FILED
United States Court of Appeal
Tenth Circuit

May 20, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT JW MCCLELAND,

Plaintiff - Appellant,

v.

RICK RAEMISCH; RENAE JORDAN; SUSAN TIONA; DEBORAH BORREGO; JOANNE MCGREW; DAYNA JOHNSON,

Defendants - Appellees.

No. 21-1303
(D.C. No. 1:18-CV-00233-PAB-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **KELLY**, and **CARSON**, Circuit Judges.

Plaintiff Robert JW McCleland, a pro se inmate, asserted Eighth Amendment violations under 42 U.S.C. § 1983 against employees of the Colorado Department of Corrections ("CDOC"). His claims were premised on an alleged delay in treatment for hepatitis C. The district court granted summary judgment in favor of the defendants, and we affirmed in *McCleland v. Raemisch*, No. 20-1390, 2021 WL

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

4469947 (10th Cir. Sept. 30, 2021) ("*McCleland I*"), *cert. denied*, 142 S. Ct. 1155 (2022). While that appeal was pending, Mr. McCleland filed a motion for relief from judgment under Fed. R. Civ. P. 60(b), which the district court denied. He now appeals that denial. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

Before his incarceration, Mr. McCleland contracted hepatitis C virus ("HCV"), which is primarily associated with liver damage. Mr. McCleland claims that while in prison he experienced non-liver manifestations of HCV and therefore requested an antiviral therapy. CDOC policy, however, mandated therapy only when an inmate's blood test indicated a particular level of liver scarring. Mr. McCleland's blood tests between June 2016 and December 2017 yielded results that did not require the therapy under that policy, so the defendants denied his request.

Mr. McCleland filed his lawsuit in February 2018, alleging the defendants were deliberately indifferent to his medical needs in violation of the Eighth Amendment. In July 2018, the CDOC revised its policy, lowering the threshold to qualify for the antiviral therapy. Based on a more recent blood test, Mr. McCleland qualified for the treatment, which he completed three months later. Lab tests in January 2019 showed he was clear of HCV.

The CDOC policy change occurred five months after Mr. McCleland filed his lawsuit, so the focus of his claims shifted to whether the alleged delay in administering the therapy caused actionable injury. During discovery, he filed three motions for appointment of counsel, each stressing the need for expert medical

testimony. The district court denied those motions. Mr. McCleland later moved for appointment of an independent expert witness under Fed. R. Evid. 706. The court denied that motion, concluding Mr. McCleland sought an expert not to assist the court but to support his view of the evidence. He then filed a fourth motion for appointment of counsel, which again was denied.

The defendants filed a summary judgment motion relying on expert declarations. The former CDOC chief medical officer averred that while there was at best an association between HCV and non-liver disease, no studies had established causation. Another expert averred that lab tests conducted on Mr. McCleland were inconclusive or unremarkable for the conditions he claimed were caused by the delay in his HCV treatment. The expert acknowledged, however, that in October 2019, Mr. McCleland had been diagnosed with chronic kidney disease of unknown cause. Mr. McCleland responded with citations to medical literature indicating a causal link between HCV and kidney disease. He also submitted two expert declarations that had been filed in other lawsuits.

The magistrate judge recommended granting the defendants' motion. *See* Fed. R. Civ. P. 72(b)(1). She declined to consider Mr. McCleland's medical literature because he offered no expert to interpret it and he lacked the expertise to do so himself. She thus deemed the defendants' evidence undisputed as to whether the delay caused any injury. Mr. McCleland objected to the recommendation under Fed. R. Civ. P. 72(b)(2) on the ground that his lack of expert evidence should not be held against him given his motions for the appointment of counsel and an

independent expert. The district court accepted the recommendation over Mr. McCleland's objection, *see* Fed. R. Civ. P. 72(b)(3), and Mr. McCleland appealed.

Mr. McCleland argued on appeal that the district court erred in granting summary judgment and that it should have appointed counsel and an expert. We rejected these arguments, holding: "The district court did not abuse its discretion when it refused to appoint counsel or an expert. In turn, it properly granted summary judgment to defendants because [Mr.] McCleland lacked evidence necessary to prove the causation element of his case." *McCleland I*, 2021 WL 4469947, at *6.

During the pendency of Mr. McCleland's appeal, he filed a motion in the district court for relief from judgment under Fed. R. Civ. P. 60(b). First, he argued that a kidney biopsy revealed new evidence concerning the connection between his kidney disease and HCV, and he therefore sought relief under Rule 60(b)(2). Second, he sought relief under Rule 60(b)(3) based on his assertions that (1) the defendants misrepresented the 2016 medical community's understanding when they asserted no causative link had been established between HCV and non-liver disease, and (2) Mr. McCleland's lab tests could not have been used to determine causation. With respect to both requests for relief, Mr. McCleland asked the district court to take judicial notice of additional factual conclusions he gleaned from medical texts. Finally, he renewed his request for the appointment of an expert.

The defendants did not respond to Mr. McCleland's motion, but the district court nevertheless held Mr. McCleland had not carried his burden under Rule 60(b).

The district court rejected Mr. McCleland's Rule 60(b)(2) and 60(b)(3) requests because they depended on the court taking judicial notice of various medical texts, which the court refused to do. The court also rejected his request for the appointment of an expert on the ground that it was simply a renewed argument the district court had already rejected. This appeal followed.

II. DISCUSSION

"We review the district court's denial of a Rule 60(b) motion for abuse of discretion." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000). Although a district court has discretion to grant relief as justice requires, "such relief is extraordinary and may only be granted in exceptional circumstances." *Id.* (internal quotation marks omitted). We hold that the circumstances of Mr. McCleland's case do not warrant the extraordinary relief contemplated by Rule 60(b).

A. Rule 60(b)(2) Request for Relief

Mr. McCleland argues the district court abused its discretion when it denied his motion based on newly discovered evidence under Rule 60(b)(2). To prevail on such a motion, the movant must show that (1) the evidence is newly discovered, (2) the movant was diligent in discovering the evidence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence would have been material, and (5) the evidence probably would have produced a different a result. *Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1529 (10th Cir. 1997).

Mr. McCleland's requested relief required the district court to take judicial notice of purported facts that he says flow from the results of his kidney biopsy.

Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of a particular fact only if it is "not subject to reasonable dispute." Fed. R. Evid. 201(b). Mr. McCleland says in his opening brief that he asked the district court to take judicial notice that: (1) his newly discovered biopsy results prove he has suffered kidney disease; (2) medical literature shows that HCV causes specific types of kidney damage; (3) it was common knowledge in the 2016 medical community that HCV causes kidney damage; and (4) the 2016 medical community knew that HCV-associated kidney damage was an objectively serious reason to treat HCV. The district court declined to take judicial notice of these purported facts and therefore denied relief. This was not an abuse of discretion, for two reasons.

First, the facts Mr. McCleland wishes the court to take judicial notice of are very much in dispute. The defendants' expert declarations, submitted in support of their summary judgment motion, averred that no studies have proven HCV causes non-liver disease and that Mr. McCleland's lab tests were mostly inconclusive for diseases he claimed were caused by delay in HCV treatment. *See McCleland*, 2021 WL 4469947, at *2. Mr. McCleland's purported facts therefore do not qualify as the type of facts of which a court may take judicial notice under Rule 201(b). *See United States v. Boyd*, 289 F.3d 1254, 1258 (10th Cir. 2002) ("[T]ak[ing] judicial notice of a fact whose application is in dispute . . . raises doubt as to whether the parties received a fair hearing." (internal quotation marks omitted)).

Second, in granting summary judgment, the district court held that Mr. McCleland's own interpretations of the medical evidence are insufficient because

he lacks the necessary medical expertise. We affirmed and noted: "If [Mr.] McCleland needs expert testimony to prove his claims—and he has never argued otherwise—then his failure to present expert causation testimony at summary judgment mandated judgment in defendants' favor." *McCleland I*, 2021 WL 4469947, at *3. Mr. McCleland still does not have an expert to interpret his newly discovered evidence. Accordingly, Mr. McCleland's biopsy results, together with the medical facts and literature he wishes the court to take judicial notice of, would not have produced a different result. *See Wolfgang*, 111 F.3d at 1529.

In short, we hold that the district court did not abuse its discretion in denying relief based on newly discovered evidence under Rule 60(b)(2).

B. Rule 60(b)(3) Request for Relief

Mr. McCleland argues the district court erred in denying relief based on Rule 60(b)(3), which allows a court to relieve a party from a final judgment based on "fraud . . . misrepresentation, or misconduct by an opposing party." The party relying on Rule 60(b)(3) "must, by adequate proof, clearly substantiate the claim of fraud, misconduct or misrepresentation." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1290 (10th Cir. 2005). The movant must show that the adverse party "acted with an intent to deceive or defraud the court, by means of a deliberately planned and carefully executed scheme." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999) (internal quotation marks omitted).

The district court did not abuse its discretion in denying Mr. McCleland's motion under Rule 60(b)(3). Mr. McCleland has not established the defendants acted

with an intent to deceive or defraud by means of a deliberate plan and carefully executed scheme. *Id.* at 1231. In addition, it appears that at the time the defendants filed their summary judgment motion, the district court was fully aware of the medical literature on which Mr. McCleland now relies in part for his Rule 60(b)(3) request. *See* R. Vol. II at 49 (acknowledging that "some [medical] literature may link chronic [HCV] to . . . non-liver . . . manifestations").

C. Appointment of an Expert

Finally, Mr. McCleland argues the district court erred in failing to appoint an expert under Fed. R. Evid. 706, "to help the court understand the medical facts that Plaintiff presented in his [Rule] 60(b) motion." Opening Br. at 13. We discern no error. As we observed in *McCleland I*, we review Rule 706 rulings for an abuse of discretion. 2021 WL 4469947, at *4 (citing *Rachel v. Troutt*, 820 F.3d 390, 397 (10th Cir. 2016)). Mr. McCleland argues the district court abused its discretion because it held he needed a medical expert to present his facts, yet refused to appoint an expert because his argument was not sufficiently complex. Mr. McCleland has already presented this argument, and we rejected it. As we held:

> [W]e see no incongruity. Rule 706 was not designed to fill in the gaps for a party who cannot find or afford an expert. We assume the district court could use that rule to solicit an independent second opinion in a case like this . . . , but we hold it was not an abuse of discretion to decline to do so.

Id. at *5 (citing *Rachel*, 820 F.3d at 398). Nothing in Mr. McCleland's Rule 60(b) motion changes this analysis.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's order denying Mr. McCleland's motion for Rule 60(b) relief and denying his related request for the appointment of an expert. We further deny Mr. McCleland's motion for the appointment of appellate counsel.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 18-cv-00233-PAB-NYW

ROBERT JW McCLELAND,

Plaintiff,

v.

RICK RAEMISCH,
RENAE JORDAN,
SUSAN TIONA,
DEBORAH BORREGO,
JOANNE McGREW, and
DAYNA JOHNSON,

Defendants.

ORDER

This matter is before the Court on plaintiff's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. Rule 60(b) [Docket No. 242]. The Court previously accepted in part the magistrate judge's recommendation, Docket No. 215, that the Court grant Defendant Joanne McGrew's Motion for Summary Judgment [Docket No. 169] and the CDOC Defendants' Motion for Summary Judgment [Docket No. 176]. Docket No. 226.[1] Both motions were granted over plaintiff's objections to the recommendation. The Court closed the case on September 29, 2020, *id.* at 15, and final judgment was entered the same day. Docket No. 227. Plaintiff now seeks relief under Federal Rule of Civil Procedure 60(b). *See generally* Docket No. 242. No

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[1] "CDOC defendants" collectively refers to defendants Rick Raemisch, Renae Jordan, Susan Tiona, Deborah Borrego, and Dayna Johnson from the Colorado Department of Corrections ("CDOC"). *See* Docket No. 176 at 1.

defendant responded to the motion.[2]

Relief after judgment is discretionary and only appropriate based on "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). Because such relief is "extraordinary and may only be granted in exceptional circumstances," *Servants of the Paraclete v. John Does*, 204 F.3d 1005, 1009 (10th Cir. 2000), parties seeking relief under Rule 60(b) have a high hurdle to overcome. *Davis v. Kansas Dep't of Corr.*, 507 F.3d 1246, 1248 (10th Cir. 2007). Rule 60(b) motions should not be treated as a substitute for an appeal. *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289 (10th Cir. 2005).

Rule 60(b)(6) has been described as a "grand reservoir of equitable power to do justice in a particular case." *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 722 (10th Cir. 1975) (en banc) (citation omitted). Relief under Rule 60(b)(6) is appropriate when circumstances are so "unusual or compelling" that extraordinary relief is warranted or when it "offends justice" to deny such relief. *Cashner v. Freedom Stores, Inc.*, 98 F.3d

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[2] The Court assumes the parties familiarity with this matter and will not detail the procedural history or background facts beyond what is necessary to resolve this motion. Additional background can be found in previous orders and recommendations. *See, e.g.*, Docket Nos. 215, 226.

572, 580 (10th Cir. 1996). Courts have granted relief under Rule 60(b)(6) "when, after entry of judgment, events not contemplated by the moving party render enforcement of the judgment inequitable," where a party is indigent, or when it offends justice to deny such relief. *Id.* at 579; *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231–32 (10th Cir. 1999).

Plaintiff seeks relief under Rule 60(b) in light of "newly discovered evidence" of "past MPGN on histological examination of [plaintiff's] kidneys." Docket No. 242 at 2.[3] Plaintiff concedes that the MPGN is "no longer active," but asserts that it is "definitive proof that his kidneys have sustained permanent damage from past infection, and the reason [plaintiff] no longer has normal kidney function." *Id.* Plaintiff also provides "peer reviewed research, medical diagnostic tests, and clinical medical tests confirming the link between chronic [Hepatitis-C virus ("HCV")] infection, renal damage, and Sjogren's Syndrome." *Id.*

Plaintiff makes two initial requests – first, that the Court to take judicial notice of "the facts he presents," which he says are "quotes and cites" from "peer reviewed published medical research, medical school college text books, and medical texts used by clinicians and specialists" and, second, that the Court appoint a medical expert in his case. *Id.* at 3. He also purports to provide (1) newly discovered medical evidence of renal damage "on kidney biopsy results of the type caused by chronic HCV" and "urinalysis and blood tests showing evidence of kidney dysfunction"; (2) evidence of misrepresentation by the CDOC defendants of the "etiology, association, and treatment of extrahepatic manifestations of HCV"; and (3) evidence of misrepresentation by the

[3] Plaintiff does not define the term "MPGN."

CDOC defendants of "untimely serologic and kidney function tests." *Id.* at 3–4. The Court considers each of these in turn.

Plaintiff's request for judicial notice is a renewed argument that plaintiff made originally in his objections to the magistrate judge's recommendation. In his objections, plaintiff argued that the magistrate judge erred by not taking judicial notice of plaintiff's chronic kidney disease, "which could have been accurately and readily determined from the sources [plaintiff] provided, whose accuracy cannot reasonably be questioned," and from which a reasonable jury could have concluded that plaintiff's kidneys are not "normal functioning." *See* Docket No. 220 at 3–4. The Court found, however, that plaintiff did not request that the magistrate judge take judicial notice of any documents in either of his responses to defendants' motions for summary judgment. Docket No. 226 at 9. As such, the Court declined to consider plaintiff's objection that the magistrate judge erred in not taking judicial notice of the information that plaintiff submitted. *Id.* (citing *Goodloe v. U.S. Parole Comm'n*, No. 06-cv-00212-CMA-BNB, 2008 WL 5156447, at *1 (D. Colo. Dec. 8, 2008); *Parks v. Persels & Assocs., LLC*, 509 B.R. 345, 357 (D. Kan. 2014) ("Generally, courts do not consider new arguments and new evidence raised in objections to a magistrate judge's report and recommendation that were not raised, and thus were not considered, by the magistrate judge.") (quotation omitted)). Nevertheless, the Court found that, even if plaintiff had timely requested that the magistrate judge take judicial notice of the medical literature that plaintiff submitted, the magistrate judge did not err by not doing so. *Id.* (citing *Mack v. Friedman*, 2008 WL 11439337, at *10 n.2 (N.D. Cal. Mar. 5, 2008) ("Mack's request

that the court take judicial notice of the two articles is denied because the articles and statements therein are not facts not subject to reasonable dispute that qualify for judicial notice under Federal Rule of Evidence 201. The articles also are inadmissible hearsay and are excluded under Federal Rules of Evidence 801 and 802. Mack's own interpretation of those articles and opinion about the appropriate care for his injury is not competent evidence because he has not shown he has any medical expertise.").

The Court finds no error in its previous determination that the magistrate judge did not err by not taking judicial notice of these facts, *see Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived."); *see also Maurer v. Idaho Dep't of Corr.*, 799 F. App'x 612, 614 n.1 (10th Cir. 2020) (unpublished), and plaintiff identifies no mistake, neglect, new evidence, fraud, or misrepresentation that could warrant "extraordinary" and "exceptional" relief under Rule 60(b). *See Servants of the Paraclete*, 204 F.3d at 1009. The Court will again deny plaintiff's request for judicial notice.

Plaintiff next requests that the Court appoint a medical expert in his case. As with plaintiff's renewed request for judicial notice, the Court considered plaintiff's request for the appointment of an expert witness in ruling on his objections to the magistrate judge's recommendation. *See* Docket No. 226 at 6–9. The Court found plaintiff's objection to be untimely because plaintiff did not object to the magistrate judge's order denying his motion to appoint an expert witness within 14 days of the order, as required by Federal Rule of Civil Procedure 72(a). *Id.* at 7. Nevertheless, the

Court considered plaintiff's request as if timely raised and found that the issues in plaintiff's case were not so complex as to require a medical expert to assist the Court. *Id.* at 7–9 (citing *Rachel v. Troutt*, 820 F.3d 390, 397 (10th Cir. 2016) (holding that district court did not abuse its discretion in declining to appoint expert witness where "the nature of [the plaintiff's] underlying claim," which was a deliberate indifference in medial treatment claim, was "not sufficiently complicated to require an independent medical expert"); *McClendon v. City of Albuquerque*, 2015 WL 13667177, at *4 (D.N.M. Oct. 13, 2015) ("[T]he purpose of Rule 706 is to assist *the court* in evaluating contradictory or complex evidence or issues. It is not designed to aid a party's prosecution of his own case.")). In his motion, plaintiff explains his efforts to retain a medical expert and also requests that the Court contact a doctor who plaintiff states has testified about similar issues previously. Docket No. 242 at 3. Plaintiff has not, however, identified any mistake, neglect, new evidence, fraud, or misrepresentation that could justify the relief he seeks. *See Servants of the Paraclete*, 204 F.3d at 1009. As such, the Court will deny this portion of his motion.

The Court next turns to plaintiff's request for relief based on new evidence. Docket No. 242 at 4–6. Plaintiff states that he underwent a kidney biopsy on December 11, 2020 but that "nothing was mentioned" by CDOC nephrologist Dr. June Scott about plaintiff's HCV infection to the kidney pathologist. *Id.* at 4. Plaintiff then lists four pieces of purportedly new evidence, which he appears to argue was discovered from his biopsy, and asks the Court to take judicial notice of "medical facts," which he says "pertain[]" to the four pieces of new evidence. *Id.* at 4–5. Next, he states that he has

undergone serologic kidney function tests and urinalysis since summary judgment and provides nine additional pieces of purportedly new evidence of abnormal kidney function that he says were revealed by the additional testing. *Id.* at 5. He then again asks the Court to take judicial notice of various medical facts. *Id.* at 6.

The Court declines to do so. First, as the Court explained in the previous order, the purported facts are not "subject to reasonable dispute that qualify for judicial notice under Federal Rule of Evidence 201" and are inadmissible hearsay excluded under Federal Rules of Evidence 801 and 802. Docket No. 226 at 10 (quoting *Mack*, 2008 WL 11439337, at *10 n.2). Second, as the Court also explained, plaintiff's own interpretation of the various medical sources and his opinion about the appropriate care for his ailments are not competent evidence because he failed to show that he has any medical expertise. *Id.* (quoting *Mack*, 2008 WL 11439337, at *10 n.2). Moreover, even if the Court were inclined to take judicial notice of the various authorities that plaintiff relies upon, the Court would only be able to do so to show their "contents, not to prove the truth of the matters asserted therein." *United Water & Sanitation Dist. v. Geo-Con, Inc.*, 488 F. Supp. 3d 1052, 1057 (D. Colo. 2020) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006)). Plaintiff has not, therefore, identified any new evidence that could warrant under Rule 60(b). *See Servants of the Paraclete*, 204 F.3d at 1009. As such, the Court will deny this portion of his motion.

Plaintiff next asks the Court to provide relief under Rule 60(b) based on "misrepresentation by the CDOC defendants." Docket No. 242 at 6–8. Plaintiff's argument is that the CDOC defendants "misrepresented the 2016 medical community's

understanding of the cause of, association of, and treatment of these extra-hepatic manifestations." *Id.* at 6. Plaintiff again cites various medical texts. *See, e.g.*, *id.* at 7–8 (citing, among others, "Pawlotsky et al.," "Hepatology Vol. 19, No. 4, 1994," a "1995 peer review article in the Annals of Internal Medicine (Vol. 123, No. 8)," a "2012 peer review of hepatitis c infection and autoimmune disease" in the "The International Journal of Medicine," "Current Medical Diagnosis & Treatment 2016"). Some of these texts appear to be the same authorities that plaintiff belatedly asked the Court to take judicial notice of in his objections to the magistrate judge's recommendation. *See, e.g.*, Docket No. 220 at 4 (citing "2016 Current Medical Diagnosis and Treatment"). As explained previously, however, the Court cannot take judicial notice of these texts "for the truth of the matters asserted therein," *United Water*, 488 F. Supp. 3d at 1057, and does not find plaintiff's interpretation of them to be competent evidence because he has not shown that he has any medical expertise. *See Mack*, 2008 WL 11439337, at *10 n.2. Plaintiff, therefore, has not identified any new evidence or misrepresentation that could warrant relief under Rule 60(b). *See Servants of the Paraclete*, 204 F.3d at 1009. As such, the Court will deny this portion of his motion.

Plaintiff next argues that the CDOC defendants misrepresented "untimely serologic tests and proteinuria." Docket No. 242 at 8–9. Plaintiff cites tests and events occurring in September 2018 and July 2019. *Id.* at 8. Plaintiff then asks the Court to take judicial notice of various facts, again from what appear to be medical texts and authorities. *Id.* at 9–10. For the reasons discussed previously, the Court will not do so. *See United Water*, 488 F. Supp. 3d at 1057; *Mack*, 2008 WL 11439337, at *10 n.2.

Moreover, plaintiff has not explained how events occurring in September 2018 and July 2019 are "newly discovered." *See Combs v. PriceWaterhouse Coopers, LLP*, 382 F.3d 1196, 1206 (10th Cir. 2004) (relief is disfavored where it is based on allegations that were "readily available" prior to the entry of judgment); *Johnson v. Ward*, No. 20-cv-00447-PAB-MEH, 2021 WL 2222713, at *1 (D. Colo. June 2, 2021); *Bartlett v. Palma*, No. 16-cv-00697-PAB-STV, 2018 WL 1046788, at *2 (D. Colo. Feb. 26, 2018).

The remainder of plaintiff's motion relies on the facts that plaintiff previously asked the Court to take judicial notice of. *See, e.g.*, Docket No. 242 at 10 ("The biopsy also shows electron densities in [plaintiff's] mesangium (NDE 4) which indicate resolving postinfectious glomerulonephritis. (FJN 5) . . . . Further establishing that [plaintiff's] kidneys sustained glomerular injury, is the fact that his epithelial foot processes were effaced. (NDE 3) This type of injury is common in all forms of glomerular injury with proteinuria. (FJN 6).").[4] Because the Court will not take judicial notice of these facts and does not find that the purportedly newly discovered evidence sufficient to show that plaintiff is entitled to "extraordinary" and "exceptional" relief, *see Servants of the Paraclete*, 204 F.3d at 1009, the Court finds that plaintiff has not overcome the "high hurdle" of Rule 60(b). *See Zurich N. Am.*, 426 F.3d at 1289.

For the foregoing reasons, it is

ORDERED that plaintiff's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. Rule 60(b) [Docket No. 242] is **DENIED**.

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[4] "NDE" refers to "newly discovered evidence" and "FJN" refers to "facts for judicial notice." *See* Docket No. 242 at 4.

DATED August 10, 2021.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge