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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS F. GOOLSBY,

Plaintiff and Appellant,

v.

MATTHEW CATE et al.,

Defendants and Respondents.

F062844

(Kern Super. Ct. No. CV270062)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Thomas F. Goolsby, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Jonathan L. Wolff, Senior Assistant Attorney General, Monica N. Anderson and Kelli M. Hammond, Deputy Attorneys General, for Defendants and Respondents.

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INTRODUCTION

Appellant Thomas F. Goolsby, an inmate at the California Correctional Institution (CCI) in Tehachapi, appeals from a judgment of dismissal upon order sustaining the demurrer of respondent prison officials to appellant's first amended complaint without leave to amend. Appellant sought monetary damages, declaratory, and injunctive relief arising from respondents' alleged "illegal underground" policies and regulations which were allegedly used to retain violent prisoners in the Security Housing Unit (SHU) of the CCI for indeterminate periods.

STATEMENT OF THE CASE

On March 29, 2010, appellant filed a first amended personal injury complaint in Kern County Superior Court. Appellant named Matthew Cate, the Director of the California Department of Corrections and Rehabilitation (CDCR) and other CDCR and CCI officials as defendants, alleging causes of action for personal injury and violation of due process under state law. Appellant alleged the loss of use of property, general damages, loss of earning capacity, and physical, emotional, and psychological damage. He prayed for compensatory and punitive damages according to proof.

On March 17, 2011, respondents filed a demurrer to the first amended complaint. Respondents alleged that (a) the facts alleged in the complaint were contradicted by appellant's declaration attached to the amended complaint as Exhibit E; (b) appellant received due process when he was retained in the SHU for administrative reasons; (c) appellant failed to state a cause of action against respondents because respondents were immune from liability for the discretionary acts which allegedly caused appellant's injuries; (d) the complaint failed to state a cause of action against respondents Cate, Piller, and Duncan; (e) appellant failed to state a claim for intentional infliction of emotional distress; and (f) appellant's claims for injunctive relief are moot.

On April 4, 2011, appellant filed written opposition to the demurrer, alleging that (a) his declaration was not contradictory; (b) he did not receive due process because respondents employed “an illegal underground policy” to make his disciplinary action indeterminate; (c) the respondents’ acts were illegal because they relied on a policy without legal effect; (d) he stated cognizable cause of actions that constituted violations of state law; (e) he stated sufficient facts to support a cause of action for intentional infliction of emotional distress; and (f) his claims for injunctive relief were not moot.

On April 29, 2011, the court conducted a contested hearing and filed a minute order sustaining the demurrer without leave to amend (Code Civ. Proc., § 430.10, subd. (e); Gov. Code, §§ 820.2, 810.2).

On May 31, 2011, the superior court filed a formal “order sustain[ing] respondents’ demurrer to the first amended complaint without leave to amend.” The court found (a) the exhibits attached to the complaint contradicted the facts expressly pleaded; (b) respondents were immune from suit for their discretionary acts pursuant to Government Code sections 820.2 and 810.2; and (c) appellant failed to set forth facts establishing intentional infliction of emotional distress (Code Civ. Proc., § 430.10, subd. (e)). The court indicated “[t]he filing of this signed order shall constitute a judgment of dismissal.”

On June 15, 2011, appellant filed a timely notice of appeal.¹

¹ Under Code of Civil Procedure section 581d, a written dismissal of an action constitutes a judgment and therefore, under Code of Civil Procedure section 904.1, subdivision (a)(1), it is appealable.

STATEMENT OF FACTS²

Appellant is an inmate who had been housed in the SHU of the CCI in 2006. In 2006, appellant engaged in violent acts, including assaulting inmates, participating in several riots, possessing an inmate-manufactured weapon, introducing dangerous contraband in the Administration Segregation Unit (ASU), and engaging in mutual combat.

Appellant was first placed in the SHU after being found guilty of the foregoing offenses. When appellant's disciplinary term in the SHU ended, the CCI Institutional Classification Committee (ICC) determined that appellant should be retained in the SHU for an indeterminate period. In the view of the ICC, appellant was a danger to the safety of others and the security of the institution. Section 3341.5 of Title 15 of the California Code of Regulations stated in relevant part:

² With respect to the administrative determination, we note a prior holding from our court: "Judicial review of a Department custody determination is limited to determining whether the classification decision is arbitrary, capricious, irrational, or an abuse of the discretion granted to those given the responsibility for operating prisons. (*In re Wilson* (1988) 202 Cal.App.3d 661, 667[.]) In *Superintendent v. Hill* (1985) 472 U.S. 445, the United States Supreme Court considered the necessary quantum of evidence to satisfy the demands of due process:

“ ‘We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board.... This standard is met if “there was some evidence from which the conclusion of the administrative tribunal could be deduced....” [Citation.] Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.’ [Citation.]”

“The issue is simply whether the evidence in question permits a court to conclude that the administrator had reasons for his or her decision. (See *In re Zepeda* (2006) 141 Cal.App.4th 1493, 1500[]; see also *In re Lawrence* (2008) 44 Cal.4th 1181, 1213 [] [parole decisions ‘must be supported by some evidence, not merely by a hunch or intuition’].)” (*In re Furnace* (2010) 185 Cal.App.4th 649, 659, italics omitted.)

“(3) Release from SHU. An inmate shall not be retained in SHU beyond the expiration of a determinate term or beyond 11 months, unless the classification committee has determined before such time that continuance in the SHU is required for one of the following reasons: [¶] ... [¶]

“(B) Release of the inmate would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct.” (Code Civ. Proc. § 3341, subd. (C)(3).)

DISCUSSION

I. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER WHERE THE EXHIBITS ATTACHED TO APPELLANT’S COMPLAINT CONTRADICTED THE ALLEGATIONS OF THE PLEADING.

Appellant contends the trial court abused its discretion by denying him leave to amend the contradictory declaration he attached to his first amended complaint as Exhibit “E.”

“On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]” (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

For purposes of a demurrer, an appellate court accepts as true both facts alleged in the text of the complaint and facts appearing in exhibits attached to the complaint. If the facts appearing in an attached exhibit contradict the facts expressly pleaded, then those in the exhibit are given precedence. (*Mead v. Sanwa Bank California* (1998) 61

Cal.App.4th 561, 568; *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1626-1627.)

Appellant's amended complaint alleged that members of the Classification Committee, defendants Croxton, Steadman, Negrete, and Munoz-Prior, based their decision to retain appellant in the SHU on an "underground" policy.³ The amended complaint also alleged: "They wanted to retain me on a[n] indeterminate SHU term for disciplinary reasons. I asked where in the Title 15 is this listed? They gave me Memorandum DO # 81-02. They collectively used this illegal underground policy to retain me in the harsh conditions of the SHU."

³ Appellant attached a number of exhibits to his first amended complaint. They included:

Exhibit "A" – August 18, 2004 Memorandum DD # 12-04 from the Department of Corrections entitled, "Security Housing Unit Term Assessment Period of Review."

Exhibit "B" – August 26, 2002 Memorandum DD # 81-02 from the Department of Corrections entitled, "Indeterminate Security Housing Unit Status for Disruptive Inmates."

Exhibit "C" – Page Two of the June 16, 2009 ICC/SHU Program Review of appellant's status.

Exhibit "D" – July 21, 2009 Classification Staff Representative (CSR) endorsement of appellant's commitment to a CCI/SHU indeterminate SHU term.

Exhibit "E" – Appellant's declaration of March 1, 2010

Exhibit "F" – 2008 Office of Administrative Law Determination No. 1 holding that Memorandum # DD 81-02 constituted a "regulation" and should have been adopted pursuant to the Administrative Procedures Act.

Exhibit "G" – Portion of 15 Cal. Code of Regs. Section 3341.5

Exhibit "H" – Portion of 15 Cal. Code of Regs. Section 3341.5

Exhibit "I" – The September 30, 2009 ICC/SHU Program Review of appellant's status.

Exhibit "J" – June 14, 2009 Inmate/Parolee Appeal Form raising a violation of due process rights.

The augmented record on appeal does not contain a copy of “Memorandum DO 91-02” but does include several copies of Memorandum “DD 81-02” as Exhibits “B” and “F” to the first amended complaint filed March 29, 2010. Memorandum DD 81-02 states in relevant part:

“The purpose of this memorandum is to provide institution staff with direction relevant to the review and program consideration of inmates who complete a Determinate Security Housing Unit (SHU) term and continue to pose a threat to the safety of others or security of the institution. This perceived threat may be based on the inmate’s behavior while in SHU housing or due to the inmate’s disciplinary history while housed in the California Department of Corrections. Due to escalating violence occurring within the institutions, administrative staff are encouraged to review for appropriate housing those inmates who have a history of participating in disruptive behavior or fomenting violence and unrest.

“This direction is appropriate and within the parameters of the California Code of Regulations, Title 15, Section 3341.5(c) which states, ‘An inmate whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU.’

“Effective immediately, during the pre-Minimum Eligible Release Date review, classification staff shall consider Indeterminate SHU status for inmates who have demonstrated the desire to be disruptive and endanger the safety of others or the security of the institution. The following are examples of inmates who may qualify for consideration of indeterminate SHU status:

“1. Inmates currently serving a Determinate SHU term whose in-custody behavior reflects a propensity towards disruptive conduct, regardless of whether the inmate is not eligible for additional Determinate SHU term assessment.

“2. Specifically, inmates who have been assessed three Determinate SHU terms for any offense or assessed two Determinate SHU terms for participation in a riot, melee, or disturbance. This requirement shall be subject to all SHU terms assessed on the same prison identification number indifferent to the inmate’s term status, e.g., ‘PVRTC’, ‘PWWNT’, etc.”

Exhibit “E” to the amended complaint consisted of appellant’s declaration dated March 1, 2010. Appellant declared in relevant part: “I asked, ‘Where in the Title 15 is this at?’ And their response was to show me C.C.R. Title 15 § 3341.5(c)(3)(B) where it states, ‘Release of the inmate would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct.’”

The amended complaint also alleged: “On September 30 2009 I was brought before another (I.C.C.). This committee was made up of CCI—Pierce; Facility Captain—R. Gonzales; Chief Deputy Warden—K. Holland; C & PRT. Miner. This Committee also collectively used this illegal underground policy to retain me in C.C.I.’s SHU on indeterminate SHU term.” In contrast, appellant’s declaration stated: “There was no ‘review.’ It was very routine. I came in, they said, ‘Continue indeterminate, and I left.’ They didn’t want to hear anything I had to say.”

Thus, appellant’s allegation that respondents relied upon an illegal underground policy is contradicted by his declaration (attached at Exhibit “E”) that respondents provided him with section 3341.5 of the California Code of Regulations, title 15. Appellant nevertheless contends the court denied him “the opportunity to amend my declaration, which it must [do] if by amending it I can overcome the deficiency.” “ ‘[A]dmissions in an original complaint that has been superseded by an amended pleading remain within the court’s cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff’s case will not be accepted.’ ” (*Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051, 1061, quoting *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425-426.) Thus, an amendment to appellant’s declaration would not be viable because his declarations in Exhibit “E,” incorporated by reference in the first amended complaint, would remain within the superior court’s cognizance.

The trial court did not err in sustaining the demurrer without leave to amend on the ground that the exhibits to the complaint contradicted the facts expressly pleaded.

II. THE APPELLANT’S FIRST AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.⁴

Appellant contends the trial court erroneously sustained the demurrer based on the “assumption appellant didn’t effectively plead intentional infliction of emotional distress.”

In this case, appellant alleged he had suffered “other damage ... physical and emotional and psychological damage.” However, he did not allege any facts to set forth a cause of action for intentional infliction of emotional distress. “The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) the actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.” (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593 (*Cervantez*).

When ruling on a demurrer, a court does not accept conclusions of fact or law to be true. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 318.) We treat a demurrer as admitting all material facts properly pleaded but not contentions, deductions, or conclusions of fact

⁴ Appellant raises three additional issues in his reply brief on appeal. Generally, “[p]oints raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. To withhold a point until the closing brief deprives the respondent of the opportunity to answer it or requires the effort and delay of an additional brief by permission.” (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) In this case, respondent has briefed all three points raised in the reply brief, and we will briefly address them as issues II, III, and IV.

or law. Irrespective of the labels the pleader has attached to any alleged cause of action, we examine the factual allegations of the complaint to determine whether they state a cause of action on any available legal theory. If they do not, then the order sustaining the demurrer will be affirmed. (*Adelman v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 352, 359.)

In this case, appellant did not plead facts demonstrating that respondents engaged in “extreme and outrageous conduct” or that the respondents intended to cause emotional distress. Absent the allegation of facts essential to a cause of action for intentional infliction of emotional distress, we must affirm the order of the trial court sustaining respondents’ demurrer without leave to amend.

III. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRER BECAUSE RESPONDENTS WERE IMMUNE FROM SUIT.

Appellant acknowledges: “Prison officials are immune from [suit for] discretionary acts when the ‘discretion’ is outlined in legal regulations and law. But if the regulation relied on [–] as is here [–] is ‘illegal,’ there’s no immunity.”

Appellant explains in further detail in his opening brief: “The court sustained the demurrer because it believed CDCR was only exercising a ‘discretionary act.’ What the court fail[ed] to take note of and erroneously resolved [as] an issue of fact was the policy used in the CDCR Act was an illegal underground regulation. This is supported by the [Office of Administrative Law] determination based on Memo DD #12-04 dated August 16, 2004 and Memo DD # 81-02 dated August 26, 2002. When a rule or regulation is ruled to be an underground regulation it is without legal effect making the actions of CCI prison officials illegal. Therefore these same prison officials cannot use a discretionary act. They do not have the discretion to enforce underground regulations or deny me a fair warning.” (Emphasis in original.)

Appellant essentially alleges that respondent correctional officers relied upon Department of Corrections memoranda that failed to comply with the Administrative Procedures Act rather than upon a duly adopted regulation, section 3341.5 of title 15 of the California Code of Regulations. Therefore, he characterizes the actions of the correctional officers as illegal. As noted in issue I, *ante*, Exhibit “E” to appellant’s amended complaint consisted of appellant’s declaration dated March 1, 2010. Appellant declared in relevant part: “I asked, ‘Where in the Title 15 is this at?’ And their response was to show me C.C.R. Title 15 § 3341.5(c)(3)(B) where it states, ‘Release of the inmate would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity of serious misconduct.’” As we noted in issue I, if the facts appearing in an exhibit attached to a complaint contradict the facts expressly pleaded in the complaint, then those in the exhibit are given precedence. (*Mead v. Sanwa Bank California, supra*, 61 Cal.App.4th at p. 568; *Dodd v. Citizens Bank of Costa Mesa, supra*, 222 Cal.App.3d at pp. 1626-1627.)

Under the California Tort Claims Act (§ 810 et seq.), public employees are liable for their torts unless a statute provides otherwise. (§ 820, subd. (a).) One exception to this general rule of liability is found in section 820.2, which codifies the common law immunity for the discretionary acts of a government official performed within the scope of his or her authority. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 979-980 (*Caldwell*)).) Section 820.2 states: “Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.” A defense of statutory immunity may be asserted by demurrer in an appropriate case. (*Cal. Gov. Tort Liability Practice* (Cont.Ed.Bar 4th ed. 2012) § 10.3, p. 612, citing *Dawson v. Martin* (1957) 150 Cal.App.2d 379, 381-382.)

Ministerial acts that merely implement a basic policy already formulated are not entitled to immunity. Immunity only applies to deliberate and considered policy decisions involving a conscious balancing of risks and advantages. (*Jamgotchian v. Slender* (2009) 170 Cal.App.4th 1384, 1397.) California Code of Regulations, title 15, section 3341.5 states in relevant part:

“Special housing units are designated for extended term programming of inmates not suited for general population. Placement and release from these units requires approval by a classification staff representative (CSR). [¶] ... [¶]

“(c) Security Housing Unit (SHU). An inmate whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU.

“(1) Assignment criteria. The inmate has been found guilty of an offense for which a determinate term of confinement has been assessed or is deemed to be a threat to the safety of others or the security of the institution.

“(2) Length of SHU confinement. Assignment to a SHU may be for an indeterminate or for a fixed period of time.

“(A) Indeterminate SHU Segregation

“1. An inmate assigned to a security housing unit on an indeterminate SHU term shall be reviewed by a classification committee at least every 180 days for consideration of release to the general inmate population. An investigative employee shall not be assigned at these periodic classification committee reviews. [¶] . . . [¶]

“(B) Determinate SHU Segregation

“1. A determinate period of confinement in SHU may be established for an inmate found guilty of a serious offense listed in section 3315 of these regulations. The term shall be established by the Institutional Classification Committee (ICC) using the standards in this section . . .

“2. The term shall be set at the expected term for the offense in the absence of mitigating or aggravating factors. Deviation from the

expected term shall be supported by findings pursuant to subsection (c)(7).
[¶] ... [¶]

“4. Serious misconduct while in SHU may result in loss of clean conduct credits or an additional determinate terms for an inmate serving a determinate term. Such additional term may be concurrent or consecutive[¶] ... [¶]

“8. The Unit Classification Committee shall conduct hearings on all determinate cases at least 30 days prior to their MERD [minimum eligible release date] or during the eleventh month from the date of placement, whichever comes first.

“(3) Release from SHU. An inmate shall not be retained in SHU beyond the expiration of a determinate term or beyond 11 months, unless the classification committee has determined before such time that continuance in the SHU is required for one of the following reasons: [¶] ... [¶]

“(B) Release of the inmate would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct....”

Generally, “[a] discretionary act is one which requires ‘personal deliberation, decision and judgment’ while an act is said to be ministerial when it amounts ‘only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own.’ ” (*Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, 942-943, citing Prosser, Torts (3d ed.) p. 1015.) Appellant implicitly contends that respondents engaged in ministerial acts by placing him in the SHU for an indeterminate term because they were implementing a basic policy already formulated under section 3341.5(c)(3)(B). Respondents contend they were vested with the discretion to retain appellant in the SHU if his release would severely endanger the lives of inmates or staff members or the security of the institution. They maintain such a decision did not amount to obedience to orders or the performance of a duty in which the officer was left no choice of his or her own.

The case of *Leyva v. Nielsen* (2000) 83 Cal.App.4th 1061 presented a somewhat analogous situation. In *Leyva*, a prison inmate filed a personal injury action against the chair of the Board of Prison Terms after the Board conducted a parole hearing for the inmate and declined to release him. The Board found the circumstances of the crimes were egregious and that the inmate had not participated in self-help and therapy programs. The superior court sustained defendant's demurrer to the inmate's complaint without leave to amend, finding that defendant was immune from liability under Government Code sections 845.8 and 820.2. Division Two of the Fourth Appellate District affirmed the dismissal of the complaint. The Fourth District held that section 845.8 is specifically intended to extend immunity to public officials for injuries resulting from their decisions to release or not release a prisoner. That specific immunity is one part of the discretionary immunity offered to officials by section 820.2. The process of considering an application for parole consists of determining both the prisoner's eligibility for parole, i.e., whether he has served the requisite minimum period of confinement, and his or her suitability for parole. The determination of whether a prisoner *should be* paroled is discretionary. (*Leyva v. Nielsen, supra*, 83 Cal.App.4th at p. 1066.)

Similarly, the determination of whether an inmate should be retained in the SHU beyond the expiration of a determinate term or beyond 11 months is discretionary because it requires prison officials to ascertain whether release of the inmate would severely endanger the lives of other inmates, the lives of staff members, or the security of the correctional institution, among other things. The trial court properly sustained respondents' demurrer.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY SUSTAINING THE DEMURRER WITHOUT LEAVE TO AMEND.

Lastly, appellant contends a “prisoner’s civil rights suit[] should be liberally construed and all effort given to ensure appellant enjoyed ‘meaningful access’ to the courts. This includes at least giv[ing] him the chance to amend defective pleadings.”

Essential to any review by an appellate court of a ruling sustaining a demurrer without leave to amend are two fundamental issues: (i) whether the substantive allegations state a cause of action, and (ii) if not, whether there is a reasonable possibility that the defect may be cured by amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) Whether to grant leave to amend a complaint is a matter within the discretion of the trial court. (*Campbell v. Regents of the University of California*, (2005) 35 Cal.4th 311, 320.) If the reviewing court sees a reasonable possibility that the plaintiff could cure the defect by amendment, then it concludes that the trial court abused its discretion in denying leave to amend. If the reviewing court determines otherwise, then it concludes the trial court did not abuse its discretion. The plaintiff has the burden of proving that an amendment would cure the defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The plaintiff must show in what manner he or she can amend the complaint and how that amendment will change the legal effect of his or her pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) In *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711, the court held: “ ‘While such a showing can be made for the first time to the reviewing court [citation], *it must be made.*’ (Italics added.)” (*Medina v. Safe-Guard Internat., Inc.* (2008) 164 Cal.App.4th 105, 113, fn. 8.)

In this case, appellant has not shown in what manner he could amend the complaint or how that amendment would change the legal effect of the pleading. In any event, appellant cannot amend the complaint to avoid the application of the immunity

statute, Government Code section 820.2. The trial court did not abuse its discretion in sustaining respondents' demurrer without leave to amend.

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Wiseman, Acting P.J.

Franson, J.