

**COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE**

**D052391**

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**ROBERT PARKER,**

**Plaintiff-Appellant,**

**v.**

**MARK KALISH,**

**Defendant-Respondent.**

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**On Appeal from Final Judgment of the Superior Court of California  
for the County of San Diego  
Honorable Luis R. Vargas  
No. 37-2007-00067254**

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**APPELLANT'S OPENING BRIEF**

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## **Preliminary Statement**

\_\_\_\_\_ This is an appeal from a final judgment of the Superior Court for the State of California for the County of San Diego entered on November 13, 2007. Clerk's Transcript ("CT") 108-24. On this date, the Honorable Luis R. Vargas granted the motion of defendant Mark Kalish to strike the complaint in this action pursuant to the anti-SLAPP provisions of California Code of Civil Procedure §§ 425.16 *et seq.*, entered judgment on behalf of the defendant, and awarded the defendant \$4,000.00 in costs and attorney's fees. CT 108-24. Plaintiff thereafter timely filed a Notice of Appeal. CT 125.

## **Statement of Facts**

On May 24, 2007, plaintiff Robert Parker ("Mr. Parker") filed an action against defendant Mark Kalish ("Dr. Kalish") based upon conduct and statements made by defendant in connection with a mental examination of Mr. Parker that was performed by Dr. Kalish at his office in May of 2005. CT 1-8. Mr. Parker contended in this verified complaint that during this examination, Dr. Kalish was abusive, sadistic, and professionally negligent, and further maintained that Dr. Kalish falsely represented that he had been retained by defendant Behrouzi in an underlying matter, all of which operated to the severe financial and emotional detriment of Mr. Parker. CT 1-8. Because the background of both this and the underlying action is necessary to a complete understanding of the factual circumstances at issue in this appeal, plaintiff will identify the factual background of this complaint at some length.

In 2003, Mr. Parker and his wife, who eagerly anticipated having children, decided to relocate to family-friendly San Diego, and purchased a house at 5468 Collier Avenue. Anxious to transform the house into a family home, the Parkers spent several months remodeling. On the day that Mr. and Mrs. Parker moved into their new home in January 2004, the couple's future looked promising. Mr. Parker was a valued employee of Intel, where he had worked as a statistician since 1999. Due to Mr. Parker's exceptional performance at Intel, he was awarded stock options each year from 1999-2003. With his professional and personal life flourishing, Mr. Parker considered himself to be a lucky man.

Tragically, the peaceful life the Parkers lived ended when they moved into their new home. Immediately upon moving in, the Parkers were subjected to numerous acts of violence, harassment and nuisance by their next-door neighbors and their guests at 5470 Collier Avenue, Behzad Behrouzi, Kevin Bourne and Don Barks (hereafter the "tenants").<sup>1</sup> All three tenants were college students who took it upon themselves to turn the property they rented into a *de facto* fraternity house. Large parties full of college students were routinely hosted and would last throughout entire nights. The tenants' exceedingly loud and offensive behavior included the playing of music at excessive volume until the early morning and the yelling of profanities into the Parkers' household, making sleep impossible. The parties invariably centered around heavy drinking, often leading to public drunkenness and urination on the Parkers' property. CT 36-39.

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<sup>1</sup> Tenants rented the house at 5470 Collier Avenue from the owner of this premises, Lauren Hunter.

After being forced to suffer through these sleepless nights, the Parkers would arise to find trash and beer bottles strewn on the surrounding property and streets and numerous cars parked in the wrong direction in such a manner as to block entire segments of sidewalks. Tenants and their party guests routinely drove the neighborhood streets at excessive speeds with music blaring, causing the Parkers to fear for the safety of neighborhood children and pedestrians, as well as themselves. The combination of high speeds and loud music made it improbable that these drivers would be able to stop in time to avoid someone if necessary, causing the Parkers to fear for their safety. CT 38-40.

Seeking to protect the public and their own use and enjoyment of their property, the Parkers began notifying the police during these parties. Rather than quieting down after the police departed, the tenants would not only continue partying, but became enraged by the Parkers' complaints. Mr. and Mrs. Parker became the targets of the tenants and their guests, who set out on a mission of retaliation. CT 38-40.

Tenants began retaliating against the Parkers by setting up three directional high-intensity lamps that shone directly into the Parkers' property throughout entire nights and by continuously blocking all sidewalk parking in front of the Parkers' home. Shortly thereafter, tenants and their guests began to take the retaliation to a new level by screaming profanities and threats at the Parkers. When the Parkers walked to and from their home they were taunted and threatened. When in their home, the Parkers were repeatedly threatened by tenants pulling up cars in front of the Parkers' home and aggressively revving the engine for 5-10 minutes at a time. CT 39-40

Being subjected to such harassment and intimidation for months and months began to take its toll on Mr. Parker, who worried about both his wife's safety and his own. Mr. Parker could no longer live in the moment when with friends and family, as he was constantly worried about what was going on at home.

The overwhelming stress and anxiety caused by these egregious acts of retaliation and excessive partying began to affect Mr. Parker's ability to concentrate and perform well at work. The extreme emotional and physical distress caused by the ongoing harassment resulted in injuries to Mr. Parker's health, strength and activity levels. CT 39-41. Mr. Parker became increasingly anxious, worried, and shaky; suffered from twitches in his face, back and neck; and could not sleep. Despite the couple's efforts, they were unable to conceive a child during this stressful time. Mr. Parker began to suffer from severe shock and emotional distress as a result of the tenants' continuous conduct, was forced to seek medical treatment and had to take a medical leave of absence from work as a result of the continued harassment by tenants. CT 41-42.

With domestic tranquility and mental well-being lost at the hands of their neighbors, Mr. and Mrs. Parker filed suit on May 7, 2004, against tenants and the owner of the property, Lauren Hunter, seeking to enjoin future acts of retaliation and disturbance and to recover for the lost income and medical costs incurred by the Parkers. CT 36-43.<sup>2</sup> It was only after the Parkers' calls to the

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<sup>2</sup> Two of the three tenants, Kevin Bourne and Don Barks, were subsequently dismissed from the action, leaving defendants Hunter and Behrouzi as the sole remaining defendants.

police did not end the tenants' disturbances, and instead made them the target of aggressive retaliation, did the Parkers filed suit. CT 39.

The Parkers continued to suffer ongoing injuries after the May 7, 2004 filing. Mr. Parker received his first poor performance appraisal at Intel, and for the first time in his six-year tenure with the company did not receive an award of stock options. CT 65-66. Indeed, Mr. Parker's injuries caused by the harassment were so severe that the Intel Human Resource Department referred Mr. Parker to see Dr. Hubbard, a psychiatrist, and was also referred to Dr. McCord, a psychologist. For the first time in his life, Mr. Parker was prescribed medication, Paxil and Trazodone, to treat his increasingly fragile mental and emotional state.

Having already incurred significant medical expenses and suffering from lost income, and without adequate means to continue to pay for an attorney, Mr. Parker was forced to take on the stressful job of representing himself *pro per* after roughly a year of litigation.<sup>3</sup> The stress of what was going on at home, work and now legal proceedings weighed heavily on Mr. Parker. Recognizing that his injuries were too severe to be cured on their own, Mr. Parker underwent frequent treatment and remained on medication for several months. Due to Mr. Parker's strong commitment to treatment, he began to experience a reprieve from his emotional distress in the Spring of 2005.

On May 4, 2005, defendant Hunter filed a motion to compel a psychiatric examination of Mr. Parker to be performed by the doctor that

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<sup>3</sup> Attorney James Spievak drafted and filed the original complaint for the Parkers. CT 36-43.

defendant Hunter had selected and hired in March 2005, Dr. Kalish.<sup>4</sup> Recognizing that his emotional distress was in remission and not wanting to jeopardize his fragile state of improvement by subjecting himself to an invasive mental examination, Mr. Parker withdrew his claim for ongoing emotional distress and opposed the motion. CT 49-54. Nevertheless, on May 20, 2005, the trial court granted defendant Hunter's motion, holding that Mr. Parker was required to submit to a mental examination by Dr. Kalish and that this examination could last up to four hours. CT 56.

That same day, May 20, 2005, having successfully obtained an order for an invasive procedure that she knew the Parkers desperately wished to avoid, defendant Hunter made a Section 998 settlement offer in the amount of \$21,101. CT 76-79. Hesitant to jeopardize his mental health, but reluctant to accept an offer far below the damage he had suffered, Mr. Parker attended the mental examination on May 24, 2005 under the belief that if it became unbearable, he could and would stop and accept the pending Section 998 offer, thereby ending his claim against defendant Hunter while not affecting his ongoing claim against defendant Behrouzi. CT 83-86. However, on the day of the mental examination, Dr. Kalish falsely represented to Mr. Parker that he had been hired to conduct the mental examination not only by defendant Hunter, but also by defendant Behrouzi, thereby preventing Mr. Parker from avoiding the mental examination through the acceptance of the pending settlement offer from defendant Hunter. CT 83-86.

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<sup>4</sup> Dr. Kalish was designated as an expert witness for defendant Hunter on April 8, 2005.

As for the mental examination itself, Dr. Kalish's careless and unprofessional conduct began at the outset of the exam, when he called Mr. Parker "Mr. Yogur." CT 2. Moreover, contrary to accepted practice, Dr. Kalish conducted the examination with reckless disregard to the impact his behavior would have on Mr. Parker's fragile mental state. Dr. Kalish laughed at Mr. Parker throughout the examination, scolded him, placed phone calls to Mr. Brubaker (the attorney for Hunter) during the examination, interrupted Mr. Parker repeatedly, and pressured Mr. Parker to stay longer than the court imposed four hour time limit. CT 2-4. Dr. Kalish's abusive and seemingly sadistic conduct required Mr. Parker to take mini breaks just to make it through the examination. Unable to make a complete assessment of Mr. Parker, Kalish placed blame on Mr. Parker himself, claiming he had been poorly cooperative, using the mini breaks necessitated by his abusive behavior to illustrate Mr. Parker's alleged lack of cooperation. CT 2-5.

Believing that if he left the exam early the trial court would dismiss all of his claims against both defendants, Mr. Parker felt he had no other option but to stay. It is for this reason alone that Mr. Parker suffered through the entire four hour mental examination, despite its abusive and harmful nature. CT 83-84.

As a direct and immediate result of the abusive examination by Dr. Kalish, Mr. Parker's symptoms dramatically worsened, thereby ending his fragile state of improvement. CT 6. The harassing, abusive and unprofessional examination by Dr. Kalish caused Mr. Parker to suffer from severe and extreme emotional distress, resulting in further injury to his already fragile emotional and physical health and strength. CT 6.

After the examination, with Mr. Parker's emotional health hanging by a thread, defendant Hunter made a second 998 settlement offer in the amount of \$10,701 – less than half of the original offer of \$21,101. CT 76-79. As a *pro per* litigant, and unaware that this second offer legally extinguished the original offer of \$21,101, Mr. Parker sought to accept the original offer. Desperate to avoid the continuing emotional toll that the litigation was taking on his health and welfare, Mr. Parker also advised the defendants that if the court did not find his acceptance of the first offer to be valid, he would in the alternative accept the second offer. Ultimately, the court ruled that Parker validly accepted the second offer of \$10,701, and the lawsuit was dismissed. CT 76-79.

As Mr. Parker's symptoms dramatically worsened after the abusive examination by Dr. Kalish, his ability to perform well at work was also compromised. Mr. Parker's injuries rendered him incapable of performing at the high level he had maintained for five years, causing him to receive poor performance appraisals for 2005 and 2006 – a devastating shock for Mr. Parker – as well as lost income and options. CT 6.

Finally, having suffered severe emotional, physical and financial harm, Mr. Parker filed suit against Dr. Kalish on May 24, 2007, seeking to recover for the damages that Dr. Kalish's wrongdoings had caused Mr. Parker. In light of the great monetary loss (as well as his diminishing faith in others) as a result of the first litigation, Mr. Parker again represented himself *pro per*. CT 1-8.

On October 10, 2007, Dr. Kalish, through his attorneys, filed a Special Motion to Strike the Complaint and moved for an award of \$5,128.00 in costs

and attorney's fees pursuant to the anti-SLAPP provisions of California Code of Civil Procedure §§ 425.16 *et seq.* CT 9-22. Mr. Parker, unable to navigate through the legal complexities of the anti-SLAPP motion, filed an unsuccessful opposition to this motion, and on November 13, 2007, the trial court entered an order granting the defendant's motion to strike, dismissing the complaint, and ordering Mr. Parker to pay defendant \$4,000.00 in costs and attorney fees.

Mr. Parker timely filed the present appeal. Mr. Parker maintains that the trial court improperly granted the anti-SLAPP motion to strike because the defendant did not satisfy his burden of demonstrating that the cause of action alleged in the complaint arose out of the defendant's assertion of a protected constitutional right and did not show that the litigation privilege provided an absolute defense to the conduct identified in the complaint.

### **Standard of Review**

The grant of an anti-SLAPP motion is reviewed *de novo* on appeal. *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269 n.3; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325. This *de novo* review requires the Court of Appeal to evaluate "the pleadings, and supporting and opposing affidavits upon which the liability or defense is based." *Cal. Code Civ. Proc.* § 425.16(b)(2). In reviewing the grant of a special motion to strike, the Court of Appeal must employ its independent judgment to determine whether the defendant has satisfied its burden of establishing that he was engaged in a protected activity and whether there is a probability that plaintiff might prevail

in the lawsuit. *Flatley*, 39 Cal.4th at 325-26; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.

Whether defendant has satisfied its burden of establishing the propriety of an anti-SLAPP motion to strike is determined by a two-part inquiry. First, the defendant must establish that the plaintiff's cause of action arises out of the defendant's actions in furtherance of his constitutional right to petition or of free speech. *Cal. Code Civ. Proc.* § 425.16(b)(1). Thereafter, if the defendant satisfies this burden, the plaintiff must establish a probability that he will prevail on the merits. *Code Civ. Proc.* § 425.16(b)(1); *Flatley*, 39 Cal.4th at 314; *Rusheen*, 37 Cal.4th at 1056. Only if the defendant meets its initial burden of showing that the plaintiff's cause of action arises from the defendant's protected constitutional conduct is the plaintiff required to show some probability of success. *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 317-18.

To demonstrate a probability of prevailing on the merits sufficient to compel the denial of an anti-SLAPP motion, the plaintiff need only show that the complaint is legally sufficient and supported by a *prima facie* showing of facts that, if believed by the trier of fact, would support a judgment in plaintiff's favor. *Taus v. Loftus* (2007) 40 Cal.4th 683, 713-14; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88. "[T]he anti-SLAPP statute does not bar a plaintiff from litigating an action . . . that arises from the defendant's free speech or petitioning. Where a complaint is legally sufficient and supported by a *prima facie* showing of facts sufficient to sustain a favorable judgment if plaintiff's evidence is credited, it is not subject to being stricken under the anti-

SLAPP statute.” *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 272 (citations omitted).

To determine whether a *prima facie* case has been shown on the anti-SLAPP motion, the Court must accept as true the evidence favorable to plaintiff. *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727; *see also Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 45-46 (“In ruling on a motion to strike . . . the court accepts as true all of the evidence favorable to the plaintiff.”). As the California Supreme Court has noted, in reviewing the grant of an anti-SLAPP motion, “we neither weigh credibility nor compare the weight of the evidence. Rather, we accept as true the evidence favorable to the plaintiff and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” *Soukup*, 39 Cal.4th at 269 n.3 (citations omitted).

To reverse the grant of an anti-SLAPP motion, plaintiff is merely required to show that his claims have “minimal merit.” *Nevellier*, 29 Cal.4th at 89; *see also Sycamore Ridge Apts. LLC v. Naumann* (2008) 157 Cal.App.4th 1385, 1392 (“Only a minimal showing of merit is required.”). “The causes of action need only be shown to have ‘minimal merit’” to compel the reversal of an anti-SLAPP motion to strike. *Yu*, 103 Cal.App.4th at 318. “A motion to strike under section 425.16 is not a substitute for a motion for a demurrer or summary judgment. In resisting such a motion, the plaintiff need not produce evidence that he or she can recover on every possible point urged. It is enough that the plaintiff demonstrates that the suit is viable, so that the court should deny the special motion to strike and allow the case to go forward.” *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 905 (citations omitted); *see also id.* at

905-06 (reversing grant of anti-SLAPP motion on this basis, holding that plaintiff had sufficiently demonstrated that the defendant's statements might potentially not be protected under Section 47 of the Civil Code).

### Argument

#### A. The Grant of the Motion to Strike Was Improper Because Defendant Did Not Establish That His Conduct Was Absolutely Privileged Pursuant to Civil Code Section 47(b).

Plaintiff contended in the trial court that defendant was liable on two principal factual bases. First, plaintiff maintained that, prior to the mental examination, defendant falsely stated that he had been retained by defendant Behrouzi (in addition to defendant Hunter) to conduct the examination. *See, e.g.*, CT 2 at ¶ 10; CT 84 at 3-7; & CT 89-90 at ¶¶ 12-19. As noted *supra*, this factual statement was not only false, and known by defendant to be false, but also prevented plaintiff from accomplishing his intended plan of avoiding the mental examination – which he both feared and strenuously attempted to avoid, CT 13-14 – through his acceptance of the pending CCP 998 settlement offer by defendant Hunter. *See, e.g.*, CT 84 & 89-90. Based upon defendant's representation that he had been hired by defendant Behrouzi, plaintiff was unable to accept the pending CCP 998 offer from Hunter as a means of avoiding the examination, and as a result suffered both financial as well as serious emotional injuries. CT 2-3, 84, & 89-90.

Second, independently, plaintiff contended that during the mental examination itself, defendant committed malpractice and violated the relevant standard of care through consistent displays of abuse, disparagement, inattention, and hostility towards plaintiff. *See, e.g.*, CT 2 at ¶ 6 (swearing that defendant was “abusive and unprofessional”); CT 3 at ¶ 12 (defendant sought to obtain “sadistic pleasure” from the abuse of plaintiff during the examination; CT 3 & 5 (stating that defendant laughed at plaintiff during the mental examination and failed to treat him with the dignity, compassion and respect required by the standard of care of others in the profession for a mental examination). This deliberate conduct -- especially towards a vulnerable person with the mental conditions that defendant knew plaintiff possessed – again caused substantial financial as well as emotional distress to plaintiff. CT 2-3, 5, 84, & 89-90.

Significantly, in connection with the anti-SLAPP motion to strike, defendant denied none of these contentions. CT 29-32. Rather than defend his actions, defendant instead filed his anti-SLAPP motion exclusively on the ground that the conduct identified by plaintiff was, as a matter of law, absolutely privileged pursuant to the litigation privilege in Civil Code § 47(b). *See* CT 16-17 & 97. Similarly, in granting the motion to strike, the trial court also relied exclusively on the litigation privilege, holding that even if the conduct identified by plaintiff was actionable, it was purportedly absolutely privileged pursuant to Section 47(b). *See* CT 101-07.

Because the litigation privilege is an affirmative defense, defendant bore the burden of pleading and proving in his anti-SLAPP motion that the privilege applied and hence precluded any recovery as a matter of law. *Carver v. Bonds*

(2005) 135 Cal.App.4th 328, 348-49 (noting that the defendant filing an anti-SLAPP motion “bears the burden of proving that the privilege applies”); *see also Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 108-09 (holding that to prevail in an anti-SLAPP motion, defendant has the burden of proving and must affirmatively establish that the litigation privilege applies). Defendant did not satisfy this burden.

The sole authority cited by the trial court in granting the motion to strike (apart from the mere text of Section 47(b)) was *Drum v. Bleau, Fox & Assocs.* (2003) 107 Cal.App.4th 1009. *See* CT 101. *Drum*, however, (1) had nothing to do with liability for a mental examination, and instead dealt with liability for a wrongful levy on property, *id.* at 1027-28; (2) reversed the grant of a motion to strike, *id.* at 1028; and (3) was disapproved of by the California Supreme Court two years prior to the trial court’s exclusive reliance upon this authority below. *Rusheen*, 37 Cal.4th at 1065. In short, the trial court’s order provides no support for the grant of defendant’s anti-SLAPP motion in the present case.

Defendant’s memorandum of points and authorities below, by contrast, relied solely on two cases: *Silberg v. Anderson* (1990) 50 Cal.3d 205 and *Gootee v. Lightner* (1990) 224 Cal.App.3d 587. CT 11-22. Both *Silberg* and *Gootee* involved mental examinations, but both the facts and holdings in these two cases are worlds apart from the contentions made by the plaintiff herein.

*Silberg* and *Gootee* were both marital dissolution actions in which all parties stipulated to an evaluation conducted by a neutral psychologist in order to make a recommendation to the trial court regarding the entry of appropriate visitation and custody arrangements. *Silberg*, 50 Cal.3d at 210; *Gootee*, 224 Cal.App.3d at 589. In both *Silberg* and *Gootee*, the psychologist conducted the

evaluation and submitted a report that was adverse to the husband and that recommended the court grant custody to the wife, and the husband in both cases responded to this recommendation by filing a lawsuit in which he claimed that the report was inaccurate and defamatory. *Silberg*, 50 Cal.3d at 210-11; *Gootee*, 224 Cal.App.3d at 589-90. In both cases, the husband argued that the erroneous report and recommendation by the psychologist had resulted in the court awarding custody of the children to the wife, and on that basis sought damages for loss of visitation with and custody of his children. *Silberg*, 50 Cal.3d at 211; *Gootee*, 224 Cal.App.3d at 590.

In *Silberg*, the California Supreme Court (entirely correctly) held that the husband could not sue based upon the recommendations of the neutral psychologist to the court – even if these recommendations were allegedly biased or erroneous – because such a report was protected by the litigation privilege. *Silberg*, 50 Cal.3d at 211-20. Less than seven months after the holding in *Silberg*, the Court of Appeal in *Gootee* followed that recently-decided authority and similarly held that, pursuant to *Silberg*, the litigation privilege precluded the husband from filing an action against the psychologist for making an allegedly erroneous custody recommendation to the trial court. *Gootee*, 224 Cal.App.3d at 591-93.

Both *Silberg* and *Gootee* based its holding on what is indisputably the case: that to allow a litigant to file a lawsuit based upon the report and recommendations of a neutral psychologist to the court would fly directly in the face of the testimonial litigation privilege, and would deter the willingness of such witnesses to provide honest recommendations adverse to one of the litigants for fear of a lawsuit based upon this testimony. *Silberg*, 50 Cal.3d at

214 (holding that the litigation privilege extended to cover such testimonial conduct because witnesses might otherwise “distort their testimony” for fear of “protracted and costly lawsuits” from disappointed litigants unhappy with the psychologist’s recommendation to the court). It was for this principal reason that the California Supreme Court, as well as shortly thereafter the Court of Appeal, held that witnesses could not be dissuaded from testifying truthfully by the threat of litigation filed by parties adversely affected by the recommendation to the court made by the psychologist. As the Court of Appeal explained in *Gootee*:

Freedom 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 that the expert must have been negligent in forming such opinions. . . . Accordingly, we conclude the privilege applies to bar appellant’s tort claims against respondents.

*Gootee*, 224 Cal.App.3d at 593.

Plaintiff herein does not disagree in the slightest with these two holdings. They are, however, wholly inapplicable to the present action, in which plaintiff does not seek to recover damages based upon the testimony or recommendation made to the court by defendant, and in which no such recommendation or testimony was even made. Defendant is not being sued based upon his adverse conclusions; rather, he is being held accountable for activities wholly apart from any testimony, conclusions, or recommendation to the court.

Defendant was not a neutral psychologist appointed by a tribunal nor, in the present case, did defendant even offer a report or any other testimony at trial. Moreover, even if he had done so, plaintiff would not have filed suit against defendant based upon any such adverse conclusion or testimony, as the testimonial privilege would properly bar such an action.

Plaintiff contends herein that wholly apart from whatever testimony – good, bad, or indifferent – defendant might potentially have submitted at any future trial, defendant should be held accountable not for any such hypothetical testimony, but rather for the abusive, sadistic, and professionally negligent misconduct that occurred at the examination itself. As the authorities discussed at length *infra* amply reflect, whereas a disappointed litigant may not permissibly file an action based upon the adverse testimony or recommendation of a psychologist (or any other medical professional) derived from a physical or mental examination, such individuals may sue, as here, for either physical or emotional injuries sustained as a result of the examination itself (if performed below the relevant standard of care). It is for these injuries, not any hypothetical and nonexistent testimony before a tribunal, for which plaintiff seeks recovery herein.

It bears repeating that nowhere below did defendant deny the misconduct identified by the plaintiff during the performance of the examination itself: the abuse, the false and injurious claim that defendant had been retained by Behrouzi, the unprofessional violation of the standard of care for individuals with the mental conditions possessed by plaintiff, and the sadistic and deliberate infliction of emotional distress upon plaintiff by defendant were all undisputed. Such conduct is actionable even if defendant's

ultimate testimony would have been entirely favorable to the plaintiff, and it is this conduct— not any recommendation at trial – for which plaintiff may and does properly seek relief.

Any lingering doubt that the litigation privilege identified in *Silberg* and *Gootee* shields only those claims based upon adverse testimonial statements should be removed by reference to the policy rationale expressly articulated by both courts in recognizing the privilege. In holding that the litigation privilege covered the defendants therein, both the California Supreme Court as well as the Court of Appeal made clear that a central reason for so holding was not only to ensure that witnesses would testify truthfully – a principle unaffected by creating liability based not upon testimony but rather upon conduct – but also because the litigation privilege thereby ensured that the recommendation advanced by the witness and adopted by the court would not be subjected to a compelled reexamination in satellite litigation. As the California Supreme Court explained in *Silberg*:

[I]n immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result. The instant case is an example in point. During the dissolution proceedings, the husband had every opportunity to challenge the validity of Dr. Adler's psychological evaluation and recommendations. He could have engaged another psychologist,

attempted to impeach the credibility of Dr. Adler by showing bias, or attacked the evaluation and recommendations in other ways using standard litigation techniques. Having failed to do so during the dissolution proceedings, however, husband now seeks to sue his former wife's attorney for money damages allegedly caused by the use of the assertedly biased and inaccurate report after finality of the dissolution decree.

For our litigation system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings. To allow a litigant to attack the integrity of evidence after the proceedings have concluded, except in the most narrowly circumscribed situations, such as extrinsic fraud, would impermissibly burden, if not inundate, our justice system.

*Silberg*, 50 Cal.3d at 214 (citations omitted).

The Court of Appeal in *Gootee* not only quoted and applied this same policy rationale of *Silberg* verbatim, *Gootee*, 224 Cal.App. 3d at 592, but further held it dispositive. Litigants cannot seek damages based upon allegedly false, erroneous, or biased testimony or recommendations at trial. In the words of the Court of Appeal in *Gootee*, “[a]ppellant had and exercised his opportunity to challenge Lightner’s methods and conclusions, and, having lost the original contest, should not now be permitted to institute new litigation over those same conclusions.” *Id.* at 593.

When, as in *Silberg* and *Gootee*, a party files suit claiming that testimony or a judicial recommendation is false, erroneous or perjurious, the litigation

privilege bars such an action. As the Court of Appeal noted in *Gootee*, the litigation privilege “defeats all tort actions . . . where the gravamen of the injury is predicated upon the privileged publication of an injurious falsehood” before a court. *Gootee*, 224 Cal.App.3d at 594 (emphasis added). By contrast, when, as in this case, the injury is not predicated upon the publication of an injurious falsehood, but rather upon the negligent performance of the examination wholly apart from any publication, the privilege does not apply. Neither the defendant nor the trial court herein were able to cite a single authority, from California or anywhere else, in which an action for the improper performance of a physical or mental examination was precluded when plaintiff sought to impose liability based not upon the testimonial result of the examination, but rather for physical or emotional injuries sustained as a result of the examination itself. This lack of authority is not surprising, as the cases are virtually uniform in their express holding that a litigant may – as here – entirely properly seek relief in such an action.

This Court first examined the critical distinction between causes of action based upon publication of an erroneous report and damages based upon injuries during the physical or mental examination itself in *Felton v. Schaeffer* (1991) 229 Cal.App.3d 229. In *Felton*, the Grossmont Union High School District ordered an independent physical examination of an employee; the physician who conducted the examination concluded (and informed Grossmont in his report) that the examinee had high blood pressure; and the employee sued, claiming that the physician’s conclusions were erroneous and caused him damage. *Id.* at 231-34. The Court of Appeal in *Felton*, in an opinion authored by Justice Froehlich and joined by Justices Huffman and Nares, reversed an

award in favor of the plaintiff, holding – after reviewing both California and out-of-state cases – that there was “overwhelming agreement” by these authorities “that a physician has no liability to an examinee for negligence or professional malpractice [during an independent medical examination ordered by a third party] *except for injuries incurred during the examination itself.*” *Id.* at 235 (emphasis added).<sup>5</sup>

The Court of Appeal subsequently reaffirmed this holding in *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466. In *Mero*, the plaintiff had allegedly been injured at work and had filed a workers’ compensation claim, and in order to defend this claim on behalf of their client, the attorneys for the employer demanded that the plaintiff submit to an independent medical examination. *Id.* at 1469-70. During that examination, the physician who conducted the exam allegedly negligently injured the plaintiff by contorting her body into various positions. The physician prepared a report of the examination and the plaintiff’s alleged physical injuries. The plaintiff subsequently sued the physician, seeking relief not for any allegedly erroneous information or conclusions contained in the report but rather for the injuries sustained during the examination. *Id.* at 1470. The trial court granted summary judgment to the physician, but the Court of Appeal unanimously reversed, holding (consistent with *Felton*) that while an independent medical examiner “is not liable to the person being examined for negligence in making that report,” he is liable “for

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<sup>5</sup> Although *Felton* was principally a duty case, it also discussed privilege issues, *see id.* at 238-39, and it is in any event the doctrinal distinction therein between injuries as a result of the report (which cannot be sued upon) versus injuries as a result of the examination (which can) that is the critical holding of the case as well as the dispositive principle here.

injuries incurred during the examination itself.” *Id.* at 1472. The Court of Appeal held that both California and out-of-state authorities uniformly hold that “a physician hired by a third person to examine plaintiff owes plaintiff a duty to properly perform the examination so as to not injure plaintiff during the course of the examination.” *Id.* at 1475. Accordingly, although “no cause of action exists for medical malpractice based upon the physician’s examination of the plaintiff and report on the results of the examination . . . the physician does owe a duty to the examinee to conduct the examination in a manner which does not harm the examinee.” *Id.* at 1476. There, as here, this distinction was dispositive. Simply put, plaintiffs who are forced to submit to independent medical examinations by their adversaries in litigation cannot sue the examiner for the contents of their reports, but are nonetheless permitted to seek relief for any physical or emotional injuries negligently caused by the examination itself.

As the leading California practice guide makes clear, and as should accordingly come to no surprise to either attorneys or examiners, individuals in California who conduct independent physical or mental examinations in connection with civil litigation “may be subject to liability for injury suffered by the examinee from a negligently-performed examination.” Justice Zerne P. Haning (Ret.), William F. Flahavan, & Daniel J. Kelly, California Practice Guide: Personal Injury (Rutter Group), Chapter C (“Physical and Mental Examinations (CCP § 2032.020 Et Seq.)”) ¶ 6:363.1 (2008) (citing cases). Moreover, as this Court noted in *Felton*, this is the law not only in California, but in virtually every other state and federal jurisdiction as well.

For example, in *Greenberg v. Perkins* (Colo. 1993) 845 P.2d 530, the Supreme Court of Colorado confronted a case in which the plaintiff, who was

a passenger allegedly injured in a fall aboard a shuttle bus at Stapleton International Airport, filed a personal injury action against the bus driver and the owner-operator of the bus. During that litigation, the bus driver and owner-operator (alongside their counsel) compelled the plaintiff to submit to an independent medical examination pursuant to Colorado's analogue to Section 2032.020 of the California Code of Civil Procedure. *Id.* at 531. The examination in connection with this litigation was conducted by Dr. David Greenberg, and during the course of this examination, Dr. Greenberg allegedly made various statements to the plaintiff in which he requested that she perform certain tasks, and after the examination, wrote and delivered to counsel a report that report that concluded that plaintiff suffered from symptom magnification syndrome, a condition in which a person consciously or subconsciously exaggerates symptoms of injury. *Id.* at 531-32.

In *Greenberg*, the plaintiff subsequently filed a lawsuit against the examiner, Dr. Greenberg, seeking relief (as here) not for the contents of the report, but rather based upon injuries that allegedly resulted from Dr. Greenberg's statements during the independent medical examination; *e.g.*, his requests and referral during the exam. *Id.* at 532. The trial court granted summary judgment to the examiner, and the Colorado Supreme Court unanimously reversed. *Id.* at 530-31. The Colorado Supreme Court cited and relied upon multiple cases from California, as well as (secondarily) elsewhere, and noted that "all courts that have considered the issue agree, under one form of analysis or another, that a physician owes a duty of care to a nonpatient examinee to conduct the examination in a manner not to cause harm to the person being examined. . . . [These authorities] uniformly recognize that . . . a

physician owes a duty to the person being examined to exercise professional skill so as not to cause harm to that person by negligently performing the examination.” *Id.* at 535-36 (citations omitted). The Colorado Supreme Court accordingly held that when, as in this case, the examiner allegedly performed the examination or made statements therein negligently, or below the standard of care, there is a valid cause of action in favor of the examinee. *Id.*<sup>6</sup>

Consistent with these uniform holdings, and on almost all fours with the present case, is *Harris v. Kreutzer* (2006) 271 Va. 188. In *Harris*, the plaintiff brought a personal injury action as a result of a car accident, and the trial court in the underlying action granted the request of the adverse party and ordered plaintiff to undergo a mental examination. *Id.* at 193. The plaintiff in *Harris* submitted, as here, to the court-ordered mental examination, which was

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<sup>6</sup> While the Colorado Supreme Court in *Greenberg* was again principally concerned with issues regarding duty, it bears repetition that the examination in *Greenberg* was in connection with an underlying litigation and was court-ordered pursuant to Colorado’s analogue to Cal. Code. Civ. Proc. § 2032.020. Given that Colorado recognizes the same litigation privilege as California, *see, e.g., Wagner v. Hillary* (Colo. App. 1995) 914 P.2d 460, 461-62, the Colorado Supreme Court’s holding that a plaintiff may permissibly file a claim based upon injuries occurring as a result of an examination itself (but not based upon testimonial statements or reports) makes sense only if an identical distinction exists in the privilege arena as well. This is true not only as a practical matter (as the grant of summary judgment in *Greenberg* should otherwise have been affirmed by the Colorado Supreme Court rather than reversed), but also as a doctrinal and policy matter. If injuries during a court-ordered examination are properly cognizable, they are simultaneously cognizable on both duty and privilege grounds.

conducted in *Harris* by Dr. Jeffrey Kreutzer, a licensed clinical psychologist. *Id.* at 193-94.

After the underlying litigation had concluded (favorably to the plaintiff), plaintiff filed a lawsuit against Dr. Kreutzer based upon his conduct during the underlying court-ordered mental examination. The allegations asserted in *Harris* are strikingly similar to those at issue in the present action<sup>7</sup> and involved core claims of medical malpractice and intentional infliction of emotional distress. *Id.* at 194. The plaintiff in *Harris*, as here, alleged not that the adverse report and testimony submitted by defendant caused her harm, but rather that the court-ordered mental examination by defendant was unprofessional, substandard, harassing, and caused her physical and emotional harm. *Id.* The plaintiff in *Harris*, as here, alleged that the examiner “knew of her pre-existing mental and emotional conditions and knew that she would be susceptible to further harm if treated in an abusive manner during the examination,” but that the examiner nonetheless “verbally abused [her], raised his voice to her, caused her to break down into tears in his office, stated she was ‘putting on a show,’ and accused her of being a faker and malingerer.” *Id.*

The trial court dismissed the plaintiff’s action, but the Virginia Supreme Court unanimously reversed, holding not only that an examiner in a court-ordered mental examination has a “duty [] to do no harm in the conduct of the examination,” but also that the claims raised by plaintiff, if believed, could

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<sup>7</sup> If only due to the uncanny similarity between the allegations in *Harris* and those in the present case, it merits at least passing mention that the plaintiff in the present case, who was *pro per* below, was entirely unaware of *Harris* at the time he filed and prosecuted the present action.

establish a violation of that duty and support a judgment for plaintiff at trial. *Id.* at 200-03. The Virginia Supreme Court held, yet again, that while a psychologist who conducts a court-ordered mental examination “is not liable to the examinee for damages resulting from the *conclusions* the physician reaches or reports,” and hence “no liability may arise from his *report or testimony* regarding the examination,” a cause of action nonetheless lies against a psychologist for professionally negligent performance during the exam. *Id.* at 200-02 (emphases added). Both that holding, as well as the conclusion that the allegations in *Harris* were sufficient to go to a jury, is dispositive of the present case, which involves substantively identical contentions.

Simply put, *every* relevant authority to have considered the issue has held that while an examinee may not permissibly sue an examiner for the testimonial contents of his or her report, the examinee may nonetheless permissibly file an action based upon statements made or conduct negligently performed during the examination itself that cause injury to the examinee. When, as in this case, the injury arises not from the examiner’s testimony or recommendation, but rather from the substandard and unprofessional conduct of the examination, the privilege does not apply.

This is not only the controlling law in California (and, for that matter, everywhere else), but also enhances justice. Defendant and the trial court would have this Court take the position that anything remotely connected with an examination is absolutely privileged. The pernicious consequences of such a holding should be self-evident. Physical and mental examinations almost invariably involve emotionally or physically fragile litigants, as well as an

examiner informed of these frailties by the adverse party. The potential for abuse resulting from absolute immunity in such settings is profound.

Take, for example, a plaintiff who alleged that she became suicidal as a result of a given tort and was compelled to attend a mental examination as part of the underlying litigation. Under the defendant's view, the litigation privilege would grant absolute immunity to an examiner who told such a potentially suicidal examinee (in blatant disregard of professional standards) that if she were "really" suicidal, she'd have slit her wrists already – and would do so through deep vertical rather than shallow horizontal cuts – rather than merely "faking it." The examiner could also tell the examinee to stand by an open window in the examiner's office, look thirty floors down, and "tell me what you're thinking," totally immune from liability if the plaintiff were to thereby jump as a consequence of being invited into such a setting.

Other consequences are equally disturbing. During hypnosis or merely conversation, examinees could be induced to think dangerous and/or harmful thoughts about themselves or others. Psychologists could tell examinees that everything is their fault; that people who think or feel certain things don't deserve to live; that their parents obviously never really loved them; that the examinee probably molested children but repressed the memory (and would almost certainly do so again); or any one of a thousand other possibilities, each of which would, according to defendant, be absolutely immunized from liability. Moreover, what is true for mental exams is also true for physical exams, as both are equally privileged. Physicians could tell examinees with broken legs to jump up and down to see if the leg is "really" injured. Examinees who allege that they have diabetes could be told to stop eating for

24 hours to see what happens. And, without liability, physicians could request that examinees disrobe or perform sexual acts to “make sure” that their physical condition or capabilities were as alleged. And while the classic response is invariably that such things would assuredly “never happen” in the context of a professional exam, sadly, the reality of the modern world suggests starkly otherwise. *See, e.g., Smith v. Welch* (1998) 265 Kan. 868 (during court-ordered independent medical examination, examiner asked examinee personal and inappropriate questions about her boyfriend and sexual experiences and fondled the examinee’s breasts).

To extend the litigation privilege to bar recovery for such unprofessional conduct, even if a jury concluded that it indisputably occurred, would not only be profoundly unjust, but any such holding would also be unnecessary. Every day, as part of their routine practice, physicians and psychologists throughout the nation treat and examine patients without immunity for their conduct and without any deleterious consequences whatsoever. In the routine (non-litigation) setting, physicians and psychologists not only have malpractice exposure from their patients, but indeed have greater malpractice exposure in such settings (e.g., for failure to diagnose) beyond that faced by physicians in court-ordered examination. Psychologists and physicians nonetheless willingly and ably perform such examinations – notwithstanding the absence of immunity – not only routinely and with ease, but for a *fraction* of the remuneration obtained by independent medical examiners in civil litigation.<sup>8</sup>

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<sup>8</sup> This differential compensation is especially stark when, as is usually the case, the physician in a non-litigation setting is paid by a health insurance company, whereas a similarly-situated physician in a litigation

It is simply implausible to assert that any untoward consequences would result from merely requiring the same competent care from physicians in the litigation setting that these same individuals already provide on a daily basis to both new and old patients in a non-litigation setting. As the California Court of Appeal explained in *Mero*, a refusal to immunize examiners in a litigation setting from liability would place “[n]o greater burden [] on the physician and the community than already exists with respect to examinees who have paid for their own examinations . . . . And, of course, insurance is available to physicians for the risk involved [in any event].” *Mero*, 31 Cal.App.4th at 1477-78.

Granting immunity to physicians, by contrast, would not only frustrate efforts at both deterrence of would-be wrongdoers as well as the provision of compensation to patients injured by unprofessional and substandard care, but would also conflict with the time-honored California maxim that “for every wrong there is a remedy.” *Cal. Civ. Code* § 3523; *see also Mero*, 31 Cal.App.4th at 1478 (applying this maxim to refuse to preclude liability for examiners hired by third parties in connection with underlying litigation).

Precedent, policy, and common sense compel the rejection of an extension of absolute litigation immunity for actions based not upon the testimony provided by examiners, but rather for the injurious performance of an examination itself. Defendant has not satisfied his burden of establishing the existence of an absolute defense in the present action. For this reason, the trial court improperly granted the motion to strike, and the dismissal of the

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setting is paid at a substantially higher (and easier-to-collect) rate by the attorney for a defendant.

present action, as in *Harris*, should be reversed and remanded for adjudication by a factfinder.

**B. Defendant Did Not Satisfy His Burden Of Establishing That The Cause of Action Arose From The Assertion of His Protected Constitutional Rights.**

As noted *supra*, the first prong of the anti-SLAPP inquiry requires the defendant to satisfy his burden of establishing that the causes of action asserted against him arise out of defendant's conduct in furtherance of his constitutional right to petition or of free speech. *Code Civ. Proc.* § 425.16(b)(1). Because the requirements of Section 425.16(b)(1) are so similar to the contents of the litigation privilege under Section 47(b), however, in cases such as the one here, these two inquiries often substantially overlap. *See, e.g., Flatley*, 39 Cal.4th at 323 (noting that because the litigation privilege and the first prong of the anti-SLAPP inquiry are both textually similar as well as serve similar policy interests, courts often “look[] to the litigation privilege [in Section 47] as an aid to construing the scope of [Section 425.16] with respect to the first step of the two-step anti-SLAPP inquiry”). Although statements privileged under Section 47 may nonetheless fail to satisfy the first prong of the anti-SLAPP inquiry, *see Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1519, it is likely that if a statement is not privileged under Section 47(b), it is similarly not properly subject to an anti-SLAPP motion to strike under the first prong as well. This Court may accordingly reverse the grant of the motion to strike here under either or both prongs of the two-part inquiry.

With respect to the first inquiry, however, two additional brief points are worth mention. First, under Section 425.16(b)(1), an anti-SLAPP motion may be filed only to strike “a cause of action against a person arising from any act of *that person* in furtherance of *the person’s* right of petition of free speech.” *Cal. Code Civ. Proc.* § 425.16(b)(1) (emphases added). This first prong of the anti-SLAPP inquiry – as well as the second litigation privilege prong -- is assuredly satisfied when an examinee sues an examiner for submitting testimony or a recommendation to a court, as the defendant in such settings is being sued based upon the exercise of his right to testify truthfully. By contrast, here, defendant is not being sued for any petition he filed or any testimony he provided; rather, he is being sued based upon conduct he performed, and these acts were (at best) performed in support of the right of *someone else* (e.g., Hunter and/or Behrouzi) to petition a court for redress. Defendant thus has not satisfied his burden of establishing the first prong of the anti-SLAPP inquiry, as the causes of action asserted against him are not “based on” (i.e, do not “arise out of”) the acts of the defendant in the exercise of his constitutional right to petition or free speech. *See Midland Pacific Building Corp.*, 157 Cal.App.4th at 275-76 (reversing grant of anti-SLAPP motion on this basis).

Second, at a minimum, defendant’s false statement to plaintiff that he had been retained by defendant Behrouzi – rather than (or in addition to) defendant Hunter -- to conduct the exam does not properly give rise to a valid anti-SLAPP motion to strike on either prong of the relevant test. As to the first prong, this statement does not entail defendant’s exercise of his right to petition or free speech and was neither necessary for (nor required by) the

examination. The defendant here essentially offered gratuitous (and false) legal advice in which he represented that plaintiff could not avoid the examination by accepting the pending settlement offer from Hunter. This representation was not only unnecessary, but was made separate from the mental exam itself as well as not in connection with any motion or other matter then pending before any tribunal. For similar reasons, this statement is not protected by the litigation privilege, as unnecessary and gratuitous legal advice from a non-lawyer affiliated with neither party to the litigation regarding an issue not under judicial review is hardly protected or absolutely immune from suit. Because part of the relevant causes of action arises out of this unprotected activity, even if the remainder of plaintiff's contentions (*e.g.*, the conduct of the examination itself) was somehow found absolutely privileged, reversal would still be required, as the presence of even a single factual claim that may properly give rise to liability compels the denial of an anti-SLAPP motion to strike. *Mann*, 120 Cal.App.4th at 106; *Computer XPress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004; *MG v. Time Warner, Inc.* (2001) 89 Cal.App.4th 523, 630.

Defendant has accordingly failed to satisfy his burden under either the first or second prong of the anti-SLAPP inquiry.

### **Conclusion**

A factfinder may well conclude that the defendant herein acted unprofessionally and with the deliberate and sadistic intent to cause severe emotional distress to plaintiff, and also caused a large amount of emotional and

financial damage to plaintiff through his knowingly false statement that he had been retained by defendant Behrouzi to conduct the exam. If so, these acts are not – and should not be – absolutely privileged, and accordingly do not properly give rise to an anti-SLAPP motion to strike, particularly at this early stage of the litigation.

More broadly, the anti-SLAPP statute was designed to stop sophisticated, well-funded parties from “wear[ing] down the other side by forcing it to spend time, money, and resources battling the SLAPP instead of the protected activity. The prototypical SLAPP is filed by a well-heeled land developer trying to silence a neighborhood organization that protests the developer’s plans.” *Visher v. City of Malibu* (2005) 126 Cal.App.364, 368. Whatever else may be said about the proclivities of the *pro se* and emotionally and financially fragile plaintiff here, he surely is not an individual capable of suppressing constitutional rights through the brute force of his superior resources and intellect, especially when confronted by an insured professional with sophisticated and able counsel at his beck and call.

The anti-SLAPP statute was designed to prevent deprivation of constitutional liberties of the powerless by the powerful by ensuring that a rights-infringing action have “minimal merit” to proceed. It should not be used – as it has been here – to impose thousands of dollars in liability against an emotionally vulnerable *pro per* litigant who is himself merely exercising his constitutional right to petition for redress from a court based upon conduct that, *at best*, no California authority has heretofore held to be privileged, and that moreover caused him demonstrable and substantial emotional distress and financial injury.

This is a small matter. But the principle at stake in this litigation is significant. Conduct during a physical or mental examination is not, and should not be, absolutely privileged. The grant of the motion to strike in the present action should accordingly be reversed.

**Certification By Counsel**

I certify pursuant to California Rule of Court 8.204(c) that Appellant's Opening Brief contains a total of 9,351 words.

Dated: November 17, 2008

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Shaun P. Martin  
Counsel for Appellant

## **Proof of Service**

I am a resident of the State of California, over the age of eighteen years, and am not a party to this action. My business address is at the University of San Diego, 5998 Alcalá Park, Warren Hall, San Diego, CA 92110.

On November 17, 2008, I served the following documents:

### APPELLANT'S OPENING BRIEF

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid in the United States mail in San Diego, California, at the University of San Diego School of Law, 5998 Alcalá Park, Warren Hall, San Diego, CA 92110, and addressed to the following:

David P. Hall, Esq.  
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Clerk of the Superior Court  
330 West Broadway  
San Diego, CA 92101

Supreme Court of California (4)  
350 McAllister Street  
San Francisco, CA 94102

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 17, 2008 at San Diego, California

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Shaun P. Martin