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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

ARBBIE HODGE, Plaintiff and Appellant, v. DEPARTMENT OF CORRECTIONS AND REHABILITATION et al., Defendants and Respondents.	B284187 (Los Angeles County Super. Ct. No. BC638582)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

Peter Borenstein for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Monica N. Anderson, Senior Assistant Attorney General, Neah Huynh and Cassandra J. Shryock, Deputy Attorneys General, for Defendants and Respondent.

Appellant Arbbie Hodge, a former inmate, brought suit against respondents California Department of Corrections and Rehabilitation (CDCR) and Board of Parole Hearings (the Board) contending that during his years of incarceration serving an indeterminate sentence, respondents had misled him concerning the effect of earning good-time credits, that he suffered emotionally as a result, and that he was entitled to monetary compensation for the credits he had amassed that were never applied to reduce his sentence. The trial court found respondents immune from suit under Government Code section 844.6, which confers immunity on public entities for injuries to prisoners except in certain limited circumstances.[1] On appeal, Hodge contends the court erred in concluding that the immunity conferred by section 844.6 supersedes any potential liability for violation of a mandatory duty under section 815.6, and in further finding that the prison regulation cited by Hodge imposes no mandatory duty supporting Hodge's section 815.6 cause of action. In addition, Hodge contends for the first time on appeal that he should be permitted to amend to state a claim under Penal Code section 3500, et seq., addressing biomedical and behavioral research on prisoners. Finding no error or basis for amendment, we affirm.

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[1] Undesignated statutory references are to the Government Code.

FACTUAL AND PROCEDURAL BACKGROUND

Hodge entered prison in 1979. He had been convicted of second degree murder with the use of a deadly weapon -- a baseball bat -- and sentenced to an indeterminate term of sixteen years to life. He remained imprisoned for 36 years. Between January 1987 and August 2002, Hodge was denied parole multiple times by the Board due to the nature of his offense, his failure to complete probation for an earlier crime, his lack of plans for employment and housing, and the opposition of the Los Angeles District Attorney's office.

In 2003, the Board granted parole. One of its members stated at the time: "[I]f we denied you parole today, what would we ask you to do? Remain disciplinary free for another year? You've done that for 24 years . . . I think you've done enough, 24 years." However, the Governor reversed the parole decision, relying on the nature of the offense and opposition by the Long Beach Police Department and the Los Angeles District Attorney's office. The Board granted parole again in 2011, observing that Hodge had "'remained disciplin[e] free [his] entire time while incarcerated'" and "'maintained a positive outlook since 2003.'" The Governor again reversed the decision, this time relying on the nature of the commitment offense and Hodge's risk of substance abuse upon parole.[2] In 2015, Hodge was

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[2] Hodge sought judicial review of the Governor's decisions, filing petitions for writ of habeas corpus in the superior court, the (*Fn. is continued on the next page.*)

found suitable for parole based on his advanced age. He was released from custody in September 2015.

After his release, Hodge filed a complaint against respondents for negligent misrepresentation, negligence and violation of the California Constitution. He subsequently filed an amended complaint, adding a claim for breach of a mandatory duty under section 815.6. Hodge contended that during his time in prison, he had "a good faith belief that he was accruing 'good-time credits' by maintaining a "'disciplinary-free' record, excelling in prison work placements, and participating in prison programming," and that his accrual of good-time credits "would eventually lead to an earlier suitability [for parole] finding by the Board."[3]

District Court, and the Court of Appeal, but was ultimately unsuccessful.

[3] Hodge contended this belief derived from section 2931 of the Penal Code and title 15, section 2410, subdivision (b) of the California Code of Regulations (CCR). Penal Code section 2931 provides for a reduction of a prison term for good behavior in any case in which a prisoner was sentenced "pursuant to [Penal Code] Section 1170," and is applicable to determinate sentences. (See Pen. Code, § 1170; *In re Dayan* (1991) 231 Cal.App.3d 184, 187; *In re Monigold* (1983) 139 Cal.App.3d 485, 494.) Prisoners like Hodge, serving indeterminate sentences or life terms, are subject to release only upon the Board's determination that they are suitable for parole, which is dependent on an assessment of a number of factors, of which institutional behavior is but one. (See Pen. Code, § 3041, subd. (b); CCR, tit. 15, § 2281; *In re Lawrence* (2008) 44 Cal.4th 1181, 1202-1203.)

(*Fn. is continued on the next page.*)

He further contended that he had acquired "twelve years worth of 'good-time credits,'" but "never received the benefit of [them]," as his release was based entirely on his age.

In his claims for negligence and negligent misrepresentation, Hodge alleged that respondents had a duty to hold status conferences or "documentation hearings" with inmates before each parole hearing, to "truthful[ly]" inform the inmates about their good-time credits, and to "provide a realistic assessment" of their likelihood of parole. He further alleged that respondents instead generated calculation sheets, which projected a "'[m]aximum DSL [determinative sentencing law] [r]elease [d]ate'" based on the

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CCR title 15, section 2410, which applies to murders committed on or after November 8, 1978 (see CCR, tit. 15, § 2400), provides that "[l]ife prisoners may earn postconviction credit for each year spent in state prison from the date the life term starts"; that life prisoners "shall have documentation hearings" prior to the initial parole consideration; and that at the documentation hearings, "the board shall document the prisoner's performance, participation, behavior and other conduct . . . ." (CCR, tit. 15, § 2410, subdivision (a).) Section 2410, subdivision (c) lists three specific criteria the panel "shall consider" in determining the amount of postconviction credit to grant: "[p]erformance in [i]nstitutional [w]ork [a]ssignments," "[p]articipation in [s]elf-[h]elp and [r]ehabilitative [p]rograms," and "[b]ehavior in the [i]nstitutional [s]etting." As Hodge acknowledges in his brief, "[h]ow much credit a life prisoner can accrue and whether it ultimately serves to reduce the total amount of time served before release on parole is discretionary" under section 2410.

prisoner's good-time credits. Hodge himself was allegedly provided calculation sheets indicating he would serve from 16 to 24 years in prison based on his good-time credits. He claimed he was never informed that the calculation sheets were "advisory document[s] and . . . not indicators of actual time the inmate can expect to serve due to 'good-time credits,'" nor that the Board "was not required to take into account his 'good-time credits.'" Hodge claimed to have relied on the calculation sheets by "maintaining a spotless record in prison," working hard to "keep[] out of trouble" and staying "'disciplinary-free,'" convinced he would "be released based on his performance," and that he "suffered as he was denied suitability again and again." Hodge contended that respondents deliberately deceived prisoners about the value of remaining discipline free and earning good-time credit, in order to "maintain an incentive for inmate good behavior based upon a false belief that good behavior will result in early release."

The claim for breach of mandatory duty was based on essentially the same allegations. Hodge contended that respondents had a duty to hold documentation hearings to apprise prisoners of their rights and their chances of being released; that at his hearings, Hodge was informed of the good-time credits he had acquired, but not told that he had little chance of being released despite accrual of good-time credits; that respondents used the promise of release for good behavior to maintain prison discipline; and that respondents breached a mandatory duty by not being

truthful about the negligible effect good-time credits would have on his prospects for release.[4] Hodge sought monetary compensation for the good-time credits he had earned, and injunctive relief.

Respondents demurred. They contended they were statutorily immune from liability for the alleged injuries under various provisions of the Government Code, including section 844.6; that appellant suffered no injury; and that there was no statutory or other authority creating a mandatory duty of the kind alleged. They further contended that parole decisions, including whether to grant credit to life prisoners for years served, were entitled to immunity under section 845.8, applicable to "[a]ny injury resulting from determining whether to parole or release a prisoner . . . ."

Hodge opposed, contending that his claims were based not on specific parole decisions or on the length of his prison term, but on "how he was informed and instructed about a 'good-time credits' system while he was incarcerated . . . ." He claimed he was "harmed by having his reasonable expectation of an earlier date of parole simply ignored or, worse, used as a tool to incentivize his continuing good behavior and maintain overall prison discipline under false

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[4] In his cause of action for violation of the California Constitution, Hodge contended he suffered cruel and unusual punishment by being incarcerated for more than double his base term despite his accrual of good-time credits. He does not revive this claim on appeal.

pretenses." He explained that he sought injunctive relief to "require [respondents] and their agents to inform life prisoners during documentation hearings that their good-time credits will not shorten their overall sentence . . . but merely reduce the minimum time they can expect to serve."

With respect to the claim that respondents violated a mandatory duty, Hodge argued that such duty arose from CCR title 15, section 2269.1.[5] He contended "the mandatory duty imposed under Section 2269.1 must include the duty to inform life prisoners like [Hodge] of their realistic chances of parole, the value of their postconviction credits, if any, and how they operate to allow for an earlier MEPD [minimum

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[5] CCR, title 15, section 2269.1 provides: "All life prisoners shall have hearings prior to the minimum eligible parole date. [¶] . . . At these hearings the panel shall review the prisoner's activities and conduct considering the criteria in §§ 2290 and 2410 and document activities and conduct pertinent to granting or withholding postconviction credit. When the board establishes a parole date the panel shall consider this information and determine whether to grant or withhold postconviction credit for time served prior to the date of the hearing at which parole is granted. Once the parole date is established, these prisoners shall have progress hearings as provided in § 2269." Section 2290, subdivision (c) goes on to list the same specific criteria listed in section 2410, subdivision (c) that "the panel shall consider" in determining the amount of postconvicton credit to grant: "[p]erformance in [i]nstitutional [w]ork [a]ssignments," "[p]articipation in [s]elf-[h]elp [r]ehabilitative [p]rograms," and "[b]ehavior in the [i]nstitutional [s]etting." (CCR, tit. 15, § 2290, subd. (c).) Hodge does not suggest section 2290 imposes a mandatory duty to reduce a prisoner's sentence.

eligible parole date] rather than reducing the overall time a prisoner can expect to be incarcerated." Hodge did not seek leave to amend.

The trial court sustained the demurrer without leave to amend. In a detailed order, the court found that section 844.6 provides broad immunity to public entities for injuries to prisoners; that section 815.6, imposing liability for failure to perform mandatory duties, was not an exception to the immunity of section 844.6; and that in any event, CCR, title 15, section 2269.1 did not impose a mandatory duty to communicate to prisoners the "'realistic chances of parole,'" or the "'value of their postconviction credits . . . .'" The court further found that Hodge was not entitled to injunctive relief because he had been released from prison, and "'[a]n inmate's release from prison while his claims are pending generally will moot any claims for injunctive relief relating to the prison's policies unless the suit has been certified as a class action.'" (Citing *Dilley v. Gunn* (9th Cir. 1995) 64 F.3d 1365, 1368.) With respect to its decision to deny leave to amend, the court stated: "[Hodge] does not explain how he could amend his pleading, nor did [he] request leave to amend. Further, . . . [respondents] . . . and their employees as public employees are immune from suit for the alleged failure to communicate. Therefore, [Hodge] did not meet his burden in demonstrating how he would amend the complaint. [Citations.]"

Judgment was entered in favor of respondents. Hodge filed a timely notice of appeal.

DISCUSSION

A. *Standard of Review*

A demurrer tests the legal sufficiency of a complaint, raising only questions of law. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.) Thus, an order sustaining a demurrer is reviewed de novo. (*Ibid.*) We treat a demurrer as admitting all material facts properly pleaded, and give the complaint a reasonable interpretation, "'reading it as a whole and its parts in their context.'" (*Ibid.*, quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Facts alleged in the complaint are deemed to be true, "'however improbable they may be.'" (*Berg & Berg Enterprises, LLC v. Boyle*, *supra*, at p. 1034.) "Where a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. [Citation.] The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect. [Citation.]" (*Id.* at p. 1035.) "Contrary to long-standing rules generally precluding a party from changing the theory of the case on appeal [citations], a plaintiff may propose new facts or theories to show the complaint can be amended to state a cause of action . . . ." (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460; accord, *Goonewardene v. ADP, LLC* (2016) 5 Cal.App.5th 154, 163.)

B. *Immunity for Injury to Prisoners*

There is no dispute that under the Government Claims Act (§ 810 et seq.), public entities enjoy sovereign immunity and are protected from liability "[e]xcept as otherwise provided by statute." (§ 815; see *State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 347 [under doctrine of sovereign immunity, "a state is immune except to the extent it consents to suit"]; *Towery v. State of California* (2017) 14 Cal.App.5th 226, 232 (*Towery*) ["[I]n California 'sovereign immunity is the rule' and 'governmental liability is limited to exceptions specifically set forth by statute'"].) One source of statutory liability is found in section 815.6, which provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

Injuries to prisoners fall under a more specific statute, section 844.6, which provides: "Notwithstanding any other provision of this part, except as provided in this section and in sections 814, 814.2, 845.4, and 845.6, or in Title 2.1 (commencing with section 3500) of Part 3 of the Penal Code, a public entity is not liable for: [¶] . . . [¶] [a]n injury to any

prisoner."[6] Hodge contends here, as he did below, that section 815.6 abrogates section 844.6 immunity for injuries to prisoners.[7] The trial court found otherwise because section 815 is not one of the specified exceptions to immunity listed in section 844.6. In addition, the court found that the regulation on which Hodge sought to rely -- CCR, title 15,

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[6] Section 814 relates to "liability based on contract or the right to obtain relief other than money or damages against a public entity." Section 814.2 relates to workers' compensation claims. Section 845.4 provides for liability in some circumstances for injury proximately caused by "interfer[ence] with the right of a prisoner to obtain a judicial determination or review of the legality of his confinement." Section 845.6 provides for liability in some circumstances if the entity's employee "knows or has reason to know that the prisoner is in need of immediate medical care and . . . fails to take reasonable action to summon such medical care" None of these provisions is at issue here. Penal Code section 3500, et seq. governs claims based on improper biomedical and behavioral research. On appeal, Hodge contends he could amend his complaint to raise a cause of action under these provisions. That contention is discussed in part C. of the Discussion, *post*.

[7] In a footnote, Hodge suggests Penal Code section 3041 provides "an opportunity" for respondents to apprise life prisoners about their realistic chances of parole. He then maintains that section 3041 also creates a mandatory duty. As this contention is not supported by reasoned argument or citation to authority, we deem it forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [contentions not supported by argument or citation to authority deemed waived]; accord, *Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

section 2269.1 -- does not support his claim that respondents violated a mandatory duty. We agree.

In concluding that section 815.6 does not abrogate the immunity of section 844.6, we need look no further than the language of section 844.6 itself. It states that a public entity is not liable for any injury to any prisoner "[n]otwithstanding any other provision of this part," other than the provisions specifically listed. Section 815.6 is not among the provisions listed.

Moreover, section 815, subdivision (b) states that the liability of a public entity established by the Government Claims Act "is subject to any immunity of the public entity, provided by statute, including this part . . . ." As recently explained in *Towery,* this provision makes clear that "specific immunities prevail over general rules of actionable duty." (*Towery, supra*, 14 Cal.App.5th at p. 232.) In *Towery*, the plaintiff, a former prisoner, brought suit against the State and the CDCR under the Bane Act, generally allowing claims by individuals whose constitutional rights have been violated through "threat[s], intimidation, or coercion.'" (*Towery, supra,* at p. 233; see Civ. Code, § 52.1, subd. (a).) The court in *Towery* affirmed a grant of judgment on the pleadings in favor of the defendants, explaining: "Section 844.6 is a specific immunity provision that applies to injuries to prisoners. Subject to some specific statutory exceptions, section 844.6, subdivision (a)(2) provides that a public entity is not liable for '[a]n injury to any prisoner.' [¶] [The plaintiff] does not argue that any of the specific statutory

exceptions apply here. Thus, under the plain language of sections 815 and 844.6, the State cannot be liable for [his] alleged injuries." (*Towery, supra*, at p. 232.) As section 844.6 does not contain the statement, found in some other provisions of the Government Claims Act (see, e.g., § 820.2), that it applies, "'[e]xcept as otherwise provided by statute,'" but instead "contains a more limited exception, stating that it applies "'except as provided in this section'" and in several other specific statutes," section 844.6 "does not leave any ambiguity about its applicability to a claim against a public entity under some other statute . . . that simply creates a general legal duty." (*Towery, supra,* at p. 234.)

Moreover, even were we to conclude that section 815.6 abrogates section 844.6, the trial court's conclusion that the regulation Hodge relied on creates no such mandatory duty was correct. A three-pronged test must be satisfied to establish a basis for public entity liability for failure to perform a mandatory duty under section 815.6: (1) the enactment at issue must impose a mandatory duty, not a discretionary duty; (2) the enactment must be designed to protect against the particular kind of injury the plaintiff suffered; and (3) breach of the mandatory duty must be the proximate cause of the injury suffered. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498-499.) "In every case, '[t]he controlling question is whether the enactment at issue was intended to impose an obligatory duty to take specified official action to prevent particular foreseeable injuries, thereby providing an appropriate basis for civil liability.

[Citation.]'" (*Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1239, quoting *Keech v. Berkeley Unified School Dist.* (1984) 162 Cal.App.3d 464, 470.)

Contrary to Hodge's assertion, CCR, title 15, section 2269.1 does not impose a mandatory duty on respondents to "apprise life prisoners of the value and efficacy of [good-time] credits" or of their "realistic chances of parole," or to explain "how and if good-time credits are applied after a suitability determination." It requires the Board to hold hearings prior to a life prisoner's MEPD, at which the panel "shall review the prisoner's activities and conduct considering the criteria in §§ 2290 and 2410 and document activities and conduct pertinent to granting or withholding postconviction credit." (CCR, tit. 15, § 2269.1, subd. (a)(1).) According to his own allegations, Hodge had at least one pre-MEPD hearing at which his activities, conduct and credits were reviewed and documented, and multiple hearings thereafter. The regulation requires nothing more.

Moreover, Hodge fails to identify any injury that CCR title 15, section 2269.1 was designed to avoid. Section 2269.1 was designed to guide the Board with regard to the timing and conduct of pre-MEPD hearings for life prisoners. (See *In re Johnson* (2009) 176 Cal.App.4th 290, 297 ["Prison regulations . . . are primarily designed to guide prison officials in the administration of the prison[,] not . . . to confer basic rights upon the inmates"].) As demonstrated by Hodge's allegations, the Board does consider an inmate's institutional behavior in making its decisions. The fact that

life prisoners, when provided with documentation of accumulated good-time credits, may be encouraged to engage in good behavior, is not an evident defect in the system that warrants correction.

C. *Liability for Biomedical and Behavioral Research*

Hodge contends for the first time on appeal that respondents violated Penal Code section 3500, et seq., an express exception to section 844.6 immunity. These provisions forbid "[b]iomedical research" on prisoners (Pen. Code, § 3502), and restrict "[b]ehavioral research" to "studies of the possible causes, effects and processes of incarceration and studies of prisons as institutional structures or of prisoners as incarcerated persons which present minimal or no risk and no more than mere inconvenience to the subject of the research" (*id.*, § 3505).[8]

Hodge does not claim that respondents subjected him to biomedical or behavioral research. Instead, he seeks to rely on Penal Code section 3508, which provides that "[b]ehavioral modification techniques shall be used only if such techniques are medically and socially acceptable means

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[8] "'Biomedical research'" is defined as "research relating to or involving biological, medical or physical science." (Pen. Code, § 3500, subd. (b).) "'Behavioral research'" is defined as "studies involving, but not limited to the investigation of human behavior, emotion, adaption, conditioning, and response in a program designed to test certain hypotheses through the collection of objective data . . . ." (*Id.*, § 3500, subd. (a).)

by which to modify behavior and if such techniques do not inflict permanent physical or psychological injury." Hodge contends that respondents engaged in improper behavioral modification techniques by "omitting critical facts regarding postconviction credits," inflicting psychological damage on him.

We do not view the possibility that prisoners may overestimate the influence of good conduct on the Board's decisions as an improper behavioral modification technique. Moreover, the remedies for violation of Penal Code section 3500 et seq. are limited. Under the chapter governing "Remedies," the sole provision is Penal Code section 3524, which provides in subdivision (a): "A prisoner may maintain an action for injury to such prisoner, including physical or mental injury, or both, caused by the wrongful or negligent act of a person during the course of the prisoner's *participation in biomedical or behavioral research* conducted pursuant to this title." (Italics added.) As Hodge does not contend he participated in biomedical or behavioral research, and none of the conduct attributed to respondents fits within the statutory definitions of biomedical or behavioral research, we discern no realistic potential for amending the complaint to assert a claim under Penal Code section 3500 et seq.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.