2d Civ. No. B213224

STATE OF CALIFORNIA

COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION TWO

DAVID CANO ARELLANO,

Plaintiff and Appellant,

vs.

CITY OF LOS ANGELES, et al.,

Defendants and Respondents.

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Appeal from the Los Angeles Superior Court
Case No. BC 371542
Hon. Margaret Oldendorf, Judge Presiding

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# RESPONDENT'S BRIEF

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# INTRODUCTION

Plaintiff David Arellano was arrested in April 2006 and held at the County of Los Angeles's Twin Towers Correctional Facility ("Twin Towers"). Within less than a day, he was released. Plaintiff later sued the County of Los Angeles ("County") and other defendants, alleging that he suffered several panic attacks while in the County's custody and County employees denied his requests to be examined by a doctor or receive medication.

The County demurred on the grounds that the complaint failed to state a cause of action and the County was immune from liability under various government tort liability statutes. The County also moved to strike the prayer for damages and attorney's fees. The trial court sustained the demurrer and granted the motion to strike. Plaintiff challenges both rulings.

The trial court's rulings were proper, and the judgment must be affirmed.

First, contrary to plaintiff's contention, the complaint fails to state a cause of action under the Ralph Civil Rights Act of 1976 ("Ralph Act"), Civil Code section 51.7, which requires that the defendant committed or threatened "violence" against the plaintiff because of a protected characteristic, such as disability or medical condition. Plaintiff fails to allege facts showing that any County employee acted violently toward him or threatened to do so; his allegations that County employees failed to provide an examination by a doctor or medication for his panic attacks are insufficient. Plaintiff also fails to allege facts establishing that any County employee's actions were motivated by an animus against his purported disability or medical condition, a panic disorder.

Second, the complaint fails to state a cause of action under the Tom Bane Civil Rights Act ("Bane Act"), Civil Code section 52.1, which provides a cause of action if the defendant interfered with – that is, violated – or attempted to interfere with a constitutional or statutory right by using threats of violence. Again, plaintiff simply alleges no facts showing that any County employee threatened him with violence. Moreover, plaintiff fails to allege facts showing that the County or its employees violated any constitutional or statutory right. The California Constitution's right to "safety," which plaintiff invokes, does not give him a legal right that the County could have violated so as to support a cause of action under the Bane Act.

Third and in any event, the County is immune from liability under Government Code section 845.6 for injury resulting from "the failure of [a public] employee to furnish or obtain medical care for a prisoner in his custody," unless "the employee knows or has reason to know that the prisoner is in need of immediate medical care" and fails to summon such care. Plaintiff's complaint does not allege facts establishing that he had a serious medical condition that required emergency care, or that any jail employee had actual or constructive knowledge of any such condition. Furthermore, the complaint admits that the County summoned medical care, alleging that plaintiff was examined by a nurse in response to a panic attack. Plaintiff's claims that he was denied *specific* medical care while in custody do not amount to a failure to summon medical care under section 845.6.

Fourth, the County is also immune under Government Code section 855.6 for injury resulting from any failure to perform an adequate physical or mental examination, except when providing an examination or diagnosis for the

purpose of treatment. Plaintiff fails to allege any facts showing that he was examined at Twin Towers for the purpose of treatment.

Finally, Government Code section 844.6, subdivision (a), which provides that "a public entity is not liable for . . . an injury to any prisoner," provides yet another immunity that shields the County from liability.

For these reasons, the judgment must be affirmed.

## STATEMENT OF FACTS[1/]

On an evening in April 2006, plaintiff David Arellano called 911 to request police assistance during an altercation with a visitor at an apartment complex plaintiff owned. (AA 37.) Because plaintiff was experiencing pain in his chest and back from being pushed against a fence during the altercation, he was taken to Mission Hills Community Hospital to receive medical attention. After plaintiff's discharge, Los Angeles Police Department ("LAPD") officers arrested him for making criminal threats. (AA 38.) The officers took him to Mission Hills Police Department, booked him, and immediately placed him into a holding cell. (AA 38.)

Plaintiff told the LAPD officers that he suffered from diabetes, panic disorder and clinical depression. (AA 38.) He was then transported to the Van Nuys jail, which had a medical facility. There, a nurse examined him and told him that the facility did not have relevant medications and, as a result, he was to be transported to the County's Twin Towers facility, where he would receive any necessary medical treatment. (AA 38.) The nurse denied plaintiff's request to take his medications, which he was carrying with him, and also denied his request to call his home so that a family member could deliver additional medication to him. (AA 38.)

LAPD officers then began to transport plaintiff to Twin Towers. En route, plaintiff had a severe panic attack. His heart pounded rapidly; he felt pain and tingling in his limbs; he felt dizzy and lightheaded, and had difficulty

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1/ Because this appeal arises from an order sustaining a demurrer, this summary assumes that the facts pleaded in the operative complaint are true. (*Noguera v. North Monterey County Unified Sch. Dist.* (1980) 106 Cal.App.3d 64, 66.)

breathing. He believed that he was having a heart attack and would die. (AA 39.) During the attack, he lay prone on the floor in the police car's backseat area and could not voluntarily move his limbs. (AA 39.) Ultimately, he was removed from the car and taken by ambulance to a second hospital where he was evaluated and discharged.

Plaintiff was then transported to Twin Towers and the County's custody. (AA 39.) At Twin Towers, plaintiff was processed and received a medical treatment wristband. He was then placed into a general population holding cell, where he had several additional panic attacks. He repeatedly asked for medical attention, but was told that he would have to wait. (AA 39.)

After several hours, plaintiff was called for a medical evaluation. He responded to several medical health questions; a blood test showed his blood-glucose level registering in the high 200 mg/dl range, higher than the 100-120 mg/dl it normally registers with the aid of his diabetic medication. (AA 39.) Plaintiff asked the person administering the questions and drawing his blood whether he would receive his necessary medications; the person indicated that she did not know. (AA 39.)

While detained at Twin Towers, plaintiff repeatedly asked to see a physician, but was not examined by a medical doctor. (AA 39.) After the blood-glucose test and medical health questions, plaintiff was returned to the general population holding cell, where he immediately had another panic attack. (AA 39.) He reported his condition to a deputy and requested medical attention. A few minutes later, the deputy took plaintiff to the area where plaintiff had just been questioned, and plaintiff communicated his condition to

someone who appeared to be a nurse. (AA 40.) Plaintiff had difficulty walking in a straight line because his physical coordination was altered without his medications. Plaintiff told the nurse that he had been prescribed 4 mg of Xanax per day. The nurse surmised that plaintiff was addicted to that medication and said that plaintiff would not receive the medication while detained at Twin Towers. (AA 40.)

The deputy then placed plaintiff into an empty holding cell. In a few minutes, plaintiff felt anxiety symptoms and pressed a call button in his cell. When a deputy responded, plaintiff said he was not feeling well. The deputy told plaintiff to refrain from using the emergency button a second time, lest plaintiff be detained "for a week." (AA 40.) For the next several hours, plaintiff felt anxious and experienced symptoms related to the absence of his regularly prescribed medications. He believed that if he requested medical assistance, he would suffer retaliation. (AA 40.) After several hours, he was released on a $50,000 bond. (AA 40.)

## STATEMENT OF THE CASE

Plaintiff sued the County of Los Angeles, the City of Los Angeles, the LAPD's Chief William J. Bratton, and Sheriff Lee Baca. (AA 1.) On June 25, 2008, plaintiff filed the operative First Amended Complaint. (AA 34.) Against the County, that complaint alleged a single cause of action for "Failure to Provide Adequate Medical Care," based on Civil Code sections 51.7 and 52.1; California Constitution, article I, section 1; Government Code sections 845.6 and 855.6; and other enumerated statutes. (AA 42-43.)

The County demurred to the First Amended Complaint, on the grounds that plaintiff could not establish a cause of action and the County was immune from liability. (AA 81-102, 116-124.) The County also moved to strike the prayer for general and compensatory damages and attorney's fees, on the grounds that plaintiff had failed to state a cause of action under the pertinent statutes and the County was immune from liability. (AA 49-57, 116-124.) The trial court sustained the demurrer without leave to amend. (AA 131.) The court granted the motion to strike as to the prayer for general and compensatory damages, and as to the

request for attorney's fees under Civil Code sections 52.1 and 52. (AA 131.)[1/]

Accordingly, the court dismissed the action against the County with prejudice on October 15, 2008. (AA 195-196.)[1/]

Plaintiff filed a timely notice of appeal. (AA 203.)

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2/ The court overruled the motion to strike as to the request for attorney's fees under Code of Civil Procedure section 1021.5. (AA 131.)

3/ Plaintiff later filed a motion for reconsideration of the court's order. (AA 132-147, 183-191.) Plaintiff's motion attached a proposed Second Amended Complaint, which plaintiff argued constituted a "different state of facts" warranting reconsideration. (AA 134, 138-147-D.)

The trial court denied reconsideration. (AA 199-200.) The appellant's opening brief does not challenge this ruling as to the County, but only as to Sheriff Baca. (AOB 20-23.)

## STANDARD AND SCOPE OF REVIEW

A judgment of the trial court is presumed correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) An appellant seeking to reverse the judgment has the burden of demonstrating reversible error in the trial court. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) This burden requires the appellant to (1) identify the issues for review, (2) provide reasoned analysis and legal authority to support his position on the issues, and (3) identify specific facts and provide citations to the record to support his position. (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1301 [generalized assertion without citation to the record is waived]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [general assertion without legal argument or authority is waived].)

When reviewing a trial court's order sustaining a demurrer without leave to amend, an appellate court must "determine whether the complaint states facts sufficient to state a cause of action." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) In doing so, the appellate court "accept[s] as true the properly pleaded allegations of fact in the complaint, but *not* the contentions, deductions or conclusions of fact or law." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711, emphasis added.) Moreover, the appellate court must "construe the pleading in a reasonable manner and read the allegations in context." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82.)

The trial court's denial of leave to amend is reviewed for abuse of discretion. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) If there is no reasonable possibility that the plaintiff can amend the complaint to state a

cause of action, the trial court properly exercised its discretion and the judgment must be affirmed. (*Schifando*, *supra*, 31 Cal.4th at p. 1081.)

The burden falls squarely on the plaintiff to demonstrate that the trial court abused its discretion. (*City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 405.) Specifically, the plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Smith*, *supra*, 93 Cal.App.4th at p. 711.)

## LEGAL DISCUSSION

### I. THE FIRST AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER CIVIL CODE SECTION 51.7, THE RALPH ACT.[1/]

Plaintiff contends that the First Amended Complaint states a cause of action for failure to provide adequate medical care based on Civil Code section 51.7, the Ralph Act. (AOB 14-16.) Specifically, plaintiff asserts that the County knew that he had a disability or medical condition but failed to provide his necessary medications while he was in custody, and that "his attempts to obtain emergency medical care, in response to a panic attack, was [sic] met with threats of prolonged detention." (AOB 16.) This argument is meritless.

Civil Code section 51.7, subdivision (a), provides that all individuals

> have the right to be free from any violence, or intimidation by threat of violence, committed against their persons . . . on account of any characteristic listed or defined in subdivision . . . (e) of Section 51, . . . or because another person perceives them to have one or more of those characteristics.

Section 51, subdivision (e), in turn identifies "disability" and "medical condition" as protected characteristics. (Civ. Code, § 51, subd. (e) (1) and (2).)

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4/ The operative First Amended Complaint listed several statutes purportedly supporting plaintiff's single cause of action against the County for "Failure to Provide Adequate Medical Care." (AA 42-43.) On appeal, plaintiff asserts only that he stated a cause of action under Civil Code sections 51.7 (the Ralph Act) and 52.1 (the Bane Act), and Government Code sections 845.6 and 855.6. We address these sections seriatim.

To establish a cause of action under the Ralph Act, a plaintiff must establish, among other things, that (1) the defendant "threatened or committed violent acts against [the plaintiff . . . ]," and (2) "a motivating reason for [the defendant's] conduct was [his/her] perception of [the plaintiff's . . . disability]." (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 880-881, original brackets; emphasis omitted.) Plaintiff's complaint fails to allege facts to satisfy either element.

## A. Plaintiff Has Alleged No Violence Or Threat Of Violence.

The Ralph Act "expressly requires that a plaintiff allege 'violence, or intimidation by threat of violence.'" (*Moreno v. Town of Los Gatos* (9th Cir. 2008) 267 Fed.Appx. 665, 666; *Austin B.*, *supra*, 149 Cal.App.4th at pp. 880-881.) Absent clear evidence that the Legislature intended otherwise, this court "must give effect to the statute's 'plain meaning,'" as manifested in the "ordinary meaning" of the statutory language. (*Duty v. Apex Corp.* (1989) 214 Cal.App.3d 742, 749; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Black's Law Dictionary defines "violence" as "[u]njust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury," or as "the exertion of any *physical* force so as to injure, damage or abuse." (Black's Law Dict. (6th ed. 1990) p. 1570, cols. 1 & 2, emphasis added.) Similarly, a commonly used dictionary defines violence as "exertion of *physical* force so as to injure or abuse"; "intense, turbulent, and often destructive action or force." (Merriam-Webster's Collegiate Dictionary (10th ed. 1998) p. 1319, emphasis added.)

Numerous courts have defined "violence" similarly in the context of other statutes, noting that "violence" requires the direct and "wrongful application of physical force." (*People v. Bravot* (1986) 183 Cal.App.3d 93, 97.) This "violence" actually goes beyond the mere exercise of physical power: while "'force . . . implies physical power exerted upon persons or things[,] . . . [v]iolence denotes the unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage, or fury.'" (*People v. McIlvaine* (1942) 55 Cal.App.2d 322, 328-329 [construing Penal Code section 261].)

In the context of false imprisonment, which requires restraint of an individual by express or implied force, courts have held that imprisonment is effected by "violence" if the perpetrator "exercise[s] . . . physical force . . . over and above the force reasonably necessary to effect such restraint." (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1123-1124 [defendant used "violence" to effect false imprisonment, where victim stayed on top of moving van because she was afraid to get off, but defendant increased the danger by driving 80 mph on freeway and purposely swerving van]; *People v. Babich* (1993) 14 Cal.App.4th 801, 806-809 & fn. 2 [holding a knife to victim's throat, threatening her life, and choking her or jerking her neck was evidence of "violence"].)

Plaintiff's contention that the County failed to give him his necessary medications while he was in custody (AOB 16) does not even remotely approach physical force, let alone "violence" or "intimidation by threat of violence" within the ordinary meaning of those words.

Plaintiff suggests that a deputy threatened violence when he told plaintiff "to refrain from using the emergency button a second time, lest [he] be detained, 'for a week.'" (AA 40.) Even assuming the deputy was somehow capable of arranging for plaintiff to be detained for a week, a detention, by itself, is not violence. (*Moreno*, *supra*, 267 Fed.Appx. at pp. 666-667 ["an arrest or threat of arrest alone does not necessarily involve violence or a threat of violence"]; *Corales v. Bennett* (C.D.Cal. 2007) 488 F.Supp.2d 975, 979, 987 [no violence or intimidation by threat of violence, where school administrator lectured students harshly regarding unexcused absences; called them "dumb, dumb, and dumber"; and said that they would have to pay a $250 fine, he would "have to get the cops involved," and they would "have to go to Juvenile hall for . . . years"]; see also *Egan v. Schmock* (N.D.Cal. 2000) 93 F.Supp.2d 1090, 1091-1092, 1094 [plaintiffs failed to allege violence or intimidation by threat of violence, where defendant called plaintiffs "dirty Indians" and told them to "go back where they came from," threw trash onto plaintiffs' and their guests' property, gave plaintiffs the "finger" and followed them on her bicycle]; cf. *Babich*, *supra*, 14 Cal.App.4th at pp. 806-809.) Plaintiff identifies no cases to the contrary. (See AOB 16.)

Plaintiff cites only a single case, *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, in support of his position (AOB 15), but that case does not help him. There, the defendant kicked plaintiff – a patently violent act – and approached her from behind as she was descending the stairs and "threatened her, saying, 'chick, you better walk faster or I am going to hurt you again'" – clearly a threat of additional

violence. (*Winarto*, *supra*, at pp. 1289-1290.) Nothing of the sort happened here.

In short, plaintiff cannot state a claim under the Ralph Act because he has failed to allege any "violence" or "threat of violence."

### B. Plaintiff Has Not Alleged That Any County Employee Was Motivated By An Animus Against Plaintiff's Disability Or Medical Condition.

Plaintiff's Ralph Act claim fails for another reason. Such a claim requires that "a motivating reason for [the defendant's] conduct was [his/her] perception of [the plaintiff's . . . disability]" or medical condition – in other words, the defendant's actions must have been motivated by an animus against the plaintiff's protected characteristic. (*Austin B.*, *supra*, 149 Cal.App.4th at pp. 880-881, original brackets, emphasis omitted.)

Plaintiff contends that he was diabetic and suffered from a panic disorder, and that County personnel at Twin Towers knew this and denied him medical care accordingly. (AOB 15-16.) These contentions do not establish that the County employees were *motivated* by plaintiff's conditions. Plaintiff alleges only that various County employees failed to provide him with medication or an immediate examination by a doctor, and that he needed such care – he alleges no facts remotely suggesting that anyone denied him such care *because* that person was biased or had an animus against individuals with diabetes, panic disorder, or even disabilities in general. (AA 39-40.)

*Austin B.*, *supra*, 149 Cal.App.4th 860, is instructive. There, two autistic preschool students sued the school district and district employees, alleging that their instructor abused them. (*Id.* at pp. 865-870.) The trial

court granted defendants a nonsuit on plaintiffs' Ralph Act claim, and plaintiffs appealed. (*Ibid.*) For purposes of the nonsuit, the trial court assumed that plaintiffs had proved that their instructor engaged in physically abusive conduct, including that he "grabbed, yanked, compressed, stepped on" and "slammed down" the students, "using pain" to control them. (*Id.* at p. 880.) These facts, plaintiffs argued, suggested that the instructor committed the alleged battery only "because the victims were nonverbal autistic children who could not complain." (*Ibid.*) The Court of Appeal rejected this argument and affirmed the nonsuit, reasoning that "plaintiffs point to no evidence creating even an inference that [the instructor's] *motivation* in allegedly abusing [plaintiffs] was the fact that they were disabled children. In other words, there was no evidence that he took the alleged actions because he was biased against or had an animus against disabled children." (*Id.* at p. 881, original emphasis.)

As noted above, plaintiff alleges that a deputy told him to stop pressing the emergency call button or he could be detained "for a week" (AA 40), but plaintiff does not allege that the deputy did so because he harbored any ill will towards individuals with panic disorder. (AA 40.) At most, the complaint's allegations might suggest that the deputy disbelieved (as explained in Section III, *post*, rightly so) that plaintiff needed emergency medical care and was simply tired of hearing, or responding to, the emergency call button – but not that the deputy's motivation for his statement was the fact that plaintiff was disabled.

For this reason, too, plaintiff's complaint fails to state a cause of action under the Ralph Act.

## II. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION UNDER CIVIL CODE SECTION 52.1, THE BANE ACT.

### A. The Complaint Fails To Allege The Threats, Intimidation or Coercion Required By Section 52.1.

Civil Code section 52.1, the Bane Act, provides a cause of action "if a person . . . interferes . . . or attempts to interfere by threats, intimidation, or coercion[] with the exercise or enjoyment by any individual . . . of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state." (Civ. Code, § 52.1, subd. (a) & (b).)

Significantly, "[s]peech alone" will not support a claim under the Bane Act,

> except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person . . . against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against [him] or [his] property and that the person threatening violence had the apparent ability to carry out the threat.

(*Id.*, § 52.1, subd. (j).)

Plaintiff contends that the First Amended Complaint states a cause of action under the Bane Act, based on the same facts he relies on to support his Ralph Act claim. (AOB 16-19.) Again, plaintiff is wrong. Just as a claim under the Ralph Act requires a showing of violence by the defendant, a claim under the Bane Act requires a showing that the defendant acted with the requisite "threats, intimidation, or coercion" in interfering with plaintiff's rights. (*Ballard*, *supra*, 136 Cal.App.4th at p. 407; *Austin B.*, *supra*, 149

Cal.App.4th at p. 882; *Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 334.) As discussed below, plaintiff has failed to allege facts to satisfy this requirement.

"A threat is an expression of an intent to inflict evil, injury, or damage on another." (*In re M.S.* (1995) 10 Cal.4th 698, 710, internal quotation marks and citation omitted [construing criminal provision of Bane Act].) To establish the requisite "threats, intimidation, or coercion" under the Bane Act, a plaintiff must show that the defendant "interfered with . . . the plaintiff's constitutional or statutory right by threatening or committing *violent* acts[, and] [t]hat the plaintiff reasonably believed that if he/she exercised his/her constitutional right the defendant would commit *violence* against him/her." (*Austin B.*, *supra*, 149 Cal.App.4th at p. 882, brackets in original omitted, emphasis added; *Ballard*, *supra*, 136 Cal.App.4th at p. 408 [allegation by building owner that city threatened to demolish building and impose monetary penalties to "'coerce millions of dollars of unrequired construction'" did not constitute "threat[s] of violence or coercion"]; *Doe v. Petaluma City School Dist.* (N.D.Cal. 1993) 830 F.Supp. 1560, 1564, 1582 [no "threats, intimidation, or coercion" where junior high school student alleged school district and administrators failed to stop sexual harassment by her peers]; *Jackson v. City of Fresno* (9th Cir. 2007) 237 Fed.Appx. 144, 146 [no coercive behavior by defendants, where alleged unconstitutional search of plaintiff's apartment occurred in plaintiff's absence].)

As with his claim under the Ralph Act, plaintiff again relies on the County's alleged failure to provide medications and the deputy's statement that he should refrain from pressing the emergency call button unless he wanted to be detained for a week. (AOB 17-18; AA 40; see also AOB 16.) And

just as these allegations were insufficient to suggest a claim under the Ralph Act, they also fail to support a claim under the Bane Act.

A failure to give plaintiff medications involves no violence or threat of violence. (See § I.A, *ante*.) The deputy's statement also is insufficient because "[s]peech alone" does not support a cause of action unless "the speech itself threatens violence." (Civ. Code, § 52.1, subd. (j).) As explained above, a "threat" of detention does not threaten "violence." (See § I.A, *ante*.)

### B. Plaintiff Has Failed To Allege Facts Showing That The County Violated Any Of His Legal Rights.

Another critical element of a Bane Act claim is that the defendant "interfere[d] . . . or attempt[ed] to interfere" with a constitutional or statutory right. (Civ. Code, § 52.1, subd. (a).) "The word 'interferes' as used in the Bane Act means 'violates.'" (*Austin B.*, *supra*, 149 Cal.App.4th at p. 883; *City of Simi Valley v. Superior Court* (2003) 111 Cal.App.4th 1077, 1085.) "The essence of a Bane Act claim is that the defendant, by the specified improper means . . . , tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force a plaintiff to do something that he or she was not required to do under the law." (*Austin B.*, *supra*, 149 Cal.App.4th at p. 883.) A plaintiff has no cause of action under the Bane Act if he fails to establish that the defendant violated a constitutional or statutory right. (See, e.g., *City of Simi Valley*, *supra*, 111 Cal.App.4th at p. 1085; *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 173.) The Act thus "does not provide any substantive protections," but provides certain specific remedies for constitutional or statutory violations. (*Reynolds v. County of San Diego* (9th Cir. 1996) 84 F.3d 1162, 1170, overruled on other grounds in *Acri v. Varian Associates, Inc.* (9th Cir. 1997) 114 F.3d 999, 1000-1001.)

### 1. The California Constitution's right to "safety" does not provide a basis for plaintiff's Bane Act cause of action.

Plaintiff relies on the California Constitution to support his Bane Act claim, asserting that the County's failure to provide medication "constitute[d] an 'interference' with [his] California Constitution, article I, § 1 right to 'safety.'" (AOB 17-18.) Plaintiff cites no authority for this contention other than article I, section 1 itself, which states:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining *safety*, happiness, and privacy.

(Cal. Const., art. I, § 1, emphasis added.)

The Supreme Court has repeatedly held that, absent a statute or established common law tort so authorizing, a California constitutional provision generally does not provide a private damages action. (See, e.g., *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 307-309, 317-329.) Moreover, courts should not create one unless certain requirements are met – specifically: (1) the language and history of the constitutional provision show an intent to provide a damages action; or (2) the language and history of the provision do not foreclose such a remedy *and* (a) existing alternative remedies are inadequate, (b) established tort law supports recognition of a new constitutional tort, and (c) no special factors (such as deference to legislative judgment, avoidance of adverse policy consequences, or considerations of government fiscal policy) counsel against recognizing a damages action. (*Ibid.*; *Degrassi v. Cook* (2002) 29 Cal.4th 333, 338-343; see also *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 807.)

Even if article I, section 1 establishes "safety" as an inalienable right in the abstract, it cannot provide a basis for recovering damages under the Bane Act because it does not create a specific legal right that could be violated here – for example, a private right of action for damages or an affirmative duty by the government to take particular steps to guarantee the safety of all citizens. Plaintiff has identified nothing in the language or history of this provision suggesting that the right to pursue "safety" provides a private right of action for damages with which the County could have interfered. Nor has plaintiff shown that the language and history permit a damages action, that established tort law supports recognition of a new constitutional tort for violation of the constitutional right to safety, or that any of the other factors necessary for recognition of such a tort are present.

To the contrary, existing case law strongly suggests that the right to "safety" does *not* support a private damages action or provide remedies for a specific violation that plaintiff could potentially establish here. For example, courts have held that the inalienable right to pursue "happiness," also articulated in article I, section 1, does not support a damages remedy. (*Langdon v. Sayre* (1946) 74 Cal.App.2d 41, 44.)

*Clausing v. San Francisco Unified School District* (1990) 221 Cal.App.3d 1224, is instructive. There, the court held that a state constitutional provision stating that all public school students and staff "have the inalienable right to attend campuses which are safe, secure and peaceful," though mandatory, was not "self-executing in the sense that it establishes an affirmative duty to act on the part of school districts, provides remedies for its violation, or creates a private right of action for damages." (*Id.* at p. 1236.)

The court reasoned that this "safe schools" provision "merely indicate[d] principles, without laying down rules by means of which those principles may be given the force of law" absent enabling legislation. (*Id.* at pp. 1236-1237 & fn. 5, internal quotation marks and citation omitted.) The court found the provision analogous to the "safety" clause at issue here, and commented:

> Clearly, although safety and happiness are inalienable rights, [article I, section 1] of the Constitution *does not establish the means whereby they may be enjoyed*. No case has ever held that this provision enunciating the inalienable right to obtain safety and happiness is self-executing in the sense that it gives rise, in and of itself, to a private right of action for damages or an affirmative duty on the part of the state to take particular steps to guarantee the enjoyment of safety or happiness by all citizens.

(*Id.* at p. 1237, fn. 6, emphasis added.)

Moreover, the Legislature has enacted an anti-harassment statute intended to protect the state constitutional right to "safety," confirming that the constitutional provision provides no remedy absent activating legislation. (See Code Civ. Proc., § 527.6 [harassment statute]; *Russell v. Douvan* (2003) 112 Cal.App.4th 399, 403.) Plaintiff does not invoke that statute here, nor can he. The statute provides only injunctive relief and requires the plaintiff to show that "unlawful harassment *exists* . . . , not that it existed in the past." (*Russell v. Douvan*, *supra*, 112 Cal.App.4th at p. 403, original emphasis.) Here, plaintiff seeks only damages for past conduct.

In short, plaintiff has no potential cause of action under the California Constitution's "safety" clause, which the County or its employees could have violated. Thus, that provision cannot support his claim under the Bane Act.[5/]

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5/ Plaintiff's complaint also listed Civil Code sections 51.5 and 52.3 as

bases for the County's liability. (AA 42.) But plaintiff admitted in opposition to the County's demurrer that neither of those statutes supported a cause of action against the County (AA 110), and he makes no argument in this regard on appeal.

### 2. Plaintiff has not alleged a claim under 42 U.S.C. section 1983 as a basis for his Bane Act cause of action.

As further support for his Bane Act claim, plaintiff asserts, cryptically, that he "has alleged facts indicating that [the] County 'had a policy practice [sic] or custom of allowing deputy sheriffs to interfere with the rights of inmates by threats, intimidation or coercion or threats of violence.'" (AOB 18.) Plaintiff cites *City of Canton v. Harris* (1989) 489 U.S. 378 [109 S.Ct. 1197], and points to the following allegations in the complaint:

> "Defendants acted knowingly, or with gross negligence, or with deliberate indifference to the constitutional rights of [plaintiff]. Defendants maintained, fostered, condoned or else failed to correct an official policy, practice, or custom of permitting the occurrence of the types wrongs [sic] set forth in the First Amended Complaint, Defendants further failed to properly train, supervise, retrain, monitor, or take corrective action with respect to the law enforcement agents described herein, so that each is liable to [plaintiff] for damages suffered herein."

(AOB 18-19, quoting AA 44.)

Plaintiff's argument is incoherent and difficult to decipher, bringing him far short of his burden as appellant to demonstrate reversible error and waiving the issue. This court is "not obliged to make . . . arguments for [appellant] . . . , nor [is it] obliged to speculate about which issues counsel intend[s] to raise." (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4 [waiver for failure to head argument as required by California Rules of Court, rule 8.204(a)(1)(B) and to make coherent argument]; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 ["conclusionary assertions are wholly inadequate to tender a basis for relief on appeal"]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [points not

argued, argued in summary fashion, or unsupported by citations to authority are deemed waived].)

Nevertheless, *City of Canton v. Harris* held that, under limited circumstances, a municipality can be held liable under 42 U.S.C. section 1983 for federal constitutional violations resulting from its failure to train municipal employees. (489 U.S. at p. 380.) Plaintiff's citation to this case suggests that he may intend to predicate his Bane Act claim on section 1983 liability – for example, on a theory that the County is liable under section 1983 for failing to train its employees adequately, resulting in some unspecified federal constitutional violation.

If so, plaintiff's argument is fatally incomplete. He doesn't mention section 1983 at all, nor does he identify the elements required to plead a section 1983 claim in general or a "failure to train" claim in particular – not to mention explain how the allegations he identifies might establish those elements. (AOB 16.)

"[T]o state a federal civil rights cause of action [under section 1983], a plaintiff must plead *specific and nonconclusory facts* showing the defendant deprived the plaintiff of rights, privileges, or immunities secured by the federal Constitution." (*Ballard*, *supra*, 136 Cal.App.4th at p. 406; *Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1360 ["Ordinary torts or violations of local law by state officials . . . cannot be elevated to federal civil rights violations merely by making passing references to the Constitution"].) "Section 1983 does not make actionable every injury in which a governmental employee may have played some role." (*Ballard*, *supra*, 136 Cal.App.4th at p. 406.) Rather, to hold a municipality liable under section 1983, a plaintiff

must establish that the municipality adopted a formal policy or acquiesced in a "permanent and well settled" custom that resulted in a violation of his federal constitutional rights. (*Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658, 690-691, 694 [98 S.Ct. 2018].)

Here, plaintiff's complaint fails to allege facts establishing either a federal constitutional violation by any County employee or a County policy or custom that caused such a violation.

### a. Plaintiff has not alleged a federal constitutional violation.

Plaintiff's opening brief and complaint assert that the County failed to provide medication or an immediate examination by a doctor for his panic attacks and possibly diabetes. (AOB 16-18; AA 39-40, 42.) To establish a federal constitutional violation based on failure to provide particular medical treatment while in custody, a plaintiff must show that a prison official displayed "deliberate indifference to [his] serious medical needs." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104 [97 S.Ct. 285, 291]; see also *Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 1000] ["deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious'"].)

A serious medical need exists when the "'failure to treat [it] could result in further significant injury or the 'unnecessary and wanton infliction of pain.'"' (*Clement v. Gomez* (9th Cir. 2002) 298 F.3d 898, 904, internal citations omitted.) To meet the state of mind requirement, the plaintiff must show that "the official *knows of and disregards* an excessive risk to [plaintiff's] health or safety; the official must both be aware of facts from

which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer v. Brennan* (1994) 511 U.S. 825, 837 [114 S.Ct. 1970, 1979], emphasis added.)

An inadvertent failure to provide adequate medical care, mere negligence or medical malpractice, or a difference of opinion over proper medical treatment, are all insufficient to constitute a constitutional violation. (*Estelle*, *supra*, 429 U.S. at pp. 105-106; *Sanchez v. Vild* (9th Cir. 1989) 891 F.2d 240, 242; see also *Wood v. Housewright* (9th Cir. 1990) 900 F.2d 1332, 1334 ["mere malpractice, or even gross negligence, does not suffice"].) Moreover, a mere delay in treatment is not culpable conduct unless the delay itself caused "substantial harm." (*Wood*, *supra*, 900 F.2d at p. 1335; *Shapley v. Nevada Board of State Prison Commissioners* (9th Cir. 1985) 766 F.2d 404, 407; see also *Frost v. Agnos* (9th Cir. 1998) 152 F.3d 1124, 1130.)[6/]

In essence, plaintiff alleges that he was not given immediate emergency care for his panic attacks by way of a doctor's examination or medication. At best, his allegations demonstrate "an inadvertent failure to provide adequate medical care," "a difference of medical opinion" regarding proper medical treatment, or a delay in treatment that did not cause substantial harm – none of which amounts to a constitutional violation. (*Estelle*, *supra*, 429 U.S. at pp. 105-106, *Sanchez*, *supra*, 891 F.2d at p. 242; *Wood*, *supra*, 900 F.2d at p. 1335.)

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6/ *Estelle, supra*, 429 U.S. at pp. 105-106, addresses the denial of medical care to convicted prisoners, which are analyzed under the Eighth Amendment, whereas the rights of a pretrial detainee are analyzed under the Fourteenth Amendment's Due Process Clause. (*Frost, supra*, 152 F.3d at p. 1128.) However, courts apply the same standards to both types of claims. (*Ibid.*)

The mere fact that plaintiff was not examined by a doctor and did not receive his medication during his short detention at the jail does not show that anyone "kn[ew] of and disregard[ed] an excessive risk to [plaintiff's] health" (*Farmer*, *supra*, 511 U.S. at p. 837), primarily because plaintiff has not alleged facts that would show that his need for medication was critical. Rather, it simply shows that the jail staff who processed plaintiff did not believe that his condition required such *immediate* medical attention. (Cf. *Wood*, *supra*, 900 F.2d at p. 1335 [delay in treatment caused no "substantial harm" where prisoner's condition "did not require emergency attention"]; *Mayan v. Weed* (7th Cir. 2009) 310 Fed.Appx. 38, 40 [jail nurses' failure to prescribe medication for anxiety or to have a doctor evaluate plaintiff to determine his need for medication was not deliberate indifference but merely "a disagreement over the course of treatment"]; *Shapley*, *supra*, 766 F.2d at p. 407 ["mere delay of surgery . . . is insufficient to state a claim of deliberate medical indifference" unless "the denial was harmful"].)

In short, plaintiff has failed to allege facts establishing that any County employee violated his federal constitutional rights. Thus, he cannot establish a section 1983 claim as a basis for his Bane Act cause of action. (See *City of Los Angeles v. Heller* (1986) 475 U.S. 796, 799 [106 S.Ct. 1571, 1573] [a municipality cannot be held liable under section 1983 if its employees committed no constitutional violation].)

### b. Plaintiff has not alleged a County policy or custom that caused any federal constitutional violation.

Another element of a section 1983 claim against a municipality requires a plaintiff to establish that the municipality adopted a formal policy or "well settled" custom that resulted in a federal constitutional violation. (*Monell*, *supra*, 436 U.S. at pp. 690-691, 694.) Liability for an improper custom "may not be predicated on isolated or sporadic incidents" involving employees without "final policy-making authority," but "must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 918; see also *Nadell v. Las Vegas Metropolitan Police Department* (9th Cir. 2001) 268 F.3d 924, 929 [single incident insufficient]; *Meehan v. County of Los Angeles* (9th Cir. 1988) 856 F.2d 102, 107 [two incidents insufficient].)

Plaintiff alleges no facts to satisfy this requirement. The allegations he identifies – that "'Defendants acted knowingly, or with gross negligence, or with deliberate indifference to the constitutional rights of [plaintiff]'"; that "Defendants maintained, fostered, condoned or else failed to correct an official policy, practice, or custom of permitting the occurrence of the types wrongs [sic] set forth in the [complaint]"; and that "Defendants . . . failed to properly train, supervise, retrain, monitor, or take corrective action with respect to the law enforcement agents described herein" (AOB 18-19; AA 44) – are merely legal conclusions without any facts to support them. Nowhere does plaintiff identify a formal policy or widespread custom adopted by the County.

Nor does plaintiff allege facts to establish that the County is liable specifically on a "failure to train" or similar theory under section 1983. When a plaintiff attempts to prove a custom of *failing* to act – such as a failure to adequately train, supervise, or discipline – he must show that the municipality's policymakers made "a deliberate choice to follow a course of action . . . from among various alternatives." (*City of Canton*, *supra*, 489 U.S. at pp. 388-390, internal quotation marks and citation omitted.) The plaintiff must also show causation. For example, if the plaintiff asserts that the failure to train police officers resulted in the denial of particular medical care, he must establish that (1) the municipality's training program was inadequate, and (2) "the deficiency in training actually caused the police officers' indifference to [plaintiff's] medical needs." (*Id.* at pp. 389-391; *Merritt v. County of Los Angeles* (9th Cir. 1989) 875 F.2d 765, 770.)

Plaintiff alleges no facts creating an inference that County policymakers made a deliberate choice not to train its employees even though they knew that the failure would result in civil rights violations. Nor does he allege facts suggesting that the County's training program for its employees at Twin Towers was inadequate – not to mention facts showing that, had the employees been properly trained, they would have arranged for plaintiff to see a doctor or receive his medication immediately rather than requiring him to wait. Without such specific facts, plaintiff cannot establish a section 1983 claim to support his Bane Act cause of action. (*Ballard*, *supra*, 136 Cal.App.4th at pp. 406-407; *Duffy*, *supra*, 201 Cal.App.3d at p. 1360.)[7/]

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7/ Since plaintiff attempts to assert a section 1983 claim, if at all, only as a predicate for his Bane Act claim – a *state* cause of action – California's pleading rules apply. (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554,

In summary, plaintiff's complaint fails to state a cause of action under the Bane Act because it alleges no facts to show any "threats, intimidation, or coercion" by any County employee, or to show that the County violated any state or federal constitutional right.

## III. THE COUNTY IS IMMUNE FROM LIABILITY UNDER GOVERNMENT CODE SECTION 845.6.

563.) But plaintiff's conclusory allegations, devoid of factual support, are woefully insufficient even under federal pleading standards. (See *Ashcroft v. Iqbal* (2009) __ U.S. __, 129 S.Ct. 1937, 1949-1952 [complaint must contain "sufficient factual matter" to show "plausibly" that plaintiff is entitled to relief]; see also *Aldabe v. Aldabe* (9th Cir. 1980) 616 F.2d 1089, 1092.)

Government Code section 845.6 provides that, in general, a public entity is immune from liability for injury resulting from "the failure of [a public] employee to furnish or obtain medical care for a prisoner in his custody." (See also *Wright v. State* (2004) 122 Cal.App.4th 659, 663, 671-672 [public entities held immune from liability for prisoner's claims for intentional infliction of emotional distress and negligence arising out of alleged failure to provide medical care, including timely surgery and prescribed medications].) The statute provides an exception "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." (Gov. Code, § 845.6.)[1/]

Relying on this exception, plaintiff contends that "County personnel knew [him] to be in need of immediate medical care." (AOB 19; AA 39-40.) This is insufficient.

To hold a public entity liable under this section, a plaintiff detainee must establish three elements: (1) the plaintiff had a "*serious* and obvious medical condition[] requiring *immediate* care"; (2) a jail employee had "'actual or constructive knowledge'" that the plaintiff needed such care; and (3) the employee failed to take reasonable action to summon such medical care. (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 841-842, first and second emphases added, other emphasis omitted; *Sanders v. County of Yuba* (1967) 247 Cal.App.2d 748, 753.) Plaintiff's claim fails on all three elements.

Statutes defining "emergency medical condition" and similar terms, which address when immediate medical care is needed, are instructive. For

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8/ A "prisoner" includes a detainee who has been arrested, booked, and delivered to the custody of jail law enforcement officers. (*Terzian v. County of Ventura* (1994) 24 Cal.App.4th 78, 84, 87.)

example, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. section 1395dd ("EMTALA"), which generally requires a hospital emergency department to provide treatment to stabilize an "emergency medical condition," defines that term as "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in – (I) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part . . . ." (42 U.S.C. § 1395dd(e)(1).) Medicaid, which provides that the federal government will pay a state for medical care provided to an undocumented immigrant only to treat an "emergency medical condition," defines the term in essentially identical language. (42 U.S.C. § 1396b(v); see also *Guzman v. Memorial Hermann Hospital System* (S.D.Tex. Mar. 23, 2009, H-07-3973) 2009 WL 780889, at pp. *6-*7.)

Similarly, California Penal Code section 653y, which restricts use of the 911 telephone system to an "emergency," defines "emergency" (as pertinent here) as "any condition in which emergency services will result in the saving of a life . . . or assistance with potentially life-threatening medical problems." Finally, Probate Code section 2353, subdivision (c), allows the guardian of a ward over 14 years of age to require the ward to have surgery only in "an emergency case in which the ward faces loss of life or serious bodily injury if the surgery is not performed."

The statutes illustrate a general consensus that a condition requiring immediate medical treatment – that is, an emergency – is one that will result in lasting, severe injury if not immediately treated. Plaintiff has alleged no facts

suggesting that his panic attacks were such a condition, even if they caused him substantial discomfort or caused him to *believe* he needed immediate medical treatment. Indeed, before arriving at the County's Twin Towers facility, plaintiff was evaluated and discharged from *two* hospitals – including one where he was evaluated specifically for a panic attack – and neither hospital found that he needed immediate medical treatment. (AA 38-39.) Plaintiff was also evaluated by a nurse at Van Nuys jail's medical facility, who rejected his request to take his medications at that time; apparently that nurse also determined that plaintiff did not need immediate medication or other treatment. (AA 38.)

In short, the mere fact that plaintiff felt uncomfortable does not establish that he was likely to suffer serious, ongoing bodily damage if he did not receive immediate treatment. (Cf. *Quinlan v. Personal Transport Services Company, LLC* (11th Cir., June 5, 2009, No. 08-14121) 2009 WL 1564134, at p. *2 [prisoner's complaints of temporary chest pain, headaches, and difficulty breathing while being transported in van, and continuing episodes of back pain, did not "require[] immediate medical attention or evidence physical injury besides discomfort"]; *Lucas v. City of Long Beach* (1976) 60 Cal.App.3d 341, 350 [intoxication due to drugs or alcohol did not give rise to duty to summon immediate medical care, even though detainee evidenced emotional upset during booking and committed suicide in his cell shortly thereafter]; *Kinney v. County of Contra Costa* (1970) 8 Cal.App.3d 761, 769-770 [jail prisoner's request for medication for a bad headache did not give notice that prisoner needed "immediate medical care"]; *Wright*, *supra*, 122 Cal.App.4th at pp. 663, 672 [state was not liable under section 845.6, where plaintiff alleged state prison

initially failed to provide him with any medical attention; then denied him timely surgery to repair two detached retinas despite recommendations of three doctors; and after surgery, failed to provide medications prescribed for his recovery].)

Since plaintiff has failed to allege facts showing that he needed immediate medical treatment, he of course has also failed to allege facts to establish that any County employee knew or should have known that he needed such treatment. Moreover, to the extent that he needed to be evaluated or triaged to determine *whether* he needed immediate medical treatment, he received such an evaluation; he alleges that, after requesting medical attention for a panic attack, he was taken to an "ostensible nurse" who apparently determined that his condition did not require immediate medication or examination by a doctor. (AA 40.) Thus, the pleaded facts, in fact, establish that the County did take reasonable action to summon medical care. Accordingly, the County is immune from liability for its employees' alleged "failure . . . to furnish or obtain" particular "medical care" for plaintiff. (Gov. Code, § 845.6; see *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 504 [government tort immunity applies to Bane Act claim]; *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 512-513 [government tort immunity applies to Ralph Act claim]; see also *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 95-96.)

## IV. THE COUNTY IS IMMUNE FROM LIABILITY UNDER GOVERNMENT CODE SECTION 855.6.

Plaintiff contends that Government Code section 855.6 creates another basis for holding the County liable. (AOB 19.) That section provides:

> Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee . . . is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others.

(Gov. Code, § 855.6.)

Under section 855.6, a public entity is immune from liability for failure to perform adequate screening examinations, such as public health examinations or examinations to determine whether a mentally ill prisoner should be released from custody. The public entity is potentially liable only for injuries caused by inadequate "examinations for the purpose of treatment such as are made in doctors' offices and public hospitals." (Cal. Law Revision Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 855.6, p. 487; *Creason v. Department of Health Services* (1998) 18 Cal.4th 623, 636; *Kravitz v. State of California* (1970) 8 Cal.App.3d 301, 306-307.)

For example, in *Creason v. Department of Health Services*, plaintiffs sued the state health department when a medical screening program, mandated for all newborns, failed to detect that their child was suffering from congenital hypothyroidism. (18 Cal.4th at p. 626.) The court held that the health department was immune under section 855.6 because the program did not

"focus on the 'in-hospital' diagnosis and treatment of a specific patient," even though the program was designed to protect the public against preventable hereditary disorders by permitting early detection and medical intervention and thus was "*ultimately* aimed at treating persons diagnosed as suffering from various ailments or conditions." (*Id.* at pp. 626-627, 637-638, original emphasis.)

Here, none of the alleged events constitutes "an examination or diagnosis for the purpose of treatment." The mere fact that plaintiff received a medical treatment wristband (AA 39) at most shows that County employees acknowledged his request for medical evaluation by designating him for later examination by a doctor or other medical professional. It does not show that anyone evaluated him or determined that he needed medication or immediate medical treatment.

Plaintiff also alleges that after several hours in the holding cell, he "was called for a medical evaluation" in which he "responded to several medical-health questions." (AA 39.) Again, this fails to establish that he was evaluated for treatment. Indeed, the person administering the questions said she did not know whether plaintiff would receive any medications. (AA 39.) Plaintiff clearly was examined only to determine whether he needed immediate medical treatment. (See *Colome v. State Athletic Com.* (1996) 47 Cal.App.4th 1444, 1458-1459 [section 855.6 immunity applied to physical examination of professional boxer, where purpose was to determine fitness for license rather than treatment; examining physician "rendered no treatment . . . nor suggested any medical procedure to [plaintiff]"].)

Plaintiff also alleges that the person who administered the medical health questions drew his blood. (AA 39.) But plaintiff does not allege that the blood test was done for the purpose of treatment. Indeed, although the blood test showed a heightened blood-glucose level, no action was taken to correct this condition, nor does plaintiff allege that any action was necessary.

Plaintiff also points to his encounter with an "apparent nurse" following a panic attack in his holding cell. (AA 40.) But the nurse did not attempt to diagnose or treat plaintiff. Instead, she merely dismissed plaintiff's request for Xanax as evidence of a drug addiction. At most, she attempted to determine whether plaintiff was experiencing a medical emergency that needed immediate medical evaluation or treatment by a doctor, or whether his problem could be handled as part of the jail's usual process for providing medical treatment to detainees. (Cf. *Ralph v. Jump* (C.D.Ill. Oct. 18, 2006, No. 04-1443) 2006 WL 2989279, at p. *5-*6 [in asking questions about plaintiff's symptoms, nurse "was not attempting to evaluate or diagnose the plaintiff's condition," but "was trying to determine if the plaintiff required immediate medical attention"].)

Since plaintiff has failed to establish that he was examined "for the purpose of treatment," the County is immune from liability for any failure to examine plaintiff adequately. (Gov. Code, § 855.6.) Since plaintiff's Bane Act and Ralph Act claims are premised on this supposed failure, the immunity precludes those claims. (See *O'Toole*, *supra*, 140 Cal.App.4th at p. 504; *Gates*, *supra*, 32 Cal.App.4th at pp. 512-513.)

## V. THE COUNTY IS IMMUNE FROM LIABILITY UNDER GOVERNMENT CODE SECTION 844.6.

Government Code section 844.6, subdivision (a)(2), provides that, except as otherwise provided by statute, "a public entity is not liable for . . . an injury to any prisoner."[9/] Under this section, courts have repeatedly held that public entities are immune from liability for a prisoner's claims based on alleged negligent failure to provide adequate medical care. (*Wright*, *supra*, 122 Cal.App.4th at p. 663 [state and Department of Corrections were immune from liability for claims of intentional infliction of emotional distress and negligence arising out of alleged medical malpractice in failing to provide timely surgery and prescribed medications]; *Terzian*, *supra*, 24 Cal.App.4th at pp. 81, 83-84, 87 [county immune from claim for alleged negligent medical care]; see also *Peterson v. County of Los Angeles* (1986) 185 Cal.App.3d 705, 707, 709 [county immune from liability for injuries sustained by prisoner negligently kicked by county jail employee].)

These authorities are squarely on point here. Plaintiff alleges that he was wrongfully refused specific medical care while in custody of County jail officials at Twin Towers, after being arrested and booked, and that he was injured as a result. (AA 39-40, 42-43.) All of the acts alleged against the County occurred while plaintiff was a "prisoner." No statutory exception applies. Thus, the County is immune from liability under section 844.6 on plaintiff's claims under the Ralph Act and the Bane Act. (*O'Toole*, *supra*, 140 Cal.App.4th at p. 504; *Gates*, *supra*, 32 Cal.App.4th at pp. 512-513.)

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9/ Again, the statute includes a detainee who has been arrested, booked, and delivered to the custody of jail law enforcement officers. (*Terzian, supra,* 24 Cal.App.4th at pp. 84, 87.)

## VI. THE TRIAL COURT PROPERLY GRANTED THE COUNTY'S MOTION TO STRIKE THE PRAYER FOR DAMAGES AND ATTORNEY'S FEES FROM PLAINTIFF'S COMPLAINT.

As pertinent to the County, the operative First Amended Complaint requested general and compensatory damages, and attorney's fees under Civil Code sections 52.1 and 52. The trial court granted the County's motion to strike these allegations. Contrary to plaintiff's contention (AOB 20), this ruling was correct.[1/]

First, the trial court properly granted the motion to strike as to the prayer for general and compensatory damages because, as shown, plaintiff failed to state a cause of action against the County on any theory and thus is not entitled to any damages as a matter of law.

Second, the trial court properly struck the prayer for attorney's fees under Civil Code sections 52.1 and 52. Section 52.1 is the Bane Act. It provides that in an action under the Bane Act, the plaintiff may recover "reasonable attorney's fees." (Civ. Code, § 52.1, subd. (h).) Section 52 allows a plaintiff to recover attorney's fees in an action under Civil Code section 51.7, the Ralph Act. (Civ. Code, § 52, subd. (b)(3).) As shown, plaintiff failed to state a cause of action under either the Bane Act or the Ralph Act, and in any case the County was immune from liability on those causes of action. Thus, as a matter of law, plaintiff cannot recover attorney's fees under those sections.

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10/ The complaint also sought attorney's fees under Code of Civil Procedure section 1021.5. (AA 45.) The County moved to strike this allegation, but the trial court denied the motion as to that ground. (AA 131.)

## CONCLUSION

The operative First Amended Complaint fails to state a cause of action against the County for "Failure to Provide Adequate Medical Care" under any statute identified by plaintiff – specifically, the Ralph Act, the Bane Act, and Government Code sections 845.6 and 855.6. Moreover, the County is immune from liability as a matter of law under Government Code sections 845.6, 855.6, and 844.6. Thus, the trial court properly granted the County's demurrer and motion to strike. The judgment should be affirmed.

Dated: November 4, 2009

MARANGA MORGENSTERN
Kenneth A. Maranga
Patricia E. Ellyatt

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Carolyn Oill
Lillie Hsu

By _____
Lillie Hsu
Attorneys for Defendant and Respondent
COUNTY OF LOS ANGELES

## CERTIFICATION

Pursuant to California Rules of Court, rule 28.1(d), I certify that this RESPONDENT'S BRIEF contains 9881 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: November 4, 2009

Lillie Hsu

# PROOF OF SERVICE

## STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On November 4, 2009, I served the foregoing document described as: RESPONDENT'S BRIEF on the parties in this action by serving:

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(**Case No. BC371542 - 1 copy**)

**(×)** **By Envelope** - by placing **()** the original **(×)** a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

**(×)** **By Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los

Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **November 4, 2009**, at Los Angeles, California.

**(✖)** (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sharon Zelina