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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBERT P. MULDER, Plaintiff and Appellant, v. PILOT AIR FREIGHT et al., Defendants and Respondents.	No. B146633 (Super. Ct. No. BC212980)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alexander H. Williams, III, Judge. Affirmed in part and reversed in part.

Ezra Brutzkus Gubner, Robert Ezra and G. Michael Jackson for Plaintiff and Appellant.

Bragg, Short, Serota & Kuluva and Sydnee R. Singer for Defendants and Respondents.

We are asked to decide whether the immunity provided by Civil Code section 47, subdivision (b) (section 47(b)) is absolute or qualified when applied to a report made to the police. We follow the weight of authority and conclude that the immunity is absolute. But we also conclude the trial court erred in denying plaintiff, Robert P. Mulder, leave to amend to add a cause of action for malicious prosecution, which is not barred by section 47(b).

FACTUAL AND PROCEDURAL SUMMARY

This is a suit between Mulder and Pilot Air Freight and one of its employees (Pilot). On its own motion, the trial court converted Pilot's motion for summary judgment to a motion for judgment on the pleadings because the sole issue was one of law: whether the privilege under section 47(b) is absolute or qualified. (See *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1817.) "A motion for judgment on the pleadings, like a general demurrer, tests the allegations of the complaint or cross-complaint, supplemented by any matter of which the trial court takes judicial notice, to determine whether plaintiff or cross-complainant has stated a cause of action. (*Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 610 [281 Cal.Rptr. 578].) Because the trial court's determination is made as a matter of law, we review the ruling de novo, assuming the truth of all material facts properly pled. (*Berry v. City of Santa Barbara* (1995) 40 Cal.App.4th 1075, 1082 [47 Cal.Rptr.2d 661].)" (*Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 Cal.App.4th 1109, 1114.) We therefore confine our review to the allegations of the complaint.

Mulder dealt in salvage. In 1997, Erick Moe, who purchased salvage, bought a number of palettes and boxes of salvage from Huy Nguyen, District Manager of Pilot. In 1998, Mr. Moe arranged to bring part of the salvage to Mulder's warehouse. They agreed that Mulder would sell the salvage for a commission. When Mulder sorted through the salvage delivered by Moe, he

discovered a flight recorder with Patlong Aircraft markings, containing a bill of lading with the Patlong telephone number. Mulder contacted Patlong and was told that the recorder had been lost a year before. Patlong expressed interest in getting the recorder and told Mulder to contact Pilot and Same Day Right of Ways, who had shipped the parts to Pilot. Mulder contacted both companies and neither expressed any interest in the recorder. He passed this information on to Patlong.

Mulder was contacted by defendant Steve Covert, who said he worked for Pilot. Covert asked Mulder how much he wanted for the recorder. Mulder asked for $5,000 and was told by Covert that Pilot would pay $500. Over the next several months, negotiations continued between Mulder and Covert. The two finally agreed on a price of $1,000, subject to approval by Pilot. Neither Pilot nor Covert told Mulder that the recorder was stolen, lost, or that it belonged to anyone else.

In October 1998, Pilot filed a report with the Los Angeles Police Department, stating that the flight recorder was stolen and in Mulder's possession. Pilot did not tell the police that it sold the recorder through Nguyen to Moe. Mulder was not told about the stolen property report. In January 1999, Covert again offered to buy the flight recorder. Two undercover Los Angeles Police Officers entered Mulder's offices on January 6, 1999. They handed him a check for $1,000 (payable to a Robert Evans). They left, then returned with eight other officers and handcuffed and searched Mulder in front of employees and a customer. He was arrested for receiving stolen property.

The criminal case against Mulder was dismissed. He then sued Pilot and Covert for false imprisonment and intentional infliction of emotional distress. Mulder alleged that the Pilot defendants made the police report in bad faith and with malice.

Pilot moved for summary judgment or, in the alternative, summary adjudication. Among other arguments, Pilot contended the action was barred by the absolute privilege of section 47(b). Mulder opposed the motion. At the hearing, the trial court ruled that the motion would be converted to a motion for judgment on the pleadings because the question was very limited--whether the immunity for filing a police report is qualified or absolute under section 47(b). The trial court indicated a belief that the privilege is absolute, but invited further briefing by the parties. After further briefing, and a second hearing, the trial court said it would rule that the privilege is absolute, entitling defendants to judgment, but discussed Mulder's request for leave to amend to allege a cause of action for malicious prosecution. At first, the trial court seemed inclined to grant leave to amend, but after argument, it granted judgment on the pleadings without leave to amend.

At a later hearing to resolve a dispute about the wording of the judgment, the trial court expressed a concern that leave to amend should have been granted. But by that time, Mulder had prepared a notice of appeal, and the trial court was concerned that it was without jurisdiction to grant leave to amend. With the approval of the trial court, the parties stipulated that the court did not have jurisdiction to modify the original order granting judgment on the pleadings without leave to amend.

DISCUSSION

I

At oral argument, appellant argued that a cause of action for false imprisonment does not implicate the section 47(b) privilege because, unlike defamation, it does not involve a communication. Where a defendant personally confines a plaintiff, section 47(b) does not apply. That is not this case. Here, we

have an arrest based on Pilot's police report. In California, a communication which results in arrest is privileged under section 47(b).

Appellant attempts to distinguish between a communication to the authorities which results in an arrest, and conduct instigating or participating in the arrest. He contends the former comes within the absolute privilege of section 47(b), but the latter does not. The complaint alleges that Pilot not only filed a police report alleging that appellant was dealing in stolen merchandise, but that its employee Covert instigated and participated in the police sting which led to appellant's arrest.

Appellant relies on the Restatement Second of Torts for this argument. The Restatement explains the concept of instigation in comment c to section 45A: "Instigation consists of words or acts which direct, request, invite or encourage the false imprisonment itself. In the case of an arrest, it is the equivalent, in words or conduct, of 'Officer, arrest that man!' It is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them. Likewise it is not an instigation of a false arrest where the actor has requested the authorities to make a proper and lawful arrest, and has in no way invited or encouraged an improper one, or where he has requested an arrest at a time when it would be proper and lawful, and it is subsequently made at a time when it has become improper." (Rest.2d Torts, § 45A, com. c, p. 70.) The Restatement supports the conclusion we reach: the section 47(b) privilege applies because the conduct of the defendants was based on their report to the police, clearly a communication within the meaning of the privilege.

Appellant's counsel stated that a defendant who takes action that results in an unjustified arrest commits false imprisonment. As we have discussed, such

conduct does not constitute "instigation" unless the defendant personally effects or directs the arrest. Conduct short of that may be the basis for liability on some other theory, such as malicious prosecution, but it is not false imprisonment.

The principal issue before us is whether the applicable privilege under section 47(b) is absolute or qualified. There is a split of California authority and the California Supreme Court has the issue before it (*Balser v. Wells Fargo Bank, N.A.* (Dec. 19, 2001, S101833)). Section 47(b) provides that a "privileged publication or broadcast is one made: . . . (3) in any other official proceeding authorized by law, . . ." This provision is essentially identical to the previous version of the privilege, Civil Code section 47, subdivision (2).

The continuity of the statutory language is important to our analysis. In 1943, the California Supreme Court concluded that the privilege under former section 47, subdivision (2) was absolute, although the publication at issue was given maliciously and with knowledge of its falsity. (*Washer v. Bank of America* (1943) 21 Cal.2d 822, 832.) The Supreme Court cited the Restatement of Torts: "'A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding or in the institution of or during the course and as a part of a judicial proceeding in which he participates, if the matter has some relation thereto.' (Vol. 3, sec. 587.)" (21 Cal.2d at p. 832.) There was no absolute privilege in *Washer* because the statements in issue were made to the press, rather than in a report to a prosecuting attorney or other public official "preliminary to a proposed criminal proceeding. (Rest. Torts, sec. 587, comment b.)" (*Ibid.*)

In 1972, the court in *King v. Borges* (1972) 28 Cal.App.3d 27, applied the absolute privilege of Civil Code section 47, subdivision (2) to a cross-complaint for libel based on a letter to the Division of Real Estate requesting investigation of

a broker who had failed to return a deposit on a land sale. Citing *Washer v. Bank of America, supra*, 21 Cal.2d 822, the court identified the public policy supporting the absolute privilege: "The importance of providing citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual. Thus the absolute privilege is essential." (28 Cal.App.3d at p. 34; see also *Imig v. Ferrar* (1977) 70 Cal.App.3d 48, 55-57 [absolute privilege of Civil Code section 47, subdivision (2) applies to action based on communications to the Los Angeles Police Department concerning misconduct by one of its officers]; *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 753-754 [report to police requesting investigation of possible criminal activity by plaintiff was absolutely privileged under Civil Code section 47, subdivision (2), as part of official proceeding, hence cannot be defeated by a showing of malice]; *Cote v. Henderson* (1990) 218 Cal.App.3d 796 [similar].)

In *Silberg v. Anderson* (1990) 50 Cal.3d 205, the Supreme Court revisited the former Civil Code section 47, subdivision (2) privilege. While the factual setting of *Silberg* is distinguishable, involving an attorney representing a wife in a dissolution proceeding, the Supreme Court's explication of the policies underlying the absolute privilege is instructive. "The principal purpose of section 47(2) is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]" (*Id.* at p. 213.) Continuing, the court explained: "To effectuate its vital purposes, the litigation privilege is held to be absolute in nature. (*Ribas v. Clark* [(1985)] 38 Cal.3d [355,] 364; *Albertson v. Raboff* [(1956)] 46 Cal.2d [375,] 381 [and 4 other cases]. In *Albertson*, Justice Traynor, speaking for the court, reasoned that the policy of encouraging free access to the courts was so important as to require application of the privilege to torts other than defamation. . . . The only exception to application of section 47(2) to tort suits has been for malicious

prosecution actions. [Citations.] Malicious prosecution actions are permitted because '[t]he policy of encouraging free access to the courts . . . is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.' [Citation.]" (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 215-216.)

"That the privilege is absolute is also confirmed by the statutory language. As amended in 1927 by the addition of the 'divorce proviso,' section 47(2) provided that an allegation involving correspondents in pleadings and affidavits filed in divorce actions is not privileged unless stated under oath, without malice, and on reasonable grounds. [Citation.] By negative implication, therefore, statements published in proceedings *other* than divorce actions may be malicious and still fall within the mantle of protection provided by the privilege. Were it otherwise, the 'without malice' language in the 'divorce proviso' would be mere surplusage. Since we presume that the Legislature does not engage in idle acts [citations], it must be concluded that the 'without malice' requirement applies only to those allegations against correspondents published in the pleadings and affidavits filed in dissolution proceedings, and that otherwise the Legislature intended section 47(2) to apply to *all* publications, irrespective of their maliciousness." (*Silberg v. Anderson, supra,* 50 Cal.3d at p. 216.)

The Supreme Court recognized "that the disallowance of derivative tort actions based on communications of participants in an earlier action necessarily results in some real injuries that go uncompensated. But, as stated in *Kachig v. Boothe* [(1971)] 22 Cal.App.3d [626,] 641, quoting Prosser, Law of Torts (3d ed. 1964) page 797, that is the '"price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say."'" (*Silberg v. Anderson, supra,* 50 Cal.3d at p. 218.)

The *Silberg* court went on to acknowledge other possible remedies which may help deter injurious publications during litigation. Examples include criminal prosecution for perjury, and penalties against attorneys. (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 218-219.)

Several months after *Silberg* was decided, Division One of the Fourth District Court of Appeal decided *Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476. John Dunbar sued the Fenelons for defamation, based on the allegation that they had induced a third party to make a false police report that Dunbar had solicited Dr. Fenelon's murder. The Fenelons sought a writ of mandate after the trial court overruled their demurrer to the complaint. They relied upon *Williams v. Taylor* (1982) 129 Cal.App.3d 745 for the proposition that the absolute privilege of Civil Code section 47, subdivision (2) should apply. (*Fenelon v. Superior Court, supra,* 223 Cal.App.3d at p. 1479.) The majority, in a widely criticized decision, held that a police report concerning suspected criminal activity is accorded only a qualified privilege because a police report is not an official proceeding within the meaning of Civil Code section 47, subdivision (2). In reaching this conclusion, the court looked to authorities from a number of other jurisdictions, rather than to California cases. (*Fenelon, supra,* at pp. 1482-1483.) A dissenting opinion by Justice Benke argued that under *Silberg v. Anderson, supra*, 50 Cal.3d 205 and *Williams v. Taylor, supra,* 129 Cal.App.3d 745, the absolute privilege should apply. (*Fenelon v. Superior Court, supra,* 223 Cal.App.3d at p. 1484.) Every subsequent reported California case has agreed with the *Fenelon* dissent rather than the majority opinion.

In our case, the trial court placed particular reliance on *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498. In that case, Hunsucker was detained by the police after a hotel housekeeping employee reported to hotel management that she had seen a woman with a gun in Hunsucker's hotel room.

The hotel manager reported this incident to the police. Hunsucker and his wife sued the Hilton for false imprisonment, assault and battery, and deprivation of civil rights. The trial court granted summary judgment based on the privilege of section 47(b).

On appeal, plaintiffs argued the absolute privilege should be confined to causes of action for defamation, or the closely related torts of intentional infliction of emotional distress, misrepresentation, or invasion of privacy, and should not apply to a case in which the plaintiff suffered a loss of liberty as a result of a false report. They also argued that report to police is not "any other proceeding authorized by law" within the meaning of section 47(b).

The *Hunsucker* court recognized that *Fenelon v. Superior Court, supra,* 223 Cal.App.3d 1476 supports the view that a police report is not within section 47(b). (*Hunsucker v. Sunnyvale Hilton Inn, supra,* 23 Cal.App.4th at p. 1502.) But it held: "However, the weight of authority in California, the very articulate dissent in *Fenelon* by Justice Benke, and what we believe is the better view, holds that reports made by citizens to police regarding potential criminal activity fall within the section 47 absolute privilege. [Citations.]" (*Hunsucker, supra,* 23 Cal.App.4th pp. 1502-1503.) The court followed Justice Benke's dissent in which she observed that the privilege applies to statements made preliminary to or in preparation for either civil or criminal proceedings. (*Hunsucker, supra,* at p. 1504.)

Hunsucker cited the safeguards provided in both the California and United States Constitutions for those detained by the police. It agreed with the court in *Williams v. Taylor, supra*, 129 Cal.App.3d 745, "that the importance of free and open access to the police to report suspected criminal activity outweighs the occasional harm that might befall a defamed individual." (*Hunsucker v. Sunnyvale Hilton Inn, supra,* 23 Cal.App.4th at p. 1504.) It concluded that the absolute privilege of section 47(b) applies.

Turning to the Hunsuckers' argument that the hotel should be held liable for the actions of the police, the court had this to say: "[T]he Hilton manager's conduct in reporting the gun sighting to police was absolutely privileged, as discussed above. Additionally, '"[a] . . . person does not become liable for false imprisonment when *in good faith* he gives information--even mistaken information--to the proper authorities though such information may be the principal cause of plaintiff's imprisonment."' (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 . . . ." (*Hunsucker v. Sunnyvale Hilton Inn, supra*, 23 Cal.App.4th at p. 1504.) In this paragraph, the court recognized the absolute privilege of section 47(b). The additional statement regarding good faith is not necessary to the opinion, and relies on *Du Lac*, which cannot be reconciled with *Silberg v. Anderson*, *supra*, 50 Cal.3d 205. We therefore reject Mulder's argument that based on this portion of *Hunsucker*, good faith must be shown to avoid liability under section 47(b). This reading of *Hunsucker* ignores the clear language of the opinion stating that there is an absolute privilege under section 47(b) for reports made to the police. Subsequent cases support this view.

Passman v. Torkan (1995) 34 Cal.App.4th 607, followed *Hunsucker, Cote* and *Williams*. It held the absolute privilege of section 47(b) applied to bar an action by two attorneys against the defendant, who had written to the district attorney urging their prosecution. The court rejected plaintiffs' argument that only a qualified privilege should apply and that malice would destroy the privilege. The court observed: "To date no reported appellate decision has followed the reasoning and rationale of *Fenelon*." (*Id.* at p. 618.) The court followed the dissent in *Fenelon* and the line of decisions represented by *Washer* and *Williams* in concluding that reports made to police officers are within section 47(b). (See also *Johnson v. Symantec Corporation* (N.D. Cal. 1999) 58 F.Supp.2d 1107 [finding weight of California authority is that privilege is absolute and criticizing *Fenelon*];

see also *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867, 875 [following *Passman* and *Hunsucker* in declining to follow *Fenelon*: "As interpreted in a number of cases, section 47 protects persons who report potential criminal activity to the police or local prosecutor from lawsuits, even if the report is made with malice."].)

Finally, in *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 495-496, we concluded that the *Williams* line of cases upholding an absolute privilege for reports to police is the better reasoned approach. The court declined to follow two cases also cited here by Mulder: *Devis v. Bank of America* (1998) 65 Cal.App.4th 1002, 1007-1008 and *Du Lac v. Perma Trans Products, Inc., supra,* 103 Cal.App.3d 937, 941: "We recognize that in *Devis v. Bank of America* (1998) 65 Cal.App.4th 1002, 1007-1008 [77 Cal.Rptr.2d 238], the court cited *Williams* and its progeny with approval, but suggested in dicta that false reports to the police are subject only to the qualified privilege, citing primarily *Turner v. Mellon* (1953) 41 Cal.2d 45, 48 [257 P.2d 15], and *Du Lac v. Perma Trans Products, Inc.[,supra,]* 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335]. However, these cases, which involve tort claims of false arrest and false imprisonment, predate *Silberg*, in which our Supreme Court indicated the broad scope of the absolute privilege (*Silberg v. Anderson, supra,* 50 Cal.3d at p. 216), and thus they are not persuasive on the issue before us." (*Id.* at pp. 495-496, fn. 6.)

We agree with the *Beroiz* court's analysis of *Devis* and the cases on which it relies. In *Devis*, the court recognized the weight of authority in the state is contrary to *Fenelon v. Superior Court*, *supra*, 223 Cal.App.3d 1476, and holds that a citizen report to the police regarding potential criminal activity is a communication which falls within section 47(b). (*Devis v. Bank of America, supra,* 65 Cal.App.4th at pp. 1007-1008.) We decline to follow the dicta in *Devis* suggesting that the privilege is qualified, and instead follow the majority of cases that have held it is

absolute and irrespective of malice. This conclusion is not altered by Mulder's reliance on *Harden v. San Francisco Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7 and *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873. In each case, plaintiffs were arrested because of a report made by the defendants. Neither opinion discusses section 47(b) and hence holds little if any relevance to our discussion. For the same reason, we are not persuaded by Mulder's reliance on Justice Grodin's concurring opinion in *Pool v. City of Oakland* (1986) 42 Cal.3d 1051. Section 47(b) was not discussed by the majority. Justice Grodin's opinion discusses a conditional privilege for reporting suspected criminal activity to the police, but does not cite section 47(b) and does not discuss *Washer v. Bank of America*, *supra*, 21 Cal.2d 822 and the other cases we have discussed which were decided before *Pool*.

The trial court properly granted judgment on the pleadings on the ground that the absolute privilege of section 47(b) bars the action.

II

Mulder argues he should have been granted leave to amend to allege a cause of action for malicious prosecution, which is not barred by section 47(b). We agree. "Where a motion for summary judgment is in effect a motion for judgment on the pleadings, the court may grant a plaintiff leave to amend the complaint. [Citation.]" (*Stolz v. Wong Communications Limited Partnership*, *supra*, 25 Cal.App.4th at p. 1817.) The record reveals that the trial court denied leave to amend because of confusion about the proper procedure, rather than on the merits. We therefore decline to address the merits in the first instance. On remand, Mulder may move to amend to add a malicious prosecution cause of action.

DISPOSITION

The judgment that the action is barred by section 47(b) is affirmed. The denial of leave to amend is reversed and the matter remanded as directed in the opinion. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.