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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MILTON BIEBER,

Plaintiff and Appellant,

v.

ROBERT T. HA,

Defendant and Respondent.

G045397

(Super. Ct. No. 30-2009-00294049)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Milton Bieber, in pro. per., for Plaintiff and Appellant.

Schmid & Voiles, Denise H. Greer, Susan Fox Dixon and Fredrick James  
for Defendant and Respondent.

Appellant Milton Bieber sued Robert T. Ha for medical malpractice in connection with Ha's diagnosis and treatment of his prostate cancer. Bieber alleges that Ha failed to adequately monitor his blood tests and perform a rectal exam, which caused his cancer to spread. Ha filed a motion for summary judgment supported by an expert declaration that he met the standard of care. Bieber's opposition was not supported by an expert declaration or a separate statement of disputed facts. The trial court granted the motion. Bieber appeals from the judgment following the order granting summary judgment, claiming it was error for the trial court to grant the motion based on his failure to hire an expert.

During the pendency of this appeal, Ha moved for a determination that Bieber is a vexatious litigant under Code of Civil Procedure section 391, subdivision (b). Ha seeks (1) an order declaring Bieber to be a vexatious litigant; (2) if Bieber is found to be a vexatious litigant, an order requiring him to show the appeal has merit before it can continue; and (3) a prefiling order prohibiting Bieber from filing any new litigation without first obtaining permission.

We affirm the judgment. We also find Bieber is a vexatious litigant and issue a prefiling order. We deny as moot Ha's request that Bieber show the appeal has merit.

#### *Background*

Ha, a medical doctor of internal medicine, became Bieber's primary care physician in late 1999. Bieber had a history of prostate cancer, so Ha ordered a Prostate Specific Antigen (PSA) blood test. The result was 2.4, well within the normal range of 0 to 4.5 for Bieber's age group. Ha recommended another test in six months. Bieber underwent additional PSA blood tests in November 2000, April 2001, and December 2001; all results were within the normal range for Bieber's age group. When Bieber was next tested, in February 2003, he was 70 years old and the normal range for his age group

was 0 to 6.5. Bieber's result was 4.58. He was tested again in September 2003 and November 2003; the test results were 4.88 and 4.77, respectively.

In June 2004, Bieber's PSA was 6.20. Ha ordered a prostate ultrasound and "documented for the patient to follow up with his urologist." By July 2005, Bieber's PSA had dropped to 4.9. The result was also 4.9 in April 2006. In March 2007, however, Bieber's PSA had gone up to 8.9. Ha's office twice contacted Bieber for follow up. He was seen by Ha in June 2007, and his PSA was 9.0. Ha referred Bieber to urologist August Maggio.

In August 2007, Maggio performed a biopsy which revealed prostate cancer. Subsequent tests revealed the possibility that the cancer had metastasized to Bieber's skull. Maggio and Bieber discussed several treatment options, but in September 2007, Bieber told Maggio he was switching to another urologist, Dr. William Pearce, to undergo a radical prostatectomy. Maggio had not recommended that treatment option. In October 2007, Pearce performed the radical prostatectomy, which, Bieber alleges, caused him permanent incontinence and impotence.

Bieber's second amended complaint alleges that Ha negligently monitored his PSA levels and failed to perform rectal examinations, allowing his cancer to spread. Ha's motion for summary judgment included a declaration from his expert, Dr. Michael Waldman, a board-certified internal medicine physician. Waldman reviewed Bieber's medical records from Ha, Pearce, Maggio, and St. Joseph Hospital; he also reviewed Maggio's deposition transcript. Waldman opined that Ha met the standard of care in treating Bieber by monitoring his PSA levels and referring him for further treatment when they reached abnormal levels.

The hearing on the motion for summary judgment was set for February 1, 2011. On January 11, 2011, Bieber filed a request for a continuance, which was heard and granted on January 25. The motion for summary judgment was continued to May 24, 2011.

On March 7, 2011, Bieber filed a notice that he was “requesting court to assign a board certified urologist surgeon and internal medical doctor.” The trial court wrote Bieber a letter in April explaining that any court appointed expert would serve on behalf of the court, not on behalf of a party. On May 9, Bieber filed opposition to the motion for summary judgment, which consisted of his assertions that Ha should have detected his cancer at an earlier time. Bieber did not file the required separate statement responding to Ha’s separate statement of undisputed material facts. Bieber attached pages from an unidentified publication from the American Cancer Society recommending early detection of prostate cancer by PSA tests. The publication also states: “Prostate cancer may also be found on a *digital rectal exam (DRE)*, in which your doctor inserts a gloved finger into the rectum.” (Original italics.) Bieber also quoted from an organization identified as Patient Advocates for Advanced Cancer Treatments, Inc., which stated that the PSA blood test was the more accurate “biomarker for the detection of prostate irregularities” compared to the digital rectal examination. It also stated that “[t]he established absolute cut-off value commonly used to differentiate the risk between cancer and no cancer is 4.0 ng/ml.” In the opposition, Bieber claims he is using these agencies as his expert, but “if this court is going to take points from plaintiff by not having an expert then I must ask this court for a continuence [*sic*] until I obtain two experts. [¶] I have just spent 5 weeks in a hospital, discharge April 29. No time to obtain a [*sic*] expert.”

At the hearing on the summary judgment motion, Bieber claimed he had provided “overwhelming evidence on perjury” as to the date Ha told him his PSA was high. Ha responded that the original continuance of the summary judgment motion was to give Bieber time to get an expert, which he did not do. The trial court found Bieber had sufficient time to obtain an expert notwithstanding his weeks in the hospital. Furthermore, Bieber had asked the court to pay for his expert. “It’s clear when you seek to have the court pay for an expert that you don’t have the funds to do that, and the law

doesn't provide . . . an exception for the requirement of an expert just because you don't have the funds." The court granted the motion for summary judgment.

*Motion to Declare Bieber a Vexatious Litigant*

During the pendency of this appeal, Ha filed a motion in this court for a declaration that Bieber is a vexatious litigant because he has filed at least five litigations in propria persona that were finally determined against him. Ha also wants a pre-filing order prohibiting Bieber from filing new litigation without first obtaining permission and a stay of the appeal while Bieber shows why the appeal has merit. Ha seeks dismissal if the appeal has no merit.

A vexatious litigant is one who: "In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person . . . ." (Code Civ. Proc., § 391, subd. (b)(1).) "Litigation," for purposes of determining vexatious litigant status, means "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (Code Civ. Proc., § 391, subd. (a).) The term includes appeals and writ petitions. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211.)

Ha asks us to take judicial notice of the following litigations filed in propria persona by Bieber:

1. In May 2006, Bieber filed a complaint in propria persona in the Orange County Superior Court (No. 06CC05738) against David L. Tsoong, Mike Kilcoyne, Ruben Carrillo, and Pinnacle Resources, alleging 22 separate causes of action for intentional torts and punitive damages. In February 2010, the defendants' demurrer to the second amended complaint was sustained without leave and the case was dismissed. Bieber appealed. This court (*Bieber v. Tsoong* (Mar. 18, 2008, G037798) [nonpub. opn.]) affirmed the order sustaining the demurrer but reversed the denial of leave to amend. After remand, Bieber filed a third amended complaint, the demurrer to which was sustained without leave to amend. The case was dismissed in February 2010.

2. Also in May 2006, Bieber filed a complaint in propria persona in the Orange County Superior Court (No. 06CL03081) against Ruben Carrillo, alleging intentional tort claims and punitive damages. Carrillo's demurrer was sustained with leave to amend and punitive damages were stricken. In July 2006, Bieber dismissed the action after Carrillo's demurrer was sustained with leave to amend and his motion to strike the claims for punitive damages was granted.
3. In June 2006, Bieber filed a complaint in propria persona in the Orange County Superior Court (No. 06CL03397) against Anthony Nguyen and Community Dental Services, Inc., alleging negligence, intentional torts, and malpractice and punitive damages. The case was dismissed with prejudice in May 2007 pursuant to the defendants' ex parte application (no reason stated on the order).
4. In February 2008, Bieber filed a complaint in propria persona in the Orange County Superior Court (No. 30-2008-00045822) against Alan Slater and Imelda T. Kroll (superior court clerks), alleging legal malpractice. Defendants' demurrer to the first amended complaint was sustained without leave to amend in July 2008.
5. In August 2008, Bieber filed an appeal in propria persona in the Appellate Department of the Orange County Superior Court (No.30-2008-00208162) from the dismissal of his case against Slater and Kroll. The dismissal was affirmed.
6. In May 2009, Bieber filed a complaint in propria persona in the Orange County Superior Court (No. 30-2009-00123764) against Robert B. Ash, Valley Radiotherapy Associates, and St. Joseph Hospital alleging medical malpractice. Summary judgment was granted in favor of Ash and Valley Radiotherapy Associates and separately to St. Joseph Hospital.
7. In May 2010, Bieber filed an appeal in propria persona from the order granting summary judgment in favor of Ash and Valley Radiotherapy and the order granting summary judgment in favor of St. Joseph Hospital. The judgment in favor of Ash and Valley Radiotherapy Associates was affirmed; the judgment in favor of St. Joseph Hospital was reversed in May 2011. (*Bieber v. Ash* (May 17, 2011, G043607) [nonpub. opn.].) After remand, judgment was entered in favor of St. Joseph on April 19, 2012.
8. In August 2009, Bieber filed the complaint underlying this appeal in propria persona against Ha and Pearce. Summary judgment in favor of Ha was granted in May 2011. Judgment in favor of Pearce was entered after trial on April 11, 2012.

Bieber was given an opportunity to brief, produce evidence, and be heard in oral argument on the question of vexatious litigant status. In his response to Ha's motion,

Bieber claimed he is not a vexatious litigant because he was partially successful in two appeals. However, both of those cases were ultimately determined against him on remand. Because Bieber has filed at least five unsuccessful litigations in propria persona within the previous seven-year period, we find he is a vexatious litigant within the meaning of Code of Civil Procedure section 391, subdivision (b).

The vexatious litigant statutes provide two distinct remedies: Civil Code section 391.1 allows a defendant in *pending* litigation to move for an order requiring the plaintiff to furnish security on the ground the plaintiff is a vexatious litigant and has no reasonable probability of prevailing against the moving defendant. The action is stayed pending determination of the motion. If, after a hearing, the court finds for the defendant on these points, it must order the plaintiff to furnish security. If the plaintiff does not do so, the action will be dismissed. (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1170.)

In his motion to declare Bieber a vexatious litigant, Ha seeks an order requiring Bieber to show the appeal has merit and, if he fails to do so, dismissing the appeal. We need not discuss whether Ha is entitled to such a remedy because the appeal is resolved by this opinion.

The second remedy allows the court on its own motion or the motion of any party to declare a person to be a vexatious litigant and to enter a prefiling order which prohibits the vexatious litigant from filing any *new* litigation in propria persona without first obtaining permission from the presiding judge or justice of the court where the litigation is proposed to be filed. Permission is given only if it appears that the litigation has merit and has not been filed for harassment or delay. Permission may be conditioned on furnishing security. (Code Civ. Proc., § 391.7.)

We have declared Bieber a vexatious litigant. We now issue an order that Bieber may not file any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge or justice of the court where the

litigation is proposed to be filed. Disobedience of this order may be punished as a contempt of court. (Code Civ. Proc., § 391.7, subd. (a).)

*The Merits of This Appeal*

In a medical malpractice action, a plaintiff must establish a violation of the standard of care through expert opinion testimony. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) “California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.’ [Citation.]” (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985; see also *Selden v. Dinner* (1993) 17 Cal.App.4th 166, 174.)

Waldman’s expert declaration established that Ha’s treatment of Bieber met the standard of care. The burden then shifted to Bieber to offer admissible evidence establishing the existence of a triable issue of material fact regarding the standard of care. (Code Civ. Proc., § 437c, subd. (p)(2).) Bieber did not meet his burden.

Although the issue is not raised by Bieber, we point out that the trial court did not err in denying Bieber’s request for a second continuance of the summary judgment motion to obtain an expert. Code of Civil Procedure section 437c, subdivision (h), provides for a mandatory continuance if the party files an affidavit showing that a continuance is needed to obtain essential facts. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170.) Bieber filed no such affidavit. If a party does not establish the grounds for a mandatory continuance, it is within the trial court’s discretion to deny it. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) Bieber did not show he had made any effort to obtain an expert

since the first continuance was granted; neither did he show he would be able to do so if the motion were to be continued again. The trial court did not abuse its discretion.

*Disposition*

The judgment is affirmed. Respondent is entitled to costs on appeal. The clerk of this court is directed to send a copy of this opinion in which we declare Bieber a vexatious litigant and enter a prefiling order to the Judicial Council. (Code Civ. Proc., § 391.7, subd. (f).)

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.