



2 of 103 DOCUMENTS

Deering's California Codes Annotated  
Copyright © 2016 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* This document is current through the 2016 Supplement \*\*\*  
(All 2015 legislation)

CIVIL CODE  
Division 1. Persons  
Part 2. Personal Rights

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Civ Code § 47 (2016)*

**§ 47. Privileged publication or broadcast**

A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with *Section 1084*) of *Title 1 of Part 3 of the Code of Civil Procedure*, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in *Section 250 of the Evidence Code* or evidence that is property of any type specified in Chapter 14 (commencing with *Section 2031.010*) of *Title 4 of Part 4 of the Code of Civil Procedure*.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly

concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by *Section 527.3 of the Code of Civil Procedure* or any other provision of law.

(d)

(1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:

(A) Violates *Rule 5-120 of the State Bar Rules of Professional Conduct*.

(B) Breaches a court order.

(C) Violates any requirement of confidentiality imposed by law.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

#### **HISTORY:**

Enacted 1872. Amended Code Amdts 1873-74 ch 612 § 11; Stats 1895 ch 163 § 1; Stats 1927 ch 866 § 1; Stats 1945 ch 1489 § 3; Stats 1979 ch 184 § 1; Stats 1990 ch 1491 § 1 (AB 3765); Stats 1991 ch 432 § 1 (AB 529); Stats 1992 ch 615 § 1 (SB 1804); Stats 1994 ch 364 § 1 (AB 2778), ch 700 § 2.5 (SB 1457); Stats 1996 ch 1055 § 2 (SB 1540); Stats 2002 ch 1029 § 1 (AB 2868), effective September 28, 2002; Stats 2004 ch 182 § 4 (AB 3081), operative July 1, 2005.

#### **NOTES:**

#### **Amendments:**

#### **1873-74 Amendment:**

Prior to 1873-74 the section read: "A privileged publication is one made:



Deering's California Codes Annotated  
Copyright © 2016 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* This document is current through the 2016 Supplement \*\*\*  
(All 2015 legislation)

EVIDENCE CODE  
Division 8. Privileges  
Chapter 4. Particular Privileges  
Article 9. Official Information and Identity of Informer

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Evid Code § 1040 (2016)*

**§ 1040. Privilege for official information**

(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and either of the following apply:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state.

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(c) Notwithstanding any other law, the Employment Development Department shall disclose to law enforcement agencies, in accordance with subdivision (i) of *Section 1095 of the Unemployment Insurance Code*, information in its possession relating to any person if an arrest warrant has been issued for the person for commission of a felony.

**HISTORY:**

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967. Amended Stats 1984 ch 1127 § 2; Stats 2015 ch 20 § 1



Deering's California Codes Annotated  
Copyright © 2016 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* This document is current through the 2016 Supplement \*\*\*  
(All 2015 legislation)

GOVERNMENT CODE  
Title 1. GENERAL  
Division 7. Miscellaneous  
Chapter 3.5. Inspection of Public Records  
Article 1. General Provisions

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Gov Code § 6254 (2016)*

**§ 6254. Records exempt from disclosure requirements**

Except as provided in Sections 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Records contained in or related to any of the following:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(e) Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

(f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, this division does not require the disclosure of that portion of those investigative files that reflects the analysis or conclusions of the investigating officer.

Customer lists provided to a state or local police agency by an alarm or security company at the request of the agency shall be construed to be records subject to this subdivision.

Notwithstanding any other provision of this subdivision, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

(2) Subject to the restrictions imposed by *Section 841.5 of the Penal Code*, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined in any of the sections of the Penal Code set forth in this subdivision may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the

crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of *Section 841.5 of the Penal Code* and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, if the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with *Section 7512 of Division 3 of the Business and Professions Code*). However, the address of the victim of any crime defined by Section 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3 (as added by Chapter 337 of the Statutes of 2006), 288.3 (as added by Section 6 of Proposition 83 of the November 7, 2006, statewide general election), 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9, or 647.6 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury. This paragraph shall not be construed to prohibit or limit a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph.

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with *Section 99150 of Part 65 of Division 14 of Title 3 of the Education Code*).

(h) The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

(i) Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.

(j) Library circulation records kept for the purpose of identifying the borrower of items available in libraries, and library and museum materials made or acquired and presented solely for reference or exhibition purposes. The exemption in this subdivision shall not apply to records of fines imposed on the borrowers.

(k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary. However, public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

(n) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.

(o) Financial data contained in applications for financing under Division 27 (commencing with *Section 44500 of the Health and Safety Code*), if an authorized officer of the California Pollution Control Financing Authority determines that disclosure of the financial data would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration. The California Pollution Control Financing Authority shall adopt rules for review of individual requests for confidentiality under this section and for making available to the public those portions of an application that are subject to disclosure under this chapter.

(p) Records of state agencies related to activities governed by Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), and Chapter 12 (commencing with Section 3560) of Division 4, that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. This subdivision shall not be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

(q)

(1) Records of state agencies related to activities governed by Article 2.6 (commencing with Section 14081), Article 2.8 (commencing with Section 14087.5), and Article 2.91 (commencing with *Section 14089*) of *Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code*, that reveal the special negotiator's deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or that provide instruction, advice, or training to employees.

(2) Except for the portion of a contract containing the rates of payment, contracts for inpatient services entered into pursuant to these articles, on or after April 1, 1984, shall be open to inspection one year after they are fully executed. If a contract for inpatient services that is entered into prior to April 1, 1984, is amended on or after April 1, 1984, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after it is fully executed. If the California Medical Assistance Commission enters into contracts with health care providers for other than inpatient hospital services, those contracts shall be open to inspection one year after they are fully executed.

(3) Three years after a contract or amendment is open to inspection under this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Legislative Analyst's Office. The committee and that office shall maintain the confidentiality of the contracts and amendments until the time a contract or amendment is fully open to inspection by the public.

(r) Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in *Sections 5097.9 and 5097.993 of the Public Resources Code* maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.

(s) A final accreditation report of the Joint Commission on Accreditation of Hospitals that has been transmitted to the State Department of Health Care Services pursuant to subdivision (b) of *Section 1282 of the Health and Safety Code*.

(t) Records of a local hospital district, formed pursuant to Division 23 (commencing with *Section 32000*) of the *Health and Safety Code*, or the records of a municipal hospital, formed pursuant to Article 7 (commencing with Section 37600) or Article 8 (commencing with Section 37650) of Chapter 5 of Part 2 of Division 3 of Title 4 of this code, that relate to any contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates pursuant to *Section 10133 of the Insurance Code*. However, the record shall be open to inspection within one year after the contract is fully executed.

(u)

(1) Information contained in applications for licenses to carry firearms issued pursuant to *Section 26150, 26155, 26170, or 26215 of the Penal Code* by the sheriff of a county or the chief or other head of a municipal police department that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or

psychological history or that of members of his or her family.

(2) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued pursuant to *Section 26150, 26155, 26170, or 26215 of the Penal Code* by the sheriff of a county or the chief or other head of a municipal police department.

(3) The home address and telephone number of prosecutors, public defenders, peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued pursuant to *Section 26150, 26155, 26170, or 26215 of the Penal Code* by the sheriff of a county or the chief or other head of a municipal police department.

(v)

(1) Records of the Managed Risk Medical Insurance Board and the State Department of Health Care Services related to activities governed by Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with *Section 12739.70 of Division 2 of the Insurance Code*, or Chapter 2 (commencing with Section 15810) or Chapter 4 (commencing with *Section 15870 of Part 3.3 of Division 9 of the Welfare and Institutions Code*, and that reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board or the department, entities with which the board or the department is considering a contract, or entities with which the board or department is considering or enters into any other arrangement under which the board or the department provides, receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff or the department or its staff, or records that provide instructions, advice, or training to their employees.

(2)

(A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.3 (commencing with Section 12695), Part 6.5 (commencing with Section 12700), Part 6.6 (commencing with Section 12739.5), or Part 6.7 (commencing with *Section 12739.70 of Division 2 of the Insurance Code*, or Chapter 2 (commencing with Section 15810) or Chapter 4 (commencing with *Section 15870 of Part 3.3 of Division 9 of the Welfare and Institutions Code*, on or after July 1, 1991, shall be open to inspection one year after their effective dates.

(B) If a contract that is entered into prior to July 1, 1991, is amended on or after July 1, 1991, the amendment, except for any portion containing the rates of payment, shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (3).

(w)

(1) Records of the Managed Risk Medical Insurance Board related to activities governed by Chapter 8 (commencing with *Section 10700 of Part 2 of Division 2 of the Insurance Code*, and that reveal the deliberative

processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or records that provide instructions, advice, or training to employees.

(2) Except for the portion of a contract that contains the rates of payment, contracts for health coverage entered into pursuant to Chapter 8 (commencing with *Section 10700*) of *Part 2 of Division 2 of the Insurance Code*, on or after January 1, 1993, shall be open to inspection one year after they have been fully executed.

(3) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto, until the contracts or amendments to the contracts are open to inspection pursuant to paragraph (2).

(x) Financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of Consumer Affairs pursuant to Chapter 20 (commencing with *Section 9800*) of *Division 3 of the Business and Professions Code*, for the purpose of establishing the service contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor.

(y)

(1) Records of the Managed Risk Medical Insurance Board and the State Department of Health Care Services related to activities governed by Part 6.2 (commencing with *Section 12693*) or Part 6.4 (commencing with *Section 12699.50*) of *Division 2 of the Insurance Code* or *Sections 14005.26 and 14005.27* of, or Chapter 3 (commencing with *Section 15850*) of *Part 3.3 of Division 9 of, the Welfare and Institutions Code*, if the records reveal any of the following:

(A) The deliberative processes, discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the board or the department, entities with which the board or department is considering a contract, or entities with which the board or department is considering or enters into any other arrangement under which the board or department provides, receives, or arranges services or reimbursement.

(B) The impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or the department or its staff, or records that provide instructions, advice, or training to employees.

(2)

(A) Except for the portion of a contract that contains the rates of payment, contracts entered into pursuant to Part 6.2 (commencing with *Section 12693*) or Part 6.4 (commencing with *Section 12699.50*) of *Division 2 of the Insurance Code*, on or after January 1, 1998, or *Sections 14005.26 and 14005.27* of, or Chapter 3 (commencing with *Section 15850*) of *Part 3.3 of Division 9 of, the Welfare and Institutions Code* shall be open to inspection one year after their effective dates.

(B) If a contract entered into pursuant to Part 6.2 (commencing with *Section 12693*) or Part 6.4 (commencing with *Section 12699.50*) of *Division 2 of the Insurance Code* or *Sections 14005.26 and 14005.27* of, or Chapter 3 (commencing with *Section 15850*) of *Part 3.3 of Division 9 of, the Welfare and Institutions Code*, is amended, the amendment shall be open to inspection one year after the effective date of the amendment.

(3) Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

(4) Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to paragraph (2) or

(3).

(5) The exemption from disclosure provided pursuant to this subdivision for the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff, or the department or its staff, shall also apply to the contracts, deliberative processes, discussions, communications, negotiations, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of applicants pursuant to Part 6.4 (commencing with *Section 12699.50 of Division 2 of the Insurance Code* or Chapter 3 (commencing with *Section 15850 of Part 3.3 of Division 9 of the Welfare and Institutions Code*).

(z) Records obtained pursuant to paragraph (2) of subdivision (f) of *Section 2891.1 of the Public Utilities Code*.

(aa) A document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

(ab) Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the Office of Emergency Services for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, "voluntarily submitted" means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

(ac) All information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry, except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative.

(ad) The following records of the State Compensation Insurance Fund:

(1) Records related to claims pursuant to Chapter 1 (commencing with *Section 3200 of Division 4 of the Labor Code*), to the extent that confidential medical information or other individually identifiable information would be disclosed.

(2) Records related to the discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the fund, and any related deliberations.

(3) Records related to the impressions, opinions, recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund in Chapter 4 (commencing with *Section 11770 of Part 3 of Division 2 of the Insurance Code*).

(4) Records obtained to provide workers' compensation insurance under Chapter 4 (commencing with *Section 11770 of Part 3 of Division 2 of the Insurance Code*), including, but not limited to, any medical claims information, policyholder information provided that nothing in this paragraph shall be interpreted to prevent an insurance agent or broker from obtaining proprietary information or other information authorized by law to be obtained by the agent or broker, and information on rates, pricing, and claims handling received from brokers.

(5)

(A) Records that are trade secrets pursuant to Section 6276.44, or Article 11 (commencing with *Section 1060 of Chapter 4 of Division 8 of the Evidence Code*), including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special

investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections.

**(B)** Notwithstanding subparagraph (A), the portions of records containing trade secrets shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

**(6)**

**(A)** Internal audits containing proprietary information and the following records that are related to an internal audit:

**(i)** Personal papers and correspondence of any person providing assistance to the fund when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn, or upon order of the fund.

**(ii)** Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed or an internal audit that contains proprietary information.

**(B)** Notwithstanding subparagraph (A), the portions of records containing proprietary information, or any information specified in subparagraph (A) shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law.

**(7)**

**(A)** Except as provided in subparagraph (C), contracts entered into pursuant to Chapter 4 (commencing with *Section 11770*) of Part 3 of Division 2 of the Insurance Code shall be open to inspection one year after the contract has been fully executed.

**(B)** If a contract entered into pursuant to Chapter 4 (commencing with *Section 11770*) of Part 3 of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed.

**(C)** Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

**(D)** Notwithstanding any other law, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to this paragraph.

**(E)** This paragraph is not intended to apply to documents related to contracts with public entities that are not otherwise expressly confidential as to that public entity.

**(F)** For purposes of this paragraph, "fully executed" means the point in time when all of the necessary parties to the contract have signed the contract.

This section does not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

This section does not prevent any health facility from disclosing to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act (*29 U.S.C. Sec. 158*).



1 of 1 DOCUMENT

Deering's California Codes Annotated  
Copyright © 2016 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* This document is current through the 2016 Supplement \*\*\*  
(All 2015 legislation)

INSURANCE CODE  
Division 1. General Rules Governing Insurance  
Part 2. The Business of Insurance  
Chapter 12. The Insurance Frauds Prevention Act  
Article 7. Workers' Compensation Insurance Fraud Reporting

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Ins Code § 1877.3 (2016)*

**§ 1877.3. Release of information by insurer or licensed rating organization to authorized governmental agency;  
Release of information relating to specific workers' compensation fraud investigation by Employment  
Development Department**

(a) Upon written request to an insurer or a licensed rating organization by an authorized governmental agency, an insurer, an agent authorized by that insurer, or a licensed rating organization to act on behalf of the insurer, shall release to the requesting authorized governmental agency any or all relevant information deemed important to the authorized governmental agency that the insurer or licensed rating organization may possess relating to any specific workers' compensation insurance fraud investigation.

(b)

(1) When an insurer or licensed rating organization knows or reasonably believes it knows the identity of a person or entity whom it has reason to believe committed a fraudulent act relating to a workers' compensation insurance claim or a workers' compensation insurance policy, including any policy application, or has knowledge of such a fraudulent act that is reasonably believed not to have been reported to an authorized governmental agency, then, for the purpose of notification and investigation, the insurer, or agent authorized by an insurer to act on its behalf, or licensed rating organization shall notify the local district attorney's office and the Fraud Division of the Department of Insurance, and may notify any other authorized governmental agency of that suspected fraud and provide any additional information in accordance with subdivision (a). The insurer or licensed rating organization shall state in its notice the basis of the suspected fraud.

(2) Insurers shall use a form prescribed by the department for the purposes of reporting suspected fraudulent

workers' compensation acts pursuant to this subdivision.

(3) Nothing in this subdivision shall abrogate or impair the rights or powers created under subdivision (a).

(c) The authorized governmental agency provided with information pursuant to subdivision (a), (b), or (e) may release or provide that information in a confidential manner to any other authorized governmental agency for purposes of investigation, prosecution, or prevention of insurance fraud or workers' compensation fraud.

(d) An insurer or licensed rating organization providing information to an authorized governmental agency pursuant to this section shall provide the information within a reasonable time, but not exceeding 60 days from the day on which the duty arose.

(e) Upon written request by an authorized governmental agency, as specified in subdivision (o) of *Section 1095 of the Unemployment Insurance Code*, the Employment Development Department shall release to the requesting agency any or all relevant information that the Employment Development Department may possess relating to any specific workers' compensation insurance fraud investigation. Relevant information may include, but is not limited to, all of the following:

(1) Copies of unemployment and disability insurance application and claim forms and copies of any supporting medical records, documentation, and records pertaining thereto.

(2) Copies of returns filed by an employer pursuant to *Section 1088 of the Unemployment Insurance Code* and copies of supporting documentation.

(3) Copies of benefit payment checks issued to claimants.

(4) Copies of any documentation that specifically identifies the claimant by social security number, residence address, or telephone number.

**HISTORY:**

Added Stats 1991 ch 116 § 19 (SB 1218). Amended Stats 1991 ch 934 § 9 (AB 1673); Stats 1992 ch 1352 § 3 (AB 3660), effective September 30, 1992; Stats 1995 ch 885 § 3 (SB 1053); Stats 2003 ch 636 § 2 (AB 1099); Stats 2005 ch 717 § 16 (AB 1183).

**NOTES:**

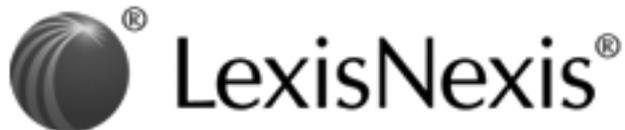
**Editor's Notes**

The phrase "an agent authorized by that insurer, or a licensed rating organization to act on behalf of the insurer" in subd (a) appears as enacted. However, the publisher believes that it was intended to read "an agent authorized by that insurer to act on behalf of the insurer, or a licensed rating organization."

**Amendments:**

**1992 Amendment:**

(1) Amended subd (c) by (a) substituting "(a), (b), or (e)" for "(a) or (b)"; and (b) adding "or workers' compensation fraud" at the end; and (2) added subd (e).



Deering's California Codes Annotated  
Copyright © 2016 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* This document is current through the 2016 Supplement \*\*\*  
(All 2015 legislation)

INSURANCE CODE  
Division 1. General Rules Governing Insurance  
Part 2. The Business of Insurance  
Chapter 12. The Insurance Frauds Prevention Act  
Article 7. Workers' Compensation Insurance Fraud Reporting

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Ins Code § 1877.5 (2016)*

**§ 1877.5. Insurer, agent, or governmental agency not subject to civil liability**

No insurer, agent authorized by an insurer to act on its behalf, or licensed rating organization who furnishes information, written or oral, pursuant to this article, and no authorized governmental agency or its employees who (a) furnishes or receives information, written or oral, pursuant to this article, or (b) assists in any investigation of a suspected violation of Section 1871.1, 1871.4, 11760, or 11880, or of *Section 549 of the Penal Code*, or of *Section 3215 or 3219 of the Labor Code* conducted by an authorized governmental agency, shall be subject to any civil liability in a cause or action of any kind where the insurer, authorized agent, licensed rating organization, or authorized governmental agency acts in good faith, without malice, and reasonably believes that the action taken was warranted by the then known facts, obtained by reasonable efforts. Nothing in this chapter is intended to, nor does in any way or manner, abrogate or lessen the existing common law or statutory privileges and immunities of an insurer, agent authorized by that insurer to act on its behalf, licensed rating organization, or any authorized governmental agency or its employees.

**HISTORY:**

Added Stats 1991 ch 116 § 19 (SB 1218). Amended Stats 1991 ch 934 § 10 (AB 1673); Stats 1993 ch 120 § 3.6 (AB 1300), effective July 16, 1993; Stats 2003 ch 636 § 4 (AB 1099).

**NOTES:**

**Amendments:**



2 of 2 DOCUMENTS

Deering's California Codes Annotated  
Copyright © 2016 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* This document is current through the 2016 Supplement \*\*\*  
(All 2015 legislation)

LABOR CODE  
Division 4. Workers' Compensation and Insurance  
Part 1. Scope and Operation  
Chapter 4. Compensation Insurance and Security  
Article 5. Workers' Compensation Misrepresentations

**GO TO CALIFORNIA CODES ARCHIVE DIRECTORY**

*Cal Lab Code § 3823 (2016)*

**§ 3823. Protocols for reporting fraudulent claims; Immunity from civil liability**

(a) The administrative director shall, in coordination with the Bureau of Fraudulent Claims of the Department of Insurance, the Medi-Cal Fraud Task Force, and the Bureau of Medi-Cal Fraud and Elder Abuse of the Department of Justice, or their successor entities, adopt protocols, to the extent that these protocols are applicable to achieve the purpose of subdivision (b), similar to those adopted by the Department of Insurance concerning medical billing and provider fraud.

(b) Any insurer, self-insured employer, third-party administrator, workers' compensation administrative law judge, audit unit, attorney, or other person that believes that a fraudulent claim has been made by any person or entity providing medical care, as described in Section 4600, shall report the apparent fraudulent claim in the manner prescribed by subdivision (a).

(c) No insurer, self-insured employer, third-party administrator, workers' compensation administrative law judge, audit unit, attorney, or other person that reports any apparent fraudulent claim under this section shall be subject to any civil liability in a cause of action of any kind when the insurer, self-insured employer, third-party administrator, workers' compensation administrative law judge, audit unit, attorney, or other person acts in good faith, without malice, and reasonably believes that the action taken was warranted by the known facts, obtained by reasonable efforts. Nothing in this section is intended to, nor does in any manner, abrogate or lessen the existing common law or statutory privileges and immunities of any insurer, self-insured employer, third-party administrator, workers' compensation administrative law judge, audit unit, attorney, or other person.

**HISTORY:**



**FREMONT COMPENSATION INSURANCE COMPANY et al., Petitioners, v.  
THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; MARAPPA V.  
GOPINATH et al., Real Parties in Interest.**

**No. G017435.**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION THREE**

*44 Cal. App. 4th 867; 52 Cal. Rptr. 2d 211; 1996 Cal. App. LEXIS 370; 61 Cal. Comp.  
Cas 363; 96 Cal. Daily Op. Service 2814; 96 Daily Journal DAR 4663*

**April 23, 1996, Decided**

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Orange County, No. 734238, Robert E. Thomas, Judge.

**DISPOSITION:** As mentioned above, this opinion does not deal with the malicious prosecution claim. *Section 47* does not preclude malicious prosecution actions ( *Kimmel v. Goland* (1990) 51 Cal. 3d 202, 209 [271 Cal. Rptr. 191, 793 P.2d 524] [litigation privilege "has been interpreted to apply to virtually all torts except malicious prosecution"]; *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 216 [266 Cal. Rptr. 638, 786 P.2d 365] ["The only exception ... has been for malicious prosecution actions."]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal. Cal. App. 4th 392, 406 [6 Cal. Rptr. 2d 781] ["The privilege applies only to tort causes of action, and not to the tort of malicious prosecution."]), a point conceded at oral argument by counsel for the insurers.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

A doctor brought an action alleging that two workers' compensation insurers acted in bad faith by reporting the doctor for overbilling. The trial court overruled the insurers' demurrer. Although *Ins. Code, § 1877.5*,

provided insurers with immunity for reporting workers' compensation insurance fraud, the trial court ruled that the immunity was qualified, inasmuch as the statute requires that the insurers act in good faith and without malice. Plaintiff's complaint, however, alleged that the insurers acted with malice. The trial court further reasoned that any immunity otherwise afforded the insurers by virtue of *Civ. Code, § 47* (absolute privilege to report crimes), was eliminated by the existence of *Ins. Code, § 1877.5*, because the specific statute controlled the general one. (Superior Court of Orange County, No. 734238, Robert E. Thomas, Judge.)

The Court of Appeal ordered that a peremptory writ issue to the trial court commanding it to sustain defendants' demurrer without leave to amend. The court held that the trial court erred in overruling the insurers' demurrer. *Ins. Code, § 1877.5*, affords an insurer a qualified immunity by exempting it from any civil liability in a cause or action of any kind where it "acts in good faith, without malice, and reasonably believes that the action taken was warranted by the then known facts." While the complaint alleged that defendants acted in bad faith, the last sentence of *Ins. Code, § 1877.5*, provides that "existing common law or statutory privileges and immunities" of insurers are not to be lessened by the statute. Moreover, *Civ. Code, § 47*, provides everybody the right to report crimes to the police, the local

44 Cal. App. 4th 867, \*; 52 Cal. Rptr. 2d 211, \*\*;  
1996 Cal. App. LEXIS 370, \*\*\*1; 61 Cal. Comp. Cas 363

prosecutor, or the appropriate agency, even if the report is made in bad faith. The rule that the specific controls the general applies only when the specific and general provision cannot be reconciled, and *Ins. Code*, § 1877.5, is reconcilable with *Civ. Code*, § 47, even insofar as *Ins. Code*, § 1877.5, relates to insurers reporting workers' compensation insurance fraud. Under *Civ. Code*, § 47, insurers are absolutely privileged to report insurance fraud to either the local district attorney or the department of insurance. The reason for the *Civ. Code*, § 47, privilege--to facilitate the utmost freedom of communications between victims of crime and law enforcement agencies--applies all the more to insurance fraud, where the costs of the crime are indirectly borne by all consumers, employees, and businesses, than it does to more localized crimes. (Opinion by Sills, P. J., with Wallin and Sonenshine, JJ., concurring.)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

**(1) Workers' Compensation § 119--Insurance--Fraud--Absolute Immunity of Insurers to Report Fraud.** -- --In an action by a doctor alleging that two workers' compensation insurers acted in bad faith by reporting the doctor for overbilling, the trial court erred in overruling the insurers' demurrer. *Ins. Code*, § 1877.5, affords an insurer a qualified immunity by exempting it from any civil liability in a cause or action of any kind where it "acts in good faith, without malice, and reasonably believes that the action taken was warranted by the then known facts." While the complaint alleged that defendants acted in bad faith, the last sentence of *Ins. Code*, § 1877.5, provides that "existing common law or statutory privileges and immunities" of insurers are not to be lessened by the statute. Moreover, *Civ. Code*, § 47, provides everybody the right to report crimes to the police, the local prosecutor, or the appropriate agency, even if the report is made in bad faith. The rule that the specific controls the general applies only when the specific and general provision cannot be reconciled, and *Ins. Code*, § 1877.5, is reconcilable with *Civ. Code*, § 47, even insofar as *Ins. Code*, § 1877.5, relates to insurers reporting workers' compensation insurance fraud. Under *Civ. Code*, § 47, insurers are absolutely privileged to report insurance fraud to either the local district attorney or the department of insurance. The reason for the *Civ. Code*, § 47,

privilege--to facilitate the utmost freedom of communications between victims of crime and law enforcement agencies--applies all the more to insurance fraud, where the costs of the crime are indirectly borne by all consumers, employees, and businesses, than it does to more localized crimes.

[See 2 **Witkin**, Summary of Cal. Law (9th ed. 1987) Workers' Compensation, § 148D.]

**COUNSEL:** Knapp, Petersen & Clarke, Paul Woolls and Antoinette S. Waller for Petitioners.

Daniel E. Lungren, Attorney General, Timothy G. Laddish, Assistant Attorney General, Jacqueline A. Schauer, James M. Robbins and Jerome M. Jackson as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Wylie A. Aitken and Annee [\*\*\*2] Della Donna for Real Parties in Interest.

**JUDGES:** Opinion by Sills, P. J., with Wallin and Sonenshine, JJ., concurring.

**OPINION BY:** SILLS, P. J.

## OPINION

[\*869] [\*\*212] **SILLS, P. J.**

The nub of this case is whether relatively recent legislation to deter workers' compensation fraud left insurers with *less* protection to report insurance fraud to police and prosecutors than they had before the legislation was enacted. The answer is no.

The legislation resulted in the addition of *section 1877.5* to the Insurance Code in 1991. (See Stats. 1991, ch. 116, § 19.) *Section 1877.5* affords insurers a *qualified* immunity to report workers' compensation fraud to a local prosecutor or the Department of Insurance. The qualified immunity does not extend to reports made in bad faith.

This lawsuit was filed by a doctor who alleges that two workers' compensation insurers acted in bad faith in reporting the doctor for overbilling. However, the last sentence in *Insurance Code section 1877.5* provides that "existing common law or statutory privileges and immunities" of insurers were not to be lessened by the

statute. As we demonstrate below, another statute, *section 47 of the Civil Code*, [\*\*\*3] already gives *everybody*--including insurers--the right to report crimes to the police, the local prosecutor or the appropriate regulatory agency, *even if* the report is made in bad faith. Accordingly, the insurers sued by plaintiff Marappa V. Gopinath for reporting him to the district attorney and the Department of Insurance fraud bureau for workers' compensation fraud are entitled to a writ of mandate commanding the superior court to sustain their demurrer to three of [\*\*213] the five causes of action in Gopinath's complaint, namely those for interference with economic advantage, intentional infliction of emotional distress, and loss of consortium.

Two causes of action remain, one for malicious prosecution and the other for violation of the federal Racketeer Influenced and Corrupt Organizations [\*870] Act (civil RICO). Of these two, the malicious prosecution claim is not challenged in this writ proceeding. (There is no doubt that *Civil Code section 47* does not affect malicious prosecution actions.) As to the civil RICO claim, while it might otherwise fall within the scope of *Civil Code section 47's* absolute immunity, the claim is, after all, based on a *federal* statute; and [\*\*\*4] the parties have not briefed the question of how the federal RICO statute interacts with substantive state law. Since there is an obvious (but unbriefed) federal supremacy issue involved, the civil RICO claim will not be ordered dismissed in this particular writ proceeding.

## BACKGROUND

As this proceeding involves a petition challenging an order overruling a demurrer, the facts, but not the conclusions, of the complaint are considered true for purposes of our review. Most of the story is told in two workers' compensation reports prepared by Dr. Gopinath and attached and incorporated into the complaint.

In 1990, a car salesman, Richard Moreno, was sent by his workers' compensation attorney to see a doctor, Marappa Gopinath, about a lower back injury sustained two years before, in 1988, when the salesman slipped and fell on a showroom floor. On the day of the examination, January 17, 1991, Dr. Gopinath wrote a workers' compensation report stating the patient's condition had deteriorated and he had become "increasingly symptomatic and painful." However, Dr. Gopinath concluded the injury was permanent and stationary and required no additional treatment.

The next day, January 18, [\*\*\*5] the same car salesman saw Dr. Gopinath again, this time regarding a workers' compensation claim for a lower back injury that took place four days before--on January 14, 1991--when the salesman was lifting a desk. Dr. Gopinath wrote another workers' compensation report. That report noted the salesman had suffered a previous injury and recounted the salesman's statement that he had "continued symptoms with regards to his lumbosacral spine." The report further stated that the salesman told Dr. Gopinath "he was completely asymptomatic for at least two weeks prior to the above-stated trauma [that is, the January 14 injury]." The report concluded the salesman would need time to recover, and placed him on total temporary disability; the possibility of a disc injury could not be ruled out. The doctor also noted he was prescribing a course of physical therapy and gave the salesman prescriptions for antiinflammatory, analgesic and muscle relaxant drugs.

The first report went to one workers' compensation insurer, defendant Pacific Compensation Insurance company (whose parent company is [\*871] Fremont Compensation Insurance Company); the second report went to another, defendant Ohio Casualty/West [\*\*\*6] American Insurance Companies. The two insurers found out about them when the salesman's attorney requested consolidation of the workers' compensation cases involving the two claims. Both claims were settled within the workers' compensation system in June 1991.

In February 1992, the two insurers reported Dr. Gopinath to the Department of Insurance and the Los Angeles District Attorney's office for insurance fraud for billing both companies for a *single* incident, and changing the date on the two reports to show two different injuries. The doctor was arrested and tried for presenting multiple claims for the same injury. <sup>1</sup>

<sup>1</sup> See former *Insurance Code section 1871.1*. See now *Penal Code section 550*; see also *Insurance Code section 1871.4*.

Dr. Gopinath was acquitted. As explained in the complaint, it turned out that the first appointment had been scheduled in December 1990, before the January 14, 1991, injury, and when the salesman showed up for that appointment on January 17, he told Dr. Gopinath's receptionist [\*\*\*7] of the January 14 injury. However, since Dr. Gopinath did not have authorization from the salesman's attorneys [\*\*214] to see him about the new

injury at that time, the salesman never told the doctor or his assistant of the January 14 injury. After the examination, the receptionist contacted the salesman's workers' compensation attorney and got authorization for Dr. Gopinath to see him about that injury the next day. The receptionist never told the doctor of her conversation with the salesman.

After his acquittal, Dr. Gopinath filed a complaint against the two insurers. His arrest had obviously not been good for his practice. His complaint charged the two insurers with having instigated "an aggressive campaign" to destroy his career, beginning in June 1991, just after the workers' compensation cases were settled. In particular, the insurers were alleged to have known, in June 1991, that the salesman had sustained two separate injuries with two separate employers leading to two separate medical examinations.

The complaint listed five causes of action: interference with economic advantage, intentional infliction of emotional distress, malicious prosecution, civil RICO, and loss of consortium. [\*\*\*8] The insurers filed a demurrer. The trial court overruled the demurrer, reasoning as follows: a statute enacted in 1991, *section 1877.5 of the Insurance Code*,<sup>2</sup> provides insurers with certain immunity. That is, when insurers furnish information to a local district [\*872] attorney's office or the fraud claims bureau in the Department of Insurance, they are immune from "any civil liability in a cause or action of any kind"--*provided* they acted " [\*\*215] in good faith, without malice, and reasonably believe[d] that the action taken was warranted by the then known facts, obtained by reasonable efforts."<sup>3</sup> In short, the statute only provides a qualified immunity. The complaint, however, alleged the insurers reported the doctor with malice, and, on demurrer, a court must assume that the allegations in the complaint are true. Moreover, the trial court reasoned, any immunity *otherwise* afforded the insurers by virtue of *section 47* was eliminated by the specific existence of the Insurance Code statute, because the specific controls the general.

<sup>2</sup> All statutory references are to the Insurance Code except for *section 47*, which is to the Civil Code, and *section 1859*, which is to the Code of Civil Procedure.

[\*\*\*9]

<sup>3</sup> Here is the full text of *section 1877.5*:

"No insurer, or agent authorized by an insurer

to act on its behalf, who furnishes information, written or oral, pursuant to this article, and no authorized governmental agency or its employees who (a) furnishes or receives information, written or oral, pursuant to this article, or (b) assists in any investigation of a suspected violation of *Section 1871.1, 1871.4, 11760, or 11880*, or of *Section 549 of the Penal Code*, or of *Section 3215 or 3219 of the Labor Code* conducted by an authorized governmental agency, shall be subject to any civil liability in a cause or action of any kind where the insurer, authorized agent, or authorized governmental agency acts in good faith, without malice, and reasonably believes that the action taken was warranted by the then known facts, obtained by reasonable efforts. Nothing in this chapter is intended to, nor does in any way or manner, abrogate or lessen the existing common law or statutory privileges and immunities of an insurer, agent authorized by that insurer to act on its behalf, or any authorized governmental agency or its employees."

[\*\*\*10] We summarily denied the insurers' petition for a writ of mandate commanding the trial court to vacate its decision and sustain the demurrer as to all causes of action except the one for malicious prosecution. The insurers then sought review by the Supreme Court; that court in turn issued an order commanding us to issue an alternative writ. Having now had the opportunity to study the matter in more detail, we must conclude that the demurrer should have been sustained as to three of the four challenged causes of action--namely those for interference with economic advantage, intentional infliction of emotional distress, and loss of consortium. We leave the civil RICO claim for another day.

**SECTION 1877.5 DOES NOT LESSEN THE IMMUNITY INSURERS HAD PRIOR TO ITS ENACTMENT TO REPORT INSURANCE FRAUD**

(1) There is no question that *section 1877.5* limits the immunity *it* establishes to reports made without malice. The statute broadly exempts insurers from "any civil liability in a cause or action of any kind where the insurer ... acts in good faith, without malice, and reasonably believes that the action taken was warranted by the then known facts." (Cf. § 1872.5 [immunizing insurers against [\*\*\*11] any "relevant tort cause of action" by virtue of making certain reports "without

malice"].)

[\*873] In refusing to sustain the demurrer, the trial judge relied on the well-venerated rule of interpretation that the specific controls the general. (E.g., *Code Civ. Proc.* § 1859 ["a particular intent will control a general one that is inconsistent with it"]; *Woods v. Young* (1991) 53 Cal. 3d 315, 325 [279 Cal. Rptr. 613, 807 P.2d 455] [" 'specific provision relating to a particular subject will govern a general provision' "].) So do the Gopinaths now. The idea is that by providing for immunity when fraud reporting is done in good faith, the statute necessarily implies that reporting (as alleged here) in bad faith enjoys no immunity. (*Expressio unius* and all that.) Accordingly, even if *Civil Code section 47* did provide immunity for "bad faith" fraud reporting, it would be overridden by *Insurance Code section 1877.5*.

The rule that the specific controls the general, however, applies only when the specific and general provisions cannot be reconciled. ( *People v. Wheeler* (1992) 4 Cal. 4th 284, 293 [14 Cal. Rptr. 2d 418, 841 P.2d 938] ["The principle that a specific [\*\*\*12] statute prevails over a general one applies only when the two sections cannot be reconciled."]; *In re Ricardo A.* (1995) 32 Cal. Cal. App. 4th 1190, 1194-1195 [38 Cal. Rptr. 2d 586].) A close reading of *Insurance Code section 1877.5* reveals that it *is* reconcilable with *Civil Code section 47*, even insofar as *section 1877.5* relates to *insurers reporting workers' compensation insurance fraud*.

*Section 1877.5* consists of two sentences; the good faith language is set forth in the first. But there is a second sentence, which was not addressed by the trial court.

"Nothing in this chapter"--which certainly includes the part about acting in good faith--is either "intended to, nor does in any way or manner, abrogate or lessen the existing common law or statutory privileges and immunities of an insurer." Plainly, *if* an insurer enjoyed a privilege to report workers' compensation insurance fraud (even in bad faith) prior to the enactment of *Insurance Code section 1877.5*, the language of the second sentence of *section 1877.5* means that the insurer still had that privilege afterwards. By providing that *section 1877.5* would not abrogate any existing statutory immunities, the statute [\*\*\*13] becomes easily reconcilable with *Civil Code section 47*--assuming, of course, that *section 47* afforded such immunities in the first place.

One might wonder, of course, why the Legislature should indulge in such redundancy. Why specifically establish an immunity for good faith fraud reporting yet retain existing immunity for bad faith reporting?

The answer is found in the nature of legislative compromise. Avoiding resolution of disputed points is one of the classic means by which legislators [\*874] are able to achieve agreement on legislative text. (See *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal. 3d 692, 709 [170 Cal. Rptr. 817, 621 P.2d 856] (conc. opn. of Newman, J.) [legislative history may show "deliberate truncation of the purpose" or "choice of words resulted from some decision quite unrelated to the point at hand"]; *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal. Cal. App. 4th 1568, 1577 [33 Cal. Rptr. 2d 206] ["if there is ambiguity it is because the legislature either could not agree on clearer language or because it made the deliberate choice to be ambiguous--in effect, the only 'intent' is to pass the matter [\*\*\*14] on to the courts"]; Eskridge, *The New Textualism* (1990) 37 *UCLA L.Rev.* 621, 677 ["The vast majority of the Court's difficult statutory interpretation cases involve statutes whose ambiguity is either the result of deliberate legislative choice to leave conflictual decisions to agencies or the courts ...."].) Here, the second sentence of *section 1877.5* appears to be the product of a legislative compromise to enact a qualified reporting privilege and leave to the courts the question of what reporting immunities might already exist.

Until today, no published decision has addressed the specific question whether *section 47* provides unqualified immunity to insurers for reporting workers' compensation fraud. The interest groups and lobbyists who fought for only a qualified immunity in *section 1877.5* had no reason to concede that insurers [\*\*216] already had more than a qualified immunity to report workers' compensation fraud. In time-honored fashion, those groups and lobbyists were prepared to leave the question of the *existing* state of the law to the courts. <sup>4</sup>

<sup>4</sup> Gopinath attached to his opposition to the demurrer excerpts from a legislative history which indicate that the qualified privilege set out in the first sentence of *section 1877.5* was the product of considerable attention by various interest groups. These excerpts, however, do not deal with the second sentence of the statute.

44 Cal. App. 4th 867, \*874; 52 Cal. Rptr. 2d 211, \*\*216;  
1996 Cal. App. LEXIS 370, \*\*\*14; 61 Cal. Comp. Cas 363

[\*\*\*15] The Gopinaths contend the second sentence in *section 1877.5* refers to something other than reporting, though they do not say what. The idea is untenable in the context of the statutory scheme considered as a whole. Reporting is one of the key features of the Insurance Frauds Prevention Act; remarkably, reporting workers' compensation fraud is *mandated* by the act whenever an insurer "knows or reasonably believes" it knows the perpetrator of insurance fraud. (§ 1877.3, *subd. (b)(1)*; cf. § 1872.4, *subd. (a)*.)<sup>5</sup> Indeed, not only is reporting under such circumstances affirmatively imposed on insurers, but it must be done within 30 days after the duty to report arises. (§ 1877.3, *subd. (d)*.) The context of the qualified immunity is thus fraud [\*875] reporting, and the natural inference to be derived from that context is that the "existing" language refers to whatever privileges or immunities insurers had *as regards reporting*.

5 And by law, insurers are required to maintain fraud units. *Section 1875.20* provides in its entirety: "Every insurer admitted to do business in this state shall maintain a unit or division to investigate possible fraudulent claims by insureds or by persons making claims for services or repairs against policies held by insureds."

[\*\*\*16] If there remains any doubt after consideration of the context, it is eliminated by the general purpose of the statute. The whole point of the act is to deter insurance fraud. It would be utterly anomalous for the Legislature to seek to curtail such fraud and, in the process, create a major disincentive that did not otherwise exist for insurers to report fraud.

UNDER SECTION 47 INSURERS ARE ABSOLUTELY PRIVILEGED TO REPORT INSURANCE FRAUD TO EITHER THE LOCAL DISTRICT ATTORNEY OR THE DEPARTMENT OF INSURANCE

As interpreted in a number of cases, *section 47* protects persons who report potential criminal activity to the police or local prosecutor from lawsuits, even if the report is made with malice. (E.g., *Cote v. Henderson* (1990) 218 Cal. App. 3d 796, 806 [267 Cal. Rptr. 274] [defendant was "absolutely privileged" to report rape to police and district attorney]; *Williams v. Taylor* (1982) 129 Cal. App. 3d 745, 753-754 [181 Cal. Rptr. 423] [owner of autoshop "absolutely privileged" to tell police department of former manager's wrongdoing].)

The privilege also extends to reports to quasi-judicial government authorities, such as administrative agencies regulating a particular [\*17] business. (*Williams v. Taylor, supra*, 129 Cal. App. 3d at p. 754 [defendant autoshop owner absolutely privileged to inform Department of Employment Development of reasons for shop manager's dismissal]; *O'Shea v. General Telephone Co.* (1987) 193 Cal. App. 3d 1040, 1047-1048 [238 Cal. Rptr. 715] [telephone company privileged to tell highway patrol in course of statutorily authorized background check reason for ex-employee's termination].)

True, *Fenelon v. Superior Court* (1990) 223 Cal. App. 3d 1476 [273 Cal. Rptr. 367] states a contrary rule as to reports made "solely" to the police. There, the plaintiff alleged that the defendants induced a third party to inform "police and other nonofficial persons" that the plaintiff had solicited the murder of one of the defendants. In a published opinion denying a writ petition after the defendants' demurrer was overruled, the majority held that "where the report is made solely to the police and not in a quasi-judicial context, to be privileged the statement must be made without malice." (*Id. at p. 1483*.)

The holding in *Fenelon* does not apply to the present case because the reports here were not made "solely to [\*18] the police," but rather to the local [\*876] district attorney and Department of Insurance fraud bureau. The [\*217] central point of the *Fenelon* majority was that reports *outside* a judicial or "quasi-judicial" context lacked "safeguards" such as notice, hearing and review. (See 223 Cal. App. 3d at p. 1483, and particularly the quotation from *Toker v. Pollak* (1978) 44 N.Y.2d 211 [N.E.2d 163, 169, 405 N.Y.S.2d 1376].) But such, or similar, safeguards certainly inhere in reports to prosecutors and the Department of Insurance Bureau of Fraudulent Claims. As to prosecutors, by definition anything they do with a report of workers' compensation fraud (beyond, of course, investigating the claim), will entail notice, hearing and review. As to the fraud bureau, a statute specifically protects the person being investigated against "unwarranted injury" by making the bureau's investigation not subject to public inspection for the period of the investigation except insofar as the police or other law enforcement agency request it. (§ 1872.3, *subds. (d) & (e)*.)

Moreover, even if *Fenelon* articulated a rule which did apply to this case, we would join *Passman v. Torkan*

44 Cal. App. 4th 867, \*876; 52 Cal. Rptr. 2d 211, \*\*217;  
1996 Cal. App. LEXIS 370, \*\*\*18; 61 Cal. Comp. Cas 363

(1995) 34 [\*\*\*19] Cal. Cal. App. 4th 607, 616-619 [40 Cal. Rptr. 2d 291] (letter of litigant to district attorney held absolutely privileged) and *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal. Cal. App. 4th 1498, 1502-1504 [28 Cal. Rptr. 2d 722] (report to police by hotel manager concerning guest's possession of a gun held absolutely privileged) in respectfully declining to follow it. The *Fenelon* majority never grappled with the substantial California authority cited in the dissent demonstrating that the solid rule in California (at least up to the *Fenelon* decision) was that the absolute privilege "applies to statements made preliminary to or in preparation for either civil or criminal proceedings," which would include reports made solely to the police. (See *Fenelon v. Superior Court*, *supra*, 223 Cal. App. 3d at p. 1484 (dis. opn. of Benke, J.); see also *Hunsucker*, *supra*, 23 Cal. Cal. App. 4th at pp. 1502-1503 ["... the weight of authority in California, the very articulate dissent in *Fenelon* by Justice Benke, and what we believe is the better view, holds that reports made by citizens to police regarding potential criminal activity fall within the *section 47* absolute [\*\*\*20] privilege."].) <sup>6</sup> Rather, *Fenelon* relied on out-of-state cases to depart from the rule articulated in *Williams v. Taylor*, *supra*, 129 Cal. App. 3d 745. (See *Fenelon*, *supra*, 223 Cal. App. 3d at pp. 1482 & 1482, fn. 8.)

6 As the Supreme Court observed in *Slaughter v. Friedman* (1982) 32 Cal. 3d 149, 156 [185 Cal. Rptr. 244, 649 P.2d 886], the " 'official proceeding' privilege has been interpreted broadly to protect communications to or from *governmental* officials which may precede the initiation of formal proceedings." (Original italics.)

The absolute privilege in *section 47* represents a value judgment that facilitating the "utmost freedom of communication between citizens and [\*877] public authorities whose responsibility is to investigate and remedy wrongdoing" is more important than the " 'occasional harm that might befall a defamed individual.' " (See *Imig v. Ferrar* (1977) 70 Cal. App. 3d 48, 55-56 [138 Cal. Rptr. 540].) But even so, *section 47* hardly leaves the [\*\*\*21] wrongly defamed individual without safeguards. The malicious prosecution remedy always remains. Indeed, Dr. Gopinath's malicious prosecution cause of action survives this writ proceeding.

If *section 47* provides immunity for false reports of

rape (*Cote*) or employee theft (*Williams*), it necessarily follows that it also provides immunity for false reports of workers' compensation overbilling. The reason for the *section 47* privilege--to facilitate the *utmost* freedom of communications between victims of crime and law enforcement agencies--applies, if anything, all the more so to insurance fraud, where the costs of the crime are indirectly borne by all consumers, employees and businesses, than it does to more localized crimes. (See § 1875.10, subd. (b) ["insurers and their policyholders ultimately pay the cost of fraudulent insurance claims"].)

#### DISPOSITION

As mentioned above, this opinion does not deal with the malicious prosecution claim. *Section 47* does not preclude malicious prosecution actions ( *Kimmel v. Goland* (1990) 51 Cal. 3d 202, 209 [271 Cal. Rptr. 191, 793 P.2d 524] [litigation privilege "has been interpreted [\*\*218] to apply to virtually all torts except malicious [\*\*\*22] prosecution"]; *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 216 [266 Cal. Rptr. 638, 786 P.2d 365] ["The only exception ... has been for malicious prosecution actions."]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal. Cal. App. 4th 392, 406 [6 Cal. Rptr. 2d 781] ["The privilege applies only to tort causes of action, and not to the tort of malicious prosecution."]), a point conceded at oral argument by counsel for the insurers.

Likewise, the civil RICO cause of action cannot be disposed of in this writ proceeding. To state the obvious, causes of action under the Racketeer Influenced and Corrupt Organizations Act are predicated on a federal statute. (18 U.S.C. § 1961-1968.) The parties have not briefed the question of how the state law we are construing in this opinion, *section 47 of California's Civil Code*, interacts with a cause of action based on the federal RICO statute in the context of the facts alleged. Suffice to say there is at least a colorable question as to whether the use of a state statute to dismiss a cause of action based on a federal statute would contravene the *supremacy clause of the United States Constitution*. Rather than address that question [\*\*\*23] now, we defer the matter to another day.

[\*878] A peremptory writ shall issue to the superior court commanding it to sustain defendants' demurrer without leave to amend as to all causes of action except the ones for malicious prosecution and civil RICO.

44 Cal. App. 4th 867, \*878; 52 Cal. Rptr. 2d 211, \*\*218;  
1996 Cal. App. LEXIS 370, \*\*\*23; 61 Cal. Comp. Cas 363

Wallin, J., and Sonenshine, J., concurred.



**JAMES A. KING, Cross-complainant and Appellant, v. JOSEPH K. BORGES,  
Cross-defendant and Respondent**

**Civ. No. 38074**

**Court of Appeal of California, Second Appellate District, Division Two**

**28 Cal. App. 3d 27; 104 Cal. Rptr. 414; 1972 Cal. App. LEXIS 732**

**October 5, 1972**

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Los Angeles County, No. 877245, Goscoe O. Farley, Judge.

Compton, J., with Roth, P. J., and Herndon, J., concurring.)

**DISPOSITION:** The order appealed from is affirmed.

**HEADNOTES**

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**  
Classified to McKinney's Digest

A realtor brought a libel action against an attorney arising out of a letter the attorney wrote to the Division of Real Estate complaining of the acts of the realtor in claiming a deposit made by his clients, the buyers, after a sale had been cancelled. Copies of the letter were sent to other interested parties. After the jury had returned a verdict in favor of the realtor, the court granted a new trial on the ground that it had erroneously instructed the jury that the letter to the Division of Real Estate was only conditionally privileged. (Superior Court of Los Angeles County, No. 877245, Goscoe O. Farley, Judge.)

**(1a) (1b) Libel and Slander § 29(3)--Privileged Communications--Absolute Privilege--Officers and Official Acts.** -- --Defamatory statements contained in a letter written to the Division of Real Estate by an attorney complaining of the action of a realtor, which letter was in the nature of a request for an investigation, was absolutely privileged within the meaning of *Civ. Code*, § 47, *subd. 2*, as a communication made in an official proceeding authorized by law, even though no action or investigation was pending at the time the letter was written.

The Court of Appeal affirmed, holding that the letter in question was in the nature of a request for an investigation, and that the activities of the Division of Real Estate in investigating and disciplining licensees, such as the realtor, is an official proceeding authorized by law, and the letter was thus absolutely privileged despite the fact that no action or investigation was pending at the time the letter was written. As to the copies of the letter sent to other persons, the court held that they were not absolutely privileged but might be within the qualified privilege of *Civ. Code*, § 47, *subd. 3*. (Opinion by

**(2) Libel and Slander § 29(3)--Privileged Communications--Absolute Privilege--Officers and Official Acts.** -- --The phrase "in any other official proceeding authorized by law" contained in *Civ. Code*, § 47, *subd. 2*, relating to privileged defamatory statements, encompasses those proceedings which resemble judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings, and defamatory statements made in such proceedings having some relation thereto are absolutely privileged.

**(3) Libel and Slander § 29--Privileged Communications--Absolute Privilege.** -- --The absolute privilege afforded to defamatory statements made in legislative, judicial, or other official proceedings by *Civ. Code, § 47, subd. 2*, is not limited to the pleadings, the oral or written evidence, to publications in open court or in briefs or affidavits, but includes communications to an official administrative agency designed to prompt action by that agency, and is a part of the official proceeding under the statute.

**(4) Libel and Slander § 30(2)-- Privileged Communications -- Qualified Privileged--Communications to Persons Interested.** -- --The absolute privilege afforded to defamatory statements contained in a letter to the Division of Real Estate was not applicable to copies thereof sent to other interested parties, although their interests in the subject matter might bring the copies within the qualified privilege of *Civ. Code, § 47, subd. 3*.

**(5) Libel and Slander § 90--Actions--New Trial.** -- --The court did not abuse its discretion in ordering a new trial in an action for libel on the ground that the court erroneously instructed the jury that the letter in question was conditionally privileged, when in fact the original, although not the copies, was absolutely privileged, where it could not be determined from the single verdict what effect the erroneous instruction had on the verdict.

**(6) New Trial § 253--Appeal--Determination and Disposition.** -- --On appeal from an order granting a new trial, review is limited to determining whether there was any support for the trial judge's ruling, and such ruling will not be disturbed unless a manifest abuse of discretion is demonstrated.

**COUNSEL:** Gainsley, Winkler, Kaufman & Ward and Richard C. Dunsay for Cross-complainant and Appellant.

Joseph K. Borges, in pro. per., and Helen E. Simmons for Cross-defendant and Respondent.

**JUDGES:** Opinion by Compton, J., with Roth, P. J., and Herndon, J., concurring.

**OPINION BY: COMPTON**

**OPINION**

[\*29] [\*\*414] Roosevelt and Margie Green (the

Greens) sued James A. King (King) in the municipal court to recover \$ 1,000 deposited by them in escrow. King cross-complained for libel naming as defendants the Greens and Joseph K. Borges (Borges), their attorney. King prayed for \$ 25,000 general damages and \$ 25,000 punitive damages. The matter was transferred to the superior court where the libel action was tried separately.

1 The Greens in the other proceeding obtained judgment against King for the deposit money. That judgment is not involved in this appeal.

A jury awarded King \$ 3,500 compensatory [\*\*\*2] damages and \$ 2,500 punitive damages against Borges.<sup>2</sup> The trial judge ordered a new trial. King appeals from that order.

2 A non-suit was granted as to the Greens. No appeal has been taken from the judgment in their favor.

[\*\*415] The Greens were in the market to buy a house. A Mrs. Taylor offered a house for sale and King was her broker. The Greens made a deposit with King of \$ 1,000 on Taylor's house. An escrow was opened but the Greens could not qualify for the requisite financing. The escrow was mutually cancelled by Taylor and the Greens.

The Greens asked for their \$ 1,000 deposit back but King laid claim to it and the escrow refused to deliver it.

[\*30] The Greens consulted Borges who wrote the following letter to the State of California, Division of Real Estate, with copies distributed as indicated:

"JOSEPH K. BORGES, Attorney at Law

1318 North La Brea Avenue

Inglewood, California -- OR 8-7678

May 25, 1965

"Division of Real Estate

107 S. Broadway

Los Angeles, California

[\*\*\*3] Re: Home Builders Escrow

No. 7975, Taylor to Green

"Gentlemen:

"I have the following complaint to file against James A. King, real estate broker. Mr. King sold my clients, Mr. and Mrs. Roosevelt Green, a piece of property for \$ 30,000, subject to obtaining a loan. My clients paid him \$ 1,000 as good faith deposit. These funds were placed in Home Builders Escrow Company along with escrow instructions which were signed by the buyer and seller. My clients, the buyers, did not qualify for a loan. Therefore, both the buyer and seller signed mutual cancellation instructions. The broker is demanding the \$ 1,000 from escrow, claiming it belongs to him. He refuses to sign cancellation instructions. We have notified escrow not to release the funds to him as it is our opinion that he will spend these funds and he is one not to be trusted. Mr. King has made a demand to escrow for this \$ 1,000. From a legal standpoint, his principal, Mrs. Taylor, canceled and if he has any claim at all, it will be against his client, the seller.

"On behalf of my clients, I would like to file an accusation against James A. King for wrongfully withholding funds not belonging to him. Perhaps a [\*\*\*4] letter from one of your deputies inquiring as to his reasons for holding these funds would straighten the matter out. I am enclosing a letter received from the attorneys for the escrow company whereby they plan to interplead if the matter is not resolved. The Greens should not be forced to additional attorney's fees on behalf of the escrow company for filing said interpleader. I am sure you will understand my concern for my clients.

"Very truly yours,

S/Joseph K. Borges

Joseph K. Borges

"JKB/br

cc: Mr. & Mrs. Roosevelt Green

cc: Home Builders Escrow Company

cc: James A. King

cc: Barsam and LeVeque"

[\*31] This letter upon which the claim of libel is

based was written without the knowledge of the Greens, hence the non-suit as to them.

During the trial the judge instructed the jury that the letter and its copies were conditionally privileged so that the pivotal issue submitted to the jury was that of malice.

In his order granting a new trial the judge set forth the grounds therefor as *Code of Civil Procedure section 657, subdivisions 1 and 7* (irregularity in the proceedings and error in law). The reason for the order was "that the letter sent to the California [\*\*\*5] Divisions of Real Estate . . . was absolutely privileged under subsection 2 of *Section 47 Civil Code* as a communication preliminary to an official proceeding authorized by law." Thus the trial judge concluded that he had erred [\*\*416] in instructing the jury that the letter was only conditionally privileged.

This holding refers to the original letter, the court ruling that the carbon copies sent to other persons were only conditionally privileged.

*Civil Code section 47* provides in pertinent part: "A privileged publication or broadcast is one made . . . 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; . . . 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, . . ."

King contends that the trial judge erred first in holding that the letter was absolutely privileged and secondly in granting the new trial in any event because there was sufficient evidence to sustain the verdict on the basis of the distribution of the copies.

(1a) The original letter to the division of real estate was absolutely privileged.

Business and Professions Code, division IV, section 10004 et [\*\*\*6] seq., contain a licensing and regulatory scheme which governs, among other things, the conduct of the real estate brokers in this state.

*Business and Professions Code section 10176* empowers the Real Estate Commissioner, either on his own motion or upon a written verified complaint of any person, to investigate the actions of any person licensed under division IV. The commissioner is authorized to suspend or revoke a license for various types of specific misconduct, as well as "Any other conduct, whether of

28 Cal. App. 3d 27, \*31; 104 Cal. Rptr. 414, \*\*416;  
1972 Cal. App. LEXIS 732, \*\*\*6

the same or a different character than specified in this section, which constitutes fraud or dishonest dealing." (*Bus. & Prof. Code*, § 10176, *subd. (i)*.)

[\*32] By force of *Business and Professions Code section 10100*, the Real Estate Commissioner, in proceeding to suspend or revoke a license, is required to proceed under *section 11500 et seq. of the Government Code*, which sections in turn control administrative adjudications. *Government Code section 11501* specifically names the Real Estate Commissioner as an agency empowered to conduct administrative hearings.

*Government Code section 11503 through 11510* provides for the procedure for an administrative hearing and gives [\*\*\*7] the commissioner power of subpoena.

(2) "The phrase 'in any other official proceeding authorized by law' [contained] in *section 47, subdivision 2*, has been interpreted to encompass those proceedings which resemble judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings. [Citations.] In accord with the California cases, the general rule is now well established that *the absolute privilege is applicable not only to judicial but also to quasi-judicial proceedings* and defamatory statements made in both judicial and quasi-judicial proceedings having some relation thereto are absolutely privileged [citations]." (*Ascherman v. Natanson*, 23 Cal.App.3d 861, 865 [100 Cal.Rptr. 656], petition denied April 26, 1972.)

It must be conceded that the activities of the commissioner in investigating and disciplining licensees is an "official proceeding authorized by law" and thus within the ambit of *Civil Code section 47, subdivision 2* so that any matter communicated to the commissioner having some relation to such proceeding would be absolutely privileged.

(1b) King argues that no action or investigation was [\*\*\*8] pending at the time Borges wrote the letter and thus under the circumstances the privilege did not attach. We disagree.

*Civil Code section 47, subdivision 2* specifically exempts from the privilege statements contained in pleadings in actions for dissolution of marriage when the statements concern persons against whom no relief is [\*\*417] sought. By implication then all other pleadings including the initial complaint are part of the judicial

proceedings.

The letter in the case at bar does not technically qualify as a formal complaint or accusation which itself would precipitate an administrative adjudication. It is in the nature of a request for investigation. As to the latter type of communication, an absolute privilege is not uniformly available in all jurisdictions.

[\*33] "Some authorities have also extended the rule of absolute privilege so as to protect complaints made, or information given, to a proper officer with regard to crime which is within his authority to investigate or prosecute." (53 C.J.S., Libel & Slander, § 104.)

The Restatement of Torts, volume 3, section 587 provides as follows: "A party to a private litigation or a private prosecutor or defendant [\*\*\*9] in a criminal prosecution is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceedings or in the institution of or during the course and as a part of a judicial proceeding in which he participates, if the matter has some relation thereto." (Also see *Washer v. Bank of America*, 21 Cal.2d 822 and cases cited therein at p. 832 [136 P.2d 297, 155 A.L.R. 1338].)

(3) The absolute privilege in California is "not limited to the pleadings, the oral or written evidence, to publications in open court or in briefs or affidavits." (*Albertson v. Raboff*, 46 Cal.2d 375, at p. 381 [295 P.2d 405]; also see *Whelan v. Wolford*, 164 Cal.App.2d 689 [331 P.2d 86].)

In *Layne v. Kirby*, 208 Cal. 694, 697 [284 P. 441], an action for libel was premised on a letter written to the Secretary of War. On appeal from the sustaining of a demurrer, defendant claimed an absolute privilege under *Civil Code section 47, subdivision 2*. In reversing the order sustaining the demurrer, the court recognized the possibility that if the communication addressed by the defendant to the Secretary of War "was intended [\*\*\*10] to, or did in fact, initiate an authorized proceeding for any purpose" the communication would be absolutely privileged by virtue of the provisions of subdivision 2 of *section 47 of the Civil Code*.

It can be argued that application of an unqualified privilege to the type of communication here involved will unduly occupy the commissioner in tracking down spurious allegations and will provide no protection to

those persons wrongfully accused.

However, the commissioner presumably has adequate expertise to sift the "wheat from the chaff." Furthermore, if the commissioner suspects that a complaint is false or improperly motivated he has the power to require a verified statement with its accompanying sanction for perjury before taking any action.

Essentially the question is one of legislative intent. The Legislature has available to it methods for preventing or minimizing false complaints. (See for example *Pen. Code*, § 148.5 making it a misdemeanor to falsely report crime to a police officer.)

[\*34] However, in enacting *Civil Code section 47, subdivision 2*, the Legislature used language adequately broad in scope to cover the type of letter at hand.

We conclude that a communication [\*\*\*11] to an official administrative agency, which communication is designed to prompt action by that agency, is as much a part of the "official proceeding" as a communication made after the proceedings have commenced.

It seems obvious that in order for the commissioner to be effective there must be an open channel of communication by which citizens can call his attention to suspected wrongdoing. That channel would quickly close if its use subjected the user [\*\*418] to a risk of liability for libel. A qualified privilege is inadequate protection under the circumstances.

Malice at best is a difficult concept to articulate. Our legal system of fact finding, good as it is, does not guarantee complete accuracy in every case. Even in the case of an actor with the purest of motives, there is

always a possibility that the trier of fact on conflicting evidence might find he acted with malice sufficient to defeat a qualified privilege.

The importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual. Thus the absolute privilege is essential.

(4) No such [\*\*\*12] considerations apply to the copies which Borges distributed to persons other than the state agency. The interests of the recipients may be such as to bring the copies within the qualified privilege of *Civil Code section 47, subdivision 3*. While this interest might include the knowledge of the fact that a complaint had been made to the commissioner, protection of the efficacy of quasi-judicial proceedings does not require that these persons be advised of the details of the allegation.

(5) As to King's second claim of error, no abuse of the trial court's discretion has been demonstrated. The jury returned a single general verdict and it cannot be determined what effect the erroneous instruction had on the verdict.

(6) On an appeal from an order granting a new trial, review is limited to determining whether there was any support for the trial judge's ruling. Such ruling will not be disturbed unless a manifest abuse of discretion is [\*35] demonstrated. ( *Mehling v. Schield*, 253 Cal.App.2d 55 [61 Cal.Rptr. 159]; *Christian v. Bolls*, 7 Cal.App.3d 408 [86 Cal.Rptr. 545].)

[\*\*\*13] The order appealed from is affirmed.



**FREDDIE CURTIS MOSBY, JR., et al., Plaintiffs and Appellants, v. LIBERTY  
MUTUAL INSURANCE COMPANY et al., Defendants and Respondents.**

**G030304**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION THREE**

*110 Cal. App. 4th 995; 2 Cal. Rptr. 3d 286; 68 Cal. Comp. Cases 1126; 2003 Cal. App.  
LEXIS 1116; 2003 Daily Journal DAR 8205; 2003 Cal. Daily Op. Service 6542*

**June 23, 2003, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published July 23, 2003.

**PRIOR HISTORY:** Appeal from a judgment of the Superior Court of Orange County, No. 01CC08384, Jonathan H. Cannon, Judge.

**DISPOSITION:** Affirmed in part; reversed in part.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

Employee and his wife sued his employer and his employer's workers' compensation insurer for malicious prosecution and loss of consortium in the wake of the insurer's submission of misleading reports of workers' compensation fraud by the employee to the local district attorney. The district attorney had filed a felony complaint against the employee based on those reports. The criminal charges were later dismissed upon motion of the district attorney. The employee and his wife sought damages in the malicious prosecution suit for the cost of defending the criminal action and for the loss of reputation attendant on arrest and prosecution. The trial court ruled that acts of the insurer fell within the exclusivity provisions of the workers' compensation laws,

and the case was dismissed. (Superior Court of Orange County, No. 01CC08384, Jonathan H. Cannon, Judge.)

The Court of Appeal affirmed the judgment as to the employer but reversed as to the insurer. The employer's involvement was clearly part of normal workers' compensation claims processing, so the tort action against the employer was barred. In contrast, the insurer was held to have stepped out of its role as insurer; its malicious, false accusation of workers' compensation fraud against the employee was not part of normal workers' compensation claims processing. The court found that the insurers' misconduct did satisfy the first step of the standard two-step analysis for finding exclusivity of workers' compensation remedies. It found an attenuated relationship between the workplace injury caused by a falling air conditioner and the filing of false accusations of fraud against the worker. The misconduct, however, did not meet the second step for finding exclusivity. The insurer's filing of false accusations could not be said to be encompassed within the risks of the compensation bargain. Moreover, the Legislature had made it clear in *Ins. Code, § 1877.5*, that there should be no civil immunity for workers' compensation fraud reporting, unless the insurer acts in good faith and without malice. The court held that it was not necessary for the [\*996] employee to demonstrate that the insurer's motive violated a fundamental public policy in order to proceed outside of workers' compensation laws. Finally, the court

noted that the alleged racial animus of a workers' compensation doctor was relevant to prove the malice element of the malicious prosecution. (Opinion by Sills, P. J., with Moore, J., and Fybel, J., concurring.)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

**(1) Workers' Compensation § 6--Exclusivity of Remedy--Compensation Bargain.**--An employee's right to recover against an employer is usually limited to remedies set forth in the Workers' Compensation Act. (*Lab. Code, § 3201 et seq.*) The exclusivity feature of the workers' compensation system is sometimes known as the compensation bargain. The function of exclusivity is to give efficacy to the compensation bargain.

**(2) Workers' Compensation § 6--Exclusivity of Remedy--Insurer.**--The Legislature has extended the protection of the workers' compensation exclusive remedy provisions to workers' compensation insurance carriers by defining the word "employer" to include insurers. (*Lab. Code, § 3850, subd. (b).*)

**(3) Workers' Compensation § 7--Exclusivity of Remedy--Scope and Extent of Exclusivity--Employer Activity.**--Where acts alleged against an employer are a normal part of the employment relationship or the workers' compensation claims process, the cause of action is subject to the exclusive remedy provisions of workers' compensation. Where the alleged acts are not a normal part of the employment relationship or the workers' compensation claims process, the cause of action is not subject to exclusivity provisions.

**(4) Workers' Compensation § 7--Exclusivity of Remedy--Scope and Extent of Exclusivity--Insurer Activity.**--Insurer activity intrinsic to the workers' compensation claims process is a risk contemplated by the compensation bargain, and insurer actions closely connected to the payment of benefits fall within the scope of the exclusive remedy provisions of the workers' compensation laws.

**(5) Workers' Compensation § 6--Exclusivity of Remedy--Two-Step Analysis.**--A two-step analysis of exclusivity is standard in suits which allege misconduct by employers and workers' compensation insurers. The first step is to determine whether the injury is collateral to

or derivative of an injury compensable by the exclusive remedies of the [\*997] Workers' Compensation Act. If the injury meets that test, and is thus a candidate for the exclusivity rule, the second step is to determine whether the alleged acts or motives that establish the elements of the cause of action fall outside the risks encompassed within the compensation bargain.

**(6) Workers' Compensation § 7.4--Exclusivity of Remedy--Scope and Extent of Exclusivity--Tort Action Against Insurer Not Barred--Malicious Prosecution.**--The acts or motives alleged against a workers' compensation insurer in a malicious prosecution action, which was based on misleading reports of workers' compensation fraud submitted by an insurer to a district attorney, were not intrinsic to the claims handling process, and thus not subject to the exclusivity provisions of workers' compensation laws. The normal workers' compensation claims process, in all its permutations, is concerned with compensation for what actually happened in the workplace. Reporting alleged fraud to the district attorney is a function of law enforcement.

[2 Witkin, Summary of Cal. Law (9th ed. 1987) Workers' Compensation, § 97]

**(7) Workers' Compensation § 6--Exclusivity of Remedy--Malicious Prosecution Action--:--Malicious Prosecution § 2--Definitions and Distinctions--Interest Vindicated.**--The interest vindicated by malicious prosecution causes of action is an interest distinct from those protected in the workers' compensation bargain. That interest is the freedom from unjustifiable and unreasonable litigation.

**(8) Workers' Compensation § 5--Generally--Construction of Statutes--Workers' Compensation Fraud--Reporting.**-- In *Ins. Code, § 1877.5*, the Legislature has made it plain that there should be no civil immunity for workers' compensation fraud reporting, unless the insurer acts in good faith, without malice.

**(9) Insurance Companies § 12--Actions by and Against Insurance Companies--Workers' Compensation Insurers--Malicious Prosecution.**--The Legislature has made a policy decision to allow civil malicious prosecution claims to be filed against workers' compensation insurers if they maliciously report workers' compensation fraud.

[2 Witkin, Summary of Cal. Law (9th ed. 1987) Workers' Compensation, § 97]

**(10) Workers' Compensation § 7.4--Exclusivity of Remedy--Scope and Extent of Exclusivity; Dual Capacity Doctrine--Tort Action Against Employer Not Barred--Violation of Public Policy Not Required.**--It is not necessary that a cause of action against an employer or insurer for [\*998] acts of misconduct in connection with employment have as an element a motive contrary to public policy in order to proceed outside of workers' compensation exclusivity. If the acts are outside the normal workers' compensation claims process or if the motive violates a fundamental public policy, the cause of action may go forward. Actions outside normal claims processing are enough without an element of the cause of action which contravenes fundamental public policy.

**(11) Malicious Prosecution § 5--Essentials to Maintenance of Action, Generally--Malice--Racial Animus.**--The elements of malicious prosecution include both lack of probable cause and malice. Allegations of racial animus by a doctor hired by a workers' compensation insurer were relevant to prove the malice element in malicious prosecution.

**COUNSEL:** Duke L. Peters for Plaintiffs and Appellants.

Kern & Wooley, Susan T. Olson, Melodee A. Yee and Lisa K. Hansen for Defendant and Respondent Liberty Mutual Insurance Company.

Cloud & Olsen, Christopher T. Olsen and Scott B. Cloud for Defendant and Respondent Best Buy Company.

**JUDGES:** SILLS, P.J.; Moore, J., and Fybel, J., concurred.

**OPINION BY:** SILLS

**OPINION**

[\*\*287] **SILLS, P. J.**--

## I. INTRODUCTION

Freddie Curtis Mosby and his wife Sheri Mosby have sued his employer, Best Buy, and his employer's workers' compensation insurer, Liberty Mutual Insurance

Company, for malicious prosecution and loss of consortium in the wake of Liberty Mutual's reporting Mosby to the local district attorney for workers' compensation insurance [\*\*\*2] fraud. (Criminal fraud charges against Mosby were dismissed after the preliminary hearing.) This case comes to us after the trial court sustained demurrers to the complaint without leave to amend.

We will affirm the judgment in favor of Best Buy. The little involvement that Best Buy has with this case was clearly a part of normal workers' compensation claims processing and therefore barred under the exclusivity provisions of the workers' compensation laws. (See generally *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800 [\*999] [102 Cal. Rptr. 2d 562, 14 P.3d 234].) Best Buy never stepped out of its role as employer. (See *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 630 [102 Cal. Rptr. 815, 498 P.2d 1063] [origin of the "role" metaphor for workers' compensation exclusivity analysis].)

The judgment in favor of Liberty Mutual, however, must be reversed. It did step out of its role of insurer, and took on the persona of "bad cop." That is, a malicious, false accusation of workers' compensation fraud against a claimant is *not* part of the normal workers' compensation claims process. Unlike the abuse [\*\*\*3] of process and fraud claims that were held to be within the exclusivity provisions of the workers' compensation laws in *Vacanti*, a malicious accusation of workers' compensation fraud made to the district attorney is not aimed at delaying or denying *payments*. In that regard, the Legislature has specifically indicated that malicious prosecution *is* a viable cause of action against workers' compensation insurers who make reports of workers' compensation fraud *with malice*.

## II. FACTS

The facts are drawn from the first amended complaint. We need not belabor the rule that on demurrer the facts in the complaint are assumed true and all reason [\*\*288] able inferences from the complaint are drawn in favor of the plaintiff.

Mosby, who is African-American, began working for Best Buy in 1994. In 1997, he was employed as a supervisor. On April 16, 1997, Mosby was moving merchandise with a forklift when a box containing an air conditioning unit fell and struck him, causing his neck to

extend backwards. Mosby stumbled but was prevented from falling by a safety belt that held him on the forklift.

As a supervisor, Mosby wanted to set a good example for his employees, [\*\*\*4] and so continued working though he was having problems with his neck, left shoulder, and low back. But he also feared he might be fired if he reported the injury. After one week of constant pain and stiffness, he reluctantly filed a claim with Best Buy for on-the-job injury.

Mosby was sent to a medical center for treatment. He returned to work, but his medication and injuries interfered with his balance and ability to work. Best Buy then referred Mosby to Dr. Bill Yeung, who first examined Mosby on April 23. On May 28, Yeung removed Mosby from his work duties due to the injury. A subsequent magnetic resonance imaging (MRI) test conducted on June 3 revealed significant damage, including several herniated discs.

While in Yeung's office on June 3 awaiting results of his MRI, Mosby overheard a conversation between the doctor and an employee, "The only [\*1000] way to straighten this guy out, is place a noose around his neck and kick the chair." Mosby understood this to be a "devastating racial remark." Mosby then sought treatment from his own physician, Dr. Reece, beginning on June 4.

Robynn Vannatta is a claims adjuster at Liberty Mutual, Best Buy's workers' compensation carrier. [\*\*\*5] At the request of Best Buy, Vannatta arranged surveillance of Mosby beginning in mid-June. In July, Vannatta contacted Reece's office and had a conversation with his receptionist, during which Vannatta stated she had information that Mosby was a "liar." At some point, Vannatta stated that she believed the sign-in sheets at Reece's office were false, although surveillance revealed that Mosby was keeping his appointments with Reece.

Thereafter, Vannatta scheduled and directed Mosby to attend an examination with Dr. Ian Brodie, which Mosby characterizes as an illegal qualified medical examination in violation of the California Labor Code. Brodie concurred with Reece that Mosby had suffered a herniated disc and a pinched nerve. He nonetheless agreed to return Mosby to modified duty for four hours per day, with no lifting, bending, stooping or related activities. According to Mosby, such restrictions were inconsistent with any duty he could perform at Best Buy.

At a workers' compensation hearing in September, Mosby "learned" (the complaint does not reveal from whom he learned it) that the examination by Brodie was illegal and Brodie's recommendations should be ignored. Later that month, [\*\*\*6] Mosby was evaluated by a neurosurgeon, who recommended surgical treatment. Mosby continued treatment from September 1997, until April 1998.

In April 1998, Mosby was sent to Dr. Stuart Green for an agreed medical examination. After a two-hour examination, Green gave Mosby a 55 percent permanent disability rating. Mosby alleges that Green's rating caused Liberty Mutual to become more vindictive and retaliatory. Liberty Mutual deposed Green and showed him surveillance tapes of Mosby walking up stairs the day of his evaluation. Green then changed his rating.

[\*\*289] Liberty Mutual then stepped up its investigation of Mosby and, in October 1998, presented its case for fraud to the district attorney. On January 15, 1999, the district attorney filed a felony complaint against him and on February 19, Mosby was arrested. Liberty Mutual instigated the criminal complaint in spite of medical evaluations which supported Mosby's on-the-job injury. No less than three medical reports had verified his injuries and there was nothing to indicate that the injuries hadn't been sustained when the [\*1001] air conditioner had fallen on him. Yet Liberty Mutual gave misleading information to the [\*\*\*7] district attorney, including misleading testimony by one of its agents at the preliminary hearing. Vannatta went so far as to change Mosby's status from "temporarily disabled" to "permanent and stationary" for the purpose of making Mosby look more culpable and ensuring that the felony charges had some support.

Green, the doctor Liberty Mutual had hired to evaluate Mosby, stated in a letter that he "always harbored certain doubts about the validity of [his] assessment of Mr. Mosby," and would "feel far more comfortable as a witness for the defense in this case than in my present position as 'chief witness' for the prosecution." Green also told Mosby, "If it wasn't for your color, then it wouldn't have gone this far." After the preliminary hearing, *upon motion by the District Attorney*, the judge dismissed the criminal charges against Mosby in the interests of justice.

On June 28, 2001, Mosby and his wife, Sheri Mosby, filed the instant case for malicious prosecution against

Liberty Mutual, Best Buy, and Green, seeking damages for the \$ 3,500 the Mosbys spent defending the criminal action and for the loss of reputation attendant on his arrest and prosecution. The complaint alleges [\*\*\*8] Liberty Mutual "knowingly submitted slanted and biased reports to Orange County District Attorney's Office alleging charges of insurance fraud." Mosby alleged malicious prosecution and Sheri Mosby alleged loss of consortium.

Both Best Buy and Liberty Mutual filed demurrers and motions to strike, arguing, inter alia, that the exclusivity provisions of the *Workers' Compensation Act* precluded both causes of action. The court sustained the demurrers and granted leave to amend, noting in its minute order that the allegations of racial discrimination were too conclusory. Moreover, the complaint failed to allege Mosby was so incapacitated he could no longer be a companion.

Mosby and Sheri Mosby filed a first amended complaint in October 2001, dropping Green as a defendant and adding Vannatta. Liberty Mutual and Best Buy again filed demurrers and motions to strike. The court ruled that the malicious prosecution action was within the compensation bargain, and because the loss of consortium claim was premised on the malicious prosecution claim, it also failed. The demurrers were sustained, the case was dismissed, and the Mosbys timely filed this appeal. On appeal, [\*\*\*9] the Mosbys seek to have their first amended complaint reinstated. They do not request further leave to amend.

### III. DISCUSSION

(1) An employee's right to recover against an employer is usually limited to remedies set forth in the *Workers' Compensation Act*. (*Lab. Code*, § 3201 [\*1002] *et seq.*) The exclusivity feature of the workers' compensation system is sometimes known as the "compensation bargain." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15-16 [276 Cal. Rptr. 303, 801 P.2d 1054].) The function of exclusivity, "is to give efficacy" to that bargain. (*Id.* at p. 16.) Under the deal, "the [\*\*290] employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort."

(*Ibid.*) [\*\*\*10] (2) The Legislature has extended the protection of these exclusive remedy provisions to workers' compensation insurance carriers by defining the word "employer" to include "insurer." (*Lab. Code*, § 3850, *subd. (b).*)

The contours of the exclusivity rule were most recently explored by our Supreme Court in *Vacanti*, *supra*, 24 Cal.4th 800. Taking its cue from the earlier *Unruh* decision, the court emphasized the scope of *normal* claims processing. Indeed, the word "normal" appears no less than 15 times in the opinion, and usually in connection with claims processing. (3) Thus, where "acts are 'a normal part of the employment relationship' [citation] or the workers' compensation claims process [citation], the cause of action is subject to exclusivity. Otherwise, it is not." (*Id.* at p. 820.)

(4) Corollaries to this "normalcy" rule are that "[i]nsurer activity intrinsic to the workers' compensation claims process is also a risk contemplated by the compensation bargain" and "insurer actions 'closely connected to the payment of benefits' fall within the scope of the exclusive remedy provisions" [\*\*\*11] of the workers' compensation laws. (*Vacanti*, *supra*, 24 Cal. 4th at p. 821.) Thus it is not surprising that injuries "tethered" to the workplace, such as the psychic loss of termination of employment, or abusive conduct during the termination process, are within the exclusivity rule. (*Id.* at pp. 814-815.)

*Vacanti* itself was a case where a group of *doctors* sued several workers' compensation insurers for mishandling lien claims. (As the court acknowledged, it was a "novel complaint." See *Vacanti*, *supra*, 24 Cal.4th at p. 807.) With regard to the mechanics of *payment*, the mishandling was clearly within the exclusivity rule. Thus the doctors could not state abuse of process claims. Those claims arose out of a "pattern or practice of delaying or denying *payments* in bad faith." (*Id.* at p. 823, italics added.) The details of that bad faith included "frivolous objections, filing sham petitions and documents with the WCAB, issuing unnecessary subpoenas, and improperly threatening to depose plaintiffs' physicians." (*Ibid.*) Those actions were obviously part of the workers' compensation claims " [\*\*\*12] process"--hence the title of the cause of action.

[\*1003] Likewise, the doctors in *Vacanti* could not state fraud claims based on "false statements about and during its processing of plaintiffs' lien claims." (*Vacanti*,

*supra*, 24 Cal.4th at p. 823.) Again, the key was the "processing" of the "plaintiffs' lien claims," which is "closely connected to a normal insurer activity--the processing and payment of medical lien claims." (*Ibid.*)

On the other hand, the doctors' antitrust (*Cartwright Act*) action survived because it entailed allegations of influencing the processing of claims the defendant insurers did not insure--here the insurers were stepping out of the role of insurer. (*Vacanti, supra*, 24 Cal.4th at p. 825.) Additionally, *Cartwright Act* claims entail a motive element that violates fundamental public [\*291] policy rooted in a statutory provision. (*Ibid.*)

So too did the doctors' "RICO" claims (see 18 U.S.C. § 1962(c)) survive, because the predicate acts of mail and wire fraud necessary to form a pattern of racketeering [\*\*\*13] activity "cannot be closely connected to normal insurer activity." (*Vacanti, supra*, 24 Cal.4th at p. 827.) These were not acts committed "during the claims process." (*Ibid.*)

Finally, the doctors' tortious interference and unfair competition law causes of action were parsed: To the degree that those causes of action depended on individual acts that showed a pattern of mishandling the doctors' lien claims, they were like the abuse of process and fraud claims, i.e., "closely connected to a normal insurer activity--the *processing* of medical lien claims." (*Vacanti, supra*, 24 Cal.4th at p. 828.) On the other hand, to the degree the causes of action were based on misconduct involving claims that the individual insurers did not themselves insure, they were like the antitrust claims, and not connected to "normal insurer activity." (*Ibid.*)

(5) *Vacanti* has come to stand for a standard two-step analysis of exclusivity. (See *Hughes v. Argonaut Ins. Company* (2001) 88 Cal.App.4th 517, 528 [105 Cal. Rptr. 2d 877].) The first step is to determine whether the injury is " 'collateral to or derivative of' [\*\*\*14] an injury compensable by the exclusive remedies of the WCA ....' " (*Vacanti, supra*, 24 Cal.4th at p. 811.) If the injury meets that test, and is thus a candidate for the exclusivity rule, the second step is to determine whether the "alleged acts or motives that establish the elements of the cause of action fall outside the risks encompassed within the compensation bargain." (*Id.* at pp. 811-812.)

In the case before us, perhaps it can be said that the

injuries from the allegedly malicious prosecution of Mosby were "derivative" of his workplace injury. There is, one must acknowledge, an attenuated for-want-of-a-nail-the-kingdom-was-lost "but for" relationship between the fact that an air conditioner fell on Mosby and his eventual prosecution for workers' compensation fraud.

[\*1004] (6) But the alleged acts or motives in the malicious prosecution action here can hardly be said to be encompassed within the risks of the compensation bargain. Reporting alleged workers' compensation fraud is not an activity at all intrinsic to the claims handling process. (Most insurance claims, most of the time, never lead to criminal proceedings.) The normal [\*\*\*15] workers' compensation claims process, in all its permutations, is concerned with compensation for what actually happened in the workplace. Reporting alleged fraud to the district attorney is a function of law enforcement.

(7) The interest vindicated by malicious prosecution causes of action is an interest distinct from those protected in the workers' compensation bargain. That interest is the "freedom from unjustifiable and unreasonable litigation." (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 878 [254 Cal. Rptr. 336, 765 P.2d 498].) It is an interest which, as this case illustrates, is at once economic, psychic, and reputational: Being unfairly prosecuted inflicts a need to pay lawyers to mount a defense. It means the horrific uncertainty of litigation, with all the usual possibilities of things that can go wrong in litigation (about which good settlement judges always remind litigants). And it means the loss of reputation attendant [\*292] upon the indignity of arrest and news of it to one's family, friends and coworkers.

The statutory duty of insurers to report cases of workers' compensation fraud is instructive as to the fundamental [\*\*\*16] *abnormality* of fraud reporting. The duty was first fastened on insurers in 1991. (See *Ins. Code*, § 1877.3, *subd.* (b); Stats. 1991, ch. 116, § 19.) That itself is significant in considering exactly what is "normal" in workers' compensation claims processing. The late enactment of such a duty suggests that *fraud reporting* was not part of the historical workers' compensation "bargain." From 1913 to 1991 normal claims processing did not envisage any institutional linkage between the workers' compensation system and the criminal justice system.

(8) But even if the independence of fraud reporting from the workers' compensation claims handling process were not enough, we cannot avoid the fact that in a related statute the Legislature has made it pretty plain that there should be no civil immunity for workers' compensation fraud reporting. (See *Ins. Code*, § 1877.5.) In pertinent part the statute reads: "No insurer ... who furnishes information, written or oral, pursuant to this article, ... shall be subject to any civil liability in a cause of action of any kind where the insurer ... *acts in good faith, without* [\*\*\*17] *malice*, and reasonably believes that the action taken was warranted by the then known facts, obtained by reasonable efforts." (Italics added.)

As this court has recognized, there is no question that the statute leaves room for civil malicious prosecution claims. (See *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867, 872 [52 Cal. Rptr. 2d 211] ["There is no question that section 1877.5 limits the immunity it establishes to reports made without malice."].) And while the statute preserves all "existing common law or statutory privileges and immunities of an insurer," those common law and statutory privileges cannot be said to include immunity from malicious prosecution. In *Fremont*, for example, we noted that the immunity provided by *Civil Code section 47* to report workers' compensation fraud to the police or district attorney did not extend to malicious prosecution. (*Fremont, supra*, 44 Cal.App.4th at p. 877 ["Section 47 does not preclude malicious prosecution actions."].) (Nor has any case up to now of which we [\*\*\*18] are aware ever considered malicious reporting in the context of workers' compensation exclusivity, so it cannot be said that there was any "existing" common law immunity.)

(9) In short, the Legislature has made a policy decision to allow civil malicious prosecution claims to be filed against workers' compensation insurers if they maliciously reported workers' compensation fraud. We cannot square a *blanket* imposition of workers' compensation immunity with the clear import of *Insurance Code section 1877.5*. To do so would render the phrases "subject to any civil liability" and "without malice" in *Insurance Code section 1877.5* surplus. If the Legislature had thought that *all* fraud reporting was within workers' compensation exclusivity, it would never have written the statute as it did.

We recognize, of course, that malicious prosecution *qua* malicious prosecution does not, alone, have as an

*element* the existence of a motive that necessarily violates a fundamental public policy, such as, say, civil rights claims or the *Cartwright Act* claims in *Vacanti* [\*\*\*19] . (We also recognize that, unlike the *Cartwright Act* and *RICO* (Racketeer Influenced and Corrupt Organizations Act) claims in *Vacanti*, this lawsuit is brought against an insurer who *did* insure the plaintiff.) (10) But it would be a misreading of *Vacanti* to say that any time a cause of action is not within workers' compensation [\*\*293] exclusivity it must have as an element a motive contrary to public policy. The high court uses the disjunctive "or" in explaining the second *Vacanti* step: If acts are outside the *normal* workers' compensation claims process *or* if the motive violates a fundamental public policy the cause of action "may go forward." (*Vacanti, supra*, 24 Cal.4th at p. 812.) Actions outside normal claims processing are enough, as shown by the facts in *Unruh, supra*, 7 Cal.3d 616, where there also was no element of the cause of action contravening fundamental public policy. (Indeed, in that regard, *Unruh*, applies a fortiori to this case, because the insurer stepped outside its role of insurer during the *investigation* of the claim. Here, the insurer acted outside [\*\*\*20] its role of insurer in a process separate from investigation.)

[\*1006] Finally, we note the complaint includes allegations of racial animus by a doctor hired by Liberty Mutual to examine Mosby for workplace injuries, and makes other allegations that would further support a finding that Liberty Mutual showed racial bias.(11) The elements of malicious prosecution include both lack of probable cause and malice (see *Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 871). Such allegations of bias are relevant to prove the *malice element* in *malicious prosecution*.

#### IV. DISPOSITION

The judgment of dismissal in favor of Best Buy is affirmed. The judgment of dismissal in favor of Liberty Mutual is reversed. We hasten to add that our decision is limited only to the exclusivity issue. We express no opinion on the substance of any other issue.

In the interests of justice, the Mosbys shall recover their costs on appeal.

Moore, J., and Fybel, J., concurred.

Respondents' petition for review by the Supreme Court was denied October 15, 2003. Baxter, J., did not

110 Cal. App. 4th 995, \*1006; 2 Cal. Rptr. 3d 286, \*\*293;  
68 Cal. Comp. Cases 1126; 2003 Cal. App. LEXIS 1116, \*\*\*20

participate therein.



**CANG WANG et al., Plaintiffs and Appellants, v. CHRISTIANNE N. HECK et al.,  
Defendants and Respondents.**

**B228191**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION FOUR**

*203 Cal. App. 4th 677; 137 Cal. Rptr. 3d 332; 2012 Cal. App. LEXIS 140*

**January 25, 2012, Filed**

**SUBSEQUENT HISTORY:** [\*\*\*1]

The Publication Status of this Document has been Changed by the Court from Unpublished to Published February 15, 2012.

**PRIOR HISTORY:** APPEAL from a judgment of the Superior Court of Los Angeles County, No. SC101283, Lisa Hart Cole, Judge.

**DISPOSITION:** Affirmed.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

In a personal injury case arising from a collision caused by a driver who suffered an epileptic seizure, the trial court granted summary judgment for the driver's neurologist and the neurologist's employer. The trial court found that the neurologist's communication to the Department of Motor Vehicles (DMV), stating that the driver's epilepsy did not affect his ability to drive safely, was protected by the litigation privilege (*Civ. Code*, § 47, *subd. (b)*). (Superior Court of Los Angeles County, No. SC101283, Lisa Hart Cole, Judge.)

The Court of Appeal affirmed the judgment, holding that the litigation privilege applied to the neurologist's communication to the DMV, an evaluation form that she

completed so that the driver could have his license reinstated and that was used in a DMV hearing on reinstatement. None of plaintiffs' causes of action could stand without relying on the completion of the DMV medical evaluation form. Therefore, all of plaintiffs' causes of action were barred by the litigation privilege and plaintiffs failed to present a triable issue of material fact. The neurologist's conduct prior to completing the evaluation form was the basis of her communication in completing the form and thus was also privileged. Although plaintiffs attempted to characterize their claim as medical negligence by failing to warn the driver not to drive, the basis of their complaint was the neurologist's statement on the DMV medical evaluation form that the driver could drive safely. The offending conduct occurred during and as part of the preparatory activities that were directed toward and done in contemplation of determining the driver's fitness to drive. (Opinion by Willhite, J., with Epstein, P. J., and Suzukawa, J., concurring.) [\*678]

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

(1) **Witnesses § 16.3--Litigation Privilege--Requirements.**--The litigation privilege, codified at *Civ. Code*, § 47, *subd. (b)*, provides that a publication or broadcast made as part of a judicial proceeding is privileged. The usual formulation is that the

privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. The privilege is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. The litigation privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing. The phrase "judicial or quasi-judicial proceedings" has been defined broadly to include all kinds of truth-seeking proceedings, including administrative, legislative and other official proceedings. The litigation privilege is broadly applied and doubts are resolved in favor of the privilege.

**(2) Witnesses § 16.3--Litigation Privilege--Prior Preparation.**--The protective mantle of the litigation privilege embraces not only the courtroom testimony of witnesses, but also protects prior preparatory activity leading to the witnesses testimony.

**(3) Witnesses § 16.3--Litigation Privilege--Medical Evaluation Form--Department of Motor Vehicles--Prior Preparation.**--A neurologist's communication to the Department of Motor Vehicles, stating that a driver's epilepsy did not affect his ability to drive safely, was privileged under *Civ. Code*, § 47, *subd. (b)*, because the evaluation form was completed so that the driver could have his license reinstated; therefore, summary judgment was properly granted in an action by individuals injured in a collision with the driver. The court rejected the argument that the claims were based on the neurologist's negligent conduct in reaching her conclusion, rather than the conclusion itself, because conduct prior to completing the form was the basis of her communication in completing the form.

[Levy et al., *Cal. Torts* (2011) ch. 31, § 31.16; 5 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Torts*, §§ 568, 570.]

**(4) Witnesses § 16.3--Litigation Privilege--Gravamen of Action.**--If the gravamen of an action is communicative, the litigation privilege extends [\*679] to noncommunicative acts that are necessarily related to

the communicative conduct. To show that the litigation privilege does not apply, the plaintiff must demonstrate that an independent, noncommunicative, wrongful act was the gravamen of the action.

**COUNSEL:** James L. Pocrass Law Corporation, James L. Pocrass and Keith A. Lovendosky for Plaintiffs and Appellants.

Fonda & Fraser, Stephen C. Fraser, Alexander M. Watson; Horvitz & Levy, S. Thomas Todd and Wesley T. Shih for Defendants and Respondents.

**JUDGES:** Opinion by Willhite, J., with Epstein, P. J., and Suzukawa, J., concurring.

**OPINION BY:** Willhite

## OPINION

[\*\*334] **WILLHITE, J.**--Appellants Cang Wang and Xiaofen Wang were critically injured when they were struck by a car being driven by Amr Sariah, who suffered an epileptic seizure and lost consciousness. Appellants filed a complaint against Sariah's neurologist, Christianne N. Heck, M.D. (Heck), and Heck's employer, the University of Southern California (USC) (collectively, respondents).<sup>1</sup> The trial court granted summary judgment in favor of respondents on the basis that Heck's communication to the Department of Motor Vehicles (DMV) that Sariah's epilepsy did not affect his ability to drive safely was privileged pursuant to *Civil Code section 47, subdivision (b)*.<sup>2</sup> [\*\*\*2] We affirm.

1 Appellants' complaint named other defendants who are not parties to this appeal.

2 For ease of reference, we will refer to the statute as *section 47(b)*.

## FACTUAL AND PROCEDURAL BACKGROUND

Sariah was born in 1971 and has had seizures since the age of 13. The seizures occurred every one or two weeks and caused Sariah to black out for about three minutes. In 2001, a neurologist at USC examined Sariah and noted that he was experiencing about one seizure per week or month.

Sariah's driver's license was suspended for three years in 2001 or 2002 when he suffered a seizure and hit a lamppost. His license was suspended again when he had

another seizure-related accident in 2007, but his license was reinstated in October 2008 after Heck wrote a favorable report to the DMV, which we discuss more fully below. [\*680]

Heck began treating Sarieh in 2003, when Sarieh enrolled in a research study regarding the use of a procedure called Gamma Knife radiosurgery to treat epileptic seizures. Heck was the principal investigator of the study at USC, so she took over Sarieh's care from a colleague so that Sarieh could participate in the Gamma Knife radiosurgery trial.

Sarieh underwent the Gamma Knife radiosurgery [\*\*\*3] at USC in June 2003. He was randomly placed in a group that received low dose radiosurgery, a procedure that ultimately was set aside because it was less effective than the high dose radiosurgery. Heck thought that Sarieh did not improve much after undergoing the surgery and that he would benefit from a standard type of epilepsy surgery, but Sarieh did not want to undergo the standard surgery. She also knew that he suffered seizures when he did not take his medication.

On November 5, 2007, Sarieh told Heck that he had had a seizure resulting in a trip to the emergency room on October 19, 2007, and that he was averaging about one seizure per month. Heck again discussed epilepsy surgery with Sarieh, but he expressed fear of undergoing the surgery. Heck "made it clear he is not to drive" because he posed a risk of injury to himself and others, and she noted that she had reported Sarieh to the State Department of Public Health.

In a letter dated January 16, 2008, Dr. Charles Liu told Heck that he had seen Sarieh in the neurosurgery clinic. Liu wrote that, although Sarieh's condition had improved, he continued to have persistent seizures after the Gamma Knife radiosurgery, about one every other month. [\*\*\*4] Liu stated that Sarieh was very anxious to drive again, as Heck and Liu had discussed, [\*\*335] and that Liu told Sarieh he should not drive if he continued to have seizures. Liu also recommended surgery to Sarieh.

On January 17, 2008, Sarieh told Heck that his epilepsy had improved since the surgery, but he continued to have "approximately one seizure every couple of months." He asked Heck to complete a driver medical evaluation form for the DMV so that he would be able to drive, but Heck advised him not to drive. Heck noted that she gave Sarieh "strict orders to refrain from

driving" because he admitted to driving illegally.

In April 2008, Sarieh told Heck that he had had two seizures in the previous year, the most recent one in November 2007. He again asked Heck for the DMV evaluation form, on the basis of which the DMV could have lifted the suspension of his privilege to drive. Although Sarieh reported that he had been seizure free for a few months, which Heck thought rendered him safe to drive, Heck did not feel comfortable giving him the form because she [\*681] was concerned about his compliance with taking his medication. She therefore recommended that he be seizure free for another three months [\*\*\*5] before she would complete the DMV form. She also again recommended that he consider epilepsy surgery.

On September 2, 2008, Sarieh again asked Heck to complete the DMV evaluation form so that he could have his license reinstated, and Heck did so. Sarieh told her that he had been seizure free since November 2007, which he attributed to his improved compliance with his medication requirements. Sarieh agreed to remain compliant with his medication requirements in order to be allowed to drive again. In the form, Heck reported that Sarieh suffered from epileptic seizures, had epilepsy surgery, continued to take medications, and last had a seizure in November 2007. She reported Sarieh's prognosis as good and his condition as stable and opined that his medical condition did not affect safe driving, so long as he took the prescribed medication.

On October 22, 2008, the DMV interviewed Sarieh to determine whether to reinstate his license, which had been suspended on November 24, 2007. The DMV hearing officer relied on the evaluation form completed by Heck and noted that Heck had indicated that "everything is good" and had cleared Sarieh to drive. Sarieh told the officer that he was not having [\*\*\*6] any complications from seizures. The officer decided to lift the suspension of Sarieh's license, and this was done.

On November 15, 2008, around 10:15 a.m., Sarieh was driving to a pharmacy to pick up medication for his stomach. He had a seizure, lost consciousness, and lost control of his car, hitting appellants. Appellants suffered serious injuries, "including bilateral traumatic amputation of Mr. Wang's legs, and a compound ankle fracture and traumatic brain injury to Mrs. Wang." Sarieh had not taken his seizure medication the night before the accident.

Appellants filed a complaint against Sariéh, respondents, and the DMV, for negligence, medical negligence, and government tort liability.

Respondents filed a motion for summary judgment. In support, respondents filed a declaration by Heck in which she stated that when she completed the DMV evaluation form, she believed Sariéh had not had a seizure since November 2007, and she relied on his statement that his seizures were under control and that he was taking the prescribed medication. Respondents also filed an expert declaration by Dr. Robert Fisher, who opined that Heck's recommendation that Sariéh could drive was appropriate, based [\*\*\*7] on Sariéh's statement [\*\*336] that he had been free of seizures for 10 months. [\*682]

The operative pleading is appellants' second amended complaint (the complaint), filed in May 2010, alleging medical negligence by respondents.<sup>3</sup> The complaint alleges that on September 2, 2008, Heck "negligently evaluated [Sariéh] and negligently concluded that he did not have any medical conditions that affect safe driving. The [DMV] relied on that medical evaluation in reinstating [Sariéh's] driver's license." The complaint further alleges that, prior to September 2, 2008, Heck "so negligently failed to exercise the proper degree of knowledge and skill in examining, diagnosing, treating, operating and caring for [Sariéh] that [Sariéh] was allowed to operate a motor vehicle and collide with [appellants] which caused [appellants] to suffer the injuries and damages hereinafter alleged. Specifically, [respondents] negligently evaluated [Sariéh] and negligently deemed him fit to operate a vehicle safely."

3 Appellants' first and third causes of action, negligence by Sariéh and government tort liability against the DMV, are not pertinent to this appeal.

In opposition to the summary judgment motion, appellants filed an expert [\*\*\*8] declaration by Dr. Ronald Fisk, a neurologist with expertise in epilepsy. Fisk reviewed all of Sariéh's medical, pharmacy, and dental records, as well as his DMV file, the depositions of Sariéh and Heck, and the declarations of Heck and Fisher. Fisk concluded that Heck's decision to approve the reinstatement of Sariéh's driving privileges fell below the applicable standard of care. In support of his conclusion, Fisk pointed out that Heck was aware of the following when she completed the DMV form:

neuropsychological tests of Sariéh indicated his IQ was between 71 and 76, which is below the average range; Sariéh had a poor record of compliance with his medication requirements, and Heck had not obtained a lab test to monitor his compliance since November 2007, even though Heck had obtained lab reports approximately every four months prior to November 2007; Sariéh was very anxious to resume driving and knew he could do so only if he reported being free of seizures; Sariéh's experimental surgery was not successful, and Sariéh did not want to undergo the standard epilepsy surgery.

The trial court granted respondents' summary judgment motion on the ground that the suit was barred by the litigation [\*\*\*9] privilege found in *section 47(b)*. The court reasoned that the complaint was based on the DMV evaluation form Heck completed in September 2008, which the court found to be a privileged communication pursuant to the statute, and that treatment prior to the September 2008 form was privileged because it was performed in anticipation of the DMV hearing. The court thus found that appellants had presented no triable issue of material fact, granted summary judgment in favor of respondents, and entered judgment in their favor. Appellants filed a timely notice of appeal. [\*683]

## DISCUSSION

Appellants contend that the trial court erred in finding that they had presented no triable issue of material fact, relying on the declaration of Fisk that they submitted in opposition to summary judgment. They further contend that the trial court erred in finding their suit barred by the litigation privilege. Appellants argue that Heck's negligent conduct was her failure to warn Sariéh not to drive, which was independent of her completion of the DMV evaluation form, and that this conduct was not a communication within the meaning of *section 47(b)*.

[\*\*337] We review the trial court's grant of summary judgment de novo, "viewing [\*\*\*10] the evidence in a light favorable to the plaintiff as the losing party, liberally construing the plaintiff's evidentiary submission while strictly scrutinizing the defendant's own showing, and resolving any evidentiary doubts or ambiguities in the plaintiff's favor. [Citation.]" (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1438 [50 Cal. Rptr. 3d 71].) "A defendant moving for summary [judgment] meets its burden of showing that there is no merit to a cause of action if that party has shown that one

or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (*Code Civ. Proc.*, § 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of her pleadings, 'but, instead, shall set forth the specific facts showing that a triable issue of material fact exists ... .' (*Code Civ. Proc.*, § 437c, subd. (p)(2).)" (*Bisno v. Douglas Emmett Realty Fund* 1988 (2009) 174 Cal.App.4th 1534, 1542-1543 [95 Cal. Rptr. 3d 492].) " '[A]ny doubts as to the propriety of granting the motion' [\*\*\*11] are resolved in the opponent's favor.' [Citation.]" (*Smith v. Freund* (2011) 192 Cal.App.4th 466, 471 [121 Cal. Rptr. 3d 427].)

(1) "The litigation privilege, codified at *Civil Code* section 47, subdivision (b), provides that a 'publication or broadcast' made as part of a 'judicial proceeding' is privileged. ... 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action.' [Citation.] The privilege 'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.' [Citation.] [¶] 'The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]' [Citation.]" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 [63 Cal. Rptr. 3d 398, 163 P.3d 89] (*Action Apartment*).) [\*684]

The litigation privilege "exists to protect citizens from the threat of litigation for communications [\*\*\*12] to government agencies whose function it is to investigate and remedy wrongdoing. [Citation.]' [Citation.]" (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 958 [70 Cal. Rptr. 3d 501] (*Gallegos*).) The phrase "judicial or quasi-judicial proceedings" has been "defined broadly to include 'all kinds of truth-seeking proceedings,' including administrative, legislative and other official proceedings. [Citation.]" (*Ibid.*) "The interpretation of section 47, subdivision (b) is a pure question of law which we review independently. [Citations.]" (*Rothman v. Jackson* (1996) 49 Cal.App.4th

1134, 1139-1140 [57 Cal. Rptr. 2d 284].) "The litigation privilege is broadly applied [citation] and doubts are resolved in favor of the privilege [citation]." (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 500 [60 Cal. Rptr. 3d 11] (*Ramalingam*).)

The trial court here reasoned that the September 2, 2008 DMV evaluation form fell within the meaning of section 47(b) because it was prepared "for use in a quasi-judicial setting by a government agency for purposes of evaluation of the driving status of defendant, Amr Sarieh." The court further reasoned that any allegations [\*\*\*338] in the complaint based on Heck's treatment of Sarieh prior to September 2, 2008, [\*\*\*13] were barred because Heck's treatment prior to that date constituted statements preliminary to or in anticipation of the DMV hearing.

We conclude that the litigation privilege applies to Heck's September 2, 2008 communication to the DMV. None of appellants' causes of action can stand without relying on Heck's completion of the DMV medical evaluation form. We therefore conclude that all of appellants' causes of action are barred by the litigation privilege and that appellants accordingly have failed to present a triable issue of material fact.

In *Gootee v. Lightner* (1990) 224 Cal.App.3d 587 [274 Cal. Rptr. 697] (*Gootee*), the appellant sued the respondents for professional negligence after the respondents performed psychological testing on the appellant's family in order to testify in child custody proceedings. The appellant contended that the respondents had been negligent in performing the testing and had destroyed some data. The trial court granted summary judgment in favor of the respondents based on its conclusion that their conduct in performing the testing fell within the litigation privilege of Civil Code former section 47, subdivision 2, now section 47(b)(1).<sup>4</sup> On appeal, the court affirmed, holding [\*\*\*14] that the privilege applied to the respondents' conduct because "the gravamen of appellant's claim relies on negligent or intentional tortious conduct [\*685] committed by respondents in connection with the testimonial function ... ." (224 Cal.App.3d at p. 591.) The court reasoned that "[f]reedom of access to the courts and encouragement of witnesses to testify truthfully will be harmed if neutral experts must fear retaliatory lawsuits from litigants whose disagreement with an expert's opinions perforce convinces them the expert must have been negligent in

forming such opinions." (*Id.* at p. 593.)

4 *Gootee* addressed the litigation privilege as it applied to communications made in connection with divorce proceedings. The principles articulated in *Gootee* regarding the litigation privilege apply to the instant case.

Similar to the respondents in *Gootee*, Heck was a professional whose role as to the DMV hearing was limited to evaluating Sarieh's fitness for driving. (See *Gootee*, *supra*, 224 Cal.App.3d at p. 591 [noting that it was undisputed that the respondents' role was limited to "evaluat[ing] the partisans in the custody matter for purposes of testifying concerning the custody dispute".]) Although Heck did not complete [\*\*\*15] the DMV evaluation form for purposes of testifying in judicial proceedings, the form was used in the DMV hearing in order for the DMV hearing officer to determine whether to reinstate Sarieh's license. Thus, the form was used in an administrative proceeding, which is a " 'truth-seeking proceeding[]' " for purposes of applying the litigation privilege. (*Gallegos*, *supra*, 158 Cal.App.4th at p. 958.)

There is no question that Heck was a participant authorized by law to complete the DMV evaluation form and that the form was completed in order to achieve the object of the DMV hearing--that is, to determine Sarieh's fitness for driving. (See *Action Apartment*, *supra*, 41 Cal.4th at p. 1241 [listing the requirements for application of the litigation privilege].) Because Sarieh's license had been suspended, he needed Heck to complete the evaluation form in order for the DMV to determine whether the license should be reinstated. There can be no dispute that the form had " 'some connection or logical relation' " to [\*\*\*339] the DMV hearing. (*Ibid.*) All four requirements of the litigation privilege accordingly are satisfied.

(2) Appellants attempt to avoid the application of the litigation privilege by arguing that [\*\*\*16] it was not merely Heck's completion of the DMV medical evaluation form, but her treatment of Sarieh prior to September 2, 2008, and her failure to warn Sarieh not to drive that constituted medical negligence. However, "the protective mantle of the privilege embraces not only the courtroom testimony of witnesses, but also protects prior preparatory activity leading to the witnesses' testimony." (*Gootee*, *supra*, 224 Cal.App.3d at p. 594.)

In *Block v. Sacramento Clinical Labs, Inc.* (1982)

131 Cal.App.3d 386 [182 Cal. Rptr. 438] (*Block*), the defendant toxicologist erroneously calculated and informed the district attorney's office of the amount of baby aspirin found in the plaintiff's deceased baby daughter, leading to murder charges against the plaintiff. After the error was discovered and the charges were dismissed, the [\*686] plaintiff sued the toxicologist for professional negligence. The toxicologist asserted the litigation privilege. The plaintiff "attempted to avoid the privilege by arguing that recovery was sought based on defendant's *negligent conduct in reaching his conclusions*, rather than on the testimony itself." (*Gootee*, *supra*, 224 Cal.App.3d at p. 594.) This argument was rejected because, "[o]n any cognizable [\*\*\*17] theory of duty, the negligent calculation formed the basis of [defendant's] communication and was privileged [citation].' [Citation.]" (*Ibid.*)

(3) Similarly here, appellants argue that their claims are based on Heck's negligent conduct in reaching her conclusion that it was safe for Sarieh to drive, rather than on the conclusion itself. However, it is clear that Heck's conduct prior to completing the September 2, 2008 DMV evaluation form was the basis of her communication in completing the form. Although appellants attempt to characterize their claim as medical negligence by Heck for failing to warn Sarieh not to drive, the basis of their complaint is Heck's statement on the DMV medical evaluation form that Sarieh could drive safely. Because "[t]he offending conduct alleged by appellant[s] occurred during and as part of the preparatory activities which were directed toward and done in contemplation of" determining Sarieh's fitness to drive, this case "falls squarely within the rationale of [*Gootee*] and *Block*." (*Gootee*, *supra*, 224 Cal.App.3d at p. 595.)

(4) Moreover, " '[i]f the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related [\*\*\*18] to the communicative conduct ... . [Citations.]' [Citations.] To show that the litigation privilege does not apply, the plaintiff must demonstrate that 'an independent, noncommunicative, wrongful act was the gravamen of the action ... .' [Citation.]" (*Ramalingam*, *supra*, 151 Cal.App.4th at p. 503.) Here, the gravamen of the action was Heck's completion of the DMV evaluation form on September 2, 2008. Although the complaint alleges that Heck negligently cared for Sarieh prior to September 2, 2008, the complaint is clear that the allegedly negligent act that caused the injury was

allowing Sariah to drive. Appellants have not demonstrated that there was any wrongful act independent of Heck's completion of the DMV evaluation form. Heck's noncommunicative conduct prior to completing the DMV evaluation form on September 2, 2008, was necessarily related to the form itself. Thus, the litigation privilege extends to her conduct in deciding to complete the form.

[\*\*340] "Any doubt about whether the privilege applies is resolved in favor of applying it." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913 [120 Cal. Rptr. 2d 576].) Although "the litigation privilege has its costs, " [I]t is desirable to create an absolute privilege [\*\*\*19] ... not because we desire to protect [\*687] the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative]

actions ... ." ' [Citation.]" (*Gallegos, supra*, 158 Cal.App.4th at p. 963.)

Because we conclude that all of the conduct relied upon by appellants in the complaint falls within the litigation privilege, we need not address appellants' arguments that they established a triable issue of material fact as to Heck's conduct prior to September 2, 2008. The trial court did not err in granting summary judgment in favor of respondents.

#### **DISPOSITION**

The judgment is affirmed. Respondents shall recover their costs on appeal.

Epstein, P. J., and Suzukawa, J., concurred.



**COUNTY OF ORANGE et al., Petitioners, v. THE SUPERIOR COURT OF  
ORANGE COUNTY, Respondent; FEILONG WU et al., Real Parties in Interest.**

**No. G023138.**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION THREE**

*79 Cal. App. 4th 759; 94 Cal. Rptr. 2d 261; 2000 Cal. App. LEXIS 243; 2000 Cal. Daily  
Op. Service 2562; 2000 Daily Journal DAR 3395*

**March 30, 2000, Decided**

**PRIOR HISTORY:** [\*\*\*1] Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of California, County of Orange. Super. Ct. No. 779098. Sheila B. Fell, Temporary Judge. \*

\* Pursuant to *California Constitution, article VI, section 21*.

**DISPOSITION:** Let a peremptory writ of mandate issue directing the trial court to vacate its order compelling the production of the investigative file and reconsider in light of the views expressed above. Should the court withhold discovery of the entire investigative file, it shall reconsider the matter at reasonable intervals at plaintiffs' request and continue in that fashion until such time as it may conclude that the Wus' interest in disclosure outweighs any further public interest in retaining the entire file in confidence. When discovery is permitted, it shall be limited to those documents reasonably necessary to plaintiffs' prosecution of their action. The alternative writ is discharged. Each side shall bear its own costs in this proceeding.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

Parents of a murdered child brought an action for defamation, conversion, spoliation of evidence, and various civil rights violations against a county and the sheriff's department, arising from the criminal investigation, including the parents' initial detention and questioning. The parents had reported the child's disappearance and he was discovered, suffocated, in a nearby ravine. The parents had not been charged with the crime, which remained unsolved, but newspapers had reported that they were suspects. Plaintiffs served a discovery request for production of the entire criminal investigative file. The trial court ordered production of the file to the parents' counsel, subject to a protective order that allowed the parents to review the documents if their attorney found it necessary, but prohibited anyone else from examining them without a court order. (Superior Court of Orange County, No. 779098, Sheila B. Fell, Temporary Judge. +)

+ Pursuant to *California Constitution, article VI, section 21*.

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its order and to reconsider that order. The court held that the trial court abused its discretion, since the entire file was confidential and subject to the official information privilege (*Evid. Code, § 1040*), and the public's interest in solving the child's homicide and bringing the perpetrator to justice

outweighed plaintiffs' interest in obtaining the discovery at the time they made their request. Even though at some future point the risk to the investigation from releasing confidential information might no longer be a compelling concern, the appropriate remedy in this case was for the trial court to stay discovery and, if necessary, the entire civil action, to allow the sheriff's department the necessary time to investigate. (Opinion by Crosby, J., with Sills, P. J., and Rylaarsdam, J., concurring.)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

#### **(1a) (1b) Discovery and Depositions § 34--Protections Against Improper Discovery--Official Information Privilege--Trial Court Discretion--Weighing Competing Interests.**

-- --The official information privilege (*Evid. Code*, § 1040) is conditional. Application of the privilege involves the always imprecise art of weighing competing interests. The weighing procedure entails a separate assessment of the necessity for disclosure in the interest of justice and the necessity for preserving the confidentiality of the subject information. Implicit in each assessment is a consideration of consequences: the consequences to the litigant of nondisclosure and the consequences to the public of disclosure. The consideration of consequences to the litigant will involve matters similar to those in issue in the determination of materiality and good cause in the context of *Code Civ. Proc.*, § 1985, including the importance of the material sought to the fair presentation of the litigant's case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of such other means. The consideration of the consequences of disclosure to the public will involve matters relative to the effect of disclosure upon the integrity of public processes and procedures.

#### **(2a) (2b) Discovery and Depositions § 34--Official Information Privilege--Civil Action by Parents Suspected of Child's Murder--Request for Entire Criminal Investigative File.**

-- --In an action for defamation, conversion, spoliation of evidence, and various civil rights violations brought by parents of a murdered child against a county and the sheriff's department, arising from the criminal investigation of the unsolved homicide, in which the parents were uncharged but subject to media reports that they were suspects, the

trial court abused its discretion in granting plaintiffs' discovery request for production of the entire criminal investigative file. The entire file was confidential and subject to the official information privilege (*Evid. Code*, § 1040). Further, the public's interest in solving the child's homicide and bringing the perpetrator to justice outweighed plaintiffs' interest in obtaining the discovery at the time they made their request. The powerful public interest in solving homicides and bringing killers to justice is at risk if confidential information about a homicide investigation is released to suspects, and witnesses will be fearful of providing incriminating information to police investigators if their statements may be disclosed to suspects who are still at large. Even though at some future point the risk to the investigation from releasing confidential information might no longer be a compelling concern, the appropriate remedy in this case was for the trial court to stay discovery and, if necessary, the entire civil action, to allow the sheriff's department the necessary time to investigate.

[See 2 Witkin, *Cal. Evidence* (3d ed. 1986) § 1240.]

**COUNSEL:** Franscell, Strickland, Roberts & Lawrence, Tracy Strickland, Priscilla F. Slocum and Cindy S. Lee for Petitioners.

Thomas F. Casey III, County Counsel, and [\*\*\*2] Miguel A. Marquez, Deputy County Counsel, for California State Association of Counties and County of San Mateo as Amici Curiae on behalf of Petitioners.

Mayer, Coble & Palmer, Martin J. Mayer and J. Scott Tiedemann for California State Sheriffs Association, California Police Chiefs Association and California Peace Officers Association as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Jeffrey Wilens for Real Parties in Interest.

**JUDGES:** Opinion by Crosby, J., with Sills, P. J., and Rylaarsdam, J., concurring.

**OPINION BY: CROSBY**

**OPINION**

[\*761] [\*\*262] **CROSBY, J.**

The County of Orange, its sheriff, and various employees of the sheriff's department (collectively, the County) seek extraordinary relief from an order allowing suspects in an ongoing criminal investigation to review the contents of the investigative file through the medium of civil discovery. The County argues the trial court abused its discretion in granting discovery of the file at this time. The County asserts the court should have stayed the civil action for a reasonable period to allow authorities to complete the investigation before having to divulge information that could [\*\*\*3] compromise the investigation and derail a potential prosecution. We agree that the court erred in the breadth and timing of the discovery order and grant the writ requested, subject to specific limitations discussed below.

## I

On the morning of August 12, 1996, Edith Marie and Feilong Wu reported the disappearance of Edith's two-year-old son, C. T. Turner. The Wus [\*762] claimed C. T. had either walked out of or been abducted from the family's Mission Viejo home. A large search party of volunteers and military personnel did not find the child that day. The next morning, Orange County Sheriff's Department investigators questioned the Wus. That afternoon the boy's body was discovered under leaves and other debris in a ravine near their home. An autopsy determined the cause of death was suffocation.

To date the homicide remains unsolved. But according to the Wus, in several newspaper reports, sheriff's department representatives have publicly indicated they are suspects.

On May 13, 1997, the Wus filed this action for defamation, conversion, spoliation of evidence, and various civil rights violations related to the sheriff's department's investigation, including their initial [\*\*\*4] [\*\*263] detention and questioning. The Wus claim "they were lured to the police station on false pretenses and then held against their will and subjected to lengthy and aggressive interrogations, during which they were not free to leave," all without benefit of *Miranda* warnings. ( *Miranda v. Arizona* (1966) 384 U.S. 436.)

With respect to their defamation claim, the Wus assert sheriff's department representatives publicly identified them in four news accounts (and in an additional conversation with a local attorney) alternately as "among the suspects," the sole remaining suspects, and

the "focus of the investigation." Each statement "was equivalent to an accusation plaintiffs killed C. T., which is false."

Plaintiffs also allege deputies searched their home pursuant to an invalid search warrant obtained by submitting a false and misleading affidavit to the magistrate. While searching the Wus' home pursuant to the invalid warrant, deputies wrongfully seized certain immigration documents belonging to Feilong Wu that he needed to apply for a green card and work permit. The County refused to return these documents, leading to loss of employment opportunities for [\*\*\*5] Feilong Wu.

Three days after the complaint was served, on May 28, 1997, the Wus served a request for production, specifying 25 categories of documents and other items. In effect, they requested the sheriff's entire investigative file relating to C. T.'s murder. For example, they sought production of "[a]ll documents generated by any police agency relating to the death of C. T. Turner . . .," including their own statements, autopsy reports, scientific testing, descriptions of physical evidence, and witness statements.

The County refused to produce any of the requested items on the ground that the investigative file is protected by the official information privilege. [\*763] ( *Evid. Code*, § 1040, *subd. (b)(2)*.)<sup>1</sup> The Wus moved to compel production. The superior court conducted an in camera review of the investigative file and an in camera hearing on the applicability of the privilege.<sup>2</sup> After taking the matter under submission, the court ruled on March 24, 1998, that the County "failed to meet [its] burden under *Evidence Code [section 1040]*" and ordered production of all requested documents to the Wus' counsel, subject [\*\*\*6] to a protective order. This protective order allows the Wus to review the documents if their attorney "finds it necessary," but prohibits anyone else from examining them or otherwise learning of their contents absent a court order.

1 All further statutory references are to the Evidence Code unless otherwise indicated.

2 We have declined to examine the file to avoid compromising the investigation. We do not need to look at it to understand, for example, that it contains details only the killer(s) would know. The more people who are aware of those details the less weighty would be any future confession or slip of the tongue by a suspect and the more

likely that such information might end up in unauthorized hands or the press. And any effort we might make to describe the fruits of the investigation to date would simply provide potentially useful information to the perpetrator(s).

This is not to say that we would *never* review the file in assessing a lower court ruling. That time may come. But for now we find disclosure was premature in any event and, thus, there was no reason to examine the file in this proceeding.

[\*\*7] The County sought writ relief and a stay. We stayed the order and issued an alternative writ.

## II

(1a) The official information privilege set forth in *section 1040, subdivision (b)(2)* applies to "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (§ 1040, *subd. (a)*.) The privilege is conditional and attaches only if "the court determines, in accordance with precise statutory standards, that disclosure is against the public interest . . ." (*Shepherd v. Superior Court* [\*\*264] *Court* (1976) 17 Cal. 3d 107, 123 [130 Cal. Rptr. 257, 550 P.2d 161].)

The Supreme Court may have exaggerated a bit in referring to "precise statutory standards." The statute states only that disclosure is against the public interest where "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . ." (§ 1040, *subd. (b)(2)*.) In other words, application of the [\*\*8] privilege involves the always imprecise art of weighing competing interests.

(2a) Before we take up the trial court's exercise of discretion in weighing the interests here, we must first consider the Wus' argument that much of [\*764] the information contained in the investigative file was not "acquired in confidence" and is thus not privileged. (§ 1040, *subd. (a)*.) They argue, for example, their own statements to the police, as well as statements made by other witnesses, were not acquired in confidence. Similarly, they argue that photos, sketches, and police reports concerning the crime scene were not acquired in confidence because the scene itself was "a ravine open to

the public."

The Wus' emphasis on the manner in which the file's contents were gathered misses the point. Viewed individually, many of the pieces of information in the file may not have been "acquired in confidence" in the literal sense of that term. But the logic of the Wus' argument does not withstand close scrutiny. Simply because the public may observe the police gathering evidence at a crime scene, or interviewing witnesses, it does not follow that the information obtained is public.

Evidence gathered by [\*\*9] police as part of an ongoing criminal investigation is by its nature confidential. This notion finds expression in both case and statutory law. For example, in *People v. Otte* (1989) 214 Cal. App. 3d 1522 [263 Cal. Rptr. 393], the court made the following observation concerning the confidentiality of criminal investigative files in the course of interpreting the section 1041 privilege as to confidential informants: " 'Communications are made to an officer in official confidence when the investigation is of such a type that disclosure of the investigation would cause the public interest to suffer. An apt illustration of this situation is the investigation of a crime by police officers. [Citations.] It is not only where a witness requests that his statement be kept in confidence, but in all cases of crime investigation that the record and reports are privileged.' ( *Jessup v. Superior Court* (1957) 151 Cal. App. 2d 102, 108 [311 P.2d 177].)" ( *People v. Otte, supra*, 214 Cal. App. 3d at p. 1532; see also *Rivero v. Superior Court* (1997) 54 Cal. App. 4th 1048, 1058-1059 [63 Cal. Rptr. 2d 213] [\*\*10] [confidentiality of criminal investigations must be maintained so that potential witnesses come forward]; *People v. Wilkins* (1955) 135 Cal. App. 2d 371, 377 [287 P.2d 555]; *People v. Pearson* (1952) 111 Cal. App. 2d 9, 18, 24 [244 P.2d 35].)

The Information Practices Act of 1977 (*Civ. Code*, § 1798 *et seq.*) protects information compiled by law enforcement agencies for the purpose of investigating criminal activities, including reports of informants and investigators. (*Civ. Code*, § 1798.40, 1798.41.) Similarly, *Penal Code section 11107*, which states the obligation of each sheriff or police chief to report crime data to the Department of Justice, specifically recognizes the confidential nature of criminal investigations. That statute includes the proviso that "[t]he Attorney General may also require that the report shall indicate [\*765]

79 Cal. App. 4th 759, \*765; 94 Cal. Rptr. 2d 261, \*\*264;  
2000 Cal. App. LEXIS 243, \*\*\*10; 2000 Cal. Daily Op. Service 2562

whether or not the submitting [\*\*\*11] agency considers the information to be confidential because it was compiled for the purpose of a criminal investigation of suspected criminal activities." (*Pen. Code*, § 11107.)

The Public Records Act (*Gov. Code*, § 6250 *et seq.*) includes a specific exemption from disclosure for law enforcement investigative files. This exemption permits the state to withhold "[r]ecords of . . . [\*\*265] investigations conducted by, or records of intelligence information or security procedures of . . . any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency . . . for correctional, law enforcement or licensing purposes . . . ." (*Gov. Code*, § 6254, *subd. (f).*)

In *Williams v. Superior Court* (1993) 5 Cal. 4th 337 [19 Cal. Rptr. 2d 882, 852 P.2d 377], the Supreme Court interpreted the scope of this Public Records Act exemption for police investigative files. The court held that [\*\*\*12] once an investigation has begun, all materials that relate to the investigation and are thus properly included in the file remain exempt from disclosure indefinitely. (*Id. at pp. 355, 361-362.*) Significantly, the court noted that the exemption "protects materials that, while not on their face exempt from disclosure, nevertheless become exempt through inclusion in an investigatory file." (*Id. at p. 354.*) Though the provisions of the Public Records Act are inapplicable to civil discovery proceedings (*Gov. Code*, § 6260), the act's express exemption of police investigative files from disclosure reinforces the view that such files are confidential in nature.

Given the broadly recognized confidentiality of investigative files, we find no need to separately analyze the manner in which each element of the file was obtained for application of the official information privilege. Instead, we conclude that the contents of police investigative files sought in civil discovery must remain confidential so long as the need for confidentiality outweighs [\*\*\*13] the benefits of disclosure in any particular case. (§ 1040, *subd. (b)(2).*) We thus proceed to that inquiry.

### III

(1b) In *Shepherd v. Superior Court*, *supra*, 17 Cal. 3d 107, the court advised that the "weighing procedure will entail a separate assessment of the 'necessity for disclosure in the interest of justice' and the 'necessity for

preserving the confidentiality [of the subject information.] [P] Implicit in each assessment is a consideration of consequences--i.e., the consequences to the litigant of nondisclosure, and the consequences to the public of disclosure. The consideration of consequences to the litigant will involve [\*766] matters similar to those in issue in the determination of materiality and good cause in the context of *Code of Civil Procedure section 1985*, including the importance of the material sought to the fair presentation of the litigant's case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of such other means. The consideration of the consequences of disclosure to the public will involve matters relative to the effect of disclosure upon [\*\*\*14] the integrity of public processes and procedures . . . ." (*Id. at p. 126*, *fn. omitted.*)

(2b) For its part, the County paints a compelling picture of the dire consequences that could result from the disclosure of the contents of an investigative file to the suspects in a possible murder. The County invokes the powerful public interest in solving homicides and bringing killers to justice. Undoubtedly, that interest is at risk if confidential information about the homicide investigation is released to suspects. There is an obvious danger that they may learn crucial information that would enable them to avoid apprehension. More specifically, permitting suspects to review materials in an investigative file "will enable them to invent stories, explain away evidence thus far gathered, and intimidate or otherwise influence potential witnesses."

The County and amici curiae also argue that witnesses will be fearful of providing incriminating information to police investigators if their statements may be disclosed to suspects, while the suspects are still at large. In *Daily Journal Corp. v. Superior Court* (1999) 20 Cal. 4th 1117 [86 Cal. [\*\*266] Rptr. 2d 623, 979 P.2d 982], [\*\*\*15] our Supreme Court cited similar concerns in affirming the importance of preserving the secrecy of grand jury proceedings that have concluded without indictment. The court observed, "In the absence of an indictment, without the protections of the court process, the innocently accused and even witnesses are more vulnerable to a risk of adverse consequences ranging from reputational injury to retaliation." (*Id. at p. 1132.*) There is also the concern that disclosure will encourage frivolous lawsuits by providing suspects with a tool to avoid criminal prosecution.

The Wus counter with the premise that they are the innocent victims of police misconduct and their civil case is an attempt to expose that misconduct. They champion the significant interest of civil litigants in having their day in court, particularly where, as here, claims of civil rights violations and defamation are at stake. The Wus argue they have a compelling need for the requested information from the investigative file to prove their case against the County and discount law enforcement's need to withhold the information.

The Wus also assert active investigation stopped by January of 1997, and there [\*\*\*16] is no longer police activity concerning the homicide. They claim the [\*767] sheriff's department, by its own admission, has exhausted all leads. As a consequence, they argue the investigation has hit a dead end and there is no need to maintain the confidentiality of the sheriff's file.

The County responds that there is no limitations period for murder. (*Pen. Code*, § 799.) Homicide cases remain open until they are solved, which sometimes occurs years after the crime with the help of new technology (e.g., DNA) or witnesses who become willing to provide new information because of some change of circumstances or because they no longer feel threatened by the suspect. The investigators remain hopeful for a break in the case. It is approaching four years since C. T.'s death, but an investigation of that length is common enough.

The Wus argue *Rider v. Superior Court* (1988) 199 Cal. App. 3d 278 [244 Cal. Rptr. 770] supports their claim to discovery of the investigative file. *Rider* involved a defamation action filed by a man against his former employer for allegedly falsely accusing him of raping the employer's minor daughter. At [\*\*\*17] issue in *Rider* was whether the girl's statements to the police concerning the alleged rape were discoverable by the plaintiff. The court held they were: "[A] plaintiff in a defamation action who claims he was wrongfully accused of rape is entitled to the same discovery as a defendant accused of rape in a criminal action." (*Id.* at p. 281.)

The *Rider* decision is not dispositive. The police in *Rider* objected to production of their notes of the girl's interview to protect her privacy. (199 Cal. App. 3d at pp. 282-283.) While certainly important, a rape victim's privacy interest is not as weighty a concern as the need to apprehend and convict a child killer. *Rider* was correctly decided, we think, but it is not this case.

We conclude on the record before us that the public interest in solving C. T. Turner's homicide and bringing the perpetrator(s) to justice outweighed the Wus' interest in obtaining the discovery sought, at least at the time this matter was considered below. We recognize the rather arbitrary nature of this conclusion, but the order we review was made less than a year after this civil action was filed. (And it is still less [\*\*\*18] than three years since it was filed.) When one reflects that the lives of other children may be at risk with the killer(s) still at large, the important interests in vindicating wronged plaintiffs and clearing dockets do not seem quite so important. Consequently, we find the superior court abused its discretion in ordering production of the investigative file to the Wus' attorney. And, parenthetically, we [\*768] [\*\*267] think that most reasonable parents in the Wus' position would concur that the interest in apprehending a child's killer must continue to take priority over any civil action of theirs.

This is not to say, however, that the Wus can never obtain the requested discovery. Law enforcement investigative files are not on equal footing with grand jury proceedings, which, except in very limited circumstances, remain forever secret where no indictment is returned. (Compare *Daily Journal Corp. v. Superior Court*, *supra*, 20 Cal. 4th at pp. 1127-1128 [only under three narrow exceptions will grand jury proceedings be made public] with *Swanner v. United States* (5th Cir. 1969) 406 F.2d 716, 719 ["while pendency of a criminal investigation [\*\*\*19] is a reason for denying discovery of investigative reports, this privilege would not apply indefinitely"] and *Jabara v. Kelley* (E.D.Mich. 1977) 75 F.R.D. 475, 493-494 [the qualified privilege to prevent disclosure expires after a reasonable time]; see also *Brown v. Thompson* (5th Cir. 1970) 430 F.2d 1214, 1215; *Kinoy v. Mitchell* (S.D.N.Y. 1975) 67 F.R.D. 1, 12; *Capitol Vending Co. v. Baker* (D.D.C. 1964) 35 F.R.D. 510, 591.)

The appropriate remedy in this case is for the trial court to stay discovery of investigative information in the civil action in order to allow the sheriff's department the necessary time to investigate. (*Pacers, Inc. v. Superior Court* (1984) 162 Cal. App. 3d 686, 690 [208 Cal. Rptr. 743].) And, should that become necessary, the trial court should stay the entire action in the interest of justice to avoid a potential statutory dismissal. (See *Code Civ. Proc.*, § 583.110 *et seq.*) We are cognizant of the Wus' concern that the County not be allowed to "immunize

[itself from] any lawsuit by the Wus forever simply [\*\*\*20] by keeping the case open." Our order is intended to preserve the confidentiality of the investigative file for some reasonable period of time, but not forever.<sup>3</sup>

3 At any time the Wus could request the trial court to lift a stay of the action and proceed to trial without discovery of the investigative file. Privilege issues certain to arise at trial would simply have to be dealt with as they might come up, including the knotty problem of the County attempting to rely on the investigative file in its defense.

In the future the trial court may determine that there has not been enough progress in the investigation to justify protecting most of the investigative file any longer. For example, the court may find the trail has grown cold and there is no reasonable probability the case will be solved. As noted above, we think it was simply to soon to have made that determination when the order under review was made. At that point the court may conclude the risk to the investigation from releasing confidential [\*\*\*21] information from the investigative file is no longer a compelling concern. Instead, the balance will have [\*769] swung in favor of giving the Wus *limited* access to that information in the file which may help develop their case against the County. In other words, with the passage of time, changing circumstances will inevitably reverse the balance of competing interests under *section 1040, subdivision (b)(2)*. (*Rubin v. City of Los Angeles* (1987) 190 Cal. App. 3d 560, 587 [235 Cal. Rptr. 516].)

What parts or how much of the file to disclose to the Wus is a question for the trial court.<sup>4</sup> The court will have to carefully assess the Wus' actual need for the information against the public's continuing need for confidentiality. That assessment must involve the requisite factors of "materiality [\*\*268] and good cause . . . including the importance of the material sought to the fair presentation of the litigant's case, [and] the availability of the material to the litigant by other means . . ." (*Shepherd v. Superior Court, supra*, 17 Cal. 3d at p. 126.) [\*\*\*22]<sup>5</sup>

4 Obviously, the file may contain sensitive information that should not be disclosed preindictment. Or there may be material relevant to the Wus' civil action that could possibly be safely confided to their attorney only subject to a

stringent protective order. In that event the trial court may choose to look for guidance from trade secret cases in fashioning a remedy that preserves confidentiality as much as possible. There will likely be relevant information that can be released without jeopardizing the investigation at all.

5 An evaluation of the legal sufficiency of the Wus' various causes of action will be relevant to the weighing of the Wus' need for the requested information. For example, as to the defamation claim, the court may consider whether the absolute privilege for acts in performance of official duty applies to a sheriff's department representative's act of discussing the status of a murder investigation. (See *Kilgore v. Younger* (1982) 30 Cal. 3d 770, 779 [180 Cal. Rptr. 657, 640 P.2d 793] [Attorney General performed "official duty" at press conference].) Along the same line, the court may consider whether the *Government Code section 821.6* absolute immunity for a public employee who causes injury by "instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause" encompasses the act of publicly naming someone as a suspect in an ongoing criminal investigation. (See *Baughman v. State of California* (1995) 38 Cal. App. 4th 182, 191-192 [45 Cal. Rptr. 2d 82], citing *Amylou R. v. County of Riverside* (1994) 28 Cal. App. 4th 1205, 1209-1210 [34 Cal. Rptr. 2d 319] [investigation is an essential step in instituting a judicial proceeding, so investigative acts are included in *Gov. Code, § 821.6* protection]; *Cappuccio, Inc. v. Harmon* (1989) 208 Cal. App. 3d 1496 [257 Cal. Rptr. 4] [issuing press release about prosecution is part of the judicial proceeding and thus included within the statutory immunity]; *Citizens Capital Corp. v. Spohn* (1982) 133 Cal. App. 3d 887 [184 Cal. Rptr. 269] [immunity under this statute extends to charges made in the press on investigations leading to license revocation proceedings].)

[\*\*\*23] Let a peremptory writ of mandate issue directing the trial court to vacate its order compelling the production of the investigative file and reconsider in light of the views expressed above. Should the court withhold discovery of the entire investigative file, it shall reconsider the matter at reasonable intervals at plaintiffs'

79 Cal. App. 4th 759, \*769; 94 Cal. Rptr. 2d 261, \*\*268;  
2000 Cal. App. LEXIS 243, \*\*\*23; 2000 Cal. Daily Op. Service 2562

request and continue in that fashion until such time as it may conclude that the Wus' interest in disclosure outweighs any further [\*770] public interest in retaining the entire file in confidence. When discovery is permitted, it shall be limited to those documents

reasonably necessary to plaintiffs' prosecution of their action. The alternative writ is discharged. Each side shall bear its own costs in this proceeding.

Sills, P. J., and Rylaarsdam, J., concurred.



**TONY RACKAUCKAS, as District Attorney, etc., Petitioner, v. THE SUPERIOR  
COURT OF ORANGE COUNTY, Respondent; LOS ANGELES TIMES  
COMMUNICATIONS, Real Party in Interest.**

**No. G030680.**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION THREE**

*104 Cal. App. 4th 169; 128 Cal. Rptr. 2d 234; 2002 Cal. App. LEXIS 5114; 31 Media L.  
Rep. 2521; 2002 Cal. Daily Op. Service 11861; 2002 Daily Journal DAR 13913*

**December 9, 2002, Decided  
December 9, 2002, Filed**

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Orange County, No. 02 CC03847, William M. Monroe, Judge.

its investigative file. (Superior Court of Orange County, No. 02CC03847, William M. Monroe, Judge.)

**DISPOSITION:** Let a peremptory writ of mandate issue directing respondent court to vacate its judgment of May 14, 2002, and its subsequent award of attorney fees to real party in interest, and to enter a new and different order denying real party in interest's petition for writ of mandate. The alternative writ is discharged. Petitioner is entitled to costs in this proceeding.

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its earlier judgment and enter a new order denying the newspaper's petition for writ of mandate. The court held that *Gov. Code § 6254, subd. (f)*, which provides a broad exemption from disclosure for investigative files, reflecting the thoughts, opinions, and conclusions of an investigating officer, is not limited merely to documents created before the conclusion of an investigation and does not terminate when an investigation ends. The nonpublic letter was directly related to the definite and concrete investigation of potential misconduct and was written to report the investigator's thoughts, opinions, and conclusions as part of the investigation. As such, it was exclusively related to the investigation, properly belonged in the investigatory file, and remained exempt from disclosure. (Opinion by O'Leary, J., with Sills, P. J., and Fybel, J., concurring.)

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court granted a newspaper a writ of mandate directing a county district attorney to release complete and unredacted copies of all of its records of investigation into a case of potential police misconduct generated on or after the date when the investigation was informally closed. The district attorney had released a public letter written by its investigators to the city police department at that time, but it claimed that a nonpublic letter written that same day was exempt from disclosure under *Gov. Code, § 6254, subd. (f)*, of the California Public Records Act (*Gov. Code, § 6250 et seq.*) as part of

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**  
Classified to California Digest of Official Reports

**(1) Records and Recording Laws § 12--Inspection of Public Records--California Public Records Act--Scope of Disclosure.** -- --The California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*) was enacted so the public could have full access to information concerning the working of the government in order to verify governmental accountability. Also important is the right to privacy of people named in government records. There is also a strong government interest in preventing and prosecuting criminal activity, whether street crime, white-collar crime, or governmental corruption. Accordingly, the CPRA contains exemptions for reasons of privacy, safety, and efficient governmental operations. An appellate court conducts de novo review of trial court rulings, but defers to the trial court's determination of any express or implied factual findings.

**(2) Records and Recording Laws § 14.2--Inspection of Public Records--California Public Records Act--Law Enforcement**

**Investigations--Exemption--Postinvestigation Report.**

-- --The trial court erred when it required a county district attorney to release to a newspaper the contents of an investigative file generated on or after the informal conclusion of an investigation into potential police misconduct, including a nonpublic letter written at that time containing an investigator's thoughts, opinions, and conclusions regarding the potential misconduct. Although the California Public Records Act (*Gov. Code, § 6250 et seq.*) authorizes public access to governmental information, *Gov. Code, § 6254, subd. (f)*, provides a broad exemption from disclosure for files reflecting the analysis of an investigating officer and one that does not require justification for secrecy on a case-by-case basis. Also, the exemption does not terminate when an investigation ends and is not limited merely to documents created before the conclusion of an investigation. Rather, where an expectation of law enforcement proceedings exists when an investigation begins, materials that relate to the investigation and properly belong in an investigatory file remain exempt from disclosure after the investigation ends. The nonpublic letter was directly related to the explicit investigation of a police officer, was exempt from disclosure on its face, and was written to report the investigator's thoughts, opinions, and conclusions. Its exemption was also supported by public policy considerations that encourage candid and frank closing reports of investigations that are unimpaired by concerns for appearances.

[See 2 Witkin, Cal. Evidence (4th ed. 2000), Witnesses, § 288 et seq.]

**(3) Records and Recording Laws § 14.2--Inspection of Public Records--California Public Records Act--Law Enforcement Investigations--Waiver of Exemption.** --

--By providing a nonpublic letter reporting the thoughts, opinions, and conclusions of an investigator regarding potential police misconduct to a city police department, a county district attorney did not waive the investigation exemption embodied in *Gov. Code, § 6254, subd. (f)*, of the California Public Records Act (*Gov. Code, § 6250 et seq.*). Although exemptions may be waived where an agency has disclosed a document to any member of the public (*Gov. Code, § 6254.5*), exemption from disclosure is not waived for interagency disclosures that are made confidentially under *Gov. Code, § 6254.5, subd. (e)*. In this matter, the district attorney provided the nonpublic letter to the police department with the understanding that it would remain confidential.

**COUNSEL:** Benjamin P. de Mayo, County Counsel, Marianne Van Riper, Nicole A. Sims and Amy E. Morgan, Deputy County Counsel, for Petitioner.

No appearance for Respondent.

Davis Wright Tremaine, Kelli L. Sager, Alonzo Wickers IV, Jean-Paul Jassy; and Karlene Goller for Real Party in Interest.

**JUDGES:** (Opinion by O'Leary, J., with Sills, P. J., and Fybel, J., concurring.)

**OPINION BY:** O'Leary

**OPINION**

**O'LEARY, [\*171] J.**

[\*\*235] We decline to rewrite the California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*)<sup>1</sup> to require the public dissemination of a postinvestigative closing report that contains the investigators' opinions, thoughts and conclusions regarding potential criminal misconduct.

<sup>1</sup> All further statutory references are to the Government Code unless otherwise indicated.

In September 2000, as a result of two separate incidents of alleged police misconduct involving Officer Edmund Kennedy, the Huntington Beach Police Department requested that the Orange County District Attorney initiate an investigation. This could result in the filing of criminal charges "if appropriate."

Ebrahim Baytieh, a deputy district attorney, conducted the investigation at the direction of Douglas Woodsmall, the supervisor of the Special [\*172] Assignments Unit of the Bureau of Investigation. On July 19, 2001, Baytieh wrote a public letter to the Huntington Beach Police Department stating that "we are of the opinion that there is a lack of sufficient evidence to support a filing of criminal charges against Officer Kennedy . . . . [P] Our decision is mainly based on the fact that we lack sufficient evidence to prove beyond a reasonable doubt that Officer Kennedy engaged in any criminal conduct." In the absence of a criminal filing, Baytieh concluded that "the Office of the District Attorney is closing its inquiry into the matter." The district attorney formally closed its inquiry on July 30, 2001.

In August 2001, the Los Angeles Times (Times) e-mailed a CPRA request for all [\*\*\*3] letters sent by the district attorney to the Huntington Beach Police Department regarding Officer Kennedy. Woodsmall produced the public letter from Baytieh, but asserted various CPRA exemptions to any other material in the investigative file, including the investigatory file privilege in *section 6254, subdivision (f)*, as well as attorney work product, confidentiality and privacy. In January 2002, the Times narrowed [\*\*236] its request to postinvestigation letters, but the district attorney still declined.

In March 2002, the Times filed a petition for writ of mandate to compel the district attorney to disclose "copies of all records generated by [the district attorney] regarding Officer Kennedy on or after July 19, 2001, i.e., after [the district attorney's] investigation of Officer Kennedy's alleged misconduct was complete . . . ."

In response to the trial court's query, the district attorney identified a nonpublic letter, also written on July 19, 2001, which was "arguably" covered by the Times' CPRA request. That letter was "generated" by the district attorney, dated July 19, 2001, and sent to the Huntington Beach Police Department in confidence.

The district attorney claimed that [\*\*\*4] this nonpublic letter was exempt from disclosure under *section 6254, subdivision (f)* as part of its investigative file. The district attorney usually prepares a closing report to the presenting police agency regarding its conclusions "[w]hen we have completed our review of police misconduct cases. . . ." Baytieh declared that he prepared the nonpublic letter "as part of" the investigation and that it contained "my legal opinions, thoughts, impressions and conclusions. That document is part of the District Attorney's investigatory file regarding Officer Kennedy." [\*173] Woodsmall declared that disclosure of the nonpublic letter would have a "chilling effect" on future police misconduct investigations. <sup>2</sup>

<sup>2</sup> The Times asserts that this nonpublic letter was "post-investigation correspondence," which was written "[l]ater that same day, July 19." There is no support in the record for this characterization. As the district attorney points out, we have no way of knowing which letter was drafted first, and the investigation was not *formally* closed until July 30, weeks later.

[\*\*\*5] A hearing was held on May 3, 2002. Neither side requested an in camera inspection. On May 14, 2002, the court issued a writ of mandate directing the district attorney to release to the Times "complete and unredacted copies of all records generated on or after July 19, 2001 by you regarding Huntington Beach Police Officer Ed Kennedy."

The district attorney sought extraordinary relief from this court. In June 2002, we issued an alternative writ of mandate directing the court to set aside its order or to show cause why a peremptory writ should not issue. The trial court has declined to set aside its order, and has awarded the Times \$ 11,000 in attorney fees.

## II

(1) Because open governments are a hallmark of a democratic society, the public should have full access to information concerning the working of the government " 'in order to verify accountability.' " (*California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 823 [108 Cal. Rptr. 2d 870].) The CPRA was enacted for this very purpose. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425-426 [121 Cal. Rptr. 2d 844, 49 P.3d 194].)

104 Cal. App. 4th 169, \*173; 128 Cal. Rptr. 2d 234, \*\*236;  
2002 Cal. App. LEXIS 5114, \*\*\*5; 31 Media L. Rep. 2521

This, however, is not the be-all and end-all of our analysis. Also important is the right to privacy [\*\*\*6] of people named in government records. (§ 6250 [declaring that the Legislature, in enacting the CPRA, is "mindful of the right of individuals to privacy"]; see *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1017 [88 Cal. Rptr. 2d 552] [barring newspaper's CPRA request for disclosure of names of individuals who complained to city about airport noise].) There additionally is a strong government interest in [\*\*237] preventing and prosecuting criminal activity, whether street crime, white-collar crime or governmental corruption. (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1064 [112 Cal. Rptr. 2d 80, 31 P.3d 760] [recognizing certain CPRA exemptions "for reasons of privacy, safety, and efficient governmental operation"].) We review de novo the trial court's ruling, but [\*174] defer to its determination of any express or implied factual findings. (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 173 [78 Cal. Rptr. 2d 847].)(2))

We are here concerned with the "broad" investigation exemption in section 6254, subdivision (f). (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 349 [19 Cal. Rptr. 2d 882, 852 P.2d 377].) It authorizes public agencies to withhold "[r]ecords of complaints to, or investigations [\*\*\*7] conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes . . . ." (§ 6254, subd. (f).) Subdivision (f) further provides that "nothing in this division shall require the disclosure of that portion of those investigative files that reflect the analysis or conclusion of the investigating officer." Unlike its federal analog, the CPRA does not require agency justification of the need for secrecy on a case-by-case basis. (*Williams v. Superior Court, supra*, 5 Cal.4th at p. 353.)<sup>3</sup>

3 Subdivision (f) does require disclosure of certain information derived from the arrest and other investigative records, but not the records themselves. (§ 6254, subd. (f)(2).)

[\*\*\*8] The investigation exemption does not

terminate when the investigation terminates. (*Williams v. Superior Court, supra*, 5 Cal.4th at pp. 354-355.) In *Williams*, a newspaper waited until after the completion of a criminal prosecution before requesting copies of criminal investigatory records concerning the conduct of sheriff's deputies during a drug raid. Although there were no pending criminal proceedings, the Supreme Court held that the section 6254, subdivision (f) exemption "does not terminate with the conclusion of the investigation. Once an investigation . . . has come into being because there is a concrete and definite prospect of enforcement proceedings at that time, materials that relate to the investigation and, thus, properly belong in the file, remain exempt subject to the terms of the statute." (*Id.* at pp. 361-362.)

In *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048 [63 Cal. Rptr. 2d 213], the San Francisco District Attorney investigated a local official for misuse of public funds, but decided not to prosecute and closed its files. A year later, one of the people who initiated the investigation filed a CPRA request for the closed files. Citing the investigation exemption, [\*\*\*9] *Rivero* refused to require disclosure, even though there was no showing of any [\*175] adverse impact upon witness cooperation or evidence destruction. The requester in *Rivero* raised the same policy arguments as does the Times regarding a sanitized investigation, a governmental cover-up, and the need for the public to understand why government officials escaped legal sanction. The court was unpersuaded: "We observe . . . that the Legislature has amended section 6254 more than once . . . but has not revised the statute to permit disclosure of closed investigation files. We [\*\*238] will not do what the Legislature has declined to do." (*Id.* at p. 1059, 63 Cal. Rptr. 2d 213.)

*Rivero* further noted that publicity-shy witnesses could be reluctant to come forward if they knew that sensitive information they provided potentially could be turned over. "Every effort must be made to ensure that investigators can gather all evidence that is available and legally obtainable." (*Rivero v. Superior Court, supra*, 54 Cal.App.4th at p. 1058.)

Recently, in *Haynie v. Superior Court, supra*, 26 Cal.4th 1061, the California Supreme Court rejected an attempt to further limit the investigation exemption. [\*\*\*10] *Haynie* involved a CPRA request for citizen reports and police radio calls following a "routine" police

stop of an African-American motorist based on mere suspicion of criminal conduct. (The neighbor's call that prompted the stop did not necessarily describe a crime, and no arrests were made, although the motorist was handcuffed and briefly detained.) (*Id.* at p. 1065.) Like the Times, the requester in *Haynie* argued that there was no danger of disclosing the identity of confidential informants, threatening the safety of police agents, victims, or witnesses, or revealing investigative techniques. Despite this, the Supreme Court applied the investigation exemption: "Limiting the section 6254(f) exemption only to records of investigations where the likelihood of enforcement has ripened into something concrete and definite would expose to the public the very sensitive investigative stages of determining whether a crime has been committed or who has committed it." (*Id.* at p. 1070.)

The Times attempts to distinguish *Williams*, *Rivero* and *Haynie* by characterizing the undisclosed July 19 letter as a *post*investigation record, presumably prepared after the district attorney [\*\*\*11] decided not to prosecute. In contrast, the Times argues, the records in *Williams*, *Rivero* and *Haynie* were each prepared while the investigation was ongoing: "[W]hile Section 6254(f) may exempt investigation records created early in an inquiry before law enforcement authorities can possibly know whether there is a concrete and definite prospect of law enforcement proceedings, it does not exempt documents that are created after the conclusion of an inquiry when authorities expressly have ruled out any prospect of enforcement proceedings."

[\*176] We follow the plain language of the statute, which contains no such distinction. (*Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 350 ["Clearly the Legislature was capable of articulating additional limitations if that is what it had intended to do."] ) As the Woodsmall and Baytieh declarations establish, the undisclosed letter directly relates to a "definite and concrete" investigation of Officer Kennedy, and is exempt from disclosure on its face. (*Williams v. Superior Court*, *supra*, 5 Cal.4th at p. 362.) Baytieh, its author, stated that he prepared the letter as part of the investigation to convey his "legal opinions, thoughts, [\*\*\*12] impressions and conclusions." Both he and Woodsmall had personal knowledge of the matters stated in their declaration, and their remarks were not conclusory. <sup>4</sup>

4 It would be self-defeating, as the Times

suggests, to apply the secondary evidence rule (*Evid. Code*, § 1523, *subd.* (a)) to require the production of the letter since that is what the litigation is all about.

[\*\*239] *Uribe v. Howie* (1971) 19 Cal. App. 3d 194 [96 Cal. Rptr. 493] is not applicable. In *Uribe*, a public agency sought to prevent disclosure of mandatory farm reports regarding pesticide use by inserting them into an investigatory file. *Uribe* refused to sanction such a subterfuge. Here, in contrast, the undisclosed letter had no purpose other than to report Baytieh's thoughts, opinions and conclusions. It properly (and exclusively) related to the investigation and legitimately belonged in the investigatory file. What other use could it serve? It remains exempt subject to the terms of the CPRA. If the Times wishes [\*\*\*13] to redraft the language of the exemption, it should direct its efforts to the Legislature, not the judiciary. <sup>5</sup>

5 We doubt, for example, that the Times would make a similar contention regarding the application of media shield law. Were a reporter to draft a memorandum to her editor regarding her thoughts, impressions or conclusions about sources used in a published article, would the Times claim that the privilege did not apply because the article already had been completed? (See *Miller v. Superior Court* (1999) 21 Cal.4th 883 [89 Cal. Rptr. 2d 834, 986 P.2d 170].)

Public policy supports our conclusions. Police investigations contain a vast amount of raw or half-baked data, gleaned from witnesses of varying degrees of reliability, veracity and bias. Much of it is hard to digest, and could prove ruinous to personal reputations, careers, or relationships if released to the general public in unvarnished form. (See, e.g., *Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1132 [86 Cal. Rptr. 2d 623, 979 P.2d 982] ["In [\*\*\*14] the absence of an indictment, without the protections of the court process, the innocently accused and even witnesses are more vulnerable to a risk of adverse consequences ranging from reputational injury to retaliation."].)

One would hope that the investigators would feel free to candidly comment and communicate upon what they have learned through the investigations, [\*177] without fear of the chilling effects of disclosure upon them or their sources. (See *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1328-1329 [283 Cal. Rptr.

104 Cal. App. 4th 169, \*177; 128 Cal. Rptr. 2d 234, \*\*239;  
2002 Cal. App. LEXIS 5114, \*\*\*14; 31 Media L. Rep. 2521

893, 813 P.2d 240] ["Yet even democratic governments require some degree of confidentiality to ensure, among other things, a candid exchange of ideas and opinions among responsible officials"]; *California First Amendment Coalition v. Superior Court*, *supra*, 67 Cal.App.4th at p. 172 [denying CPRA petition for disclosure of applications for vacant county supervisory position]; *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 653 [117 Cal. Rptr. 106] ["Complainants often demand anonymity. The prospect of public exposure discourages complaints and inhibits effective enforcement"].)

Candor is especially [\*\*\*15] needed at the close of an unsuccessful or inconclusive investigation. A case, while promising, may not be strong enough to meet the burdens of proof beyond a reasonable doubt without additional corroborating evidence or more forthcoming witness cooperation. If anything, public policy encourages a frank and outspoken closing report unimpaired by a concern for appearances. " 'Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process.' " (*California First Amendment Coalition v. Superior Court*, *supra*, 67 Cal.App.4th at p. 172.)

Disclosure also may compromise the reopening of a case and the effectiveness of related investigations. This is particularly true with police misconduct allegations, where the involved officer may remain on [\*\*240] the force, or be part of a like-minded clique. Police officers who step forward to aid in investigations may do so only on assurances of confidentiality; public disclosure of their statements could expose them to unjustified criticism or animosity, and cost the department their future cooperation. Public safety would [\*\*\*16] be imperiled as a result of declining departmental morale, without any offsetting increase in professionalism or discipline.

Although not directly applicable, we find close parallels in the Supreme Court's decision in *Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117 [86 Cal. Rptr. 2d 623, 979 P.2d 982]. In *Daily Journal*, the district attorney ended the grand jury investigation of the county's bankruptcy without indicting a major investment banking firm which underwrote some of the county's debt offerings. Following media requests, the trial court ordered the release of all transcripts and

documents of the closed grand jury investigation. The Supreme Court disagreed. Notwithstanding the strong public policy for openness, the high court held that the documents should not be disclosed. The Supreme Court [\*178] was concerned about the impact upon the willingness of prospective witnesses to come forward or to speak " 'fully and frankly, as they would be open to retribution' " or " 'public ridicule.' " (*Id.* at p. 1126.)

Our conclusions make it unnecessary to consider any of the other CPRA exemptions raised by the district attorney.

### III

The Times objects to the district attorney's [\*\*\*17] "self-serving" statements and asks that we not merely "take its word" regarding the contents of the nonpublic letter. But, although authorized by the CPRA (§ 6259), the Times never asked the trial court to conduct an *in camera* review to determine whether the nonpublic letter has been improperly withheld. Accordingly, we consider the Woodsmall and Baytieh declarations to sufficiently establish that the letter actually relates to the investigation and falls within the investigation exemption contained in section 6254, subdivision (f). No remand is necessary to further consider this issue. <sup>6</sup>

<sup>6</sup> The Times itself objected to the district attorney's belated offer in conjunction with this writ proceeding for an *in camera* review of the subject document because "[t]he Times' responses to the asserted exemptions stand as a matter of law, and cannot be defeated by the unnecessary and unwarranted additional delay that would flow from an *in camera* review at this late stage in the proceedings."

### IV

(3) We reject the Times' [\*\*\*18] contention that the district attorney waived the investigation exemption by providing the nonpublic letter to the Huntington Beach Police Department, which initiated the criminal investigation and employed Officer Kennedy. The district attorney did so with the understanding that the document would remain confidential. Nothing in the record indicates that this understanding has been breached.

Under the CPRA, particular exemptions may be waived only where the agency has disclosed a document

104 Cal. App. 4th 169, \*178; 128 Cal. Rptr. 2d 234, \*\*240;  
2002 Cal. App. LEXIS 5114, \*\*\*18; 31 Media L. Rep. 2521

"to any member of the public." (§ 6254.5.) *Section 6254.5, subdivision (e)* expressly provides that exemptions are not waived for interagency disclosures that are made in confidence. Based on similar concerns about the efficacy of interagency information sharing, we decided in *Michael P. v. Superior Court (2001) 92 Cal.App.4th 1036, 1048 [113 Cal. Rptr. 2d 11]*, that a local police department did not waive the official information privilege by [\*\*241] divulging privileged information to a county social services agency " 'with an official interest in the information.' "

[\*179] Let a peremptory writ of mandate issue directing respondent court to vacate its judgment of May 14, 2002, and its subsequent award of attorney fees [\*\*\*19] to real party in interest, and to enter a new and different order denying real party in interest's petition for writ of mandate. The alternative writ is discharged. Petitioner is entitled to costs in this proceeding.

Sills, P. J., and Fybel, J., concurred.



**FRANCISCO JOSE RIVERO, Petitioner, v. THE SUPERIOR COURT OF THE  
CITY AND COUNTY OF SAN FRANCISCO, Respondent; ARLO SMITH as  
District Attorney, etc., et al., Real Parties in Interest.**

No. A075959.

**COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT,  
DIVISION THREE**

*54 Cal. App. 4th 1048; 63 Cal. Rptr. 2d 213; 1997 Cal. App. LEXIS 338; 97 Cal. Daily  
Op. Service 3165; 97 Daily Journal DAR 5527*

**April 30, 1997, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] Rehearing denied May 21, 1997. Review Denied July 23, 1997, Reported at: *1997 Cal. LEXIS 4546*.

**PRIOR HISTORY:** Superior Court of the City and County of San Francisco, No. 973715, William J. Cahill, Judge.

**DISPOSITION:** The order to show cause is discharged, and the petition for a peremptory writ of mandate is denied.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

The trial court granted summary judgment in favor of a district attorney in an action by a former police officer seeking disclosure of closed investigation files concerning a local official. (Superior Court of the City and County of San Francisco, No. 973715, William J. Cahill, Judge.)

The Court of Appeal denied the former officer's petition for a writ of mandate. The court held that neither the California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*), nor the county's sunshine ordinance

compelled disclosure of the district attorney's closed criminal investigation files. *Gov. Code, § 25303*, prevents a county board of supervisors from obstructing the investigatory and prosecutorial functions of a district attorney, and compelled disclosure of closed criminal investigation files would obstruct the investigatory function of the district attorney's office, thus contravening section *Gov. Code, § 25303*. Very few activities performed by public officials are more important to the public and to the individuals most directly involved than the full and proper investigation of criminal complaints. Every effort must be made to ensure that investigators can gather all evidence that is available and legally obtainable. Without the assurance of continuing confidentiality, potential witnesses could easily be dissuaded from coming forward. Even if they knew that sensitive information would not automatically be turned over, publicity-shy witnesses would still have reason to be wary. Although the county was autonomous with respect to all municipal affairs, the investigation and prosecution of state criminal law are statewide concerns, not municipal affairs, and conflicting local ordinances must yield. *Gov. Code, § 6253.1*, which allows local agencies to permit greater access to records than offered by the CPRA, did not compel a different conclusion; it does not authorize a local board of supervisors to violate *Gov. Code, § 23503*. Similarly, the fact that the district

attorney could voluntarily disclose records of his investigations did not mean that the board of supervisors could compel him to do so. (Opinion by Corrigan, J., with Phelan, P. J., and Parrilli, J., concurring.)

## HEADNOTES

### CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

**(1) Municipalities § 15--Legislative Control--Home Rule Cities.** -- --Home rule charter cities have autonomy with respect to all municipal affairs and are subject to general state laws as to matters of statewide concern only if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation. Local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters that are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Instead, in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other.

**(2) District and Municipal Attorneys § 1--Application of Sunshine Ordinance to District Attorney.** -- --A city's sunshine ordinance governing access to public information under the control of city "departments" was applicable to the district attorney's office. The ordinance used the word "department" generically to refer to any office, agency, department, or other work unit conducting the business of local government, without regard to whether the office might be called a "department" by the city charter or other legal documents. Further, the board of supervisor's reference to itself as a department suggested that "department" is a generic term that covers the district attorney's office as well.

**(3) Records and Recording Laws § 14.2--Inspection of Public Records--District Attorney's Closed Criminal Investigation Files.** -- --Neither the California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*) nor a county's sunshine ordinance compelled disclosure of a district attorney's closed criminal investigation files. *Gov. Code, § 25303*, prevents a county board of supervisors from obstructing the investigatory and prosecutorial

functions of a district attorney, and the compelled disclosure would obstruct the investigatory function, thus contravening *Gov. Code, § 25303*. Very few activities performed by public officials are more important to the public and to the individuals most directly involved than the full and proper investigation of criminal complaints. Every effort must be made to ensure that investigators can gather all evidence that is available and legally obtainable. Without the assurance of continuing confidentiality, potential witnesses could easily be dissuaded from coming forward. Even if they knew that sensitive information would not automatically be turned over, publicity-shy witnesses would still have reason to be wary. Although the county was autonomous with respect to all municipal affairs, the investigation and prosecution of state criminal law are statewide concerns, not municipal affairs, and conflicting local ordinances must yield. *Gov. Code, § 6253.1*, which allows local agencies to permit greater access to records than offered by the CPRA, did not compel a different conclusion; it does not authorize a local board of supervisors to violate *Gov. Code, § 23503*. Similarly, the fact that the district attorney could voluntarily disclose records of his investigations did not mean that the board of supervisors could compel him to do so.

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1256.]

**COUNSEL:** Randall B. Aiman-Smith for Petitioner.

Thomas R. Burke, Davis Wright Tremaine and Elizabeth Pritzker as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Louise H. Renne, City Attorney, Patrick J. Mahoney and Hajime Tada, Deputy City Attorneys, for Real Parties in Interest.

**JUDGES:** Opinion by Corrigan, J., with Phelan, P. J., and Parrilli, J., concurring.

**OPINION BY:** CORRIGAN

**OPINION**

[\*1050] [\*\*214] **CORRIGAN, J.**

Here we hold that neither the California Public Records Act (CPRA) (*Gov. Code, § 6250 et seq.*)<sup>1</sup> nor the San Francisco Sunshine [\*\*215] Ordinance

(Ordinance) (S.F. Admin. Code, ch. 67) compels disclosure of district attorney criminal investigation files. *Section 25303* prevents a county board of supervisors from obstructing the investigatory and prosecutorial [\*1051] functions of a district attorney. Applying the ordinance as petitioner here urges [\*\*\*2] would constitute such an obstruction.

1 Except as otherwise indicated, all statutory references are to the Government Code. Although the California Supreme Court has used both PRA and CPRA in its references to the act (compare *Powers v. City of Richmond* (1995) 10 Cal. 4th 85, 89 [40 Cal. Rptr. 2d 839, 893 P.2d 1160] [PRA] and *CBS, Inc. v. Block* (1986) 42 Cal. 3d 646, 649 [230 Cal. Rptr. 362, 725 P.2d 470] [PRA] with *Williams v. Superior Court* (1993) 5 Cal. 4th 337, 341 [19 Cal. Rptr. 2d 882, 852 P.2d 377] [CPRA]), we use CPRA because the official short title of the chapter covering inspection of public records is the California Public Records Act. (§ 6251.)

#### FACTS AND PROCEDURAL HISTORY

In 1994, San Francisco District Attorney Arlo Smith received information leading to the investigation of a local official for failing to account properly for public funds. The district attorney's office maintained a confidential file of its investigation, which ended with a decision "not to [\*\*\*3] prosecute for lack of evidence of any criminal wrongdoing." According to the deputy in charge, the office "closed its file on the matter."

On October 18, 1995, Francisco Jose Rivero, a former police officer who had instigated the investigation, presented a written request for the complete investigation file. Rivero cited the CPRA and the Ordinance. He referred to a deputy city attorney's statement in federal court that a complete investigation had been conducted and no wrongdoing had been found.

Smith answered Rivero promptly, conceding that the investigation was closed but denying the request. He asserted that investigation files were exempt from disclosure and that the exemption continued after the investigation ended. He noted Rivero's federal court action against the city and suggested that the request was related to that civil action. He left open the possibility that he would comply with a more limited request.

On November 2, 1995, Rivero filed a complaint against Smith in superior court under the CPRA and the Ordinance for release of the investigation file. Smith answered and moved for summary judgment on the ground the file was exempt from disclosure. The court granted [\*\*\*4] summary judgment, and this petition followed. We granted a request by the California First Amendment Coalition; the Society of Professional Journalists, Northern California Chapter; and the First Amendment Project to file a brief amici curiae in support of Rivero.

#### CPRA

"CPRA, adopted in 1968 (Stats. 1968, ch. 1473, § 39, pp. 2945-2948), acknowledges the tension between privacy and disclosure: 'In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.' ( *Gov. Code*, § 6250.) CPRA provides that '[p]ublic records are open to inspection at all times during the office hours of the state or local [\*1052] agency and every person has a right to inspect any public record, except as hereafter provided. . . .' ( *Gov. Code*, § 6253, *subd. (a)*.) CPRA then provides various exemptions, including '[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy . . . .' ( *Gov. Code*, § 6254, *subd. (c)*), [and] certain investigatory and [\*\*\*5] security files ( *Gov. Code*, § 6254, *subd. (f)*; . . . ) . . ." ( *City of Richmond v. Superior Court* (1995) 32 Cal. App. 4th 1430, 1433 [38 Cal. Rptr. 2d 632].)

*Section 6254, subdivision (f)* provides that "[r]ecords of complaints to, or investigations conducted by . . . the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes . . ." shall be exempt from disclosure, except that certain information must be disclosed to victims, insurance companies, and [\*\*216] persons harmed by certain crimes. Subdivision (f)(1) and (2) provides, however, for disclosure to the public of certain information about arrests and about citizens' complaints and requests for assistance. The disclosure exemption extends indefinitely, even after an investigation is closed. (See

*Williams v. Superior Court, supra, 5 Cal. 4th at pp. 355-362.)*

The CPRA also permits a state or local agency "[e]xcept as otherwise prohibited by law" [\*\*\*6] to "adopt requirements for itself which allow greater access to records than prescribed by the minimum standards set forth in" the CPRA. (§ 6253.1.)

#### *SAN FRANCISCO'S SUNSHINE ORDINANCE*

The Ordinance is presented in four articles, the first of which states the legislative findings and purpose of the Ordinance. The second article governs public access to meetings, the third authorizes access to governmental information, and the fourth provides for a task force and designates responsibility for implementing the Ordinance.

The findings and purpose are stated broadly: ". . . [P] (a) Government's duty is to serve the public, reaching its decisions in full view of the public. [P] (b) Commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. This ordinance will assure that their deliberations are conducted before the people and that City operations are open to the people's review. [P] (c) . . . Violations of open government principles occur at all levels, from local advisory boards to the [\*1053] highest reaches of the State hierarchy. [P] . . . [P] (e) The people of San Francisco want an open society. They do not [\*\*\*7] give their public servants the right to decide what they should know. The public's right to know is as fundamental as its right to vote. To act on truth, the people must be free to learn the truth. [P] (f) The sun must shine on all the workings of government so the people may put their institutions right when they go wrong. . . ." (S.F. Admin. Code, § 67.1.)

Article II, covering public access to meetings, is not involved here. Article III provides for release of documentary public information for inspection and copying. Section 67.24, the provision in issue, provides that "Notwithstanding the department's legal discretion to withhold certain information under the California Public Records Act, the following policies shall govern specific types of documents and information: [P] . . . [P] (d) **Law Enforcement Information.** No records pertaining to any investigation, arrest or other law enforcement activity shall be exempt from disclosure under *Government Code Section 6254, Subdivision (f)* beyond the point where the prospect of any enforcement action has been terminated

by either a court or a prosecutor. When such a point has been reached, related records of law enforcement [\*\*\*8] activity shall be accessible, except that individual items of information in the following categories may be withheld: [names of witnesses, private information unrelated to the investigation, etc.]." Thus, unlike the CPRA, the Ordinance does not provide a temporally unlimited exemption for law enforcement files.

Article IV calls for the board of supervisors to appoint a task force to help implement the Ordinance (S.F. Admin. Code, § 67.30) and establishes responsibility for implementing it: "The Mayor shall administer and coordinate the implementation of the provisions of this Chapter for departments under his or her control. The Mayor shall administer and coordinate the implementation of the provisions of this Chapter for departments under the control of boards and commissions appointed by the Mayor. Elected officers shall administer and coordinate the implementation of the provisions of this Chapter for departments under their respective control . . ." (S.F. Admin. Code, § 67.31).

#### *LOCAL CONTROL OVER MUNICIPAL AFFAIRS*

(1) Home rule charter cities, such as San Francisco (see *Rossi v. Brown* (1995) 9 Cal. 4th 688, 697, fn. 3 [38 Cal. Rptr. 2d 363, 889 P.2d 557]; *Pac. [\*\*\*9] Tel. & Tel. Co. v. City & County of S.F.* (1959) 51 Cal. 2d 766, 769 [336 P.2d 514]), have "autonomy with respect to all municipal affairs" and are subject to general state laws as to matters of statewide concern only "if it is the [\*1054] intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation . . . ." [\*\*217] (*Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 61-62 [81 Cal. Rptr. 465, 460 P.2d 137].) "As is made clear in the leading case of *Pipoly v. Benson* [(1942) 20 Cal. 2d 366, 369-370 (125 P.2d 482, 147 A.L.R. 515)], local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Instead, in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations [\*\*\*10] on the other. [Citations.]" (*Id. at p. 62.*)

*THE SUPERIOR COURT'S ANALYSIS*

The superior court issued a six-page statement of decision granting summary judgment in which it agreed with Smith's position that the Ordinance was never intended and did not apply to the district attorney, who was "a state officer when conducting criminal investigations . . . ." The court conceded that, for many purposes, the district attorney was a county officer under the control of the county board of supervisors. However, county control did not extend to the district attorney's enforcement of state criminal law. The records created during these state investigations were state records exempt from disclosure even after the investigation was closed. The court explained its reasons for rejecting Rivero's counterarguments.

We conclude the trial court reached the correct result, although we are not persuaded by all its reasoning. "No rule of decision is better or more firmly established by authority . . . than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329 [48 [\*\*\*11] P. 117].)

*APPLYING THE SUNSHINE ORDINANCE*

(2) We consider first whether the board of supervisors passed an ordinance that applies to the district attorney's office. Smith contends the Ordinance applies only to city and county departments, and the district attorney's office is not a department of San Francisco government. He refers to the San Francisco Charter, which describes various departments (e.g., building inspection, elections, fire, human resources, juvenile probation, and police) but does not refer to the district attorney's office as a department. [\*1055] Smith insists that the district attorney is a state officer under the California Constitution and is not covered by the Ordinance.

Rivero does not address the meaning of "department," but argues that the Ordinance's purpose and scope are broad, covering "government," "public servants," and "institutions." Rivero notes that the Ordinance does not state "except the district attorney."

Amici curiae point out that section 24000, subdivision (a) makes the district attorney a county officer. Other sections provide that compensation of

county officers is set by the county board of supervisors (§ 25300) and that expenses [\*\*\*12] of the district attorney's office are generally the county's responsibility (§ 29601).

We conclude the Ordinance was passed with the intent that it apply to the district attorney's office. Article III of the Ordinance, covering access to "Public Information," compels city "departments" to provide access to various public records. The article opens by defining "[d]epartment," to mean "a department of the City and County of San Francisco." (S.F. Admin. Code, § 67.20, subd. (a).) This explanation begs the question of what constitutes a "department" of San Francisco government. However, after examining the use of "department" throughout article III, we conclude that the Ordinance uses it generically to refer to any office, agency, department, or other work unit conducting the business of local government, without regard to whether the office might be called a "department" by the city charter or other legal documents.<sup>2</sup>

<sup>2</sup> See, e.g., San Francisco Administrative Code sections 67.21, subdivision (b) (" . . . information . . . shall be made available . . . in any form . . . which is available to the *department*, its officers or employees . . . . Nothing . . . shall require a *department* to program or reprogram a computer . . . ."); 67.22, subdivision (a) ("Every *department* head shall designate a person . . . knowledgeable about the affairs of the *department* . . . . If a *department* has multiple bureaus . . . ."); 67.24 ("Notwithstanding the *department's* legal discretion to withhold certain information . . . the following policies shall govern specific types of documents and information: [P] (a)(1) . . . no preliminary draft or *department* memorandum shall be exempt . . . . [P] . . . [P] (b)(1) No pre-litigation claim . . . received or created by a *department* . . . shall be exempt . . . . [P] (2) . . . all communications between the *department* and the adverse party shall be subject to disclosure . . . . [P] (c) None of the following shall be exempt . . . . [P] . . . [P] (5) Any memorandum of understanding between the City or *department* and a recognized employee organization. [P] (d) No records pertaining to any investigation . . . shall be exempt . . . beyond the point where the prospect of any enforcement action has been terminated . . . . The subdivision shall not exempt

54 Cal. App. 4th 1048, \*1055; 63 Cal. Rptr. 2d 213, \*\*217;  
1997 Cal. App. LEXIS 338, \*\*\*12; 97 Cal. Daily Op. Service 3165

. . . any record of a concluded . . . enforcement action by an officer or *department* responsible for regulatory protection of the public health, safety or welfare."); 67.28, subdivision (d) ("A *department* may establish and charge a higher fee than the one cent presumptive fee [for copying] . . ."); 67.29 ("Each *department* may cooperate with any voluntary effort . . . to compile a master index to the types of records it maintains . . ."). (Italics added, section headings omitted.)

[\*\*\*13] [\*1056] [\*\*218] Our conclusion is bolstered by article IV's wording in establishing the Sunshine Ordinance Task Force and designating responsibility for administering the Ordinance. The task force is to "advise the Board of Supervisors and provide information to other City departments" on ways to implement the Ordinance. (S.F. Admin. Code, § 67.30, subd. (c).) The word "other" shows that the board of supervisors considered itself a department for purposes of the Ordinance. The board does not have the title "department" and is not called a department by the city charter. The board's reference to itself as a department suggests that "department" is a generic term that covers the district attorney's office as well.

San Francisco Administrative Code section 67.31, which implements the Ordinance throughout city government, confirms that the Ordinance applies to offices not designated as departments by the city charter. That section compels the mayor to administer and implement the Ordinance for "departments under his or her control" and for "departments under the control of boards and commissions appointed by [him or her]." Elected officers (which would include the district attorney) [\*\*\*14] administer and implement the Ordinance for "departments" under their control. The Ordinance cannot be read in the restrictive way Smith and the trial court have read it. By its terms, it applies to the district attorney's office.

#### *OBSTRUCTION OF STATE ACTION AND DISCLOSURE OF STATE RECORDS*

Our analysis of the Ordinance does not end here, however. The next issue is whether the Ordinance applies to all district attorney records, including those related to investigations of criminal allegations. Smith contends that other statutes and constitutional provisions demonstrate that the board of supervisors is precluded from passing laws that impinge on criminal investigations

by the district attorney. He directs our attention to *Penal Code section 684*, section 25303, and article V, section 13 of the California Constitution.

*Penal Code section 684* provides that criminal actions are to be prosecuted in the name of the People of the State of California. According to Smith, this makes the district attorney an officer of the state. *Article V, section 13 of the California Constitution* provides that "[t]he Attorney General shall have direct supervision over every district attorney . . . [\*\*\*15] in all matters pertaining to the duties of their respective offices . . . ." Section 25303, while providing that the board of supervisors will supervise the official conduct of county officers, affirms prosecutorial independence and states that the board shall [\*1057] not "obstruct the investigative and prosecutorial function of the district attorney of a county." Smith argues that forcing disclosure of a closed investigation file would interfere with the district attorney in the same way as would disclosing an open file, because the threat of disclosure might affect the district attorney's decision to begin an investigation. The trial court did not address directly the issue of obstructing investigations.

Rivero concedes that the district attorney is a "state actor" when prosecuting a crime [\*\*219] and that the board of supervisors may not obstruct a district attorney's investigatory and prosecutorial functions. He contends, however, that the Ordinance does not interfere with investigations, because it operates only after the investigation is closed. Rivero also suggests that the district attorney is not a state actor when merely retaining files. Rivero disputes Smith's claim that [\*\*\*16] investigations will be chilled. According to Rivero, the district attorney's ability under the Ordinance to protect such matters as investigative techniques and informants' names nullifies any chilling that inspecting the files might otherwise cause.

Amici curiae object to the court granting summary judgment without any proof that San Francisco Administrative Code section 67.24, subdivision (d) actually obstructs or interferes with the district attorney's investigatory and prosecutorial functions. They also argue that the court erred in ruling that the district attorney's investigation files are "state records" at any stage of the investigation. Amici curiae offer *Dibb v. County of San Diego* (1994) 8 Cal. 4th 1200 [36 Cal. Rptr. 2d 55, 884 P.2d 1003] (*Dibb*) as an example of the

California Supreme Court approving potentially greater interference with state law prosecutions.

In *Dibb*, the Supreme Court upheld a county charter amendment creating a citizen review board with authority to investigate public complaints against the county sheriff and probation departments. The review board was given broad power to subpoena witnesses and documents. (8 Cal. 4th at p. 1204.) [\*\*\*17] The *Dibb* court answered concerns about state law preemption by assuming that the review board would comply with section 25303 by not obstructing the investigative functions of the sheriff or the district attorney. (*Dibb, supra, at pp. 1209-1210.*)

Amici curiae cite *Dibb* to show that full subpoena power does not obstruct or interfere with the district attorney's investigative and prosecutorial functions. Thus, amici curiae contend that the lesser power offered by San Francisco Administrative Code section 67.24, subdivision (d), to examine closed investigation files, cannot possibly interfere with the district attorney. Amici curiae read too much from *Dibb*. The court did not approve full [\*1058] subpoena power or define "obstruction" for purposes of section 25303. As amplified in the concurring opinion, the court merely *assumed* "until the contrary is demonstrated, that the Board will exercise its subpoena powers in ways that avoid any such obstruction or interference." (See *Dibb, supra, 8 Cal. 4th at p. 1219* (conc. opn. of Kennard, J.))

Amici curiae's position that summary judgment was premature because Smith did not prove obstruction of his investigative [\*\*\*18] or prosecutorial function also fails. The propriety of locally compelled disclosure of a district attorney's closed investigation files is a question of policy and of law. It is not to be decided differently in each county based on evidence about a particular district attorney's office or the factual nuances of individual cases.<sup>3</sup>

<sup>3</sup> As we will explain below, potential witnesses and citizens providing information anonymously must have assurances about the confidentiality of their reports. Ad hoc decisions by the various superior courts cannot provide such assurances to potential witnesses.

The superior court cited *Williams v. Superior Court, supra, 5 Cal. 4th at pages 355-357*, for the proposition that the district attorney's investigation files were state records not subject to locally compelled disclosure.

Amici curiae correctly note that the *Williams* court, which held that the CPRA applied to closed investigation files, did not describe the files as state records and did not consider whether [\*\*\*19] such files were subject to local disclosure ordinances.

Whether to describe the district attorney as a state actor or a local actor and whether to characterize the district attorney's closed files as state records or local records beg the central question before us. The more fundamental and dispositive legal question is one of first impression. (3) Does compelled disclosure of closed criminal investigation files obstruct the investigatory function of the district attorney's office, thus [\*\*\*220] contravening section 25303? We conclude it does.

Very few activities performed by public officials are more important to the public and to the individuals most directly involved than the full and proper investigation of criminal complaints. Every effort must be made to ensure that investigators can gather all evidence that is available and legally obtainable. Without the assurance of continuing confidentiality, potential witnesses could easily be dissuaded from coming forward. Even if they knew that sensitive information would not automatically be turned over, publicity-shy witnesses would still have reason to be wary.

It is not a complete answer that publicity-shy witnesses may already be deterred [\*\*\*20] from coming forward by the prospect of being subpoenaed for a [\*1059] criminal trial. Sometimes anonymous sources, well known to the targets of investigations, provide important information. That information, though not usable itself, may help focus the inquiry and lead to the acquisition of admissible evidence. These sources' anonymity would be compromised and their willingness to provide information hindered if the subjects could easily review investigation files.

We acknowledge a footnote in *Williams* that suggests the public may have no interest in preventing disclosure of a prosecutors' closed investigation files. After concluding that the CPRA in its then current form protected closed investigation files, the *Williams* court offered advice to the Legislature: "In our view, the matter does appear to deserve legislative attention. Although there are good reasons for maintaining the confidentiality of investigatory records even after an investigation has ended [citation], those reasons lose force with the passage of time. Public policy does not demand that stale records

be kept secret when their disclosure can harm no one, and the public good would seem to require [\*\*\*21] a procedure by which a court may declare that the exemption for such records has expired." ( *Williams v. Superior Court*, *supra*, 5 Cal. 4th at pp. 361-362, fn. 13.)

We observe, however, that the Legislature has amended *section 6254* more than once since the *Williams* decision, but has not revised the statute to permit disclosure of closed investigation files. We will not do what the Legislature has declined to do.

#### CONFLICT WITH STATE LAW

Next we consider whether San Francisco may override *section 23503* by adopting a municipal ordinance that interferes with the district attorney's state criminal law investigations. San Francisco is autonomous with respect to all municipal affairs. As to matters of statewide concern, however, it is subject to overriding general state laws. ( *Bishop v. City of San Jose*, *supra*, 1 Cal. 3d at pp. 61-63.) Investigation and prosecution of state criminal law are statewide concerns, not municipal affairs. (See *In re Lane* (1962) 58 Cal. 2d 99, 106, 111-112 [22 Cal. Rptr. 857, 372 P.2d 897] (conc. opn. of Gibson, J.))<sup>4</sup> Conflicting local ordinances, such as San Francisco Administrative Code *section 67.24*, subdivision (d), must [\*\*\*22] yield.

4 Rivero may be correct that the subject matter of this particular investigation, possible theft of county funds, is in many ways a municipal affair. However, prosecution for the violation of state law is nevertheless a statewide concern and disclosure of Smith's investigation files in this case could have a wide impact on enforcement of state criminal law, inhibiting future investigations of all kinds.

*Section 6253.1*, which allows local agencies to permit greater access to records than offered by the CPRA, does not compel a different conclusion. It

[\*1060] does not authorize a local board of supervisors to violate *section 23503*. Similarly, the fact that Smith could voluntarily disclose records of his investigations (see *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal. App. 3d 931, 941-942 [143 Cal. Rptr. 255]) does not mean that the board of supervisors may compel him to do so.

#### IN CAMERA REVIEW FOR EXEMPTION FROM SECTION 6254, SUBDIVISION (F)

Rivero's final claim is that [\*\*\*23] Smith improperly failed to produce even that information subject to release under *section 6254*, subdivision [\*\*221] (f), such as names and addresses of persons involved and of witnesses, a description of the property involved, and the date, time and location of each incident complained about. He argues that the trial court should have inspected the file in camera and determined whether Smith's request for blanket exemption from disclosure was justified.

Here, Rivero sought disclosure of the complete file. No more narrow request was articulated. The holder of the file is not obliged to redraft the request to comply with *section 6254*, subdivision (f) or to offer the entire file to the court for in camera review and extraction of those records not exempt from disclosure. (See *City of Richmond v. Superior Court*, *supra*, 32 Cal. App. 4th at pp. 1440-1441.)

#### DISPOSITION

The order to show cause is discharged, and the petition for a peremptory writ of mandate is denied.

Phelan, P. J., and Parrilli, J., concurred.

A petition for a rehearing was denied May 21, 1997, and petitioner's application for review by the Supreme Court was denied July 23, 1997.



**PREMIER MEDICAL MANAGEMENT SYSTEMS, INC., et al., Plaintiffs and  
Respondents, v. CALIFORNIA INSURANCE GUARANTEE ASSOCIATION et al.,  
Defendants and Appellants.**

**B179325**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION FOUR**

*136 Cal. App. 4th 464; 39 Cal. Rptr. 3d 43; 71 Cal. Comp. Cases 210; 2006 Cal. App.  
LEXIS 145; 2006 Cal. Daily Op. Service 1103*

**February 6, 2006, Filed**

**SUBSEQUENT HISTORY:** Rehearing denied by *Premier Medical Management Systems, Inc. v. California Insurance Guarantee Association*, 2006 Cal. App. LEXIS 302 (Cal. App. 2d Dist., Feb. 22, 2006)

Later proceeding at *Premier Medical Management Systems Inc. v. California Insurance Guarantee Assoc.*, 2006 Cal. LEXIS 4407 (Cal., Apr. 12, 2006)

Review denied by *Premier Medical Management Systems Inc. v. California Insurance Guarantee Assoc.*, 2006 Cal. LEXIS 5594 (Cal., May 10, 2006)

Appeal after remand at *Premier Med. Mgmt. Sys. v. Cal. Ins. Guar. Ass'n*, 2008 Cal. App. LEXIS 809 (Cal. App. 2d Dist., May 30, 2008)

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Los Angeles County, No. BC318384, Jon Michael Mayeda, Judge.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

Insurers and employers alleged excessive charges by a medical management company and its affiliated treating physicians and petitioned the California Workers' Compensation Appeals Board (WCAB) to consolidate cases and to stay processing of workers' compensation

bills and lien claims. The WCAB granted that petition. In response, the company and physicians brought a suit alleging anticompetitive activity in violation of the Cartwright Act, *Bus. & Prof. Code*, § 16720, as well as other statutory and tort claims. The complaint did not allege anticompetitive activity outside the normal claims handling process. The insurers and employers moved to strike the complaint under *Code Civ. Proc.*, § 425.16, the anti-strategic lawsuit against public participation (anti-SLAPP) statute. The trial court denied the special motion to strike. (Superior Court of Los Angeles County, No. BC318384, Jon Michael Mayeda, Judge.)

The Court of Appeal reversed the denial of the special motion to strike, holding that the activities of the insurers and employers were taken in the exercise of their *First Amendment* right to petition and thus fell within the *Noerr-Pennington* doctrine. The complaint was a SLAPP because it was based entirely on the constitutional right to petition the WCAB, which included communications preceding the filing of the petitions. The company and its physicians did not address the *Noerr-Pennington* defense and did not invoke the sham activity exception. Thus, the insurers and employers established a probability of prevailing on their affirmative defense, and the trial court erred in denying their special motion to strike. (Opinion by Epstein, P. J., with Hastings and Curry, JJ., concurring.) [\*465]

**HEADNOTES****CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports

**(1) Pleading § 93--Motion to Strike Pleading as Whole--Anti-SLAPP Motion--**

**Motion--An** anti-SLAPP (strategic lawsuit against public participation) motion requires a court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under *Code Civ. Proc.*, § 425.16, *subd. (b)(2)*, the trial court in making these determinations considers the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. A defendant who files an anti-SLAPP motion must demonstrate that the conduct on which the plaintiff's complaint is based falls within one of the four categories described in *Code Civ. Proc.*, § 425.16, *subd. (e)*, which defines acts in furtherance of a person's right of petition or free speech under the United States or California Constitution. In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech. The principal thrust or gravamen of the claim determines whether § 425.16 applies.

**(2) Pleading § 93--Motion to Strike Pleading as Whole--Anti-SLAPP Motion--Right to Petition--Communications to Administrative Agency--**

**In** the context of determining whether a case comes within *Code Civ. Proc.*, § 425.16, the constitutional right to petition includes the basic act of seeking administrative action. Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege, such statements are equally entitled to the benefits of *Code Civ. Proc.*, § 425.16. Communications to an administrative agency designed to prompt action by that agency come within the definition of an official proceeding, even though they may precede the initiation of formal proceedings.

**(3) Pleading § 93--Motion to Strike Pleading as Whole--Anti-SLAPP Motion--Probability of Prevailing--**

**In** order to establish a probability of prevailing on the claim for purposes of *Code Civ. Proc.*, § 425.16, *subd. (b)(1)*, a plaintiff responding to an

anti-SLAPP (strategic lawsuit against public participation) motion must state and substantiate a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima [*\*466*] facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, as indicated in § 425.16, *subd. (b)(2)*; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.

**(4) Pleading § 93--Motion to Strike Pleading as Whole--Anti-SLAPP Motion--Affirmative Defenses--**

**The** second step in evaluating an anti-SLAPP (strategic lawsuit against public participation) motion usually requires that plaintiffs demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. If defendants have an affirmative defense to a cause of action, they may assert it in the special motion to strike. Although *Code Civ. Proc.*, § 425.16, places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.

**(5) Monopolies and Restraints of Trade § 1--Noerr-Pennington Doctrine--Applicability--Sham Activity--**

**The** *Noerr-Pennington* doctrine, which arose in the context of antitrust law, holds that those who petition government for redress are generally immune from antitrust liability. The *Noerr-Pennington* doctrine has been extended to the approach of citizens to administrative agencies and to courts. It has been applied to commercial speech and competitive activity, as well as to anticompetitive activity. The immunity applies to virtually any tort, including unfair competition and interference with contract. *Noerr-Pennington* immunity also has been applied to Cartwright Act, *Bus. & Prof. Code*, § 16720, and Racketeer Influenced and Corrupt Organizations Act claims. The principle of constitutional law that bars litigation arising from injuries received as a consequence of *First Amendment* petitioning activity

should be applied, regardless of the underlying cause of action asserted by the plaintiffs. To hold otherwise would effectively chill the defendants' *First Amendment* rights. The *Noerr-Pennington* doctrine extends to conduct in exercise of the right to petition, as well as to communications. There is an exception to *Noerr-Pennington* immunity; it does not apply to sham activities.

**(6) Pleading § 93--Motion to Strike Pleading as Whole--Anti-SLAPP Motion--Right to Petition--Noerr-Pennington Doctrine.**--The gravamen of a complaint filed by a medical management company and its [\*467] affiliated treating physicians, alleging various tort and statutory causes of action based on claims of anticompetitive activity, was the successful activity of insurers and employers in petitioning the California Workers' Compensation Appeals Board to stay processing of workers' compensation bills and lien claims by the company and its physicians. The insurers and employers established that these activities were taken in the exercise of their *First Amendment* right to petition and so fell within the *Noerr-Pennington* doctrine. The company and its physicians did not address this defense and did not invoke the sham activity exception. Thus, the insurers and employers established a probability of prevailing on this defense, and the trial court erred in denying their special motion to strike under *Code Civ. Proc.*, § 425.16, the anti-strategic lawsuit against public participation (anti-SLAPP) statute.

[5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 963; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 562; 1 Kiesel et al., *Matthew Bender Practice Guide: Cal. Pretrial Civil Procedure* (2005) § 13.06.]

**COUNSEL:** Lord, Bissell & Brook, C. Guerry Collins, William S. Davis and Conrad V. Sison for Defendant and Appellant California Insurance Guarantee Association.

Pillsbury Winthrop Shaw Pittman, John S. Poulos and Andrea L. Courtney for Defendant and Appellant Pacific Secured Equities, Inc.

Heggeness & Sweet and Clifford D. Sweet III for Defendants and Appellants Insurance Company of the West and The Explorer Insurance Company.

Yohman, Parker, Kern, Nard & Wenzel and Richard J. Kern for Defendant and Appellant American All-Risk

Loss Administrators.

Gray, York & Duffy and John J. Duffy for Defendant and Appellant HMI Associates, Inc.

Schaffer, Lax, McNaughton & Chen and John H. Horwitz for Defendant and Appellant Lehman Foods, Inc.

Roxborough Pomerance & Nye and Michael Breen Adreani for Defendants and Appellants Elite Personnel Services, Inc. and Select Personnel Services.

[\*468] Riley & Reiner, Raymond L. Riley and Christopher J. Hamner for Plaintiffs and Respondents.

**JUDGES:** Epstein, P. J., with Hastings and Curry, JJ., concurring.

**OPINION BY:** EPSTEIN

**OPINION**

[\*\*45] **EPSTEIN, P. J.**--The principal [\*\*\*2] issue on this appeal is whether the trial court erred in denying a special motion to strike a complaint under the anti-SLAPP law, *Code of Civil Procedure section 425.16* (strategic lawsuit against public participation, hereafter *section 425.16*). The dispute originated in efforts by insurers and employers to obtain a determination from the Workers' Compensation Appeals Board (WCAB) as to whether the plaintiff Premier Medical Management Systems, Inc. was improperly representing treating physicians in WCAB proceedings. Premier and five affiliated treating physicians sued the insurers and employers, alleging various tort and statutory causes of action based on claims that the defendants were in fact engaged in anticompetitive activity. The [\*\*46] trial court denied the defendants' special motion to strike.

We conclude the complaint falls within the ambit of *section 425.16*. We also conclude that plaintiffs cannot establish a probability of prevailing on the merits because the conduct of defendants which forms the basis for the complaint is petitioning activity protected by the *First Amendment*. Plaintiffs fail to present any exception to that doctrine that would enable [\*\*\*3] them to prevail on the merits. The trial court erred in denying defendants' special motion to strike.

**FACTUAL AND PROCEDURAL SUMMARY**

The Workers' Compensation Act (WCA) is "a

comprehensive statutory scheme governing compensation given to California employees for injuries incurred in the course and scope of their employment." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810 [102 Cal. Rptr. 2d 562, 14 P.3d 234] (*Vacanti*), citing *Lab. Code*, § 3201.) Under this scheme, an insurer ordinarily must pay all medical or medical-legal bills of an injured employee within 60 days of receipt. (*Lab. Code*, §§ 4603.2, *subd. (b)*, 4622, *subd. (a)*.) If the insurer contests the bill, payment is due only if ordered by the WCAB. (*Lab. Code*, §§ 4603.2, *subd. (b)*, 4622, *subd. (a)*.)

As the Supreme Court explained in *Vacanti*, medical providers who treat employee injuries covered by the WCA may file lien claims for the cost of their services directly with the WCAB. (*Vacanti, supra*, 24 Cal.4th at p. 811, citing *Lab. Code*, §§ 4903, 5300.) Such [\*\*\*4] a provider is a "party in interest" to the WCAB proceeding, with full due process rights, including the right to be heard. (*Vacanti, at p. 811*.)

In this case, California Insurance Guarantee Association (CIGA) became responsible for some covered claims because of the insolvency and liquidation of the insurer on those claims. It disputed charges for services rendered [\*469] through Premier. In July 2002, CIGA asked the WCAB to consolidate 13 pending cases involving claims filed by Premier plaintiffs in litigated cases covered by CIGA. An amended petition for removal and consolidation was filed in October 2002.

In September 2002, defendant The Explorer Insurance Company (Explorer) and defendant Insurance Company of the West (ICW) filed separate petitions to consolidate several pending proceedings before the WCAB involving Premier-related bills and liens. In late 2003, other defendants <sup>1</sup> also filed petitions to consolidate Premier-related WCAB liens.

1 Select Personnel Services and CAN, Intercare and American All-Risk Loss Administrators.

Defendants argued that these proceedings [\*\*\*5] should be consolidated, based on allegations that Premier and its affiliates were unlawfully practicing medicine, chiropractic treatment, and physical therapy as a result of illegal fee-sharing in violation of *Business and Professions Code section 650*. They also alleged that Premier and its affiliates were illegally referring business and making improper and excessive charges.

Premier opposed the consolidation petitions, arguing that they were brought for the improper purpose of delay. The WCAB ordered consolidation in May 2004. It reasoned that the business practices of Premier and its affiliates were common issues in each of the cases for which consolidation was sought, and that to litigate [\*\*47] these issues separately in hundreds of workers' compensation cases would clog the workers' compensation tribunals. The workers' compensation judge noted that if the defendants prevailed in their arguments, all lien claims could be denied. The WCAB granted consolidation and stayed all liens. Its order was later amended to add claims involving the other defendants in this action. The workers' compensation judge clarified that the scope of the stay extended to all Premier [\*\*\*6] bills and liens against the defendants in the consolidated actions. During the appearance at which this ruling was announced, counsel for Premier stated that he planned to sue defendants under the Racketeer Influenced and Corrupt Organizations Act, *title 18 United States Code section 1961 et seq.* (RICO).

The complaint was filed in July 2004. Plaintiffs are Premier Medical and five individual physicians affiliated with it (Francis G. D'Ambrosio, Robert Schatz, Frank J. Coufal, Afshin Mashoof, Manuel Anell). We refer to them collectively as Premier or Plaintiffs. The named defendants are CIGA, several [\*470] insurance companies, and other entities. <sup>2</sup> All are defendants in the consolidated workers' compensation cases in which lien claims have been filed by Plaintiffs. We refer to them collectively as defendants.

2 American Casualty Company of Reading, Pennsylvania (erroneously sued as CNA Insurance Company, Inc.; we refer to it as American Casualty); Pacific Secured Equities, Inc., (doing business as InterCare Insurance Services); Insurance Company of the West; Explorer; American All-Risk Loss Administrators; Elite Personnel Services, Inc.; Headway Corporate Staffing; USA Biomass Corporation; Good Nite Inn, Inc.; Abbey Party Rents; Southwest Trails; Lehman Foods, Inc.; San Fernando Valley Association; Terry Hinge Hardware Co.; Select Personnel Services; Encore Painting; King Wire Partitions; HMI Associates; Kodiak Construction, Inc.; Basement Clothing, Inc.

[\*\*\*7] The gravamen of the complaint is that after Premier submitted plaintiff physicians' bills to defendants for payment, and filed liens in numerous workers' compensation cases before the WCAB, defendants collectively conspired to contest, delay, and avoid payment of these bills and liens.

The first cause of action alleges violation of the Cartwright Act (*Bus. & Prof. Code, § 16720*), the state antitrust statute. The complaint alleges that the defendants conspired to delay or avoid payment of the bills and liens; reduce the amount paid on the claims; prevent lawful competition by the plaintiff physicians; fix the amount Plaintiffs could bill or lien for treatment of medical services to the employers' applicants; agree to pay a certain price (unilaterally agreed upon by defendants) on Plaintiffs' claims; and "pool, combine and directly or indirectly unite other interests connected with the payment to Plaintiffs for medical treatment and services provided Employers' Applicants so that the price of such treatment and medical services would be affected to Defendants' benefit." It also alleges the price fixing directly or indirectly affected free and unrestricted [\*\*\*8] competition between Plaintiffs and defendants' preferred medical providers. Plaintiffs allege that these activities produced multiple anticompetitive results, such as restriction on competition and on applicants' ability to choose service providers.

The second cause of action claims violations of the RICO statute, *title 18 United States Code sections 1961, 1962(c)*. It alleges that the insurers were "enterprises" through which defendants conspired to perpetrate a scheme of unlawfully delaying or refusing to pay claims. The complaint also alleges that defendants engaged in racketeering activities including mailing and electronically wiring multiple wrongful [\*\*\*48] and unlawful objections to billings and liens so that defendants could strong-arm Plaintiffs to accept less on the claims.

The third cause of action, for violation of *Business and Professions Code section 17200*, incorporates the previous allegations of improper conduct and [\*471] asserts that defendants conspired to do these acts, which were not a normal part of the workers' compensation claims process. The fourth cause of action, for intentional interference with contractual and prospective [\*\*\*9] economic relations, alleges: "Physicians had an existing economic relationship with certain attorneys for various

Applicants, and such relationships held present and probable future economic benefits to Physicians. Physicians customarily provided for the clients of those attorneys medical treatment and medical services for which they were entitled to payment under the workers' compensation system." Plaintiffs allege that defendants engaged in the conduct which forms the basis of the complaint with the intent to interfere with said relationships.

The fifth cause of action for negligent interference is similar, alleging that defendants knew, or should have been aware, of the relationship between the physicians and applicant attorneys, and that damage to the physicians' businesses would also damage those relationships. The sixth cause of action for abuse of process alleges that defendants utilized proceedings before the WCAB to engage in an unlawful course of conduct for the purpose of obtaining a collateral advantage not directly related to the WCAB. Defendants allegedly acted with the ulterior motive of damaging or destroying the lawful business of Plaintiffs in order to maximize profits.

[\*\*\*10] The complaint alleges that the defendants engaged in this conduct with malice. Plaintiffs seek \$ 15,000,000 in compensatory damages and restitution, as well as punitive damages, injunctive relief, costs, and fees.

Some of the defendants filed joint demurrers, motions to strike portions of the complaint, and a special motion to strike.<sup>3</sup> Others joined in the special motion to strike. In the end, 10 of the 21 defendants joined in that motion.<sup>4</sup> We refer to this group of defendants collectively as the moving defendants. They argued that the complaint is an anti-SLAPP lawsuit because it is based entirely on the defendants' constitutional right to petition the WCAB. In support of their motion, defendants filed declarations and exhibits relating to the consolidation petitions. Plaintiffs opposed the special motion to strike, submitting their own declarations and exhibits.

<sup>3</sup> On appeal, CIGA argues that the trial court's ruling on the special motion to strike also should be reversed because it is immune from suit under state and federal law. Those grounds were raised in CIGA's demurrer, which was overruled by the trial court except as to the RICO cause of action, but were not raised in the special motion to strike.

Our conclusion that the special motion to strike should have been granted renders the issues raised on the demurrer moot.

[\*\*11]

4 The parties moving to strike the complaint under the anti-SLAPP statute are: CIGA, American Casualty, Pacific Secured Equities, Inc., Insurance Company of the West, Explorer, American All-Risk Loss Administrators, Elite Personnel Services, Inc., Lehman Foods, Inc., Select Personnel Services, and HMI Associates.

[\*472] The trial court denied the special motion to strike. It concluded that the first five causes of action "do not satisfy the first prong of the SLAPP analysis because they are not based on any communication made in anticipation of litigation." Although the trial court found the sixth [\*49] cause of action for abuse of process satisfied the first prong of the statute, it concluded that Plaintiffs had submitted sufficient evidence to satisfy the second prong, by showing a probability of success on the merits. The moving defendants filed a timely appeal from this order.

## DISCUSSION

### I

(1) An anti-SLAPP motion "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is [\*\*\*12] one arising from protected activity. ... If the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [124 Cal. Rptr. 2d 507, 52 P.3d 685] (*Equilon*)). "Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Ibid.*) On appeal, its determination of each step is subject to de novo review. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456 [125 Cal. Rptr. 2d 534].)

The moving defendant must demonstrate that the conduct on which the plaintiff's complaint is based falls within one of the four categories described in section 425.16, subdivision (e), which defines acts " 'in furtherance of a person's right of petition or free speech

under the United States or California Constitution ... ' " (*Equilon, supra*, 29 Cal.4th at p. 66.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based [\*\*\*13] on an act in furtherance of the defendant's right of petition or free speech. (*Equilon, supra*, 29 Cal.4th at pp. 67-68; see also *Briggs [v. Eden Council for Hope & Opportunity]* (1999) 19 Cal.4th [1106,] 1114 [81 Cal. Rptr. 2d 471, 969 P.2d 564].)" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [124 Cal. Rptr. 2d 519, 52 P.3d 695], italics omitted.) The principal thrust or gravamen of the claim determines whether section 425.16 applies. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 102-103 [15 Cal. Rptr. 3d 215] (*Mann*)).

Subdivision (e) of section 425.16 provides in relevant part that, as used in that statute, " 'act in furtherance of a person's right of petition or free speech [\*473] under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement ... made before a legislative [or] executive ... proceeding ... ; (2) any written or oral statement ... made in connection with an issue under consideration or review by a legislative [or] executive ... body ... ; (3) any written or oral statement ... made in a place open to the public or a public forum in connection with an issue of public interest; (4) [\*\*\*14] or any other conduct in furtherance of the exercise of the constitutional right of ... free speech in connection with a public issue or an issue of public interest."

The moving defendants argue that the entire complaint is an anti-SLAPP suit, subject to a special motion to strike. This is so because the complaint "wholly arises from, and is predicated upon, [defendants'] acts and communications in connection with or in proceedings before the [WCAB]." Defendants argue that the entire process of submitting bills and lien claims for medical services in pending [\*\*50] WCAB cases is inherently part of the WCAB litigation process.

In support of that proposition, they rely on *Vacanti, supra*, 24 Cal.4th 800, which held that claims by workers' compensation medical providers for damages arising out of insurers' failure to make full and timely payment on their lien claims came within the exclusive remedy provisions of the WCA. The court concluded that "the alleged injury underlying all of plaintiffs' causes of action is collateral to or derivative of a compensable workplace injury and falls within the scope of the exclusivity

provisions." (*Vacanti, supra, 24 Cal.4th at p. 815.*)

[\*\*\*15] The moving defendants reason that they were sued because they exercised their statutory right to object to Plaintiffs' bills and liens claims. They also observe that Plaintiffs pursued payment in workers' compensation litigation. The moving defendants invoke the rule that communications preparatory to litigation are included within the ambit of the anti-SLAPP law.

The Premier plaintiffs argue that the entire complaint does not come within *section 425.16*, citing allegations that the defendants conspired to delay, avoid, and obstruct payment on bills and lien claims. These activities, they contend, had nothing to do with petitioning the WCAB. Plaintiffs cite paragraph 40 of their complaint, which alleges that defendants combined to "contest, object to, litigate, delay payment on and/or not pay at all on Plaintiffs' valid and proper bills and lien claims for medical treatment and/or services provided to Employers' Applicants."

[\*474] Paragraph 40 further alleges defendants conspired to:

"(b) limit or reduce the amount Defendants would pay on valid and proper bills and lien claims for Employers' Applicants who Physicians had provided medical services to; [¶] ... [¶]

"(e) agree to only pay a [\*\*\*16] certain price, unilaterally agreed upon by Defendants, on Plaintiffs' valid and proper bills and lien claims for Employers' Applicants who Physicians had provided medical services to;

"(f) establish or settle, between each Defendant, the payment for valid and proper bills and lien claims for Employers' Applicants who Physicians had provided medical services to, so as to directly or indirectly affect free and unrestricted competition between Plaintiffs and, among others, those medical treatment and service providers, other than Physicians, which Defendants preferred treat and provide medical services to Employers' Applicants."

Plaintiffs argue that none of these allegations refer to petitioning the WCAB, but instead address delay and avoidance of payment to Premier, activity which is not protected and therefore does not fall within the ambit of *section 425.16*.

(2) The moving defendants have the better argument. In the context of determining whether a case comes within *section 425.16*, the Supreme Court has held that the constitutional right to petition includes the basic act of seeking administrative action. (*Briggs v. Eden Council for Hope & Opportunity, supra, 19 Cal.4th at p. 1115.*) [\*\*\*17] We applied this principle in *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal.App.4th 777 [54 Cal. Rptr. 2d 830]*. In that case, the plaintiff sued for libel and interference with an economic relationship in a dispute which arose because the defendant intended to file a complaint with the California Attorney General seeking an investigation of whether the plaintiff had honored its contractual obligation to pay [\*\*51] the proceeds of a celebrity recording to charity. The factual predicate of the lawsuit was a letter the defendant had sent to various celebrities who had participated in the recording that sought support for a complaint defendant initiated to the Attorney General. (*Dove, at p. 780.*)

We held the action fell within the ambit of the anti-SLAPP statute because the defendant's communication "raised a question of public interest: whether money designated for charities was being received by those charities. The communication was made in connection with an official proceeding authorized by law, a proposed complaint to the Attorney General seeking an investigation. 'The constitutional right to petition ... includes the basic act of filing litigation or otherwise seeking administrative [\*\*\*18] action.' [Citation.] Just as [\*475] communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege[,] we hold that such statements are equally entitled to the benefits of *section 425.16*. [Citation.]" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra, 47 Cal.App.4th at p. 784.*)

In *Dickens v. Provident Life & Accident Ins. Co. (2004) 117 Cal.App.4th 705, 714 [11 Cal. Rptr. 3d 877]*, we held that contact with the executive branch of government and its investigators about a potential violation of law was preparatory to commencing an official proceeding authorized by law--a criminal prosecution for mail fraud--and thus came within the ambit of the anti-SLAPP law. A similar result was reached in *ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993 [113 Cal. Rptr. 2d 625]*, which concerned a lawsuit based on the defendants' filing of a complaint with the Securities and Exchange Commission.

The issue was whether the complaint fell within the ambit of *section 425.16*. Finding that the purpose of the complaint was to solicit an investigation by that agency, the *ComputerXpress* court [\*\*\*19] had "little difficulty in concluding that the filing of the complaint qualified at least as a statement before an official proceeding" under *section 425.16, subdivision (e)*. (*ComputerXpress at p. 1009*.) Communications to an administrative agency designed to prompt action by that agency come within the definition of an official proceeding, even though they "may precede the initiation of formal proceedings." (*ComputerXpress, Inc. v. Jackson, supra, 93 Cal.App.4th at p. 1009*, citing *Slaughter v. Friedman (1982) 32 Cal.3d 149, 156 [185 Cal. Rptr. 244, 649 P.2d 886]* [in context of *Civil Code section 47* privilege], and *Edwards v. Centex Real Estate Corp. (1997) 53 Cal.App.4th 15, 30 [61 Cal. Rptr. 2d 518]* [*Civil Code section 47* privilege applied to communications or complaints by citizens to public officials or authorities charged with investigating, prosecuting or remedying alleged wrongdoing].)

In their brief and at oral argument, Plaintiffs argued that the complaint was not based on defendants' handling of liens and claims through the workers' compensation system. Instead, they contended it is based on anticompetitive [\*\*\*20] activity that occurred outside the normal claims handling process. Plaintiffs cited declarations to the effect that Lynn Devine, who represented defendants CIGA, ICW, and Elite Personnel Services before the WCAB, encouraged third parties to refuse to honor settlements reached with Plaintiffs in cases not covered by the stay.

The problem with this contention is that there is no allegation in the complaint that defendants conspired to stop third parties from honoring settlements of Plaintiffs' liens and claims. For example, paragraph [\*\*52] 36 alleges that in an effort to gain an economic advantage over Plaintiffs, and to impede their business, "Defendants, in a concerted conspiracy with each other, [\*476] banded together to contest, object to, litigate, delay payment on and/or not pay at all on valid, proper and lawful billings and lien claims. Said conspiratorial acts by Defendants were perpetrated with the knowledge that such concerted activity would result in an overwhelmingly negative effect on Plaintiffs' ability to collect on services rendered to Employers' Applicants, thereby resulting in extreme pressure on Plaintiffs to concede to Defendants wrongful and unlawful attempts to lower Plaintiffs' [\*\*\*21] billings and lien claims for

Employers' Applicants."

Paragraph 40 alleges that defendants acted in combination to "object to, litigate, delay payment on and/or not pay at all on Plaintiffs' valid and proper bills and lien claims." Seven subparagraphs detail defendants' allegedly improper behavior, but do not allege that defendants improperly persuaded third parties to refuse to pay settlements which had previously been agreed upon.

If we were reviewing a ruling on a demurrer, the rules of liberal construction might suggest that Plaintiffs be allowed to amend their complaint to allege the claims regarding the impact of defendants' conspiracy on third-party settlement payments. On review of an anti-SLAPP motion to strike however, the standard is akin to that for summary judgment or judgment on the pleadings. We must take the complaint as it is.

(3) "In order to establish a probability of prevailing on the claim (§ 425.16, *subd. (b)(1)*), a plaintiff responding to an anti-SLAPP motion must 'state[] and substantiate[] a legally sufficient claim.' ' (*Briggs v. Eden Council for Hope & Opportunity[, supra,] 19 Cal.4th 1106, 1123 [81 Cal.Rptr.2d 471, 969 P.2d 564]*, [\*\*\*22] quoting *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 412 [58 Cal.Rptr.2d 875, 926 P.2d 1061]*.) Put another way, the plaintiff 'must demonstrate that the *complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.*' (*Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548 [46 Cal.Rptr.2d 880]*; accord, *Rosenaur v. Scherer (2001) 88 Cal.App.4th 260, 274 [105 Cal.Rptr.2d 674]*.) In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, *subd. (b)(2)*); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the [\*477] motion defeats the plaintiff's attempt to establish evidentiary support for the claim. (*Paul for Council v. Hanyecz (2001) 85 Cal.App.4th 1356, 1365 [102 Cal.Rptr.2d 864]*.)" (*Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 821 [123 Cal. Rptr. 2d 19, 50 P.3d 733]*, [\*\*\*23] italics added.)

Applying these principles and confining our review to the conduct alleged in the complaint, we are satisfied that the gravamen of Plaintiffs' action arises from the

activity of defendants in litigating lien claims through the workers' compensation process. This includes communications preceding the filing of the petitions for consolidation. The entire complaint falls within the scope of *section 425.16*. *Section 425.16, subdivision (e)* states that an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) ... (2) any written or oral statement or [\*\*53] writing made in connection with an issue under consideration or review by [an] executive ... body, or any other official proceeding authorized by law." (Italics added.) All of the acts alleged fall within this category. The moving defendants satisfied their initial burden under *section 425.16*, taking us to the second step of the analysis.

## II

(4) The second step usually requires that Plaintiffs "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing [\*\*\*24] of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 [124 Cal. Rptr. 2d 530, 52 P.3d 703].) Here the focus of the special motion to strike was on affirmative defenses raised by the moving defendants. If defendants have an affirmative defense to a cause of action, they may assert it in the special motion to strike. "[A]lthough *section 425.16* places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. (See, e.g., *Mann*, *supra*,] 120 Cal.App.4th at p. 109 [noting, in the context of a [section] 425.16 analysis, that defendants had failed to carry their burden of establishing their allegedly defamatory statements were protected under the conditional privilege of *Civil Code* [section] 47, [subdivision] c).]" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676 [35 Cal. Rptr. 3d 31].)

Plaintiffs argue that because their complaint is not directed at protected activity, defendants cannot demonstrate a probability [\*\*\*25] of prevailing on the merits of their affirmative defenses. They rely on *Mann*, *supra*, 120 Cal.App.4th at page 106, which held that a plaintiff need only show a probability of prevailing on any part of its claim; the plaintiff need not substantiate all theories presented within a single cause of action. The

*Mann* [\*478] court concluded that reviewing courts need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined have merit. (*Ibid.*)

Here, however, defendants invoke affirmative defenses which apply to all of Plaintiffs' claims. Defendants bear the burden of establishing a probability of prevailing on those defenses. We turn to an examination of the affirmative defenses.

## III

Moving defendants argue that all of Plaintiffs' causes of action are barred either by the absolute litigation privilege of *Civil Code* *section 47, subdivision (b)*, or by the broader *Noerr-Pennington*<sup>5</sup> doctrine. Because we conclude that the *Noerr-Pennington* issue is dispositive, [\*\*\*26] we do not reach the *Civil Code* *section 47* issue.

<sup>5</sup> *Eastern R. Conf. v. Noerr Motor* (1961) 365 U.S. 127 [5 L. Ed. 2d 464, 81 S. Ct. 523] (*Noerr*); *Mine Workers v. Pennington* (1965) 381 U.S. 657 [14 L. Ed. 2d 626, 85 S. Ct. 1585].

(5) The *Noerr-Pennington* doctrine, which arose in the context of antitrust law, holds that "[t]hose who petition government for redress are generally immune from antitrust liability." (*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993) 508 U.S. 49, 56 [123 L. Ed. 2d 611, 113 S. Ct. 1920].) In *Noerr*, *supra*, 365 U.S. at page 137, the [\*\*\*54] Supreme Court concluded that the Sherman Antitrust Act does not punish political activity through which the people "freely inform the government of their wishes."

The *Noerr-Pennington* doctrine was extended by the Supreme Court in *California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 510 [30 L. Ed. 2d 642, 92 S. Ct. 609] to "the approach of citizens [\*\*\*27] ... to administrative agencies ... and to courts." It has been applied to commercial speech and competitive activity, as well as to anticompetitive activity. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 21-22 [43 Cal. Rptr. 2d 350] (*Ludwig*).) The immunity applies to "virtually any tort, including unfair competition and interference with contract." (*Id.* at p. 21, fn. 17.) *Noerr-Pennington* immunity also has been applied to Cartwright Act (*Blank*

v. *Kirwan* (1985) 39 Cal.3d 311 [216 Cal. Rptr. 718, 703 P.2d 58]) and RICO claims. (*International Broth. of Teamsters v. Philip Morris* (7th Cir. 1999) 196 F.3d 818, 826.) In *Ludwig*, the court explained: "Obviously, 'the principle of constitutional law that bars litigation arising from injuries received as a consequence of *First Amendment* petitioning activity [should be applied], regardless of the underlying cause of action asserted by the plaintiffs." [\*479] [Citation.] "[T]o hold otherwise would effectively chill the defendants' *First Amendment* rights." [Citation.]' " (*Ludwig, supra*, 37 Cal.App.4th at p. 21, fn. 17, quoting *Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 577-578 [29 Cal. Rptr. 2d 646].) [\*\*\*28]

Defendants argue the *Noerr-Pennington* doctrine applies to their alleged conduct before the WCAB. They point out that this action was filed after they objected to and successfully petitioned for consolidation of Plaintiffs' lien claims before the WCAB. All of the actions which form the basis for the complaint took place in anticipation of, or during, proceedings before the WCAB. Each of Plaintiffs' causes of action incorporates the allegations of the previous causes of action. As we have discussed, these allegations are based on the moving defendants' exercise of their right to petition the WCAB to stay all claims involving Plaintiffs in order to obtain an adjudication of the defendants' claims against Plaintiffs. We conclude that the defendants have demonstrated that the *Noerr-Pennington* immunity applies to each cause of action.

There is an exception to *Noerr-Pennington* immunity: it does not apply to sham activities. (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th 811, 820.) But Plaintiffs do not rely on that exception here and present no evidence establishing its applicability. In their reply brief, Plaintiffs address related arguments made [\*\*\*29] by defendants under the litigation privilege, *Civil Code section 47*. But they fail to address

*Noerr-Pennington* and the cases cited by defendants in support of their argument that this doctrine bars the complaint. They provide a broad statement that the litigation privilege (*Civ. Code*, § 47) applies only to communications and not to actions or other noncommunicative conduct. But unlike *Civil Code section 47*, the *Noerr-Pennington* doctrine extends to conduct in exercise of the right to petition, as well as to communications.

(6) As we have discussed, the gravamen of the complaint is defendants' successful activity in petitioning the WCAB to stay processing of workers' compensation bills and lien claims by Plaintiffs. Defendants have established that these activities were taken in the exercise of their *First Amendment* right to petition and so fall within the *Noerr-Pennington* doctrine. Plaintiffs have not addressed this defense and have not invoked the sham activity exception. [\*\*55] We conclude the moving defendants established a probability of prevailing on this defense and that the trial court erred in denying the moving [\*\*\*30] defendants' special motion to strike under *section 425.16*. Moving defendants are entitled to their reasonable attorney fees on appeal. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra*, 47 Cal.App.4th 777, 785.)

[\*480] **DISPOSITION**

The order of the trial court denying the special motion to strike is reversed. Moving defendants are to have their costs and fees on appeal.

Hastings J., and Curry, J., concurred.

A petition for a rehearing was denied February 22, 2006, and respondents' petition for review by the Supreme Court was denied May 10, 2006, S142038. George, C. J., did not participate therein.