge of Covid-19. They also contend that his background indicates no specialization in infectious disease and he lacks certifications in immunology or infectious disease.

With respect to the issue before the Court, the Wayne County Jail currently houses approximately 800 detainees. Certain conditions for the conduct of Dr. Rottnek's inspection were

stipulated to and ordered by this Court in a “Joint Proposed Inspection Order.” The order for inspection included the following relevant conditions:

3. The inspector shall be allowed to speak with and interview any person incarcerated at the Jail. When speaking with inmates, the inspector may provide his name, title, the reason for his visit, and that he does not work for the Jail. Specifically, he may state that he is conducting an inspection of Jail conditions insofar as they directly relate to the health and safety of detainees in the context of COVID-19. The inspector also may inform inmates that they will not be retaliated against for speaking with him and answering his questions.

4. The inspector shall provide a report to the parties and the Court by May 20, 2020 by 5:00 pm. The report shall be sealed until otherwise ordered by the Court. The Court will consider argument on whether to make the report public at a later date.

5. The inspector shall be produced for deposition within 48 hours of producing said report unless another time is agreed to by the parties.

6. The inspection shall be completed within a twelve-hour time frame and shall include the following areas inside Wayne County Jail facilities Division I, II and III:

- All housing units where inmates are housed;
- Housing units where quarantined inmates are being held;
- Common areas where inmates congregate to watch TV, eat, and utilize telephones and tablets;
- The ingress/egress staff screenings;
- Medical facilities;
- Kitchen;
- Laundry facilities;

- Shower/bathroom facilities; and Areas where cleaning supplies and personal protective equipment are maintained.

7. The inspector's reports shall include any information he was able to ascertain regarding the following:

- 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.

8. During the course of the inspection, the inspector shall be permitted, without intrusion of jail staff, to ask inmates questions about the following topics outlined in the agreed upon stipulation order:

- Availability and access to medical staff;
- Availability and access to medical kites;
- Availability and access to free medical care for COVID-19 testing, COVID-19 tests, grievances, showers, mental health services, reading materials, phone and video calls, and counsel whether in quarantine or not;
- Availability and access to facemasks, N95 respirators, eye protection, disposable medical gloves, and disposable gowns/one piece coveralls;

- Self-reporting procedures for COVID-19 symptoms;
- Whether detained people have received sufficient cleaning and hygiene supplies and the time it takes to receive them; and
- Incidents of punitive transfers, threats of punitive transfers, and concerns about retaliation for raising concerns formally or informally with Jail staff about the health and safety conditions at the Jail.

10. An attorney from each side is permitted to attend the inspection.

11. The inspector may designate to Defendants areas, items, or people detained in the jail which he would like to be photographed. Defendants will take the photograph(s) in the presence of the inspector. Photographs will be shared with each party through their attorneys within twelve hours of the inspection.

12. Any photographs of the Jail shall be kept confidential by all attorneys on this case and shall not be used for any purpose other than this litigation. ...

13. The format of the report shall be as follows:

- Executive summary
- Materials reviewed before finalizing inspection report
- Individuals interviewed during inspection
- Observations for Divisions I, II, and III regarding matters outlined in paragraphs 7 and 8 above
- Recommendations.

Dr. Rottnek's report was submitted on May 16, 2020. [County's Exhibit C (completely redacted)]. Plaintiffs have moved that the Court unseal the report, while at the same time, Defendants have moved to strike Dr. Rottnek's report from the record or to redact certain

portions of it. After oral argument on both motions, the Court has issued an order unsealing the report. Now before the Court is Defendants' motion to strike Dr. Rottnek's report or to redact portions of it.

II. DISCUSSION

Defendants' motion requests that the Court either strike Dr. Rottnek's report in its entirety or, in the alternative, strike the portions of the report that "go beyond the scope" of the "Joint Proposed Inspection Order." In support of their motion, Defendants argue (1) that Dr. Rottnek fails to demonstrate an expertise in the subject he purports to render an opinion on the spread of COVID-19; (2) that Dr. Rottnek's opinions are not reliable because they are "based on a paucity of material" and because "he fails to properly investigate the subjects of his recommendations;" (3) that Dr. Rottnek's opinions are also not relevant; and (4) that his opinions will not assist the Court or the trier of fact. Conversely, Plaintiffs' position is that the report was prepared by a qualified expert, is sufficiently reliable, and contains factual information and recommendations relevant to the issues in this case. Plaintiffs also argue that Defendants' argument "ignores Dr. Rottnek's two decades of experience in correctional healthcare and asks this Court to do the same" and that "Dr. Rottnek has substantial experience in correctional healthcare which qualifies to him provide expert testimony on healthcare at the Jail."

Preliminarily, it should be noted that, if the Court deems that the report has been done by a qualified expert, that it is sufficiently reliable, and that it will assist the Court, the trier of fact, the report will be admissible record evidence for the motion for a temporary restraining order. Also of note is the fact that the parties have agreed that the Court will decide the motion for a temporary restraining order based on the parties' briefs. The essential issue now before the Court is whether or not Dr. Rottnek is sufficiently qualified as an expert to opine, either by testimony

or in a report, on whether or not Defendants have adequately responded to the COVID-19 pandemic in the Jail setting.

The admissibility of expert testimony is governed by MRE 702 which provides:

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.

The inquiry under MRE 702 is a flexible one where the court, in its gatekeeping role, must determine “that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable.” *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016)[Footnote omitted]. “MRE 702 incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharm, Inc...*” *Id.*¹ “A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony.” *Id.* at 23.

A trial court’s role as a gatekeeper “does not require it to search for the absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes.” *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007). Rather, the proper inquiry is whether the expert opinion is “rationally derived from a sound foundation.” *Id.* at 139. The burden is on the party offering the expert’s opinion to satisfy the preconditions established by MRE 702. *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004).

¹ *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed2d 469 (1993).

As part of its “gatekeeper” role, a trial court must also consider the factors listed in MCL 600.2955(1), to determine whether the expert's opinion is reliable and will assist the trier of fact:

Elher, supra. The statute provides:

In an action for the death of a person or 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.

While MCL 600.2955(1) requires the trial court to consider the listed factors, it does not require that each and every factor must favor the proposed expert testimony. *Chapin, supra* at 137. Indeed, it may be that not every factor will necessarily apply in every case in which the

reliability of scientific evidence testimony is challenged. All the factors in MCL 600.2955 may not be relevant in every case. *Ehler, supra* at 27. In some cases, the scientific testing and replication factor may not fit the type of opinion at issue. *Id.* “Ultimately, the gatekeeping inquiry asks whether the expert has reached his or her conclusions in a sound manner, and not whether the expert’s conclusions are correct.” *Chapin, supra*.

The decision whether to conduct a *Daubert* hearing is within the trial court’s discretion. *Lenawee Co v Wagley*, 301 Mich App 134, 162; 836 NW2d 193 (2013). “Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation.” *Gilbert, supra* at 78.

Regarding Dr. Rottnek’s qualifications as an expert under MCR 702, Dr. Rottnek has no specialized knowledge in virology, infectious disease, or immunology. The focus of his credentials is on family and addiction medicine. He has not studied, researched, or published articles on the novel corona virus or any other infectious disease or virus. Under MCR 702, he cannot be said to be qualified as an expert “by knowledge, skill, experience, training, or education” in Covid-19 or any other infectious diseases or viruses.

Under MCL 600.2955(1), while scientific testing and replication may not fit the type of opinion at issue, *Ehler, supra*, given the current conditions, Dr. Rottnek has provided no publications upon which his opinions rely. As indicated above, “supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony.” *Id.*; MCL 600.2955(1)(b). As Defendants point out, Dr. Rottnek’s recommendations basically mirror the guidance and recommendations of the Center for Disease Control (“the CDC”).

Dr. Rottnek’s opinion cannot be said to be reliable because he has not provided any specific scientific basis from which his opinion derives. Although he has experience in the

correctional facility setting, his opinions on the spread of Covid-19 provide no scientific, medical, or specialized knowledge of the virus and its effect on concentrated populations such as a jail. Moreover, because Dr. Rottnek’s credentials demonstrate that his expertise is in family medicine and addiction medicine, his opinion has no connection to infectious disease, virology, and immunology and the manifestations of Covid-19. Dr. Rottnek’s lack of specialized knowledge and the failure to provide published literature on Covid-19 or other viruses demonstrate a lack of reliability of his opinions. Hence, the opinion cannot be said to be sufficiently reliable or relevant. Neither knowledge of family medicine nor knowledge of addiction medicine are relevant or reliable for a determination of whether the Court should or should not issue a temporary restraining order.

As the court in *Daubert, supra* explained:

“Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” 3 Weinstein & Berger ¶ 702[02], p. 702–18. See also *United States v Downing*, 753 F2d 1224, 1242 (CA3 1985) (“An additional consideration under Rule 702 -- and another aspect of relevance -- is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute”). The consideration has been aptly described by Judge Becker as one of “fit.” *Ibid.* “Fit” is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.

Id at 591.

Because of his lack of specialized knowledge, Dr. Rottnek’s opinion cannot be said to be “sufficiently tied to the facts” of the instant case. *Id.* In short, Dr. Rottnek’s qualifications do not demonstrate that he has sufficient specialized knowledge based on science in the relevant scientific community, i.e., the community of experts in infectious disease, virology, or immunology. His expertise has no connection to facts of this case. In addition, MCR 702 “further

requires that the evidence or testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’ This condition goes primarily to relevance.” *Id.* Thus, in the Court’s view, Dr. Rottnek’s opinions cannot assist the Court in its determination as to whether or not to issue a temporary restraining order.

III. CONCLUSION

Dr. Rottnek is not sufficiently qualified as an expert to opine on the effects of COVID-19 and as to whether or not the County has appropriately addressed the spread of the virus in the Jail. His opinion is not reliable, relevant, and will not assist this Court in its determination of the issue of whether or not to issue a temporary restraining order. Because Dr. Rottnek is not qualified as an expert, the Court need not address Defendants’ alternative request to redact portions of Dr. Rottnek’s report that go beyond the scope of the “Joint Proposed Inspection Order.” Accordingly, the Court grants Defendants’ motion to strike the report of Fred Rottnek, MD, MAHCM.

On the basis of the foregoing opinion;

IT IS ORDERED that Defendants’ motion to strike the report of Fred Rottnek, MD, MAHCM, is hereby **GRANTED**;

IT IS FURTHER ORDERED that the report of Fred Rottnek, MD, MAHCM, shall be **STRICKEN** from the Court’s record in this case.

SO ORDERED.



Hon. Timothy M. Kenny, Chief Judge