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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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ALEXANDER A. DE LOS REYES,  
  
Plaintiff and Appellant,  
  
v.  
  
KEVIN F. HANLEY,  
  
Defendant and Respondent.

C066453  
  
(Super. Ct. No.  
34200900055133CUFRGDS)

Plaintiff Alexander A. De Los Reyes sued defendant Kevin F. Hanley, M.D., alleging that defendant filed a false medical report in connection with plaintiff's application for workers' compensation benefits. The trial court sustained without leave to amend defendant's demurrer to plaintiff's second amended complaint, on the ground that defendant's alleged actions were protected by the litigation privilege of Civil Code section 47, subdivision (b) (§ 47(b)).

On appeal, plaintiff has failed to show that he has stated a viable cause of action. Accordingly, we shall affirm.

## BACKGROUND

Plaintiff's second amended complaint alleges as follows: While defendant was acting "as a qualified medical examiner," he prepared a report about plaintiff in connection with plaintiff's application for workers' compensation benefits. The report falsely stated plaintiff's knee was normal. Further, defendant destroyed evidence by substituting an MRI image of a different patient's knee, which conduct resulted in plaintiff's acceptance of a low workers' compensation settlement. The complaint purported to state causes of action against defendant for fraud and breach of fiduciary duty.<sup>1</sup>

Defendant demurred, contending plaintiff's claims were barred by the section 47(b) litigation privilege.

The trial court sustained the demurrer without leave to amend, and plaintiff filed a timely appeal.<sup>2</sup>

## DISCUSSION

### I

#### *Demurrer*

On appeal from a judgment based on a demurrer, the plaintiff must demonstrate that the complaint states a viable cause of action, or can be amended to state a viable cause of action. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *People*

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<sup>1</sup> We omit facts pertaining to a breach of contract claim against defendants who are not parties to this appeal.

<sup>2</sup> The judgment of dismissal is not in the record on appeal, but defendant concedes that one was entered, therefore we elect to overlook this particular gap in the appellate record.

*ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957 (*Gallegos*); see also Code Civ. Proc., § 472c.)

Section 47(b) provides a privilege for any publication made in connection with "any . . . official proceeding authorized by law," with exceptions not here relevant. "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*)). The principal purpose of the privilege "is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Silberg, supra*, 50 Cal.3d at p. 213.) The privilege extends to all kinds of tort suits, including fraud and misrepresentation, with the exception of malicious prosecution suits. (*Silberg, supra*, at pp. 215-216.) It also extends to "'all kinds of truth-seeking proceedings,' including administrative, legislative and other official proceedings. [Citation.] Further, the privilege "'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.'" (*Gallegos, supra*, 158 Cal.App.4th at p. 958.)

A case cited by the trial court is on point. In *Harris v. King* (1998) 60 Cal.App.4th 1185 (*Harris*), Harris in part alleged Dr. King "misrepresented" Harris's medical condition in a report prepared in connection with a workers' compensation claim, and

framed the complaint in part in terms of fraud and breach of fiduciary duty. (*Harris, supra*, 60 Cal.App.4th at p. 1187.) The court found all of Harris's claims barred by the litigation privilege, even if the report had been "prepared and communicated maliciously and with knowledge of its falsity." (*Harris, supra*, at pp. 1187-1188.) The court also noted that a workers' compensation evaluation does not of itself create a doctor-patient relationship, giving rise to a duty of care towards the applicant. (*Id.* at p. 1188; see *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 313-314.)

This clear precedent supports the trial court's ruling and is not addressed by plaintiff.

Plaintiff cites Penal Code section 118, subdivision (a), proscribing perjury, and similar laws. We agree that the privilege would not bar a *criminal* prosecution based on perjury or similar laws. (See *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1245-1247.) However, plaintiff cites no authority showing a private person may maintain a *civil suit* based on perjury, in the face of the litigation privilege.

Similarly, plaintiff also cites Labor Code section 3820, which proscribes the submission of fraudulent information in connection with a workers' compensation claim, and provides for civil penalties to "be assessed and recovered in a civil action brought in the name of the people of the State of California by any district attorney." (Lab. Code, § 3820, subd. (f); see, e.g., *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006)

136 Cal.App.4th 24, 29-31.) Although plaintiff asserts this provision "nullifies" the litigation privilege, he provides no authority showing this statute authorizes a private civil suit, or that such suit is not subject to the litigation privilege.

In a related claim, plaintiff points to cases discussing the *exclusivity* of the workers' compensation remedy. (AOB 18-19) (See, e.g., *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810-828.) We see nothing in those cases establishing an exception to the litigation privilege.

We reject all other points raised in the opening brief because they are unintelligible or patently frivolous. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2; *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

New points raised in the reply brief come too late. (See *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29; *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 808.)

## II

### *Request for Sanctions*

Defendant requests that we sanction plaintiff for filing a frivolous appeal, and has also moved to dismiss the appeal, because it is frivolous.

Defendant correctly points out that although plaintiff appears in this court without counsel, we must apply ordinary procedural rules to this appeal. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Doran v. Dreyer* (1956) 143 Cal.App.2d

289, 290.) However, although we find plaintiff's appeal lacks merit and observe that some of his arguments are, indeed, frivolous, applying the stringent standards used to define a frivolous appeal, we decline to dismiss the appeal or to impose sanctions. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-651.)

**DISPOSITION**

The judgment is affirmed. Plaintiff shall pay defendant's costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

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DUARTE, J.

We concur:

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BLEASE, Acting P. J.

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BUTZ, J.