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**OPINION, COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(AUGUST 30, 2023)**

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA THIRD APPELLATE DISTRICT
(Amador)

NORTHERN CALIFORNIA
COLLECTION SERVICE, INC.,

Plaintiff and Respondent,

v.

RAYMOND H. PIERSON III,

Defendant and Appellant.

GERALD MCINTYRE, ET AL.,

Respondents.

No. C089972

(Super. Ct. No. 17CVC10112)

Before: MAURO, Acting P.J., DUARTE, J.,
McAdam, J.

Plaintiff Northern California Collection Service,
Inc. (NCCS) brought a debt collection action against

defendant Raymond H. Pierson, III, M.D., to collect unpaid rent due under a commercial lease agreement for office space. Dr. Pierson, proceeding in propria persona, tiled a cross-complaint against NCCS and others, including the owners of the office building, alleging numerous claims (*e.g.*, negligence, breach of contract, fraud, defamation). Dr. Pierson appeals from the judgments of dismissal entered in favor of the cross-defendants after the trial court declared him to be a vexatious litigant within the meaning of Code of Civil Procedure section 391, subdivision (b)(1),¹ ordered him to furnish security to avoid dismissal of his cross-complaint (§ 391.3, subd. (a)), and imposed a prefiling order prohibiting him from filing any new litigation in propria persona without first obtaining leave of the presiding justice or judge (§ 391.7, subd. (a)).

Dr. Pierson argues that the judgments of dismissal, which were entered after he failed to furnish the court-ordered security (§ 391.4), must be reversed because the trial court's vexatious litigant finding is not supported by substantial evidence. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the pertinent facts and procedural history. Additional background information relevant to the resolution of this appeal is set forth in the Discussion, *post*.

¹ Undesignated statutory references are to the Code of Civil Procedure.

Prior Federal Litigation Commenced in Florida

Dr. Pierson is an orthopedic surgeon. In 1993, he moved to Orlando, Florida. Thereafter, he was granted medical staff privileges and performed surgeries at hospitals that were part of a non-profit private health care network serving central Florida-Orlando Regional Healthcare System (ORHS). Dr. Pierson's privileges included placement on the trauma and emergency call list.

In mid-1996, an investigation was initiated after complaints were received regarding Dr. Pierson's emergency room usage from nurses, technicians, and physicians at ORHS's hospitals. The complaints consisted of concerns that Dr. Pierson (1) took an excessive length of time completing his surgeries, (2) scheduled surgeries at inappropriate times, (3) delayed dictating operative notes, and (4) treated elective surgeries as urgent or semi-urgent cases.

In early 2004, following the investigation and administrative disciplinary proceedings that took more than seven years to complete, the ORHS board found that some of the complaints against Dr. Pierson's were valid and filed an adverse action report with the National Practitioner Data Bank, as required under the Health Care Quality Improvement Act of 1986 (HCQIA) (42 U.S.C. § 11101 et seq.). ORHS told Dr. Pierson that it would restore him to the trauma and emergency call list (from which he had been removed after a preliminary review of the complaints against him) if he was willing to comply with the standard policies and protocols that applied to all orthopedic surgeons on staff at ORHS's hospitals. Dr. Pierson refused to do so and instead moved to California in mid-2004 and opened a medical practice in Amador County.

Almost four years later, Dr. Pierson commenced a federal action in Florida. In January 2008, represented by counsel, he brought suit in the United States District Court for the Middle District of Florida, against ORHS, numerous physicians, the United States of America, and various federal and state agencies. The complaint, which arose out of the suspension of Dr. Pierson's trauma and emergency call and consulting privileges at ORHS's hospitals, alleged 22 claims, including breach of contract, intentional and unjustifiable interference with contractual relations, defamation, fraud, civil conspiracy, and multiple claims involving HCQIA.²

In October 2010, the district court entered judgment against Dr. Pierson after it dismissed most of his claims and granted summary judgment on those remaining. Dr. Pierson, represented by counsel, appealed. In January 2012, the Eleventh Circuit Court of Appeals affirmed the judgment. In June 2012, the Eleventh Circuit denied Dr. Pierson's in propria persona petition for rehearing.³ In January 2013, the

² Dr. Pierson asserted one claim alleging that ORHS and others violated HCQIA, and several claims seeking an order declaring HCQIA unconstitutional. HCQIA provides immunity from monetary liability for both individuals (*e.g.*, physicians) and health care facilities that participate in reasonably informed, reasonably justified disciplinary decisions by qualified medical peer review bodies. (*See Fahlen v. Slitter Central Valley Hospitals* (2014) 58 Cal.4th 655, 684-686 [observing that federal courts have generally held that "where the record establishes a sufficient quality-of-care basis for the peer review action, the disciplined physician cannot overcome the immunity by showing the peer reviewers acted in bad faith or with hostile motives"].)

³ The petition for rehearing is not in the appellate record. In his opening brief on appeal, Dr. Pierson agrees he filed a petition for

United States Supreme Court denied Dr. Pierson's in propria persona petition for writ of certiorari.

Prior Federal Litigation Commenced in California

In late January 2014, Dr. Pierson, proceeding in propria persona, filed a legal malpractice action in the United States District Court, Eastern District of California, against two attorneys who had represented him in the federal litigation in Florida. The claims alleged in this action arose out of the "grossly deficient legal advocacy provided by [the attorneys] in all stages of their representation of Dr. Pierson before the 11th Circuit Appellate Court." As a basis for subject matter jurisdiction, Dr. Pierson alleged diversity of citizenship.

In early February 2014, the California district court sua sponte transferred the action to the United States District Court, Southern District of Florida based on improper venue under 28 U.S.C. section 1406.⁴ The next day, the Florida district court sua sponte dismissed the action without prejudice due to Dr. Pierson's failure to sufficiently allege subject matter jurisdiction.

In April 2014, the Florida district court struck Dr. Pierson's first amended complaint because the action

rehearing en banc in propria persona. However, the Eleventh Circuit's order denying the petition indicates that he sought both panel and en banc rehearing. It is immaterial to the resolution of this appeal whether he requested one or both forms of relief.

⁴ 28 U.S.C. section 1406, subdivision (a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

had not been “reopened following its dismissal.” The court noted the dismissal was without prejudice to Dr. Pierson’s “right to refile th[e] action.” Less than two weeks later, he refiled the action and it was assigned a new case number.

In May 2014, the California district court denied Dr. Pierson’s in propria persona motion to vacate the transfer order. In July 2014, the Ninth Circuit dismissed his in propria persona appeal of the transfer order and the order denying his motion to vacate the transfer order, explaining that it lacked subject matter jurisdiction because the challenged orders were not final or directly appealable. In February 2015, the United States Supreme Court denied Dr. Pierson’s in propria persona petition for a writ of certiorari.

In July 2015, the Florida district court dismissed the “refiled” legal malpractice action. This dismissal occurred after Dr. Pierson informed the district court of his desire to prosecute the complaint he filed in a related action in the same district, which although unclear, was apparently filed in propria persona at some point in 2015.

Present Action

In 2016, Dr. Pierson maintained an orthopedic surgery practice at the Amador Professional Center, an office building owned by Gerald and Betty McIntyre (collectively McIntyres) and managed by Colliers International Real Estate Management Services, Inc. (Colliers International). He leased one of the office suites in the building, located in Jackson, California. On October 10, 2016, the office building was damaged when a woman crashed her car into the area near the “front office operations section” of Dr. Pierson’s office.

Thereafter, Dr. Pierson claimed that he could no longer evaluate and treat patients at his office due to the “negligent handling” of the repairs. As a consequence of the “exceptional financial disruption” caused by the “negligent and prolonged repairs,” Dr. Pierson stopped paying rent and vacated his office on November 30, 2016.

In May 2017, NCCS filed a debt collection action against Dr. Pierson to collect the unpaid rent due under the terms of his commercial lease agreement.

In February 2018, Dr. Pierson, proceeding in propria persona, filed a “response” to the complaint and a cross-complaint against NCCS and others.⁵ The operative cross-complaint, filed in October 2018, asserted numerous claims against NCCS, the McIntyres, Colliers International, and one other party.⁶ Among other things, Dr. Pierson alleged that the “negligent demolition and repairs” rendered his office “completely uninhabitable” due to a “toxic combination of dust, debris and other unknown inhalants,” and that, due

⁵ At all times, Dr. Pierson has proceeded in propria persona in the present action.

⁶ That party, the Amador Professional Center, was dismissed from this action for lack of service and is not involved in this appeal. Dr. Pierson alleged 14 claims against cross-defendants the McIntyres and Colliers International, including seven negligence claims, and claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud per se and intentional deceit, malicious use of process, abuse of process, defamation, and intentional infliction of emotional distress. He alleged five claims against NCCS, including breach of the implied covenant of good faith and fair dealing, fraud per se and intentional deceit, malicious use of process, abuse of process, defamation, and intentional infliction of emotional distress.

to the excessive amount of time it took to complete the repairs, he suffered financial loss and the temporary closure of his medical practice was “necessary to avoid complete financial insolvency.” He further alleged that he and his staff sustained “permanent pulmonary injury” from their exposure to the contaminated office space, and that the “unlawful and fraudulent lawsuit” brought by NCCS “defamed [his] good name and caused exceptional emotional distress.” Dr. Pierson claimed that “legal representatives” from NCCS filed a lawsuit which “advanced their demands on the basis of an invalid and expired lease,” and noted that NCCS’s complaint failed to inform the trial court about the damage caused by the “motor vehicle accident,” which resulted in his office “being completely unacceptable for patient care for an extended period.”

Vexatious Litigant Motions Filed in the Present Action

In early December 2018, NCCS moved for an order declaring Dr. Pierson to be a vexatious litigant within the meaning of section 391, subdivision (b)(1), requiring him to furnish security as a condition of prosecuting his cross-complaint (§ 391.3, subd. (a)), and imposing a prefiling order prohibiting him from filing any new litigation in propria persona without first obtaining leave of the presiding justice or judge (§ 391.7, subd. (a)). NCCS argued that such relief was warranted because Dr. Pierson had filed seven litigations in propria persona in the preceding seven years that were finally determined adversely to him, and that he had no reasonable probability of prevailing in this litigation (*i.e.*, succeeding on any of the claims alleged in his cross-complaint). In support of its motion, NCCS

requested the trial court take judicial notice of various court records.

Several weeks later, in late December 2018, the McIntyres and Colliers International moved for similar relief Like NCCS, they sought an order declaring Dr. Pierson to be a vexatious litigant within the meaning of section 391, subdivision (b)(1), and requiring him to furnish security as a condition of prosecuting his cross-complaint (§ 391.3, subd. (a)).⁷ Also like NCCS, they argued that such relief was warranted because Dr. Pierson had filed seven litigations in propria persona in the preceding seven years that were finally determined adversely to him, and that he had no reasonable probability of succeeding on any of the claims alleged in his cross-complaint. In support of their motion, the McIntyres and Colliers International requested the trial court take judicial notice of various court records.

Both vexatious litigant motions relied on court records from the two federal cases discussed *ante*. As set forth more fully *post*, although there was substantial overlap in the litigations identified by the moving parties to show that Dr. Pierson was a vexatious litigant, there were a few separate litigations offered for the trial court's consideration.

Dr. Pierson filed a joint opposition, arguing that the moving parties had failed to demonstrate that he was a vexatious litigant within the meaning of section 391, subdivision (b)(1). In arguing that he had not commenced, prosecuted, or maintained in propria persona

⁷ Unlike NCCS, the McIntyres and Colliers International did not move for a prefiling order.

at least five separate litigations that were finally determined adversely to him, he noted that the federal action commenced in Florida was “initiated by attorneys and taken through the late stages by attorneys,” and that the related federal legal malpractice action commenced in California (and immediately transferred to Florida) had not been finally determined adversely to him. He did not, however, submit any evidence in support of his position or present reasoned argument with citations to pertinent authority. Nor did he ask the trial court to take judicial notice of any court records. Instead, without citation to supporting evidence, he provided a general and incomplete description of the procedural history of the federal cases.

Trial Court’s Ruling on the Vexatious Litigant Motions

In early March 2019, a hearing was held on the vexatious litigant motions. Dr. Pierson argued, as he did in his joint opposition, that the moving parties had failed to demonstrate he was a vexatious litigant within the meaning of section 391, subdivision (b)(1). In so arguing, he noted that the moving parties had only cited two cases, and reiterated that he was represented by counsel in one of those cases in the trial court and on appeal, and that there was no final adverse determination in the other case. He insisted the moving parties were improperly attempting to rely on “all the little pieces” of the cases to establish his status as a vexatious litigant. At the conclusion of the hearing, the matter was taken under submission.

In late March 2019, the trial court issued a written order granting the vexatious litigant motions, finding that there was “substantial evidence” that Dr. Pierson

had “commenced, prosecuted or maintained at least five actions as a self-represented litigant in the past seven years, all of which [were] finally determined adversely to him (¶ § 391(b)(1)).” In so finding, the court took judicial notice of and relied on the court records submitted by the moving parties. The court, however, did not identify which specific litigations qualified for vexatious litigant purposes. Without elaboration, the court also concluded that the moving parties had shown that there was no reasonable probability that Dr. Pierson would prevail in this litigation, noting that he effectively conceded the issue by failing to address it in his opposition. In addition to declaring Dr. Pierson to be a vexatious litigant, the court granted NCCS’s request to enter a prefiling order against him and ordered him to furnish security in the amount of 577,020.32 as to NCCS and \$63,723.10 as to the McIntyres and Colliers International. The court warned Dr. Pierson that the failure to furnish the security within 30 days would result in the dismissal of the moving parties from the cross-complaint.

Judgments of Dismissal

Dr. Pierson did not furnish the court-ordered security within 30 days.

In early May 2019, the trial court denied Dr. Pierson’s ex parte application to extend the time to furnish the security. Shortly thereafter, the court entered judgment of dismissal in favor of NCCS. In a separate order, the court entered judgment of dismissal in favor of the McIntyres and Colliers International. Both judgments of dismissal were entered on May 7, 2019.

Motion for Reconsideration

In June 2019, after a hearing, the trial court denied Dr. Pierson's motion for reconsideration, in which he argued in part that the evidence submitted by the moving parties was not sufficient to support a vexatious litigant finding under section 391, subdivision (b)(I). The court found the motion procedurally deficient, as it was untimely and not supported by an affidavit or declaration. The court also rejected the motion on the merits, finding that it failed to set forth any new facts, circumstances, or law that would justify reconsideration.

Notice of Appeal and Extensions of Time to File Appellate Briefs

In July 2019, Dr. Pierson filed a timely notice of appeal, which indicated that he was appealing from the judgment entered on May 7, 2019, and various other orders and judgments.

Nearly three years later, after numerous extensions of time were granted, Dr. Pierson filed his opening brief and an appellant's appendix in April 2022. In his brief, Dr. Pierson stated that he sought reversal of both judgments of dismissal entered on May 7, 2019. However, the judgment of dismissal entered against the McIntyres and Colliers International was not included in the appellate record.

In May 2022, NCCS filed a respondent's brief. In its brief, NCCS noted that Dr. Pierson could not obtain reversal of the vexatious litigant finding because he failed to appeal from the judgment of dismissal entered in favor of the McIntyres and Colliers International.

Two weeks later, Dr. Pierson filed a motion in this court asserting that he intended to appeal both judgments of dismissal entered on May 7, 2019. He requested that we designate the McIntyres and Colliers International as respondents.

After Dr. Pierson (at our request) submitted a copy of the judgment of dismissal entered in favor of the McIntyres and Colliers International, we issued an order augmenting the record to include that document, directing the clerk of this court to designate the McIntyres and Colliers International as respondents, and ordering those parties to file a respondent's brief.

Following the stipulation for an extension of time, the granting of multiple requests for an extension of time, and the granting of a motion to file a revised and corrected reply brief, the case was fully briefed in April 2023.

DISCUSSION

I. Appellate Jurisdiction

As a threshold matter, we reject respondents' contention that the appeal must be dismissed because Dr. Pierson's notice of appeal failed to identify an appealable judgment or order.

A. Applicable Legal Principles

The existence of an appealable order or judgment is a jurisdictional prerequisite to an appeal. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 21.) A corollary of this rule is that an appeal from a judgment or order that is not appealable must be dismissed. (*Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 771;

Munoz v. Florentine Gardens (1991) 235 Cal.App.3d 1730, 1732.)

“Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute.” (*Walker v. Los Angeles County Metropolitan Transportation Authority, supra*, 35 Cal.4th at p. 19; see § 904.1 [listing appealable judgments and orders].) An order declaring a person to be a vexatious litigant and imposing a pre-filing order is appealable. (*In re Marriage of Deal* (2020) 45 Cal.App.5th 613, 618-619.) Likewise, a judgment of dismissal that follows from the failure to furnish security in connection with an order declaring a person to be a vexatious litigant is appealable. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 635 (*Golin*).)

“The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed.” (Cal. Rules of Court, rule 8.100(a)(2); *Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) A notice of appeal may be deemed sufficient if it is “reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.” (*Luz*, at p. 59; see *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 344 [a notice of appeal “may be deemed sufficient if it has not misled or prejudiced the respondent”].)

B. Analysis

Dr. Pierson’s notice of appeal stated that he was appealing from the judgment entered on May 7, 2019. However, he checked four boxes on the notice of appeal form, which indicated that he was also appealing from the following: (1) a judgment after an order granting

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a summary judgment motion; (2) an order after judgment under section 904.1, subdivision (a)(2); (3) and order or judgment under section 904.1, subdivision (a)(3)-(13); and (4) an order granting or denying a special motion to strike under section 425.16 (*i.e.*, an anti-SLAPP motion).

Although Dr. Pierson checked several boxes on the notice of appeal form that do not apply to his case, this is not fatal to his appeal. The notice of appeal expressly references the judgment entered on May 7, 2019. The only documents in the record filed on that date were the judgment of dismissal in favor of NCCS, and the judgment of dismissal in favor of the McIntyres and Colliers International.⁸ And the other orders and judgments referenced in the notice of appeal are plainly not at issue in this case (*e.g.*, judgment after an order granting summary judgment) or are not separately appealable.⁹ except for the order declaring Dr. Pierson to be a vexatious litigant and imposing a

⁸ The record also includes a proposed order granting judgment of dismissal in favor of the McIntyres and Colliers International. However, that document, which is dated May 7, 2019, does not include a file stamp by the clerk indicating that it was filed with the trial court.

⁹ Section 904.1, subdivision (a)(2) authorizes an appeal from an order after judgment. Here, the only postjudgment order in the record is the trial court's denial of Dr. Pierson's motion for reconsideration of the vexatious litigant finding, which is not a separately appealable order. (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 927, fn. 6; see § 1008, subd. (g) ["An order denying a motion for reconsideration . . . is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order"].)

prefiling order. (*in re Marriage of Deal, supra*, 45 Cal.App.5th at pp. 618-619 [while an order declaring a person to be a vexatious litigant is not itself appealable. such an order may be reviewed in conjunction with a prefiling order, which is an injunction appealable under section 904.1, subdivision (a)(6)].)

On this record, we conclude it was “reasonably clear” that Dr. Pierson was attempting to appeal both judgments of dismissal entered on May 7, 2019, and the order encompassed within those judgments—*i.e.*, the order declaring Dr. Pierson to be a vexatious litigant, requiring him to furnish security, and imposing a prefiling order. We further conclude that, despite the deficiencies of the notice of appeal, the respondents were not misled or prejudiced by it. Indeed, respondents make no attempt to show prejudice. And, as pointed out by NCCS, Dr. Pierson could not obtain reversal of the vexatious litigant finding without challenging both judgments of dismissal. Under the circumstances presented, we liberally construe the notice of appeal and deem it sufficient.¹⁰

II. Vexatious Litigant Finding

Next, we consider the propriety of the trial court’s vexatious litigant finding. For the reasons we shall

¹⁰ We decline to dismiss the appeal, as urged by the McIntyres and Colliers International, based on Dr. Pierson’s failure to timely “procure an adequate record on appeal” and seek to designate them as respondents. This argument is predicated on the record omission of the judgment of dismissal entered in favor of the McIntyres and Colliers International. As discussed *ante*, we issued an order augmenting the record to include that document. Further, the McIntyres and Colliers International have not developed a cogent legal argument persuading us that dismissal of the appeal is warranted on the basis of an inadequate record.

explain, we agree with Dr. Pierson that there is insufficient evidence to support the trial court's determination that he was a vexatious litigant within the meaning of section 391, subdivision (b)(1). The evidence submitted in support of the vexatious litigant motions does not establish that Dr. Pierson had commenced, prosecuted, or maintained in propria persona at least five distinct litigations in the preceding seven years that were finally determined adversely to him.

A. Applicable Substantive Law and Standard of Review

The purpose of the vexatious litigant statutory scheme is to curb the misuse of the court system by the persistent and obsessive litigant who repeatedly files groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and not only places an unreasonable burden on the courts but also prejudices other parties waiting their turn before the courts. (*Shalant v. Gliardi* (2011) 51 Cal.4th 1164, 1169 (*Shalant*); *Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 406 (*Garcia*); *In re Kinney* (2011) 201 Cal.App.4th 951, 957-958.) The statutory scheme "provides a 'means of moderating a vexatious litigant's tendency to engage in meritless litigation.'" (*Garcia*, at p. 406.)

To be declared a vexatious litigant, a party must come within one of the four definitions set forth in section 391, subdivision (b). As relevant here, section 391, subdivision (b)(1) defines a vexatious litigant as a person 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 deter-

mined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.” The seven-year period is calculated based on the filing date of the vexatious litigant motion. (*Stolz v. Bank of America* (1993)]⁵ Cal.App.4th 217, 224; *Garcia, supra*, 231 Cal.App.4th at p. 406, fn. 4.) A litigation qualifies as being within the seven-year period so long as it was filed or maintained during that period. (*Stolz*, at p. 225, *Garcia*, at p. 406. fn. 4.)

Section 391 broadly defines “[l]itigation” as meaning “any civil action or proceeding, commenced, maintained or pending in any state or federal court.” (§ 391. subd. (a).) “A litigation includes an appeal or civil writ proceeding filed in an appellate court.” (*Garcia, supra*, 231 Cal.App.4th at p. 406.) However, a “litigation” does not include “every motion or other procedural step taken during an action or special proceeding.” (*Shalant, supra*, 51 Cal.4th at pp. 1173-1174 [explaining that a person cannot be declared a vexatious litigant under section 391, subdivision (b)(1) for losing five *motions* in the same lawsuit during a seven-year period]; see *Garcia, supra*, 231 Cal.App.4th at p. 412, fn. 10 [“In the framework of the vexatious litigant law, a particular *litigation* is distinguishable from the various applications, motions, pleadings or other procedural steps that may be filed or taken within the context of that litigation.”].)¹¹

¹¹ The vexatious litigant statutes do not define the term “special proceeding.” “The Code of Civil Procedure classifies the remedies that may be obtained in the courts.” (*People v. Board of Parole Hearings* (2022) 83 Cal.App.5th 432, 445.) remedies are divided into ‘actions’ and ‘special proceedings.’” (*Ibid.*) “An action is an ordinary proceeding in a court of justice by which one party

“A litigation is finally determined adversely to a plaintiff if he does not win the action or proceeding he began, including cases that are voluntarily dismissed by a plaintiff.” (*Garcia, supra*, 231 Cal.App.4th at p. 406.) “A particular litigation is finally determined when avenues for direct review (appeal) have been exhausted or the time for appeal has expired.” (*Id.* at p. 407, fn. 5.)

Qualifying litigations for purposes of the vexatious litigant law include separate appeals and writ petitions from multiple orders within the same case that are finally determined adversely to the person. (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 1005-1007 [wife declared vexatious litigant under section 391, subdivision (b)(1) based on unsuccessful writ petitions and appeals taken from various orders in marital dissolution action].) However, not every denial of a writ petition qualifies as a litigation for purposes of the vexatious litigant law. An appellate court’s summary denial of a writ petition on a pretrial issue that could also be reviewed on appeal from the judgment ultimately entered in the action does not constitute a litigation that has been finally determined adversely to the person within the meaning of section 391, subdivision (b)(1). (*Fink v. Shemtov* (2010) 180

prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” (*Ibid.*) “Every other remedy is a special proceeding.’ [Citation.] ‘[A] special proceeding is confined to the type of case which was not, under the common law or equity practice, either an action at law or a suit *in equity*.” (*Id.* at p. 446.) “Writs of mandate and prohibition are denominated special proceedings of a civil nature.” (*Ibid.*) Other special proceedings include punishment of contempt, contesting elections, arbitrations, enforcement of liens, and probate proceedings. (See § 23, Code Commission Notes [listing special proceedings].)

Cal.App.4th 1160, 1172 [explaining that, in these situations, the court does not take jurisdiction over the case and does not give the legal issue full plenary review].) By contrast, an appellate court's summary denial of a writ petition constituting the *exclusive* means of obtaining appellate review is properly considered a litigation that has been finally determined adversely to the person for purposes of qualifying for vexatious litigant status under section 391, subdivision (b)(1). (*Fink*, at p. 1172 [explaining that, in these situations, “an appellate court must judge the petition on its procedural and substantive merits, and a summary denial of the petition is necessarily on the merits”].)

“The [vexatious litigant] statutory scheme provides two sets of remedies. First, in pending litigation, ‘the defendant may move for an order requiring the plaintiff to furnish security on the ground the plaintiff is a vexatious litigant and has no reasonable probability of prevailing against the moving defendant.’ [Citations.] If the court finds in the defendant’s favor on these points, it orders the plaintiff to furnish security in an amount fixed by the court. [Citation.] Failure to provide the security is grounds for dismissal.” (*In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1345.) The second remedy “‘operates beyond the pending case’ and authorizes a court to enter a ‘prefiling order’ that prohibits a vexatious litigant from filing any new litigation in propria persona without first obtaining permission from the presiding judge.” (*Ibid.*)

“The trial court exercises its discretion in determining whether a person is a vexatious litigant. Review of the order is accordingly limited and the Court of Appeal will uphold the ruling if it is supported by substantial evidence. Because the trial court is best

suit to receive evidence and hold hearings on the question of a party's vexatiousness, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment. [Citations.] Of course, we can only imply such findings when there is evidence to support them. When there is insufficient evidence in support of the designation, reversal is required." (*Golin, supra*, 190 Cal.App.4th at p. 636.)

To the extent we must determine the proper interpretation of a statutory provision, we do so independently under a de novo standard of review. (*Garcia, supra*, 231 Cal.App.4th at p. 408; *Golin, supra*, 190 Cal.App.4th at p. 636.) "[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.)

B. Additional Background

As previously indicated, in support of their respective vexatious litigant motions, the respondents submitted various court records they claimed showed that Dr. Pierson had commenced, prosecuted, or maintained in propria persona at least five litigations in the preceding seven years that were finally determined adversely to him. Each of the litigations relied on by the respondents arose out of the federal cases described *ante*.

NCCS argued the following seven litigations were finally determined adversely to Dr. Pierson within the meaning of section 391, subdivision (b)(1): (1) the

Eleventh Circuit's decision affirming the judgment entered against Dr. Pierson in the federal action commenced in the Middle District of Florida; (2) the Eleventh Circuit's order denying Dr. Pierson's petition for rehearing; (3) the United States Supreme Court's order denying Dr. Pierson's petition for writ of certiorari regarding the Eleventh Circuit's decision; (4) the California district court's order denying Dr. Pierson's motion to vacate the order transferring the legal malpractice action to the Southern District of Florida; (5) the Ninth Circuit's order dismissing Dr. Pierson's appeal of the transfer order and the order denying his motion to vacate the transfer order; (6) the United States Supreme Court's order denying Dr. Pierson's petition for writ of certiorari regarding the transfer order; and (7) the Florida district court's (Southern District) July 2015 order dismissing the "railed" legal malpractice action.

The McIntyres and Colliers International relied on the same litigations as NCCS except three—the Eleventh Circuit's decision affirming the judgment entered against Dr. Pierson in the federal action commenced in the Middle District of Florida, the California district court's order denying Dr. Pierson's motion to vacate the transfer order, and the Florida district court's (Southern District) July 2015 order dismissing the "reified" legal malpractice action. Instead of these three litigations, they relied on the transfer order issued by the California district court, a postappeal judgment entered by the Florida district court (Middle District), which encompassed an order requiring Dr. Pierson to pay costs and/or attorney fees to certain defendants in the federal action commenced in Florida, and the Florida district court's (Southern District)

April 2014 order striking the first amended complaint in the legal malpractice action.

Collectively, the respondents identified 10 specific litigations for the trial court's consideration in deciding whether Dr. Pierson was a vexatious litigant within the meaning of section 391, subdivision (b)(1). However, in passing, NCCS's moving and reply papers suggested that there were five postappeal judgments entered by the Florida district court (Middle District) against Dr. Pierson that also constituted qualifying litigations under the vexatious litigant law, including the postappeal judgment relied on by the McIntyres and Colliers international. These additional judgments encompassed the order(s) awarding costs and/or attorney fees to various defendants after the Eleventh Circuit issued its decision affirming the judgment against Dr. Pierson. Thus, in total, there were 14 litigations offered for the trial court's consideration.

Before addressing the propriety of the trial court's vexatious litigant finding, we briefly pause to note that our review of this issue is significantly hampered by the inadequate legal analysis offered by the parties in their briefing in the trial court and on appeal, the failure of the parties to develop an adequate record in the trial court with respect to the procedural history of the federal cases relied on to support the vexatious litigant motions,¹² and the trial court's failure to identify

¹² Without citation to evidence in the record, Dr. Pierson's opening brief on appeal, like his joint opposition in the trial court, identifies and describes various proceedings (*e.g.*, appeals filed with the Eleventh Circuit) that purportedly occurred in the legal malpractice action commenced in California and transferred to Florida. But he acknowledges there is no evidence in the record to substantiate his representations.

the specific litigations that qualified for vexatious litigant purposes and explain why they so qualified.

C. Analysis

1. Federal Action Commenced in Florida

We begin our analysis with the federal action commenced in the Middle District of Florida in 2008. As an initial matter, we observe that the judicially noticed court records disclose that, as to the merits, judgment was entered in the district court against Dr. Pierson in 2010, well beyond the applicable seven-year period under section 391, subdivision (b)(1).¹³ The court records also disclose that Dr. Pierson was represented by counsel during the trial court proceedings and on appeal. And nothing in the record establishes that Dr. Pierson commenced, prosecuted, or maintained this action in propria persona at any time before the Eleventh Circuit issued its decision affirming the judgment entered against Dr. Pierson.¹⁴ Thus, neither

¹³ We recognize that respondents did not argue in the trial court that the judgment entered by the Florida district court against Dr. Pierson constituted a qualifying litigation for purposes of section 391, subdivision (b)(1). We provide this background information for context.

¹⁴ The McIntyres and Colliers International speculate that the trial court could have reasonably concluded that Dr. Pierson had pursued his appeal with the Eleventh Circuit as a self-represented litigant. In support of this theory, they argue that the trial court could have reached this conclusion by finding that Dr. Pierson had “ghostwritten” certain papers and merely affixed an attorney’s name to those documents. We are unpersuaded. This specific argument was not raised in the trial court, and nothing in the record, including the trial court’s order declaring Dr. Pierson to be a vexatious litigant, supports this theory.

the judgment entered by the district court in 2010 against Dr. Pierson nor the decision issued by the Eleventh Circuit in January 2012 affirming that judgment constitute a qualifying litigation under section 391, subdivision (b)(1).

Likewise, we conclude that none of the five separate judgments entered against Dr. Pierson after the Eleventh Circuit issued its decision constitute a qualifying litigation under section 391, subdivision (b)(1). Each of these postappeal judgments, which were issued by the Florida district court in April, May, July, and October 2012, encompassed an order granting a motion for costs and/or attorney fees. On appeal, respondents do not point to anything in the record showing that Dr. Pierson was acting in propria persona during these proceedings. And even if we were to assume that he was acting in such a capacity, our Supreme Court has held that a “litigation” under section 391, subdivision (b)(1) does not include “every motion or other procedural step taken during an action or special proceeding.” (*Shalant, supra*. 51 Cal.4th at p. 1173.)

In *Shalant*, the high court explained that, reading the vexatious litigant statutes as a collective whole, the term “litigation” in section 391, subdivision (a) *cannot* be construed to include every motion or other procedural step taken during an action or special proceeding because applying such a definition throughout the vexatious litigant statutes would result in several provisions taking on “absurd, unworkable, or clearly unintended meanings.” (*Shalant, supra*, 51 Cal.4th at

p. 1174, *id.* at p. 1173.)¹⁵ By way of example and of relevance here, the *Shalant* court observed: “Under section 391, subdivision (b)(1), a person could be declared a vexatious litigant for losing five *motions*—*all* of which might have been filed in the same lawsuit—in a seven-year period. Section 391, subdivision (b)(3)’s reference to ‘motions, pleadings, or other papers’ filed in the course of a litigation would make little sense if every motion, pleading, or paper filed was itself a new litigation.” (*Shalant*, at p. 1174; see § 391, subd. (b)(3) [defining a vexatious litigant as a person who does the following: “In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay”].) For their part, respondents have not directed us to any authority supporting the conclusion that a postappeal order by the trial court awarding costs and/or attorney fees to a defendant in the same underlying case (which is later incorporated into a separate judgment) constitutes a final determination of a distinct litigation within the meaning of section 391, subdivision (b)(1). And we

¹⁵ The *Shalant* court rejected as “unworkable” the argument that, because “litigation” is defined, for purposes of the vexatious litigant statutes, as “any civil action or proceeding” (§ 391, subd. (a)) and the term “proceeding” can, in some circumstances, refer to a procedural step that is part of a larger action, a vexatious litigant who is barred by a pre-filing order from “filing any new litigation” in propria persona (§ 391.7, subd. (a)), and who becomes self-represented while an action is pending, cannot take any further procedural steps in the action without first obtaining permission from the presiding judge. (*Shalant. supra*, 51 Cal.4th at pp. 1173-1175.)

decline to reach such a conclusion, as it would be inconsistent with *Shalant*.

Finally, while Dr. Pierson concedes that he filed, in propria persona, the petition for rehearing denied by the Eleventh Circuit, respondents have not cited, and we are not aware of, any authority holding that the denial of such a petition qualifies as a distinct litigation that was finally determined adversely to Dr. Pierson within the meaning of section 391, subdivision (b)(1). In our view, it does not constitute a qualifying litigation. Although the term “litigation” is broadly defined under the vexatious litigant law, a petition for rehearing is not a civil action or a special proceeding within the meaning of the vexatious litigant law. (See § 23, Code Commission Notes [listing special proceedings].) Nor is it an appeal or writ proceeding filed in an appellate court. (See *Garcia, supra*, 231 Cal.App.4th at p. 406 [a litigation for purposes of the vexatious litigant law includes an appeal or civil writ proceeding filed in an appellate court].) And, as we have explained, the term “litigation” does not include every procedural step taken during an action. (*Shalant, supra*, 51 Cal.4th at pp. 1173-1174.)

We need not and do not decide whether, under the circumstances of this case, the United States Supreme Court’s denial of Dr. Pierson’s petition for writ of certiorari constitutes a distinct qualifying litigation within the meaning of section 391, subdivision (b)(1). Even if we were to assume that it does, respondents failed to identify four additional qualifying litigations, as we next explain.

2. Federal Action Commenced in California

Turning to the related federal legal malpractice action commenced in the Eastern District of California in 2014, we initially observe that respondents have not pointed to any authority supporting the conclusion that the California district court's sua sponte order transferring the matter to the Southern District of Florida or any of the subsequent orders related to the transfer order qualify as a distinct litigation that was finally determined adversely to Dr. Pierson within the meaning of section 391, subdivision (b)(1). For the reasons that follow, we conclude that neither the transfer order nor the denial of the motion to vacate that order is properly considered a qualifying litigation for purposes of the vexatious litigant law. We reach the same conclusion regarding the Ninth Circuit's dismissal of Dr. Pierson's appeal challenging those orders and the United States Supreme Court's denial of Dr. Pierson's petition for writ of certiorari.

A transfer order is an interlocutory order that is not appealable prior to a final judgment, although a party may seek review of a transfer order by way of a writ of mandamus. (*Pacific Car & Foundry Co. v. Pence* (9th Cir. 1968) 403 F.2d 949, 951-952; see *NBS Imaging Systems, Inc. v. United States District Court for the Eastern District of California* (9th Cir. 1998) 841 F.2d 297, 298 [“[w]e have long held that in extraordinary circumstances involving a grave miscarriage of justice, we have power via mandamus to review an order transferring a case to a district court in another circuit”].) Under California law, the summary denial of a writ petition that is not the exclusive means of obtaining appellate review of a pretrial ruling does not

qualify as a litigation finally determined adversely to a party within the meaning of section 391, subdivision (b)(1). (See *Fink v. Shemtov*, *supra*, 180 Cal.App.4th at pp. 1172-1173 [distinguishing writ petitions challenging pretrial orders that could also be reviewed on appeal from the judgment ultimately entered in the action from situations in which a writ petition was the only authorized mode of appellate review].) Here, although it could have, the Ninth Circuit did not treat Dr. Pierson's notice of appeal as a mandamus petition and review the merits of the transfer order. (See *Special Investments, Inc. v. Aero Air, Inc.* (9th Cir. 2004) 360 F.3d 989, 993 ["a notice of appeal from an otherwise nonappealable order can be considered as a mandamus petition"].) Instead, the Ninth Circuit dismissed Dr. Pierson's appeal for lack of subject matter jurisdiction because the transfer order and the order denying the motion to vacate that order were not final or directly appealable, citing *Nascimento v. Dummer* (9th Cir. 2007) 508 F.3d 905, 908 [transfer order not directly appealable]; *Branson v. City of Los Angeles* (9th Cir. 1990) 912 F.2d 334, 336 [denial of reconsideration of non-appealable order is itself not appealable]; *In re San Vincente Med. Partners, Ltd.* (9th Cir. 1989) 865 F.2d 1128, 1131 [magistrate judge order not final or appealable].¹⁶ Thereafter, the United States

¹⁶ Transfer orders are reviewable only in the circuit of the transferor district court. (*Posnanski v. Gibney* (9th Cir. 2005) 421 F.3d 977, 980.) However, a party is not without any recourse when an action is transferred to a district court in another circuit. Under those circumstances, the party "may move in the transferee court to retransfer the action to the transferor court and the denial of that motion is reviewable in the transferee circuit." (*Id.* at pp. 980-981 [noting that "[s]uch review may even be had via a petition for a writ of mandamus in certain circum-

Supreme Court denied Dr. Pierson's petition for writ of certiorari, which does not constitute an expression of an opinion on the merits of the transfer order. (*Teague v. Lane* (1989) 489 U.S. 288, 296 [“denial of a writ of certiorari imports no expression of opinion upon the merits of the case”].) In short, neither the transfer order nor any of the subsequent orders related to that order qualify as a distinct litigation within the meaning of section 391, subdivision (b)(1). None of the orders constitute a “final” adverse determination of the transfer issue.

We need not and do not decide whether either of the orders issued by the Florida district court (Southern District) dismissing the legal malpractice action constitute a distinct qualifying litigation within the meaning of section 391, subdivision (b)(1). Even if we were to assume that they do, respondents failed to identify five qualifying litigations.

3. Conclusion

We conclude that substantial evidence does not support the trial court's determination that “in the immediately preceding seven-year period” Dr. Pierson “commenced, prosecuted, or maintained in propria persona at least five litigations . . . finally determined adversely” to him. (§ 391, subd. (b)(1).) Therefore, the court committed reversible error when it determined that he was a vexatious litigant under that provision, and also erred when it ordered further relief under the vexatious litigant statutes-*i.e.*, the prefiling order (§ 391.7, subd. (a)), and the requirement that Dr.

stances”].) The record does not disclose whether Dr. Pierson sought such relief in the Florida district court.

Pierson furnish security to avoid dismissal (§ 391.3, subd. (a))—since that relief was based on his classification as a vexatious litigant. Finally, because the judgments of dismissal were premised upon Dr. Pierson’s failure to furnish the court-ordered security in connection with the vexatious litigant determination (§ 391.4), they too must be reversed.¹⁷

Given the conclusions we have reached in this opinion, we need not and do not consider any of the other issues raised on appeal.

¹⁷ We reject Dr. Pierson’s undeveloped argument that “severe” sanctions should be imposed against respondents for filing vexatious litigant motions.

DISPOSITION

The judgments of dismissal, which encompass the order declaring Dr. Pierson to be a vexatious litigant (§ 391, subd. (b)(1)), requiring him to furnish security to avoid dismissal of his cross-complaint (§ 391.3, subd. (a)), and imposing a prefiling order (§ 391.7, subd. (a)), are reversed. Dr. Pierson shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

/s/ Duarte, J.

We concur:

Mauro, Acting P. J.

McAdam, J.*

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

App.33a

**APPELLANT REPLY BRIEF FILED IN THE
CALIFORNIA COURT OF APPEALS, THIRD
APPELLATE DISTRICT, EXCERPTS
(APRIL 3, 2023)**

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA THIRD APPELLATE DISTRICT

RAYMOND H. PIERSON, III M.D.,

Appellant,

v.

NORTHERN CALIFORNIA
COLLECTION SERVICE, INC.,

Respondent.

Court of Appeal No. C089972

Superior Court No. 17-CVC10112

Amador County Superior Court No. 18-CVC-10813
Honorable Renee Day

Raymond H. Pierson, III, M.D.
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. . . intent to misinform the Court and to create the false impression that Dr. Pierson was quite significantly in arrears with respect to rent payments.

[Reply Brief, Page 98]

Argument #10

Strong Evidence has been Presented in the Appellant Opening Brief as well as in this Appellant Reply which Provides Confirmation that the Multiple Decisions by Judge Renee Day, the Amador Superior Court Assigned to this Case Before Her Court, Not Only Represented Multiple Instances of Blatant and Manifest Error but also Strongly Suggests Evidence of a Deep and Inherent Bias of that Court Directed Toward Dr. Pierson. That Evidence Coupled with Judge Day's Improper Effort (Witnessed by Others) to Go Out of Her Way to Initiate an Improper Discussion with Dr. Pierson at the Amador Republican Lincoln Dinner on August 28, 2018 (Exhibit E) Which Dr. Pierson was Ethically Forced to Immediately Disengage From Suggests that an Improper Motivation Existed on the Part of Judge Day in Initiating that Meeting which has Resulted in Judge Day's Subsequent Severe Retaliation.

The above referenced improper interaction initiated by Judge Day with Dr. Pierson which occurred on April 28, 2018 occurred well after the filing of the original complaint (case #17-CVC-10112) by NCCS et al. on May 19, 2017 which was assigned to Judge Day's Court (1-APP-002). That interaction initiated by Judge Day with Dr. Pierson also occurred subsequent to Dr. Pierson's February 23, 2018 filing of his initial timely *Response to Complaint and Counterclaims* (1-APP-19-125). That filing included many exhibits which

documented the extensive damage to Dr. Pierson's leased medical office suite. Furthermore, that improper interaction initiated by Judge Day also occurred subsequent to Dr. Pierson's filing of his April 14, 2018 *Cross Complaint and Demand for Jury Trial (1-APP-126-150)*. Based upon the existence of those multiple filings submitted in the case before Judge Day's Court, it would be highly improbable that Judge Day was not aware of Dr. Pierson's direct involvement in this litigation then before her court. When confronted with the improper circumstances of Judge Day's quite intentionally initiating an interaction with him, Dr. Pierson became immediately concerned that there was the possibility of an improper motivation behind the Judge's actions. Even Despite those concerns, Dr. Pierson made the prompt assessment that he must immediately remove himself from those improper circumstances which he later discussed with other meeting attendees. In addition, Dr. Pierson also subsequently discussed the matter with immediate family members on arrival home. As this and the related case (case #18-CVC-10813) have both progressed through Judge Day's Court and experienced exceptionally adverse, unlawful and otherwise inexplicable results, Dr. Pierson has become fully convinced that Judge Day's improper actions toward him at that meeting on April 28, 2018 were motivated by significant and improper intent that have contributed to her subsequent blatant retaliation against Dr. Pierson in both of these litigations.

PRAYER FOR RELIEF

Dr. Pierson prays that the Court grant this Appeal and all of the cited requests advanced in the conclusion to the Appellant Opening Brief.

App.36a

April 3, 2023

Respectfully submitted,

/s/ Raymond H. Pierson

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Reh.App.37a

**AMADOR COUNTY
LINCOLN DAY DINNER INVITATION**



Cordially invite you to THE ANNUAL

LINCOLN DAY DINNER

Saturday, April 28, 2018

At Mel & Fay's banquet room in Jackson.

Begin with our social hour at 5:00pm

Continue with a buffet style dinner of Chicken and Tri-Tip at 6:00pm

We proudly present as our honored speaker

Congressman Tom McClintock

For reservations, mail form and donation to:

ACRCC

PO Box 264, Jackson, CA 95642

Tickets: \$50 per person or \$90 per couple. Children 16 years and under \$25.

Or, buy your own table for \$320.

And stay for the silent auction!

For information call: ACRCC @ 209-257-3405, Vince Destigter @ 209-418-8146 or Mike Blake @ 209-217-7809

Name: _____

Number of tickets/table _____ Amount enclosed \$ _____

Phone # _____

"We cannot attend but would like to show our financial support" \$ _____

Mailed by Amador County Republican Central Committee, PO Box 264, Jackson, CA 95642

Reh.App.38a

{ Transcription }

Amador County Republicans

Cordially invite you to
**THE ANNUAL
LINCOLN DAY DINNER**

Saturday, April 28, 2018

At Mel & Fay's banquet room in Jackson.

Begin with our social hour at 5:00pm

Continue with a buffet style dinner
of Chicken and Tri-Tip at 6:00pm

We proudly present as our honored speaker

Congressman Tom McClintock

For reservations, mail form and donation to:

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Name: _____

Number of tickets/table. ___ Amount enclosed \$ ____

Phone# _____

"We cannot attend but would like to show our financial support" \$ ____

Paid for by Amador County Republicans Central
Committee, PO Box 264, Jackson. CA 95642.

Reh.App.39a

**PETITION FOR REVIEW
FILED IN THE SUPREME COURT OF
CALIFORNIA, EXCERPTS
(NOVEMBER 4, 2024)**

FILED WITH PERMISSION

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

RAYMOND H. PIERSON, III M.D.,

Appellant,

v.

PHYLISS M. RUSHING,

Respondent.

No. S287732

AMADOR SUPERIOR COURT
The Honorable Renee Day
The Honorable J.S. Hermanson
(209) 257-2603

THIRD DISTRICT COURT OF APPEALS
Acting P.J. Elena J. Duarte
Associate Justice Shama H. Mesiwala
Assoc. Justice Peter Krause

Third Appellate District, Case No.C097290
Amador County Superior Court,
Case No. 18-CVC-10813

Reh.App.40a

PETITION FOR REVIEW

Following the October 21, 2024 Decision of the California Court of Appeal, Third Appellate District to Deny Appellant's (Revised) Petition for Rehearing, Accepted for Filing 10-18-2024 following that Court's September 25, 2024 Denial of Appellant's Original Appeal filed on 10-28-2022.

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Pro Per Appellant

[...]

Rehearing filed that date (7-APP-1542-1565) a *Petition for Writ of Supersedeas* was also submitted but not filed by this Third District Court of Appeal and later returned for defects. That petition was refiled on July 18, 2022 but later denied without an opinion by Associate Justice Duarte at the Third District Appellate Court provided on July 29, 2022 (7-APP-1763).

[Petition for Review, Page 28]

ARGUMENT

1 The three Justice panel which was present at Oral Argument on September 18, 2024 was not the three justice panel that participated in the September 25, 2024 Appeal Decision as one justice who had participated in oral argument was substituted by another Justice in the appeal decision which is completely contrary to the many long-standing precedents of this Supreme Court of California as well as to the intent of the California Constitution, Article VI, Section 3 (*See Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 870-872).

A. The three-judge panel which was present at the bench during September 18, 2024, Oral Argument included Associate Justice Mauro who was seated in the third seat to Dr. Pierson's left. Though in attendance Justice Mauro did not direct any questions either to Dr. Pierson or to Respondent Counsel Quintero. Remarkably, on review of September 25, 2024, Appeal Decision Dr. Pierson discovered that Justice Mauro did not sign the opinion, but had been substituted for by Associate Justice Peter Krause. No information was contained within the decision document or elsewhere which acknowledged or provided any explanation or justification for this substitution.

- a) Dr. Pierson attended the September 18, 2024, oral argument in Case# C097290 in the company of his life partner, Ms. P. Herr. Ms. Herr had previously attended the oral argument in the appeal titled *R Pierson, III*

v. CSAA et al. on June 23, 2023, in Case# C091099 in which Justice Mauro was a member of the three (3) judge panel that sat for oral argument and participated in the appeal decision. From that prior experience Ms. Herr as well as Dr. Pierson were familiar with the physical appearance of Justice Mauro. In addition, Dr. Pierson had a later opportunity to observe Justice Mauro at the August 23, 2023, Oral Argument for the appeal in *Northern California Collections, Inc. et al v. R. Pierson* Case# C089972 in which Justice Mauro was again a member of the three (3) judge panel. In addition to observing Judge Mauro to be present on the panel on September 18, 2024, Dr. Pierson and Ms. Herr, did not observe Justice Peter Krause to be present or impaneled at that oral argument.

- b) The substitution of a participant on the three (3) judge panel who had attended oral argument and who was then exchanged for an alternative judge in the written decision in the case would represent a circumstance completely contrary to the accepted procedures of the California Courts of Appeal and the many case law precedents of this Supreme Court of California. Furthermore, the failure to disclose such a substitution would be even more highly irregular.
- c) The Supreme Court of California in the case precedent *Moles v. Regents of University of California*, 32 Cal.3d 867, 870 has stated: "At an early date in California's constitutional

history, this court observed that “whenever there is an oral argument, only the justices who were present at such argument would be authorized to take part in the decision of the cause” (*Niles v. Edwards* (1892) 95 Cal. 41, 44). Indeed, it has been the general rule in California that “a judge not present at the argument is barred from participating in the decision”.

- d) In the Petition for Rehearing, Dr. Pierson advance this matter to the Court and requested an explanation for what happened. In addition, in the initial form of the Petition for Rehearing that was over length submitted on October 10, 2024 which was rejected, Dr. Pierson also requested the secure retention of all attendance records, security camera footage, etc. inclusive of all relevant documentation that related to this issue of the identity of the Justices present at oral argument. The revised Petition submitted on October 16, 2024 had to reduce the word count of this request. That Petition requested information on this issue. With the October 21, 2024 denial of that Petition by Acting Presiding Judge Duarte, no information in any form was provided in that denial on this issue of the substitution. That response simply stated “*Appellant’s petition for rehearing is denied.*”

**The Third District Appellate Court's
September 25, 2024 Decision is Completely
Invalidated by the Fact that the Decision Was
Not the Result of Those three Judges Present
at Oral Argument.**

The recognition of the right to oral argument in both criminal as well as civil cases can be found both in the California Constitution as well as the within the case law precedents dating back to the last century. With respect to the case law precedents, the Supreme Court of California at an early point in the state's constitutional history in *Niles v. Edwards* (1892) 95 Cal. 41, 44 emphasized that it is only the justices that are present that are qualified to participate in the decision in a case:

... whenever there is an oral argument, only the justices who were present at such argument would be authorized to take part in the decision in the cause."

In fact, it has been observed to be the general rule in California that "*a judge not present at the argument is barred from participating in the decision.*" (6 Witkin, Cal. Procedure (2d ed. 1972) Appeal § 490. p.4442). The only "*sanctioned exception*" [*Moles v. Regents of University of California*, 32 Cal.3d 867, 870] to this rule that a justice must be present at oral argument in order to participate in the appellate decision in the case occurs under those circumstances where the parties to the appeal "*before the case was argued*" (*Blanc v. Bowman* (1863) 22 Cal. 24, 25) or alternatively "*at the hearing*" stipulate "*that any justice not present at the argument might participate in the decision*" (*Luco v. De Toro*, (1891) 88 Cal. 26, 27).

The Supreme Court of California, in the 1982 case precedent *Moles v. Regents of University of California*, 32 Cal.3d 867, 872 reconfirmed this long-standing position of that Court that all California Appellate Court decisions irrespective of whether the case is in a criminal or civil proceeding must be made only with the participation of those three judges who were present at the oral argument in the case:

“The right to oral argument would be an empty right indeed if it did not encompass the right to have one’s case decided by the justices who heard the argument”.

A last point in this regard is to emphasize the fact that the right to oral argument “*in all appeals . . . both civil as well as criminal cases*” is recognized to both explicitly and implicitly to exist in the California Constitution and the case law precedents (*Moles*, p. 872) as the California Supreme Court has emphasized (*People v. Brigham* (1979) 25 Cal.3d 283, 287-288 fn. omitted, italics added):

The Constitution of the State of California recognizes a right to oral argument on appeal. Article VI, section 3 provides that: [concurrence] of 2 judges present at the argument is necessary for a judgment’ by the Court of Appeal.

This Supreme Court later in *Moles* (at p.872) concluded that all conditions applicable to the Supreme Court were equally applicable to the Courts of Appeal:

Since article VI, section 3 was amended in 1966 to “parallel” article VI, section 2, which governs the Supreme Court, “all the cases which interpret the phrase ‘present at the

argument' in article VI, section 2 are now equally applicable to the same sections in article VI, section 3 (citing People v. Brigham, at p. 288, fn. 7.) Therefore, the longstanding recognition in prior case law of the right of all litigants before the Supreme Court to argue their cases orally was made applicable to the Court of Appeal as well.

Finally, this Supreme Court in the *Moles v. Regents of University of California*, (*supra*, at p. 872) fully recognized the compelling evidence concerning the value of the opportunity for dialogue of the parties to the appeal with the seated panel of the Court:

As a result, "it promotes understanding in ways that cannot be matched by written communication" (Commission on Revision of Fed. Ct. App. System, Structure and Internal Procedures: Recommendations for Change (1975) p. 48.) For example, in complex cases, oral argument "provides a fluid and rapidly moving method of getting a essential issues." (ABA Committee on Standards of Judicial Administration., Stds. Relating to App. Cts. (Approved Draft 1977) p. 56.) In the words of one judge, "Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the Bar." (Cutler, Appellate Cases: the Value of Oral Argument (1958) 44 A.B.A. J. 831, 832; see generally Stern, Appellate Practice in the United States (1981) pp. 358-359.)

This Court (*Id*, p.872) emphasized that the evidence supporting the value of oral argument is not only compelling, but that the value of oral argument

represents an empty promise if the judge(s) who decide a case were not present at oral argument:

No proof of the value of oral argument is more compelling, however, “than the fact that many judges find the opportunity for a personal exchange with counsel makes a difference in result.” (Com. On Revision of the Fed. Ct. App. System, Structure and Internal Procedures: Recommendations for Change, supra, at p. 47.) This aspect of oral argument — the chance to make a difference in result — is extremely valuable to litigants. If oral argument is to be more than an empty ritual, it must provide litigants with an opportunity to persuade those who will actually decide an appeal. Clearly, oral argument cannot provide this opportunity if the judges who hear the argument are not the ones who decide the case. If “those who hear” are not “those who decide,” oral argument is meaningless, and the right to oral argument no right at all.

Dr. Pierson immediately on receipt of the September 25, 2024 appeal decision in this case fully recognized the fact that one of the panel of three (3) judges, Associate Justice Peter Krause, who signed the decision was not a member of the panel of three judges that was in attendance at the oral argument held on September 18, 2024.

In order to substantiate this fact that one of the justices who had signed off on the September 25, 2024 case decision had not been in attendance at oral argument, shortly after reading the decision, Dr. Pierson contacted the Clerk’s Office of the Third District Appellate Court to inquire as to what sources of infor-

mation (*i.e.* written documentation and/or attendance records, video and/or surveillance footage, etc.) were available to provide confirmation of the fact that Justice Krause was not in attendance. That individual in the Clerk's office stated categorically that there was corroborating information that was maintained, but that it was not available to inquiry by a party to the appeal. Dr. Pierson has a clear and specific recollection of that conversation inclusive of the name of that individual and must choose not to disclose that information at this time to protect the identity and job security of that individual. Dr. Pierson would be willing to disclose that information to a confidential investigative body or third-party investigator who vowed to protect that individual's identity.

As a result of this absolute bar on obtaining access to that requested critical information imposed by the apparent official policy of the Third District Appellate Court, Dr. Pierson was left with no alternative but to advance this concern along with his concern regarding the impropriety of the assignment procedure utilized by the Third District Appellate Court which failed to follow the random rotation system in assigning his multiple appeals to panels of justices within the *Petition for Rehearing* filed on October 10, 2024. That *Petition* was submitted just before midnight on October 10, 2024 in excess of the permissible word limit (containing 10012 words). It was followed shortly thereafter in the early morning (01:12 AM) of October 11, 2024 along with a *Application* to be permitted the opportunity to file the *Petition for Rehearing* in excess of the permissible word limit. It is critical to point out that this October 10, 2024 submitted version of the

Petition for Rehearing provided a more expanded discussion of the multiple irregularities of the procedures utilized in the appeal by the Third District Appellate Court (pgs. 10 — 24, containing 3684 words). That *Application* for an overlength *Petition* was immediately denied as were the Exhibits filed with the *Petition* on October 11, 2024 in the Court's order by Acting Presiding Judge Duarte who had been the author of the September 25, 2024 appeal decision in this case. It is important to point out that Justice Duarte had been the author of the decisions in the other two separate appeals which Dr. Pierson had advanced before the Third District Appellate Court (Cases C091099 and C089972). As a result of that order by Justice Duarte the October 10, 2024 *Petition* at excess length was rejected by the clerk fully eliminating it from the record of the case. In that order Associate Justice Duarte provided five (5) days for resubmission: "Appellant's corrected petition for rehearing is to be served and filed by October 16, 2024".

As a result of the denial of the overlength *Petition*, Dr. Pierson had no alternative but to dramatically reduce in length (pages 1-19, 806 words) this section of the *Petition* which reviewed his concerns with respect to the manner in which this appeal and the other two appeals advanced before the Third District Appellate Court had been handled inclusive of the issue that the appeal decision had included a different third justice than had been present at the September 18, 2024 oral argument. In that revised October 16, 2024, *Petition* Dr. Pierson referenced this Supreme Court of California decision in *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 870 which referenced the much earlier case prec-

edent of this Court in *Niles v. Edwards* (1892) 95 Cal. 41, 44 in stating:

“Indeed, it has been the general rule in California that “a judge not present at the argument is barred from participating in the decision.” (6 Witkin, Cal. Procedure (2d ed. 1972) Appeal, § 490, p.4442.)

Following the above citation and in reference to Dr. Pierson’s position that Associate Justice Peter Krause was disqualified from participation in the appeal decision due to his non-attendance at the September 18, 2024 oral argument, Dr. Pierson stated that he would await the Third District Appellate Court’s response on this issue (see page 19 of the submitted October 16, 2024 (Revised) Petition for Rehearing):

e) Dr. Pierson will respectfully wait for the Court to provide further information on this concern which has been formally advanced.

The (Revised) Petition for Rehearing which had been submitted on October 16, 2024 was then accepted for filing on Friday, October 18, 2024. Following the intervening weekend, Associate Justice Duarte acting in the capacity of Acting Presiding Judge on Monday, October 21, 2024 at 1:15 PM (TruFiling posting), proceeded to deny the Petition for Rehearing. That decision was communicated with the single sentence response *“Appellant’s petition for rehearing is denied”*. Obviously, that single phrase decision made no reference whatsoever to Dr. Pierson’s request for a response concerning the issue of the improper substitution in the September 25, 2024, appeal decision of Associate Justice Peter Krause for the individual who had actually attended the September 18, 2024, oral argument.

That is, there was no acknowledgement of that substitution nor explanation provided to justify such a critical and improper substitution. The last point to be made in this regard is that the denial by Associate Justice and Acting Presiding Justice Duarte was signed only by her and not by either Associate Justice Peter Krause or by Associate Justice Shama Mesiwala, the other two justices who had signed off on the September 25, 2024 appeal decision. The non-participation of those Associate Justices in the denial of the Petition for Rehearing calls into question whether those other two signatories to the September 25, 2024 appeal decision were aware of these concerns which Dr. Pierson had advanced in the Petition for Rehearing. The question also arises as to whether or not Associate Justices Krause and Mesiwala were even aware of or had participated in the denial of the Petition for Rehearing.

It remains Dr. Pierson belief that Acting Presiding Justice Duarte denied his *Application* for the overlength Petition for Rehearing with the intent to greatly minimize the amount of the Petition which Dr. Pierson could devote to this issue of the improper substitution in the appeal decision with a justice who had not attended the oral argument. It also had the intent to minimize the discussion and evidence that Dr. Pierson would be able to present concerning the issue of the failure of the Third District Appellate Court to follow the *random rotation system* in the assignment of justices to his three separate appeals advanced before that Court as evidenced by the fact that the decisions in all these separate appeals were authored by Associate Justice Duarte.

The abrupt Denial of the Petition for Rehearing with no reference or response to the critical issue

advanced by Dr. Pierson concerning the improper participation in the September 25, 2024 Appeal Decision by Associate Justice Peter Krause who had been Substituted for the Justice who had actually been present on the panel of three (3) judges at the September 18, 2024 Oral Argument represents a conspiracy to prevent discovery of a critical violation of the case law precedents of this Supreme Court of California as well as the deprivation of a fundamental right granted to all litigants by the California Constitution. In addition, it also provides irrefutable confirmation of the presence of a conspiracy within the Third District Appellate Court to fraudulently deprive Dr. Pierson of the review of his appeal by an unbiased court which represents a deprivation of his civil rights under both the U.S. and California Constitutions.

The first point to be emphasized here is to state unequivocally that Dr. Pierson had not at any time agreed to a stipulation which permitted a Justice not present at oral argument to participate in the appeal decision. In addition, at no point has the Third District Appellate Court admitted to or provided an explanation to justify the substitution for the third justice who had attended oral argument on September 18, 2024 with Associate Justice Peter Krause who participated in the appeal decision. Likewise, there has been no explanation provided that even though Justice Krause had not attended oral argument that he had reviewed the voice file of that oral argument though it is clear from the California Supreme Court case law precedents that such an explanation would not have cured the problem unless a stipulation had been agreed to in advance.

Reh.App.53a

The next point to address is with regard to the fact that despite Associate Justice and Acting Presiding Judge Duarte having been alerted by Dr. Pierson to his concerns regarding Associate Justice Peter Krause's non-attendance at oral argument, Justice Duarte proceeded to abruptly deny the Petition for Rehearing and to fail to address Dr. Pierson's legitimate concern that a Justice had participated in the appeal decision who had not attended oral argument in direct conflict with the long-standing case law precedents of this Supreme Court of California. It is also not clear that Justice Duarte even brought these concerns to the attention of the other September 25, 2024 appeal decision signatories, Associate Justices Peter Krause and Shama Mesiwala or to other members of the third District Appellate Court including the actual Presiding Judge, L. M. Earl for that matter.

When viewed from the perspective provided by the above facts, the only reasonable conclusion possible is that Associate Justice Duarte, the author of the September 25, 2024 appeal decision who at times relative to this matter was also Acting Presiding Judge of the Third Appellate District Court, had conspired with others members of the Court to prevent the discovery of this unlawful substitution as an appeal decision participant with a Justice who had not attended the September 18, 2024 oral argument in the case. Furthermore, this effort fully represents a fraudulent effort to deprive Dr. Pierson of the fundamental rights and civil liberty interests that he entitled under the California and U.S. Constitutions. Based upon the detailed review provided in the sections above it is indisputable that the substitution as a participant in the appeal decision of a Justice that did not attend the

oral argument has deprived Dr. Pierson of the fundamental right to oral argument and reducing it to “*no right at all*” (*Moles*, supra, p. 872). This violation of the multiple long-standing case law precedents of this Supreme Court of California which also represents a deprivation of a critical right delegated to all litigants in the appeal of their cases by the California Constitution which the Third District Appellate Court has perpetrated and has been unwilling to correct demands the intervention and action of this Highest Court of California.

[...]

effort to reverse that vexatious litigant determination required four years of significant expense and intensive work numbering in the many hundreds of hours. During that four-year period and even subsequently Dr. Pierson has had to be persistently subjected to the circumstances of being falsely defamed with extreme adverse personal and professional effects.

- C089972-In this case in the AOB at Argument #12 (p.105) Dr. Pierson reviewed in detail the quite extensive list of unlawful and vindictive decisions by Judge Day.
- C089972-In the ARB at Argument #10 (pg. 98) and Exhibit E Dr. Pierson reviewed the improper contact that Judge Day initiated which Dr. Pierson had to remove himself from at the Republican Party Lincoln dinner event on April 28, 2018. That improper contact initiated by Judge Day occurred during the pendency of the NCCS litigation.

- C091099-In this litigation Judge Day improperly denied Dr. Pierson's request for leave to amend even once at the granting of the CSAA et al. and Rushing Demurrers.

Prayer for Relief

Dr Pierson prays that this court will fully reconsider the adverse and unlawful Third Appellate Court decision and reverse the determination of Dismissal by Judge Day in the Amador Superior Court with remand of the case for proceedings before an unbiased and knowledgeable court below which categorically excludes Judge Day's further involvement, and which avoids the exceptional prejudice and harassment which Dr. Pierson has been subjected to in the Amador Superior Court.

Dated: November 4, 2024

/s/ Raymond H. Pierson
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