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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JAMETTA JOY BERNICE WILLIAMS JACKSON,

Plaintiff and Appellant,

v.

SAN LEANDRO HOSPITAL,

Defendant and Respondent.

A126400

(Alameda County
Super. Ct. No. HG-07358557)

Jametta Joy Bernice Williams Jackson sued the San Leandro Hospital (the hospital) for medical malpractice after she claimed she suffered an injury as a result of the hospital's negligence when injecting her with Dilantin. The hospital filed a motion for summary judgment and, in support of its motion, it submitted a declaration by a medical expert. The hospital's expert opined that the hospital did not breach its duty of care and was not the cause of any injury to Jackson. When opposing the motion for summary judgment, Jackson did not provide a medical expert opinion. The lower court granted summary judgment in favor of the hospital, finding that Jackson had to submit an expert opinion that the hospital had breached its duty of care to create a triable issue of fact. Subsequently, Jackson requested relief from the judgment pursuant to Code of Civil Procedure section 437 and for reconsideration under Code of Civil Procedure section 1008. The lower court denied this motion.

On appeal, Jackson argues that she did not need to provide an expert opinion that the hospital had breached its duty of care because the declaration of the hospital's expert was inadmissible, was insufficient, and created a triable issue of fact regarding the hospital's negligence. She also claims that the doctrine of res ipsa loquitur applies and therefore the jury could decide the question of negligence without an expert opinion. We agree with the lower court that Jackson needed to provide a medical expert's opinion that the hospital breached its duty of care and that its negligence caused her injury in order to survive the hospital's summary judgment motion. We also concur with the lower court's ruling that her request for relief from the judgment or reconsideration of the judgment had no merit. We therefore affirm the judgment.

## BACKGROUND

On December 8, 2006, after experiencing three seizures at home, Jackson went to the emergency department (ED) of the hospital. Her boyfriend had witnessed the seizures and told the medical providers that she had not been taking her medications of Dilantin or Keppa. He also reported that she had been to the ED on other occasions for the same problem.

While at the ED, Jackson suffered a grand mal seizure. The medical staff administered Dilantin through an intravenous (IV) catheter in Jackson's wrist. In the very early hours of December 9, 2006, Jackson's pump alarm sounded and a nurse responded. The area of the infusion on Jackson's arm was swollen; the IV catheter was found to be partially out of the vein and was removed. Bacitracin and a bandage were applied to Jackson's wrist.

Jackson was discharged during the morning of December 9, 2006. The hospital provided her with the following written instructions signed by Jackson: "Call as soon as possible to make an appointment in 5 days to see" your own doctor. Additionally, the instructions warned: "Call your doctor or return to the Emergency Department if you have: [¶] more seizures. [¶] any new problems or concerns." Slightly above Jackson's signature, the instructions advised: "YOU ARE THE MOST IMPORTANT FACTOR IN YOUR RECOVERY. [¶] Follow the above instructions carefully. Take your

medicines as prescribed. Most important, see a doctor again as discussed. If you have problems that we have not discussed, call or visit your doctor right away. If you cannot reach your doctor, return to the Emergency Department."

Jackson's right arm began to hurt and became swollen as soon as she was discharged from the hospital. She did not return to the hospital immediately, despite knowing that she needed treatment, because she was scared of the doctors in the hospital.

Jackson returned to the ED during the morning of December 13, 2006. She told the medical staff that she could not use her right arm because of pain and swelling in the area of the prior IV site. Dr. Edward Lee observed a necrotic (dead skin) area in her wrist and proximal hand area, which was approximately two inches in diameter. Dr. Lee determined that she had right hand necrosis at the IV site with surrounding cellulitus. The discharge instructions given to Jackson on December 13, 2006, advised her to see her personal doctor and to take the antibiotics prescribed. The wrist was secured in a volar splint, and a sling was provided; Jackson was told to keep the wrist and hand elevated. Jackson again was told to return with any new problems or concerns.

A little less than one year later, on November 29, 2007, Jackson filed a lawsuit against the hospital and alleged medical malpractice. She claimed that, on December 8, 2006, the hospital "attempted an injection in her arm which thereafter caused severe scarring."

The hospital filed a motion for summary judgment against Jackson's complaint, arguing that the hospital's care of Jackson was reasonable as a matter of law. In support of this motion, the hospital submitted Jackson's medical records, Jackson's deposition testimony, and the expert declaration of Michael J. Bresler, M.D.

In his declaration, Dr. Bresler identified his clinical specialty as emergency medicine. He stated that he had reviewed Jackson's medical records. He opined that the staff of the hospital's ED on December 8 and 13, 2006, "acted in compliance with the standard of care required of them and that no act or failure to act on the part of [the hospital] personnel including nurses and ancillary staff caused the harm claimed" by Jackson. Dr. Bresler noted that Jackson had a history of seizure disorder since the age of

three months as she suffered "some sort of hypoxic injury as a baby which she described as 'crib death.' She was revived and has had seizures ever since." He stressed that Jackson admitted "that in virtually every instance where she has received IV medications which she described as in the 'thousands of times' for seizure disorder, at hospitals . . . , the hospital personnel had extreme difficulty placing her IVs because of poor vasculature or for other unknown reasons. She admitted that on multiple occasions multiple different practitioners were summoned to attempt IV placement and that this is true in both arms and other sites of her body. She readily admitted this was not confined to the practitioners at San Leandro Hospital but to virtually every provider who attempted to give her IV medications."

Dr. Bresler elaborated that Jackson admitted "that she had a number of episodes of infiltration following IV administration. She acknowledged knowing that she should receive immediate treatment if her IV infiltrated because infiltration, whether by some medication or other fluid, could cause injury to her if treatment was not obtained promptly." Indeed, in July 2006, she received a difficult IV stick resulting in extravasation of fluid into her subcutaneous tissues at the hospital. On that occasion, she returned to the hospital the next day and received emergency medical care for that extravasation. Bresler stressed that Jackson knew it was important to get the treatment immediately and "she had been instructed to return to the ER on numerous occasions with any new symptoms or problems."

Dr. Bresler stated the following regarding Jackson's treatment at the hospital on December 8 and 9, 2006: "Despite the fact that the IV catheter dislodged and the medication infiltrated during Dilantin administration, all appropriate precautions were implemented on December 8-9, 2006[,] by the medical personnel who provided intravenous Dilantin to [Jackson] at San Leandro Hospital. IV catheters can and do become dislodged for a variety of reasons, typically with some movement or repositioning of the limb where the IV site is located. Negligence cannot be inferred merely from the fact that extravasation occurred during IV administration of Dilantin. [¶] The nursing staff appropriately discontinued the IV catheter, applied Bacitracin to the

catheter site and wrapped the IV site in a sterile dressing. [Jackson] was discharged with the instruction to return for any new problems or concerns. Although the IV site began to bother her almost immediately after discharge from the ED on December 9, 2006—and she knew from her previous experiences IV infiltration that it was important to get immediate medical attention—she waited almost 5 days to do so."

Additionally, Dr. Bresler provided his opinion that Jackson's delay in seeking treatment and self-management of her wound contributed to the problems she had. He explained that Jackson "received appropriate treatment by Dr. Lee on December 13, 2006[,] for the skin injury that evolved at the IV site and he appropriately referred her for further follow up. . . . [Jackson] testified that she did see a clinic physician named Dr. Smith, but failed to see either the first or second wound care specialists to whom he subsequently referred her in the following weeks. Instead, [Jackson] followed a treatment that was not prescribed by Dr. Lee or other health care provider at San Leandro Hospital for what she describes as an 'open' wound that persisted for 8 months: 3 times daily application of peroxide and unidentified creams."

Dr. Bresler concluded that "all of the care provided by the physicians and all personnel of San Leandro Hospital to [Jackson] at the ED on December 8-9, 2006[,] and on December 13, 2006[,] was within the standard of care." He further concluded that no physician or staff person at the hospital treating Jackson on December 8, 9, or 13, 2006, "was a cause of the injuries" Jackson claimed in the lawsuit.

Jackson filed points and authorities in opposition to the hospital's summary judgment motion. She did not provide an expert declaration. She objected to Dr. Bresler's declaration on the ground that it was not based upon his personal knowledge, because he was not present during Jackson's procedure.[1] She also asserted that expert testimony was unnecessary because the doctrine of res ipsa loquitur applied.

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[1] In her separate statement of undisputed facts, Jackson set forth her objections to the declaration of Dr. Bresler as follows: "Objection to declaration of Michael J. Bresler as declaration is not stated to be based upon personal knowledge and is in fact not based upon personal knowledge as to how the medical procedure was performed or by whom;

The trial court's tentative ruling granting the hospital's summary judgment motion was not contested and therefore the court did not hold a hearing on the matter. The court issued its order granting summary judgment on January 28, 2009. It found that the undisputed facts established that the hospital's treatment of Jackson was within the applicable standard of care. The court stated that the standard of care in a medical malpractice case could only be established by expert testimony, unless the medical question is within the common knowledge of laypersons. The court elaborated: "The proper procedure for the intravenous infusion of Dilantin, and the appropriate course of action to take in the event of infiltration, is not within the common knowledge of laypersons, and the doctrine of res ipsa loquitur therefore does not apply to this case." The court noted that Jackson "failed to submit any properly authenticated evidence in support of her opposition" and did not sign her own declaration under penalty of perjury; the court therefore ruled that her declaration was inadmissible. Finally, with regard to Jackson's objection to the declaration of Dr. Bresler, the court stated that her evidentiary objections were not in the format required by California Rules of Court, rule 3.1354 and to the extent she was objecting to his entire declaration, her objection was overruled. The court ruled that the "entire action is DISMISSED."

Notice of entry of this order was mailed on May 13, 2009.

On May 22, 2009, Jackson filed a motion for relief from, or reconsideration of, the judgment pursuant to Code of Civil Procedures sections 473 and 1008, respectively. Jackson asserted that she did not receive the hospital's reply brief containing its "new argument" regarding the res ipsa loquitur doctrine until after the court's deadline for contesting the tentative ruling. She also argued that her declaration inadvertently had the incorrect date and omitted the language that it was "under penalty of perjury." She also

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improper hypothetical as there are no admissible facts to support the hypothetical or opinions and conclusion; there are no facts which detail what 'plaintiffs injuries claimed' are and thus is conclusory. [*Sic*] Objected to as 'met the standard care' is an unsupported opinion and conclusion as the standard of care was not defined factually or that any specific acts by the hospital staff conformed to the acts or procedures which would be identified as standard of care. [*Sic*]"

declared that she inadvertently did not file her objections to Dr. Bresler's declaration in accordance to the California Rules of Court, rule 3.1354.

On July 6, 2009, the trial court denied Jackson's motion for relief and/or reconsideration. The court noted that Jackson had been aware of the court's tentative ruling, which granted the hospital's summary judgment motion, but failed to contest it and therefore her argument that she could not respond to the hospital's res ipsa loquitur argument had no merit. Similarly, Jackson failed to demonstrate mistake, inadvertence, surprise, or excusable neglect as she chose not to contest the tentative ruling. The court noted that even if it did consider her declaration, it would still grant the hospital's motion for summary judgment. The court also explained that it would have overruled her objections to Dr. Bresler's declaration even if it had considered her objections.

On this same date, July 6, 2009, the court signed the following order: "On January 28, 2009, the court granted the Motion for Summary Judgment of defendant SAN LEANDRO HOSPITAL. There being no further issues to be tried between said defendant and plaintiff, [¶] IT IS HEREBY ORDERED that judgment be entered in favor of defendant SAN LEANDRO HOSPITAL and against plaintiff[] JAMETTA JACKSON, and further, that plaintiff JAMETTA JACKSON shall take nothing on her complaint. [¶] IT IS SO ORDERED."

On August 26, 2009, Jackson filed her notice of appeal from the "judgment granting [the hospital's] motion for summary judgment file marked on July 6, 2009 (based upon the order granting summary judgment file marked January 28, 2009)."

The hospital filed a motion in this court to dismiss Jackson's appeal. It contended that Jackson's appeal from the judgment was untimely. It also argued that she could not challenge the order regarding her request for relief or reconsideration because she did not mention this order in her notice of appeal. We denied without prejudice the hospital's motion to dismiss.

## DISCUSSION

### I. *Motion to Dismiss*

Jackson filed her notice of appeal on August 26, 2009. Her notice stated that she was appealing from the "judgment granting [the hospital's] motion for summary judgment file marked on July 6, 2009 . . . ." The hospital argues that the time for appealing from the judgment had expired because the final judgment was filed on January 28, 2009, when the court granted its summary judgment motion and stated that the action was dismissed. The hospital maintains that the subsequently entered "judgment" prepared by its counsel and signed by the judge on July 6, 2009, did not alter this fact because there can be only one final judgment. (Code Civ. Proc., § 581d;[2] see also *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987; *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.)

There can be only one final judgment in any case (*Knodel v. Knodel* (1975) 14 Cal.3d 752, 760), and the time for appealing a judgment is jurisdictional (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56). California Rules of Court require a notice of appeal to be filed on or before the earliest of the following dates: (1) 60 days after the clerk of the court serves notice of entry of judgment; (2) 60 days after a party serves notice of entry of judgment; or (3) 180 days after entry of judgment.[3] Thus, the outside time limit for filing a notice of appeal

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[2] Code of Civil Procedure section 581d provides: "A written dismissal of an action shall be entered in the clerk's register and is effective for all purposes when so entered. [¶] All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case."

[3] The time to file an appeal may be extended pursuant to California Rules of Court, rule 8.108 when a party files a motion for reconsideration of an appealable order. However, the time to appeal from a judgment is never extended beyond 180 days after entry of that judgment. (Cal. Rules of Court, rule 8.108, subds. (b)(1)(C), (c)(3), (d)(1)(C), and (e)(3).)

from a judgment is 180 days after the judgment is entered. (Cal. Rules of Court, rule 8.104(a).)

If the date of the entry of the final judgment in the present case were January 28, 2009, the last possible date for filing the notice of appeal would be 180 days later, July 27, 2009. Thus, the hospital argues that Jackson's filing of the notice of appeal in August 2009 was untimely.

A summary judgment is not ordinarily a final judgment. Here, the January 28, 2009 order states that the action is dismissed, but it does not specify the action is dismissed *with prejudice*. We therefore conclude that it does not constitute a final judgment. The cases cited by defendant do not involve a summary judgment order. In *Melbostad v. Fisher, supra,* 165 Cal.App.4th 987, the defendant filed a special motion to strike the plaintiff's complaint in its entirety, and the court dismissed the complaint "with prejudice." (*Id.* at p. 990.) In *Brehm v. 21st Century Ins. Co., supra,* 166 Cal.App.4th 1225, the court in its minute order sustained the demurrer without leave to amend and also dismissed the case. (*Id.* at pp. 1233-1234.)

In the present case, the hospital never *moved* for dismissal and the trial court did not dismiss the complaint with prejudice. (See Code of Civ. Proc., § 581, subd. (f).)[4] Thus we conclude there was no final judgment and, consequently, the time to file the notice of appeal did not start to run until the court signed the judgment order on July 6,

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[4] Code of Civil Procedure section 581, subdivision (f) provides: "The court may dismiss the complaint as to that defendant when: [¶] (1) [A]fter a demurrer to the complaint is sustained without leave to amend and either party moves for dismissal. [¶] (2) [A]fter a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal. [¶] (3) After a motion to strike the whole of a complaint is granted without leave to amend and either party moves for dismissal. [¶] (4) After a motion to strike the whole of a complaint or portion thereof is granted with leave to amend the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." Subdivision (m) states: "The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant."

2009. Since Jackson filed her notice of appeal on August 26, 2009, which was within 60 days of the judgment order, her filing of the notice of appeal was timely.

The hospital also contends that Jackson cannot challenge the order concerning her request for relief from the judgment or reconsideration of the judgment because her notice of appeal does not mention this order. Jackson's notice of appeal stated that she was appealing from the "judgment granting [the hospital's] motion for summary judgment file marked on July 6, 2009 . . . ." The hospital acknowledges that notices of appeal are liberally construed in favor of their sufficiency (Cal Rules of Court, rule 8.100 (a)(2); *Luz v. Lopes* (1960) 55 Cal.2d 54, 59), but contends liberal construction cannot save this appeal because it "completely omits any reference to the judgment being appealed" (*Shiver, McGrane & Martin v. Littell* (1990) 217 Cal.App.3d 1041, 1045). Here, Jackson failed to refer to her motion for relief and/or reconsideration.

We conclude that Jackson's notice of appeal, which we consider with her attached request for the preparation of the record on appeal, sufficiently provided notice that she was objecting to both the summary judgment order and the order concerned with her request for relief or reconsideration. In her notice of appeal, Jackson did not expressly mention the order related to her request for relief or reconsideration, but she specified in her notice the date of July 6, 2009, which was the date of both the summary judgment order and the relief/reconsideration order. Jackson's request for the record on appeal filed with her notice of appeal included the documents related to the court's ruling on her motion for reconsideration and for relief. Thus, the hospital had notice that these documents were relevant to the issues on appeal. Accordingly, we conclude that the hospital was not misled or prejudiced by Jackson's appealing from the relief/reconsideration order. (See *Department of Industrial Relations v. Nielsen Construction Co.* (1996) 51 Cal.App.4th 1016, 1024 [request to prepare transcripts " 'on appeal,' " referring to documents entitled " 'Notice of Appeal' " and " 'Judgment,' " held sufficient to constitute notice of appeal from judgment].)

Finally, as the hospital points out, Jackson's opening brief does not include the statement of appealability required by California Rule of Court, rule 8.204(a)(2)(B). We

note that Jackson's counsel has demonstrated in the lower court and in this court a pattern of failing to comply with the rules. Nevertheless, we consider the merits of her appeal since we have concluded that we have jurisdiction.

## II. *The Granting of Summary Judgment*

### A. *Standard of Review*

We review a trial court's grant of summary judgment de novo. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 388-389.) "In performing our de novo review, we must view the evidence in a light favorable to [the] plaintiff as the losing party [citation], liberally construing [his] evidentiary submission while strictly scrutinizing [the] defendant['s] own showing, and resolving any evidentiary doubts or ambiguities in [the] plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

A defendant seeking summary judgment "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) California law requires that "a defendant moving for summary judgment . . . present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854, fn. omitted.)

### B. *The Elements of a Medical Malpractice Claim and the Lower Court's Findings*

Here, Jackson's sole claim was for medical malpractice. The elements of a cause of action for health care or medical malpractice are: "(1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.) At trial, a plaintiff claiming medical negligence has the burden of proving defendant's treatment fell below the applicable standard of care. (*Ibid.*)

"In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen. [Citation.]" (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523 (*Kelley*).) When a defendant moves for summary judgment and supports the motion with an expert declaration that its conduct fell within the standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 985.) However, "an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 (*Bushling*).)

In support of its motion for summary judgment, the hospital submitted Dr. Bresler's declaration that the hospital did not breach the standard of care and that Jackson's failure to seek prompt medical treatment or comply with the treatment advised was a significant reason for her suffering an injury. Thus, it presented evidence challenging two elements of Jackson's action: the violation of the standard of care and causation. Jackson did not submit an expert declaration and, thus, provided no conflicting expert evidence.

The lower court found that "[t]he proper procedure for the intravenous infusion of Dilantin, and the appropriate course of action to take in the event of infiltration, is not within the common knowledge of laypersons," and therefore expert opinion was required. Jackson contends that she did not need to proffer an expert because Dr. Bresler's opinion was based on speculation and incompetent matter. She also maintains that Dr. Bresler's declaration was inadequate because he did not set forth the proper standard of care and that his declaration created a triable issue of fact regarding the hospital's negligence when giving her discharge instructions. Additionally, she claims that she did not need to provide an expert opinion because the doctrine of res ipsa loquitur applies. We examine each of these contentions.

### C. *Qualifying Dr. Bresler as an Expert Witness and Admitting His Opinion into Evidence*

"To qualify a witness as a medical expert, it must be shown that the witness (1) has the required professional knowledge, learning and skill of the subject under inquiry sufficient to qualify him to speak with authority on the subject; and (2) is familiar with the standard required of a physician under similar circumstances; where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility. [Citation.]" (*Evans v. Ohanesian* (1974) 39 Cal.App.3d 121, 128.) " 'It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence [citation], and its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown.' [Citations.]" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 274.) This court "may find error only if the witness '*clearly lacks* qualification as an expert.' " (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1377.)

Here, the hospital's expert, Dr. Bresler, stated that he had been a physician licensed to practice medicine in California since 1974 and that his clinical specialty is emergency medicine. He then cited his extensive education, training, and experience in the field of emergency medicine. Thus, his declaration established that he had the required professional knowledge and experience. Indeed, Jackson does not mount any challenge to Dr. Bresler's qualifications to give an opinion on the subject of emergency room treatment and IV injections.

Rather than object to Dr. Bresler's experience and background, Jackson contends that Dr. Bresler did not qualify as a witness because he was not present when Jackson received her treatment. She maintains that his declaration was based on speculation, not competent matter. Jackson argues that Dr. Bresler did not know what actually happened and that there is nothing that even establishes that it was Dilantin that was infused into her vein. She asserts that Dr. Bresler could not know if the hospital's records were accurate.

Contrary to Jackson's assertion, an expert witness is not limited to providing an opinion based on personal knowledge and therefore the cases cited by Jackson that involved percipient, not expert, witnesses are inapplicable. (See, e.g., *Witchell v. DeKorne* (1986) 179 Cal.App.3d 965, 974-975, superseded by statute on another issue [declaration of defendant vendors in an action by a purchaser of unimproved property for damages was insufficient to support summary judgment where there were numerous technical defects with the declaration, including a failure to state the information contained in the declaration was based upon personal knowledge].) Evidence Code section 801, subdivision (b) provides that an expert witness's opinion testimony is limited to such an opinion as: "Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

Although an expert need not have personal knowledge of the medical treatment provided, the expert cannot base his or her opinion on incompetent material. (*Young v. Bates Valave Bag Corp.* (1942) 52 Cal.App.2d 86, 96.) An expert opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value. (*Kelley, supra,* 66 Cal.App.4th at pp. 523-525; see also *Bushling, supra,* 117 Cal.App.4th at p. 510 ["[e]xpert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact"].)

Dr. Bresler's declaration recited that as a foundation for his opinion, he reviewed the deposition of Jackson, photographs provided by Jackson, and Jackson's medical records at the hospital. The custodian of records authenticated the medical records. The declaration recited Jackson's history of seizures and her failure to take her medicine. Dr. Bresler provided the basis for his conclusion that the hospital's level of care was not

negligent. He noted that Jackson admitted that she had IV procedures " 'thousands of times' " for seizure disorder and that "in virtually every instance where she has received IV medications[,]" the hospital personnel had extreme difficulty placing her IVs because of "poor vasculature or for other unknown reasons." He also noted that Jackson admitted "that she had a number of episodes of infiltration following IV administration." He explained that the hospital implemented protective measures when administering the IV catheter of Dilantin, and concluded that the hospital employed all appropriate precautions. He opined that "IV catheters can and do become dislodged for a variety of reasons, typically with some movement or repositioning of the limb where the IV site is located. Negligence cannot be inferred merely from the fact that extravasation occurred during IV administration of Dilantin."

Dr. Bresler stated that the treatment after the catheter became dislodged was appropriate. After reviewing the record, he concluded that "[t]he nursing staff appropriately discontinued the IV catheter, applied Bacitracin to the catheter site and wrapped the IV site in a sterile dressing." After reviewing the records, he also concluded that Jackson received the proper care and was appropriately told about further follow-up when she returned to the hospital on December 13, 2006.

We conclude that Dr. Bresler relied on properly authenticated medical records that were before the court and these records are the type that may be reasonably relied upon by an expert. Jackson has presented no evidence that even suggests that the records were inaccurate. Dr. Bresler's opinion was not based on speculative factors, since the hospital records and Jackson's deposition provided evidentiary support for his opinion. Thus, Dr. Bresler's expert declaration was adequate as prima facie evidence that the hospital met the standard of care.

Jackson appears to be objecting to Dr. Bresler's declaration because, after reviewing the hospital records, he concluded there was no evidence of medical malpractice. However, a defendant's expert can come to an opinion based on the lack of any evidence of negligence in a medical record. The court in *Bushling*, *supra*, 117 Cal.App.4th 493 explained: "To state that one has experience in certain medical

procedures and has reviewed pertinent medical records and that based on that experience and that review, the declarant has found nothing to support a claim of medical malpractice and therefore concludes that there was none is not an improper conclusion for an expert witness. The expert has given an explanation for that expert's conclusion that defendants are not guilty of medical malpractice: Based on the expert's experience and the patient's medical records, there is no evidence to support a claim of negligence as a cause of injury. The reason for the opinion is the absence of evidence of medical malpractice. That opinion is significantly different than one that concludes that the standard of care has not been met resulting in an injury, but fails to give a reasoned explanation, based on facts and not on speculation, of why the expert has come to those conclusions." (*Id.* at p. 509.)

Alternatively, Jackson argues that the record did show evidence of negligence because the record establishes that the alarm sounded and the catheter came loose and that event would not have occurred absent some negligence by the hospital. In making this argument, she relies on *Bushling, supra,* 117 Cal.App.4th 493. The court in *Bushling* held that the plaintiff's expert opinion was insufficient to raise a triable issue of fact where it was based on assumed facts for which there was no supporting evidence. (*Id.* at p. 511.) Here, Dr. Bresler's opinion was not based on assumed facts, but on Jackson's medical records at the hospital and Jackson's deposition testimony. Dr. Bresler based his conclusion that the catheter did not dislodge because of negligence due to Jackson's particular medical history of having difficulty in having an IV placed in her wrist and his own experience that it is common for catheters to dislodge when no negligence is involved. The record he reviewed supported this conclusion as the records indicated that the IV of Dilantin began at 11:00 p.m. on December 8, and the alarm sounding that an occlusion had occurred happened about two hours later, at 1:00 a.m. on December 9. Only an expert could determine whether the alarm would not sound until two hours later if the initial placement of the catheter was improper.

We are satisfied that Dr. Bresler's declaration, based upon medical records maintained by the hospital pertaining to Jackson's care, was the type of material an

expert may rely upon in rendering an opinion in a malpractice action.

**D. *The Adequacy of Dr. Bresler's Statement Regarding the Standard of Care***

Jackson argues that Dr. Bresler's declaration was deficient because he concluded that the hospital met the standard of care but failed to specify what the standard of care is. She acknowledges that Dr. Bresler did mention what is customarily done but complains that he did not state that what is customarily done was actually done when Jackson was in the hospital. She maintains that his declaration has no evidentiary worth even if it was uncontradicted. (See *Kelley, supra,* 66 Cal.App.4th 519.) She asserts: "A jury could conclude that leaving a groggy, sleeping, confused patient unattended (negligent monitoring), knowing that arm movement can cause an infiltration, could disbelieve Dr. Bresler that the standard of care was met." She adds that a jury could find his opinion unbelievable because he had no knowledge of how the IV procedure was actually performed.

Jackson's argument would have some merit if she had presented a declaration of an expert that the hospital's treatment of Jackson did not satisfy a reasonable standard of care. The jury then would assess the contradictory evidence and determine what evidence is more believable. Here, however, Jackson did not present any medical expert opinion to contradict Dr. Bresler's opinion and his opinion was the only evidence considered by the trial court when ruling on the summary judgment motion. As already noted, we conclude that Dr. Bresler's declaration was a prima facie showing that an element of Jackson's case could not be established and it was incumbent upon Jackson to come forward with evidence sufficient to create a triable issue of fact. She failed to provide any evidence that the records relied upon by Dr. Bresler were inaccurate and provided no evidence contradicting his conclusion that the hospital's treatment of her met the necessary standard of care.

As already stressed, Dr. Bresler's declaration was sufficient and may simply state that the basis for his opinion is the "absence of evidence of medical malpractice" (*Bushling, supra,* 117 Cal.App.4th at p. 509) when, as here, the opinion is based on a review of medical records and those records have been authenticated and properly

submitted as evidence. A defense expert is not required to identify the actual standard of care, but merely state that he or she is familiar with the standard of care and that the record shows no evidence of a breach. (*Ibid.*)

**E. *Dr. Bresler's Declaration and the Hospital's Discharge Instructions***

Jackson alleges that Dr. Bresler's declaration created a triable issue of fact regarding the hospital's negligence with regard to its discharge instructions to Jackson on December 9, 2006. Jackson argues that she was instructed to return to the ER if she suffered any new problems or concerns and she claims that the hospital should have instructed her to return the next day for immediate treatment. She argues: "Thus if [the hospital] maintain[s] that the intervening five days between [December 8, 2006,] and [December 13, 2006,] caused or contributed to the injury then the Respondent Hospital was negligent in failing to instruct her to come back the next day."

When arguing that she presented this argument in the trial court, Jackson does not cite to her complaint but cites to her brief filed in opposition to the hospital's summary judgment motion. In her opposition to the summary judgment motion, Jackson asserted that Dr. Bresler's declaration suggests that she was negligent in failing to return to the hospital the next day when she knew immediate treatment was necessary and that a jury could decide that any delay in treatment was caused by the hospital. She claims that the hospital was negligent in telling her to come back in five days rather than to come back the next day when it knew that she had suffered an extravasation injury.

The hospital responds that Jackson has waived raising this issue on appeal because this was not a theory of her case. Jackson never alleged negligence on this basis in her complaint.

Motions for summary judgment are adjudicated within the parameters of the allegations raised by the complaint and the answer. (*FPI Development, Inc. Nakashima* (1991) 231 Cal.App.3d 367, 381.) Here, Jackson never alleged negligence based on the discharge instructions in her pleading, although she did argue this theory in her opposition to the hospital's summary judgment motion. She, however, never requested to amend her pleading to add this new theory of negligence.

We need not decide the question of waiver because we can easily dismiss Jackson's argument on its merits. The record does not indicate that the hospital told Jackson to return in five days; rather, the written instructions signed by Jackson advised her to see her own doctor within five days. The instructions expressly told her to call her doctor or return to the hospital's ED if she had any "more seizures" or "any new problems or concerns." Additionally, the instructions advised: "If you have problems that we have not discussed, call or visit your doctor right away. If you cannot reach your doctor, return to the Emergency Department." Thus, the record establishes that the instructions the hospital gave to Jackson advised her to return to the ED if she experienced any problems and could not reach her doctor.

Jackson also argues that the hospital should have told her to return the next day and she points out that Dr. Bresler observed that Jackson had been given that instruction when she experienced a similar problem in July 2006. It is not clear from this record whether the hospital in July 2006 instructed her to return the next day or had told her to return if she experienced a problem and she had, on that occasion, complied with that directive. In any event, Jackson presents no evidence that the standard of care is to instruct the patient to return to the ED the following day whenever an IV becomes loose. Moreover, even if she had been given such advice, there is no evidence to suggest that she would have followed it because she did not comply with the instruction to seek immediate medical care if any concerns arose.

Accordingly, Jackson has failed to provide any evidence to support her new theory of negligence based on the discharge instructions.[5]

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[5] Jackson also argues that she presented sufficient evidence to show that she suffered an injury. We agree, and the hospital does not dispute, that that the record contains evidence that she suffered an injury. Injury is just one element of a medical malpractice claim. As already discussed, she cannot prevail because she presented no evidence to support a finding that the hospital breached its duty of care or its negligence caused her injury.

**F. *The Doctrine of Res Ipsa Loquitur***

Jackson contends the doctrine of res ipsa loquitur applies, which permits an exception to the rule that expert testimony is required in a medical malpractice case. For the reasons discussed below, we conclude that the doctrine does not apply to the present case.

In applying the doctrine of res ipsa loquitur, a jury may be entitled to rely on common knowledge, in concluding that the harm would not have occurred but for someone's negligence. (See, e.g., *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) " '[T]he applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of [defendants'] negligence. [Citations.] "Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply." ' " (*Zentz v. Coca Cola Bottling Co.* (1952) 39 Cal.2d 436, 442.) "[I]t must appear . . . that the accident is of a type which probably would not happen unless someone was negligent. In the absence of such a probability there would be no basis for an inference of negligence which would serve to take the place of evidence of some specific negligent act or omission." (*Id.* at pp. 442-443.)

The doctrine of res ipsa loquitur is an evidentiary presumption impacting the burden of producing evidence. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825.) The three elements of this doctrine include the following: 1) the incident must be the type which generally does not happen absent someone's negligence; 2) an agency or instrumentality within the defendant's exclusive control must have caused the incident; and 3) the plaintiff must not have caused it. (*Id.* at pp. 825-826.)

Jackson never established the threshold showing that her particular injury would not ordinarily occur in the absence of negligence. The doctrine of res ipsa loquitur does not apply where an injury or infection could have happened without anyone being negligent. Here, the uncontroverted evidence established that negligence could not be inferred merely from the fact that extravasation or infiltration occurred during the IV administration of Dilantin. Jackson testified that medical staff frequently had problems

giving her an IV and problems had occurred in the past. Dr. Bresler testified that the IV could come loose for a variety of reasons. Further, Jackson may have suffered an injury not because of her treatment at the hospital on December 8 and 9, 2006, but because she waited until December 13 to return to the ED of the hospital, despite experiencing problems immediately. Additionally, her injury may have resulted from her failure to comply with the directions of Dr. Lee and other medical staff after she left the ED on December 13, 2006.

Jackson maintains that the jurors could conclude that the hospital was negligent simply because of the presence of Dilantin in the tissues surrounding the vein in her hand. She further asserts that Dr. Bresler's statement that Jackson should have sought care the next day supports the conclusion that "[t]he appropriate course of action to take in the event of infiltration is within the knowledge of laypersons." This argument has no merit. The fact that Jackson was told to seek treatment if she experienced pain does not indicate that a layperson would have any knowledge about the procedure. Indeed, this comment simply indicates that pain or some type of problem may be a common result of this procedure.

It is not within common experience to know whether an injection of Dilantin is likely to infiltrate. The narrow exception to requiring the testimony of an expert in a medical malpractice case is limited to such situations as when a foreign object, such as a sponge or surgical instrument, is left in a patient following surgery because a layperson could say as a matter of common knowledge that this was not an ordinary consequence of surgery. (See, e.g., *Flowers v. Torrance Memorial Hospital Medical Center, supra,* 8 Cal.4th at p. 1001; *Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 943-944; *Gannon v. Elliott* (1993) 19 Cal.App.4th 1, 6-7.) Here, as the trial court correctly ruled, res ipsa loquitur does not apply because the method for giving Dilantin with an IV and the treatment for infiltration is not within the common knowledge of a layperson. This is especially true in a case such as this where the patient has a chronic problem with receiving an IV.

Jackson also argues that Dr. Bresler's statement that catheters "can and do become dislodged for a variety of reason" supports the doctrine of res ipsa loquitur because it shows that the hospital should have prevented her from moving her arm while she was groggy or sleeping. She devotes a significant portion of her brief to arguing that arm movement is to be expected and the hospital must have known arm movement could dislodge the catheter. She concludes that the hospital was negligent for failing to take any action to keep her arm immobile.

The foregoing statement of Dr. Bresler does not, as Jackson asserts, support the application of the res ipsa loquitur doctrine. Firstly, Dr. Bresler does not state that the catheter became dislodged because Jackson moved her arm; he merely indicated that this was one among many possible reasons for the catheter's becoming loose. Secondly, Dr. Bresler stated that the procedure used by the hospital was the proper procedure. There is nothing in this record to indicate that restraining Jackson would have been the proper standard of care.

Rather than Jackson's injury being caused by the hospital's negligence, her injury could have been caused by risks inherent to the procedure or by her own failure to seek immediate treatment or to comply with the advice regarding follow-up care. None of the alternative explanations for Jackson's injuries is inherently more probable than the other. Thus, the doctrine of res ipsa loquitur did not apply, and the hospital was entitled to summary judgment.

### III. *Motion for Relief Pursuant to Code of Civil Procedure Section 473*

Jackson maintains that the lower court erred in denying her relief from the judgment under Code of Civil Procedure section 473. She claims that she was entitled to relief for the following: inadvertently omitting the language made "under penalty of perjury" and setting forth the incorrect date on her own declaration, inadvertently using the wrong format when objecting to Dr. Bresler's declaration, and failing to respond because of excusable neglect or surprise to the hospital's argument against the res ipsa loquitur doctrine.

Code of Civil Procedure section 473, subdivision (b) provides that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . ." We review the lower court's ruling on a motion for discretionary relief under Code of Civil Procedure section 473, subdivision (b) for an abuse of discretion. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419.) Under an abuse of discretion standard of review, we afford considerable deference to the trial court and, when two or more inferences can be drawn from the record, we defer to the decision of the court. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Id.* at p. 478.)

Relief due to mistake, inadvertence, or excusable neglect is warranted only if the plaintiff demonstrates that the action prompting the request for relief might have been done by a reasonably prudent person under the same circumstances. (*Black v. County of Los Angeles* (1970) 12 Cal.App.3d 670, 675.) Additionally, to qualify for relief under Code of Civil Procedure section 473, the moving party "must also be diligent" in seeking relief. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258.)

In the present case, Jackson does not show that a prudent person under the same circumstances would have committed any of the mistakes she made or would have failed to address the hospital's argument on res ipsa loquitur. Furthermore, Jackson's failure to contest the tentative ruling does not satisfy the diligence requirement under Code of Civil Procedure section 473. The trial court indicated in its tentative ruling that it was rejecting her res ipsa loquitur argument and therefore she should have contested this ruling if she had any additional contention to make. In its tentative ruling, the court also set forth the problems with Jackson's declaration and the improper format of her objections to Dr. Bresler's declaration. Despite knowing that the trial court had ruled against her in its tentative ruling, Jackson did not contest the tentative ruling and did not ask the court at that time to consider any corrected documents or additional argument on the res ipsa loquitur doctrine. Thus, she failed to show diligence.

Further, as already discussed, Jackson's objections to Dr. Bresler's declaration and her claim that the doctrine of res ipsa loquitur apply have no merit. Consideration of her declaration would not have had any effect because she failed to present any evidence from an expert to counter the hospital's expert testimony that the hospital did not breach any duty of care and was not the cause of her injury. Thus, even if the lower court considered Jackson's argument on res ipsa loquitur, her declaration, and her objections to Dr. Bresler's declaration, it would have still properly granted the hospital's motion for summary judgment against her claim of medical malpractice.

## IV. *Motion for Reconsideration*

Jackson argues that the lower court should have granted her motion for reconsideration under the Code of Civil Procedure section 1008.[6] Her sole basis for requesting reconsideration of the court's grant of summary judgment in favor of the hospital was that she did not have an opportunity to respond to the hospital's argument on res ipsa loquitur set forth in its reply brief.

"After an order is granted by a court, any party affected by the order may seek reconsideration based upon a showing of new or different facts." (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) A request for reconsideration of a court's order made under Code of Civil Procedure section 1008 requires that the "motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.)

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[6] Code of Civil Procedure section 1008, subdivision (a) provides: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

"A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standards." (*Glade*, at p. 1457.)

Here, Jackson has failed to show new or different facts. She complains that she could not respond to the "facts" regarding the res ipsa loquitur doctrine set forth in the hospital's reply papers. However, the hospital was merely responding to Jackson's opposition papers, which raised this doctrine for the first time, and its response did not raise any new or different facts. Furthermore, as already stressed, Jackson was aware that the lower court's tentative ruling rejected her argument that this doctrine applied and she did not challenge this ruling. Thus, she has completely failed to explain why she could not have raised any argument or issue regarding this doctrine at an earlier time.

**DISPOSITION**

The judgment is affirmed. The hospital is awarded the costs of appeal.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.