No. B109602

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FIVE

JOHN NELLI,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF INSURANCE COMMISSIONER JOHN GARAMENDI, in his official capacity; COUNTY OF LOS ANGLES; COUNTY OF LOS ANGELES DISTRICT ATTORNEY GIL GARCETTI, in his official capacity; DEPUTY DISTRICT ATTORNEYS ALAN FIELDS, ED FELDMAN and DON M. TAMURA, individually and in their official capacities; DEPARTMENT OF INSURANCE FRAUD BUREAU INVESTIGATORS JOHN BENANE and HAROLD HUBER, individually and in their official capacities,

Defendants-Respondents

Appeal from the Los Angeles County Superior Court,
Honorable Arthur Jean and Gregory O'Brien, Judges
(Los Angeles County No. BC127009)

COUNTY RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

A. Nature of the Action

Plaintiff-Appellant John Nelli alleged that the County of Los Angeles and four officials from the District Attorney's office (the County Defendants)[1] violated his federal rights in connection with the surreptitious tape-recording of an interview by agents of the California Department of Insurance. However, the facts alleged did not establish that the County Defendants did anything wrong. The Superior Court sustained the County Defendants' demurrer without leave to amend. Nelli filed an appeal on October 25, 1993, which this Court dismissed on January 25, 1996, pursuant to California Rules of Court, rule 17(a).

This Court should either (1) dismiss this appeal as barred by Code of Civil Procedure section 913, or (2) affirm on the merits.

B. Summary of Allegations of the Second Amended Complaint

Nelli commenced this action by filing his original complaint on October 2, 1992. (JA 1.) He filed a First Amended Complaint on October 15, 1992. (JA 10.) On January 25, 1993, the Superior Court sustained demurrers to the First Amended Complaint, with 20 days leave to amend. (JA

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[1] The "County Defendants" named in the Second Amended Complaint are the County of Los Angeles, District Attorney Gil Garcetti, and Deputy District Attorneys Alan Fields, Ed Feldman and Don M. –Tamura. (JA 237.)

247-248.) Nelli filed the Second Amended Complaint (the operative pleading with respect to the County Defendants) on February 16, 1993. (JA 236.)

The allegations of the Second Amended Complaint center on a California Department of Insurance investigation of Nelli. He claims that, when the state investigators interviewed him on October 4, 1991, they told him that they would not tape the interview, but went ahead and did so anyway. (JA 238-239.) Because they were under the impression that there would be no taping, Nelli and his attorney Bruce Kaufman sought to confer privately in the interview room after the investigators left. The recording equipment continued to run, and the state investigators wound up with a tape that contained confidential attorney-client communications. (JA 239.) Nelli alleged that those actions violated state and federal wiretapping statutes. (JA 243.)[2]

Before the interview, the state investigators conferred with attorneys in the District Attorney's office who advised them that they "could legally tape interviews without informing the interviewees of the taping." (JA 239:8-13.) However, those attorneys "did *not* advise the CDIFB that it was lawful to misrepresent that the interview was not being taped and also did *not* state it was lawful to record attorney-client conferences. (JA 239:13-17 (emphasis supplied.)

After the interview, the tape came into the possession of the District Attorney's office. At a meeting with Defendants Feldman, Fields and Ta-

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[2] The Third Cause of Action alleged that the State Defendants violated California Penal Code section 632, 636 and 639. The Fourth Cause of Action alleged that they violated 18 U.S.C. sections 2510-2520.

mura, Kaufman, Nelli's attorney, learned about the tape, and asked that it be destroyed. The District Attorney's office retained possession of the tape, but no one in that office listened to it. (JA 240.) During the meeting with Kaufman, Defendant Field explained exactly what had happened, assured him that no one had listened to the tape, and said that the tape was on the way over in a sealed condition. (JA 362-363.) Defendant Field also explained that he wished to preserve the tape in a secure condition so that a court could at some time rule on the admissibility of any evidence that might be contained on it. (JA 369-370.)[3] In the course of the meeting, the

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[3] According to the transcript of the meeting that Nelli attached to his opposition to the demurrer, Defendant Field said:

> We don't intend to use it [the tape] in any fashion. And maybe this is just an abundance of caution, I don't know, but I'm trying to look forward as a D.A. as to what the situation might be. And I would like — I would like the tape to be someplace where you feel as comfortable with it as we do.
>
> …
>
> But let's take the worst case scenario and Mr. Nelli is charged with some crime, and whatever proof that we have, you or his defense counsel at a later point would come in to court and say this is a product of that illegal taping or improper taping that was done during the course of this interview, I would want to be in a position to say to some court, well, judge, you listen to this tape in camera and you make a decision, I don't want to hear the tape, I don't want anything to do with the tape, but you make a decision as to whether it is or it isn't and exclude whatever evidence you think is appropriate, and that's my only concern.

tape arrived in a sealed envelope. The envelope was opened, and the tape shown to Kaufman. It was then resealed, and Kaufman affixed his signature to the seal. (JA 379-383.)

Nelli only named the County Defendants as defendants in three of the six causes of action alleged in the Second Amended Complaint. The First Cause of Action sought damages under 42 U.S.C. section 1983 against Defendants Fields, Feldman and Tamura, and damages under the State Constitution against those defendants and the County. The Second Cause of Action likewise sought damages under 42 U.S.C. section 1983 against Defendants Fields, Feldman and Tamura, and damages under the State Constitution against those defendants and the County. (JA 241-242, 342.) The Sixth Cause of Action sought "injunctive relief" against all the County Defendants. (JA 244.)

> And if that weren't my concern I would say destroy it right now, but I think for our protection and your protection it needs to be preserved and it needs to be preserved in a place where you and I both feel confident that if it ever reaches the stage where that has to become a legal question, but a judge listens to it and does it, you know, after listening to the tape. If we destroy it we'll be in a position of your best recollection against his best recollection and we've really destroyed the very best evidence that could either help you or either help us.

(JA 369-370.)

C. The Superior Court's Rulings

On April 21, 1993, the Superior Court (Hon. Diane Wayne) entered an order of preliminary injunction with respect to the tape of the interview. That reflected the Court's ruling at the March 30, 1993 hearing on Nelli's motion for a preliminary injunction. The order stated:

> IT IS ORDERED that:
>
> The October 4, 1991 tape recording, which is the subject of this action, shall be filed and maintained under seal with this Court and not be available to any person except on court order with notice of any application therefore to all parties to this proceeding and if any of the State defendants or the County defendants including but not limited to the County of Los Angeles or the District Attorney or any Deputy District Attorney heretofore a party herein is dismissed, each and all of them shall be given notice of said application.

(JA 385-386.) The Superior Court took custody of the tape on March 30, 1993. (Appellant's Opening Brief, p. 5.) Thereafter, it became "permanently lost," while in the court's possession. (JA 2450.)

On April 28, 1993, the Superior Court (Hon. Arthur Jean) sustained the County Defendants' demurrer to the Second Amended Complaint without leave to amend. (JA 405-407.)

On October 25, 1993, Nelli filed a Notice of Appeal. It stated that he was appealing

> from the Judgment or final order dismissing the Complaint with prejudice entered on April 28, 1993 in favor of Defendants COUNTY OF LOS ANGELES, DISTRICT ATTORNEY GIL GARCETTI, DEPUTY DISTRICT ATTORNEYS

ALLEN FIELD, EDWARD FELDMAN and DON TAMURA.

(JA 3159-3160.) This Court assigned appeal number B079719 to that appeal. On January 25, 1996, this Court dismissed the appeal with the following order:

> It appearing that the appellant is in default pursuant to RULE 17A, California Rules of Court, the appeal filed October 25, 1993, is dismissed.

(JA 4321.)[4]

On January 28, 1997, Nelli filed the present appeal. His Notice of Appeal stated, in part, that he was appealing from

> 1. The April 28, 1993 order granting defendants County of Los Angeles, District Attorney Gil Garcetti, Deputy Dis-

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[4] Rule 17(a) provides as follows:

> If the appellant's opening brief is not filed within the time prescribed in subdivision of (a) of rule 16, the clerk of the reviewing court shall notify the parties by mail that if the brief is not filed within 15 days after the date of mailing of the notification, the appeal will be dismissed unless good cause is shown for relief. If a sufficient written showing of excuse is made within the 15-day period, the Chief Justice or presiding justice may grant additional time to file the brief subject to such conditions as may be deemed proper to impose; otherwise the appeal may be dismissed forthwith.
>
> If the brief is not filed within the time granted by the Chief Justice or presiding justice, the appeal may be dismissed forthwith. If the notification is not mailed by the clerk or the appeal is not dismissed on the court's own motion, the respondent may move to dismiss the appeal.

> trict Attorneys Allen Field (sued erroneously as Alan Field), Edward Feldman and Don M. Tamura's demurrers to the Second Amended Complaint as to Causes of Action 1, 2, 3, 4, 5, and 6.

(JA 2883.)

II. ARGUMENT

A. This Court should dismiss the appeal with respect to the County defendants pursuant to Code of Civil Procedure section 913

Code of Civil Procedure section 913 provides:

> The dismissal of an appeal shall be with prejudice to the right to file another appeal within the time permitted, unless the dismissal is expressly made without prejudice to another appeal.

The effect of that provision is to preclude any further appeal from the same lower court order. (*Lyons* v. *Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1017-1018; *Linn* v. *Weinraub* (1948) 85 Cal.App.2d 109, 110 (interpreting the predecessor statute to section 913).)

Nelli's previous appeal was from the same April 28, 1993 disposition that is the basis for the present appeal with respect to the County Defendants. This Court's order dismissing Nelli's previous appeal did *not* state that it was without prejudice. Therefore, the dismissal was *with* prejudice. Nelli may *not* maintain a second appeal from the Superior Court's April 28 decision. Pursuant to section 913, this Court should dismiss the present appeal.

B. The demurrer was properly sustained as to all County Defendants with respect to all causes of action, because the Second Amended Complaint did not allege any wrongful conduct

On appeal from a dismissal following the sustaining of a demurrer, the reviewing court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law." (*Serrano* v. *Priest* (1971) 5 Cal.3d 584, 591; accord, *Moore* v. *Conliffe* (1994) 7 Cal.4th 634, 638.)

The essence of the factual allegations against the County Defendants is that (1) they told the state investigators that they could tape conversations without permission, but did *not* say that they could lie about their intentions, and (2) they retained the tape of the interview until it was turned over to the Superior Court, but did *not* listen to it. Those facts provide no basis for imposing liability on the County Defendants.

1. There were no facts to support a claim that the County Defendants violated Nelli's right to privacy

The First Cause of Action in the Second Amended Complaint purported to state a cause of action for violation of Nelli's rights to privacy and to be free of unlawful searches and seizures. His Opening Brief abandons any search and seizure claim, and asserts only that "the County's continued possession of the audio tapes that contained his attorney-client conversations" violated his right to privacy. (Opening Brief, pp. 37-38.) There is no authority for that argument.

To plead a violation of his constitutional right to privacy, Nelli had to allege facts to support a claim that the County Defendants either disclosed protected information, or intruded themselves into an area of personal autonomy interests. (*Hill* v. *NCAA* (1994) 7 Cal.4th 1, 28-31.) He did not allege any such facts. He attempts to base his claim solely on the fact that the County Defendants retained possession of the tape until it was turned over to the Superior Court. The County Defendants did not disclose any information. They did not intrude themselves into Nelli's attorney-client relationship.

The only authority that Nelli cites for his argument is *Church of Scientology v. United States* (1992) 506 U.S. 9. That decision provides no support for the imposition of liability on the County Defendants. To begin with, the Supreme Court expressly disclaimed any opinion on the merits of the dispute before it. It held only that the Church of Scientology's appeal from the District Court's order enforcing an IRS summons did not become moot when the Church complied with order. (506 U.S. at p. 17.) Therefore, anything that the Court may have said about the merits of the underlying claim was dictum, and of little precedential value.

In any event, the facts with respect to the government's actions in that case were very different from those that Nelli alleged in the Second Amended Complaint. IRS agents had examined and made copies of tape recordings in the possession of the Los Angeles Superior Court, pursuant to an IRS summons. The IRS's copies were ordered filed with the federal district court, and then returned to the state court. The IRS then sought en-

forcement of the summons that it had served on the state court. The federal court enforced compliance with the summons, and copies of the tapes were delivered to the IRS while the Church's appeal was pending. The Ninth Circuit dismissed the appeal as moot.

The "narrow question" before the Supreme Court was "whether the appeal was properly dismissed as moot." (506 U.S. at 12.) In the course of deciding that some relief might still be available despite compliance with the summons, the Court said the following with respect to the Church's claim:

> Taxpayers have an obvious possessory interest in their records. When the Government has obtained such materials as a result of an unlawful summons, that interest is violated and a court can effectuate relief by ordering the Government to return the records. Moreover, even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government's continued possession of those materials, namely, the affront to the taxpayer's privacy. A person's interest in maintaining the privacy of his "papers and effects" is of sufficient importance to merit constitutional protection. [Footnote omitted] Indeed, that the Church considers the information contained on the disputed tapes important is demonstrated by the long, contentious history of this litigation. Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot.

(506 U.S. at p. 13.)

Here, by contrast, the County Defendants did not examine and make copies of the tape of the interview. The only defendant who may have had access to any of the information on the tape was the state investigator who was monitoring the recording equipment. (JA 239:5-8.) Unlike the IRS, the County Defendants never came into possession of the *information* on the tape. The County Defendants simply retained custody of the physical object until it was turned over to the Superior Court.

Further, Kaufman, Nelli's attorney, disclaimed any interest in the tape itself, and the information on it, when he asked that it be destroyed. (JA 240.) That contrasts sharply with the Church of Scientology's position. The Church had a continuing interest in retaining sole possession of the information on the tape that the IRS seized.

Finally, Nelli has effectively received exactly the relief that the Supreme Court identified as the "possible remedy" that saved the Church of Scientology's appeal from dismissal. The Supreme Court stated:

> Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have the power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession.

(506 U.S. at p. 13.) The County Defendants relinquished the only tape in its possession to the Superior Court in compliance with its preliminary injunction. Thereafter, the tape became "permanently lost," and is no longer available to the County Defendants. That effectively granted the original request by Kaufman, Nelli's attorney, that the tape be destroyed.

Therefore, the Superior Court properly sustained the County Defendants' demurrer with respect to the First Cause of Action without leave to amend.

2. There were no facts to support a claim that the County Defendants violated Nelli's right to counsel

Nelli effectively concedes that the Second Amended Complaint did not allege facts to support a claim that the County Defendants violated his right to counsel. He argues that he should have been given leave to take additional discovery and then amend his complaint again. (Opening Brief, pp. 39-41.) The argument lacks merit.

This Court reviews the denial of leave to amend for abuse of discretion. (*McGettigan* v. *Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1023-1024.) "The burden is on the plaintiffs to demonstrate that the trial court abused its discretion and to show in what manner the pleadings can be amended and how such amendments will change the legal effect of their pleadings." (*Careau & Co.* v. *Security Pacific Bus. Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1387, quoted with approval in *McGettigan, supra,* 57 Cal.App.4th at p. 1023-1024.) Nelli has not met that burden.

Nelli's argument in effect rests on the hope that discovery from the County Defendants would have shown that the allegations of the Second Amended Complaint were false. His complaint alleged that the County Defendants "did *not* advise the CDIFB that it was lawful to misrepresent that the interview was not being taped and also did *not* state it was lawful to record attorney-client conferences." (JA 239:13-17 (emphasis supplied).) In

his Opening Brief, he asserts that additional discovery would contradict that allegation, and somehow establish a cause of action "for advising or failing to advise against unlawful wiretapping." (Opening Brief, p. 41.) Such vague hopes are not sufficient to avoid the rule that a pleader is bound by admissions in his initial pleadings. (*Mercury Cas. Co.* v. *Superior Court* (1986) 179 Cal.App.3d 1027, 1035 ("Permitting plaintiff to amend the complaint would serve no useful purpose given the fact that the actions of petitioner, as set forth in plaintiff's original complaint, cannot give rise to a cause of action"); see also *Owens* v. *Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.)

In any event, Nelli had ample information on which to evaluate any possible claim against the County Defendants. His attorney had access to the tape of the interview itself. (JA 381-383.) He had a full transcript of the meeting that Kaufman had with Defendants Field, Feldman and Tamura. (JA 358-383.) At that meeting, the participants discussed in detail exactly what involvement the County Defendants had in the interview conducted by the state investigators. Nelli does not explain what additional information he would glean from additional formal discovery.

Finally, Nelli has not articulated any legal theory that would support a claim against the County Defendants no matter what additional discovery might have shown. He claims that he might have had a cause of action "for advising or failing to advise against unlawful wiretapping." (Opening Brief, p. 41.) However, he cites no authority for such a cause of action. Nor could

he have cited authority for a cause of action for negligent legal advice by a Deputy District Attorney.

Negligent conduct is not sufficient to warrant relief under section 1983. (*City of Canton* v. *Harris* (1989) 489 U.S. 378 (establishing "deliberate indifference" as the standard for liability under section 1983).) Moreover, there is no basis for claiming that the County Defendants owed a negligence duty to Nelli under state law with respect to the giving of legal advice to the state investigators. (See *Sheldon Appel Co.* v. *Albert & Oliker* (1989) 47 Cal.3d 863 (an attorney's duty runs primarily to the client and not to the adversary); *Goodman* v. *Kennedy* (1976) 18 Cal.3d 335 (attorney does not owe duty to the other side in a business transaction).)

3. Since Nelli did not allege any unlawful conduct, there was no basis for an injunction

The Sixth Cause of Action purports to state a claim for "injunctive relief." However, a request for an injunction is not a cause of action. It is a remedy that may be granted if plaintiff establishes the elements of a substantive cause of action. (*City of South Pasadena* v. *Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293; *Shell Oil Co.* v. *Richter* (1942) 52 Cal.App.2d 164, 168.) As explained above, Nelli has not pleaded facts sufficient to establish the elements of any of his substantive causes of action. Therefore, he has no separate claim for an injunction.

C. The County Defendants are immune from any claim for damages.

1. Defendants Fields, Feldman and Tamura have absolute prosecutorial immunity from any claim for damages under 42 U.S.C. section 1983.

Nelli's opposition to the County Defendants' demurrer made it clear that he was only seeking damages under 42 U.S.C. section 1983 against Defendants Fields, Feldman and Tamura, the Deputy District Attorneys who allegedly had contact with the state investigators. He disclaimed any intent to seek such damages from the County or from District Attorney Garcetti. (JA 342.) However, as prosecutors, Defendants Fields, Feldman and Tamura have absolute immunity from liability under section 1983 for their prosecutorial actions. (*Imbler* v. *Pachtman* (1976) 424 U.S. 409.) As Nelli concedes in his Opening Brief, the question is whether the prosecutor's conduct is related to "initiating a prosecution." (Opening Brief, p. 44.)

There is no question that maintaining possession of the tape in the face of Kaufman's demand that it be destroyed was related to "initiating a prosecution." The fact that there had been no arrest, indictment or judicial appearance at that stage does not matter. As the United States Supreme Court explained in *Buckley* v. *Fitzsimmons* (1993) 509 U.S. 259, 273:

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the po-

> lice and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

In this case, the Deputy District Attorneys' actions in securing potential evidence and preserving it for possible use in later proceedings occurred in the course of their roles as advocates for the State. In his Opening Brief, Nelli focuses on the advice that the Deputy District Attorneys allegedly gave to the state investigators. However, he has *not* explained how that advice constituted a section 1983 violation. Therefore, the holding in *Burns* v. *Reed* (1991) 500 U.S. 478 with regard to advice to the police is inapposite. Nelli has provided *no* authority to support his argument that maintaining possession of the tape pending a later proceeding falls outside the protection of absolute immunity.

2. Defendants Fields, Feldman and Tamura have qualified immunity from any claim for damages under 42 U.S.C. section 1983.

All government officials sued under section 1983 have qualified immunity from liability. Such immunity extends to any conduct by a prosecutor that falls outside his or her absolute immunity. (*Buckley*, *supra*, 509 U.S. at pp. 272-273.) The relevant inquiry is whether a reasonable government official could have believed that his conduct was objectively reasonable, in light of clearly established law and the information known to the official at the time. (*Anderson* v. *Creighton* (1987) 483 U.S. 635, 640.) The individual defendants are immune from liability if (1) the right allegedly

violated was not clearly established at the time, and (2) a reasonable official would have thought that the defendants' actions were constitutional.

Here, Nelli has not provided any authority that he had a clearly established right to be free of the conduct that he has alleged against the individual defendants in 1991 when the conduct in question occurred. The *only* authority for his claim against the County Defendants is *Church of Scientology* v. *United States* (1992) 506 U.S. 9, which was decided a year later. (In any event, for reasons explained in Section II.B.1 above, *Church of Scientology* provides no support for a claim against the County Defendants.) There is no authority for the proposition that mere possession of a tape containing attorney-client communications is unconstitutional. Therefore, Nelli cannot overcome the first prong of the qualified immunity defense.

It is also clear that a reasonable prosecutor in the individual defendants' positions would have thought his actions were constitutional. As Defendant Field explained to Nelli's attorney, he simply wished to preserve the tape in a secure condition so that a court could at some time rule on the admissibility of any evidence that might be contained on it. There was no reason to think that that action was unlawful.

3. All the County Defendants are immune from liability on any state damages claim under Government Code section 821.6.

Nelli also purported to allege claims for damages under the California Constitution against all the County Defendants. However, Government Code section 821.6 grants immunity to any public employee for damages

"caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."[5] That immunity is at least as extensive as the prosecutorial immunity from section 1983 liability:

> The immunity accorded by section 821.6 extends to all conduct related to instituting and prosecuting any proceedings, i.e., to (1) conduct taken in instituting and prosecuting a proceeding, (2) conduct essential to the accomplishment of instituting and prosecuting a proceedings, and (3) conduct which, although only incidental and collateral to instituting and prosecuting a proceeding, serves to promote the accomplishment of those principal purposes. [Citations omitted] Thus, because gathering, retaining custody of, disclosure or nondisclosure and use or nonuse of evidence in a prosecution is conduct essential to the accomplishment of instituting and prosecuting a proceeding, as well as conduct which serves to promote the institution and prosecution of a proceeding, a public employee who engages in such conduct is immune from liability based on it.

(*Benach* v. *County of Los Angeles* (1997) 60 Cal.App.4th 637, ___.)

That is exactly the sort of conduct that Nelli claims the County Defendants were engaged in here. "While asserting they have not presently listened to the tape, the defendants have refused to destroy the tape, which they retain in their possession, and have asserted the right to use the tape or portions of it in future proceedings involving plaintiff." (JA 240:11-15.) In

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[5] The County Defendants did not raise section 821.6 in their demurrer to the Second Amended Complaint. However, the issue raises a pure question of law that may be raised for the first time on appeal. (See *Carman* v. *Alvord* (1982) 31 Cal.3d 318, 324.)

short, the individual defendants were making decisions about "retaining custody of" and "use or nonuse of" evidence. They were acting in a prosecutorial capacity within the terms of section 821.6. Therefore, they are immune from any claim of damages under state law. Since the individual defendants are immune, the County is also immune. (Gov. Code, § 815.2, subd. (b).)[6]

D. The Third Cause of Action is moot, because the County complied with the Superior Court's order to file the tape with that Court

Nelli appears to argue on this appeal that he should still be permitted to pursue his claim for injunctive relief against the County Defendants. As explained in Section II.B.3 above, that claim should fail, because he has not alleged facts that establish the elements of his substantive causes of action. In addition, the cause of action is moot as a result of the County Defendants' compliance with the Superior Court's preliminary injunction.

On March 30, 1993, the Superior Court granted Nelli's request for a preliminary injunction. That was a month *before* it sustained the County Defendants' demurrer. In the intervening period, the County Defendants turned the tape of the interview over to the Superior Court, as required by the preliminary injunction. Since, then the County Defendants have had no

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[6] Section 815.2, subdivision (b) provides: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

access to the tape, and, as the Superior Court noted the tape eventually became "permanently lost." Further, Nelli concedes in his Opening Brief that the tape was never used in the course of obtaining his criminal conviction.[7] As a result, Nelli effectively received all the relief that he sought through the Sixth Cause of Action.[8] There is no live dispute between Nelli and the County Defendants with respect to the Sixth Cause of Action. (See *Phipps* v. *Saddleback Valley Unified Sch. Dist.* (1988) 204 Cal.App.3d 1110, 1117 (injunction not appropriate where "there is no reasonable probability that past acts complained of will recur").)

E. Nelli did not seek an award of attorneys' fees against the County Defendants

Nelli appeals from the Superior Court's denial of his request for fees and costs in connection with the preliminary injunction. The Opening Brief

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[7] The Opening Brief states: "Nelli's 'preliminary' relief became permanent at the moment the criminal case was resolved — at the time Mr. Nelli entered his *nolo contendere* plea, the tape was still under seal and in the custody of the Superior Court. Thus, Mr. Nelli obtained permanent relief in that the State was prohibited from using the tape at issue against him in the criminal matter. (Opening Brief, p. 49.)

[8] Nelli's prayer for injunctive relief sought "[a]n order restraining defendants from continuing to possess the tape recording or using it in any fashion, directly or indirectly; providing the tape and all copies to plaintiff with authority to destroy them or, alternatively, providing the tape(s) to the Superior Court to be held under seal; and restraining CDIFB from continuing to participate in any investigation involving the plaintiff." (JA 245-246.)

does not explicitly state that he seeks any relief with respect to the County Defendants on that aspect of his appeal. Nor would he be entitled to any such relief. The County Defendants were dismissed from the case on April 28, 1993. (JA 405-407.) Nelli did not file his motion for fees and costs until January 3, 1997. (JA 2508.) He only served the motion on the attorney for the State Defendants. (JA 2533.) The County Defendants did not participate in the proceedings on the motion. Therefore, Nelli never sought fees and costs from the County Defendants, and has no basis for pursuing such a claim on this appeal.

III. CONCLUSION

For the reasons stated above, this Court should either (1) dismiss this appeal as barred by Code of Civil Procedure section 913, or (2) affirm on the merits.

February ___, 1998

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