Filed 3/1/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

JACOB B., Plaintiff and Respondent, v. COUNTY OF SHASTA et al., Defendants and Appellants.	C049794 (Super. Ct. No. 149219)

APPEAL from a judgment of the Superior Court of Shasta County, Jack Halpin, J. Reversed with directions.

Brickwood Law Office, Gary Brickwood and Monique Grandaw for Defendants and Appellants.

Halkides, Morgan & Kelley, Arthur L. Morgan and Paul C. Meidus for Plaintiff and Respondent.

A jury awarded plaintiff Jacob B. $30,000 against defendants County of Shasta (the County) and Stephanie B. Lloyd for invasion of his state constitutional right to privacy. The

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV of the Discussion.

invasion consisted of a letter written by Lloyd, a supervisor in the County's Victim Witness Program, referring to a child molestation accusation against Jacob, which was published in a family law proceeding that concerned visitation rights among Jacob, his parents, and members of their extended family.

On a motion for nonsuit, the trial court found that the letter was cloaked with the litigation privilege immunity found in Civil Code section 47, subdivision (b) (hereafter section 47(b)), and dismissed all causes of action *except* for invasion of Jacob's constitutional right to privacy. Defendants appeal, claiming the trial court should have dismissed the entire case.

We conclude that the letter was absolutely privileged, and that the motion for nonsuit should have been granted. We shall reverse the judgment.

FACTUAL BACKGROUND

A motion for nonsuit is proper when, "'"interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff[,] a judgment for the defendant is required as a matter of law." [Citations.]'" (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506, citing *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.) We summarize the evidence in light of that principle, which is applicable to both reviewing courts and trial courts. (*DiPalma,* at pp. 1505-1506.)

The 1993 Molestation Claim

In 1993, Laura and Charles B.[1] came into the Shasta County Sheriff's office to report that their five-year-old son B.B. had been molested by his uncle Jacob--Charles's younger brother who was 15 years old at the time. The investigating officer interviewed B.B. and was of the opinion that a molestation had occurred, but the case was not prosecuted due to his young age and inability to communicate specifics about what had occurred.

The County operates a Victim Witness Program (Victim Witness), which is a subdivision of the district attorney's office. On September 24, 1993, Laura applied for Victim Witness benefits on B.B.'s behalf. Victim Witness is authorized by law to grant compensation to a victim of any "criminal act," regardless of whether there was a prosecution or conviction. (See Gov. Code, §§ 13950, subd. (a), 13955.) To determine whether benefits are payable, Victim Witness decides, using a preponderance of the evidence standard and based on medical and police reports and other documentation, whether a crime occurred. In this case, Victim Witness approved Laura's claim, and as a result, B.B. received $10,000 in counseling services.

In 1993, Victim Witness transferred raw data from its cases into a statewide victims-of-crime (VOX) computer database system, while maintaining index cards to track and identify

[1] To avoid confusion and for convenience only, we shall refer to some family members in this narrative by their first names. No disrespect is intended.

individual claims. On the VOX system, B.B. was identified as the victim of a molestation and his uncle Jacob as the perpetrator. Although B.B.'s date of birth was listed, at that time there was no space in the system to enter a birth date for the perpetrator.

Family Historical Events

Todd and Stephanie B. were married from 1990 to 1999 and had three biological sons together, M., Q. and C. (hereafter Todd's sons). In 1999, Todd divorced Stephanie, while Charles divorced Laura. Each then married the other's spouse. As a result, Charles and Stephanie lived together with Todd's sons, while B.B. (Charles's biological son with Laura) lived with Todd and Laura. At this time, all of the children are still minors.

When Charles and Laura were divorced in 1999, the couple stipulated, after mediation, that B.B. would have no contact with either his uncle Jacob or his paternal grandparents M.B.[2] and K.B. Likewise, Stephanie and Todd's dissolution decree also forbade contact between Todd's sons and Jacob, M.B. and K.B.

Stephanie and Charles grew unhappy with the court order forbidding contact between Todd's sons and Charles's brother Jacob or his parents. Consequently, there was an ongoing

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[2] When B.B. accused Jacob of molestation in 1993, Charles had confided to Laura that there was a history of molestation in his family--that his father M.B. had molested him and, he believed, also molested Jacob. Charles's sister also accused M.B. of molesting her.

dispute in Stephanie and Todd's family law proceeding as to whether Todd's sons should be able to visit Jacob, M.B. and K.B.

On February 11, 2003, Stephanie (now married to B.B.'s father, Charles) filed an order to show cause (OSC) in Tehama County Superior Court, asking the family law court to remove visitation restrictions between Todd's sons and Jacob, M.B. and K.B., due to the financial and emotional hardships these restrictions caused the stepfamilies.

The February 21 Letter

On February 21, 2003, Laura (now Todd's wife) came into the Victim Witness office, crying and distraught. She told Victim Witness advocate Carol Gall and her supervisor Lloyd that there was a court hearing that day in Tehama County, in which the judge would be deciding whether her son B.B. would have contact with his uncle Jacob. She pleaded with them to help her by writing to the court.

Gall went to her index card file and located a card for B.B.'s case. She then took the card to Lloyd who instructed her to obtain the information on the case in the VOX computer system. Gall went to claims specialist Brenda Ness, who accessed the VOX computer screen. The VOX synopsis listed the crime as Penal Code section "288 [child molest]," recited that Jacob had molested his nephew B.B., and that B.B. had been paid $10,000 in Victim Witness benefits. VOX also indicated criminal proceedings were closed due to insufficient evidence.

After receiving the information, Lloyd had Gall compose a letter for Lloyd's signature. That letter, dated February 21, 2003, on the stationary of the Shasta County District Attorney (the February 21 letter), is the focal point of this litigation. In it, Lloyd states that in November 1993, Laura "established" a claim with Victim Witness that her son was a victim of molestation by "his uncle Jacob," that the case "was investigated by [the] Shasta County Sheriff['s] Department," and that B.B.'s family had used all $10,000 in Victim Witness benefits for "counseling due to the crime."

Lloyd assumed Jacob was an adult at the time of the molestation because he was referred to as B.B.'s uncle and the information she had did not indicate he was a minor. Both she and Gall understood that the letter would be presented to a judge in family law court in Tehama County. Lloyd used the salutation "To Whom It May Concern" because she did not know the judge's name and thought using "Dear Mr. Judge" or "Your Honor" would sound awkward.

As it turned out, the Tehama County court proceeding involved removal of visitation restrictions between Jacob, M.B. and K.B. and Todd's sons. Visitation between Jacob and B.B. was not an issue before the court. However, Laura felt that if the no-contact order were dropped as to Todd's sons, removal of Jacob's prohibition on visiting B.B. would inexorably follow. This was especially true because Charles had previously sought to lift the restrictions on contact between Jacob and B.B. and

because Todd's sons and his stepson B.B. usually traveled together as a unit for family visitation purposes.

Laura gave the letter to her husband Todd, who attached it to his declaration in opposition to Stephanie's request to modify visitation, and filed it in Tehama County Superior Court. When Stephanie saw the letter, she gave it to Jacob, who filed this lawsuit on July 7, 2003.

PROCEDURAL HISTORY

Jacob filed a complaint against the County and Lloyd for libel and negligent infliction of emotional distress based on the February 21 letter and a second letter that was sent to Jacob's attorney in response to his demand for a retraction.[3] In addition, the complaint alleged an invasion of privacy based on the February 21 letter.

A jury was impaneled and the above evidence was presented. At the conclusion of Jacob's case, defendants (the County and Lloyd) made a motion for nonsuit, based on the litigation privilege. The trial court ruled that the litigation privilege attached to the February 21 letter, and thus defendants were entitled to dismissal of Jacob's causes of action for defamation, negligence, and common law invasion of privacy.

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[3] The second letter, dated March 7, 2003, states: "Dear Mr. Andrews: This letter is to confirm that Jacob [B.] was never convicted of molesting his nephew [B.B.]. Based on the totality of the information available to us, including statements in the crime report and other related items, it appears that [B.B.] was a victim of molest."

However, relying on *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 Cal.App.4th 345 (*Jeffrey H.*), the court determined that Jacob's state *constitutional* privacy interests overrode the litigation privilege, and denied the nonsuit as to Jacob's invasion of privacy cause of action based on article I, section 1 of the California Constitution.

The case proceeded to its conclusion, resulting in a jury verdict of $30,000 against the County and Lloyd. Judgment was entered accordingly.

DISCUSSION

I. The Parties' Contentions

Each party has set its own agenda for appellate review of the propriety of the trial court's ruling on defendants' motion for nonsuit: Defendants' appeal is based on the straightforward assertion that the trial court followed the wrong line of authority in ruling that the *constitutional* right to privacy trumped the litigation privilege. Jacob counters that the trial court erred in its foundational finding that the privilege of section 47(b) applied *at all,* because (1) defendants violated the law when they engaged in the unauthorized disclosure of confidential juvenile criminal records, and (2) the County and Lloyd were neither litigants nor participants in the visitation dispute regarding Jacob and Todd's sons.[4]

[4] Defendants assert that Jacob is not entitled to complain about the trial court's ruling on the nonsuit motion because he did not file a cross-appeal. We disagree.

In the event we disagree with his primary thesis, Jacob concedes that it is "unsettled" whether a claim for constitutional invasion of privacy survives section 47(b), but urges us to uphold the trial court's ruling, based on the reasoning of *Jeffrey H.*, *supra*, 85 Cal.App.4th 345.

We conclude the trial court was correct that the privilege applied but incorrect in its view that a privacy claim invoking the state Constitution could trump it. Moreover, even if a constitutionally-based privacy cause of action could survive the privilege, defendants could not be liable for that tort based on the evidence presented at trial.

II. Did the Litigation Privilege Apply to the February 21 Letter?

Section 47(b) provides in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] [i]n any . . . judicial proceeding." "[T]he privilege applies to any

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If Jacob were using his argument to attack any part of the judgment, we would be without jurisdiction to consider it, absent the taking of a cross-appeal. (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.) However, "[a]ppellate courts can review error upon respondent's request, even though respondent has not filed a cross-appeal, for the purpose of determining whether *appellant* was *prejudiced* by the error *appellant* asserted on appeal." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 8:196, p. 8-124; see Code Civ. Proc., § 906.)

Here, if the trial court was wrong in its intermediate ruling that the privilege applied, defendants' motion for nonsuit should have been denied *in its entirety* and the jury's verdict must be upheld. Accordingly, Jacob may raise his argument for the purpose of demonstrating that the judgment is free from prejudicial error. (See *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671.)

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." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*); accord see *Rusheen v. Cohen* (Feb. 23, 2006, S123203) ___ Cal.4th ___, ___ [2006 Cal. Lexis 2542, *2-*3, *13-*18] (*Rusheen*).) The privilege is absolute, which means it applies regardless of the existence of malice or intent to harm. (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 810, 815.) "Although originally enacted with reference to defamation [citation], the privilege is now held applicable to any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution. [Citations.] Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation . . . ." (*Silberg, supra,* 50 Cal.3d at p. 212.) Finally, "[c]ase 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." (*Wise v. Thrifty PayLess, Inc.* (2000) 83 Cal.App.4th 1296, 1302 (*Wise*).)

Applying these principles to the facts here, it is clear to us that the February 21 letter was protected by the litigation privilege. The letter constituted a "communication." It was made in the context of a judicial proceeding, i.e., a pending

case in Tehama County. Lloyd, who was 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.

Jacob maintains that the trial court incorrectly ruled that privilege applied, because Lloyd broke confidentiality laws meant to protect a juvenile's right to privacy by releasing information about the 1993 incident without a prior court order.[5] Consequently, he argues, Lloyd's disclosure was not "*authorized by law*," and an essential element of the privilege is gone. He relies on cases such as *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290 (*Susan S.*), *Kimmel v. Goland* (1990) 51 Cal.3d 202 (*Kimmel*) and *Mansell v. Otto* (2003) 108 Cal.App.4th 265 (*Mansell*).

Those cases are distinguishable however, because in each, tort liability was based on *noncommunicative* acts that invaded the plaintiff's privacy, not publications or broadcasts in a

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[5] Jacob relies exclusively on Welfare and Institutions Code section 827, which, in February 2003, shielded from public view any "petition" filed in juvenile court or "other documents filed in that case or made available to the probation officer in making his or her report, or to the judge, referee, or other hearing officer." (§ 827, former subd. (a), as amended by Stats. 1999, ch. 996, § 1 [text in former subd. (a) redesignated as subd. (e)]; see also 73A West's Ann. Welf. & Inst. Code (2006 supp.) foll. § 827, p. 141.) However, because a juvenile court case was never opened as a result of the 1993 investigation, defendants do not appear to have violated the provisions of that section, and thus Jacob's argument is flawed at its inception.

judicial proceeding. In *Susan S.*, a defense attorney was inadvertently given the plaintiff's confidential psychiatric records; after reading them, he transmitted them to a psychiatric expert. The court stated that "Susan S.'s cause of action for invasion of her constitutional right of privacy does not depend on the 'publication' or 'broadcast' of her mental health records but rests on Israels'[s] conduct in reading those records." (*Susan S.*, *supra*, 55 Cal.App.4th at p. 1299.) The privacy invasion recognized in *Susan S.* was not the dissemination of confidential medical records in the civil suit, but the noncommunicative act of reading them and transmitting them to a third party.

In *Kimmel*, *supra*, 51 Cal.3d 202, the plaintiffs sued the defendants for unlawfully tape-recording confidential conversations between the parties in violation of an eavesdropping statute. Defendants argued they were immune from liability under the litigation privilege because they made the recordings in order to gather evidence to be used in litigation. The Supreme Court rejected that claim, ruling that the litigation privilege "precludes recovery for tortiously inflicted injury resulting from *publications* or *broadcasts* made during the course of judicial and quasi-judicial proceedings, but does not bar recovery for injuries from tortious *conduct* regardless of the purpose for which such conduct is undertaken." (*Id.* at p. 205.) Thus, plaintiff was permitted to go forward

with her privacy claim based on the *noncommunicative* acts of making illegal recordings.

Mansell's facts parallel those of *Susan S.* in that plaintiff, a crime victim, brought an invasion of privacy suit against the alleged perpetrator and his criminal defense attorneys for the unauthorized reading and disseminating of her mental health records. (*Mansell*, *supra*, 108 Cal.App.4th at p. 267.) The Court of Appeal for the Second Appellate District, Division Seven, reiterated its holding in *Susan S.*, *supra*, 55 Cal.App.4th 1290, that noncommunicative *conduct* is not protected by the litigation privilege, regardless of whether the defendant harbors a litigation-related purpose. (*Mansell*, at p. 271.) Even then, the court affirmed a dismissal of the case because the defendants received the records through the court's normal discovery process. (*Id*. at pp. 276-279.)

Ribas v. Clark (1985) 38 Cal.3d 355 (*Ribas*) sheds far more light on the resolution of this case than the triad of cases relied on by Jacob. There, the attorney for the plaintiff's wife eavesdropped on a telephone conversation between the wife and the plaintiff. The attorney then revealed the contents of the overheard conversation in an arbitration proceeding. Plaintiff sued the attorney alleging, inter alia, violation of California's Invasion of Privacy Act (Pen. Code, § 630 et seq.) and common law invasion of privacy. Our Supreme Court held that while the defendant could be held statutorily liable for

listening in on the conversation,[6] plaintiff could not state a cause of action for the common law privacy tort, noting that the claimed injury "stems solely from defendant's testimony at the arbitration proceeding." (*Ribas, supra*, at p. 364.)

Here, the gravamen of Jacob's invasion of privacy claim was not Lloyd's noncommunicative conduct in accessing data through the VOX system and disclosing it to the victim's mother. The alleged injury stems from the *publication* of the information in a judicial proceeding, thereby exposing it to public view.

Just as *Ribas* held that the plaintiff's Privacy Act claim could not defeat the litigation privilege when based on testimony given in a quasi-judicial proceeding, Jacob's privacy claim, which is based on publication of a letter in a *judicial* proceeding[7] must also yield to the privilege. (*Ribas*, *supra*, 38 Cal.3d at pp. 364-365.)

Jacob next claims the privilege was inapplicable because neither the County nor Lloyd was a "participant" in any litigation. He relies on this court's decision in *Wise*, *supra*, 83 Cal.App.4th 1296. There, a PayLess pharmacy that made an

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[6] See Penal Code section 637.2.

[7] We reject any suggestion that the second letter, written by Lloyd to Jacob's attorney in response to a retraction demand, could support a jury verdict based on invasion of privacy. The letter was written only to plaintiff's counsel and there is no evidence it was intended to be or actually was disseminated to anyone else. Moreover, the invasion of privacy cause of action in plaintiff's complaint relies solely on the February 21 letter, and makes no reference to the second letter.

unauthorized disclosure of private medical information regarding the plaintiff to her husband in the middle of an acrimonious divorce proceeding claimed that the litigation privilege immunized it from liability for invasion of privacy because the husband subsequently published the information in judicial and quasi-judicial proceedings. (*Id*. at pp. 1301-1302.) We noted that PayLess's disclosure of the information to the husband for "'tax purposes'" did not satisfy any of the elements necessary for application of the privilege (*id*. at p. 1304), and refused to create an extension of the privilege that would allow litigants to escape from the consequences of their tortious conduct under the blanket of privilege belonging to a third party (*id*. at p. 1299). However, we were careful to point out that "[h]ad PayLess provided the information to a litigant or attorney in order to further the object of litigation this case would stand in a far different posture, for there the paramount goal of encouraging freedom of access to the courts would be implicated." (*Id*. at pp. 1306-1307.)

Our case resembles the hypothetical we contemplated in *Wise*. The February 21 letter was evidence submitted for consideration by a family law judge who was about to rule on an interfamilial visitation dispute that involved Jacob. It is incontrovertible that the privilege protects not merely litigants, judges and jurors, but *witnesses* and prospective witnesses from liability arising from publications made in judicial proceedings. (*Mattco Forge, Inc. v. Arthur Young & Co.*

(1992) 5 Cal.App.4th 392, 402; *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 865; *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 641.) As the custodian of evidence relevant to the family law dispute, Lloyd clearly qualified as a witness or prospective witness. Laura and her then-husband Todd acted solely as intermediaries for the transmission of evidence from Victim Witness to the family law court.

Jacob repeatedly tries to navigate around this roadblock by characterizing the tort as the disclosure of confidential information by defendants to Laura, a noncommunicative act. But as we have emphasized, it is not *that disclosure* which formed the gravamen of the privacy injury. The alleged invasion of Jacob's privacy, and the only conceivable basis for the damage award, was the *publication* of the letter in the Tehama County court file. And, as the California Supreme Court recently held, "if the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct." (*Rusheen, supra*, ___ Cal.4th at p. ___ [2006 Cal. Lexis 2542 at p. *34].)

Jacob's argument that the letter did not further the objects of the litigation because the dispute did not concern his contact with B.B. also fails to persuade. "The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be *connected with*, or have *some logical relation* to, the action, i.e., that it not be extraneous to the

action." (*Silberg, supra,* 50 Cal.3d at pp. 219-220, italics added.) One issue before the family law court was whether a judicially imposed restriction on Jacob having contact with Todd's sons should be lifted. The fact that Victim Witness, a county agency, had determined that Jacob molested his minor nephew B.B. was relevant to and connected with that issue[8] and therefore the litigation.

We conclude, like the trial court, that the litigation privilege attached to the publication of Lloyd's February 21 letter in the family law action.

III. Did Jacob's Constitutional Right to Privacy Trump the Privilege?

We now come to the crux of defendants' appeal--the propriety of the trial court's ruling that, while the privilege was fatal to Jacob's causes of action for negligence, defamation, and *common law* invasion of privacy, Jacob's cause of action based on his right to privacy as set forth in article I, section 1 of the California Constitution outweighed the litigation privilege, and could go to the jury.

The battle lines are clearly drawn. Since *Silberg* was decided in 1990, the California Supreme Court has consistently

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[8] Stephanie's declaration in support of her OSC request that visitation restrictions between her minor sons with Todd and M.B., K.B. and Jacob be lifted, stated: "[N]one of Charles'[s] family members[,] [M.B.], [K.B.], or Jacob [B.], have any legal restrictions or convictions against them as to being around children or as a danger to children." Lloyd's letter contained probative evidence shedding light on this technically true but potentially misleading statement.

held that the privilege set forth in section 47(b) immunizes defendants not only from defamation claims but from *all tort causes of action*, except malicious prosecution. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 830; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194; *Kimmel, supra,* 51 Cal.3d at p. 209; *Silberg*, *supra*, 50 Cal.3d at pp. 215-216.) Even more impressive, the Supreme Court has thrice held that the privilege specifically preempts a tort cause of action for invasion of privacy. (*Kimmel*, *supra*, 51 Cal.3d at p. 209; *Silberg*, *supra*, 50 Cal.3d at p. 215; *Ribas, supra,* 38 Cal.3d at p. 364.)

Four years before *Silberg*, Division One of the Court of Appeal, First Appellate District, held in *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836 (*Cutter*), that a psychotherapist could be found liable for the voluntary disclosure of privileged information about a patient in the course of litigation. The court came to this conclusion by "weighing" the policies served by the litigation privilege against the importance of the patient's *constitutional* right to privacy.[9] (*Id*. at pp. 844-848.)

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[9] The constitutional tort was explicitly recognized in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*), where the California Supreme Court held: "[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Id*. at pp. 39-40.)

This court roundly criticized *Cutter*'s holding in *Wise*, wherein we stated: "Plaintiff's heavy reliance on *Cutter*[, *supra*,] 183 Cal.App.3d 836 is unconvincing. *Cutter* not only predates *Silberg*, but its analysis, which 'weighs' a plaintiff's constitutional right to privacy against the interests promoted by the litigation privilege ([*Cutter*,] at pp. 844-848), clearly conflicts with the absolute nature of the privilege as subsequently stated by the state Supreme Court." (*Wise*, *supra*, 83 Cal.App.4th at p. 1303, fn. 1.)

Barely two months after *Wise* was published, the same appellate division that decided *Cutter* again found that a tort claim for constitutional privacy violation outweighed the litigation privilege so as to expose members of a law firm and their secretary to tort liability for improperly releasing plaintiff's hospital records in an arbitration proceeding. (*Jeffrey H., supra,* 85 Cal.App.4th at pp. 355-361.) While acknowledging that state Supreme Court precedent meant that the privilege overrode any claim for "tortious invasion of privacy," the *Jeffrey H.* court nevertheless decided that "[a] cause of action under California Constitution, article I, section 1, which neither *Silberg* nor *Ribas* considered, . . . presents distinct considerations." (*Id.* at pp. 356-357.) Pointing out that no state Supreme Court decision had yet ruled on whether a claim based on the *constitutional* right to privacy could trump the litigation privilege and that *Cutter* had been cited by the higher court without indication of disapproval, *Jeffrey H.*

concluded that *Cutter* remained good law, and followed it to save plaintiff's complaint from a demurrer based on section 47(b). (*Jeffrey H.*, at pp. 357-360.)

We adhere to the view we expressed in *Wise* and believe that *Cutter* and *Jeffrey H.* were incorrectly decided, for the following reasons: First, the state Supreme Court has repeatedly said that, for strong policy reasons, *only* the tort of malicious prosecution survives the litigation privilege. The Supreme Court restated that view years after *Cutter* and *Jeffrey H.* purported to carve a new exception for constitutional privacy torts. (*Hagberg v. California Federal Bank, supra,* 32 Cal.4th at p. 360.)[10]

Second, *Jeffrey H.'s* reliance on the *Hill* case to support the use of a balancing test in deciding whether the privilege applies (*Jeffrey H.*, *supra*, 85 Cal.App.4th at p. 360), is clearly misplaced. In *Hill*, *supra*, 7 Cal.4th 1, the California Supreme Court approved a balancing test for assessing whether a constitutional privacy violation may be offset by countervailing

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[10] Although the state high court has cited *Cutter* on a couple of occasions, it has done so in the context of discussing the nature of the constitutional right to privacy (*Hill, supra,* 7 Cal.4th at p. 18; *People v. Wharton* (1991) 53 Cal.3d 522, 554). The court has never approved *Cutter*'s holding that the right may, under some circumstances, override the litigation privilege. In *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, the court dodged the issue, reversing the Court of Appeal's judgment that plaintiff had stated a privacy claim on other grounds, while declining to "reach plaintiff's claim that a constitutional invasion of privacy defeats application of the litigation privilege." (*Id.* at p. 44.)

interests. But the court's discussion makes clear that this test is one to be used by the *trier of fact* to determine whether the defense of justification applies.[11] The high court itself has never "balanced" the importance of *any* tort against the litigation privilege. On the contrary, it has consistently stated that the purpose of the privilege can only be served by according the publisher complete immunity from tort liability.[12] *Jeffrey H.* goes off course by using a balancing test to decide whether to give effect to a privilege that, by its very nature, is absolute.

Finally, we disagree with the implied premise of *Cutter* and *Jeffrey H.* that a constitutional violation of the right to privacy can trump the litigation privilege because the right is

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[11] The *Hill* court stated: "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest." (*Hill, supra,* 7 Cal.4th at p. 38.) Accordingly, "[a] defendant may prevail in a state constitutional privacy case by negating any of the three elements . . . or by *pleading and proving*, *as an affirmative defense*, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Id*. at p. 40, italics added.)

[12] The court emphatically restated this view in *Rusheen*: "The purposes of section 47, subdivision (b), 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 [citation]. To effectuate these purposes, the litigation privilege is *absolute and applies regardless of malice*." (*Rusheen*, *supra*, ___ Cal.4th at p. ___ [2006 Cal. Lexis 2542 at pp. *27-*28], citing *Silberg*, *supra*, 50 Cal.3d at pp. 213-216, italics added.)

broader and its breach more serious than a garden-variety privacy violation. After all, perjury may cause a miscarriage of justice and carries serious criminal penalties, yet the privilege precludes any civil action based on damage sustained from perjured testimony. (*Kachig v. Boothe*, *supra*, 22 Cal.App.3d at p. 641.) In reflecting on this somber result, our state Supreme Court stated: "'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.' [Citation.] *This policy is equally compelling in the context of common law and statutory claims for invasion of privacy*; there is no valid basis for distinguishing between the two." (*Ribas*, *supra*, 38 Cal.3d at p. 365, italics added.)

We find it unlikely that the Supreme Court would now find a "valid basis" for distinguishing between constitutional privacy violations and those rooted in statutory or case law. Indeed, recognition of such a distinction would allow a plaintiff to easily overcome the privilege on any privacy claim by simply inserting the adjective "constitutional" into his or her pleadings and jury instructions.

We conclude that the trial court erred by using the weighing process espoused by *Jeffrey H.* Both *Jeffrey H.* and its progenitor *Cutter,* are out of step with our Supreme Court's jurisprudence regarding the nature of the litigation privilege and, in our view, do not represent the current state of the law.

IV. Should Nonsuit Have Been Granted Using the *Cutter* Template?*

As an independent ground for our decision, we conclude that, even applying the *Cutter/Jeffrey H.* balancing test, defendants were immune from liability under these facts.

The controlling case on this point is *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128. There, the plaintiff Urbaniak underwent medical procedures in connection with a workers' compensation claim. He disclosed his positive HIV status to a nurse following a neurological test so hospital technicians would know to sterilize the equipment properly. The physician unnecessarily included plaintiff's HIV status in his report and sent a copy of the report to Urbaniak's counsel, his employer's insurance carrier and the carrier's counsel, who in turn sent a copy to the Workers' Compensation Appeals Board. (*Id.* at pp. 1134-1135.)

Urbaniak brought suit, claiming the gratuitous disclosure of his HIV status was an unconstitutional invasion of his right of privacy. The trial court granted the defendants' motion for summary judgment, finding dissemination of the report was protected by section 47(b) as a publication in a judicial proceeding. (*Urbaniak, supra,* 226 Cal.App.3d at p. 1133.) There the Court of Appeal, First Appellate District, Division One, reversed the judgment in favor of the doctor on Urbaniak's cause of action for invasion of his constitutional right of

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* See footnote, *ante*, page 1.

privacy by applying *Cutter*'s weighing process, since "[t]he offending information had limited relevance to the medical examination," and the doctor could have conveyed his concerns without mentioning Urbaniak's HIV status. (*Id*. at p. 1141.)

However, the court affirmed the judgment in favor of the insurance company, its counsel and the employer's counsel because these parties received the doctor's report in discovery proceedings and there was no indication the information was confidential. The court concluded that the scales tipped against liability for invasion of privacy because "*the evidence does not reveal that they had actual notice of facts suggesting an invasion of privacy*." (*Urbaniak, supra,* 226 Cal.App.3d at p. 1141, italics added.)

Defendants here stood in the same shoes as the prevailing defendants in *Urbaniak*. Laura told Victim Witness that there was a court hearing that day regarding B.B.'s visitation with Jacob. She asked Lloyd to write a letter to the family law judge documenting the molestation because she was worried that "[B.B.] would be forced to visit with *this man*, who . . . had molested her son." (Italics added.) Lloyd verified, through the VOX system, her agency's determination that B.B. had been the victim of molestation by his uncle Jacob. She had no reason to believe that Jacob was a minor at the time, since the VOX system did not so indicate, and it referred to Jacob as the victim's "uncle." She understood the letter was "going to go to

the judge in the Family Law court in Tehama County" who was ruling on a visitation request involving Jacob.

Defendants' letter was thus written solely for presentation to the family law court and defendants had no notice of facts suggesting that they were revealing confidential juvenile records. Because defendants lacked knowledge that certain information in the letter constituted an invasion of Jacob's privacy and because the material in the letter was of direct relevance to an ongoing family law proceeding, we find, applying the methodology developed in *Cutter, Jeffrey H.* and *Urbaniak*, that Jacob cannot maintain a viable claim for invasion of his constitutional right to privacy based on the judicial publication of the February 21 letter. Thus, even under *Cutter* and *Jeffrey H.*, the trial court was compelled to grant the nonsuit.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with instructions to grant the motion for nonsuit in its entirety and enter judgment in favor of defendants.

Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 27(a).) ***(CERTIFIED FOR PARTIAL PUBLICATION)***

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MORRISON, J.