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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LIONEL S. FOSTER, Plaintiff and Appellant, v. MEDICAL BOARD OF CALIFORNIA et al., Defendants and Respondents.	A112595 (San Francisco County Super. Ct. No. 439492)

INTRODUCTION

This case concerns whether the immunity from suit provided to public employees pursuant to Government Code section 821.6 immunizes employees of the Medical Board of California from suit when they falsely report to a third party that a doctor has been the subject of discipline and must take and pass a professional competency examination. We hold that it does. Accordingly, we affirm the trial court's judgment entered upon a demurrer sustained without leave to amend.

FACTS AND PROCEDURAL BACKGROUND[1]

Appellant Lionel S. Foster, M.D., is a licensed medical doctor board certified in urology. In 1998 the San Jose Medical Clinic, Inc. transmitted to respondent Medical

[1] The facts are taken from the complaint and the unopposed request for judicial notice filed by respondents in the trial court in support of their demurrer. On appeal from a demurrer, the reviewing court assumes the truth of the factual allegations of the complaint, and may consider matters which may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Board of California a report that appellant's clinical privileges were restricted as a result of quality of care concerns. Respondents[2] commenced an investigation regarding the circumstances surrounding the suspension of appellant's clinical privileges.

In the course of the investigation, appellant informed respondents that an arbitration proceeding concerning the allegations made against him resulted in an award in his favor and the restoration of his clinical privileges. Thereafter, respondents sought an expert opinion from a urologist concerning the charges of unprofessional conduct made against appellant. Materials forwarded to the urologist by respondents did not include any mention of the arbitration or the outcome in favor of appellant. The urologist prepared a report that concluded appellant had departed from the standard of care. Notwithstanding appellant's earlier vindication in the arbitration proceeding, respondents concurred in that conclusion and referred appellant for disciplinary action. A disciplinary accusation was filed against him.

There was an attempt to resolve appellant's disciplinary case by a stipulation that would have required him to take a professional competency examination. If he passed the examination, the accusation against appellant was to have been withdrawn. The lawyer prosecuting the accusation against appellant was unaware of the arbitration that ended in appellant's favor. So, the stipulation was not acted upon, and instead the accusation was referred for another clinical opinion. This time, the reviewing physician concluded that appellant had not departed from the standard of care. So, pursuant to an agreement reached following the ineffective stipulation, the accusation against appellant was withdrawn by respondents and the disciplinary proceeding was terminated in appellant's favor.

Notwithstanding the termination of the disciplinary proceeding in appellant's favor, respondent reported to the Federation of State Medical Boards[3] that appellant was

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[2] Respondents are the Medical Board of California and Dave Thornton, its executive director. We will refer to them collectively as any liability of the Board is derivative from acts or omissions of Board employees. (Gov. Code, §§ 815 & 815.2, subd. (a).)

the subject of a September 24, 1999, disciplinary order that required him to take and pass an oral clinical examination in urological surgery.

Based upon this false reporting by respondents of a disciplinary order against him, appellant filed suit for libel, invasion of privacy, a violation of the Medical Practices Act and a violation of the Information Practices Act. Respondents demurred, in part, on the grounds that they were immune from suit under Government Code section 821.6.[4] The trial court sustained the demurrer without leave to amend.

DISCUSSION

"When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable probability that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

Government Code section 821.6 states: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." Appellant argues that section 821.6 does not apply to bar his claims against respondents because (1) the acts he challenges occurred after termination of the disciplinary proceeding filed against him and constitute separate torts, (2) there should be no immunity for a false report of discipline, and (3) in making the public report, respondents breached a mandatory duty. We disagree.

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[3] The Federation of State Medical Boards is described as a formal repository for actions taken against physicians that is available to state medical boards, health care entities, insurance companies and consumers.

[4] Because we decide today that respondents are indeed immune from suit, we do not address the other bases asserted in the demurrer. We also deny appellant's motion to augment the record with additional evidence on appeal that was filed December 14, 2006.

In *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491, we held that the immunity conferred by Government Code section 821.6 prohibited a doctor from suing the Board of Medical Quality Assurance for public disclosure of a disciplinary action taken against him.[5] Appellant seeks to distinguish *Kayfetz* for two reasons. He says that in his case, unlike in *Kayfetz*, the board never reached a decision that could be the subject of a report.[6] He also argues the published information in *Kayfetz* was an accurate summary of discipline that was actually imposed, while the information published about him was "utterly false." We are not persuaded. Although the charges against the doctor and disposition taken by the board were accurately published in *Kayfetz*, the published information was false because it implied the doctor was on probation when he was not. (*Kayfetz v. State of California, supra,* at p. 495.) The holding in *Kayfetz* is dispositive of appellant's claims.

Appellant's argument that Government Code section 821.6 does not apply because the conduct he challenges occurred after conclusion of the disciplinary proceedings against him fails for two reasons. First of all, "Publication of disciplinary action is part of a statutory scheme for the enforcement of the Medical Practices Act for the public benefit." (*Kayfetz v. State of California, supra,* 156 Cal.App.3d at p. 497.) The information is required by law to be publicly available, and only recently respondents were directed by statute to post all disciplinary information on the Internet. (Bus. & Prof.

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[5] The Board of Medical Quality Assurance is the predecessor entity of respondent Medical Board of California's Division of Medical Quality. (*Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 637.)

[6] At oral argument, appellant's counsel also sought to distinguish his case from *Cappuccio, Inc. v. Harmon* (1989) 208 Cal.App.3d 1496, on the basis that *Cappuccio* involved misrepresentation of the result of a proceeding. Here, appellant claims there was no result in the action filed against him by the Medical Board of California. But respondent correctly points out that the Board did reach a decision on the accusation filed against appellant. The accusation was withdrawn by order of the Board and the action terminated in appellant's favor. That result was misrepresented to the Federation of State Medical Boards.

Code, §§ 803.1, 2027; see *Szold v. Medical Bd. of California* (2005) 127 Cal.App.4th 591.) Action taken by respondents to publish records of disciplinary proceedings, even if following the conclusion of those proceedings, is part of the enforcement scheme. We do not consider it fatal to respondents' claim of immunity that they did so after the disciplinary proceedings against appellant concluded. Moreover, it is not apparent from appellant's complaint that publication of the false report of discipline occurred, as he alleges, in May 2004. The disciplinary search report issued by the Federation of State Medical Boards, attached and incorporated by reference into the complaint, shows the report to be dated May 28, 2004, but contrary to appellant's characterization, there is no indication when the information about appellant was provided to the federation.

Finally, appellant claims that there is a mandatory duty imposed by the Information Practices Act to maintain accurate records (Civ. Code, § 1798.18), and respondents breached this duty. Government Code section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Because it has been held that Government Code section 821.6 does not provide immunity in a case claiming breach of a mandatory statutory duty (*Roe v. State of California* (2001) 94 Cal.App.4th 64), appellant argues he has alleged a cognizable claim.

But appellant does not allege that respondents' records themselves are inaccurate, nor could he. As the unopposed request for judicial notice shows, appellant did execute a stipulation as described in the report of disciplinary action. The problem is that the stipulation was ineffective and superseded by another agreement, and was falsely reported as an effective order of discipline. It is the false report of discipline that is challenged by appellant's complaint, not the accuracy of the respondents' records. Business and Professions Code section 803.1 requires respondent to disclose certain information, including the outcome of disciplinary proceedings, to the public "[n]otwithstanding any other provision of law," and there is no countervailing statutory

duty that restricts that obligation. (Cf. *Roe v. State of California, supra*, 94 Cal.App.4th at p. 64 [an agreement or statutory requirement to maintain confidentiality can create a mandatory duty].) The immunity provided by Government Code section 821.6 applies to shield respondents from suit in this case.

DISPOSITION

The judgment entered following the order sustaining the demurrer without leave to amend is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Pollak, J.