

**BOSS PERRYMAN et al., Plaintiffs and Appellants, v. COUNTY OF
LOS ANGELES, Defendant and Respondent.**

B194373

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE
DISTRICT, DIVISION TWO**

2007 Cal. App. LEXIS 1263

July 31, 2007, Filed

PRIOR HISTORY: [*1]

APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC351404, Elizabeth A. Grimes, Judge.

COUNSEL: Moreno & Perez, Hermez Moreno, Richard T. Copeland, for Plaintiffs and Appellants.

Lewis, Brisbois, Bisgaard & Smith, Laura Inlow; Greines, Martin, Stein, Richland, Martin Stein, Carolyn Oill, for Defendant and Respondent.

JUDGES: Boren, P. J., with Doi Todd and Chavez, JJ., concurring.

OPINION BY: BOREN

OPINION

BOREN, P. J.--The trial court dismissed a complaint alleging that the county coroner negligently failed to preserve the bodily remains of appellants' murdered relative. After a de novo review of appellants' claims, we conclude that (1) no mandatory statutory duty requires the coroner to embalm or refrigerate corpses; (2) the government is not vicariously liable for the acts of employees at the coroner's office, who generally perform autopsies and have no duty to handle remains in the same manner as mortuaries or crematories that contract to provide dignified services to relatives; and (3) California law confers no constitutionally protected property right in dead bodies that would entitle appellants to claim a civil rights violation under federal law.

FACTS

Appellants are relatives of Eugene Perryman [*2] (decedent), a 66-year-old victim of a drive-by shooting. Decedent passed away in a hospital. His remains were promptly transferred to respondent Los Angeles County Coroner's Office (the County). The County kept decedent's remains unembalmed and unrefrigerated for one week, resulting in substantial decomposition. Decedent's relatives suffered grief, mortification, anguish, shock and pain when they observed his decomposed and unrecognizable remains. Appellants filed a negligence suit against the County. The trial court sus-

tained the County's demurrers, without leave to amend, and dismissed appellants' case with prejudice. A timely appeal was taken from the dismissal.

DISCUSSION

1. *Appeal And Review*

This appeal arises from the dismissal of appellants' first amended complaint. (*Code Civ. Proc.*, § 581, *subd. (f)(1)*.) The dismissal is an appealable final judgment. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115 [55 Cal. Rptr. 2d 276].) We review de novo the trial court's ruling, exercising our independent judgment to determine whether, as a matter of law, a claim has been stated. (*Ibid.*) The factual allegations of the complaint are accepted as true. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 193 [126 Cal. Rptr. 2d 908, 57 P.3d 372].)

2. [*3] *Government Tort Liability*

a. *Mandatory Duty*

A public entity is not liable for injury, except as provided by statute. (*Gov. Code*, § 815.) "[P]ublic entities may be held liable only if a statute (not a charter provision, ordinance or regulation) is found declaring them to be liable." (Legis. Com. com., 32 West's Ann. Gov. Code (1995 ed.) foll. § 815, p. 167.) "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (*Gov. Code*, § 815.6.)

With respect to the obligation to discharge a mandatory duty, it is not enough that the public entity have a "general" duty to regulate conduct. "In order to recover plaintiffs have to show that there is some *specific* statutory mandate that was violated by the County, which violation was a proximate cause of the accident." (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896-897 [45 Cal. Rptr. 2d 646].) The enactment must be "*obligatory*" and "*must require*, rather [*4] than merely authorize or permit, that a particular action be taken or not taken." (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498 [93 Cal. Rptr. 2d 327, 993 P.2d 983].) "Whether an enactment creates a mandatory duty is a question of law" for the courts to decide. (*Id.* at p. 499; *Crea-son v. Department of Health Services* (1998) 18 Cal.4th 623, 631 [76 Cal. Rptr. 2d 489, 957 P.2d 1323].)

Appellants cite two provisions in the Health and Safety Code to demonstrate that the County had a mandatory duty to properly preserve decedent's remains.

First, appellants point to *Health and Safety Code section 7100*, which addresses the right of survivors to control the disposition of remains, as well as their duty to inter the remains. ¹ The statute lists, in order of standing, the identities of those individuals who have the right and duty to dispose of bodily remains (e.g., an agent under a power of attorney for health care; the surviving spouse; an adult child; and so on). (*Health & Saf. Code*, § 7100, *subd. (a)*.) The law also empowers funeral directors or the public administrator to assume responsibility for the disposition of remains, in the absence of surviving relatives. (*Health & Saf. Code*, § 7100, *subd. (c)*.)

1 "Disposition" of remains means "interment." (*Health & Saf. Code*, § 7025.)

Health and Safety Code section 7100 [*5] "establishes only an orderly process by which to ensure that proper disposition is made of human remains." (*Christensen v. Superior Court (1991) 54 Cal.3d 868, 896-897 [2 Cal. Rptr. 2d 79, 820 P.2d 181]*.) Nothing in *section 7100* creates an obligatory duty to act on the part of the coroner. In fact, the coroner is not even mentioned in *section 7100*. There is no directive to the coroner "that a particular action be taken or not taken." (*Haggis v. City of Los Angeles, supra, 22 Cal.4th at p. 498*.) *Section 7100* does not impose a mandatory duty that would give rise to government liability in this case.

Next, appellants rely upon *Health and Safety Code section 7104*, the purpose of which is "to create a condition of last resort with respect to the expense of interment." (*Spates v. Dameron Hospital Assn. (2003) 114 Cal.App.4th 208, 219 [7 Cal. Rptr. 3d 597]*.) The statute provides that where the decedent has failed to make burial pre-arrangements; or if the estate is inadequate to pay for interment; and if no duty to inter devolves upon a responsible person (or no such person can be found), then the coroner may take possession of the remains and "shall inter the remains in the manner provided for the interment of indigent dead." (*Health & Saf. Code*, § 7104, *subd. (a)*.) [*6] The statute was not designed to protect surviving family members: it is intended "to protect the county treasury." (*Spates v. Dameron Hospital Assn., supra, 114 Cal.App.4th at p. 219*.)

Health and Safety Code section 7104 recognizes that a county exercises jurisdiction over the remains of individuals who are crime victims or who die under suspicious circumstances. The coroner has a duty to investigate such deaths. (*Gov. Code*, §§ 27491, 27491.2.) In this situation, the coroner "is entitled to the custody of the remains of the person whose death is the subject of investigation until the conclusion of the autopsy or medical investigation" (*Health & Saf. Code*, § 7102; *Aguirre-Alvarez v. Regents of University of California (1998) 67 Cal.App.4th 1058, 1064 [79 Cal. Rptr. 2d 580]*.) If the county has exercised jurisdiction over a body, it "shall be responsible for the disposition of the remains of that decedent," i.e., its interment. (*Health & Saf. Code*, §§ 7104, *subd. (b)*, 7025.)

The law requires that a reasonably diligent attempt be made to locate the family of persons whose remains are in the coroner's custody. (*Health & Saf. Code*, §§ 7104, *subd. (a)*, 7104.1; *Davila v. County of Los Angeles (1996) 50 Cal.App.4th 137, 140-143 [57 Cal. Rptr. 2d 651]*.) [*7] "After a reasonable attempt, the coroner may embalm the body or authorize the embalming by a mortician for purposes of preserving the remains for evidence, to prevent microbial and contagious disease hazards, or for investigative functions." (*Gov. Code*, § 27471, *subd. (a)*.) "If the embalming has been requested by the family," the coroner may charge a fee for doing so. (*Ibid.*)

Thus, the law contemplates a mandatory duty on the part of the coroner to arrange for the "disposition" (interment) of remains or attempt to locate family members to handle the disposition; however, the law contemplates only a discretionary determination by the coroner to embalm or not embalm a body, for the express purpose of preserving evidence, preventing disease, or aiding an investigation. The law does not impose a mandatory duty to embalm. Appellants do not allege that they requested embalming and the coroner ignored their request. Nor do they allege that the coroner denied them the right to inter decedent's remains. (See *O'Donnell v. Slack (1899) 123 Cal. 285, 288-289 [55 P. 906]*; *Davila v. County of Los Angeles, supra, 50 Cal.App.4th at p. 143* [coroner's failure to use "reasonable diligence" to locate decedent's relatives [*8] resulted in cremation by county, depriving plaintiffs of the right to bury their decedent].)

In short, nothing in *Health and Safety Code section 7104* required that the coroner embalm or refrigerate decedent's remains, or that the coroner take any measures to ensure that the remains stay intact.² Appellants do not allege that the coroner delivered the *wrong* body to them for interment (see *Quesada v. Oak Hill Improvement Co. (1989) 213 Cal.App.3d 596, 605 [261 Cal. Rptr. 769]*); rather, the coroner delivered the right body, but in an unaesthetic condition. Absent a statutory requirement that the coroner maintain a corpse in an intact condition through embalming or refrigeration, no claim can be asserted that the coroner failed to execute a mandatory duty when it allowed decedent's remains to decompose.

2 On the contrary, the coroner has the right during autopsy to remove body parts and retain them as needed or advisable "for scientific investigation and training." (*Gov. Code, § 27491.45, subd. (a)(1).*)

b. Vicarious Liability

In one brief paragraph, appellants argue that the County is liable under a theory of respondeat superior. "A public entity is liable for injury proximately caused by an act or omission of [*9] an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee" (*Gov. Code, § 815.2, subd. (a).*) What is necessary, under this theory, is "to show that some employee of the public entity tortiously inflicted the injury in the scope of his employment under circumstances where he would be personally liable." (*Legis. Com. com., 32 West's Ann. Gov. Code, supra, foll. § 815.2, p. 179.*) A public employee is liable for injury "to the same extent as a private person." (*Gov. Code, § 820, subd. (a).*)

Appellants' argument is so terse that they fail to elucidate why employees of the coroner's office owe them the same common law duty to preserve human remains that is owed by private persons. It is true that mortuary employees have a duty "to provide appropriate and dignified services" to family members who contract for such services, and not to mishandle human remains while facilitating funeral rites, burial, encryption or cremation. (*Christensen v. Superior Court, supra, 54 Cal.3d at p. 886.*) "Once a mortuary ... undertakes to accept the care, custody and control of [*10] the remains, a duty of care must be found running to the members of decedent's bereaved family." (*Id. at pp. 887-888.*)

No similar duty to avoid mishandling remains (or duty to handle remains in a respectful and dignified manner) is owed by employees of the coroner's office. If such a duty were imposed, the public entity could be sued every time its employees conduct a lengthy crime scene investigation or an autopsy that results in disfigurement of the corpse. As noted in footnote 2, *ante*, the coroner is entitled to remove body parts and retain them as "necessary or advisable for scientific investigation and training." (*Gov. Code, § 27491.45, subd. (a)(1).*) For example, next of kin have no right to prohibit a government employee from performing an invasive autopsy and removing brain, heart, lung, spleen, kidney, and liver specimens to determine a cause of death. (*Huntly v. Zurich General A. & L. Ins. Co. (1929) 100 Cal.App. 201, 204, 213-215 [280 P. 163]*). See also *Gray v. Southern Pacific Co. (1937) 21 Cal.App.2d 240 [68 P.2d 1011]* [coroner and his surgeons cannot be held liable for widow's shock, disgust and anguish upon seeing her husband's body after an autopsy that mutilated his body and head].) In other words, [*11] "the handling of an individual's remains during an investigation into his death [is] different from mortuary services ... [and] the [government] was under no contractual obligation to treat decedent's remains in a certain manner during the investigation."

(*Sabow v. U.S. (9th Cir. 1996) 93 F.3d 1445, 1458* [applying California law].) In the *Sabow* case, the body of the plaintiffs' decedent was left in the sun for seven hours while the crime scene was investigated. (*Id. at p. 1449, fn. 2.*) The rule in the *Christensen* case imposing a duty on mortuaries and crematories to handle remains carefully and respectfully is distinguishable from a case involving the coroner, whose very work is likely to result in mutilation.

Because appellants can identify no common law duty owed by the coroner's employees to treat human remains in the same manner as would be expected of a mortuary or crematory, appellants' effort to impose vicarious liability on the County fails. Their argument fails for the secondary reason that public employees are not liable for injury resulting from the exercise of discretion. (*Gov. Code, § 820.2.*) As noted in the prior section, the decision to embalm or not embalm is discretionary [*12] (*Gov. Code, § 27471, subd. (a)*), and appellants did not identify a mandatory statutory duty to refrigerate corpses. As a result, the coroner's employees are immune from liability.

3. Request To Amend

The trial court denied appellants' request to file a second amended complaint. Appellants did not offer a plausible reason to amend. However, their meager showing in the trial court is unimportant: failure to grant leave to amend is always "open on appeal" even when *no* request to amend the pleading was made, and "new theories may be advanced for the first time on appeal" (*Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal.App.4th 677, 684, fn. 5* [67 Cal. Rptr. 2d 323]; *Code Civ. Proc., § 472c, subd. (a)*.)

Appellants now request leave to amend their complaint to assert a cause of action for a civil rights violation under *section 1983 of 42 United States Code (section 1983)*. *Section 1983* creates civil liability if a person, under color of state law, deprives another person of any rights, privileges, or immunities secured by the federal constitution. Appellants propose to allege, by amendment, a claim showing that they "were deprived of a constitutionally protected property right in the body of their [*13] deceased as a result of the misconduct of the County Coroner's office and its employees"

In analyzing a claim of government deprivation of a property interest under *section 1983*, the courts look to an "underlying substantive interest ... created by 'an independent source such as state law' " and "determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the *Due Process Clause*." (*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 9* [56 L. Ed. 2d 30, 98 S. Ct. 1554].) Thus, we must decide whether California law creates substantial property rights in dead bodies that are possessed by the deceased's next of kin.

It is well settled that "there is no property in a dead body" in California. (*Enos v. Snyder (1900) 131 Cal. 68, 69* [63 P. 170]; *Gray v. Southern Pacific Co., supra, 21 Cal.App.2d at p. 246.*) At most, there is only a " 'quasi property right ... for the limited purpose of determining who shall have its custody for burial." (*Holm v. Superior Court (1986) 187 Cal.App.3d 1241, 1245* [232 Cal. Rptr. 432]; *Spates v. Dameron Hospital Assn., supra, 114 Cal.App.4th at p. 221*; *Sinai Temple v. Kaplan (1976) 54 Cal.App.3d 1103, 1110* [127 Cal. Rptr. 80]; *Cohen v. Groman Mortuary, Inc. (1964) 231 Cal.App.2d 1, 4* [41 Cal. Rptr. 481], disapproved [*14] on other grounds in *Christensen v. Superior Court, supra, 54 Cal.3d at p. 889*; *Huntly v. Zurich General A. & L. Ins. Co., supra, 100 Cal.App. at p. 207.*) "The right is to the possession of the body, and is one recognized for the purpose of determining who shall have its custody for the purpose of burial." (*Gray v. Southern Pacific Co., supra, 21 Cal.App.2d 240, 246*; *Estate of Jimenez (1997) 56 Cal.App.4th 733, 740* [65 Cal. Rptr. 2d 710]

[the body " 'unquestionably forms no part of the property of [decedent's] estate.' ").] A body does not fit into the category of property because it "cannot be sold or transferred, has no utility and can be used only for the one purpose of interment or cremation." (*Rest.2d Torts*, § 868, *com. a*, p. 275.)

Our Supreme Court has refused to recognize a property right or ownership interest in one's own body parts. In *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 134-147 [271 Cal. Rptr. 146, 793 P.2d 479], the Court rejected the plaintiff's claim that the defendants' unauthorized use of his white blood cells constituted a conversion of his personal property. The state high court noted that statutes governing human tissue, organs, blood, fetuses, glands and dead bodies all regulated their disposition, [*15] rather than treating such things as part of "the general law of personal property." (*Id.* at p. 137.) In passing, the Court observed that state law "does not purport to grant property rights in dead bodies [though] it does give the surviving spouse, or to other relatives, '[t]he right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent ...'" (*Id.* at p. 137, *fn.* 27.)

Appellants rely on *Newman v. Sathyavaglswaran* (9th Cir. 2002) 287 F.3d 786 (*Newman*) in support of their proposed claim. In *Newman*, the parents of deceased children brought a *section 1983* action against the coroner alleging deprivation of property without due process, based on the coroner's removal of their children's corneas without notice or consent. ³ (*Id.* at p. 788.) The federal appeals court concluded that the property rights California affords to next of kin to possess bodies of deceased family members was infringed when the corneas were extracted without parental consent, which amounted to a due process violation. (*Id.* at p. 798.)

3 State law authorizes the coroner to remove corneas and release the tissue for transplant, therapeutic or scientific purposes. [*16] (*Gov. Code*, § 27491.47.)

Newman purports to apply California law as the basis for its holding: it cites the same state cases we have listed above, which hold that there is no property right in dead bodies. The *Newman* court then concludes that all of the California cases are wrong. Looking to "values and understandings contained in our legal history dating from the Roman Empire," the court found that "California may not be free to alter them with exceptions that lack 'a firm basis in traditional property principles.'" (*Newman*, 287 F.3d at p. 797.)

To find a *section 1983* violation, the federal court is supposed to *apply* state law, not *rewrite* it. The *Newman* court shrugged off over 100 years of California case authority to write an entirely new rule regarding property rights in dead bodies. It is, at this point, a federal rule, not a state rule, and we decline to follow it. ⁴ The dissent in *Newman* is correct: California law creates "merely a right to possession" of a corpse for the limited purpose of carrying out burial duties, but "decidedly does not confer a property right upon anyone." (*Newman*, 287 F.3d at p. 800 (dis. opn., Fernandez, J.)) Because we find that next of kin have no recognized [*17] property right to the corpses of deceased relatives, there is no basis for a *section 1983* action alleging a deprivation of a constitutional right.

4 We are not bound by the opinions of federal district or circuit courts when analyzing *section 1983* claims. (*Garcia v. Superior Court* (1996) 42 Cal.App.4th 177, 181 [49 Cal. Rptr. 2d 580].) As an intermediate appellate court, we are bound by the decisions of the Supreme Court, in this case, *Enos v. Snyder*, *supra*, 131 Cal. at page 69, which states that "there is no property in a dead body." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal. Rptr. 321, 369 P.2d 937].)

CONCLUSION

Appellants are understandably dismayed over the coroner's failure to preserve decedent's remains in an aesthetic condition. "Nobody who has had the misfortune of having his loved ones die can fail to be moved by the prospect that somebody else will treat the loved one's former earthly vessel with disrespect." (*Newman, supra, 287 F.3d at p. 801*(dis. opn. of Fernandez, J.)) Nevertheless, decedent's remains are not property, and the coroner and the coroner's employees have no mandatory statutory duty or common law duty to treat human remains as if they were operating a mortuary or crematory.

DISPOSITION

The [*18] judgment is affirmed.

Doi Todd and Chavez, JJ., concurred.