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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Peter K. Naki,

Plaintiff,

v.

Hawaii, State of, et al.,

Defendants.

No. CV-13-02189-PHX-JAT

ORDER

Pending before the Court is Peter K. Naki's ("Plaintiff's") Motion for Reconsideration (Doc. 131) pursuant to Fed. R. Civ. P. 59(e) of the Court's August 5, 2015, Order granting summary judgment in favor of Defendants Hawaii, State of, et al. (Doc. 127). The Court now rules on the motion.

I. Background

This matter arises out of injuries suffered by Plaintiff after he allegedly fell from the top bunk of his prison cell in Saguaro Correctional Center ("SCC"). (Doc. 127 at 1). Plaintiff alleges, among other claims, that Defendant[1] was negligent when it forced Plaintiff to use the top bunk in his cell without providing adequate safety measures and proper means to ascend to and descend from his bunk. (Doc. 39 at 7-8).

On August 5, 2015, the Court ruled on Defendant's Motion for Summary

[1] Defendants Hawaii, State of, the Hawaii Department of Public Safety, and Doe Defendants 1-100 were dismissed from the case. (Doc. 43). Corrections Corporation of America is the only remaining defendant in the matter.

Judgment (Doc. 108) and Motion to Exclude Plaintiff's Human Factors Expert Joellen Gill. (Doc. 107). The Court found—with respect to Plaintiff's proposed expert witness—that under Fed. R. Civ. P. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), Ms. Gill's proposed testimony was "unsupported by any reasoning, data, facts, principles, techniques, or methods," and would not be admitted. (Doc. 127 at 6). Turning to Defendant's motion for summary judgment, the Court found that "under Arizona law, when 'the alleged lack of care occurred during [a] professional or business activity, the plaintiff must present expert witness testimony'" to establish the requisite standard of care, (Doc. 127 at 9 (quoting *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 742 P.2d 808, 816 (Ariz. 1987))), and that "[c]ourts have applied this principle to prison operations." (*Id.* (citations omitted)). Absent Plaintiff's ability to proffer expert testimony, Defendant was entitled to summary judgment on the negligence claim. (*Id.*). The Court also granted Defendant summary judgment on Plaintiff's Title 42 U.S.C. § 1983 (2012) claim. (*Id.* at 10).

On August 19, 2015, Plaintiff filed a motion that the Court characterized as a Rule 59(e) motion to provide relief from a final judgment.[2] (Doc. 131). Although Plaintiff had simultaneously filed a notice of appeal, the Court retained jurisdiction over the matter under Fed. R. App. Proc. 4(a)(4)(B)(i). (Doc. 134 at 2). On September 11, 2015, the Court issued an Order that acknowledged it had "recently held that a claim for negligence against prison officials in the failure to provide medical attention in some circumstances does not require expert testimony as to the standard of care," and ordered Defendant to respond to Plaintiff's motion and address whether the issues surrounding the negligence claim fell within "the common understanding of jurors." (Doc. 134 at 5). Having reviewed the parties' filings, the Court now addresses the motion.

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[2] Plaintiff's motion failed to address the Court's rulings that barred Ms. Gill's testimony and granted Defendant summary judgment on the 42 U.S.C. § 1983 claim. The Court therefore confines its discussion to Plaintiff's contention that the Court committed clear error when it granted Defendant summary judgment on his negligence claim.

II. Legal Standard

"Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id.* (quoting *389 Orange Street Partners*, 179 F.3d 656, 665 (9th Cir. 1999)). "A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Id.* (emphasis in original).

III. Analysis

Plaintiff has not brought to the Court's attention newly discovered evidence pertaining to his case, and has not argued that there has been an intervening change in the controlling law. Rather, Plaintiff contends that the Court committed clear error in two respects: (1) the Court "overlooked the common law standard of care," because "[i]t is not necessary to have an expert witness to establish the standard of care in prisons"; (Doc. 131 at 2); and (2) the Court ignored Plaintiff's argument that his negligence claim was also based on Defendant repeatedly instructing Plaintiff to climb on to his bunk using unsecured "lockers" stacked on top of one another. (*Id.* at 4). The Court analyzes each argument in turn.

A. The Necessity of Expert Testimony to Establish the Standard of Care

The Court first considers Plaintiff's argument that under Arizona law a proffer of expert testimony is not necessary to establish the standard of care for a correctional facility. As stated in the August 5, 2015 Order: in ordinary negligence actions, "the standard imposed is that of the conduct of a reasonably prudent man under the

circumstances." *Bell v. Maricopa Medical Ctr.*, 755 P.2d 1180, 1182 (Ariz. Ct. App. 1988) (citing *Paul v. Holcomb*, 442 P.2d 559, 561 (Ariz. 1968)). (Doc. 127 at 9). "In such cases, it is not necessary for the plaintiff to present evidence to establish the standard of care because the jury can rely on its own experience in determining whether the defendant acted with reasonable care under the circumstances." *Id.* (citing *Rossell v. Volkswagen of Am.*, 709 P.2d 517, 523-24 (Ariz. 1985)). But under Arizona law, when "the alleged lack of care occurred during [a] professional or business activity, the plaintiff must present expert witness testimony as to the care and competence prevalent in the business or profession." *St. Joseph's Hosp. & Med. Ctr.*, 742 P.2d at 816. A number of courts have applied this standard to correctional facilities.[3]

Plaintiff argues that *Ballesteros*, 2013 Ariz. App. Unpub. LEXIS 19, at *10, stands for the principle that under Arizona law, "in prisons, the standard [of care] is that of a reasonably prudent person and it is not necessary for the plaintiff to present evidence to establish the standard of care . . . ." (Doc. 131 at 2 (citation omitted)). The Court disagrees. Ignoring the unpublished status of the opinion, the *Ballesteros* court did not articulate such a broad, sweeping holding. Rather, the court—after acknowledging that generally "the issue of inmate safety is not 'within the realm of the everyday experiences

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[3] *See e.g.*, *Gordon v. Kitsap County*, No. 45648-6-II, 2015 Wash. App. LEXIS 981, at *7-*8 (Wash. Ct. App. May 5, 2015) (internal quotation marks omitted) (concluding that "in light of the complex considerations inherent in the management of a correctional facility . . . expert testimony [is] necessary to establish what constitutes reasonable care"); *Red. Equip. PTE Ltd. v. BSE Tech, LLC*, No. 2:13-CV-1003-HRH, 2014 U.S. Dist. LEXIS 13070, at *17 (D. Ariz. Sept. 18, 2014) (citing *Porter v. Arizona Dep't of Corr.*, No. 2:09-CV-2479-HRH, 2012 U.S. Dist. LEXIS 186799, at *3–*5 (D. Ariz. Sept. 17, 2012)); *Villalobos v. Bd. of County Comm'rs*, 322 P.3d 439, 442 (N.M. Ct. App. 2014) (holding that expert testimony was required to assist the jury in rendering a decision on the standard of care imposed on prison officials monitoring inmates); *Seawright v. State*, No. 2:11-CV-1304-PHX-JAT, 2013 WL 4430928, at *1 (D. Ariz. Aug. 16, 2013) (noting that the plaintiff conceded "that the law in Arizona requires an expert witness to establish the standard of care" for a gross negligence and wrongful death claim brought against prison officials); *Ballesteros v. State*, 1 CA-CV 12-0005, 2013 Ariz. App. Unpub. LEXIS 19, at *10 (Ariz. Ct. App. Jan. 8, 2013) (quoting with approval *Hughes v. District of Columbia*, 425 A.2d 1299, 1303 (D.C. 1981), for the general proposition that "the issue of inmate safety is not 'within the realm of the everyday experiences of a lay person'"); *Porter*, 2012 U.S. Dist. LEXIS 186799, at *3–*5 (concluding that the "professional standard of care" applied "because the alleged lack of care was by correction officers acting in their professional capacity").

of a lay person,'" 2013 Ariz. App. Unpub. LEXIS 19, at *10 (quoting *Hughes*, 425 A.2d at 1303)—concluded that "inmate access to medical care, after an appropriate request, is within a lay person's realm of experience." *Id.* Thus, "under the circumstances of [the] case, the State and its prisons officials [were not] subject to a professional standard of care . . . ." *Id.* The court reasoned that because the plaintiff was "experiencing influenza-like symptoms" and "did not receive medical evaluation or treatment" for over a week despite having "repeatedly requested medical attention," *id.* at *2, "[t]he State's management of prisoner medical care and its failure to respond to Ballesteros's repeated requests for care [were] not factual issues outside the common understanding of jurors." *Id.* at *8-*9. The court's holding comports with ample Arizona precedent recognizing that expert testimony is necessary when "the jury [cannot] rely on its own experience in determining whether the defendant acted with reasonable care under the circumstances," *Bell*, 755 P.2d at 1182 (citation omitted). Consequently, Plaintiff's argument fails.

The Court's inquiry continues, however. As noted *supra*, the September 11, 2015, Order explained that this Court recently held in *Reidhead v. Arizona*, No. 2:12-CV-12-00089-PHX-JAT, 2014 U.S. Dist. LEXIS 85626, at *16-*18 (D. Ariz. June 24, 2014)—that at least in some circumstances—expert witness testimony is not required to establish the standard of care in a negligence claim against prison officials. (Doc. 134 at 5). Having reviewed the parties' filings and requisite case law, the Court concludes that Plaintiff's negligence claim is not within the "common understanding of jurors," *Rossell*, 709 P.2d at 524 (citation omitted), and *Reidhead* does not absolve Plaintiff of the requirement to proffer expert testimony on the standard of care.

At issue in *Reidhead* was the failure, by numerous prison officials, to monitor the condition of a female inmate exhibiting commonly recognized symptoms of a life-threatening health issue. Inmate Brenda Todd was in her cell when she first "reported to another inmate that she was having trouble breathing," and then when the on-duty "pill nurse" made her rounds that evening, Todd informed the nurse that she was suffering from the "classic symptoms" of a heart attack. *Reidhead*, 2014 U.S. Dist. LEXIS 85626,

at *2, *11. Specifically, Todd "was experiencing chest pain, left arm pain, numbness, tingling, pain in her neck, and throat constriction." *Id.* at *2. Despite "begging for help," *id.* (internal quotation marks omitted), the nurse told Todd to take an ibuprofen, drink water, lay down, and that there was "nothing" that the nurse could do for her. *Id.* at *2-*3. That evening, no efforts were made by on-site prison officials to monitor Todd or address the symptoms she articulated earlier. *Id.* at *3-*4. Todd's body was discovered the next morning by a corrections officer conducting a security check, and an autopsy revealed that she "had been dead for a number of hours." *Id.* at *4 (internal quotation marks omitted).

The defendants argued that the plaintiff's negligence claims must fail because the plaintiff failed to proffer expert witness testimony on "the standard of care of a pill nurse employed by the Arizona Department of Corrections." *Reidhead*, 2014 U.S. Dist. LEXIS 85626, at *10-*11. This Court rejected the argument, finding that in light of Todd exhibiting "the classic symptoms of a heart attack that are widely known even among those with no formal training," *id.* at *17, and the prison officials' failure to conduct standard "security checks," "investigate . . . banging noises," inform on-duty officials of the "identify of the inmate having breathing problems," and their failure to respond to Todd's numerous "requests for medical attention," *id.* at *16-*17, "[a] reasonable juror could find such negligence occurred not only by the pill nurse's failure to obtain medical aid for Todd, but also by the other prison officers' failure" to adequately carry out their job responsibilities. *Id.* Similarly, *Ballesteros*, *supra*, involved a visibly ill inmate repeatedly having his requests for medical assistance denied over the course of an entire week by prison officials—even as his condition worsened to the point of becoming terminal. 2013 Ariz. App. Unpub. LEXIS 19, at *10. *Reidhead* and *Ballesteros* therefore do not stand for the principle that the standard of care for correctional facilities is simply that of a reasonably prudent person, but rather both cases are examples of the exception under Arizona law recognizing that expert testimony on a profession's or business's standard of care is not necessary when "the negligence is so grossly apparent that a

layman would have no difficulty in recognizing it." *Bell*, 755 P.2d at 1183 n.1; *see also Nina Dejonghe v. E.F. Hutton & Co., Inc.*, 830 P.2d 862, 867 (Ariz. Ct. App. 1991).

In the instant matter, Plaintiff seeks to establish that Defendant was negligent by "failing to provide Plaintiff with proper . . . devices to enable [Plaintiff] to safely descend and/or ascend" from his top bunk, (Doc. 39 at 8), by "refusing to reassign Plaintiff from the top level of the bunk," (Doc. 39 at 9), by "instructing" Plaintiff to climb up to his bunk by using "unstable plastic locker crates," and by "repeatedly ignoring Plaintiff's complaints." (Doc. 39 at 9). First, the Court finds that Defendant's system-wide cell bunk policies involve "factual issues outside the common understanding of jurors." *Rossell*, 709 P.2d at 524 (citing *Atchison, Topeka, & Santa Fe Railway Co. v. Parr*, 391 P.2d 575, 578-79 (Ariz. 1964)). Specifically, Plaintiff's claim attacks the policy and process by which Defendant places inmates in particular cell bunks, the administrative process for requesting bunk changes, the authority of correctional officers to make such changes, the rationale behind Defendant's refusal to affix ladders or other fixtures to the top bunks, the frequency and severity of injuries suffered among the prison population from bunk falls, and consideration of inmates' physical characteristics in assigning bunks. Generally, "[p]rison operations are outside the common knowledge of the average juror," *Porter*, 2012 U.S. Dist. LEXIS 186799, at *14-*15, and the prison operation being attacked here is a system designed to house a large number of inmates of differing physical characteristics while balancing the interests of a particular inmate's physical safety and well-being with the safety of correctional officers and other inmates in the facility. These factual issues are beyond a lay juror's understanding. *Rossell*, 709 P.2d at 524 (citation omitted).

Second, Plaintiff has failed to establish "grossly apparent" negligence on the part of Defendant that would be obvious to a layman. *Bell*, 755 P.2d at 1183 n.1. Plaintiff's claim is premised on three principal factual allegations: (1) Defendant failed to provide Plaintiff with a ladder to access his bunk; (2) Defendant failed to permit Plaintiff to transfer to a lower bunk; and (3) Defendant instructed Plaintiff to access his bunk by

climbing up lockers that were stacked on top of one another.[4] (Doc. 39 at 8-9). In contrast, in *Reidhead*, the negligence was grossly apparent where the defendants flatly ignored the "classic symptoms" of widely recognizable trauma. 2014 U.S. Dist. LEXIS 85626, at *16-*17. In *Ballesteros*, the defendants' negligence was grossly apparent and evident to a lay juror where prison officials ignored an inmate's deteriorating physical condition to the point where it became terminal. 2013 Ariz. App. Unpub. LEXIS 19, at *10; *see also Tiller v. Von Pohle*, 230 P.2d 213 (Ariz. 1951) (negligence was grossly apparent when a doctor left a medical rag in a patient for two years); *Carranza v. Tucson Med. Ctr.*, 662 P.2d 455, 456-57 (Ariz. Ct. App. 1983) (concluding that expert testimony was not required to prevail on the theory of res ipsa for a burn on the patient's leg following heart surgery). Taken together, the Court finds that the facts alleged by Plaintiff do not rise to the level of what courts have treated as "grossly apparent" negligence in the past.

Because the Court has found that Plaintiff's negligence claim rests on factual issues beyond the common understanding of the average juror, and Plaintiff is unable to show that Defendant was negligent in a "grossly apparent" manner, the Court concludes that Plaintiff must proffer expert testimony to establish the standard of care in this case. *See St. Joseph's Hosp. & Med. Ctr.*, 742 P.2d at 816.

B. The Court's Consideration of Plaintiff's Factual Allegations

The Court now turns to Plaintiff's remaining argument, that the Court committed clear error when it ignored Plaintiff's argument that his negligence claim was based on Defendant's repeated instructions to Plaintiff directing him to climb on to his bunk by stacking unsecured boxes on top of one another in violation of institution staff instructions. (Doc. 131 at 2, 6). The Court disagrees. The Court considered all of Plaintiff's factual allegations when it ruled on whether Defendant was entitled to judgment as a matter of law. As a general matter, the Court has treated Plaintiff's claims

[4] The Court's consideration of this factual allegation is addressed fully *infra*.

against Defendant as a "professional standard of care case because the alleged lack of care was by correction officers acting in their professional capacity." *Porter*, 2012 U.S. Dist. LEXIS 186799, at *14-*15. Ordinarily, "[p]rison operations are outside the common knowledge of the average juror," as "[c]orrection officers have to manage potentially dangerous individuals living in close proximity to each other," and "[t]he standard of care required in such an environment is a matter beyond the ken of the average juror that requires expert testimony." *Id*. at *15 (citation and internal quotation marks omitted). However, Plaintiff need not present expert testimony if he can demonstrate that "the negligence is so grossly apparent that a layman would have no difficulty in recognizing it," *Bell*, 755 P.2d at 1183 n.1, as the plaintiff did in *Reidhead*, 2014 U.S. Dist. LEXIS 85626, at *16-*17.

The Court acknowledges that Plaintiff's factual allegation—that Warden Griego directed Plaintiff to use stacked and unsecured "lockers" to climb on to his top bunk—is a closer call. (Doc. 115-2 at 4). A cursory examination of the facts, allegedly showing that an individual in a position of authority directed Plaintiff to stack unsecured items on top of one another in order to hoist himself on to a bunk 4'8" off of the floor, (Doc. 115-1 at 8), may appear to be within the "common understanding of jurors." However, the court concludes otherwise for two reasons: (1) the allegation is based wholly on the management of "potentially dangerous individuals living in close proximity to each other" by correctional officers "acting in their professional capacity," *Porter*, 2012 U.S. Dist. LEXIS 186799, at *14-15; and (2) as the Court discussed *supra*, the placement of cell bunks and inmate assignments encompass myriad considerations to be weighed by the correctional facility that are "beyond the ken of the average juror." Further, although Plaintiff's allegation that Warden Griego violated Defendant's "internal policies and procedures" by instructing Plaintiff to use stacked lockers to climb on to his bunk may be evidence of negligence," *id.* at *14, that factual allegation alone does not constitute "grossly apparent" negligence. *Bell*, 755 P.2d at 1183 n.1. Thus, in the context of a correctional facility, Plaintiff's negligence claim rests on factual issues "beyond the

common understanding of jurors," and expert testimony is necessary. *Rossell*, 709 P.2d at 524 (citation omitted).

Based on the foregoing analysis, Plaintiff has failed to demonstrate that the Court committed clear error when it granted Defendant's motion for summary judgment. Accordingly the Court will deny Plaintiff's motion for reconsideration.

IV. Conclusion

For the aforementioned reasons,

IT IS ORDERED that Plaintiff's motion for reconsideration (Doc. 131) is hereby DENIED.

Dated this 14th day of October, 2015.

James A. Teilborg
Senior United States District Judge