IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

Joleen K. Youngers,
as the Personal Representative of the
Wrongful Death Estate of Roxsana
Hernandez,

Plaintiff,

vs. Cause No. 1:20-cv-00465-WJ-JHR

LaSalle Corrections Transport LLC,
LaSalle Corrections West LLC,
LaSalle Management Company LLC,
Global Precision Systems LLC,
TransCor America LLC,
CoreCivic, Inc., and
United States of America,

Defendants.

DEFENDANTS LASALLE CORRECTIONS TRANSPORT LLC, LASALLE CORRECTIONS WEST LLC, and LASALLE MANAGEMENT COMPANY LLC'S REPLY TO PLAINTIFF'S OPPOSITON (*DOC. 134*) TO LASALLE DFEENDENTS' MOTION TO DISMISS (*DOC. 123*) PLAINTIFF'S SECOND AMENDED COMPLAINT (*DOC. 111*) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO FRCP RULE 12(b)(6) AND MEMORANDUM IN SUPPORT

COME NOW, the Defendants, LASALLE CORRECTIONS TRANSPORT LLC, LASALLE CORRECTIONS WEST LLC, and LASALLE MANAGEMENT COMPANY LLC, (LaSalle/Defendants/LaSalle Defendants) by and through their attorney of record, ADAM D. RAFKIN, P.C. (Adam Daniel Rafkin, Esq.), and hereby submit their Reply to Plaintiff's Opposition (*Doc. 134*) to LaSalle Defendants' Motion to Dismiss (*Doc. 123*) Plaintiff's Second

Amended Complaint (*Doc. 111*) for Failure to State a Claim Upon Which Relief can be Granted Pursuant to FRCP Rule 12(b)(6), and Memorandum in Support, and in support thereof, would show the following:

Whether New Mexico or Arizona Substantive Law Applies
to Counts 1, 3, 4 and 5 of the Second Amended Complaint (*Doc. 111)*

From Plaintiff's Opposition (*Doc. 134*), it appears that the parties essentially agree that it is New Mexico's law which determines whether New Mexico's substantive law or Arizona's substantive law applies to the claims asserted based on alleged acts or omissions by the LaSalle Defendants in Arizona. It likewise appears that the Parties agree on what the law is in New Mexico regarding this issue, but that they disagree on the application of that law.

Specifically, Plaintiff believes that because the alleged acts or omissions by the LaSalle Defendants purportedly caused Roxsana's death in New Mexico, *that* is where the wrong occurred. Respectfully, however, this is a misreading of the law.

In *Terrazas v. Garland & Loman, Inc*., the New Mexico Court of Appeals stated:

> "Here, there is no dispute that the place where the wrong occurred was the job site in Las Cruces, New Mexico. *Torres v. State*, 119 N.M. 609, 613, 894 P.2d 386, 390 (1995) (*observing that the place of the wrong is the location of the last act necessary to complete the injury*)..."
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> *Terrazas v. Garland & Loman, Inc.*, 2006-NMCA-111, ¶ 12, 140 N.M. 293, 142 P.3d 374 [emphasis added].

In *Est. Of Gilmore*, the New Mexico Court of Appeals similarly stated:

> "In determining which state's law to apply in a tort action, New Mexico generally follows the doctrine of lex loci delicti, *Torres v. State*, 119 N.M. 609, 613, 894 P.2d 386, 390 (1995), meaning the law of the place where the crime or wrong took

> place." Black's Law Dictionary 630 (abr. 6th ed.1991). *We have said that the place of the wrong is the location of the last act necessary to complete the injury.*"
>
> *In Re Estate of Gilmore*, 1997-NMCA-103, ¶ 9, 124 N.M. 119, 946 P.2d 1130 [emphasis added] [internal quotation marks omitted][1].

Thus, the proper focus is where the Defendant's alleged last act of negligence occurred and which purportedly caused the harm to the plaintiff. *Gilmore* and *Terrazas*, supra, make it clear that it is the last act constituting negligence, not the place where the harm ultimately manifests itself, that matters.

That analysis indisputably points to Arizona because Plaintiff makes no allegations whatsoever that the LaSalle Defendants committed any acts or omissions constituting negligence in New Mexico. Instead, Plaintiff alleges that while transporting Roxsana on a short drive from California to Arizona, the LaSalle Defendants violated various California civil rights statutes. Then, while in Arizona, Plaintiff alleges that during a brief 6 hour stop at the San Luis Regional Detention Center and 2 hour drive to the Mesa airport, the LaSalle Defendants purportedly ignored signs of medical distress and generally treated Roxsana inhumanely.

Significantly, in her Opposition, Plaintiff concedes that all of the alleged acts and omissions by the LaSalle Defendants occurred in California and Arizona:

> "But the factual allegations of the FAC are no longer before this Court. Instead, the SAC expands the allegations to describe additional facts concerning the true scope

[1] Plaintiff notes that Defendants mistakenly attributed a quote to *Zamora v. Smalley*, 68 N.M. 45, 47, 358 P.2d 362, 363 (1961). This is true. The following language cited in the Motion was instead taken from *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 749 F. Supp. 2d 1235, 1258 (D.N.M. 2010)("The lex loci delicti rule defines the state where the wrong occurred as "the state where the last event necessary to make an actor liable for an alleged tort takes place."), which itself cited *Zamora v. Smalley*.

> of Defendants' acts and omissions in California and Arizona."
>
> *Plaintiff's Opposition (Doc. 134 pg 8 ¶ 3).*

This statement by Plaintiff argues against applying New Mexico's substantive law, where none of Defendants' alleged negligence occurred in New Mexico, and not in favor of it. If all of the allegedly tortious conduct by these Defendants occurred in California and Arizona, why would New Mexico's substantive law apply? Instead, the *Gilmore* and *Terrazas* cases, *supra*, make it clear that Arizona's substantive law should apply to the claims arising from the acts or omissions occurring in those states.[2]

Aside from the allegations of having violated various civil rights statutes in California, ***all*** of Plaintiff's allegations regarding the LaSalle Defendants focus on their acts or omissions which occurred in Arizona. Thus, it is clear that "the location of the last act necessary to complete the injury" occurred in Arizona, and Arizona's substantive law applies.

Rehabilitation Act Claim (Count I of the Second Amended Complaint)

In terms of the Rehabilitation Act claim, the Complaint is long on conclusory statements, but short on factual allegations establishing that the LaSalle Defendants received subsidies from the federal government, so as to bring them within the ambit of the Act.

In *Shotz v. Am. Airlines, Inc*., the 11th Circuit Court of Appeals stated:

> "Importantly, Congress usually requires federal agencies to obtain from the recipients of federal financial aid written, executed assurances that they will comply

[2] Defendants will raise this same argument later in this Reply regarding the counts contained in the Second Amended Complaint which assert violations of California law.

> with the Rehabilitation Act. Indisputably, such implementing assurances were not promulgated here."
>
> *Shotz v. Am. Airlines, Inc*., 420 F.3d 1332, 1337 (11th Cir. 2005) [internal citation and quotation marks omitted].

The waiver at issue with respect to the San Luis Regional Detention Center is a "Dental Screening" waiver[3], as this Court noted in its previous Order:

> "To be sure, PBNDS waivers likely allow contractors to save on costs. But the key difference between Federal financial assistance and the cost savings associated with a waiver is whose money the private contractor pockets at the end of the day. Federal financial assistance, or a subsidy, involves the payment of federal money....A waiver is different; it frees up how a private contractor may spend *its own* money."
>
> *Memorandum Opinion and Order, Doc. 109 pg 10 [emphasis in original].*

The pertinent allegations made in the Second Amended Complaint regarding Section 504 of the Rehabilitation Act and the LaSalle Defendants are:

> "LaSalle Corrections received federal funds for these services pursuant to its contracts with ICE. Upon information and belief, LaSalle Corrections also received federal subsidies to support the conduct described herein and engaged in a 'program or activity conducted by [an] Executive agency' within the meaning of Section 504(a)."
>
> *Doc. 111, ¶ 27.*

And:

> "Due to ICE's participation in a program or activity conducted by DHS, Contractor Defendants participation in the program, the subsidies received from Defendant U.S. to conduct this program or activity, and the contracts between Defendant U.S.

[3] The Second Amended Complaint (*Doc. 111*) does not appear to allege that LaSalle Transportation Services (which drove Roxsana from California to Arizona and from San Luis to Mesa), received a dental screening waiver. Neither does the Second Amended Complaint appear to allege LaSalle Management received such a waiver.

> and its agency subcomponents, Section 504 requires that DHS and Contractor Defendants make reasonable accommodations (modifications) to their programs, services, or activities, unless such accommodations would constitute a fundamental alteration or undue hardship."
>
> *Doc. 111 ¶ 231.*

The Second Amended Complaint fails to allege any facts which, if taken as being true, would establish that as a result of the waiver program at issue, the LaSalle Defendants actually receive any *additional* government money, beyond the compensation that they are normally paid. At most (and as the Court noted in its earlier *Memorandum Opinion and Order Doc. 109 pg 10* regarding this issue which was raised by Defendant CoreCivic), the LaSalle Defendants *save some of their own money* by not having to abide by the PBNDS standards; that is far different than receiving additional money from the federal government in the form of a subsidy. Thus, the Rehabilitation Act does not apply to the LaSalle Defendants and this claim should be dismissed.

Failure To Summon Medical Aid Under Cal. Gov. Code Sec. 845.6

At the outset, Defendants would argue that this Court should hold that California substantive law applies to the claims asserted by Plaintiff under Cal. Civ. Code Section 845.6, the Bane Act and the Unruh Act, because as with those claims asserted based on acts or omissions that are alleged to have occurred in Arizona, under New Mexico law, the proper focus is where the Defendant's alleged last act of negligence was which caused the harm to the plaintiff (see *Gilmore* and *Terrazas*, supra, which make it clear that it is the last act constituting negligence, not the place where the harm ultimately manifests itself, that matters).

In terms of the substance of Plaintiff's Cal. Gov. Code 845.6 claim, Plaintiff cites a host of cases purportedly standing for the proposition that the LaSalle Defendants are governmental

entities in regard to LaSalle Transportation Services' transporting Roxsana on a roughly one hour trip to Arizona.

The primary case relied upon by Plaintiff, *West v. Atkins*, 487 U.S. 42 (1988) bears little factual resemblance to this case. In *West*, the Court found that a doctor was a state actor where North Carolina law mandated medical care be provided to inmates and that only state-authorized physicians were permitted to see inmates. The *West* Court stated:

> "[C]ommon law requires *55 North Carolina to provide medical care to its prison inmates)... North Carolina employs physicians, such as respondent, and defers to their professional judgment, in order to fulfill this obligation. By virtue of this relationship, effected by state law, Doctor Atkins is authorized and obliged to treat prison inmates, such as West. He does so clothed with the authority of state law. He is a person who may fairly be said to be a state actor. It is only those physicians authorized by the State to whom the inmate may turn."
>
> *West v. Atkins*, 487 U.S. 42, 54–55, 108 S. Ct. 2250, 2258, 101 L. Ed. 2d 40 (1988) [internal citations and quotation marks omitted].

Further, and crucially, *West* involved a 42 U.S.C. Sec. 1983 claim, not a state claim under California's Gov. Code Sec. 845.6. Undersigned counsel has researched this issue extensively, and was unable to locate a single case which held that Cal. Gov. Code Sec. 845.6 applies to private contractors.

Lastly, Plaintiff simply ignores the plain text of the statute in question, which states

> "Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody..."
>
> *Cal. Gov. Code 845.6*

Plaintiff similarly ignores the fact that the California Government Code explicitly states that:

> "Public entity" includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State."
>
> *Cal. Gov. Code Sec. 811.2.*

The California legislature certainly *could* have elected to include private contractors within the definition of "public employee" if it had chosen to, but it did not.

Although not necessarily factually on point, there is a nonetheless relevant California case which stands for the proposition that a private entity is *not* entitled to the protections of California's Tort Claims Act because it is a private, and not a public, entity:

> "The Petition cites no authority, and we are aware of none, that extends the governmental immunity set forth in the Tort Claims Act to a private entity working under contract for the State, or indeed, that extends governmental immunity beyond the types of entities described in Government Code section 811.2.23 Accordingly, we conclude that Center Point is not a "public entity" and thus is not entitled to claim the immunity set forth in the Tort Claims Act."
>
> *Lawson v. Superior Ct.*, 180 Cal. App. 4th 1372, 1397, 103 Cal. Rptr. 3d 834, 855 (2010).

The Bane Act (Cal. Civ. Code Sec. 52.1) And Cal. Civ. Code Sec. 43

Plaintiff advances four (4) arguments as to why these Defendants are liable under the Bane Act and Cal. Civ. Code sec. 43. First, Plaintiff claims they impaired Roxsana's right to be free from bodily transgressions such as assault, battery and false imprisonment restraint or harm. *Plaintiff's Opposition, Doc. 134, pg 17, count V*.

However, in terms of Plaintiff's first argument, the Second Amended Complaint does not allege that somehow these Defendants lacked the legal authority to take custody of Roxsana at the California facility and transfer her to San Luis, Arizona. Neither has Plaintiff alleged that somehow

Defendants were free to simply ignore jail or prison standards which all required that prisoners or detainees must be restrained during transport.

Second, Plaintiff asserts Defendants violated Section 845.6 by failing to summon medical aid for Roxsana. However, as has been shown in the LaSalle Defendants' Motion (*Doc. 123, pgs 11-12)*, Cal. Civ. Code Sec. 845.6 unequivocally applies only to governmental entities and Plaintiff has not pointed to any California case holding that this statute applies to private contractors.

Third, Plaintiff argues that the LaSalle Defendants violated Roxsana's rights under Section 504 of the Rehabilitation Act. *Plaintiff's Opposition, Doc. 134, pg 18*. Again, Defendants have addressed this issue previously herein, and have demonstrated that the issuance of a waiver to follow the PBNDS to Defendant LaSalle Corrections West does not equate to the LaSalle Defendants putting any federal government money in their pockets; at most, the LaSalle Defendants might perhaps save some of their *own money*, which does not equate to a subsidy for Section 504 purposes.

Lastly, Plaintiff asserts that Defendants infringed upon her right to "full and equal accommodations, advantages, facilities, privileges, or services under the Unruh Act" (Cal. Civ. Code Sec. 51). *Plaintiff's Opposition Doc. 134, pg 18*. However, as argued previously in the LaSalle Defendants' Motion to Dismiss (*Doc. 123*), the Unruh Act is a public accommodations statute and is inapplicable here. In *Curran v. Mount Diablo Council of the Boy Scouts*, the Court found that since the Boy Scouts were a private organization and their facilities (and members' homes used for meetings) were not open to the public, the Unruh Act did not apply. *Curran v. Mount Diablo Council of the Boy Scouts,* 17 Cal. 4th 670, 697, 952 P.2d 218, 236 (1998). It thus cannot seriously be argued that a prison bus is available for use by the public. Thus, the Unruh Act

does not apply here, whether asserted independently by Plaintiff, or derivatively through either the Bane Act or Cal. Civ. Code 43.

The Unruh Act (Cal. Civ. Code Sec. 51)

Plaintiff relies primarily on *Wilkins-Jones v. Cty. of Alameda*, 859 F. Supp. 2d 1039 (N.D. Cal. 2012) in support of her argument that the Unruh Act provides relief in this case. *Plaintiff's Opposition Doc. 134 pgs. 23-24*. However, the *Wilkins-Jones* case involved facts very different from those of this case.

In *Wilkins-Jones*, the plaintiff was disabled and confined in a facility without proper access to medical care necessitated by her condition. The Court stated:

> "PHS/Corizon does not dispute that it is a private, for-profit entity that functions as a business within County jails, whereby it is paid to provide services to inmates. By providing services for a fee, PHS/Corizon performs a "customary business function," through which it serves inmates like Plaintiff. That customary business function renders it a "business establishment" under the broad terms of the Unruh Act."
>
> *Wilkins-Jones v. Cty. of Alameda*, 859 F. Supp. 2d 1039, 1050 (N.D. Cal. 2012).

Here, driving a prison van to San Luis Regional Detention Center in Arizona does not constitute a "customary business function". While provision of medical care for a fee (even if the County is paying the fee, as in *Wilkins-Jones*) may constitute a customary business activity, transporting a detainee from one facility to another cannot be reasonably described as a customary business function in terms of public accommodation. Certainly, the California legislature, in enacting the Unruh Act, was not likely concerned that all Californians would have equal access to transportation in a prison bus.

Further, while the Complaint in *Wilkins-Jones* was found to have alleged deprivation of access to accommodations because it was "replete with facts as to her difficulties accessing the jail's facilities, such as the beds, toilets, showers, walkways, benches, etc., as a result of Defendants' actions" (*Id*. at 1050), at most, the allegations here are that Defendant LaSalle Transportation Services did not allow Roxsana to use the restroom on the bus (which Defendants deny, but understand must be taken as being true in the context of their Motion to Dismiss) for a roughly one hour drive to Arizona. This is not analogous to, say, a restaurant not having a bathroom accessible to all patrons, regardless of their disability. Thus, Defendants argue that the Unruh Act does not apply.

Finally, Plaintiff's Opposition requests that in the event "the Court finds any deficiencies, Plaintiff seeks leave to amend the SAC to address such deficiencies". *Doc. 134, page 24*. To the extent that this request by Plaintiff can be considered to constitute a motion for leave to amend the Second Amended Complaint, Defendants would oppose this. While FRCP Rule 15 states that leave to amend should be freely granted "when justice so requires", Plaintiff has already filed three (3) iterations of her Complaint in this matter and has had more than an ample opportunity to properly plead her claims. Thus, this request should be denied.

WHEREFORE, the Defendants, LASALLE CORRECTIONS TRANSPORT LLC, LASALLE CORRECTIONS WEST LLC, and LASALLE MANAGEMENT COMPANY LLC, pray this Court grant their Motion to Dismiss (*Doc. 123*) Plaintiff's Second Amended Complaint (*Doc. 111*) for Failure to State a Claim Upon Which Relief Can be Granted Pursuant to FRCP Rule 12(b)(6), and for such other and further relief as the Court deems just and proper.

Respectfully Submitted:

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Certificate of Service

I HEREBY CERTIFY THAT on the 21st day of March, 2022, I filed the foregoing electronically through the CM/ECF system, which caused the following parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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