UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

OMAR CASTILLON, DUSTY KNIGHT, JUSTIN PETERSON, LEON RUSSELL, CHRISTOHPER JORDAN, JACOB JUDD, MICHAEL FORD-BRIDGES, AND RAYMOND BRYANT,

Plaintiffs,

v.

CORRECTIONS CORPORATION OF AMERICA, INC.,

Defendant.

Case No. 1:12-CV-00559-EJL

MEMORANDUM DECISION AND ORDER

On July 7, 2016, this Court entered an Order adopting in part and rejecting in part Magistrate Judge Candy Dale's Report and Recommendation on a Motion for Summary Judgment by Defendant Correction Corporation of America (CCA). In its Order, this Court granted summary judgment to CCA on prisoner-Plaintiffs' "gang clustering theory," but denied summary judgment on Plaintiffs' theories regarding understaffing and municipal liability. CCA seeks reconsideration of the Court's order with respect to Plaintiffs' understaffing claim, and also asks the Court to analyze its previously-briefed argument seeking summary judgment on

Plaintiffs' punitive damages claim.[1] The Court here considers CCA's Motion for Reconsideration (Dkt. 245). As reconsideration is denied, the Court will issue a separate order resolving CCA's Motion to Bifurcate, as well as several evidentiary issues set forth in Plaintiffs' Motion for Reconsideration and CCA's Motion for Reconsideration of its Motion to Exclude Expert Testimony.

STANDARD OF REVIEW

Neither the Federal Rules of Civil Procedure nor the Local Rules provide for a motion to reconsider. However, the Ninth Circuit has stated that motions to reconsider should be treated as motions to alter or amend under Federal Rule of Civil Procedure 59(e). *Sierra On-Line, Inc. v. Phoenix Software, Inc*., 739 F.2d 1415, 1419 (9th Cir. 1984); *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985). Reconsideration under Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (quotation omitted). As a result, the Ninth Circuit has identified three reasons sufficient to warrant a court's reconsideration of a prior order: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; or (3) the need to correct

[1] This Court followed the framework of Judge Dale's Report and Recommendation ("R&R") in its Order, and focused on Plaintiff's objections to the R&R. The Court overlooked CCA's punitive damages argument since the R&R recommended granting summary judgment to CCA and thus did not discuss Plaintiffs' claim for punitive damages.

clear or manifest error in law or fact, to prevent manifest injustice. *Id*; *see also 389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (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 there is an intervening change in the controlling law.) CCA suggests "some, if not all, of these considerations merit reconsideration of the Court's Order on Defendant's Motion for Summary Judgment." (Dkt. 245, p. 3.)

Plaintiffs contend the Court should summarily deny CCA's Motion because it was not timely submitted. (Dkt. 247, pp. 4-6.) However, a district court may modify a pre-trial interlocutory order, such as this Court's Order denying summary judgment, "at any time prior to final judgment." *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996). Whenever possible, the Court strives to resolve matters on the merits, rather than on procedural technicalities. Thus, despite the purported untimeliness of CCA's motion, the Court will address CCA's arguments.

ANALYSIS

A. Plaintiffs' Understaffing Claim[2]

In its Motion for Reconsideration, CCA challenges the Court's conclusion that Plaintiffs presented a genuine issue of material fact with respect to the *Monell* causation required to state a claim for violation of the Eight Amendment due to understaffing. Briefly, in light of evidence that the DEF high security unit was overstaffed on the day of the May 5, 2012 attack against Plaintiffs, Judge Dale recommended summary judgment be granted in favor of CCA because Plaintiffs "failed to articulate how CCA's alleged policy of understaffing, when CCA on the day of the attack had more officers than the one pod control and four floor officers contractually required, caused the injuries of which they complain." (Dkt. 231, p. 47.) This Court rejected the recommendation after finding there was sufficient evidence to withstand summary judgment on Plaintiffs' claim that understaffing on May 4, 2012 was the moving force behind the attack. (Dkt. 236, p. 30.)

In so holding, this Court credited testimony from Sergeant Garth Carrick and Pod Control Officer Jacob Mills suggesting an inmate (Offender Campos) was not supervised due to understaffing the night of May 4, 2012 when he rigged a closet

[2] The Court will not here repeat the factual background of and legal framework for Plaintiffs' § 1983 claim against CCA, including the four elements Plaintiffs are required to establish under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691-94 (1978), already set forth in its Order denying summary judgment.

door and communicated with Plaintiffs' attackers. Plaintiffs' attackers used the rigged closet to hide and avoid detection by guards so they could surprise Plaintiffs and attempt to murder them on the morning of May 5, 2012. The Court held a reasonable juror could determine a lack of staffing on the night of May 4, 2012 was the "moving force" behind Plaintiffs' attack. "The testimony of Carrick and Mills regarding the lack of supervision the night of May 4, 2012, particularly when coupled with all of the evidence of frequent understaffing in the DEF unit in May of 2012, especially during the night shift, is sufficient to establish causation at the summary judgment stage." (*Id*., pp. 31-32.)

On reconsideration, CCA argues Plaintiffs' theory of understaffing on May 4, 2012 cannot withstand scrutiny because: (1) Plaintiffs have conceded that the contractually required, mandatory posts were filled during the second shift; (2) the Ninth Circuit has recently concluded in *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016) that the contractual staffing requirements were the least intrusive means of bringing ICC into compliance with the Eighth Amendment; and (3) the critical element of *Monell* causation is missing. (Dkt. 245, p. 4.).

1. Staffing on the Night of May 4, 2012

CCA suggests Plaintiffs' understaffing claim must fail because the DEF Unit was fully staffed on the night of May 4th. According to CCA Managing Director

Kevin Myers, who reviewed Kronos Time Detail Reports, shift rosters, and the DEF logbook for that night, "the DEF Unit was fully staffed throughout [the] second shift between May 4 and May 5, 2012." (Dkt. 245, p. 6.) During the second shift on May 4, 2012, the Idaho Correctional Center's contract mandated a total of four officers in DEF—one pod control officer and three floor officers. (Dkt. 131, ¶ 11.) At 10:23 p.m., the time Offender Campos tampered with the janitor's closet door in the F-1 Pod, Officer Mills, Officer Kelley, Officer Aivles, and Officer Coombs were on duty in the DEF Unit. In addition to Myers' testimony showing CCA purportedly had the contractual minimum of staff posted on the night of May 4th, CCA notes Officer Mills confirmed in his affidavit that he recalled one pod control officer and three floor officers were posted in the DEF Unit on the night of May 4th. (Dkt. 245, pp. 6-7) (citing *Mills Affidavit*, Dkt. 143-09, ¶¶ 17 & 21.)

At the outset, the Court notes that although the evidence regarding the specific staffing on May 4, 2012 is in the record, it was submitted in conjunction with CCA's March, 2014 Motion to Stay and for Protective Order, and was not provided in the hundreds of pages submitted in support of CCA's September, 2014 Motion for Summary Judgment. Although the record on summary judgment is replete with references to staffing on May 5, 2012, CCA did not offer any evidence on summary judgment regarding the specific staff present on May 4, 2012 when

the closet door was rigged. *See, e.g.*, Dkt. 166, *CCA's Motion for Summary Judgment*, pp. 3, 10-12, 19 (arguing the DEF Unit was overstaffed on May 5, 2012 but failing to address staffing the night of May 4th); Dkt. 167, *CCA's Statement of Facts*, pp. 7-8 (setting forth DEF staffing on May 5, 2012 but neglecting to discuss staffing on the night of May 4th); Dkt. 169, *Myers Affidavit in Support of Motion for Summary Judgment*, pp. 10-11 (reviewing staffing on May 5, 2012 and concluding DEF was fully staffed on May 5, without discussion of staffing on May 4); Dkt. 169-15, *Carrick Affidavit in Support of Motion for Summary Judgment*, ¶ 12 (discussing presence of staff and contractual minimum on May 5th); Dkt. 170-9, *Ex. 22k* (staff roster for first day shift of May 5, 2012); Dkt. 170-10, *Ex. 22l* (staff log book for May 5, 2012); Dkt. 202, p. 7, *CCA's Reply in Support of Motion for Summary Judgment* (erroneously suggesting the DEF Unit had four more officers posted than the contractual minimum on May 4, 2012 without identifying staff and/or specific times they were present).[3] When moving for summary

[3] Although CCA notes other officers, including Officers Chase, Goodman, Anderson and Rodriquez worked a portion of the second shift in the DEF Unit the night of May 4th, none of these officers were posted in the DEF Unit after 8:38 p.m. that night. Officers Anderson and Rodriguez left work at 7:47 p.m., and Officers Chase and Goodman were reassigned to the G floor in another unit at approximately 8:38 p.m. (Dkt. 245, p. 6.) Such officers cannot be counted within the number of staff posted to the DEF Unit throughout the second shift of May 4, 2012. As CCA concedes in its Motion for Reconsideration, only the contractual minimum of three floor officers and one pod control officer were present in the DEF Unit at 10:23 p.m., the time Offender Campos rigged the janitor's closet door. (*Id.*)

judgment, CCA failed to present specific evidence regarding staffing on the night of May 4, 2012 despite Plaintiffs' argument, in response to CCA's Motion for Summary Judgment, that the planning of the attack began in the evening of May 4, 2012, when Offender Campos "who was not being supervised due to the understaffing at the facility, rigged the closet door." (Dkt. 188, p. 10); *see also* (Dkt. 188-1, *Plaintiffs' Statement of Disputed Material Fact*, ¶¶ 11, 46, 59.)

As the party seeking summary judgment, CCA had the burden of not only informing the Court of the basis for its motion, but also identifying those portions of the record which it believed demonstrated the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed.R.Civ.P. 56(c)(1) (a party asserting that a fact cannot be genuinely disputed must support the assertion by "citing to particular parts of materials in the record."). A district court "need not examine the entire file for evidence establishing the [absence of] a genuine issue of fact, where the evidence is not set forth in the moving papers with adequate references so that it could be conveniently found." *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *see also Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). As the Seventh Circuit observed in its oft-quoted maxim, "'judges are not like pigs, hunting for truffles buried in briefs.'" *Independent Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). The fact

CCA failed to meet its burden when moving for summary judgment with respect to understaffing on May 4, 2012 is not a basis for granting reconsideration. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (a losing party cannot use a Rule 59(e) motion to raise arguments or present evidence that could have been raised before the entry of judgment).

CCA further suggests the Court gave Officer Mills' testimony regarding understaffing on May 4, 2012 credit "that the law does not allow under Fed. R. Civ. P. 56." (Dkt. 245, p. 7.) CCA argues Mills' testimony was conclusory and based on mere allegation and speculation that not enough staff were present on the night of May 4, 2012. (*Id*.) However, Officer Mills was one of the four officers present in the DEF Unit on May 4, 2012, and testified that neither he, nor any of the other officers on duty, witnessed Offender Campos tampering with the closet door. (Dkt. 143-9, ¶ 20.) Officer Mills does not base his conclusion that Offender Campos was not supervised on mere speculation, but instead offers an eye-witness account of the night in question. Further, CCA did not provide any testimony from the other officers on duty that night to counter Officer Mills' claim that Offender Campos was not supervised. As such, Officer Mills' testimony presents a genuine issue of material fact precluding summary judgment. *Blankenhorn v. City of Orange*, 485 F.3d 463, 483 (9th Cir. 2007) (reversing grant of summary judgment where eye-witness testimony contradicted police report).

CCA also suggests reconsideration is appropriate because Officer Mills "never challenged the *factual* evidence presented by Managing Director Myers that at least three floor officers and a pod officer were physically present at all times during the second shift of the unit; indeed, Mills even *corroborates* this fact." (Dkt. 245, p. 8) (emphasis in original). Apart from the fact that the factual evidence CCA belatedly identifies was not included with CCA's briefing on the Motion for Summary Judgment, the Court does not find such evidence conclusive for purposes of summary judgment.[4] Although CCA claims it is undisputed that it maintained the contractual minimum number of staff at all times during May 4, 2012, Plaintiffs have presented conflicting evidence sufficient to establish a genuine issue of material fact.

[4] As Plaintiffs note in their Response to CCA's Motion for Reconsideration, there is also evidence that undermines the validity of Myers' conclusions regarding staffing on the night of May 4, 2012. (Dkt. 247, pp. 10-13.) For instance, Myers admitted that the Kronos Data and the Log Books could not identify the location of correctional officers within the prison, and that CCA did not interview any of the officers on duty in DEF on the night of May 4, 2012 when it concluded the unit was fully staffed. (*Id.*) Although Mills stated he recalled three floor officer and one pod control officer on duty the night of May 4, he also testified such officers frequently left their posts during the shift. (Dkt. 143-9, ¶ 21.) For instance, Mills, who was the single pod control officer that night, did not work his entire shift in pod control because he was frequently called away to cover other posts. (*Id.*, ¶ 14.) However, even if the Court accepts CCA's conclusion that three floor officers and one pod control officer were present in the DEF Unit at all times during the second shift on May 4, 2012, Plaintiffs' evidence disputes whether the four officers actually satisfied the contractual minimum number of staff.

Significantly, IDOC Deputy Warden Tim Higgins testified during the contempt hearing in *Kelly v. Wengler* that Amendment Eight to CCA's contract with IDOC included minimum expectations as far as staffing patterns at the facility, but also required additional staffing in certain cases, such as when an inmate was out of his cell. (Dkt. 167-5, p. 5). Higgins confirmed that direct supervision was contractually required, regardless of whether the minimum staff was fulfilled. (*Id*.) (stating the contract "includes what the minimum expectations are as far as the staffing patterns at the facility... The contract itself also has some other areas that do identify when *additional staffing would be required*. As an example, if a town hospital inmate was assigned to town hospital, it stipulates that that person would be supervised. *It also says that if an inmate's out of his cell, they'd be supervised*.") (emphasis added). According to Higgins, it appears CCA was required to have more staff than the contractual minimum if more staff was needed to directly supervise inmates outside of their cells. However, Officer Mills testified DEF "did not have enough staff to provide uninterrupted and direct supervision of offenders during the second shift on May 4, 2012." (Dkt. 143-9, *Mills Affidavit*, ¶ 21.) Because there is a disputed issue of material fact with respect to whether Offender Campos was directly supervised, the Court cannot find CCA's staffing numbers "were at or above IDOC's contract requirements," for purposes of summary judgment. (Dkt. 245, p. 9.)

2. Kelly v. Wengler

As discussed more fully in the Court's Order denying summary judgment, various inmates at Idaho's Correctional Center brought suit against CCA in 2011 alleging Eighth Amendment violations. The parties entered into a settlement agreement ("Kelly Agreement") which, among other things, required CCA to maintain minimum staffing levels.[5] (Dkt. 236, pp. 17-18.) Two years after the Kelly Agreement was entered into, Judge David Carter held a show cause hearing to determine whether CCA had breached it. Judge Carter held CCA in civil contempt and breach, and extended the Kelly Agreement, which was supposed to last for only two years, for another two years. CCA appealed, *inter alia*, Judge Carter's contempt finding and extension of the settlement agreement.

On May 23, 2016, after Plaintiffs and CCA had fully briefed Plaintiffs' objections to the R&R, but before this Court entered its Order, the Ninth Circuit issued a decision upholding Judge Carter's contempt order in *Kelly v. Wengler*, 822 F.3d 1085 (2016). In upholding Judge Carter's extension of the Kelly Agreement, the Ninth Circuit explained:

> CCA further contends the district court abused its discretion by extending the entire settlement agreement instead of extending only the staffing

[5] Amendment 8 to the Kelly Agreement is the contractual provision Higgins referenced regarding the minimum number of staff and the direct supervision requirement.

> requirements embodied in paragraph 4… When the district court and the parties approved the settlement agreement, there was no dispute that its remedies were narrowly drawn, necessary, and the least intrusive means to bring ICC into compliance with the Eighth Amendment, in accordance with [18 U.S.C. § 3626(a)(1)(A)]. The same remedies remain narrowly drawn, necessary, and the least intrusive means to rectify CCA's continued Eighth Amendment violations.

Kelly, 822 F.3d at 1098.

CCA extends the above language to mean the Ninth Circuit held as long as CCA had three floor officers and one pod control officer on the night of May 4, 2012, it complied with the Eighth Amendment. (Dkt. 245, p. 10); (Dkt. 252, p. 2) (arguing, the "DEF Unit was fully staffed with three correctional officers and a pod control officer on the second/evening shift of May 4-5, 2012—a threshold number that the Ninth Circuit recently confirmed satisfies the constitutional minima for the DEF Unit in question.")

CCA misconstrues the Ninth Circuit's ruling. The *Kelly* opinion did not hold that as long as CCA had a contractual minimum number of staff all other Eight Amendment violations were cured. Indeed, in addition to staffing requirements, the Ninth Circuit highlighted CCA had failed to comply with other requirements of the Kelly Agreement:

> The district court's findings were not confined the failure of CCA to fulfill the staffing requirements. The court found, in addition, that the 'same supervisors who signed falsified record sheets remain[ed] on the job,' and that CCA's shoddy record keeping 'obscured who was working at what posts and at what times.' In light of these findings, the district court doubted

> CCA's 'compliance in other respects, such as whether every violent incident is reported.'

Kelly, 822 F.3d at 1098.

Further, in light of CCA's non-compliance, the Ninth Circuit held extension of the entire Kelly Agreement was necessary to rectify CCA's continued Eighth Amendment violations: "Further, the district court was reasonably concerned that CCA's failure to comply with staffing requirements affected its ability to comply with the settlement agreement's other requirements. The court's conclusion that the *extension of the entire agreement* was suitably tailored to correct CCA's non-compliance was thus not an abuse of discretion." *Id*. (emphasis added).

As Plaintiffs note, the Kelly Agreement did not just identify minimum staffing requirements, but also mandated that CCA directly supervise inmates. (Dkt. 247, p. 13); (Dkt. 248-2, ¶ 11); (Dkt. 167-5, p. 5.) Direct supervision required an officer to be in the same room as an inmate when an inmate was out of their cell. (Dkt. 188-2, p. 73); (Dkt. 224-2, pp. 40-41.) Thus, under CCA's logic, like a contractual minimum number of staff, direct supervision—another remedy of the Kelly Agreement—was "narrowly drawn, necessary and the least intrusive means to rectify CCA's continued Eighth Amendment violations." *Kelly*, 822 F.3d at 1098. Whether CCA fulfilled its obligation of direct supervision is a disputed issue of material fact precluding summary judgment.

In reply to Plaintiffs' opposition to reconsideration, CCA argues Plaintiffs' contention regarding direct supervision fails because this money damages lawsuit is not for contempt or enforcement of a settlement agreement. (Dkt. 252, p. 7.) However, it is CCA's claim that the Ninth Circuit held compliance with the Kelly Agreement constituted compliance with the Eighth Amendment. (Dkt. 245, p. 9) (stating the Ninth Circuit held in Kelly that "the staffing requirements and other contractual obligations imposed on CCA were the least intrusive means to bring the prison in compliance with the Eighth Amendment.") CCA cannot ignore other remedies provided in the Kelly Agreement, such as the requirement of direct supervision, the Ninth Circuit also extended and, by implication, held necessary to satisfy the Eighth Amendment in *Kelly*. 822 F.3d at 1098.

CCA also suggests:

> Plaintiffs' reasoning is circular and "rests on a flawed premise about the number of staff physically present: 'CCA violated the [Kelly Agreement] on May 4, 2012 because Officer Campos was not directly supervised due to inadequate staffing.' If the DEF Unit was fully staffed as shown above, it stands to reason that Plaintiffs' direct supervision and settlement violation arguments must fail."

(Dkt. 252, p. 7) (quoting *Plaintiffs' Response to CCA's Motion for Reconsideration*, Dkt. 247, p.13.)

The Court disagrees. If direct supervision is required under the Kelly Agreement, and the contractual minimum wasn't enough to allow for direct supervision, then the number of staff present on May 4, 2012 may not have been

enough to keep Plaintiffs safe. As the Ninth Circuit held, "there was no dispute that [the Kelly Agreement's] remedies were narrowly drawn, necessary, and the least intrusive means to bring ICC into compliance with the Eighth Amendment." *Kelly*, 822 F.3d at 1098. Further, as the testimony of Higgins, highlighted above, indicates, CCA was required to have staff above the contractual minimum if such staff was necessary to directly supervise inmates. (Dkt. 167-5, p. 5.)

Interestingly, Judge Carter ordered an Independent Monitor ("IM") o check CCA's compliance with the staffing requirements established in the Kelly Agreement after finding CCA in contempt for violating the agreement. (Dkt. 168-15, p. 1.); *see also Kelly v. Wengler*, 979 F. Supp.2d 1104, 1116 (D. Idaho 2013.) The IM visited ICC during 70 on-site inspections between November 15, 2013 and June 29, 2014. During every on-site inspection, the IM found no violations of the staffing requirements established in Amendment 8. (Dkt. 168-15, p. 1.) In fact, the night shift frequently had *10 or more* staff above the Amendment 8 requirements. (*Id.*) That CCA staffed its facility with 10 or more staff beyond the minimum requirement specified in Amendment 8 after it was held in contempt of the Kelly Agreement suggests the contractual minimum was not sufficient to satisfy CCA's additional contractual and constitutional obligations to the prisoners housed at ICC.

3. Causation

CCA argues even if the Court concludes that a triable issue is presented as to whether the DEF Unit was staffed on May 4th in accordance with contractual and constitutional requirements, "Plaintiffs do not have the but-for causation evidence to reach a jury." (Dkt. 245, p. 10.) To establish the alleged lack of staff the night of May 4th prevented the direct supervision of Offender Campos, Plaintiffs relied upon the declaration of Officer Mills and a Disciplinary Offense Report by Sergeant Garth Carrick, who reviewed the surveillance video of that night to later charge Campos with tampering with the door. CCA suggests Plaintiffs' evidence is speculative because "inmate Campos was an assigned orderly or janitor, whose duties required him to work with janitor supplies… and there was no reason for his presence at the closet to spark suspicion by the three floor officers and pod officer on duty." (Dkt. 245, p. 11.) Thus, regardless of whether Campos was directly supervised, "there would have been no logical reason for any officer to question Campos' janitorial activities that night." (*Id.*)

Plaintiffs' evidence is entitled to more weight than CCA suggests. First, with respect to Carrick's report, CCA contends "Plaintiffs' evidence shows only that Carrick used surveillance video after the assault to charge inmate Campos with tampering with the janitor door because one viewing the video could see him at the closet door." (*Id.*) Carrick's statement actually says more than this, explaining the

surveillance video showed Offender Campos, at approximately 10:23 p.m., tampering with the closet door and communicating with the aggressors. (Dkt. 124, p. 4.) In the absence of any testimony from CCA to the contrary, it is reasonable to assume a guard directly supervising Offender Campos would have been suspicious after watching him "tamper" with the closet door and communicate with the attackers through their cell doors.

Moreover, any "speculation" regarding what Campos could actually be seen doing on the surveillance video is a result of CCA's actions. CCA has admitted it failed to preserve the surveillance footage from the night of May 4, 2012. (Dkt. 143, pp. 5-6.) CCA cannot fault Plaintiffs for relying upon testimony from the only person who viewed Campos' actions when CCA failed to preserve evidence that could supposedly contradict this account.[6]

Second, Mills' affidavit is the only evidence before the Court regarding what the officers actually present in the DEF Unit on the night of May 4th witnessed. Mills stated, "I recall that neither I, nor any other officers on duty during the second shift on May 4, 2012 directly supervised Offender Campos when we accessed the janitor's closet on the F1 pod… DEF did not have enough staff to provide uninterrupted and direct supervision of offenders during the second shift

[6] CCA has not submitted an affidavit from Carrick to suggest the surveillance video only showed Campos at the closet door, rather than tampering with the door.

on May 4, 2012… Without an additional officer to relieve the four staff posted within DEF, gaps in coverage occurred when officers used the restroom or had to leave their post. " (Dkt. 143-9, ¶ 20.) Although CCA had the burden on summary judgment to set forth specific evidence to establish an absence of material fact, it has not submitted evidence from any of the other guards on duty to dispute Mills' testimony regarding direct supervision.

Finally, CCA suggests a Seventh Circuit case illustrates why Plaintiffs' May 4th staffing allegations are inconsequential to the May 5th assault. (Dkt. 245, p. 12.) In *Thomas v. Cook Cnty. Sheriff's Dept*., 604 F.3d 293 (7th Cir. 2010), a pretrial detainee died of pneumococcal meningitis and his mother brought a § 1983 action against the sheriff's department and various officers and medical technicians at the county jail. Following a jury verdict for the mother, the Seventh Circuit affirmed the verdict against the individual officers, but reversed the verdict against the sheriff's department. In so holding, the Seventh Circuit assumed the jail was understaffed but nonetheless concluded proof of causation was absent:

> Because the jury held the individual officers liable, it must have found that the officers deliberately ignored Smith's condition. But the evidence does not demonstrate that their actions had anything to do with understaffing. No one testified or even argued that the officers would have acted differently if more of them were on duty. How many officers would the Sheriff need to hire to ensure that no one deliberately ignores a complaint or medical request? We do not know.

Id. at 306-07.

Judge Dale similarly held, "Plaintiffs have failed to articulate how CCA's alleged policy of understaffing, when CCA on the day of the attack had [at least three] more officers than the one pod control and four floor officers contractually required, caused the injuries of which they now complain." (Dkt. 231, pp. 46-47.) Plaintiffs' understaffing claim with respect to the night of May 4, 2012 does not suffer the same deficiency identified by the Seventh Circuit in *Thomas* or by Judge Dale with respect to staffing of ICC on May 5th. That is, Plaintiffs have articulated how understaffing on May 4th caused the injuries of which they complain. Under Plaintiffs' theory, if enough staff had been present to provide uninterrupted direct supervision of Offender Campos, he would not have had the opportunity to tamper with the closet door and communicate with Plaintiffs' attackers. As the Court held in its Order denying summary judgment, [a]bsent Offender Campos' closet rigging on May 4, 2012, a reasonable juror could conclude the assailants would not have been able to attack Plaintiffs on the morning of May 5, 2012." (Dkt. 236, p. 33.) The Court again finds Plaintiffs have established *Monell* causation for purposes of summary judgment.

4. Punitive Damages

On summary judgment, CCA argued that it was either entitled to immunity on Plaintiffs' claim for punitive damages, or that the evidence was insufficient to

satisfy the heightened proof requirements for punitive damages. (Dkt. 166-1, pp. 18-19.) As the Court did not address CCA's arguments regarding punitive damages in its Order denying summary judgment, reconsideration is appropriate to consider CCA's immunity and evidence-insufficiency arguments.

Public entities are immune from punitive damages under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). However, the defense of qualified immunity is not categorically available to private actors, like CCA, who act under the color of state law. *Richardson v. McKnight*, 521 U.S. 399, 404 (1997) (finding the qualified immunity defense unavailable to private prison guards because "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision, undertakes that task for profit and potentially in competition with other firms.")

Where, as here, qualified immunity is not available to a defendant who is a private actor in an action brought under 42 U.S.C. § 1983, the Ninth Circuit has held the defendant nevertheless may assert a good faith defense to liability. *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (2008). "A good faith defense fully protects defendants who act in good faith and thus provides them with protection similar to qualified immunity." *Franklin v. Fox*, 2001 WL 114438, *5 (N.D. Cal. 2001). "Application of the good faith defense turns on the defendant's subjective good faith; because good faith in an affirmative defense to liability, the

defendant bears the burden of proof." *Sundquist v. Philip*, 2008 WL 8549452 (N.D. Cal. 2008).

In *Clement*, the Ninth Circuit held a towing company was entitled to assert a good faith defense where the "company did its best to follow the law and had no reason to suspect that there would be a constitutional challenge to its actions." 518 F.3 at 1097. Further, the "constitutional defect—a lack of notice to the car's owner—could not have been observed by the towing company at the time when the tow was conducted; there would be no easy way for a private towing company to know whether the owner had been notified or not." *Id*. Here, by contrast, there is ample evidence in the record to suggest CCA not only should have been aware of the constitutional violation (understaffing), but was aware it was severely understaffing its prison and consciously failed to correct the violation. (Dkt. 236, pp. 16-28.) CCA is not entitled to summary judgment on the basis of the good faith defense.

CCA also suggests Plaintiffs' punitive damages claim should be dismissed because there exists no evidence of CCA acting with an evil motive or intent, or a reckless or callous indifference to the constitutional rights of others. (Dkt. 166-1, p. 18) (citations omitted). Punitive damages may be awarded on a finding of reckless or callous disregard of or indifference to a prisoner's rights or safety. *Smith v. Wade*, 461 U.S. 30, 37 (1983).

The punitive damages claim in this case is a close call. However, the Court finds the evidence Plaintiffs submitted on summary judgment creates a genuine dispute of material fact as to whether CCA acted with reckless disregard for the safety and rights of Plaintiffs. (Dkt. 236, pp. 16-28.) Accordingly, CCA is not entitled to summary judgment on Plaintiffs' punitive damages claim.

The Court will reserve its ruling on whether or not the punitive damages claim will be submitted to the jury until the parties have rested.

ORDER

NOW THEREFORE, it is hereby ORDERED:

1. CCA'S Motion for Reconsideration (Dkt. 245) is **DENIED**.

DATED: November 10, 2016

Edward J. Lodge
United States District Judge