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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

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MITCHELL A. CARAVAYO,

Plaintiff and Appellant,

v.

GLEN JAMES,

Defendant and Respondent.

C065245

(Super. Ct. No. 45197)

Plaintiff Mitchell A. Caravayo is a pro se litigant in the custody of the California Department of Corrections and Rehabilitation (CDCR). Caravayo filed a negligence action against Dr. Glen James and other defendants. The trial court sustained Dr. James's demurrer to Caravayo's first amended complaint and Caravayo was given leave to amend. Caravayo failed to amend, the trial court dismissed his case, and Caravayo appealed.

On appeal, Caravayo raises several arguments attacking the dismissal of his case and the trial court's ruling on the demurrer. We ultimately conclude the trial court properly

dismissed Caravayo's case against Dr. James, the only demurring defendant. We also conclude, however, that the trial court should not have dismissed Caravayo's case as to the remaining defendants. We affirm the dismissal as to Dr. James and remand for further proceedings.

#### **BACKGROUND**

On June 15, 2007, Caravayo filed a negligence action in Lassen County Superior Court against Dr. James, James E. Tilton, Tom Felkner, and Does 1-10. Over two years later, on June 22, 2009, without having served any defendant, Caravayo filed a first amended complaint, the operative pleading.

Like the original complaint, the first amended complaint is an amalgam of Judicial Council forms and other documents. The parties are the same, except that the first amended complaint adds the CDCR as a defendant. The body of the first amended complaint (contained within several Judicial Council forms) alleges three separate causes of action for negligence -- the first against Dr. James; the second against Does 1-5; and the third against Does 6-10.

Roughly five months after filing his first amended complaint, Caravayo effectuated service on Dr. James. Dr. James is the only defendant who has been served in this case and the only respondent on appeal.

#### **I. Caravayo's Cause of Action against Dr. James**

According to the first amended complaint, on November 9, 2005, while incarcerated at the High Desert State Prison (High Desert), Caravayo was "hit and/or kicked at least 10-20 times

in the front and back of [his] head" by an unnamed individual. The impact bloodied Caravayo's nose and caused "temporary loss/memory [*sic*], temporary mental confusion and clouded consciousness." Caravayo was taken by wheelchair to the prison infirmary where he received a stitch above his right eye and "chomp[ed] on some gauze." The first amended complaint avers that Dr. James was employed at High Desert. The first amended complaint identifies various actions Dr. James purportedly failed to take with respect to providing medical care to Caravayo.

Allegedly, Dr. James did not conduct "as thorough a neurological examination or evaluation as could [have been] given." There were no X-rays taken of Caravayo's face or head "to determine any non-observable facts having physical existence." "At no time did Dr. Glen James or any other doctor ask [Caravayo] to walk heel to toe in a straight line in order to determine whether [Caravayo] could maintain an independent upright movement without erratic osilation [*sic*] or staggering." "At no time did Dr. Glen James or ant [*sic*] other doctor ask [Caravayo] to hop on one foot in order to determine the presence of any infirmities [*sic*]." "At no time did Dr. Glen James or any other doctor question [Caravayo] whether he perceived any symptoms like retrograde amnesia, vertigo, nausea, loss of coordination, numbness in the extremities [*sic*] . . . , or any other clinical symptom relative to serious impairment to the brain." "At no time did Dr. Glen James or any other doctor disclose all material facts relative to serious impairment

to the brain which could not be commonly appreciated by [a] reasonable person in [Caravayo's] position." "At no time did Dr. Glen James disclose a forecast admonishing and outlining a prediction of any probable outcome of [Caravayo's] impaired brain and the proximate consequences were he to suffer more blows to the face and head." Dr. James also allegedly failed to "document any personal medical information in support of his prescribing medication."

The first amended complaint alleges that Dr. James "did act negligently in the manner described above" and failed "to exercise the standard of care that a reasonably prudent doctor would have exercised in a similar situation." As "a proximate result of defendant [Dr.] James'[s] conduct," Caravayo "has suffered and continues to suffer in the form of pain and suffering and emotional distress."

Caravayo attached documents to his first amended complaint including an "Inmate/Parolee Appeal Form" known as a CDC 602. The CDC 602 is accompanied by handwritten continuation pages and other supporting materials.

## **II. The Demurrer**

Dr. James demurred to the first amended complaint on four grounds: (1) Caravayo's action against Dr. James was barred by the statute of limitations, (2) the first amended complaint fails to allege facts sufficient to state a cause of action for negligence against Dr. James; (3) Dr. James is immune from suit under Government Code section 855.6, and (4) Caravayo failed to exhaust his administrative remedies. In support of his

demurrer, Dr. James requested judicial notice of certified records from the CDCR Inmate Appeals Branch.

Caravayo belatedly filed an opposition, and a trial court commissioner held a hearing on the demurrer on March 11, 2010. Caravayo and Dr. James, through his counsel, appeared telephonically. At the hearing, the commissioner sustained the demurrer on all grounds and granted leave to amend.

On March 23, 2010, the commissioner issued a formal order on the demurrer. The order granted Dr. James's request for judicial notice and sustained the demurrer on all grounds. The order also granted Caravayo 30 days from the date of the order to file and serve a second amended complaint. On April 1, 2010, Dr. James mailed a copy of the order, with a notice of entry, to Caravayo.

### **III. Subsequent Filings And Proceedings**

On April 12, 2010, Caravayo filed a "Proposed Order; Objection" in which he objected to the "proposed" order on the demurrer.<sup>1</sup> Caravayo argued that the order failed to reflect that the court granted his request for judicial notice of a prison regulation (Cal. Code Regs., tit. 15, § 3000.5, subd. (f)), and denied his "request for a Declaration of Rights as to that section." Caravayo further argued that the order failed to reflect that leave to amend was separately granted with respect to each ground on which the demurrer was sustained.

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<sup>1</sup> At that juncture, the order on the demurrer was no longer "proposed."

On April 19, 2010, the trial court held a case management conference (CMC). Dr. James, through his counsel, appeared at the CMC, but Caravayo did not. Dr. James requested dismissal pursuant to Code of Civil Procedure section 581, subdivision (f)(2) (section 581(f)(2)).<sup>2</sup> The court entered a minute order directing the clerk to serve an "OSC Re: Sanctions" on Caravayo "for failure to file a further case management statement and failure to appear at the case management conference." The minute order set a hearing for May 6, 2010. The minute order indicated that the hearing would address the "status of [the] 2nd amended" complaint.

On April 21, 2010, the clerk mailed a notice to Caravayo indicating that a hearing was set for May 6, 2010 on "why sanctions should not be imposed for failure to comply with Delay Reduction Rules."

On April 26, 2010, Caravayo filed a document entitled "Ex Parte Notice; Emergency Exception" (Ex Parte Notice). Therein, Caravayo explained why he had failed to appear at the CMC; namely that "Courtcall" had faxed the "wrong access code" for his telephonic appearance. Caravayo also requested additional time, beyond the 30 days given, to file his second amended

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<sup>2</sup> Although Dr. James's request for dismissal under section 581(f)(2) is not part of the appellate record, this fact was included in Dr. James's appellate brief and was not disputed by Caravayo.

Undesignated statutory references are to the Code of Civil Procedure.

complaint. Caravayo represented that on March 17, 2010, he was removed from the prison's general population and placed in administrative segregation and that prison staff had "seized" his "legal material." Prison staff did not "hand over [his] legal material until Apr. 16, 2010." In light of these circumstances, Caravayo stated that he would not be able to comply with the 30-day deadline to amend. Caravayo stated that since April 16, 2010, he had been "formatting his amendments" and he "believe[d]" he could "make the necessary adjustments." He requested until May 21, 2010 to file a second amended complaint. In the context of explaining his need for an extension of time, Caravayo quoted rule 3.1320(h) of the California Rules of Court, which states: "A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under Code of Civil Procedure section 581(f)(2)."<sup>3</sup> Wisely anticipating such a motion, Caravayo stated, "if this court were to issue an O.S.C. why [Caravayo's] complaint should not be dismissed before ruling on an anticipated ex parte application on Dr. James['s] behalf[,] [Caravayo] can explain the situation[] unless, of course, the court accepts [Caravayo's] ex parte notice sufficient to satisfy that need."

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<sup>3</sup> Caravayo referred to this rule by its old number, 325(f).

On April 30, 2010, Caravayo filed a "Notice Of Objection And Objection To The Court's Order Of March 23, 2010." Therein, Caravayo objected to the trial court's written order sustaining the demurrer. Caravayo largely reiterated the arguments he previously had raised in his "Proposed Order; Objection" filing. In addition, however, Caravayo cited section 472d and argued that the order did not sufficiently describe each ground on which the demurrer was sustained.

On May 6, 2010, the court held the order to show cause hearing. Caravayo and Dr. James (through his counsel) appeared telephonically. According to Caravayo's appellate briefing, he "argued the same thing at the OSC hearing" as he did in his Ex Parte Notice. The transcript from the May 6, 2010 hearing is not in the appellate record.<sup>4</sup> The trial court apparently was unmoved by Caravayo's oral argument and prepared a minute order indicating the case was dismissed for lack of prosecution.

On May 21, 2010, the court entered a formal order of dismissal. The order states in pertinent part: "The court finds that plaintiff has not shown good cause for his failure to timely file and serve a second amended complaint in compliance with this court's order dated March 23, 2010. Therefore, good cause appearing, [¶] IT IS ORDERED that this matter is DISMISSED

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<sup>4</sup> Correspondence from the trial court clerk on file in this appeal indicates that a court reporter was not present at the hearings below. There is no indication that Caravayo ever requested a court reporter for the May 6, 2010 hearing or any others.

in its entirety." Caravayo timely appealed from the order of dismissal.

## **DISCUSSION**

Although the trial court's order sustaining the demurrer with leave to amend is not appealable, the trial court's subsequent dismissal order is an appealable final judgment. (§ 581, subd. (d); *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1032, fn. 1; *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457 (*Otworth*).) Caravayo's appeal from the dismissal order allows him to challenge intermediate orders prior to dismissal, including the trial court's order sustaining the demurrer. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 128.) For analytical purposes, we first consider Caravayo's attack on the dismissal.

### **I. Caravayo's Case Against Dr. James**

#### **A. The Dismissal**

Apart from whether the trial court correctly ruled on the demurrer, Caravayo contends that the court erred in subsequently dismissing his case against Dr. James. Specifically, Caravayo argues that the trial court abused its discretion when it dismissed his case "for his failure to comply with local delay reduction rules." In support, Caravayo cites *Youngworth v. Stark* (1991) 232 Cal.App.3d 395 (*Youngworth*) and *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*). Caravayo's reliance on these cases is misplaced.

In *Youngworth*, the trial court dismissed a case as a sanction for the plaintiffs' counsel's noncompliance with local delay reduction rules. (*Youngworth, supra*, 232 Cal.App.3d at p. 398.) Counsel missed three court appearances of escalating importance and failed to timely file reports and answers to court-ordered, standardized interrogatories. (*Id.* at pp. 398-399, 405.) *Youngworth* concluded that the trial court did not abuse its discretion in dismissing the case. (*Id.* at pp. 405-406.) *Youngworth* noted that the plaintiffs' counsel's disobedience wasted time and judicial resources. (*Id.* at p. 405.) In addition, prior to dismissal, less severe sanctions were imposed (two monetary sanctions), yet counsel's disobedience continued. (*Id.* at pp. 405-406.) Therefore, the trial "court could reasonably conclude that sanctions less severe than dismissal would be ineffective to obtain [counsel's] compliance with the local fast track rules." (*Id.* at p. 406.)

In *Elkins*, a family law case, a local rule and a trial scheduling order required parties in dissolution trials to present their respective cases by written declarations in lieu of live testimony. (*Elkins, supra*, 41 Cal.4th at p. 1344.) In these written trial declarations, parties were required to establish the admissibility of all exhibits they sought to introduce for trial purposes. (*Ibid.*) In his written trial declaration, Jeffrey Elkins failed to establish the evidentiary foundation for 34 of his 36 exhibits. (*Ibid.*) Consequently, the trial court excluded them as a sanction for noncompliance, leaving Mr. Elkins with only two exhibits. (*Id.* at pp. 1344,

1363-1364.) The court proceeded to the merits and divided the marital property in a manner adverse to Mr. Elkins. (*Id.* at p. 1345.) Mr. Elkins filed a writ petition attacking the local rule and scheduling order, which essentially mandated a "trial by declaration." (*Id.* at p. 1350.)

*Elkins* concluded that the local rule (and the scheduling order) were inconsistent with various statutory provisions, including the ban on hearsay evidence at trial. (*Elkins, supra*, 41 Cal.4th at p. 1345.) *Elkins* also concluded that the trial court "abused its discretion in sanctioning [Mr. Elkins] by excluding the bulk of his evidence simply because he failed, prior to trial, to file a declaration establishing the admissibility of his trial [exhibits]." (*Id.* at pp. 1363-1364.)

As pertinent here, during its discussion of the sanction issue, *Elkins* commented: "Although authorized to impose sanctions for violation of local rules (Code Civ. Proc., § 575.2, subd. (a)), courts ordinarily should avoid treating a curable violation of local procedural rules as the basis for crippling a litigant's ability to present his or her case. . . . [I]n the absence of a *demonstrated history of litigation abuse*, '[a]n order based upon a curable procedural defect [including failure to file a statement required by local rule], which effectively results in a judgment against a party, is an abuse of discretion.' [Citation.]" (*Elkins, supra*, 41 Cal.4th at p. 1364, italics added.)

Caravayo argues that, in this case, his litigation conduct was less severe than the repeated disobedience in *Youngworth* and

does not amount to a "demonstrated history of litigation abuse." Thus, dismissing his case for his "failure to comply with local delay reduction rules" was an abuse of the trial court's discretion.

Caravayo's argument, and his reliance on *Youngworth* and *Elkins*, is based on a false premise, i.e., that his case was dismissed because he failed to comply with the local delay reduction rules. On the contrary, as the express language of the order of dismissal indicates, the trial court dismissed Caravayo's case against Dr. James because Caravayo failed to amend his first amended complaint within the time the trial court permitted.

Caravayo's failure to timely amend his first amended complaint did not constitute and cannot be equated with a failure to follow a local rule. "Whether to grant leave to amend a complaint is a matter within the discretion of the trial court." (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.) When leave to amend is granted, "the court . . . shall fix the time within which the amendment or amended pleading shall be filed." (§ 472a, subd. (c).) As California law has long recognized, the time selected by the trial court for amending a pleading is entirely within the trial court's discretion. (*Vestal v. Young* (1905) 147 Cal. 715, 720 (*Vestal*).) Here, the trial court had the discretion both to grant Caravayo leave to amend and to establish 30 days as the leave period. Caravayo's failure to amend within 30 days was not a failure to abide by a

local rule, it was simply a failure to take advantage of an opportunity the trial court bestowed upon him.

Nor was the dismissal of Caravayo's case against Dr. James a *sanction* for noncompliance with a local rule (as was the dismissal in *Youngworth* and the exclusion of evidence in *Elkins*). Rather, the dismissal was a natural consequence of Caravayo's failure to amend and was authorized by statute. (*Sadler v. Turner* (1986) 186 Cal.App.3d 245, 250, fn. 6, 2d par. ["it is self-evident that the defective complaint will be dismissed in the event no amended pleading is forthcoming"]; see also *Otworth, supra*, 166 Cal.App.3d at p. 457.) Pursuant to section 581(f)(2), a trial "court may dismiss the complaint as to that defendant, when: [¶] . . . [¶] (2) . . . after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." Thus, by statute (and not simply by local rule), the trial court had authority to dismiss Caravayo's complaint against Dr. James after Caravayo failed to amend. Caravayo recognized this statutory authority in his Ex Parte Notice. Although the trial court did not cite section 581(f)(2) in its dismissal order, the statute obviously served as the basis for dismissal.<sup>5</sup>

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<sup>5</sup> As mentioned, Dr. James requested dismissal under section 581(f)(2), and Caravayo recognized the potential for such a dismissal in his Ex Parte Notice. Moreover, we presume the trial court applied the correct statutory law in the discharge of its duties. (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032.)

Because Caravayo's case against Dr. James was not dismissed as a sanction for noncompliance with a local rule, *Youngworth* and *Elkins* are inapposite. Caravayo has cited no authority, and we are aware of none, that requires "a demonstrated history of litigation abuse" as a prerequisite to dismissal when the plaintiff fails to amend his pleading within the leave period the trial court permits. We decline to create any such prerequisite for discretionary dismissals under section 581(f)(2). Consequently, we reject any argument that the trial court abused its discretion in dismissing Caravayo's case against Dr. James because Caravayo had not engaged in a "demonstrated history of litigation abuse." No such showing was required in order for the court to properly exercise its discretion under section 581(f)(2).

The substance of Caravayo's argument appears to be that the trial court should have given him additional time to amend his first amended complaint before ordering dismissal. We are not persuaded.

Whether to give Caravayo additional time to amend his pleading, beyond the 30 days granted, was a matter entirely within the trial court's discretion. (*Vestal, supra*, 147 Cal. at p. 720.) The burden is on Caravayo to demonstrate the trial court abused its discretion, which must be clearly shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 566 (*Denham*); *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) Generally speaking, discretion is abused "where the trial court's decision exceeds the

bounds of reason or contravenes the uncontradicted evidence.’  
[Citation.]” (*Garcia v. County of Sacramento* (2002)  
103 Cal.App.4th 67, 81.)

The trial court considered whether to give Caravayo additional time at the OSC hearing on May 6, 2010. Caravayo did not secure a transcript from this hearing and this failure is problematic.

“It is the appellant’s affirmative duty to show error by an adequate record.” (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 [appellant failed to secure a hearing transcript].) Moreover, a “necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed.’ [Citation.]” (*Ibid.*)

According to Caravayo’s appellate briefing, he “argued the same thing at the OSC hearing” as he did in his Ex Parte Notice. Obviously, the trial court was not persuaded by Caravayo’s oral argument at the OSC hearing. Because Caravayo failed to secure a transcript from this hearing, however, it remains unknown why the court was not persuaded or whether statements were made, information was elicited, or matters bearing on credibility came to light at this hearing, all of which may support the trial court’s decision to deny Caravayo additional time to amend. On a silent record we must presume the trial court had before it

circumstances warranting the decision it made. (*Denham, supra*, 2 Cal.3d at p. 564; see also *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 258.)

Because Caravayo failed to generate an adequate appellate record, he has failed to demonstrate that the trial court abused its discretion in denying him additional time to amend his first amended complaint. Even were we to assume (as Caravayo would have us believe) that all the information the court had before it at the OSC hearing was the content provided in Caravayo's Ex Parte Notice, the result would be the same. Caravayo stated in his Ex Parte Notice that, on March 17, 2010 (six days after the bench ruling on the demurrer), he was removed from the prison's general population and placed in administrative segregation. He was "stripped" of his "legal material" and it was not returned until April 16, 2010. Even assuming the veracity of these statements, they are insufficient to demonstrate that the trial court abused its discretion in denying Caravayo additional time to amend his first amended complaint.

To begin with, Caravayo failed to explain why he was placed in administrative segregation or to otherwise elaborate on the surrounding circumstances. As any trial judge is undoubtedly aware, a prisoner can be placed in administrative segregation for engaging in misconduct. In Caravayo's Ex Parte Notice, he claims that when he was placed in administrative segregation, prison staff failed to prepare "a rules violation report -- CDC 115." "A CDC 115 documents misconduct that is 'believed to be a violation of law or is not minor in nature.'" (Cal. Code

Regs., tit. 15, § 3312, subd. (a)(3).)" (*In re Reed* (2009) 171 Cal.App.4th 1071, 1077.) Caravayo's silence on what prompted his placement in administrative segregation and his complaint that a "CDC 115" was not prepared call into question whether his own misconduct created the predicament (the temporary loss of his "legal material") on which he premised his request for additional time. Caravayo's Ex Parte Notice also lacked specificity in other key respects. Caravayo did not explain what the "legal material" consisted of, whether he ever requested this material back before it was returned, or whether he was denied access to writing materials or secondary sources. Without a more developed picture of the circumstances, it is difficult to fault the trial court for its reluctance to grant Caravayo further leave.

Moreover, even assuming Caravayo was "stripped" of his "legal material" (whatever that may mean) from March 17, 2010 to April 16, 2010, Caravayo nevertheless had a meaningful opportunity to amend and file his pleading. Given the applicable dates, Caravayo had five to six days to work on amending his pleading before he was stripped of his legal material. Once his legal material was returned, he had another six days to amend before the 30-day deadline expired.<sup>6</sup> And, with or without his legal material in hand, Caravayo had the ability to contemplate amendments to his first amended

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<sup>6</sup> We note that a 10-day leave period is not uncommon. (See Cal. Rules of Court, rule 3.1320(g).)

complaint. Indeed, he appeared at the hearing on the demurrer and was surely familiar with the facts of his own case.

Finally, looking at the larger context, by the time of the OSC hearing, Caravayo's case had been languishing on the court's docket for nearly three years. And during this time, despite having named multiple parties as defendants, Caravayo had managed to serve only one of them -- Dr. James.

On these facts, Caravayo has not shown that the trial court's refusal to grant him additional time to amend his first amended complaint, beyond the 30 days given, was an abuse of discretion. Consequently, we reject any claim that the trial court erred in dismissing Caravayo's case because further time to plead should have been granted. Having addressed and rejected Caravayo's attack on the dismissal, we now turn to the ruling on the demurrer.

#### **B. The Ruling on the Demurrer**

Caravayo argues that it was "plain error" to sustain the demurrer on each ground Dr. James advanced. Dr. James contends that each ground provides a valid basis for sustaining the demurrer.

Because the trial court did not abuse its discretion in denying Caravayo additional time to amend his pleading, we apply the normal rules of appellate review that attach when a plaintiff, who has been given leave to amend following a demurrer, fails to amend and then attacks the demurrer ruling on appeal. In this context, a "strict construction of the complaint is required and it must be presumed that the plaintiff

has stated as strong a case as he can.' [Citations.]" *Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal.App.4th 247, 251.) We determine only whether Caravayo's first amended complaint, as currently constituted, states a cause of action and not whether Caravayo might be able to state a cause of action or cure deficiencies if given further opportunity to do so. (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 312; *Independent Journal Newspapers v. United Western Newspapers, Inc.* (1971) 15 Cal.App.3d 583, 585.) The trial court's ruling must be affirmed if Caravayo's unamended pleading is objectionable on any ground raised by the demurrer. (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.)

Caravayo's first amended complaint is objectionable on at least two grounds. Accordingly, we affirm the ruling on the demurrer.

**1. Failure to state a claim for negligence**

Dr. James argued below and the trial court agreed that Caravayo failed to allege facts sufficient to state a cause of action for negligence against Dr. James. We agree.<sup>7</sup>

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<sup>7</sup> Dr. James refers to Caravayo's negligence claim as one for "professional negligence" as opposed to simply one for negligence. Because "professional negligence" is not a separate cause of action from negligence (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 995, 998-999, for sake of simplicity, we refer to Caravayo's claim as one for negligence. We understand that statutes like those contained in the Medical Injury Compensation Reform Act place restrictions on negligence claims that meet the statutory definition of "professional negligence," but those restrictions do not change

"The following elements must be pleaded to state a cause of action for negligence: (1) a legal duty of care toward the plaintiff; (2) a breach of that duty; (3) legal causation; and (4) damages." (*Century Surety Co. v. Crosby Ins., Inc.* (2004) 124 Cal.App.4th 116, 127; see also *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 589 [referring to "'duty, breach of duty, causation, and damages'" as the "'traditional elements'" of negligence].)

Dr. James attacked the elements of causation and damages, arguing that both were insufficiently pled. We look first to the element of duty, mindful that a strict construction of the first amended complaint is required.

While the first amended complaint alleges that Dr. James "fail[ed] to exercise the standard of care that a reasonably prudent doctor would have exercised in a similar situation" and this failure caused Caravayo "to suffer in the form of pain and suffering and emotional distress," the first amended complaint never alleges that *Dr. James owed a duty of care to Caravayo*. Because the first amended complaint lacks this essential element of negligence, the demurrer was properly sustained. We recognize that the trial court probably did not sustain the demurrer for this reason. Our duty, however, is to review the correctness of the trial court's action sustaining the demurrer, not its reasons for doing so. (*Hood v. Santa*

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the "underlying character" of the cause of action. (*Flowers*, supra, 8 Cal.4th at p. 998.)

*Barbara Bank & Trust* (2006) 143 Cal.App.4th 526, 535;  
*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 72.)

Apart from duty, the first amended complaint is also infirm with respect to causation. "A plaintiff 'must allege a causal connection between the negligence . . . and the injury he suffered. Ordinarily that is accomplished by implication from the juxtaposition of the allegations of wrongful conduct and harm. [Citation.] However, where the pleaded facts of negligence and injury do not naturally give rise to an inference of causation the plaintiff must plead specific facts affording an inference the one caused the others.' [Citation.]" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 900-901.)

Here, the pleaded facts are that Caravayo was beaten by an unnamed individual and wheeled to the prison infirmary where the medical attention he received from Dr. James was purportedly deficient in a number of respects. Dr. James failed to give Caravayo "as thorough" an examination as could have been provided. For example, Dr. James did not ask Caravayo "to hop on one foot." Dr. James also failed to "disclose a forecast admonishing and outlining a prediction of any probable outcome" and failed to document Caravayo's "personal medical information in support of his prescribing medicine." All of Dr. James's alleged deficiencies purportedly caused Caravayo to "suffer in the form of pain and suffering and emotional distress." The first amended complaint does not identify any specific harm suffered as a consequence of Dr. James's numerous alleged failings.

The purported failings of Dr. James do not give rise to a natural inference that they caused Caravayo to "suffer in the form of pain and suffering and emotional distress." Indeed, one would think that if Dr. James actually forced Caravayo to "hop on one foot," that may have caused more harm than good. Because a natural inference of causation does not arise from the pleaded facts, Caravayo was required to "'allege facts, albeit as succinctly as possible, explaining how the conduct [complained of] caused or contributed to the injury. [Citations.]' [Citation.]" (*Berkeley v. Dowds* (2007) 152 Cal.App.4th 518, 528.) Caravayo did not do so, leaving his negligence claim flawed.

In his opening brief, Caravayo does not offer any argument as to why he believes his first amended complaint contains facts sufficient to state a cause of action against Dr. James for negligence. Instead, Caravayo asserts that the issue is "moot" because the court granted him leave to amend. Caravayo is clearly mistaken. The granting of leave to amend means that, in the trial court's view, deficiencies exist in the pleading under review. It is Caravayo's burden, as the appealing party, to demonstrate that there were no such deficiencies and the ruling sustaining the demurrer was erroneous.

In his reply brief, Caravayo essentially concedes (as his first amended complaint suggests) that he did not sustain any physical injury as a result of Dr. James's allegedly deficient examination. Caravayo argues: "Oddly Dr. James'[s] argument [that Caravayo] did not claim to have actually suffered a brain

injury,' actually strengthens [Caravayo's] position that he failed to at least order X-rays of [Caravayo's] head/facial area(s) in order to diagnose whether any nonobservable facts physically existed--either organically or structurally." Like his first amended complaint, Caravayo's appellate briefing fails to explain how Dr. James caused him any injury.

The trial court properly sustained the demurrer on the ground that the first amended complaint failed to state a cause of action against Dr. James for negligence.

## **2. Failure to exhaust administrative remedies**

Citing *Wright v. State of California* (2004) 122 Cal.App.4th 659 (*Wright*) and other authorities, Dr. James argued and the trial court agreed that Caravayo's negligence claim was also flawed because he failed to exhaust his administrative remedies. Again, we agree.<sup>8</sup>

The "failure to exhaust administrative remedies is a proper basis for demurrer." (*Gupta v. Stanford University* (2004) 124 Cal.App.4th 407, 411; see also *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 333 (*Campbell*) [upholding trial court's sustaining of demurrer on administrative exhaustion grounds].)

The "rule of exhaustion of administrative remedies is well established in California jurisprudence." (*Campbell, supra,*

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<sup>8</sup> In connection with the exhaustion issue, the trial court took judicial notice of the prison documents Dr. James included with his demurrer. Because these documents are unnecessary to our disposition, we analyze the exhaustion issue without them.

35 Cal.4th at p. 321.) "In general, a party must exhaust administrative remedies before resorting to the courts." (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080.) More specifically, "[t]he doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided by statute, regulation, . . . or ordinance, relief must be sought by exhausting this remedy before the courts will act." [Citation.]" *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 99-100.) Exhaustion of administrative remedies has been described as a "fundamental rule of procedure," a "jurisdictional prerequisite" to resort to the courts, and a "condition precedent" to obtaining judicial relief. (*Campbell, supra*, 35 Cal.4th at p. 321; *Kaiser, supra*, 128 Cal.App.4th at p. 100; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 981.)

"The prerequisite of exhaustion 'requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention.' [Citations.]" (*Farmer v. City of Inglewood* (1982) 134 Cal.App.3d 130, 137.) "Before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings."

[Citations.]” (*Governing Board v. Commission on Professional Competence* (1985) 171 Cal.App.3d 324, 329.)

A complaint is vulnerable to demurrer on administrative exhaustion grounds where the complaint fails to plead either that administrative exhaustion occurred or a valid excuse for not exhausting. (See *Campbell, supra*, 35 Cal.4th at pp. 321-322, 333; *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 736-737; *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 439; *Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 386.) A complaint is also vulnerable to demurrer on administrative exhaustion grounds where the complaint’s allegations, documents attached to the complaint, or judicially noticeable facts indicate that exhaustion has not occurred and no valid excuse is alleged in the pleading to avoid the exhaustion requirement. (See *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 566; *Williams, supra*, 121 Cal.App.4th at p. 714, fn. 6 [documents attached to the complaint and matters of judicial notice may be considered on demurrer].)

A California State prisoner must exhaust available administrative remedies before filing a lawsuit. (*Wright, supra*, 122 Cal.App.4th 659.) California prison regulations establish a multilevel administrative review process for the resolution of prison grievances. (See Cal. Code Regs., tit. 15,

§§ 3084.1-3084.7;<sup>9</sup> *Vaden v. Summerhill* (9th Cir. 2006) 449 F.3d 1047, 1049.) A prisoner may appeal any departmental decision, action, condition or policy adversely affecting the prisoner's welfare. (Cal. Code Regs., tit. 15, § 3084.1, subd. (a).)

To commence the appeal process, within 15 working days of the "event or decision being appealed," the prisoner must initiate an "informal" appeal in which the prisoner and staff involved in the action or decision attempt to resolve the grievance informally. (Cal. Code Regs., tit. 15, §§ 3084.2, subds. (a) & (b), 3084.5, subd. (a) & (a)(2), 3084.6, subd. (c).) The prisoner must utilize a CDC 602 to describe the problem and the action requested. (Cal. Code Regs., tit. 15, § 3084.2, subd. (a).) If an informal appeal does not resolve the grievance, the prisoner may proceed through a series of three formal levels of review, the last being a director's level review. (Cal. Code Regs., tit. 15, §§ 3084.1, subd. (a) & 3084.5, subds. (b)-(d).) To proceed among the formal stages of review the prisoner must appeal each "unacceptable lower level appeal decision" within 15 working days of receiving the unacceptable decision. (Cal. Code Regs., tit. 15, § 3084.6, subd. (c).)

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<sup>9</sup> The pertinent prison regulations have recently been amended. Although the recent amendments further support our disposition, we cite to, quote from, and apply the regulations as they existed in November 2005 when the purportedly deficient examination of Caravayo occurred.

Caravayo has failed to plead that he administratively exhausted his claim against Dr. James or that he had a valid excuse from the exhaustion requirement. Moreover, documents attached to the first amended complaint indicate that Caravayo has not exhausted his administrative remedies.

Although when he filed the first amended complaint, Caravayo checked a box on a Judicial Council form indicating that he "has complied with applicable claims statutes," his obligation to exhaust his administrative remedies is distinct from his obligation to submit a claim under and comply with the California Tort Claims Act. (*Wright, supra*, 122 Cal.App.4th at pp. 670-671; *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1155; *Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 698.)

In Caravayo's second cause of action asserted against Does 1 to 5, Caravayo alleges that he "submitted a California Department of Corrections Inmate/Parolee Form ('602') to *DOES 1-5* complaining that CDC doctors failed to investigate his head/brain injuries, and that the degree of care did not comport with the standard of care as to that physical impairment. . . . *During DOES 1-5['s]* employment . . . at High Desert State prison . . . , DOES 1-5 did not respond to plaintiff's administrative remedy under the ten (10) working day rule as is required by the California Administrative Code Section." (Italics added.) These allegations do not demonstrate that Caravayo exhausted, or is excused from exhausting, his administrative remedies with respect to his claim against Dr. James. Caravayo's claim

against Dr. James appears in the first cause of action, not the second, and Dr. James is not a doe defendant.

Turning to Caravayo's attachments, appended to his first amended complaint is a CDC 602 he signed and dated "Jan 27, 06." Following the CDC 602 are two handwritten continuation pages and several other documents. The CDC 602 and continuation pages discuss the "blunt force trauma" Caravayo received "in November, 2005" and the failure of the "CDC doctors" to adequately investigate. The CDC 602 has blank spaces for informal and formal level responses.

While Caravayo presumably attached the CDC 602 to his first amended complaint in hopes of showing that he exhausted his administrative remedies, the document demonstrates to the contrary.

The CDC 602 lacks any stamp or other formal markings to indicate that Caravayo actually filed it. True, Caravayo entered "Jan 27, 06" on the space next to "Date Submitted," but there is nothing on the face of the document to show it was submitted to anyone. The top of the document has spaces for items such as a "Log Number" and "Category," and the bottom has a space for a "CDC Appeal Number." These items are all blank. Nothing on the CDC 602 demonstrates that it was submitted, and, notably, there are no allegations in the first amended complaint confirming that Caravayo actually submitted this particular document.

Second, even assuming Caravayo submitted the CDC 602, the face of the document indicates that Caravayo's submission was

untimely. The alleged deficient examination by Dr. James occurred on November 9, 2005, during Caravayo's visit to the infirmary. Caravayo had 15 working days from that date to initiate the appeal process. Caravayo purportedly submitted his CDC 602 on "Jan 27, 06," well beyond the 15-day deadline. Accordingly, his administrative appeal was untimely filed. (Cf. *Metropolitan Culinary Services, Inc. v. County of Los Angeles* (1998) 61 Cal.App.4th 935, 948 [litigant failed to exhaust administrative remedies because a "timely claim" was not made].)

Caravayo essentially concedes that his CDC 602 was untimely submitted. He attempts to avoid this fact by pointing to section 3000.5, subdivision (f) of title 15 of the California Code of Regulations, which provides that the time limits set forth in the prison regulations "are directory and the failure to meet them does not preclude taking the specified action beyond the time limits."<sup>10</sup> While this may be true, nothing in Caravayo's appellate briefing, and, more importantly, nothing alleged in the first amended complaint suggests that his failure to timely submit his appeal was excused. That prison officials may have had authority to excuse Caravayo's noncompliance with appeal time requirements does not mean that they actually

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<sup>10</sup> Section 3000.5, subdivision (f) of title 15 of the California Code of Regulations reads in full: "The time limits specified in these regulations do not create a right to have the specified action taken within the time limits. The time limits are directory, and the failure to meet them does not preclude taking the specified action beyond the time limits." Caravayo requests, and we will take, judicial notice of this regulation. (Evid. Code, §§ 451, 459.)

exercised that authority for Caravayo's benefit. If anything, the blank spaces on the CDC 602 imply otherwise.

Caravayo suggests in his appellate briefing (not in his first amended complaint) that his efforts to exhaust his administrative remedies against Dr. James were "frustrated" by prison authorities. This cursory argument is belied by the fact that Caravayo himself failed to comply with the appeal requirements. In any event, the first amended complaint does not allege this or any other excuse.

The demurrer was properly sustained on the ground that Caravayo failed to exhaust his administrative remedies. Having determined that the demurrer was properly sustained on at least two grounds, we now turn to Caravayo's remaining contentions.<sup>11</sup>

### **C. Other Arguments**

Caravayo raises two other arguments, neither of which is persuasive and neither of which requires extended discussion.

First, Caravayo claims that he was deprived of "his right to expedite matters" because after the demurrer was sustained, a different judge assumed responsibility over the action and this judge "did not acquire a reasonable understanding of [his] case." Caravayo cites *La Seigneurie U.S. Holdings, Inc. v. Superior Court* (1994) 29 Cal.App.4th 1500 at page 1504 (*La Seigneurie*) for the proposition that "[t]he principal purpose of

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<sup>11</sup> We express no opinion on whether the demurrer was properly sustained on statute of limitations grounds, or on the ground that Caravayo's case against Dr. James was barred by Government Code section 855.6.

assigning a judge to a case for all purposes is to "expedite complex matters by permitting one judge to handle the entire matter from start to finish, acquiring an expertise regarding the factual and legal issues involved which will expedite the process." [Citations omitted.]"

We do not quarrel with this quoted language, but neither it nor anything else in *La Seigneurie* furnishes Caravayo with a claim that error was committed below when a different judge assumed control of his case. Moreover, there is no evidence that the judge who assumed control lacked a reasonable understanding of Caravayo's case, a garden variety negligence action. Nor has Caravayo demonstrated any prejudice caused by the assignment of his case to a different judge. For these reasons, Caravayo's argument regarding his "right to expedite matters" is unavailing.

Second, Caravayo argues that the trial court erred because its order sustaining the demurrer failed to specify the grounds on which the demurrer was sustained. Caravayo cites *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497 (*E.L. White*), a case that discusses section 472d. That section provides: "Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer." For several reasons, Caravayo's argument is unpersuasive.

To start, the trial *did* specify the grounds on which it sustained the demurrer. The order on the demurrer indicates that it was sustained on four grounds: (1) the "lawsuit is barred by the . . . statute of limitations," (2) the "Complaint fails to allege facts sufficient to state a cause of action," (3) "Dr. James is immune from suit under Government Code section 855.6," and (4) "plaintiff failed to . . . exhaust administrative remedies." By expressing (albeit briefly) the grounds on which the demurrer was sustained, the trial court complied with section 472d. (*Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 275 [concluding that compliance with section 472d was achieved by trial court's statement that demurrer is sustained "'for failure to state a cause of action'"]; see also *Mautner v. Peralta* (1989) 215 Cal.App.3d 796, 801.) Caravayo's belief that he "is entitled to a more detailed recitation of the court's reasoning is incorrect." (*Stevenson, supra*, 24 Cal.App.4th at p. 275.)

Moreover, as *E.L. White* explained, compliance or noncompliance with section 472d has no impact on the scope of appellate review: "[I]t is clear that the requirement of section 472d has no effect on the scope of appellate review. 'While section 472d imposes procedural requirements which undoubtedly assist reviewing courts, it prescribes no rule regulating the reviewing process. Nowhere does it provide . . . that the order must be tested only according to the reasons given by the trial court. . . . [I]t is the validity of the court's *action*, and not of the *reason* for its action, which is

reviewable.' [Citation.]" (*E.L. White, supra*, 21 Cal.3d at p. 504, fn. 2.)

For these reasons, Caravayo's argument under section 472d is unavailing.

## **II. Caravayo's Case Against Other Defendants**

Thus far we have rejected Caravayo's potpourri of arguments, and we will affirm the dismissal of his case against Dr. James under section 581(f)(2). There is another wrinkle to this case, however, that must be addressed.

As a consequence of Caravayo's failure to timely amend his first amended complaint, the trial court did more than dismiss his case against Dr. James. The trial court also purported to dismiss Caravayo's case as to the other defendants. In this regard, the trial court overstepped its statutory authority.

The dismissal authorized by section 581(f)(2) is defendant specific. The statute permits dismissal of "the complaint as to *that defendant*" when a "demurrer to the complaint is sustained with leave to amend [and] the plaintiff fails to amend it within the time allowed by the court." (§ 581(f)(2), italics added.) Because only Dr. James demurred to the first amended complaint and this demurrer was sustained with leave to amend, the trial court properly dismissed Caravayo's case *against Dr. James* under section 581(f)(2) when Caravayo failed to amend within the time the trial court permitted. However, the trial court lacked statutory authority under section 581(f)(2) to go further and dismiss Caravayo's case against other defendants. We recognize that Caravayo did not object that the trial court exceeded its

authority under section 581(f)(2), but “[t]he forfeiture ‘doctrine does not apply where the trial court exceeds its statutory authority.’ [Citations.]” (*In re Stier* (2007) 152 Cal.App.4th 63, 75.)<sup>12</sup>

Our conclusion that only the case against Dr. James was properly dismissed does not affect the appealability of the dismissal order. The dismissal order was a final judgment as to Dr. James and was thus appealable. (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 993, fn. 3.)

Although we reverse the part of the dismissal order that dismisses Caravayo’s complaint against the other defendants, the trial court is free, on remand, to consider whether alternate

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<sup>12</sup> We note that former section 581, subdivision 3, the predecessor to what is now section 581(f)(2), contained facially broader language. Former section 581, subdivision 3 provided that “[a]n *action may be dismissed* in the following cases: [¶] . . . 3. By the court, . . . when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court, and either party moves for such dismissal.” (Former § 581, subd. 3; Stats. 1974, ch. 1369, § 4, p. 2967, italics added.) The broad language of this former section perhaps accounts for the similarly broad language of rule 3.1320(h) of the California Rules of Court, which provides that “[a] motion to dismiss the *entire action* . . . after expiration of the time to amend following the sustaining of a demurrer may be made by ex parte application to the court under Code of Civil Procedure section 581(f)(2).” (Italics added.) We express no opinion on whether rule 3.1320(h) should be revised to more closely track the defendant-specific language of section 581(f)(2). We only note that, taken facially, rule 3.1320(h) may have led the trial court (or counsel preparing the dismissal order) to erroneously believe that section 581(f)(2) authorized dismissal of the entire action, even as to nondemurring defendants, when Caravayo failed to amend.

discretionary grounds warrant the dismissal of the other defendants. (See, e.g., §§ 583.410, subd. (a), 583.420, subd. (a)(1).) We simply cannot exercise that discretion in the first instance.

**DISPOSITION**

The dismissal of Caravayo's case against Dr. James is affirmed. The remainder of the case is remanded for further proceedings not inconsistent with this opinion. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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MURRAY, J.

We concur:

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ROBIE, Acting P. J.

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BUTZ, J.