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

(Lassen)

WILLIAM R. BUTLER et al.,

Plaintiffs and Appellants,

v.

MCCAIN AND ASSOCIATES et al.,

Defendants and Respondents.

C074654

(Super. Ct. No. 49261)

Plaintiffs William and Peggy Butler, husband and wife, sued their neighbor's land surveyor, Everd A. McCain, for professional negligence, slander of title, and intentional and negligent infliction of emotional distress. McCain successfully moved for summary judgment on the grounds that (1) the "official proceeding privilege" found in Civil Code section 47, subdivision (b) (section 47(b)) provides a complete defense to the Butlers' complaint; and (2) McCain does not have a contractual relationship with the Butlers and does not owe them a duty of care.¹

¹ Undesignated statutory references are to the Civil Code.

The Butlers appeal, challenging both grounds for granting summary judgment and raising a host of other issues. We asked the parties to submit supplemental briefs addressing whether the allegations in the Butlers' complaint establish a complete defense under the litigation privilege, which is also found in section 47(b). Having received and considered the parties' supplemental briefs, we conclude that summary judgment was properly granted under section 47(b) and affirm.

I. BACKGROUND

The Butlers own a large parcel of land in Janesville in Lassen County. The Butlers purchased their approximately 79 acre parcel in 1980. The Butlers' property is bordered on the north side by a smaller parcel owned by Lisa Souliere. Souliere purchased her parcel in 2003.

In 2006, Souliere hired James Eddy to survey her property. Eddy discovered an error in the legal description of Souliere's property. Specifically, Eddy determined that the southern boundary of Souliere's property was approximately 95 feet to the north of the boundary described in the legal description, thereby decreasing Souliere's property by approximately .3 acres, or 13,068 square feet.

Souliere tendered the claim to her title insurance company. The title insurance company settled the claim for \$29,340 in August 2006.

In 2009, Souliere engaged Everd McCain to survey the common boundary between the Souliere and Butler properties. In contrast to the earlier survey prepared by Eddy, McCain determined that the boundary between the two properties was correctly set forth in the original legal description.

McCain documented his findings in a “record of survey.” (Bus. & Prof. Code, § 8763.)² McCain submitted the record of survey to Lassen County Deputy Surveyor Marc Van Zuuk for review. While the record of survey was under review, the Butlers contacted McCain and asked him to revise his conclusions. McCain declined to do so.

Deputy Surveyor Van Zuuk completed his review and submitted the record of survey for filing with the Lassen County Recorder (Recorder). The record of survey was recorded on June 30, 2009. Less than two months later, on August 18, 2009, Souliere commenced an action against the Butlers seeking to quiet title to the disputed .3 acres. The Butlers and Souliere executed a mutual settlement agreement in the quiet title action in December 2013. As part of their settlement, the parties agreed that the boundary between the Souliere and Butler properties was as described in the 2006 survey prepared by Eddy.

In the meantime, on June 30, 2010, the Butlers commenced the instant action against McCain, McCain’s operating entity, McCain and Associates, Inc., and McCain’s wife, Iona McCain.³ The Butlers’ complaint alleges causes of action for professional negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and slander of title. Among other things, the complaint alleges: “As has been testified to by Souliere, under penalty of perjury [in the previously-filed quiet title action], the suit filed against [the Butlers] would not have been filed but for McCain filing his survey map and asserting to [Souliere] that the measurements of her deed were correct and that she owned the disputed land. The McCain map was the causation and

² A “record of survey” is “a map, legibly drawn, printed, or reproduced by a process guaranteeing a permanent record in black or on tracing cloth, or polyester base film, 18 by 26 inches or 460 by 660 millimeters.” (Bus. & Prof. Code, § 8763.)

³ Iona McCain is an officer of McCain & Associates, Inc. For convenience, McCain, McCain and Associates, Inc., and Iona McCain are collectively referred to as “McCain” unless otherwise indicated.

central element that prompted Souliere to file suit against [the Butlers].” The Butlers do not allege privity of contract with McCain. The Butlers’ complaint was consolidated with the previously-filed quiet title action.

On November 5, 2012, McCain moved for summary judgment on the grounds that (1) McCain does not have a contractual relationship with the Butlers and does not owe them a duty of care; (2) the Butlers did not rely on the record of survey; (3) McCain was required to submit the record of survey to Van Zuuk, and Van Zuuk was required to record the record of survey with the Recorder, pursuant to Business and Professions Code section 8762; and (4) the record of survey was privileged pursuant to the official proceeding privilege of section 47(b).

The Butlers opposed the motion, arguing: (1) McCain prepared a sham record of survey at Souliere’s direction, knowing it would be used to support Souliere’s quiet title action against them; (2) McCain was not required to submit the record of survey to Van Zuuk pursuant to Business and Professions Code section 8762, and therefore, the record of survey was not privileged pursuant to section 47(b); and (3) McCain was motivated by personal animus against the Butlers. In declarations supporting their opposition to the motion, the Butlers averred that Souliere’s attorney sent them a demand letter enclosing an unrecorded draft of the record of survey on or about June 20, 2009, prior to the recording of the record of survey with the Recorder on June 30, 2009, and the filing of Souliere’s complaint on August 18, 2009. The Butlers also averred that “McCain was aware his record of survey . . . was going to be used for the basis of litigation against the Butlers.”

The trial court heard argument on McCain’s motion for summary judgment on April 5, 2013. At the beginning of the hearing, the trial court (Mason, J.) expressed an inclination to grant the motion, stating, “I believe that there would be some kind of privity required between Mr. McCain and the Butlers, something more than what is actually the case. Furthermore, I believe that—whether I agree that Mr. McCain was

accurate in his survey, that he did what he is lawfully entitled and, in fact, required to do under the law; that it was submitted to the County; that there was a comment period; that it was subsequently recorded. And then it's pretty clear that the Butlers never believed in the accuracy of that survey or relied on it in any respect. And—I do not find, having looked at statutory and case law, that there is any basis for professional liability for a surveyor for neighbors who disagree with the results of his survey, as long as he has performed his survey in accordance with the standards of his profession.”

Following oral argument, the trial court stated, “I am issuing an order granting the motion for summary judgment filed by Mr. McCain.” The trial court directed McCain’s trial counsel to “prepare an appropriate order, submit it to the other side.” Several days later, McCain’s trial counsel prepared and circulated a proposed order granting the motion for summary judgment. The Butlers objected to the proposed order.

On April 18, 2013, the trial court (Mason, J.) issued a “Ruling on Motion For Summary Judgment.” The ruling, which does not track the proposed order submitted by McCain’s trial counsel, states in pertinent part: “The Court finds that Butler has failed to provide admissible evidence that successfully controverts any of McCain’s Undisputed Material Facts in Support of McCain’s Motion for Summary Judgment, and that McCain has provided sufficient admissible evidence to support each of McCain’s Undisputed Material Facts. [¶] Therefore, judgment is for McCain on the Motion for Summary Judgment.”

In addition to the above-described ruling, the record contains an “Order Granting Defendant’s Motion for Summary Judgment,” on the form prepared by McCain’s trial counsel. Unlike the ruling, which was signed by Judge Mason, the order was signed by Judge Holmer, who was assigned to the consolidated cases and authorized to sign orders and judgments pursuant to Code of Civil Procedure section 635. The order is file stamped and hand-dated April 18, 2013, the same day as the ruling.

On April 24, 2013, the Butlers filed a motion to disqualify Judge Mason for cause pursuant to Code of Civil Procedure section 170.1. On May 7, 2013, a clerk's minute order was entered indicating that the consolidated cases had been assigned to Judge Holmer for all purposes. On May 28, 2013, another minute order was entered, stating, "Presiding Judge Michele Verderosa hereby designates Judge C. Anders Holmer under [Code of Civil Procedure section] 635 to sign orders and or judgments on these cases for the previous Judge Assigned David A. Mason." That same day, Judge Holmer signed a judgment in favor of McCain pursuant to Code of Civil Procedure section 635.

In the weeks that followed, the Butlers filed a motion for a new trial and a motion to strike McCain's memorandum of costs. Among other things, the Butlers claimed an irregularity in the proceedings, arguing that Judge Mason's ruling was not equivalent to an order granting summary judgment, and Judge Holmer's order was unauthorized. The trial court denied the Butlers' motions.

The Butlers, representing themselves, filed a timely notice of appeal.

II. DISCUSSION

A. Standard of Review

"A party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a).) A defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); see Code Civ. Proc., § 437c, subd. (p)(2).) Such a defendant bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar, supra*, at p. 850.) Once the defendant meets its initial burden, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Id.* at pp. 850-851.)

“ ‘Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]’ ” (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are: (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent’s claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid.*)

Following a grant of summary judgment, we review the record de novo for the existence of triable issues, and consider the evidence submitted in connection with the motion, with the exception of evidence to which objections were made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)⁴ We will affirm a summary judgment if it is correct on any ground, “as we review the judgment, not its rationale.” (*Overstock.com, Inc. v. Goldman Sachs & Co.* (2014) 231 Cal.App.4th 513, 528, fn. 10.)

B. Official Proceeding Privilege

The trial court based its ruling, in part, on the official proceeding privilege set forth in section 47(b). The official proceeding privilege, if applicable, would provide a complete defense to the Butlers’ complaint. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241-1242 (*Action Apartment*) [section 47(b) applies to all torts except malicious prosecution]; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489 [same].) We therefore begin our analysis with an overview of section 47(b)’s official proceeding privilege.

Section 47(b) establishes an absolute privilege for publications made “ ‘[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding

⁴ Here, our review encompasses all the evidence submitted by the parties, despite the Butlers’ numerous evidentiary objections. Because the trial court did not expressly rule on the Butlers’ objections, we presume them to have been overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)

authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [statutes governing writs of mandate],” with certain statutory exceptions that do not apply here. (§ 47, subd. (b).) “ ‘ “The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.” ’ ” (*Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 364 (*Hagberg*), citing *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753-754.) The privilege is broadly applied regardless of malice. (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.) “Any doubt as to whether the privilege applies is resolved in favor of applying it.” (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529.)

McCain contends the record of survey is protected by the official proceeding privilege. His argument proceeds in two parts. First, he claims he was required to submit the record of survey to Deputy Surveyor Van Zuuk pursuant to Business and Professions Code section 8762.⁵ Second, he claims that the purportedly mandatory submission of the

⁵ Business and Professions Code section 8762, subdivisions (a) and (b)(1), (2) provide, in pertinent part:

“(a) Except as provided in subdivision (b), after making a field survey in conformity with the practice of land surveying, the licensed surveyor or licensed civil engineer may file with the county surveyor in the county in which the field survey was made, a record of the survey.

“(b) Notwithstanding subdivision (a), after making a field survey in conformity with the practice of land surveying, the licensed land surveyor or licensed civil engineer shall file with the county surveyor in the county in which the field survey was made a record of the survey relating to land boundaries or property lines, if the field survey discloses any of the following:

“(1) Material evidence or physical change, which in whole or in part does not appear on any subdivision map, official map, or record of survey previously recorded or properly filed in the office of the county recorder

record of survey to Deputy Surveyor Van Zuuk amounts to a communication made as part of an official proceeding, and is therefore privileged within the meaning of section 47(b). The Butlers, for their part, contend that McCain was *not* required to submit the record of survey to Deputy Surveyor Van Zuuk.

The parties' focus on whether or not McCain was required to submit the record of survey to Deputy Surveyor Van Zuuk misses the point. The official proceeding privilege protects communications made in the course of any "official proceeding authorized by law." (§ 47, subd. (b).) The privilege does not differentiate between required and nonrequired communications. (See generally, *Prevost v. First Western Bank* (1987) 193 Cal.App.3d 1492, 1499 ["Because Civil Code section 47, subdivision (2) focuses on the proceeding in which the publication occurs rather than on the legal requirement to communicate, sanctions for violation of disclosure requirements are irrelevant to the existence of absolute privilege"].) We therefore decline the parties' invitation to decide whether or not McCain was required to submit the record of survey to Deputy Surveyor Van Zuuk. Instead, we focus on whether the record of survey was published in connection with an "official proceeding."

The phrase "any other official proceeding authorized by law" encompasses a wide range of administrative and quasi-judicial proceedings, including planning commission proceedings (see *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 490-491 [privilege applied to

or county surveying department, or map or survey record maintained by the Bureau of Land Management of the United States.

"(2) A material discrepancy with the information contained in any subdivision map, official map, or record of survey previously recorded or filed in the office of the county recorder or the county surveying department, or any map or survey record maintained by the Bureau of Land Management of the United States. For purposes of this subdivision, a "material discrepancy" is limited to a material discrepancy in the position of points or lines, or in dimensions."

submission of forged building permit to planning commission]; see also *Whelan v. Wolford* (1958) 164 Cal.App.2d 689, 693 [privilege applied to property owners' written protest against neighbor's application for use variance]), city council proceedings (*Cayley v. Nunn* (1987) 190 Cal.App.3d 300, 303 [privilege applied to petition circulated in anticipation of city council proceedings]), school board proceedings (see *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 503 [privilege applied to statements made in a motion presented to the board of trustees of a school district]), hospital peer review proceedings (*Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 57 [privilege applied to peer review proceeding resulting in suspension of hospital privileges]), investigative audits (see *Braun v. Bureau of State Audits* (1998) 67 Cal.App.4th 1382, 1388 [privilege applied to investigative audit pursuant to Govt. Code, § 8547 et seq.]), and disciplinary hearings (see *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 952 [privilege applied to statements at disciplinary hearing of Board of Dental Examiners]; see also *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517-518 [privilege applied to expert's testimony at hearing before Contractors' State License Board]). The official proceeding privilege applies to “ ‘all kinds of truth-seeking proceedings.’ ” (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 958.) “ ‘ ‘The ‘official proceeding’ privilege has been interpreted broadly to protect communication to or from *governmental* officials which may precede the initiation of formal proceedings.’ ” (*Garamendi v. Golden Eagle Ins. Co.* (2005) 128 Cal.App.4th 452, 478; see *Hagberg, supra*, 32 Cal.App.4th at p. 368 [privilege applies to communications “made ‘in anticipation of or . . . designed to prompt official proceedings’ ”].) Thus, the privilege extends to proceedings involving the exercise of quasi-judicial power by a governmental body.

“In determining whether an administrative body or agency possesses such quasi-judicial power, the preliminary factors to be determined are ‘(1) whether the administrative body is vested with discretion based upon investigation and consideration

of evidentiary facts, (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and, more importantly, (3) whether its power affects the personal or property rights of private persons [citations].’ [Citations.]” (*Tiedemann v. Superior Court* (1978) 83 Cal.App.3d 918, 925 (*Tiedemann*); see *Picton v. Anderson Union High School Dist.* (1996) 50 Cal.App.4th 726, 737.) McCain’s separate statement of undisputed facts fails to establish that Deputy Surveyor Van Zuuk’s examination of the record of survey meets any of these criteria.

McCain’s separate statement asserts that Deputy Surveyor Van Zuuk reviewed the record of survey for compliance with Business and Professions Code section 8766, then submitted the record of survey to the Recorder. McCain does not offer any other information concerning the purported “official proceeding.” We therefore focus our analysis on Business and Professions Code sections 8766 and 8767.

Business and Professions Code section 8766, subdivision (a) requires the county surveyor to examine the record of survey for mathematical accuracy and compliance with certain statutory requirements as to presentation and form.⁶ For example, Business and Professions Code section 8766, subdivision (a)(1) requires the county surveyor to

⁶ Business and Professions Code section 8766, subdivision (a) requires the county surveyor to examine the record of survey with respect to “(1) Its accuracy of mathematical data and substantial compliance with the information required by [Business and Professions code] Section 8764 [which requires that the record of survey reflect relevant monuments, the name and legal description of the subject property, the date or time period of the survey, the relationship of the subject property to adjacent tracts, a memorandum of oaths, and any other data necessary for interpretation of the survey] . . . [and] (2) Its compliance with [Business and Professions code] Sections 8762.5 [which requires a certificate of compliance with the requirements of the Subdivision Map Act in appropriate cases], 8763 [which requires that the survey be a certain size], 8764.5 [which requires statements and signatures by the surveyor, county surveyor and county recorder], 8771.5 [which requires the submission of a control scheme for certain coordinates], and 8772 [which sets forth requirements for marking monuments].” (Bus. & Prof. Code, § 8766, subd. (a).)

examine the record of survey for substantial compliance with Business and Professions Code section 8764, which requires, among other things, that the record of survey set forth the name and legal description of the subject property, and the date or time period of the survey. (Bus. & Prof. Code, § 8764, subd. (c).) Similarly, Business and Professions Code section 8766, subdivision (a)(2) requires the county surveyor to examine the record of survey for compliance with Business and Professions Code section 8763, which requires that the survey be “a map, legibly drawn, printed, or reproduced by a process guaranteeing a permanent record in black on tracing cloth, or polyester base film, 18 by 26 inches or 460 by 660 millimeters.” (Bus. & Prof. Code, § 8763.) Business and Professions Code section 8767 provides: “If the county surveyor finds that the record of survey complies with the examination in Section 8766, the county surveyor shall endorse a statement on it of his or her examination, and shall present it to the county recorder for filing.” (Bus. & Prof. Code, § 8767.)

Neither of these provisions describes or establishes an administrative body vested with discretion based upon investigation and consideration of evidentiary facts. (*Tiedemann, supra*, 83 Cal.App.3d at p. 925.) Neither authorizes the County Surveyor or Deputy Surveyor to hold hearings or decide issues by application of law to ascertained facts (*ibid.*), and neither empowers the County Surveyor or Deputy Surveyor to affect the personal or property rights of private persons. (Accord, *Wheeler v. County of San Bernardino* (1978) 76 Cal.App.3d 841, 849 [holding that a county surveyor’s duties under Business and Professions Code sections 8766 and 8767 are nondiscretionary for purposes of Government Code section 820.2].) McCain has not directed our attention to any statute, ordinance, regulation, or rule authorizing the County Surveyor or Deputy Surveyor to conduct quasi-judicial proceedings, and our own research has uncovered none. We therefore conclude Deputy Surveyor Van Zuuk’s examination and submission of the record of survey pursuant to Business and Professions Code sections 8766 and 8767 were not an “official proceeding” within the meaning of section 47(b). Under the

circumstances, we conclude that McCain has failed to establish a defense under section 47(b)'s official proceeding privilege. We next consider whether the publication of the record of survey was protected by section 47(b)'s litigation privilege.

C. Litigation Privilege

The Butlers' complaint alleges that Souliere relied on the record of survey in bringing the quiet title suit against them. According to the Butlers, "the suit filed against [them] would not have been filed but for McCain filing his survey map and asserting to [Souliere] that the measurements of her deed were correct and that she owned the disputed land. The McCain map was the causation and central element that prompted Souliere to file suit against [the Butlers]." These allegations suggest that the record of survey was published in connection with a *judicial* proceeding, rather than "any other official proceeding authorized by law." Because the trial court relied on the official proceeding prong of section 47(b), we invited the parties to submit supplemental briefs addressing the applicability of the litigation privilege. (Code Civ. Proc., § 437c, subd. (m)(2).) Upon review of the parties' supplemental briefs, we conclude the litigation privilege applies and affirm the trial court's judgment.

Section 47(b) provides an absolute privilege to communications made in judicial or quasi-judicial proceedings by litigants or other authorized participants to achieve the objects of the litigation and that have some connection or logical relation to the action. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) In its application to communications made in a "judicial proceeding," the privilege is not limited to statements made in a courtroom. (*Hagberg, supra*, 32 Cal.4th at p. 361.) The litigation privilege encompasses not only in-court testimony and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit. (*Ibid.*) However, to be protected, prelitigation statements must relate to litigation that is contemplated in good faith and under serious consideration. (*Action Apartment, supra*, 41 Cal.4th at p. 1251.) " "Good

faith' in this context refers to a good faith intention to file a lawsuit rather than a good faith belief in the truth of the communication.” (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1173.)

The Butlers contend in their supplemental brief that “[t]here is no evidence before the court that Souliere proposed or even contemplated litigation until after the recordation of McCain’s map.” We disagree. The complaint alleges that the record of survey was the “catalyst,” “causation and central element that prompted Souliere to file the suit against [the Butlers].” The complaint further alleges that McCain “knew that the recorded survey map would be used in a lawsuit against plaintiffs in an attempt by Souliere to seize land of [the Butlers].” These allegations, which frame the issues on summary judgment and constitute judicial admissions (see *Mark Tanner Construction, Inc. v. HUB International Insurance Services, Inc.* (2014) 224 Cal.App.4th 574, 586-587), establish that Souliere relied on the record of survey in deciding to bring suit against the Butlers. Put another way, the record of survey was made in connection with litigation that was “contemplated in good faith and under serious consideration.” (*Action Apartment, supra*, 41 Cal.4th at p. 1251.)

The Butlers’ declarations confirm that litigation was “contemplated in good faith and under serious consideration.” (*Action Apartment, supra*, 41 Cal.4th at p. 1251.) In their declarations, the Butlers aver that Souliere’s attorney sent them a demand letter enclosing a draft of the record of survey on or about June 20, 2009. According to the Butlers, the letter indicated that Souliere claimed an interest in the Butlers’ property pursuant to the as yet unrecorded record of survey.⁷ The Butlers’ declarations state that the record of survey was recorded approximately ten days later, on June 30, 2009. Elsewhere, the Butlers aver that, “McCain was aware his record of survey . . . was going

⁷ We have not been provided with a copy of the letter.

to be used as the basis of litigation against the Butlers.” Thus, the Butlers’ own declarations confirm that the record of survey was logically connected to litigation that was contemplated in good faith and under serious consideration at the time the record of survey was recorded.

The Butlers argue that “California precedent does not authorize and the policies underlying the [litigation] privilege do not support its use to protect a negligent expert witness from liability.” We disagree. The litigation privilege bars negligence actions against adverse expert witnesses based on their actual or anticipated testimony in judicial proceedings. (*Gootee v. Lightner* (1990) 224 Cal.App.3d 587, 594 (*Gootee*); but see *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 405 [“the litigation privilege does not exist to protect one’s own expert witness, but to protect adverse witnesses from suit by opposing parties after the lawsuit ends”].)

In *Gootee*, for example, the parties to a marital dissolution action stipulated that a psychologist, Marshall Lightner, would be retained to provide a child custody evaluation. (*Gootee, supra*, 222 Cal.App.3d at p. 589.) Lightner prepared a report and subsequently testified, recommending that the mother have physical custody. The father sued Lightner for professional negligence, alleging that he had been negligent in administering and interpreting tests and had destroyed raw test data. (*Id.* at pp. 589-590.) The trial court granted Lightner’s motion for summary judgment on the basis of the litigation privilege, and the court of appeal affirmed, stating “[f]reedom of access to the courts and encouragement of witnesses to testify truthfully will be harmed if neutral experts must fear retaliatory lawsuits from litigants whose disagreement with an expert’s opinions perforce convinces them the expert must have been negligent in forming such opinions.” (*Gootee, supra*, 224 Cal.App.3d at p. 593.) The court rejected the father’s contention that the litigation privilege was inapplicable because Lightner’s allegedly negligent conduct was independent of his testimony. The court reasoned, “the protective mantle of the

privilege embraces not only the courtroom testimony of witnesses, but also protects prior preparatory activity leading to the witnesses' testimony." (*Id.* at p. 594.)

Similarly, in *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, a toxicologist negligently performed an autopsy, leading to criminal proceedings against the plaintiff. (*Id.* at pp. 387-388.) This court held that the plaintiff's subsequent action for professional negligence was barred by the litigation privilege, which defeats all tort actions, "however labeled and whatever the theory of liability," where the gravamen of the injury is predicated on the privileged publication of an injurious falsehood. (*Id.* at pp. 390-391, fn. omitted.) The plaintiff attempted to avoid the privilege by arguing that recovery was sought based on defendant's negligent conduct in reaching his conclusions, rather than on the testimony itself. This court rejected the plaintiff's argument, stating: "Plaintiff's theory of liability places [the] communication of the report to the district attorney and, later, [the toxicologist's] testimony in the criminal proceeding, at the heart of the claim of liability. The publication of [the] report for purposes of the criminal proceeding is made *the* actionable wrong." (*Id.* at p. 392.) Applying the privilege, the court reasoned that, "[t]o allow plaintiff to proceed with this action would substantially defeat the purpose of a privilege designed '*to afford litigants freedom of access to the courts . . . and to promote the unfettered administration of justice* even though as an incidental result it may [sometimes] provide . . . immunity to the . . . malignant slanderer [citations].' [Citation.]" (*Id.* at p. 394.)

More recently, in *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263 (*Falcon*), the Court of Appeal for the Fourth District, Division 1, concluded that the litigation privilege barred a professional negligence action against a genetic testing laboratory. There, the plaintiffs, Leslie Falcon and Michael Patterson, were the parents of a minor child. (*Id.* at p. 1266.) The defendant, Long Beach Genetics, Inc., contracted with the County of San Diego (County) to perform genetic testing for paternity cases. (*Id.* at p. 1268.) Patterson provided a genetic sample to Long Beach Genetics in

connection with a paternity proceeding in San Diego County Superior Court. (*Id.* at pp. 1267-1268.) In 2003, Long Beach Genetics issued test results excluding Patterson as the biological father of the minor. (*Id.* at p. 1268.) In 2008, Falcon discovered that the test results were erroneous, “as they were based on the DNA markers of someone other than Patterson.” (*Ibid.*) Falcon, Patterson and the minor (together, the plaintiffs) sued Long Beach Genetics for negligence. (*Falcon, supra*, 224 Cal.App.4th at p. 1268.) Long Beach Genetics moved for summary judgment on the grounds that the plaintiffs’ claims were barred by the litigation privilege. (*Ibid.*) The trial court granted the motion and the plaintiffs appealed. (*Id.* at p. 1270.) The court of appeal affirmed, noting that “the defendants’ DNA test was prepared for the purpose of determining minor’s paternity in connection with County’s paternity proceeding, and transmitted to and used by County for that purpose.” (*Id.* at p. 1278.) The court rejected the plaintiffs’ argument that application of the privilege would “ ‘afford[] absolute immunity to DNA paternity testers,’ ” reasoning that, “[i]t protects only those persons or entities conducting tests in connection with or contemplation of litigation within the meaning of the section 47(b) privilege, a result compelled by the breadth of the privilege and its purposes.” (*Ibid.*)

Applying these authorities to the undisputed facts in this case, we conclude that the record of survey was prepared and published in anticipation of Souliere’s quiet title action against the Butlers, which was contemplated in good faith and under serious consideration at the time the record of survey was recorded. Accordingly, we conclude the record of survey was protected by section 47(b)’s litigation privilege.⁸ Because we

⁸ During oral argument, the Butlers suggested that application of the litigation privilege to the record of survey would leave them without a remedy to remove the cloud on title created by McCain’s alleged errors. We disagree. Although the litigation privilege defeats the Butlers’ claims against McCain, the Butlers could still seek relief from any cloud on title created by the record of survey by means of a quiet title action. (See generally Code of Civ. Proc., § 760.020.)

conclude the record of survey was protected by the litigation privilege, we need not determine whether McCain owed the Butlers a duty of care.⁹

D. Other Issues

Finally, the Butlers raise a host of procedural challenges, none of which compel reversal. Specifically, the Butlers contend: (1) Judge Mason abdicated his judicial responsibility by directing McCain’s trial counsel to prepare a proposed order granting summary judgment (even though Judge Mason never signed the proposed order); (2) Judge Mason’s ruling on the motion for summary judgment was void because it was entered after the hearing on the motion, which gave rise to the Butlers’ disqualification motion (even though Judge Mason issued the ruling before the Butlers moved to disqualify him and Judge Holmer independently reviewed the ruling and reached the same result); (3) Judge Mason failed to enter an *order* on the motion for summary judgment—as opposed to a “ruling”—and failed to determine the ultimate rights of the parties (even though the ruling clearly states that “judgment is for McCain on the Motion for Summary Judgment”); (4) Judge Mason failed to provide a statement of decision (even though the trial court is not required to issue a statement of decision on a motion for summary judgment (*Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 678)); and (5) Judge Holmer lacked authority to enter an order granting summary judgment on April 18, 2013, because his assignment was not effective until May 28, 2013 (even though Judge Holmer’s order was essentially the same as Judge Mason’s ruling).

⁹ The Butlers have requested that we take judicial notice of a document entitled “Informal Conference Decision,” issued by the Board of Professional Engineers, Land Surveyors and Geologists on or about October 30, 2013. We deferred ruling on the request for judicial notice and now deny it, without reaching the merits, on the grounds that it is immaterial to our conclusion on appeal.

We need not consider the merits, if any, of these contentions because we have independently examined the record and concluded that summary judgment was properly granted. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 [“ ‘Regardless of how the trial court reached its decision, it falls to us to examine the record de novo and independently determine whether that decision is correct’ ”].) Because we give no deference to the trial court’s ruling, we need not concern ourselves, for purposes of this appeal, with the manner in which the ruling was entered. “The sole question properly before us on review of the summary judgment is whether the judge reached the right *result* . . . whatever path he might have taken to get there, and we decide that question independently of the trial court.” (*Ibid.*)

Based on our independent review of the record, we conclude that the trial court properly granted summary judgment in McCain’s favor. Accordingly, we need not reach any of the Butlers’ procedural challenges.

III. DISPOSITION

The judgment is affirmed. Respondents McCain and Associates are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(1) and (2).)

/S/

RENNER, J.

We concur:

/S/

BUTZ, Acting P. J.

/S/

MAURO, J.