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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GLENN SHELHAMER, Plaintiff and Appellant, v. SHIRIN TOWFIGH et al., Defendants and Respondents.	B292421 (Los Angeles County Super. Ct. No. SC128977)

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

LDT Consulting and Dimitrios P. Biller for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Cassidy C. Davenport, Bethany J. Peak; Carroll, Kelly Trotter, Franzen, McBride & Peabody, Thomas M. Peabody and Michael E. deCoster for Defendants and Respondents.

This appeal arises from the second lawsuit brought by Glenn Shelhamer (plaintiff) against Dr. Shirin Towfigh and the Beverly Hills Hernia Center (defendants). In the first action, plaintiff alleged that Dr. Towfigh had committed medical malpractice in performing a hernia repair surgery and a revision procedure on him and had failed to obtain informed consent for the procedures, including for the use of an assistive robotic device. In this, the second action, plaintiff brought claims of abuse of process and unfair business practices based in large part on defendants' conduct defending the first lawsuit. The trial court granted defendants' anti-SLAPP motion as to the entirety of the abuse of process cause of action, and those portions of the unfair business practices cause of action which involved conduct during the underlying lawsuit; the court dismissed the abuse of process claim, but not the unfair business practices claim.

Plaintiff appeals, contending the trial court erred in (1) failing to conduct an allegation-by-allegation analysis of the abuse of process cause of action; (2) finding inapplicable the exception for illegality as a matter of law as to most or all of his allegations; and (3) finding that the litigation privilege of Civil Code section 47, subdivision (b) protected against several of his allegations.[1]

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[1] As was the case in the trial court, plaintiff's pleadings are disorganized and difficult to follow. The opening brief lacks the appropriate headings and subheadings which ensure that litigants " 'present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.' [Citation.]" (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.)

We have reviewed the record de novo. An abuse of process claim requires misuse of the court's process and so involves activity after a lawsuit has begun, undertaken in the prosecution or defense of that action. Thus, the allegations all involved protected activity in the first instance. Although plaintiff alleged numerous instances of illegal conduct by defendants, plaintiff failed to offer the required conclusive evidence of illegality. The abuse of process allegations did not lose their protected status, and the burden shifted to plaintiff to show a probability he would prevail on the merits. Although plaintiff alleged the litigation privilege of Civil Code section 47, subdivision (b) did not apply because defendants destroyed or altered documents, plaintiff did not show he was denied the use of such documents. Thus, Civil Code section 47, subdivision (b) does apply and precludes plaintiff from showing a probability of prevailing on the merits of his abuse of process claim. We affirm the trial court's order.

BACKGROUND

On January 6, 2015, plaintiff visited Dr. Towfigh with complaints of abdominal pain. She diagnosed him with a hernia. On February 23, 2015, Dr. Towfigh performed laparoscopic surgery on plaintiff using an assistive robotic device. Plaintiff was unhappy with the appearance of the scar from the surgery, which he described as looking like a second belly button. On

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Although we exercise our discretion to consider those issues we can discern in plaintiff's disorganized arguments, there are times when it is not possible to understand what precisely plaintiff is arguing. Any arguments not discussed in this opinion are deemed forfeited. (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179.)

July 31, 2015, Dr. Towfigh subsequently performed a scar revision procedure in her office. Plaintiff was not satisfied with the result.

Before this lawsuit was filed, plaintiff asked for his medical records. He received some documents in response to this request, including a July 31, 2015 consent form which he claims contains his forged signature. Plaintiff stated that he did not receive three documents which were subsequently produced in discovery: (1) a medical report for the initial January 2015 visit electronically signed by Physician's Assistant Christopher Littman in January 2015; (2) a medical report for the July 31, 2015 revision procedure signed on November 2, 2016, and (3) a January 19, 2015 e-mail from Beverly Hills Hernia Center informing plaintiff the assistive robotic device was going to be used in his surgery.

On September 14, 2016, plaintiff filed his first lawsuit against Dr. Towfigh, alleging causes of action for medical malpractice, fraud and unfair business practices. Discovery begin in November 2016.

During discovery, which appears to have been extremely contentious, plaintiff began to believe that some medical records were forged, altered, destroyed or concealed. As relevant on appeal, the three primary documents which plaintiff alleges were the product of illegal activity are (1) the July 31, 2015 consent form (forged); (2) the medical report for the July 31, 2015 revision procedure (fabricated); and (3) the medical/consultation report for plaintiff's initial January 2015 visit (altered). At some point, plaintiff sought leave to amend his complaint to allege causes of action for abuse of process and unfair business practices and to add new parties based on Dr. Towfigh's discovery responses. This request was apparently unsuccessful. On March 9, 2018, plaintiff

filed this second lawsuit against Dr. Towfigh, Beverly Hills Hernia Center, and Dr. Matthew Lublin, who provided expert testimony in support of Dr. Towfigh's motion for summary judgment in the first action. Although the complaint contains two causes of action, the trial court dismissed only the abuse of process cause of action in response to defendants' anti-SLAPP motion.[2]

DISCUSSION

California's anti-SLAPP statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike, unless the court determines . . . there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).)[3] The

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[2] The trial court found only a very small portion of the allegations of plaintiff's unfair business practices claim arose from protected activity. The court struck those allegations at the second step of the anti-SLAPP analysis. The court did not dismiss the unfair business practices cause of action, and plaintiff makes no separate claim of error on appeal concerning the trial court's ruling on this cause of action. Plaintiff represents that the trial court later dismissed this cause of action in its ruling on a motion for abatement. For these reasons, we do not consider or discuss this cause of action any further.

Dr. Lublin brought his own anti-SLAPP motion, which is not part of this appeal. Accordingly, we do not consider any of plaintiff's contentions that Dr. Lublin independently engaged in illegal conduct in the underlying litigation.

[3] Further undesignated statutory references are to the Code of Civil Procedure.

phrase, " 'in furtherance of a person's right of petition or free speech' " is defined in section 425.16, subdivision (e), which provides that " '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) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Ibid.*)

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral, supra,* 1 Cal.5th at p. 384.)

In the first step of the anti-SLAPP analysis, "the moving defendant bears the burden of identifying all *allegations* of protected activity, and the claims for relief supported by them."

(*Baral*, *supra*, 1 Cal.5th at p. 396, italics added.) Thus, "if the complaint itself shows that a claim arises from protected conduct . . . , a moving party may rely on the plaintiff's allegations alone in making the showing necessary under prong one without submitting supporting evidence." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 936.)

"On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant made its threshold showing the action was a SLAPP suit and whether the plaintiff established a probability of prevailing. [Citation.] 'In doing so, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." ' [Citation.] We do not weigh the credibility of the evidence or its comparative probative strength." (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1270.)

I. The Entire Abuse Of Process Claim Arises From Protected Activity.

Plaintiff contends his cause of action for abuse of process contained allegations of both protected and unprotected activity, and so was a mixed cause of action. Plaintiff asserts defendants were required to identify each individual allegation within the complaint which involved protected activity, but failed to do so. He contends the trial court erred in applying the "gravamen" approach and looking at the cause of action as a whole, rather than considering the allegations individually.

As our Supreme Court has explained, anti-SLAPP motions are not restricted to striking entire causes of action. (*Baral, supra*, 1 Cal.5th at p. 393.) The holding of *Baral* is intended to prevent plaintiffs from avoiding dismissal under section 425.16

by permitting courts to "rule on plaintiff's specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Baral*, at p. 393.) A defendant simply "bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Id*. at p. 396.)

The Courts of Appeal are split on whether *Baral* prohibits an anti-SLAPP motion directed at an entire cause of action which contains allegations of both protected and unprotected activity. (See, e.g., *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1170 [gravamen analysis no longer viable after *Baral*]; *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 589 [gravamen analysis remains viable].) Under the facts of this case, we need not decide this issue because there are no allegations of relevant unprotected activity.

By definition, an abuse of process claim involves conduct in the underlying litigation. The tort is based on " 'the misuse of the tools the law affords litigants once they are in a lawsuit.' " (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 41–42, italics omitted.) Abuse of process claims typically arise from improprieties in the discovery process. (*Ibid*.) Thus, "it is hard to imagine an abuse of process claim that would not fall under the protection of the [anti-SLAPP] statute." (*Booker v. Rountree* (2007) 155 Cal.App.4th 1366, 1370.) Defendants' motion to strike the entire abuse of process cause of action was thus consistent with the fundamental nature of that cause of action.

We have reviewed the allegations supporting the abuse of process claim and find them typical for such a cause of action – they arise from conduct related to discovery in the underlying litigation. Plaintiff's own summary of the abuse of process cause

of action in his Opposition to the anti-SLAPP motion conceded that the conduct arose from activity in the underlying litigation; plaintiff claimed that Towfigh "abused the discovery tools in the discovery process and the processes in the civil procedure process to cover-up the fraud" she allegedly committed by using the assistive robotic device and failing to obtain informed consent from plaintiff for two surgical procedures.[4]

On appeal, plaintiff contends some of the activity was not protected because it took place before he filed the first underlying lawsuit. Plaintiff points to (1) activities related to his medical care, treatment and surgeries, and (2) concealment of information and misrepresentations, including an allegedly forged signature on the July 31, 2015 consent form, an allegedly fabricated medical report for the July 31, 2105 revision procedure, alleged pretrial concealment of a January 2015 e-mail regarding the robotic device, and possibly also an allegedly altered medical/consultation report for his initial January 2015 visit.

These allegations standing alone cannot support a claim for abuse of process because no use or misuse of the court's process was involved. At most, they provide background or context for defendants' actions after litigation had begun.[5] As the trial court cogently explained, plaintiff's "injury under the abuse of process

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[4] Plaintiff's reference to the civil procedure process appear to refer to a summary judgment motion in the underlying lawsuit.

[5] Not surprisingly, all but two of the 38 paragraphs which plaintiff contends include unprotected activity are found in the general allegations portions of his complaint and are simply incorporated by reference into the abuse of process cause of action.

arose from Defendant producing these tampered with documents and representing that these documents were the original documents–not the tampering of the documents themselves."

Plaintiff's reliance on *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28 and *Okorie v. Los Angeles Unified School Dist.*, *supra*, 14 Cal.App.5th 574 to show defendants' prelitigation conduct is not protected is misplaced. None of these cases involved a motion to strike an abuse of process cause of action, which can only be based on conduct involving an alleged misuse of the court's process. They involved claims for violations of statutes concerning financial interests (*City of Montebello*), breach of contract/lease (*Newport Harbor*) and discrimination (*Okorie*), all of which can be based in whole or part on prelitigation conduct.

We recognize plaintiff's abuse of process claim also included allegations that (1) defendants altered or destroyed evidence, and (2) defendants acted illegally, rendering inapplicable the litigation privilege of Civil Code section 47. A defendant need not show her conduct is protected by the Civil Code section 47 litigation privilege to satisfy her burden under the first prong of the anti-SLAPP analysis. (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 284 (*Birkner*); see *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1261.) The applicability of Civil Code section 47 is generally relevant at the second stage of the anti-SLAPP analysis. (See, e.g., *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1485.) As we discuss in more detail below, mere allegations of illegal activity are not sufficient to defeat an anti-SLAPP motion. (*Birkner*, at p. 285.)

II. Plaintiff Has Not Shown Defendants' Conduct Was Illegal As A Matter of Law.

Plaintiff's complaint alleges that much of defendants' assertedly protected activity was illegal as a matter of law, and plaintiff repeated these claims in his Opposition to defendants' anti-SLAPP motion. The illegality exception to the anti-SLAPP statute is a narrow one and it does not apply here.

When a "defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*).) The "showing required to establish conduct illegal as a matter of law [is] either through defendant's concession or by uncontroverted and conclusive evidence." (*Ibid*.) Defendants did not concede any illegality. Thus, to apply the illegality exception, plaintiff was required to identify "uncontroverted and conclusive evidence" of illegality. We have reviewed the record de novo and we reach the same conclusion as the trial court: plaintiff has not identified conclusive and uncontroverted evidence of illegality.

a. The Complaint

Plaintiff repeatedly refers to the allegations of the complaint as showing illegality, but these allegations are not evidence, and defendants were not required to submit evidence to refute those allegations. It was plaintiff's burden to identify evidence that defendant behaved as alleged and to provide legal argument showing how those facts were illegal as a matter of law. " '[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical.'

[Citations.] An exception to the use of section 425.16 applies only if a 'defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.' (*Flatley, supra,* 39 Cal.4th at p. 320.)" (*Birkner*, *supra*, 156 Cal.App.4th at p. 285.)[6]

b. The Declarations Of Plaintiff And His Attorney Dimitrios Biller

Plaintiff's declaration and attorney Biller's declaration in support of plaintiff's Opposition to the anti-SLAPP motion do contain evidence, but that evidence is not conclusive or uncontroverted. The trial court sustained many of defendants' objections to the 60-page Biller declaration, resulting in almost all of the declaration being stricken. In the remaining portions of the declaration, Biller primarily describes documents which were not produced in response to discovery requests, or were produced late. Biller points to Dr. Towfigh's verification of the Requests for Production as proof that she committed perjury, among other crimes. Even if uncontradicted, this would not be conclusive evidence of perjury.

Perjury requires a willfully false statement. (CALCRIM No. 2640.) There are many possible reasons a document might be not be produced initially in response to a request, including an

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[6] Plaintiff also relies on exhibits to the complaint to show illegality. The exhibits consist of various discovery requests and responses, plus medical records apparently produced during discovery. As we explain in more detail in our discussion of the exhibits to plaintiff's attorney's declaration, the exhibits, standing alone, are meaningless. The mere existence of different versions of a report, for example, does not qualify as conclusive proof the document was illegally altered or fabricated.

objection to the request, a temporary inability to locate the document, or confusion over terminology used to describe the document. Thus, even assuming it might be reasonable to infer from Dr. Towfigh's non-production of documents that she was willfully false when she verified her discovery responses, that is not the only reasonable inference and it is therefore insufficient. (See *City of Montebello v. Vasquez, supra,* 1 Cal.5th at p. 424 [explaining that when defendants deny wrongdoing and plaintiff's claim "depends on inferences to be drawn from circumstantial evidence . . . . This state of the case forecloses a resolution at the first step of the anti-SLAPP inquiry."].)

Plaintiff's own declaration is evidence that the signature on the July 31, 2015 consent form is not his. If left uncontradicted, this would be conclusive evidence that the signature was forged. Although Dr. Towfigh did not expressly contradict this evidence, she stated in her February 27 deposition that plaintiff came into her office on July 31 to discuss the scar. Biller asked "Did he sign any form?" Dr. Towfigh replied, "Yes." She also stated "we consented him." This is sufficient to dispute plaintiff's claim his signature was forged.

c. Exhibits To The Biller Declaration

Plaintiff contends correctly that the trial court overruled most of defendants' specific objections to the exhibits to his declaration. These exhibits are evidence. Standing alone, however, no exhibit provides evidence of a crime, including the transcripts of Dr. Towfigh's February 27, 2017 and September 8, 2017 depositions. We have reviewed both transcripts. They contain Biller's accusation that Dr. Towfigh made false statements on a number of topics; however, these accusations are not evidence. The transcripts also include Biller's accusation that

Dr. Towfigh shipped a computer out of state to avoid his inspection of the hard drive; again that accusation is not evidence.[7]

As to the non-deposition exhibits, plaintiff seizes upon different versions of a medical or consultation report for the January 2015 initial consultation, one with Littman's signature alone and one with both Littman's and Towfigh's signatures, as proof of fraudulent alteration of the report. This accusation does not establish that there is anything more involved than supervisorial editing; the changes are not substantive. Plaintiff also claims a medical report for July 31, 2015 with an electronic signature date of November 2, 2016 is fabricated. Plaintiff stated in his declaration that this document was not included in his medical file produced pre-litigation. Biller argues in his declaration that the late production was circumstantial evidence that the document is not authentic, and the delayed signature strongly suggests, if not proves, the document was tampered with. We strongly question whether these inferences would be reasonable. However, even if they are, they are not the only reasonable inferences from the evidence and so they are not

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[7] In her deposition testimony, Towfigh disputed this and all other accusations by Biller. Towfigh's testimony is evidence. With regard to the computer, Towfigh stated that she was not sure whether the computer she gave to a relocating employee was used by Littman to create the reports at issue, but she and her attorney agreed to make the employee available to Biller for deposition. With regard to the November signature date, she explained that she had to electronically sign the document before she could print it out.

sufficient to prove illegality as a matter of law. (See *City of Montebello v. Vasquez*, *supra*, 1 Cal.5th at p. 424.)

Finally, plaintiff asserts Dr. Lublin's declaration, attached as an exhibit to Biller's declaration, shows illegality. Defendants had offered this declaration in support of their summary judgment motion in the underlying lawsuit. Dr. Lublin was the expert retained by defendants in their defense of the first action. Dr. Lublin states he is relying on documents provided to him by Dr. Towfigh. As we have just explained, plaintiff has not offered conclusive proof of illegality concerning these documents. Thus, there is no conclusive evidence that Dr. Towfigh acted illegally in providing the documents to Dr. Lublin.

Plaintiff contends that Dr. Lublin's declaration contained obvious falsehood which could not have been based on the underlying documents he relied on. Plaintiff makes a detailed argument that: 1) Dr. Lublin falsely stated plaintiff had "a robotic assisted laparoscopic" procedure but the underlying documents discussed only "a laparoscopic procedure";
2) Dr. Lublin falsely stated plaintiff requested a "revision of a supraumbilical scar," but plaintiff did not request such surgery and Lublin had no basis to use the word "supraumbilical";
3) Dr. Lublin falsely described the scar as "dimpled" which is not a medical term and not a term used by plaintiff; 4) Dr. Lublin falsely stated Towfigh performed a scar revision procedure "to break up the adhesions and allow the skin to release from the underlying tissue" when there were no details of the procedure in the documents.

Assuming plaintiff has not forfeited these claims by failing to raise them properly in the trial court, none of the statements are conclusive evidence of illegality.[8] Dr. Lublin clearly believed using the robotic assistance device did not change the nature of the procedure; plaintiff's expert may have believed it did. Dr. Lublin's statement reflects at most a difference of opinion on this topic. Nothing in Dr. Lublin's statement suggests plaintiff used the words "supraumbilical" or "dimpled" and there is nothing false in these descriptions. Similarly, Dr. Lublin's description of what a scar revision procedure involves is not false. Plaintiff has not shown defendants committed an illegal act by offering Dr. Lublin's declaration in support of their motion for summary judgment.

Because plaintiff did not show conduct that was illegal as a matter of law, the allegations continue to be protected activity at the first stage of our analysis.

III. Civil Code Section 47 Precludes Plaintiff From Showing A Probability He Would Prevail On The Merits.

At the second step of the anti-SLAPP analysis, the plaintiff has the burden "to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra,* 1 Cal.5th at p. 384.) Here, the trial court found all the alleged conduct which supported the abuse of process cause of action "occurred while the

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[8] Plaintiff did make these arguments in Biller's declaration in the trial court. As the trial court correctly noted, substantive argument is not properly included in declarations. (See *In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30, fn. 3.) The trial court sustained defendant's objections to Paragraphs 19 and 20 which included the Lublin arguments.

underlying litigation was pending and in response to discovery demands and substantive motions . . . ." The court found these communications were made in furtherance of litigation and as such the alleged conduct was protected by litigation privilege of Civil Code section 47, subdivision (b). The court concluded that due to the litigation privilege, plaintiff could not carry his burden with respect to the cause of action for abuse of process. Plaintiff contends the trial court erred because some of his key allegations involved the alteration or destruction of evidence by defendants, placing that conduct outside the litigation privilege provided by Civil Code section 47, subdivision (b).

"Section 47 establishes a privilege that bars liability in tort for the making of certain statements. Pursuant to section 47(b), the privilege bars a civil action for damages for communications made '[i]n 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 [statutes governing writs of mandate]'. . . . The privilege established by this subdivision often is referred to as an 'absolute' privilege, and it bars all tort causes of action except a claim for malicious prosecution." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360.) "The principal purpose of [Civil Code section 47, subdivision (b)] 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." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213.) "[I]n immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby

enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." (*Id.* at p. 214.)

There is an exception to this privilege, found in Civil Code section 47, subdivision (b)(2) which provides: "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."

Plaintiff clearly identifies two allegations of altered and/or destroyed documents: (1) the alleged alteration of the medical report for the initial January 6, 2015 consultation; and (2) the alleged addition of a forged signature to a consent form on July 31, 2015. At times he appears to contend the July 31, 2015 medical report with a signature date of November 2, 2016 was an altered version of an earlier report, although he more frequently contends this report was simply fabricated after litigation began.

Plaintiff has a copy of what he alleges is the original version of the January 2015 medical report and a copy of what he alleges is the altered version of that report. Thus, he was has not shown that he was deprived of the use of the "original" version of the report by any editing or alteration of the report. The allegations concerning the January 2015 medical report do not fall under Civil Code section 47, subdivision (b)(2)'s exception to the litigation privilege.

Plaintiff contends the addition of the forged signature to the consent form destroyed the original unsigned version of the consent form and deprived him of its use. The consent form is simply a pre-printed or pre-formatted form with a number of blank areas. The specific information relevant to plaintiff has

been written in. Plaintiff has not claimed that he was shown a consent form with hand-written information relevant to him that he failed or refused to sign. Plaintiff stated in his declaration "I was not presented with a AUTHORIZATION FOR & CONSENT TO SURGERY OR OTHER INVASIVE PROCEDURES(S) on July 31, 2015 to sign." Absent some proof of the existence of a partially completed but unsigned form, no evidence has been destroyed. The unaltered version of the consent form would simply be a generic blank form. Such a blank form would have no relevance and no "use" in the underlying litigation. The allegations concerning the consent form do not fall under Civil Code section 47, subdivision (b)(2)'s exception.

Plaintiff's lack of clarity concerning the July 31, 2015 medical report with the signature date of November 2, 2016 makes it extremely difficult to analyze this claim. To the extent he is claiming that "fabricating" a report is the equivalent of altering or destroying physical evidence, he is mistaken. If he is in fact claiming the document is an altered version of an earlier medical report, he has failed to show another such version ever existed. We find only one version of the medical report listed as an exhibit to Biller's declaration. Biller's declaration mentions that Dr. Towfigh produced a document entitled "July 31, 2015, Procedural Note For Revision Surgery." If this is the document which he claims is the original of the July 31, 2015 medical report, he was not deprived of the use of that original. The allegations concerning the July 31, 2015 medical report do not fall under Civil Code section 47, subdivision (b)(2)'s exception to the privilege.

DISPOSITION

The trial court's order is affirmed. Appellant to pay costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.