Filed 12/13/01

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KENNETH G. KEEL, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, ET AL., Defendants and Respondents.	B144735 (Los Angeles County Super. Ct. No. BC214864)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elihu M. Berle, Judge. Affirmed. .

Kenneth G. Keel, in propria persona, for Plaintiff and Appellant.

Houle & Houle, Gregory Houle and Richard Houle; Greines, Martin, Stein & Richland LLP, Martin Stein and Carolyn Oill for Defendant and Respondent.

Plaintiff Kenneth Keel ("plaintiff") appeals from a summary judgment granted to the County of Los Angeles and its sheriff's department ("the county," "the sheriff's department," and collectively "respondents").[1] In his appeal, plaintiff asserts the trial court abused its discretion when it (1) denied his motion to amend his complaint and (2) denied his request to extend the time for completing service of summons and complaint on the other defendants. Plaintiff also contends the court erred in granting respondents a summary judgment.

We find no error and no abuse of discretion in the court's rulings. Therefore, we affirm the judgment.[2]

BACKGROUND OF THE CASE

1. *The Complaint and the Answers*

Plaintiff filed this suit on August 6, 1999. Besides respondents, plaintiff also named certain nurses and doctors, and a deputy sheriff as defendants. The general basis of plaintiff's complaint is that (1) while he was incarcerated in the county's jail facility, the defendant deputy sheriff committed assault and battery on him and negligently and intentionally inflicted emotional distress on him; (2) the other defendants were negligent in the medical care they gave him and negligent in their supervision of medical personnel

---

[1] In their appellate brief, the respondents observe that the sheriff's department is actually an agency of the county, and not a separate legal entity.

[2] Plaintiff is representing himself in this appeal. He also represented himself in the trial court. Courts hold litigants appearing in propria persona to the same standards and rules of practice to which they hold attorneys who represent litigants. (*Nelson* v. *Gaunt*

and the deputy sheriff, and they negligently inflicted emotional distress on plaintiff; and (3) plaintiff's statutory rights were violated. The alleged bases of such statutory rights are Civil Code section. 43 (right of protection from bodily restraint and harm), Civil Code section 52.1 (right to be free from interference with civil rights], and Government Code section 845.6 (prisoner's right to have medical care summoned when the prisoner has an immediate need for such care).[3]

(1981) 125 Cal.App.3d 623, 638.)

[3] Government Code section 845.6 states: "Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody ; but, except [in circumstances not relevant in this case], a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state from liability for injury proximately caused by malpractice or exonerates the public entity from its obligation to pay any judgment, compromise, or settlement that it is required to pay under subdivision (d) of Section 844.6."

Section 845.6 creates liability. "The subject of the section is not, as in section 844.6, an admitted breach of duty as to which no remedy shall exist, but the creation of a duty whose breach will lead to liability regardless of the foundational circumstances, be they trauma or disease and whatever the origin." (*Hart* v. *County of Orange* (1967) 254 Cal.App.2d 302, 306.)

Government Code section 844.6 is also at issue in this case. That section states in part:

"(a) Notwithstanding any other provision of this part, except as provided in this section and in [certain other sections, including section 845.6], a public entity is not liable for: [Par.] (2) An injury to any prisoner.

"..... .....

"(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any

Respondents were named as defendants in the following causes of action: (1) the seventh cause of action for negligence, that was based on an alleged violation of the duty under Government Code section 845.6 to summon medical care for plaintiff when he was in immediate need of such care; (2) the eighth cause of action for alleged negligent supervision of personnel at the county's jail vis-à-vis their care of plaintiff's medical needs; (3) the ninth cause of action for negligent infliction of emotional distress stemming from respondents' alleged negligence in supervising the jail personnel and securing medical care for plaintiff; (4) the twelfth cause of action for negligence, under the theory of respondeat superior, based on the alleged negligent use of mechanical restraints on plaintiff by a deputy sheriff and that deputy's alleged negligent infliction of emotional distress on plaintiff; (5) and the fifteenth cause of action for an intentional tort, under the theory of respondeat superior, based on the deputy sheriff's alleged intentional misuse of mechanical restraints on plaintiff (assault and battery) and alleged intentional infliction of emotional distress on him.

The county answered the complaint on September 20, 1999. The county filed an answer on behalf of the sheriff's department on November 8, 1999.

---

judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of this state for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action, based on such malpractice, to which the public entity has agreed."

2. *The Order Directing Service of the Summons and Complaint On Or Before December 20, 1999*

At a status conference held on October 20, 1999, the court ordered plaintiff to complete, on or before December 20, 1999, his service of the summons and complaint. According to plaintiff's brief, this two-month period to complete service was granted to him at his request for additional time. (The court also struck, pursuant to a motion filed by respondents, the punitive damages allegations against respondents.)

3. *Plaintiff's Motion for Leave to File a First Amended Complaint*

On November 29, 1999, plaintiff filed a motion for an order permitting him to file an amended complaint. The reasons given by plaintiff for seeking the amendment were twofold: (1) the names of the individual defendants named in his complaint had to be corrected or set forth in full because plaintiff had learned the correct and full names by discovery propounded on respondents,[4] and (2) allegations respecting exemplary

---

[4] In plaintiff's original complaint (the operative complaint) the 13 named individual defendants were named only by title and last name, such as "Deputy Tupper," "Dr. Serafini," and "Nurse Pennell." In their answers to plaintiff's interrogatories, respondents provided plaintiff with the full names of these individual defendants. The appellate record shows respondents served plaintiff with their answers to such interrogatories on October 20, 1999.

The record also shows that by cover letter dated *November 5, 1999*, plaintiff sent papers to the trial court, which included his proposed first amended complaint, a request for an amended summons, and a "notice of amendment to complaint." The record shows that plaintiff served two separate papers relating to the amendment of his complaint. One is entitled "notice of amendment to complaint" and bears a date of November 2, 1999, and a proof of service showing service on respondents on November 5, 1999. The other is a motion for an order "permitting amendment to complaint." This paper includes points and authorities, and is dated November 20, 1999. A proof of service shows it was served on respondents on that same day. Apparently the second papers were drawn up and served in response to the court clerk's November 10, 1999 letter to plaintiff whereby

damages should be removed from the complaint either because they are not permitted by Code of Civil Procedure, section. 425.13 (which sets out a procedure for when allegations of punitive damages against health care providers in negligence actions can be included in a complaint), or because the court had previously ruled that exemplary damages allegations against respondents should be stricken from the complaint. Hearing on plaintiff's motion was set for December 22, 1999, which was two days after the day by which plaintiff was to have completed service of his summons and complaint.[5] The clerk served plaintiff with notice that the motion was reset for January 5, 2000. On that date, the court denied the motion, saying: "An amendment to the complaint is unnecessary to add first names and eliminate matters already stricken by the court in view of the fact that defendants have answered the complaint."[6]

4. *Plaintiff's Request to Extend the Time for Serving the Defendants*

On February 3, 2000, plaintiff filed two ex parte requests. One request sought an extension of time to serve the summons and complaint on 13 named defendants and the

---

plaintiff was informed that he could not file a first amended complaint because the county had already filed an answer, and that he had to notice and make an "appropriate motion."

[5] Apparently plaintiff also filed his proposed first amended complaint with his motion to amend. Although plaintiff's appellate designation of the record includes such amended complaint, it was not made a part of the record on appeal.

Despite the fact that the hearing on plaintiff's motion for leave to file an amended complaint was set for December 22, 1999, respondents filed their answer to the proposed first amended complaint on December 2, 1999.

[6] Although plaintiff states in his brief that the trial court denied his request to attend the January 5, 2000 hearing by telephone, we have no reporter's transcript for that

Doe defendants. The request states it was made "on the ground that reasonable diligence has been exercised at attempting to obtain the Clerk's signature and the seal of the Court on the Amended Summons." The other ex parte request sought to have the clerk issue an amended summons (that identified the individual defendants by their full and correct names). The court's February 3 minute order states the ex parte requests were denied because "[n]o first amended complaint has been filed by the court and, accordingly, there is no need for an extension of time to serve or for the clerk to issue an amended summons."[7]

5. *Respondents' Motion for Summary Adjudication*

Respondents' motion for summary adjudication of issues was filed on March 1, 2000. Plaintiff filed opposition to the motion. Hearing on the motion was set for April 3, and the matter was taken under submission on that day.[8]

On May 1, 2000, the court issued a minute order and a lengthy formal order granting respondents' summary adjudication motion. This latter order discusses two affirmative defenses asserted by respondents in their motion for summary adjudication. The first concerns Government Code section 845.6, which respondents asserted was a defense to the seventh cause of action's allegation that respondents and certain of their

---

hearing. The minute order simply states "no appearances" for that day.

[7] After the minute order denial of the ex parte requests, respondents filed opposition to the requests and plaintiff filed a reply to the opposition.

[8] Respondents state in their appellate brief that although their motion was "styled as a motion for summary adjudication of issues, the motion addressed all plaintiffs' [sic]

employees failed to summon medical care for plaintiff when it was immediately necessary. The second is Government Code section 844.6's provision for governmental immunity which respondents asserted in connection with plaintiff's eighth, ninth, twelfth and fifteenth causes of action.

A judgment in favor of respondents was signed and filed on August 1, 2000. Thereafter, plaintiff filed this timely appeal.

CONTENTIONS ON APPEAL

Plaintiff contends the trial court abused its discretion when (1) it did not permit him to file his proposed first amended complaint and (2) denied his request for an extension of time in which to complete service of his summons and complaint. Plaintiff also contends the trial court erred in granting respondents a summary judgment because respondents did not meet their initial burden of proof, and he demonstrated there are triable issues of material fact in the remaining cause of action against respondents.

DISCUSSION

1. *There Was No Abuse of Discretion When the Trial Court Denied Plaintiff Leave to File a First Amended Complaint*

The trial court's denial of plaintiff's motion to file a first amended complaint was based on its analysis that "[a]n amendment to the complaint is unnecessary to add first names and eliminate matters already stricken by the court in view of the fact that *defendants have answered the complaint*." (Italics added.) Plaintiff asserts the trial court "erroneously concluded that the unserved parties had already answered the complaint."

---

claims against the County."

However, given the very large number of named defendants, and the fact that the court's file only contained answers from respondents, it is not reasonable to conclude that the court believed the unserved defendants had answered the complaint. Rather, absent proof to the contrary, it appears to us that the trial court's reference to defendants that had "answered the complaint" was a reference to only the respondents.

a. *No Need to Add First Names of Defendants*

Given the timing of certain events that took place prior to the denial of plaintiff's motion to amend the complaint, such denial was not an abuse court's discretion. The trial court had previously ordered plaintiff to serve the named defendants and the Doe defendants on or before December 20, 1999. Plaintiff's motion for leave to file a first amended complaint for the purpose of clarifying the names of the individual defendants was scheduled to be heard *after that December 20, 1999 service cut-off date*. Given the timing of that hearing, the trial court could reasonably conclude that plaintiff's attempt at clarification of names was undertaken for the benefit of respondents, *not* for the benefit of those individual defendants whose correct names plaintiff had discovered but who could no longer be served because the time to serve them had already passed. Therefore, the court could reasonably rule that since the respondents had already answered the complaint (and indeed had *supplied* the correct and full names of the individual defendants), it was not necessary for plaintiff to clarify the names of the individual defendants. Thus, there was no abuse of discretion in denying amendment of the complaint for the purpose of clarifying the names of the individual defendants.

b. *No Need to Eliminate Punitive Damages Allegations*

Plaintiff's other stated reason for wanting to file a first amended complaint was that the new complaint would not include (1) punitive damage allegations that were improper under Code of Civil Procedure section 425.13, and (2) punitive damage allegations against respondents that the trial court had previously ruled should be stricken from the complaint. However, plaintiff had already been precluded from serving the individual defendants who were the health care providers because he failed to serve them on or before December 20, 1999. Therefore, the presence in the original complaint of punitive damages allegations that ran afoul of Code of Civil Procedure section 425.13 was of no consequence. As for the second type of punitive damages allegations that plaintiff sought to eliminate from his complaint, the trial court had already granted respondents' motion to strike them. Therefore, those allegations were no longer in play and their presence in the original complaint was of no consequence.

c. *Respondents' "Answer" to the Proposed First Amended Complaint Is of No Consequence*

Plaintiff argues that respondents stipulated to the amendment of his complaint when they, prior to the hearing on his motion for leave to file the amended complaint, filed an answer to the proposed first amended complaint. Whatever the respondents' reason for filing the answer, plaintiff cites no authority for his implied contention that it was within respondents' power to preempt the court from exercising its discretion on the issue whether plaintiff should be permitted to file his amended complaint. Moreover, even if respondents' answer had preempted the court from ruling on plaintiff's motion for

leave to file the amended complaint, the presence of the first amended complaint as the operative complaint would be of no consequence to the question whether a summary judgment in favor of respondents was warranted.

2. *There Was No Abuse of Discretion When the Trial Court Denied Plaintiff's Request For an Extension of Time in Which to Complete Service of the Summons and Complaint*

As noted above, this suit was filed on August 6, 1999. Under rule 7.7 of the delay reduction rules for the Los Angeles County Superior Court, plaintiff was required to serve his complaint on the defendants within 60 days of its filing. At a status conference held on October 20, 1999, the court, pursuant to plaintiff's request for an extension of time to serve the defendants who had not yet been served, ordered plaintiff to complete such service on or before December 20, 1999. By ex parte application filed February 3, 2000, plaintiff sought an extension of time to serve the summons and complaint on 13 named defendants and the Doe defendants. The request states it was made "on the ground that reasonable diligence has been exercised at attempting to obtain the Clerk's signature and the seal of the Court on the Amended Summons." In a declaration filed with his ex parte request for additional time to serve, plaintiff stated: (1) after he was granted the 60-day extension on October 20, 1999 for service of summons and complaint, he spent time attempting to file a first amended complaint, and secure an amended summons, because he had learned the correct names of the individual defendants, (2) the clerk of the court refused to file his documents because he had not noticed a motion for leave to file the amended complaint, (3) thereafter he did bring his motion for leave to file the amended complaint, and (4) when his motion was denied, he spent more time

attempting to have the clerk "endorse" his original summons but the clerk wrote to him and said that clerk's do not endorse summonses but the sheriff's office does, and when this message from the clerk was sent to him, it was improperly opened and returned to the clerk, who then resent it to plaintiff.

The court's February 3 minute order states the ex parte request for additional time to serve the summons and complaint was denied because "[n]o first amended complaint has been filed by the court and, accordingly, there is no need for an extension of time to serve or for the clerk to issue an amended summons." Citing Code of Civil Procedure section 1054, plaintiff now argues the trial court abused its discretion when it denied his request for an extension of time to served defendants. Section 1054 permits a trial court to extend time periods within which litigants have to perform certain acts when the party requesting the extension shows good cause for such extension.[9] Plaintiff contends he presented good cause for the extension of time. Plaintiff also observes that it is the policy of the law that cases be tried on their merits.

Whether plaintiff's presentation constitutes good cause is not relevant, nor is it relevant whether plaintiff's failure to serve the remaining defendants prior to the trial court's cutoff date of December 20, 1999 affected their substantial rights or those of the respondents. The operative truth here is that plaintiff's previous 60-day extension for

---

[9] Plaintiff also cites rule 7.7 (b) of the Los Angeles Superior Court delay reduction rules to support his assertion that the trial court should have granted his request for an extension of time to serve the remaining defendants. Rule 7.7 (b) states the trial court "may extend the time standards set forth in the Rule upon a showing of good cause." The 60-day period for serving process is one of those "time standards."

service had already expired by the time the court denied him additional time. The very notion of an *extension* of a time period requires that the time period still exist. (Cf. *In re Clary* (1896) 112 Cal. 292, 295 [order of a court granting an extension of time to prepare a proposed bill of exceptions, when the extension was made after the expiration of the statutory period within which such bill could be proposed, was "ineffectual and void"].) It was plaintiff's duty, as his own attorney, to be mindful of the December 20, 1999 cutoff date and to make his request for an extension of time for serving process, prior to the expiration of that date.

We also note that by the time plaintiff made his request for an extension of time, *six months* had passed since he filed his suit. Thus, even if the trial court did have the power to grant plaintiff more time to serve his summons and complaint, we cannot say that denial of his request for additional time was an abuse of discretion. The only directive that *requires* a trial court to grant an extension of time to serve a complaint is found in Government Code section 68616, which states that exceptions to the local rule for how long a plaintiff has to serve a complaint "(1) may be granted as authorized by local rule and (2) shall be granted on a showing that service could not reasonably be achieved within the time required with the exercise of due diligence consistent with the amount in controversy." The record does not convince us that with due diligence, plaintiff could not have served his complaint within six months.

3. *The Trial Court Did Not Err When It Granted Respondents a Summary Judgment*

a. *Standard of Review*

We conduct a de novo review of this matter. (*Price* v. *Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 474.) In doing so, we apply the same rules as the trial court was required to apply in deciding defendant's motion for summary judgment. Those rules are as follows.

As the parties moving for summary judgment, defendants bore an initial burden of production of a prima facie showing that there is no triable issue of material fact in this case and they are entitled to judgment as a matter of law. Only if they carried that burden was plaintiff faced with a burden of production of its own--to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar* v. *Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for." (*Id*. at p. 851.)

"[F]rom commencement to conclusion, the party moving for summary judgment bears 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. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense'

thereto. ([Code Civ. Proc.], § 437c, subd. (o) (2).)" (*Aguilar* v. *Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 850, italics and footnotes omitted.)

"[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. [The California Supreme Court has] held to the effect that the placement and quantum of the burden of proof at trial [are] crucial for purposes of summary judgment. [Citation.] . . . Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact 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. By contrast, if a defendant moves for summary judgment against such a plaintiff, he 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 a judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." (*Aguilar* v. *Atlantic Richfield Co*., *supra*, 25 Cal.4th 826, at p. 851, fns. omitted.)

A defendant moving for summary judgment is not required "to conclusively negate an element of the plaintiff's cause of action. . . . [A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action--for example, that the plaintiff cannot prove element *X*. Although he remains free to do so, the defendant need not himself conclusively negate any such element--for example, himself prove *not X*. . . . The defendant has shown that the plaintiff cannot establish at

least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence[.]" (*Aguilar* v. *Atlantic Richfield Co*., *supra*, 25 Cal.4th 826, at pp. 853-854, fns. omitted.)

Because a summary judgment denies the adversary party a trial, it should be granted with caution. (*Michael J*. v. *Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 865.) Declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact. (*Id*. at pp. 865-866.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal. (*Western Mutual Ins. Co*. v. *Yamamoto* (1994) 29 Cal.App.4th 1474, 1481.) If, on the other hand, we find that one or more triable issues of material fact exist, then we must reverse the judgment.

b. There Is No Triable Issue of Material Fact Regarding Liability Under Section 845.6 of the Government Code (Plaintiff's Seventh Cause of Action)

(1) *Most of Plaintiff's Causes of Action Were No Longer Viable*

At the beginning of this case, the county might have had a duty, under Government Code section 844.6, to pay the judgments, compromises or settlements

resulting from the medical negligence (if any) of the public employee health care professional defendants who treated plaintiff at the county's jail facility. However, the fact that such individual defendants were never served eliminated that potential duty since there could never be any judgments, settlements or compromises against those defendants. With the evaporation of that potential financial duty went the eighth cause of action against respondents. Additionally, given respondents' section 844.6 immunity from liability for "injury to any prisoner" when such injury is not the result of malpractice by a public employee health care provider, plaintiff's recovery on the ninth, twelfth and fifteenth causes of action was also precluded. In his written opposition to the motion for summary adjudication, plaintiff acknowledged that the only remaining cause of action against respondents was the seventh cause of action for negligence, which was based on an alleged violation by respondents' employees of their statutory duty, under Government Code section 845.6, to summon medical care for plaintiff when and if he was in immediate need of such care.

(2) *Plaintiff's Own Allegations Defeat His Seventh Cause of Action*

The trial court's formal order on the summary adjudication motion states that at the hearing on the motion for summary adjudication, at which plaintiff apparently appeared by a telephone call, "plaintiff stated unequivocally on the record that the only injury at issue for which he is making a claim is his fall on an escalator [at the county's jail facility] which occurred on November 16, 1998. As to this injury, defendant's

evidence supports the conclusion that plaintiff was furnished immediate medical care."[10] Based on this conclusion, the trial court ruled that plaintiff's claim in his seventh cause of action was defeated. The evidence on which the trial court relied was in the form of a declaration from a Karen Magnusen Tait, M.D. Whether Dr. Tait's declaration would

---

[10] On appeal, plaintiff disputes the trial court's statement that at the hearing on the summary adjudication motion, plaintiff unequivocally stated on the record that the only injury which he was pursuing was that which occurred because of his fall on an escalator at the county's jail. Plaintiff states the trial court was mistaken when it made such a pronouncement in its formal summary adjudication order. He points to the fact that in his written opposition to the motion for summary adjudication, he (1) stated that there are "numerous instances" when the county's employees "had actual or constructive knowledge of Plaintiff's need for immediate medical care, yet failed to procure such care" and (2) cited a specific instance of this alleged failure to summon immediate medical care. The specific instance involved his having been handcuffed in a manner that, according to his complaint, was too tight on his left wrist and caused his hand to become infected and him to suffer physical and emotional pain. Plaintiff also asserts that at the hearing, he "verbally argued his left wrist injury consistent with his opposition papers."

While it may indeed be true that at the hearing on respondents' motion for summary adjudication plaintiff did not abandon all alleged violations of Government Code section 845.6 except the one involving his fall on the elevator, we are not in a position to accept his appellate representation on the matter. He has not provided us with a reporter's transcript of the hearing on the motion so that we may verify his position. Moreover, if he is unable to afford the transcript, there were other avenues open to him for correcting what he asserts is the trial court's mistake. The record shows the trial court mailed a copy of its formal order to plaintiff. It was plaintiff's responsibility to address the matters in that order that he believes are not reflective of what actually transpired at the hearing. He could have served and filed a motion for clarification or even written a letter to the court and sent a copy of the letter to respondents' counsel. As it stands now, we are left with one instance in which respondents are alleged to have violated plaintiff's section 845.6 rights—the escalator incident.

Judgments and orders are presumed to be correct, and reversible error must be affirmatively shown. (*Walling* v. *Kimball* (1941) 17 Cal.2d 364, 373.) Here, the summary judgment is based on the trial court's belief that the only alleged violation of plaintiff's Government Code section 845.6 rights that remained to be addressed was the escalator fall. Plaintiff has not affirmatively shown that the trial court's belief was erroneous and that therefore its judgment is erroneous.

defeat a cause of action against respondents founded on Government Code section 845.6 is actually not relevant because the allegations made by plaintiff in his own complaint defeat such a claim against them.

In his complaint, plaintiff alleged the following. The escalator accident occurred when plaintiff was returning to his housing unit at the jail after being seen at the jail's medical clinic for his back pain. He alleged that he was "debilitated by dizziness [and before he] reached the top of the escalator, he collapsed and fell backwards." A deputy came to plaintiff's aid as plaintiff was sliding down the escalator and held him, and then "a massive rescue effort ensued." Under the supervision of two of the named defendant nurses, plaintiff was placed on a backboard and carried down the escalator. Then he was placed on a gurney and transported to the jail clinic. He was able to move his arms and legs but could not walk, had little strength, and had severe pain in his head, neck and back. When he arrived at the Clinic (which was apparently at around 9:00 p.m.), the two nurses noted plaintiff's vital signs on his medical chart. The blood pressure they recorded for him was "abnormally high, higher than ever recorded before ('167/107')." He was not informed of this reading. Then, the two nurses went off duty "without taking reasonable action to ensure that Plaintiff received necessary medical attention. Plaintiff suffered greatly as he waited for medical aid." At around 10:00 p.m., the defendant deputy sheriff approached plaintiff, as he was lying on the gurney, and told plaintiff to return to his module. When plaintiff replied he could not walk, the deputy violently placed plaintiff's left hand in a handcuff and then proceeded to tightened the handcuff to the point where it was "biting into Plaintiff's flesh," and attached the other side of the

handcuffs to the gurney. The deputy returned 20 minutes later and removed the handcuffs. By that time, plaintiff had throbbing pain in his left hand and his fingertips were numb. Although plaintiff remained at the clinic for several more hours, and although he described his medical problems to at least one of the nurses during that time, he was denied medical treatment and was sent back to his module at approximately 7:30 a.m. the next morning, without having been seen by a doctor. On his way back he hobbled and had to stop frequently to regain his strength and balance. One of the nurses "falsely noted" on his chart that he had been seen by a doctor.

Assuming arguendo plaintiff was in need of immediate medical care after his fall on the escalator, his own allegations show that medical care *was summoned for him.* Upon seeing his predicament on the escalator, the jail sheriff personnel stopped him from falling further, and they summoned staff from the jail medical clinic. Two nurses from the jail clinic came to supervise *his removal to the clinic, the very place where medical care is dispensed at the jail*. Such conduct brings respondents' employees within the duty required of them by section 845.6. However, our analysis does not end there.

Plaintiff's seventh cause of action also addresses the *quality of care* given to him after he was taken to the jail clinic. He alleged that the several nurses who attended to him after his fall on the escalator breached their section 845.6 duty by failing to secure for him medical treatment when they had actual or constructive knowledge that he was in need of immediate medical care, and as a result he sustained bodily injury. However, this alleged failure of the nurses, even if true, would not require reversal of the summary judgment because whatever the failings of the nurses, their conduct can no longer be the

basis of a recovery against respondents. If any of the nurses who attended to plaintiff after he fell failed to perform their duties under the applicable standard of care for nurses under the same or similar circumstances (for example, if they failed to summon a doctor to examine and treat plaintiff when it was necessary to do so), plaintiff's recourse was initially against them, not against respondents. The same can be said for the doctors who attended to him after his fall, if any did; if they committed malpractice, plaintiff's recourse would initially be against them. (*Watson* v. *State of California* (1993) 21 Cal.App.4th 836, 841-843.)

A reading of section 845.6 shows that the public entity can be directly liable for its employee's failure to *summon* medical care for a prisoner who is in immediate need of such care. However, section 845.6 goes on to state that while the public entity can ultimately be obligated to pay for the malpractice of one of its employees who is lawfully engaged in the practice of one of the healing arts, such obligation would be limited by subdivision (d) of section 844.6. Thus, the public entity's obligation is limited to paying a judgment against such employee, or paying a settlement or compromise involving that employee if the public entity agrees to the compromise or settlement. "Section 845.6 requires that the medical malpractice action be brought against the employees, not the public entity. [Citation.]" (*Watson* v. *State of California*, *supra*, 21 Cal.App.4th at p. 842, fn. omitted.) Here, plaintiff has forfeited his ability to seek a judgment, compromise or settlement against the nurses by failing to serve them in a timely manner. Therefore, respondents cannot be held financially responsible for the nurses' actions in attending to plaintiff, and respondents are entitled to a summary judgment in their favor

as a matter of law.

DISPOSITION

The judgment from which plaintiff has appealed is affirmed. Costs on appeal to the County of Los Angeles.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We Concur:

KITCHING, J.

ALDRICH, J.