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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

FRIEDERICH KOENIG,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO et al.,

Defendants and Respondents.

E057342

(Super.Ct.No. CIVDS1102909)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Reversed.

John B. Barriage for Plaintiff and Appellant.

Lynberg & Watkins, Norman J. Watkins, Shannon L. Gustafson and Allan D.

Kellogg for Defendants and Respondents.

This case concerns events that occurred in a separate, underlying lawsuit. The underlying case involved a contempt proceeding for an alleged violation of a restraining order. Plaintiff and appellant Friederich Koenig (Koenig) allegedly violated the restraining order. During the underlying contempt proceeding, San Bernardino County

Sheriff's Deputy Miller (Miller) accessed the California Law Enforcement Telecommunications System (CLETS) to determine the status of the restraining order against Koenig, and Miller shared the CLETS information with the parties and attorneys in the underlying contempt case.

As a result of those actions by Miller, Koenig sued Miller and the County of San Bernardino (the County) for (1) invasion of privacy, (2) violation of the Information Practices Act (Civil Code, § 1798.53), and (3) negligence. The trial court granted summary judgment in favor of defendants and respondents Miller and the County (collectively, defendants).

Koenig contends the trial court erred by granting summary judgment because (1) the trial court's reasons for granting summary judgment relied on facts that were not included in defendants' separate statement of undisputed facts, in particular, the fact that Miller was acting within the scope of his employment; and (2) there is no evidence to support the trial court's finding that Miller was acting at the direction of the trial judge in the underlying contempt proceeding. We reverse the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. RESTRAINING ORDER HEARING

In this subsection, we present the facts and procedural history related to the issuance of the restraining order. The restraining order case concerned a dispute between neighbors. The parties involved were Koenig and David Falossi (Falossi). The dispute stemmed from (1) Falossi's belief that Koenig was showing a disturbing interest in Falossi's children by taking photographs of the children and talking to them, and

(2) Koenig's belief that Falossi was falsely accusing Koenig of being a pedophile. The parties engaged in "one-upmanship." For example, Falossi parked his truck on Koenig's driveway, and Koenig parked his van in front of Falossi's property.

In May 2009, after a six day hearing, the trial court, specifically Judge Mazurek, granted Falossi's request for a civil harassment restraining order. The trial court made the following statements about the restraining order: (1) Koenig was required to stay at least 50 yards away from the Falossis, their home, their places of work, and the children's school(s); (2) Koenig was not permitted to photograph the Falossis; and (3) Koenig was prohibited from contacting the Falossis.

B. CONTEMPT HEARING

Falossi brought a contempt action against Koenig due to Koenig allegedly violating the restraining order. In August 2010, the trial court, specifically Judge Harris, held a hearing in the contempt matter. At the hearing, Falossi's attorney (Mahoney) requested the trial court take judicial notice of the restraining order. Mahoney asserted the restraining order had been issued on June 24, 2009, by Judge Powell, and served in open court. Koenig's attorney (Nickerson) asserted the order was not served in open court. The trial court questioned if the restraining order was issued by Judge Mazurek, rather than Judge Powell. Nickerson objected to the request for judicial notice, asserting the restraining order did not reflect the oral statements made by Judge Mazurek.¹

¹ An appeal was pending in the restraining order case.

The trial court explained it did not have a June 24, 2009, order signed by Judge Powell. Mahoney explained that he was mistaken. Judge Powell signed the order related to attorney's fees. Mahoney clarified that Judge Mazurek signed the restraining order. The trial court said, "Sir, I'm very concerned that you just asked me to take judicial notice of a document that did not exist." Mahoney produced a copy of the restraining order, and explained that it was served on June 24.

The trial court explained that an objection was pending, and the objection reflected the restraining order document was inaccurate. Koenig's attorney also objected on the basis of not being given sufficient notice of the request for judicial notice. The trial court asked Mahoney to respond. Mahoney argued that the order was presumptively valid, and a minute order reflected the order was served on June 24th. Mahoney conceded he did not give notice to opposing counsel of his request for judicial notice. Mahoney requested a 30-day continuance. The trial court dismissed the case without prejudice.

After the trial court announced the dismissal, Koenig's second attorney (Barriage) said, "I want to put on the record the fact that a CLETS was provided in the middle of this trial to opposing counsel by the sheriff's department." The trial court said, "That issue is not before me." Falossi's attorney (Mahoney) requested the CLETS document that he had shown to Koenig's attorney be returned to Mahoney. Koenig's attorney said, "I want a copy of this, your Honor, before I relinquish it. This is an extremely valuable piece of information." Koenig's attorney said the CLETS document had been provided in open court and it "raises some very severe questions."

The trial court asked what jurisdiction it had over a CLETS printout. Koenig's attorney responded, "Probably nothing, no jurisdiction at all. I've got the CLETS order. I intend to keep it as evidence." Mahoney asked, "Is Counsel stealing my document?" Koenig's attorney asked the court to make a copy of the CLETS document. The trial court responded, "No, I'm not going to make a copy of that. I'm not involved in that. The case has been dismissed."

C. CURRENT LAWSUIT

On March 4, 2011, Koenig filed his lawsuit against Miller and the County. Koenig's causes of action concerned: (1) invasion of privacy, (2) violation of the Information Practices Act (Civil Code, § 1798.53), and (3) negligence. In the complaint, Koenig alleged Miller unlawfully accessed CLETS and unlawfully disclosed private information about Koenig to Mahoney. Koenig asserted CLETS information is only to be used for official business. (Gov. Code, § 15153.) Koenig asserted the disclosure of the CLETS information was not made within Miller's official capacity, but instead "was made to assist the private party FALOSSSI."

For all three causes of action, Koenig sought emotional distress damages, special damages, general damages, and punitive damages. For the alleged invasion of privacy, Koenig sought an injunction against defendants "to prohibit their future unlawful access and use of CLETS and or other confidential law enforcement data base [*sic*] regarding plaintiff."

D. MOTION FOR SUMMARY JUDGMENT

Defendants filed a motion for summary judgment. Defendants explained that, during the contempt hearing, “it became necessary to determine whether there was . . . a valid restraining order still in place” because Mahoney did not have a copy of the restraining order with him. Mahoney asked Miller to confirm the status of the restraining order. Miller accessed CLETS but could not find the restraining order. Miller consulted with Judge Harris and then went to the Court Services Office. A clerk at the Court Services Office found the restraining order in CLETS and gave Miller “a ‘print out of what she had on her screen.’” Miller gave a copy of the CLETS printout, confirming the status of the restraining order, to Mahoney. The CLETS document was reviewed by the parties to the restraining order and their attorneys. The CLETS document provided Koenig’s height, weight, race, eye color, hair color, date of birth, and the restraining order information, such as who was protected.

Defendants asserted the information in the CLETS document was available from public sources, such as the court’s records. Defendants explained Miller used CLETS as a more efficient means of accessing information that was available in the court’s file. Defendants argued, “Miller accessed CLETS in the performance of his duties as Bailiff in order to verify that there was a valid restraining order in place for purposes of the contempt proceedings.”

Defendants argued that Miller was immune from the lawsuit because the case involved a privileged publication in a judicial proceeding, i.e., the litigation privilege. (Civ. Code, § 47, subd. (b).) Defendants further asserted Miller was immune because

he was acting within the scope of his employment. (Gov. Code, § 821.6 [public employee immunity].) Defendants asserted that since Miller was immune, the County, by extension, was also immune.

Defendants also raised arguments pertaining to the individual causes of action. In regard to invasion of privacy, defendants asserted the cause of action failed because the disclosed information was available as part of the court's public record, therefore, there was no invasion of privacy. As to the cause of action for violating the Information Practices Act (Civ. Code, § 1798.53), defendants asserted it also failed because the information was available as part of the court's public record. In regard to the negligence cause of action, defendants argued Koenig failed to provide evidence of severe emotional distress.

Defendants filed a separate statement of undisputed facts in support of their motion for summary judgment. In the separate statement, defendants presented facts including the following: (1) Mahoney did not have a copy of the restraining order at the contempt hearing; (2) "Miller consulted with Judge Harris and then proceeded to the Court Services office"; (3) the Court Services Office clerk found the restraining order in CLETS and gave Miller a printout of "what she had on her screen"; (4) Miller gave Mahoney the printout in open court.

The fact that Miller "consulted" with Judge Harris was supported by a citation to Miller's deposition. The citation references a portion of Miller's deposition reflecting the following:

"[Attorney Barriage]: Now, what did Judge Harris tell you?"

“[Miller]: Like I said, not knowing what the topic was before, she—and telling her that I can find out whether the restraining order was entered in the system, I don’t know her exact words, but just insinuating okay. That’s what bailiffs do. We access the computer system often to run—depending on the situation, run different situations for information.

“[Attorney Barriage]: So Mr. Mahoney asked you to find out the status of the restraining order. You went to Judge Harris and told her that you wanted to do what?

“[Miller]: That I could find out if the restraining order was valid and in the system by running the parties.

“[Attorney Barriage]: And did Judge Harris tell you that you could do that?

“[Miller]: Yes.

“[Attorney Barriage]: Okay. So what did you do after Judge Harris told you it was okay?

“[Miller]: I re—went to our office, the Court Services office, and attempted to run Mr. Falossi, ‘cause you have to—you have to put in a name.

“[Attorney Barriage]: Okay.

“[Miller]: There’s no other way to check if there is a restraining order. You have to put in the party’s name, and it’s a very—if you were to get a hit, it’s a very vague response—”

In a declaration filed on the same day as the motion for summary judgment, Mahoney declared he asked, “Bailiff Clinton Miller if he could confirm the status of the restraining order. [¶] . . . In this capacity, Bailiff Clinton Miller handed me a one-page

printout from the CLETS system which confirmed the existence of the restraining order.”

E. OPPOSITION

Koenig opposed the motion for summary judgment. In regard to Miller acting in his official capacity, Koenig faulted defendants for failing to allege in their separate statement of undisputed fact that Miller was acting within the scope of his employment. Koenig contended he would have disputed the fact that Miller was acting within the scope of his employment, had the fact been properly presented.

Further, Koenig noted the statute creating immunity for public employees protects public employees who institute or prosecute a judicial or administrative proceeding within the scope of their employment. (Gov. Code, § 821.6.) Koenig asserted the public employee immunity did not apply in this case because Miller was not instituting or prosecuting a judicial or administrative proceeding.

Koenig asserted the litigation privilege (Civ. Code, § 47, subd. (b)) did not apply because the CLETS document was not introduced as evidence at the contempt hearing. In regard to the information being available from public sources, Koenig asserted there was information in the CLETS document that was not in the court’s record. For example, the CLETS document reflected Koenig had no prior criminal activity, which Koenig contended would not be in the court’s public record, and the CLETS document contained 12 lines of data that was not in the public record.

In regard to the negligence cause of action, Koenig asserted he was not seeking emotional distress damages.

In Koenig's objections to defendants' separate statement, as to the fact that Miller "consulted" with Judge Harris, Koenig wrote, "Disputed and Objection: Improper use of fragmented evidence to draw an inference where an opposing inference may also be drawn." Koenig supported the foregoing with citations to (1) his own separate statement and objections, and (2) his attorney's, Barriage's, declaration. In Koenig's separate statement, he asserted the "consulted" fact was (a) hearsay; (b) "[f]ragmentary as it implies permission or consent"; and (c) contradictory inferences could be drawn from the fact, for example, that permission was not given.

In Barriage's declaration, he declares, in regard to Miller's deposition, "What Miller says is however, is [*sic*] both vague and contradictory, . . . [in] the Deposition of Defendant Miller . . . he says, 'I don't know her (Harris) exact words, but just insinuating okay[.]' Then Miller unequivocally says[,] 'Yes[,] he was told by Judge Harris he could to [*sic*] access the computer system . . . and when asked to explain the meaning of his 'insinuating okay?' Miller says[,] 'She did not say, 'No. Don't do it' [citation]. Moreover, Miller does admit that Judge Harris did not tell him to disclose the document to Mahoney. [Citation.]"²

² During Miller's deposition, he was asked, "Did [Judge Harris] tell you that you could provide a printout to Mr. Mahoney?" Miller responded, "She did not state anything regarding that."

F. REPLY

Defendants filed objections to Barriage's declaration. As to the portion of Barriage's declaration concerning Miller's deposition, defendants wrote, "Plaintiff's counsel may not argue his view of the law in a declaration to resist summary judgment."

Defendants submitted the declaration of Emma Kleeman (Kleeman), who works in the San Bernardino County Sheriff's Technical Services Division. Kleeman regularly works with CLETS. Kleeman explained that the 12 lines of data on the CLETS document that were not related to the restraining order reflected the type of computer search query that had been run, the date the query was run, and the terminal from which the query originated. For example, the line that read "'4DCFGCT2500.IB'" was transaction data identifying the terminal. Kleeman explained the 12 lines of data did not contain information personal to Koenig.

Defendants replied to Koenig's opposition. Defendants asserted the CLETS document did not contain private information about Koenig. Defendants contended the 12 lines of data were not personal to Koenig, and the lack of prior criminal activity "is the same information contained in the Restraining Order." Defendant also noted that Koenig had disclaimed his request for emotional distress damages. Accordingly, defendants argued Koenig was neither injured nor damaged.

Defendants also asserted they were immune from the lawsuit due to the litigation privilege (Civ. Code, § 47, subd. (b)) and because Miller was acting in his official capacity as a public employee (Gov. Code, § 821.6). In regard to the litigation privilege, defendant asserted that producing a document in open court is "fundamentally

a communicative act.” As to the public employee privilege, defendants asserted “Miller’s search for the restraining order was ‘an essential step toward the institution of formal proceedings.’”

G. HEARING

On July 16, 2012, the trial court held a hearing on defendants’ motion for summary judgment. Koenig asserted the Kleeman declaration was filed late, which was improper. Koenig requested additional time for discovery related to the 12 lines in the CLETS document. Koenig also argued that defendants, in their separate statement of undisputed facts, failed to include the alleged fact that Miller was acting in his official capacity as a sheriff’s deputy or within the scope of his employment. Koenig noted defendants’ separate statement of undisputed facts reflected Miller consulted with Judge Harris, but it failed to reflect that Judge Harris told Miller to obtain the CLETS information. Koenig asserted he would have disputed any alleged fact reflecting Miller was acting in his official capacity.

Defendants asserted none of Koenig’s confidential information was disclosed. Defendants argued the case “boils down” to the 12 lines of information on the CLETS document that are different than the restraining order, and the 12 lines were not personal to Koenig. The trial court responded that the matter also involved issues of immunity under Government Code section 821.6.

The trial court said, “It is the Court’s opinion after reading all the documents in this matter and the undisputed facts that Miller was acting in his capacity as bailiff for the court in the contempt proceeding. That was a contempt proceeding as he pulled and

provided the CLETS document or record regarding the underlying restraining order. So he was acting within his capacity. And because he was a bailiff, he was shielded from liability in this matter.

“As to complete immunity in this matter, the Court also finds there’s no further need to proceed in this motion with respect to the individual claims. There’s no violation of Plaintiff’s privacy as the CLETS record was part of the public record, that being the restraining order.

“There was no misuse of the CLETS procedure, as the Court authorized the conduct and the determination—he didn’t—Miller didn’t go directly from the attorney to run the thing. He went to—in fact, both counsel knew about it—and he went to Judge Harris who acquiesced to the running of the CLETS procedure for an official hearing in this matter. That is a contempt proceeding. And so the Court authorized the conduct and the determination of the validity of the restraining order which was inherent in the prosecution of the contempt proceeding.

“There was no negligence on the part of Miller who acted, based upon what the Court read and the documents in this matter, appropriately. [¶] The Court is going to grant summary judgment on the basis of the immunity provided under Government Code sections 821.6 and 815.2^[3] in this matter. [¶] I do find that Plaintiff fails to raise a triable issue of material fact as to the defendants and is entitled to judgment thereon.”

³ Government Code section 815.2 concerns the liability of a public entity, i.e., the County.

DISCUSSION

A. IMMUNITY

The trial court found “Miller was acting in his capacity as bailiff for the court . . . [a]nd because he was a bailiff, he was shielded from liability in this matter.” Thus, the trial court found defendants were immune from the lawsuit. (Gov. Code, §§ 815.2, 821.6.) Koenig contends the trial court erred by granting summary judgment based upon a fact that was not included in defendants’ separate statement of undisputed facts. The particular fact being that Miller was authorized to disclose the CLETS information, and thus acting within the course and scope of his employment at the time he disclosed the CLETS information.

Code of Civil Procedure section 437c, subdivision (b)(1), provides law concerning summary judgment motions. In particular, the subdivision reads, in relevant part, “The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court’s discretion constitute a sufficient ground for denial of the motion.” (Code Civ. Proc., § 437c, subd. (b)(1).) There is no fact in defendants’ separate statement plainly reflecting Miller was acting within the course and scope of his employment when he disclosed the CLETS information.

There is a split of authority as to whether the facts used to justify summary judgment must be in the separate statement of undisputed facts. The Fourth District,

Division One has concluded the facts used to justify summary judgment must be in the separate statement of undisputed facts. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 32 (*North Coast*)). The Fourth District, Division Three has held the facts used to decide a motion for summary judgment are not required to be in the separate statement of undisputed facts. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315 (*Watercrafts*)).

In *North Coast*, the appellate court noted the separate statement of undisputed facts “serves two functions: to give the opponent notice of the facts; and to permit the trial court to focus on the facts germane to the issues. [Citation].” (*North Coast, supra*, 17 Cal.App.4th at p. 30.) The court focused on the portion of section 437c, subdivision (b)(1) requiring the moving party to set forth “plainly and concisely all material facts.” The court concluded, “‘all material facts must be set forth in the separate statement. ‘This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, it does not exist.’” [Citation.]” (*North Coast*, at pp. 30-31.)

The appellate court reasoned strict compliance with the statutory mandate regarding separate statements is needed to assist overburdened courts. The court concluded that if summary judgment could be decided on a fact that existed in the record, but not included in the separate statement, it would impose an “impossible burden” on the trial court to determine the existence and significance of a fact not mentioned by the parties. (*North Coast, supra*, 17 Cal.App.4th at p. 31.) The appellate court held it could not “interpret section 437c as permitting a party to ignore its obligation to highlight material facts in the required separate statement.” (*Id.* at p. 32.)

In *Watercrafts*, the appellate court cited the “golden rule” conclusion set forth *ante*, i.e., ““the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, it does not exist.”” (*Watercrafts, supra*, 102 Cal.App.4th at p. 313.) However, the appellate court focused on the portion of section 437c, subdivision (b)(1) that provides, “failure to comply with this requirement of a separate statement may in the court’s discretion constitute a sufficient ground for denial of the motion.” (*Watercrafts*, at p. 315.) Due to the discretionary language in the statute, the appellate court rejected the summary judgment “golden rule,” due to the statute being permissive, rather than mandatory. (*Id.* at pp. 315-316.) The appellate court concluded trial courts have discretion to consider facts not included in the separate statement of undisputed facts when ruling on a motion for summary judgment. (*Ibid.*)

In the instant case, if the “golden rule” were applied, then the trial court erred. The alleged fact that Miller was authorized to disclose the CLETS information was not included in defendants’ separate statement, and therefore ““does not exist.”” (*North Coast, supra*, 17 Cal.App.4th at pp. 30-31.) Accordingly, when the trial court found “he was acting within his capacity . . . he was shielded from liability in this matter,” the trial court relied on a fact that did not exist. The “fact” that Miller was acting within the scope and course of his employment was not in the separate statement and therefore could not be used to justify summary judgment.

If the discretionary rule were applied in this case, the trial court still erred. We review the decision to consider evidence not included in the separate statement for an abuse of discretion. (*Watercrafts, supra*, 102 Cal.App.4th at p. 316.) Miller’s

deposition testimony reflects Judge Harris did not speak to Miller about disclosing the CLETS information to Mahoney. Koenig asserted he would have disputed the fact that Miller was acting within the course and scope of his employment if such a “fact” had been presented in defendants’ separate statement.

Justifying summary judgment on the “fact” that Judge Harris authorized the CLETS disclosure, which Koenig could not properly dispute, violated Koenig’s due process rights. Koenig could not properly dispute the fact because it was not included in the separate statement. When a remedy as drastic as summary judgment is involved, due process requires a party be given a full opportunity to dispute the material facts. (See *Watercrafts, supra*, 102 Cal.App.4th at p. 316 [abuse of discretion because of a due process violation].) As a result, we conclude the trial court abused its discretion by concluding Miller was acting within the course and scope of his employment when he disclosed the CLETS information because, given the state of defendant’s motion, such a conclusion would violate due process.

Defendants contend the trial court’s finding that Miller was acting within the course and scope of his employment is “amply supported” by the following facts, which appeared in their separate statement: (1) the need to confirm the status of the restraining order stemmed from the contempt case, not a personal need on Miller’s part; (2) Miller consulted with Judge Harris; (3) a person in the Court Services Office gave Miller a printout; and (4) Miller disclosed the printout in open court. Defendants assert the only reasonable inference that could be drawn from this evidence is that Miller was acting within the course and scope of his employment.

“““Succinctly stated, an employee is acting in the course and scope of his employment when he is engaged in work he was employed to perform [citations], or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience.”” (Mazzola v. Feinstein (1984) 154 Cal.App.3d 305, 311.) Acts incidental to an employee’s regular duties, “““if of benefit to the employer and not personal to the employee, are within the scope of his employment” [Citation.]’ [Citation.]” (Id. at p. 312)

The facts outlined by defendants, in the separate statement, do not reflect Miller was authorized to disclose the CLETS information to Mahoney. The facts in the separate statement reflect Miller spoke to Judge Harris, obtained the printout, and disclosed the information. There is no information regarding whether Miller acted within the scope of his employment by disclosing the information. There is no support for an inference that Judge Harris authorized the disclosure or that the disclosure was authorized by another source. Accordingly, we find defendants’ argument to be unpersuasive.

Defendants’ next argument is that the course and scope of employment issue involves a legal conclusion, rather than a fact that would appear in the separate statement; and therefore, there was no need to place the scope of employment information in the separate statement. “Whether an employee has acted within the scope of his employment is ordinarily a factual issue to be resolved by the trier of fact. [Citations.] When the facts are undisputed and no conflicting inferences possible, the

issue becomes one of law. [Citations.]” (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1751.)

Koenig disputes that Miller was acting within the course and scope of his employment when he disclosed the CLETS document. As a result, this is a factual issue, and therefore, there should have been facts concerning Miller’s course and scope of employment in the separate statement, if defendants wanted to argue public employment immunity.

Next, defendants assert Koenig failed to produce evidence that Miller was acting outside the scope of his employment, and therefore summary judgment was properly granted. “A defendant moving for summary judgment bears the initial burden to show the plaintiff’s action has no merit. [Citation.] The defendant can meet that burden by either showing the plaintiff cannot establish one or more elements of his or her cause of action or there is a complete defense to the claim. [Citations.] To meet this burden, the defendant must present evidence sufficient to show he or she is entitled to judgment as a matter of law. [Citation.]” (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 889.) “Once the defendant meets that burden, the burden shifts to the plaintiff to present evidence establishing a triable issue exists on one or more material facts. [Citations.]” (*Ibid.*)

We have not concluded that defendants met their initial burden. As a result, we are not persuaded by their argument concerning Koenig failing to meet his burden, since the burden shifts to Koenig only after defendants have satisfied their burden. In other words, Koenig has no burden to meet until defendants have proven Koenig’s lawsuit

lacks merit, and, at this point in this case, due to the deficiencies in the motion for summary judgment, defendants have not shown Koenig's action is meritless.

B. INDIVIDUAL CLAIMS

Apart from the immunity issue, the trial court concluded Koenig's individual claims failed. The court found: (1) the CLETS procedure was not violated because the trial court "authorized the conduct"; and (2) Miller was not negligent because Miller acted "appropriately." It can be inferred from the trial court's comments that it found Miller acted appropriately due to the finding that the trial court authorized Miller's conduct. Koenig contends there is no fact in defendants' separate statement of facts that justifies the trial court granting summary judgment on the finding that Miller's conduct was authorized by Judge Harris.

When ruling on a motion for summary judgment, a trial court may rely on "all inferences reasonably deducible from the evidence, [however] 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." (Code Civ. Proc., § 437c, subd. (c).) When reviewing a motion for summary judgment, we apply the de novo standard of review, interpreting any inferences in the light most favorable to Koenig. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

Defendants' separate statement reflects the following fact: "Deputy Miller consulted with Judge Harris and then proceeded to the Court Services office." It is unclear from the separate statement of fact if Judge Harris authorized Miller to disclose

the CLETS information to Mahoney. It could be inferred from the “consulted” fact that Judge Harris authorized Miller to leave the courtroom to obtain a copy of the court’s paper record, so as to find the restraining order within the public domain, and share that information only with Judge Harris. Since we must view the ambiguity in the record in the light most favorable to Koenig, we conclude the trial court erred. It is not clear from the facts in the separate statement that Judge Harris authorized Miller’s actions, and the ambiguity must be viewed in Koenig’s favor. Moreover, in Miller’s deposition, he said Judge Harris did not speak about disclosing CLETS information. So, if we went beyond the separate statement, there is still a lack of support for the finding.

Defendants contend Judge Harris’s authorization is immaterial to the issue of whether Miller was acting within the scope of his employment. We agree that explicit authorization for an act is not required to show the act comes within the course and scope of a person’s employment. (See *Mazzola v. Feinstein*, *supra*, 154 Cal.App.3d at p. 311 [authorization not included in defining course and scope of employment].) However, this was the method by which defendants elected to prove Miller was acting within the course and scope of his employment—that Miller had Judge Harris’s approval. Judge Harris’s approval was also a reason cited by the trial court in justifying summary judgment; the trial court said, (1) “the Court authorized the conduct”; (2) “he went to Judge Harris who acquiesced to the running of the CLETS procedure”; and (3) “so the Court authorized the conduct.” Since defendants and the trial court relied on Judge Harris’s approval so thoroughly in determining Miller was acting in the course and scope of his employment, it is problematic for defendants to now argue the finding

is immaterial because changing theories at the appellate stage is generally unacceptable. (*Cable Connection, Inc. v. Directv, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12 [fairness prohibits changing theories on appeal]; *DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 [appellate courts do not consider theories raised for the first time on appeal].) Accordingly, since defendants appear to be changing theories, we do not further discuss the issue of immateriality.

C. LITIGATION PRIVILEGE

Defendants contend summary judgment was properly granted because Miller’s actions “were unquestionably made in connection with a judicial proceeding,” and therefore are protected by the litigation privilege (Civ. Code, § 47, subd. (b)).⁴

The litigation privilege “‘applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.’ [Citation.]” (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.)

The litigation privilege cannot be applied at this point in the proceedings because defendants have not provided sufficient facts in their separate statement to support a finding that Miller’s actions were authorized by law. The evidence supplied with

⁴ The trial court did not grant summary judgment based upon the litigation privilege. However, on appeal, we review the trial court’s ruling, not its reasoning. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1168 (*Walker*.) Therefore, since defendants raised the litigation privilege issue below, we will consider it.

defendant's motion for summary judgment reflects only that Miller consulted with Judge Harris, went to the Court Services Office, retrieved a CLETS printout, and then gave the printout to a private party. It is unclear from defendants' motion whether Judge Harris authorized the disclosure of the CLETS information, or if there may have been an alternate basis for an authorized disclosure of the information. Given the state of the motion for summary judgment, we conclude the litigation privilege cannot be applied because it is unclear if Miller's actions were authorized by law.

D. INJURY

Defendants contend the grant of summary judgment can be affirmed because the information in the CLETS printout was available in the public record. The trial court found the information in the CLETS printout was available as part of the public record. Accordingly, we consider the issue of whether summary judgment was properly granted due to the disclosed information being available to the public. We apply the independent standard of review to determine whether there are triable issues of material fact. (*Walker, supra*, 98 Cal.App.4th at p. 1168.)

Defendants filed the Kleeman declaration on July 11, 2012. Kleeman explained that the 12 lines of coded data on the CLETS document did not contain Koenig's personal information. The hearing on the summary judgment motion took place on July 16, 2012. At the hearing, Koenig argued it was improper to rely on the Kleeman declaration because evidence needed to be filed 75 days prior to the hearing, rather than five days prior to the hearing. (Code Civ. Proc., § 437c, subd. (a).) Koenig requested time for additional discovery to rebut the Kleeman declaration.

The Kleeman declaration was untimely filed. The declaration should have been filed 75 days prior to the hearing. (Code Civ. Proc., § 437c, subds. (a) & (b)(1).) Due process violations would be implicated by our use of the Kleeman declaration because Koenig was not given an opportunity to file a surrebuttal to the evidence or otherwise address the new evidence in a substantive manner. (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8 [Fourth Dist., Div. Two] [evidence submitted in reply may only be considered if opposing party is given notice and an opportunity to respond].) As a result, we do not rely upon the Kleeman declaration.

Without the Kleeman declaration, we know there are 12 lines of coded data in the CLETS document, but lack any information regarding whether that information is personal to Koenig. One of the elements of invasion of privacy (first cause of action) is an intrusion into a private matter. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231.) A violation of the Information Practices Act (second cause of action) requires disclosure of information “not otherwise public.” (Civ. Code, § 1798.53.) Given that the 12 lines of data could be about anything, such as Koenig’s private information, we are not persuaded the disclosed information was available to the public. As a result, summary judgment could not properly be granted on Koenig’s privacy causes of action.

E. NEGLIGENCE

Defendants contend summary judgment was properly granted on the negligence cause of action because (1) there is no statutory authority imposing a relevant mandatory duty on the government; (2) there is no statute authorizing a private lawsuit

for disclosure of CLETS information; and (3) by disclaiming emotional distress damages, Koenig failed to assert he suffered damage.⁵ We apply the independent standard of review to determine whether summary judgment was properly granted. (*Walker, supra*, 98 Cal.App.4th at p. 1168.)

1. *DUTY*

We address the mandatory/statutory duty issue. “The basic rule of immunity for public entities in California is contained in Government Code section 815, which states that ‘[e]xcept as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.’ [Citation.] Conversely, ‘[e]xcept as otherwise provided by statute . . . , a public employee is liable for injury caused by his act or omission to the same extent as a private person.’ [Citations.] Thus, the Tort Claims Act ‘establishes the basic rules that public *entities* are immune from liability except as provided by statute [citation] [and] that public *employees* are liable for their torts except as otherwise provided by statute.’ [Citation.]” (*Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1382 (*Lawson*)).

There are two statutory exceptions to the public entity immunity that are relevant here. The first is found in Government Code section 815.2, which provides, “A public entity is liable for injury proximately caused by an act or omission of an employee of

⁵ The trial court did not cite these reasons when granting summary judgment, but “[t]he [trial] court’s stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. [Citation.]” (*Walker, supra*, 98 Cal.App.4th at p. 1168.)

the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.” “This ‘[v]icarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior.’ [Citation.]” (*Lawson, supra*, 180 Cal.App.4th at p. 1382.)

The second is found in Government Code section 815.6, which provides, “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.”

Koenig’s complaint and administrative tort claim form do not reflect if he is relying on Government Code section 815.2 or 815.6. It appears defendants’ argument regarding duty is based upon an assumption that Koenig is relying on Government Code section 815.6, as opposed to Government Code section 815.2. We do not make that same assumption, because the complaint and administrative tort claim form are ambiguous. In other words, we are unsure if Koenig is relying on Government Code section 815.2 or Government Code section 815.6. As a result, defendants’ argument focused on the inapplicability of Government Code section 815.6 is not persuasive, because it is unclear if that statute is relevant in the case.

2. PRIVATE ENFORCEMENT

Defendants assert there is no statute authorizing a private lawsuit for disclosure of CLETS information, but if there is a statute, then it is Civil Code section 1798.53, which would mean Koenig's second and third causes of action are identical. Therefore, defendants assert summary judgment was properly granted on the negligence cause of action (the third cause of action). Defendants raised this same argument in their motion for summary judgment, so we will address it.

Civil Code section 1798.53 provides, "Any person, other than an employee of the state or of a local government agency acting solely in his or her official capacity, who *intentionally* discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency or from 'records' within a 'system of records' . . . maintained by a federal government agency, shall be subject to a civil action, for invasion of privacy, by the individual to whom the information pertains." (Italics added.) There is case law that applies a malice standard to a claim under Civil Code section 1798.53 where the claim focused on the falsity of the published information. (*Alim v. Superior Court* (1986) 185 Cal.App.3d 144, 153.)

Koenig's second cause of action, under Civil Code section 1798.53, is not identical to his negligence cause of action because Civil Code section 1798.53 requires an intentional act, while negligence is failure to use ordinary care (see *Manuel v. Pacific Gas & Elec. Co.* (2009) 173 Cal.App.4th 927, 940 [defining negligence]). As a result, the causes of action are not identical—the Civil Code section 1798.53 cause of action

concerns an alleged intentional act, i.e., an intentional tort, while the negligence cause of action concerns a failure to use ordinary care.

In regard to there not being a statute authorizing civil lawsuits for alleged improper CLETS disclosures, it is unclear if defendants are discussing the torts claims statutes or privacy statutes. In other words, we cannot decipher if defendants are contending a public entity and public employee can never be sued for an alleged negligent CLETS violation because (1) public agencies and employees cannot be sued for negligent acts, or (2) no person who negligently accesses CLETS can be sued for such an act because damages can never be awarded for a negligent CLETS violation. Since defendants' argument is unclear, we do not address it further.

3. *DAMAGES*

Defendants contend that because Koenig disclaimed his request for emotional distress damages, he failed to allege damages for the negligence cause of action.

In Koenig's complaint, within the negligence cause of action, he alleges, "As a result of this negligence plaintiff has been harmed and has suffered damages in an amount according to proof." In the prayer section, Koenig requests emotional distress damages, special damages, general damages, exemplary damages, and punitive damages for the negligence cause of action. Given Koenig's broad request for damages and general allegation of harm, it is unclear from defendants' Respondent's Brief how Koenig's rejection of emotional distress damages causes the damage element of his negligence cause of action to fail. (See *Zvolanek v. Bodger Seeds* (1935) 5 Cal.App.2d 106, 108 [general and special damages may be alleged in negligence cases].)

At oral argument at this court, defendants asserted Koenig failed to allege damages because Koenig, in his response to form interrogatories, claimed to only be seeking emotional distress damages, but then Koenig disclaimed emotional distress damages in his Opposition to Summary Judgment, so, when these two things are brought together, Koenig is supposedly left without an allegation of damages.

In response to Form Interrogatory question No. 6.2, Koenig wrote, “Emotional distress. Anxiety that bailiffs and court personnel of the Joshua Tree Superior [*sic*] will violate the law and invade my privacy to help my adversaries in a civil matter. Loss of sleep for several months.” In response to Form Interrogatory question No. 6.3, Koenig wrote, “Yes. Same as 6.2 but less severe.” There are then several form interrogatory answers that simply reflect, “No.”

The Form Interrogatory Questions are not included with the responses. Thus, there is no context in which to place Koenig’s responses. We cannot conclude Koenig disclaimed all damages when the record does not include the Form Interrogatory questions that would provide context for his answers. Accordingly, we find defendants’ argument to be unpersuasive.

F. CONCLUSION

In this opinion, we are not necessarily concluding Koenig’s trial court case has substantive merit. Rather, the result in this appellate case is primarily caused by procedural problems pertaining to the motion for summary judgment. In other words, our conclusion that the summary judgment ruling must be reversed is more a reflection upon defendants’ motion than Koenig’s lawsuit.

DISPOSITION

The judgment is reversed. The trial court is directed to enter an order denying defendants' motion for summary judgment. Appellant is awarded his costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.