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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JAVIER MORALES-HERNANDEZ, an
Incompetent Person, etc.,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B230866

(Los Angeles County
Super. Ct. No. BC376301
c/w BC382885)

APPEAL from judgments of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Mathon & Rosensweig, Michelle Cooper, Layla Khamoushian and William Rosensweig for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Amy Jo Field and Kjehl T. Johansen, Deputy City Attorneys for Defendants and Respondents City of Los Angeles, Lieutenant Lydia Diaz, Officer Rick Huerta and Officer Trevor Whiteman.

Gutierrez, Preciado & House, Calvin House and Amy J. Osborne for Defendants and Respondents County of Los Angeles and Robert J. Hill.

INTRODUCTION

Plaintiff Javier Morales-Hernandez, through his Conservator, Enrique Morales-Hernandez, appeals from judgments in favor of defendants City of Los Angeles, Lieutenant Lydia Hernandez, Officers Rick Huerta and Trevor Whiteman (City defendants) and the County of Los Angeles in case No. BC376301, and defendants County of Los Angeles and Robert J. Hill (County defendants) in case No. BC382885. He contends the trial court erred in granting a nonsuit as to the County defendants and in refusing to grant a judgment notwithstanding the verdict as to the City defendants. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2006, Javier Morales-Hernandez (Javier) was 30 years old, but had the communication, socialization, coping and interpersonal relationship skills of a young child. He had been mentally disabled since birth. Javier resided with his brother, Enrique Morales-Hernandez (Enrique).

On March 17, Javier was arrested and booked by Officers Whiteman and Huerta of the Los Angeles Police Department. The officers had observed Javier standing on the side of the street and placing an item that appeared to be a gun in his waistband. The officers asked Javier to put his hands on his head and conducted a pat down search. A plastic toy gun was concealed in Javier's waistband. After obtaining Javier's personal information, an officer conducted a warrant check which returned with a felony warrant for possession of a controlled substance for sale (Health & Saf. Code, § 11351). On the warrant, the name of the person was "Javier Hernandez Morales," a Hispanic male with a birth date of December 29, 1974, 5 feet 5 inches in height and weighing 140 pounds. The officers arrested Javier but did not verify Javier's identity as the person named on the warrant by checking records of his date of birth, fingerprints, or previous booking photo.

The arrest report indicated Javier was a Hispanic male with a height of 5 feet 5 inches and weight of 160 pounds. Javier was incarcerated in the County jail.

The Los Angeles County Public Defender's Office appointed attorney Robert J. Hill (Hill) to represent Javier. On Hill's advice, Javier pled guilty. He was sentenced to three years in prison and incarcerated at the North Kern County State Prison in Delano. At the prison, no one verified Javier's identity through his name, date of birth or previous booking photo.

When Javier's family discovered Javier's situation, they secured a criminal law attorney who obtained a "Wrong Person Certificate" for Javier from the superior court. Javier was released on June 21, 2006. The criminal law attorney referred the family to a civil attorney who could assist them in regard to wrongful arrest and imprisonment.

In December 2006, a licensed psychologist, Jared Maloff, Psy.D., performed an evaluation and assessment of Javier's mental abilities and skills. In January 2007, Enrique filed a petition for appointment as Javier's conservator. Ultimately, the probate court adjudicated Javier to be incompetent and appointed Enrique as his conservator on May 21, 2007.¹

Javier filed claims pursuant to the Tort Claims Act (Gov. Code, § 900 et seq.) with City on December 21, 2006 and with County on February 8, 2007 for damages suffered due to false arrest and imprisonment. On August 22, 2007, Javier filed a lawsuit for false imprisonment and civil rights violations under Civil Code section 52.1 against City and County in case No. BC376301.

On November 5, 2007, Javier submitted to County a claim against County and Hill for legal malpractice, together with an application to present a late claim by reason of mental incapacity pursuant to the Tort Claims Act. (§ 911.6, subd. (b)(3).) The claim

¹ As Javier's conservator, Enrique is the person who actively participated in the litigation process. Nevertheless, we will use Javier's name throughout the remainder of this opinion in those circumstances in which Enrique performed the actions on Javier's behalf.

stated that Hill was negligent in failing to recognize that Javier could not possibly be the individual named on the warrant and that he did not understand the proceedings, but, instead, Hill urged Javier to plead guilty.

Javier received no response from County for more than 45 days. Javier filed a complaint for legal malpractice against County and Hill on December 26, 2007 in case No. BC382885. County gave notice by letter dated February 11, 2008, that County denied the claim on its merits.

The trial court consolidated the two cases for trial. On the cause of action for legal malpractice, County filed a motion for nonsuit after Javier presented his case to the jury on the ground Javier failed to comply with the Tort Claims Act. The trial court granted County's motion and entered judgment in favor of County and Hill. Javier filed a motion for a new trial, but the trial court denied it.

The causes of action for false imprisonment and civil rights violations under Civil Code section 52.1 were tried by the jury. The jury returned verdicts in favor of Javier on the false imprisonment cause of action and in favor of the City and County defendants on the civil rights cause of action. Javier filed a motion for judgment notwithstanding the verdict as to the civil rights cause of action. The trial court denied the motion.

DISCUSSION

A. Nonsuit on Legal Malpractice Cause of Action

The trial court granted a motion for a nonsuit judgment in favor of the County defendants on the legal malpractice cause of action based upon Javier's failure to comply with the claim presentation requirements of the Tort Claims Act (Gov. Code,² §§ 945.4, 946.6). Javier contends the evidence showed that he complied with the claim

² All further statutory references are to the Government Code unless otherwise identified.

presentation requirements prior to filing suit and, therefore, the judgment of nonsuit must be reversed. We disagree.

1. Standard of Review

A defendant may move for a judgment of nonsuit after a plaintiff has completed his or her opening statement or, as County did here, after the plaintiff's presentation of his or her evidence in a trial by jury. (Code Civ. Proc., § 581c, subd. (a); *Stein-Brief Group, Inc. v. Home Indemnity Co.* (1998) 65 Cal.App.4th 364, 369.) "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by [the] plaintiff is insufficient to permit a jury to find in his favor." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; see also Code Civ. Proc., § 581c, subds. (a), (b), (c).) In determining the sufficiency of the plaintiff's evidence, "the court may not weigh the evidence or consider the credibility of witnesses." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 118.) "[A] motion for nonsuit 'is the modern equivalent of a demurrer to the evidence: it concedes the truth of the facts proved, but denies that they, as a matter of law, sustain the plaintiff's case. [Citations.]" [Citation.]" (*Stein-Brief Group, Inc., supra*, at p. 369, italics omitted.)

We review an order granting a judgment of nonsuit de novo in the same manner as the trial court, "evaluating the evidence in the light most favorable to the plaintiff and resolving all presumptions, inferences and doubts in his or her favor. [Citations.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1124.) We will sustain the judgment only if, notwithstanding the plaintiff's evidence, judgment for the defendant is required as a matter of law. (*Nally v. Grace Community Church, supra*, 47 Cal.3d at p. 291.) However, "[i]f there is substantial evidence to support [the plaintiff's] claim, and if the state of the law also supports that claim, we must reverse that judgment." [Citation.]" (*Wolf, supra*, at p. 1125.)

2. Late Claim for Legal Malpractice Against County and Hill

A necessary element of a cause of action against a public entity for personal injury is that the plaintiff either timely complied with the claim requirements of the Tort Claims Act as mandated by section 945.4³ or was excused from compliance by court order granting a petition under section 946.6. (See *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1240-1241.) “[A] plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his complaint is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action.” (*Id.* at p. 1243; accord, *Harvey v. City of Holtville* (1967) 252 Cal.App.2d 595, 597.) Similarly, a plaintiff is subject to a judgment of nonsuit if the evidence he presents to the jury in his case-in-chief is insufficient, as a matter of law, to demonstrate or excuse compliance with the claim presentation requirement. (See *Stein-Brief Group, Inc. v. Home Indemnity Co.*, *supra*, 65 Cal.App.4th at p. 369.)

The claim requirements apply to an action for legal malpractice against an office of a public defender and a public defender employed by the office. (*Fantazia v. County of Stanislaus* (1996) 41 Cal.App.4th 1444, 1449.) Such a claim constitutes a claim for personal injury under the Tort Claims Act. (*Id.* at pp. 1449-1450, 1452-1453.)

A claimant must present a personal injury claim to the applicable public entity not later than six months after the cause of action accrues. (§ 911.2, subd. (a).) To submit a claim after the six-month deadline, a claimant must present the claim together with an application for leave to present a late claim “within a reasonable time not to exceed one

³ Section 945.4 states: “Except as provided in Section[] . . . 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with [the Tort Claims Act, section 900 et seq.] until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with [the Tort Claims Act].”

year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim.”⁴ (§ 911.4, subds. (a), (b).)

If the reason for the delay was the claimant’s physical or mental incapacity during the six-month period, the public entity must grant his application to file a late claim. Section 911.6, subdivision (b)(3), provides: “The board [of the public entity] shall grant the application where . . . : [¶] . . . [¶] . . . [t]he person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and *by reason of* such disability failed to present a claim during such time.” (Italics added.)

Pursuant to section 911.6, subdivision (c), if a public entity does not act on a late-claim application within 45 days after its submission, “the application shall be deemed to have been denied on the 45th day,” in the absence of an agreement between the claimant and the public entity to some other deadline. Similarly, section 912.4 provides that a claimant’s claim shall be deemed denied on the 45th day after it is submitted, in the absence of any agreement extending the time. (§ 912.4, subds. (a), (c).)

According to Javier, his cause of action accrued on June 21, 2006 when he was released from prison.⁵ The six-month claim filing period expired on December 21, 2006. Javier did not submit the claim for legal malpractice to the County until November 5, 2007, well past the six-month filing deadline. With the claim, Javier submitted an

⁴ For purposes of the claim requirements, “the date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto.” (§ 901.)

⁵ Code of Civil Procedure section 340.6 sets forth the limitations period for filing a legal malpractice action. County claims Javier’s cause of action for legal malpractice accrued no later than March 22, 2006, when he was sentenced after the hearing on the alleged probation violation that led to issuance of the arrest warrant. No issue is raised on appeal concerning the date Javier’s cause of action accrued. For our purposes in this appeal from a nonsuit judgment, we will assume, without deciding, that date of accrual asserted by Javier, June 21, 2006, is the operative date. (*Wolf v. Walt Disney, supra*, 162 Cal.App.4th at p. 1124.)

application to present a late claim pursuant to section 911.6, subdivision (b)(3), based on his mental incapacity during the six-month claim submission period. The parties do not dispute that Javier’s late-claim application was timely. The 45th day after Javier submitted the late-claim application was December 20, 2007. As County asserts, Javier’s late-claim application and his claim were deemed denied by operation of law on that date. (§§ 911.6, subd. (c); 912.4, subds. (a), (c).)

County asserts that, after denial of his late-claim application, Javier was required to file a petition pursuant to section 946.6 and obtain an order excusing him from compliance with claim requirements, prior to filing his legal malpractice lawsuit. As support, County quotes the following statement by our colleagues in Division 5 of this court: “If the public entity denies an application for leave to file a late claim, the claimant *must* obtain a court order [under section 946.6] for relief from the requirements of the claims act before filing suit.” (*City of Los Angeles v. Superior Court* (1993) 14 Cal.App.4th 621, 627, italics added.) County argues that the Tort Claims Act barred Javier from filing suit after his late-claim application was deemed denied, in that he never filed a petition pursuant to section 946.6 to obtain judicial relief from the claim filing requirements. We agree.

Section 946.6 provides an avenue for a claimant to obtain the right to initiate a lawsuit notwithstanding failure timely to submit a claim in compliance with the Tort Claims Act.⁶ (*Los Angeles City Sch. Dist. v. Superior Court* (1970) 9 Cal.App.3d 459,

⁶ Section 946.6 provides: “(a) If an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. . . . [¶] . . . [¶] (b) . . . [¶] . . . [¶] (3) . . . [¶] The petition shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6. [¶] (c) The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that one or more of the following is applicable: [¶] . . . [¶] (3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for

468.) The claimant must file the petition within six months after his late-claim application is denied or deemed denied by operation of law. (§ 946.6, subd. (b); *Rason v. Santa Barbara City Housing Authority* (1988) 201 Cal.App.3d 817, 823.) Courts have recognized that the deadline for filing a petition is six months after a late-claim application is deemed denied, even if the public entity does not give notice of the denial in accordance with section 911.8; the six-month deadline is mandatory. (See *D.C. v. Oakdale Joint Unified School Dist.* (2012) 203 Cal.App.4th 1572, 1582.) “The failure to timely comply with the Government Code requirements concerning claims bars a subsequent suit.” (*City of Los Angeles v. Superior Court, supra*, 14 Cal.App.4th at p. 627.)

It is undisputed that Javier never filed a petition under section 946.6 to seek relief after his late-claim application was deemed denied by operation of law. The result is that, as a matter of law, Javier cannot establish that he complied with the claims requirements, a necessary element of his legal malpractice cause of action, and cannot prevail against County and Hill. (§ 945.4; see *State of California v. Superior Court, supra*, 32 Cal.4th at pp. 1240-1241; *City of Los Angeles v. Superior Court, supra*, 14 Cal.App.4th at p. 627.) The evidence Javier presented would not, as a matter of law, support a verdict in his favor. (*Nally v. Grace Community Church, supra*, 47 Cal.3d at p. 291.) Accordingly, County and Hill were entitled to a judgment of nonsuit in their favor. The trial court properly granted their motion for nonsuit.

B. Judgment Notwithstanding the Verdict on the Civil Code Section 52.1 Cause of Action

Javier contends that the trial court erred in denying his motion for judgment notwithstanding the jury’s verdict on his civil rights claim under Civil Code section 52.1. “Civil Code section 52.1, subdivision (a), provides that if a person interferes, or attempts

the presentation of the claim and by reason of that disability failed to present a claim during that time.”

to interfere, by threats, intimidation, or coercion, with the exercise or enjoyment of the constitutional or statutory rights of ‘any individual or individuals,’ the Attorney General, or any district or city attorney, may bring a civil action for equitable or injunctive relief.

Subdivision (b) allows ‘[a]ny individual’ so interfered with to sue for damages.”⁷

(*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841.) Javier alleged that the City defendants violated his rights under the United States Constitution and the California Constitution, “including the right not to be subjected to unlawful search and seizure, and false imprisonment.”

We review the denial of a motion for judgment notwithstanding the verdict to determine “whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury’s verdict. [Citations.] If there is, we must affirm the denial of the motion. [Citations.]” (*Wolf v. Walt Disney Pictures & Television, supra*, 162 Cal.App.4th at p. 1138.) If the issue on appeal raises solely a question of law, our review is de novo. (*Ibid.*)

In *Venegas v. County of Los Angeles, supra*, 32 Cal.4th 820, the Supreme Court briefly addressed the scope of the applicability of section 52.1 as follows: “First, 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. Second, imposing added limitations on the scope of section 52.1 would appear to be more a legislative concern than a judicial one, and perhaps the Legislature would be advised to reexamine the matter. But we need not decide here whether section 52.1 affords protections to every tort claimant, for plaintiffs in this case have alleged

⁷ Subdivision (b) of Civil Code section 52.1 provides: “Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or . . . secured by the Constitution or laws of [California], has been interfered with, or attempted to be interfered with, as described in subdivision (a) [i.e., “by threats, intimidation, or coercion”], may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, . . . injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.”

unconstitutional search and seizure violations extending far beyond ordinary tort claims. All we decide here is that, in pursuing relief for those constitutional violations under section 52.1, plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion.” (*Venegas, supra*, 32 Cal.4th at p. 843.) No California authority has definitively addressed the question of whether the threat, intimidation or coercion inherent in a constitutional or statutory rights violation is sufficient to constitute the “threats, intimidation or coercion” required to impose liability under section 52.1.

In *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, however, our colleagues in Division Four of this court recently issued an opinion involving facts and issues significantly similar to those in the instant appeal. Shoyoye was properly arrested, but he was detained in the jail for a longer period than required by law. On the basis of the evidence of his over-detention, the jury rendered verdicts in his favor on his allegations of false imprisonment and violation of his civil rights under Civil Code section 52.1. The court affirmed the judgment in his favor on false imprisonment but reversed the judgment as to the civil rights violation. (*Shoyoye, supra*, at p. 963.)

The *Shoyoye* court concluded “that where coercion is inherent in the constitutional violation alleged, i.e., [a false imprisonment], the [Civil Code section 52.1] statutory requirement of ‘threats, intimidation, or coercion’ is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.” (*Shoyoye v. County of Los Angeles, supra*, 203 Cal.App.4th at p. 959.) The court determined there was no evidence of any coercion independent of that inherent in false imprisonment. To constitute a violation of Civil Code section 52.1, according to the court, the requisite interference with the plaintiff’s constitutional rights must be intentional, that is “deliberate or spiteful.” (*Shoyoye, supra*, at p. 959.) The *Shoyoye* court stated, “The apparent purpose of the statute is not to provide relief for [a false imprisonment] brought about by human error rather than intentional conduct.” (*Ibid.*)

Javier first claims that the evidence of intimidation and coercion accompanying the violation of his constitutional rights was wholly uncontradicted and, therefore, the

court was required to grant his motion. The evidence shows that Javier was handcuffed, searched, taken by squad car to the police station, booked, including being disrobed and strip searched, fingerprinted and photographed, and then incarcerated in the general population. Javier points out that his coping skills in any kind of stressful situation had been determined to be at the level of a person four-and-a-half years of age. Javier argues that any mentally incompetent person who was subjected to the actions taken by City would find the actions both intimidating and coercive.

As City points out, the actions Javier enumerates are inherent in the detention and incarceration process and, therefore, in a false arrest and imprisonment situation. There is substantial evidence that City defendants engaged in the actions as the result of their mistaken belief that Javier was the person of the same name who was the subject of an outstanding warrant for arrest and not with intent to threaten, intimidate or coerce Javier for any other reason. The jury found that City defendants did not act with malice in their false arrest of Javier.

In sum, Javier refers to no evidence of any coercion independent of that inherent in a false arrest and imprisonment. Javier points to the evidence of his mental incapacity as another factor to be considered, but cites no supporting authority.⁸ In the absence of evidence of any intimidation or coercion beyond that inherent in a false arrest and imprisonment, substantial evidence supported the jury verdict and Javier was not entitled

⁸ It appears that Javier contends that, when a person such as himself who, mentally and emotionally, is a four-and-one-half-year-old child, but has the physical appearance of an adult, the degree of threat, intimidation and coercion inherent in the physical and mental effects of arrest, court proceedings, and imprisonment is, in effect, much higher than it would ordinarily be when the person not only looks like an adult, but also has the mental and emotional capacity of an adult. For that reason, Javier asserts, the violations of his constitutional rights were accompanied by greater threats, intimidation and coercion than are ordinarily inherent in the violations themselves and, therefore, he was entitled to a judgment in his favor notwithstanding the jury's verdict on his section 52.1 cause of action against the City defendants. However reasonable his contention may seem to be, Javier has not cited authority supporting his contention. We are aware of none.

to the grant of his motion for judgment notwithstanding the verdict. (*Shoyoye v. County of Los Angeles*, *supra*, 203 Cal.App.4th at p. 959; *Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at p. 1138.)

Javier also contends that the trial court committed reversible error by its response to the jury's question during deliberations regarding the meaning of the words interfering, threats, intimidation and coercion in regard to the jury instruction for Javier's cause of action under Civil Code section 52.1. The trial court's written response was, "Please give the words their common everyday meaning."

Before submitting the response to the jury, the trial court shared the question with counsel for all of the parties and discussed how to respond with counsel on the record. The court informed counsel of its proposed response and asked counsel if it was acceptable to them. All of the counsel, including the attorneys for Javier, agreed on the response and did not state any objection. Having not objected in the trial court, Javier waived any issue regarding instructional error arising from the response. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501 ["an appellant waives his right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal"].)

DISPOSITION

The judgment in favor of County and Hill in case No. BC382885 is affirmed. The judgment in favor of City, the City defendants and County in case No. BC376301 is affirmed. The parties shall bear their own costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.