IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GENISE HART, et.al.,	)	
	)	
Plaintiffs,	)	No. 03 C 1768
v.	)	
	)	Judge: James Zagel
THOMAS DART, et.al.,	)	
	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY, MOTION FOR A NEW TRIAL

NOW COME Defendants THOMAS J. DART, Sheriff of Cook County, and COOK COUNTY through their attorney ANITA ALVAREZ, State's Attorney of Cook County, by her assistants, Patrick Smith, Kevin Frey, and Maureen Hannon and move this Honorable Court to grant their renewed motion for Judgment As A Matter of Law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or in the alternative, grant their motion for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

Rule 50(b) of the Federal Rule of Civil Procedure provides that if a party files a motion for judgment as a matter of law under Rule 50(a), "the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b) (2009). The Court should deny a motion for judgment notwithstanding the verdict when the evidence and all reasonable inferences that can reasonably drawn from the evidence, viewed in the light most favorable to the party opposing the motion, is such that "reasonable men in a fair and impartial exercise of their judgment may reach different conclusions." *Rakovich v. Wade*, 850 F.2d 1180, 1188 (7th Cir. 1988)(*quoting Smith v. J.C.*

Penny Co., 261 F.2d 218, 219 (7th Cir. 1958)). When deciding whether the evidence is sufficient, the Court may not weigh the evidence, pass on the credibility of witnesses, or substitute its own judgment of the facts for the jury's judgment. *Rakovich*, 850 F.2d at 1188.

Under Rule 59(a) of the Federal Rules of Civil Procedure, "a new trial may be granted to all or any of the parties on all or some of the issues after a jury trial for any reason for which a new trial has been granted in an action at law in a federal court." Fed. R. Civ. P. 59(a) (2009). The Court should grant a motion for a new trial when the clear weight of the evidence is against the jury verdict, the damages are excessive, or for some other reason the trial was not fair to the moving party. *Scaggs v. Consolidated Rail Corp*., 6 F.3d 1290, 1293 (7th Cir. 1993). Conduct by the court, counsel or jury, which improperly influences the deliberative process is grounds for a new trial. *Hillard v. Hargraves*, 197 F.R.D. 359 (N.D. Ill. 2000) (*citing McNabola v. Chicago Transit Authority*, 10 F.3d 501, 516 (7th Cir. 1993); *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996)). A new trial also may be granted when the non-moving party failed to disclose material information prior to trial. *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 758 (7th Cir. 1994). The moving party must establish that misconduct occurred and caused prejudice to him. *Wiedemann v. Galiano*, 722 F.25 335, 337 (7th Cir. 1983). The total impact of all errors or irregularities at trial determines whether a defendant is entitled to a new trial. *United States v. Williams*, 81 F.3d 1434, 1443-44 (7th Cir. 1985) (*citing United States v. Boyd*, 55 F.3d 239, 243 (7th Cir. 1995)).

ARGUMENT

I. JUDGMENT IN FAVOR OF DEFENDANTS SHOULD BE GRANTED AS A MATTER OF LAW BECAUSE THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, Defendants renew their Rule 50 Motion for Judgment as a Matter of Law.[1] Defendants restate and incorporate by reference all arguments set forth in their Motion for a Directed Verdict pursuant to Rule 50(a), as if fully set forth herein. (Ex. A) Here, the finding of liability is against the manifest weight of the evidence. Moreover, the jury's verdict is inconsistent and contrary to the law. [2]

Judgment as a matter of law should be entered on behalf of Defendants because the sufficiency of the evidence cannot sustain a verdict for Plaintiffs, and there was no evidence submitted that the Sheriff's practice of weekend lockdowns was the moving force behind the alleged constitutional violations or injuries suffered by Plaintiffs. This Court correctly found that weekend lockdowns did not, in and of themselves, violate Plaintiffs' constitutional rights. (Dkt. 201) The issue that was left for the jury to decide was whether Defendants' procedure in locking down a division for a whole weekend violated Plaintiffs' constitutional rights and injured Plaintiffs.

Because Dart was sued in his official capacity, Plaintiffs had to demonstrate that a constitutional deprivation was caused by: (1) an express policy; (2) a widespread practice that is so permanent and well-settled as to constitute a custom or usage with the force of law; or (3) a decision by a person with final policy making authority. *Baxter by Baxter v. Vigo County School Corp.*, 26 F. 3d 728, 734-35 (7th Cir. 1994). Further, to prevail, Plaintiffs had to show that the

[1] Both Parties moved for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(a) prior to the case being submitted to the jury. (Trial Tr. 601-606)

[2] Please note that the exhibits attached to the previous Memorandum in Support of Motion for Judgment as a Matter

[2] Please note that the exhibits attached to the previous Memorandum in Support of Motion for Judgment as a Matter of Law or Alternatively, a New Trial are the same exhibits used within this Memorandum. As such, Defendants have not reattached them to this supplemented memorandum.

official policy or custom was the *cause* of the alleged constitutional violation-the 'moving force' behind it. *Estate of Sims v. County of Bureau*, 506 F. 3d 509, 514 (7th Cir. 2007). "A governmental body's policies must be the moving force behind the constitutional violation before liability can be imposed under *Monell*." *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 306 (7th Cir. 2009)." The Seventh Circuit in *Thomas* noted that in § 1983 actions, the United States Supreme Court "has been especially concerned with the broad application of causation principals in a way that would render municipalities vicariously liable for their officer's actions." *Thomas*, 604 F.3d at 306, *citing Bd. of the County Comm'rs v. Brown*, 520 U.S. 397 (1997).

Plaintiffs asserted that weekend lockdown increased the risk of harm to the Plaintiffs and that Defendant Sheriff was deliberately indifferent to that risk. "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of the County Comm'rs*, 520 U.S at 410. Deliberate indifference requires that an "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 that inference." *Riccardo v. Rausch*, 375 F.3d 521 (7th. Cir. 2004)(*quoting Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

A. A Verdict for Plaintiffs is Not Supported by the Evidence.

In determining whether there is sufficient evidence to support the verdict, the Court examines whether the evidence presented, combined with all reasonable inferences which may be derived from it, was sufficient to support the verdict. *Steffen v. Meridian Life Insurance Co.*, 859 F.2d 534, 546 (7th Cir. 1988). The evidence is viewed in the light most favorable to the prevailing party. *Mathewson v. National Automatic Tool Co.*, 807 F.2d 87, 90 (7th Cir. 1986). "This evidence must provide a sufficient basis from which the jury could have reasonably

reached a verdict without speculation or drawing unreasonable inferences which conflict with the undisputed facts." *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984) (citations omitted). Plaintiffs failed to provide sufficient evidence that would permit the jury to reach a verdict without speculation or unreasonable inferences.

Plaintiffs testified to three separate incidents that occurred during weekend lockdowns where they claimed they suffered physical injuries. Helen Koss testified to suffering physical injuries on two occasions while she was housed in Division 3 during a weekend lockdown. The first occasion was when Koss began to experience false labor pains and was left without medical attention for approximately three hours because there was no officer on the tier. (Trial Tr. 297:24-298:20.) Koss claims that she was able to leave her cell and sit out in the dayroom for two to three hours with no correctional officer present. (Trial Tr. 324:9-326:21.) The other occasion was a fight that occurred between Koss and her cellmate where Koss testified that she was the victim of a massive beating while she was approximately six to eight months pregnant. (Trial Tr. 334:8-336:12.) Ann Gelso testified that she was injured in Division 4 during a weekend lockdown when her cellmate struck Gelso as Gelso attempted to prevent that cellmate from committing suicide. (Trial Tr. 431:25-433:5.) On each of these three occasions, Plaintiffs testified that no officer was on the tier during the periods of time when they were allegedly injured. (Trial Tr. 303:18-21, 325:1-3, 432:8-12.)

The only evidence elicited that an officer was away from the tier for any period of time was in relation to the fact that cross-watching took place during the weekend lockdowns. However, this is not evidence that Plaintiffs were left alone for hours on end. Katie Harrison testified that even if an officer was cross-watching on the inner tiers of Division 4, that officer would be able to see or hear if a detainee from across the hallway was trying to get the officer's

attention. (Trial Tr. 384:1-13, 384:20-385:9.) Martha Salazar testified that in Division 3 both tiers are connected to one interlock, and Katie Harrison testified that the end tiers of Division 4 are connected by one interlock. (Trial Tr. 381:22-24, 576:4-577:5.) Therefore, an officer could see into both dayrooms from the interlock. (Trial Tr. 383:13-16, 577:3-5.) Katie Harrison testified that an officer could not go on a tier without backup, so there was always supposed to be someone in the interlock at all times. (Trial Tr. 409:20-410:8.) Thus, it would be very improbable that Helen Koss was able to stay in the dayroom of her tier in Division 3 for 2-3 hours with no officer present in the interlock, because there was always supposed to be an officer in the interlock. (Trial Tr. 325:17-326:11, 580:13-17.)

Another reason Plaintiffs' testimony cannot be believed is because the injuries alleged by both Plaintiffs are not corroborated by the evidence. Helen Koss testified that she was struck multiple times about the head, body and her pregnant stomach and the beating lasted anywhere from twenty to thirty minutes. (Trial Tr. 335:2-336:14.) Koss testified that the extent of her injuries was that some hair was pulled out and she suffered some cuts and bruises, for which she received medical treatment. (Trial Tr. 335:13-21, 337:22-338:3.) The injuries Koss to which testified were not typical of the beating she claims to have suffered; there were no broken bones, loss of consciousness, or harm to her unborn child. Moreover, Koss claimed that she was only seen in the dispensary after this massive beating and was not sent to an outside hospital to get herself and unborn child examined. (Trial Tr. 339:3-8.) Similarly, Koss was not sent to an outside hospital after she suffered false labor pains. (Trial Tr. 339:11-17.) Plaintiff Koss presented no medical evidence to corroborate her self-serving testimony.

Gelso's claim is equally suspect. She testified that she was struck by her cellmate for approximately ten to fifteen minutes, but only suffered an injury to her mouth. (Trial Tr. 462:4,

434:14-17.) The injuries she claimed to have suffered are similar to the ones she claimed to suffer in a lawsuit she filed in 2008, where she alleged that she lost several teeth during an altercation. (Ex. B) Gelso also claims that she did not see medical personnel until the following day, even though Martha Salazar testified that if a detainee is involved in an altercation they are taken to see medical staff as soon as possible. (Trial Tr. 466:25-467:3, 579:19-22.) Gelso asserted that she did not get proper medical treatment and needed to see a dentist once discharged from the jail to fix her bridge. (Trial Tr. 468:24-469:20.) However, no evidence of that visit or treatment was ever presented.

Casting further doubt on their testimony was the fact that they failed to present any evidence to corroborate their testimony. Plaintiffs did not call a single doctor, medical professional or present a single medical record. Fontella Brown-Marshall and Martha Salazar both testified that if a detainee is involved in any physical altercation they are taken to the dispensary to be seen by the medical staff. (Trial Tr. 544:20-545:13, 579:19-22.) Both Ms. Salazar and Ms. Harrison testified if a detainee is in need of medical treatment, especially in Division 3 which is medical building, they are taken for medical treatment. (Trial Tr. 391:21-24, 579:19-22.) This is corroborated by the testimony of both Plaintiffs who admit that they received some form of medical treatment after the incidents. (Trial Tr. 339:3-8, 466:25-467:3.) However, Plaintiffs presented no medical records to demonstrate that they were indeed injured and received treatment for their injuries.

Plaintiffs improperly tried to shift the burden of proof by suggesting, through the testimony of Charles Fasano, that Defendant Dart was somehow responsible for the fact that their medical records were not presented as evidence or that the records were missing. (Trial Tr. 510:16-512:13.) Only on the cross-examination of Fasano did it come out that Defendant Dart

had no control over any medical records, including Plaintiffs'. (Trial Tr. 523:20-524:3.) Moreover, Plaintiffs never claimed to this Court or to the jury that they requested their medical records and that they could not be found. Fasano's testimony also does not explain why Gelso failed to present any evidence of the dental procedures she claimed to have received once she was discharged from the jail.

This lack of medical evidence also plagues Plaintiffs' alleged psychiatric injuries. Both Plaintiffs asserted that they suffered psychiatric injuries as a result of the weekend lockdowns. (Trial Tr. 428:1-7, 684-685.) Yet neither Plaintiff presented any evidence as to what psychiatric harm was caused, what treatment was received, or that it was linked to the weekend lockdowns. Gelso testified that she has seen a mental health professional since 1995 for a variety of different psychiatric conditions, but he was not called to testify. (Trial Tr. 416:19-25.) There was no testimony or documentation that Plaintiffs received psychiatric treatment during or after their discharge from the jail related to the weekend lockdowns. By failing to present evidence, other than their self-serving testimony, that should have been readily available to them if their stories were true, Plaintiffs failed to establish that they actually suffered any psychological harm or that the weekend lockdowns were the cause of that harm. Therefore, the sufficiency of the evidence presented supports a verdict in the favor of Defendant.

B. The Sheriff's Practice of Weekend Lockdowns is not Unconstitutional and not the Moving Force Behind Plaintiffs' Injuries.

Even if there were evidence that either Plaintiff suffered an injury, Plaintiffs failed to demonstrate a causal link between these injuries and the manner in which Defendant Dart conducted weekend lockdowns. Moreover, there was no evidence presented demonstrating that Defendant Dart was aware of any increased risk in how the weekend lockdowns were conducted or that there was a widespread problem in how they were conducted.

Plaintiffs did not present any evidence of an increased risk to their safety during a weekend lockdown as opposed to a regular day. Katie Harrison, Martha Salazar and Fontella Brown-Marshall all testified that there is always some form of risk in the jail whether it is a weekend lockdown or not. (Trial Tr. 392:17-19, 547:8-10, 581:9-12.) Even Plaintiffs' expert Shelia Vaughan agreed with this premise. (Trial Tr. 188:8-10.) The testimony of correctional officers and Ms. Vaughan indicated that a detainee could be attacked if an officer was standing five feet away. (Trial Tr. 188:18-189:11, 392:11-19, 547:8-10.) Thus, there was no evidence of an increased risk due to lockdowns. The risk is always present because of the proximity of the detainees to each other. Even if there was evidence of an increased risk, there was no evidence that Sheriff Dart was aware of that risk or that he was aware of any problems with the weekend lockdowns, such as officers out of the sight and hearing of the detainees for hours on end.

As explained above, there was no actual evidence that Plaintiffs were injured. If Plaintiffs were injured in altercations, it was not because of weekend lockdowns, it was because of their cellmates. Katie Harrison, Martha Salazar and Fontella Brown-Marshall all testified that there is always some form of risk in the jail. (Trial Tr. 392:17-19, 547:8-10, 581:9-12.) Fontella Brown-Marshall testified that it is safer to have detainees in their cells as opposed to in the dayroom because in the dayroom there is a higher risk of a group beating. (Trial Tr. 547:2-7.) In addition, detainees are in their cells on average approximately twelve hours a day. (Trial Tr. 187:19-21.) There was no evidence of a heightened risk to Plaintiffs while they were in their cells during a weekend lockdown as opposed to any other day, so there is no support for a conclusion that weekend lockdowns were the moving force behind Plaintiffs' alleged injuries.

Moreover, the manner in which the lockdowns were conducted neither allowed Plaintiffs to be left out of sight and hearing of correctional officers for extended periods of time, nor

caused injuries to Plaintiffs. Operating procedures at the jail during weekend lockdowns required correctional officers to check on the status of prisoners every thirty minutes. (Trial Tr. 387:3-13, 536:16-18.) Case law establishes that checking on inmates two times per hour is not a constitutional violation. *See e.g., Butera v. Cottey*, 285 F.3d 601 (7th Cir. 2002). In addition to these checks, headcounts were standard practice throughout the jail. (Trial Tr. 534:6-8, 535:9-11, 578:12-15.) Correctional officers either delivered meals to the inmates or accompanied those that delivered meals during the weekend lockdown. (Trial Tr. 390:22-25, 391:7-13, 535:12-14, 536:5-7, 578:16-18.) Inmates also were permitted to leave their cells for prearranged visits with outsiders, attorney's visits, medical or psychological care, and work throughout the lockdown period. (Trial Tr. 388:21-389:1, 390:13-19, 391:23-25, 537:18-538:6, 575:23-576:1, 580:18-581:4.) When the cells in a given tier were being searched for contraband, those inmates were taken from their cells to a day room or recreation room. (Trial Tr. 537:18-538:6, 543:18-21.) Jail medical staff also checked on inmates' wellbeing during visits to administer medications. (Trial Tr. 391:1-6, 578:19-21.) Moreover, the testimony at trial established that even when cross-watching took place, an officer still had to conduct thirty-minute security checks with backup in the interlock, thus, there would have been an officer within sight and/or hearing distance of a detainee at all times. (Trial Tr. 387:3-13, 409:16-410:8, 536:16-18.)

The other aspect of the weekend lockdowns Plaintiffs focused on was the length of the lockdowns. This Court already ruled that the length of the lockdowns was not punishment and was not excessive in relation to its purpose. (Dkt. 201 at FN 3) There was no evidence presented that established that Plaintiffs suffered physical injuries due to the alleged "excessiveness" of the lockdowns or any alleged risk associated with it. The alleged injuries to Plaintiff Gelso occurred on a Friday, a couple hours after the lockdown started. (Trial Tr. 467:4-

7.) Koss testified that she suffered her pre-labor pains on a Saturday. (Trial Tr. 298:1-2.) Neither Plaintiff testified that their tier had been searched prior to any of these incidents and that there was no reason for the movement restriction. Moreover, as discussed above, neither Plaintiff provided any tangible evidence of physical or psychological injuries and linked those injuries to the weekend lockdowns, let alone due to the excessiveness of the lockdowns. Thus, Plaintiffs' alleged injuries were not caused by the length of the lockdown or any alleged risk associated with it.

II. PERMITTING THE TESTIMONY OF CHARLES FASANO WAS IN ERROR.

Charles Fasano was permitted to testify at the trial in violation of Federal Rule of Evidence (Fed. R. Evid.) 701, which prohibits opinion testimony by lay witnesses, and Fed. R. Evid. 403, which prohibits the presentation of evidence for which the prejudicial value outweighs its probative value. Further, Fed. R. Evid. 702 requires expert discovery disclosures to be made prior to testimony; such disclosures were never made in this case. Plaintiffs led the Court to believe that Fasano would be testifying as a lay person who had seen the jail. (Trial Tr. 27-28.) Despite Plaintiffs' failure to disclose Mr. Fasano as an expert, the Court permitted him to testify to his extensive experience in the correctional industry, even though his credentials and experience did not apply to the issues in this case. Mr. Fasano's testimony include that:

- He has worked and been an advisor in the corrections field, and had worked in these roles for Cook County for over twenty years;
- Based on his work he can conclude that the Sheriff and Cermak Health Services do not keep adequate medical and non-medical detainee records;
- He visited Division IV during a lockdown weekend, and can describe the events in 2001 and 2003, despite testimony given during his deposition in 2003 that he had not visited the jail during a lock down weekend;

- He spoke to Director Maul, Assistant Executive Director of the Cook County Department of Corrections, who made statements regarding lockdown weekends, which Fasano did not remember during his deposition, but remembered at trial;

- In his opinion, lockdowns were unnecessarily long and could have been accomplished in a much shorter time frame;

- In his opinion, lockdowns were inappropriate for detainees suffering from mental health problems.

(Trial Tr. 478, 498-529.)

Prior to trial, Fasano was merely identified by Plaintiffs as a Fed. R. Evid. 701 fact witness who may have information regarding the layout of Divisions III and IV. (Ex. C, Plaintiffs' Disclosures) Further, Fed. R. Civ. P. 26(a) requires updates to prior discovery disclosures when a party learns that the information disclosed is incomplete or incorrect. Throughout Fasano's August 22, 2003 deposition, Defendants objected to the absence of an Expert Report pursuant to Fed. R. Civ. P. 26(a)(2), because Fasano testified about lockdowns at the jail. (Ex. D, Dep. of Fasano.) Nevertheless, Plaintiffs never identified Fasano as an expert pursuant to Fed. R. Civ. P. 26(a)(2) or updated their initial, expert, or pretrial discovery production to supplement the disclosures in order to modify Fasano's testimony.

Defendants' Motion *in limine* No. 6 objected to Fasano's testimony as summarized in the pretrial order. (Dkt. 257 at 15-16) Prior to the testimony of the first witness, this Court ruled that if Fasano could testify at all, it would be as a rebuttal witness and only in his lay capacity as a witness who visited the Department of Corrections. (Trial Tr. 27-28.) This Court determined prior to trial that Fasano could testify to the occurrences he saw firsthand, such as broken monitors and lights, but could not testify to his opinions on jail policies. During the Plaintiffs' case in chief, however the Court allowed Plaintiffs to call Fasano as their witness and elicit testimony as to his opinions on: (1) recordkeeping at the Sheriff's office; (2) recordkeeping of

medical records at Cermak; (3) his visits to the jail during lockdowns; (4) the appropriate length of time for lockdowns; (5) how mentally challenged detainees should be cared for at the jail; and (6) his conversations with Mr. Maul. (Trial Tr. 510-512.) Therefore, Fasano's testimony at trial violated the Court's ruling on motion *in limine* No. 6.

A. Fasano Testified as an Expert, Despite Not Being Designated As Such.

Fed. R. Evid. 701 provides that "[t]he difference between an expert witness and a lay witness is that 'the former can offer an opinion while the latter is confined to testifying from personal knowledge.'" *United States v. Williams,* 81 F.3d 1434, 1442 (7th Cir. 1996). The test to determine whether a witness is an expert or an ordinary fact witness is "whether the witness has specialized knowledge that the lay person cannot be expected to possess and reasonably applies that knowledge to the relevant facts." *Chao v. Guinte Corporation*, 442 F.3d 550, 559 (7th Cir. 2006). The breadth of Fasano's testimony extended beyond his first-hand accounts of lockdown weekends, and into his opinion based upon his years of experience with and knowledge of the corrections industry. (Trial Tr. 498-501.) For example, he offered opinions regarding how long a lockdown should take, how detainees with mental health issues should be cared for, and the Sheriff's office and Cermak Health Services' record keeping. These opinions were all based on his years of special experience in the corrections industry and not as a lay witness. (Trial Tr. 480.)

Plaintiff's failure to identify Fasano as an expert witness should have precluded him from testifying to these subjects, per Defendants' Motion *in limine* #6 (Ex. E) The failure to disclose Fasano as an expert prejudiced the Defendants, who were unable to prepare for such expert testimony and take countermeasures that are not applicable to fact witnesses, "such as attempting to disqualify the expert testimony on grounds set forth in *Daubert v. Merrell Dow*

Pharmeceutical, 509 U.S. 579 (1983), retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report." *Musser v. Gentiva Health Services*, 356 F.3d 751, 758 (7th Cir. 2004). Moreover, the error in permitting Fasano's testimony was not harmless and would have changed the outcome of the trial.

B. Fasano Testified to New Matters that Had Not Been Previously Disclosed nor Supplemented by Discovery Prior to Trial.

The opinion that the Sheriff's office and Cermak do not adequately keep records and that they lose records on a consistent basis was not that of a lay witness, but of Fed. R. Evid. 702's definition of an expert. However, in addition to the proffered testimony being improper expert testimony by a lay witness, Fasano's "experience," "opinion" and/or "conclusion" regarding poor record keeping and retrieval at the Department of Corrections and Cermak was never disclosed as testimony to the Defendants in this case in any capacity. (Ex. B, p. 2; Ex. C.; Ex. F; Trial Tr. 494, 496.) In addition to the Defendants being unaware of his new fact and opinion testimony regarding inadequate record keeping by the Sheriff and Cermak Health Services, a non-party, Plaintiff also failed to supplement other material facts regarding Fasano's testimony such as: Fasano's change of testimony as to whether he visited the jail during a lockdown weekend, (previously Fasano testified at his deposition that he had never been present in Division II or IV when a lockdown occurred, (Ex. D., p. 100; Trial Tr. 520.)) and Fasano's remembering what Defendants' employee, John Maul, said after previously testifying that he "did not know or remember what Maul had told him." (Ex. D, p. 104; Trial Tr. 518.) In the pretrial order, at trial, and prior to his taking the stand, Defendants objected to Fasano's testimony as undisclosed expert testimony under Fed. R. Civ. P. 701 and 702 and as overly prejudicial under Fed. R. Civ. P. 403 because of Mr. Fasano's experience, but also advised that Court that even if considered fact rather than opinion testimony, it was new and had not been

disclosed as required under Fed. R. Civ. P. 26(e). (Dkt. 257 at 15-16, Trial Tr. at 28, 478-80.) Defendants' objections were overruled, and the testimony was heard by the jury. The Court erroneously let Mr. Fasano testify despite Defendants' pretrial motions and timely objection at trial. This error also was not harmless and if his testimony had been excluded, it would have changed the outcome of the trial. There was nothing more Defendants could have done to keep out the highly irrelevant and prejudicial testimony by Fasano.

III. PERMITTING THE TESTIMONY OF SHEILA VAUGHN WAS IN ERROR.

The Court permitted Sheila Vaughn to testify about prior cases against the Sheriff of Cook County in which she was a witness that resulted in settlement of cases. However, she was permitted to testify that the outcome those settled cases in which she testified against the office of the Cook County Sheriff were "favorable outcomes." (Trial Tr. 223:2-8.) Thus, Vaughn's testimony led the jury to infer that other juries or courts found her testimony credible and that the Sherriff of Cook County had been found liable of some wrongdoing. In fact, the cases she testified in were settled, and were not found in favor of the plaintiffs at trial. (Trial Tr. 211:14-19) The Court allowed Vaughan's testimony over the objection of the Defendants. (Trial Tr. 223:10-12) Vaughn's testimony is not relevant under Fed. R. Evid. 401 and 402. "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Irrelevant evidence is generally inadmissible. Fed. R. Evid. 402. Fed. R. Evid. 403 states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. The advisory committee notes following Fed. R. Evid. 403 define unfair prejudice as "an undue tendency to suggest decision on an improper basis." Fed. R. Evid. 403. Sheila Vaughn's testimony should have been barred

because it was irrelevant. If it was relevant, her testimony should be barred because its prejudicial effect outweighed any probative value it proffered.

Defendants were prejudiced when the Court allowed Plaintiffs to examine Sheila Vaughn regarding the outcome of prior cases she had testified or consulted on, absent any evidence provided by the Plaintiffs as to the actual success of, or to Vaughn's contribution to, the success of those cases. (Trial Tr. 212:19-21.) The implication that prior cases were "successful" unfairly prejudiced Defendants. Even if the testimony regarding the outcomes of prior cases is permissible under the Federal Rules of Evidence, the jury was not provided with information sufficient to distinguish a favorable verdict at trial with "prevailing party status" during settlement. Allowing Vaughn to testify to her "success" in prior cases at all, let alone insinuate that Vaughn's testimony had been a determining factor in successful outcomes in prior cases, unfairly prejudiced Defendants and this error was not harmless.

The Court erred in permitting Sheila Vaughn to testify at all after the Department of Justice Report was deemed inadmissible because that was the material basis of her opinions. Vaughn never testified that she had been to the jail during a lockdown, and, thus, had no experience on which to formulate her opinion that the lockdowns were unreasonably protracted. For an expert to testify as to her opinion "[t]he trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline. *Kumho Tire Company, LTD. v. Carmichael*, 526 U.S. 137, 149 (1999)(*citing* ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 592 (1993)). This Court has held that "experts are held to the same standards of intellectual rigor in testimony as in their scholarly work." *Erickson v. Baxter Healthcare, Inc.,* 131 F. Supp. 2d 995, 1000 (N.D. Ill. 2001) (*citing Kumho Tire Co.*, 526 U.S. at 152). When the DOJ report was deemed inadmissible, Vaughn lost the sole basis of her

testimony regarding weekend lockdowns. The exclusion of the report required Vaughn to base her testimony on two visits to the jail and her experience with Riker's Island in New York, a facility unlike Cook County Jail. Vaughn did not visit the jail during a non-lockdown weekend. Without visiting the jail to experience a lockdown weekend and the DOJ report to rely upon, Sheila Vaughn was unable to form an informed opinion about weekend lockdowns at the Cook County Jail. Fed. R. Evid. 702 "specifically contemplates the admission of testimony by experts whose knowledge is based on experience." *Kumho Tire Co.*, 526 U.S. at 156. Vaughn's lack of experience pertaining specifically to the conditions at the jail during a lockdown weekend leave her testimony without sufficient basis for her opinions, thus the Court erred in denying Defendants' Motion *in limine* to Bar Sheila Vaughn's testimony.

IV. PLAINTIFFS FAILED TO DISCLOSE EVIDENCE REGARDING PLAINTIFF GELSO ALTHOUGH REQUIRED BY FEDERAL RULE OF CIVIL PRODEDURE 26(e).

Plaintiff Gelso filed three lawsuits prior to her current action (two against the Sheriff's Office, and one against the police). These suits were not disclosed prior to trial. Instead, moments before Gelso took the stand, Plaintiffs' counsel told the Court and Defendants' attorneys that he "forgot" that he represented his client in three prior matters, but they were unrelated. (Trial Tr. 411:23-412:2, 412:12-14.) Further, he stated that he did not intend to go into those cases with her on the stand. (Trial Tr. 412:19-22.) Without knowledge of the nature of these prior cases, Defendants were unable to question Gelso or object to testimony regarding her prior actions.

Following the conclusion of the trial, Defendants reviewed the three cases that Gelso failed to disclose. One of the cases, *Gelso v. Correctional Officer Doe*, 08 C 215, actually

alleges another detainee injured Gelso and caused her to lose seven teeth.[3] This allegation would be directly contradictory to the testimony she gave on the stand on March 10, 2011, when she told the jury that the injuries she suffered from her cellmate included a permanent bridge becoming detached from one of her teeth. (Trial Tr. 434:15-17, 435:7-9.) This information could have impeached Gelso's credibility and discredited her claim of injuries to her mouth. Plaintiffs' failure to disclose prevented Defendants from properly impeaching Plaintiff or challenging her assertion that she was harmed as a result of Defendants' conduct.

Rule 26 (e)(1) requires that "[a] party who has made a disclosure under Rule 26(a) – or who has responded to an interrogatory request for production, or request for admission – must supplement or correct its disclosure in response: . . . if the party learns that in some material respect the disclosure or response is incomplete or correct, and if the additional or corrective information had not otherwise been made known to the other parties during the discovery process or in writing."

Gelso signed, and Plaintiffs' counsel delivered responses to Interrogatories without reference to this prior suit. (Ex. F; Pl. Gelso's Answer to Interrogatories) The failure to identify other cases in which Plaintiff was claiming she that other law enforcement personnel injured her jaw and teeth is a material omission. Further, Plaintiffs' failure to disclose these material omissions or supplement discovery to include them constitute dishonesty to the tribunal. This material error prejudiced Defendants and affected the outcome of the case. At the trial, the information regarding the other cases would have been directly relevant for impeachment as to Gelso's credibility for the real reason why she lost her teeth, and damages attributable to that loss. The error was in no way harmless. (*See, e.g., Filippo v. Lee Publications, Inc.*, 2007 U.S.

[3] *Gelso v. Correctional Officer Jane Doe,* 08 C 215, contains the allegation, "as a direct and proximate result of defendants Jane Doe's failure to protect the plaintiff from the actions of the detainees, plaintiff (GELSO)sustained neurological injuries, suffered great pain, and lost seven teeth." [dkt 1 paragraph 8]

Dist Lexis 68710 (N.D. Ind. September 12, 2007)(Moody, J.) (Plaintiff's failure to disclose and evasiveness about prior encounters with police and arrests were directly relevant to her claim. Sanctions against the attorney and the plaintiff were imposed).

V. DEFENDANTS WERE NOT PERMITTED TO CROSS-EXAMINE KOSS CONCERNING HER DEPRESSION.

The Court's limiting Defendants' cross-examination of Plaintiffs on a key issue even though Plaintiff opened the door on direct examination prejudiced Defendants. "The court shall exercise reasonable control over the mode and order of interrogating witnesses." Fed. R. Evid. 611(a). "Cross-examination should be limited to the subject matter of the direct examination and matter affecting the credibility of the witness." Fed. R. Evid. 611(b). "It is established . . . that cross-examination may be limited where the sixth amendment interest is outweighed by the danger of harassing witnesses or unduly prejudicing the jury." *U.S. v. Kizer*, 569 F.2d 504, 505 (9th Cir. 1978) quoting *Davis v. Alaska*, 415 U.S. 308 (1974). The proper extent of cross-examination is left to the discretion of the trial court. *Id.*, citing Fed. R. Evid. 611(a); *Skinner v. Cardwell*, 564 F.2d 1381, 1388-89 (9th Cir. 1977). "A district judge has wide discretion to impose reasonable limits on cross-examination, and may do so based on concerns about . . . prejudice, confusion of the issues, or questioning that is only marginally relevant." *U.S. v. Jackson*, 540 F.3d 578, 591 (7th Cir. 2008). The Court must decide if testimony elicited on cross-examination is outside the scope of the direct-examination. *See U.S. v. Hoyos*, 3 F.3d 232 (7th Cir. 1993).

Here, despite being barred from doing so via a motion *in limine*, and over the objection of Defendants, Plaintiff Koss testified on direct examination concerning her depression upon entering the jail. (Trial Tr. 287:3-8.) When Defendants attempted to inquire about her depression on cross-examination, they were barred from doing so via a sustained objection. (Trial Tr.

310:18-21.) No further inquiry was allowed into the reasons behind or nature of Plaintiff's depression. Plaintiff Koss, however, testified during her deposition that she was placed on suicide watch due to the nature of her charges.[4] (Koss' Dep., 28.) She testified at trial, however, that she was depressed due to entering jail. (Trial Tr. 296:3-5.) At trial, Defendants attempted to impeach Koss on this surprising testimony via the introduction of the inconsistent statement from her deposition, but were barred from doing so by the sustained objection of Plaintiffs. (Trial Tr. 310:15-21.) Defendants were prejudiced by the prevention of their ability to cross Koss with her deposition testimony concerning the cause of her depression. The inquiry into Plaintiff Koss's depression was highly relevant to Defendants' case. Allowing Plaintiff Koss to testify on the matter without cross examination is not a reasonable restriction on Defendants' ability to cross-examine witnesses and was prejudicial to Defendants.

VI. PLAINTIFFS REPEATEDLY SHIFTED THE BURDEN TO DEFENDANTS AT TRIAL, WHICH IRREPARABLY MISLED THE JURY.

Plaintiffs' improper references to Defendants' failure to produce evidence exonerating the Sherriff's office are grounds for a new trial because these references misled the jury about Plaintiffs' burden of proof. Plaintiffs consistently made remarks about Defendants' failure to produce evidence to exonerate the Sheriff's Office.

To sustain a Section 1983 claim, a plaintiff has the burden of proof. *Maddox v. Jones,* 370 Fed. Appx. 716, 719 (7th Cir 2010) (citing *Gayton v. McCoy,* 593 F.3d 610, 620 (7th Cir. 2010)). A plaintiff must prove that the defendant was deliberately indifferent to a risk of serious harm. *Gayton,* 593 F.3d at 620. To demonstrate deliberate indifference, Plaintiffs must prove that the Sheriff's Office was subjectively aware of a serious risk to their health and either knowingly or

[4] Plaintiff Koss was charged with murder, involuntary manslaughter, and concealment of a homicide in the death of her two-month-old child, who was found partially decomposed in a hole near railroad tracks.

recklessly disregarded that risk. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Knight v. Wiseman*, 590 F.3d 458, 463 (7th Cir. 2009). There was nothing unique about Plaintiffs' case that would shift the burden onto Defendants to prove their lack of liability. Therefore, the burden of producing evidence to prove their Section 1983 claim rested entirely on Plaintiffs.

Instead of providing sufficient evidence of Defendants' deliberate indifference, Plaintiffs argued that Defendants lacked proof that correctional officers were able to see and hear the detainees during lockdowns. (Trial Tr. 671:1-16; 674:7-12.) Plaintiffs further argued that Defendants did not show logbooks proving that checks were carried out as the policy prescribed. (Trial Tr. 671:1-16.) Defendants timely objected to Plaintiffs' repeated attempts to shift the burden at trial; however, these objections were overruled. (Trial Tr. 671:8-9.) As a result of Plaintiffs' burden shifting, the jury was misled into believing the Plaintiffs could prevail on their claims if Defendants failed to present evidence that they were not culpable. It is reasonable to conclude that the jury was prejudiced by the repeated references to Defendants' need to show proof that the Sheriff's office did nothing wrong. This misstatement of the appropriate burden at trial prejudiced Defendants, misled the jury as to the law, and improperly influenced the deliberative process. The Plaintiffs' attorney's argument regarding that erroneous burden of proof was so prejudicial that this court should have declared a mistrial.

VII. THE DAMAGE AWARD WAS EXCESSIVE AND SPECULATIVE.

This Court should award Defendants a new trial on the issue of damages, or in the alternative, reduce the award of damages. Section 1983 does not authorize compensatory damages that are based only on the "abstract value of the constitutional right allegedly violated." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986). When a court reviews an award of compensatory damages, it uses a three-part test: (1) whether the award is monstrously

excessive; (2) whether there is no rational connection between the award and the evidence; and (3) whether the award is roughly comparable to awards made in similar cases. *Tullis v. Townley Eng'g & Mfg. Co., Inc.*, 243 F.3d 1058, 1066 (7th Cir. 2001).

Plaintiffs provided no evidence that they required medical attention or incurred medical expenses related to any incidents that occurred during a weekend lockdown. Although Koss testified that she was assaulted by her cellmate during a weekend lockdown, she presented no evidence showing injuries or medical treatment for either physical or psychological injuries. (Trial Tr. 304:2-20.) Gelso similarly asserted that she required dental work because of an incident that occurred during a weekend lockdown (Trial Tr. 434:11-17.); however, Gelso provided no evidence of this injury or the cost of dental treatment. Gelso could easily have provided this information through dental records. In addition, as set forth in Section IV *supra*, Gelso claimed in a separate action that she lost seven teeth because she was hit by a different inmate in 2006. (Ex. B)

The jury awarded Anne Gelso $48,000 and Helen Koss $95,000. The award is excessive and reflects the passion and prejudice of the jury instead of an impartial assessment of the merits of Plaintiffs' case. The jury awarded Plaintiffs significantly more damages than they requested based on no actual evidence – only speculation. Plaintiff Koss asked for $45,000 for emotional injuries and $25,000 for alleged physical injuries. (Trial Tr. 686:16-687:12.) Plaintiff Gelso requested $9,000 for emotional injuries (Trial Tr. 688:8-9.) and $25,000 for physical injuries (Trial Tr. 715:15-17.) Plaintiffs' ability to appeal to juror sympathies through the admission of testimony regarding Gelso's rape, which allegedly occurred years prior to her incarceration,[5] (Trial Tr. 414:20-416:25) and admission of testimony regarding Koss's depression (Trial Tr.

[5] Defendants requested documents from the West Palm Beach Police Department regarding Plaintiff Gelso's rape, and received a reply that the West Palm Beach Police Department does not have any record of the rape of Plaintiff Gelso. (Ex. G)

287:3-9), which Defendants were unable to cross-examine her on prejudiced Defendants. Jurors simply wished to compensate Plaintiffs after this prejudicial testimony without regard to the law or evidence of injuries.

The award of damages in this case should result in a new trial, or at least remittitur, because the award is unsupported by the evidence and is excessive. Additionally, the award represents the passion and prejudice of the jury resulting from the admission of prejudicial testimony.

VIII. THE COURT'S FAILURE TO PERMIT DEFENDANTS' SPECIAL INTERROGATORIES WAS AN ABUSE OF DISCRETION.

Defendants requested a series of special interrogatories regarding whether the weekend lockdowns and/or cross-watching was the moving force behind the alleged constitutional violations and injuries. (Trial Tr. 646:22-647:12, 648:23-649:8.) This Court denied Defendants' request at the jury instruction conference. (Trial Tr. 647:13-648:22, 649:9-650:22.) Defendants also requested a jury instruction that a failure to follow a correctional guideline does not necessarily equal a constitutional violation. (Trial Tr. 650:24-651:4, 660:17-661:7.) The failure to give such an instruction, as well as the denial of the special interrogatories, prejudiced Defendants because it precluded the jury from seeing that the governmental body's policies must be the moving force behind the constitutional violation as required under *Monell*. *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293, 306 (7th Cir. 2009). The Seventh Circuit in *Thomas* noted that in Section 1983 actions, the United States Supreme Court "has been especially concerned with the broad application of causation principals in a way that would render municipalities vicariously liable for their officer's actions." *Thomas*, 604 F.3d at 306 *citing Bd. of the County Comm'rs v. Brown,* 520 U.S. 397 (1997). That is exactly what happened in this case and why these special interrogatories and jury instructions were necessary. In other

words, if the special interrogatories were given and the instruction as to the violation of a correctional guideline not being equal to a constitutional violation was given, the outcome of the verdict would have been different.

IX. THE COURT ERRED IN DENYING MOTION *IN LIMINE* NO. 9

This Court erred in denying Defendants' motion *in limine* No. 9 and allowing Plaintiffs to present evidence that did not relate to the alleged harm of the weekend lockdowns, specifically, Plaintiffs' use of memoranda from 2004 relating to cross-watching. (Trial Tr. 30:23-35:4.) These memoranda were not relevant because they did not relate to weekend lockdowns or the time Plaintiffs were incarcerated and were filled out well after the weekend lockdowns had ended. As a result these memoranda were not probative under Fed. R. Evid. 403 and the dangers of unfair prejudice outweighed any probative value and prejudiced Defendant.

X. THE SHERIFF'S OFFICE DID NOT VIOLATE PLAINTIFFS' FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHTS.

For the reasons stated in Defendants' Motion for Judgment as a Matter of Law, Section I. *supra*, the jury's verdict here was inconsistent and contrary to the law. Defendants' reassert these arguments in support of their motion for a new trial.

CONCLUSION

WHEREFORE, Defendants respectfully request this Honorable Court grant their motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(b) because Plaintiffs failed to provide sufficient evidence to support the verdict. In the alternative, Defendants request that this Court grant their motion for a new trial or remittitur pursuant to Federal Rule of Civil Procedure 59 for each of the foregoing reasons and because the cumulative impact of all trial irregularities made the trial unfair to Defendants.

Respectfully submitted,
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