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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BEN SAFYARI, Plaintiff and Appellant, v. FUJITEC AMERICA, INC., Defendant and Respondent.	B272007 (Los Angeles County Super. Ct. No. BC531632)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Daneshrad Law Firm, Joseph Daneshrad, for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Anthony E. Sonnett and Sonie M. Haneline, for Defendant and Respondent.

Plaintiff and appellant Ben Safyari (plaintiff) was injured when an elevator he was standing in suddenly dropped one and a half floors. He brought product liability and negligence claims against the elevator's manufacturer and against defendant and respondent Fujitec America, Inc. (defendant), the company that agreed to provide maintenance services for the elevator. Plaintiff dismissed his claims against the manufacturer, and the trial court granted summary judgment for defendant, finding (1) defendant carried its initial summary judgment burden by relying on plaintiff's factually devoid responses to defendant's discovery requests, and (2) plaintiff's opposition to summary judgment did not demonstrate the existence of a material dispute of fact requiring trial. We consider whether the grant of summary judgment was proper, which requires us to analyze, among other things, whether plaintiff can properly invoke the doctrine of res ipsa loquitur to defeat summary judgment.

I. BACKGROUND

A. The Accident, and the Lawsuit

On January 3, 2012, plaintiff stepped into an elevator on the third floor of the CalTrans building in Los Angeles. After he pressed the button for the first floor, the elevator abruptly dropped and stopped between the first and second floors. According to plaintiff, he was "kind of thrown up and down," landed on his backside, and suffered injuries to his left knee. Roughly two years after the incident, in December 2013, plaintiff sued defendant and the elevator's manufacturer, Kone Inc. (Kone).[1]

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[1] Plaintiff dismissed its causes of action against Kone in early 2016.

B. Discovery

Approximately six weeks after plaintiff filed his complaint, defendant propounded special interrogatories. Plaintiff served his responses to these interrogatories two months later.

Special interrogatory number three asked plaintiff to "state all facts, not legal conclusions" that supported his contention that defendant was negligent in a manner that caused his injuries. As ultimately amended, plaintiff's response to interrogatory number three stated: "Objection. Calls for expert opinion. ¶ Without waiving the foregoing objections, [plaintiff] responds as follows: [Plaintiff], at this time, does not know the facts in support of this contention. Discovery is continuing."

Special interrogatory number four asked plaintiff to identify all documents supporting his contention that defendant was negligent. Plaintiff responded in a similar fashion: "Objection. Calls for expert opinion. ¶ Without waiving the foregoing objections, [plaintiff] responds as follows: [Plaintiff], at this time, does not know the facts in support of this contention. Discovery is continuing. To the best of [plaintiff's] knowledge, information, and belief, the person or organization having possession, custody, or control of the DOCUMENTS is [defendant] and/or [Kone]. [Plaintiff] has requested a production of DOCUMENTS from [defendant] and [Kone], but has not received such production by the time of this response."

Plaintiff served defendant with his own special interrogatories and requests for documents in January 2015, just over a year after he filed his complaint and two days before defendant filed its motion for summary judgment (we discuss the details of the motion *post*). Defendant's responses to plaintiff's interrogatories acknowledged defendant "was responsible for

maintaining the equipment on [the elevator] in good operating condition" and identified its employee Arthur Castro (Castro) as a person who had knowledge of the elevator incident involving plaintiff. In response to plaintiff's document production demands, defendant produced two items: a one-page report of the incident and a two-page maintenance check chart that described maintenance on the elevator during the years 2011 and 2012.

A week before his summary judgment opposition was due, plaintiff deposed Castro. Castro testified defendant entered into a contract to maintain and repair the elevators in the CalTrans building in July 2011, six months prior to the elevator incident. According to Castro, on the day of the incident he responded to an emergency call indicating plaintiff was stuck in the elevator. He "found that [the] safety circuit was open," which is what occurs when the elevator automatically brakes itself in the event of a problem. When asked "[w]hat went wrong" to activate the safety circuit, Castro said "[t]he tail shift switch"[2] that was supposed "to prevent the governor rope from becoming untension" was "open applicant tripped . . . ." Castro explained there was no problem with the governor rope itself, which keeps the elevator from moving too fast, but Castro said he adjusted the governor rope and tail switch to keep the two from hitting each other because they were "too close."[3]

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[2] Defendant states the correct term is "tail sheave tension switch." The terminology does not matter for our purposes; we call the part the "tail switch."

[3] Castro's incident report concerning the elevator drop, produced in discovery by defendant, similarly stated the incident was caused by the tail switch being out of adjustment. In a section of the report that required Castro to describe the work he

Castro acknowledged he had not performed an overall initial inspection of the elevator or its governor rope in particular prior to the incident involving plaintiff. According to defendant's "maintenance check chart," which Castro completed as part of his routine maintenance on the elevator, the governor rope was to be checked annually in June, which was why Castro had not yet checked it before the incident, which occurred in January.

C. Summary Judgment Proceedings

Defendant moved for summary judgment, arguing plaintiff's causes of action for products liability and negligence failed because defendant did not design, manufacture, sell, install, or warrant the elevator and plaintiff had no evidence defendant was negligent. Defendant asserted plaintiff's lack of evidence to support his negligence claim was apparent from his discovery responses, including the aforementioned responses to special interrogatories three and four.

In opposition, plaintiff conceded defendant could not be held liable on a products liability theory but maintained the negligence cause of action must go forward for resolution at trial. Plaintiff argued defendant had not carried its initial burden of production to obtain summary judgment on the negligence claim because it had not shown plaintiff could not reasonably obtain evidence to support his negligence claim. In the event the court disagreed, plaintiff contended summary judgment still should be denied because (a) the doctrine of res ipsa loquitur applied and

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performed to resolve the problem, Castro wrote he "adjusted [the] governor rope that was hitting the rope slack switch," checked the elevator's operation, and then put it back in service.

dispensed with any need to come forward with evidence that defendant was negligent, and (b) Castro's deposition testimony sufficed, in any event, to demonstrate issues of fact requiring trial on the negligence cause of action. Plaintiff further urged the court, at a minimum, to continue the summary judgment hearing because he believed defendant had stymied efforts to obtain evidence in discovery that would support his negligence claim.[4]

The summary judgment hearing was continued several times and ultimately held eleven months after the parties finished briefing the motion. Three days before the hearing, plaintiff filed a one-page declaration executed by Thomas Hawkins (Hawkins). Hawkins stated he had worked in the elevator industry for more than 50 years and had, since 1999, worked as a specialist who "investigate[d] design, construction, and safety issues involving elevators and escalators." Hawkins declared he had reviewed the discovery in this case and he set forth his opinion in a single sentence: "Based on my review of the record provided to me so far and subject to my inspection of the elevator, it is my expert opinion that [defendant] was negligent in maintaining . . . the elevator at issue in this case, and that said negligent maintenance caused the incident at issue in this case." Hawkins's declaration did not identify the facts on which he

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[4] In a declaration supporting the request for a continuance, plaintiff's attorney stated he had been unable to complete discovery because of defendant's evasions, he accordingly might need to file a motion to compel, and he intended to conduct more discovery to prepare for trial. Counsel's declaration also asserted plaintiff's responses to defendant's discovery requests had been provided "at the outset of the case" and counsel "disputed that the responses at this present time [are] the same."

based this opinion, nor did it include any further description of the reasons for his conclusions. Defendant objected to Hawkins's declaration on the grounds it was untimely, lacked foundation, and was speculative.

After hearing from counsel, the trial court granted summary judgment for defendant. The court denied plaintiff's request for a continuance on the ground plaintiff did not "submit[ ] the requisite declaration mandatory under the Code." The court also ruled the Hawkins declaration was not supported by adequate foundation. With respect to the merits of plaintiff's negligence claim, the trial court's minute order concluded: "Factually devoid discovery responses are an admission that there is no evidence to support the cause of action. *Union Bank v. Superior Court* (1995) 31 Cal App 4th 573, 578-9; Facts 5 and 6.[5] [¶] With regard to res ipsa, evidence must be provided. *Brown v. Poway Unified School District* (1993) 4 Cal 4th 820, 825. Plaintiff fails to provide evidence. Elevators are not common carriers. *Bozzi v. Nordstrom* (2010) 186 Cal App 4th 755, 766 [(*Bozzi*)]."

Plaintiff appealed the trial court's judgment with respect to his negligence cause of action only.

II. DISCUSSION

We hold, preliminarily, that the trial court did not err in rejecting defendant's request to continue the summary judgment

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[5] The minute order's reference to "Facts 5 and 6" refers to defendant's statement of undisputed material facts, which highlighted plaintiff's responses to special interrogatories three and four, quoted *ante*.

hearing and in concluding plaintiff's one-page expert declaration lacked foundation. With these predicate conclusions in mind, we further hold summary judgment for defendant was proper. Plaintiff cannot defeat summary judgment by invoking the doctrine of res ipsa loquitur because there was no admissible expert testimony that would at least establish a genuine dispute of fact as to whether the elements necessary to invoke the doctrine had been met. Nor has plaintiff shown the deposition testimony by elevator mechanic Castro should have sufficed to defeat summary judgment. His testimony did not fill the gaps left empty by the absence of expert testimony regarding the standard of care that would apply to defendant.

A. The Trial Court Did Not Err in Denying Plaintiff's Request to Continue the Summary Judgment Hearing

If affidavits submitted in opposition to a motion for summary judgment show "that facts essential to justify opposition may exist but cannot, for reasons stated, be presented," the court must deny the motion, grant a continuance to permit additional discovery, or make some other just order. (Code Civ. Proc., § 437c, subd. (h);[6] *Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 764-765 (*Hamilton*).) Continuances warranted by section 437c, subdivision (h) "'are to be liberally granted.'" (*Hamilton*, *supra*, at p. 765, citation omitted; see also *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 714 [if section 437c, subdivision (h) requirements met, continuance is mandatory] (*Lerma*).) To merit

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[6] Undesignated statutory references that follow are to the Code of Civil Procedure.

a continuance under the statute, the affidavit "should show the following: (1) '*Facts* establishing *a likelihood that controverting evidence may exist* and *why* the information sought is *essential* to opposing the motion'; (2) 'The *specific* reasons why such evidence cannot be presented at the present time'; (3) 'An estimate of the *time* necessary to obtain such evidence'; and (4) 'The specific steps or procedures the opposing party intends to utilize to obtain such evidence.' (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 10:207.15, p. 10-83 (rev. #1, 2011).)" (*Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 532 (*Johnson*).)

The declaration by plaintiff's counsel failed to satisfy the requirements for a section 437c continuance. Counsel's declaration asserted defendant had provided "improper and evasive responses" to discovery, a motion to compel might accordingly be required, and plaintiff intended to conduct additional discovery in preparation for trial. Those statements do not amount to facts showing a likelihood that evidence in support of plaintiff's opposition existed. Nor did counsel indicate what steps he would perform to obtain the evidence needed or how much time it would take for him to do so.

Hawkins's untimely declaration did not supply the information missing from plaintiff's counsel's declaration. The only evidence Hawkins indicated he needed was to physically inspect the elevator at issue. He provided no information regarding why he had not yet completed that inspection, how it would support plaintiff's opposition to defendant's motion, or how much time he would need to conduct the inspection. Accordingly, the court did not err in denying plaintiff's request for a statutory continuance. (See, e.g., *Lerma*, *supra*, 120 Cal.App.4th at p. 715

[section 437c "requires more than a simple recital that 'facts essential to justify opposition may exist'"]; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548 ["not sufficient under [section 437c] merely to indicate further discovery or investigation is contemplated"].)

In addition, we reject plaintiff's suggestion that he was entitled to a continuance because "the information necessary to defeat the [summary judgment] motion [wa]s within [defendant's] exclusive possession, custody, and control." Although plaintiff contends defendant hindered his efforts to obtain this asserted information, the record reflects his own largely passive approach to discovery was at least equally to blame. Plaintiff did not propound substantive discovery until more than a year after filing his complaint, and he did not depose Castro until two months after defendant moved for summary judgment. At the time plaintiff first raised the issue of a continuance, the case had been pending for roughly 16 months, and it was close to another year before the trial court actually heard the summary judgment motion. There is nothing in the record to indicate plaintiff sought additional discovery from defendant during that year, or took steps to compel further responses from defendant if plaintiff believed the responses he had received were unsatisfactory. Under these circumstances, the court's refusal to grant a continuance was far from an abuse of discretion. (See *Johnson*, *supra*, 205 Cal.App.4th at p. 533 [plaintiff's failure "to conduct any meaningful discovery during the more than three years that elapsed between the initiation of suit and the close of discovery" warranted denial of continuance request].)

B. The Trial Court Did Not Err by Finding the Hawkins Declaration Inadmissible

In deciding defendant's motion for summary judgment, the court ruled the untimely declaration of plaintiff's expert, Hawkins, lacked foundation. Several courts of appeal have held a trial court's evidentiary rulings on summary judgment are reviewed for abuse of discretion, but our Supreme Court has yet to take a position. (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 951; *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114 (*Howard*).) No matter for our purposes: the trial court's decision to exclude Hawkins's declaration was not error under any standard.

An expert declaration is admissible to support or oppose a motion for summary judgment if the contents of the declaration would be admissible at trial. (*Bozzi*, *supra*, 186 Cal.App.4th at p. 761.) For expert testimony to be admissible, there must be a foundation as to the expert's qualifications, the validity of the methods or principles on which the expert relied to reach his or her opinion, and the reliability and relevance of the facts underlying the expert's opinion. (*Howard*, *supra*, 208 Cal.App.4th at p. 1114.)

An expert witness is one who has "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720.) The expert's testimony "must 'provide a reasonable basis for the particular opinion offered,'" which means it "may not be based on conjectural or speculative matters." (*Howard*, *supra*, 208 Cal.App.4th at p. 1115, citation omitted; see also *Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1115 ["trial court may strike or dismiss an expert declaration filed in

connection with a summary judgment motion when the declaration states expert opinions that are speculative, lack foundation, or are stated without sufficient certainty"] (*Lynn*).)

Here, Hawkins's declaration lacked a sufficient foundation or explanation for his opinion defendant was negligent. Hawkins said he based his opinion on the discovery in the case without specifying what facts in the record informed his conclusions. Nor did Hawkins define, in the first place, what duty of care he believed defendant to have. Without setting forth either the applicable standard of care or how defendant breached that standard, Hawkins's declaration was conclusory, and impermissibly so. (See, e.g., *Bozzi*, *supra*, 186 Cal.App.4th at p. 762 [expert declaration lacked foundation where he "stated no facts to support his opinions, and his opinions were conclusory and speculative"]; *Lynn*, *supra*, 8 Cal.App.5th at p. 1116 [""an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based""].)

C. Summary Judgment for Defendant Was Proper

A defendant may move for summary judgment on the ground the action has no merit. (§ 437c, subd. (a)(1).) A cause of action lacks merit if one or more of its essential elements cannot be established. (§ 437c, subd. (o)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) A defendant can show that one or more elements of the cause of action cannot be established "by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence: The defendant must show that the plaintiff *does not possess* needed evidence, because

otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff *cannot reasonably obtain* needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the motion (Code Civ. Proc., § 437c, subd. (h).)" (*Aguilar*, *supra*, at p. 854.)

The movant for summary judgment maintains the burden of persuasion "that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) The burden of production, however, shifts between the parties. (*Ibid*.) A defendant may satisfy its initial burden of production by showing an absence of evidence through "factually devoid discovery responses." (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590; see also *Collin v. Calportland Co.* (2014) 228 Cal.App.4th 582, 589 ["Evidence that the defendant propounded sufficiently comprehensive discovery requests and that the plaintiff provided factually insufficient responses can raise an inference that the plaintiff cannot prove causation"] (*Collin*).)

By producing evidence of factually devoid discovery responses, a defendant can shift the burden of production to the plaintiff, who must then make "a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id*. at p. 851.) That said, the plaintiff may not simply rest on allegations in its pleadings but must instead set forth specific facts showing the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).)

Where the plaintiff would bear the burden of proof at trial by a preponderance of evidence, the defendant moving for

summary judgment "must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not—otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 851.) In other words, a triable issue of material fact exists if the evidence allows a reasonable trier of fact to find the disputed fact in favor of the plaintiff by a preponderance of evidence. (*Id.* at p. 850.)

On appeal from the grant or denial of summary judgment, we review the matter de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018; *Aguilar*, *supra*, 25 Cal.4th at p. 843.)

1. Defendant carried its initial burden of production

"'[I]n order to prove facts sufficient to support a finding of negligence, a plaintiff must show that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury.'" (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629, quoting *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 292.) Here, plaintiff's responses to defendant's interrogatories seeking to understand the basis of the negligence claim were factually devoid even on their own terms—plaintiff admitted he "does not know the facts in support of" his negligence claim. This appropriately raised an inference he could not establish the breach-of-duty element of a negligence claim, which thereby

satisfied defendant's initial summary judgment burden of production. (*Collin*, *supra*, 228 Cal.App.4th at p. 591 ["[Defendant's] discovery questions and [plaintiff's] responses raise an inference that plaintiff cannot prove the element of causation. [Citation.] [Defendant's] showing shifted the burden of production to plaintiff"]; *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 106-107.)

Plaintiff protests, however, that his factually devoid interrogatory responses established only that he did not then possess needed evidence, not that he had no ability to reasonably obtain such evidence. (See generally *Aguilar*, *supra*, 25 Cal.4th at p. 854.) In other words, plaintiff believes defendant failed to carry its initial burden of production because it failed to show he would be unable to obtain evidence of negligence if permitted to engage in additional discovery. His argument, in this respect, merges with the arguments he makes in support of his view that the trial court should have continued the summary judgment hearing. We have already rejected those arguments, and we do so again in this context. Plaintiff had a reasonable opportunity to obtain discovery before the trial court heard the summary judgment motion but failed to vigorously pursue available means of compelling the disclosure of information. Plaintiff also had every right to further amend his initial responses to defendant's interrogatories if he subsequently discovered facts to support his negligence claim, but he did not supplement his factually devoid responses. (§ 2030.310 ["Without leave of court, a party may serve an amended answer to any interrogatory that contains information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory"].)

2. Res ipsa loquitur does not apply and therefore cannot defeat summary judgment

Because the record demonstrates defendant satisfied its initial burden on summary judgment, the burden of production shifted to plaintiff to come forward with "substantial responsive evidence sufficient to establish a triable issue of material fact on the merits of . . . defendant's showing." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163; see also § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 850.) Plaintiff advances two theories to contend he met this burden, and we will discuss each, starting with his invocation of the doctrine of res ipsa loquitur.

"Res ipsa loquitur, when translated, 'means simply "the thing, or affair, speaks for itself," and, so speaking, authorizes the inference of negligence in the absence of a showing to the contrary.' [Citations.]" (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 440 (*Zentz*).) The doctrine "'applies where the occurrence of the injury is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.'" (*Tomei v. Henning* (1967) 67 Cal.2d 319, 322, citation omitted (*Tomei*).) Res ipsa loquitur "deals with circumstantial evidence and the presence of probabilities." (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 321 (*Elcome*).) When found to apply, it establishes "a presumption affecting the burden of producing evidence." (Evid. Code, § 646, subd. (b).)

There is "no magic in the Latin phrase" res ipsa loquitur. (*Zentz*, *supra*, 39 Cal.2d at p. 440.) To invoke the presumption established by the doctrine, there must be "evidence satisf[ying] three conditions: "'(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" [Citation.]" (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825-826 (*Brown*).)

When a defendant moves for summary judgment on the ground that the plaintiff cannot prove the defendant breached a duty of care that proximately caused harm, the plaintiff can defeat the summary judgment motion by showing the res ipsa loquitur doctrine applies. (See *Brown*, *supra*, 4 Cal.4th at p. 826.) To show the doctrine applies, however, a plaintiff in at least some circumstances is required to introduce expert testimony. (See *Tomei*, *supra*, 67 Cal.2d at p. 322 ["Since the res ipsa loquitur instruction permits the jury to infer negligence from the happening of the accident alone, there must be a basis either in common experience or expert testimony that when such an accident occurs, it is more probably than not the result of negligence"].) The court in *Tomei* held that because it was not a matter of common knowledge that the mistaken use of sutures during the surgery at issue was probably attributable to negligence, expert testimony was required to determine whether the mere happening of the accident established a probability of negligence. (*Ibid.*; see also *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1547 [court was required to instruct the jury not only on res ipsa loquitur but also that expert testimony was required to establish defendant's negligence; *Elcome*, *supra*, 110 Cal.App.4th at pp. 318-320 [doctrine inapplicable where etiology of injury was not matter of common knowledge and plaintiff's expert did not testify the injury was of a kind that did not ordinarily occur absent negligence].)

Here, plaintiff did not rely on expert testimony in asserting that "elevators are not supposed to drop down at a high speed and come to a sudden stop between floors absent someone's negligence." Plaintiff considers this a matter of "common knowledge" as to which expert testimony is unnecessary.[7] When the question is correctly framed, we conclude otherwise.

The maintenance of modern elevators is not a matter of common knowledge. While the sudden drop of an elevator may be unexpected, that consideration alone does not raise an inference that the party responsible for maintaining the elevator was negligent. (*Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 944 ["The fact that a particular injury rarely occurs does not in itself justify an inference of negligence unless some other evidence indicates negligence"].) *Blackwell* is a good case in point. It involved a dentist sued for malpractice after the dentist dropped a crown in a patient's mouth, which she aspirated, eventually resulting in her death. One might assume the defendant's negligence was inferable under the circumstances, but the issue was sharply contested by dueling experts at trial. (*Id*. at p. 942.) The Court of Appeal concluded a conditional res ipsa loquitur jury instruction was appropriate because testimony of the plaintiff's expert allowed the jury to find the injury was not a type to ordinarily occur absent negligence. (*Id*. at pp. 945-946.)

By contrast, cases in which common knowledge justifies applying res ipsa loquitur *without* expert testimony are generally

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[7] Plaintiff contended during the trial court proceedings that defendant was a common carrier required to use the "utmost care and diligence." The court rejected plaintiff's contention, and he does not continue to press it on appeal.

confined to circumstances in which negligence is the only possible explanation for the incident and no technical knowledge is needed for the jury to infer negligence. (*Elcome*, *supra*, 110 Cal.App.4th at p. 318; *Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 7.) When a surgeon leaves a surgical tool within a patient's body after operating, for example, one needs no medical expertise to infer the surgeon was negligent. (See *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 141; see also *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702, fn. 15 [negligent construction is common knowledge where "those failures on the part of the builder . . . are so obvious, if not bizarre, that they present no problem in the determination of his negligence, as for example the installation of a fireplace without a chimney or of a second floor without any means of access to it"] (*Miller*).)

Plaintiff, however, cites to a 1916 opinion from our Supreme Court that found res ipsa loquitur could be invoked in the case of a plaintiff injured by a four-floor drop of an elevator "owned and operated by the defendant in its building in Los Angeles." (*Worden v. Central Fireproof Bldg. Co.* (1916) 172 Cal. 94, 95 (*Worden*).) The negligence claim in that case went to trial, and the court rejected the contention that the jury's verdict was unsupported by the evidence by concluding the jury could have relied on res ipsa loquitur, which meant "[t]he plaintiff was only called upon to show that he was injured by the rapid descent and sudden stopping of the elevator, and that the elevator was under the control and management of the defendant." (*Id.* at p. 96.)

Even if we assume *Worden* was a common knowledge case, this case is different than *Worden*. Here, plaintiff originally sued the elevator's manufacturer, Kone, and defendant, the company

that took over the elevator maintenance contract six months before the incident involving plaintiff. This highlights the key problem for plaintiff: common knowledge permits no inference as to whether the elevator drop in this case was probably the result of *defendant's* negligence. Instead, admissible expert testimony was both required and absent. (See, e.g., *Miller*, *supra*, 8 Cal.3d at pp. 702-703 [standard of care in construction defect cases requires expert testimony unless defect is obvious to layperson]; *Allied Properties v. John A. Blume & Associates* (1972) 25 Cal.App.3d 848, 858 [standard of care in providing engineering services required expert testimony where services involved "complex calculations" under "complex circumstances"].)

Put in more specific terms, defendant's maintenance check chart indicated the elevator's governor rope was to be inspected annually every June, and only expert testimony about whether that inspection schedule was consistent with the standard of care would even potentially permit an inference that the elevator's sudden drop "'probably was the result of negligence by someone and . . . defendant is probably the person who is responsible.'"[8] (*Tomei*, *supra*, 67 Cal.2d at p. 322, quoting *Clark v. Gibbons* (1967) 66 Cal.2d 399, 408.) Moreover, expert testimony was necessary to permit an inference the elevator incident probably would not have occurred but for defendant's negligence because there exists no reason to believe—merely as a matter of common knowledge—that the circumstances that caused the elevator to

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[8] The maintenance chart indicated the elevator's "governor tension sheave" was to be inspected semi-annually, and it further indicated it had been checked in December 2011, the month before the incident in question.

drop would have been discovered during a competent inspection of the elevator, as opposed to being a latent manufacturing defect that would have gone undiscovered regardless. The bottom line is that there was no basis for the trial court to conclude, merely by virtue of the elevator dropping, that defendant probably breached its duty of care.

3. Castro's deposition testimony does not suffice to defeat summary judgment

The second theory plaintiff advances to contend he met his summary judgment burden of production is the argument that Castro's deposition testimony establishes a material dispute of fact that must be resolved at trial. We conclude Castro's testimony was insufficient to raise a triable issue.

As already noted, plaintiff did not present expert testimony on the applicable standard of care. Castro's testimony did not otherwise fill in the evidentiary gaps. Castro did testify the position of the tail switch relative to the governor rope caused the elevator to drop. But that technical explanation, standing alone, does not raise an issue of material fact regarding whether the improper positioning of those components was caused by defendant's breach of a duty. Rather, just as we have explained, the governor rope was to be inspected annually every June, and Castro did not testify defendant failed to abide by that schedule or that the schedule itself was below the standard of care. And again, even if we assume the standard of care required defendant to perform an inspection of all elevators immediately upon entering into the maintenance contract, Castro's testimony provides no reason to believe the circumstances that caused the elevator to drop would have been discovered during a competent

general inspection of the elevator, as opposed to an investigation conducted after the specific incident (the sudden drop of the elevator) had already occurred.

Having concluded Castro's testimony was insufficient to raise a triable issue of fact, that res ipsa loquitur does not apply, and that the Hawkins declaration was properly disregarded, we hold defendant carried its burden of persuasion. The grant of summary judgment for defendant was proper.

DISPOSITION

The judgment is affirmed. Defendant is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.