

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTHONY BROWN,

Plaintiff-Appellant,

v.

COUNTY OF LANE; ALFREDO
VELEZ; NATHAN L. GENT;
WELLPATH, LLC; JOHN/JANE DOES,
1-5,

Defendants-Appellees.

No. 24-4000

D.C. No. 6:21-cv-01866-AA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted March 9, 2026
Portland, Oregon

Before: COLLINS and FORREST, Circuit Judges, and FITZWATER, District Judge.**

Plaintiff-Appellant Anthony Brown, an inmate in an Oregon prison, appeals the district court's entry of judgment rejecting certain claims he asserted against Defendants-Appellees County of Lane, Nathan Gent, and Dr. Alfredo Velez. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and reverse and

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

remand in part.

I

The district court did not commit a “clear abuse of discretion” in denying Brown’s request for a fifth extension of the deadline for completing discovery. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985). The district court acknowledged that Brown’s counsel had been ill for a period of time, but the court concluded that, in light of the multiple previous extensions and counsel’s “fail[ure] to schedule depositions for the lead Defendants for two years,” counsel had not been diligent and had failed to establish the requisite “good cause” for a further extension of discovery. *See* FED. R. CIV. P. 16(b)(4) (stating that a scheduling order “may be modified only for good cause and with the judge’s consent”); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (“Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.”). On this record, the district court’s conclusion was reasonable. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006) (stating that a party has not been diligent “where he had ample opportunity to conduct discovery[] but failed to do so” (simplified)).

II

The district court properly granted summary judgment to Dr. Velez on Brown’s claim for medical negligence under Oregon law.

As an initial matter, we conclude that the district court did not abuse its discretion in holding that the opinion evidence offered in the declaration of Brown’s medical expert, Dr. Baskerville, did not satisfy the requirements of Federal Rule of Evidence 702. *See Engilis v. Monsanto Co.*, 151 F.4th 1040, 1046 (9th Cir. 2025) (stating standard of review). “Consistent with the court’s gatekeeping function, Rule 702 instructs a district court judge to determine whether an expert had sufficient factual grounds on which to draw conclusions.” *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025–26 (9th Cir. 2022) (simplified); *see also* FED. R. EVID. 702(b) (stating that expert opinion must be “based on sufficient facts or data”). As the district court explained, Dr. Baskerville had “reviewed only a medication log provided by [Brown],” which represented “only a small excerpt of [Brown’s] medical record,” and certain “email correspondence” between Brown and his counsel that was not provided to the court. The court further noted that Dr. Baskerville had not reviewed “any other portion of the medical record,” including the records concerning Brown’s relevant interactions with Dr. Velez. On this record, the district court acted well within its discretion in determining that Dr. Baskerville’s conclusory opinions in his declaration lacked an adequate factual basis. *See Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 n.3 (9th Cir. 1994).

Because the district court struck Dr. Baskerville’s opinion testimony, Brown

lacked sufficient evidence to create a triable issue of fact as to whether Dr. Velez's treatment fell below the applicable standard of care. *See Trees v. Ordonez*, 311 P.3d 848, 854 (Or. 2013) ("In most medical malpractice cases, expert testimony is required to establish the standard of care."). Brown asserts in his opening brief that his medical negligence claim is subject to the doctrine of *res ipsa loquitur* and therefore did not require expert testimony. *See Morris v. Dental Care Today, P.C.*, 473 P.3d 1137, 1140 (Or. Ct. App. 2020). Even assuming that this argument has not been forfeited, we reject it. Brown's argument is based on the premise that he "believes" that the medications Dr. Velez prescribed were "intended for a different patient," but the district court properly concluded that Brown had "produced no evidence to substantiate" this speculation. We therefore affirm the district court's grant of summary judgment to Dr. Velez on Brown's medical negligence claim.

Brown's opening brief also challenges the district court's dismissal of his claims against Dr. Velez for an Eighth Amendment violation and for "*intentional* infliction of emotional distress" (emphasis added). But these claims were dismissed at the pleading stage, and Brown's opening brief fails to address the district court's reasons for doing so, much less explain why they were wrong. As such, any challenge to the district court's dismissal of these claims has been forfeited. *See Transamerica Life Ins. Co. v. Arutyunyan*, 93 F.4th 1136, 1146 (9th Cir. 2024). To the extent that Brown intended to challenge the district court's

rejection, at summary judgment, of his claim against Dr. Velez for *negligent* infliction of emotional distress, the district court correctly concluded, for the reasons we have discussed, that Brown failed to raise a triable issue of negligence. *See Philibert v. Kluser*, 385 P.3d 1038, 1042 n.3 (Or. 2016).

Accordingly, we affirm the district court’s judgment of dismissal as to Dr. Velez in its entirety.

III

Brown also appeals the dismissal of his battery claim under Oregon law against Gent. We reverse and remand as to this claim.

The district court analyzed Brown’s battery claim solely under the conventional Oregon standards for battery that are applicable outside the prison context, and the court did *not* address any issue of justification for the alleged force applied. *Cf. Gigler v. City of Klamath Falls*, 537 P.2d 121, 126 (Or. Ct. App. 1975) (holding that battery claim against officers failed as a matter of law because force applied “was justified”). Gent’s brief in this court does likewise. For purposes of this appeal, we therefore will similarly confine ourselves to whether Brown presented sufficient evidence to create a triable issue of fact as to these standard elements.

The standard elements for a battery claim under Oregon law require a plaintiff to show that “(1) a person act[ed] with intent to cause harmful or offensive

contact with another person, and (2) those actions directly or indirectly cause a harmful or offensive contact with that other person.” *Underwood v. City of Portland*, 510 P.3d 918, 923 (Or. Ct. App. 2022). In support of his contention that these elements were met, Brown submitted his own declaration under penalty of perjury stating that, outside the view of the prison’s cameras, “Gent slammed [Brown] to the ground, and dislocated [Brown’s] right shoulder, grinding [Gent’s] knee in [Brown’s] back and neck.” The district court disregarded this declaration, concluding that “Plaintiff’s claim that he was slammed to the ground and that his shoulder was dislocated is not borne out in the record.” Brown’s claim that his shoulder was “dislocated” makes a specific medical claim for which he did not provide an adequate foundation, particularly in light of the medical records submitted by Defendants, which do not reflect any such injury. But Brown’s sworn statements that Gent “slammed” him to the ground and that Gent “gr[ou]nd[.]” his knee into Brown’s “back and neck” must be credited for purposes of summary judgment, and they suffice to create a triable issue as to the two elements of battery.

In arguing to the contrary, Gent asserts that the district court correctly held that there was no triable issue as to his “intent to cause harmful or offensive contact.” But the district court’s analysis of this issue improperly assumed that Gent had not engaged in the particular acts of violence that Brown asserted in his

declaration. From the nature of those alleged actions, a trier of fact could reasonably infer that Gent “must have intended to bring about a harmful or offensive contact” sufficient to constitute a battery. *Bakker v. Baza’r, Inc.*, 551 P.2d 1269, 1271 (Or. 1976).

Because the reasons given by the district court for its dismissal were flawed, we reverse and remand as to Brown’s battery claim against Gent. As noted, we have no occasion to address whether any battery was justified under Oregon law, and we express no view on that point.

Although there is overlap between Brown’s state law battery claim and his § 1983 Eighth Amendment claim against Gent, Brown’s opening brief fails to address the district court’s distinct reasons for dismissing that Eighth Amendment claim. In particular, the district court held that, even crediting Brown’s contention that Gent acted “outside of a camera view,” there was insufficient evidence from which a jury could find that the heightened scienter required for an Eighth Amendment claim was met. *See Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010) (holding that an Eighth Amendment excessive force claim requires the plaintiff to show that the alleged battery “was carried out maliciously and sadistically rather than as part of a good-faith effort to maintain or restore discipline” (simplified)). While Brown’s unadorned assertion that Gent slammed Brown into the ground and ground his knee into Brown’s back and neck suffices to establish the bare elements

of battery, it does not, without more evidence about the context of the incident, suffice to create a triable issue as to that heightened scienter. Because Brown’s opening brief contains no argument whatsoever on that point, we deem any challenge to the dismissal of the Eighth Amendment claim against Gent to be forfeited. *See Transamerica*, 93 F.4th at 1146.

Brown also asserted several other claims against Gent and the County below, but his opening brief does not distinctly address any of those claims, much less explain why they were improperly dismissed. We deem any challenge to the dismissal of these remaining claims to be forfeited. *Id.*

IV

For the foregoing reasons, we reverse the district court’s grant of summary judgment to Gent on Brown’s battery claim and remand for further proceedings consistent with this disposition. In all other respects, we affirm the district court’s judgment of dismissal.¹

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

¹ “On remand, as there is no longer any federal claim in this case, the district court may determine, using its sound discretion, whether to retain supplemental jurisdiction over the remaining state law claim[]” in this case or whether to decline supplemental jurisdiction over that claim and to dismiss it without prejudice to refile it in state court. *Johnson v. Barr*, 79 F.4th 996, 1007 (9th Cir. 2023); *see* 28 U.S.C. § 1367(c)(3).