

**SUPREME COURT
FILED
JULY 12, 2017
Jorge Navarrete Clerk**

Deputy

S242263

**In The Supreme California Court of California
En Banc**

Aaron Raiser, Plaintiff and Appellant

v.

**Tri-City Healthcare District et. al. Defendants
and Respondents**

The request for judicial notice is granted.
The petition for review is denied.
Chin, J. was recused and did not
participate.

CANTIL-SAKAUYE
Chief Justice

Filed 4/19/17

NOT TO BE PUBLISHED IN OFFICIAL
REPORTS

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COURT OF APPEAL, FOURTH
APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

AARON RAISER,
Plaintiff and Appellant,

v.

TRI-CITY HEALTHCARE DISTRICT et
al.,

Defendants and Respondents.

D068567

(Super. Ct. No. 37-2013-00070368-CU-MM-
NC)

APPEAL from an order of the Superior
Court of San Diego County, Timothy M.
Casserly, Judge. Affirmed.

Aaron Raiser, in pro. per., for Plaintiff and
Appellant.

Dummit, Buchholz & Trapp and Christopher M. Freistedt, Janelle R. Thornton for Defendants and Respondents Tri-City Healthcare District, Tri-City Hospital Foundation.

Reed Smith and Elizabeth G. Miner, Julie Hardin for Defendant and Respondent General Electric Company/GE Healthcare.

Robert A. Cosgrove & Associates and Robert A. Cosgrove, Jennifer Watson for Defendants and Respondents William A. Mead, Jr. and William A. Meade Jr., M.D., PC.

The trial court found Aaron Raiser to be a vexatious litigant under Code of Civil Procedure¹ section 391, subdivision (b)(1), ordered him to furnish security for the benefit of respondents Tri-City Healthcare District, General Electric Company/GE Healthcare,

William Meade, Jr. an individual, William A. Meade Jr., M.D., PC, a corporation, and Joenell Estrabillo (collectively respondents) under section 391.3, and imposed prefiling requirements on Raiser (§ 391.7). Raiser filed this appeal in pro. per. before the entry of judgment.² After Raiser failed to furnish the

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

² We treated this appeal as an appeal from the order, and denied as moot Raiser's subsequent "motion to correct docket text."

required security, the superior court dismissed the case.

On appeal, Raiser challenges section 391's constitutionality on several grounds; he also disputes the trial court's finding he did not have a reasonable probability of success on the merits of the lawsuit. Tri-City Healthcare District and GE Healthcare filed a joint respondents' brief arguing that section 391 is constitutional, and the trial court did not err in designating Raiser a vexatious litigant. William Meade, Jr., an individual, and William A. Meade Jr., M.D., PC, filed a separate respondent's brief, also arguing that the court did not err. We find Raiser's contentions meritless and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Raiser's Complaint

In November 2014, Raiser filed the operative second amended complaint against respondents.³ Based on his October 2012 visits to the Tri-City Medical Center (Tri-City) in Oceanside, he alleged a total of 23 causes of action, for medical negligence, fraud, promissory fraud, negligent

³ Raiser initially sued Dr. Robert B. Fortuna and StatRad, LLC as well, but later dismissed them from the case.

misrepresentation, medical battery, concealment, strict products liability, breach of express warranty, breach of implied warranty, and estoppel.

Raiser alleged as to all respondents that he initially refused to undergo an abdominal computerized tomography (CT) scan at Tri-City, but he relented after he learned from Dr. Meade that no alternative existed, and from CT technologist Estrabillo that radiation would not be directed at Raiser's "private parts." Raiser alleged that while undergoing the CT scan (manufactured by GE Healthcare), he felt a burning sensation on his private parts. Raiser alleges that he returned to the hospital the next day and a different doctor ordered a flu swab, he tested positive for the flu, received medication, and subsequently recovered.

Raiser alleges in the operative complaint that Estrabillo and Drs. Meade and Fortuna never informed him that "a burning in [his] private parts would occur; had [he] been informed of this he never would have consented to the CT scan." Raiser alleges, "At no time did any [d]efendant give [him] as much information as [he] needed to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the CT scan procedure,

and any other information skilled practitioners would disclose to the patient under the same or similar circumstances."

Raiser alleges, among other harm, that he received an excessive amount of radiation "causing temporary damage to his private parts and ability to have a healthy posterity, killing and/or disabling at least some of [his] sperm and temporarily injuring [his] testosterone production, including causing decreased testosterone on a temporary basis."

He also alleges he "is in fear and shall continue to live in fear of contracting cancer and other health problems due to the unnecessary and fraudulently induced [CT] scans, and is and shall suffer mentally and emotionally as a result."

Respondents' Motion to Designate Raiser a Vexatious Litigant

In December 2014, respondents moved to designate Raiser a vexatious litigant (§ 391, subd. (b)(1)), require him to post a security (§ 391.1), and comply with a prefiling order prohibiting him from filing new lawsuits as a pro. per. without first obtaining the presiding judge's permission (§ 391.7). They submitted court documents showing Raiser in pro. per.

had commenced, prosecuted or maintained 20 cases in the past seven years.⁴

⁴ On appeal, respondents describe 13 of those cases that they argue suffice to establish that Raiser was properly designated a vexatious litigant: 1. (*In re Raiser* (10th Cir. Sept. 18, 2008, No. 08-4026).) On September 18, 2008, the Tenth Circuit Court of Appeals denied Raiser's appeal from the district court's order designating him a restricted filer. 2. (*Raiser v. BYU* (10th Cir. Oct. 23, 2008, No. 08-4027).) On October 23, 2008, the Tenth Circuit Court of Appeals affirmed the district court's ruling dismissing Raiser's lawsuit under Federal Rules of Civil Procedure, rule 41(b). 3. (*Raiser v. Lois* (C.D. Cal. Dec. 16, 2013, No. 5:12-CV-00045-SMM).) Raiser filed this action against federal court clerk staff for "unlawful conduct." Judgment was entered in defendants' favor for lack of prosecution and absolute immunity, affirmed by the Ninth Circuit Court of Appeals on December 16, 2013. 4. (*Raiser v. Lois* (9th Cir. 2013, No. 13-55980).) Raiser filed this action against federal court clerk staff for "unlawful conduct." The Ninth Circuit Court of Appeals affirmed the judgment in defendants' favor in Case No. 5:12-CV-00045-SSM. Raiser's petition for writ of certiorari was denied, and the United States Supreme Court Clerk noted "the petitioner has repeatedly abused this Court's process." 5. (*Raiser v. Corp. of the President of the*

Church of Jesus Christ of Latter Day Saints (6th Cir. Aug. 7, 2012, No. 11-3227).) The district court granted defendant's motion for summary judgment. The Sixth Circuit Court of Appeals affirmed the district court's judgment on August 7, 2012. Raiser claims that he lost this appeal "due to an error of fact by the 6th Cir. [sic]." 6. (Raiser v. Corp. of the President of the Church of Jesus Christ of Latter Day Saints (6th Cir. 2012, No. 2:10-CV-189).) The district court granted summary judgment on January 28, 2011, in defendants' favor, which was affirmed by the Sixth Circuit Court of Appeals in 2012. Raiser claims that he lost "based solely on discretionary decision by the magistrate." 7. (Raiser v. Ventura College of Law (9th Cir. Mar. 8, 2011, No. 10-56528).) The Ninth Circuit Court of Appeals dismissed the appeal for lack of jurisdiction on March 8, 2011. Raiser claims that this appeal was denied "due to 9th Circ. [sic] Staff misconduct." 8. (Raiser v. Ventura College of Law (9th Cir. July 10, 2012, Nos. 10-55097, 1055362 & 10-55619).) The Ninth Circuit Court of Appeals affirmed the district court's dismissal, with prejudice, of six causes of action, and remanded the remaining causes of action (Raiser is currently appealing a judgment in favor of defendants in the Ninth Circuit Court of Appeals on the remanded causes of action; however, the dismissed causes of action were judicially February 4, 2014, for failure to prosecute and failure to timely

Respondents submitted a declaration by Dianna Cody, Ph.D., a professor in the Department of Imaging Physics at the University of Texas MD Anderson Cancer Center. She reviewed Raiser's medical

determined adversely to Raiser). 9. (*Raiser v. City of Upland* (C.D. Cal. Feb. 4, 2014, No. ED-CV-11-00465RGK).) This case was dismissed on serve the summons and complaint. 10. (*Raiser v. Ventura College of Law* (9th Cir. Dec. 8, 2010, No. 10-56269).) On December 8, 2010, the Ninth Circuit Court of Appeals dismissed the appeal for failure to respond to the district court's order. Raiser claims that this appeal was denied "due to 9th Circ. [sic] Staff misconduct." 11. (*Raiser v. U.S. Central District Court of California* (9th Cir. Oct. 19, 2012, No. 12-72536).) Raiser's petition for writ of mandate was denied by the Ninth Circuit Court of Appeals on October 19, 2012. Petition for writ of certiorari was denied. 12. (*Raiser v. City of Los Angeles* (C.D. Cal. 2014, No. 2:13-CV-02925-RGKRZ).) Raiser voluntarily dismissed this case without prejudice. 13. (*In re Raiser* (9th Cir. Aug. 24, 2010, No. 10-72395).) Raiser filed a writ of mandate "to get the judge to rule on [a] motion." On August 24, 2010, the Ninth Circuit Court of Appeals denied Raiser's petition for writ of mandamus on the basis that he did not demonstrate the case warranted the intervention of the court by means of the extraordinary remedy of mandamus.

records, scan data, and his second amended complaint. She concluded that exposure to some ionizing radiation is a necessary aspect of any CT scan; further, the scanner used "functioned as designed and as prescribed by Tri-City Hospital to deliver an appropriate scan to Mr. Raiser." Dr. Cody further concluded that Raiser's "effective radiation dose from his abdomen/pelvis CT Scan was . . . , far below the American Association of Physicists in Medicine . . . standard for detectable risk. . . . In other words, Mr. Raiser was not exposed to more radiation than would be expected from a routine abdomen/pelvis CT scan. It is also my opinion that, given Mr. Raiser's effective dose of radiation, he would not have experienced any physical injury, including reddening of the skin or hair loss . . . as a result of the scan. Finally, it is my opinion that Mr. Raiser's increased risk, if any, of developing cancer (excluding thyroid and non melanoma skin cancer) from this singular abdomen/pelvis CT scan is less than 0.002 [percent]. To be clear, the increased risk, if any, is so de minimis that modern science cannot reliably measure it."⁵

⁵ Dr. Cody explained: "This tiny increased risk (0.002 [percent]) on an annual basis can be compared

Respondents also submitted a declaration by emergency physician R. Scott Jacobs, who reviewed Raiser's medical records and concluded that "Tri-City, acting through its nursing and non-physician staff as well as co-defendant, emergency physician, Dr. William Meade and other physicians who

to the average lifetime risk of developing cancer, which is 43 [percent] in this country across both genders and all ages. . . . [¶] These risks should be understood to be for large populations of similar patients who all received the same diagnostic procedures as did this patient, not the probability that this individual patient will develop cancer (because such a calculation is not possible). In this case, a risk of 0.002 [percent] means that if 100,000 patients were to undergo the same diagnostic procedures, 2 additional patients would develop cancer and 99,998 would not. . . . [¶] The difference between the average lifetime cancer risk (43 [percent]) compared to increased cancer risk as a result of this one abdomen/pelvis CT scan, is so small that modern science cannot reliably measure it. In addition, this tiny increase in risk must be weighed against the risk of managing this patient's condition without the benefit of these diagnostic examinations."

cared for Mr. Raiser, met the standard of care for hospital emergency departments and physicians in Southern California with regard to Mr. Raiser's care and treatment." Dr. Jacobs further concluded: "[N]o act or omission by Tri-City through its nursing and non-physician staff, GE, Dr. Meade, Dr. Fortuna, or any other physician involved in the care and treatment of Mr. Raiser constituted fraud, concealment, negligent misrepresentation, or medical battery because (1) Mr. Raiser signed the Conditions of Admission form, consenting to [X]-rays and other treatments and procedures, (2) there is no evidence in the medical records that Mr. Raiser withdrew his consent or gave 'conditional' consent, (3) there is no evidence whatsoever to suggest Tri-City, Dr. Meade, and Dr. Fortuna, or any other physician involved in Mr. Raiser's care intended to defraud or misrepresent any aspect of Mr. Raiser's care, and (4) the CT scan emitted low to average amounts of radiation for abdominal/pelvic CT scans." Finally, respondents submitted a declaration by Tri-City's custodian of medical records.

Raiser's Opposition to the Motion Raiser opposed the motion, arguing, "Of the 20 'cases' [d]efendant [sic] claims support [Raiser] as being a [section] 391 Vexatious litigant, [he]

has lost 2 court cases in the trial court, neither of which were from a California state [sic]." He also conceded he lost six cases on appeal, although he claims none were filed in California state courts.

Raiser challenged section 391's legality on multiple constitutional and other grounds: He submitted three of his own declarations in opposition to the motion, explaining in one declaration how each of the 20 cases he had prosecuted was resolved. He further declared he had "general expertise in reading tables and doing science math," and took college courses in math, physics and chemistry. He provided his own "calculation of [his] BEIR VII cancer risk estimates based on Table 12B-3." Stating that he was 51 years old when the incident occurred, he purported to set forth his chance of cancer assuming he lived to 81 years old.

In another declaration, Raiser outlined the events that occurred during his visits to Tri-City's emergency room in October 2012: "With respect to injury, I have subsequently researched the risks of CT scans and learned that the generally accepted statistic is 1 out of 1300 CT scans result in a cancer as a result. [¶] . . . Had I been properly informed of the true risks of CT scans, I never would have

consented to the CT scan. [¶] . . . I am also in substantial fear of developing cancer in the future. I am also poor and have not [sic] health insurance and cannot pay for cancer screenings or other medical care. I also have a fear that any posterity of mine I subsequently have might be deformed as a result of exposure to radiation of my private parts. [¶] . . . On information and belief, I also believe my kidneys were temporarily damaged by the X-Radiation, and the contrast dye, that some of my sperm were killed, and that I had a temporary lowering of my testosterone levels and other damage to my reproductive parts. [¶] . . . I also experience substantial anger and mental anguish that I was lied to about there being no flu swab test when I asked Dr. Meade and that [Estrabillo] lied to me about the CT scan x-ray radiation not being directed at my private parts when it was. I relied on their misrepresentations when making the decision to get the CT scan. I also relied on [Tri-City's] representations in its conditions of admittance that I would get a proper informed consent with respect to any treatment received."⁶

⁶ In Raiser's third declaration, he discussed the "Utah and [United States] Supreme Court

matters" as follows: "The underlying case at issue there was not a popular one. It dealt with clerk misconduct, AND dealt with the sensitive and unpopular issue of judicial delegation of authority to court staff to decide cases and outcomes of cases, which is standard in the federal courts mainly with pro[.] per[.] cases, and then, if a litigant is 'lucky' the staff member gives some short summary of the matter to the judge who then rubber stamps everything—assuming an ethical presentation was made. [¶] While the case had merit, and was substantially supported by factual court staff misconduct, it went to appeal . . . and as fate has it, no judge decided that matter, a law clerk for the judge did, which is ironic. [¶] With respect to the [United States] Supreme Court, they don't want messy cases with messy facts. They want nice cases where the record is well[]developed and easy to decipher, typically that record comes from a well-reasoned and detailed [c]ircuit [o]pinion which lays out the facts and law in a reasoned and impartial manner. All the ninth circuit [sic] staff are aware of this. So for [p]laintiff's appeal, they simply denied it—no record of the facts, no record of anything mentioning what the case was about. So [p]laintiff doesn't have some nice impartial [o]pinion which he can simply included [sic] as an appendix to the petition for writ of certiorari. That simple act by the staff of the ninth circuit [sic] virtually guarantees that the petition for writ

Raiser submitted a declaration from Corinne Deurdulian, M.D., who stated she is not an emergency room physician. She also stated, "It is generally accepted that judicious use of imaging does not significantly increase cancer risk." Raiser asked Dr. Deurdulian to respond to Raiser's questions based on Raiser's declaration regarding his visit to Tri-City; accordingly, Dr. Deurdulian's declaration is structured in the form of Raiser's questions and Dr. Deurdulian's responses.

Evidentiary Challenges

Raiser moved to strike the custodian of medical records' declaration on chain of custody and best evidence grounds, among others. Raiser moved to strike Dr. Cody's declaration, arguing she erred by undercounting his risk of developing cancer. Raiser in a declaration elaborated regarding his failure to obtain an expert regarding emergency room care: "I realize this matter for the ER emergency room [sic] expert is on what information is used for the opinion. Using the scant hospital records, [d]efendants

of certiorari shall be denied—it is simply too messy." (Emphasis omitted.)

win in the ER doctor matters, using my [d]eclaration, I win." He also made a conclusory request that the court strike Dr. Jacobs's declaration.

Relying on Evidence Code sections 350, 352, 403, 702, 720, 750, and 800, respondents moved to strike Dr. Deurdulian's declaration in its entirety as lacking foundation, assuming facts not in evidence, speculative, and lacking sufficient certainty. Respondents further objected to Raiser's declaration regarding the Utah and United States Supreme Court lawsuits as irrelevant, lacking personal knowledge, speculative, assuming facts not in evidence, and unduly prejudicial. They objected to Raiser's declaration regarding his failure to obtain experts on grounds it was irrelevant, speculative, lacked foundation, constituted an improper lay opinion, called for expert testimony, and he lacked personal knowledge.

The Trial Court's Ruling

At the hearing on the motion, the court asked Raiser about Dr. Deurdulian's lack of emergency room expertise: "You do understand when you're—with some of your causes of action, your particular expert is not qualified to render opinions. Do you understand that?" The court added, "Explain to me how you get around issues such as, for

example, in an emergency room doctor malpractice case, it has to be a qualified emergency room doctor saying it was below the standard of care." Raiser's reply was nonresponsive.

The trial court granted defendants' motions to strike Raiser's declarations and that of Dr. Deurdulian, and denied Raiser's motion to strike those of respondents' experts. The court designated Raiser a vexatious litigant under section 391, subdivision (b)(3) because he, in pro. per., had prosecuted or maintained five cases in the past seven years. It stated it was bound by prior case law upholding section 391's constitutionality, and ruled: "Defendants established that [Raiser] will not prevail in this litigation on any cause of action in that the [d]efendants['] expert testimony established that [Raiser] suffered no actionable injury and that [d]efendants acted within the standard of care and no act or omission by any of the [d]efendants caused or contributed to any alleged injury of [Raiser] and no act or omission by [d]efendants constituted fraud, concealment, negligent misrepresentation or medical battery."⁷

⁷ Accordingly, the court ordered Raiser to furnish security deposits as follows: \$136,338.27 for the benefit of Tri-City Healthcare District; (2)

DISCUSSION

I. Raiser's Contentions

Raiser challenges section 391's constitutionality on several grounds, arguing that the statute: (1) bears on a fundamental right of access to courts, and contains an irrebuttable presumption that any pro. per. litigant who loses five litigations in seven years is a vexatious litigant, but under a strict scrutiny analysis, it is not narrowly tailored; (2) fails under the rational basis test because although the legislative intent was to free up California state resources caused by groundless or harassing litigation, there is no relationship between a plaintiff's litigation in another jurisdiction and any burden to California's courts; (3) punishes otherwise legal conduct committed outside California

\$11,547.43 for the benefit of Tri-City Hospital Foundation; (3) \$252,514.12 for the benefit of General Electric Company/GE Healthcare; (4) \$117,516.34 for the benefit of defendants William Meade Jr., an individual, and William A. Meade, Jr., M.D., P.C., a corporation; (5) \$103,813.84 for the benefit of Estrabillo; and \$97,400 for the benefit of StatRad, LLC. It required Raiser to comply with section 391.7's prefiling requirements.

courts' jurisdiction; (4) relies on litigiousness alone to support a prefilng injunction; (5) is facially unconstitutional on notice grounds; (6) is overbroad; (7) is unconstitutional as applied; (8) impermissibly burdens interstate travel; (9) burdens the First Amendment right to petition for grievances; (10) "amounts to defamation to those pro se litigants losing [five] meritorious cases in [seven] years" (some capitalization omitted); (11) amounts to extortion and (12) permits the dismissal of even meritorious litigation as meritless because he had only six court days to pay for two diverse expert witnesses to counter defendants' expert witnesses even before he had conducted discovery, and without being able to cross-examine defendants' experts; and burdens the right to a jury and is constitutionally vague because it allows arbitrary and discriminatory enforcement. Raiser further argues that the trial court was permitted to strike plaintiffs' declarations, but retain defendants' experts' declarations, despite their conclusions being purportedly based on "junk science."

II. Applicable Law

We review the trial court's order finding that a litigant is vexatious for an abuse of discretion. (Bravo v. Ismaj (2002) 99 Cal.App.4th 211, 219.) We presume the order

is correct and imply findings necessary to support the judgment. Questions of statutory interpretation, however, we review de novo. (Ibid.) The court's determination that a vexatious litigant has no reasonable probability of success on the merits, and therefore must post security for costs, is binding on the appellate court if supported by substantial evidence. (Muller v. Tanner (1969) 2 Cal.App.3d 445, 464-465.) "Defendants raising a claim of insufficiency of the evidence assume[] a 'daunting burden.' " (Whiteley v. Philip Morris, Inc. (2004) 117 Cal.App.4th 635, 678.) "[W]e note that we must approach this question with all of the usual presumptions and intendments in favor of constitutionality [Citation.] All doubts must be resolved in favor of the statute." (Taliaferro v. Hoogs (1965) 236 Cal.App.2d 521, 525.)

In 1963, the Legislature passed vexatious litigant statutes (§ 391 et seq.) to curb misuse of the courts by litigants acting in propria persona who repeatedly relitigate the same issues. These persistent and obsessive litigants often file groundless actions against judges and other court officers who made decisions adverse to them. This abuse of the system wastes court time and resources and prejudices other parties waiting their turn before the courts. (Bravo v. Ismaj, supra, 99

Cal.App.4th at pp. 220-221.)

Section 391, subdivision (b)(1), defines a vexatious litigant as one who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing."

"Litigation" is broadly defined as "any civil action or proceeding, commenced, maintained, or pending in any state or federal court" and includes appeals and writ petitions, which are considered to be new litigation. (§ 391, subd. (a); *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1220.) Voluntary dismissals are counted as adverse determinations under the statute. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 777.)

The statutory scheme contains two remedies to address the problem of vexatious litigants and allow them to proceed with a lawsuit. First, sections 391.1 through 391.6 outline a procedure for a defendant in a pending case to move for the posting of security by a plaintiff shown to be a vexatious litigant who does not have reasonable

probability of prevailing in the litigation. (§§ 391.1-391.3.) If the plaintiff fails to post the bond, the action must be dismissed as to the moving defendant. (§ 391.4.) Second, under section 391.7, "the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the . . . presiding judge of the court where the litigation is proposed to be filed." (§ 391.7, subd. (a).)

III. *Analysis*

The vexatious litigation statutes have survived many legal challenges: "A long line of California decisions upholds [the vexatious litigant] statutory scheme against similar constitutional challenges]. We see no reason to disagree with them." (*Wolfe v. George* (9th Cir. 2007) 486 F.3d 1120, 1125.) We conclude the trial court did not abuse its discretion in declaring Raiser a vexatious litigant because Raiser had initiated at least five separate actions in pro. per. during the prior seven years that resulted in final determinations against him. Under Raiser's own calculation, he lost eight cases as a pro. per. litigant in the previous seven years. His litigation history in

that time frame exceeds section 391, subdivision (b)(1)'s requirement for declaring someone a vexatious litigant.

Raiser contends that section 391 is not narrowly tailored to serve a compelling state interest because "[a]ssuming that a person who loses [five] cases in [seven] years is vexatious is not narrowly tailored." (Some capitalization omitted.) Raiser argues that for that statute to be narrowly tailored, the court "must look to see if an actual case is without merit or harassing." The court in *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43 (*Wolfgram*) rejected similar arguments, holding that "there is no direct 'penalty' exacted as a result of [losing five lawsuits]. Instead, [the relevant authorities] inform us that the suer has repeatedly lost many meritless (albeit colorable) suits while acting in propria persona, which, when combined with the fact that he has filed another (sixth) suit which has been found to lack merit, support the reasonable inference that the suer has been using the court' system inappropriately and will continue to do so." (*Id.* at p. 57.) The *Wolfgram* court continued, "The fact that the statute does not include a requirement that the five losing suits be frivolous does not render it unconstitutional," explaining that such a "showing is insufficient

to support a motion to declare someone a vexatious litigant[;] it must be coupled with proof that the suer has come into court again, with a suit with no reasonable probability of success. [Citation.] That fact, coupled with the abysmal history of failure, is sufficient to establish 'vexatiousness' in the ultimate sense, litigation lacking 'reasonableness or probable cause or excuse.' " (Id. at p. 58.) We agree with that analysis.

We also reject Raiser's contention that "[section] 391 fails the rational basis test." (Some capitalization omitted.) "California's vexatious litigation statute is 'rationally related to a legitimate state purpose.' First, vexatious litigants tie up a great deal of a court's time, denying that time to litigants with substantial cases. Second, the state has an interest in protecting defendants from harassment by frivolous litigation, just as it has an interest in protecting people from stalking." (Wolfe v. George, supra, 486 F.3d 1 at p. 1126, fn. omitted.)

Raiser contends "[section] 391 is unconstitutional by imposing its law on citizens of other jurisdictions." (Some capitalization omitted.) We disagree. The statute does not sanction past behavior committed in other states. It does use a

litigant's past as a gauge in determining his or her future litigation activities. For example, section 391, subdivision (b)(1) allows a litigant to be declared vexatious in a case—without regard to the litigant's behavior in that case—because the litigant commenced, prosecuted or maintained five lawsuits during the preceding seven years that were either determined adversely, or were unjustifiably permitted to remain pending for at least two years without being brought to trial. (*Holcomb v. U.S. Bank* (2005) 129 Cal.App.4th 1494, 1504-1505.)

Raiser further argues that section 391 is facially unconstitutional on notice grounds: "There is simply no valid mechanism by which the state of California can give citizens of other states notice of its laws concerning [section] 391 and that the citizen's wholly lawful conduct in that state shall be punished in California at some future time." Raiser adds that there is insufficient notice to both out-of-state and in-state residents that an appeal is new litigation. We reject those arguments. All residents of California are charged with knowledge of the law and are not entitled to claim they were ignorant of it. (See *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 244; see also *Hale*

v. Morgan (1978) 22 Cal.3d 388, 396; People v. O'Brien (1892) 96 Cal. 171, 176; County of Los Angeles v. Salas (1995) 38 Cal.App.4th 510, 516.) For it " 'is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.' " (People v. Noori (2006) 136 Cal.App.4th 964, 978.)

Raiser argues section 391 punishes litigiousness "and forces a pro[.] per[.] to do what an attorney does not have to do: win each case." We disagree. A "state may set the terms on which it will permit litigation in its courts. The restriction of section 391, subdivisions (b)(1) [.] (2), to persons proceeding in propria persona is not arbitrary or unreasonable. Attorneys are governed by prescribed rules of ethics and professional conduct, and, as officers of the court, are subject to disbarment, suspension, and other disciplinary sanctions not applicable to litigants in propria persona. There is no constitutional requirement of uniform treatment of all persons but only that there be a reasonable basis for each classification." (Taliaferro v. Hoogs, supra, 236 Cal.App.2d at p. 527.) "Nor can appellant successfully argue that the statute unconstitutionally discriminates against a group of litigants who are too poor to afford attorneys." (Ibid.)

"The California statute does not violate equal protection. Frequent pro se litigants are not a suspect class meriting strict scrutiny. A state can rationally distinguish litigants who sue and lose often, sue the same people for the same thing after they have lost, and so on, from other litigants. When no bond is required, the California prefiling order does little more than require sua sponte review of a vexatious litigant's complaint to see whether it states a claim before imposing the burden of litigation on a defendant. The defendant could move to dismiss for the same reason, so the statute is not a substantial or irrational bar to access. Before the court can require security, it must determine in an individualized hearing that 'the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation.' The court must also make an individualized determination of the appropriate amount of security." (Wolfe v. George, *supra*, 486 F.3d at pp. 1126-1127, fns. omitted.)

Raiser cursorily challenges section 391's legality on several other grounds: it is overbroad; it is unconstitutional as applied; it infringes his "First Amendment right to petition for grievances;" under the California

Constitution, his right to a jury trial in a civil matter is burdened; it is unconstitutionally vague; and it "amounts to defamation" because he, as a law school graduate, is especially injured by this label. (Some capitalization omitted.) "It injures his reputation before the state bar, eliminating his chance to practice law and injures his ability to find meaningful employment as a law clerk which [he] is actively seeking." Raiser argues section 391 "also amounts to extortion." Raiser also argues he has a "property interest in his right to practice law in California, yet [section] 391 clearly threatens to prevent [him] from practicing law." He adds, "Despite [his] having a highly meritorious and factually and legally sound case section] 391 allowed for its dismissal all prior to any discovery, any cross[-]examination [of] witnesses, and without giving the same opportunity to obtain and prepare expert witnesses as other litigants for a trial."

As a general rule, "[a] judgment or order of the lower court is presumed correct [with] [a]ll intendments and presumptions . . . indulged to support it on matters as to which the record is silent." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted.) To obtain reversal, the appellant must affirmatively

demonstrate error on the record before the court. (Ibid.) Further, an appellate court is not required to independently search the record for errors, or "consider alleged errors where the appellant merely complains without a pertinent argument." (Benach v. County of Los Angeles (2007) 149 Cal.App.4th 836, 852; Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1115.) Rather, the appellant must "support each point by argument and, if possible, by citation of authority" and "[s]upport any reference to a matter in the record by acitation to the volume and page number of the record where the matter appears." (Cal.Rules of Court, rule 8.204 (a)(1).) "When an appellant fails to raise a point, or asserts it but fails to support it with a reasoned argument and citations to authority, we treat the point as waived." (Benach v. County of Los Angeles, at p. 852.) Finally, this court must hold a self-represented litigant to the same restrictive procedural rules as an attorney. (Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1247.) As to the majority of his constitutional challenges, Raiser does not specify which constitutional provisions he contends were violated. He does not support these claims with any citation to applicable case law or reasoned arguments.

Therefore, we deem these contentions forfeited.

IV. *Reasonable Probability of Success on the Merits of the Underlying Lawsuit*

Raiser challenges the court's evidentiary ruling denying his request to strike the declaration of respondents' experts and granting respondents' request to strike Dr. Deurdulian's declaration. He argues that section 391 "allowed the case to be dismissed based on 'junk science' "; it allows "defendants' experts to use limited evidence" when his expert was in fact "very helpful." (Some capitalization omitted.) He argues the court "simply struck [p]laintiff's own expert testimony No explanation was ever given." Raiser argues, "Because the trial court need not credit the complaint, with [p]laintiff's declaration struck, there existed nothing to support [p]laintiff's case. No facts. Nothing. With [p]laintiff's facts completely wiped out, [d]efendants came along and presented their facts for the case and their experts['] opinions on those facts, and of course [d]efendants won the case. Nothing surprising about that." He argues, "The only remotely valid grounds for striking [his declaration] was that [he] was engaging in 'speculation' when he said that he would not

have gotten the cancer[-]causing CT scan had he been told the truth about the true cancer risks. However, there were causes of action for fraud, so that part of [p]laintiff's [d]eclaration was a key fact and went to the element of fraud in that [p]laintiff's [sic] was misled and were it not for the deceit his course of conduct would have been different. Defendant also argued [p]laintiff was making lay opinion about CT scan safety which [p]laintiff never did anywhere. [¶] Oddly, even if some parts were objectionable, only those parts should have been struck and the case could have continued." Raiser argues the trial court improperly restricted his right to a jury trial after it struck his declaration and denied his motion to strike Dr. Cody's declaration.

To obtain an order requiring a vexatious litigant to post security, defendants must show there is not a reasonable probability Raiser will prevail in the litigation against them. (§ 391.1.) In determining a motion under section 391.1, however, the court is not required to assume the facts alleged are true, and it may weigh the evidence submitted by the parties on the merits. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 782.) A vexatious litigant in pro. per. files

a sixth lawsuit lacking merit when " 'plaintiff's recovery is foreclosed as a matter of law or that there are insufficient facts to support recovery by the plaintiff on its legal theories, even if all the plaintiff's acts are credited.' [Citation.] Such a suit is by definition not worthy and under settled rules of practice would ordinarily be disposed of by means of a demurrer, judgment on the pleadings, or summary judgment." (Wolfgram, supra, 53 Cal.App.4th at pp. 58-58, fns. omitted.)

We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion. (Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747, 773.) A court abuses its discretion if its ruling is " 'so irrational or arbitrary that no reasonable person could agree with it.' " (Ibid.) "When applying the deferential abuse of discretion standard, 'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (In re C.B. (2010) 190 Cal.App.4th 102, 123.) "It is the appellant's burden on appeal to show the trial court abused its discretion." (Cahill v. San

Diego Gas & Electric Co. (2011) 194 Cal.App.4th 939, 957.)

We regard Raiser's arguments as forfeited because Raiser does not analyze the court's evidentiary ruling in light of the applicable standard of review for evaluating such claims. (Gombiner v. Swartz (2008) 167 Cal.App.4th 1365, 1375 [contention waived where appellant did "not analyze the court's ruling in light of the applicable abuse of discretion standard of review"].) Raiser also fails to cite to the Evidence Code or any case law relating to the criteria a trial court uses to decide the admissibility of evidence.

Forfeiture aside, the court did not err by excluding Dr. Deurdulian's declaration because she is not an emergency room physician. Therefore, her expertise was of limited applicability to the circumstances of this case. To provide an expert opinion, a person must have sufficient "special knowledge, skill, experience, training, or education." (Evid. Code, § 720, subd. (a).) The person "must have had basic educational and professional training as a general foundation for his testimony, but it is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of

controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured.' " (Huffman v. Lindquist (1951) 37 Cal.2d 465, 478.)

The court also did not err by striking Raiser's declarations because he was not an expert. Raiser provided no evidence under Evidence Code section 720 that he has the requisite medical knowledge to qualify him to opine on his life expectancy, for example.

The court having properly struck Dr. Deurdulian's declaration, Raiser's case was weakened because it was bereft of expert witness testimony. In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care (Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal.3d 689, 702), except in cases where negligence is obvious to a layman. (Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992, 1001 [discussing doctrine of *res ipsa loquitur*].) This is not a case where negligence is obvious, but a case in which expert opinion is required because of the nature of the scientific issues involved, as demonstrated by the parties' submission of expert declarations in support of and in

opposition to the motion.

Furthermore, under the controlling authority of *Potter v. Firestone* (1993) 6 Cal.4th 965, 997, Raiser has not made out a proper claim for injury: Potter states: "[I]n the absence of a present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure. Under this rule, a plaintiff must do more than simply establish knowledge of a toxic ingestion or exposure and a significant increased risk of cancer. The plaintiff must further show that based upon reliable medical or scientific opinion, the plaintiff harbors a serious fear that the toxic ingestion or exposure was of such magnitude and proportion as to likely result in the feared cancer." The Potter court also held that "a toxic exposure plaintiff need not meet the more likely than not threshold for fear of cancer recovery in a negligence

action if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to 'oppression, fraud, or malice' as defined in Civil Code section 3294, which authorizes the imposition of punitive damages." (Potter, *supra*, at p. 998.) Raiser's claimed injury is based on his unfounded fear of developing cancer from having undergone the CT scan; it does not stem from a "knowledge, corroborated by reliable medical or scientific opinion." (Id. at p. 997.)

All of Raiser's causes of action require him to make out a claim of injury or damages: medical negligence (Powell v. Kleinman (2007) 151 Cal.App.4th 112, 123); fraud and promissory fraud (Lazar v. Superior Court (1996) 12 Cal.4th 631, 638); negligent misrepresentation (Apollo Capital Fund, LLC v. Roth Capital Partners, LLC (2007) 158 Cal.App.4th 226, 243); medical battery (CACI No. 530A); fraudulent concealment (Prakashpalan v. Engstrom, Lipscomb & Lack (2014) 223 Cal.App.4th 1105, 1130); strict products liability (Nelson v. Superior Court (2006) 144 Cal.App.4th 689, 695); breach of express warranty (CACI No. 3201); breach of implied warranty (CACI Nos. 3210 and 3211); and estoppel (Nicolopoulos v. Superior Court (2003) 106 Cal.App.4th 304, 311). But Raiser

adduced no admissible evidence of his medical injury. By contrast, because Dr. Cody concluded Raiser would not experience physical injury from the CT scan and furthermore, the probability of his developing cancer from the CT scan was de minimis, he could not make out the different causes of action. Moreover, Dr. Jacobs testified that Raiser consented to the CT scan, and the Tri-City staff and physicians who attended to him met the standard of care for hospital emergency departments and physicians in Southern California. Accordingly, the trial court did not err by finding that under *Potter v. Firestone*, supra, 6 Cal.4th 965 and the cases cited above, Raiser had not shown a reasonable probability that his causes of action were meritorious. Raiser raises no other issue in his opening brief that warrants reversal of the court's order.

Court of Appeal Fourth Appellate District
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COURT OF APPEAL, FOURTH
APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

AARON RAISER,
Plaintiff and Appellant,

v.

TRI-CITY HEALTHCARE DISTRICT et
al.,

Defendants and Respondents.

D068567

(Super. Ct. No. 37-2013-00070368-CU-MM-
NC)

ORDER DENYING REHEARING

THE COURT:

The petition for rehearing is denied.
BENKE, Acting P. J.

Copies to: All parties