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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JOHN V. APOLLO,

Plaintiff and Appellant,

v.

E. GYAAMI et al.,

Defendant and Respondent.

A130733

(Solano County
Super. Ct. No. FCS024920)

This is an appeal from a judgment entered in favor of respondent E. Gyaami, a registered dietician employed at the California Medical Facility (CMF) in Vacaville. Appellant John V. Apollo, a state prisoner housed at CMF, filed a personal injury lawsuit against respondent alleging several causes of action, including negligence and fraud, based on her refusal of his request for a special high-fiber diet to alleviate pain and discomfort associated with his medical conditions of diverticulitis of the colon and a hiatus hernia.

Respondent successfully moved for summary judgment on the grounds that no triable issues of fact exist with respect to any of appellant's causes of action, that appellant failed to file a claim with the Victim Compensation and Government Claims Board within the time period prescribed by the Government Claims Act, Government Code sections 810 et seq., and that respondent was entitled to qualified immunity for the conduct alleged in the complaint pursuant to Government Code section 845.6. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second appeal by appellant relating to his request for a special high fiber diet to treat his medical conditions. On October 31, 2008, we reversed a judgment in favor of respondents Gyaami, Dr. Hawley and Nurse Mann after concluding appellant had been denied meaningful access to the courts to prosecute his claims. (*Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468 (A118431) (*Apollo I*).¹ Much of the factual and procedural background of these proceedings was set forth in detail in our previous decision. As such, in the name of efficiency and where appropriate herein, we paraphrase and quote at length from our earlier decision.

I. Appellant's Allegations.

Appellant brought a personal injury lawsuit seeking \$250,000 in damages stemming from the refusal of CMF personnel to provide him with a medically-prescribed special diet when he was transferred from Folsom State Prison on a “medical override” due to his medical conditions of diverticulitis of the colon and a hiatus hernia. “Shortly before his transfer to CMF, the staff physician at Folsom State Prison made the following order: ‘This patient has a chronic dietary problem that he needs a special diet in a medical facility. No expiration.’ Consistent with that order, after appellant arrived at CMF, two physicians on at least three separate occasions ordered that appellant receive a high fiber, low fat, no dairy, no spice, and minimal meat (chicken and fish only) diet. After several weeks, however, appellant was still not receiving the special diet, and thus went to speak with respondent [Gyaami], a registered dietician and the head dietician at CMF.” (*Apollo I, supra*, 167 Cal.App.4th at p. 1471.)

Respondent advised appellant that, pursuant to a 1997 mandatory policy promulgated by the California Department of Corrections and Rehabilitation, he was not entitled to a specially formulated therapeutic high fiber diet unless he was prescribed clozapine, an anti-psychotic medication. Respondent also advised appellant’s physician,

¹ Dr. Hawley and Nurse Mann, respondents in appellant’s prior appeal, are not involved in this appeal.

Dr. Altchek, in writing that appellant was not entitled to the specially formulated high fiber diet because he was not taking clozapine. When appellant told respondent that he had been transferred to CMF on a medical override due to his colon condition, and that two physicians at CMF had prescribed a special diet, respondent replied: “They do not know what they are doing, as I am the dietician, and I know what you can and can not [sic] have!” Respondent thus refused to provide appellant with the special medical diet and instead offered to order him a vegetarian diet from the mainline diet. Respondent also offered to instruct appellant on how to choose high fiber, low fat, non-diary, non-meat meals from the mainline diet that would take care of his medical needs. When appellant responded that he was not a vegetarian, respondent advised him to return to the medical clinic to talk to a physician. (*Apollo I, supra*, 167 Cal.App.4th at p. 1472.)

Shortly after this exchange, Dr. Hawley, a physician at the CMF clinic who was not appellant’s regular physician, submitted a Dietary Referral Form selecting a vegetarian derivative of the mainline diet for appellant. This form was then reviewed and approved by both appellant’s regular physician, Dr. Altchek, and by respondent.

II. Appellant’s Administrative Claim.

Appellant thereafter filed an administrative claim with the prison regarding his right to receive a medically-prescribed special diet. After his claim was denied, appellant filed an administrative appeal, which was also denied. (*Apollo I, supra*, 167 Cal.App.4th at pp. 1472-1473.) “Accordingly, having exhausted his prison-level administrative remedies, appellant filed a claim in June 2002 with the California Victim Compensation and Government Claims Board (the Board). In that claim, appellant explained that, as a result of defendants’ failure to provide a specially-formulated, medically-prescribed diet, he was suffering from chronic light-headedness, dizziness, weakness, fatigue, stomach cramps, diarrhea and a ‘swelled stomach.’ ” (*Apollo I, supra*, 167 Cal.App.4th at p. 1473.)

“On September 12, 2003, the Board notified appellant by letter that his claim had been rejected, and that he had six months from the date the letter was personally

delivered or deposited in the mail to file a court action on his claim.” (*Apollo I, supra*, 167 Cal.App.4th at p. 1473.)

III. This Lawsuit.

In early 2004, appellant filed this lawsuit in Solano County Superior Court. (*Apollo I, supra*, 167 Cal.App.4th at p. 1473.) As mentioned above, on October 31, 2008, we reversed a trial court order granting a motion for summary judgment filed by respondent after concluding that appellant’s right of meaningful access to court had been violated in the lower court proceedings. After the case was remanded to the trial court, appellant was granted leave to file an amended complaint, which he did on October 8, 2009.

On December 3, 2009, respondent again moved for summary judgment. After a contested hearing, the trial court granted respondent’s motion on the grounds that no triable issue of fact exists with respect to any of appellant’s causes of action, that his lawsuit was barred because he failed to file a claim with the Board within the time period prescribed by the Government Claims Act, Government Code sections 810 et seq., and that respondent was entitled to qualified immunity for the conduct alleged in the complaint pursuant to Government Code section 845.6.² Judgment was thus entered in favor of respondent. Appellant filed a timely appeal on December 14, 2010.

DISCUSSION

Appellant, continuing to proceed in propria persona, contends the trial court erred in granting summary judgment in favor of respondent because (1) his claim should be deemed timely, (2) triable issues of fact exist as to each of his causes of action based upon respondent’s failure to comply with his physicians’ orders to provide him a special diet for his medical conditions, (3) and respondent is not entitled to immunity from liability under section 845.6. In addition, for the first time, appellant argues that respondent also violated his Eighth and Fourteenth Amendment rights under the United States Constitution.

² Unless otherwise stated, all statutory citations herein are to the Government Code.

We review a trial court's grant of summary judgment de novo, considering all the evidence set forth by the parties in support of and in opposition to the motion except that to which objections have been made and sustained. We then determine whether there is a triable issue as to any material fact. (Code Civ. Proc., § 437c, subd. (c).) As such, we must determine whether respondent, as the party prevailing on summary judgment, has with respect to each of appellant's causes of action "shown that one or more elements . . . 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." (Code Civ. Proc., § 437c, subd. (p)(2).)

"In performing our de novo review, we view the evidence in the light most favorable to [appellant] as the losing part[y]. [Citation.] In this case, we liberally construe [appellant's] evidentiary submissions and strictly scrutinize [respondent's] own evidence, in order to resolve any evidentiary doubts or ambiguities in [appellant's] favor." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; see also *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.)

With these rules in mind, we turn to appellant's arguments in seeking to reverse the judgment against him.

I. Negligence/Professional Malpractice.

Appellant's complaint sets forth causes of action for both negligence and medical malpractice based upon respondent's failure to grant his request for a special high-fiber diet to treat his medical conditions of diverticulitis and a hiatus hernia. Appellant theorizes that, by disregarding his primary care physicians' written orders for such diet, respondent violated the standard of care applicable to certified registered dietitians such as herself, who are part of the CMF health services team but work under the supervision of medical physicians.

A. The Evidence.

Respondent contends appellant's negligence and malpractice claims fail as a matter of law because it is undisputed that, in refusing his special dietary request, she was merely following a mandatory state-wide policy, which, as head dietitian for the CMF, she was required to do. To support her contention, respondent produced the following evidence with her motion for summary judgment.

A statewide mandatory policy was promulgated in 1997 by the California Department of Corrections and Rehabilitation (CDCR) that restricted which inmates could receive outpatient therapeutic diets (1997 policy). Specifically, under the 1997 policy, only inmates admitted to a licensed general acute care hospital, skilled nursing facility or correctional treatment center bed were entitled to receive specially formulated therapeutic diets.³ As for the general inmate population, the 1997 policy furthered the CDCR's goal of inmate self-responsibility by requiring them to make food choices from among items in the standard mainline "Heart Healthy" meal. The mainline "Heart Healthy" meal is not only high fiber, containing an average of 32 grams of fiber per meal, but also low fat, low sodium, and non pork or pork derivative. The mainline vegetarian meal is a non-meat derivative of the regular mainline "Heart Healthy" meal.

In 1998, CMF requested and received an exception to the 1997 policy for general population inmates taking the anti-psychotic drug clozapine. Under this exception, such inmates would receive a specially-formulated high-fiber therapeutic diet to counteract clozapine's common side effect of constipation.

According to respondent's declaration, Dr. Wodell, M.D., treated appellant on May 25, 2001, shortly after his transfer to CMF, and ordered him a "high-fiber, low fat (no grease), no spice, non-pork, [no] beef, chicken, no dairy diet." To do so, Dr. Wodell

³ The 1997 policy defines "Therapeutic Diet" as: "Special meals, ordered by a physician and prepared under the direction of a Clinical Dietician, for inpatients admitted to a licensed general acute care hospital, skilled nursing facility, or correctional treatment center bed." These diets may, where appropriate, consist of tube feeding, clear liquid diets, full liquid diets, pureed diets, dialysis diets, low protein diets, gluten free diets or high fiber diets.

filled out the CMF Dietary Referral Form, selecting the high fiber diet, which was marked as only available for patients on clozapine, as well as the lactose controlled and vegetarian (with seafood) options from the mainline menu. As this form indicated, appellant could not be approved for this special diet because, undisputedly, he was not taking clozapine, nor was he admitted to a licensed general acute care hospital, skilled nursing facility or correctional treatment center bed. According to respondent's declaration, physicians, particularly those under contract, may not know CDCR's dietary policies, and it is her job, as head dietitian, to inform physicians if they mistakenly order a diet for an inmate inconsistent with those mandatory policies.

On June 18, 2001, appellant was treated by CMF staff physician, Dr. Altchek, M.D., who, Like Dr. Wodell, mistakenly selected the high fiber diet only for patients on clozapine. In addition, Dr. Altchek, also like Dr. Wodell, selected the vegetarian derivative of the mainline diet, noting "no dairy, low fat, no meat or chicken."

On June 26, 2001, respondent advised Dr. Altchek in writing of his mistake, explaining that appellant was not entitled to the specially formulated high fiber diet because he was not taking clozapine. The next day, on June 27, respondent discussed with appellant his dietary concerns, advising him that he was not entitled to a specially formulated diet but could select a low fat, non dairy, fish-only meal from the mainline menu. When appellant rejected her advice, respondent recommended that he see a physician.

Shortly thereafter, Dr. Hawley at the CMF clinic selected for appellant a vegetarian derivative of the mainline diet on the Dietary Referral Form, which both Dr. Altchek and respondent approved. Then, on July 19, 2001, respondent instructed appellant on how to select foods from the mainline "Heart Healthy" vegetarian diet that would accommodate his specific health needs.

B. The Analysis.

Appellant does not dispute the existence of the mandatory statewide 1997 policy.⁴ Rather, appellant argues that respondent had a legal and ethical duty to comply with his physicians' written orders that he receive a special high fiber diet, regardless of the 1997 policy.⁵ Breach of this duty, appellant continues, amounted to negligence and medical malpractice. We disagree.

As set forth above, a defendant may qualify for summary judgment by showing that an essential element of a plaintiff's cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2); see also, e.g., Weil & Brown Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) [¶] 10:240, pp. 10-90 – 10-91.) For appellant's related claims of negligence and medical malpractice (otherwise known as professional negligence), a single standard applies.⁶ "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by

⁴ Nor does appellant challenge the validity of this policy, which in any event was authorized under Penal Code sections 5058 and 6104. (See Pen. Code § 5058, subd. (a) ["The director [of Corrections] may prescribe and amend rules and regulations for the administration of the prisons"]; Pen. Code § 6104 ["The Director of Corrections shall make rules and regulations for the government of the Medical Facility and the management of its affairs"].)

⁵ Specifically, appellant contends respondent should be held liable for "follow[ing] departmental regulations instead of the medical code of ethics of her profession as a certified registered dietitian to assist and work in a professional manner to help those with medical conditions that call for special medical diets."

⁶ As the California Supreme Court explains: "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation. Thus, the standard for professionals is articulated in terms of exercising 'the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing" (Prosser & Keeton, Torts (5th ed. 1984) The Reasonable Person, § 32, p. 187.)" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997-998.) "[W]hether the cause of action is denominated 'ordinary' or 'professional' negligence, or both, ultimately only a single standard can obtain under any given set of facts and any distinction is immaterial to resolving a motion for summary judgment." (*Flowers v. Torrance Memorial Hospital Medical Center, supra*, 8 Cal.4th at p. 1000.)

acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.” (Judicial Council of Cal. Civ. Jury Insts. (2007) CACI No. 401.) (Fn. omitted.)” (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024-1025.) Generally whether conduct amounts to negligence is a question of fact for a jury. However, California courts have not hesitated to decide this question on summary judgment in cases where no reasonable person could find the defendant violated the applicable standard of care. (E.g., *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1000.) We believe this is such a case.

California law is clear that government officials may be held liable for negligent performance of their ministerial duties. (See § 820, subd. (a) [under the California Tort Claims Act, public employees are liable for their torts except as otherwise provided by statute].) “Actions that are manifestly ministerial, because they amount only to obedience to orders which leave the officer no choice, plainly include actions governed by specific statutory or regulatory directives. Such actions have been found nondiscretionary, and thus not immunized, because they entail the fulfillment of enacted requirements.” (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 141.)

Here, the relevant regulatory directive – the 1997 policy promulgated by the CDCR – could not be more clear: “Health Care managers *shall* ensure: [¶] (1) Physicians prescribe a therapeutic diet only for inmates admitted to a licensed health care bed, or as required by a Court Order. . . . *No outpatient therapeutic diets shall be prescribed.*”⁷ (Emphasis added.) Thus, on its face, the 1997 policy affords the CDCR and its agents no discretion to order special therapeutic diets for inmates, like appellant, not admitted to a licensed health care bed or under court order.⁸ The policy also requires health care

⁷ Recall the 1997 policy defines “Therapeutic Diet” as: “Special meals, ordered by a physician and prepared under the direction of a Clinical Dietician, for inpatients admitted to a licensed general acute care hospital, skilled nursing facility, or correctional treatment center bed.”

⁸ As appellant notes, the CMF, where he is incarcerated, is a medical facility rather than a general correctional facility. However, under the 1997 policy, an inmate is entitled

managers, who are not generally licensed physicians, to ensure that physicians refrain from ordering special therapeutic diets for non-qualifying inmates. That is just what respondent did in this case – she advised appellant’s physician that he mistakenly selected a specially-formulated therapeutic diet for appellant which she could not, under state law, provide.

Given respondent’s undisputed compliance with the relevant regulatory directive, we conclude there is no basis, as a matter of law, for finding her negligent. Simply put, no reasonable trier of fact could find that respondent failed to use reasonable care to prevent harm to appellant when she merely acted in conformance with the policy she was charged with carrying out. As such, the trial court’s ruling on this issue stands. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; see also *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839 [“[o]nly when the inferences are indisputable may the court decide the issues as a matter of law”].)

II. Breach of Mandatory Duty.

Below, appellant also relied upon sections 845.6, subdivision (d), 855.8 and 856 in claiming respondent breached a mandatory statutory duty by not providing him a special high fiber diet.⁹ In ruling against appellant on this issue, the trial court found, as an initial matter, that sections 855.8 and 856 do not apply to appellant because he is not mentally ill. On appeal, implicitly acknowledging the correctness of this ruling, appellant omits any reference to sections 855.8 and 856 and relies instead on section 845.6 and a previously-unmentioned statute, section 844.6, subdivision (d), to establish breach of mandatory duty. As we will explain, even assuming appellant should be permitted to

to a special therapeutic diet only if the inmate is “admitted to a licensed general acute care hospital, skilled nursing facility, or correctional treatment center bed.” Here, appellant appears to be in the general population at CMF; there is no evidence that he was admitted to a hospital, nursing facility or treatment center bed.

⁹ In some instances, statutory law may impose upon certain persons a standard of care higher than or otherwise different from the “ordinary care” standard. (*Flowers v. Torrance Memorial Hospital Medical Center, supra*, 8 Cal.4th at p. 997, fn. 2.)

raise a new theory of liability for the first time on appeal, we conclude neither section 845.6 nor section 844.6, subdivision (d), provides a basis for his claim.

A. Section 845.6.

Section 845.6 provides that a public employee is not liable for injury proximately caused by his or her failure to furnish medical care to a jail prisoner, unless “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.” Here, the trial court found “no evidence that [appellant] was ever in need of immediate medical care and [that] . . . Gyaami failed to summon such care.” We agree. “Liability under section 845.6 is limited to serious and obvious medical conditions requiring immediate care.” (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 841.) While appellant generally alleges that he suffered weakness, fatigue, light-headedness, stomach cramping and bloating as a result of respondent’s failure to grant his special diet request, he has provided no evidence that he required immediate medical care for any “serious and obvious” medical condition. (Compare *Kinney v. County of Contra Costa* (1970) 8 Cal.App.3d 761, 770 [an inmate’s request to a prison official for something to treat a headache could not reasonably be deemed notice “that the prisoner is in need of immediate medical care”].) Accordingly, appellant’s reliance on section 845.6 as a basis for surviving summary judgment is misplaced.

B. Section 844.6, subdivision (d).

Nor does section 844.6, subdivision (d), help appellant survive summary judgment. This provision provides in relevant part that, while a public entity is generally not liable for an injury to any prisoner, “[n]othing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission.”¹⁰ (§ 844.6, subd. (d).) We have already concluded, for reasons set forth

¹⁰ Section 844.6 provides in relevant part: “(a) Notwithstanding any other provision of this part, except as provided in this section and in Sections 814, 814.2, 845.4, and 845.6, or in Title 2.1 (commencing with Section 3500) of Part 3 of the Penal Code, a public entity is not liable for:

above, that respondent did not commit a “negligent or wrongful act or omission” in denying appellant’s special diet request. As such, section 844.6 is likewise inapplicable.

III. Fraud.

Next, we address appellant’s claim that the trial court erred in granting summary judgment with respect to his cause of action for fraud.

According to appellant, respondent committed fraud when she called a registered nurse at the CMF clinic and instructed her “to have a doctor, any doctor order [him] a mainline vegetarian no meat diet card.” This doctor, named as a defendant in appellant’s initial complaint, then allegedly ordered such a diet for appellant, identifying it as his “personal choice” on the referral form without examining him or reviewing his medical records.

However, as appellant himself acknowledges, a prima facie case of fraud requires a showing with respect to each of the following elements: “ ‘(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.’ [Citation.]” (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.) Here, even assuming for the sake of argument that triable issues of fact exist as to whether respondent knowingly made a false statement

“(1) An injury proximately caused by any prisoner.

“(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 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.”

by instructing a nurse to “to have a doctor, any doctor order [appellant] a mainline vegetarian no meat diet card,” there is no evidence whatsoever that appellant justifiably relied on such statement to his detriment.

Specifically, to establish the “justifiable reliance” element of fraud, a plaintiff must show he actually relied on the defendant’s misrepresentation, and that he was reasonable in doing so. (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.*, *supra*, 157 Cal.App.4th at pp. 863-864.) Actual reliance, in turn, requires the plaintiff to “ “establish a complete causal relationship” between the alleged misrepresentations and the harm claimed to have resulted therefrom.’ [Citation.]” (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.*, *supra*, 157 Cal.App.4th at p. 864.) Appellant, however, has made no showing that he reasonably relied on respondent’s allegedly fraudulent instruction to a CMF clinic nurse “to have a doctor, any doctor order [him] a mainline vegetarian no meat diet card,” or that his reliance in this regard caused him actual harm. Respondent, in turn, has declared under oath that a physician selected the vegetarian derivative of the mainline diet for appellant after appellant visited the CMF clinic, and that both she and appellant’s regular physician thereafter approved this selection. While appellant denies this version of events and argues that he will be able to prove injuries in court by expert medical testimony, neither appellant’s denial nor his promise to produce evidence of injury in the future is sufficient to enable him to survive summary judgment. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 [plaintiff must do more than deny the credibility of the defense witness to survive summary judgment].)

As such, we conclude respondent has negated a necessary element of appellant’s fraud claim, rendering summary judgment appropriate.

IV. Violations Under the Eighth and Fourteenth Amendments of the U.S. Constitution.

Finally, we briefly address appellant’s remaining claims that respondent violated his rights under the Eighth and Fourteenth Amendments of the United States Constitution by refusing his request for a special high fiber diet. We agree with respondent that

appellant has forfeited the right to raise these constitutional claims on appeal by not including them in his complaint or raising them before the trial court. As one California court has aptly stated: “For Code of Civil Procedure section 437c to have procedural viability, the parties must be acting on a known or set stage.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258, fn. 7.) Accordingly, “[i]f a plaintiff wishes to expand the issues presented, it is incumbent on the plaintiff to seek leave to amend the complaint either prior to the hearing on the motion for summary judgment, or at the hearing itself.” (*Id.* at p. 1258.)

Here, undisputedly, appellant has never sought to amend his complaint to add causes of action for violations of his rights under the Eighth and Fourteenth Amendments. As a result, these causes of action were not considered by the trial court in ruling on respondent’s motion for summary judgment. Under these circumstances, we need not consider them for the first time here. (*Laabs v. City of Victorville, supra*, 163 Cal.App.4th at p. 1258. See also *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1069, fn. 7 [where “ ‘ ‘ ‘[a] party finds, on the hearing of [a summary judgment] motion, that his pleading is not adequate, . . . the court may and should permit him to amend; but in the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings’ ” ’ ’ ’].)

Accordingly, the trial court’s grant of summary judgment in favor of respondent must stand.¹¹

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

¹¹ Because we conclude judgment in favor of respondent is proper on the merits of appellant’s claims, we need not address the trial court’s alternative ruling that appellant’s claims were untimely under section 911.2.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.