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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

MALCOLM NEUMAN-SAMPLE, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, et al., Defendants, STATE OF CALIFORNIA, Respondent.	B282150 (Los Angeles County Super. Ct. No. BC605975)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael M. Johnson, Judge. Affirmed.

Barry Zelner, Law Offices of Barry S. Zelner and Charles L. Fonarow for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Danielle F. O'Bannon, Senior Assistant Attorney General, Joel A. Davis, Supervising Deputy Attorney General, and David Adida, Deputy Attorney General for Respondent.

INTRODUCTION

Plaintiff and appellant Malcolm Neuman-Sample (plaintiff) brought suit against the State of California alleging correctional officers denied his requests for a usable walker, which he needed due to recent brain surgery in order to move around the prison facility where he was incarcerated. He asserted the employees' conduct violated Government Code section 845.6, which imposes liability when a public employee knows or has reason to know that a prisoner has a serious and obvious medical condition requiring immediate medical care and fails to take reasonable action to summon such care.[1]

The trial court sustained the State's demurrer to plaintiff's Third Amended Complaint without leave to amend, ruling plaintiff failed to state a cause of action and did not exhaust his administrative remedies. We affirm.

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1 All further statutory references are to the Government Code unless otherwise indicated.

BACKGROUND

A. Factual background.[2]

On April 1, 2015, Los Angeles County sheriff's deputies arrested plaintiff. The deputies allegedly used excessive force, causing plaintiff to suffer severe physical and emotional injuries. Plaintiff was initially incarcerated in the Los Angeles County jail.

Plaintiff was transferred to Wasco State Prison. While plaintiff was at Wasco State Prison, he repeatedly complained to corrections officers about his physical injuries, but he did not receive appropriate medical treatment.

In addition, plaintiff needed a walker because he had recently undergone brain surgery. Plaintiff had his own walker, but one morning he awoke to find his walker had been stolen and replaced with a "defective" walker which plaintiff could not effectively use. Plaintiff told corrections officers he needed his walker or another similar walker so he could properly move around, but the officers did not accommodate his needs.

Meanwhile, correctional officers found a weapon inside the defective replacement walker and charged plaintiff with possessing a weapon. Plaintiff denied the charge and pursued his administrative remedies in an attempt to disprove it, but he was unsuccessful. Plaintiff was convicted of possessing a weapon and the length of his prison stay was increased as a result.

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2 Consistent with the applicable standard of review (discussed below), we take the facts from the operative Third Amended Complaint.

B. Procedural background.

On January 6, 2016, plaintiff filed a complaint against the State of California asserting claims for negligence, negligent employment, violation of section 845.6, violation of the Unruh Civil Rights Act, and violation of 42 U.S.C. section 1983.[3] On April 6, 2016, plaintiff filed a first amended complaint which omitted the negligent employment claim.

The State demurred to the first amended complaint. On August 11, 2016, the trial court sustained the demurrer to the claims for negligence and violation of the Unruh Civil Rights Act based on the immunity provided by section 844.6, subdivision (a)(2). The court sustained the demurrer to the claim for violation of section 845.6 because it did not sufficiently allege that State employees knew or had reason to know that plaintiff needed immediate medical care. The court sustained the demurrer to plaintiff's claims for violation of the Unruh Civil Rights Act and 28 U.S.C. section 1983 because the statutes do not apply to State defendants. The court sustained the demurrer to all of plaintiff's claims based on his failure to exhaust administrative remedies. The court denied plaintiff leave to amend the claims for negligence, violation of the Unruh Civil Rights Act, and violation of 28 U.S.C. section 1983. The court gave plaintiff 20 days to file an amended complaint alleging liability under section 845.6.

On August 31, 2016, plaintiff filed a Second Amended Complaint. On November 14, 2016, pursuant to the parties' stipulation, plaintiff filed a Third Amended Complaint.

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3 Additional defendants County of Los Angeles and Does 1-20 are not parties to this appeal.

The State demurred to the Third Amended Complaint and filed a request for judicial notice. Plaintiff opposed the demurrer and objected to the judicial notice request. The State filed a reply.

On February 22, 2017, the trial court sustained the State's demurrer to the Third Amended Complaint and denied the State's request for judicial notice. The court explained that a public entity is not liable for failure to provide medical care to a prisoner under section 845.6 unless the prisoner has a serious and obvious medical condition requiring immediate medical care, a public employee knows or has reason to know that the prisoner needs immediate medical care, and the employee fails to take reasonable action to summon the care. The court concluded that plaintiff's allegation that he needed his own walker or another similar walker did not meet this standard. The court also ruled that plaintiff had failed to allege facts showing he exhausted his administrative remedies.

The court denied leave to amend, reasoning that "[p]laintiff's proposed amendment would address only the replacement of [p]laintiff's walker with a walker that [p]laintiff did not regard as satisfactory, and not some other medical condition requiring immediate care." The court noted that counsel had engaged in "considerable discussion" of plaintiff's request for leave to amend but it was not reported because there was no court reporter.

On March 16, 2017, the court entered judgment for the State. Plaintiff timely appealed.

DISCUSSION

I. Standard of Review

"'"Our only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action."'" (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102 (*Tenet*).) We decide this question de novo. (*Busse v. United PanAm Financial Corp.* (2014) 222 Cal.App.4th 1028, 1035 (*Busse*).) "We assume the truth of allegations in the [third] amended complaint that have been properly pleaded and give it a reasonable interpretation by reading it as a whole and with all its parts in their context." (*Tenet*, *supra*, 169 Cal.App.4th at p. 1102.) We also assume the truth of reasonable inferences drawn from the facts properly alleged in the complaint. (*Busse*, *supra*, 222 Cal.App.4th at pp. 1032-1033.) But we do not assume the truth of contentions, deductions, or conclusions of law or fact. (*Tenet*, *supra*, 169 Cal.App.4th at p. 1102.)

"'On appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend, unless failure to grant leave to amend was an abuse of discretion, the appellate court must affirm the judgment if it is correct on any theory. [Citations.]'" (*Tenet*, *supra*, 169 Cal.App.4th at p. 1102.)

"If there is a reasonable possibility that the defect in the complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended. [Citation.]'" (*Tenet*, *supra*, 169 Cal.App.4th at p. 1102.)

II. Adequacy of record.

Plaintiff did not designate a reporter's transcript of the hearing on the State's demurrer to plaintiff's Third Amended Complaint or a suitable substitute such as a settled statement. We therefore asked the parties to address in their briefs whether plaintiff provided an adequate record to permit appellate review of plaintiff's legal arguments.

We have reviewed the parties' responses and conclude that a reporter's transcript or suitable substitute is not necessary for our review of the trial court's order sustaining the State's demurrer. (See *Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700, fn. 2 [where appeal is from sustaining of demurrer, reporter's transcript or suitable substitute is not necessary]; see also *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699 [reporter's transcript not necessary where appellate issue is "a purely legal issue based on the filings before the trial court"].)

A reporter's transcript or suitable substitute might have been needed to permit appellate review of the trial court's decision to deny leave to amend the Third Amended Complaint. But plaintiff has not presented any argument on appeal that the trial court abused its discretion in denying leave to amend. Therefore, a record of the oral proceedings is not required.

III. The trial court properly sustained the State's demurrer.

A. Plaintiff failed to exhaust administrative remedies.

A California state prisoner must exhaust available administrative remedies before filing a lawsuit. (*Parthemore v. Col* (2013) 221 Cal.App.4th 1372, 1379 (*Parthemore*).) The failure to exhaust administrative remedies is a proper basis for demurrer. (*Ibid.*) "A complaint is vulnerable to demurrer on administrative exhaustion grounds when it fails to plead either that administrative remedies were exhausted or that a valid excuse exists for not exhausting." (*Ibid.*)

To begin the administrative appeal process, a prisoner must initiate an informal appeal using a Department of Corrections and Rehabilitation (DCR) "CDCR 602" form to describe the relief requested. (*Parthemore*, *supra*, 221 Cal.App.4th at p. 1380.) If an informal appeal does not resolve the grievance, the prisoner may proceed through three formal levels of review. (*Ibid.*, citing regulations.) Administrative remedies are not exhausted until the appeal proceeds to a third level review. (*Ibid.*) And "administrative remedies are not deemed exhausted as to any new issue, information or person not included in the originally submitted DCR CDCR 602." (*Ibid.*; see *id.* at p. 1381 [plaintiff did not exhaust administrative remedies for claims not raised in his original DCR CDCR 602].)

Here, plaintiff alleged only that he "filed the necessary Form 602 to pursue [his] administrative remedy" concerning the charge of having a weapon in his walker. He did not allege he

filed a separate DCR CDCR 602 concerning the correctional officers' alleged refusal to return his walker or give him a similar walker. Instead, he alleged "he was rebuffed, thwarted and rejected in his efforts, and in effect, he had exhausted his administrative remedies to no avail since the prison authorities, instead of responding to his needs for a proper walker, simply refused same, convicted him of a trumped-up charge, and added additional time to his prison stay."

On appeal, plaintiff continues to argue he exhausted his administrative remedies concerning his request for a walker by exhausting his administrative remedies concerning the weapon possession charge. Plaintiff cites no legal authority to support the argument and he does not address the legal authority, referenced above, refuting it.

We hold the trial court correctly found plaintiff failed to exhaust his administrative remedies. Based on this finding, we affirm the trial court's order sustaining the demurrer.

B. Plaintiff failed to allege facts supporting liability under section 845.6.

Even assuming plaintiff exhausted his administrative remedies, the trial court properly sustained the demurrer because plaintiff failed to allege facts supporting liability under section 845.6. "Public entities in California are not liable for tortious injury unless liability is imposed by statute." (*Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1069, citing § 815 (*Castaneda*).) Section 844.6, subdivision (a)(2) establishes the State's general immunity from liability for injuries to prisoners.

Section 845.6 creates a narrow exception to that immunity. It provides in part:

> "Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, 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. . . ." (§ 845.6.)

"Section 845.6 creates 'a newly-defined duty not applicable to private persons, created by the Legislature as a special burden to be borne by public entities under limited circumstances. [Citation.]'" (*Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 317 (*Johnson*).)

Liability under section 845.6 is limited "to serious and obvious medical conditions requiring immediate care." (*Watson v. State of California* (1993) 21 Cal.App.4th 836, 841 (*Watson*).) A public employee must have "'actual or constructive knowledge that the prisoner is in need of immediate medical care.'" (*Ibid.*, emphasis omitted, quoting Cal. Law Revision Com. com., 32 West's Ann. Gov. Code (1980 ed.) § 845.6, p. 414.) A public entity's "malpractice in furnishing or obtaining that medical care," however, does not subject it to liability under section 845.6. (*Castaneda*, *supra*, 212 Cal.App.4th at p. 1070.)

In some cases, a public entity's liability under section 845.6 is a factual question for a jury to decide. In *Hart v. County of Orange* (1967) 254 Cal.App.2d 302 (*Hart*), sheriff's deputies

arrested Hart for public drunkenness and put him in a "drunk tank" even though they realized he might be ill rather than drunk. (*Hart*, *supra*, 254 Cal.App.2d at pp. 303-304, 308.) Hart stayed in the drunk tank all night, lost consciousness, and was taken to a hospital in a coma the next morning. (*Id*. at p. 304.) Several days later he died of a form of encephalitis. (*Ibid*.) His heirs brought suit against the County under section 845.6 and prevailed in a jury trial. (*Id*. at p. 303.) The Court of Appeal affirmed, stating: "A review of the evidence relating to the decedent's detention in the jail discloses that the factual question of actual or constructive knowledge of [the] need for immediate care by an employee acting within the scope of his employment and of reasonable action to summon immediate medical care were properly questions for the jury and the evidence thereon is not subject to being reweighed by this court." (*Id*. at p. 307; see *id*. at p. 308 ["it was squarely for the jury whether [Hart] came within and had met the conditions and standards of section 845.6"].)

Similarly, in *Johnson*, *supra*, 143 Cal.App.3d 298, the Court of Appeal reversed the dismissal of plaintiffs' complaint alleging sheriff's deputies failed to summon medical care for the obviously suicidal decedent and instead released him without notifying plaintiffs, stating: "[W]e need not, and do not, speculate on the nature of the medical care, if any, which here should have been summoned for Decedent. That, as well as the questions of Sheriffs' actual or constructive knowledge of Decedent's need for immediate care, and of Sheriffs' reasonable action to summon or not to summon such care, are questions of fact to be determined at trial." (*Id*. at p. 317; see also *Sanders v. County of Yuba* (1967) 247 Cal.App.2d 748, 749-750, 755 [reversing judgment for county after trial court sustained county's demurrer where plaintiff,

while inmate in county jail, received eye injury in accident and brought suit alleging jailers negligently failed to summon medical care for eight days after the accident although they knew plaintiff needed medical care].)

In other cases, however, the Courts of Appeal have rejected claims brought under section 845.6 as a matter of law when the plaintiff could not allege or prove the statutory elements. (See *Castaneda*, *supra*, 212 Cal.App.4th at pp. 1072, 1075 [reversing judgment for prisoner's estate where State summoned medical care and treated prisoner by diagnosing his condition and referring him for medication and a biopsy, even though State's employees failed to provide further treatment, ensure further diagnosis or treatment, monitor prisoner, or follow up on his progress]; *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1385 [trial court properly sustained demurrer because denial of prisoner's medications and breast pump did not amount to neglect of a serious and obvious medical condition]; *Watson*, *supra*, 21 Cal.App.4th at pp. 840, 846 [affirming summary judgment for State where plaintiff received prompt medical care while in prison, even though plaintiff later learned the care was inadequate]; *Lucas v. City of Long Beach* (1976) 60 Cal.App.3d 341, 349-351 [reversing judgment on jury verdict for mother of arrestee who, during booking, appeared intoxicated and "evidenced emotional upset by crying and expressing concern" about effect of arrest on his mother; mother "offered no evidence as to what kind of medical care she claims should have been provided and more importantly she offered no evidence as to how such medical care could have prevented [arrestee's suicide]"]; *Kinney v. County of Contra Costa* (1970) 8 Cal.App.3d 761, 765, 769-770, 772 [trial court properly granted nonsuit against

plaintiff because her request that jail attendant turn down radio and give her something for a "'very bad headache'" was not "notice 'that the prisoner is in need of immediate medical care'"].)

Plaintiff argues *Zeilman v. County of Kern* (1985) 168 Cal.App.3d 1174 (*Zeilman*) supports his claim against the State under section 845.6. In *Zeilman*, the plaintiff was arrested and taken to the Kern County jail for booking. (*Id.* at p. 1177.) She had previously injured her leg and was using crutches to walk. (*Ibid.*) She remained standing during the booking process. (*Ibid.*) The plaintiff's attorney, who was present, observed that the plaintiff was in an "'aggitated [*sic*], emotional and weakened condition which was easily apparent to him and any other person in his vicinity.'" (*Id.* at pp. 1177-1178.) When the booking deputy finished with the plaintiff and pointed to a chair, the plaintiff did not request assistance but attempted to walk to the chair with the aid of her crutches. (*Id.* at pp. 1176-1177.) She slipped and fell, apparently on a wet spot, before she reached the chair. (*Id.* at pp. 1177, 1181, 1185.) The plaintiff filed a complaint against the County for personal injuries suffered in the fall. (*Id.* at p. 1176.) The trial court granted the County's motion for summary judgment based on governmental immunity. (*Id.* at pp. 1176-1177.)

The Court of Appeal reversed, holding "the trial court erred in granting summary judgment in favor of [the County] since a triable issue of fact existed as to whether plaintiff was a prisoner within the meaning of [statutes immunizing public entities for injuries to prisoners] at the time of her injury." (*Zeilman*, *supra*, 168 Cal.App.3d at p. 1183.)

After reaching this conclusion, which disposed of the case, the Court of Appeal then addressed – arguably in *dicta* – whether

the County breached its duty to provide immediate medical care to the plaintiff under section 845.6. (*Zeilman*, *supra*, 168 Cal.App.3d at pp. 1184-1187.) The court stated: "Clearly, plaintiff's failure to ask for medical care may be a factor in what the governmental entity or its agents knew or should have known, but it is not the sole fact to be considered. . . . The trier of fact should be permitted to determine, as a question of fact, whether plaintiff's use of crutches and her apparently agitated, emotional, and weakened condition should have given rise to knowledge of her need for immediate medical care." (*Id*. at pp. 1186-1187.) Moreover, "it seems possible that summoning medical aid to relieve plaintiff's weakened condition, whether in the form of medical personnel to assist her or in the provision of a wheelchair, could have prevented plaintiff from falling." (*Id*. at p. 1187.)

Zeilman does not support plaintiff's contention that the trial court erred in sustaining the State's demurrer. In *Zeilman*, the plaintiff's use of crutches and her agitated, emotional, and weakened condition raised triable issues of fact concerning whether (1) the plaintiff had a serious and obvious medical condition requiring immediate care and (2) the defendant had actual or constructive knowledge that the plaintiff needed immediate medical care. (See *Zeilman*, *supra*, 168 Cal.App.3d at p. 1187; *Watson*, *supra*, 21 Cal.App.4th at pp. 841-842.)

Here, plaintiff has alleged that he was using a walker as the result of brain surgery, that his walker was stolen and replaced by a defective walker which he could not effectively use, and that he asked correctional officers to return his walker or give him a similar walker. Assuming the truth of these allegations for purposes of reviewing the demurrer ruling, we

conclude they support inferences that plaintiff had a serious and obvious medical condition which required that he use a walker in order to move around, and the replacement walker did not serve this purpose.[4]

But the allegations do not support an inference that plaintiff needed immediate medical care. Unlike the plaintiff in *Zeilman*, plaintiff did not allege any facts showing he was experiencing distress or discomfort or was in danger of imminent harm due to his medical condition. He alleged only that "he needed his walker or a similar one to be given to him so that he could properly move around" and "follow the orders of the correctional officers who required him to move from place to place throughout his day in prison . . . ." Although plaintiff alleged he "needed immediate medical care consisting of the replacement of his walker," we do not assume the truth of contentions, deductions, or conclusions of law or fact. (*Tenet*, *supra*, 169 Cal.App.4th at p. 1102.) Plaintiff did not allege *facts* showing the requested walker was necessary for the immediate medical care of his condition.

It follows that plaintiff has not alleged facts showing defendants had actual or constructive knowledge that plaintiff needed immediate medical care. The complaint alleged defendants were aware that plaintiff needed his walker or a similar walker for mobility purposes, but failed to allege facts

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4 Thus, we disagree with the State's contentions that plaintiff "has not pled a medical condition at all" and "does not allege that he could not still move around with the replacement walker . . . ."

showing defendants knew or should have known plaintiff needed immediate medical care.[5]

Plaintiff's failure to allege facts supporting liability under section 845.6 provides an additional basis for the trial court's order sustaining the State's demurrer.

IV. Plaintiff has abandoned his argument that the trial court abused its discretion in denying leave to amend the Third Amended Complaint.

In the trial court, plaintiff sought leave to amend after the trial court sustained the State's demurrer to the Third Amended Complaint. The trial court denied the request.

On appeal, plaintiff does not assert the trial court abused its discretion in denying leave to amend the Third Amended Complaint. Plaintiff's appellate brief proposes no amendments that might support an abuse of discretion ruling. (See *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452 [appellate court has discretion to disregard issue not properly addressed in appellant's briefs, effectively treating issue as having been abandoned].) We deem the argument abandoned.

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5 Plaintiff's Third Amended Complaint also alleged, in a conclusory fashion, that while he was incarcerated at Wasco State Prison, he "complain[ed] to the correction officers and employees therein of his physical injuries and appropriate medical treatment was never provided to him" even though his injuries "were of such magnitude as to require immediate medical treatment . . . ." Plaintiff does not pursue these allegations on appeal.

DISPOSITION

The judgment is affirmed. The State of California is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

JASKOL, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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