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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HELEN JONES, Individually and as  
Personal Representative, etc.,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES et al.,

Defendants and Respondents.

B241333

(Los Angeles County  
Super. Ct. No. BC 431634)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed in part; reversed in part.

Law Offices of Lisa L. Maki, Lisa L. Maki, Christina M. Coleman and Jill McDonell for Plaintiff and Appellant.

Hurrell Cantrall, Thomas C. Hurrell, and Melinda Cantrall for Defendants and Respondents County of Los Angeles and Sheriff Leroy Baca.

Seki, Nishimura, & Watase, Gilbert M. Nishimura, J. Edwin Rathbun, Jr., Corinne D. Orquiola for Defendant and Respondent Christopher Kidder.

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Plaintiff Helen Jones brought this action individually and as personal representative of the estate of her son, John Horton. Horton died in March 2009 while incarcerated at the Los Angeles County Sheriff's Department, Men's Central Jail. Plaintiff filed a complaint in February 2010 against the County of Los Angeles (County), Sheriff Leroy Baca, and doe defendants. She later identified and sued Deputy Christopher Kidder as a doe defendant. The County and Sheriff Baca filed a motion for summary judgment. Deputy Kidder filed a separate motion for summary judgment. The trial court granted summary judgment or judgment on the pleadings for all three defendants, and plaintiff appealed.

We affirm in part and reverse in part. The judgment for Sheriff Baca is affirmed. The judgment for the County on causes of action for wrongful death and negligence is reversed. As well, the judgment for Deputy Kidder on the causes of action for wrongful death, negligence, and violation of civil rights is reversed. In all other respects, we affirm.

## **FACTS AND PROCEDURE**

### ***1. Allegations of the Complaint***

Jones's complaint alleged as follows. Horton was incarcerated in March 2009 in the custody of the Los Angeles County Sheriff's Department (Department). On or about March 16, 2009, the court ordered that Horton be placed in the medical unit of the jail for at least the beginning of the two to three weeks it would take to transfer him to "fire camp." The court based its order on Horton's "obvious mental health state of distress and other medical factors." The Department failed to implement the court's medical order, and Horton never received the care and treatment ordered by the court. Instead, the Department "secret[ed]" Horton in solitary confinement for 30 days, where he spent his time in a closet-sized cell with no windows, no furniture except a bed, and a lamp that produced very little light. The Department denied plaintiff any visitation with her son, despite numerous attempts to see him. Horton was subjected to "ongoing harassment, physical abuse, mental harassment, emotional abuse and/or other outrageous conduct" by the deputies charged with his care. On or about March 30, 2009, deputies physically

abused, assaulted, emotionally abused, and/or facilitated Horton's death by hanging while he was in solitary confinement.

The complaint alleged causes of action for wrongful death; violation of civil rights under Civil Code sections 43, 51, 51.7, and 52.1; negligence; negligent supervision; and intentional infliction of emotional distress (IIED). Plaintiff alleged all causes of action against all defendants, except she did not allege the wrongful death cause of action against Sheriff Baca. She alleged she brought the action both individually and as a representative of Horton's estate. After the summary judgment proceedings, the court entered judgment for the County, Sheriff Baca, and Deputy Kidder on all causes of action.

In her opening brief, plaintiff states she is not appealing the court's ruling on all causes of action for Sheriff Baca or the court's ruling for all defendants on the IIED cause of action. She also states she is not appealing the ruling for the County on her causes of action "as an individual," except for the wrongful death cause of action. Moreover, she limits her appeal to (1) the court's ruling for the County on the wrongful death, violation of civil rights, negligence, and negligent supervision causes of action; and (2) the court's ruling for Deputy Kidder on the wrongful death, violation of civil rights, and negligence causes of action.<sup>1</sup> Our summary of the facts and procedure is therefore limited to that information necessary to evaluate her contentions on appeal.

## ***2. The County's Motion for Summary Judgment or Summary Adjudication***

The County filed a motion for summary judgment or summary adjudication in October 2011 and argued, in pertinent part, the causes of action plaintiff brought on

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<sup>1</sup> In one sentence of her opening brief, plaintiff also states she is challenging the court's ruling striking a claim for punitive damages against Deputy Kidder, which was part of the relief requested in Deputy Kidder's motion. Plaintiff fails to present any argument or citation to authority on the issue, beyond a bare assertion that she had alleged conduct justifying punitive damages. We deem this contention waived. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522.)

behalf of Horton against the County were barred because the County was statutorily immune to liability for injuries to prisoners.

In support of its motion, the County submitted the declaration of Dennis Burns, chief of the custody operations division of the Department. Chief Burns had overall administrative responsibility for the custody operations division, which was responsible for the operation of the County's jail system and the care, custody, security, and rehabilitation of all inmates housed in the County's jails. He was involved in the investigation into Horton's death. He had read the reports prepared by the different investigative units (the Department's homicide bureau, the internal affairs division, and the men's central jail investigative unit) regarding Horton's death and had reviewed the evidence gathered. The investigations revealed the following, according to Chief Burns:

- Horton entered the County jail system on February 24, 2009. During intake, he reported having a history of alcohol abuse. Medical intake personnel did not observe any signs of substance abuse or withdrawal at the time. He denied a history of mental problems and denied any suicide attempts or ideation.
- On February 27, 2009, upon his return from court, Horton appeared to be under the influence of narcotics. He admitted to a deputy that he had smuggled Ecstasy and PCP into the jail and had taken the narcotics at court that day. As a result, a discipline report was prepared for Horton, and after a hearing, he was housed in a disciplinary unit with a loss of privileges for 30 days.
- On March 2, 2009, Horton fought with another inmate. Nursing staff did not observe any physical injury on him at the time.
- On March 4, 2009, a deputy found Horton roaming a hallway, claiming he was returning from a pass. Horton refused the deputy's orders to face the wall while the deputy determined Horton's correct housing location. Horton also refused to get on the ground when the deputy ordered. The deputy pepper sprayed Horton and additional deputies arrived to subdue him. Horton was transported to the clinic where he was videotaped saying he had ingested 11 "Blue Dolphins" (a

combination of Ecstasy and PCP), which were part of the narcotics he had earlier smuggled into custody. Horton was transported to the hospital for treatment.

- When he returned to the jail from the hospital on March 5, 2009, medical personnel screened him again, and he again denied any mental health problems, suicide attempts, and current thoughts of suicide, and he had no obvious signs of mental illness.
- Due to the incident with the deputy and being under the influence of narcotics, Horton's classification was changed on March 5, 2009, to "K-10," meaning he would be housed in a single-man cell and waist chained during movement, with all movement accompanied by deputies.
- A disciplinary review board hearing was held on March 7, 2009, relating to the March 4 incident. Horton was charged with creating a disturbance, fighting, and insubordination. The board found the charges substantiated and gave Horton 29 days of disciplinary segregation with loss of privileges.
- On March 30, 2009, Horton was in discipline module 3301 in a single-man cell. At approximately 3:59 a.m. that day, deputies found Horton hanging with a noose around his neck in his cell. Following the investigation by homicide detectives and an autopsy, it was determined Horton had committed suicide by hanging.
- During a subsequent investigation, it was discovered the deputy responsible for monitoring module 3301, Deputy Kidder,<sup>2</sup> had left his station for a three-hour period prior to Horton's being found dead. During that three-hour period, Deputy Kidder failed to perform half-hour security checks of the cells as required by Department policy. He also failed to arrange for another deputy to perform those checks.

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<sup>2</sup> Chief Burns's declaration does not identify Deputy Kidder by name. We know from Deputy Kidder's separate motion for summary judgment that he was the deputy responsible for module 3301 during the pertinent time period.

- In 2007, the Department installed a barcode scanning system to ensure deputies were timely conducting welfare checks of the cells and to deter efforts to doctor welfare check logs after an adverse event. The system uses permanent barcode plaques mounted at each end of every cell row in the jail. Deputies are supposed to scan each of the plaques as they walk the rows performing their checks. The scanner records each barcode and the time at which the scan is performed.
- Deputy Kidder did not make any barcode scans and faked handwritten records of row checks for his three-hour absence. The deputy responsible for module 3300, however, made one scan of module 3301 during Deputy Kidder's absence. The deputy responsible for module 3300 used a barcode "cheat sheet" to fraudulently scan his welfare checks when he did not actually walk the rows and conduct the checks. In using that cheat sheet, the deputy mistakenly scanned the barcode for module 3301 during the time Deputy Kidder was absent. The discovery of these actions opened a separate line of investigation into the deputies' circumvention of the barcode scanning system.<sup>3</sup>

The County also submitted a March 19, 2009 commitment order (March 19 order) from the superior court in support of its motion. The March 19 order noted Horton was convicted of violating Health and Safety Code section 11352, subdivision (a), and was committed to state prison for a term of four years. It stated: "Court recommends consideration for fire camp program and CDC facility has drug treatment program." Plaintiff's prelawsuit claim for damages under the Government Claims Act (Gov. Code, § 810 et seq.),<sup>4</sup> as well as the complaint, referred to a March 16, 2009 order that Horton be transferred to a medical unit of the jail for the time it would take to arrange a transfer

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<sup>3</sup> We note that while the County submitted Chief Burns's declaration in support of its motion, their separate statement of undisputed material facts (separate statement) actually incorporated very little from Chief Burns's declaration.

<sup>4</sup> Further undesignated statutory references are to the Government Code.

to fire camp. The County propounded a document request on plaintiff for “all medical orders issued by the Superior Court for examination or treatment of decedent, John Horton, between February 25, 2009 and March 30, 2009, including but not limited to the medical order of March 16, 2009,” identified in the complaint and government claim. Plaintiff never produced any court-issued medical orders in response.

### ***3. Deputy Kidder’s Motion for Summary Judgment or Summary Adjudication***

By May 2011, plaintiff had identified and sued Deputy Kidder as “Doe 2.” Deputy Kidder filed a motion for summary judgment around the same time as the County. As pertinent here, Deputy Kidder argued the causes of action for wrongful death and negligence were barred as a matter of law because plaintiff could not prove causation when a prisoner’s injuries result from his own intentional conduct -- that is, his suicide. Moreover, he argued, he did not violate any civil rights of plaintiff or Horton under Civil Code sections 43, 51.7, 52.1, because he never had any contact with plaintiff and she could not recover for alleged “hate crimes” against Horton.

In support of his motion, Deputy Kidder submitted his own declaration and that of Dr. Richard Fukumoto, a forensic pathologist retained by him to provide expert witness services. Deputy Kidder was assigned to module 3301 at the jail on March 29 and 30, 2009, between 10:00 p.m. and 6:00 a.m. There were seven inmates in the module, each assigned to an individual cell, when he arrived for work at approximately 9:45 p.m. on March 29. He performed a check of each cell within five minutes of arriving. Deputy Kidder saw Horton in his assigned cell; nothing appeared unusual and the deputy did not communicate with Horton. He performed another check at 10:30 p.m., and again nothing appeared unusual with Horton. At approximately 12:00 a.m. on March 30, Deputy Kidder’s supervisor, Sergeant Clifford Yates, performed the check on module 3301. He told Deputy Kidder “everything look[ed] okay.” Deputy Kidder performed another check at 2:15 a.m., and once again, nothing appeared unusual with Horton. At approximately 3:45 a.m., when the deputy checked Horton’s cell, he saw Horton hanging and immediately called for assistance. Efforts were made to provide first aid, but Horton appeared to be deceased already. Deputy Kidder never spoke with Horton and knew

nothing about Horton prior to this lawsuit, and he asserted he knew nothing that would indicate Horton might commit suicide.

Dr. Fukumoto opined Horton's death was caused by asphyxia due to self-inflicted hanging by a cord ligature around his neck. He noted Horton's body displayed a ligature mark around the upper neck with tissue damage but no fractures in the larynx or trachea. He concluded the absence of any physical injuries to Horton's body that would be attributable to a struggle with a third party demonstrated the injuries to Horton's neck were self-inflicted. Dr. Fukumoto based his opinion on a review of a number of documents and photographs, including Horton's autopsy report and the report of another forensic pathologist, Dr. Howard Oliver.

Dr. Vadims Poukens, deputy medical examiner for the County's department of the coroner, conducted Horton's autopsy. Dr. Poukens opined the autopsy findings supported a self-inflicted hanging. Horton had a ligature mark around his neck and a small hemorrhage of a muscle close to the right lower jaw area. He also noted intra-abdominal hematoma in the area of Horton's kidney and liver and right back muscle hematoma, which indicated recent blunt force torso injury. He noted the significance and circumstances of these injuries were not clearly established. Slides of the liver, adrenal gland, mesentery, and kidney showed soft tissue hemorrhage or contusion less than four hours old. Dr. Poukens could not determine with medical certainty whether the intra-abdominal injuries contributed directly or indirectly to Horton's death. As a result, he ascribed Horton's death to "hanging and other undetermined factors." Horton's death certificate listed the cause of death as "deferred." The death certificate and autopsy report list Horton's time of death as 4:05 a.m. on March 30, 2009.

Dr. Oliver examined Horton's body after Dr. Poukens's autopsy. He opined Horton "succumbed to asphyxia due to hanging." He found "no evidence of trauma (bruises, abrasions, lacerations, etc.)" after a "careful examination" of Horton's body.



#### **4. Plaintiff's Oppositions and Discovery Motions**

##### **a. Discovery Motions**

Before filing her oppositions, plaintiff filed several motions in an attempt to obtain more discovery or continue the summary judgment proceedings. She first filed an ex parte application to compel the production of “the complete homicide investigation into the death of John Horton.” The court denied the ex parte application and stated plaintiff must file a *Pitchess*<sup>5</sup> motion before bringing such a motion to compel.

Plaintiff also filed a motion to continue the summary judgment motions after successfully shortening the time to hear such a motion. The motion to continue was based on plaintiff's asserted need to conduct more discovery before filing her opposition to the motions for summary judgment. The court heard plaintiff's motion to continue the summary judgment motions and her *Pitchess* motion on the same date. The court denied the *Pitchess* motion without prejudice for defective service on the custodian of records. It also denied the motion to continue. The next day, plaintiff refiled her *Pitchess* motion. The motion sought production of numerous categories of documents, including the entire homicide and internal affairs investigation files created in response to Horton's death; all documents related to the “‘scannergate’ scandal,” which is what plaintiff called the deputies' circumvention of the barcode scanning system; and the entire personnel files of Deputy Kidder, Sergeant Yates, and various other deputies. Plaintiff was required to file her oppositions to the defense motions for summary judgment prior to the hearing on her *Pitchess* motion.

##### **b. Opposition to Deputy Kidder's Motion**

In opposition to Deputy Kidder's motion for summary judgment, plaintiff argued the cause of Horton's death was a disputed material fact and Deputy Kidder failed to show a lack of causation. Plaintiff asserted the evidence showed Horton suffered serious intra-abdominal injuries that may have contributed to his death, and it was disputed

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<sup>5</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

whether he committed suicide or was beaten to death by deputies, who were the only people who had access to him in module 3301. In the assault scenario, Deputy Kidder or other deputies beat Horton to death and hung him to make it appear as though he committed suicide.

In support of her opposition, plaintiff submitted the declaration of her forensic pathologist expert witness, Dr. Silvia Comparini. Among other things, Dr. Comparini reviewed the autopsy report by Dr. Poukens and the Department's homicide report on the death of Horton. She disagreed with Deputy Kidder's expert witness, Dr. Fukumoto, that Horton's body lacked any injuries attributable to a third party struggle. She found "[s]evere signs" attributable to a struggle. She pointed to the autopsy report describing intra-abdominal injuries and found the injuries were consistent with or caused by "blunt force inflicted within less than four (4) hours old." She opined the injuries to Horton's neck were not consistent with death by hanging. Instead, she found the "shallow furrow" from the noose around the neck was most likely obtained after Horton's death. She also noted the lack of petechial hemorrhaging in the eyes as inconsistent with death by hanging. She found the intra-abdominal injuries along "with the delay in immediate response and slow first care emergency in-house facility observed during [her] visit . . . denied Horton the possibility of survival following the assault." Dr. Comparini thus opined the cause of Horton's death was internal bleeding in combination with the failure to provide immediate medical care. She believed the time of death was earlier than what the coroner's report stated.

Deputy Kidder's separate statement had said he checked Horton's cell at approximately 9:45 p.m. on March 29, 2009, and he saw Horton in the cell and nothing appeared unusual. Plaintiff disputed that fact in her response to the separate statement, stating: "John Horton had died by 9:45 p.m. or the time Defendant Kidder allegedly performed this security check . . . ." In support of this statement, she cited the portion of Dr. Comparini's declaration in which the doctor opined Horton's death was earlier than what the autopsy report stated. She also cited a page of Deputy Kidder's deposition in

support of this statement, but the cited page was not included in the package of evidence plaintiff filed with her opposition.

Also in support of her opposition, plaintiff submitted a copy of a March 2, 2009 order from the superior court (March 2 order) noting Horton had moved for a medical examination and ordering one to be conducted. Under the section for “[s]pecify treatment,” the order stated: “hallucination[,], drug withdraw[a]l, ec[s]tasy psychosis.”

She additionally submitted an excerpt from the deposition of Deputy Remigius Ezeonye, who was on duty before Deputy Kidder took over on March 29, 2009. According to the excerpt, Deputy Ezeonye checked Horton’s record in the computer and saw he had previously been under mental observation. He also observed Horton acting moody and quiet that night and giving him “not kind of pleasant eyes.” The deputy made a note in the log book to this effect. He also called for a “psych line” on Horton and asked that he be checked out in the morning.

### **c. Opposition to County and Sheriff Baca’s Motion**

In opposition to the County’s motion, plaintiff argued the County was not statutorily immune to liability because an exception to immunity for failure to provide immediate medical care applied. Plaintiff contended there was an issue of fact regarding whether the County acted unreasonably in failing to provide court-ordered medical attention and other care. She asserted two theories relating to failure to provide immediate medical care: (1) The March 2 order put the County on notice that Horton needed immediate medical care for psychoses, but Horton was never treated; and (2) Horton was so severely beaten that he bled to death because of the failure to provide immediate medical care.

In support of her opposition, plaintiff again submitted evidence of the March 2 order directing a medical examination for Horton, Dr. Comparini’s declaration, and the excerpt from Deputy Ezeonye’s deposition, among other things. In addition, she submitted the declaration of Dr. James Missett, a psychiatrist who she had retained. Dr. Missett opined Horton “would appear to have required immediate medical attention” of the sort ordered by the court on March 2, 2009. Dr. Missett stated the “records” failed

to indicate the court-ordered examination was ever performed. Dr. Missett believed no medical/psychiatric assessment was conducted at a time when such an assessment might have disclosed that Horton suffered from a mental or emotional disorder causing him to be a danger to himself.

#### **5. *Reply Brief of Deputy Kidder***

Deputy Kidder argued in his reply that plaintiff's opposition established he was not liable as a matter of law. This was because in response to his separate statement, plaintiff stated Horton was already dead when Deputy Kidder started his shift at 9:45 p.m. on March 29. He argued he could not, therefore, have caused Horton's death. Additionally, he argued plaintiff had no evidence he had any contact with Horton. He submitted a supplementary declaration stating he "never had any physical contact with John Horton," had "never hit, beaten, slapped, kicked, punched or otherwise touched John Horton," and had never opened a jail cell housing Horton until the morning of March 30, 2009, when Horton was already dead. In response to Deputy Kidder's reply, plaintiff filed a notice of errata regarding her response to the separate statement. She asserted her response was supposed to state Horton had died *by 3:45 a.m.*, not 9:45 p.m.

#### **6. *Reply Brief of the County***

The County argued in reply that plaintiff could not rely on the exception to immunity for failure to provide immediate medical care because she did not plead the exception in either her government claim or her complaint. Moreover, the County objected to the statement in Dr. Missett's declaration that "the records" failed to indicate Horton received the medical examination ordered by the court in the March 2 order. In fact, medical records produced by the County in discovery indicated Horton was showed in response to the March 2 order. A "Medical Services Bureau Court Order Worksheet" indicated the court requested a medical examination and treatment for "drug withdrawals" on March 2, 2009. The same form indicated Horton was sent to Los Angeles County + USC Medical Center and was evaluated by two different doctors, one on March 4, 2009, and one on March 6, 2009. He was diagnosed with Ecstasy

intoxication and his prognosis was “good.” The records listed his “care and treatment” as “continuing.”

### **7. Court’s Ruling Granting Motions for Summary Judgment**

The court issued an order granting summary judgment and/or judgment on the pleadings for the County, Sheriff Baca, and Deputy Kidder. The court held plaintiff had “submitted expert testimony that raises a triable issue of fact whether Horton took his own life or was the victim of an assault and/or murder by persons who allegedly also hanged him in his cell.” But regardless of how Horton died, the court held the moving defendants were entitled to judgment.

In pertinent part, the court ruled the County was protected by statutory immunity (§ 844.6, subd. (a)(2)) against all causes of action plaintiff brought as a representative of Horton’s estate. The court rejected plaintiff’s reliance on the exception to immunity for failure to provide immediate medical care. Deeming the motion for summary judgment a motion for judgment on the pleadings, the court found the complaint failed to allege any failure to respond to an immediate need for medical care. Further, the March 2 order failed to raise a triable issue as to any failure to provide immediate medical care. Similarly, Deputy Ezeonye’s testimony that Horton was quiet and moody on March 29 did not raise a triable issue as to the need for immediate medical care.

As to Deputy Kidder’s motion, the court ruled plaintiff failed to raise a triable issue of fact on causation. Citing to *Lucas v. City of Long Beach* (1976) 60 Cal.App.3d 341, the court held an inmate’s act of committing suicide was an intervening, intentional act that superseded any alleged negligence by jailers. Even if Horton had not committed suicide but had died as a result of an assault, the court held plaintiff had not proffered any evidence that Deputy Kidder was somehow involved in the assault. Without that evidence, the alleged assault operated as an intentional act that superseded Deputy Kidder’s alleged negligence. Additionally, plaintiff agreed Deputy Kidder reported to work at 9:45 p.m. on March 29 and stated in her response to the separate statement that Horton had died by 9:45 p.m. Accepting this admission, the court found Deputy Kidder could not have caused Horton’s death, if he was dead before Deputy Kidder reported to

work. The court struck plaintiff's notice of errata -- which stated her response to the separate statement was in error and should have said Horton died by 3:45 a.m., not 9:45 p.m. -- as an untimely alteration of a material fact.

Additionally, as to the failure to provide immediate medical care, there was no evidence Deputy Kidder knew or had reason to know Horton needed immediate medical care and failed to provide it. Regarding the cause of action for violation of civil rights, the court agreed with Deputy Kidder that plaintiff could not recover any damages for "hate crimes" against Horton or plaintiff. The court found it undisputed that Deputy Kidder had no contact with plaintiff and did not know her.

#### **8. Court's Ruling on Pitchess Motion**

The court heard argument on plaintiff's *Pitchess* motion the same day it heard argument on the defense summary judgment motions. At argument, plaintiff's counsel conceded the County had produced one category of requested documents -- the homicide investigation file. The court denied the motion except as to the personnel files for Deputy Kidder, Sergeant Yates, and three other deputies who were on duty the night of Horton's death. The court ruled any documents in these deputies' files relating to the internal affairs investigation into Horton's death might be discoverable and set a date for an in camera hearing to review the personnel files with the Department's custodian of records. After conducting the in camera hearing, the court ordered the County to produce transcribed interviews with Deputy Kidder, Sergeant Yates, and one other deputy found in the officers' personnel files. After the court announced its ruling, plaintiff's counsel asked whether there were any "relevant findings issued in the personnel files" that would be produced. The court responded in the negative and stated it did not think "findings were matters that are appropriate to produce."

#### **STANDARDS OF REVIEW**

We review the trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Collins* (2004) 115 Cal.App.4th 137, 151.) Likewise, we review for abuse of discretion the court's ruling on a motion to continue summary judgment proceedings

under Code of Civil Procedure section 437c, subdivision (h). (*Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, 1038.)

Defendants may move for summary judgment when they contend an action has no merit. (Code Civ. Proc., § 437c, subd. (a).) The defendants have met their burden of showing a cause of action is meritless if they demonstrate one or more elements of the cause of action cannot be established or there is a complete defense to the cause of action. (§ 437c, subd. (p)(2).) Once the defendants have met that burden, the burden shifts to the plaintiff to set forth specific facts showing a triable issue of material fact. (*Ibid.*) The court shall grant the motion for summary judgment if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).)

“An issue of fact can only be created by a conflict of evidence. It is not created by ‘speculation, conjecture, imagination or guess work.’” (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.) A genuine issue of fact exists if, and only if, the evidence would allow a reasonable juror to find the underlying fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

We review the grant of summary judgment de novo, applying the same legal standard and analysis as the trial court in determining whether any genuine issues of material fact exist or whether the moving party is entitled to judgment as a matter of law. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 390.) We accept as true the facts shown by the losing party’s evidence and reasonable inferences from that evidence, and we resolve evidentiary doubts or ambiguities in the losing party’s favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.)

To the extent the court construed and granted the defense motions as motions for judgment on the pleadings, we review that determination de novo, meaning we independently decide whether the complaint is legally sufficient to state a cause of action.

(*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) “A judgment on the pleadings in favor of the defendant is appropriate when the complaint fails to allege facts sufficient to state a cause of action. (Code Civ. Proc., § 438, subd. (c)(3)(B)(ii).)” (*Ibid.*) We treat the properly pleaded allegations of the complaint as true and liberally construe those allegations with a view to attaining substantial justice between the parties. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401.) When liberally construing allegations, we may also draw reasonable inferences from the facts pled. (*Ibid.*) “““Our primary task is to determine whether the facts alleged provide the basis for a cause of action against defendants under any theory.””” (*Ibid.*, quoting *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1232.)

## **DISCUSSION**

### ***1. Timeliness of Appeal***

As a preliminary matter, the County contends plaintiff’s notice of appeal is untimely. We hold otherwise. The court filed the order granting summary judgment or judgment on the pleadings on February 1, 2012. The County and Sheriff Baca served plaintiff with notice of the ruling on February 9, 2012. Also attached to the notice was a minute order dated February 1, 2012, which stated the court had ruled on the defense motions for summary judgment and had “sign[ed] and file[d] the judgment this date.” The minute order contained the clerk’s certificate of mailing stating the clerk had “served Notice of Entry of the above minute order” upon the parties.

The record does not contain a separate judgment dated February 1, 2012, and the docket does not show a judgment entered on or around that date. On April 24, 2012, the County and Sheriff Baca served plaintiff with notice and a copy of an “amended judgment” in favor of the County, Sheriff Baca, and Deputy Kidder, entered on March 13, 2012. This March 13 judgment appears on the docket as “Judgment (Amended Judgment),” and no judgment appears in the docket before that. Plaintiff filed her notice of appeal on May 11, 2012.

The County argues the time to appeal began running on February 1, 2012, when the clerk served plaintiff with notice of the minute order stating the judgment was signed



and filed on that date. The County admits it is not aware of a separate judgment signed by the trial court on February 1, and indeed, there is no evidence in the record of such. We decline to construe the minute order as a judgment. It falls short because it contains no express declaration of the ultimate rights of the parties, such as ““plaintiff shall take nothing.”” (Davis v. Superior Court (2011) 196 Cal.App.4th 669, 673.) The March 13 “amended” judgment, by contrast, contains an express declaration of the ultimate rights of the parties. (“IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs shall take nothing by their complaint in this matter as against defendants County of Los Angeles, Christopher Kidder and Leroy Baca . . . .”) Furthermore, the minute order does not even purport to be the judgment, but merely refers to a separate (and apparently nonexistent) judgment.

The March 13 amended judgment is the judgment for our purposes. Plaintiff received notice of that on April 24, 2012. Her notice of appeal on May 11, 2012, was therefore timely. (Cal. Rules of Court, rule 8.104, subd. (a)(1)(B).)

## **2. Pitchess Motion and Motion to Continue**

Plaintiff contends the court erred in denying the *Pitchess* motion with respect to (1) any conclusions and findings of internal affairs investigators, and (2) documents relating to the scanner gate scandal. She also contends the court erred in denying her motion to continue the summary judgment. We are not persuaded.

A trial court has broad discretion in determining what to disclose pursuant to a *Pitchess* motion, and we will reverse the court’s determination only on a showing of abuse of discretion. (Haggerty v. Superior Court (2004) 117 Cal.App.4th 1079, 1086.) According to Evidence Code section 1045, subdivision (a), parties have a “right of access to records of complaints, or investigations of complaints . . . concerning an event or transaction in which the peace officer or custodial officer” at issue participated, “provided that information is relevant to the subject matter involved in the pending litigation.” While plaintiff argues the internal affairs investigators’ conclusions and findings were relevant, she cites no authority to support this assertion. In fact, the case she cites held the law enforcement department in an excessive force lawsuit *did not* have

to disclose portions of an internal affairs file representing the investigating officer's analysis and conclusions. (*Haggerty v. Superior Court, supra*, at p. 1088 ["There is nothing contained in the officer's subjective impressions of the facts found during the investigation that would be admissible at trial or lead to the discovery of admissible evidence."].) If this were a criminal proceeding, the *Pitchess* statutory framework would absolutely preclude the disclosure of any investigating officer's conclusions. (Evid. Code, § 1045, subd. (b)(2).) Plaintiff's conclusory assertions that the investigating officers' subjective conclusions and findings were relevant do not demonstrate an abuse of discretion. Likewise, plaintiff has not demonstrated error with respect to the scanner gate documents. Again, her argument consists only of a conclusory assertion that the scanner gate documents were "relevant and essential" to her opposition, without any explanation as to why.

Neither has plaintiff demonstrated the court erred in denying her motion to continue. Plaintiff again asserts the court abused its discretion without much further argument or citation to authority. She also fails to include in the record a transcript of the hearing on the motion to continue, and the minute order containing the ruling states merely that the motion was "argued and denied." We may reject plaintiff's contention for these failures alone. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [rejecting parties' claim for failure to provide an adequate record demonstrating error]; *McComber v. Wells, supra*, 72 Cal.App.4th 512, 522 [treating contentions as waived when unsupported by legal argument and citation to authority].)

Even disregarding these failures, plaintiff has not demonstrated error. We review the court's denial of a continuance for abuse of discretion. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) The summary judgment statute provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." (Code Civ. Proc., § 437c, subd. (h).) Lack of diligence is a ground for

denying a request for continuance. (*Cooksey v. Alexakis, supra*, at p. 257.) “Although the statute does not expressly mention diligence, it does require a party seeking a continuance to declare why ‘facts essential to justify opposition . . . cannot, for *reasons stated, then* be presented’ ([Code Civ. Proc.], § 437c, subd. (h), italics added), and courts have long required such declarations to be made in good faith. [Citations.] There must be a justifiable reason why the essential facts cannot be presented. An inappropriate delay in seeking to obtain the facts may not be a valid reason why the facts cannot then be presented. . . . [Citation.] A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner.” (*Ibid.*)

Here, plaintiff demonstrated a lack of diligence. Evidence the County submitted showed plaintiff had previously requested the materials at issue in discovery. Specifically, plaintiff requested (1) all documents regarding “the Department of Internal Affairs investigation of the death of” Horton; (2) all documents regarding “the Department of Internal Affairs investigation of Deputy Christopher Kidder’s row checks on March 30, 2009”; (3) all documents regarding “the Department of Internal Affairs investigation of the bar code scanning system concerning the row checks on March 30, 2009”; and (4) all documents regarding “any actual knowledge” or “any constructive knowledge” of the Department from March 4, 2009, to March 30, 2009, “that Deputy Christopher Kidder was not performing all the required row checks.” On June 17, 2011, the County served responses to these requests objecting to them on numerous grounds and stating it would not produce documents. Plaintiff waited nearly six months, and until after the defendants had filed their summary judgment motions, to file the *Pitchess* motion seeking the same documents, even though she realized her claimed need for them much earlier. And plaintiff has not explained why she did not move the court for these documents sooner. Under these circumstances, we cannot say the court abused its discretion. We turn now to the court’s summary judgment rulings.

### **3. Summary Judgment or Judgment on the Pleadings for the County Was Not Proper**

The trial court granted summary judgment and/or judgment on the pleadings for the County on the ground that it was immune from liability. The Government Claims Act (§ 810, subd. (b)) governs all actions against public entities and public employees. (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 182; *County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1267.) “[T]he very purpose of the [Government Claims] Act is to afford categories of immunity where, but for its provisions, public agencies or employees would otherwise be liable under general principles of law.” (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 985.) The Legislature enacted it “to confine potential governmental liability to rigidly delineated circumstances,” not to expand plaintiffs’ rights against governmental entities. (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776.)

Under the Government Claims Act, specifically section 844.6, “a public entity is not liable for . . . [¶] . . . [a]n injury to any prisoner.” (§ 844.6, subd. (a)(2).) A “public entity” includes any county of the state, and a “prisoner” includes an inmate of a jail. (§§ 811.2, 844.) The term “injury” includes death, injury to a person, “or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.” (§ 810.8.) This governmental immunity applies to any tortious conduct, whether intentional or negligent. (*Richardson-Tunnell v. School Ins. Program for Employees (SIPE)* (2007) 157 Cal.App.4th 1056, 1062; *Wright v. State of California* (2004) 122 Cal.App.4th 659, 672.) Further, specific statutory immunity generally prevails over any liability created by statute outside of the Government Claims Act, including those Civil Code sections under which plaintiff claims civil rights violations (Civ. Code, §§ 51.7, 52). (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 231; *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 510, 512.) Moreover, under section 844.6, a public entity is immune to liability for wrongful death in an action brought by a prisoner’s heirs. (*May v. County of Monterey* (1983) 139 Cal.App.3d 717, 720-721.) “In sum, section 844.6 says that a prisoner who experiences an injury which otherwise would be actionable for the

reason that he is a prisoner may not recover against the public entity. Section 844.6 does not concern itself with either the type of duty which may be breached or with kinds of injury which may be suffered; it concerns itself only with status as a prisoner and with injuries which, but for that status, would give rise to a cause of action.” (*Hart v. County of Orange* (1967) 254 Cal.App.2d 302, 306.)

Plaintiff advances two arguments on appeal to defeat the County’s immunity. First, she argues section 844.6 “is unconstitutional to the extent it provides immunity to a public entity for inflicting cruel and unusual punishment in violation of Article I, section 17 of the California Constitution and the Eighth Amendment.” Second, she urges us to apply the statutory exception to immunity for failure to provide immediate medical care.

Although we do not find her Eighth Amendment argument to be persuasive, we agree the County is not entirely immune to suit because plaintiff adequately alleged an exception in the failure to summon immediate medical care. Accordingly, the County was not entitled to judgment on the wrongful death and negligence causes of action.

**a. Constitutionality of Section 844.6**

Plaintiff does not cite any authority for the specific proposition that section 844.6 is unconstitutional as a violation of a prisoner’s right against cruel and unusual punishment. The plain language of the statute does not impose any punishment. Indeed, it is not a punitive statute contained in the Penal Code. What plaintiff seems to argue is that, when applied to a situation in which deputies battered Horton, the statute would permit cruel and unusual punishment. But in such a case, the deputies’ purported actions inflicted the alleged cruel and unusual punishment, not the statute providing for immunity.

Plaintiff’s only support for her argument that section 844.6 is unconstitutional is a citation to the United States Supreme Court case, *Hudson v. McMillian* (1992) 503 U.S. 1, 7-8 (*Hudson*). *Hudson* involved a prisoner’s lawsuit against three correctional officers under title 42 United States Code section 1983, and the prisoner alleged the officers violated the Eighth Amendment proscription against cruel and unusual punishment. (*Hudson*, at p. 4.) The court “decide[d] whether the use of excessive physical force

against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury.” (*Ibid.*) The case did not involve the application of an immunity statute to the prisoner’s claim. And unlike the plaintiff in *Hudson*, plaintiff’s complaint did not allege deputies’ actions violated the Eighth Amendment or the California Constitution’s proscription against cruel and unusual punishment. Plaintiff has forfeited the contention because she has not cited any authority besides *Hudson*, which relates not at all to governmental immunities. (*McComber v. Wells, supra*, 72 Cal.App.4th at p. 522.)

**b. Section 845.6 Exception to Immunity**

On the other hand, plaintiff adequately stated a violation of the duty to summon immediate medical care under section 845.6, for which the County is *not* immune. Section 845.6 immunizes public entities and public employees “for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody,” *except* that “a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care.”

Section 845.6 creates limited public entity liability. (*Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1070 (*Castaneda*); *Hart v. County of Orange, supra*, 254 Cal.App.2d at p. 306.) “It has to do with something which exists neither privately nor publicly, an obligation of help.” (*Hart v. County of Orange, supra*, at p. 306.) Under the circumstances set forth in section 845.6, “a duty of ‘reasonable action to summon’ medical care is created.” (*Hart v. County of Orange*, at p. 306.)

Here, the trial court found plaintiff’s complaint did not allege any failure to respond to an immediate need for medical care, and the County was therefore entitled to judgment on the pleadings. We disagree. The court considered only plaintiff’s theory that Horton evidenced a need for medical care relating to psychosis and had he been treated, he would not have committed suicide. If this were all plaintiff alleged, we might

agree with the trial court's conclusion.<sup>6</sup> But plaintiff's separate theory that deputies assaulted and battered Horton also included the theory that they failed to summon immediate medical care after the battery, and the trial court's order did not expressly consider this theory as it related to summoning medical care. Under this theory, the County was not entitled to judgment on the pleadings or summary judgment.

The County contends the complaint frames the issues on summary judgment, and plaintiff did not plead a violation of section 845.6 in the complaint. It further argues she did not allege such a violation in her prelawsuit claim, also entitling the County to judgment. Preliminarily, the County has a too narrow view of the claims presentation requirement. The Government Claims Act requires that any civil complaint for money or damages be first presented to and rejected by the relevant public entity in a claim for damages. (*Brownell v. Los Angeles Unified School Dist.* (1992) 4 Cal.App.4th 787, 793.) The claim must fairly reflect each theory of recovery alleged in the lawsuit, or the complaint is vulnerable to a demurrer or motion for judgment on the pleadings. (*Id.* at pp. 793-794.) The claim must state, among other things, the date, place and "other circumstances of the occurrence" that gave rise to the claim and a general description of

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<sup>6</sup> Plaintiff relies on the March 19 and March 2 orders to argue the officers and the County were on notice Horton needed immediate medical care. As far as the March 19 order goes, that was the order committing Horton to prison, and it simply "recommend[ed] consideration for [the] fire camp program and [a] CDC facility [that] has [a] drug treatment program." The mere recommendations as to Horton's placement did not establish or impart knowledge of an *immediate need* for medical care. (§ 845.6.) As to the March 2 order for a medical examination, there was no triable issue because the evidence in the record demonstrated Horton actually received medical care in response to that order. Plaintiff's expert declaration stated Horton "would appear to have required immediate medical attention" of the sort ordered in the March 2 order, and the "records" failed to indicate the court-ordered examination was ever performed. The County objected to the statements on the ground they lacked foundation, and it submitted evidence of medical records showing Horton was, in fact, examined and treated in response to the March 2 order. Accordingly, there was no failure to summon immediate care with respect to the March 2 order.

the “indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.” (§ 910, subds. (c)-(d).) The purpose of the claims presentation requirement is to give “the public entity the opportunity to evaluate the merit and extent of its liability and determine whether to grant the claim without the expenses of litigation.” (*Crow v. State of California* (1990) 222 Cal.App.3d 192, 202.) The claims presentation requirement also informs the public entity of potential liability for purposes of budgeting. (*Munoz v. State of California, supra*, 33 Cal.App.4th at p. 1776.)

While a plaintiff may not maintain a theory of liability not reflected in a claim, the claims presentation requirement is not designed to defeat meritorious lawsuits when a claim’s purposes have been satisfied. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 446 (*Stockett*).) Thus, a claim is not required to be technically perfect; it need only substantially comply with the statutory requirements. (See, e.g., *Connelly v. County of Fresno* (2006) 146 Cal.App.4th 29, 38.) In addition, the courts should construe claims liberally; the former rule of strict and literal compliance with the Government Code’s claims presentation rules has now “disappeared from California law.” (Cf. *Munoz v. State of California, supra*, 33 Cal.App.4th at p. 1778 [petition for relief from claims filing statutes’ procedural requirements]; see also *Stockett, supra*, at p. 449 [“[W]e are mindful that “[s]o long as the policies of the claims statutes are effectuated, [the statutes] should be given a liberal construction to permit full adjudication on the merits.””].) “The test for substantial compliance is whether the face of the filed claim discloses sufficient information to enable the public entity to make an adequate investigation of the claim’s merits and settle it without the expense of litigation.” (*Connelly v. County of Fresno, supra*, at p. 38.)

In this case, plaintiff’s claim substantially complied with the claims presentation requirements. The claim provided enough information for the County to conduct an investigation and evaluate the merits of plaintiff’s claims. The claim was part of the summary judgment record. Under a heading titled, “Date, Place & Circumstances Surrounding the Claim,” plaintiff alleged that on or about March 30, 2009, Horton was in



solitary confinement in the men's central jail, and "doe" deputies "facilitated" Horton's death by, among other things, assaulting and battering Horton, using excessive and deadly force against him, and allowing his death, "which was preventable." Plaintiff further claimed the County's and the deputies' actions or omissions were the proximate and legal cause of Horton's death. Plaintiff claimed they were thus liable for the wrongful death of Horton. These claims that deputies battered Horton and caused his death on March 30, 2009, were sufficient to prompt a meaningful investigation into the circumstances, including whether deputies battered him *and how they acted afterward*. If an investigation determined there was a battery, any reasonable investigator would have asked whether they left Horton without medical care after the battery, which would have allowed the County to evaluate its potential liability for failure to immediately summon medical care. Especially in view of the liberal construction we should apply to Government Claims Act claim forms, plaintiff's claim was sufficient.

Moving beyond the prelawsuit claim, insofar as the County contends the complaint did not sufficiently plead failure to summon immediate medical care, we also reject this argument. Because Government Claims Act liability is based on statute, a plaintiff must plead liability under the Act with particularity. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 795 (*Lopez*); *Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.) This means "the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate." (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

But these "rules do not deprive the plaintiff of the benefit of the general principle that the courts should liberally construe a complaint" with a view to attaining substantial justice between the parties, in considering whether to grant judgment on the pleadings. (Van Alstyne, *Cal. Government Tort Liability Practice* (Cont. Ed. Bar 1992) § 8.49; see also *Lopez, supra*, 40 Cal.3d at p. 792.) Our Supreme Court has "held that, 'in governmental tort cases "the rule is liability, immunity is the exception" . . . . [And] [u]nless the Legislature has clearly provided for immunity, the important societal goal of

compensating injured parties for damages caused by willful or negligent acts must prevail.” (*Lopez, supra*, at pp. 792-793.)

Mindful of these principles, we conclude the complaint was sufficiently particular. The allegations were detailed enough to support a reasonable inference the elements of liability were met. The allegations of the complaint were similar to the allegations of the Government Code claim. The complaint alleged Horton was in solitary confinement in the men’s central jail, and on or about March 30, 2009, officers acting within the scope of their employment, “for no justified reason and for no lawful justification, physically abused, assaulted, . . . and/or facilitated the hanging death of John Horton.” The complaint also alleged officers “negligently, carelessly, recklessly, intentionally and/or wantonly assaulted or caused to be assaulted, [and] battered John, and/or used excessive deadly force against him and/or allowed his death which was preventable had the Sheriffs been adequately trained, supervised and/or managed,” and the officers’ actions and omissions were the proximate cause of Horton’s death. Moreover, it alleged the defendants breached their duty of care to Horton by, “including but not limited to, failing to protect John Horton.”

From these specific allegations regarding the time, place, nature, and result of the attack, and the allegation officers “facilitated” Horton’s hanging, one may reasonably infer the alleged perpetrators not only attacked Horton but left him without summoning immediate medical care -- else he would not have been found hanging but would have received care before that point. One may also reasonably infer from these alleged facts that the perpetrators, as the persons who committed a battery severe enough to cause death, had reason to know the victim needed immediate medical care after their actions. This is all section 845.6 requires -- that public employees acting within the scope of their employment knew or had reason to know the prisoner needed immediate medical care, and they failed to summon such care. The complaint may be inartfully drafted; it is not, however, fatally defective for failure to be particular. All the facts necessary for the County’s alleged liability are there or may be readily and reasonably inferred. These facts formed the basis for either plaintiff’s negligence cause of action, in which the duty

breached was the duty to summon immediate medical care, or her wrongful death cause of action, in which the failure to summon immediate medical care satisfied the “tort or wrongful act” element of the cause of action. (See *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 283-284 [claim of failure to summon immediate medical care for prisoner alleged under negligence and wrongful death causes of action]; *Hart v. County of Orange, supra*, 254 Cal.App.2d at p. 303 [claim of failure to summon immediate medical care for prisoner alleged under wrongful death cause of action]; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 938, p. 352 [among essential elements of wrongful death are a tort or wrongful act].)

Thus, the County is not assisted by its frequent citation to cases holding the complaint frames the issues for summary judgment, and the plaintiff may not avoid summary judgment by relying on facts or theories not alleged in the complaint. Failure to summon immediate medical care was an issue framed by this complaint. Moreover, any claim the County might make to surprise at plaintiff’s reliance on the failure to summon immediate medical care during summary judgment proceedings would ring hollow. Though the record before us does not include much of the parties’ discovery materials, we see at least one instance in which plaintiff served discovery responses raising this issue. In November 2010, nearly one year before the County filed its summary judgment motion, plaintiff served on the County responses to interrogatories stating: “They beat him [(Horton)] according to the autopsy, they broke his cartilage from [*sic*] his nose, his liver was busted 4 hrs. prior to his death, blunt force trauma to his kidney, muscle in his back, gash on his forehead, shoulder, and pancreas. [¶] . . . *Then they gave him no medical attention until after his death.*” (Italics added.)

The County was not entitled to judgment on the pleadings because the complaint sufficiently alleged plaintiff’s claim, and further, it was not entitled to summary judgment. Given plaintiff’s theory of failure to summon immediate medical care after an assault and battery, the County did not show one or more elements of the wrongful death and negligence causes of action could not be established, nor did it establish a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).)

In sum, the County was not immune to suit for failure to summon immediate medical care under section 845.6. The Legislature clearly carved out an exception to the County's immunity under these circumstances. We conclude plaintiff sufficiently invoked this exception in both her prelawsuit claim and the complaint such that judgment should not have been granted for the County on her wrongful death and negligence causes of action.<sup>7</sup>

#### **4. Summary Judgment for Deputy Kidder Was Not Proper**

Deputy Kidder contends he cannot be liable for wrongful death, negligence, or violation of civil rights because causation is lacking. He asserts Horton's suicide was the independent cause of Horton's death, regardless of his actions. Furthermore, he contends there was no evidence he battered Horton and thus caused his death in that manner. We disagree with Deputy Kidder; there are triable issues of material fact precluding summary adjudication of these causes of action.

##### **a. Wrongful Death**

In his separate statement, Deputy Kidder stated asphyxia due to self-inflicted hanging was the cause of Horton's death, citing the declaration of his expert forensic

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<sup>7</sup> Even if it were the case that plaintiff's pleading was insufficient, judgment for the County should not have been granted without leave to amend. If a court is inclined to grant summary judgment "on the ground that the complaint is legally insufficient, but it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action, the trial court should give the plaintiff an opportunity to amend the complaint before entry of judgment." (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663; see also *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067 ["A motion for summary judgment may effectively operate as a motion for judgment on the pleadings." [Citation.] Where the complaint is challenged and the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend."].) The complaint could have easily been amended to expressly reference section 845.6 and use the phrase "failure to summon immediate medical care," although we do not believe that is required in this case. We do not address this issue further in light of our holding that the complaint was adequate.

pathologist. Plaintiff disputed this fact, citing her expert's declaration, which in turn cited the County coroner's autopsy report. The coroner's autopsy report was inconclusive, to be sure. Dr. Poukens, who conducted the autopsy, determined Horton's cause of death was "hanging and other undetermined factors," noted intra-abdominal injuries that indicated recent blunt force trauma, and noted tissue in the intra-abdominal area showed hemorrhaging or contusions less than four hours old. Horton's time of death was noted as 4:05 a.m. on March 30, 2009. Dr. Poukens could not determine with medical certainty whether the intra-abdominal injuries contributed directly or indirectly to Horton's death. Plaintiff's expert opined Horton's injuries from the ligature around his neck were inconsistent with death by hanging and his intra-abdominal injuries caused his death. This was sufficient to raise a triable issue of fact regarding whether Horton died as a result of self-inflicted hanging or an assault and battery that was made to look like suicide.

The trial court noted plaintiff had successfully raised this triable issue of fact. Nevertheless, it found the issue immaterial because plaintiff failed "to introduce any evidence that Kidder was somehow involved in the alleged assault." This was not the case. As a moving defendant, Deputy Kidder bore the initial burden of showing "the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case . . .'" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) Deputy Kidder's statements in his moving and reply declarations that he had no contact with Horton the night Horton died may have initially demonstrated he did not assault Horton. The inquiry does not end there, however. The burden then shifted to plaintiff to raise a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) Plaintiff did so. Deputy Kidder himself proffered evidence through his declaration that Horton was confined in module 3301 in a single-man cell, a maximum security section of the jail, and that Deputy Kidder was responsible for security checks in that module from March 29, 2009, at 10:00 p.m., to March 30, 2009, at 6:00 a.m. Plaintiff proffered testimony from Deputy Kidder's deposition that Deputy Kidder had access to Horton during that time. No inmates had access to Horton in his single-man, maximum security cell, Deputy

Kidder was the person responsible for Horton's module and for checking on Horton during the period of Horton's death, Deputy Kidder had access to Horton in his cell, and there was conflicting evidence about whether Horton suffered recent blunt force injuries causing his death. A reasonable juror could infer Deputy Kidder's involvement in an assault from these facts. In other words, there was sufficient circumstantial evidence to raise a triable issue of material fact as to Deputy Kidder's liability. At best, his denials of contact present a conflict with the circumstantial evidence that he did have physical contact with Horton.<sup>8</sup> This conflicting evidence is exactly what precludes summary judgment.

Deputy Kidder suggests circumstantial evidence is not enough to defeat summary judgment. He is wrong. "A summary judgment cannot be granted solely because the opposing party's evidence is only circumstantial." (Rylaarsdam et al., Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 2008) ¶¶ 10:272.1.) In determining whether the plaintiff has met the burden of defeating summary judgment, we may consider both direct and circumstantial evidence and all reasonable inferences to be drawn from both. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) The presence of reasonable inferences supporting a judgment for the plaintiff is sufficient to defeat a summary judgment in favor of the defendant. (*Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1060, superseded by statute on other grounds as declared in *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583.)

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<sup>8</sup> This case does not present an instance when "summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations . . . ." (Code Civ. Proc., § 437c, subd. (e).) This rule only applies when "a party is otherwise entitled to a summary judgment." (*Ibid.*) Thus, when a moving defendant has shown one or more elements cannot be established, and there is no disputed issue of material fact, the court may not deny summary judgment because the opposing party contends the moving party's declarant lacks credibility. This is not a case in which Deputy Kidder "is otherwise entitled to a summary judgment."

Deputy Kidder also relies on plaintiff's purported "admission" that Horton had died by 9:45 p.m. on March 29, 2009. This does not assist Deputy Kidder. To review, the deputy's separate statement said he came on duty at 9:45 p.m. on March 29, 2009, checked Horton's cell then, and he saw Horton in the cell where nothing appeared unusual. Plaintiff disputed the fact in her response to the separate statement and stated Horton had died by 9:45 p.m. Deputy Kidder asserted, and the trial court agreed, this was an admission that he could not have caused Horton's death. First, there was actually no evidence in the record to support this unsworn statement that Horton was dead by 9:45 p.m. "[A] separate statement is not evidence; it *refers* to evidence submitted in support of or opposition to a summary judgment motion." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4.) Plaintiff cited Dr. Comparini's declaration, but the expert simply opined Horton's death was earlier than stated in the coroner's report. She did not opine as to the specific time of death. Plaintiff did not include the second piece of evidence cited, a page of Deputy Kidder's deposition, with her evidence submitted in opposition. Second, it seems evident plaintiff's statement that Horton was dead by 9:45 p.m. was a mistake. Contrary to this statement, she argued throughout her opposition brief that Deputy Kidder and perhaps other deputies assaulted Horton, thereby causing his death. We are not inclined to construe this statement as a judicial admission under these circumstances. (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1225, fn. 2 ["[W]e fail to see how defendants can rely on the [plaintiffs'] mistaken response to bolster their motion when the response to the separate statement is not evidence because it is not under oath, nor is it verified. Accordingly, we do not consider the mistaken response of plaintiffs as a 'judicial admission' or concession on the issues of liability and causation."].)

To summarize, there existed a triable issue of material fact regarding causation as to Deputy Kidder under plaintiff's assault and battery theory. Causation was an essential element of the wrongful death cause of action. (5 Witkin, Cal. Procedure, *supra*, Pleading, § 938, p. 352 [among essential elements of wrongful death are the tort or

wrongful act and resulting death].) This triable issue precluded summary adjudication of plaintiff's wrongful death cause of action in favor of Deputy Kidder.

**b. Negligence**

Deputy Kidder contends he is not liable for negligence because Horton's suicide was the cause of Horton's death, not any of Deputy Kidder's actions or failures to act. He relies on *Lucas v. City of Long Beach, supra*, 60 Cal.App.3d 341, as did the trial court's ruling. Deputy Kidder might be right if there were no triable issue of fact as to the cause of Horton's death and Horton did, indeed, commit suicide. But this is not the case. If Horton died as the result of an assault and battery, there is still a triable issue as to whether Deputy Kidder's negligence caused it.

We begin with a discussion of *Lucas v. City of Long Beach*. The plaintiff in *Lucas* was the mother of an inmate who had committed suicide while in custody. She alleged wrongful death against the public entity and the officer who was on duty and responsible for monitoring the inmate. (*Lucas v. City of Long Beach, supra*, 60 Cal.App.3d at p. 344.) State regulations of the type of facility at issue required inmates to be observed by a custodian at least once an hour. (*Id.* at p. 345.) The officer admitted he did not check on the inmate between 2:00 a.m. and 4:55 a.m., when the officer found the inmate hanging by a noose. (*Ibid.*)

The officer and his public entity employer appealed from a jury verdict in favor of the plaintiff. (*Lucas v. City of Long Beach, supra*, 60 Cal.App.3d at p. 345.) First, the court noted the "general rule" that "a jailer is not liable to a prisoner in his keeping for injuries resulting from the prisoner's own intentional conduct," and absent "some possible special circumstances" the jailer had no duty to prevent the prisoner from taking his own life. (*Id.* at p. 349.)

Having decided this, the court went on to "consider whether [the officer's] failure to make hourly inspection provides a special basis of liability." (*Lucas v. City of Long Beach, supra*, 60 Cal.App.3d at p. 350.) The court "assume[d], as the jury found, that the failure was negligence" and believed it was unnecessary "to discuss the many possible circumstances in which that failure might give rise to liability." (*Ibid.*) It was clear,



however, the “plaintiff’s case founder[ed] on the element of causation.” (*Ibid.*) The autopsy surgeon testified the inmate could have survived for up to 15 minutes while hanging from the noose. Allowing an additional 40 minutes to make the noose, the court concluded there would have been sufficient time for the entire event to occur in between the officer’s hourly checks, even if he had conducted them as required. (*Id.* at p. 351.) Further, the inmate did not have to complete the act within one hour, but could have been interrupted by the officer’s inspection and then resumed the process after that. The evidence showed the mattress cover from which the inmate made the noose was torn and the ripped edges were tucked back such that it was “doubtful” the officer would have seen the inmate’s preparations, had the officer conducted a check while the preparations were ongoing. (*Ibid.*) Thus, there was “no evidence in the record from which it could reasonably be inferred the hourly inspection would have prevented the suicide.” (*Ibid.*) The court wrapped up by noting “[t]he intentional act of a third person is a superseding cause of harm and relieves the original actor of liability unless such act was reasonably foreseeable or the failure to foresee such act was a factor in the original negligence.” (*Ibid.*) The court explained it agreed with the jury’s conclusion that the officer could not have foreseen the likelihood of the inmate harming himself. Ultimately, the court held the jury’s finding of causation was pure speculation and reversed the judgment for the plaintiff. (*Ibid.*)

In this case, Deputy Kidder was also required to perform regular checks. Title 15, section 1027 of the California Code of Regulations requires a sufficient number of personnel at each local detention facility to conduct at least hourly “safety checks” of inmates. The code defines “safety checks” as “direct, visual observation . . . to provide for the health and welfare of inmates.” (Cal. Code Regs., tit. 15, § 1006.) Department policy apparently required more frequent half-hour safety checks. Deputy Kidder’s declaration demonstrated he did not do safety checks of his module at the required interval, and his last check before the 3:45 a.m. check when he found Horton hanging was at 2:15 a.m. Consistent with *Lucas v. City of Long Beach*, we will assume he was

negligent because he had a duty to perform the required checks and he breached that duty. Deputy Kidder does not argue otherwise.

Even so, the deputy presented evidence his failure to conduct the safety checks would not have prevented a suicide, as in *Lucas v. City of Long Beach*. His expert opined the entire process of asphyxiation by hanging occurs within 10 to 15 minutes.<sup>9</sup> Even if Deputy Kidder had performed half-hour safety checks, it was possible Horton could have fashioned a noose and died in the 30-minute period between checks. Thus, the safety checks would not have necessarily prevented the suicide. The essential element of causation in a negligence cause of action means that the defendant's negligence was a "substantial factor" in causing the plaintiff's harm. (CACI No. 400.) Conduct is not a substantial factor in causing harm "'if the harm would have been sustained even if the actor had not been negligent.'" (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240; see CACI No. 430 ["Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."].) Deputy Kidder presented evidence Horton could have committed suicide even if the deputy had conducted the required security checks.

This showing of lack of causation shifted the burden to plaintiff to show a triable issue on the matter. This plaintiff did not do. She did not, for example, dispute the opinion of Deputy Kidder's expert that asphyxiation is complete in 10 to 15 minutes. Instead, she relies on the statement in *Lucas v. City of Long Beach* that a superseding cause relieves an actor of liability "unless [the superseding] act was reasonably foreseeable or the failure to foresee such act was a factor in the original negligence."

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<sup>9</sup> Although Deputy Kidder did not highlight this particular statement of Dr. Fukumoto in the separate statement, the deputy submitted the doctor's declaration with the moving papers, and plaintiff was obviously well aware of the doctor's declaration and had the opportunity to debunk it with her own evidence. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 438.) A court has discretion to consider all evidence presented by a moving party, even evidence not appearing in the separate statement. (*Id.* at p. 437; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315-316.)

(*Lucas v. City of Long Beach*, *supra*, 60 Cal.App.3d at p. 351.) She contends whether Horton's actions were reasonably foreseeable was a fact question for the jury.

Her reliance on superseding cause principles is misplaced. Superseding cause is an affirmative defense. (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 574; CACI No. 432.) The doctrine comes into play only after the defendant is found to be the actual cause of the plaintiff's injury. (*Maupin v. Widling*, *supra*, at p. 574; *Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199.) Here, Deputy Kidder's evidence showed he could not be the actual cause of Horton's suicide through the failure to conduct safety checks. He was not presenting an affirmative defense, but was negating the essential element of causation. The statements in *Lucas v. City of Long Beach* regarding superseding cause were informative but superfluous in the sense that the court had already determined causation did not exist, and it was not necessary to reach the affirmative defense of superseding cause.

Still, *Lucas v. City of Long Beach* only assists Deputy Kidder if Horton committed suicide. Deputy Kidder failed to show his negligence could not have contributed to Horton's death by assault and battery. A physical attack severe enough to lead to death likely would have involved a certain amount of noise, including cries from the victim. Assuming Deputy Kidder did not participate in any such attack on Horton, he was nevertheless responsible for the module where Horton was housed. If he saw or even heard what sounded like an attack occurring in a single-man cell in his module, he should have investigated. (See *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1389-1390 ["Case law holds that 'there is a special relationship between jailer and prisoner, imposing on the former a duty of care to the latter.' [Citation.] . . . Prisoners are vulnerable. And dependent. Moreover, the relationship between them is protective by nature, such that the jailer has control over the prisoner, who is deprived of the normal opportunity to protect himself from harm inflicted by others."]; *Molar v. Gates* (1979) 98 Cal.App.3d 1, 18 ["[O]ne of the primary goals of prison administration is physical protection of the inmates."].) And if he was or should have been aware of other officers using an unreasonable amount of force on an inmate in his care, his failure to prevent or

halt an attack or summon immediate medical care could well lead to liability for negligence. Deputy Kidder did not present evidence in his separate statement that he did not see or hear an attack occurring. Under the assault and battery theory, he did not sufficiently establish one or more elements of negligence are lacking. The burden never shifted to plaintiff to raise a triable issue of fact. He was thus not entitled to summary adjudication on negligence.

### **c. Violation of Civil Rights**

Summary adjudication of the cause of action for violation of civil rights also was not appropriate. The court ruled in favor of Deputy Kidder because it agreed with the deputy's argument below that plaintiff could not recover damages for any "hate crimes" causing injury to Horton. Deputy Kidder's trial court briefing argued plaintiff could not allege a survivor action for violation of Horton's civil rights and relied solely on *Ure v. Maggio Bros. Co.* (1938) 24 Cal.App.2d 490. He quoted the following from *Ure*: "In actions by a parent, either for the death or the injury of a child, the damages to be allowed are those, and those only, which have been, or may be, suffered by the parent. No damages can be given in such an action for pain or anguish inflicted on the child, or for any pecuniary injury personal to such child.'" (*Id.* at p. 491.) *Ure* was speaking solely about the damages recoverable for wrongful death and not about the ability to bring survivor causes of action in general. (*Ibid.*)

Plaintiff brought the violation of civil rights cause of action as representative of Horton's estate. "A cause of action that survives the death of a person passes to the decedent's successor in interest and is enforceable by the 'decedent's personal representative . . .'" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264.) Survivor causes of action are distinct from a cause of action for wrongful death. Wrongful death is a new cause of action vesting in the heirs of the decedent on his or her death. (*Ibid.*) By contrast, "[t]he survival statutes do not create a cause of action. Rather, '[t]hey merely prevent the abatement of the cause of action of the injured person,'" and provide for its postdeath enforcement. (*Ibid.*) Damages for a survivor

cause of action are limited to those sustained by the decedent or incurred before death. (*Id.* at p. 1265)

The court's conclusion that plaintiff could not bring a survivor cause of action for violations of Horton's civil rights was not correct. Nothing in the survivor statute excludes causes of action for violation of civil rights from survival principles. (Code Civ. Proc., § 377.20, subd. (a) ["Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period."].) And nothing in Civil Code section 52.1 -- on which plaintiff bases the violation of civil rights action -- excludes the cause of action from survivor principles.

Deputy Kidder also contends he was entitled to summary adjudication because there was no evidence he had contact with Horton. As we determined in part 4.a., there was a triable issue of fact regarding the deputy's contact with Horton such that summary adjudication is precluded. The deputy further asserts there was no evidence that race was a motivating factor for any of his alleged actions. This is not significant. "To obtain relief under Civil Code section 52.1, a plaintiff need not allege the defendant acted with discriminatory animus or intent . . . ." (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 882.) Lastly, Deputy Kidder argues plaintiff cannot bring a survivor cause of action because she did not file the required affidavit under Code of Civil Procedure section 377.32. Deputy Kidder did not raise this argument below and does not explain why he failed to do so. Plaintiff therefore had no occasion to present evidence she filed an affidavit, and the court had no opportunity to resolve the issue. Deputy Kidder forfeited the argument. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

### **DISPOSITION**

The judgment is affirmed in part and reversed in part. The judgment for Sheriff Baca is affirmed. The judgment for the County on the wrongful death and negligence causes of action is reversed. The judgment for Deputy Kidder on the causes of action for wrongful death, negligence, and violation of civil rights is reversed. In all other respects,

the judgment is affirmed. Sheriff Baca shall recover his costs on appeal. Plaintiff shall recover her costs related to appealing the judgment for Deputy Kidder and the County.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.