

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

D052391

**ROBERT PARKER,
Plaintiff-Appellant,**

v.

**MARK KALISH,
Defendant-Respondent.**

**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**

APPELLANT'S REPLY BRIEF

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Preliminary Statement

_____ There is substantial common ground between the parties in this matter. Both sides agree that this Court's review is *de novo*, and that the judgment of the trial court is entitled to no deference on appeal. Appellant's Opening Brief ("AOB") at 9; Respondent's Brief ("RB") at 4. The parties also agree that the defendant requested dismissal below solely on the ground that his acts were absolutely privileged under Civil Code § 47(b). AOB at 13; RB at 18. Both sides further agree that the trial court's dismissal was founded exclusively on this basis; moreover, that the sole authority relied upon by the trial court for its dismissal, *Drum v. Bleau, Fox & Assocs.* (2003) 107 Cal.App.4th 1009, is neither good law nor provides any basis for the judgment entered herein. AOB at 14; RB at 18.

The parties further agree that certain activities performed in physical and mental examinations are indeed protected by the litigation privilege, whereas other activities performed therein are not. The only dispute between the parties consists of which activities are protected by the privilege and which are not.

Respondent admits that physical acts during an examination are not subject to the litigation privilege, but insists that any statement therein – of whatever type – is absolutely immunized. By contrast, appellant maintains that precedent distinguishes between reports, recommendations and conclusions -- which are indeed absolutely privileged – as opposed to conduct, which is not. Appellant essentially maintains that there is a dispositive distinction between testimonial and nontestimonial conduct, whereas respondent would have this Court find a conclusive distinction between words and physical acts.

The testimonial/nontestimonial distinction relied upon by appellant is superior to the words/physical acts distinction relied upon by respondent, not only as a policy matter, but also as reflected by precedent. If a doctor is sued for his testimony or the recommendations he makes to a court, the litigation privilege properly applies. However, if – as here – the doctor makes no conclusions nor offers any testimony, but is instead sued for misconduct in the examination itself, the litigation privilege does not immunize his conduct.

Simply put, doctors who conduct the examination of either a litigant or a routine patient are subject to the same standards of malpractice, and rightly so. Doctors in neither examination are immunized if they perforate an artery, instruct a patient to jump on a broken leg, or tell an examinee that suicide is a good idea. The testimonial/nontestimonial distinction adopted by precedent – both in California and elsewhere – properly reflects this principle. Respondent’s words/physical acts distinction does not.

Because respondent requested and obtained an anti-SLAPP dismissal solely on the ground that his conduct was absolutely privileged under Section 47(b), and because this privilege does not immunize respondent from the conduct identified in the Complaint, this Court should reverse the judgment below and remand for further proceedings. Respondent is fully entitled to defend his conduct on the merits; however, he did not properly obtain an anti-SLAPP dismissal at the pleading stage on the basis of the litigation privilege. For this reason, the dismissal and award of attorney’s fees against this vulnerable and pro se litigant should be reversed.

Argument

A. Defendant Did Not Establish That His Conduct Was Absolutely Privileged Pursuant to Civil Code Section 47(b).

Because the litigation privilege is an affirmative defense, respondent bore the burden of pleading and proving in his anti-SLAPP motion that the privilege applied and hence precluded 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”); *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). Respondent attempted to satisfy this burden below by arguing – as he continues to maintain in this Court – that Section 47(b) covers any words uttered during an examination, regardless of their truth or falsity, regardless of whether such words constitute actionable malpractice, and regardless of whether those words entail a conclusion, recommendation or testimony to a tribunal. Respondent insists that words in an examination are absolutely protected, and that only non-verbal conduct is actionable. By contrast, appellant maintains that testimonial conduct is indeed absolutely privileged, but that nontestimonial conduct (both acts and words) is not.

This Court should affirm the judgment below if respondent is correct that California law has properly established the purported words/physical act distinction upon which he insists. By contrast, this Court should reverse and remand the judgment if California law instead reflects – as appellant contends – a central distinction between testimonial and nontestimonial conduct.

For the reasons below, the testimonial/nontestimonial distinction properly reflects the existing (and proper) law of California, whereas the purported words/physical acts distinction relied upon by respondent does not.

1. Appellant’s Position Is Supported By California Precedent.

(a) Silberg and Gootee

First, the testimonial/nontestimonial distinction advanced by appellant is supported by every one of the four controlling California precedents that have applied the litigation privilege to court-ordered physical and mental exams, whereas the words/physical act distinction is supported by none of these authorities.

The first two of these cases are those principally relied upon by respondent: *Silberg v. Anderson* (1990) 50 Cal.3d 205 and *Gootee v. Lightner* (1990) 224 Cal.App.3d 587. Both *Silberg* and *Gootee* were marital dissolution actions in which a neutral psychologist was appointed 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 cases, the psychologist conducted the evaluation and submitted a report that was adverse to the husband, and the husband responded to this

recommendation by filing a lawsuit in which he claimed that the report was inaccurate and defamatory and resulted in the court ordering custody of the children to the wife. *Silberg*, 50 Cal.3d at 210-11; *Gootee*, 224 Cal.App.3d at 589-90.

Nowhere in *Silberg* or *Gootee* was there a holding that the litigation privilege applied to whatever words the psychologist happened to utter during the examination. Rather, both courts expressly held that the litigation privilege barred the lawsuit because the lawsuit contested the examiner's *testimonial report and recommendation* presented to and adopted by the court. *Silberg*, 50 Cal.3d at 211-20; *Gootee*, 224 Cal.App.3d at 591-93. The California Supreme Court made clear that the reason the litigation privilege covered such testimonial conduct was because allowing lawsuits for an examiner's allegedly unfounded recommendation might "distort their testimony" for fear of "protracted and costly lawsuits" from disappointed litigants unhappy with the recommendation. *Silberg*, 50 Cal.3d at 214. Similarly, the Court of Appeal in *Gootee* held that the litigation privilege immunized such recommendations in order to prevent "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.*" *Gootee*, 224 Cal.App.3d at 593 (emphases added).

The express rationale and reasoning of *Silberg* and *Gootee* thus clearly support the testimonial/nontestimonial distinction advanced by appellant. The reason the litigation privilege applies is so truthful testimony and honest recommendations to a court will not be subjected to a lawsuit in which the disappointed litigant maintains that this testimony or recommendation was

false. When, as here, no such testimony or recommendation was made, and at issue is only nontestimonial conduct performed during the examination itself, *Silberg* and *Gootee* provide no basis for application of the litigation privilege. These cases instead amply support the testimonial/nontestimonial distinction advanced by appellant, and offer no support whatsoever to the competing words/physical act distinction advanced by respondent.

Lest there be any doubt in this regard, both *Silberg* and *Gootee* also expressly relied upon the avoidance of satellite litigation as a principal rationale for immunizing *testimonial* recommendations under Section 47(b). 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. . . . 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) (emphases added). *Gootee* not only quoted and applied this rationale of *Silberg* verbatim, *Gootee*, 224 Cal.App. 3d at 592, but held it dispositive: “Appellant 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 or erroneous, the litigation privilege bars such an action. As the Court of Appeal held 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.

In short, both the articulated reasoning as well as the express holdings of *Silberg* and *Gootee* support the testimonial/nontestimonial distinction advanced by appellant and offer no support for the words/physical act distinction advanced by respondent.

(b) *Felton and Mero*

Respondent's attempt to avoid controlling California precedent also fails to comport with the holdings of the California Court of Appeal in *Felton v. Schaeffer* (1991) 229 Cal.App.3d 229 and *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466. Division One of the Fourth Appellate District in *Felton* stated that there was "overwhelming agreement" by both California and non-California authorities that during a court-ordered physical or mental examination, "a physician has no liability to an examinee for negligence or professional malpractice *except for injuries incurred during the examination itself.*" *Id.* at 235 (emphasis added). Respondent's sole response to *Felton* is the assertion (at RB 10-11) that this statement was *dicta*. However, not only did the Fourth Appellate District expressly rely on this statement for its ultimate holding, but even were it *dicta*, the fact that this Court has previously read precedent as establishing an "overwhelming agreement" that examiners such as Dr. Kalish may be liable for injuries that – as here – occurred during the examination itself would remain significant. Given that it is undisputed that appellant has alleged precisely such injuries occurring his examination, it is telling that this Court has previously indicated that such injuries would indeed be actionable.

Respondent's argumentative deficiency is even greater with respect to *Mero*, particularly since the Court of Appeal in that case adopted precisely the testimonial/nontestimonial distinction advanced by appellant herein. *Mero* involved an examiner who conducted an independent medical exam on behalf of a defendant in litigation with the plaintiff and who prepared a report of the exam that was unfavorable to the plaintiff. Plaintiff subsequently sued the

examiner for injuries that occurred during the examination, and the trial court granted summary judgment to the defendant. *Mero*, 31 Cal.App.4th at 1469-70. The Court of Appeal reversed, holding that while an independent medical examiner “is not liable to the person being examined for negligence in making that report,” he is liable “for injuries incurred during the examination itself.” *Id.* at 1472. *Mero* repeatedly reiterated this testimonial/nontestimonial distinction, holding:

[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 (emphases added).

Respondent’s sole response to *Mero* is the assertion (at RB 11) that the controlling testimonial/nontestimonial distinction therein was articulated “only to the avoidance of physical injuries,” as opposed to purportedly distinct emotional distress damages. This purported distinction would make no difference here even if true, as appellant identified not only emotional damages due to his fragile psychological condition, but also physical as well as financial damages as a result of respondent’s negligence. CT 6 & 76-79 (respondent caused appellant physical injuries, loss of income, and diminished recovery in the underlying action). Moreover, respondent’s purported physical/mental distinction not only lacks any support in *Mero* (or any other authority), but also makes no sense. The litigation privilege does not depend upon the type of damage alleged. If a physician is liable for nontestimonial conduct that results

in physical injury due to malpractice in an exam, he is equally liable for emotional and financial losses from that same malpractice. Respondent's attempt to distinguish the testimonial/nontestimonial rule articulated in *Mero* accordingly fails as a matter of both precedent as well as policy.

There are, in short, four relevant California authorities that govern the application of the litigation privilege to the liability of independent medical examiners. The holding and reasoning of each of these four cases supports the testimonial/nontestimonial distinction advanced by appellant, and none of these authorities supports the contrary distinction advanced by respondent. California precedent accordingly strongly supports the position of appellant.

2. Appellant's Position Is Supported By Other Precedent.

Second, the testimonial/nontestimonial distinction is not only supported by California authorities, but has also been expressly adopted – and for good reason – by other jurisdictions as well. For example, in *Greenberg v. Perkins* (Colo. 1993) 845 P.2d 530, the Supreme Court of Colorado unanimously held that while an examiner could not be liable for the contents of his report or recommendation, he could be liable for negligence during the performance of the examination itself. *Id.* at 530-31. Significantly, in so holding, *Greenberg* expressly rejected respondent's assertion that "mere words" in an examination cannot give rise to liability; indeed, in *Greenberg*, liability was founded upon *precisely* such conduct. *Id.* at 531-32 (holding that the examiner could be liable for verbally instructing the examinee to perform certain tests).

Respondent's brief asserts that *Greenberg* held that the examiner was liable because he personally manipulated the plaintiff's body. RB at 11. This is a clear misreading of *Greenberg*. The defendant in *Greenberg* was the physician who verbally instructed the plaintiff to take the tests, not the physical therapist who assisted with the tests themselves. *Id.* at 532. *Greenberg* thereby clearly rejected the words/physical conduct distinction relied upon by respondent herein, and instead squarely held – relying on authorities from both California and elsewhere – 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” even if that harm results from statements made during the examination. *Id.* at 535-36.

Further, on all fours with the present case is the recent decision of the Virginia Supreme Court in *Harris v. Kreutzer* (2006) 271 Va. 188. *Harris*, as here, involved a mental examination conducted by a clinical psychologist. *Id.* at 193-94. *Harris*, as here, involved claims not about the inaccuracy of any report or testimony, but instead liability for an allegedly unprofessional and harassing examination. *Id.*; *see also id.* (alleging, as here, that the examiner “knew of [plaintiff's] pre-existing mental and emotional conditions” but nonetheless “verbally abused [her], raised his voice to her, [and] caused her to break down into tears in his office”). The Virginia Supreme Court reversed unanimously the trial court's dismissal of this action, holding that such claims – even though involving “mere words” – are actionable. *Id.* at 200-03. *Harris* further adopted the precise testimonial/nontestimonial distinction advanced by appellant herein, holding that while a psychologist who conducts a 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 and/or abusive statements during the exam. *Id.* at 200-02 (emphases added).

In short, the facts and holding of *Harris* are essentially identical to those of the present action. Respondent’s sole response to the unanimous opinion in *Harris* is the unsupported assertion that Virginia “has chosen to adopt much broader rules relating to the liability of physicians . . . than have the courts in California.” RB at 12. The undersigned, having spent 18 years as a resident of Virginia, strongly disputes any assertion that the exceptionally conservative Virginia Supreme Court has (or ever will) adopt more expansive liability principles than the California Supreme Court. Moreover, the California precedent discussed *supra* makes clear that the holding in *Harris* – alongside its simultaneous adoption of the testimonial/nontestimonial distinction and rejection of the contrary words/physical acts distinction – is entirely consistent with the holdings of every one of the controlling California cases on this point.

It bears emphasis that respondent has not – and cannot – cite a *single case*, from any jurisdiction, in which a court has immunized *nontestimonial* statements made during a physical or mental examination. By contrast, the unanimous holding in *Harris*, as well as the additional authorities discussed above, make clear that numerous courts have found liability for such nontestimonial statements. Against this weight of authority, respondent says essentially nothing other than to reiterate its purported rule, notwithstanding its express rejection by every single court to have considered the issue.

This omission is significant. The unanimous holdings of both California as well as non-California authorities adopting the testimonial/nontestimonial distinction and finding liability for statements made during an examination strongly favors appellant's position herein.

3. Appellant's Position Is The Superior Policy.

Third, not only is appellant's position the one supported by precedent, but also articulates the superior policy choice. According to respondent, an examiner is entirely immunized from any liability for whatever statements he makes during a physical or mental examination, regardless of how fragile the examinee, how deliberately an injury is inflicted, and how injurious the damage. Appellant's brief discussed at length the deleterious consequences of such a principle. AOB at 26-29. Respondent's position that the litigation privilege applies to any words uttered during an examination would mean that examiners would be free to negligently or intentionally solicit suicide; falsely persuade examinees that they have molested children; cause examinees (through hypnosis or otherwise) to harm themselves or others; engage in acts that financially benefit the examiner; and engage in a plethora of other acts that would cause serious injury and/or socially disastrous results.

Tellingly, respondent's brief offers not a single response to – nor any defense whatsoever of – these consequences, each of which flows directly from the words/physical conduct distinction relied upon by respondent. The implicit admission by respondent of the untoward (and unacceptable) consequences of its purported legal principle weigh heavily in favor of its rejection. Examiners

are not, and should not be, immunized from the consequences of the words they deliberately direct to emotionally and physically fragile examinees. The litigation privilege does not grant a doctor the privilege of abusing a patient with impunity in the privacy of his office. Any contrary principle, including the one advanced by respondent herein, would not only be unjust, but would necessarily lead to disturbing and unacceptable results. This Court should reject the invitation to create a rule that would leave examinees without recourse at the hands of those examiners -- including respondent herein -- who deliberately harm those patients entrusted to their care.

4. Respondent's Position Is Artificial and Unprincipled.

Fourth, the distinction relied upon by respondent herein to avoid liability is both artificial and unprincipled. It is undisputed that California law holds an examiner liable for *physical* conduct during an examination that results in injury to the examinee. See, e.g. *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466. For example, a physician who pulls upon an injured tendon and who knows (or reasonably should know) that such an act will result in injury is clearly liable for his performance of this act during an examination notwithstanding the litigation privilege. This clear liability for physical activities performed by the examiner is, after all, a central principle behind the purported words/physical act distinction advanced by respondent. Respondent nonetheless contends that while physical acts are not immunized by the litigation privilege, words are allegedly categorically protected.

Even beyond the numerous problems identified *supra* with respect to this position, as a matter of first principles, respondent's position also makes no sense. If a physician is liable – as all parties concede he is – for pulling on an examinee's injured tendon during an examination, a physician should be equally liable for instructing the examinee to pull on it himself. The former involves “physical” conduct and the latter “mere words,” but the consequence is the same. It is an artificial, and meaningless, distinction to hold a doctor liable for giving a diabetic patient a doughnut during an examination if the law simultaneously immunizes the doctor from telling the patient during an examination to eat a dozen doughnuts and call him in the morning.

Making a statement is a physical act. A doctor who gives a suicidal patient a razor blade (a “physical act”) is no more or less liable than a doctor who tells that same patient (a “statement”) that there's a box of razor blades in the table in front of him and that slitting one's wrist would be a great way out. It makes no sense to allow liability for the former – as California indisputably does – and yet to immunize the latter. The litigation privilege applies equally to both statements and words; which is to say, for *nontestimonial* words or statements, the privilege applies not at all.

Malpractice can take the form of words, physical acts, or both. In each of these settings, the litigation privilege applies equally. If a physical act or statement involves testimony or a recommendation to a court, the privilege applies. If it does not, as here, the privilege is inapplicable. Any contrary rule would not only conflict with precedent and policy, but would also be both artificial and make no rational sense.

5. Appellant's Position Creates No Untoward Consequences.

Fifth, and finally, the position of appellants in this matter, unlike the position of respondents, treats similarly-situated physicians equally. Treating physicians are indisputably liable for both the words they utter (e.g., "You do not have cancer") as well as for the physical conduct they perform. Treating physicians are, by contrast, immunized by the litigation privilege from liability for any testimony they give to a court.

Physicians who conduct physical and mental examinations, including respondent herein, are no different. They are not liable for the reports and recommendations they make to a court, but they may be liable for malpractice and injuries that result – as here – from an examination itself. As the Court of Appeal has explained, the testimonial/nontestimonial distinction as applied to liability during physical and mental examinations thus treats examining physicians no differently – and imposes no liability – beyond that undertaken by these same individuals in their everyday practice. The refusal to immunize examiners from liability for their injurious words places "[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." *Mero*, 31 Cal.App.4th at 1477-78.

Moreover, the availability of liability insurance for both treating and non-treating physicians results in identical beneficial consequences in both settings: the deterrence of misconduct and the provision of compensation for patients injured by malpractice. Doctors who perform physical and mental

examinations have no greater liability than treating physicians, but neither are they immunized for their conduct. Such a rule does not result in untoward consequences, but rather avoids unjust discrimination as well as advances salutatory principles.

The testimonial/nontestimonial distinction applies equally to both treating and nontreating physicians. It applies equally to Dr. Kalish with respect to his regular patients as well as to Mr. Parker. Just as Dr. Kalish could be sued for malpractice through words with his regular patients, so too may Dr. Kalish be held responsible for his misconduct towards Mr. Parker.

The litigation privilege properly recognizes a distinction between testimonial and nontestimonial conduct, and immunizes only the former. No California case has ever held the litigation privilege to apply to nontestimonial statements made during a physical or mental examination, and numerous cases – both in California and elsewhere – have held directly to the contrary.

These principles are dispositive here. Dr. Kalish gave no testimony and made no conclusion or recommendation to a court. He was instead sued, and properly so, for malpractice during the performance of the examination itself. Because the litigation privilege does not apply to such nontestimonial conduct, respondent did not satisfy his burden of establishing a defense. Accordingly, the dismissal on the pleadings must be reversed, and the case remanded for further proceedings on the merits.

B. Respondent Did Not Satisfy His Burden Of Establishing That The Causes of Action Arose From The Assertion of His Protected Constitutional Rights.

Because the litigation privilege is an affirmative defense upon which respondent bears the burden, the easiest way in which to resolve this matter is to reverse on the ground that this burden was not satisfied. Alternately, for similar reasons, this Court could also conclude that respondent did not satisfy his burden with respect to the first prong of the anti-SLAPP inquiry; namely, 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 similar to the contents of the litigation privilege under Section 47(b), these two inquiries substantially overlap. *Flatley*, 39 Cal.4th at 323. Because respondent was sued based upon his malpractice during an examination, and not based upon any testimonial activity, the first prong of the anti-SLAPP inquiry is not satisfied in this case any more than it would be for an identical action filed against a treating physician. Respondent was sued for conduct he performed during an examination, not conduct he performed while filing suit or petitioning for redress. The judgment below may accordingly be reversed for this additional reason as well.

Moreover, even if there was petitioning activity with respect to the first prong of the anti-SLAPP inquiry here, it was performed not by respondent, but by a third party (*i.e.*, Hunter and Behrouzi). 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). While respondent is correct that even anticipatory activities prior to a lawsuit may be protected by Section 426.16, Dr. Kalish did not engage in the conduct complained of herein in preparation for any lawsuit *of his own* (i.e., “by that person”). The first prong of the anti-SLAPP inquiry accordingly fails to be satisfied on this additional reason as well, thus providing yet another basis for reversal of the judgment below.

C. Respondent's New Arguments On Appeal Lack Merit.

Perhaps in recognition of the weakness of the arguments made in and decision of the trial court, respondent devotes the remainder of his brief to advancing new arguments that are distinct from the litigation privilege and that were never made below; e.g., that appellant did not submit expert testimony, that appellant did not prove that he relied upon respondent's false statements, etc. RB at 19-27. Although respondent's brief (as well as trial court's decision) below relied solely on a claim that the Complaint was barred by the litigation privilege, CT 16-17, 97 & 101-07, respondent asserts that its new arguments are proper because “[t]he appellate court reviews only the trial court's ruling, not its rationale.” RB at 18.

Respondent's new arguments are not only erroneous on the merits, but more importantly, they are manifestly improper, as none of them were ever asserted or raised by respondent in the anti-SLAPP motion he filed below. It is a cardinal principle of appellate jurisprudence that a party cannot raise on

appeal arguments that were not presented to the trial court and as to which the opposing party had no notice and opportunity to respond. *World Financial Group, Inc. v. HBW Ins. & Fin. Svcs., Inc.* (2009) 92 Cal.Rptr.3d 227; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249. While a judgment may, of course, be affirmed on alternate grounds, those grounds need to be those asserted below, not raised for the first time on appeal and waived by their deliberate omission in the trial court.

This is especially the case here, in which respondent's failure to raise these issues in the trial court also deprived appellant of the opportunity to create a meaningful appellate record. To take but one example, respondent opens the final section of its brief by asserting that the cause of action for malpractice must be dismissed because "the record is utterly devoid of any expert testimony demonstrating that Dr. Kalish's conduct fell below the standard of care," alleging that such expert testimony is required. RB at 19-20. It is true, of course, that appellant did not submit any expert testimony below, but that is solely because respondent *did not raise this issue in the trial court and neither argued that expert testimony was required nor disputed that his conduct fell below the standard of care*. The same is true with respect to each of the other non-litigation privilege arguments raised by appellate counsel for respondent;¹ e.g., that appellant did not submit evidence that he relied on Dr. Kalish's statements. Appellant did not respond to or submit evidence on these

¹ Respondent has obtained different counsel on appeal than counsel who represented him in the trial court, which may perhaps explain why on appeal respondent asserts new arguments that appellate counsel wishes had been – but were not – raised by respondent below.

points for the simple reason that respondent indisputably did not raise these arguments below, and instead filed an anti-SLAPP motion that relied solely on the litigation privilege as a defense.

When a defendant files an anti-SLAPP motion that relies *exclusively* upon a particular defense – indeed, a defense upon which defendant himself bears the burden of proof – the arguments omitted from that motion are deemed waived. Moreover, a plaintiff that confronts an anti-SLAPP motion that exclusively raises a particular defense is not obligated to respond or create a record with respect to every other possible issue that might have been (but was not) asserted in defendant’s motion. When a defendant files a motion to strike on the basis of Defense X, plaintiff is required to respond and to create a record with respect only to Defense X, not Defense Y, Defense Z, and Elements A, B and C of a tort.

Just as a party opposing a motion for summary judgment must respond to and submit evidence with respect to *only* those grounds for dismissal raised in the motion, so too is a party faced with an anti-SLAPP motion to strike compelled to establish his case *solely* with respect to the issues raised in the motion. *Nevellier v. Sletten* (2003) 106 Cal.App.4th 763, 768 (“Plaintiff’s burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment.”). Not only would consideration of new arguments on appeal that were not raised in the anti-SLAPP motion violate the central principle of appellate review that arguments not raised below are waived, but permitting the assertion of such arguments would also deprive the plaintiff of due process, as he was not given notice of and an opportunity to be heard on those objections in the one forum in which he is

permitted to make an appellate record (the trial court). Moreover, permitting the assertion of new arguments on appeal in connection with an anti-SLAPP motion in particular would also violate Section 425.16(f), which requires the complete motion be filed within 60 days of the Complaint – a requirement that would make no sense if, as here, years after the motion, the moving party could make entirely new arguments never before asserted in connection with that request. *Cal. Code Civ. Proc.* § 425.16(f).

By asserting only the litigation privilege as a basis for his anti-SLAPP motion to strike, respondent waived the different arguments currently raised by appellate counsel ostensibly in support of that motion. Respondent is free to assert those additional defenses on remand, either in a motion for judgment on the pleadings or in a motion for summary judgment. Respondent cannot, however, obtain an anti-SLAPP dismissal, as well as costs and attorney's fees, on the basis of arguments nowhere raised below. Respondent waived those arguments in connection with his motion to strike by not raising them before the trial court, and cannot now be heard on those issues in the Court of Appeal.

Conclusion

The merits of the present action will, and should, be fully contested on remand. The litigation privilege, however, does not bar the assertion of the causes of action alleged in the Complaint. Dr. Kalish never submitted any testimony, recommendation or suggested disposition to a court. He is instead being sued for malpractice performed during the examination itself, not for any testimony or petition he submitted to a judicial tribunal. For this reason, the grant of the anti-SLAPP motion should be reversed, and the case remanded for further consideration on the merits.

Certification By Counsel

I certify pursuant to California Rule of Court 8.204(c) that Appellant's Reply Brief contains a total of 5,984 words.

Dated: May 4, 2009

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 May 4, 2009, I served the following documents:

APPELLANT'S REPLY 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:

Larry A. Dunlap, Esq.
Creason & Arvig, LLP
32 Executive Park, Suite 105
Irvine, CA 92614

Clerk of the Superior Court
330 West Broadway
San Diego, CA 92101

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

I am readily familiar with the practice of the University of San Diego School of Law of collecting and processing correspondence for mailing. Under that practice it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date is more than one day after the date of deposit for mailing.

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

Executed on May 4, 2009 at San Diego, California

Shaun P. Martin