Court of Appeal, First District, Division 2, California.
Carole MARASOVIC, Individually and as Administratrix, etc., Plaintiff and Appellant,
v.
Laura EBERHARD, Defendant and Respondent.

No. A106356.
(Alameda County Super. Ct. No. C-826899).
Feb. 17, 2006.

Joseph Spalding Picchi, Galloway Lucchese & Everson, Walnut Creek, CA, for Defendant and Respondent.

RUVOLO, J.FN*

FN* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

*1 Appellant Carole Marasovic seeks review of a summary judgment entered in favor of respondent Laura Eberhard, a medical doctor who is one of the defendants in an action arising out of the death of appellant's mother. Appellant contends that the judge who granted respondent's summary judgment motion was biased against her; that her cause of action for professional negligence should not have been summarily adjudicated because respondent did not move for summary judgment on that cause of action; that the court below erred in failing to consider evidence appellant submitted in opposition to the summary judgment motion, and in finding no triable issue of fact; and that the court should have permitted appellant to amend her complaint to plead a cause of action on a negligence per se theory based on asserted violations of state and local law. We reject all of these contentions, and affirm the judgment. FN1

FN1. Appellant has also appealed from a summary judgment entered in favor of two other defendants, Alta Bates Medical Center and its employee Linda Bradford. In a separate opinion filed today, we also affirm that judgment. (Marasovic v. Alta Bates Medical Center (Feb. 17, 2006, A106355) [nonpub. opn.].)

FACTS FN2 AND PROCEDURAL BACKGROUND

FN2. The two-and-a-half page statement of facts in appellant's opening brief contains a total of three citations to the record. In addition, the body of the brief is replete with further factual assertions, only a few of which are supported by record citations, and many of which are immaterial to the issues presented by this appeal. The California Rules of Court require that every factual and procedural statement in an appellate brief must be supported by a citation to the appellate record. (Cal. Rules of Court, rule 14(a)(1)(C).) “It is not the task of the reviewing court to search the record for evidence that supports the party's statement; it is for the party to cite the court to those references. Upon the party's failure to do so, the appellate court need not consider or may disregard the matter. [Citations.]” Regents of University of California v. Sheily (2004) 122 Cal.App.4th 824,

826, fn. 1, 19 Cal.Rptr.3d 84; see also Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal.App.4th 1134, 1140-1141, 135 Cal.Rptr.2d 796; Pringle v. La Chapelle (1999) 73 Cal.App.4th 1000, 1003-1004, 87 Cal.Rptr.2d 90; Gotschall v. Daley (2002) 96 Cal.App.4th 479, 481, fn. 1, 116 Cal.Rptr.2d 882.) Accordingly, in summarizing the facts in this opinion, we have disregarded statements of fact in appellant's brief that are not supported by specific references to the record. We also have omitted facts that are not material to the determination of the issues presented by this specific appeal.

In February 1999, appellant's mother, Elizabeth Marasovic,FN3 who was 83 years old, blind, and hard of hearing, was admitted overnight to Alta Bates Medical Center (Alta Bates), where she was diagnosed with a "high risk leaking aortic arch aneurysm" that was not suitable for surgical intervention. One of the doctors who saw Elizabeth at that time, Dr. Walter Kwan, concluded that she had a "terrible prognosis" and that her life expectancy was "quite limited." Neither Elizabeth nor Carole wanted any "aggressive or heroic measures" taken, so Elizabeth was discharged and returned to the home in El Cerrito that Carole and Elizabeth shared. Dr. Kwan told Elizabeth that eventually, the aneurysm would burst open, possibly causing her death, though he hoped this would occur quickly and with minimal pain. Due to her condition, Elizabeth's "code status was made into a NO CODE " at this time, evidently with Carole's concurrence. (Capitalization and underscoring in original.)

FN3. Because appellant and her late mother share the same last name, we follow the usual custom in cases involving family members, and refer to Elizabeth by her first name, and to appellant either by her first name or as appellant. We do this to avoid confusion, and no disrespect is intended.

In April 1999, while Elizabeth and Carole were out of town, Elizabeth exhibited symptoms of "hemoptysis and hypoxemia." She was admitted to Santa Rosa Memorial Hospital overnight in order to stabilize her condition.

On May 29, 1999, Elizabeth lost about two or three cups of blood, via either a nosebleed or vomiting, and was again admitted to Alta Bates. She was seen by Dr. Harish Murthy. With Carole's concurrence, Elizabeth was given only conservative treatment, including saline hydration and a blood transfusion. A chest x-ray revealed that Elizabeth's aortic aneurysm "look[ed] somewhat more prominent" than it had in February 1999. Dr. Murthy's notes indicate that "As per the discussion with [Carole], I will make the patient DNR at this point." "DNR" is a medical abbreviation for "do not resuscitate."

By June 3, 1999, Elizabeth's condition had stabilized sufficiently for her to be discharged from Alta Bates. Dr. Kwan requested an evaluation of Elizabeth's ability to transfer in and out of her wheelchair, and the physical therapist found that Elizabeth required maximum assistance with such transfers, which Carole could not demonstrate that she had the ability to provide. Linda Bradford, a social worker at Alta Bates, recorded in her notes on June 3, 1999, that Carole could not take Elizabeth back to their home in El

Cerrito, because the house was not wheelchair accessible, and that Carole had been looking but had “not been able to find a place to take her mother.”

*2 Bradford concluded that the safest placement for Elizabeth was a skilled nursing facility, Shields-Richmond Nursing Center (Shields-Richmond). Bradford's notes indicate that she discussed the transfer to Shields-Richmond with both Elizabeth and Carole, and that “[t]hey are accepting of plan, [but] hope it will be short term.” Pending a final discharge plan, Elizabeth was kept at Alta Bates for one more night.

During the morning of June 4, 1999, Elizabeth was accepted for placement by Shields-Richmond. Just prior to Elizabeth's discharge from Alta Bates, respondent assumed Elizabeth's care for a few hours and was asked to authorize her transfer from Alta Bates to Shields-Richmond. Respondent reviewed Elizabeth's chart, evaluated her, and spoke with Dr. Kwan, Bradford, and Elizabeth. Respondent believed that Elizabeth was competent to make medical decisions, and that Elizabeth understood she was going to be transferred to a skilled nursing facility. Because Elizabeth did not voice any objection to the plan to transfer her to a skilled nursing facility, respondent understood her to have impliedly consented to the transfer to Shields-Richmond. Respondent believed that the placement at Shields-Richmond was appropriate, and was unaware that Carole had any objection to the transfer plan. Respondent prepared a discharge summary and orders for the transfer of Elizabeth to Shields-Richmond, and noted Elizabeth's DNR status and her condition on both documents. Respondent was not involved in Elizabeth's care at any time after her discharge to Shields-Richmond on June 4, 1999.

On June 7, 1999, while at Shields-Richmond, Elizabeth again began bleeding from her nose. The night nurse could not find her pulse. The paramedics were called, and despite Carole's protests and the DNR notations on Elizabeth's record, they insisted on administering CPR. Elizabeth died shortly thereafter.

On May 31, 2000, Carole filed a complaint alleging various causes of action against numerous defendants, including Alta Bates, Bradford, Shields-Richmond, and respondent.FN4 When respondent filed her motion for summary judgment, the operative pleading was the second amended complaint, filed April 8, 2002, which alleged causes of action against respondent for wrongful death, professional negligence (medical malpractice), and false imprisonment.FN5

FN4. In a previous unpublished opinion, we reversed the trial court's dismissal of appellant's action against other defendants named in the second amended complaint (Contra Costa County and two employees of its Adult Protective Services agency), holding that the trial court properly sustained those defendants' demurrer to most of appellant's causes of action, but should have permitted appellant to amend her complaint to allege a cause of action for trespass based on their entry into her and Elizabeth's home on June 1, 1999, while Elizabeth was hospitalized at Alta Bates. (Marasovic v. Contra Costa County Adult Protective Services (Dec. 3, 2003, A100348 [nonpub. opn.].) Appellant's claims against those defendants are not at issue on this appeal. Appellant's

causes of action against Shields-Richmond and its employees also are not at issue on this appeal.

FN5. Appellant also alleged other causes of action against respondent in the second amended complaint, but those causes of action were dismissed on demurrer, and are not at issue on this appeal.

On December 3, 2003, respondent moved for summary judgment on the grounds that "plaintiffs [sic] cannot establish that the medical care and treatment rendered to Elizabeth Marasovic by [respondent] fell below the applicable standard of care, or that any act or omission to act on the part of [respondent] caused or contributed to the death of Elizabeth Marasovic. In addition, plaintiff cannot establish the elements for false imprisonment against [respondent] and plaintiff also lacks standing to sue for the alleged false imprisonment of her mother." On March 1, 2004, Judge James A. Richman granted the motion in its entirety.

*3 Appellant moved for reconsideration, and for leave to amend her complaint to allege a cause of action for negligence per se. Judge Richman denied both of these motions, and entered a judgment dismissing respondent from the action on March 17, 2004. Appellant timely filed her notice of appeal on April 19, 2004.FN6

FN6. We construe appellant's notice of appeal from the nonappealable order granting summary judgment as an appeal from the ensuing appealable judgment. (See Krueger Brothers Builders, Inc. v. San Francisco Housing Authority (1988) 198 Cal.App.3d 1, 3-4, 243 Cal.Rptr. 585.) An amended judgment specifying the amount of costs awarded to respondent was entered on September 1, 2004.

DISCUSSION

A. Standard of Review

"A motion for summary judgment must be granted if all of the papers submitted show 'there is no triable issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law. In determining whether the papers show ... there is no triable issue as to any material fact[,] the court shall consider all of the evidence set forth in the papers ... and all inferences reasonably deducible from the evidence....' ([Code Civ. Proc.,] § 437c, subd. (c).) A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show ... a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff ... may not rely upon the mere allegations or denials of its pleading to show ... a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists....' (Id., subd. (o)(2) [FN7]; [citations])." (Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal.App.4th 64, 69, 81 Cal.Rptr.2d 360.)

FN7. Code of Civil Procedure section 437c, subdivision (o) was redesignated section 437c, subdivision (p), after Scheiding was decided.

If a defendant moving for summary judgment shows that any single element of a given cause of action cannot be established, and the plaintiff cannot rebut this showing by establishing the existence of a triable issue of fact as to that element, summary judgment is appropriate as to that cause of action even if the plaintiff can show a triable issue as to other elements of the same cause of action. In Elcome v. Chin (2003) 110 Cal.App.4th 310, 1 Cal.Rptr.3d 631, for example, the court held that the plaintiff in a medical malpractice case had established a triable issue as to the fact that she suffered injury, but nonetheless affirmed summary judgment for the defendants, because the plaintiff did not establish the existence of a triable issue of fact as to negligence and causation. (Id. at p. 322, 1 Cal.Rptr.3d 631.)

On appeal, the trial court's summary judgment rulings are subject to de novo review. (Scheiding v. Dinwiddie Construction Co., supra, 69 Cal.App.4th at p. 69, 81 Cal.Rptr.2d 360.) “In performing our de novo review, we must view the evidence in a light favorable to [appellant] as the losing party [citation], liberally construing [her] evidentiary submission while strictly scrutinizing [respondent's] own showing, and resolving any evidentiary doubts or ambiguities in [appellant]'s favor. [Citations.]” (Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768-769, 107 Cal.Rptr.2d 617, 23 P.3d 1143.) We do not, however, consider evidence to which objections were made in the trial court and sustained, unless the trial court's ruling excluding the evidence is successfully challenged on appeal under an abuse of discretion standard. (Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 334, 100 Cal.Rptr.2d 352, 8 P.3d 1089; Alexander v.Codemasters Group Limited (2002) 104 Cal.App.4th 129, 140 & fn. 3, 127 Cal.Rptr.2d 145; Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal.App.4th 1158, 1168-1169, 121 Cal.Rptr.2d 79.)

*4 Normally, “[w]hen we review a decision granting summary judgment, ‘our account of the facts is presented in the light most favorable to the nonmoving party below, in this case [appellant], and assumes that, for purposes of our analysis, [that party's] version of all disputed facts is the correct one....’ [Citations.]” (Levy v. Skywalker Sound (2003) 108 Cal.App.4th 753, 757, fn. 1, 134 Cal.Rptr.2d 138.) On the other hand, even in a summary judgment appeal, “[a]s with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed. [Citations.]” (Lewis v. County of Sacramento (2001) 93 Cal.App.4th 107, 116, 113 Cal.Rptr.2d 90, italics added, disapproved on another ground as recognized in Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal.App.4th 26, 41-42, 34 Cal.Rptr.3d 520.) Thus, we do not consider assertions of fact in the briefs of either party that are not supported by citations to evidence in the record. Moreover, we consider only issues that are properly raised and supported by legal

analysis and citation to authority in appellant's opening brief (see, e.g., Trinkle v. California State Lottery (2003) 105 Cal.App.4th 1401, 1412-1413, 129 Cal.Rptr.2d 904), and we will not address issues that have been raised for the first time in appellant's reply brief. (Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 764-766, 60 Cal.Rptr.2d 770.) FN8

FN8. In this regard, we note that "[w]hen a litigant is appearing in propria persona, he [or she] is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation]." (Nelson v. Gaunt (1981) 125 Cal.App.3d 623, 638-639, 178 Cal.Rptr. 167, fn. omitted, disapproved on other grounds by Dumas v. Stocker (1989) 213 Cal.App.3d 1262, 1267, fn. 13, 262 Cal.Rptr. 311; see also Gamet v. Blanchard (2001) 91 Cal.App.4th 1276, 1284-1285, 111 Cal.Rptr.2d 439.)

Finally, we are not restricted in our review to the trial court's determination of the issues. Rather, we may affirm a grant of summary judgment on any correct legal theory that the parties had the opportunity to address to the trial court. (Kramer v. State Farm Fire & Casualty Co. (1999) 76 Cal.App.4th 332, 335-336, 90 Cal.Rptr.2d 301.)

B. Judicial Bias

Appellant's first argument on appeal is that Judge Richman was biased against her. She bases this claim on the following facts. First, at a hearing held on July 17, 2001, regarding a motion to withdraw filed by appellant's former attorney, Judge Richman commented that "I don't know what the problems are between you, whether you don't take his advice, whether he doesn't give you any advice, whether you don't pay him. Whatever it is, there's something there." Second, at a hearing on June 25, 2002, regarding the defendants' demurrers, in the course of questioning appellant about the factual basis for naming respondent Eberhard as a defendant on some of her causes of action, Judge Richman admonished appellant that one should have a good reason to name someone as a defendant in a lawsuit, using as an example the difficulty that pending litigation might cause the defendant in refinancing his or her home.FN9 Third, at the hearing on the motion for summary judgment filed by Alta Bates and Bradford, on January 16, 2004, Judge Richman questioned appellant as to whether, in light of Elizabeth's short life expectancy following her diagnosis, appellant had considered being grateful for the additional four months she had enjoyed with her mother, rather than "suing everyone under the sun." Appellant also complains of allegedly biased remarks made by Judge Richman at the hearing on respondent's summary judgment motion and on appellant's motion for reconsideration. Finally, appellant complains that Judge Richman has participated in the work of a charitable organization with which Bradford (the Alta Bates social worker) is also associated.

FN9. Specifically, Judge Richman stated as follows: "[I]t's [a] very serious business that we're about here. And you're making very serious charges. And if you have a basis for the charges, then the demurrers are going to be overruled, and it's going to go forward. But if there is no basis for the charges, then they're going to get tossed out. [¶] And I say this to

you, among other things, it's bad enough that Alta Bates is in here as an enemy or the County or maybe Shields[-]Richmond. But as I use the example for people all the time, you have named a whole bunch of individuals. Let's just take Dr. Eberhard as an example. [¶] Now, this is a great time to refinance your home. If Dr. Eberhard goes down there to refinance her house, the very first question probably that's on the application says, are you involved in any lawsuits. And she has to answer yes and [there is] a charge against her. And if there is nothing there, then she shouldn't be here."

*5 Respondent contends that appellant has waived her bias argument by failing to take any action to disqualify Judge Richman, either peremptorily under Code of Civil Procedure section 170.6 or for cause under Code of Civil Procedure section 170.3, subdivision (c). Appellant counters that a claim of judicial bias is not waived by a failure to object in the trial court, relying on this division's opinion in Catchpole v. Brannon (1995) 36 Cal.App.4th 237, 42 Cal.Rptr.2d 440 (Catchpole).

In Catchpole, supra, 36 Cal.App.4th 237, 42 Cal.Rptr.2d 440, the plaintiff in a sexual harassment case contended on appeal that the judgment against her, entered after an eight-day bench trial, was the product of gender bias on the part of the trial judge. In rejecting the respondent's contention that the appellant's bias claim had been waived by her failure to raise it in the trial court, we reasoned that "[f]ew more daunting responsibilities could be imposed on counsel than the duty to confront a judge with his or her alleged gender bias in presiding at trial. The risk of offending the court and the doubt whether the problem could be cured by objection might discourage the assertion of even meritorious claims. Requiring the issue to be raised at trial could therefore have the unjust effect of insulating judges from accountability for bias. [Citation.] ... [T]he rule that an appellate court will not consider points not raised at trial does not apply to '[a] matter involving the public interest or the due administration of justice.' [Citation.] The issue of judicial gender bias obviously involves both a public interest and the due administration of justice." (Id. at p. 244, 42 Cal.Rptr.2d 440.)

While adhering to our decision in Catchpole, supra, 36 Cal.App.4th 237, 42 Cal.Rptr.2d 440, we find it distinguishable on two grounds. First, the type of bias alleged in the present case differs both in substance and in degree from the blatant, pervasive, and extreme gender bias evidenced by the trial judge in Catchpole. (See id. at pp. 246-252, 42 Cal.Rptr.2d 440.) Second, and more significantly, Catchpole involved bias on the part of the judge assigned to the case for trial, and there is nothing in our opinion in Catchpole indicating that the complaining party had any notice whatsoever of the judge's bias prior to the start of the trial.

Here, by contrast, much of the evidence in support of appellant's claim of bias consists of statements that Judge Richman made on the record at hearings held before respondent's summary judgment motion was heard on February 18, 2004.FN10 Thus, if appellant believed on the basis of those statements that Judge Richman was biased against her, she-unlike the plaintiff in Catchpole-had ample opportunity to raise the issue before the hearing whose adverse outcome she now seeks to challenge on appeal. Having failed to

do so, she has waived the issue. (See Roth v. Parker (1997) 57 Cal.App.4th 542, 548, 67 Cal.Rptr.2d 250 [nonstatutory claim that final judgment is constitutionally invalid due to judicial bias may be raised on appeal from judgment, but in civil cases, issue must be raised at earliest opportunity or will be considered waived].) “Were we to permit review on appeal in this matter, [parties] such as appellant would be able to waive the disqualification and permit the judge to preside over the entire case, secure in the knowledge that, if any portion of the result were unfavorable to [them], [they] could appeal and obtain a reversal of the judgment and a ‘second “bite at the apple,” ’ which would constitute an ‘ “intolerable windfall.” ’ [Citation.]” (People v. Barrera (1999) 70 Cal.App.4th 541, 551, 82 Cal.Rptr.2d 755.)

FN10. The only significant exception is Judge Richman's association with the charitable organization, which we discuss on the merits post. The statements by Judge Richman of which appellant complains that were made after the February 18, 2004 hearing do not evidence his purported bias in any way that is different in substance or degree than the statements he made before that hearing.

*6 In any event, even if we were to ignore the waiver and reach the merits, we would not find support in the record for appellant's claim of impermissible bias. As appellant acknowledges, Judge Richman was generally courteous to her. He permitted her to argue motions even though she had not contested the tentative rulings. He also agreed to consider motion papers that she filed untimely. Our review of the record confirms that Judge Richman generally exhibited laudable consideration and restraint in the face of the difficulties that appellant's lack of familiarity with the law and the rules of procedure occasioned for the court and opposing counsel. These facts seriously undercut appellant's claims of bias.

More importantly, the isolated remarks appellant cites as showing Judge Richman's bias do not evidence anything other than opinions he had arrived at in the legitimate exercise of his judicial function, based on the record before him. (See generally Haldane v. Haldane (1965) 232 Cal.App.2d 393, 395, 42 Cal.Rptr. 828 [trial judge's opinions regarding law and facts, reached after hearing in performance of judicial duty, do not constitute ground for disqualification].) His remarks at the hearing on appellant's former counsel's motion to withdraw merely reflect his understanding that an attorney normally does not withdraw from representing a client without a reason. Indeed, rule 3-700 of the California Rules of Professional Conduct prohibits an attorney from withdrawing in ongoing litigation without the client's consent except upon the grounds specified in the rule. Judge Richman expressly disclaimed any knowledge of what the reason for the withdrawal was in this particular case, and listed at least one possible reason (“he doesn't give you any advice”) that did not reflect adversely on appellant.

Similarly, Judge Richman's remarks at the demurrer hearing on June 25, 2002, merely evince an effort to bring home to an unrepresented plaintiff the necessity of pleading a valid factual basis for each cause of action as applied to each defendant. In assessing whether Judge Richman's remarks reflect bias, we believe it is important to view them in

context. Shortly after making the reference to home refinancing of which appellant complains, Judge Richman followed up by asking appellant "[W]hat does [Dr. Eberhard] do that causes her to be the subject of a lawsuit [in which] you've named her in the second, third, fifth, seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action?" After appellant responded only in general terms, averring that the facts she had alleged in her complaint were accurate, consistent, and specific, Judge Richman reiterated, "[L]et's just take it one count at a time. Let's go about it differently. [¶] You've accused Dr. Eberhard of the wrongful death of your mother. What did she do that caused your mother to die?"

Appellant then explained that the basis for her claims against respondent for wrongful death and professional negligence was respondent's failure to obtain Elizabeth's signature on the DNR order that respondent signed when Elizabeth was discharged, as well as respondent's failure to include oxygen instructions and emergency directions in the discharge orders. After the hearing, Judge Richman overruled respondent's demurrer as to the causes of action for wrongful death, professional negligence, and false imprisonment. In light of this record, we do not view Judge Richman's remarks at the June 25, 2002, hearing as reflecting any improper bias against appellant.

*7 As for Judge Richman's association with the same charitable organization as Bradford, the record reflects that appellant did raise this issue below promptly after she discovered the relevant facts, which was shortly after the court ruled on the summary judgment motions. Thus, the issue was not waived. Also, we are willing to assume for purposes of this opinion that if Judge Richman had been shown to be disqualified due to a connection with Bradford, the scope of his disqualification would have extended to appellant's case against Eberhard as well, particularly in light of Eberhard's acknowledged reliance on information she received from Bradford.

On the merits, however, appellant has not established any bias on this ground. Appellant cites no authority for the proposition that mere association with a charitable organization, without more, disqualifies judges from hearing any litigation in which one of the parties is also associated with the same organization.FN11 In the present case, both Judge Richman and Bradford stated that they did not recall ever meeting one another. Appellant does not contest Judge Richman's averment in this regard. Indeed, Judge Richman stated on the record that he did not even know of Bradford's connection with the charity in question until appellant advised him of it, after he had already ruled on the summary judgment motion. Under these circumstances, appellant's bias claim finds no support in the record.

FN11. In fact, although our research has not located any case precisely on point, the analogous authorities that we have located are all to the contrary. (See Code Civ. Proc., § 170.2, subd. (a) [judge's membership or nonmembership in racial, ethnic, religious, sexual or similar group does not disqualify judge from hearing case involving rights of such group]; Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal.4th 670, 684, fn. 10, 72 Cal.Rptr.2d 410, 952 P.2d 218 [adoption of ethics rule permitting judges to participate in nonprofit youth organizations, as exception to rule against participation

in discriminatory organizations, did not disqualify judges from adjudicating discrimination suit against nonprofit youth organization]; United Farm Workers of America v. Superior Court (1985) 170 Cal.App.3d 97, 216 Cal.Rptr. 4 [in action by employer against union arising out of strike, fact that judge's wife had worked for employer for brief period during strike, which judge had forgotten until nearly two months into trial, did not disqualify judge from hearing case, where judge's conduct during trial did not support inference of partiality].)

C. Adjudication of Professional Negligence Claim

Appellant's next contention is that respondent's summary judgment motion did not seek adjudication of appellant's professional negligence claim, and the trial court therefore should not have reached that issue. Quite simply, appellant's contention is flatly contradicted by the record.

Initially, we note that respondent's motion was one for summary judgment, not summary adjudication. Had respondent been seeking summary adjudication of less than all of appellant's causes of action, her motion would not properly have been framed as one for summary judgment. (Code Civ. Proc., § 437c, subd. (f); see generally 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, §§ 178, 239, pp. 592-593, 654.) Moreover, respondent's separate statement of undisputed material facts made it explicitly clear that she was contending that there was “no merit to plaintiff's causes of action for medical malpractice /wrongful death or false imprisonment.” (Italics added.) A cause of action against a physician for “professional negligence” simply alleges medical malpractice by another name. (See generally Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992) 3 Cal.4th 181, 191-193, 10 Cal.Rptr.2d 208, 832 P.2d 924.) Moreover, as the trial judge noted in his order granting the motion, appellant's causes of action for professional negligence and for wrongful death were both “based on the same operative facts,” including the same allegedly negligent conduct by respondent.

*8 In addition, appellant made the same contention in her opposition papers in the trial court. As a result, respondent further clarified, both in her reply memorandum supporting the motion and at the hearing on the motion, that “the Motion for Summary Judgment on behalf of Dr. Eberhard addresses medical malpractice/wrongful death as a single cause of action.” Thus, the record is clear that respondent's motion sought summary judgment on all of the causes of action alleged against her that had not been dismissed earlier based on her demurrer.

D. Triable Issue of Fact Regarding False Imprisonment

One of the elements of a cause of action for false imprisonment is that the defendant intentionally and unlawfully exercised force, the express or implied threat of force, menace, fraud, deceit, or unreasonable duress to restrain, detain, or confine the plaintiff. (Scofield v. Critical Air Medicine, Inc. (1996) 45 Cal.App.4th 990, 996, 100-1002, 52 Cal.Rptr.2d 915; Wilson v. Houston Funeral Home (1996) 42 Cal.App.4th 1124, 1135, 50 Cal.Rptr.2d 169; BAJI No. 7.60.) In short, false imprisonment is an intentional tort. (Fermino v. Fedco, Inc. (1994) 7 Cal.4th 701, 715-716, 30 Cal.Rptr.2d 18, 872 P.2d 559;

Kesmodel v. Rand (2004) 119 Cal.App.4th 1128, 1144, fn. 37, 15 Cal.Rptr.3d 118.) If the plaintiff has consented to being confined, an element of the tort is negated. (Snyder v. Evangelical Orthodox Church (1989) 216 Cal.App.3d 297, 303-305, 264 Cal.Rptr. 640 [affirming summary adjudication on false imprisonment cause of action, on ground of consent, against church member who agreed, at request of church officials, to spend one week isolated in motel cabin] FN12.) Most significantly for our purposes, even apparent consent, if reasonably understood as such, is sufficient to defeat the cause of action. (Rest.2d, Torts, § 892, subd. (2) ["If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact."].)

FN12. See also 5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 426, p. 642 ("False imprisonment involves the intentional confinement of another against the person's will. The elements [include] nonconsensual, intentional confinement of a person ...." [italics added]); Prosser & Keeton, Torts (5th ed.1984) § 18, p. 112 ("Consent ordinarily bars recovery for intentional interferences with person or property. It is not, strictly speaking, a privilege, or even a defense, but goes to negative the existence of any tort in the first instance." [Fns. omitted]).

In moving for summary judgment motion on plaintiff's false imprisonment cause of action, respondent submitted her own declaration averring that she spoke with Elizabeth as well as Dr. Kwan and Bradford; that Elizabeth was competent to make medical decisions; that Elizabeth understood that she was going to be transferred to a skilled nursing facility upon her discharge from Alta Bates, and did not voice any objection to this plan; and that respondent was not informed that appellant had any objection to Elizabeth being transferred to Shields-Richmond. Given this showing, in order to raise a triable issue of fact as to respondent's liability for false imprisonment, appellant would have had to introduce, at a minimum, admissible evidence not only that Elizabeth did not in fact consent to her transfer to a nursing home, but also that respondent knew of her lack of consent.

To the extent we can discern the nature of appellant's arguments from her opening brief, her contention appears to be that she raised a triable issue of fact regarding whether or not Elizabeth actually consented to be placed in a nursing home. In support of this contention, appellant relies on informal transcripts of tape recorded conversations between herself and Elizabeth in which Elizabeth expressed a preference that appellant continue to care for her. Appellant complains that in granting summary judgment on the false imprisonment cause of action, the trial judge improperly disregarded this evidence.

*9 Even if the evidence is taken into account, however, it does not raise a triable issue of material fact with respect to respondent's liability for false imprisonment. Appellant does not contend that respondent was aware of the contents of these conversations at the time respondent approved Elizabeth's transfer to Shields-Richmond. If Elizabeth's reservations about going to a nursing home were expressed only in private conversations with appellant, of which respondent was unaware, then the existence of those reservations

cannot raise a triable issue of fact as to whether respondent intentionally transferred Elizabeth to a nursing home without Elizabeth's consent.FN13

FN13. Because we hold that summary judgment on this issue was properly granted even if the informal transcripts are considered, we need not and do not reach the question whether either the tape recordings or the informal transcripts were properly admissible as evidence.

Appellant also relies on what she characterizes as an admission by respondent, made in a telephone conversation with appellant after Elizabeth's death. In her declaration in opposition to respondent's summary judgment motion, appellant related that when she asked respondent whether the latter had spoken with her mother to find out what she wanted, respondent replied only that "I took her vital signs. Linda Bradford is one of our best social workers." Appellant appears to argue that respondent's failure to respond more clearly to her question raises a triable issue of fact as to whether respondent personally verified that Elizabeth had consented to the transfer. That, however, is not the issue on this appeal. Rather, as already noted, the issue is whether respondent intentionally and knowingly transferred Elizabeth to Shields-Richmond against Elizabeth's wishes.

Finally, we note that in the declaration of respondent's expert witness, Dr. Fugaro, he opined that "[i]t was ... within the applicable standard of care for Dr. Eberhard to rely on information from the social worker, Mr. [sic] Bradford, in determining whether the discharge plan for Elizabeth Marasovic was appropriate," and that "Dr. Eberhard did not have a duty to speak with the patient's daughter, Carol [sic] Marasovic, if the patient was competent to make medical decisions." Respondent's separate statement of undisputed facts cited this declaration as evidence for the fact that respondent's "authorization of the transfer of Elizabeth Marasovic to Shields[-]Richmond ... and reliance on the information from the social worker, Ms. Bradford, was appropriate and within the applicable standard of care."

Appellant's separate statement in opposition to respondent's motion did not address this fact, and did not cite any evidence to contradict it. The trial court therefore had the discretion to treat it as undisputed. (Code Civ. Proc., § 437c, subd. (b)(3); Cal. Rules of Court, rule 342(f); see generally Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 Cal.App.4th 1466, 1475-1478, 33 Cal.Rptr.3d 111; San Diego Watercrafts, Inc. v. Wells Fargo Bank (2002) 102 Cal.App.4th 308, 315, 125 Cal.Rptr.2d 499.) We perceive no abuse of that discretion here. On the merits, it is self-evident that a physician who complies with the applicable standard of care in authorizing the transfer of a patient from a hospital to a nursing home cannot be liable for false imprisonment of the patient.

E. Triable Issue of Fact Regarding Negligence

*10 The gist of appellant's causes of action against respondent for medical malpractice, professional negligence, and wrongful death appears to be that respondent's failure to document Elizabeth's DNR status and medical condition properly upon her release from Alta Bates caused, or at least contributed to, the failure of the Shields-Richmond

personnel and the paramedics to honor the DNR directive and refrain from administering CPR to Elizabeth. Appellant argues that in finding no triable issue of material fact on this question, the trial court “did not properly consider” various items of evidence she offered in opposition to defendant's summary judgment motion on these causes of action, including the declaration of her expert, Dr. John Fullerton.

The record belies this contention. Judge Richman's order granting respondent's motion for summary judgment expressly discusses Dr. Fullerton's declaration, and explains why it is not sufficient to raise a triable issue of fact regarding respondent's alleged negligence. We agree with his conclusion that the portions of Dr. Fullerton's declaration on which appellant relies are concerned with the negligence of Shields-Richmond, not that of respondent, and that the declaration does not raise a triable issue of fact as to respondent's negligence.

Appellant also appears to argue that the trial court erred in granting respondent's motion because there was a triable issue of fact as to whether respondent's professional negligence caused appellant to experience emotional distress. In order to defeat respondent's summary judgment motion, however, appellant was obligated to raise a triable issue of fact not only as to her having suffered emotional distress at her mother's death-a requirement which we have no doubt she could and did satisfy-but also as to whether that distress was caused, in a legally cognizable way, by respondent's negligence, that is, by her failure to meet the applicable standard of care.FN14 By establishing in her summary judgment motion that there was no triable issue as to her compliance with the applicable standard of care, respondent negated this element of appellant's cause of action.

FN14. In any medical malpractice action, the plaintiff must establish: (1) the duty of the physician to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. (Hanson v. Grode (1999) 76 Cal.App.4th 601, 606, 90 Cal.Rptr.2d 396.) The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts. It presents the basic issue in a malpractice action and can only be proved by their testimony. (Id. at pp. 606-607, 90 Cal.Rptr.2d 396.) Our courts have incorporated the expert evidence requirement into the standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports the motion with expert declarations that the defendant's conduct fell within the community standard of care, the defendant is entitled to summary judgment unless the plaintiffs come forward with conflicting expert evidence. (Id. at p. 607, 90 Cal.Rptr.2d 396.)

Respondent's motion also negated the element of causation. Based on her expert's declaration, respondent's motion listed as undisputed facts “that no substandard act or omission to act on the part of [respondent] caused or contributed to Elizabeth Marasovic's death,” and “that Elizabeth Marasovic would likely have died on or about July [sic] 7,

1999[,] regardless of whether CPR was administered." Appellant's separate statement in opposition to the motion did not address the first of these facts. She characterized the second fact as disputed based solely on the declaration of Dr. John Fullerton which she submitted in opposition to the motion. Dr. Fullerton's declaration states that Elizabeth should have been given an oxygen mask if she was having difficulty breathing, and should not have been given chest compressions, and that she was alive when the paramedics were summoned to Shields-Richmond. It does not, however, state that she would have survived her bleeding episode on June 7, 1999, if these measures had been followed. Accordingly, Dr. Fullerton's declaration does not create a triable issue of fact on that question.

*11 In short, we concur with the trial judge's conclusion that respondent established the absence of any triable issue of material fact as to the element of causation-a conclusion that appellant does not challenge on appeal. Thus, even if appellant raised triable issues of fact as to other elements of her professional negligence and wrongful death causes of action, summary judgment was nonetheless properly granted in respondent's favor.

F. Motion to Amend to Allege Negligence Per Se

After respondent's summary judgment motion was granted, appellant moved for leave to amend her complaint to plead a cause of action for negligence per se. FN15 We review the trial court's decision to deny the motion to amend for abuse of discretion. (Levy v. Skywalker Sound, supra, 108 Cal.App.4th at p. 770, 134 Cal.Rptr.2d 138; Mesler v. Bragg Management Co. (1985) 39 Cal.3d 290, 296-297, 216 Cal.Rptr. 443, 702 P.2d 601.)

FN15. Negligence per se is not, in fact, a separate cause of action, but rather an alternative means of establishing the element of negligence in any action based on a negligent tort, by relying on a rebuttable presumption arising from the defendant's violation of a statute or regulation meeting certain criteria. (Evid.Code, § 669; see Peart v. Ferro (2004) 119 Cal.App.4th 60, 80, fn. 11, 13 Cal.Rptr.3d 885; Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1272-1273, 102 Cal.Rptr.2d 813.) We therefore construe appellant's motion as one to amend her professional negligence and wrongful death claims to add negligence per se as an alternative theory of liability.

By the time respondent's summary judgment motion was filed, appellant had been permitted to amend her complaint twice. Appellant did not establish that she could not reasonably have discovered the facts and legal theories supporting the proposed amendment at an earlier stage in the proceedings. Rather, she attributed her failure to plead the negligence per se theory earlier to the failure of her former counsel to advise her that she could do so. She did not file her motion to amend until February 20, 2004, two days after respondent's summary judgment motion was heard. Moreover, although she advised the court and opposing counsel prior to the hearing that she intended to move to amend, she did not request a continuance of the hearing on the summary judgment motion in order to pursue the matter. When she finally did submit her motion, she failed to attach a copy of the proposed amended complaint as required by California Rules of

Court, rule 327(a)(1). Under these circumstances, the trial court cannot be said to have abused its discretion in declining to allow the amendment. (Levy v. Skywalker Sound, supra, 108 Cal.App.4th at pp. 770-771, 134 Cal.Rptr.2d 138; Record v. Reason (1999) 73 Cal.App.4th 472, 486-487, 86 Cal.Rptr.2d 547.)

DISPOSITION

The judgment in favor of respondent Eberhard is affirmed. Respondent is awarded her costs on appeal.

We concur: KLINE, P.J., and LAMBDEN, J.