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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KEITH THOMAS,

Plaintiff and Appellant,

v.

KAMALA HARRIS, as Attorney General,
Etc.,

Defendant and Respondent.

A133349

(San Francisco County
Super. Ct. No. CGC-11-507972)

Plaintiff and appellant Keith Thomas argues the trial court was wrong to sustain defendant Attorney General Kamala Harris's demurrer to his complaint without leave to amend. Thomas seeks to impose civil liability upon the Attorney General because, according to his allegations, an incorrect jury instruction was used when he was successfully prosecuted for battery committed by gassing under Penal Code section 243.9. As the Attorney General, or any public employee involved in prosecuting the charge against Thomas, was statutorily immune from civil liability for acts undertaken in the course of a judicial proceeding, the trial court was correct. Moreover, since any judgment in favor of Thomas would necessarily imply the invalidity of his conviction for battery by gassing, his complaint must be dismissed. There is no possibility that Thomas could cure the defect in his complaint by amendment. We affirm.

FACTUAL AND LEGAL BACKGROUND

Thomas filed a civil complaint against Attorney General Harris, and other defendants described as the Judicial Council, the Administrative Office of the Courts, the

Office of the General Counsel, the Advisory Committee and the California Revision Commission. The complaint sought injunctive relief due to the erroneous use of CALCRIM No. 2272 in a trial where Thomas was charged and convicted of battery by gassing under Penal Code section 243.9.

The Attorney General was served and demurred to the complaint. Thomas opposed the demurrer, and the trial court sustained it without leave on August 26, 2011. This appeal is timely.

DISCUSSION

California Government Code section 821.6 provides: “A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.” In order to further the rationale underlying the immunity conferred by section 821.6, the courts give it an expansive interpretation so prosecutors may freely exercise their discretion and be protected from harassment in the performance of their duties. (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1292.)

To the extent Thomas is seeking to impose civil liability on a public officer or employee due to their incorrect use or promulgation of CALCRIM No. 2272, Government Code section 821.6 provides them immunity from suit. To the extent Thomas is arguing that his conviction resulted from the improper use of CALCRIM No. 2272, his claim is not one that may be asserted in a civil action unless he can show that his conviction has been invalidated. (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 896–897.) It has not. (See *People of the State of California v. Keith Thomas* (November 15, 2010, D056958 [nonpub. opn.].) Thomas can state no cognizable cause of action. The trial court correctly sustained the demurrer to the complaint without leave to amend.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Pollak, J.