2nd Civil No. B224903

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARIA FLORES,

Plaintiff and Appellant,

vs.

MARTIN LUTHER KING HOSPITAL/DREW MEDICAL CENTER,

Defendant and Respondent.

Appeal from the Los Angeles County Superior Court
Honorable William Barry, Judge
Los Angeles County Superior Court Case No. TC020160

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Cases	Page
LeFrancois v. Groel (2005) 35 Cal.4th 1094	31
Lewis v. County of Sacramento (2001) 93 Cal.App.4th 107	8, 9
Lombardo v. Santa Monica Young Men's Christian Association (1985) 169 Cal.App.3d 529	9
Lopez v. Southern California Permanente Medical Group (1981) 115 Cal.App.3d 673	15
Mabie v. Hyatt (1990) 61 Cal.App.4th 581	29
In re Marriage of Arceneaux (1990) 51 Cal.3d 1130	8
Martell v. Antelope Valley Hospital Medical Center (1998) 67 Cal.App.4th 978	25
Morgan v. Superior Court (1959) 172 Cal.App.2d 527	29
Nelson v. State of California (1982) 139 Cal.App.3d 72	14, 21
Norgart v. Upjohn Co. (1999) 21 Cal.4th 383	26
Nwosu v. Uba (2004) 122 Cal.App.4th 1229	19
People v. Stanley (1995) 10 Cal.4th 764	8
Roberts v. County of Los Angeles (2009) 175 Cal.App.4th 474	25
Salinas v. Martin (2008) 166 Cal.App.4th 404	34
Shelton v. Superior Court (1976) 56 Cal.App.3d 66	11, 20

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

INTRODUCTION

Plaintiff Maria Flores appeals from a summary judgment granted to the County of Los Angeles (the "County") based on her failure to comply with the Government Claims Act (Gov. Code, § 810 et seq.). Plaintiff filed a government claim for the alleged wrongful death of her daughter, Maria G. Flores ("Maria G."), based on purportedly negligent medical care in the emergency room at Martin Luther King, Jr./Drew Medical Center on September 19 and 20, 2005. Plaintiff later amended her complaint to add an allegation that from 1986 onward – *before* the emergency room visit – other County doctors failed to give Maria G. a vaccination that would have prevented her death by preventing the illness that ultimately caused it. The trial court found that plaintiff's new allegations were not reflected in her government claim.

As we will show, the trial court was correct. The judgment must be affirmed.

STATEMENT OF FACTS[1]

In the early afternoon of September 19, 2005, Maria G. complained to her mother and her brother, Carlos Flores, that her back hurt and she felt cold. (2 CT 300; 1 CT 146-147, 151-153.)[2] After initially calling paramedics to their home, Carlos drove Maria G. and their mother to the emergency room at Martin Luther King, Jr./Drew Medical Center ("King/Drew Medical Center" or

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[1] Because this is an appeal from the grant of summary judgment, we state the facts in the light most favorable to plaintiff unless otherwise noted.

[2] Throughout this brief, "CT" refers to the clerk's transcript (preceded by volume number), "RT" the reporter's transcript, and "AOB" the appellant's opening brief.

"the hospital"), arriving at approximately 6:30 p.m. (2 CT 300; 1 CT 147-148, 152-154.) According to the hospital's records, Maria G. was admitted at 7:16 p.m. and her vital signs were taken at 8:00 p.m. The medical history taken upon admission stated that Maria G. had chills, back pain and abdominal pain that afternoon, with pain worsening. (2 CT 300-301; 1 CT 138, 140, 143, 160.)

Despite receiving antibiotics at the emergency room, Maria G. deteriorated rapidly. She was diagnosed with pneumococcal sepsis with disseminated intravascular coagulation ("DIC"), developed multi-organ failure, and was pronounced dead at 8:07 a.m. on September 20, 2005. (2 CT 300-301; 1 CT 138, 141, 143, 174-175.) The coroner concluded that the cause of death was sepsis due to Streptococcus pneumoniae. (2 CT 301, 289.)

In 1986 (19 years before this incident), Maria G. had been involved in a motorcycle accident that required her to undergo a splenectomy, left nephrectomy and liver resection. She developed hepatitis C from a blood transfusion related to that treatment, and at some point was also diagnosed with diabetes. (2 CT 301; 1 CT 140-141, 143; 2 CT 306.)

Post-splenectomy patients who develop pneumococcal sepsis with DIC have a high mortality rate of 50% to 70% despite appropriate antibiotic therapy and intensive medical support. The time between symptoms and death is extremely short; 68% of patients die within 24 hours and 80% within 48 hours. (2 CT 301; 1 CT 141; see also 2 CT 307, 326, 333.) Accordingly, Maria G. had less than a 50% chance of survival when she arrived at the emergency room the evening before her death. (1 CT 141.)[3]

Although a vaccine exists for Streptococcus pneumoniae, the vaccine is

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[3] Plaintiff stated in her separate statement that this fact was disputed (2 CT 302), but the evidence she cites does not refute this point. (See 2 CT 302, 308.)

not administered in hospital emergency rooms, and a vaccine administered to Maria G. at the time she entered King/Drew Medical Center's emergency room would not have increased her chances of survival. (2 CT 302; 1 CT 141, 144.)

STATEMENT OF THE CASE

On approximately December 9, 2005, Maria G.'s family filed a government claim with the County. (2 CT 266, 285-288.) The claim identified the claimants' injuries as wrongful death and, for Maria's mother and three brothers, negligent infliction of emotional distress "for observing how treatment caused death of [Maria G.]." (2 CT 286-287.) The claim further stated that the injuries occurred at King/Drew Medical Center on September 20, 2005 and that "[n]egligent treatment of Drs. Moustafa, Gierahn, Gentile, Aguillera, Kachabian, and other presently unknown emergency room physicians, nurses and hospital employees resulted in the death of Maria G. Flores." (2 CT 287.) The claim identified the particular act or omission causing injury as: "No physician attended [Maria G.] for hours and then negligent treatment and misdiagnosis, including wrong medication and failed [sic] to identify injury, resulting in death." (2 CT 287.)

On June 29, 2006, Maria G.'s mother and siblings sued the County and various individual defendants. (1 CT 7.)[4] The original complaint alleged causes of action for (1) medical malpractice based on Maria G.'s wrongful death, and (2) negligent infliction of emotional distress. (1 CT 7-12.) The cause of action for medical malpractice alleged that after arriving at the King/Drew Medical Center emergency room on September 19, 2005, Maria G.

[4] Plaintiff dismissed the individually named defendants on October 20, 2006. (1 CT 5.)

received no medical attention for several hours, and hospital physicians then provided negligent treatment, misdiagnosed her, and gave her improper medication, resulting in her death. (1 CT 10.)

On July 17, 2009, plaintiffs moved to amend the complaint. (1 CT 13-42; see also 1 CT 68-100.) The County opposed the motion (1 CT 43-67), and the trial court granted it on August 4, 2009 (1 CT 101).

On August 11, 2009, Maria G.'s mother, as the sole remaining plaintiff, filed a first amended complaint against the County. (1 CT 102.) The amended complaint alleged a single cause of action for medical malpractice based on Maria G.'s death. (1 CT 102-107.) The cause of action was essentially identical to the cause of action for medical malpractice in the original complaint, except that the new complaint further alleged that from 1986, when Maria G.'s spleen was removed, through September 19, 2005, King/Drew Medical Center physicians failed to vaccinate her for Streptococcus pneumoniae or advise her of the "high risk of death without vaccination . . . ." (1 CT 105.)

The County moved for summary judgment. (1 CT 115-214; 2 CT 215-264; see also 2 CT 265-296, 369-383.) Regarding the events in the emergency room on September 19 and 20, 2005, the County argued that even if Maria G. had received antibiotics immediately upon admission, she would have had less than a 50% chance of survival because asplenic persons (persons without a spleen) who develop pneumococcal sepsis with DIC have a 50% to 70% mortality rate despite appropriate therapy. Thus, plaintiff could not establish that any negligence by the emergency department staff was a legal cause of her death. (1 CT 130-133.)

Regarding the failure-to-vaccinate theory alleged for the first time in the amended complaint, the County argued that plaintiff had failed to comply with

the government claims statute because her claim failed to raise the vaccination theory, and in any case that theory was barred by the statute of limitations. (1 CT 125, 135-136.)[5]

In opposition to the County's motion, plaintiff contended that in granting her earlier motion for leave to amend the complaint, the trial court had already ruled that plaintiff's government claim adequately raised her vaccination theory. Thus, to ask the trial court to revisit its earlier ruling, the County had to move for reconsideration under Code of Civil Procedure section 1008. (2 CT 319-320.)

Plaintiff also presented the declaration of her expert, Bernard McNamara, M.D. (2 CT 348-352.) Regarding the events in the emergency room on September 19 and 20, 2005, Dr. McNamara stated, consistent with the County's experts, that in patients without spleens, a Streptococcus pneumoniae infection has a fatality rate of 80% to 90%. (2 CT 350.) However, he opined that the emergency room physicians accelerated Maria G.'s death by failing to take a blood culture until seven hours after she was admitted, and by delaying the administration of antibiotics and IV liquids to fight the infection. (2 CT 351-353.)

Regarding plaintiff's vaccination theory, Dr. McNamara opined that the standard of care required that persons who are asplenic, or who have hepatitis C or diabetes, be vaccinated against Streptococcus pneumoniae infection or be advised of the high mortality rate without vaccination; more

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[5] The County also presented an expert declaration stating that (1) even if Maria G. had received a pneumococcal vaccine at the time of her splenectomy or any time thereafter, it would not have increased her chances of survival, and (2) in patients such as Maria G. who have undergone Interferon treatment for hepatitis C, such vaccines may not establish immunity and are potentially harmful. (1 CT 141, 144; see also 1 CT 132.)

specifically, he opined, Maria G. should have been vaccinated after her splenectomy in 1986 and revaccinated every five years. Had she been vaccinated, she would have had "a near 100% chance of survival." (2 CT 350-351.)

The County objected to Dr. McNamara's declaration on the grounds that his opinions lacked foundation and were conclusory. (2 CT 380-383.)[6]

The trial court granted the County's motion for summary judgment (2 CT 410-415), finding that there was no triable issue of material fact and that the County was entitled to judgment as a matter of law. (2 CT 410.) First, the court reasoned that the County could not be held liable based on the actions of the emergency room staff because when Maria G. entered the emergency room on September 19, 2005, she had less than a 50% chance of survival. (2 CT 410-411, 414.) The court explained:

> From Dr. McNamara's declaration, . . . it is clear that [Maria G.] had only a 10-20% survival chance when she presented at the emergency room because he is of the opinion that she had not been vaccinated. Assuming this opinion to be correct (it is consistent with defendant's expert's opinion), [Maria G.] was probably going to die when she came to defendant's emergency room no matter what the emergency room staff did. The uncontradicted authority in defendant's moving papers demonstrates that a medical practitioner cannot be held responsible for a patient's demise unless there was at least a 50% chance of survival. Therefore, there is no liability for the acts or omissions of defendant's emergency room staff.
>
> This is a wrongful death action; it is not coupled with a survival action. Therefore, Dr. McNamara's conclusion that the emergency room staff contributed to her death by accelerating her demise is, as a

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[6] Specifically, the County argued that there was no foundation for Dr. McNamara's statements that (1) Maria G. was never vaccinated for Streptococcus pneumoniae infection, and (2) King/Drew Medical Center was plaintiff's sole provider of medical care from the time of her splenectomy in 1986 until her death. (2 CT 374-375, 381.)

> matter of law, immaterial. She presented at the emergency room with a mortal condition, which was probably going to, and did, result in her death soon after she arrived at the emergency room.

(2 CT 414.)

Second, the trial court reasoned that plaintiff's vaccination theory, alleged for the first time in her amended complaint, had not been raised in her government claim. Thus, plaintiff had failed to comply with Government Code sections 910, subdivision (c) and 945.4. (2 CT 411, 414-415.) The court said:

> [T]he fact that plaintiff's Claim did not mention [the] vaccination issue as a basis for liability, and that she did not seek leave to amend her Claim to include a later discovered basis for a claim, is fatal to her case.
> . . .
> [T]he circumstances surrounding the alleged vaccination issue are significantly different than the alleged negligence in the emergency room, such that this new issue is not an expansion of the underlying claim.

(2 CT 414-415.)

Regarding plaintiff's contention that the County needed to raise the claim variance issue via a motion for reconsideration, the trial court explained that the court had allowed plaintiff to file the amended complaint

> in connection with a motion to file an amended pleading, which is decided under a liberal standard, one that disfavors barring an amendment because it might lack merit at the end of the day. Therefore, the court did not rule on the merits of whether or not the [vaccination] issue might be barred. For that reason, [Code Civ. Proc.,] § 1008 is not applicable here. The court is not reconsidering the decision.

(2 CT 415.) The trial court also sustained the County's evidentiary objections to Dr. McNamara's declaration. (2 CT 411, 414.)[7]

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[7] Plaintiff has not challenged the trial court's ruling sustaining the County's evidentiary objections to Dr. McNamara's declaration, so she is bound by that ruling. (See *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 [appellate review is limited to issues adequately raised

Judgment was entered on March 30, 2010. (2 CT 405.) The County served notice of entry of judgment on April 7, 2010. (2 CT 407-417.) On June 4, 2010, plaintiff filed a timely notice of appeal. (2 CT 421-422.)

STANDARD AND SCOPE OF REVIEW

A judgment of the trial court is presumed correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) An appellant seeking to reverse the judgment has the burden of demonstrating reversible error in the trial court. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) This burden requires the appellant to (1) identify the issues for review; (2) provide reasoned analysis and legal authority to support her position on the issues; and (3) identify specific facts and provide citations to the record to support her position. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

The appellant's burden on appeal is not lessened by the fact that the judgment was a summary judgment, which the appellate court reviews de novo. The de novo standard describes the manner in which the evidence is reviewed, not the scope of review. De novo review means that the appellate court makes its own decision on the evidence before it, without giving deference to the trial court's decision. (*Worton v. Worton* (1991) 234 Cal.App.3d 1638, 1646.) The scope of that de novo review, however, is determined by the issues properly raised in the opening brief and supported by citation to the record and legal authority. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116;

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and briefed].) Accordingly, plaintiff has improperly cited the portion of Dr. McNamara's declaration stating that Maria G. "became a regular outpatient of the hospital from 1986 to her death on September 20, 2005." (See AOB 13 [citing 2 CT 349].)

Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1115.) "[D]e novo review does not obligate [the appellate court] to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues" of material fact to defeat summary judgment. (*Lewis v. County of Sacramento, supra*, 93 Cal.App.4th at p. 116; see also *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115.)

Like any judgment, a summary judgment should be affirmed if it can be upheld on any grounds supported by the record. (*Lombardo v. Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 538, fn. 4.)

LEGAL DISCUSSION

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE COUNTY.

On appeal, plaintiff does not challenge the trial court's ruling that the County could not be held liable based on the actions of the emergency room staff on the night before Maria G.'s death, thereby waiving any error with respect to that claim. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.) Rather, plaintiff takes issue with the court's ruling that her failure to comply with the government claim requirements precluded her vaccination theory. As we show below, that ruling was proper, and the trial court properly granted summary judgment to the County.

A. Summary Judgment Was Proper Because Plaintiff Never Raised Her Vaccination Theory in Her Government Claim.

1. The Government Claims Act requires a plaintiff to present a timely claim that includes all factual and legal bases for a lawsuit against a public entity.

Under the Government Claims Act (Gov. Code, § 810 et seq.), a person who wishes to sue a public entity must present a timely claim to the entity before filing a complaint. (Gov. Code § 945.4; *Fall River Joint Unified School District v. Superior Court* (1988) 206 Cal.App.3d 431, 434 ["*Fall River*"].) The claim must include "[t]he date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted," a general description of the injuries, and the names of the public employees who caused them. (Gov. Code § 910; see also *Fall River*, *supra*, 206 Cal.App.3d at p. 434.) Failure to comply with the claim statutes bars the claimant's action at law. (*State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239; *City of San*

Jose v. Superior Court (1974) 12 Cal.3d 447, 454 .)

The purpose of the claim requirement is "'to apprise the governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate, avoid litigation by settling meritorious claims.'" (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 888; see also *City of San Jose v. Superior Court, supra,* 12 Cal.3d at p. 455.) Accordingly, the claim requirement must be satisfied even if the public entity had actual knowledge of the circumstances surrounding the claim. (*City of San Jose v. Superior Court , supra,* 12 Cal.3d at p. 455; *Shelton v. Superior Court* (1976) 56 Cal.App.3d 66, 82.)

Moreover, the claim submitted to the public entity must "'describe fairly what that entity is alleged to have done.' [Citation.]" (*Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1808; *Turner, supra,* 232 Cal.App.3d at p. 888.) In particular, "a claim filed in anticipation of litigation must set forth *all* the legal and factual bases that will be asserted in any subsequent lawsuit." (*Doe 1 v. City of Murrieta* (2002) 102 Cal.App.4th 899, 920, emphasis added.) "If a plaintiff relies on more than one theory of recovery against the [public entity], each cause of action must have been reflected in a timely claim." (*Turner, supra,* 232 Cal.App.3d at p. 888; *Fall River, supra,* 206 Cal.App.3d at p. 434.) Similarly, "the factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint; even if the claim [was] timely, the complaint is vulnerable to a demurrer . . . if it alleges a factual basis for recovery which is not fairly reflected in the written claim." (*Fall River, supra,* 206 Cal.App.3d at p. 434, citations and internal quotation marks omitted; *Turner, supra,* 232 Cal.App.3d at p. 888.)

Courts have formulated a "substantial compliance" exception to the

strict claims requirement. However, the exception "is unavailing where the plaintiff seeks to impose upon the defendant public entity the obligation to defend a lawsuit based upon a set of facts entirely different from those first noticed." (*Fall River*, *supra*, 206 Cal.App.3d at p. 435; accord, *Turner*, *supra*, 232 Cal.App.3d at p. 891.) To hold otherwise, courts have noted, would subvert the purpose of the claim requirement, "which is intended to give the governmental agency an opportunity to investigate and evaluate its potential liability . . . ." (*Fall River*, *supra*, 206 Cal.App.3d at p. 435-436; *Turner*, *supra*, 232 Cal.App.3d at p. 891.)

Fall River illustrates these principles. There, plaintiff was injured when the door of a building on a high school campus hit his head. (*Fall River*, *supra*, 206 Cal.App.3d at p. 433.) Plaintiff filed a government claim with the school district, asserting that "'the door was in a dangerous and defective condition for several reasons, including, but not limited to the fact, the door closed with excessive force.'" (*Id.* at p. 434.) In accordance with the claim, plaintiff's original complaint properly asserted causes of action for dangerous condition of public property based on the unsafe door, and negligence in maintaining the school premises. (*Ibid*.) Plaintiff then filed an amended complaint asserting that school district personnel negligently failed to supervise students engaged in "'dangerous horse-play" during which plaintiff's head was caught in the door. (*Ibid.*) The court of appeal held that defendant was entitled to judgment on the pleadings because plaintiff's tort claim did not include his new failure-to-supervise theory. (*Id.* at p. 434-435.)

The court reasoned that plaintiff's amended complaint "patently attempt[ed] to premise liability on an entirely different factual basis" from that stated in the claim. (*Id.* at p. 435.) The court noted that negligently maintaining an unsafe structural or mechanical condition, the dangerous door,

was not "the 'factual equivalent'" of failing to halt student horseplay. (*Ibid.*)

The court also rejected plaintiff's contention that he had substantially complied with the claim requirement. The court noted that the school district "was given no warning that it might be sued for" a failure to supervise students and "had no opportunity to consider the validity of such a claim until the filing of the amended complaint." (*Id.* at p. 436.) Accordingly, "plaintiff did not even rise to level of minimal, much less substantial, compliance with the claim filing prerequisites." (*Ibid.*)

Turner v. State of California (1991) 232 Cal.App.3d 883 is also instructive. There, plaintiff was shot during a gang-related incident on state property. (*Id.* at p. 887.) He filed a government claim alleging failure to warn or take adequate precautions against gang-related violence, and reckless conduct of security officers in firing the shot that hit him. (*Id.* at p. 888-889.) The claim also alleged specific legal theories, including "'dangerous conditions of property.'" (*Id.* at p. 889.) Plaintiff's complaint accordingly alleged a cause of action for dangerous condition of public property. (*Id.* at p. 887.) Later, in opposition to summary judgment, plaintiff presented evidence that the property was inadequately lit. (*Id.* at p. 888.) The court of appeal held that the trial court properly disregarded this evidence in granting summary judgment, because plaintiff's claim had not alleged inadequate lighting. (*Id*. at p. 891.)

The court rejected plaintiff's contention that he had substantially complied with the claim requirements because his claim's general reference to "dangerous conditions of property" was broad enough to include inadequate lighting. (*Id.* at p. 890.) The court reasoned that "[r]ead in its entirety," the claim alleged a dangerous condition of known criminal activity, not inadequate lighting. (*Id.* at p. 890-91.) Thus, the new allegations were "completely different" from those stated in the claim and "constitute[d] a complete shift in

theory." (*Id.* at p. 890-891.)

Similarly, in *Nelson v. State of California* (1982) 139 Cal.App.3d 72, plaintiff filed a government claim alleging that the state and its doctors were negligent in examining, diagnosing and treating him while incarcerated. (*Id.* at p. 77, 80.) The claim stated that when plaintiff arrived at the state prison, he saw medical personnel and informed them of his medical problems, and they discounted his statements after taking x-rays and checking his blood pressure. (*Id.* at p. 80.) After filing an original complaint properly alleging medical malpractice (*id.* at p. 77), plaintiff filed an amended complaint alleging that state employees negligently failed to summon immediate, competent medical assistance. (*Id.* at p. 75-76, 78.) The court of appeal held that the state's demurrer to the amended complaint was properly sustained. (*Id.* at p. 81.) The appellate court reasoned that a doctor's failure to prescribe or provide the correct medication "cannot be characterized as a failure to summon medical care." (*Id.* at p. 80-81; see also *Watson v. State of California* (1993) 21 Cal.App.4th 836, 844-845 [similar facts].)

Numerous cases are in accord. (E.g., *Donahue v. State of California* (1986) 178 Cal.App.3d 795, 804 [claim's assertion that state negligently permitted uninsured motorist to take a driving test was "not the factual equivalent" of complaint's allegation that state negligently failed to direct and control motorist during driving examination]; *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1807-1808 [on retrial, plaintiff could not assert new theory of liability against hospital for employing insufficient personnel, where claim asserted medical negligence; "it was [plaintiff's] responsibility to present a claim reflecting all possible theories of liability"]; *Lopez v. Southern Cal. Permanente Medical Group* (1981) 115 Cal.App.3d 673, 676-677 [where claim alleged that state had negligently

issued a driver's license despite driver's epileptic condition, trial court properly denied leave to amend complaint to allege that state neglected to suspend or revoke driver's license for noncompliance with accident reporting and financial responsibility laws].)

As discussed next, these authorities make clear that plaintiff's government claim failed to give the County proper notice that it would be sued for its physicians' failure to vaccinate Maria G. or to warn her of the dangers of forgoing the vaccination.

2. Plaintiff's government claim cannot be read to include her vaccination theory.

Plaintiff's government claim read as follows:

> 5. **How did Damage or injury/death occur?** Negligent treatment of Drs. Moustafa, Gierahn, Gentile, Aguillera, Kachabian, *and other presently unknown emergency room physicians, nurses and hospital employees* resulted in the death of Maria G. Flores.
>
> 6. **When did injury and damage occur?** *September 20, 2005*
>
> 7. **Where did damage or injury occur?** Martin Luther King Jr. Hospital/Drew Medical Center, 12021 Wilmington Ave, Los Angeles, Ca. 90059
>
> 8. **What particular act or omission caused the injury or damage?** *No physician attended patient for hours and then negligent treatment and mis-diagnosis, including wrong medication and failed to identify injury*, resulting in death.
>
> . . .
>
> 11. **Damages or injuries:** Wrongful Death Claims for each member and Negligent Infliction of Emotional Distress for Maria Flores, Ray Flores, Pedro Flores and Carlos Flores for observing how treatment caused death of daughter and sister.

(2 CT 287, emphasis added.)

In short, the claim asserted that the emergency room staff failed to treat Maria G. for hours and then provided negligent treatment, including mis-diagnosing her and giving her the wrong medication.

Accordingly, plaintiff's original complaint alleged medical malpractice based on allegations that "[a]fter presenting herself in the emergency room of defendant hospital in the afternoon of September 19, 2005, no physician attended patient [Maria G.] for hours and then negligent treatment and mis-diagnosis, including wrong medication and failed [sic] to identify injury, resulting in death." (1 CT 105 [¶ 11].) The complaint further elaborated:

> The acts of negligence include: the failure to provide competent emergency room treatment and/or provide any assistance after admitting the deceased and performing preliminary inefficient testing, the failure to provide any assistance in order to diagnose her condition and prescribe the proper medication, the failure to diagnose clinical findings and subjective complaints, the failure to diagnose or treat the condition forming in the deceased, Maria G. Flores, and prescribing the wrong medication after being told of [the] medications that produced allergic reactions in the deceased."

(1 CT 105-106 [¶ 14].)

Plaintiff's amended complaint, however, added a different factual theory. It alleged that County doctors failed to vaccinate Maria G. for Streptococcus pneumoniae or to warn her of the high risk of death without vaccination when they removed her spleen in 1986, and continuing until her hospital admission on September 19, 2005. The amended complaint stated:

> Specifically, the negligent acts include, with knowledge that the decedents [sic] spleen had been removed, *the physicians employed by the defendant failed to vaccinate the decedent for Streptococcus pneumoniae upon removing her spleen in 1986 and through September 19th, 2005,* and the defendant's physicians *failed to warn and advise the decedent of the high risk of death without vaccination, upon removing her spleen in 1986, and through September 19th, 2005.*

(1 CT 106, emphasis added.)

On appeal, plaintiff limits the timeframe of these allegations, and asserts that County physicians were negligent in failing to vaccinate Maria G. (or to warn her of the dangers of not being vaccinated) during only one consultation

on August 23, 2005, 27 days before the emergency room incident. (See AOB 3, 7, 19.) In opposing summary judgment, plaintiff asserted that the August 23, 2005 consultation was with Anil K. Dev, M.D., an internal medicine physician who was not one of the physicians named in the government claim. (2 CT 318, 351; see also AOB 15.)

Plaintiff's new failure-to-vaccinate theory is not properly part of this case. That theory asserts liability based on different acts, by different actors, that occurred at different times and in different places from those asserted in plaintiff's government claim. As shown, plaintiff's claim asserted liability based on the actions of particular emergency room physicians in failing to treat Maria G. immediately, and then giving her the wrong medication and mis-diagnosing her in the emergency room on September 19 and 20, 2005. (2 CT 287.) The vaccination theory, on the other hand, premised liability on other physicians' failure to vaccinate Maria G. or to warn her of the dangers of failing to be vaccinated, during a nonemergency consultation one month before her emergency room visit (or, as alleged in the amended complaint, during multiple visits over a 20-year period) — "an entirely different factual basis than what was set forth in the [] claim." (*Fall River, supra*, 206 Cal.App.3d at p. 435; 1 CT 105-106; 2 CT 318, 351; AOB 3, 7, 15, 19.) Thus, plaintiff's government claim gave the County "no warning that it might be sued" for the failure to vaccinate Maria G., and the County "had no opportunity to consider the validity of such a claim until the filing of the amended complaint." (*Fall River, supra*, 206 Cal.App.3d at p. 436.) Accordingly, plaintiff was not entitled to assert her vaccination theory. (*Id*. at pp. 434-436.)[8]

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[8] Plaintiff does not contend that she could file a timely claim at this point, nor could she. A potential plaintiff must present a claim to the public entity within six months after the cause of action accrues (Gov. Code, § 911.2),

Plaintiff contends that she substantially complied with the claim statutes because her government claim alleged wrongful death and identified the injury as Maria G.'s death at the hospital due to negligent treatment. From this information, plaintiff argues, the County could have identified the failure to vaccinate as a possible basis for the claim. (AOB 22-23.) Specifically, she contends "a reasonable investigation" would include reviewing the coroner's report, which states that Maria G. died from septic shock and that the underlying Streptococcus pneumoniae infection has a high mortality rate for persons without spleens; the County then should have determined whether reasonable medical care could have prevented Maria G. from contracting the infection and whether she received such care. (AOB 22-23.) The County should also have reviewed Maria G.'s complete medical records, which showed that she had three risk factors for death from infection and had "some 15 consultations with the gastroenterology physicians at the . . . hospital in the 8 months before her death." (AOB 23.)

Plaintiff's argument fails for several reasons.

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or apply for leave to present a late claim within one year after accrual (Gov. Code, § 911.4, subds. (a) & (b), 946.6, subd. (c) [to obtain relief from claim-presentation requirements, plaintiff must have applied for leave to present a late claim within one year]). The accrual date is provided by the statute of limitations that would apply if the defendant were not a public entity — here, Code of Civil Procedure section 340.5. (Gov. Code, § 901; *Torres v. County of Los Angeles* (1989) 209 Cal.App.3d 325, 332-333.) Under that section, a cause of action for wrongful death based on medical negligence generally accrues upon the decedent's death, or possibly when the plaintiff discovers or should have discovered the death's negligent cause. (*Larcher v. Wanless* (1976) 18 Cal.3d 646, 656-658.) Here, plaintiff obviously was aware of both the death and its alleged negligent cause by the time she filed her amended complaint on August 11, 2009 — well over a year ago. (1 CT 102.) Thus, regardless of which accrual date applies, plaintiff can no longer comply with the claim statutes.

First, plaintiff provides not a single citation to the record to support her factual contentions. (See AOB 20-23.)[9] This court is not required to take on the appellant's burden and comb the record looking for error. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Points unsupported by citations to the record are deemed waived. (*Ibid.*) Because plaintiff has not supported her assertions with proper citations to the record, the court should disregard her argument.

Second, the authorities discussed above make clear that the claim requirement is intended to alert the public entity that it is about to be sued and inform it of the grounds for suit so that it can determine the merits of the claim, in order to facilitate settlement and allow the entity to terminate the litigation with the minimum possible cost. (See *City of San Jose v. Superior Court*, *supra*, 12 Cal.3d at p. 455; *Turner*, *supra*, 232 Cal.App.3d at p. 888.) That the governmental body might have the capacity — with an exhaustive investigation — to discover other bases for potential lawsuits, even if not actually asserted by a claimant, is irrelevant. The mere occurrence of an injury does not necessarily mean that someone will sue or assert a particular cause of action. Accordingly, the public entity is not required to conduct a fishing expedition to guess at potential theories. This is also why a plaintiff must comply with the claim statutes even if the public entity has actual knowledge of the facts surrounding the injury. (See *City of San Jose v. Superior Court, supra,* 12 Cal.3d at p. 455; *Shelton v. Superior Court, supra,* 56 Cal.App.3d at p. 82.)

Shelton v. Superior Court (1976) 56 Cal.App.3d 66, 82-83, is instructive. There, a husband and wife were injured in an automobile accident,

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[9] In fact, contrary to plaintiff's contention, the coroner's report does *not* say that a Streptococcus pneumoniae infection carries a high mortality rate if contracted by persons without spleens. (See 2 CT 218-226.)

and each filed a government claim with defendant public entities seeking damages for his or her own injuries based on defective road conditions. (*Id*. at p. 70-71 & fn. 1.) Plaintiffs later sought to amend their complaint to include claims for loss of consortium, arguing that their government claims generally put the public entities on notice of the injuries underlying the claims for loss of consortium and satisfied the claim requirement. (*Id*. at p. 69, 71 & fn. 2, 82.) The court rejected this contention. (*Id*. at p. 82.)

The court explained that the claim statutes' purpose "'is not . . . to prevent surprise,'" but "'to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.'" (*Ibid*.) Accordingly, the court reasoned, "'the public entity's actual knowledge of the circumstances surrounding the claim,'" standing alone, did not amount to substantial compliance. (*Ibid*.) The court concluded that "the state had no notice that any claim for loss of consortium was involved until its attorney received a telephone call more than one year after the accident." (*Ibid*.)

Similarly, in the other cases discussed above, the plaintiff's government claim did not sufficiently notify the public entity that it was being sued for the conduct later alleged, even though arguably it could be said — as plaintiff asserts here — that the governmental body could have guessed that it might be sued for such conduct, had it thoroughly investigated all of the circumstances surrounding the plaintiff's injury. For example, in *Fall River*, *supra*, 206 Cal.App.3d 431, the defendant school district arguably could have determined that plaintiff and other students were involved in "dangerous horseplay" when plaintiff was hit by a door, had it investigated all of the circumstances surrounding the incident. Similarly, in *Turner*, *supra*, 232 Cal.App.3d 883, the public entity arguably had the capacity to examine

lighting conditions on its property to determine whether the lighting was inadequate when plaintiff was shot. And in *Nelson*, *supra*, 139 Cal.App.3d 72, the state arguably could have guessed that plaintiff might sue not only for medical malpractice, but for failure to summon competent medical assistance. Nevertheless, in those cases, the mere fact that the public entity theoretically had the ability to determine that the plaintiff might have additional theories, whether or not alleged in the claim, was insufficient to put the public entity on notice that it needed to investigate such conditions. To hold otherwise would require public entities to act as advocates for potential plaintiffs and would frustrate the claim statutes' purpose to facilitate settlement and save public entities the expense of litigation whenever possible.

Finally, plaintiff relies on *Stockett v. Association of California Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441 to argue that her government claim sufficiently raised her vaccination theory, but that case is inapposite. There, plaintiff was terminated from employment with a public agency after the agency's executive committee discussed his job performance in a closed meeting. (*Id.* at p. 444.) Plaintiff presented a claim to the agency, alleging that he had been wrongfully terminated because he supported a coworker's sexual harassment complaints against the agency's insurance broker, he knew that the committee and the broker had purchased insurance without competitive bidding, and he had considered soliciting other bids. (*Ibid.*) At trial, plaintiff asserted that he was fired for additional reasons – specifically, opposing the insurance broker's conflict of interest and telling an industry newsletter that the agency's workers' compensation insurer was selling insurance below cost. (*Id.* at p. 445, 446.) The court held that plaintiff's claim adequately notified the agency of all of plaintiff's theories of wrongful termination. (*Id.* at p. 446.)

The court reasoned that both plaintiff's claim and his new theories were "predicated on the same fundamental actions or failures to act by the defendants." (*Id.* at p. 447.) In particular, the new theories "alleged liability on the same wrongful act" — the termination — and "simply . . . added detail to [plaintiff's] wrongful termination claim by alleging additional motivations for [the agency's] single action of wrongful termination"; they "did not shift liability to other parties or premise liability on acts committed at different times or places." (*Id.* at p. 447-448.)

The court further reasoned that by notifying the agency of the precise wrongful act — termination — that caused his injury, and naming the individuals plaintiff believed responsible, plaintiff's claim "provided sufficient information for [the agency] to investigate and evaluate its merits." (*Id.* at p. 449.) Since plaintiff had requested the reasons for his termination and been denied them, a reasonable investigation of plaintiff's wrongful termination claim would have included questioning executive committee members to determine their reasons for terminating plaintiff and evaluating whether any of those reasons constituted wrongful termination. (*Ibid.*)

The present case is completely different. Unlike in *Stockett*, where plaintiff's government claim and his new theories were all based on the same, single wrongful act by the defendant public entity — the termination — and the new theories merely added different motivations or subjective reasons for that act, here plaintiff's government claim and her vaccination theory based liability on different wrongful acts, committed at different times and by different people. As explained, the claim alleged that the actions of emergency room doctors — specifically, delaying treatment and then providing the wrong medication and diagnosis — on two particular dates, caused Maria G.'s death. (2 CT 287.) Plaintiff's vaccination theory, however, asserted that different

actions – failing to vaccinate Maria G. — by different doctors, during consultations outside the emergency room, before the dates stated in the claim, resulted in Maria G. contracting the illness that ultimately caused her death. (1 CT 105-106; 2 CT 318, 351; AOB 3, 7, 15, 19.) Thus, unlike in *Stockett*, the claim and the new theory were not "predicated on the same fundamental actions or failures to act by the defendants." (See *Stockett, supra*, 34 Cal.4th at p. 447.)

Moreover, in *Stockett*, plaintiff's government claim adequately notified the defendant agency that it needed to investigate plaintiff's additional theories. Since plaintiff's claim alleged wrongful termination in violation of public policy, and that theory necessarily depended on the agency members' subjective motivations, the claim ensured that the defendant agency would investigate all of the reasons for the termination. Here, in contrast, plaintiff's claim notified the County only that the actions of emergency room doctors on two specific dates caused Maria G.'s death. A reasonable investigation of those actions would not necessarily involve evaluating the actions of Maria G.'s prior physicians during all previous consultations — particularly over a 20-year period — to determine whether they had committed additional wrongful acts.

Plaintiff further asserts that *Stockett* is on point because there the newly asserted theories implicated "events and actions that occurred on different dates and in different locations and involved additional people" — for example, at trial, plaintiff argued that he had been terminated for making comments to an industry newsletter. (AOB 24; see *Stockett, supra*, 34 Cal.4th at p. at 445.) But this was an act by *plaintiff*, which merely provided evidence of motivation for the agency's single act of termination; plaintiff did not argue that a different wrongful act by the defendant agency caused his injury. Here, in contrast,

plaintiff's vaccination theory premised liability on completely different alleged wrongful acts by the County.

In short, the trial court properly granted summary judgment because plaintiff's government claim failed to raise her belatedly asserted vaccination theory.

B. As an Alternative Ground for Affirmance, the Statute of Limitations Bars Plaintiff's Vaccination Cause of Action.

Even if plaintiff could overcome the variance in her government claim, the statute of limitations bars her cause of action based on the alleged failure to vaccinate.

A plaintiff suing a public entity for medical malpractice must comply with the outside, three-year period of Code of Civil Procedure section 340.5, the Medical Injury Compensation Reform Act of 1975 ("MICRA") statute of limitations. (*Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474, 481 [three-year limitation period in section 340.5 is "the outer limit by which a lawsuit must be filed against a public health care provider"].)[10] Specifically, section 340.5 provides that in medical malpractice actions, the statute of limitations is the earlier of "three years after the date of injury" or one year after the plaintiff discovers or should have discovered the injury, but "in no

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[10] The plaintiff must also comply with Government Code section 945.6, which generally provides the statute of limitations for actions against public entities. (*Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 980-985.) That section requires a plaintiff to sue a public entity no later than (1) six months after the public entity rejects the plaintiff's government claim and issues a warning pursuant to Government Code section 913, or (2) if the entity does not send a section 913 written notice, then two years from accrual of the cause of action. (Gov. Code, § 945.6, subd. (a).)

event . . . exceed[s] three years" unless tolled for specified reasons inapplicable here. (Code Civ. Proc., § 340.5; see *Roberts, supra*, 75 Cal.App.4th at p. 482.) As applied to wrongful death actions arising from alleged medical malpractice, "'injury' in section 340.5 . . . refer[s] to the wrongfully caused death of the plaintiff's decedent." (*Larcher v. Wanless, supra,* 18 Cal.3d at pp. 659, 650-651, 655-658 & fn.11.)

Here, the three-year limitation period began running on the date of injury — i.e., when Maria G. died on September 20, 2005 — and expired on September 20, 2008. Although plaintiff filed her original complaint on June 29, 2006, she did not file her amended complaint alleging her new vaccination theory until August 11, 2009 — almost a year after the statute of limitations expired. Accordingly, the amended complaint was barred unless it related back to the original complaint. (See *Barrington v. A.H. Robbins Co.* (1985) 39 Cal.3d 134, 150-151 [statute of limitations bars an amended complaint filed after the limitation period has run, unless amended complaint "relates back" to a timely original complaint].)

To relate back to an earlier complaint, an amended complaint not only must involve the same injury, but also must "rest on the same general set of facts" and "refer to the same instrumentality." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409, emphasis omitted; see also *Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342, 345 [amended complaint must "refer[] to the same action and the same injuries].) "'[I]t is the sameness of the *facts* rather than the rights or obligations arising from those facts that is determinative.'" (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1199, emphasis added.)

In *Coronet Manufacturing Co.*, for example, plaintiffs filed a government claim alleging that the decedent was electrocuted by defective

hairdryer; they later filed an amended complaint alleging that a defective lamp switch and socket were responsible for the electrocution. (*Id.* at p. 344-345.) The court held that the amended complaint did not relate back to the original complaint because even though both the lamp and hairdryer related to a single death at a single location, they were "different instrumentalities." (*Id.* at p. 347.)

Here, similarly, plaintiff's amended complaint was based on a different set of facts and referred to a different instrumentality. The original complaint alleged that County physicians committed malpractice at the emergency room on September 19 and 20, 2005 — specifically, by failing to treat Maria G. for several hours, misdiagnosing her condition, and giving her improper medication. (1 CT 105-106.). Plaintiff's amended complaint alleged that during a different timeframe (from 1986 until the emergency room incident in September 2005), County personnel at King/Drew Medical Center failed to vaccinate Maria G. for Streptococcus pneumoniae or advise her of the "high risk of death" without vaccination. (1 CT 105-106.) The failure to vaccinate involves an entirely separate, independent set of acts or omissions from the treatment (or delay in treatment) at the emergency room. Thus, the amended complaint did not relate back to the original complaint, and the statute of limitations bars the amended complaint. The summary judgment should be affirmed for this additional reason.

II. PLAINTIFF'S OTHER CONTENTIONS ARE MERITLESS.

A. Contrary to Plaintiff's Contention, the Trial Court Never Determined That Her Government Claim Adequately Raised Her Vaccination Theory.

Plaintiff contends that in granting her motion for leave to amend her

complaint, the trial court ruled that under *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, plaintiff's government claim adequately raised her vaccination theory. She contends that since the court had already determined the issue, the County could not raise it on summary judgment without filing a motion for reconsideration under Code of Civil Procedure section 1008. (AOB 26-28.) Plaintiff is wrong.

At the outset, plaintiff provides no citation to the record for her assertion that the trial court previously ruled that her government claim adequately raised the vaccination issue. (AOB 27.) This court "is not required to . . . consider points . . . not supported by citation to . . . the record." (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Thus, plaintiff has waived her argument.

In any case, the trial court did *not* in fact rule that plaintiff's claim adequately raised the vaccination issue.[11] To the contrary, the reporter's transcript suggests that the court granted leave to amend partly because it assumed that plaintiff's new allegations regarding the failure to vaccinate were part and parcel of her original allegations regarding negligent treatment in the emergency room. Specifically, the trial court expected plaintiff to argue that the emergency room physicians would have treated her differently — for example, by giving her different medications or vaccinating her — had they known she had never been vaccinated. (RT A-10 ["as I understand the plaintiff's case is that the doctor should have done things differently *when she presented in the emergency room*, one of the things they should have done was given her different medications for the situation she was confronting, and that kind of wraps in that they knew or should have known she didn't have the shot"], emphasis added.) When the court granted summary judgment,

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[11] The trial court's order granting leave to amend the complaint does not state the court's reasons for granting the motion. (1 CT 101.)

however, there was no evidence that the emergency room physicians would have vaccinated Maria G. or treated her any differently even if they knew she had not been vaccinated, and the undisputed evidence established that as a matter of law, a failure to vaccinate Maria G. in the emergency room did not cause her death because she had less than a 50% chance of survival at that time. (2 CT 414-415.)

More important, in granting summary judgment, the trial court explained that

> when the court allowed [the] amendment [to the complaint], it was doing so in connection with a motion to file an amended pleading, which is decided under a liberal standard, one that disfavors barring an amendment because it might lack merit at the end of the day. Therefore, the court *did not rule on the merits* of whether or not the issue might be barred.

(2 CT 415, emphasis added.) Thus, the court reasoned that it was not reconsidering an earlier decision, and Code of Code of Civil Procedure section 1008 was inapplicable. (2 CT 415.)

The trial court was correct. Motions for leave to amend must be liberally granted, and indeed denial of leave to amend is rarely justified. (*Mabie v. Hyatt* (1990) 61 Cal.App.4th 581, 596; *Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.) Generally, the trial court does not consider the validity of the proposed amendment in deciding whether to grant leave to amend, since the opposing party will have an opportunity to challenge the amendment by demurrer or summary judgment. (See *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) In contrast, on summary judgment, the court *does* determine the merits; the question at that point is whether, given the evidence presented by the parties, there is a triable issue of material fact or whether the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

Moreover, Code of Civil Procedure section 430.80, subdivision (a) allows objections to a complaint to be asserted in an answer or demurrer. The County preserved its objection to the amended complaint on the claim variance issue by asserting the variance as an affirmative defense in its answer. (1 CT 112-113.) The mere fact that plaintiff was allowed to file an amended complaint did not prohibit the County from asserting its defenses via a motion for summary judgment.

Plaintiff relies on *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494 to argue that the County's motion for summary judgment improperly sought reconsideration of the trial court's earlier order granting leave to amend (AOB 27-28), but that case is inapposite. There, defendant public entity moved for summary judgment based on plaintiff's failure to comply with the government claim requirements and the statute of limitations. (*Id*. at p. 1497-1498.) The trial court granted plaintiff relief from the claim filing requirements, allowed plaintiff to amend the complaint to allege facts supporting such relief, and dismissed defendant's summary judgment as moot. (*Id*. at p. 1498.) Defendant then moved for reconsideration of the trial court's rulings granting relief from the claim filing requirements and permitting the amended complaint — in other words, defendant explicitly sought reconsideration of the trial court's earlier decision — and simultaneously filed a demurrer to the amended complaint, which incorporated defendant's earlier summary judgment motion. (*Id*. at p. 1498.) The trial court granted reconsideration, reversed its earlier order granting plaintiff relief from the claim filing requirements, and sustained defendant's demurrer without leave to amend. (*Id*. at p. 1498.)

The court of appeal reversed (*id.* at p. 1503), reasoning that the trial court lacked the power to grant reconsideration because defendant failed to meet the prerequisites for such relief under Code of Civil Procedure section

1008. (*Id*. at p. 1499-1500.) The appellate court further held that it was error to grant defendant's demurrer. The court reasoned that the demurrer simply incorporated defendant's prior summary judgment motion, which the trial court had denied as moot given its orders relieving plaintiff from the claim filing requirements and granting leave to amend the complaint. Because the demurrer required the trial court to reconsider those precise rulings, it was essentially an improper motion for reconsideration. (*Id*. at p. 1502.)

Here, unlike the demurrer and motion for reconsideration in *Gilberd*, the County's summary judgment motion did not ask the trial court to reconsider an earlier ruling. Contrary to plaintiff's contention, the trial court never ruled that plaintiff's government claim adequately raised her vaccination theory; the court merely permitted plaintiff to amend her complaint to allege a new theory. (See 1 CT 101; 2 CT 415.) Thus, the court could decide the merits of the claim variance issue, and grant summary judgment, without reversing an earlier ruling.

Plaintiff also relies on *LeFrancois v. Groel* (2005) 35 Cal.4th 1094 (AOB 28), which held that a trial court may reconsider a prior interim order on its own motion. (*Id*. at p. 1108.) That case is inapposite because here, the trial court did not reconsider its ruling granting plaintiff leave to amend her complaint; rather, the court simply held that, given the evidence presented on summary judgment, plaintiff's new failure-to-vaccinate theory was based on completely different factual circumstances from the allegations of plaintiff's government claim.

Finally, *Blair v. Superior Court*, *supra*, 218 Cal.App.3d 221 does not help plaintiff establish that her government claim adequately raised the vaccination issue. In *Blair*, plaintiff was injured when the vehicle in which she was a passenger hit a tree. (*Id*. at p. 223.) Plaintiff filed a government claim

stating that the portion of the highway where she was injured "'was iced over, car went out of control and collided with a tree.'" (*Ibid*.) The claim further stated that the injury was caused by "[n]egligent maintenance and construction of highway surface. Failure to sand and care for highway for safetyness [sic] of automobile transportation." (*Ibid*.) Plaintiff later filed a complaint alleging that the road's configuration required warning signs or guardrails to prevent cars that might encounter ice from hitting objects next to the roadway. (*Id*. at p. 224.)

The court held that the claim adequately supported the complaint's allegations, because the complaint merely "elaborate[d] or add[ed] further detail to a claim which was predicated on the same fundamental facts set forth in the complaint." (*Id*. at p. 226.) Specifically, both the claim and the complaint were "premised on essentially the same foundation" — that due to its negligent construction or maintenance, the highway at the accident scene constituted a dangerous condition of public property. (*Ibid*.) The court further reasoned that the claim's charge of negligent construction could "reasonably be read to encompass defects in the placement of highway guard rails, slope of the road, presence of hazards adjacent to the roadway or inadequate warning signs." (*Ibid*.) The court noted that the complaint did not involve "a complete shift in allegations" or attempt to "premise . . . liability on acts or omissions committed at different times or by different persons than those described in the claim." (*Ibid*.)

Here, as discussed, plaintiff's failure-to-vaccinate theory completely shifted her theory of the case and alleged liability based on acts committed at different times and by different persons from those described in plaintiff's claim. (See § I. A, *ante*.) Accordingly, when the trial court actually addressed the merits of plaintiff's vaccination theory on summary judgment, the court

concluded that *Blair* required summary judgment for the County "because the circumstances surrounding the alleged vaccination issue are significantly different than the alleged negligence in the emergency room, such that this new issue is not an expansion of the underlying claim." (2 CT 414-415.)

B. Plaintiff's Contention That the County Failed to Show That Its Physicians Complied with the Standard of Care or Did Not Cause Injury Is Irrelevant Because Plaintiff Failed to Comply with the Government Claims Requirement.

Plaintiff contends that as to her vaccination theory, the County failed to meet its burden, in moving for summary judgment, to present evidence that its physicians did not breach the standard of care by failing to vaccinate or warn Maria G. of the dangers of not being vaccinated, or that this failure did not cause Maria G.'s death. Thus, plaintiff argues, the trial court "erred in ruling that there was no causation as a matter of law." (AOB 18.)[12] Plaintiff misses the mark.

First, plaintiff again fails to provide a single citation to the record to support her factual assertions, thus waiving her argument. (*Kim v. Sumitomo Bank, supra*, 17 Cal.App.4th at p. 979; see AOB 17-19.)

Second, plaintiff's argument is moot because the County's moving

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[12] Contrary to plaintiff's assertion, the trial court did not rule that "there was no causation as a matter of law." (AOB 18.) Rather, the court ruled that the actions of the emergency room physicians could not have been a legal cause of Maria G.'s death because she had less than a 50% chance of survival when she arrived (meaning that there was no legal probability that the death would not have happened absent the physicians' actions), and that the County could not be held liable on plaintiff's vaccination theory because plaintiff's government claim did not mention the failure to vaccinate as a basis for liability. (2 CT 410-411, 414-415.)

papers established that there was no triable issue of material fact as to whether plaintiff's government claim included her vaccination theory, thereby negating an essential element of plaintiff's cause of action based on failure to vaccinate. Compliance with the claims presentation requirements is an element of a cause of action against a public entity and thus is part of plaintiff's prima facie case. (See *State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1243-1244.) The County also alleged the fatal claim variance as an affirmative defense in its answer. (1 CT 112-113.) By presenting evidence that plaintiff failed to comply with the claims presentation requirement, the County "show[ed] that one or more elements of [plaintiff's vaccination cause of action] . . . [could not] be established, or that there [was] a complete defense to [the] cause of action" and thereby "met [its] burden of showing that [the] cause of action ha[d] no merit." (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 410.) Thus, the burden shifted to plaintiff to show that a triable issue of material fact existed as to her vaccination cause of action. (*Ibid.*) Because she failed to do so, summary judgment was proper.[13]

CONCLUSION

Summary judgment was properly granted to the County.

The trial court ruled that the County could not be held liable based on any acts or omissions of the emergency room staff immediately before

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[13] Incidentally, plaintiff is wrong when she states that "to be entitled to summary judgment, the defendant must conclusively negate an essential element of the plaintiff's cause of action. [Citation.]" (AOB 17, internal quotation marks omitted.) The authority she cites for this proposition, *Salinas v. Martin* (2008) 166 Cal.App.4th 404, 411, actually says that "to obtain a summary judgment a defendant *may* conclusively negate an essential element of plaintiff's action, *but is not required to do so*." (Emphasis added.)

Maria G.'s death, because she had less than a 50% chance of survival when she entered the emergency room; plaintiff has not challenged that ruling. The trial court properly found that the County also could not be held liable for any failure to vaccinate Maria G. during prior consultations with physicians at King/Drew Medical Center because plaintiff failed to raise the issue in her government claim. In addition, the statute of limitations independently bars any cause of action based on the alleged failure to vaccinate.

For these reasons, the judgment should be affirmed.

Dated: June 17, 2011

Respectfully submitted,

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Martin Stein
Carolyn Oill
Lillie Hsu

By: _____
Lillie Hsu
Attorneys for Defendant and Respondent
COUNTY OF LOS ANGELES

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached RESPONDENT'S BRIEF is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 9,891 words.

DATED: June 17, 2011

_____
Lillie Hsu

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036-3697

On **June 17, 2011**, I served the foregoing document described as **RESPONDENT'S BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Steven O'Reilly
12304 Santa Monica Blvd., Suite 300
Los Angeles, California 90025
Attorneys for Plaintiff/Appellant Maria Flores

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102
(4 copies)

Clerk of the Court
Los Angeles County Superior Court
Hon. William Barry
200 W. Compton Blvd.
Compton, California 90220
(Case No. TC020160 - 1 copy)

I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **June 17, 2011**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

_____
Joyce McGilbert