

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JESUS KNOX,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendant and Respondent.

F062871

(Super. Ct. No. 10C0407)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. James T. LaPorte and Harry N. Papadakis, * Judges. †

Jesus Knox, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Jonathan L. Wolff, Thomas S. Patterson, Diana Esquivel and Misha D. Igra, Deputy Attorneys General, for Defendant and Respondent.

* Retired Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

† Judge LaPorte ruled on appellant's petition; Judge Papadakis ruled on appellant's motion for reconsideration.

-ooOoo-

While appellant Jesus Knox was incarcerated in the Substance Abuse and Treatment Facility at the state prison in Corcoran, California, a nurse delivering medications to the inmates kicked appellant's medication under the cell door. The event occurred on April 22, 2009. Nearly one year later, appellant submitted a letter and proposed tort claim¹ regarding the incident to the Victim Compensation and Government Claims Board (the Board), requesting leave to file a late claim against, among others, respondent California Department of Corrections and Rehabilitation. The Board rejected appellant's claim as untimely but informed him that he could file a petition for relief in the superior court under Government Code section 946.6.² Appellant did so, arguing in his petition that relief from the six-month claim presentation requirement should be granted because during the relevant time period he was ignorant of the law and mentally and physically incapacitated. The trial court found that appellant did not adequately establish the asserted grounds for relief under section 946.6 and the petition was accordingly denied. A subsequent motion for reconsideration was likewise denied. Appellant's appeal followed. We conclude the trial court did not abuse its discretion in denying relief and we accordingly affirm.

FACTS AND PROCEDURAL HISTORY

On April 22, 2009, appellant was in need of medication for an eye infection. The licensed vocational nurse on duty that day with the responsibility of delivering medications to inmates was T. Arden (Nurse Arden). According to appellant, Nurse Arden was typically gruff, rude and contentious toward inmates. When Nurse Arden arrived at appellant's cell with the eye medication, rather than asking the accompanying

¹ We use the terms "tort claim" and "claim" interchangeably.

² Unless otherwise indicated, all further statutory references are to the Government Code.

officer to unlock the food port as a means of delivering the medication to appellant, Nurse Arden kicked the medication under the cell door. Other confrontations between Nurse Arden and appellant occurred thereafter.

Approximately one year later, on April 4, 2010, appellant sent a letter and a proposed tort claim to the Board. Appellant requested the Board's permission to file his claim late. In his letter to the Board, appellant explained that the claim was tardy because he was still completing the prison's internal administrative process. Appellant's proposed tort claim listed the date of the incident as April 22, 2009, and stated that the incident was "still ongoing." He checked the "Yes" box to indicate the incident had occurred "more than six months ago." By letter of May 27, 2010, the Board denied appellant's application to present a late claim. In so doing, the Board's letter informed appellant that he could petition the superior court under section 946.6 for an order relieving him of the claim presentation requirements of section 945.4.

Appellant's petition for relief under section 946.6 was filed on November 4, 2010, in Kings County Superior Court. In his petition, appellant described the April 22, 2009 incident and also mentioned other, subsequent conduct on the part of Nurse Arden.³ Appellant claimed in his petition that his failure to timely file a tort claim was excusable because of (i) appellant's honest mistake or ignorance concerning the law, and (ii) appellant's physical or mental incapacity. Appellant's assertion of physical incapacity was based on the fact that the prison had several "lockdowns," which allegedly prevented him from gaining access to the law library or other resources. Appellant's assertion of mental incapacity was based on his alleged diagnosis of "paranoid schizophrenia." He described this disorder as commonly including "obsession with

³ For example, appellant's petition stated that he wanted to avoid Nurse Arden altogether and to accomplish that goal he persuaded his psychiatrist to discontinue a prescription medication. Nurse Arden allegedly contacted the prison pharmacy and attempted to restart the prescription.

avoiding contamination, germs, filth, poison; suspicion or belief someone may be trying to deliberately harm them; and behaviors intended to protect themselves from such harms through hyper-vigil[a]nce to their vulnerabilities to attack.”

Respondent filed opposition to the petition, arguing that appellant did not present evidence sufficient to show any of the alleged grounds for relief. The trial court denied the petition.⁴ In its written “ORDER DENYING PETITION FOR RELIEF UNDER GOVERNMENT CODE SECTION 946.6,” the trial court gave the following reasons for its decision:

“1. [Appellant’s] ignorance of the time limitation for filing a government claim against a public entity is not a sufficient ground for granting the relief requested. (*Harrison v. County of Del Norte* (1985) 168 Cal.App.3d 1, 7 [(“*Harrison*”)]; *Tsingaris v. State of Cal[ifornia]* (1979) 91 Cal.App.3d 312, 314; *Drummond v. City of Fresno* (1987) 193 Cal.App.3d 1406, 1413.) [¶] 2. [Appellant] failed to show that his mistaken belief about the time to file a claim was reasonable or based on information received from reliable sources. (*Harrison, supra*, 168 Cal.App.3d at p. 7; *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 479; *Viles v. State of Cal[ifornia]* (1967) 66 Cal.2d 24, 29.) [¶] 3. [Appellant] failed to show that he was physically or mentally incapacitated for the duration of the limitations period. (Gov. Code, § 946.6, subd. (c)(3).)”

Appellant filed a motion for reconsideration under Code of Civil Procedure section 1008, asking the trial court to reconsider its denial of appellant’s petition. Respondent filed opposition, arguing that the motion was nothing more than “a reiteration of facts and argument made in his petition ... or facts and argument that he could have presented in response to the opposition or at the hearing on his petition.” The trial court agreed with respondent’s assessment and denied the motion for reconsideration because appellant “submitted no new or different facts, circumstances, or law that were

⁴ The minute order reflecting the trial court’s denial of the motion was issued on March 21, 2011. The trial court’s formal written order denying the motion was filed on May 5, 2011.

not presented, or could have been presented, with his petition for relief under Government Code section 946.6.”

Appellant’s timely appeal followed. Appellant’s argues on appeal that the trial court reversibly erred because (i) adequate grounds for relief under section 946.6 were shown, (ii) the claim was timely filed with the Board after all based on subsequent conduct of Nurse Arden, and (iii) failure to conduct an evidentiary hearing with live oral testimony on the issue of appellant’s alleged mental incapacity was an abuse of discretion because it denied him a reasonable accommodation.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Denying Appellant’s Petition Under Section 946.6

A. Legal Background and Standard of Review

Under the Government Claims Act (§ 810 et seq.),⁵ a person seeking to assert a cause of action for damages or personal injury against a public entity must file a claim with the appropriate public entity within six months of the accrual of the cause of action. (§ 911.2, subd. (a).) Under section 945.4, presentation of a timely claim is a condition precedent to the commencement of suit against the public entity. If the six-month deadline for filing the claim is missed, the person may apply to the public entity for leave to file a late claim, provided that the application is made within one year of the accrual of the cause of action. (§ 911.4, subds. (a) & (b).) If the public entity rejects the application, the person may petition the superior court under section 946.6 for relief from the claim presentation requirements of the Government Claims Act. The court must grant the petition for relief if (i) the petitioner demonstrates by a preponderance of the evidence

⁵ The Supreme Court has recommended use of the term “Government Claims Act,” rather than “Tort Claims Act,” since the claim-filing provisions are applicable to contract causes of action as well. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 741-742, & fn. 7.) We shall follow that recommendation.

that the application for leave to file a late claim was made within a reasonable time not exceeding one year after the accrual of the cause of action *and* (ii) one of the four criteria listed in section 946.6, subdivision (c) was met. (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776-1778 (*Munoz*)).) Those statutory criteria for relief include, as relevant to the present case, that “[t]he failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect,” and/or that “[t]he person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time.” (§ 946.6, subd. (c)(1) & (c)(3).)

“The determination of the trial court in granting or denying a petition for relief under Government Code section 946.6 will not be disturbed on appeal except for an abuse of discretion. Abuse of discretion is shown where uncontradicted evidence or affidavits of the plaintiff establish adequate cause for relief.” (*Munoz, supra*, 33 Cal.App.4th at p. 1778, citing *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 435; accord, *Barragan v. County of Los Angeles* (2010) 184 Cal.App.4th 1373, 1382 (*Barragan*)).) Section 946.6 is a remedial statute intended to provide relief from technical rules that may trap the unwary. Because of the policy favoring trial on the merits, any doubts should be resolved in favor of the petition. A denial of relief by the trial court is therefore examined more carefully than an order granting relief. (*Ebersol v. Cowan, supra*, at p. 435; *Barragan, supra*, at p. 1382.) Nevertheless, we “cannot arbitrarily substitute our judgment for that of the trial court” (*Bennett v. City of Los Angeles* (1970) 12 Cal.App.3d 116, 120), and “[t]he ... policy favoring trial on the merits cannot be applied indiscriminately so as to render ineffective the statutory time limits” (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 44).

To summarize: “[A] petitioner has the burden of proving by a preponderance of the evidence the necessary elements for relief. The granting or denial of a petition for relief under Government Code section 946.6 rests within the discretion of the trial court,

and its determination will not be disturbed on appeal except for abuse of that discretion. Appellate courts may not substitute their own judgment for the function of the superior court, which is to decide these petitions.” (*Munoz, supra*, 33 Cal.App.4th at p. 1783.)

B. Appellant Failed to Show Grounds for Relief

1. *Ignorance or Mistake of Law*

Appellant argues that he showed excusable mistake or neglect because of evidence that he was sincerely ignorant or mistaken about the six-month claim filing requirement.

We begin by defining what constitutes excusable mistake or neglect under section 946.6. “Excusable neglect [is] neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances.” (*Barragan, supra*, 184 Cal.App.4th at pp. 1382-1383.) Mere ignorance of the six-month filing requirement is not a sufficient basis for relief under section 946.6. (*Barragan, supra*, at p. 1383; *Drummond v. City of Fresno, supra*, 193 Cal.App.3d at p. 1412 [“ignorance of the time limitation for filing a claim against a public entity is not a ground for allowing a late claim to be filed”]; *Harrison, supra*, 168 Cal.App.3d at p. 7 [same]; *Tsingaris v. State of California, supra*, 91 Cal.App.3d at p. 314 [same].) “[A] petitioner must show more than his or her failure to discover a fact until too late; the petitioner must establish that in the use of reasonable diligence he or she failed to discover it.” (*Munoz, supra*, 33 Cal.App.4th at p. 1784.)

Although an honest mistake of law may be excusable (*Viles v. State of California, supra*, 66 Cal.2d at p. 29 [misconception of claim-filing deadline was reasonable where it was based on representation of experienced insurance adjuster]), the controlling factor is the reasonableness of the misconception of the law under the circumstances of the particular case (*ibid.*; *Harrison, supra*, 168 Cal.App.3d at p. 7; *Tammen v. County of San Diego, supra*, 66 Cal.2d at p. 479).

Appellant claimed in his petition that he was mistaken about the six-month claim presentation requirement because unspecified inmates or prison employees allegedly told

him he needed to finish his administrative procedures at the prison before filing anything outside of the prison system, and such person or persons also told him that he had one year to file a claim. The trial court concluded that appellant “failed to show that his mistaken belief about the time to file a claim was reasonable or based on information received from reliable sources.” We agree that appellant failed to show reasonable diligence or a reasonable misconception of the law. The mere fact that appellant may have listened to and believed the stray comments of individuals in prison whose reliability or knowledge of the law is not specified, was clearly insufficient to render appellant’s ignorance or mistake of law excusable or reasonable, and it certainly does not give us warrant to second-guess the trial court’s exercise of discretion under the circumstances.

Appellant also asserted in his petition that his failure to learn the relevant law was excusable because he had very little access to the law library or any other resources during the six-month period since the prison was in “lockdown” mode due to several prison riots. As a result, he was allegedly locked in his cell “for weeks” during the lockdown and other restrictions on regular activities. Respondent’s opposition to the petition pointed out (with supporting documentation) that there were lengthy periods of time the prison was on normal operations and appellant admitted he was only confined for “weeks,” not the entire six-month period. In light of the opposition evidence, it appears that appellant failed to adequately or credibly show that he was without reasonable time or opportunity to ascertain the law. “[A] petitioner must show more than his or her failure to discover a fact until too late; the petitioner must establish that in the use of reasonable diligence he or she failed to discover it.” (*Munoz, supra*, 33 Cal.App.4th at p. 1784.) We conclude that appellant failed to establish an excusable basis for his mistake or ignorance of the law, and no abuse of discretion is evident on this record.

2. *Mental Incapacity*

In his petition in the trial court, appellant argued that relief should be granted based on mental incapacity. To establish incapacity as a justification for relief from the Government Claims Act requirements, a claimant must establish that he or she was physically or mentally incapacitated during all of the six-month period for the presentation of the claim and by reason of that disability failed to present a claim during that time. (§ 946.6, subd. (c)(3); *Barragan, supra*, 184 Cal.App.4th at p. 1384.) The trial court found there was no evidence of mental incapacity for the duration of the six-month period. We agree with the trial court. Although appellant's petition includes a few conclusory comments about his alleged psychological or mental diagnosis, he failed to present any competent medical evidence that he was mentally incapacitated throughout the six-month period or that said incapacity prevented him from complying with the claims presentation requirement during that time.

We note that appellant's petition *could* be construed as asserting that his alleged mental condition was a factor that made his ignorance of the claims presentation requirement excusable. Such a line of argument is permissible. "When a claimant is disabled, even if not so limited as to satisfy the incapacity basis for relief, that disability could justify a trial court in concluding that the claimant's failure" to file a timely claim was excusable neglect. (*Barragan, supra*, 184 Cal.App.4th at p. 1384.) However, as already noted, there was no competent evidence presented in connection with the petition that appellant was mentally incapacitated or disabled *or* that his mental condition played any part in his failure to timely comply with the claims presentation requirement. As respondent aptly pointed out in its opposition to the petition in the trial court: "[Appellant's] claim of mental impairment is equally unavailing because he did not submit the declaration of his mental-health provider or other medical provider to show that his mental illness prevented him from functioning or attending to his affairs with care and diligence.... [¶] Moreover, [appellant's] admissions in the petition contradict his

claim of mental incapacitation. [Appellant] asserted that he filed four inmate grievances since the incident occurred on April 22, 2009. [Citation.] He pursued each grievance through the various administrative levels, including [the California Department of Corrections and Rehabilitation's] Office of Internal Affairs. [Citation.] [Appellant] also filed a complaint against [Nurse] Arden with the Office of Consumer Affairs for the Board of Vocational Nursing and Psychiatric Technicians. [Citation.] Despite his claim of mental impairment, [appellant] had the presence of mind to prepare, complete, and file his grievances and appeals, and he was able to obtain, prepare, and file a complaint with the nursing board. These calculated and rational actions do not evidence any mental impairment." The trial court agreed with respondent that appellant's petition lacked evidence to show a mental incapacity or disability that prevented his timely compliance with the claims presentation requirement. We likewise agree and, in any event, readily conclude on this record that there was no abuse of discretion.

3. *Physical Incapacity*

Appellant asserted in his petition that his physical incapacity was a separate basis for relief. We have already noted appellant's argument on this matter above. Appellant asserted he was physically incapacitated during the six-month period because the prison was often in "lockdown" mode due to several prison riots. As a result, he was allegedly locked in his cell "for weeks" during the lockdown or other restrictions on regular activities. In its opposition to the petition, respondent presented documentation showing that there were lengthy periods of time the prison was on normal operations, and respondent noted that appellant admitted in his petition that he was only confined for "weeks" at a time, not the entire six-month period. To qualify for relief based on physical incapacity, a claimant must establish that he or she was physically incapacitated during all of the six-month period for the presentation of the claim and by reason of that disability failed to present a claim during that time. (§ 946.6, subd. (c)(3); *Barragan*,

supra, 184 Cal.App.4th at p. 1384.) Appellant plainly did not meet this burden. No abuse of discretion is evident on this record.

In summary, we conclude appellant has failed to demonstrate that the trial court abused its discretion when it denied appellant's petition for relief under section 946.6.

II. Appellant's New Theory Was Not Properly Raised and Is Deemed Forfeited⁶

Appellant argues for the first time on appeal that his tort claim was timely filed with the Board after all, because allegedly there were subsequent events or incidents involving Nurse Arden that occurred within the six-month period of the Government Claims Act. This argument was not raised by appellant in the trial court. He did not raise it in connection with his section 946.6 petition, nor did he do so in connection with his motion for reconsideration. As a result, respondent argues that appellant's new theory should be deemed forfeited. We agree with respondent.

An appellate court generally will not consider a matter presented for the first time on appeal (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143), and a failure to raise an issue or argument in the trial court will result in it being forfeited on appeal (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226; *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381 [failure to raise issue in trial court *waives* the point on appeal]). Moreover, "[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial. [Citation.]" (*Bogacki v. Board*

⁶ Although the loss of the right to challenge a ruling on appeal because of the failure to object in the trial court is often referred to as a "waiver," the correct legal term for the loss of a right based on failure to timely assert it is "forfeiture," because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is the "intentional relinquishment or abandonment of a known right." (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9; *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.)

of Supervisors (1971) 5 Cal.3d 771, 780.) Here, the new theory would depend on factual issues of the nature of the subsequent conduct on the part of Nurse Arden, whether that conduct was connected to the April 22, 2009 event, and whether appellant put the Board on notice that he intended to state a cause of action based on such subsequent events. According to appellant, the subsequent events allegedly took place on “05/07/09, 06/17/09, 11/29/09, and 12/30/09” and were part of a “pattern” of conduct. Appellant contends these subsequent incidents were mentioned somewhere in a lengthy attachment to his tort claim filed with the Board, but that attachment was not before the trial court and is not part of the record on appeal. Therefore, since these matters were not raised in the trial court, we will not consider them for the first time on appeal.

Moreover, appellant was required to inform the Board of the “date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.” (§ 910, subd. (c).) The basic facts underlying the cause of action had to be “fairly reflected” in the claim. (*Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79.) Here, in appellant’s claim, he identified the date of the incident as April 22, 2009. Only a single incident and date were mentioned. Appellant checked the “Yes” box in response to the question, “Was the incident more than six months ago?” Although appellant also stated in his claim that (in some sense) the incident was “still ongoing,” nothing in the claim indicated *what* was still ongoing.⁷ Under the circumstances, the Board and the trial court were entitled to rely on appellant’s representation in his claim that the cause of action was premised on the April 22, 2009 incident, and not upon some unspecified later event or occurrence. And, most assuredly, if appellant wished to assert that there were subsequent events or occurrences within the six-month period, it was incumbent upon him to raise those matters in the trial court in connection with his petition or

⁷ Appellant may have been referring to the fact that the administrative process was still ongoing as to the April 22, 2009 incident.

reconsideration motion, which he failed to do. For all of these reasons, we will not consider appellant's new theory on appeal and we deem the matter to be forfeited due to appellant's failure to raise it below.

III. Trial Court Did Not Abuse Its Discretion in Failing to Hold an Evidentiary Hearing on Whether Appellant Was Disabled

Appellant argues that the trial court abused its discretion when it decided the petition and motion for reconsideration based on the declarations alone without holding an evidentiary hearing with oral testimony before deciding whether appellant was mentally incapacitated or disabled. Appellant characterizes the trial court's purported failure as a violation of his right to reasonable accommodation to the courts. We disagree.

First, motions are ordinarily decided based on declarations filed by the parties. (Code Civ. Proc., § 2009; Cal. Rules of Court, rule 3.1306.⁸) Trial courts are empowered to hear motions upon declarations alone and have broad discretion to refuse oral testimony. (*Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483; *Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1160.) Therefore, it was proper for the trial court to base its ruling on appellant's petition and reconsideration motion upon the declarations of the parties.

Second, there was no request for an accommodation based on disability that was before the trial court. In appellant's motion for reconsideration, he stated: "In the event the Court conducts a formal hearing in the matters of the petition, [appellant] does intend to appear in person and to avail himself of reasonable accommodation of his disability under ... rule 1.100 for the duration of the hearing by making the requisite Reasonable Accommodation Request in advance in writing to the ADA Coordinator of the Superior Court." However, no written request for an accommodation was made by appellant, nor

⁸ All further rule references are to the California Rules of Court.

did he specify what accommodation he would have sought if he had filed such a request. Appellant also did not orally request an accommodation at either the hearing on his petition or the hearing on his motion for reconsideration.

An accommodation request under rule 1.100, requires a request for accommodation to be made ex parte, by other written format (such as a court approved form), or orally. The request must include a statement of the specific accommodation being sought, along with a statement of the impairment that necessitates the accommodation, and such request must be made no fewer than five court days before the requested implementation date. (Rule 1.100(c)(1)-(c)(3).) “The purpose of rule 1.100 is to allow meaningful involvement by all participants in a legal proceeding to the fullest extent practicable. Rule 1.100(b) declares: ‘It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system.’ [Citation.] Rule 1.100 obligates a court to rule on every properly presented request for accommodation that the court receives, and ordinarily the ruling must be in writing.” (*Biscaro v. Stern* (2010) 181 Cal.App.4th 702, 707.) Here, no such request was before the trial court. Although appellant expressed an intention to make a request, he never did so.

Appellant’s reliance on *Tennessee v. Lane* (2004) 541 U.S. 509 (*Lane*) is also unavailing. *Lane* held that the Americans With Disabilities Act (42 U.S.C. § 12101 et seq.) applied to disabled persons’ rights to access the court and judicial services. (*Lane* at pp. 533-534.) However, nothing in *Lane* mandates a hearing with oral testimony before making a ruling. We conclude the trial court did not abuse its discretion in making its rulings based on the declarations and other papers filed in connection with the petition and reconsideration motion.

DISPOSITION

The orders of the trial court are affirmed. Costs on appeal are awarded to respondent.

Kane, J.

WE CONCUR:

Levy, Acting P.J.

Poochigian, J.