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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JUANA VASQUEZ et al.,

Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES et al.,

Defendants and Respondents.

B192189

(Los Angeles County  
Super. Ct. No. BC345589)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Paul Gutman, Judge. Affirmed.

Moreno & Perez, Hermez Moreno, Richard T. Copeland for Plaintiffs and Appellants.

Lewis, Brisbois, Bisgaard & Smith, Laura Inlow; Greines, Martin, Stein & Richland, Martin Stein, Lillie Hsu and Carolyn Oill for Defendants and Respondents.

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Plaintiffs, the widow and children of Julio Olvera (decedent), appeal the dismissal of their complaint against the defendant County of Los Angeles for negligent mishandling of a corpse and negligent supervision of its employees. Plaintiffs alleged that the County Coroner's office failed to preserve and/or protect the decedent's body from decay as mandated by Health and Safety Code sections 7100 et seq. The trial court found that the cited statutes do not create the mandatory duty alleged by plaintiffs, and so sustained the County's demurrer to the complaint. In addition to appealing that ruling, plaintiffs request leave to amend their complaint to state a cause of action against the County for violation of their due process rights under 42 United States Code section 1983. We affirm the judgment and deny plaintiffs' request for leave to amend.

#### FACTUAL AND PROCEDURAL BACKGROUND

The operative first amended complaint alleges that plaintiffs' elderly husband and father suffered head injuries while on a walk on July 5, 2005. He was transported to Los Angeles County/USC Medical Center, where he died two days later. Subsequently, decedent's remains were delivered to the County Coroner's office, where they remained until August 11, 2005.

The complaint alleges that the County was obligated "to take . . . measures to preserve and/or protect DECEDENT's body from decay . . .," citing Health and Safety Code section 7100 et seq. as the source of this mandatory duty. The complaint further alleges that the County failed to preserve decedent's body, such that "DECEDENT's body decayed and decomposed to the point of being unrecognizable by his loved ones, Plaintiffs herein . . . ." Additionally, plaintiffs allege that the County was negligent in failing to adequately train its employees in the proper measures to prevent decomposition and decay as occurred here.

The County demurred to the first amended complaint, arguing that the coroner had no statutory duty to preserve the remains of plaintiffs' decedent in a recognizable

condition, and that its employees had neither a statutory nor common law duty to do so. The trial court agreed, and dismissed the complaint as to the County.<sup>1</sup>

## DISCUSSION<sup>2</sup>

### 1. *Coroner's mandatory duty*

A public entity such as the County is not liable for an injury arising out of a negligent act or omission except as provided by statute. (Gov. Code, § 815, subd. (a); *Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896-897.) Government Code section 815.6 provides that "[w]here 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." As the court in *Davila v. County of Los Angeles* (1996) 50 Cal.App.4th 137, 140, explained: "For liability to attach under this statute, (1) there must be an enactment imposing a mandatory duty, (2) the enactment must be intended to protect against the risk of the kind of injury suffered by the individual asserting liability, and (3) the breach of the duty must be the cause of the injury suffered."

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<sup>1</sup> The complaint also contained a cause of action against unnamed Doe defendants, with whom we are not here concerned.

<sup>2</sup> On appeal of a demurrer, we accept as true all well-pleaded facts of the complaint, and determine whether the complaint states a cause of action as a matter of law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Cognizant of these requirements, plaintiffs cite Health and Safety Code section 7100 et seq.<sup>3</sup> as the source of the mandatory duty underlying their lawsuit against the County. Section 7100 identifies the person or persons responsible for disposition of a deceased person's body, including "the location and conditions of interment, and arrangements for funeral goods and services to be provided." (Health & Saf. Code, § 7100, subd. (a).) The person who has the duty to inter the body also has the right to possess the body for that purpose. (Health & Saf. Code, § 7102.) While these statutes do not explicitly mandate the preservation of a corpse by embalming or refrigeration,

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<sup>3</sup> Health and Safety Code section 7100 provides in pertinent part as follows:

"(a) The right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided, unless other directions have been given by the decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon, the following in the order named:

"(1) An agent under a power of attorney for health care who has the right and duty of disposition under Division 4.7 (commencing with Section 4600) of the Probate Code, . . . [¶] . . . [¶]

"(2) The competent surviving spouse.

"(3) The sole surviving competent adult child of the decedent, or if there is more than one competent adult child of the decedent, the majority of the surviving competent adult children. . . .

"[¶] [¶] . . .

"(d) The liability for the reasonable cost of final disposition devolves jointly and severally upon all kin of the decedent in the same degree of kinship and upon the estate of the decedent. . . .

"(e) This section shall be administered and construed to the end that the expressed instructions of the decedent or the person entitled to control the disposition shall be faithfully and promptly performed. . . ."

Health and Safety Code section 7102 provides: "When a person is charged by law with the duty of interment he is entitled to the custody of the remains for the purpose of interment or, with respect to cremated remains, for the purpose of burial at sea in accordance with the provisions of this division; except that in any case where a coroner is required by law to investigate the cause of death, the coroner is entitled to the custody of the remains of the person whose death is the subject of investigation until the conclusion of the autopsy or medical investigation by the coroner. Any person in whose possession such remains are found, shall, upon demand by the coroner, surrender such remains to him."

plaintiffs argue that they implicitly impose on the County a duty to deliver remains to next of kin in a condition which permits them to exercise their right to inter the body as they see fit. Plaintiffs allege that they wished to bury their loved one's body, but that, as a result of its negligence, the County delivered the body in a condition which precluded burial, forcing them to choose cremation.

In support of their argument, plaintiffs cite *Quesada v. Oak Hill Improvement Co.* (1989) 213 Cal.App.3d 596 for the proposition that a county has a duty to "properly handle" a decedent's remains, and *Davila v. County of Los Angeles, supra*, 50 Cal.App.4th 137 for the proposition that that mandatory duty resides in Health and Safety Code sections 7100 et seq. Both cases are distinguishable.

In *Quesada*, defendant County of Santa Clara delivered to defendant funeral home a body other than the plaintiffs' decedent. The defendants ignored plaintiffs' protestations that the body was not that of their loved one, and conducted the funeral service with the stranger's body, burying it in the decedent's stead. Plaintiffs, the sister and niece of the decedent, sued the county and funeral home for negligent infliction of emotional distress arising out of defendants' mishandling of their decedent's remains. The bulk of the appellate opinion concerned whether plaintiffs, who had not entered into a contractual relationship and who did not have the right to control disposition of remains pursuant to Health and Safety Code section 7100, were within the class of persons to whom a duty of due care was owed under these factual circumstances. Although the Court of Appeal found plaintiffs had stated a cause of action against the county for negligent mishandling of a corpse, there was no discussion of the statutory basis of the county's mandatory duty. Nevertheless, the court's implied conclusion – that a county's duty to deliver a corpse in its custody to the persons having a right to dispose of it under Health and Safety Code section 7100 encompasses the mandatory duty to deliver the right corpse to those relatives – is assuredly correct. However, plaintiffs' complaint includes no allegation that the County delivered the wrong body to them for interment, and thus *Quesada* has no relevance to this case.

Plaintiffs also rely on *Davila v. County of Los Angeles*, *supra*, 50 Cal.App.4th 137. In *Davila*, plaintiffs were the children of a man found dead in a parked car. Even though the decedent had on his person identification which included his son's home and work telephone numbers, the county made no effort to notify plaintiffs and, after no one contacted the coroner's office during the 30 days that it had custody of the body, the coroner cremated the body pursuant to Health and Safety Code section 7104. Division One of this District's Court of Appeal found on these facts that Government Code section 27471, subdivision (a)<sup>4</sup> imposes on the coroner a mandatory duty to make a reasonable attempt to locate a decedent's next of kin. The court concluded that the cited statutes "impose upon the coroner a duty to act with reasonable diligence in attempting to identify a body placed in his custody and then to attempt with reasonable diligence to locate some family member." (*Id.* at p. 143.) Again, plaintiffs do not allege that the County failed to exercise diligence in notifying them of its custody of their decedent's body. Consequently, the holding of *Davila* has no application to the facts of this case.

Plaintiffs contend that a duty to preserve a corpse must be read into the statute in order to protect the next of kin's rights to control the disposition of the remains of their loved one. Otherwise, plaintiffs argue, the coroner "could store the bodies at an unacceptable temperature thereby causing them to rot and decay at an accelerated rate, and leaving the remains in an unrecognizable condition. This would result in family members being divested of their right to control the disposition of their decedent's remains and the condition of the interment, violating their clearly enumerated rights under *Health and Safety Code* §§7100, *et.seq.*"

On July 31, 2007, after completion of briefing on appeal, our colleagues in Division Two of this District Court of Appeal filed its opinion in *Perryman v. County of Los Angeles* (2007) 153 Cal.App.4th 1189 ("*Perryman*"). That court considered this same argument, on somewhat different facts.

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<sup>4</sup> "Whenever the coroner takes custody of a dead body pursuant to law, he or she shall make a reasonable attempt to locate the family."

In *Perryman*, the plaintiffs' decedent was the victim of a drive-by shooting. The body was transported to the County Coroner's Office, where it remained "unembalmed and unrefrigerated for one week, resulting in substantial decomposition." (*Perryman*, *supra*, 153 Cal.App.4th at p. 1194.) The decedent's next of kin sued the County for negligence in its handling of the body. The Court of Appeal affirmed the trial court's sustaining of the County's demurrer, ruling that "nothing in Health and Safety Code section 7104 required that the coroner embalm or refrigerate decedent's remains, or that the coroner take any measures to ensure that the remains stay intact. . . . Absent a statutory requirement that the coroner maintain a corpse in an intact condition through embalming or refrigeration, no claim can be asserted that the coroner failed to execute a mandatory duty when it allowed decedent's remains to decompose." (*Id.* at p. 1197.) We concur with the reasoning of *Perryman*, and conclude that the cited statutes do not create the mandatory duty alleged by plaintiffs.

In short, unlike the plaintiffs in *Quesada* and *Davila*, *supra*, plaintiffs exercised their right to control the disposition of their loved one's body as provided by Health and Safety Code section 7100. While they chose to cremate the body rather than bury it on account of the state of its decomposition by the time that they claimed it, the County fulfilled its mandatory obligations under the Health and Safety Code. Indeed, the County cannot be faulted for "causing" the body to decompose over a period of more than 30 days; nature is responsible for that unfortunate fact.

Plaintiffs also argue that, even if the County had no duty to preserve the decedent's remains, they should be allowed to pursue a negligence cause of action against the County "for the negligent acts of its employees in failing to properly house, store, refrigerate and/or other wise care for DECEDENT'S remains pursuant to *Government Code* §815.2." Plaintiffs cite no authority in support of this contention, and we therefore deem it waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 ["[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration"]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [scope of appeal

is limited to those issues adequately raised and supported in opening brief even where review is de novo].) Even if we were to consider the contention, plaintiffs cannot state a cause of action against the County based on vicarious liability. As the court in *Perryman, supra*, noted, employees of the coroner's office do not have a common law duty "to treat human remains in the same manner as would be expected of a mortuary or crematory, . . ." (153 Cal.App.4th at p. 1199.) And because the decision to embalm or not embalm is discretionary, and public employees are not liable for injuries resulting from the exercise of discretion, "the coroner's employees are immune from liability." (*Ibid.*)

## 2. *Leave to amend*

Citing the well-established rule that it is an abuse of discretion to sustain a demurrer without leave to amend if the facts alleged show entitlement to relief under any possible legal theory (see, e.g., *Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1444), plaintiffs maintain the trial court erred in granting the demurrer without leave to amend.

The amendment which plaintiffs propose on appeal would include a new theory of liability, to wit: a civil rights cause of action against the County for violation of section 1983 of 42 United States Code. As plaintiffs explain, they contend that, based on the authority of *Newman v. Sathyavaglswaran* (9th Cir. 2002) 287 F.3d 786, they had a property right in their decedent's remains, and were deprived of that property right when the County, acting under the color of state law, "converted DECEDENT'S remains by letting his body decompose to a point where it was unrecognizable."

*Perryman, supra*, 153 Cal.App.4th 1189 considered and rejected this precise argument. As that court explained, in California there is no property right in a dead body. (*Id.* at p. 1200.) Thus, the County can have no liability for depriving plaintiffs of their



property under color of state law. (*Id.* at p. 1201.) Consequently, the trial court did not err in failing to grant plaintiffs leave to amend their complaint.

DISPOSITION

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.