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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Peter K. Naki,

10 Plaintiff,

11 v.

12 State of Hawaii, et al.,

13 Defendants.
14

No. CV-13-02189-PHX-JAT

ORDER

15 Pending before the Court is Plaintiff's Motion for Reconsideration of the Court's
16 Order Filed on August 5, 2015 (Doc. 131).

17 **I. Background**

18 On August 5, 2015, the Court granted Defendant Corrections Corporation of
19 America's ("Defendant") motion for summary judgment. (Doc. 127). The Court excluded
20 Plaintiff's expert witness pursuant to Federal Rule of Evidence 702, and concluded in the
21 absence of any expert witness that Plaintiff could not prevail on his state-law negligence
22 claim. (*Id.* at 8-9). The Court also concluded that Defendant was entitled to summary
23 judgment on Plaintiff's Eighth Amendment claim. (*Id.* at 12).

24 On August 19, 2015, Plaintiff filed the pending motion for reconsideration. (Doc.
25 131). Before the Court could address this motion, on September 4, 2015, Plaintiff filed a
26 notice of appeal to the Ninth Circuit Court of Appeals. (Doc. 132).

27 **II. Nature of Plaintiff's Motion**

28 Although Plaintiff captions his motion as a motion for reconsideration, there is no

1 provision in the Federal Rules of Civil Procedure for the filing of motions for
2 reconsideration. Nevertheless, the Local Rules of Civil Procedure for the District of
3 Arizona (“Local Rules”) permit the filing of motions for reconsideration within fourteen
4 days. LRCiv 7.1(g). The Court has previously distinguished between motions for
5 reconsideration, which address interlocutory orders, and motions filed under Federal Rule
6 of Civil Procedure (“Rule”) 59(e) and 60(b), which provide for relief from final
7 judgments or orders. In *Motorola, Inc. v. J.B. Rodgers Mechanical Contractors*, 215
8 F.R.D. 581, 582-83 & n.1 (D. Ariz. June 18, 2003), the Court distinguished between
9 motions under Rules 59(e) or 60 and motions for reconsideration of interlocutory orders.
10 There, the Court cited the Local Rules’ discussion of motions for reconsideration in the
11 context of reconsidering interlocutory orders. 215 F.R.D. at 583. Consistent with that
12 case, a motion for reconsideration is proper when the order that is the subject of the
13 motion is an interlocutory order.

14 On the other hand, the Court ordinarily treats a motion for reconsideration of a
15 final order as being made under Rule 59(e). *DIRECTV Inc. v. Eagle West Commc’ns Inc.*,
16 2015 WL 274059, at *1 (D. Ariz. Jan. 22, 2015); *see also School Dist. No. 1J,*
17 *Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Accordingly, the
18 Court will treat Plaintiff’s motion for reconsideration as a motion under Rule 59(e).

19 Rule 59(e) permits a party to file a motion to alter or amend a judgment within 28
20 days after the entry of the judgment. “Under Rule 59(e), a motion for reconsideration
21 should not be granted, absent highly unusual circumstances, unless the district court is
22 presented with newly discovered evidence, committed clear error, or if there is an
23 intervening change in the controlling law.” *389 Orange St. Partners v. Arnold*, 179 F.3d
24 656, 665 (9th Cir. 1999). Because the Court treats the present motion as a Rule 59
25 motion, the Court was not divested of jurisdiction by Plaintiff’s filing of a notice of
26 appeal. Fed. R. App. Proc. 4(a)(4)(B)(i).

27 **III. Analysis**

28 Plaintiff argues the Court erred in concluding that a state-law negligence claim

1 arising out of prison operations requires expert witness testimony. (Doc. 131 at 2). The
2 Court quoted, in its original Order, *St. Joseph's Hospital and Medical Center v. Reserve*
3 *Life Insurance Company*, 742 P.2d 808 (Ariz. 1987) for the proposition that when “the
4 alleged lack of care occurred during the professional or business activity, the plaintiff
5 must present expert witness testimony as to the care and competence prevalent in the
6 business or profession.” (Doc. 127 at 9). This statement in *St. Joseph's* is a reference to a
7 holding in *Powder Horn Nursery, Inc v. Soil & Plant Laboratory, Inc.*, 579 P.2d 582
8 (Ariz. Ct. App. 1978). *See St. Joseph's*, 742 P.2d at 808 (“Where, as in *Powder Horn*
9 *Nursery*, the alleged lack of care occurred . . .”).

10 In *Powder Horn Nursery*, the Arizona Court of Appeals relied on an earlier case to
11 conclude that:

12 Where, as here, the duty which the law recognizes arises
13 because the defendant has held himself out to be trained in a
14 particular trade or profession, the standard required for the
15 protection of customers against unreasonable risks must be
16 established by specific evidence. It cannot be left to
17 conjecture nor be established by argument of counsel. In the
18 absence of evidence establishing the requisite standard of care
and that defendant's conduct failed to meet that standard,
there was no basis upon which the jury could have found
defendant liable to the plaintiff, and therefore the trial court
did not commit error in refusing to submit the matter to the
jury.

19 *Powder Horn Nursery*, 579 P.2d at 587 (quoting *Kreisman v. Thomas*, 469 P.2d 107, 113
20 (Ariz. Ct. App. 1970)). The issue in *Powder Horn Nursery* was the appropriate standard
21 of care owed by a professional plant laboratory to its customers. *Id.* at 583, 585. In turn,
22 *Kriesman v. Thomas* involved the standard of care owed by a seller of hearing aids to his
23 customers; there, the court held that the “standard required for the protection of others
24 against unreasonable risks is that the defendant exercise the skill and knowledge normally
25 possessed by members of that trade or profession in good standing in similar
26 communities.” *Kriesman*, 469 P.2d at 112. Thus, the line of cases culminating in *St.*
27 *Joseph's Hospital* concerned the standard of care in professional malpractice. As the
28 Arizona Court of Appeals explained in *Bell v. Maricopa Medical Center*, 755 P.2d 1180

1 (Ariz. Ct. App. 1988):

2 In the ordinary negligence action, the standard imposed is that
3 of the conduct of a reasonably prudent man under the
4 circumstances. In such cases, it is not necessary for the
5 plaintiff to present evidence to establish the standard of care
6 because the jury can rely on its own experience in
7 determining whether the defendant acted with reasonable care
8 under the circumstances.

9 Within their areas of expertise, health care providers and
10 other professionals are held to a higher standard of care than
11 that of the ordinary prudent person. In professional
12 malpractice cases, the reasonable man standard is therefore
13 replaced by a standard based upon the usual conduct of other
14 members of the defendant's profession in similar
15 circumstances. In such cases, the plaintiff must present
16 evidence of this accepted professional conduct to enable the
17 jury to determine the applicable standard. The plaintiff must
18 then establish the professional defendant's negligence by
19 demonstrating that his conduct deviated from the standard.

20 *Bell*, 755 P.2d at 1182 (citations omitted).

21 Arizona courts have held that “[t]he threshold test for expert testimony is whether
22 it will assist the trier of fact.” *Messina v. Midway Chevrolet Co.*, 209 P.3d 147, 152 (Ariz.
23 Ct. App. 2008). “Expert testimony is unnecessary when the disputed subject is something
24 that persons unskilled in the relevant area are capable of understanding and are therefore
25 able to decide relevant fact questions without the opinions of experts.” *Rudolph v. Ariz.*
26 *B.A.S.S. Federation*, 898 P.2d 1000, 1004 (Ariz. Ct. App. 1995) (holding that expert
27 testimony was not necessary to determine whether the defendants held a fishing
28 tournament in a reasonable manner); *see also Rossell v. Volkswagen of Am.*, 709 P.2d 517,
524 (Ariz. 1985) (expert testimony unnecessary to establish the standard of care unless
“factual issues are outside the common understanding of jurors”).

In the present case, Plaintiff alleges that Defendant breached its duty by refusing
to reassign Plaintiff from the top level of his in-cell bunk bed to the bottom level of the
bed when Defendant should have known that Plaintiff's short height exposed Plaintiff to
excessive risk of harm. (Doc. 39 at 9). Plaintiff also alleges that Defendant instructed
Plaintiff to stack unstable plastic crates on the floor of his cell in order to reach the top
bunk and repeatedly ignored Plaintiff's complaints regarding the difficulty of reaching

1 the top bunk. (*Id.*)

2 This Court has recently held that a claim for negligence against prison officials in
3 the failure to provide medical attention in some circumstances does not require expert
4 testimony as to the standard of care. *See Reidhead v. Arizona*, 2014 WL 2861046, at *6
5 (D. Ariz. June 24, 2014). In *Reidhead*, the plaintiff alleged that the defendant's
6 negligence arose from failure to conduct security checks consistent with Defendant's own
7 policy, guards' failure to inform other guards' about the inmate having breathing
8 problems, the failure to timely respond to the inmate's complaint of breathing problems,
9 and the failure to seek immediate help when the inmate complained of the symptoms of a
10 heart attack. *Id.* The Court held that expert testimony was not necessary as to the standard
11 of care in these circumstances. *Id.*

12 Accordingly, the Court will require Defendant to file a response addressing
13 whether the Arizona cases governing expert testimony require expert testimony on the
14 standard of care in this case or whether the allegations in this case would be within "the
15 common understanding of jurors."

16 **IV. Conclusion**

17 Accordingly,

18 **IT IS ORDERED** that Defendant shall file a response to Plaintiff's motion for
19 reconsideration (Doc. 131) on or before September 25, 2015. Plaintiff may file a reply to
20 Defendant's response on or before October 2, 2015.

21 Dated this 11th day of September, 2015.

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26 James A. Teilborg
27 Senior United States District Judge
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