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 O R D E R

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan
on this: 6/19/2020

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

This civil matter is before the Court on an "Emergency Motion for Temporary Restraining Order and Preliminary Injunction" filed on May 28, 2020 by Plaintiffs, Wayne County Jail Inmates, *et al*. For the reasons stated below, the Court denies the motion.

I. BACKGROUND

The instant motion arises from Plaintiffs' allegation that there are health threatening conditions in the Wayne County Jail ("the Jail") as a result of the spread of the novel corona virus, COVID-19. Currently, there are approximately 800 detainees in the Jail. According to Plaintiffs, as of May 11, 2020, 25% or 171 of the 689 inmates then housed at the Jail were either

infected with the virus or had tested positive for antibodies, which means that they had previously been infected with the virus. Plaintiffs combine the number of those positive for COVID-19 with those who tested negative for the virus, but positive for the antibodies. The number of inmates testing positive for antibodies was significantly higher than the number of inmates testing positive for the COVID-19 virus. However, there is no way to precisely determine how many inmates with COVID-19 antibodies had been exposed prior to confinement in the Jail. In reality, the number of those who tested positive for the antibodies was significantly greater than the number who tested positive for active COVID-19. Moreover, those who are positive for the antibodies are not required to be quarantined. Plaintiffs also state that 206 Sheriff's Office employees had tested positive for the virus and four employees had died.

Plaintiffs argue that the Defendant, the County of Wayne ("the County") continues to confine detainees in a manner which fails to mitigate the spread of COVID-19. This includes: (1) detainment in cells with open steel grids or bars that allows the spread of aerosolized droplets containing COVID-19; (2) double-bunking; (3) limited access to hygiene products and cleaning supplies; (4) lack of quarantining of sick detainees; (5) insufficient personal protection equipment such as facemask; (6) lack of access to medical care; and (6) failure to confine detainees in areas allowing social distancing.

In response, the Defendants argue that County officials engaged in extensive efforts to reduce the jail population and implemented many measures to mitigate the spread of COVID-19. Between March 13, 2020 and April 29, 2020, County officials met with Plaintiffs' counsel on four occasions to discuss the measures that were being taken and implemented by Defendants to address the pandemic.

On May 4, 2020, Plaintiffs filed a class action in federal court,[1] which was dismissed, and Plaintiffs then filed the instant matter in this Court on May 28, 2020. Defendants assert that Plaintiffs have failed to recognize that, prior to filing this motion, "Defendants and court appointed Inmate Counsel were taking action under the supervision of this Court to address the novel health crisis..."

On March 2, 2020, the Jail housed 1,411 detainees. Significantly, as of June 17, 2020, the Jail population was reduced to 779 inmates, a reduction of 632 inmates in the population, which represents a 44.79% reduction in the Jail population.

On May 15, 2020, the Court entered a "Stipulated Temporary Amendment to the Consent Order, which ordered that all inmates in the Jail subjected to testing for COVID-19 shall submit to testing, and that "[a]ny specimen collected for said testing will only be utilized for purposes of addressing" the health crisis and that the testing would not be used to collect DNA. The duration of this order was for 30 days.

On May 18, 2020, the Court entered another "Stipulated Temporary Amendment to the Consent Order." This amendment, the purpose of which is to address the current health crisis, amended the parties' previous consent order dated July 20, 2018. The stipulated temporary amendment included the following relevant provisions:

- Inspection of Jail facilities by a court-appointed inspector limited to the COVID-19 pandemic response;[2]

- Ensure that each incarcerated person receives, free of charge and upon request: (a) a supply of soap and hand towels sufficient to allow regular hand washing and drying

---

[1] *Russell, et al v Wayne County*, et al, Case No. 2:20-cv-11094-MAG-EAS.

[2] A "Joint Proposed Inspection Order" was entered by the Court on May 15, 2020 and an inspection was conducted. The report of which was originally sealed, but later unsealed and redacted to protect exposure of private material. The inspector was deemed unqualified by the Court and the Court ordered that the inspection report be stricken from the Court record.

each day, and (b) an adequate supply of disinfectant products effective against the COVID-19 virus;

- Provide access to showers on a daily basis;

- Ensure that, to the fullest extent possible, all Jail staff wear personal protective equipment, including masks and gloves;

- Ensure that, to the fullest extent possible, all Jail staff wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol both before and after touching any person or any surface in cells or common areas;

- Continue to implement protocols through which medical attention is provided, on a timely basis, to any incarcerated person that reports a need for medical attention for any COVID-19 related symptoms to any member of the Jail staff;

- Make COVID-19 testing available to all incarcerated persons either displaying symptoms of COVID-19 or to those who have been in known proximity of other persons, within the last 14 days, who have tested positive for COVID-19;

- Provide adequate spacing between people incarcerated so that social distancing, as defined by the CDC, can be accomplished to the extent possible;

- Ensure that individuals identified as having COVID- 19, as having symptoms of COVID-19, or as having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a designated quarantine area, and that they remain in quarantine and are encouraged to wear face masks when interacting with others until they are no longer at risk of infecting others;

- Provide sufficient disinfecting supplies without cost, so incarcerated people can clean high-touch areas;

- Communicate to all people incarcerated, including low-literacy and non-English-speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices;

- Train staff regarding measures to identify symptoms of COVID-19 in inmates, measures to reduce transmission, and the Jail's policies and procedures;

- Refrain from charging medical co-pays to those experiencing COVID-19- related symptoms, including testing;

- Ensure that retaliatory discipline is not taken in response to incarcerated persons' requests for medical attention and basic, necessary protections, and/or efforts by incarcerated persons to publicize unsafe and life-threatening conditions inside the Jail.

Again, by another Court order entered on June 17, 2020, the stipulated temporary amendment order was extended until September 30, 2020.

On June 2, 2020, the Court entered an "Amended Consolidated Consent Order Regarding COVID-19 Inmate Testing at Time of Booking." This order, the provisions of which commenced on June 8, 2020 until otherwise ordered by the Court, mandates that all new inmates be tested for COVID- 19 by PCR (nasal swab) and Serology (antibody) at the time of the inmates' booking. Under the order, inmates who test negative for both PCR and Serology will be re-tested in 14 days from the time of booking. If an inmate tests negative for PCR, but positive for Serology, the inmate may be housed in general population without need of quarantine. The order further requires the Sheriff provide to Plaintiffs the testing data as follows:

- The number of inmates who tested negative for COVID-19;

- The number of inmates who tested positive for COVID-19; and

- The number of inmates who tested negative for PCR, but positive for Serology.

The data from testing under the order is to be provided on a monthly basis beginning on June 30, 2020. On June 15, 2020, the Court received preliminary data from the testing results. The testing was performed between June 8, 2020 and June 12, 2012. The results are as follows:

115 Inmates booked in between June 5, 2020 and June 11, 2020

- 12 inmates tested negative for active COVID-19 and positive for antibodies.
- 1 inmate tested positive for active COVID-19 and negative for antibodies.
- 1 inmate tested positive for both active COVID-19 and for antibodies.
- 18 tested negative for active COVID-19 with no results for antibodies.
- 1 inmate has not received results yet.
- The remainder tested negative for both active COVID-19 and for antibodies.

Testing Backlog of 47 Inmates booked between June 1, 2020 and June 4, 2020

- Two inmates both negative for active COVID-19 and both tested positive for antibodies.
- 16 inmates tested negative for active COVID-19 and have no results for antibodies yet.
- The remainder tested negative for active COVID-19 and negative for antibodies.

The parties have submitted various affidavits and declarations from physicians and from inmates. The physicians have opined on what is necessary to contain COVID-19 in a jail environment. The declarations of eleven inmates generally indicate that they do not have adequate disinfectant cleaning supplies and of soap and hand towels for personal hygiene. Some

inmates also indicate that, when they first entered the Jail, no one made them aware of the risks of the spread of the virus.

On May 12, 2020, the Michigan Department of Corrections ("MDOC") conducted an inspection of the Jail as provided for by Act. No. 232 of the Public Acts 0f 1953, as amended, being section 791.262 of the Michigan Compiled Laws and the Governor's Executive Order 2020-62. The Jail was found to be in compliance with the MDOC COVID-19 Protocols.

Beginning on March 13, 2020, Defendants issued various policies and directives for implementation in response to COVID-19 and in an effort to contain the spread of the virus in the Jail. Directives 20-03, 20-04, 20-05, 20-06, 20-07, 20-08, and 20-09. For the Jail staff, directives include social distancing, wearing protective gear when transporting inmates, disinfecting touch areas, and staying home from work when sick. For those entering the Jail, the directives include questioning about whether they have traveled, whether they had been asked to quarantine, or whether they had been diagnosed with COVID-19. Persons coughing, sneezing, experiencing shortness of breath, or exhibiting other signs of illness were to be denied entrance to the Jail. Other directives include more questioning about whether persons had close contact with anyone who had been diagnosed with COVID-19, quarantine of new inmates for 72 hours in a segregation unit while awaiting COVID-19 test results, quarantine of inmates returning from a hospital with virus-related symptoms, and protocols for staff donning personal protective equipment. Directives also include the screening of all inmates, staff, and all persons entering the Jail facilities. Visiting by the public with inmates has been discontinued, except for visits by attorneys representing inmates. Inmates were also directed to wear surgical masks when outside of their cells.

Wellpath, the Jail's contracted medical provider also provided guidance by issuing its policies and procedures for symptomatic inmates and for isolation of those displaying symptoms and those awaiting test results. However, Plaintiffs contend that Defendants' policies and directives are inadequate unless they are actually implemented. As indicated above, the Court issued several orders, which thus far have been followed to the greatest extent possible, including the testing for COVID-19 of all inmates. In addition, as indicated above, the Jail population reduction demonstrates that a substantial number of inmates have been administratively released. Now before the Court is Plaintiffs' motion for injunctive relief.

II. STANDARDS FOR DETERMINING MOTIONS FOR INJUNCTIVE RELIEF

Injunctive relief is governed by MCR 3.310, the provisions of which must be carefully followed. It should be noted that there is a difference between temporary restraining orders (TROs) and preliminary injunctions. TROs may be issued without written or oral notice to the other party, only if circumstances justify it and those circumstances are set forth in a verified complaint or supporting affidavit. "TROs have a limited lifespan, not to exceed 14 days, and are designed to prevent loss or damage only till such time as the matter may be initially heard by the court." §2:23.Jurisdictional allegation—Equitable relief sought, 1 Mich Ct Rules Prac, Forms § 2:23. In the instant case, Defendants have had notice of the instant motion and the principal requests by Plaintiffs are for both a TRO and a preliminary injunction.

The purpose of a preliminary injunction is to preserve the status quo so that, upon final hearing, the rights of the parties may be determined without injury to either party. *Michigan Council 25, AFSCME v County of Wayne*, 136 Mich App 21; 355 NW2d 695 (1984).

Granting injunctive relief is within the sound discretion of the trial court. *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). To obtain a preliminary

injunction, the moving party bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 648; 825 NW2d 616 (2012). This four-factor test requires the trial court to consider: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998). "The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008).

III. DISCUSSION

The grounds of Plaintiffs' motion are alleged violations of the Eighth Amendment's prohibition against cruel and unusual punishment, violations of the due process clause of the Fourteenth Amendment, and violations of Article I, Sections 16 and 17 of the Michigan Constitution.

In support of its motion, Plaintiffs allege that they are at imminent risk of serious illness or death. They contend that they are likely to succeed on the merits of their claims as they relate to violations of the Eighth Amendment, Fourteenth Amendment, and the Michigan Constitution's Article I, Sections 16 and 17. *Thermatool Corp, supra.* They argue that the detainees in the Jail can prove a due process violation under the Fourteenth Amendment by demonstrating that they are subject to a substantial risk of serious harm. Finally, they assert that the conditions under which the detainees are confined are unreasonable and that Defendants have been deliberately indifferent to these conditions.

In response, Defendants argue that Plaintiffs are unlikely to succeed on the merits of their constitutional claims. They assert that the main component of a constitutional violation in the context of a request for injunctive relief, "deliberate indifference," has not been pled in such a manner that it connects policies and practices to particular injuries. In other words, they aver that Plaintiffs cannot demonstrate that Defendants' policies and practices have caused injury and that Defendants disregarded a known or obvious risk.

Preliminarily, it should be noted that, in the context of a class action by inmates for conditions related to the spread of an illness in a correctional facility, there is little Michigan case law on the subject. The Court will look to U.S. Supreme Court case law and then may look to other federal case law for further guidance.[3] Although the Court must consider the four elements for issuance of injunctive relief, the primary issue before this Court is the likelihood that Plaintiffs will prevail on the merits of their constitutional claims.

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishments." USC Const Amend 8. "The [Eighth] Amendment ... imposes duties on ... officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care..." *Farmer v Brennan*, 511 US 825, 832; 114 S Ct 1970; 128 L Ed2d 811 (1994). "[U]nder the Fourteenth Amendment, pretrial detainees are 'entitled to the same Eighth Amendment rights as other inmates.' *Thompson v Cty of Medina, Ohio,* 29 F 3d 238, 242 (6th Cir 1994). The analysis set forth in *Farmer,* although rooted in the Eighth Amendment, therefore applies with equal force to

[3] See *Hoffman v Bay City Sch Dist*, 137 Mich App 333, 337; 357 NW2d 686 (1984)("Because there are no Michigan cases dealing with this issue, we look to the federal courts for guidance ..."); *Estate of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 598; 909 NW2d 862 (2017)("It is also well established that this Court is free to adopt the analysis of a lower federal court 'if it is persuasive and instructive.'"[Citation omitted]).

a pretrial detainee's Fourteenth Amendment claims." *Richko v Wayne Co, Mich*, 819 F3d 907, 915 (CA 6, 2016).

In *Estelle v Gamble*, 429 US 97, 105; 97 S Ct 285; 50 L Ed 2d 251 (1976), the court deemed that "deliberate indifference" to the serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain proscribed by Eighth Amendment whether the indifference is manifested by prison doctors in response to prison needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed; regardless of how evidenced deliberate indifference to prisoner's serious illness or injuries states cause of action under civil rights statute. USC Const Amend 8; 42 USC 1983.

There are two components to a "deliberate indifference" claim, an objective component and a subjective component. Detainees may satisfy the objective component by showing that 'absent reasonable precautions, [they are] exposed to a substantial risk of serious harm. To satisfy the subjective component," Plaintiffs "must show that the officials being sued subjectively perceived facts from which to infer a subjective risk to the prisoner, that the officials did in fact draw the inference, and the official[s] then disregarded that risk." *Albino-Martinez v Adducci*, ___F Supp 3d___ at 3 (2020); 2020 WL 1872362 [Internal quotation marks and citations omitted].[4]

---

[4] In *Albino-Martinez v Adducci*, --- F Supp 3d ---- at 3 (2020); 2020 WL 1872362, the court analyzed the claims, which were related to health concerns, under the Eighth Amendment, rather than the Fifth Amendment. In *Albino-Martinez*, immigrant detainees who were being detained by the federal government for violating immigration laws filed a petition for a writ of habeas corpus arguing that they were being held in violation of their Fifth Amendment due process rights. Detainees filed an emergency motion for a TRO, arguing that the court should order their immediate release because they were particularly vulnerable to the COVID-19 pandemic because they had certain pre-existing health conditions.

In *Farmer, supra*, the Supreme Court explained what is necessary to show "deliberate indifference:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it.
>
> *Id* at 837 [Emphasis added].
>
> Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.
>
> *Id* at 842 [Emphasis added].
>
> An inmate seeking an injunction on the ground that there is "a contemporary violation of a nature likely to continue," *United States v Oregon State Medical Soc,* 343 US 326, 333; 72 S Ct 690, 695, 96 L Ed 978 (1952), must adequately plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.
>
> *Id* at 845-846.

Thus, to establish "deliberate indifference," a plaintiff must demonstrate that an official knows of and disregards an excessive risk and the official fails to act in spite of the knowledge of the risk.

The *Farmer* test was explained more simply in *Wilson v Williams*, ___ F3d___; No. 20-3447; 2020 WL 3056217 (CA 6, June 9, 2020), which is the most closely related case to the

instant case. In *Wilson*, federal prisoners filed an emergency habeas corpus petition as a putative class action, asserting an Eighth Amendment deliberate indifference claim based on the prison officials' alleged failure during COVID-19 pandemic to create safe conditions for prisoners. The United States District Court for the Northern District of Ohio certified a subclass of prisoners particularly vulnerable to medical complications and granted a preliminary injunction to the subclass, entered an enforcement order, and denied the officials' motion for stay of the preliminary injunction pending appeal. The *Wilson* court explained the "deliberate indifference" standard:

> To satisfy the objective prong, an inmate must show "that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834, 114 S.Ct. 1970. Under the subjective prong, an official must "know[ ] of and disregard[ ] an excessive risk to inmate health or safety." *Id.* at 837, 114 S.Ct. 1970. "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842, 114 S.Ct. 1970. "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk."
>
> *Id* at 7.

The *Wilson* court also explained that, if prison officials respond reasonably to the risk, they may not be liable even if the risk is not averted. *Id* at 7, quoting *Farmer, supra* at 844. See also *Helling v McKinney*, 509 US 25, 36; 113 S Ct 2475, 2482; 125 L Ed 2d 22 (1993)(In consideration of smoking policy in a prison, the Supreme Court stated that "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct, which may have changed considerably since the judgment of the Court of Appeals. Indeed, the adoption of the smoking policy mentioned above will bear heavily on the inquiry into deliberate indifference.").

As the *Wilson* court opined, everyone, the public as well as Jail officials, knows of the risks of exposure to COVID-19, especially medically vulnerable persons. This widespread knowledge easily satisfies the objective prong of "deliberate indifference." *Id.*

Regarding the subjective element, Defendants herein responded reasonably to the risk of exposure to COVID-19. Although Plaintiffs assert that Defendants have not taken the necessary steps to contain the virus and to prevent a "widespread outbreak" in the Jail, in the Court's view, Defendants have responded reasonably to address the risks posed in the Jail. Defendants have issued policies and directives and this Court's has also issued various orders for implementing measures to reduce the Jail population. The Jail population has been reduced by almost 45%. Defendants have made significant efforts to release non-violent offenders and, particularly medically vulnerable ones. Wellpath has identified all inmates having medical vulnerabilities as defined by the CDC and those inmates have been examined for administrative release. Defendants have also ordered mandatory testing, provided necessary supplies and equipment, and mandated staff adherence to the directives. Scientific knowledge of this virus is evolving on a daily basis and all reasonable steps have been taken to avert the risk as much as possible and to adjust to the new scientific knowledge as it has been publicized. Therefore, in the Court's view, because Defendants' response to the COVID-19 risks in the Jail has been reasonable, Plaintiffs are unlikely to succeed on the merits of their constitutional claims.

IV. CONCLUSION

Plaintiffs have not demonstrated that they are likely to succeed on the merits of their constitutional claims because they have not satisfied both components of "deliberate indifference" in order to prevail on Eighth Amendment violations. *Farmer, supra; Wilson, supra*; *Richko, supra.* Although, Defendants as well as the general public are aware of the risks

of COVID-19, Defendants' response to the risks posed by COVID-19, coupled with proactive measures ordered by this Court, has been reasonable. Defendants have made extensive efforts to administratively release detainees, thereby significantly reducing the Jail population, to implement testing, screening, providing guidance for Jail staff, and quarantining of those infected or exposed to others who have been infected. Therefore, Plaintiffs are unlikely to succeed on the merits of their claims. Accordingly, the Court denies Plaintiffs' motion.

On the basis of the foregoing opinion;

IT IS ORDERED that Plaintiffs' "Emergency Motion for Temporary Restraining Order and Preliminary Injunction" is hereby **DENIED.**

SO ORDERED.

/s/ Timothy M. Kenny
Hon. Timothy M. Kenny, Chief Judge