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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STELLA CARRERA, Plaintiff and Appellant, v. NANCY MCCULLOUGH et al., Defendants and Respondents.	B245402 (Los Angeles County Super. Ct. No. BC454283)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan S. Rosenfield, Judge. Affirmed.

Ellen Hammill Ellison for Plaintiff and Appellant.

Stone Busailah, Michael P. Stone, Muna Busailah, and Robert Rabe for Defendants and Respondents Nancy McCullough and Daniel Widman.

Michael N. Feuer, Amy Jo Field, and Blithe S. Bock, City Attorneys for Defendant and Respondent City of Los Angeles.

Stella Carrera (appellant) appeals from a judgment following a bench trial on her causes of action for assault and battery; violation of the California Constitution and Civil Code sections 51.7 (Ralph Act) and 52.1 (Bane Act); and intentional infliction of emotional distress against Nancy McCullough (McCullough) and the City of Los Angeles (City) (collectively "respondents"). The trial court ruled in favor of appellant on her causes of action against McCullough for battery and intentional infliction of emotional distress. However, the court ruled in favor of the City on all causes of action and in favor of both respondents on the causes of action for Ralph Act and Bane Act violations.

Appellant challenges the trial court's ruling in favor of the City on all causes of action. Appellant also challenges the trial court's decision that no violation of the Bane Act occurred. We find no error and affirm the judgment.

CONTENTIONS

Appellant contends that the trial court should have held the City vicariously liable for off-duty Los Angeles Police Department (LAPD) Detective McCullough's intentional torts. Appellant further contends that the trial court erred in determining that appellant failed to prove a violation of the Bane Act. Finally, appellant contends that the trial court erred in failing to award punitive damages based on the City's ratification of McCullough's acts and McCullough's alleged violation of the Bane Act.

FACTUAL BACKGROUND

On the morning of March 11, 2010, appellant and McCullough were riding the DASH bus to work. Appellant boarded the bus after McCullough was already on board. Appellant took a seat next to McCullough. Appellant heard McCullough say to her, "You're practically on top of me," but she did not respond. Appellant testified that McCullough kept commenting that appellant was fat. McCullough suggested that appellant lose weight and made other verbally insulting comments. Appellant said to McCullough, "This is public transportation . . . if you don't like it, drive." Appellant testified that when McCullough's bus stop approached, McCullough stood up and kicked appellant with her right foot. Appellant was struck on the leg, although there were no marks visible and she was not otherwise injured. She did not cry out or react when

kicked, but stood up in shock. McCullough, who was headed towards the exit, came back in a matter of seconds and hit appellant on the left cheek with her right hand.

McCullough then exited the bus with appellant right behind her. Appellant indicated that she wanted law enforcement assistance. McCullough headed towards police headquarters, and appellant had trouble keeping up with her. Appellant flagged down Officer Kong, who was in a black and white patrol car. Officer Kong began walking in a brisk pace after McCullough, who stopped and spoke with Officer Kong outside of police headquarters.

The bus driver, Net Chavarria, heard some raised voices but was unaware of a problem until McCullough exited the bus then re-boarded with a look of anger and clenched fists. Chavarria put out his right arm to signal McCullough to stop but she ignored the gesture and continued past him. At about that time, he triggered a video recording device which recorded some of the events at issue. He saw McCullough hit appellant in the face and heard McCullough call appellant a bitch. The audio portion of the recording reveals something about calling the police, consistent with appellant's recollection of what was said.

McCullough testified that when appellant boarded the bus and sat down on McCullough's purse, they had a verbal exchange which included some expletives. McCullough pulled her property out from under appellant. Appellant then opened her purse and jabbed McCullough with her elbows. When McCullough stood up to exit she was holding a pole in the bus aisle and facing forward. McCullough testified she was hit on the back of the head. She turned and asked appellant why she had done that, but appellant only glared at her. Appellant then started coming toward McCullough who pushed appellant with her right hand, aiming for appellant's shoulder, but missed and hit her face. When appellant kept coming, McCullough exited the bus followed by appellant.

McCullough admitted to changing her story in various statements and felt she had acted to stop a crime against herself.

Later that day, appellant went to see her doctor, who was not in the office. She then went to the emergency room at Queen of the Valley Hospital in West Covina. She was prescribed medication, and went to her own doctor a few days later. She felt anxiety, confusion and dizziness for some time. She also felt violated. A photograph taken by police the day after the incident does not show any injury except possibly slight discoloration and swelling.

PROCEDURAL HISTORY

Appellant's first amended complaint (FAC) for damages against the City, Officer Daniel Widman[1] (Widman) and McCullough was filed on March 24, 2011. The FAC alleged three causes of action against the named defendants: assault and battery, violation of the Ralph Act and the Bane Act, and intentional infliction of emotional distress.

On February 23, 2012, Widman and McCullough filed a motion for summary adjudication of issues. Widman raised specific reasons why he alone was entitled to summary adjudication on the first cause of action, alleging assault and battery, and the third cause of action, alleging intentional infliction of emotional distress. Both Widman and McCullough raised specific reasons why the claims under both the Ralph Act and the Bane Act had no merit. Widman also argued he was immune from liability as to all causes of action pursuant to Government Code sections 820.2 and 846.

On May 8, 2012, the trial court granted the motion for summary adjudication as to Widman. Appellant filed a motion for reconsideration pursuant to Code of Civil Procedure section 1008, subdivision (a) on May 18, 2012. Appellant's motion was denied and judgment was entered in favor of Widman on June 4, 2012.

The trial of the City and McCullough, began on July 24, 2012. At the conclusion of appellant's case, both the City and McCullough moved for judgment pursuant to Code

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[1] Widman was contacted by Officer Kong to investigate the incident between appellant and McCullough. As explained further below in section I, appellant has not appealed from the final judgment as to Widman, and we have no jurisdiction to consider any appeal as to the issues resolved by that judgment.

of Civil Procedure section 631.8.[2] The City's motion was granted on all causes of action to which it was named a party. The motion of McCullough was granted as to the second cause of action pertaining to the alleged violations of the Bane Act and the Ralph Act.

After closing arguments on August 1, 2012, the case was submitted for decision. On August 6, 2012, the court filed a written tentative decision finding in favor of appellant against McCullough on the first cause of action for battery and on the third cause of action for intentional infliction of emotional distress. The court awarded noneconomic damages of $2,500 and declined to award punitive damages. Appellant requested a statement of decision, which the court filed on September 7, 2012. Final judgment as to McCullough and the City was entered on September 28, 2012.

On November 26, 2012, appellant filed a notice of appeal as to "the Judgment entered 9-28-12."

DISCUSSION

I. Motion to dismiss appeal as to Widman

Widman's motion to dismiss the purported appeal as to the judgment entered in his favor is granted. No notice of appeal has been filed as to the judgment in favor of Widman. When no notice of appeal has been filed within the relevant jurisdictional period, "the appellate court . . . lacks all power to consider the appeal on its merits and must dismiss . . . without regard to considerations of estoppel or excuse." (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674.)

In *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208 (*Bosetti*), one defendant (Keenan) successfully demurred, and judgment was entered in its favor. The matter then proceeded to judgment as to the other defendants. Upon its review of the record on appeal, the Court of Appeal noted that no

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[2] Code of Civil Procedure section 631.8 states, in part: "After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment."

notice of appeal had been filed as to the judgment in favor of Keenan. (*Id.* at p. 1223.) The Court of Appeal dismissed the purported appeal as to Keenan, stating:

> "It is true that a notice of appeal 'must be liberally construed.' (Cal. Rules of Court, rule 8.100(a)(2).) However, there is no construction under which a notice of appeal of a March 17, 2008 '[j]udgment after an order granting a summary judgment motion' can be construed as a notice of appeal of a March 21, 2008 judgment of dismissal following an order sustaining a demurrer of *a different defendant*. We will therefore dismiss the purported appeal from the judgment entered in favor of Keenan."

(*Bosetti, supra*, 175 Cal.App.4th at pp. 1224-1225.)

The same reasoning applies here. While notices of appeal must be liberally construed, there is no way that appellant's appeal of the September 28, 2012 judgment as to McCullough and the City can be construed as an appeal of the June 4, 2012 judgment dismissing Widman following a motion for summary adjudication. We therefore dismiss the purported appeal from the judgment entered in favor of Widman.

II. Respondeat superior liability

Appellant first challenges the trial court's finding that the City was not liable for McCullough's actions under the doctrine of respondeat superior.

A. Relevant legal principles

"The principles governing application of the doctrine of respondeat superior to make an employer responsible for the torts of an employee are familiar and easily stated. '[A]n employer's liability extends to torts of an employee committed within the scope of his employment. [Citation.] This includes willful and malicious torts as well as negligence. [Citation.]' [Citation.] Whether a tort was committed within the scope of employment is ordinarily a question of fact; it becomes a question of law, however, where the undisputed facts would not support an inference that the employee was acting within the scope of his employment. [Citation.]" (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 447.)

An employee need not be on duty in order for vicarious liability to attach. (*Inouye v. County of Los Angeles* (1994) 30 Cal.App.4th 278, 280 [county's policy of deeming its

off-duty safety police officers to not be engaged in the performance of their duties ineffective to insulate the county from respondeat superior liability for the alleged wrongful conduct of an off-duty safety officer in the course of making an arrest].) However, the burden is on the plaintiff to prove that the employee's tortious conduct was committed within the scope of employment. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209 (*Mary M.*).)

An employer is not strictly liable for all actions of its employees during working hours. (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 (*Farmer's*).) "[B]efore such liability will be imposed on the employer there must be a connection between the employee's intentional tort and the employee's work." (*Perry v. County of Fresno* (2013) 215 Cal.App.4th 94, 101 (*Perry*).) In other words, "there must be a causal nexus between the tort and the employee's work, i.e., the tort . . . must be engendered by or arise from the work. [Citation.]" (*Ibid*.)

For such a causal nexus to exist, "'the incident leading to injury must be an "outgrowth" of the employment [citation]; the risk of tortious injury must be "'inherent in the working environment"' [citation] or "'typical of or broadly incidental to the enterprise [the employer] has undertaken' [citation]."' [Citation.] In other words, the risk of the tort must be a generally forseeable consequence of the enterprise. [Citation.]" (*Perry, supra*, 215 Cal.App.4th at pp. 101-102.) In the context of respondeat superior liability, forseeability means "'that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.' [Citations.]" (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299 (*Lisa M.*).) "If the employee acts out of personal malice unconnected with the employment, the employee is not acting within the scope of employment. [Citation.]" (*Perry, supra*, at p. 102.)

B. Substantial evidence supports the trial court's finding that the City was not liable for McCullough's actions

The evidence in this matter shows that McCullough acted out of personal malice unconnected with her employment. She was not on duty at the time of the incident; she

was not wearing a uniform; and she gave no indication that she was an employee of the LAPD. Instead, the evidence showed she was riding the bus on her way to work at the time the incident occurred. Generally, an employee is not acting within the scope of employment or engaged in activity arising out of employment when she is merely going to or from work. (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721-722; *Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157.)

In addition, there was no indication that McCullough misused her official authority. (See *Mary M., supra*, 54 Cal.3d at p. 207 [imposition of liability on the city where police officer committed a sexual assault while on duty where officer was in uniform, wore a badge and a gun, and was driving a black and white police car].) She had no unusual power or control over appellant. (See *Perry, supra*, 215 Cal.App.4th at p. 104 [county not liable for correctional officer's misuse of access to information in correctional management computer system].) In sum, McCullough's conduct was not an outgrowth of her employment. It was a personal encounter that was totally unrelated to her job, and is not fairly attributable to her employer. McCullough's acts fell outside the scope of her employment, thus the City cannot be held vicariously liable.

Appellant argues that McCullough's actions were "typical of or broadly incidental to the crime stopping enterprise the employer has undertaken." She argues that McCullough acted on training by her employer, and felt that she had acted to stop a crime against herself. Appellant notes that the authority of on-duty or off-duty officers is substantively the same. Appellant urges City liability on the ground that McCullough's conduct was forseeable because responding to criminal acts is what a police officer is trained to do.

The trial court rejected McCullough's assertion that she was acting to stop a crime, finding instead that "given [McCullough's] actions after departing the bus and her subsequent inconsistent statements, the Court disbelieves her version of the events as to the part about her having been struck from behind on the back of the head and that her punch was in self-defense." The court specified, "Whatever happened between the

[appellant] and [McCullough] before the described punch to the face was a mutual disagreement."

The evidence, including the testimony of appellant, the bus driver, and the video recording, support the trial court's factual finding. McCullough was not acting to stop a crime but was engaged in "low level mutual combat." McCullough was not acting to further her employer's interests, nor was she engaged in a work-related dispute. (See *Farmer's, supra*, 11 Cal.4th at pp. 1005-1006 [employer may be liable for injuries caused by an employee's tortious actions resulting or arising from pursuit of the employer's interests or where the dispute arises from a dispute over performance of the employee's duties].) Instead, the misconduct arose from a personal dispute or was the result of a personal compulsion. (*Id.* at p. 1006.) As such, McCullough's torts were "not causally attributable to [her] employment." (*Lisa M., supra*, 12 Cal.4th at p. 301.) Under the circumstances, there was no error in the trial court's determination that the City was not vicariously liable for McCullough's torts.

C. Ratification

Appellant next argues that McCullough's continued employment with LAPD shows that the City has ratified her conduct. Ratification is a question of fact. (*StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 242.) We must therefore review this issue under the substantial evidence standard. (*Ibid.*)

Appellant cites *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852 (*Murillo*) for the proposition that "'[i]f the employer, after knowledge of or opportunity to learn of the agent's misconduct, continues the wrongdoer in service, the employer may become an abettor and may make himself liable in punitive damages.' [Citations.]"

In *Murillo*, the plaintiff was subjected to inappropriate touching, sexual propositions and lewd remarks throughout her employment. The plaintiff complained to her manager on two occasions, but the manager did nothing to remediate the situation. Instead, he suspended the plaintiff, and ultimately terminated her employment.

The employer defendant argued that an employer may not be held liable for sexual harassment under the doctrine of respondeat superior, because sexual harassment is not

within the scope of employment as a matter of law. The court noted that the plaintiff need not rely on the doctrine of respondeat superior. The court explained, "Plaintiff alleges facts which, if proved, could be viewed as establishing defendant's ratification" of the alleged conduct. (*Murillo, supra*, 65 Cal.App.4th at p. 852.)

Here, in contrast, there is no evidence of ongoing harassing conduct at the workplace.[3] Instead, the evidence shows a brief, isolated incident, which occurred outside of the workplace while McCullough was not on duty. There is no evidence that the City was made aware of any ongoing conduct occurring within the course and scope of McCullough's duties.

Under the circumstances, the evidence supports the trial court's decision not to impose liability on the City under the doctrine of ratification.

III. Bane Act

The Bane Act provides a cause of action to an individual when a person "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment" of the individual's rights secured by the constitution or laws of the state. (Civ. Code, § 52.1, subd. (a).) Appellant argues that the trial court erred when it dismissed her cause of action for violation of the Bane Act against McCullough.[4] Specifically, appellant argues that the battery and infliction of

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[3] The cases cited in *Murillo* discussing employer ratification all arise out of incidents where the employee who engaged in misconduct was operating within the course and scope of his employment. (See *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App.3d 908 [assault by union employees at a union meeting of an individual who opposed certain payments, where the union president did not repudiate the employees and had previously been informed of their violent propensities]; *City of Los Angeles v. Superior Court* (1973) 33 Cal.App.3d 778 [police officer, acting within the course and scope of his employment, beat citizen]; *Seymour v. Summa Vista Cinema* (9th Cir. 1987) 809 F.2d 1385 [discussing employer ratification of broker's fraudulent inducement of the plaintiffs to purchase stock]; *McChristian v. Popkin* (1946) 75 Cal.App.2d 249 [discussing employer ratification of employee of defendant theater owners who violently ejected plaintiff from theater and beat him].)

[4] Appellant has not appealed the trial court's decision regarding the Ralph Act, therefore we do not address it.

emotional distress upon appellant "was coercive and interfered with [appellant's] right to go about her life free of terrifying attacks on the bus on her way to work."

A. Relevant law

The Legislature enacted the Bane Act to stem a tide of hate crimes. (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 (*Jones*).) "Civil Code section 52.1 requires 'an attempted or completed act of interference with a legal right, accompanied by a form of coercion.' [Citation.] To obtain relief under Civil Code section 52.1, a plaintiff need not allege the defendant acted with discriminatory animus or intent; a defendant is liable if he or she interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion. [Citation.]" (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 882 (*Austin B.*).)

A plaintiff alleging a Bane Act violation must allege: (1) that the defendant interfered with, or attempted to interfere with, the plaintiff's constitutional or statutory right by threatening or committing violent acts; (2) that the plaintiff reasonably believed that if she exercised her constitutional right, the defendant would commit violence against her or her property; or that the defendant injured the plaintiff or her property to prevent her from exercising her constitutional right or to retaliate against the plaintiff for having exercised her constitutional right; (3) that the plaintiff was harmed; and (4) that the defendant's conduct was a substantial factor in causing the plaintiff's harm. (*Austin B., supra*, 149 Cal.App.4th at p. 882.) The plaintiff must specify a constitutional right with which the defendant allegedly interfered. (*Ibid*., citing right to free public education guaranteed by Cal. Const., art. IX, § 5.)

A Bane Act claim may be asserted against private individuals as well as state actors. (*Jones, supra*, 17 Cal.4th at p. 334.) However, where the claim brought against the private individual is based on interference with constitutional rights, the plaintiff must demonstrate that a state actor engaged in unconstitutional conduct. (*Id.* at pp. 334-335 [Bane Act claim for alleged interference with plaintiff's fourth amendment right to be free from unreasonable search and seizure subject to dismissal because it was a citizen's arrest].)

B. The trial court properly granted judgment in favor of McCullough on appellant's Bane Act claim

Appellant has failed to specify a constitutional or statutory right with which McCullough allegedly interfered. Instead, appellant states that the torts of battery and intentional infliction of emotional distress are "torts rooted in violation of rights." Appellant argues that she has the right to be free from such wrongdoing.

The act of battery alone is insufficient to prove a claim under the Bane Act. As set forth in *Jones*, a Bane Act violation requires "an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones*, *supra*, 17 Cal.4th at p. 334.) Appellant raises no separate, affirmative right with which McCullough allegedly interfered.

Appellant argues that McCullough's act of battery, in and of itself, renders McCullough liable under the Bane Act. This argument must fail. If this were the case, every simple battery would also be considered a Bane Act violation. The statute reveals no intent to create such a widely applicable claim. Instead, the plaintiff must demonstrate (1) that she was subjected to threats, intimidation or coercion; and (2) the interference with a specified right. (See *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843 ["Civil Code section 52.1 does not extend to all ordinary tort actions because its provisions are limited to threats, intimidation, or coercion that interferes with a constitutional or statutory right"]; *Austin B.*, *supra*, 149 Cal.App.4th at p. 883 ["The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law"]; *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 ["the statute was intended to address only egregious interferences with constitutional rights, not just any tort. The act of interference with a constitutional right must itself be deliberate or spiteful"].) Appellant failed to prove a Bane Act violation, and the trial court properly granted judgment in favor of McCullough under Code of Civil Procedure section 631.8.

IV. Punitive damages

Appellant's argument that she is entitled to punitive damages is based on two arguments already addressed in this opinion. First, appellant argues that McCullough's continued employment with the LAPD is evidence of ratification, which can render an employer liable for punitive damages. As discussed above in section II.C., the trial court did not err in declining to impose liability on the City under the doctrine of ratification.

Second, appellant argues that the Bane Act itself provides for punitive damages. As set forth above, appellant did not present evidence showing a Bane Act violation. The trial court did not err in declining to award punitive damages under these theories.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST