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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HELEN JONES, Individually and as
Personal Representative, etc.,

Plaintiff and Appellant,

v.

WILLIAM PENHOLLOW et al.,

Defendants and Respondents.

B243057

(Los Angeles County
Super. Ct. No. BC 431634)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed in part; reversed in part.

Law Offices of Lisa L. Maki, Lisa L. Maki, Christina M. Coleman and Jill McDonell for Plaintiff and Appellant.

Hurrell Cantrall, Thomas C. Hurrell, and Melinda Cantrall for Defendants and Respondents.

* * * * *

Plaintiff Helen Jones brought this action individually and as personal representative of the estate of her son, John Horton. Horton died in March 2009 while incarcerated at the Los Angeles County Men’s Central Jail. Plaintiff filed a complaint in February 2010 against the County of Los Angeles (County), Sheriff Leroy Baca, and doe defendants. She later identified and sued Deputy William Penhollow and Sergeant Cliff Yates as doe defendants. Deputy Penhollow and Sergeant Yates filed a joint motion for summary judgment, which the court granted.¹

Plaintiff limits the issues on appeal to the court’s ruling on causes of action for wrongful death, violation of civil rights, and negligence against both Deputy Penhollow and Sergeant Yates. As well, she argues the court erred in ruling for Sergeant Yates on a negligent supervision cause of action. We affirm in part and reverse in part. The judgment for Sergeant Yates on the negligence cause of action is affirmed but reversed with respect to Deputy Penhollow. The judgment for both officers on the wrongful death and violation of civil rights causes of action is reversed. The judgment for Sergeant Yates on the negligent supervision cause of action is also reversed.

FACTS AND PROCEDURE

1. Allegations of the Complaint

Jones’s complaint alleged as follows. Horton was incarcerated in March 2009 in the custody of the Los Angeles County Sheriff’s Department (Department). On or about March 16, 2009, the court ordered that Horton be placed in the medical unit of the jail for at least the beginning of the two to three weeks it would take to transfer him to “fire

¹ Several months before the defendants in this appeal moved for summary judgment, the County and Sheriff Baca filed a motion for summary judgment and another doe defendant, Deputy Christopher Kidder, filed a separate motion for summary judgment. The court granted the motions of the County, Sheriff Baca and Deputy Kidder and entered judgment for all three defendants. The judgment for those defendants is the subject of the related appeal in *Jones v. County of Los Angeles* (Jan. 31, 2014, B241333) (nonpub. opn.).

camp.” The court based its order on Horton’s “obvious mental health state of distress and other medical factors.” The Department failed to implement the court’s medical order, and Horton never received the care and treatment ordered by the court. Instead, the Department “secret[ed]” Horton in solitary confinement for 30 days, where he spent his time in a closet-sized cell with no windows, no furniture except a bed, and a lamp that produced very little light. The Department denied plaintiff any visitation with her son, despite numerous attempts to see him. Horton was subjected to “ongoing harassment, physical abuse, mental harassment, emotional abuse and/or other outrageous conduct” by the deputies charged with his care. On or about March 30, 2009, deputies physically abused, assaulted, emotionally abused, and/or facilitated Horton’s death by hanging while he was in solitary confinement.

The complaint alleged causes of action for wrongful death; violation of civil rights under Civil Code sections 43, 51, 51.7, and 52.1; negligence; negligent supervision; and intentional infliction of emotional distress. Plaintiff alleged all causes of action against all defendants and alleged she brought the action both individually and as a representative of Horton’s estate.

As discussed in the introductory paragraph, plaintiff limits the issues on appeal such that intentional infliction of emotional distress is not at issue. Our summary of the facts and procedure is therefore limited to that information necessary to evaluate her contentions on appeal.

2. Motion for Summary Judgment or Summary Adjudication

Deputy Penhollow and Sergeant Yates filed a joint motion for summary judgment or summary adjudication in January 2012 and argued, in pertinent part, that they did not cause Horton’s death, whether he died of a self-inflicted hanging or was beaten to death, and this lack of causation defeated the negligence and wrongful death causes of action.²

² Two other officers, Deputy Ricky Bratton and Deputy Arturo Quiroz, joined in this motion. They are not parties to this appeal.

Moreover, the cause of action for violation of civil rights failed because plaintiff could not show violations of the statutes on which she relied; Civil Code section 51 applied only to business establishments, and sections 51.7 and 52.1 required a showing that the officers subjected Horton to violence or intimidation, which they did not. They also asserted the cause of action for negligent supervision failed because only an employer could be liable under this theory, not individual supervisors.

In support of their motion, the officers submitted the declaration of Dennis Burns, chief of the custody operations division of the Department. Chief Burns had overall administrative responsibility for the custody operations division, which was responsible for the operation of the County's jail system and the care, custody, security, and rehabilitation of all inmates housed in the County's jails. He was involved in the investigation into Horton's death. He had read the reports prepared by the different investigative units (the Department's homicide bureau, the internal affairs division, and the men's central jail investigative unit) regarding Horton's death and had reviewed the evidence gathered. The investigations revealed the following, according to Chief Burns:

- Horton entered the County jail system on February 24, 2009. During intake, he reported having a history of alcohol abuse. Medical intake personnel did not observe any signs of substance abuse or withdrawal at the time. He denied a history of mental problems and denied any suicide attempts or ideation.
- On February 27, 2009, upon his return from court, Horton appeared to be under the influence of narcotics. He admitted to a deputy that he had smuggled Ecstasy and PCP into jail and had taken the narcotics at court that day. As a result, a discipline report was prepared for Horton, and after a hearing, he was housed in a disciplinary unit with a loss of privileges for 30 days.
- On March 4, 2009, a deputy found Horton roaming a hallway, claiming he was returning from a pass. Horton refused the deputy's orders to face the wall while the deputy determined Horton's correct housing location. Horton also refused to get on the ground when the deputy ordered. The deputy pepper sprayed Horton and additional deputies arrived to subdue him. Horton was transported to the

clinic where he was videotaped saying he had ingested 11 “Blue Dolphins” (a combination of Ecstasy and PCP), which were part of the narcotics he had earlier smuggled into custody. Horton was transported to the hospital for treatment.

- Due to the incident with the deputy and being under the influence of narcotics, Horton’s classification was changed on March 5, 2009, to “K-10,” meaning he would be housed in a single-man cell and waist chained during movement, with all movement accompanied by deputies.
- A disciplinary review board hearing was held on March 7, 2009, relating to the March 4 incident. Horton was charged with creating a disturbance, fighting, and insubordination. The board found the charges substantiated and gave Horton 29 days of disciplinary segregation with loss of privileges.
- On March 30, 2009, Horton was in discipline module 3301 in a single-man cell. At approximately 3:59 a.m. that day, deputies found Horton hanging with a noose around his neck in his cell. Following the investigation by homicide detectives and an autopsy, it was determined Horton had committed suicide by hanging.
- During a subsequent investigation, it was discovered the deputy responsible for monitoring module 3301 had left his station for a three-hour period prior to Horton’s being found dead. During that three-hour period, the deputy failed to perform half-hour security checks of the cells as required by Department policy. He also failed to arrange for another deputy to perform those checks.
- In 2007, the Department installed a barcode scanning system to ensure deputies were timely conducting welfare checks of the cells and to deter efforts to doctor welfare check logs after an adverse event. The system uses permanent barcode plaques mounted at each end of every cell row in the jail. Deputies are supposed to scan each of the plaques as they walk the rows performing their checks. The scanner records each barcode and the time at which the scan is performed.
- The deputy responsible for module 3301 did not make any barcode scans during his three-hour absence the night Horton died.

The officers also submitted the declarations of Deputy Kidder and their own declarations in support of their motion. Deputy Kidder was the deputy assigned to module 3301 on March 29 and 30, 2009, from 10:00 p.m. to 6:00 a.m. There were seven inmates in module 3301, each assigned to a single-man cell. He arrived for work at approximately 9:45 p.m. on March 29 and conducted a security check of the module right after arriving. He also performed security checks at 10:30 p.m. and 2:15 a.m. Each time, he saw Horton in his cell and nothing appeared unusual. At 3:45 a.m. on March 30, he was performing a security check of module 3301 and saw Horton hanging in his cell. He immediately yelled to a nearby module for assistance. Efforts were made to provide first aid, but Horton appeared to be already deceased.

Sergeant Yates was assigned to the 3000 floor of the jail from 9:30 p.m. on March 29, 2009, to 5:30 a.m. on March 30, 2009. His duties included supervising the deputies who worked the floor and checking and signing the log books in each module once per night. At approximately 12:09 a.m. on March 30, he gave Deputy Kidder permission to go on a “chow run.” When a deputy left his post for any period of time, the deputy was responsible for arranging for another deputy to supervise his or her module during his absence. Sergeant Yates later learned Deputy Kidder did not arrange coverage for module 3301 during his absence. After granting Deputy Kidder permission to leave at 12:09 a.m., Sergeant Yates walked module 3301 and observed Horton in his cell. He did not notice anything unusual at that time. That was the only occasion when Sergeant Yates was in module 3301 that evening until approximately 3:45 a.m., when he heard a request over the radio for a nurse and gurney in module 3301. He immediately responded to module 3301 and observed deputies moving Horton out of his cell and the nursing staff arriving. He notified the watch commander on duty of the incident. Sergeant Yates stated he did not “have any physical altercation with, assault, batter, strike, kick or otherwise physically injure Mr. Horton,” and at no time did he “observe anyone (custody official, inmate or anyone else) have any physical altercation with, assault, batter, strike, kick or otherwise physically injure Mr. Horton.” The sergeant also asserted that, as a

floor sergeant, he was not responsible for the hiring, training, or decisions concerning the discipline of any other employee.

Deputy Penhollow was assigned to module 3300 on March 29 and March 30, 2009. Sometime shortly after midnight on March 30, Deputy Kidder asked Deputy Penhollow to go on a “chow run” with him to get food for themselves and other deputies on the 3000 floor of the jail. Deputy Penhollow was away from module 3300 for approximately two hours or less while on the “chow run.” He returned at approximately 1:45 a.m. At approximately 3:45 a.m., he heard Deputy Kidder yell for him to go to module 3301, and when he got to module 3301, Deputy Kidder said he had a “hanger.” Deputy Penhollow then followed Deputy Kidder to the cell where he observed Horton hanging by a noose tied to an air vent. Another deputy brought scissors and they entered the cell, where Deputy Penhollow held Horton while the third deputy cut the ligature. They placed Horton on the ground. Deputy Penhollow felt for a pulse but could not find one. Horton’s body was cold and rigid. The nursing staff arrived in less than five minutes, and Deputy Penhollow returned to module 3300 to complete his shift. Deputy Penhollow stated he did not enter module 3301 or have any contact with Horton at any time on March 29 and 30, except at approximately 3:45 a.m. on March 30 when summoned by Deputy Kidder. A question later arose regarding whether Deputy Penhollow had been in module 3301 prior to 3:45 a.m. on March 30 because scanner logs indicated he had scanned the barcode plaque in module 3301 at 11:06 p.m. on March 29, 2009. Deputy Penhollow explained he used a barcode “cheat sheet” to attempt to document a security check of module 3300, when he had not actually walked the module and conducted the check. Instead of using the cheat sheet for module 3300, he mistakenly scanned the cheat sheet for module 3301 at 11:06 p.m. Deputy Penhollow asserted he did not “have any physical altercation with, assault, batter, strike, kick or otherwise physically injure Mr. Horton,” and at no time did he “observe anyone (custody official, inmate or anyone else) have any physical altercation with, assault, batter, strike, kick or otherwise physically injure Mr. Horton.” The deputy also asserted that he was

not responsible for the hiring, training, or decisions concerning the discipline of any other employee.

In support of their motion, the officers also submitted the declaration of Dr. Richard Fukumoto, a forensic pathologist retained by the defense to provide expert witness services. Dr. Fukumoto opined Horton's death was caused by asphyxia due to self-inflicted hanging with a cord ligature around his neck. He noted Horton's body displayed a ligature mark around the upper neck with tissue damage but no fractures in the larynx or trachea. He concluded the absence of any physical injuries to Horton's body that would be attributable to a struggle with a third party demonstrated the injuries to Horton's neck were self-inflicted. Dr. Fukumoto based his opinion on a review of a number of documents and photographs, including Horton's autopsy report and the report of another forensic pathologist, Dr. Howard Oliver.

Dr. Vadims Poukens, deputy medical examiner for the County Department of the Coroner, conducted Horton's autopsy. Horton had a ligature mark around his neck and a small hemorrhage of a muscle close to the right lower jaw area. He also noted intra-abdominal hematoma in the area of Horton's kidney and liver and right back muscle hematoma, which indicated recent blunt force torso injury. He noted the significance and circumstances of these injuries were not clearly established. Slides of the liver, adrenal gland, mesentery, and kidney showed soft tissue hemorrhage or contusions less than four hours old. Dr. Poukens could not determine with medical certainty whether the intra-abdominal injuries contributed directly or indirectly to Horton's death. At the same time, Dr. Poukens opined the findings supported a self-inflicted hanging. As a result, he ascribed Horton's death to "hanging and other undetermined factors." Horton's death certificate listed the cause of death as "deferred." The death certificate and autopsy report list Horton's time of death as 4:05 a.m. on March 30, 2009.

Dr. Oliver examined Horton's body after Dr. Poukens's autopsy. He opined Horton "succumbed to asphyxia due to hanging." He found "no evidence of trauma (bruises, abrasions, lacerations, etc.)" after a "careful examination" of Horton's body.

3. Plaintiff's Opposition

In opposition, plaintiff argued disputed issues of material fact existed regarding whether Deputy Penhollow and Sergeant Yates caused Horton's death. Plaintiff argued only three people had access to Horton the night he died -- Deputy Kidder, Deputy Penhollow, and Sergeant Yates. She asserted there was evidence the officers used excessive force on Horton the night he died. Even if Sergeant Yates or Deputy Penhollow did not use excessive force, she argued they would have heard any assault because their posts were close by. She also contended an individual supervisor such as Sergeant Yates could be liable for negligent supervision if he knew or should have known officers under his supervision were unfit for duty.

In support of her opposition, plaintiff relied on her forensic pathologist expert, Dr. Silvia Comparini. Plaintiff had filed Dr. Comparini's declaration several months earlier in connection with separate motions for summary judgment brought by the County and Deputy Kidder. Plaintiff relied on this same declaration as well as a supplemental declaration filed with her opposition to Deputy Penhollow and Sergeant Yates's motion.

Among other things, Dr. Comparini reviewed the autopsy report by Dr. Poukens and the Department's homicide report on the death of Horton. She disagreed with the defense's expert, Dr. Fukumoto, that Horton's body lacked any injuries attributable to a third party struggle. She found "[s]evere signs" attributable to a struggle. She pointed to the autopsy report describing intra-abdominal injuries and found the injuries were consistent with or caused by "blunt force inflicted within less than four (4) hours old." She opined the injuries to Horton's neck were not consistent with death by hanging. Instead, she found the "shallow furrow" from the noose around the neck was most likely obtained after Horton's death. She also noted the lack of petechial hemorrhaging in the eyes as inconsistent with death by hanging. She found the intra-abdominal injuries along "with the delay in immediate response and slow first care emergency in-house facility observed during [her] visit . . . denied Horton the possibility of survival following the assault." Dr. Comparini thus opined the cause of Horton's death was internal bleeding in combination with the failure to provide immediate medical care. She believed the time of

death was earlier than what the coroner's report stated because of Horton's body temperature and level of rigor mortis. Dr. Comparini opined in her initial declaration that Horton's intra-abdominal injuries "occurred no sooner than 48 hours before the time he was found dead." In her supplemental declaration, she referred to this statement and explained, "My opinion has not changed, but the manner in which I previously expressed my opinion appears to have been confusing and open to an incorrect interpretation which does not represent my opinion." Specifically, Horton's intra-abdominal injuries "occurred no *more* than forty-eight (48) hours before the time" he was found dead, "and no injuries which John Horton *may* have sustained in the time frame more than 48 hours prior to his death caused his death." She noted this clarification was consistent with her opinion stated in the initial declaration that Horton's intra-abdominal injuries were inflicted within four hours of his death.

4. Court's Ruling Granting Motion for Summary Judgment

The court filed an order granting the officers' motion for summary judgment on April 30, 2012. The court ruled Deputy Penhollow's and Sergeant Yates's declarations shifted the burden of proof to plaintiff on the causation element of the causes of action for wrongful death and negligence. It found that although plaintiff had raised a triable issue of fact regarding whether Horton committed suicide or died as a result of a beating, she failed to introduce any evidence the officers were involved in a beating. Regardless of whether Horton was beaten to death or committed suicide, the court reasoned either circumstance was an intentional act that superseded any alleged negligence on the part of the officers. As to the cause of action for violation of civil rights, the court concluded claims under Civil Code section 52.1 were limited to alleged violations of constitutional rights accomplished by threats, intimidation, and coercion, and there was no evidence the officers had engaged in such conduct here. The court ruled for Sergeant Yates on the negligent supervision cause of action, reasoning that an individual supervisor, as distinct from an employer, cannot be liable for the conduct of employees under his or her supervision. Alternatively, the court found that, because there was no triable issue of fact as to any wrongdoing on the part of the supervised deputies (Deputy Kidder and Deputy

Penhollow), there could be no triable issue of fact regarding the sergeant's alleged negligent supervision of them.

Plaintiff filed a notice of appeal from the court's order granting summary judgment. An appeal lies from the judgment entered after the court's order, not from the order itself. (*Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 14, fn. 1.) Accordingly, we directed plaintiff to obtain a judgment and file a conformed copy with this court. She has done so, and we now deem the appeal to be from the judgment. (*Ibid.*)

STANDARD OF REVIEW

Defendants may move for summary judgment when they contend an action has no merit. (Code Civ. Proc., § 437c, subd. (a).) The defendants have met their burden of showing a cause of action is meritless if they demonstrate one or more elements of the cause of action cannot be established or there is a complete defense to the cause of action. (§ 437c, subd. (p)(2).) Once the defendants have met that burden, the burden shifts to the plaintiff to set forth specific facts showing a triable issue of material fact. (*Ibid.*) The court shall grant the motion for summary judgment if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (§ 437c, subd. (c).)

“An issue of fact can only be created by a conflict of evidence. It is not created by ‘speculation, conjecture, imagination or guess work.’” (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.) A genuine issue of fact exists if, and only if, the evidence would allow a reasonable juror to find the underlying fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

We review the grant of summary judgment de novo, applying the same legal standard and analysis as the trial court in determining whether any genuine issues of material fact exist or whether the moving party is entitled to judgment as a matter of law. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 390.) We accept as true the facts shown by the losing party's evidence

and reasonable inferences from that evidence, and we resolve evidentiary doubts or ambiguities in the losing party's favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.)

DISCUSSION

1. Trial Court's Rulings on Evidentiary Objections

Preliminarily, plaintiff contends the trial court erred in sustaining Deputy Penhollow and Sergeant Yates's six evidentiary objections. Specifically, the court sustained objections to (1) exhibits plaintiff identified as two logs documenting security checks for module 3301 and two inmate discipline reports for Horton; (2) the deposition transcript of Horton's sister; and (3) the declaration of an attorney at Disability Rights California regarding a study on mental health issues at the jail. Plaintiff asserts the officers' objections lacked merit and also that the court erred in filing its evidentiary rulings but never serving the rulings on the parties.³ Even if we were persuaded the court erred, plaintiff has not demonstrated prejudice. A party challenging evidentiary rulings made in the course of a summary judgment motion has two burdens on appeal -- affirmatively show error in the rulings and establish prejudice. (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119.) Plaintiff argues the rulings were either wrong or ineffective for lack of service, but she does not explain how or why the court's ruling granting summary judgment would have been otherwise, had the court overruled the defense objections. Without a showing that the court's alleged errors were prejudicial, we decline to reverse the evidentiary rulings.

2. Summary Adjudication on the Wrongful Death and Negligence Causes of Action

Plaintiff contends the court erred in granting the officers' motion because it was disputed whether the officers caused Horton's death by participating in an assault and

³ Plaintiff explains she only became aware of the rulings when she was reviewing the docket in preparation for this appeal.

battery. Alternatively, she argues, the officers were negligent in failing to prevent the beating and caused Horton's death in this manner. We agree there were disputed issues of material fact precluding summary adjudication on the wrongful death cause of action as to both officers and on the negligence cause of action as to Deputy Penhollow only.

a. Wrongful Death

In their separate statement of undisputed material facts (separate statement), Sergeant Yates and Deputy Penhollow highlighted the opinion of defense expert Dr. Fukomoto that Horton died from a self-inflicted hanging. Plaintiff disputed this fact, citing Dr. Comparini's declaration that the evidence was inconsistent with a self-inflicted hanging, and Horton had instead died from intra-abdominal injuries inflicted by blunt force trauma. Dr. Comparini relied on the autopsy report. The coroner's autopsy report was inconclusive, to be sure. Dr. Poukens, who conducted the autopsy, determined Horton's cause of death was "hanging and other undetermined factors," noted intra-abdominal injuries that indicated recent blunt force trauma, and noted tissue in that area showed hemorrhaging or contusions less than four hours old. The report noted Horton's time of death as 4:05 a.m. on March 30, 2009. Dr. Poukens could not determine with medical certainty whether the intra-abdominal injuries contributed directly or indirectly to Horton's death. These conflicts in the evidence were sufficient to raise a triable issue of fact regarding whether Horton died because of a self-inflicted hanging or a physical attack that was apparently made to look like suicide. The elements of a wrongful death cause of action are (1) the tort (negligence or another wrongful act), (2) resulting death, and (3) damages. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263.) To the extent there was evidence Horton suffered a recent beating that killed him, there was certainly evidence of a "wrongful act" causing his death.

The trial court acknowledged the triable issue of fact as to the cause of Horton's death, but it nevertheless found the issue immaterial because plaintiff "failed to introduce any evidence that Yates and/or Penhollow were somehow involved in the alleged assault." This was not the case. As moving defendants, Deputy Penhollow and Sergeant Yates bore the initial burden of showing "the plaintiff 'has not established, and cannot

reasonably expect to establish, a prima facie case” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) Deputy Penhollow and Sergeant Yates stated in their declarations that they never had a physical altercation with Horton and did not have any contact with Horton before 3:45 a.m. on March 30, 2009, except for Sergeant Yates’s walk down module 3301 around 12:09 a.m.

The burden was then plaintiff’s to raise a triable issue of material fact, and she did so. (Code Civ. Proc., § 437c, subd. (p)(2).) The evidence showed Horton was confined in a single-man, fully enclosed cell in a maximum security section of the jail and Horton may have died from internal injuries inflicted by blunt force trauma. No inmates would have had access to Horton in his single-man, maximum security cell on March 29 and March 30, 2009. On the other hand, the deputies would have had access. Although Deputy Kidder was the officer responsible for Horton’s module the night of Horton’s death, Deputy Penhollow was working in the neighboring module. He and Deputy Kidder went on a “chow run” together that night. Deputy Penhollow acknowledged the scanner log showed he entered Deputy Kidder’s module at 11:06 p.m. on March 29, but he asserts it was an error in that he was using a barcode cheat sheet to falsify his security checks, and he accidentally scanned the cheat sheet for Deputy Kidder’s module instead of the cheat sheet for his own module. He further asserted the only purpose of scanning the module barcode plaques was to document security checks, and if he was in the module for any other purpose, he would not have scanned the barcode plaque. The implication is that if he were in the module to commit wrongful conduct, he would not have scanned the barcode. This might be true, but the fact is evidence places him in and around Horton’s module at approximately the time plaintiff’s evidence suggests Horton was assaulted.⁴ So, too, was Sergeant Yates in and around the module at approximately

⁴ Deputy Penhollow contends he could not have been responsible even if we assume plaintiff’s theory of assault and battery is true. This is because Dr. Comparini opined Horton’s intra-abdominal injuries were “inflicted within less than four (4) hours,” and counting back from 3:45 a.m. on March 30, the time when Horton was found hanging,

that time. By his own admission, he was there around midnight on March 30. Given plaintiff's evidence of a recent attack on Horton, and the fact that no inmates would have had access to Horton in his cell, the only reasonable inference was that one or more officers attacked Horton, and plaintiff pointed to evidence that Deputy Penhollow and Sergeant Yates were two of three officers (along with Deputy Kidder) who accessed module 3301 that night.

The officers suggest plaintiff had to show they were the *only* officers who had access to Horton, otherwise it was pure speculation to say they were responsible for any attack on Horton. We disagree. Plaintiff did not have to show *no other officers* could have been responsible. She simply had to offer evidence from which we could infer Deputy Penhollow's and Sergeant Yates's involvement, and this she did. The officers invite us to infer some other unspecified individuals could have attacked Horton. But the more reasonable and probable inference is that those responsible were the people whom evidence showed accessed Horton's module. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483 [plaintiff seeking to prove essential element of her case with circumstantial evidence must show the inferences favorable to her are more reasonable or probable than those against her].)

We express no opinion as to the eventual outcome of a trial on these issues and are mindful that our only duty "is to determine whether [triable] issues of fact exist and not to decide the merits of the issue[s]." (*Evan F. v. Hughson United Methodist Church* (1992)

the injuries would have been inflicted between 11:45 p.m. on March 29 and 3:45 a.m. on March 30. Deputy Penhollow's scan of module 3301 was before that, at 11:06 p.m. on March 29. We are not persuaded by Deputy Penhollow's argument. We interpret Dr. Comparini to be saying Horton's injuries were suffered within four hours of his death, but she also opined his time of death was earlier than the time stated in the coroner's report (4:05 a.m.) because of his body temperature and level of rigor mortis at the time the deputies discovered his body. Thus, in Dr. Comparini's view, the four-hour period during which the injuries would have been inflicted could well have started earlier than 11:45 p.m.

8 Cal.App.4th 828, 842.) And in determining whether plaintiff has met the burden of defeating summary judgment, we may certainly consider circumstantial evidence and all reasonable inferences to be drawn from it. (*Leslie G. v. Perry & Associates, supra*, 43 Cal.App.4th at p. 483.) The presence of reasonable inferences supporting a judgment for plaintiff is sufficient to defeat a defense summary judgment motion. (*Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1060, superseded by statute on other grounds as declared in *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583; see also Code Civ. Proc., § 437c, subd. (c) [in determining whether to grant summary judgment, court shall consider “all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact”].)

To summarize, we find, as did the trial court, a triable issue of fact regarding the cause of Horton’s death. There was some evidence suggesting Horton died because of relatively recent blunt force injuries. Given the conflicting evidence regarding Horton’s cause of death and the circumstantial evidence suggesting Deputy Penhollow’s and Sergeant Yates’s possible involvement, summary adjudication of the wrongful death cause of action was not proper.

b. Negligence

Plaintiff alternatively alleged the officers were negligent when they breached their duty of care to Horton by failing to protect him from an assault and battery that killed him. Under this alternative theory, Deputy Penhollow and Sergeant Yates did not actively participate in beating Horton, but they were aware of the wrongful conduct because they either heard it or saw it occurring and did nothing to prevent it.

To reiterate, the initial burden on a defendant moving for summary judgment is to show one or more elements of a cause of action cannot be established or there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met that burden, the plaintiff must show one or more triable issues of material fact exist. (*Ibid.*)

The elements of a cause of action for negligence are duty, breach of the duty, causation, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) Deputy Penhollow and Sergeant Yates contend there was no evidence they had knowledge Horton's safety was in jeopardy, suggesting they did not breach any duty to Horton. They cite to the statements in their declarations, highlighted in their separate statement, that they did not "observe anyone (custody official, inmate or anyone else)" have any physical altercation with Horton.

Their statements shifted the burden to plaintiff, who demonstrated a triable issue of fact at least with respect to Deputy Penhollow. Again, there is some evidence Horton suffered a physical attack in the several hours before 3:45 a.m. on March 30 and this attack caused his death. An attack of that nature would involve a certain amount of noise, likely including cries from the victim. Deputy Penhollow's post that night was in the neighboring module. He was close enough that he could hear Deputy Kidder yell for help in module 3301 when he said he found a "hanger." Although the cells in the module were fully enclosed, they do not appear to have been sound proof. Plaintiff submitted an excerpt from the deposition of Sergeant Yates in which he explained he sometimes walks the discipline modules, like module 3301, because the "inmates would like to see a sergeant" and "they'll yell to [him] if they have concerns." The inference is that officers outside the cells can still hear inmates in the enclosed cells. In light of the evidence of an attack and Deputy Penhollow's neighboring post, there was sufficient evidence to find a triable issue of fact regarding the deputy's breach of a duty to protect Horton.

On the other hand, plaintiff did not show a triable issue of fact with respect to Sergeant Yates. There is nothing from which we could infer he could have or should have heard an attack. Sergeant Yates was responsible for the whole floor, not just module 3301 or a neighboring module. In his deposition, he indicated he supervised approximately 12 deputies and their respective modules that night. But plaintiff presented no evidence about Sergeant Yates's own post and whether he was stationed close to module 3301, such that he would have heard an attack at any time. Thus, while the court erred in granting Deputy Penhollow summary adjudication of this cause of

action, it did not err in granting Sergeant Yates summary adjudication here. Sergeant Yates's liability for negligence in supervising deputies who may have harmed Horton is a different matter, which we discuss in the next part.

3. Summary Adjudication for Sergeant Yates on the Negligent Supervision Cause of Action

Plaintiff next contends the court erred in granting summary adjudication of the negligent supervision cause of action for Sergeant Yates. We agree.

The court granted the motion as to this cause of action because it believed an individual employee, as opposed to the employer, could not be liable. The court held Sergeant Yates was therefore entitled to judgment on the pleadings. The cause of action is not so narrowly defined, however. California case law “recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee.” (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.) Many cases frame the cause of action as one against the employing enterprise. (E.g., *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339-1340 [“Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees.”].)

At the same time, our Supreme Court has held individual supervisory employees may be liable for negligent hiring or supervision when a special duty exists between the supervisors and the plaintiff. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869, 875-876.) When our high court recognized the cause of action, the case involved public school employees, who “have a special relationship with the district’s pupils, a relationship arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel” (*Id.* at p. 870.) This special relationship “impos[ed] obligations beyond what each person generally owes others” (*Ibid.*) Sergeant Yates does not contend he owed no special duty to Horton.

He simply argues individual supervisors can never be liable for negligent supervision, which is not the case.

He further argues he cannot be vicariously liable for the acts of a subordinate under Government Code section 820.8 (“[A] public employee is not liable for an injury caused by the act or omission of another person.”). But “[l]iability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability.” (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815.) And as section 820.8 holds, nothing in that “section exonerates a public employee from liability for injury proximately caused by his *own* negligent or wrongful act or omission.” (Italics added.)

Sergeant Yates also asserts he is entitled to summary adjudication because there is no evidence he knew or had reason to know his subordinate deputies were “incompetent.” It is true “there can be no liability for negligent supervision ‘in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised.’” (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 395.) Sergeant Yates did not negate this element or demonstrate an absence of such evidence in his moving papers below, though. In the trial court, he moved on the simple legal ground that individual supervisors could not be liable. *If* he had demonstrated the pertinent evidence was absent, it would have been plaintiff’s burden in her opposition to show an issue of fact regarding his knowledge “of the dangerous propensities” (*C.A. v. William S. Hart Union High School Dist., supra*, 53 Cal.4th at p. 878) of Deputy Kidder or Deputy Penhollow. But the sergeant did not do this. “[A] plaintiff resisting a motion for summary judgment bears no burden to establish any element of his or her case unless and until the defendant presents evidence either affirmatively *negating* that element (proving its absence in fact), or affirmatively showing that the plaintiff does not possess and cannot acquire evidence to prove its existence.” (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 107.) Sergeant Yates did not carry his burden and was not entitled to summary adjudication of this cause of action.

Lastly, the court’s second reason for granting the motion -- that there was no triable issue as to any negligence or wrongful conduct on the part of supervised deputies -- no longer applies. As we discuss above, triable issues of material fact exist as to Deputy Penhollow’s liability. And as we explain in the related opinion in *Jones v. County of Los Angeles et al.*, B241333, triable issues of material fact exist as to Deputy Kidder’s liability.

4. Summary Adjudication on the Violation of Civil Rights Cause of Action

Plaintiff’s final claim of error relates to the violation of civil rights cause of action brought under Civil Code section 52.1.⁵ Plaintiff contends there was evidence the officers violated Horton’s rights through an unlawful assault and battery, which satisfied the requirements of section 52.1 and precluded summary adjudication. Deputy Penhollow and Sergeant Yates contend the cause of action fails as a matter of law because the claimed wrongful conduct does not satisfy the requirements of the statute. We do not agree the cause of action fails as a matter of law and find a triable issue of material fact as well.

Section 52.1, commonly referred to as the Tom Bane Civil Rights Act (Bane Act), “provides that a person may bring a cause of action ‘in his or her own name and on his or her own behalf’ against anyone who ‘interferes by threats, intimidation or coercion, with the exercise or enjoyment’ of any constitutional or statutory right.” (*Bay Area Rapid Transit Dist. v. Superior Court* (1995) 38 Cal.App.4th 141, 144, quoting § 52.1; see *Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447.) The statute allows the plaintiff in such a civil action to seek both damages and equitable relief. (§ 52.1, subd. (b).) The word “‘interferes’” as used in the Bane Act means “‘violates.’” (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 883.) Among the rights plaintiff alleged the officers violated was Horton’s statutory “right of protection from bodily restraint or harm” under section 43.

⁵ Further undesignated statutory references are to the Civil Code.

Deputy Penhollow and Sergeant Yates argue plaintiff's cause of action fails because "she must establish threats, intimidation or coercion *separate and apart from the underlying constitutional* [or statutory] *violation.*" As expressed by one federal court decision on which the officers rely, "a cause of action under the [Bane Act] requires a predicate -- the application of threat, intimidation or coercion -- and an object -- interference with a constitutional or statutory right." (*Rodriguez v. City of Fresno* (E.D.Cal. 2011) 819 F.Supp.2d 937, 953.) The officers contend the same act -- in this case the claimed assault and battery of Horton -- cannot be both the predicate and the object under the Bane Act. They believe the act constituting the violation of rights must be something different than the "threat[s], intimidation, or coercion." They rely on *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947 (*Shoyoye*). As the facts in *Shoyoye* will demonstrate, that case is distinguishable, and we think the officers' reading of *Shoyoye* is an overly broad one.

Before discussing *Shoyoye*, we begin with some brief background of the Bane Act. Although the Legislature enacted the Bane Act in response to the increasing incidence of hate crimes in California (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 977), in *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843, our Supreme Court clarified the Bane Act is not limited to hate crimes and plaintiffs need not show defendants have "a discriminatory purpose in harassing them." The *Venegas* court further held: "[S]ection 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. . . . [W]e need not decide here whether section 52.1 affords protections to every tort claimant, for plaintiffs in this case have alleged 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" (*Venegas, supra*, at p. 843.) The defendants in *Venegas* did not raise the argument the officers raise here -- that the Bane Act does not apply when the threats, intimidation, or coercion are inherent in the violation of legal rights.

As far as the officers' reliance on *Shoyoye*, the facts there demonstrate plain differences with the case at bar. Officers lawfully arrested Shoyoye, but they detained him for a much longer period than allowed by law because of a negligent clerical error misidentifying him as another inmate. (*Shoyoye, supra*, 203 Cal.App.4th at pp. 951-953.) On the basis of this overdetention, the jury rendered verdicts for Shoyoye on his cause of action for false imprisonment and his cause of action under the Bane Act. (*Shoyoye*, at p. 954.) The Court of Appeal affirmed the judgment on false imprisonment but reversed as to the Bane Act. (*Shoyoye*, at p. 963.) The court concluded the "statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence" based on "multiple references to violence or threats of violence in the statute," which "serve to establish the unmistakable tenor of the conduct that section 52.1 is meant to address. The apparent purpose of the statute is not to provide relief for an overdetention brought about by human error rather than intentional conduct." (*Id.* at pp. 958-959.) Thus, the legislative history indicated "the statute was intended to address only egregious interferences with constitutional rights, not just any tort. The act of interference with a constitutional right must itself be deliberate or spiteful." (*Id.* at p. 959.)

Having determined this, the court then held "where coercion is inherent in the constitutional violation alleged, i.e., an overdetention in County jail, the 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, supra*, 203 Cal.App.4th at p. 959.) Shoyoye had not made the requisite showing because his "overdetention occur[ed] because of mere negligence rather than a volitional act intended to interfere with the exercise or enjoyment of a constitutional right," and the only coercion present "was simply that which is reasonable and incident to maintaining a jail." (*Id.* at pp. 957-958, 961.) The officers did not carry out any coercion that effected a knowing and blameworthy interference with Shoyoye's legal rights. (*Id.* at p. 961.)

Here, by contrast, plaintiff has shown evidence of intentional, knowing, and blameworthy conduct -- indeed, the type of egregious, violent conduct the statutory framework indicates the Bane Act was meant to address, not simply unintentional harm or human error. Under plaintiff's assault and battery theory of the case -- as to which there are triable issues of material fact -- one or more of the officer defendants attacked Horton in his cell, did not call for medical assistance afterward, and instead arranged a hanging to bring about a death perceived as suicide. Depending on how the evidence comes in at trial, a reasonable jury could certainly conclude the perpetrators' violent attack on Horton constituted intentional and deliberate intimidation or coercion -- acts that essentially threatened him not to fight back but also violated his statutory right to protection from bodily restraint or harm. The type of wrongful conduct supposed here went beyond the unintentional or incidental coercion in *Shoyoye*, and it is not necessarily conduct inherent in all violations of the right to protection from restraint or harm. *Shoyoye* does not compel us to conclude that when, as here, "deliberate or spiteful" (*Shoyoye, supra*, 203 Cal.App.4th at p. 959) force accomplishes a knowing violation of the right to protection from bodily harm, the Bane Act requires an additional showing of conduct violating some other separate right.

We agree with several recent federal cases in which the defendants made the same argument the officers make here, and the courts construed *Shoyoye* narrowly, as do we. In *Holland v. City of San Francisco* (N.D.Cal., Mar. 12, 2013, No. C10-2603 TEH) 2013 WL 968295, *10, the court denied the defense motion to dismiss the Bane Act cause of action and held: "[T]he harms alleged -- an arrest without probable cause, the use of excessive force, retaliation for protected speech, and an unlawful strip search -- were brought about by intentional conduct. In contrast to the negligent overdetention in *Shoyoye*, this conduct may reasonably [be] perceived as threatening, intimidating, or coercive." Similarly, in *Bass v. City of Fremont* (N.D.Cal., Mar. 8, 2013, No. C12-4943 TEH) 2013 WL 891090, *5, the court rejected "a broad reading of *Shoyoye* -- one that would, perversely, preclude any section 52.1 action in which the underlying statutory or constitutional violation involved 'threats, intimidation, or coercion'" and held: "This

reading is contrary to the plain language of the statute, which specifically provides for a civil action based on interference with a right ‘by threats, intimidation, or coercion.’” Likewise, in *M.H. v. County of Alameda* (N.D.Cal., Apr. 18, 2013, No. 11-cv-02868 JST) 2013 WL 1701591, *7, the court held “the relevant distinction for purposes of the Bane Act is between intentional and unintentional conduct, and . . . *Shoyoye* applies only when the conduct is unintentional.”

In sum, the Bane Act cause of action does not fail as a matter of law. Additionally, as we have discussed at length above, there were triable issues of material fact regarding an assault and battery on Horton, the theory underlying this cause of action. Summary adjudication of this cause of action was not proper.

DISPOSITION

The judgment is affirmed in part and reversed in part. The judgment for Sergeant Yates on the negligence cause of action is affirmed but reversed with respect to Deputy Penhollow on the same cause of action. The judgment for both officers on the wrongful death and violation of civil rights causes of action is reversed. The judgment for Sergeant Yates on the negligent supervision cause of action is also reversed. In all other respects, the judgment is affirmed. Plaintiff shall recover costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.