No. 19-1694

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

William Ledford,

Plaintiff–Appellant,

v.

Michael Baenen, et al.,

Defendants–Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Eastern District of Wisconsin
Case No. 2:16-cv-665, Hon. J.P. Stadtmueller

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January 15, 2020

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Appellate Court No: 19-1694

Short Caption: Ledford v. Baenen et al.

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Attorney's Signature: s/ Bradley Girard Date: 01/15/2020

Attorney's Printed Name: Bradley Girard

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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n/a

Attorney's Signature: s/ Brian Wolfman Date: 01/15/2020

Attorney's Printed Name: Brian Wolfman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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LIST OF PARTIES AND OTHERS INVOLVED

State defendants (sued under Section 1983 and Wisconsin state law)

- Michael Baenen, GBCI warden
- Amy Basten, GBCI correctional management services director
- Scott Leurquin, GBCI health and safety officer
- Randall Mattison, Department of Corrections engineer
- Yana Pusich, GBCI supervising officer

Construction defendants (sued under Wisconsin state law)

- Mike Abhold, CEO of SMA Construction Services
- Burt Feucht, SMA superintendent and GBCI site supervisor
- SMA Construction Services
- Society Insurance (SMA's insurer)

Other individuals involved

- Dr. Kim Anderson, toxicologist
- Dwayne Cox, GBCI inmate who filed similar lawsuit
- Wayne Laufenberg, GBCI sergeant
- Joseph Martin, institutional complaint examiner
- Chris Timmers, GBCI building and grounds superintendent
- Todd Zuge, GBCI officer

INTRODUCTION

When toxic exhaust fumes began flowing into William Ledford's prison cell from a construction site adjacent to his cell hall, his carbon-monoxide poisoning began as well. As a result of the poisoning, he and other inmates suffered severe headaches, dizziness, dry heaving, vomiting, and bloody mucus.

Though the fumes permeated prisoners' cells for months, the people with the power to fix the problem—prison officials and the private company in charge of construction—effectively did nothing. The sole measure prison officials took in response to repeated pleas for help was to close the building's air vents, which turned off the heat in the middle of one of the coldest winters in Wisconsin's history. But turning off the heat did not get rid of the fumes; it only made the cell hall frigid. After learning that their attempted solution significantly worsened conditions, prison officials refused to do *anything* else. For its part, the construction company did not take the precautions it usually takes to limit fume exposure on its nonprison projects, and, even worse, did nothing after learning that exhaust was flowing into the prison. As a result, Ledford spent the next three months being poisoned, freezing, or both.

A prison sentence is no justification for this inhumane treatment. Prison officials had a legal duty to protect Ledford, and the construction company had a legal duty to protect anybody who foreseeably could be harmed by its construction. Prison officials did not fulfill their duty by relying on a half-measure they knew made the problem worse. And the construction company and its officers did not fulfill their duty by failing to take any action whatsoever. The Eighth Amendment and Wisconsin law do not allow defendants to respond so callously.

JURISDICTIONAL STATEMENT

Appellant William Ledford sued state defendants in the Eastern District of Wisconsin under 42 U.S.C. § 1983. Ledford also brought Wisconsin state-law negligence claims against state and construction defendants. The district court had jurisdiction over the Section 1983 claims under 28 U.S.C. § 1331. The district court had jurisdiction over the state-law claims under 28 U.S.C. § 1367(a). The district court's opinion and final order granting summary judgment and separate judgment were entered on March 28, 2019. ECF 179; ECF 180. Ledford filed a notice of appeal on April 11, 2019. ECF 181. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred in granting summary judgment to prison officials on William Ledford's Eighth Amendment claims, by concluding that prison officials were not deliberately indifferent when they allowed toxic fumes to enter his cell hall, turned off the heat in a failed attempt to prevent fumes from entering, and took no further action after learning fumes persisted and temperatures plummeted.

2. Whether the district court erred in dismissing Ledford's state-law negligence claims when it

(a) granted immunity to prison officials, concluding that Ledford's confinement in the cell hall with exhaust fumes and extreme cold was not a known danger; and

(b) held that the construction company did not breach its duty of care when it ran fumes-emitting construction equipment next to Ledford's cell hall without taking safety precautions.

3. Whether the district court erred when it denied Ledford's repeated requests for appointment of counsel without analyzing his capacity to litigate this complex case.

STATEMENT OF THE CASE

This case concerns the dangerous living conditions appellant William Ledford and other prisoners suffered at Green Bay Correctional Institution (GBCI) resulting from a construction project during winter 2013-2014. Ledford brings claims against seven individuals and one company. As in the district court, defendants are referred to in two groups: "state defendants" (Michael Baenen, Amy Basten, Scott Leurquin, Randall Mattison, and Yana Pusich) and "construction defendants" (Mike Abhold, Burt Feucht, SMA Construction, and SMA's insurer: Society Insurance). For the Court's convenience, a list of acronyms, defendants, and others involved in the case is included above (at ix).

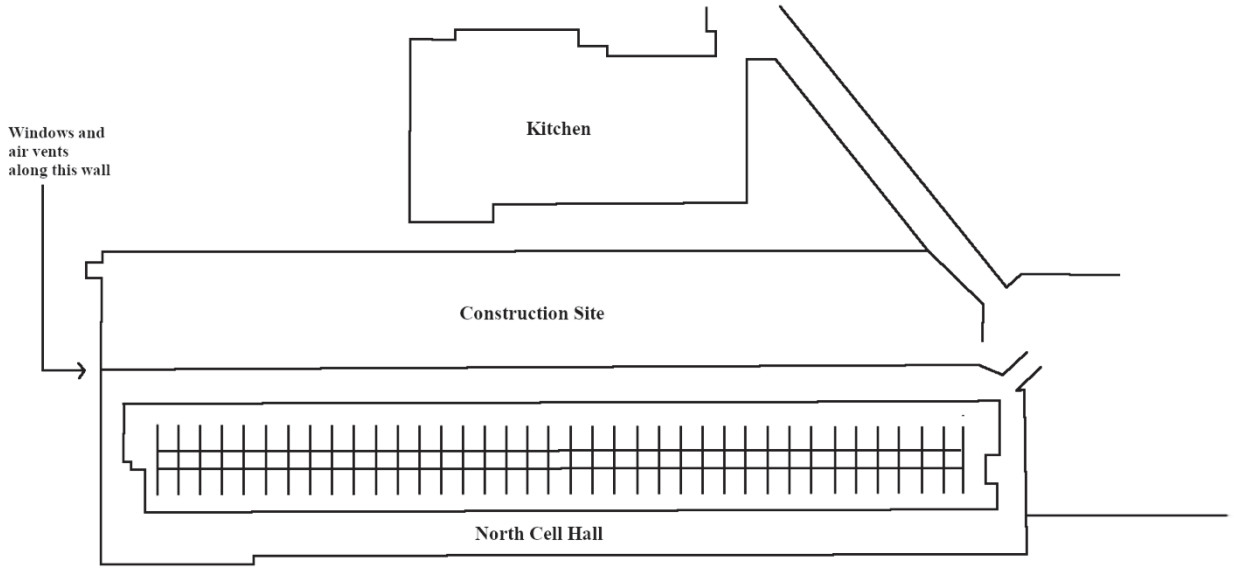
Because this case was decided at summary judgment, this Court should construe the evidence and inferences in the light most favorable to Ledford, the nonmoving party. *Thomas v. Ramos*, 130 F.3d 754, 759 (7th Cir. 1997).

I. Factual background

A. Exhaust fumes from construction equipment polluted Ledford's cell hall and caused symptoms associated with carbon-monoxide poisoning.

1. William Ledford was a GBCI inmate between 2013 and 2014. App. 52A. Ledford lived in North Cell Hall (NCH), a long, narrow building with cells along one wall and windows on the other. *Id.* 269A-271A. The windows overlooked a small outdoor space between the cell hall and the prison's kitchen, about fifty feet away. *Id.* 247A, 272A.

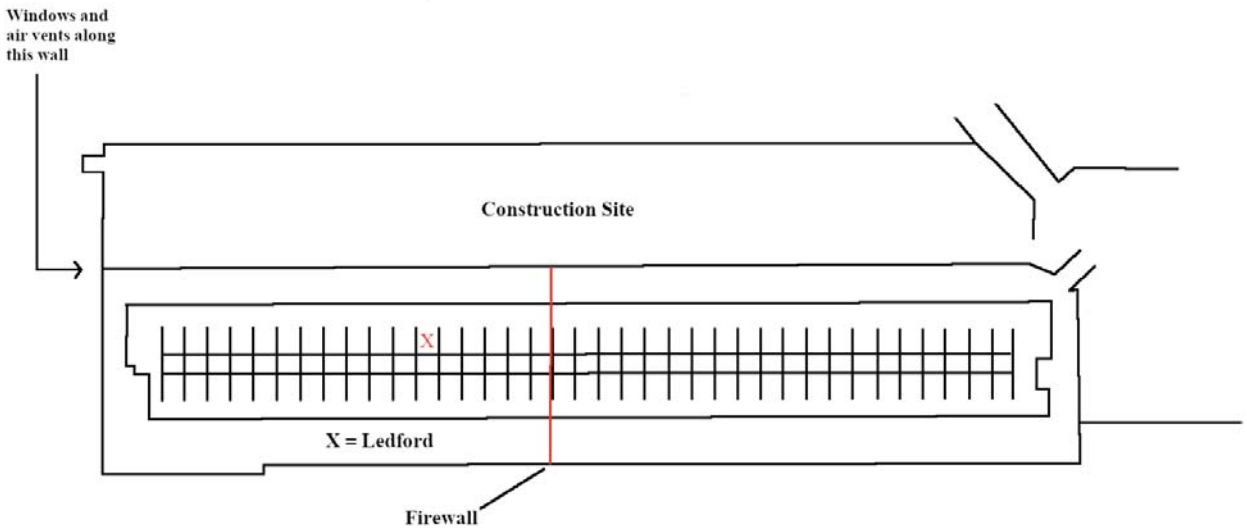
In November 2013, construction began on a shower building in the narrow area between the cell hall and the kitchen, as depicted in the drawing below. App. 274A.[1]



A private contractor, appellee SMA Construction, oversaw construction of the shower facility. App. 274A.

Construction on GBCI's shower building was almost constant between 8 a.m. and 5 p.m. most days. App. 400A. Throughout the project, SMA used diesel-fueled heavy machinery and tools, which emitted carbon-monoxide-containing exhaust fumes. *Id.* 227A, 398A. During one phase, twenty to thirty cement trucks cycled through the work site daily, each arriving, idling, and emitting exhaust fumes outside the cell hall for approximately fifteen minutes before departing and being replaced by another truck. *Id.*

[1] The two diagrams in this section are traced from a diagram in the record that depicts North Cell Hall, the planned shower facility, and GBCI's kitchen. App. 247A.



390A-391A. At another point, SMA continuously ran diesel-fueled, ground-thawing equipment twenty-four hours a day for a week. *Id.* 233A, 400A-401A.

Shortly after work started, exhaust fumes from SMA's machinery entered the cell hall through the building's vents. App. 53A. So much exhaust was entering NCH that there was a visible haze, as if someone was "running a generator in a closed room." *Id.* 55A. The fumes and accompanying haze remained in NCH for months. *Id.* 99A.

The exhaust fumes concentrated near Ledford's cell, which was located at the end of the cell hall across from air-intake vents and windows facing the construction site. App. 56A, 396A. A firewall bisected the hall. *Id.* 256A. During the construction project, this wall trapped the fumes and haze in one half of the cell hall, concentrating them near Ledford's cell. *Id.* 56A, 72A-73A.

2. Constant exposure to concentrated construction fumes caused Ledford and other NCH inmates to experience breathing difficulties, headaches, burning eyes, nausea, and vomiting. App. 15A. One inmate reported seeing blood in his mucus after blowing his

nose. *Id.* 265A. The inmates' symptoms are associated with prolonged carbon-monoxide exposure. *Id.* 409A.

Ledford dreaded spending time in his cell because of the fumes' effects. App. 56A-57A. At one point, the haze and fumes were so bad that Ledford had to fashion a mask out of his towel, draping it over his face. *Id.* 57A. Even then, Ledford still suffered severe headaches, dizziness, and nausea. *Id.* "It was like being … poisoned all the time," Ledford explained, like "being stuck in a room with … no ventilation … . You'd just be trying to watch TV and your eyes would be running from the burn." *Id.* Because Ledford was only allowed to leave his cell for meals, recreation, and occasional visits to the library or doctor, he was confined in the cell hall with the fumes for twenty-two hours a day. *Id.* 75A-76A.

The fumes remained for more than four months. App. 54A, 99A.

3. Over those four months, inmates repeatedly reported symptoms consistent with carbon-monoxide poisoning to prison employees and complained about visible, odorous exhaust fumes in the cell hall. *See, e.g.*, App. 55A, 292A-293A, 250A. Despite inmates' persistent complaints, no GBCI or SMA employee ever measured the level of air pollution in the cell hall. *Id.* 158A.

Ledford told a doctor in the Health Services Unit (HSU) about his symptoms. App. 99A. Yet the doctor did not examine Ledford. Instead, the doctor simply informed him "there was nothing that you could do other than get rid of the problem." *Id.*

Ledford was not the only inmate to complain about his symptoms: Michael Piester and Dwayne Cox also reported their symptoms to HSU. App. 412A-413A. HSU

charged Piester a copay, then told him there was no treatment for his symptoms. *Id.* 415A. And instead of answering Cox's question, HSU sent Cox a note saying he needed to request an appointment and pay a copay. *Id.* 300A. Other inmates with similar symptoms opted not to report their illnesses to HSU because they could not afford the copay and knew HSU would not offer any treatment. *Id.* 304A.

B. When GBCI finally attempted to solve the problem, it failed to eliminate the fumes and created a new problem: extreme cold.

Shortly after construction began, NCH inmates voiced concerns about the haze and fumes to GBCI Officer Todd Zuge and Sergeant Wayne Laufenberg. App. 54A-55A, 242A. Laufenberg told Health and Safety Officer Scott Leurquin about the inmates' complaints. *Id.* 54A-55A. Ledford also complained directly to Supervising Officer Yana Pusich in a February 4 letter, but Pusich did not respond. *Id.* 250A.

Pusich told GBCI Correctional Management Services Director Amy Basten about inmates' complaints. App. 119A, 126A. Though Basten's job was to ensure GBCI's facilities satisfied health and safety standards, she did nothing to address the fumes other than discuss the issue with Building and Grounds Superintendent Chris Timmers and GBCI Warden Michael Baenen. *Id.* 160A-161A. The prison did not have carbon-monoxide detectors, and Basten never asked anyone to test for carbon monoxide in the cell hall. *Id.* 158A, 164A-165A.

Finally, after multiple complaints, Timmers attempted to stop the flow of fumes into the cell hall by turning off the building's air-intake system when construction was active. App. 156A, 281A-282A. When on, the system brought in and heated outside air, which

in turn heated the cell hall. *Id.* 218A. But "turning off the air intakes simultaneously shut off the heat in the building." D. Ct. Op. at 9. Thus, GBCI's decision to turn off the system turned off the heat in the cell hall during one of the coldest winters in Wisconsin's history. App. 124A-125A, 218A, 342A.

During winter 2013-14, when the heat was turned off in the cell hall, outside temperatures regularly dipped well below zero, at times reaching negative forty-five. App. 248A. The winter was so brutal that there was three-foot-thick frost at the construction site as late as March 2014. *Id.* 351A. At least once, SMA ran ground-thawing equipment twenty-four hours a day for a week. *Id.* 400A-401A. Whenever construction equipment like this machine ran, the air-intake system that heated the cell hall was turned off. *Id.* 156A.

Not only did GBCI staff turn off the heat, they also opened the cell-hall windows and ran large floor fans in the cell hall. App. 58A, 70A-71A, 156A. One fan was placed directly in front of Ledford's cell. *Id.* 58A. Ledford said the fans "had no effect whatsoever" on the fumes' concentration; they simply moved the haze around the cell hall (and presumably made the cell hall even colder). *Id.*

Because GBCI staff turned off the heat, opened the windows, and turned on fans during one of Wisconsin's coldest-ever winters, Ledford and other inmates were forced to wear multiple layers of clothes indoors—including hats and coats—and stay under blankets during the day to avoid the freezing temperatures. App. 265A.

GBCI did not attempt to regulate temperatures inside the cell hall. The prison staff took no steps to check on conditions in the building after turning off the heat. App.

161A-162A. Basten said Timmers "monitored" the temperature as part of his daily routine, but it is not clear whether this involved simply walking through the building or taking the temperature with a thermometer. *Id.* 162A. In any event, if Timmers did measure the temperature, he did not write it down anywhere and did not tell any other GBCI employees what it was. *Id.*

C. Defendants' reactions to inmates' complaints about the fumes and cold

After GBCI turned off the heat, Ledford and the other NCH inmates renewed their complaints to Laufenberg and Zuge, explaining that GBCI's attempted solution both failed to solve the fumes problem and made the cell hall unbearably cold. App. 58A. Officer Zuge shared these concerns with GBCI's Health and Safety Officer Scott Leurquin, whose job included identifying and addressing hazardous prison conditions. App. 371A.

Leurquin, however, did not take the complaints seriously. His only response to multiple inmate complaints about visible exhaust fumes in the cell hall was to share the information with Timmers. App. 184A. Leurquin did nothing to monitor, evaluate, or diminish the fumes in the cell hall. *Id.* 188A-189A. Leurquin testified that when Ledford told him about the fumes "I just said, okay, and then I continued about my business." *Id.* 183A.

When his verbal complaints were met with indifference, Ledford filed a written complaint about the fumes and cold through the prison's official inmate complaint review system in February 2014. App. 248A, 415A. Ledford's complaint explained that

the solutions implemented to date were ineffective and the fumes inside NCH continued to cause severe headaches, nausea, breathing difficulties, and running, stinging eyes. *Id.* 15A. NCH inmates filed three other official complaints, representing nine inmates. *Id.* 248A-250A, 277A, 292A, 308A-309A, 327A. Each complaint, like Ledford's, stressed that GBCI's efforts not only failed to eliminate the fumes, but also made the cell hall unbearably cold. *Id.* 248A.

1. Construction defendants learned that fumes from their equipment were filling the cell hall yet did nothing in response.

GBCI staff told SMA Construction about the inmates' complaints at a meeting on February 18, 2014. App. 275A-276A. Correctional Management Services Director Amy Basten informed SMA that there were "some complaints regarding the fumes in the cell halls" and that "we need to do everything we can to mitigate it." *Id.* 157A-158A. Yet, at that same meeting, SMA continued pursuing plans to use fume-producing equipment, discussing the need to secure ninety additional gallons of diesel fuel to run ground-thawing equipment for extended periods in the weeks ahead. *Id.* 275A.

SMA Superintendent and Site Supervisor Burt Feucht said the February 18 meeting was the first he learned that there were fumes inside the cell hall. App. 229A. But Officer Zuge saw construction workers inside the cell hall—where there was a visible haze and strong odor from the exhaust fumes—almost daily during the construction project. *Id.* 241A. Regardless of when SMA learned about the fumes, the company agreed at the February 18 meeting to use exhaust scrubbers on its equipment when working near the

cell hall's vents and windows. *Id.* 157A. But SMA never implemented this or any other fume-reduction measure. *Id.* 229A.

This failure to identify and mitigate air contamination at GBCI was a departure from SMA's standard approach to safety. According to SMA CEO Michael Abhold, the easiest way to determine whether construction fumes pose a public safety risk is to use common sense. App. 388A. For example, SMA's safety manual lists the symptoms of carbon-monoxide poisoning—headaches, dizziness, vomiting, and watering or "smarting" of the eyes, all of which NCH inmates experienced—and tells employees that if "any of these symptoms develop, move outdoors immediately." *Id.* 363A.

SMA Site Supervisor Burt Feucht was trained how to recognize hazards on construction sites, including hazards related to air quality. App. 220A. This training addressed when and how to "monitor the air" to protect "the general public" and "anybody" near the site. *Id.* 220A, 222A. Feucht's training covered how to protect "an incarcerated individual." *Id.* 222A.

At its other construction projects, SMA mitigated neighbors' exposure to exhaust fumes. App. 384A-386A. Abhold explained he "absolutely" would be concerned if fumes moved into an adjacent building when work was taking place next to an open window. *Id.* 384A. SMA typically used particle testers to assess whether equipment was polluting the air when, for example, the company was "working outside an open window of the neighbor's house." *Id.* 385A. SMA did not take these measures at GBCI.

SMA began monitoring for carbon monoxide only after putting the roof on the shower building, when its own employees would be in an enclosed space with the machinery and tools. App. 228A.

2. State defendants learned that their attempted solution had worsened conditions yet took no additional actions.

Warden Michael Baenen and DOC Engineer Randall Mattison also attended the February 18 meeting with SMA. Baenen asked Mattison to look into GBCI's air-intake system in response to inmates' complaints. App. 144A, 255A. Mattison's review was "not intended to be the total investigation of the complaint," but one part of a larger investigation. *Id.* 365A-366A. Baenen directed Mattison to speak with only Timmers and Basten, and no one else. *Id.* 180A.

Mattison's investigation involved spending just forty-five minutes looking at GBCI's ventilation system and a couple hours reviewing building plans to confirm whether the ventilation system was up to code when it was installed more than fifty years earlier and whether it was an appropriate size for the space. App. 174A-175A. Mattison did not conduct any testing. He simply observed that the fans "were operating" and "moving a lot of air." *Id.* 178A.

Mattison's only other action was to ask Basten to review HSU logs from the month before Ledford filed his complaint to see whether any inmates had visited HSU complaining of vomiting or nausea. App. 178A. Basten reported none had. *Id.* Mattison did not, however, ask if HSU received healthcare requests related to other symptoms reported by NCH inmates like chronic headaches, breathing difficulties, or stinging

eyes. Despite the limited scope of Mattison's investigation and his lack of medical training, Mattison nonetheless concluded the fumes caused "no long lasting health effects." *Id.* 180A.

Mattison wrote a two-page memorandum of his findings and shared it with Warden Baenen and Amy Basten. App. 255A-256A. Without ever setting foot in the cell hall or measuring the air quality in any way, Mattison stated "the volume of outside air flow in relation to the amount of exhaust" would prevent fumes from reaching dangerous concentrations. *Id.* 256A.

Institutional Complaint Examiner Joseph Martin, who also investigated Ledford's complaint, came to a very different conclusion. App. 416A-418A. Unlike Mattison, Martin conducted a multi-pronged investigation. He interviewed multiple inmates and GBCI staff. *Id.* 252A. He also visited the cell hall after GBCI's purported fixes were implemented to assess the situation in person, but still smelled fumes and saw a visible haze in the air. *Id.* 253A, 417A.

Martin reviewed Mattison's memo and issued a report. App. 252A-254A. According to Martin, Mattison had failed to address the core issue: whether a noticeable amount of exhaust fumes remained in the cell hall even after GBCI implemented its failed attempts at a fix—that is, turning off the heat, opening the windows, and using fans. *Id.* 253A-254A. Martin also emphasized that Mattison's conclusion that the fumes did not cause any long-lasting health effects "strains credulity." *Id.* 253A.

On the basis of his investigation and review of Mattison's memo, Martin recommended that the prison "affirm" Ledford's complaint, meaning that the prison should address the fumes and cold in the cell hall. App. 254A.

After reviewing Mattison's memo and Martin's report, Warden Baenen dismissed Ledford's complaint in a four-sentence decision. App. 257A. Baenen explained that "[t]he crux of the issue is whether harm has been done. People may complain about many odors they deem noxious, but without some evidence of harm, they do not rise to the level of significance." *Id.* Baenen's decision did not address Martin's finding that inmates were experiencing harm ranging from vomiting to bloody mucus, nor Ledford's allegation he experienced severe headaches, breathing difficulties, and burning eyes. *Id.* 248A, 253A.

Despite continuing freezing temperatures and persistent fumes, Baenen directed GBCI staff to continue turning off the heat, opening windows, and using fans in the cell hall. App. 142A-149A, 257A.

According to GBCI staff, the prison administrators were angry that NCH inmates filed formal complaints about the fumes and that Officer Zuge, Sergeant Laufenberg, and Complaint Examiner Martin confirmed the inmates' allegations. App. 78A, 301A.

Ledford appealed to the Department of Corrections. The DOC Deputy Secretary, who decides inmate appeals, found Ledford's complaint meritorious and instructed GBCI to "implement processes to ensure the fumes do not enter the building." App. 267A. The Deputy Secretary's decision was sent to GBCI staff on March 21, 2014, the same day Baenen retired. D. Ct. Op. at 15. But no GBCI staff member took any

additional steps to address the problem. Internal GBCI emails acknowledged that the fumes persisted in the cell hall until at least late April. App. 338A.

II. Proceedings below

A. Ledford sued Baenen, Basten, Leurquin, Mattison, Pusich (state defendants) and Abhold, Feucht, and SMA (construction defendants) under Section 1983, maintaining that his months-long exposure to the toxic fumes and freezing cold was cruel and unusual punishment under the Eighth Amendment. App. 24A-29A. Ledford brought state-law claims of negligence and negligent infliction of emotional distress against all defendants for his physical and emotional injuries. *Id.* 30A-35A. He also brought a negligent-supervision claim against construction defendants for failing to supervise the employees on the construction site, causing his exposure to carbon-monoxide fumes. *Id.* 32A-33A.

Ledford moved to be appointed counsel three times. ECF 18, 45, 48. The magistrate judge denied his first motion, observing Ledford had a "good grasp of the procedural rules and [was] able to utilize relevant case law to support his arguments" and "[t]his is not a case that will rely heavily on documents or witness testimony." App. 2A-3A. The magistrate judge denied his second motion for counsel because he believed Ledford was still representing himself well. *Id.* 5A. The magistrate judge denied Ledford's third request on similar grounds. *Id.* 3A. Instead, he instructed counsel for NCH inmate Dwayne Cox, who had filed a similar suit, to provide Ledford redacted materials from Cox's already-completed discovery. *Id.*

B.1. Both state and construction defendants moved for summary judgment. ECF 86, 95. The district court granted both motions. D. Ct. Op. at 1. The court observed that, under the Eighth Amendment, prisoners have a right to be free from inhumane conditions. *Id.* at 21. If prison officials are deliberately indifferent to the risk created by the inhumane conditions, they violate the Eighth Amendment. *Id.*

The court held that Ledford made out a claim that his exposure to fumes was inhumane because a reasonable jury could conclude that Ledford's exposure to the "undisputed … fumes and haze in the NCH" were a sufficiently dangerous condition of confinement. D. Ct. Op. at 22. But it nonetheless held that no reasonable jury could conclude state defendants acted with deliberate indifference to Ledford. *Id.* at 23. According to the court, neither Leurquin nor Pusich believed the fumes posed a risk of harm. *Id.* at 23-24. The court found that Basten and Baenen believed that the problem had been resolved because they relied on Timmers and Mattison to look into the problem. *Id.* at 24-25. The court held that Mattison did not act with deliberate indifference to the fumes because he examined the ventilation system and found significant airflow through the cell hall. *Id.* at 26.

The court acknowledged that despite "indisputable evidence that the [cell hall] was intensely cold," Ledford had not suffered an unconstitutional level of cold. D. Ct. Op. at 27. According to the court, that Timmers monitored the temperature absolved all state defendants of liability for the freezing temperatures. *Id.* at 27. The court did not address Timmers's failure to record any temperatures from his alleged monitoring. *Id.*

Nor did the court consider the combined effect of the fumes and cold, instead viewing the two in isolation. *Id.* at 22, 26.

2. Turning to Ledford's state-law negligence claims, the court held that construction defendants did not have a reason to suspect the fumes were causing any harm because, the court maintained, they lacked notice that fumes were entering the cell hall. D. Ct. Op. at 31-32. Though construction defendants were told in the February 18 meeting that fumes were entering the prison and did nothing in response, Timmers told them a week later that the issue was "resolved." App. 257A. The court concluded this meant they had been taken "off notice." D. Ct. Op. at 29. The court did not address the week between the meeting and Timmers allegedly telling construction defendants about the fumes. The court also rejected Ledford's argument that construction defendants should have known fumes would enter the building given its proximity to the construction site, noting only that Ledford had not offered expert testimony establishing this standard of care. *Id.* at 30.

3. The court did not address the merits of Ledford's negligence claims against state defendants, holding that prison officials were immune under Wisconsin law for conduct involving the exercise of discretion. D. Ct. Op. at 33-34. The court considered whether state defendants knew of and failed to respond to a "known and compelling danger," which would negate immunity. *Id.* at 34. It rejected this known-danger exception, holding that exposure to toxic fumes was not an "accident waiting to happen" and that because, in its view, each defendant had taken one step over three months to abate the fumes, state defendants did not fail to respond to them. *Id.* at 34-35.

SUMMARY OF ARGUMENT

I. The Eighth Amendment guarantees inmates adequate shelter and ventilation. GBCI did not provide Ledford either. Throughout winter 2013-2014, Ledford's cell hall was filled with a thick haze of toxic fumes. In a lackluster attempt to address the fumes, GBCI employees closed the air vents, which turned off the cell hall's heat and caused the temperature inside to plummet to intolerably cold levels.

These conditions caused Ledford serious harm. He and other inmates suffered severe headaches, nausea and vomiting, dizziness, and burning eyes—all known symptoms of carbon-monoxide poisoning. The inmates were not only ill, they were freezing. It was so cold that Ledford was forced to remain in bed during the day—even when wearing multiple layers of clothing—to combat the cold temperatures.

Ledford and other inmates repeatedly complained about the conditions. In the face of manifest physical injury, GBCI simply continued pursuing the same "fix" they knew had already proved ineffective. Officials took no other steps to remedy the fumes and cold. A reasonable jury could find that state defendants' blatant indifference to prisoners' health and safety violated the Eighth Amendment.

II. The district court erred in granting defendants summary judgment on Ledford's state-law claims.

A. State defendants negligently injured Ledford because it was foreseeable that confining him in his cell with fumes and frigid air would harm him. Prolonged exposure to fumes was a substantial factor causing Ledford's dizziness, nausea, dry heaving, and headaches. Even after it became clear that state defendants' attempt to get rid of the

fumes had failed, they did nothing to fulfill their non-discretionary duty to either address the sources of the harm or remove inmates from the contaminated cell hall. Because state defendants ignored the compelling danger to Ledford, they are not entitled to state-law immunity on Ledford's negligence claims.

Construction defendants negligently exposed Ledford to toxic fumes. Construction defendants created a foreseeable and unreasonable risk of danger when they operated heavy-exhaust machinery next to cell-hall windows and did not take any protective measures to prevent harm inside the cell hall. Because it is common sense to employ some sort of precautionary measure when using heavy machinery near occupied buildings, Ledford was not required to introduce expert testimony to establish that construction defendants had a duty to avert the harm.

Defendants' ongoing failure to address the concentration of toxic fumes and freezing temperatures in the cell hall caused Ledford physical injuries and severe emotional distress.

B. Construction defendants knew that toxic fumes from their equipment were causing inmates serious harm and promised to install exhaust scrubbers to address inmates' complaints. But SMA managers responsible for public safety on the construction site never told SMA's employees or subcontractors to implement any safety measures to reduce the fumes. Their negligent supervision was a substantial factor in injuring Ledford.

III. Ledford moved three times for appointment of counsel. The district court abused its discretion in denying Ledford's requests because it was apparent the case was

too complex for a pro se litigant. Ledford told the district court that he needed counsel to secure an expert witness. The court nonetheless denied Ledford's request for counsel, and then (paradoxically) dismissed Ledford's negligence claims because he failed to support them with an expert. The district court's refusal to appoint counsel thus prejudiced Ledford.

STANDARD OF REVIEW

The district court's grant of summary judgment on the Eighth Amendment and state-law claims is reviewed by this Court de novo. *Thomas v. Ramos*, 130 F.3d 754, 759 (7th Cir. 1997). When reviewing a district court's grant of summary judgment, this Court must "accept[] all facts and inferences in the light most favorable" to the nonmoving party, here Ledford. *Id.*

The district court's failure to appoint counsel is reviewed for abuse of discretion. *Henderson v. Ghosh*, 755 F.3d 559, 564 (7th Cir. 2014). This Court evaluates whether the district court's decision to deny a motion to appoint counsel was reasonable and whether it prejudiced the moving party. *Id.*

ARGUMENT

I. State defendants violated Ledford's Eighth Amendment rights when they responded with deliberate indifference to exhaust fumes and extreme cold in North Cell Hall.

The Eighth Amendment requires prison officials to provide humane conditions and take reasonable measures to guarantee inmates' safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993). Prison officials violate the Eighth Amendment when they respond with deliberate indifference to an objectively

serious harm to inmates' health or safety. *Board v. Farnham*, 394 F.3d 469, 478 (7th Cir. 2005).

For months, prison officials failed to protect Ledford's right to adequate shelter and ventilation. And because these constitutional rights have been clearly established for decades, state defendants are not entitled to qualified immunity on Ledford's Eighth Amendment claim. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

A. The exhaust fumes and extreme cold inflicted objectively serious harms on Ledford's health and safety.

Prison conditions cause objectively serious harm in violation of the Eighth Amendment when they deny a prisoner "the minimal civilized measure of life's necessities." *See Hardeman v. Curran*, 933 F.3d 816, 820 (7th Cir. 2019) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The basic necessities guaranteed by the Eighth Amendment have long included adequate shelter and ventilation. *Board*, 394 F.3d at 485-86; *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997). When an inmate contends that his conditions of confinement caused objectively serious harm, the challenged conditions must be "evaluated as a whole"—a court may not "pick apart the individual components" of the claim. *Gray v. Hardy*, 826 F.3d 1000, 1005 (7th Cir. 2016). Exposure to toxic fumes or extreme cold alone is an objectively serious harm. When the two conditions are "evaluated as a whole," *id.*, the seriousness of the harms imposed on Ledford is unquestionable.

1. Exhaust fumes. The district court correctly concluded that state defendants exposed Ledford to serious harm when they allowed exhaust fumes from diesel-

powered machines to concentrate in Ledford's cell hall. D. Ct. Op. at 22. There is "no question" that exposure to poisonous fumes is "contrary to current standards of decency." *Board*, 394 F.3d at 486 (citing *Helling*, 509 U.S. at 35). The exhaust fumes contained carbon monoxide, App. 210A, an undeniably toxic gas, Armin Ernst and Joseph D. Zibrak, *Carbon Monoxide Poisoning*, 339 New Eng. J. Med. 1603, 1603 (1998). Low concentrations of carbon monoxide can cause cardiovascular and neurological harm. Ivan Blumenthal, *Carbon Monoxide Poisoning*, 94 J. Royal Soc'y Med. 270, 270-71 (2001). Even secondary exposure to tobacco smoke, which contains far less carbon monoxide than diesel exhaust, may pose an objectively serious threat to inmate health and safety. *Helling*, 509 U.S. at 35-36; *McKinney v. Anderson*, 924 F.2d 1500, 1506-07 (9th Cir. 1991), *cert. granted, judgment vacated sub nom. Helling v. McKinney*, 502 U.S. 903 (1991), *judgment reinstated*, 959 F.2d 853 (9th Cir. 1992), *aff'd*, 509 U.S. 25 (1993). And that is to say nothing of the myriad other chemicals present in diesel exhaust. *See Partial List of Chemicals Associated with Diesel Exhaust*, Occupational Safety and Health Administration.[2]

Ledford and other inmates experienced severe headaches, sore throats, vomiting, burning eyes, dizziness, and difficulty breathing for months on end. App. 96A, 248A, 292A, 308A. They alleged that the exhaust fumes caused these harms. *Id.* Their symptoms, viewed in the light most favorable to Ledford, establish a "direct physical manifestation" of carbon-monoxide poisoning. *See Board*, 394 F.3d at 486.

[2] https://www.osha.gov/SLTC/dieselexhaust/chemical.html (last visited Jan. 15, 2020).

State defendants argued below that Ledford could link his symptoms to the fumes only by presenting a medical diagnosis (which HSU did not give him) and evidence that he had tested the air quality himself (which, obviously, a prison inmate cannot do). ECF 95 at 80-89. But specific diagnoses are not required to establish that prison conditions are objectively harmful. *See Del Raine v. Williford*, 32 F.3d 1024, 1035-36 (7th Cir. 1994). And Ledford's testimony that exhaust fumes caused his symptoms is enough to satisfy the objective-harm test. *See Board*, 394 F.3d at 486.

2. Extreme cold. State defendants also created bitterly cold temperatures when they turned off the heat in Ledford's cell hall. No standard of decency allows inmates to be freezing for months in a half-hearted attempt to stop them from being poisoned.

Whether cold is sufficiently severe to cause an Eighth Amendment violation is a question "peculiarly appropriate" for jury determination. *Dixon*, 114 F.3d at 643. The factfinder weighs several factors, including the degree of cold, its duration, the adequacy of alternatives like blankets and clothing, and, of particular relevance here, whether an inmate must endure "other uncomfortable conditions as well as cold." *Id.* at 644. All of these factors cut in Ledford's favor.

For starters, both the degree and duration of cold in Ledford's cell hall were severe. Two months' frigid cold is sufficient to preclude summary judgment on an Eighth Amendment severe-temperature claim. *See Haywood v. Hathaway*, 842 F.3d 1026, 1030-31 (7th Cir. 2016). The cold in Ledford's cell hall lasted even longer. Prison officials began turning off the heat in late January and continued doing so through April. App. 69A-70A, 74A, 248A. That winter, outdoor temperatures regularly fell below zero and

were often much lower. *Id.* 248A, 258A. Because GBCI turned off the heat whenever construction was active, the cell hall lacked heat weekdays and even some evenings and weekends. *Id.* 70A, 235A, 274A. For at least one week in March or April, it was so cold that SMA ran ground-thawing equipment around-the-clock—indicating that officials provided no heat day or night during that period. *Id.* 235A, 274A, 400A-401A. And, if all that weren't bad enough, officials made the cold worse by opening windows and running large industrial fans in the cell hall. *Id.* 60A, 70A-71A.

Ledford's "alternative means of warmth"—blankets and clothing—were inadequate to combat the cold. *See Dixon*, 114 F.3d at 643-44. Prison officials cannot rely on blankets and clothing to provide warmth if severe cold nevertheless limits inmates' daytime activities in their cells. *Id.* Because GBCI officials turned off the heat, Ledford was forced to remain under covers during the day. App. 258A, 265A. This fact strongly supports the inference that freezing temperatures prevented Ledford from completing simple tasks in his cell.

And, to say that Ledford was forced to endure "other uncomfortable conditions" in addition to weeks-long cold would be an understatement. *See Dixon*, 114 F.3d at 644. A visible haze and overpowering odor from exhaust fumes permeated the cell hall. App. 57A, 248A. GBCI's single, unsuccessful attempt to deal with these fumes forced Ledford and other inmates to freeze while being poisoned.

In response to Ledford's showing of extreme cold, the district court either ignored Ledford's evidence and inferences, or viewed them in a light favorable to state defendants, the moving party. For example, the district court erroneously required

Ledford to establish that prison officials opened windows and turned off the heat twenty-four hours a day. D. Ct. Op. at 27. The court then ignored evidence that officials *did* open cell-hall windows and *did* turn off the heat both day and night. App. 60A, 70A, 400A-401A. And the court improperly construed Ledford's access to clothing and blankets in defendants' favor, D. Ct. Op. at 27, despite evidence that these "alternative means of warmth" were inadequate, App. 258A, 265A. When the evidence is properly construed in Ledford's favor, a jury could easily conclude that the cold in Ledford's cell (whether combined with the carbon-monoxide poisoning or not) was unconstitutionally severe.

B. State defendants responded with deliberate indifference to the fumes and cold.

Prison officials are deliberately indifferent when they know about a serious harm and fail to take reasonable steps to address it. *See Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994). Prison officials know about harms when they are obvious or officials receive information about them. *Farmer*, 511 U.S. at 838, 842. Officials respond unreasonably to serious harms when they take "flimsy, non-productive band-aid" measures despite being "on notice" that those measures are ineffective. *Board*, 394 F.3d at 486. Put another way, "[k]nowingly persisting in an approach that does not make a dent in the problem is evidence from which a jury could infer deliberate indifference." *Gray v. Hardy*, 826 F.3d 1000, 1009 (7th Cir. 2016). A "conscious, culpable refusal to prevent the harm" can also be inferred when prison officials ignore repeated requests for repairs. *Duckworth v. Franzen*, 780 F.2d 645, 653 (7th Cir. 1985). Drawing that inference

is especially appropriate when evidence of harm is "longstanding, pervasive, well-documented" and is expressly noted by prison officials. *Farmer*, 511 U.S. at 842 (citation omitted).

Here, the harm caused by extreme cold and fumes was obvious *and* GBCI officials were told about it. *See Farmer*, 511 U.S. at 838, 842. State defendants responded unreasonably to the harm because each defendant could have averted known dangers yet failed to do so. *See Case v. Ahitow*, 301 F.3d 605, 607 (7th Cir. 2002). By taking "flimsy, non-productive band-aid" measures instead, each defendant knowingly allowed extreme cold and toxic fumes to persist—and knowingly allowed Ledford to suffer as a result. *See Board*, 394 F.3d at 486.

1. Randall Mattison. Department of Corrections Chief Engineer Randall Mattison was on notice of the harm caused by fumes and cold because he attended the February 18 meeting where state and construction defendants discussed inmates' complaints. App. 174A. He agreed at the meeting to evaluate the ventilation equipment through which fumes entered the cell hall. *Id.* Mattison also advised prison officials to continue turning off the heat at the height of winter, supporting a strong inference that he knew about the cold. *Id.* 256A.

Mattison responded unreasonably to the knowledge that inmates were being poisoned by exhaust fumes. Mattison did not test carbon-monoxide levels or otherwise analyze the fumes passing through the ventilation system. App. 178A. He testified that doing so would be "extremely difficult." *Id.* But carbon monoxide can be tested easily, for example, by purchasing a carbon-monoxide detector at a local grocery store. In any

event, the upshot of Mattison's position was that it is not worth determining whether prisoners are being exposed to a *known* lethal gas if that evaluation is "difficult." *See id.* It is hard to imagine something more deliberately indifferent.

Mattison did not speak with inmates or GBCI staff who reported the fumes. App. 174A, 180A. Rather, Mattison's "investigation" considered only whether the ventilation system was operating at code and whether it was the correct size for the space. *Id.* 174A-175A. He spent just forty-five minutes assessing the "airflow passing through the cell hall, just by observation, not by measurement," *id.* 178A, and reviewed blueprints to determine whether the system complied with the 1957 code in effect when it was installed, *id.* 174A, 255A. Ultimately, Mattison rested his entire analysis of the system on his plain-eye observation that fifty-year-old intake fans "were operating" and, in his opinion, "moving a lot of air." *Id.* 178A.

Whether GBCI's ventilation system "mov[es] air," App. 178A, is irrelevant if, as here, the air it moves is toxic and is confined in one space. *See Haywood v. Hathaway*, 842 F.3d 1026, 1031 (7th Cir. 2016) (whether the heat worked was irrelevant when an inmate alleged his windows would not close). Mattison's response was akin to addressing a poisoned water supply by making sure there are no clogs in the pipes.

Mattison testified that he did not evaluate the fumes problem because he believed it was not his job to address inmate complaints. App. 177A-179A. Yet Mattison *did* "address" them, by writing a report dismissing inmates' concerns. *Id.* 255A-256A. "[I]t is not expected that dangerous concentrations of fumes or combustion by-products would have been present," Mattison wrote. *Id.* 256A. But Mattison had no idea whether

toxic fumes were present in the cell hall because he never tested the air. *Id.* 178A. Mattison said that Baenen prohibited him from speaking with GBCI staff or inmates, yet Mattison nevertheless concluded that no one was harmed. Mattison had no medical training, *id.* 419A, yet he concluded that the fumes had "no lasting health effects," *id.* 256A. His only evidence was Basten's failure to find nausea or vomiting reports when she reviewed a single month of HSU logs. *Id.* 178A, 256A. Though Mattison had no basis for believing that officials had effectively addressed the fumes (they had not), he recommended both that officials continue shutting off the heat and advised that they need not do *anything else* to address the problem. *Id.* 256A. By issuing a baseless report that recommended continued inaction, Mattison "effectively condon[ed]" the fumes and cold in Ledford's cell hall. *See Giles v. Tobeck*, 895 F.3d 510, 513 (7th Cir. 2018) (quoting *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010)).

2. Michael Baenen. GBCI Warden Michael Baenen knew exhaust fumes and extreme cold posed a substantial risk to inmate health and safety. He also knew GBCI's meager mitigation efforts were ineffective. Ledford was "hardly the only prisoner … to complain" about carbon-monoxide poisoning and freezing temperatures in the cell hall. *See Dixon*, 114 F.3d at 645. Baenen received at least four complaints in February 2014 through the formal Inmate Complaint Review System. App. 131A. These complaints represented nine inmates with symptoms of carbon-monoxide poisoning. *Id.* 248A (Ledford), 277A, 292A-295A (Cox et al.), 308A (Piester), 327A (Stankowski). All four complaints explicitly stated that GBCI's mitigation efforts—turning off the heat and

installing fans—did nothing to dissipate the fumes while causing temperatures in the cell hall to drop precipitously.

What's more, Joseph Martin—the official responsible for investigating inmate complaints—submitted a report to Baenen concluding that GBCI's "fixes" both failed to alleviate the toxic fumes and made the cell hall extremely cold. App. 265A-266A. Martin warned that he could smell fumes and see a visible haze "before and after the 'fixes' … had been implemented." *Id.* 266A. Unlike Mattison, Martin spoke with both inmates and staff who attested to ongoing problems. *Id.* 265A. And Martin explicitly rebutted Mattison's memo, stressing that Mattison had no medical training and that inmates could have been poisoned by fumes without the HSU recording their symptoms. *Id.* 266A. In light of ongoing complaints, including one inmate's report of blood in his mucus, Martin concluded that Mattison's medical analysis "strains credulity." *Id.*

Baenen dismissed inmates' complaints and rejected Martin's report outright. App. 257A. He did so based on Mattison's report, even though Baenen himself had barred Mattison from evaluating the fumes problem or speaking with inmates or staff. *Id.* 174A-175A, 180A. Baenen then directed GBCI staff to *continue* running fans and turning off the heat—(supposed) mitigation efforts he knew were not working. *Id.* 142A-149A. And despite abundant contrary evidence of which he was aware, Baenen told the Department of Corrections Secretary that "there has been no harm done to anyone" and that exhaust fumes "do not rise to the level of significance" for GBCI to address them. *Id.* 266A.

After dismissing Ledford's complaint, Baenen continued to ignore the fumes and cold. He never asked that inmates be tested for carbon-monoxide poisoning, never required that carbon-monoxide levels be measured or carbon-monoxide detectors installed, never confirmed whether SMA installed scrubbers on its equipment, and never followed up with other GBCI staff to confirm whether they were monitoring or addressing the fumes or cold. *See* App. 142A-149A. Simply put, Baenen attempted to "mask the symptoms of the problem" instead of addressing it. *See Board*, 394 F.3d at 486.

3. Amy Basten. Correctional Management Services Director Amy Basten heard about inmate's complaints from Baenen and Supervising Officer Yana Pusich and attended the February 18 meeting where SMA and prison officials discussed the complaints. App. 119A, 135A-136A, 157A. In fact, Basten testified that SMA and GBCI agreed on the "need to do everything we can to mitigate" the fumes. *Id.* 158A.

But Basten did not do everything she could, or even the minimum she was supposed to do. It was Basten's job to ensure that "all facilities are maintained meeting health and safety standards." App. 166A. Though she supervised building superintendent Chris Timmers, *id.* 167A-168A, and oversaw Mattison's "investigation," *id.* 146A, 161A, 163A-164A, she never asked either of them to test the air in Ledford's cell or cell hall, *id.* 161A, 164A. Basten acknowledged that GBCI never installed carbon-monoxide detectors, *id.* 164A, and that prison officials never tested the air quality, *id.* 158A-159A. She also acknowledged the only measures her team ever took to address the fumes were to turn off the heat and run industrial fans. *Id.* 160A.

Basten knew these mitigation efforts had not worked. As explained above (at 28-29), every inmate complaint stressed that GBCI's mitigation efforts had not only failed, they made the problem worse. And Basten continued to hear about inmate complaints and fumes in the cell hall months after Mattison and Baenen erroneously decided that inmates would not be harmed. App. 169A-170A. But Basten did not follow up on ongoing complaints, *id.*, or ask that inmates' health be evaluated in any way. *Id.* 161A, 163A. Nor did Basten follow up with construction employees to confirm whether they had installed the scrubbers allegedly discussed at the February 18 meeting—even though it was Basten's job to coordinate with SMA. *Id.* 155A, 158A-160A, 170A. Basten claims she relied on Timmers to do so, but Basten did not follow up with Timmers to confirm whether he had. *Id.* 169A-170A.

As to the cold, the district court absolved Basten—and all other state defendants—because it determined that Basten's employee, Chris Timmers, "began monitoring" temperatures in the cell hall. D. Ct. Op. at 27. Here too the court ignored that facts were disputed and improperly drew inferences in defendants' favor. The court must have assumed, for example, that Timmers used a thermometer to take the temperature, did so throughout the winter, measured the temperature at times when the heat was turned off, and discovered reasonable temperatures every time. None of this evidence is in the record.

The only evidence of Timmers' "monitoring" is Basten's vague statements that Timmers walked through the cell hall—which he did as part of his everyday activities, not because of inmate complaints. App. 162A. The district court also ignored

contradictory evidence, including Ledford's testimony and the numerous complaints inmates made to GBCI officials about the persistent cold. That evidence—which the district court had to credit on summary judgment—at least makes clear that whether, when, and to what extent officials responded to the cold remains disputed.

Moreover, even if Timmers *had* taken readings, simply *knowing* the temperature cannot itself mitigate the cold, contrary to the district court's conclusion. D. Ct. Op. at 27-28. Periodically checking the temperature—without actually dealing with the problem—underscores defendants' knowledge of the unconstitutional condition and is a "plainly inappropriate" response to inmate complaints of extreme cold. *Haywood*, 842 F.3d at 1031 (quoting *Hayes v. Snyder*, 546 F.3d 516, 524 (7th Cir. 2008)).

4. Yana Pusich. Supervising Officer Yana Pusich admitted to being aware of the fumes. App. 118A-119A. She smelled them herself. *Id.* And many inmates, including Ledford, complained to her. *Id.* 55A, 344A, 374A, 412A-413A.

Pusich also knew GBCI's mitigation efforts had failed and that fumes remained in the cell hall. App. 118A-119A. And in mid-February, weeks after prison officials installed industrial fans and began shutting off the heat, Pusich emailed Basten that she had "been getting an increasing number of complaints from the North Cell Hall inmates regarding fumes that are emitting from the construction facility." *Id.* 156A.

Pusich did not report the fumes to anyone other than Basten or take any steps to address the problem. App. 119A-120A. Pusich admitted she was "responsible for the care and custody of inmates at GBCI," *id.* 112A, and that it was her job to "take some reasonable caution to stop fumes from entering" the cell hall, *id.* 113A. But she never

followed up on inmates' complaints. She ignored all but one, which she summarily rejected. *Id.* 123A-126A, 412A, 413A. Pusich's only "response" over the course of four months was to send emails to Basten passing along the problem.

5. Scott Leurquin. Ledford reported his carbon-monoxide symptoms to Safety Officer Scott Leurquin, and both Officer Todd Zuge and Sargent Wayne Laufenberg told Leurquin about Ledford's complaint. App. 63A, 183A-184A, 372A. Yet all Leurquin did in response to the complaints of toxic fumes was to tell Chris Timmers, *id.* 184A, and walk through North Cell Hall a single time, *id.* 185A, 189A. He did not speak with anyone about the medical conditions associated with carbon-monoxide exposure, took no steps to evaluate inmates' cells, and did not monitor carbon-monoxide levels or the temperature in Ledford's cell hall. *Id.* 187A-188A.

When Ledford told Leurquin about the fumes, Leurquin testified that he "just said, okay, and then I continued about my business." App. 183A. Dismissive responses like Leurquin's are a sign of deliberate indifference to serious harms. *See Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997). Moreover, Leurquin did *not* in fact go about his "business." Leurquin's business—his job—was to "protect inmates from being exposed to harmful fumes … and/or … report such to someone who could do something about it if he himself could not." App. 371A (state defendants' response to Ledford's second request for admissions). But Leurquin ignored these job requirements, testifying that he did not typically evaluate toxic gases. *See id.* 189A, 192A. As a Health and Safety Committee member charged with "inspect[ing] assigned areas of the facility for property security and hazardous conditions or any other problems,"

id. 371A, Leurquin instead prioritized "stuff stacked on a shelf too high, potential to fall, tripping hazards, you know, stuff that needs to be addressed right now," *id.* 189A. That inmates were being poisoned by carbon monoxide was somehow not, to Leurquin, "an emergency" or something that "need[ed] to be addressed" right away. *Id.*

* * *

In sum, over the course of four months, state defendants wrote one baseless report, sent one email, walked once through the cell hall, and had Basten tell Timmers to look into the problem. Defendants insist that each of their plainly ineffective responses fulfilled their Eighth Amendment duties. That cannot be. The Eighth Amendment does not allow officials to take just *any* action. It requires officials to take action that is reasonable in light of the circumstances. *Giles v. Tobeck*, 895 F.3d 510, 513 (7th Cir. 2018). Here, both inmates and staff repeatedly informed defendants that extreme cold and fumes persisted and posed substantial risks to their health and safety. "Nothing more is needed at this stage: the risk of both physical and psychological harm [was] obvious." *Gray v. Hardy*, 826 F.3d 1000, 1009 (7th Cir. 2016).

Nor have state defendants demonstrated any extenuating circumstances that justified their lackluster response to inmate complaints. And state defendants cannot in any way demonstrate that they were "in haste, under pressure," or "without the luxury of a second chance" when they responded ineffectively to Ledford's complaint. *See Farmer*, 511 U.S. at 835 (citation omitted). State defendants knew for *months* that inmates were being poisoned by exhaust fumes, and the only step they took to address the poisoning was turning off the heat at the height of an historically cold winter. When

this failed, officials effectively gave up—an unreasonable response to a known risk of severe, ongoing harm.

C. The constitutional right to adequate ventilation and heat was clearly established in 2013.

State defendants are not entitled to qualified immunity on Ledford's Eighth Amendment claims because qualified immunity does not extend to conduct that violates "clearly established" constitutional rights. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Both the constitutional right to ventilation and the right to be free from extreme temperatures had been established for decades when Ledford filed his claim. *See, e.g.*, *Board*, 394 F.3d at 487 (ventilation); *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1087 (7th Cir. 1986) (ventilation); *Dixon*, 114 F.3d at 642 (cold); *Henderson v. DeRobertis*, 940 F.2d 1055, 1059 (7th Cir. 1991) (cold); *Gillis v. Litscher*, 468 F.3d 488, 493-95 (7th Cir. 2006) (cold). State defendants were therefore on notice that GBCI's extreme cold and toxic fumes were unlawful. *See Henderson*, 940 F.2d at 1059-61.

II. State defendants and construction defendants were negligent under Wisconsin state law.

A Wisconsin common-law negligence claim consists of duty, breach, causation, and injury. *Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins.*, 596 N.W.2d 456, 461 (Wis. 1999). Every person has a duty to "refrain[] from … acts that may unreasonably threaten the safety of others," *Behrendt v. Gulf Underwriters Ins.*, 768 N.W.2d 568, 574 (Wis. 2009) (quotation marks omitted), and breaches this duty when the action foreseeably leads "to an unreasonable risk of injury or damage," *Shannon v. Shannon*, 442 N.W.2d 25, 30

(Wis. 1989) (citation omitted). The defendant's negligence must be "a substantial factor" in causing the plaintiff's injury. *Clark v. Leisure Vehicles*, 292 N.W.2d 630, 635 (Wis. 1980). Compensable injuries include bodily harm and "mental distress (including fear and anxiety) resulting from the bodily harm." *Brantner v. Jenson*, 360 N.W.2d 529, 532 (Wis. 1985).

And when a defendant's negligence causes emotional distress of "such substantial quantity or enduring quality that no reasonable person could be expected to endure it," *Hicks v. Nunnery*, 643 N.W.2d 809, 818 (Wis. Ct. App. 2002), the defendant's actions (or inaction) make out a claim for negligent infliction of emotional distress (NIED).

When the evidence is viewed in Ledford's favor, as it must be at this point, a reasonable jury could conclude that state defendants and construction defendants all negligently injured Ledford. The district court was wrong to conclude otherwise.

A. State defendants negligently exposed Ledford to carbon monoxide and extreme cold.

State defendants negligently created a dangerous environment in the cell hall and failed to protect Ledford from it. Although Wisconsin common law grants state officials immunity from negligence claims for acts that involve "the exercise of discretion and judgment," *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 677 (Wis. 2005), Wisconsin officials are not immune when they fail to address a known danger that creates a nondiscretionary duty to act. *Engelhardt v. City of New Berlin*, 921 N.W.2d 714, 725 (Wis. 2019). State defendants were negligent because it was foreseeable that inmates would be harmed unless officials cleared the hall of fumes or

moved the inmates. Their failure to do either was a substantial factor in causing Ledford's injuries.

1. State defendants ignored a known danger.

State officials are not immune from liability when they fail to act when confronted with a "known present danger." *Lodl v. Progressive N. Ins.*, 646 N.W.2d 314, 324 (Wis. 2002) (quoting *C.L. v. Olson*, 422 N.W.2d 614, 620 (Wis. 1988)). A known danger exists when the danger "is of such force that the public officer has no discretion not to act," *Lodl*, 646 N.W.2d at 323, or is an "accident waiting to happen," *Heuser ex rel. Jacobs v. Community Ins. Corp.*, 774 N.W.2d 653, 659, 662 (Wis. Ct. App. 2009). When it granted state defendants discretionary immunity, the district court ignored the compelling danger posed by the fumes and concluded the state defendants' single, ineffective measure excused three subsequent months of inaction.

a. Ledford's prolonged exposure to toxic fumes was a compelling known danger. Compelling dangers are risks that are "nearly certain to cause injury," *Engelhardt*, 921 N.W.2d at 722, like a natural-gas leak, *Oden v. City of Milwaukee*, 863 N.W.2d 619, 625-26 (Wis. Ct. App. 2015), using a scalpel without proper safety precautions, *Heuser*, 774 N.W.2d at 655, 662, or walking in a crowded classroom with vision-impairing goggles, *Voss ex rel. Harrison v. Elkhorn Area Sch. Dist.*, 724 N.W.2d 420, 425 (Wis. Ct. App. 2006). In circumstances like these, the chance of harm is nearly certain, and government officials are compelled to act.

State defendants did not need to speculate about the likelihood of harm—they knew that harm was actively occurring. Carbon monoxide is a deadly toxic substance, *see*

Carbon Monoxide Poisoning: Frequently Asked Questions, Centers for Disease Control and Prevention,[3] and Ledford was suffering symptoms of carbon-monoxide poisoning, including dry heaving, nausea, and blurred vision. As discussed above (at 6-7, 10, 18), every defendant knew the cell hall was inundated with fumes. Some defendants saw the visible haze. Some heard inmate complaints. Some read Martin's report. Several had multiple sources of knowledge.

The district court's conclusion that there was "no evidence that the inmates' exposure to the construction site was an 'accident waiting to happen,'" D. Ct. Op. at 35, is at odds with common knowledge about carbon monoxide, Wisconsin's known-danger precedent, and the tangible harm Ledford was already suffering. Confining Ledford in a cell for twenty-two hours a day while noxious fumes continued to stream in, *after* he had complained about the fumes, is the equivalent of failing to evacuate a family after a natural-gas explosion, *see Oden*, 863 N.W.2d at 625-26, or telling a student to continue to walk with vision-impairing goggles after he knocked out his front teeth, *Voss*, 724 N.W.2d at 425.

b. State defendants had a nondiscretionary duty to act when their initial measures worsened prison conditions. They breached this duty by taking no other steps to address the harm. When confronted with "obviously hazardous circumstances," a government official "in a position … to do something" has a nondiscretionary duty to address the risk. *Engelhardt*, 921 N.W.2d at 725. Officials are not immune when they discover safety measures are not working but fail to address the lingering danger. *See*

[3] https://www.cdc.gov/co/faqs.htm (last visited Jan. 15, 2020).

Heuser, 774 N.W.2d at 657-58, 662 (teacher not immune for continuing to use scalpels after two students were hurt in previous classes). When state defendants became aware of the toxic fumes in the cell hall, they had a nondiscretionary duty to ensure that the inmates were not breathing in toxic fumes. They could have discharged this duty by clearing the cell hall of fumes or by removing the inmates from the cell hall. They did neither.

The district court, however, granted immunity, reasoning that each defendant took at least one isolated step to "resolve" inmate complaints. D. Ct. Op. at 35. But the court ignored that state defendants' "solution"—taken in the first few weeks after prison staff learned of the fumes—was ineffective and actually compounded the harm by subjecting inmates to extreme cold.

And after state defendants learned that their attempt to get rid of the fumes failed, they did not take any new steps to address the continuing danger. Mattison ignored the ongoing health risks to inmates and declared the fumes issue "resolved" when it was not. App. 178A. Baenen received multiple complaints alerting him that the prison's attempt to remedy the fumes had not worked, but he ignored this information and refused to take any additional action. *Id.* 265A-266A. And while Basten, Pusich, and Leurquin repeatedly heard from prisoners that the initial "fixes" had not solved the problem, none of them did anything to test the carbon-monoxide levels in the air or report other prisoner complaints. *Id.* 119A, 158A, 191A, 412A. In sum, faced with more prisoner complaints about exposure to fumes and cold—and a report warning about the ineffectiveness of their initial efforts—state defendants took no further action.

Discretionary-immunity cases often involve emergency situations where officials must make split-second decisions without the benefit of hindsight, like how to respond to a broken stoplight, *see Lodl*, 646 N.W.2d at 317, or a sinking boat, *see Hoskins v. Dodge Cty.*, 642 N.W.2d 213, 217 (Wis. Ct. App. 2002). But as the Wisconsin Supreme Court noted when it established the known-danger doctrine, "[t]here comes a time when the buck stops:" when an official knows about a danger, he is in a position to do something about it, and he fails to take action. *Cords v. Anderson*, 259 N.W.2d 672, 680 (Wis. 1977) (quotation marks omitted). Officials cannot be immune when their initial ineffective measures *worsened* a danger and they were in a position to address the renewed danger, yet they failed to do anything about it *for three months*. Holding otherwise would undermine the purpose of the known-danger exception.

2. State defendants were negligent.

As explained above (at 25-35), state defendants were deliberately indifferent to the inhumane conditions in the North Cell Hell. Because deliberate indifference involves a more culpable state of mind than negligence, *cf. Farmer v. Brennan*, 511 U.S. 825, 835 (1994), Ledford's showing of deliberate indifference necessarily satisfies the negligence standard. In any case, state defendants were negligent under Wisconsin law.

a. Duty and breach. State defendants breached their duty of care to Ledford because it was foreseeable that confining him in an area permeated by toxic fumes and freezing temperatures would harm him. The harm here was more than foreseeable—defendants actually knew the inmates were suffering and were deliberately indifferent to it. Officials could have helped the prisoners by halting the construction project,

diverting the toxic fumes, or moving Ledford away from the dangerous conditions. But they allowed the fumes to accumulate and then created the additional danger of extreme cold. It was foreseeable that their continued failure to act would cause additional harm. *See A.E. Inv. Corp. v. Link Builders*, 214 N.W.2d 764, 767 (Wis. 1974).

b. Causation. State defendants' negligence was a "substantial factor" in causing Ledford's injuries. *See Clark*, 292 N.W.2d at 635. As already explained (at 26-34), each defendant was responsible for how the prison responded to these inhumane conditions. No one took any meaningful action. By keeping Ledford in a cell without addressing the sources of his harm, state defendants caused his injuries.

c. Injury. Ledford suffered compensable injuries, including "dizziness, nausea, dry heaving, severe headache[s]," and burning eyes. App. 96A. Moreover, he was confined in an unheated prison cell during one of the coldest winters in decades. State defendants exacerbated the extreme cold by opening the windows and running floor fans inside the cell hall. *Id.* 57A-58A, 70A-71A, 156A. Ledford was forced to wear several layers of clothing and stay in bed during the middle of the day to avoid the cold. *Id.* 70A. None of this provided Ledford relief from the fumes. Ledford thus suffered from state defendants' refusal to mitigate these dangerous conditions.

In addition to his physical injuries, Ledford's severe emotional distress as a result of exposure to toxic fumes and severe cold is compensable. And because Ledford's distress was of "such substantial quantity or enduring quality that no reasonable person could be expected to endure it," *Hicks v. Nunnery*, 643 N.W.2d 809, 818 (Wis. Ct. App.

2002) (citation omitted), it is compensable as ordinary negligence or under the NIED rubric. *See id.*

A reasonable jury could find that no person could be expected to endure what Ledford suffered for a brief period, let alone for months. Ledford was forced to spend twenty-two hours a day in a freezing, fume-filled cell, which he likened to constant poisoning. App. 56A-57A. And when Ledford told those responsible for his well-being about the toxic fumes and extreme cold, he received, at best, a collective shrug. With formal and informal complaints getting him nowhere, Ledford was forced to craft handmade solutions like using a towel as a makeshift mask. *Id.* And to the extent that he was given a short reprieve from the fumes and cold (approximately two hours a day), he dreaded when the same people responsible for his well-being escorted him back to choking, nausea, and cold. App. 56A.

B. Construction defendants negligently exposed Ledford to carbon monoxide.

Construction defendants indisputably failed to monitor or control the fumes emitted by their equipment. The facts—construed in favor of Ledford—reveal that construction defendants breached their duty of care because they were aware of the foreseeable risks posed by operating machinery near the prison but failed to take necessary precautions. As a result, their negligence was a substantial factor in Ledford's suffering. In addition, construction defendants negligently supervised SMA's employees and subcontractors by failing to instruct them to monitor or control the equipment's toxic fumes.

1. Construction defendants breached their duty of care when they operated heavy machinery next to the cell hall without taking appropriate precautions.

a. Construction defendants' use of heavy-exhaust equipment near the cell hall's windows and air vents—without scrubbers or particle testers—posed a foreseeable and unreasonable risk of danger. When individuals have control over a potential harm, they breach their duty when they "omit[] a precaution" that could foreseeably prevent the harm. *See Shannon v. Shannon*, 442 N.W.2d 25, 30 (Wis. 1989); *Walker v. Ranger Ins.*, 711 N.W.2d 683, 688 (Wis. Ct. App. 2006). And a company is vicariously liable when its employees forgo a necessary precaution while acting within the scope of their employment. *See Shannon v. City of Milwaukee*, 289 N.W.2d 564, 568 (Wis. 1980).

Construction defendants knew of the danger to occupants of surrounding buildings posed by toxic fumes. SMA's safety manual warned of the dangers of carbon-monoxide poisoning from exhaust-emitting equipment. App. 220A. SMA CEO Mike Abhold testified he would "absolutely" be concerned that noxious fumes from construction-site equipment might move into an adjacent building. *Id.* 384A. Site supervisor Burt Feucht was trained to monitor air quality as part of his duty to ensure safety on construction sites. *Id.* 220A. And construction defendants were so concerned with the danger to surrounding buildings that on their other projects—when, for example, SMA worked next to houses or schools—they used particle testers to ensure that their equipment was not emitting dangerous levels of fumes. *Id.* 385A.

But from the beginning of the project, construction defendants failed to take any "common sense" precautions of which they admittedly were aware. App. 388A. SMA's

employees, and subcontractors under its supervision, used gasoline- and diesel-powered heavy machinery next to windows and air ducts used to ventilate the prison without taking precautions such as installing scrubbers on heavy-exhaust equipment or using particle testers to monitor the air. *See id.* 227A, 398A. And despite Feucht's and Abhold's respective responsibilities to ensure public safety, both failed to take precautions to protect those inside the prison. *Id.* 376A, 386A, 389A.

b. The district court erred when it discounted this evidence and required Ledford to introduce expert testimony to prove the standard of care. Because "[e]xpert testimony is not generally required to prove a party's negligence," a court should require expert testimony as "an extraordinary step" only when needed to explain "unusually complex or esoteric issues." *Trinity Lutheran Church v. Dorschner Excavating*, 710 N.W.2d 680, 688 (Wis. Ct. App. 2006) (quoting *City of Cedarburg v. Allis-Chambers Mfg.*, 148 N.W. 13, 16 (Wis. 1967)). When a jury can "draw its own conclusions without the assistance of an expert opinion," requiring an expert is "not only unnecessary but improper." *Cramer v. Theda Clark Memorial Hosp.*, 172 N.W.2d 427, 429 (Wis. 1969). Although working in the construction field requires some technical expertise, a jury does not need expert evidence to determine whether a basic construction accident—like a water pipe rupturing, *Trinity Lutheran*, 710 N.W.2d at 689, or concrete causing burns, *Netzel v. State Sand & Gravel*, 186 N.W.2d 258, 262 (Wis. 1971)—breaches the standard of care.

The standard SMA itself uses to protect the public from fumes at their construction sites was decidedly nontechnical. According to Abhold, SMA's public-safety precautions were guided by *common sense*, not a specialized standard. App. 388A. Feucht

conceded he had no scientific way of determining when supplemental ventilation in open-air sites was required: "It's an ever-changing world … every situation is so different. I can't specifically tell you … [what] would have required supplemental ventilation." *Id.* 237A. SMA's nontechnical approach could not be considered specialized knowledge of an unusually complex topic that requires an expert. That alone requires reversal of the district court's dismissal of Ledford's negligence claim.

Beyond wrongly demanding an expert at all, the district court required an expert based on an irrelevant legal standard. The district court held Ledford needed an expert to rebut SMA's showing that it had followed "general OSHA protocols about site safety." D. Ct. Op. at 30-31. But Wisconsin courts' use of administrative regulations to prescribe the standard of care is limited to the "class of persons" that the regulations are "designed to protect." *See Nordeen v. Hammerlund*, 389 N.W.2d 828, 829-30 (Wis. Ct. App. 1986). OSHA's safe-workplace standards require employers to protect their *employees*. *See* 29 U.S.C. § 654(a). OSHA has nothing to do with the general duty that a construction company owes people who may be harmed by its construction.

Nor can OSHA regulations even provide helpful guidance: The prisoners' situation differed dramatically from that of SMA's employees. Ledford was locked inside a cell where fumes became trapped, while the construction employees worked outside and remained free to move away from exhaust and pollutants. Ledford was exposed for twenty-two hours a day, while OSHA exposure guidelines anticipate only an eight-hour work shift. 29 C.F.R. § 1926.55(a)(2).

2. Construction defendants' failure to take precautions after hearing complaints about toxic fumes inside the prison is further evidence that they breached their duty of care.

Construction defendants further breached their duty of care to Ledford when they learned of inmates' complaints and then represented that they would immediately remedy the problem, yet made no attempt to do so. When a defendant has actual notice of a potential risk under her control, she breaches her duty by failing to address the risk. *See, e.g.*, *Ruff v. Burger*, 145 N.W.2d 73, 76 (Wis. 1966); *Plesko v. City of Milwaukee*, 120 N.W.2d 130, 133 (Wis. 1963).

Abhold and Feucht were told about inmates' complaints at the February 18 meeting. *See* App. 233A, 347A-348A. Moreover, construction defendants promised to install scrubbers on their equipment to address the complaints. *See id.* 147A-148A, 157A-158A, 174A. But defendants indisputably failed to take action even after they were told fumes from their equipment were causing health issues. *Id.* 229A.

The district court erred when it held that Timmers' comments to Feucht that the issue was resolved took construction defendants "off-notice." The district court reached this conclusion based on Feucht's testimony that he asked Timmers "are things resolved?" a week after the February 18 meeting, and Timmers stated "yes … we took the corrective measures." App. 235A.

But this conversation did not take defendants "off-notice." Under Wisconsin law, a defendant's notice is "not extinguished" because the party addressed a current harm without acknowledging the risk of a future harm stemming from the same source. *Callan v. Peters Constr.*, 288 N.W.2d 146, 151 (Wis. Ct. App. 1979). "To theorize if the rubble

of the day is gone, the opportunity to take notice of the danger is also gone" would be "contrary to common sense." *Id.* Timmers's statement that he resolved the prisoners' complaints did not provide any explanation that the resolution was permanent. Yet construction defendants continued to run the equipment near the air intake without taking any precautions. A reasonable jury could find that Timmers's passing statement did not change that it was foreseeable that construction defendants' continued failure to use scrubbers or take any precautions would cause future harm.

At the very least, even if construction defendants were taken "off notice," the district court was still wrong to dismiss the negligence claims against them. SMA failed to act in between the February 18 meeting—the latest possible date construction defendants were put on notice—and when Timmers purportedly took them "off notice" a week later. During that period, SMA promised to deploy scrubbers before any further use of its equipment but failed to do so. Construction defendants cannot be excused from their negligence because they poisoned Ledford and the other inmates for only a week.

3. Construction defendants' actions caused Ledford's injuries.

Construction defendants' actions were a "substantial factor," *see Clark*, 292 N.W.2d at 635, in causing Ledford's injuries. Construction defendants were operating heavy, exhaust-emitting machinery next to the air intake, and the air intake provides the air for the cell hall. App. 391A, 407A. While the machinery was operating, the cell hall filled with diesel fumes and a visible haze. *Id.* 55A, 242A, 256A. Ledford then began suffering symptoms consistent with carbon-monoxide poisoning. *Id.* 406A. The "common-sense link," *Gray v. Hardy*, 826 F.3d 1000, 1007 (7th Cir. 2016), between the fumes and

Ledford's injuries is sufficient to show that the construction defendants' emissions were a "substantial factor" in causing Ledford's injuries.

And if that weren't enough, Dr. Kim Anderson's expert report would be. That report found that SMA equipment created the danger of carbon-monoxide exposure and the symptoms exhibited by inmates were "likely a result of carbon monoxide exhaust from the construction equipment." App. 215A. An expert's opinion is unnecessary to prove causation when the matter is "within the realm of ordinary experience and lay comprehension," *White v. Leeder*, 440 N.W.2d 557, 562 (Wis. 1989), so Dr. Anderson's report only bolsters the common-sense conclusion that construction defendants were a substantial cause of Ledford's injuries. Ledford has shown more than enough to defeat a motion for summary judgment.

As previously explained (at 42), Ledford suffered severe emotional distress, which is compensable as ordinary negligence or as NIED. Any of the construction defendants should have reasonably foreseen that running construction equipment close to prison air intakes for months would have resulted in the feeling of constant poisoning and distress Ledford experienced. Construction defendants' apathy to Ledford's situation was therefore a substantial factor in causing Ledford emotional distress. *Niewendorp v. Am. Family Ins.*, 529 N.W.2d 594, 599 (Wis. 1995).

4. SMA's, Abhold's, and Feucht's negligent supervision exposed Ledford to fumes.

SMA, Abhold, and Feucht negligently supervised the construction site workers. An employer is liable for negligent supervision when "the failure of the employer to

exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury." *Miller v. Walmart Stores*, 580 N.W.2d 233, 238 (Wis. 1998).

The district court rejected Ledford's negligent-supervision claim because, according to the court, Ledford "failed to provide evidence that SMA breached the standard of care." D. Ct. Op. at 33. A reasonable jury could find that the failure of SMA, Abhold, and Feucht to supervise construction workers was a substantial factor that caused Ledford's injury.

a. Feucht's supervising failures are evident. Construction workers used a variety of machines that discharged carbon-monoxide fumes, including trucks that idled for over seven hours a day and ground thawers that sometimes ran continuously. App. 233A, 391A. Yet Feucht, SMA's superintendent on the GBCI project, failed to instruct SMA's construction workers to take safety measures to reduce the fumes, even though he was in charge of the general safety of the project. *Id.* 379A. Feucht's role as superintendent involved overseeing the safety of the job site, including the safety of nonemployees. *Id.* 224A. Though Feucht "monitor[ed] the safety very closely on projects," and supervised construction workers, he failed to take basic steps to prevent an injury he was trained to know about. *Id.* 363A.

b. Abhold, SMA's CEO, who oversees SMA's operations, likewise failed to take any preventive measures. App. 204A, 375A. According to Abhold, the easiest way to determine whether fume exposure at a construction site reaches unsafe levels is to use common sense. *Id.* 388A. Yet Abhold simply "rel[ied] on [his] people to monitor safety

on a day-to-day basis," *id.* 389A, rather than take basic steps to prevent fumes from becoming a problem in the first place.

c. SMA did nothing to ensure that its employees prevented or responded to the fumes. App. 204A, 229A, 376A. Although SMA provided its employees a safety manual requiring them to respond to hazards including carbon monoxide, *id.* 362A-363A, SMA did not ensure compliance with those polices, even after learning that prisoners complained of carbon-monoxide exposure, *id.* 376A.

III. The district court abused its discretion in failing to appoint counsel for Ledford.

The district court made another error requiring reversal—repeatedly denying Ledford's motions for counsel. For the reasons explained below, this Court should remand with instructions to the district court to appoint counsel. If this Court holds that the district court erred in granting summary judgment, as we have urged above, the law and facts demand, appointment of counsel still matters because it will enable Ledford to conduct a trial in this complex case.

A. The district court abused its discretion in denying Ledford's motions to appoint counsel.

When the factual and legal difficulty of a case "exceeds the particular plaintiff's capacity as a layperson to coherently present it," a district court abuses its discretion in not appointing counsel. *Navejar v. Iyiola*, 718 F.3d 692, 696 (7th Cir. 2013) (quoting *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007)). Here, the district court abused its discretion by overstating Ledford's capabilities and understating the complexity of the case.

Ledford told the court that he had limited capacity to present the case. He contended that he would be "totally outmatched" due to his "[in]ability to engage either a medical or HVAC expert." ECF 45 at 8-9. What's more, Ledford was confined to prison and suffered from severe health problems—including severe nerve damage and congestive heart failure—that impaired his ability to read and write, App. 38A-39A, circumstances that limit an individual's capacity to litigate. *See, e.g.*, *Navejar*, 718 F.3d at 698; *Santiago v. Walls*, 599 F.3d 749, 762 (7th Cir. 2010).

Ledford's case is complex. Even seasoned lawyers have to work hard to litigate cases like this one, with more than ten parties, a 2,400-page record, and multiple questions of constitutional and state law. Ledford had only one to three hours per week to research the case in the prison library, App. 39A, and, as an inmate, he was constrained in conducting his own factual investigations, ECF 45 at 8-9. Ledford's limited time and resources meant that he could not retain an expert, a consideration that often necessitates counsel. *See Rowe v. Gibson*, 798 F.3d 622, 630 (7th Cir. 2015).

Misconstruing the facts and this Court's precedent, the district court found Ledford was "capable" of handling the case himself. The district court reasoned that Ledford did not need counsel because his filings "indicate that he is able to communicate his claims and arguments to the Court." App. 3A. Although it acknowledged Ledford's health problems, the court believed extending discovery deadlines would give him "sufficient time to recover from his surgery and litigate his case." ECF 41 at 2. And the court discounted Ledford's arguments about the complexity of the case, reasoning that it would not "rely heavily on documents or witness testimony" and that Ledford could

"support a dispositive motion … by including his version of the events in an affidavit or unsworn declaration." App. 2A-3A.

The court's conclusion that Ledford was capable of representing himself because he could articulate his legal position failed to consider other hurdles that impaired his ability to litigate. The court did not meaningfully address Ledford's difficulty gathering evidence, his hampered ability to read and write in the face of severe health issues, or his limited access to the prison law library. And it incorrectly characterized the case—which required Ledford to prove defendants' deliberate indifference and his exposure to carbon monoxide—as one that would not "rely heavily on documents or witness testimony." App. 2A. Yet state defendants refused to give Ledford documents that were provided to Cox's counsel. *See id.* 87A-89A. And when Cox's counsel showed the documents to Ledford during his deposition, counsel for state defendants demanded that Ledford return them. *Id.*

Most significantly, after rejecting Ledford's arguments that he would be outmatched without an expert, the district court dismissed his state-law claims *because* he lacked an expert. D. Ct. Op. at 30-32. When "it should have been apparent from the outset" that a pro se litigant needs expert evidence of an "accepted professional practice" and what would constitute "a substantial departure from the … practice," the litigant is placed at a "serious disadvantage" that warrants counsel. *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992). Although "[a]ppellate review is necessarily limited to the evidence available when the … motion was denied," *Pruitt v. Mote*, 503 F.3d 647, 659 (7th Cir. 2007), the district court knew from Ledford's initial complaint that he intended

to bring a negligence claim. As explained (at 48), an expert was *not* required to prove the construction defendants' negligence. But if this Court disagrees, it should not affirm the dismissal of Ledford's claims because he failed to provide an expert when he repeatedly alerted the district court that he would need counsel to obtain one.

B. The district court's denial of counsel prejudiced Ledford.

The district court's refusal to appoint counsel prejudiced Ledford because there was a "reasonable likelihood that the presence of counsel would have made a difference in the outcome." *Henderson* 755 F.3d at 564-65 (quoting *Pruitt*, 503 F.3d at 659). As just explained, Ledford lacked access to the law, lacked access to the facts, and lacked access to the time and place to apply them. These "profound handicaps" in litigating claims that are "far from frivolous," show Ledford was prejudiced when he was denied counsel. *Rowe*, 798 F.3d at 631-32.

The court allowed Ledford access to depositions and an expert report from *Cox v. Baenen*, the case similar to Ledford's. But Cox's attorneys did not represent Ledford, nor did they take depositions or employ experts for Ledford's benefit. The different dispositions of Ledford's and Cox's claims—Cox remains free to litigate his state-law claims in state court while Ledford's were rejected on the merits—provides further evidence of prejudice.

If nothing else, Ledford requested counsel specifically to enlist an expert. Denying Ledford's request, the magistrate judge decided that Ledford's case would not "rely heavily on documents or witness testimony." App. 2A. Yet the district court, without acknowledging that decision, went on to dismiss Ledford's claims against construction

defendants *because* he lacked an expert. If that is not prejudice, it is hard to imagine what is.

Because Ledford was prejudiced, this Court should direct the district court to appoint counsel on remand. Ledford's case will prove more difficult to navigate should it go to trial—as, for the reasons described above, it should. Ledford should be given a fair shot at vindicating his rights.

CONCLUSION

The judgment of the district court should be reversed and remanded for a trial on the merits of all of Ledford's federal and state claims. This Court should direct the district court to appoint counsel for Ledford.

Respectfully submitted,

s/ Bradley Girard

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January 15, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 13,951 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5), the type-style requirements of Rule 32(a)(6), and the requirements of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, set in Garamond font in 14-point type.

/s/ Bradley Girard
Bradley Girard

ATTACHED APPENDIX

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

In accordance with Circuit Rule 30(d), I certify that this appendix contains all of the materials required by Circuit Rule 30(a) and that the separately submitted appendix contains all of the materials required by Circuit Rule 30(b).

/s/ Bradley Girard
Bradley Girard

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM N. LEDFORD,

Plaintiff,

v.

MICHAEL BAENEN, AMY BASTEN, RANDY MATTISON, CATHY JESS, YANA PUSICH, C.O. LEURQUIN, SMA CONSTRUCTION SERVICES, MIKE ABHOLD, BURT FEUCHT, and SOCIETY INSURANCE COMPANY,

Defendants.

Case No. 16-CV-665-JPS

JUDGMENT

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Construction Defendants' motion for summary judgment (Docket #86) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED AND ADJUDGED that the State Defendants' motion for summary judgment (Docket #94) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's motion to dismiss Defendant Cathy Jess (Docket #138) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Cathy Jess be and the same is hereby **DISMISSED** from this action; and

S FURr HER ORDERED AND ADJUDGED that this action be r and the same is he eby **D ISMISSED with prejudice**. r

r APPROVED: r

r

r

r r r r r

r J.P. Stadtmuelle r

r U.S. Dist ict Judge r

r

r r STEPHEN C. DRIES r

r r Cle k of Cou t r

Ma ch 28, 2019 r r *s/ Jodi L. Malek* r

Date r r By: Deputy Cle k r

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM N. LEDFORD,

Plaintiff,

v.

MICHAEL BAENEN, AMY BASTEN, RANDY MATTISON, CATHY JESS, YANA PUSICH, C.O. LEURQUIN, SMA CONSTRUCTION SERVICES, MIKE ABHOLD, BURT FEUCHT, and SOCIETY INSURANCE COMPANY,

Defendants.

Case No. 16-CV-665-JPS

ORDER

Plaintiff William N. Ledford ("Ledford"), a prisoner proceeding *pro se*, filed this action to recover for injuries he allegedly sustained from the discharge of noxious fumes into his cell block during construction of a new shower facility at Green Bay Correctional Institution ("GBCI"). (Docket #55). In his amended complaint, Ledford asserts claims for violations of his constitutional rights under the Eighth Amendment pursuant to 42 U.S.C. § 1983. *Id.* at 16. He also raises claims of negligence, negligent supervision, and negligent infliction of emotional distress under Wisconsin state law. *Id.* at 22–26. The defendants include a variety of prison officials (collectively, the "State Defendants"), as well as private individuals and entities associated with the construction work (collectively, the "Construction Defendants").

Before the Court are motions for summary judgment by the State Defendants and the Construction Defendants. (Docket #86 and #94). The

motions are fully briefed.[1] For the reasons stated below, they will be granted and the case will be dismissed.

1. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Boss v. Castro*, 816 F. d 910, 916 (th Cir. 2016). A fact is "material" if it "might affect the outcome of the suit" under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 4 U.S. 242, 248 (1986). A dispute of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court construes all facts and reasonable inferences in the light most favorable to the non-movant. *Bridge v. New Holland Logansport, Inc.*, 815 F. d 56, 60 (th Cir. 2016). The Court must not weigh the evidence presented or determine credibility of witnesses; the Seventh Circuit instructs that "we leave those tasks to factfinders." *Berry v. Chi. Transit Auth.*, 618 F. d 688, 691 (th Cir. 2010). The party opposing summary judgment "need not match the movant witness for witness, nor persuade the [C]ourt that [his] case is convincing, [he] need only come forward with appropriate evidence demonstrating that there is a pending dispute of material fact." *Waldridge v. Am. Hoechst Corp.*, 24 F. d 918, 921 (th Cir. 1994).

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[1] Ledford's motion to exceed the page limit under Civ. L. R. 56(b)(8) (Docket #1 9) will be granted in light of the fact that his submissions are handwritten. His motion to supplement his responsive pleadings with exhibits (Docket #151) will also be granted. The State Defendants' motion to seal an exhibit (Docket #1 5) will be granted as well.

. **RELEVANT FACTS** n

n The parties' evide tiary submissio s i co n ectio with the prese t n motio s are massive,[2] but the core operative facts are largely u disputed. n I the arrative that follows, disputes co cer i g the facts will be n me tio ed o ly whe ecessary. Otherwise, the facts are prese ted i the n light most favorable to Ledford.[3] n

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n [2]Per the order of Magistrate Judge David E. Jo es, to whom this matter was n origi ally assig ed, the parties have borrowed evide tiary materials, i cludi g n docume ts, discovery respo ses, a d expert reports, from a similar suit brought n by a other GBCI priso er, Dway e Cox, Case No. 15-CV-395-PP (E.D. Wis.), n prese tly pe di g before a other bra ch of the Court. *See* (Docket #48 a d #54 at n 4). n

n [3]A few words about the parties' fact briefi g are i order. First, without n requesti g leave of the Court, the Co structio Defe da ts submitted a n suppleme tal set of proposed material, u disputed facts with their reply. (Docket n #162). Such a submissio is ot authorized by Local Rule 56, a d rightly so, as it n deprives the o -mova t of the ability to challe ge the factual assertio s therei . n Plai tiff moved to strike the docume t o that basis. (Docket #16). The n Co structio Defe da ts respo ded that the suppleme tal facts merely reply to n the facts asserted i Plai tiff's respo se, (Docket #168), but this ig ores the n procedural problem that Plai tiff ow has o opportu ity to co test the n suppleme tal facts, as fair ess dictates he should be allowed to do. His motio to n strike the suppleme tal stateme ts of fact will be gra ted. n

n Seco d, alo g with his respo se, Ledford filed a motio for sa ctio s n agai st the State Defe da ts. (Docket #14). He argues that they fraudule tly n mischaracterized parts of the evide tiary record i order to support their positio . n The Court detects o gamesma ship i the State Defe da ts' submissio s. Parties n e joy wide latitude to prese t their competi g i terpretatio s of the facts o n summary judgme t without riski g sa ctio s. Ledford may disagree with n Defe da ts' view of the facts, but his disagreeme t does ot mea the State n Defe da ts are lyi g. His recourse is to argue that Defe da ts are wro g, which n he has do e. The motio for sa ctio s will be de ied. n

n Third, Ledford's respo ses to Defe da ts' stateme ts of fact are replete n with ill-co ceived objectio s, i cludi g, for i sta ce, de ials based o his n disagreeme t with the substa ce of a wit ess' testimo y rather tha whether the n wit ess so testified. *See, e.g.*, (Docket #140 ¶ 45). Ofte , as i his motio for n sa ctio s, he declared that such assertio s of fact are misleadi g or n mischaracterize the evide ce. They are either. Nevertheless, out of co sideratio n

H **2.1 The North Cell Hall** H

H The North Cell H all ("NCH") at GBCI is a long, four-story structure H with cells located along its west side on each floor. The NCH is bisected by H a firewall between cells A-2 and A-24. The firewall is made from steel and H glass and stretches from the floor to the ceiling of the structure. It has a H standard double door on the ground floor and a single door on the H walkways on the three floors above. *See* (Docket #1 4-4, #151-1) H (photographs of NCH interior). During the relevant period, about 50 H prisoners were housed in the NCH. H

H When Ledford was incarcerated in the NCH, he occupied cell A-26, H which is on the ground floor beyond the firewall. Cell A-26 is located H directly across from the air intakes, ventilation system, and exterior H windows on the east side of the hall. The exterior windows are high up on H the wall, across from the third-floor cells. (There are exterior windows on H the ground floor, but they are sealed shut.) H

H **2.2 The Bathhouse Project** H

H In November 201 , construction began on a new shower facility at H GBCI located between the NCH and GBCI's main kitchen. Amy Basten H ("Basten"), GBCI's Correctional Services Manager, exercised day-to-day H supervision of the project for the prison. SMA Construction Services H ("SMA") was hired to build the facility. The bathhouse was positioned such H that it directly abutted the east wall of the NCH. H

H Ledford says the area in which construction took place was "very H narrow" and close to the NCH's air intakes. Defendants maintain that this H

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for his *p se* status and the robust factual record presently before the Court, every s effort was made to uncover the true undisputed facts and resolve all reasonable s disputes in his favor. s

is simply his subjective opinion. However, Ledford provided photographs q of the construction site from which it can be inferred that heavy q construction e uipment was being used in close proximity—sometimes q only a few feet—from the air intakes. (Docket #15 -1 at 1 –20). A diagram q of the building project reflects that the space in which construction occurred q was only about fifty feet wide. (Docket #109-1). Further, Mike Abhold q ("Abhold"), president of SMA, agreed during his deposition that the q shower facility was being built in a "fairly narrow corridor." (Docket #15 - q 4 at 8). q

q Construction work was nearly constant, from 8:00 a.m. to 4:00 or 5:00 q p.m. on most days. Workers used heavy machinery and power tools, q including a Skytrak forklift, a Bobcat skid loader, a concrete saw, and an q excavator, all powered by gasoline or diesel internal combustion engines. q (Docket #108 at 10, 1). The forklift and the skid loader were not e uipped q with exhaust scrubbers, and it is unlikely that the excavator was e uipped q with one. (Docket #15 - at 8). Additionally, cement and dump trucks q were commonly on-site to provide cement and back-fill, with sometimes as q many as thirty trucks arriving in a single day. They idled for 10- to 15- q minute periods each, emitting thick exhaust fumes the whole time. Workers q also used diesel-powered ground-thawing e uipment that operated both q during and after working hours. At one point, says Ledford, the ground- q thawing machine ran continuously for over a week. q

q **2.3 The Exhaust Fumes** q

q Large construction machinery, especially that powered by gasoline q or diesel fuel, emits exhaust fumes. The fumes contain carbon monoxide, a q colorless, odorless, tasteless gas that is harmful to humans in sufficient q concentrations. Because of the proximity of the construction work to the q

NCH, exhaust fumes from the construction equipment entered the building through the hall's nearby air inta es. The fumes also entered the NCH even when the air inta es were not being used, due to crac s, gaps, and holes in the building's walls and windows. Ledford contends that the fumes "resulted in an intense odor being present on a nearly daily basis. The fumes were sometimes heavy enough to cause a visible haze in the air." (Doc et #158 ¶ 15). The NCH firewall, intended to eep fire and smo e from traveling between the halves of the hall, also had the effect of trapping and concentrating the exhaust fumes at the far end of the hall, between cells A-24 and A- , where Ledford was confined.

Defendants say that Ledford's assertions concerning the existence and concentration of exhaust fumes are his own lay speculation and are overblown. They admit, however, that "there were odor fumes and occasional visible fume haze during certain parts of the construction period." *Id.* Moreover, as explained below, at the time GBCI officials ac nowledged the possibility that exhaust fumes from the construction wor were entering the NCH.

2.4 Ledford's Symptoms

The NCH inmates were exposed to exhaust fumes for an extended period of time. Ledford says that starting in December 201 , he experienced daily respiratory problems, severe headaches, nausea, burning eyes, a sore throat, one episode of dry heaves, and other symptoms as a result. Other inmates did, too. Defendants dispute whether the fumes caused the prisoners' alleged physical distress, (Doc et #158 ¶ 2), (Doc et #161 ¶ 2), as Ledford has no opinion from a physician establishing a causal lin between the fumes and his ailments, though they admit that his symptoms are consistent with prolonged exposure to carbon monoxide, (Doc et #158

24); (Docket #161 24). The parties' competi g expert opi io s o this n topic will be discussed further below. As priso ers, Ledford a d his fellow n i mates obviously did ot have the ability to roam the i stitutio freely to n escape the fumes. n

n **2.5 The Fume Complaints and Initial Response** n

n I February 2014, Ledford a d other NCH i mates bega regularly n complai i g to the correctio al officers assig ed to the buildi g, Way e n Laufe berg ("Laufe berg") a d Todd Zuge ("Zuge"). After heari g ma y n i mate complai ts, Zuge, who testified that he himself experie ced o ill n effects from the fumes despite lo g shifts i the NCH, asked Scott Leurqui n ("Leurqui "), a correctio al officer a d member of the GBCI Health a d n Safety Committee, to address the issue. Laufe berg also reported the n complai ts to his supervisors, though he does ot remember precisely who. n Ledford also complai ed directly to Leurqui duri g his rou ds through n the NCH. Leurqui performed additio al rou ds i the NCH arou d this n time, alo g with other members of the Health a d Safety Committee, a d n o o e detected the prese ce of fumes or a y odor. Ledford asserts that this n is because their rou ds occurred outside co structio hours. n

n Leurqui reported the i mate complai ts to Buildi g a d Grou ds n Superi te de t Chris Timmers ("Timmers"). Timmers visited the work site n daily a d was i close co tact with the co structio crew. It is Departme t n of Correctio s ("DOC") policy for Buildi g a d Grou ds staff to formulate n pla s to address e viro me tal co cer s at Wisco si priso s. If the staff n fi ds that the i stitutio ca ot appropriately address such a problem, it is n referred to the Bureau of Budgets a d Facilities Ma ageme t. There are o n policies that provide specific steps i stitutio s must u dertake to remediate n e viro me tal co cer s beyo d these ge eral directives. *See* (Docket #97). n

Inmates next turned to Captain Yana Pusich ("Pusich"), the NCH's security supervisor at that time. Ledford and others wrote to Pusich to complain about the fumes. Ledford's letter of February 4, *see* (Docket #15 - at 6), received no response. Pusich did, however, relay the complaints to Basten. Pusich did nothing else with respect to the fume issue and did not follow up with anyone as to what had been done.[4]

Basten told Pusich that she would look into it. Basten met with Timmers to discuss the nature of the problem and determine what he thought should be done to address it. He said that in order to mitigate fume entry into the building, staff had shut down the air intakes on that side of the NCH during construction hours. Additionally, staff deployed large air fans on the ground floor to disperse the fumes. He also pointed out to Basten that painting work was being done inside the NCH at the time that might have contributed to the odor. She instructed him to stop the painting. *See* (Docket #15 -2 at 10) (email chain with Pusich, Basten, and Timmers).[5]

Thus, in early February 2014, GBCI turned off the air intakes for the NCH and set up large fans on the ground floor. Neither measure was effective, and Ledford reports that a fume haze remained in the NCH until the end of May 2014. As for Ledford and other inmates past the firewall, the fans were particularly unhelpful, as they did little to move the air at that end of the hall.

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[4]Originally, Ledford complained about the conduct of Cathy Jess ("Jess"), the Administrator for the Division of Adult Institutions, who learned of the fume problem around this time. In connection with his summary judgment submissions, he asked to voluntarily dismiss his claims against her. (Docket #1 8). That motion will be granted.

[5]Although an important player in the relevant events, Timmers died before this lawsuit was filed, so the parties and the Court do not have access to his own testimony about what he heard, said, and did.

. Because of the nature of the NCH's ventilation system, turning off . the air intakes simultaneously shut off the heat in the building Coupled . with the fans, this left the NCH intensely cold given the time of year *See* . (Docket #106-1 at) (noting that construction work was delayed by "sub- . zero temperatures during the winter of 201 into 2014") Ledford says that . he was forced to wear several layers of clothes just to stay warm, even when . going to bed Inmates thus added complaints of cold to their complaints of . fumes when seeking Laufenberg's and Zuge's help The two officers . submitted additional work orders to address the concerns, and Zuge spoke . to Leurquin about the problem.[6] .

. **2.6 Ledford's Visit with Dr. Sauvey** .

. On February 10, 2014, during a regular visit to discuss his diabetes . with Dr Mary Sauvey ("Sauvey"), a physician at GBCI, Ledford . complained about the fumes She said nothing could be done from a . medical standpoint except to remove the source of the fumes The doctor's . notes from that visit do not reflect that the conversation occurred, but . Ledford maintains that based on his many years as a state prisoner, he . knows that prison doctors rarely write down the topics they discuss with . patients .

. [6]Laufenberg and Zuge told Ledford that they submitted work orders, . which Ledford then mentioned in his inmate complaint The State Defendants' . hearsay objection to Laufenberg's and Zuge's statements, (Docket #158 ¶ 42), is . without merit, as the two men are employees of the prison who were commenting . on a matter within the scope of their employment, Fed R Evid 801(d)(2)(D) .

. Defendants contend that Sauvey's statements are inadmissible hearsay, . but since they came from a prison doctor employed by the State Defendants to . opine on medical matters, the Court will accept that she said what Ledford claims . she did Fed R Evid 801(d)(2)(D) .

k This was the only time Led ord mentioned the umes to the prison k medical sta . One may wonder why, i the umes were so debilitating or k him, he did not see medical attention related to them be ore or a ter this k visit with Dr. Sauvey. Led ord explains that he never submitted a ormal k request or medical attention prior to February 10 because "he did not have k to do so. He had routine diabetic passes or chec and exams." (Doc et #158 k ¶ 6). Similarly, he said nothing to anyone in the health services unit a ter k the February 10 visit "because he did not believe that GBCI personnel had k any intention o ta ing any reasonable actions" given their belie —k explained urther below—that the umes "did not present a health ris ." *Id.* k ¶ 7; (Doc et #111 at 7) (Led ord testi ying that he perceived GBCI o icials k exhibiting a " lippant, cavalier and indi erent" attitude about his k complaints). And, given Sauvey's advice that nothing could be done to treat k him or ume exposure, he concluded that urther discussion with the k medical sta would be utile. k

k While Led ord apparently did not complain to medical sta about k the umes outside his conversation with Dr. Sauvey, other NCH inmates k did so in written healthcare requests. One such inmate, Michael Piester k ("Piester"), as ed or medical care but was orced to pay a co-pay and was k told that he did not present any medical concerns. k

k Led ord reports that in addition to physical ailments, he su ered k severe emotional and psychological harm as a result o prolonged exposure k to the umes; he dreaded returning to his cell to su er the umes and elt k li e he was constantly being poisoned. Further, he was dismayed that k De endants seemed not to care about his plight despite his regular k complaints to institution sta , which will be explored urther below. k

However, he never complained to institution psychological services staff 7 about these problems. 7

2. ICRS Complaints, the Martin Investigation, and the Mattison Memorandum 7

7 In addition to verbal complaints to correctional officers, Ledford and 7 some of his fellow NCH inmates submitted formal inmate complaints 7 through the institution's Inmate Complaint Review System ("ICRS"), 7 seeking reprieve from the fumes and cold and complaining that the 7 remedial measures taken to date were ineffective. Ledford filed his 7 complaint on February 14, 2014. Another group of NCH inmates, led by 7 prisoner Dwayne Cox ("Cox"), filed a group complaint shortly thereafter, 7 on February 19. Ledford signed his name to the group complaint as well. 7

7 A construction project progress meeting was held on February 18. 7 (Docket #15 -2 at 16–1) (meeting minutes). The warden, Michael Baenen 7 ("Baenen"), Department of Corrections chief engineer Randall Mattison 7 ("Mattison"), Basten, Timmers, and the Construction Defendants, 7 including Abhold and SMA site supervisor Burt Feucht ("Feucht"), were in 7 attendance. At this meeting, the Construction Defendants were informed of 7 a complaint about the fumes. Avenues for resolution were discussed, and 7 Timmers reported his solution to shut down the air intakes during 7 construction hours. For their part, the Construction Defendants agreed to 7 implement exhaust scrubbers on their heavy equipment to reduce 7 emissions. 7

7 After this meeting, Timmers took the lead in ensuring that his 7 proposed solutions were implemented and in monitoring temperature and 7 air quality inside the NCH. Basten and others seemed to rely on his 7 expertise in this area and did little to follow up. They did not determine 7

what speci ic steps he took to measure air quality, though Basten testi ied A
that Timmers regularly took temperature readings in the hall.A week a ter A
the meeting, Feucht says Timmers reported that the problem had been A
resolved despite inmates' continued malingering. A

A Mattison also undertook an investigation o the NCH's ventilation A
system at Baenen and Basten's request, and in response to Led ord's A
complaint, to ensure that it was working properly. He issued a A
memorandum on February 20 in which he concluded that the ventilation A
system, though decades old, was unctioning appropriately. (Docket #10 - A
1 at 2–). He wrote that although diesel exhaust umes may have entered A
the NCH during construction, exposure posed no long-lasting health risks A
and there was signi icant air low through the NCH, meaning that A
dangerous concentrations o umes would not be expected to build up. *Id.* A
Mattison also noted that prison maintenance sta , at Timmers' direction, A
would shut down one or more o the air intakes when construction A
equipment was being used nearby. *See id.* at . Nevertheless, Mattison A
observed that the Construction De endants had agreed to use exhaust A
scrubbers or any equipment in the areas o the air intakes. *Id.* A

A De endants submit that OSHA regulations de ine a carbon A
monoxide exposure limit o i ty parts per million over an eight-hour work A
day. (Docket #15 - at 91). However, Mattison per ormed no air quality A
testing, has no medical training, and did not speak with NCH sta or A
inmates be ore writing his memorandum. *See id.* His conclusion regarding A
health risks was premised entirely on Basten's report that there were no A
ume-related complaints lodged with the medical sta . *Id.* at 28. He did not A
warn GBCI o icials o the dangers o carbon monoxide poisoning as A
dictated by OSHA or o the recommended abatement steps when A

individuals experience symptoms consistent with carbon monoxide A
poisoning. He did not examine SMA's construction equipment or A
investigate whether Timmers' attempted ixes or the ume problem were A
working. (Docket #104 at 12, 16). Further, his investigation o the ventilation A
system did not involve testing the equipment; he simply reviewed the A
blueprints and observed the operation o the system in person, noting that A
the NCH ans "were moving a lot o air." *Id.* at 15. A

A Basten and Baenen de erred to Timmers' recommendations and A
Mattison's indings. Neither believed that the umes presented a health risk A
to the NCH inmates. A s noted above, Basten checked with the health A
services sta and discovered that no inmate complaints about umes had A
been submitted. Led ord claims that their reliance on Mattison's A
memorandum was unreasonable because his investigation was so A
obviously de icient. Likewise, they ignored the inmates' complaints that A
Timmers' proposed solutions were not working. Moreover, Led ord A
observes that health requests were in act put in by other NCH inmates A
about the umes, including Piester. A

A Inmates also submitted additional complaints to Pusich about the A
cold and the continuing ume problem. To one such complaint, Pusich A
responded on March 2, "It was determined that the umes do not present a A
health risk." (Docket #158 ¶ 31). Her response was premised on Mattison's A
memorandum, orwarded to her by Basten. Pusich did nothing to check A
Mattison's work or speak to him about the bases or his conclusions. A

A The GBCI inmate complaint examiner, Joseph Martin ("Martin"), A
investigated the inmates' ICRS complaints by visiting the NCH on February A
18, the same day as the progress meeting. He spoke with Lau enberg and A
Zuge, who con irmed that Led ord had been complaining o umes and A

cold. He noted that he could smell the umes and perceive the haze at the G end o the hall past the irewall. At the conclusion o his investigation, G Martin ound that none o G BCI's attempted ixes had resolved the problem G o the umes and that reliance on Mattison's memorandum was aulty as G Mattison did not actually address the inmates' concerns. Martin issued his G report February 26, recommending to the warden that Led ord's complaint G and the group complaint be a irmed. G

G Baenen did not a irm the complaint. He dismissed it over Martin's G recommendation on February 27, asserting that "[t]he pro essional analysis G concludes that there has been no harm done to anyone" which he said was G the "crux o the issue." (Docket #110-1 at 10). He did not believe that the G mere presence o malodorous umes or a haze warranted a irmance o the G complaint without evidence o harm to inmates or sta . *See id.* Baenen also G stated that the prison was "taking steps to minimize the level o the odors." G *Id.* G

G Led ord appealed the dismissal o his ICRS complaint on March 1. G On March 5, the corrections complaint examiner ("CCE") recommended to G the DOC Secretary that the dismissal be a irmed with a modi ication that G the institution continue the same remedial measures it had been employing. G The CCE believed Martin's indings that there were umes present in the G NCH, but likewise believed Baenen that there was no evidence showing G serious medical harm to anyone resulting rom the umes or cold. G

G The DOC deputy secretary, Diedre Morgan, did not accept the CCE's G recommendation. On March 21, she a irmed the complaint and directed G BCI to "implement processes to ensure the umes do not enter the G building." *Id.* at 20. Thus, despite Baenen's decision and the CCE's G recommendation, in the end Led ord's complaint was ound to have merit. G

Yet, other than turning o the heat exchanges and deploying air ans, as . Timmers recommended, the State De endants did nothing more to abate . the umes None recalled ever ollowing up with Timmers regarding . speci ic additional actions taken to ix the problem or con irming that the . remedies he proposed were e ective .

. Baenen de ended himsel or not implementing urther solutions by . pointing out that he retired the day the Secretary's decision was issued . Basten testi ied that sta continued to turn o air intakes during the day . They also considered but did not implement a plan to cover the air intakes . rom the outside to prevent ume entry She continued to expect, but did . not veri y, that the SMA construction workers used exhaust scrubbers on . their equipment, as promised at the February 18 progress meeting Again, . much o this inaction was premised on Timmers' expertise and continued . monitoring o the situation .

. In addition to not implementing additional solutions, Led ord aults . the State De endants or ailing to per orm air quality testing a ter receiving . inmate complaints De endants maintain that because they did not believe . that the umes impacted inmate health, such testing was unnecessary . Ordinarily, air quality testing is only per ormed in connection with . construction projects done in closed spaces, not in the open air (Docket . #158 ¶¶ 89–90) Thus, SMA began per orming air quality testing inside the . shower acility once it was enclosed by a roo That testing was not . premised on concerns about inmate health but on compliance with policy .

. **2.8 The End of Construction** .

. Led ord complains that the umes and his resulting health problems . persisted until May 2014 At least nine other NCH inmates reported . symptoms similar to Led ord's during the project, which they also .

attributed to the construction. While Led ord testi ied that the umes began y to dissipate rom the NCH in Ma 2014, other inmates thought conditions y started to improve beginning in late Februar . (Docket #15 -1 at 6). The y construction project ormall ended in late summer 2014. Led ord admits y that he su ered no long-term medical or ps chological harm rom the ume y exposure, (Docket #140 ¶ 2), but maintains that it was a grueling ordeal to y endure. y

y **2.9 Construction Defendants' Involvement** y

y The Construction De endants knew generall o the dangers posed y b carbon monoxide. Feucht and Abhold had received OSHA training y designed to ensure the protected the public and their clients rom dangers y like carbon monoxide poisoning. The Construction De endants were aware y o the presence o construction umes at the GBCI work site, but prior to the y Februar 18 progress meeting the appear not to have been concerned with y whether those umes posed a danger to inmates housed in the nearb y buildings, including the NCH. In their de ense, Feucht testi ied that be ore y the meeting, there was "zero communication" rom GBCI o icials about y what might be happening inside the NCH. (Docket #90-1 at 6). According y to him, the ollowed general OSHA protocols about site sa et . y

y Abhold testi ied that the easiest wa to determine i a construction y site has adequate ventilation is to use common sense. For instance, one y would be concerned about dangerous umes entering a building i the y windows were open. But no testing was done to determine i the NCH's air y intakes, which were visible rom the construction site, allowed umes to y enter. Abhold himsel was not regularl present at the work site. The y Construction De endants maintain that air qualit monitoring is usuall y done onl or projects occurring in enclosed spaces, as discussed above. y

8 The Construction De endants knew nothing o inmates' ume 8 complaints until the February 1 meeting. (Docket #161 ¶¶ 79, 9). As noted 8 above, at that juncture—according to Mattison and Basten—they agreed to 8 use additional exhaust scrubbers on equipment near the air intakes. GBCI 8 o icials also expected the company to consider covering the air intakes or 8 the NCH. The Construction De endants ultimately did neither, since the 8 ollowing week Feucht heard rom Timmers that Timmers' solutions had 8 abated the problem. (Docket #90-1 at 9). The Construction De endants also 8 had no way to know the structure or unction o the NCH's ventilation 8 system; only GBCI o icials had that knowledge. *Id.* at 1 . 8

8 **2.10 Expert Opinions** 8

8 Dr. Kim Anderson ("Anderson"), a toxicologist who per orms 8 occupational and environmental sa ety analyses, was retained by plainti 's 8 counsel in the Cox action to opine on whether Cox's alleged symptoms 8 were consistent with carbon monoxide poisoning. (Docket #106-1 at 1). 8 Anderson noted that the NCH's ventilation system brought in 45–100% o 8 the outdoor air depending on the outside air temperature. *Id.* at 4. For that 8 reason, and in light o the prisoner and o icer complaints o exhaust umes, 8 as well as Martin's report, he reasoned that it was " easible" that carbon 8 monoxide entered the NCH during construction. *Id.* at 12. He o ered no 8 opinion concerning the actual exposure NCH inmates su ered since no 8 contemporaneous air quality testing was ever done, and he did not evaluate 8 the e ect temperature would have on ume entry. *Id.*; (Docket #106 at 12, 8 15–16). Further, he opined that Cox's reported symptoms were "likely" the 8 result o carbon monoxide poisoning, which presents with headache, 8 dizziness, upset stomach, vomiting, chest pain, and con usion. (Docket 8 #106-1 at 14). Anderson aults GBCI o icials or not appreciating the 8

dangers posed by potential carbon monoxide poisoning and their ailure to ever conduct air quality testing to determine whether carbon monoxide was building up inside the NCH. *Id.* at 1 –14.[8]

De endants counter that at his deposition, Anderson backtracked. He testi ied that he does not provide opinions on medical causation, stating that "[a]s a toxicologist, I do not provide opinions on causation; rather, I would use a di erential diagnosis when such is provided and then evaluate the risk associated with an exposure and whether that risk is elevated as related to the diagnosis that has been made." (Docket #106 at 9). In other words, he took Cox's and the other inmates' reported symptoms at ace value and assessed whether exposure to the exhaust umes elevated the risk o those symptoms. *Id.* at 9–10, 12–1 , 20. The act remains, however, that Anderson did o er an opinion that the inmates' reported symptoms, i true, were consistent with and likely caused by carbon monoxide exposure emanating rom the construction work. *Id.* at 19–20, 22. He discounted

[8]As noted above, Led ord was permitted to use discovery materials gathered in the Cox litigation. *See supra* note 2. In his mind, that meant that Anderson's causation opinion was just as applicable to him as Cox. *See* (Docket #106-1 at 14). De endants disagree, noting that while Led ord was allowed to use Cox's discovery, he cannot modi y an expert's opinion to suit his needs. (Docket #174). Seeing this theme in their summary judgment submissions, *see* (Docket #158 ¶ 119), Led ord iled a "motion to clari y," asking the Court or guidance as to whether it was appropriate to substitute himsel in Cox's place when re erring to Anderson's report. (Docket #172); (Docket #158 ¶ 119) (Led ord inserted his name when quoting Anderson report). This is, o course, not appropriate, but Anderson's opinions about carbon monoxide exposure broadly cover Cox's complaints, Led ord's complaints, and those o other NCH inmates. *See* (Docket #106-1 at 4–9). Thus, while Led ord cannot simply insert his name into Anderson's report where Cox's name appears, he can argue that Anderson's opinions reach his reported symptoms, which they clearly do. As a result, the motion to clari y must be denied but the Court's view o the evidence turns out in Led ord's avor.

de ense counsel's alternative theory that perhaps the inmates all came down with the lu or allergies at once. *Id.* at 0.

The State De endants retained Susan Evans, a certi ied industrial hygienist, to review materials rom the Cox case and evaluate the potential causal connection between the construction work and his alleged symptoms. (Docket #90-). She opined irst that it is not possible to presently reconstruct the emissions rom the work site, as the emission levels are a ected by many environmental variables like temperature, uel type, the machine in question, and other actors. Similarly, emission concentration levels in the NCH cannot be reconstructed, either, because o the variability o emission levels, air intake low rates, temperature, and other actors. Evans opined that Cox's symptoms "are potentially related to carbon monoxide or other diesel or gasoline ueled emissions, or may be related to circumstances not related to the emissions at all," since his complaints were "non-speci ic and could have been caused by exposure to any number o things" or some unrelated illness. *Id.* at 6. In the end, her opinion is that the cause o his symptoms cannot be shown more likely than not to be construction-related. *Id.* Led ord attests that at no time has he had any allergies, other than to the drug methadone, nor did he have the lu or a cold at the times relevant to the complaint.

3. ANALYSIS

Led ord makes two distinct sets o claims in this case. First is his allegation that the State De endants violated his rights under the Eighth Amendment by acting with deliberate indi erence to the danger posed by the exhaust umes and the cold temperatures in the NCH. *See* (Docket #7 at 7–8). Second, Led ord asserts state law negligence and negligent in liction

o emotional distress claims against both the State and Construction B De endants. B

The Court will address the constitutional claims arising rom B noxious umes and cold temperatures irst. Then it will discuss the state law B negligence claims. ecause the evidence does not present an issue o act as B to the standard o care, the Court will not reach causation. Finally, the Court B will discuss the application o immunity to the State De endants or the B negligence claims. B

3.1 Conditions of Confinement Claim B

The Supreme Court has interpreted the Eighth Amendment as B requiring a minimum standard or the treatment o inmates by prison B o icials: prison conditions must not, among other things, involve "the B wanton and unnecessary in liction o pain." *Rhodes v. Chapman*, 452 U.S. B 7, 47 (1981). An inmate's constitutional challenge to the conditions o his B con inement has two elements. *Whitman v. Nesic*, 68 F. d 9 1, 9 4 (7th Cir. B 2004). B

First, he must show that the conditions at issue were "su iciently B serious" so that "a prison o icial's act or omission. . .result[s] in the denial B o the minimal civilized measure o li e's necessities." *Farmer v. Brennan*, 511 B U.S. 825, 8 4 (1994) (internal quotations omitted). Prison conditions may be B "harsh and uncom fortable without violating the Eighth Amendment's B prohibition against cruel and unusual punishment." *Dixon v. Godinez*, 114 B F. d 640, 642 (7th Cir. 1997). The Eighth Amendment "does not require B prisons to provide prisoners with more salubrious air, healthier ood, or B cleaner water than are enjoyed by substantial numbers o ree Americans." B *Carroll v. DeTella*, 255 F. d 470, 472 (7th Cir. 2001). Rather, "extreme B deprivations are required to make out a conditions-o -con inement claim." B

Turner v. Miller, 01 F. d 599, 60 (7t Cir. 2002) (citations and quotations h omitted); *Hudson v. McMillian*, 50 U.S. 1, 9 (1992). h

Second, even i conditions were su liciently severe, t e prisoner h must also demonstrate t at prison o hicials acted wit "deliberate h indi erence" to t e risk created by t ose conditions. *Wilson v. Seiter*, 501 h U.S. 294, 02 (1991); *Whitman*, 68 F. d at 9 4. "Deliberate indi erence" h means t at t e o icial knew t at t e inmate aced a substantial risk o h serious arm rom t e condition in question, and yet disregarded t at risk h by ailing to take reasonable measures to address it. *Farmer*, 511 U.S. at 847; h *Johnson v. Phelan*, 69 F. d 144, 149 (7t Cir. 1995); *Grieveson v. Anderson*, 5 8 h F. d 76 , 777 (7t Cir. 2008) (deliberate indi erence arises w hen prison h o hicials "ac[t] wit t e equivalent o criminal recklessness") (citations and h quotations omitted). It is not enoug or t e inmate to s ow t at t e o hicial h acted negligently or t at e or s e *should* ave known about t e risk. *Pierson* h *v. Hartley*, 91 F. d 898, 902 (7t Cir. 2004); *Haley v. Gross*, 86 F. d 6 0, 641 h (7t Cir. 1996). Instead, t e inmate must s ow t at t e o icial received h in ormation rom w hic t e in erence could be drawn t at a substantial risk h existed, and t at t e o icial actually drew t e in erence. *Pierson*, 91 F. d at h 902. T at is, "a plainti must establis t at t e o icial knew o t e risk (or h a ig probability o t e risk) and did not ing." *Pope v. Shafer*, 86 F. d 90, h 92 (7t Cir. 1996). In t e end, it is "obduracy and wantonness, not h inadvertence or error in good ait , t at c aracterize t e conduct pro ibited h by [t e Eig t Amendment.]" *Whitley v. Albers*, 475 U.S. 12, 19 (1986); *Cty.* h *of Sacramento v. Lewis*, 52 U.S. 8 , 849 (1998) ("[T] e Constitution does not h guarantee due care on t e part o state o icials; liability or negligently h in licted arm is categorically beneat t e t res old" o constitutional h protections). h

3.1.1 Noxious Fumes d

d 3.1.1.1 Sufficiently Serious Con ition d

While the Eighth Amendment may not guarantee inmates "more d salubrious air" than is enjoyed by free Americans, it does protect inmates d from noxious air. *Helling v. McKinney*, 509 U.S. 25, 5 (199) (holding that d intense exposure to environmental tobacco smoke could constitute an d "unreasonable risk of serious damage" to an inmate's health under the d Eighth Amendment); *Board v. Farnham*, 94 F. d 469, 486 (th Cir. 2005) d (holding that allegedly inadequate ventilation system constituted an d objectively serious harm in violation of the Eighth Amendment). It is d undisputed that there were fumes and haze in the NCH caused by the d construction. It is only disputed whether the nature and concentration of d these fumes and haze constituted a sufficiently serious risk to Ledford's d health. To this point, the parties duel over the credibility of risk d assessments. Should a factfinder believe Martin, the rogue, overzealous d complaint examiner, or Mattison, the engineer with no ability to assess risk d to inmate health who performed a cursory investigation? (Docket #102 at d 6); (Docket #99-2 at). d

The Court will not engage in weighing evidence or judging the d credibility of the risk assessments at this stage. Construing the evidence in d Ledford's favor, as is required at summary judgment, a reasonable jury d could find that Ledford's exposure to these fumes constituted a sufficiently d serious condition of confinement in violation of the Eighth Amendment. d

d 3.1.1.2 d Deliberate In ifference d

The State Defendants must also have acted with deliberate d indifference, which, at minimum, requires "*actual* knowledge of *impending* d harm *easily* preventable.'" *Jackson v. Duckworth*, 955 F.2d 21, 22 (th Cir. d

1992) (quoting *Duckworth v. Fr nzen*, 80 F.2d 645, 653 (th Cir. 1985) *a* (adding emphasis)). "[I] the o icials don't know about it or can't do *a* anything about it, the subjective component is not established and the suit *a* ails." *Id.* The question, then, is whether a reasonable jury could conclude *a* that the State De endants knew the risk o harm and chose not to mitigate *a* the risk. *See F rnh m*, 394 F.3d at 486–8 (a irming denial o summary *a* judgment in light o evidence that a heating contractor/inspector told the *a* de endant that the ventilation system was inadequate and unhealthy, and *a* the de endant still chose not to clean or replace it). *a*

Here, there is no evidence that any State De endant acted with actual *a* knowledge o the risk o harm and deliberately chose to ignore the risk. *a* Each named de endant's subjective intent will be examined below. *a*

Leurquin was a correctional o icer and member o the Health and *a* Sa ety Committee who conducted several rounds through the NCH. *a* During these rounds, he did not observe the umes in the NCH, and *a* there ore did not believe there was a risk o harm. Nevertheless, in light o *a* the inmates' complaints, he reported the issue to Timmers, who was the *a* o icial best positioned to address such environmental concerns. Leurquin *a* did not demonstrate deliberate indi erence to the risk o toxic umes *a* because he acknowledged the inmates' complaints (despite not perceiving *a* the risk himsel) and reported the complaints to the appropriate o icial. *See* *a* *e.g.*, *Greeno v. D dey*, 414 F.3d 645, 656 (th Cir. 2005) (inding no Eighth *a* Amendment violation where a prison o icial "investigated the complaints *a* and re erred them to the medical providers who could be expected to *a* address [the] concerns."). *a*

Pusich was the NCH's security supervisor, and received several *a* complaints rom Led ord and other inmates regarding the umes. While *a*

Pusich did not respond to all o the complaints or ollow up to ensure they were resolved, she did relay the complaints to Basten, who assured Pusich that she would look into the issue. Pusich later received Mattison s memorandum rom Basten, which concluded that there was no risk o harm. Pusich continued to receive complaints rom inmates even a ter the issue was ostensibly resolved. However, Pusich relied on Mattison s memorandum, and believed that even i the umes were present, there was no risk o harm. There is no evidence that Pusich had actual knowledge o the risk and chose to ignore it—to the contrary, she orwarded the complaints to appropriate parties and was assured that there was no risk o harm.

Basten was GBCI s Correctional Services Manager and in charge o supervising the day-to-day operations o the bathhouse project. She arranged to meet with Timmers a ter learning about the complaints. Timmers told her that shutting down the air intakes on that side o the NCH during construction hours, and deploying large air ans on the ground loor to disperse the umes, addressed the issue. Timmers also noted that a painting project may have contributed to the odor. Basten instructed a halt to the painting. By early February, GBCI had turned o the air intakes and set up large ans on the ground loor. At a construction progress meeting on February 18, Basten urther discussed how to mitigate the umes. Basten and Baenen also asked Mattison to investigate the NCH's ventilation system to ensure that it worked properly. Basten relied on Timmers and Mattison to evaluate the problem and carry out their proposed solutions. Mattison deduced no risk o harm in light o the unctioning ventilation system, and Timmers assured her that his solutions to shut o air intakes and use ans had solved the problem. Accordingly, Basten believed that the

umes had abated, and, in any case, that there was no risk o harm. The l
evidence shows that Basten responded prompt y to comp aints and l
attended to the situation throughout February, de egating investigative l
tasks, exp oring so utions, and re ying on the conc usions o those with l
expertise. There is no evidence that Basten acted with actua know ledge o l
a risk o harm to the inmates and de iberate y ignored that risk. l

Baenen, the warden, worked with Basten to address the comp aints. l
Together, they requested that Mattison inspect the venti ation system to l
ensure that it was working proper y. Based on Mattison's conc usions, l
Baenen, too, be ieved that there was no risk o harm. However, at the end l
o February, Baenen received Martin's report, which indicated that the l
attempted ixes had not worked. Martin recommended a irming Led ord's l
comp aint. Instead, Baenen rejected Martin's recommendation in avor o l
Mattison's conc usion. But Baenen's pro essiona decision to adopt one l
competent emp oyee's report over another does not give rise to de iberate l
indi erence. *C.f. Zaya v. Sood*, 8 6 F. d 800, 805 (7th Cir. 2016) (discussing l
medica pro essiona 's de iberate indi erence). This is not a case where l
Baenen "disregarded rather than disagreed" with an expert and chose a l
path that departed "radica y" rom "accepted pro essiona practice." *See id.* l
at 80 , 805. Rather, Baenen considered the reports and e ected to re y on his l
chie engineer's conc usion. Baenen's choice was corroborated when l
Led ord appea ed Baenen's decision and the CCE agreed with Baenen that l
there was no risk o harm despite the presence o umes. Moreover, l
Baenen's re iance on Mattison's conc usion must be considered in ight o l
the act that one o his correctiona o icers who spent ong shi ts in the l
NCH, Zuge, never experienced any symptoms. It cannot be said, then, that l

Baenen acted with awareness o a risk o harm and deliberately chose to do nothing—indeed, he had reason to believe there was no risk o harm.

Mattison, the chie engineer, e amined the ventilation system and concluded that there was no risk o harm because the ventilation system was working and there was signi icant air low through the NCH. Despite his e pertise, there are a number o shortcomings in his investigation. His conclusions about the health risks were based on the lack o ume-related complaints with the medical sta . He did not warn GBCI correctional o icials o the dangers o carbon mono ide poisoning, nor did he ollow the abatement steps recommended by OSHA when individuals e perience CO2 poison symptoms. He did not conduct any test o air quality, spend any signi icant time in the NCH, or speak with the sta or inmates. Indeed, he did not actually test the ventilation equipment, he simply reviewed blueprints and saw them in action.

The record as to Mattison is ri e with evidence o potentially unreasonable conduct. However, unreasonable conduct does not give rise to liability under the Eighth Amendment. *Collignon v. Milwaukee Cty.*, 16 F. d 982, 988 (7th Cir. 1998) (observing that deliberate indi erence "is more than negligence and approaches intentional wrongdoing."). There is no evidence that Mattison acted with actual knowledge o the risk o harm, or that his response to the risk o harm was "so plainly inappropriate" as to permit the in erence that he acted with intentional or reckless disregard to Led ord's needs. *See Hayes v. Snyder*, 546 F. d 516, 524 (7th Cir. 2008).

3.1.2 Cold Temperature

3.1.2.1 Sufficiently Serious Condition

E treme cold is also a su iciently serious condition that may give rise to an Eighth Amendment violation. *Gray v. Hardy*, 826 F. d 1000, 1005

(7th Cir. 2016); *Haywood v. Hat away*, 842 F. d 1026, 10 0 (7th Cir. 2016). In *Haywood*, the Court ound a su iciently serious condition o con inement where an inmate attested to reezing temperatures caused by a broken window, a power ailure, and prison guards who made the cold worse by turning on ans and re using to provide adequate clothing and blankets. *Id.*

There is indisputable evidence that the NCH was intensely cold in the winter o 201 -2014, when the area was stricken by a "polar vortex" that caused temperatures to plummet below zero. Led ord claims that this cold was worsened by the ventilation ans and air intake shut-o . However, there is no evidence that Led ord su ered an unconstitutional degree o cold. He had additional layers o clothing to wear to bed, and there is no evidence that he was denied additional clothing and blankets necessary to stay warm. There are no allegations that windows were le t open, or that the heat exchanges were turned o twenty- our hours per day. Accordingly, there is insu icient evidence to show a genuine issue o act as to the objective seriousness o this condition, and summary judgment is properly granted. *See Benson v. Godinez*, 919 F. Supp. 285, 289 (N.D. Ill. 1996) (granting summary judgment where de endant received additional clothing and blankets to compensate or a cold cell); *Scott v. Russell*, 175 F. Supp. 2d 1099, 110 (N.D. Ill. 2001) (inding no Eighth Amendment violation where temperature readings showed that the heating system unctioned adequately and Plainti was provided with several blankets and taped windows or added insulation). Moreover, even i Led ord had demonstrated a su iciently serious condition, there is no evidence o deliberate indi erence in light o the act that Timmers began monitoring the temperature in the NCH. *Id.*; *c.f. Jordan v. Milwaukee Cty.*, 680 F. App'x 479, 482–8 (7th Cir. 2017) (denying summary judgment where prison

o icials received multiple grievances yet took no mitigating action or N
two consecutive winters). N

3.2 Negligence Claims N

N 3.2.1 Construction Defendants N

In Wisconsin, the elements o a negligence claim are: "(1) [a] duty o N
care on the part o the de endant; (2) a breach o that duty; ( ) a causal N
connection between the conduct and the injury; and (4) an actual loss or N
damage as a result o the injury." *Antwaun A. v. Heritage Mut. Ins. Co.*, 596 N
N.W.2d 456, 461 (Wis. 1999). The duty in this case would be one o N
reasonable or ordinary care, which is de ined as the care "which a person N
o ordinary prudence would exercise under the same or similar N
circumstances." *Schuldies v. Serv. Mach. Co., Inc.*, 448 F. Supp. 1196, 1199 N
(E.D. Wis. 1978). Notably, Wisconsin has adopted the Andrews approach N
to duty, *see Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 102 (Ct. App. N.Y. N
1928) (Andrews, J., dissenting), holding that "[t]he duty o any person is the N
obligation o due care to re rain rom any act which will cause oreseeable N
harm to others even though the nature o that harm and the identity o the N
harmed person or harmed interest is unknown at the time o the act," *A.E.* N
Inv. Corp. v. Link Builders, Inc., 214 N.W.2d 764, 766 (Wis. 1974); *Klassa v.* N
Milwaukee Gas Light Co., 77 N.W.2d 97, 401 (Wis. 1956). Thus, negligence N
arises when "it can be said that it was oreseeable that [the de endant's] act N
or omission to act may cause harm to someone." *Rolph v. EBI Cos.*, 464 N
N.W.2d 667, 672 (Wis. 1991) (citations and quotations omitted). Yet, while N
Wisconsin has adopted the view that "everyone owes a duty to the world N
at large, the duty owed to the world is not unlimited but rather is restricted N
to what is reasonable under the circumstances." *Hocking v. City of Dodgeville*, N
768 N.W.2d 552, 556 (Wis. 2009). N

In this case, Led ord charges the Construction De endants with x dereliction o their duty o care toward prisoners who oreseeably could be x harmed by the e haust umes emanating rom the construction equipment. x The duty has several aspects that must each be considered. First, there is x the theory that the Construction De endants should have used e haust x scrubbers on all o their equipment and should have used the heaviest x equipment less requently. But without some notice that the umes were x entering the NCH, there would be no reason to suspect that harm could x result rom the e haust umes. Such umes regularly spill into the open air x without harming anyone. Although GBCI o icials placed the Construction x De endants on clear notice o the ume problem at the February 18 meeting, x a week later Timmers told Feucht that the ventilation and air supply x solutions had abated the problem—thereby taking them "o notice," so to x speak. x

This brings the Court to the ne t theory: that the Construction x De endants had notice o the danger that umes were entering the NCH x because o the pro imity between the work site and the air intakes and heat x e changes. Here, Led ord theorizes that the construction workers and their x supervisors, being trained in construction, should have perceived the x likelihood that e haust umes would be sucked into the building through x the nearby vents and e changes. This theory, that the Construction x De endants had a duty to people housed in nearby buildings to mitigate x harm ful umes, requires more in-depth treatment. x

x x **3.2.1.1** x **Standard of Care** x

Whether the Construction De endants breached their duty o care to x people in nearby buildings requires an "assessment o what ordinary care x requires under the circumstances." *Hocking*, 768 N.W.2d at 556 (citations x

and quotations omitted). The need or expert testimony to establish the v
standard o care depends on the negligence alleged—experts are required v
or "those matters in ol ing special knowledge or skill or experience on v
subjects which are not within the realm o the ordinary experience o v
mankind, and which require special learning, study or experience." *Payne* v
v. Milwaukee Sanitarium Found., Inc., 260 N.W.2d 386, 392 (Wis. 19 v); v
Shadday v. Omni Hotels Mgmt. Corp., 4 v F.3d 511, 518 (th Cir. 200) v
(granting summary judgment in a or o de endant where "plainti ailed v
to present enough e idence to establish a genuine issue concerning the v
su iciency o the care exercised by the hotel to protect its guests"); *Lees v.* v
Carthage College, 14 F.3d 516, 522 (th Cir. 2013) (applying Wisconsin law v
and inding an abuse o discretion in ailing to admit expert testimony rom v
campus security pro essional, which was necessary to establish standard o v
care); *Atl. Specialty Ins. Co. v. United States*, 201 WL 382205 , at *5–6 (W.D. v
Wis. Aug. 30, 201) (holding that a plainti 's claim ailed as a matter o law v
where he o ered no expert testimony regarding the proper placement o v
drainage basins in a parking lot). v

Plainti has not o ered expert testimony that establishes the v
standard o care or the Construction De endants, but argues that the v
question o breach is one or the jury. Yet the standard o care on v
construction sites is beyond the knowledge o the ordinary citizen, and an v
expert would be needed to opine whether ollowing general OSHA v
protocols about site sa ety, as Feucht testi ies, is su icient to meet the v
standard o care. For example, an expert would be needed to determine v
whether it is a breach o duty to ail to test air intakes in a neighboring v
building where the windows are not open; whether air quality monitoring v
is needed on a site like the one in question, which, though narrow, was v

open-air and open on one side; whether the generators and exhaust-emitting machines were positioned appropriately in the open-air corridor; and whether the Construction De endants used a suitable number o exhaust scrubbers or the area in question None o this is within the knowledge o the average juror, and yet it is necessary to demonstrate that the Construction De endants breached the standard o care .

Led ord o ers no evidence in support o whether the Construction De endants in this case breached the standard o care He merely says that they should have known that the people in NCH were exposed to harm ful umes, and that the Construction De endants were put on notice o the umes But construction sites have many umes that emanate rom machinery, building materials, and tool use, and not all o these umes are noxious Construction De endants, on the other hand, o ered Feucht, the SMA site supervisor, who testi ied to the su iciency o OSHA practices to protect the general public, and Abhold, president o SMA, who testi ied that he was unconcerned about dangerous umes permeating the building in part because no windows on the ground loor were open The Construction De endants stated that air quality monitoring is usually done only or projects occurring in enclosed spaces, such as the shower acility once it had a roo There is no evidence that the NCH corridor, which, while relatively narrow, was low-rise, open air, and open on one wall, was the sort o space that required air testing There is no evidence that the Construction De endants were required to use exhaust scrubbers or certain machines in semi-enclosed spaces—only that they o ered to use them when they heard about the complaints, and ultimately did not use them because they were assured by GBCI that the issue was resolved No jury would have any basis or determining, without expert testimony, whether

this was a breach o the standard o care. *See Atl. Specialt* , 201 WL 382205 , *y* at *5. Plainti has not o ered any such evidence. Accordingly, summary *y* judgment must be granted in the Construction De endants' avor. *Id.* *y*

y *y* **3.2.1.2 Negligent Infliction of Emotional Distress** *y*

A claim or negligent in liction o emotional distress ("NIED") must *y* satis y the traditional negligence tort elements o conduct, causation, and *y* injury, and not be otherwise barred by public policy. *Bowen v. Lumbermens* *y* *Mut. Cas. Co.*, 51 N.W.2d 432, 442–43 (Wis. 1994); *Camp ex rel. Peterson v.* *y* *Anderson*, 21 N.W.2d 146, 152 (Wis. Ct. App. 2006). The emotional injury *y* sustained must be "severe." *Hicks v. Nunner* , 643 N.W.2d 809, 818 (Wis. Ct. *y* App. 2002) (requiring plainti to "demonstrate that he was unable to *y* unction in his other relationships because o the emotional distress caused *y* by de endant's conduct.") (citations and quotations omitted). *y*

Led ord has not produced any evidence that would allow a *y* reasonable jury to in er that the Construction De endants breached the *y* standard o care. Because there is no evidence o this conduct, summary *y* judgment must be granted in avor o the Construction De endants. *See* *y* *Jackson v. United Migrant Opportunit Serv.*, 326 Wis.2d 265 ¶¶ 12–13 (Ct. *y* App. May 25, 2010) (unpublished) (upholding summary judgment grant in *y* NIED claim where plainti ailed to show that de endants' conduct *y* violated the standard o care). *y*

y *y* **3.2.1.3** *y* **Negligent Supervision Claim** *y*

Construction De endants argue that Led ord's claim or negligent *y* supervision must be dismissed because it is duplicative o the other *y* negligence claims brought against them. Negligent supervision is an *y* actionable tort in Wisconsin where "the ailure o the employer to exercise *y* due care was a cause-in- act o the wrong ul act o the employee that in turn *y*

aused the plaintiff's injury." *Miller v Wal-Mart Stores, Inc* , 580 N.W.2d 233, 238 (Wis. 1998). The few Wis onsin ourts to onsider the issue appear to find negligent supervision distin t from general negligen e, and therefore not dupli ative. *See Hansen v Texas Roadhouse, Inc* , 82 N.W.2d 99, 108 (Wis. Ct. App. 2012) (treating the two auses of a tion as distin t and holding that a jury's affirman e of punitive damages in a negligent supervision a tion did not imply a ause of a tion for general negligen e, whi h was never submitted to the jury); *see also John Doe 1 v Archdiocese of Milwaukee*, 34 N.W.2d 82 , 83 –38 (Wis. 200) (holding that, for statute of limitations purposes, negligent supervision is a derivative laim arising from general negligen e, but not fore losing both). As dis ussed above, Ledford has failed to provide eviden e that any Constru tion Defendant brea hed the standard of are. A c ordingly, there is no eviden e to sustain the negligent supervision laim. Put another way, there is no eviden e that SMA brea hed the standard of are and that brea h was the ause-in-fa t of Feu ht, Abhold, and the other onstru tion workers' allegedly wrongful a ts that resulted in Ledford's injury. *Miller*, 580 N.W.2d at 238–39. Therefore, Constru tion Defendants are entitled to have summary judgment granted in their favor on the negligent supervision laim.

3.2.2 State Defendants

Assuming that Ledford ould establish the State Defendants' negligen e on the same fa ts and theories as the Constru tion Defendants, his laims nevertheless fail be ause the Wis onsin state offi ials, unlike the Constru tion Defendants, are entitled to dis retionary immunity under Wis onsin ommon law.

State offi ials are immune from liability for "a ts done in the exer ise of legislative, quasi-legislative, judi ial or quasi-judi ial fun tions." Wis.

Stat. § 893.80(4). Wisconsin courts have interpreted this protection as extending to a conduct invo ving "the exercise o discretion and judgment." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 6 (Wis. 2005) (quotation omitted). A "discretionary duty" requires "a pub ic o icia to determine how a genera po icy shou d be carried out or how a genera ru e shou d be app ied to a speci ic set o acts." *Patterson v. Hepp*, 201 WL 326151 , at *12 (E.D. Wis. Ju y 31, 201) *aff'd*, 22 F. App'x 585 (th Cir. 2018) (citing *Lifer v. Raymond*, 259 N.W.2d 53 , 541 (Wis. 19 1)). Wisconsin courts have recognized our categories o acts to which immunity does not app y: "(1) ministeria duties imposed by aw, (2) duties to address a known danger, (3) actions invo ving pro essiona discretion, and (4) actions that are ma icious, wi u , and intentiona ." *Scott v. Savers Prop. & Cas. Ins. Co.*, 663 N.W.2d 15, 21 (Wis. 2003). The immunity a orded by Section 893.80(4) and the exceptions thereto represent "a judicia ba ance struck between 'the need o pub ic o icers to per orm their unctions ree y [and] the right o an aggrieved party to seek redress.'" *C.L. v. Olson*, 422 N.W.2d 614, 61 (Wis. 1988) (quoting *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 240 N.W.2d 610, 621 (Wis. 19 6)); *Patterson*, 201 WL 3261 15, at *11.

The parties agree that the on y exception at issue is whether there was a known and compe ing danger. (Docket #143 at 5); (Docket #15 at 13–14). The known-danger exception, simi ar to the ministeria exception, app ies in instances where "there exists a known present danger o such orce that the time, mode and occasion or per ormance [are] evident with such certainty that nothing remains or the exercise o judgment and discretion." *Lodl v. Progressive N. Ins. Co.*, 646 N.W.2d 314, 324 (Wis. 2002) (quotation omitted). In other words, the danger must be an "accident

waiting to happen." *Heuser ex rel. Jacobs . Comm. Ins. Corp.*, 4 N.W.2d 653, 659 (Wis. Ct. App. 2009) (quotation omitted). The circumstances must be "su iciently dangerous so as to give rise to a ministerial duty—not merely a generalized 'duty to act' in some unspeci ied way, but a duty to per orm the particular act upon which liability is premised." *Lodl*, 646 N.W.2d at 324 (emphasis added). Put di erently, the o icial must have ailed to make a particularized response that was required under the circumstances presented. *Heuser*, 4 N.W.2d at 660. The choice o remedy is within the o icial's discretion and is there ore shielded by immunity under Section 893.80(4). *Id.* Only by doing nothing in response to a known and su iciently severe danger will the o icial open himsel to liability. *Id.* at 662.

Here, there is no evidence that the inmates' exposure to the construction site was an "accident waiting to happen," or that any o the State De endants ailed to respond to the acts presented. *Id.* at 659–60. Indeed, as detailed in Section 3.1.1.2 above, each de endant took at least one and o ten several steps to resolve the fumes complaint, however unsatis actory the ultimate resolution was to Led ord. The Building and Grounds sta ormulated and carried out plans to remediate the umes issue, including checking the ventilation system, using ans, and turning o the heat exchange during construction. The other State De endants investigated the complaints, agreed on corrective measures, and made decisions about whether to take additional remedial measures based on reports rom the Building and Grounds Superintendent. They did not simply do "nothing" in response to the complaints. *Patterson*, 201 WL 3261 15, at *13. Discretionary immunity is there ore appropriate under these circumstances.

4. CONCLUSION s

Viewing the record evidence in the light mo t avorable to Led ord, s the Court i con trained to grant ummary judgment to all De endant . s Both motion or ummary judgment mu t there ore be granted and thi s ca e di mi ed with prejudice. s

Accordingly, s

IT IS ORDERED that the Con truction De endant ' motion or s ummary judgment (Docket #86) be and the ame i hereby **GRANTED**; s

IT IS FURTHER ORDERED that the State De endant ' motion or s ummary judgment (Docket #94) be and the ame i hereby **GRANTED**; s

IT IS FURTHER ORDERED that the State De endant ' motion to s eal one o their ummary judgment exhibit (Docket #135) be and the ame s i hereby **GRANTED**; s

IT IS FURTHER ORDERED that Plainti ' motion to di mi s De endant Cathy Je (Docket #138) be and the ame i hereby **GRANTED**; s

IT IS FURTHER ORDERED that De endant Cathy Je be and the s ame i hereby **DISMISSED** rom thi action; s

IT IS FURTHER ORDERED that Plainti ' motion or leave to s exceed the page limit or hi legal brie (Docket #139) be and the ame i s hereby **GRANTED**; s

IT IS FURTHER ORDERED that Plainti ' motion or anction s (Docket #14) be and the ame i hereby **DENIED**; s

IT IS FURTHER ORDERED that Plainti ' motion or leave to ile s upplemental exhibit (Docket #151) be and the ame i hereby **GRANTED**; s

IT IS FURTHER ORDERED that Plainti ' motion to trike the s Con truction De endant ' upplemental propo ed inding o act (Docket s #16) be and the ame i hereby **GRANTED**; s

T S FURTHER ORDERED that Plainti 's motion to clari y D (D ocket #172) be and the same is hereby **DEN IED**; and D

T S FURTHER ORDERED that this action be and the same is D hereby **D ISMISSED with prejudice**. D

The Clerk o the Court is directed to enter judgment accordingly.

D ated at Milwaukee, Wisconsin, this 28th day o March, 2019. D

D D D D D BY THE COURT: D
D
D
D _____ D
D D D D D J. P. Stadtmueller D
D D D D D U.S.D istrict Court D

CERTIFICATE OF SERVICE

I certify that on January 15, 2020 this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Bradley Girard
Bradley Girard