Filed 12/30/16 Cady v. Cooper CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KIMBERLEY CADY et al., Plaintiffs and Appellants, v. HELEN COOPER, Defendant and Respondent.	B257704 (Los Angeles County Super. Ct. No. BC458689)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Affirmed.

Lee Tran & Liang, Geoffrey Tong, Gina Gi and David Crane for Plaintiffs and Appellants.

Manning & Kass, Ellrod, Ramirez, Trester, Louis W. Pappas, Steven J. Renick and Marilyn R. Victor for Defendant and Respondent.

INTRODUCTION

Plaintiffs Kimberley Cady and her daughters Anastasia Gamick and Schuyler Gamick appeal from the dismissal of their negligence lawsuit against their therapist, defendant, Helen Cooper, LCSW, after the trial court granted defendant's summary judgment motion (Code Civ. Proc., § 437c). The court determined that there was no triable issue of material fact, with the result, as a matter of law, the complaint was barred by the statute of limitations contained in the Medical Injury Compensation Reform Act (Code Civ. Proc., § 340.5 (MICRA)). We hold, apart from whether the trial court correctly decided the MICRA issue, its ruling was correct for a different reason, namely that the disclosure was absolutely protected by the litigation privilege (Civ. Code, § 47, subd. (b)).[1] Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Viewing the evidence set forth in the moving and opposing papers except that to which objections have been made and sustained (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639), it shows that during the dissolution of Cady's marriage to her second husband, the family law court ordered the appointment of Vivian Carlson, MFT, to render an assessment about the custody and visitation of the couple's minor children. In connection with the court's order, Cady identified defendant as someone with whom she had counseling or therapy, and signed an authorization allowing for defendant to release information "about me, or my minor children, confidential or

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[1] All further statutory references are to the Civil Code, unless otherwise noted.

otherwise," to the superior court's evaluator "for the purpose of developing a parenting plan that is in the best interests of my child(ren)." Carlson notified defendant on superior court letterhead that the court had ordered a child custody evaluation concerning the couple's five children. Carlson requested that defendant provide "information concerning the counseling, including such issues as dates of service; presenting issues; treatment goals; summary of the course of treatment; recommendations for counseling upon termination, observations of parenting and *parent/child relationships*, and so forth." (Italics added.)

In the course of Carlson's ensuing interview of defendant, defendant disclosed confidential psychotherapy history and communications about Anastasia and Schuyler, Cady's adult children from her first marriage, who were not at issue in the custody dispute. Defendant had provided psychotherapy services to Anastasia and Schuyler when they were minors. Anastasia was born in 1989 and underwent therapy with defendant from ages six to nine. Schuyler, born in 1990, had her last therapy session when she was 16 years old.

Plaintiffs moved the family law court to exclude confidential information about Anastasia and Schuyler disclosed by defendant and to strike the portions of the child custody evaluation report that included those disclosures. The court granted the motion and ordered that Carlson's evaluation report be stricken in its entirety from the court's record and not received into evidence. The court found that defendant had "improperly disclosed" Anastasia and Schuyler's "psychotherapy history and communications" to Carlson.

All three plaintiffs then signed authorizations directing defendant to provide to their attorney "all protected information related to your disclosure of information to Vivian Carlson, MFT ('Carlson') in or about April, 2009 ('Disclosure')."

Plaintiffs' complaint ensued more than a year later. In three causes of action, entitled negligence, professional negligence, and negligent infliction of emotional distress, the operative complaint alleged that Cady, Anastasia, and Schuyler were patients of defendant who was a California licensed clinical social worker. The complaint alleged that "[a] psychotherapist-patient relationship existed between Plaintiff[s] . . . and Defendant[]" and that defendant "owed duties to Plaintiff[s], including but not limited to, maintaining the confidentiality of their psychotherapy history, including communications . . . including, but not limited, as a result of the psychotherapist-patient relationship." Plaintiffs alleged that defendant "improperly disclosed Plaintiffs' psychotherapy history and communications without their authorization or consent. . . . [and] improperly disclosure [*sic*] and released Plaintiffs' psychotherapy history and communications to Vivian Carlson." Carlson included these communications in her custody evaluation report causing plaintiffs damage.

Defendant answered by generally denying all of the complaint's allegations and stating as the fifteenth affirmative defense that the conduct was privileged. Defendant then moved for summary judgment or summary adjudication. Although the principal ground for the motion was that the complaint was barred by MICRA's one-year statute of limitations applicable to actions against a health care provider, defendant also argued in her motion that summary judgment should be granted because

the litigation privilege in section 47, subdivision (b) prohibited actions against participants in the litigation based on a publication made in the context of judicial proceedings.

In their opposition, plaintiffs argued that the litigation privilege did not apply because the challenged disclosures about Anastasia and Schuyler had no connection or logical relation to the family law action as those plaintiffs were not the subjects of the custody battle.

The trial court granted the summary judgment motion on the sole ground, there being no triable factual issue, that the complaint was barred by MICRA's one-year statute of limitations. After judgment was entered in favor of defendant, plaintiffs filed their timely appeal.

DISCUSSION

1. *Standard of review*

"In reviewing the propriety of an order granting summary judgment, we 'apply the same three-step analysis required of the trial court. We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' [Citation.] *If* there is no triable issue of material fact, 'we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal.' [Citations.]" (*Morgan v. Beaumont Police Dept.* (2016)

246 Cal.App.4th 144, 150-151; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951 ["An appellate court is not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not the rationale."].)[2]

2. *The litigation privilege protects defendant from tort liability here.*

The parties do not dispute the operative facts, namely that in the context of the custody dispute, the family law court ordered a custody evaluation. Cady identified defendant as a therapist, and Carlson sent defendant a fax on superior court letterhead, asking defendant to provide "information concerning the counseling, including such issues as . . . *observations of parenting and parent/child relationships*, and so forth." (Italics added.) Cady authorized her "therapist . . . possessing information about me, or my minor children, confidential or otherwise, to release

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[2] Plaintiffs' first assignment of trial court error is the ruling striking four paragraphs from the first amended complaint, because, plaintiffs assert, the stricken paragraphs "pleaded necessary facts that Respondent's wrongful disclosures did not arise during or relate to treatment." Apart from the fact that those paragraphs are irrelevant to our disposition of the case, plaintiffs forfeited this contention. The appellate record does not contain defendant's motion to strike or plaintiffs' opposition. Although plaintiffs supplied this court with an earlier trial court ruling denying a motion to strike, the record does not contain the later-filed, challenged order granting the motion to strike. "It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record. [Citations.]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575.) In the absence of such a record, we are unable to consider the merits of this contention. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003, fn. 2.)

the information . . . to the Superior Court through its duly appointed Court Evaluator" "for the purpose of developing a parenting plan that is in the best interests of my child(ren)."[3] Nor is it disputed that Anastasia and Schuyler were Cady's daughters, had as minors undergone therapy with defendant, but were not subjects of the custody fight in the family law matter. Defendant's disclosure included confidential information and communication from Anastasia and Schuyler. There being no dispute of operative facts, " 'the availability of the [litigation] privilege is a matter of law which the court may determine on summary judgment. . . .' " (*Obos v. Scripps Psychological Associates, Inc*. (1997) 59 Cal.App.4th 103, 107-108, fn. 3 (*Obos*).)

The litigation privilege of section 47, subdivision (b) is "given broad application" to "all torts except malicious prosecution." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 211-212.) It is an absolute privilege and applies irrespective of malice. (*Id*. at pp. 215-216.) " '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 have some connection or logical relation to the action.' "

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[3] Although we cite Cady's authorization, we take no position about whether, as defendant contends, the disclosure at issue here was not actionable because authorized. Rather, our purpose in quoting Cady's authorization is to demonstrate that the disclosure was made in connection with the trial court's request that Carlson seek information, confidential or otherwise, about Cady and her children to aid the court in developing a parenting plan.

(*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955 (*Jacob B.*), quoting from *Silberg v. Anderson*, *supra*, at p. 212.)

The purposes of the litigation privilege " 'are to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation.' (*Rusheen v. Cohen* [(2006)] 37 Cal.4th [1048, 1063].) Another purpose is to 'promote[ ] effective judicial proceedings' by encouraging full communication with the courts. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322 . . . .) . . . Indeed, the privilege extends even to civil actions based on perjury. [Citations.] ' "The resulting lack of any really effective civil remedy against perjurers is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say." ' [Citations.]" (*Jacob B.*, *supra*, 40 Cal.4th at pp. 955-956.)

Jacob B. is instructive. As here, that case involved the disclosure of confidential information to a court in the course of a custody battle. Jacob had molested his nephew B.B. when both were minors and so B.B.'s mother had obtained counseling services for B.B. from the county's victim witness program at the district attorney's office. (*Jacob B.*, *supra*, 40 Cal.4th at p. 952.) B.B.'s mother and father divorced and both remarried. All four parents had stipulated in their respective custody decrees that Jacob would have no contact with any children of the marriages. (*Id.* at p. 953.) Later, B.B.'s father and his wife became unhappy with the contact prohibition and an ongoing dispute existed in the family law proceedings about whether Jacob could visit the children. At the request of B.B.'s mother, the victim witness

program provided the family court with a letter describing the molestation and the services provided to B.B. (*Id*. at pp. 953-954.) The victim witness program incorrectly assumed that Jacob was an adult at the time of the molestation, and wrote a letter describing the case. (*Id*. at p. 954.) Jacob sued the county for damages based on the letter. (*Ibid.*) The Supreme Court held that the letter "fits squarely within" the litigation privilege because it " 'constituted a "communication." It was made in the context of a judicial proceeding, i.e., a pending case in Tehama County. . . . the custodian of information relevant to the action, was a witness/participant. Finally, the letter furthered the objects of the litigation, since the information it conveyed had relevance to a family law visitation dispute.' . . . 'One issue before the family law court was whether a judicially imposed restriction on Jacob having contact with Charles' sons should be lifted. The fact that Victim Witness [program], a county agency, had determined that Jacob molested his minor nephew B.B. was relevant to and connected with that issue and therefore the litigation.' " (*Id*. at p. 956.) The Supreme court added that "when a court must make very difficult and critical decisions regarding child visitation, it should receive the maximum amount of relevant information. Accordingly, 'Case law is clear that section 47(b) absolutely protects litigants and other participants from being sued on the basis of communications they make in the context of family law proceedings.' [Citation.]" (*Ibid.*)

Obos, *supra*, 59 Cal.App.4th 103, also involved a custody dispute in the family law court. During the course of the litigation, the court appointed a psychologist to recommend, among other things, placement and custody of the children of the marriage. The appointed psychologist learned that mother's

boyfriend had been dishonorably discharged from the military and fired from his job for dishonesty. The psychologist discussed these allegations with the children's attorney and their therapist. The allegations were not included in the ensuing report and did not influence the custody recommendation. (*Id*. at pp. 105-106.) In the boyfriend's ensuing lawsuit for defamation and invasion of privacy, the trial court granted the defendant's motion for summary judgment on the ground the communications were privileged under section 47, subdivision (b). (*Obos*, at pp. 105, 107.) The appellate court rejected the boyfriend's contention that the communication had no connection or logical relation to the case because he was not a party to the litigation. (*Id*. at p. 108.) The court reasoned that the statements were indisputably made to achieve the objects of litigation, namely to render a recommendation consistent with the children's best interest, and that mother's boyfriend would likely have an impact on the children's environment if they lived with mother. The *Obos* court stated, "obviously informing the children's counsel and therapist of the allegations, and inquiring as to their veracity, furthered the goal of ascertaining which custodial arrangement was in the children's best interests." (*Id*. at p. 107.)

Here, following *Jacob B*. and *Obos*, defendant's disclosures are covered by the broad, absolute privilege of section 47, subdivision (b). The disclosure was a communication, made in a judicial proceeding, namely the Family Law Court in Los Angeles County. Defendant, who was the custodian of the information relevant to parenting and parent/child relationships, was a witness/participant. (*Jacob B*., *supra*, 40 Cal.4th at p. 956.) The object of the family law litigation was to develop a parenting plan that was in the best interest of the couple's five children. The

disclosure was made to achieve the object of the litigation because the information was logically related to the family law custody dispute. (*Ibid.*; *Obos*, *supra*, 59 Cal.App.4th at p. 107.) The court appointed Carlson to provide her assessment and evaluation about those very issues, including parenting and parent/child relationships. In the course of this investigation, Carlson collected information from defendant about defendant's "observations of parenting and parent/child relationships." Inquiring about Cady's parenting and her child/parent relationships from the therapist who had provided therapy for Cady and her daughters Anastasia and Schuyler as minors, was designed to further the goal of determining what parenting plan was in the best interest of the five children at issue in the custody dispute. (*Obos*, at p. 107.) The disclosure was made to achieve the objects of the litigation and so the litigation privilege applied, notwithstanding the disclosure was confidential. (*Jacob B.*, *supra*, at p. 959.)

Plaintiffs argue that *Jacob B.* is inapplicable because, unlike Jacob who was himself the subject of the custody proceeding, here adult Anastasia and Schuyler are not among the five children at issue in Cady's divorce proceeding. However, Obos was also *not* the subject of the custody dispute, and was *not a party to the family law litigation*, and yet the privilege extended to conversations the court appointed evaluator had with the children's therapist about Obos. (*Obos*, *supra*, 59 Cal.App.4th at pp. 105-107.) The *Obos* court explained, "The judicial privilege 'is accorded not only to parties but to witnesses, even where their testimony is allegedly perjured and malicious.' [Citation.] '[T]he privilege is *not restricted to the actual parties to the lawsuit but need merely be connected or related to the proceedings*.' [Citation.]

A defendant 'may rely upon the defense of judicial privilege, Civil Code section 47, provided that there is some reasonable connection between the act claimed to be privileged and the legitimate objects of the lawsuit in which that act took place. The privilege is broadly applied to protect most publications within lawsuits provided there is some connection between the lawsuit and the publication. [Citation.]" (*Id.* at p. 108, italics added.)

Stated otherwise, "the focus of the applicability of judicial privilege lies in whether the publication was *connected or related to the underlying proceedings*; the focus is *not the status of the plaintiff* in the subsequent proceeding. Indeed, even lack of standing does not vitiate the privilege. . . . '*The lack of connection, not the lack of standing, would be the reason for denying the privilege.*' " (*Obos, supra,* 59 Cal.App.4th at p. 108, italics added.) Here, the requisite connection is clear, and so it is irrelevant that Anastasia and Schuyler were not parties to the family law proceeding.

Urbaniak v. Newton (1991) 226 Cal.App.3d 1128 (*Urbaniak*), cited by plaintiffs, is distinguished. There, during the plaintiff's workers' compensation action for a head injury and neck and back strain, his employer's insurer arranged for a neurological examination. (*Id.* at pp. 1133-1134.) The plaintiff disclosed to the neurologist that he tested positive for HIV to ensure that the medical equipment would be sterilized. (*Id.* at p. 1134.) The doctor unnecessarily included the plaintiff's HIV status in his neurological report to counsel for the insurer, who passed the information on to the insurer, the Workers' Compensation Appeals Board, and the plaintiff's chiropractor. The plaintiff sued alleging that the gratuitous disclosure of his HIV status was an unconstitutional invasion of his right to

privacy. The trial court granted defendants' summary judgment motion concluding the report was privileged under section 47, subdivision (b). Agreeing that the litigation privilege applied to the insurance company and its attorneys, the appellate court reversed the judgment in favor of the doctor because the disclosure of the HIV status had limited relevance to the purposes of the medical examination of the head injury. (*Urbaniak*, at p. 1141.) Unlike *Urbaniak*, here as explained, the disclosure bore direct connection to the custody issues in Cady's dissolution action. (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 212.)[4] " 'Any doubt as to whether the privilege applies is resolved in favor of applying it. [Citations.]' [Citation.]" (*Obos, supra,* 59 Cal.App.4th at p. 108, italics omitted.)

We disagree with plaintiffs' next argument that defendant was not *required* by law to disclose the psychotherapy history and communications of Anastasia and Schuyler. The same type of

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[4] *Urbaniak* is also distinguished because it held that the litigation privilege did not apply to a cause of action for violation of the right to privacy protected by the California Constitution. (Cal. Const., art 1, § 1; *Urbaniak*, *supra*, 226 Cal.App.3d at p. 1141.) Since *Urbaniak*, however, *Jacob B.* held that "the litigation privilege applies even to a constitutionally based privacy cause of action." (*Jacob B.*, *supra*, 40 Cal.4th at p. 961.) Furthermore, apart from the fact that *Urbaniak* does not support plaintiffs' argument that a constitutional privacy cause of action survives the litigation privilege, plaintiffs did not allege a constitutionally-based privacy cause of action. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 ["The complaint limits the issues to be addressed at the motion for summary judgment. The rationale is clear: *It is the allegations in the complaint to which the summary judgment motion must respond*" (italics added)].)

communication between evaluator and therapist was covered by the litigation privilege in *Obos*. The reason is that the litigation privilege applies "even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 212; accord, *Jacob B.*, *supra*, 40 Cal.4th at p. 955.) Nor is entitlement to the privilege vitiated because the family law court here ordered Carlson's report stricken from the record, plaintiffs' contention to the contrary notwithstanding, because the disclosure had " 'some connection' " to the action. (*Jacob B.*, *supra*, at p. 955.) Indeed, if the communications in *Obos* between the evaluator and therapist are covered by the privilege because they furthered the litigation's goals even though they were *not submitted to the court* and did not appear to have influenced the recommendations, then defendant's disclosures, which Carlson determined were relevant, but which were later stricken from the record, are also privileged because they bore a direct connection to the litigation. (*Obos*, *supra*, 59 Cal.App.4th at pp. 105-107.) To expose communications that are otherwise entitled to the privilege's protection to liability because the trial court later struck them from the record would have the effect of chilling the free exchange of information in contravention of the privilege's purposes to promote effective judicial proceedings by encouraging full communication with the courts, while avoiding unending litigation. (*Jacob B.*, *supra*, at pp. 955-956.) The effect would also "promote chaos, particularly in the realm of custody determinations. Non-parties might become factors in custody determinations for any number of reasons. Certainly a custody evaluation might consider the impact upon the child-both positive and negative-of other individuals residing in (or even merely

frequenting) the parent's home, such as a new spouse, *other children*, grandparent, friend, or roommate. We will not hamstring a court-appointed psychologist's efforts to ascertain the best environment for children by permitting such individuals subsequently to sue the psychologist for alleged defamation when the psychologist's communications otherwise satisfy the requisites of Civil Code section 47." (*Obos*, *supra*, at p. 109, italics added.)

There being no dispute of material fact, as a matter of law, the challenged, confidential communication is privileged (§ 47, subd. (b)), with the result that summary judgment was properly granted. Accordingly, we need not reach the remaining issues raised by the parties.

DISPOSITION

The judgment is affirmed. Respondent is to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

STRATTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.