S182629

Supreme Court No. _____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOSEPH L. SHALANT,

Plaintiff and Appellant,

vs.

THOMAS V. GIRARDI, et al.,

Defendants and Respondents.

After a Partially Published Decision by the Court of Appeal
Second Appellate District, Division One
Court of Appeal No. B211932 (c/w B214302)
Los Angeles Superior Court No. BC 363843 (c/w BC 366214)
Hon. Teresa Sanchez-Gordon

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

PETITION FOR REVIEW

Petitioners Thomas V. Girardi and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby request that this Court grant review of the April 5, 2010 partially published decision of the Court of Appeal, Second Appellate District, Division One. The Court of Appeal's opinion is attached hereto as Exhibit A, and its order denying a separate party's petition for rehearing and modifying the opinion is attached hereto as Exhibit B.[1] No petition for rehearing was filed by Girardi or National Union.

ISSUE PRESENTED

1. Where a vexatious litigant who is subject to a prefiling order files a new lawsuit while represented by counsel, but his lawyer substitutes out of the case or is relieved, may the vexatious litigant proceed in propria persona without first obtaining approval of the presiding judge pursuant to Code of Civil Procedure section 391.7?

WHY REVIEW SHOULD BE GRANTED

Review should be granted to resolve a direct conflict between two published decisions of the Court of Appeal. In the published portion of its opinion below, the Court of Appeal expressly rejected the contrary holding

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[1]This petition for review pertains to the published portion of the Court of Appeal's opinion. Simultaneously with this petition, Jose Castro, the party affected by the unpublished portion of the Court of Appeal's opinion, is filing his own separate petition for review.

of a 2007 published opinion by another division in the same appellate district. (Ex. A at pp. 7-13, rejecting *Forrest v. State of California Dept. of Corporations* (2007) 150 Cal.App.4th 183.)

In *Forrest*, Division Two of the Second Appellate District held that "the requirements of a prefiling order, under section 391.7, remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel or without the permission of the presiding judge." (*Id.* at p. 197.) In a 2-1 decision, the court rejected a vexatious litigant's claim "that section 391.7 applies only to the initial filing of a lawsuit and has no application to a pending action."[2] (*Id.* at p. 195.)

In this case, however, Division One of the Second Appellate District "agree[d] with the *Forrest* dissent's conclusion that a prefiling order issued pursuant to section 391.7 governs only the initiation of a lawsuit, not what occurs during the prosecution of the litigation." (Ex. A at p. 10.) In the published portion of its decision, Division One stated: "We do not find the *Forrest* majority's arguments to the contrary persuasive." (*Ibid.*) The court went on to criticize the *Forrest* majority's interpretation of the vexatious litigant statute. (*Id.* at pp. 10-13.) Quoting from the *Forrest* dissent, the

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[2]Section 391.7, subdivision (a) provides that "the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed."

court held: "[W]e conclude that section 391.7 authorizes the issuance of prefiling orders that 'govern[] only the initiation of a lawsuit, not what occurs during the prosecution of the litigation.'" (*Id.* at p. 13, quoting *Forrest, supra,* 150 Cal.App.4th at p. 208 [dis. opn. of Ashmann-Gerst, J.].)

Review should be granted to secure uniformity of decision and resolve the conflict between these published opinions. (Cal. Rules of Court, rule 8.500(b)(1).) The conflict created by the Court of Appeal's decision makes it impossible for trial courts to know how to administer the vexatious litigant statute properly. As a result, courts will inevitably reach inconsistent results in cases where a vexatious litigant who is initially represented by counsel later seeks to prosecute the case in propria persona. Some courts will follow *Forrest*, and others will follow *Shalant.*

This is an important question of law that is certain to recur in the future. So far as petitioners have been able to determine, there are roughly 1,000 individuals or entities who have been declared vexatious litigants in California.[3] By statutory definition, these vexatious litigants all have a past

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[3]Section 391.7, subdivision (e) requires the Judicial Council to maintain a list of vexatious litigants. The vexatious litigants list is apparently not available on the public website for the California Courts and the Judicial Council. (See *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 540 [stating that Judicial Council is not required to make the list public].) However, a September 2008 version of the list is available on the Imperial County Superior Court website. Excluding apparently duplicative names, this version of the list includes roughly 1,000 names. <http://www.imperial.courts.ca.gov/PDFDocs/Vexatious_litigant_list.pdf>

history of abusing the judicial process by repeatedly filing unmeritorious claims, motions, or pleadings, or engaging in other frivolous or dilatory tactics. (Code Civ. Proc., § 391, subd. (b).) Because of the overwhelming number of vexatious litigants, and their demonstrated ability to wreak havoc on the judicial system, it is particularly important that this statute be clearly and consistently construed.

In addition to creating a conflict, the Court of Appeal's decision also creates a significant loophole in the law that vexatious litigants may easily exploit. If allowed to stand, the opinion below would allow a vexatious litigant to evade the requirements of the statute simply by finding a lawyer who is willing to put his name on the complaint and later substitute out of the case. Vexatious litigants could defeat the purpose of the law by using attorneys "as mere puppets" to file the initial complaint. (See, e.g., *In re Shieh* (1993) 17 Cal.App.4th 1154, 1167 [finding that vexatious litigant used his attorneys "as mere puppets" rather than "as neutral assessors of his claims, bound by ethical considerations not to pursue unmeritorious or frivolous matters on behalf of a prospective client"].)

The same evasive tactic could be used by a vexatious litigant seeking to circumvent the requirement of obtaining permission to pursue an appeal. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1217 [holding that vexatious litigant statute requires permission of administrative

presiding justice to appeal].) Under the Court of Appeal's reasoning, as long as the vexatious litigant could find a lawyer to "initiate" the appeal by putting his name on the notice of appeal, the litigant could later substitute himself for the lawyer and pursue the appeal in propria persona without permission of the administrative presiding justice.

It is settled that a statute should be construed so as to avoid subterfuge, evasion, or circumvention. (*Freedland v. Greco* (1955) 45 Cal.2d 462, 467-468.) Courts must "'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and to avoid an interpretation that would lead to absurd consequences.'" (*People v. Coronado* (1995) 12 Cal.4th 145, 151, citation omitted.) The *Forrest* majority correctly construed the vexatious litigant statute in a manner that prevents evasion and promotes its essential purpose "of curbing those for whom litigation has become a game." (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 60.) Review should be granted to resolve the conflict between this case and *Forrest*.

BACKGROUND

On February 26, 2002, the Honorable J. Stephen Czuleger of Los Angeles County Superior Court declared Joseph L. Shalant to be a vexatious litigant within the meaning of Code of Civil Procedure section

391. (9 CT 1923-1924.) Pursuant to section 391.7, Judge Czuleger issued a prefiling order using the standard Judicial Council form. (9 CT 1899.) The order stated that Shalant "is prohibited from filing any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed." (9 CT 1899.)

On May 18, 2005, the Review Department of the State Bar Court placed Shalant on inactive status. (9 CT 1952.) The Review Department found that Shalant had collected an illegal fee from his client and had committed an act of moral turpitude by threatening to withdraw from the case if his client did not pay the illegal fee. (9 CT 1936-1942.) The Review Department also found that Shalant had been the subject of four prior disciplinary proceedings (*id.* at pp. 1942-1943), and that "[m]ost of his prior misconduct was fee-related." (*Id.* at p. 1949.) The Review Department stated: "[W]e find that respondent's involvement with the disciplinary system has spanned every decade over nearly thirty years, beginning in early 1976, and that his past disciplinary proceedings involved 9 separate matters where at least 13 clients were adversely affected, of whom at least 5 were minor children." (*Id.* at pp. 1948-1949.)

On December 14, 2005, this Court denied Shalant's petition for review and disbarred him from the practice of law. (8 CT 1927.)

On December 22, 2006, Shalant filed this lawsuit against petitioners

Thomas V. Girardi and National Union. The complaint was filed on Shalant's behalf by attorney L'Tanya Butler. (1 CT 17.) After several substitutions (3 CT 472; 5 CT 1102; 5 CT 1106), Ms. Butler substituted back into the case on March 26, 2008. (6 CT 1295.) Less than four months later, however, the trial court granted Ms. Butler's application to withdraw as Shalant's attorney, leaving him unrepresented. (8 CT 1727.)

On July 29, 2008, Girardi filed a notice that Shalant had been declared a vexatious litigant and was the subject of a prefiling order, and that Shalant could not proceed in propria persona without permission of the presiding judge under *Forrest v. Department of Corrections*, *supra*, 150 Cal.App.4th 183. (9 CT 1897-1903.) Fifteen days later, Girardi filed an ex parte application to dismiss Shalant's complaint pursuant to section 391.7. (9 CT 2031-2044.) National Union also filed a motion to dismiss for failure to comply with section 391.7. (9 CT 1912-1956.)

On August 14, 2008, the trial court ordered Shalant to request permission from the presiding judge to proceed in propria persona. (10 CT 2047.) On September 18, 2008, after Shalant failed to comply, the trial court granted Girardi's and National Union's motions to dismiss the complaint pursuant to section 391.7. (10 CT 2198-2200.)

Represented by a new attorney, Shalant appealed from the order dismissing his complaint. (11 CT 2456.) On April 5, 2010, in a published

opinion, the Second Appellate District, Division One reversed the dismissal order. (Ex. A at p. 15.)

LEGAL DISCUSSION

I.

REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THIS CASE AND *FORREST*

"The vexatious litigant statutes were enacted in 1963 to curb misuses of the court system by persons acting in propria persona who attempt to repeatedly litigate the same issues and in doing so waste judicial resources and prejudice other parties who are waiting to have their claims heard." (*In re Natural Gas Anti-Trust Cases* (2006) 137 Cal.App.4th 387, 393-394.) "Since its enactment of the vexatious litigant law, the Legislature has expanded its reach. [Citation.] Most notably, in 1990, the Legislature both broadened the definitions of terms used in the law (§ 391) as well as created an additional tool, known as a prefiling order (§ 391.7), by which courts may counter vexatious litigants' misuse of our justice system ...." (*In re R.H.* (2009) 170 Cal.App.4th 678, 688; see also *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838, 843 [holding the intent of the 1990 amendments was "to broaden the reach of the vexatious litigant statute" and describing "the expansive nature of the amendments"].)

Section 391.7, subdivision (a) provides that "the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of

this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed." Subdivision (b) further provides that "[t]he presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment and delay."

The statute defines "litigation" to mean "any civil action or proceeding, commenced, ***maintained or pending*** in any state or federal court." (§ 391, subd. (a), emphasis added.) It defines a "vexatious litigant" to include anyone who "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." (§ 391, subd. (b)(3).) It also defines "plaintiff" to mean "the person who commences, institutes ***or maintains*** a litigation or causes it to be commenced, instituted ***or maintained***, including an attorney at law acting in propria persona." (§ 391, subd. (d), emphasis added.)

"[A]ppellate courts have taken an expansive approach to the vexatious litigant law in much the same way as the Legislature." (*In re R.H.*, *supra*, 170 Cal.App.4th at p. 691, citing *Forrest*, *supra*, 150 Cal.App.4th at pp. 195-196; *In re Natural Gas Anti-Trust Cases*, *supra*, 137 Cal.App.4th at p. 396; *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 222; *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838,

840-845.) Because "the vexatious litigant law has been both broadly written and interpreted," (*In re R.H.*, *supra*, 170 Cal.App.4th at p. 693), courts have rejected an overly literal interpretation where a more expansive reading is appropriate to achieve its purposes. For example, "[a]lthough the language of the statute refers to a person who is representing himself in propria persona, it has also been applied to a person represented by counsel where counsel acts as a mere puppet or conduit for the client's abusive litigation tactics." (*In re Natural Gas Anti-Trust Cases*, *supra*, 137 Cal.App.4th at p. 394, citing *In re Shieh*, *supra*, 17 Cal.App.4th at pp. 1166-1167.)

In *Forrest*, *supra*, 150 Cal.App.4th 183, Division Two of the Second Appellate District ruled that section 391.7 is *not* limited to the initial filing of a lawsuit, and held that a vexatious litigant must also seek permission if he attempts to proceed in propria persona at any stage of a pending lawsuit. (*Id.* at pp. 195-197.) The court reasoned that: (1) section 391.7 has been "broadly interpreted"; (2) when viewed in the context of the statutory scheme, the term "new litigation" in section 391.7 refers "to a civil lawsuit filed *after* entry of the prefiling order" rather than "an early procedural stage in the lawsuit"; (3) the "broad" statutory definition of "litigation" in section 391, subdivision (a) "encompasses lawsuits beyond the initial filing to include those that are maintained or pending"; and (4) the statute allows

a litigant to be designated as "vexatious" for actions during the pendency of the lawsuit, not just for its commencement (§ 391, subd. (b)(3)), and "[i]t would be anomalous for the statute to permit the entry of a prefiling order based on a litigant's bad faith acts throughout a lawsuit but then limit application of the order to the filing of a new lawsuit and have no application during its pendency." (*Forrest, supra*, 150 Cal.App.4th at pp. 195-197.) Accordingly, the *Forrest* majority held "that the requirements of a prefiling order, under section 391.7, remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel or without the permission of the presiding judge." (*Id.* at p. 197.)

However, in the published portion of its opinion in this case, Division One of the Second Appellate District disagreed with *Forrest* and rejected its holding and reasoning. (Ex. A at pp. 8-13.) Finding no ambiguity in the language of the statute, Division One concluded that section 391.7 by its terms applies only to the filing of a whole new civil action or proceeding. (Ex. A at pp. 10-12.) The court rejected *Forrest*'s reliance on the statutory definition of "litigation" as including actions that are "maintained or pending" in any court. (§ 391, subd. (a).) The court also concluded that section 391.7 "should not be broadly interpreted" and "should be applied strictly according to its terms." (Ex. A at p. 13.)

The Court of Appeal's opinion not only creates a direct conflict with *Forrest*, but it is also inconsistent with the prior case law holding that the vexatious litigant statute should be interpreted expansively to achieve the Legislature's broad objectives. (*In re R.H.*, *supra*, 170 Cal.App.4th at p. 691, citing cases; see also *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1170 ["The term 'litigation' is broadly defined in section 391, subdivision (a) ...."].) Review should be granted to resolve these conflicts in the published case law.

CONCLUSION

For all the foregoing reasons, petitioners respectfully submit that review should be granted.

Dated: May 12, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d) of the California Rules of Court, I certify that the foregoing Petition for Review was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 2,802 words.

Dated: May 12, 2010

NIDDRIE, FISH & BUCHANAN, LLP

By: _____

Martin N. Buchanan
(Attorney for Petitioner
Thomas V. Girardi)

Filed 4/5/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOSEPH L. SHALANT, Plaintiff and Appellant, v. THOMAS V. GIRARDI et al., Defendants and Respondents.	B211932 c/w B214302 (L.A.Super.Ct. No. BC 363843 c/w BC 366214)
JOSE CASTRO, Plaintiff and Respondent, v. JOSEPH L. SHALANT, Defendant and Appellant.	B214302 c/w B211932 (L.A.Super.Ct. No. BC 366214 c/w BC 363843)

APPEALS from judgments of the Superior Court of Los Angeles County. Teresa Sanchez-Gordon, Judge. Judgment in B211932 reversed with directions; judgment in B214302 affirmed in part and reversed in part with directions.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part II.

Law Offices of Brian A. Yapko and Brian A. Yapko for Plaintiff and Appellant in B211932.

Joseph L. Shalant, in pro. per., for Defendant and Appellant in B214302.

Girardi | Keese and Shawn J. McCann for Defendant and Respondent Thomas V. Girardi; Lewis Brisbois Bisgaard & Smith and Rebecca R. Weinreich for Defendant and Respondent National Union Fire Insurance Company of Pittsburgh, PA. in B211932.

Girardi | Keese and Shawn J. McCann for Plaintiff and Respondent Jose Castro in B214302.

In the first of these consolidated appeals, Joseph L. Shalant challenges the dismissal of his complaint against Thomas V. Girardi and Nation Union Fire Insurance Company. The superior court dismissed the complaint on the ground that Shalant, a vexatious litigant, was in violation of the prefiling order that had been entered against him pursuant to Code of Civil Procedure section 391.7.[1] In the published portion of our opinion, we conclude that because Shalant was initially represented by counsel, who filed the complaint on Shalant's behalf, Shalant did not violate the prefiling order by later appearing in the case in propria persona. Accordingly, we reverse the dismissal.

In the second appeal, Shalant challenges the judgment entered against him on Jose Castro's complaint in a related action. In the unpublished portion of our opinion, we conclude that the judgment against Shalant is not supported by substantial evidence and must be reversed as well.

BACKGROUND

In a prior action in 2002, the superior court entered an order declaring Shalant to be a vexatious litigant within the meaning of section 391. On that basis the court entered a "prefiling order" pursuant to section 391.7. The prefiling order provides that Shalant

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

"is prohibited from filing any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed." In 2004, on appeal from the final judgment in that action, the Court of Appeal affirmed the trial court's determination that Shalant is a vexatious litigant. (*Shalant v. Deutsch* (Feb. 4, 2004, B157103) [nonpub. opn.].)

On December 22, 2006, Shalant, represented by counsel, filed the instant action against Girardi, Continental Casualty Company, and National Union. The complaint alleges that Shalant and Girardi jointly represented Castro and his wife as the plaintiffs in a personal injury matter, in which Continental and National Union were the defendants' insurers. According to Shalant's complaint, when the Castros' matter settled Continental and National Union issued the settlement payment to the Castros and Girardi alone, without including Shalant as a payee or giving him notice, despite Continental and National Union's awareness of his attorney's fees lien on the settlement proceeds. Thereafter, the complaint alleges, Girardi paid Shalant $745,000 of the proceeds as attorney's fees but refused to pay an additional $27,745.34 to which Shalant was entitled "as the balance of his fee interest and as reimbursement of costs." Shalant alleged claims for breach of contract, breach of the covenant of good faith and fair dealing, an accounting, and intentional and negligent interference with prospective economic advantage.[2] Shalant sought to recover actual damages in the amount of $27,745.34 and punitive damages in the amount of $5,000,000.

On January 22, 2006, Girardi filed a cross-complaint against Shalant. Girardi alleged that Shalant was disbarred on May 18, 2005, before entering into the contract that formed the basis for Shalant's complaint, and that Shalant had misrepresented his bar status to Girardi and the Castros to induce them to enter into the contract. Girardi sought to recover actual damages in the amount of $745,000 and punitive damages in the amount

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2 Shalant omitted Continental as a defendant in his second and third amended complaints, and as far as we can determine from the record Continental is no longer a party to this action. We will accordingly omit Continental from the remainder of our discussion.

of $7,000,000. Shalant's state bar records (introduced by Girardi) indicate that the actual chronology differs from the allegations of the cross-complaint. Shalant was involuntarily "enrolled inactive" by the state bar on May 18, 2005, effective no later than May 21, 2005. On December 14, 2005, the Supreme Court filed an order disbarring Shalant, effective January 13, 2006. (See Cal. Rules of Court, rule 9.18(a).)

On February 13, 2007, Castro filed a complaint against Shalant. Castro's operative second amended complaint alleges claims for fraud, concealment, negligent misrepresentation, and breach of fiduciary duty. The pleading alleges that Shalant either misrepresented or failed to disclose various facts about his impending discipline by the bar (e.g., Shalant allegedly told Castro that he "had a minor infraction with the California [s]tate [b]ar" that would likely lead to nothing more than a suspension of at most 90 days), and that as a result Castro entered into a joint-representation and fee-splitting agreement with Shalant and Girardi that contained "less favorable terms regarding fees and costs than [Castro] was entitled to." In his action against Shalant, Castro (represented by Girardi) sought to recover actual damages in the amount of $745,000 and punitive damages in the amount of $7,000,000.

On September 4, 2007, National Union filed a cross-complaint against the Castros for indemnity and related claims.

In May 2007, new counsel for Shalant substituted into the case, replacing the attorney who had filed the complaint on Shalant's behalf. Seven months later, Shalant substituted in as his own attorney on Girardi's cross-complaint. The following month Shalant substituted in as his own attorney on his complaint as well. Two months after that, Shalant's original counsel substituted back into the case, replacing Shalant. Three months later, however, Shalant's attorney filed an ex parte application to be relieved as counsel. On July 15, 2008, the trial court granted counsel's application, leaving Shalant self-represented once again.

On July 29, 2008, Girardi filed a notice of Shalant's status as a vexatious litigant subject to a prefiling order. On July 30, 2008, National Union filed a motion to dismiss Shalant's complaint for failure to comply with section 391.7.

Shalant filed an application for permission to proceed in propria persona, but the application is not part of the record on appeal. The record does, however, include the presiding judge's minute order dated August 12, 2008, denying Shalant's application on the ground that "no proof of service is attached to establish that notice was given to all parties." On the same day and in response to the court's order, Shalant submitted a handwritten letter to the presiding judge. In it, Shalant contended that the relevant statutory provisions and case law do not require him to serve his application on opposing parties. He asked the court to inform him if the court disagreed, and he said he would be "happy" to serve the other parties and would do so "immediately" if the court was of the opinion that service was required.

On August 13, 2008, Girardi filed an ex parte application to dismiss Shalant's complaint pursuant to section 391.7 or, in the alternative, for an order shortening time to hear a motion to dismiss on that ground. On August 14, 2008, the court calendared National Union's and Girardi's motions to dismiss for hearing on September 18, 2008, and the court ordered Shalant "to request permission from the presiding [j]udge to proceed in this matter." Also on August 14, the presiding judge entered a minute order noting receipt of Shalant's handwritten letter of August 12, which the court considered to be an "improper ex-parte communication" because it was not served on defendants. The court returned the letter to Shalant without further comment.

At some subsequent date, Shalant filed and served a new application for permission to proceed in propria persona. The copy of the application in the record on appeal bears no file stamp, but Shalant states in his opening brief that the application was filed on August 18. The proof of service is dated August 18. The trial court calendared Shalant's application for hearing on October 1, 2008 (that is, nearly two weeks after the September 18 hearing on the motions to dismiss).

On September 18, 2008, the trial court heard and granted the motions to dismiss on the ground that Shalant had failed to comply with section 391.7. Shalant did not appear at the hearing.[3] On October 20, 2008, the court entered judgment in favor of National Union on Shalant's complaint. Shalant timely appealed.

The case proceeded to a jury trial on Girardi's and Castro's claims against Shalant. The evidence introduced at trial revealed the following sequence of events: The Castros first retained Shalant to represent them in their personal injury matter no later than the spring or summer of 2003. Castro testified that Girardi substituted for Shalant "sometime around June 2005" and that he understood that thereafter Shalant "would no longer be representing him" and that Girardi would be his "only lawyer."[4] The Castros settled the personal injury matter in January 2006 ("[o]n or about January 20, 2006," according to the Castros' repondents' brief).

The jury found by special verdict that Shalant did not make a false representation of an important fact to Castro or Girardi and that Shalant did not intentionally fail to disclose to Castro or Girardi an important fact that they did not know and could not reasonably have discovered. The jury also found, however, that Shalant breached the duty of an attorney and that the breach was a substantial factor in causing Castro harm. The jury determined that Castro had suffered no economic damages but had suffered noneconomic damages in the amount of $55,000. The jury also awarded Castro punitive damages of $100,000, having found that Shalant acted with malice, oppression, or fraud. The jury awarded no damages, compensatory or punitive, to Girardi.

On February 4, 2009, the trial court entered judgment on the jury verdict. Shalant timely appealed, and we consolidated the case with the earlier appeal from the judgment

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3 Shalant claims that he inadvertently missed the hearing because he mistakenly believed that it had been continued to a later date.

4 Castro's wife testified that it was her understanding that Shalant "was continuing to act as" her lawyer even after Girardi substituted in, because Shalant periodically phoned and "offered advice." ("He just often talked about the case and how much it was worth and moneywise and stuff like that.") Her testimony is of limited relevance, however, because only Castro himself is a plaintiff on the complaint against Shalant. His wife is not a party to that action.

that was entered after the granting of the motions to dismiss.[5] Neither Castro nor Girardi filed a cross-appeal.

DISCUSSION

I. Section 391.7 Governs Only the Initiation of a Lawsuit

Shalant argues that because section 391.7 concerns only the filing of a new action and Shalant was represented by counsel when he filed his complaint, the trial court erred when it granted the motions to dismiss. We review this issue of statutory interpretation de novo (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219), and we agree with Shalant.

National Union's and Girardi's motions sought dismissal of Shalant's action on the basis of Shallant's alleged violation of the prefiling order issued pursuant to section 391.7. Our analysis therefore must address the terms of both the statute and the order.

Subdivision (a) of section 391.7 provides in relevant part: "[T]he court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed." For purposes of the vexatious litigant statutes, including section 391.7, "litigation" is "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).)

The prefiling order entered against Shalant (on a form approved by the Judicial Council) prohibits Shalant "from filing any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed." The order closely tracks the language of section 391.7 and at one point substitutes the term "action" for the statutory term "litigation" ("court in which the action is to be filed" instead of "court where the litigation is proposed to be filed"), in keeping with the statutory definition ("litigation" is "any civil action or proceeding").

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[5] In view of our consolidation of the appeals, we deny as moot Shalant's motion to augment the record in the first appeal to include the jury verdict that is the subject of the second appeal.

Shalant filed only one civil action or proceeding in this case, namely, his action against Girardi and National Union. He did not file it in propria persona but rather filed it through counsel. Nothing in the prefiling order prohibits Shalant from continuing to *prosecute* or *maintain* an action in propria persona as long as he did not *file* the action in propria persona (and nothing in the statutory language would authorize the issuance of a prefiling order containing such a prohibition). Shalant therefore did not violate the prefiling order, and the trial court erred by granting the motions to dismiss.

Our analysis cannot end there, however, because *Forrest v. Department of Corporations* (2007) 150 Cal.App.4th 183 (hereafter *Forrest*), held that "the requirements of a prefiling order, under section 391.7, remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel or without the permission of the presiding judge." (*Id.* at p. 197.) In *Forrest*, the plaintiff was declared a vexatious litigant and became subject to a prefiling order in 1994. (*Id.* at p. 188.) In 2003, the plaintiff filed a complaint in propria persona but did not serve it on the defendants. (*Id.* at p. 189.) The plaintiff then retained counsel, who filed and served a first amended complaint. (*Ibid.*) Later, the plaintiff's counsel withdrew, and the defendants moved to dismiss on the basis of section 391.7, subdivision (c), which provides that once a defendant files and serves notice that the litigation was filed in violation of a prefiling order, the litigation "shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation . . . ." (See *Forrest*, *supra*, 150 Cal.App.4th at pp. 190-192.) When the plaintiff failed, after a number of continuances, to retain new counsel or obtain permission from the presiding judge to proceed in propria persona, the trial court dismissed the complaint. (*Id.* at p. 193.)

The Court of Appeal affirmed. (*Forrest*, *supra*, 150 Cal.App.4th at p. 188.) The court began its analysis by observing that section 391.7 "has been broadly interpreted." (*Id.* at p. 195.) The court also noted that "the definition of 'litigation' encompasses lawsuits beyond the initial filing to include those that are maintained or pending." (*Id.* at

pp. 196-197.) The court went on to reason that the phrase "any new litigation" in subdivision (a) of section 391.7—which authorizes the issuance of a prefiling order that prohibits filing "any new litigation" in propria persona without permission of the presiding judge—"plainly refers to a civil lawsuit filed *after* entry of the prefiling order," not "to an early procedural stage in the lawsuit." (*Id.* at p. 196.) That is, the word "new" in subdivision (a) of section 391.7 does not limit a prefiling order to the *initiation* of a lawsuit but rather indicates that such an order applies only to lawsuits initiated *after* the order is issued. The court also observed that "a litigant may be designated 'vexatious' for actions throughout the life of a lawsuit, not merely at its commencement," and the court concluded that "[i]t would be anomalous for the statute to permit the entry of a prefiling order based on a litigant's bad faith acts throughout a lawsuit but then limit application of the order to the filing of a new lawsuit and have no application during its pendency." (*Id.* at p. 197.) For all of those reasons, the court concluded that "the terms of the prefiling order—representation by counsel or permission to file—pertain throughout the life of the lawsuit," so dismissal is permitted any time the vexatious litigant proceeds without counsel and without the permission of the presiding judge. (*Id.* at p. 197.)

The panel was not, however, unanimous. The dissent began by stating that "[t]he majority has rewritten Code of Civil Procedure section 391.7 to say what it believes the statute should say." (*Forrest*, *supra*, 150 Cal.App.4th at p. 205 (dis. opn. of Ashmann-Gerst, J.).) In particular, the dissent observed that "nothing in section 391.7 expressly prohibits a vexatious litigant from proceeding in propria persona after his or her complaint has been filed by an attorney then representing the plaintiff." (*Id.* at p. 206.) For that reason and others, the dissent found that "the statute is, at best, ambiguous." (*Id.* at p. 207.) The dissent ultimately concluded, on the basis of public policy considerations, that "[the plaintiff's] action should not have been dismissed pursuant to section 391.7" and that, in general, "a prefiling order governs only the initiation of a lawsuit, not what occurs during the prosecution of the litigation." (*Id.* at pp. 207-208.)

We agree with the *Forrest* dissent's conclusion that a prefiling order issued pursuant to section 391.7 governs only the initiation of a lawsuit, not what occurs during the prosecution of the litigation. We do not, however, find any pertinent ambiguity in the language of either the statute or the prefiling order entered against Shalant, and we therefore see no need to resort to extrinsic interpretive aids such as public policy considerations.

As we noted at the outset, the statutory definition of "litigation" for purposes of section 391.7 is "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).) Thus, litigation is a civil action or proceeding (such as a writ proceeding). Section 391.7, subdivision (a), authorizes the issuance of a prefiling order that "prohibits a vexatious litigant from filing any new litigation" in propria persona without permission of the presiding judge. Thus, if we insert the statutory definition of "litigation," we find that subdivision (a) of section 391.7 authorizes issuance of a prefiling order that prohibits a vexatious litigant from *filing any new civil action or proceeding* in propria persona without permission. That is precisely what the prefiling order in this case does: The order prohibits Shalant "from filing any new litigation [i.e., civil action or proceeding] in propria persona" without permission of the presiding judge. Once that condition is satisfied—that is, once the suit has been filed either with permission of the presiding judge or by counsel representing the plaintiff—nothing in the language of the order prohibits Shalant from prosecuting the action in propria persona, and nothing in the language of the statute would authorize the issuance of an order that did prohibit it.

We do not find the *Forrest* majority's arguments to the contrary persuasive. First, the majority's interpretation of the term "new" does not affect our analysis. Assuming that the *Forrest* majority is correct that the phrase "any new litigation" in subdivision (a) of section 391.7 refers to any litigation commenced after the prefiling order is issued, the statute still authorizes only the issuance of prefiling orders that prohibit the filing of civil actions or proceedings in propria persona and without permission of the presiding judge.

The statute says nothing about prohibiting a vexatious litigant from *prosecuting* a new action in propria persona if the action was properly *filed.*

Second, we are not persuaded by the claim that "[i]t would be anomalous for the statute to permit the entry of a prefiling order based on a litigant's bad faith acts throughout a lawsuit but then limit application of the order to the filing of a new lawsuit and have no application during its pendency." (*Forrest*, *supra*, 150 Cal.App.4th at p. 197.) That purported anomaly cannot change what section 391.7 says. The statute authorizes nothing more than the issuance of prefiling orders that prohibit the filing of new civil actions or proceedings in propria persona and without permission. By its terms, the statute does not authorize issuance of prefiling orders that regulate the conduct of actions properly commenced.

Third, we believe that both the majority and the dissent in *Forrest* misperceived the import of the statutory definition of the term "litigation." Again, the definition of "litigation" for purposes of the vexatious litigant statutes, including section 391.7, is "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).) Both the majority and the dissent in *Forrest* appear to have inferred that the reference to litigation that is "pending" or being "maintained" suggests that section 391.7's authorization of prefiling orders concerning "litigation" extends to the conduct of litigation that is already in progress. (See *Forrest*, *supra*, 150 Cal.App.4th at pp. 196-197; *id.* at p. 206 (dis. opn. of Ashmann-Gerst, J.).) No such inference is warranted. The Legislature adopted a general definition of the term "litigation" so that the term could be used throughout the vexatious litigant statutes to refer to various types of civil actions or proceedings at various stages of progress and in various courts. But *as used in the context of a particular statutory provision* the term can have a more specific meaning, referring only to a part of the general category of actions included within the definition.

A simple example illustrates the point: The statutory definition of "litigation" includes civil actions or proceedings "in any state or federal court." (§ 391., subd. (a).)

But subdivision (a) of section 391.7 authorizes only prefiling orders that bar the filing of litigation "in the courts of this state." The general statutory definition of "litigation," which covers actions in federal court as well as the courts of other states, does not mean that, contrary to its own terms, subdivision (a) of section 391.7 authorizes California courts to bar vexatious litigants from filing actions in federal court or the courts of other states. Rather, the language of section 391.7, subdivision (a), makes clear that the term "litigation" *as used in that provision* refers only to a subset of the larger category of actions that are included within the statutory definition—it there refers only to actions in California courts.

Similarly, the general statutory definition of "litigation," which covers actions that are already pending, does not mean that, contrary to its own terms, subdivision (a) of section 391.7 authorizes California courts to issue prefiling orders that regulate the conduct of actions that are already pending. Rather, the language of section 391.7, subdivision (a), makes clear that the term "litigation" *as used in that provision* refers only to a subset of the larger category of actions that are included within the statutory definition—it there refers only to actions that the plaintiff proposes to file but has not yet filed.

Fourth and finally, we disagree with the *Forrest* majority's reliance on the statement that "[s]ection 391.7 has been broadly interpreted." (*Forrest*, *supra*, 150 Cal.App.4th at p. 195.) Taken as a purely descriptive claim, the statement is probably true—section 391.7 does appear to have been interpreted broadly. (See *Forrest*, *supra*, 150 Cal.App.4th at pp. 195-196 & fn. 4 [collecting cases].) But taken as a normative claim—that section 391.7 *should be* interpreted broadly—the statement is incorrect, because the Court of Appeal has repeatedly upheld the vexatious litigant statutes (including section 391.7) against constitutional challenges on the ground that the statutes are *narrowly drawn* and thus do not impermissibly invade the right of access to the courts. (See *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 55-57, 60; *Luckett v. Panos* (2008) 161 Cal.App.4th 77, 81; *In re R.H.* (2009) 170 Cal.App.4th 678,

702; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 541.) Given the important constitutional concerns that section 391.7 implicates, we conclude that the statute should not be broadly interpreted. Rather, it should be applied strictly according to its terms.

We sympathize with the plight of already overburdened trial courts that are forced to contend with the abusive conduct of vexatious litigants. But in their efforts to deal with the problem of vexatious litigants, courts must observe the limits set by the applicable statutory scheme. If those limits are too confining, then it is the function of the Legislature, not the courts, to expand them.

In addition, our holding today does not leave defendants or trial courts without remedies for dealing with vexatious litigants, frivolous lawsuits, or abusive litigation conduct. For example, vexatious litigants may be required to post security (§ 391.1), attorneys and self-represented parties may, under certain conditions, be sanctioned for pursuing frivolous litigation (§ 128.7), and sanctions may be imposed for discovery abuses as well (§§ 2023.010-2023.040).

For all of the foregoing reasons, we conclude that section 391.7 authorizes the issuance of prefiling orders that "govern[] only the initiation of a lawsuit, not what occurs during the prosecution of the litigation." (*Forrest, supra*, 150 Cal.App.4th at p. 208 (dis. opn. of Ashmann-Gerst, J.).) The prefiling order entered against Shalant does not exceed that statutory authorization. It prohibits him from filing a new civil action or proceeding in propria persona without permission of the presiding judge, but it does not prohibit him from prosecuting (in propria persona and without permission) an action that was filed in compliance with those requirements. The trial court therefore erred in granting the motions to dismiss.

II. The Verdict Against Shalant Is Not Supported by Substantial Evidence

Shalant argues that the verdict on the breach of fiduciary duty claim must be reversed because "there was no evidence whatsoever of any such breach." We agree that the verdict on that claim is not supported by substantial evidence.

The trial court instructed the jury as follows on the breach of fiduciary duty claim: "Jose Castro claims that he was harmed because Joseph L. Shalant breached an attorney's duty in failing to disclose his state bar status to his clients. To establish this claim, Jose Castro must prove all of the following: that Joseph L. Shalant breached the duty of an attorney to disclose his state bar status to his clients; that Jose Castro was harmed; and that Joseph L. Shalant's conduct was a substantial factor in causing Jose Castro's harm." The jury was not instructed on any other legal or factual theory of breach of fiduciary duty. Thus, the only basis on which the jury could have found a breach of fiduciary duty was by finding that Shalant breached a duty "to disclose his state bar status" to Castro.

The record contains no evidence that Shalant breached such a duty. The record does contain evidence that after being enrolled inactive by the state bar in May 2005 but before being disbarred in December 2005 (effective in January 2006), Shalant did not disclose his inactive status to Castro. But that evidence cannot support Castro's claim that Shalant breached a duty "to disclose his state bar status" because respondents cite no authority, and we have found none, that Shalant had a duty to disclose to Castro that Shalant was enrolled inactive by the state bar. Once he was enrolled inactive, Shalant could no longer practice law, and the record reflects that Shalant did promptly arrange for Girardi to substitute in as Castro's attorney.[6] But respondents cite no authority (and we have found none) for the proposition that Shalant also had a duty to disclose to Castro *why* he would no longer be handling the case.

The record likewise contains no evidence that Shalant breached a duty to disclose to Castro that Shalant was disbarred. The Supreme Court entered its order disbarring Shalant on December 14, 2005, so the order was effective January 13, 2006. (Cal. Rules of Court, rule 9.18(a).) By Castro's admission, Shalant ceased representing Castro

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6 Castro himself testified that the substitution took place "sometime around June 2005" and that he understood that thereafter Shalant "would no longer be representing" him and that Girardi would be his "only lawyer."

"sometime around June 2005." Respondents cite no authority, and we have found none, for the proposition that Shalant had a duty to disclose his disbarment to former clients.

In addition, the Supreme Court's disbarment order directed Shalant to comply with subdivision (a) of rule 9.20 (formerly rule 955) of the California Rules of Court within 30 days of the effective date of the Court's order. The rule required Shalant to "[n]otify all clients being represented in pending matters" of his disbarment. (Cal. Rules of Court, rule 9.20(a).) The rule, and hence the order, did not require Shalant to notify former clients like Castro—the notification requirement is expressly limited to clients being represented in pending matters, and Castro admits that Shalant no longer represented him. Moreover, the deadline for notification under the Supreme Court's order was February 12, 2006 (30 days after the effective date of January 13, 2006). The record contains no evidence that Shalant failed to notify Castro of his disbarment by February 12. Indeed, Castro testified that he learned of Shalant's disbarment in "early February 2006." Consequently, even if Castro did not learn of the disbarment *from Shalant*, there is no evidence of causation, because Castro cannot have been harmed by Shalant's failure to disclose facts Castro already knew.[7]

For all of the foregoing reasons, we agree with Shalant that the verdict in favor of Castro on the breach of fiduciary duty claim is not supported by substantial evidence. We accordingly reverse and direct the trial court to enter judgment in favor of Shalant on that claim.

DISPOSITION

The judgment in B211932 is reversed, and the superior court is directed to enter a new and different order denying Girardi's and National Union's motions to dismiss.

The judgment in B214302 is reversed with respect to Castro's breach of fiduciary duty claim against Shalant, and the superior court is directed to enter judgment in favor of

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[7] Castro's wife testified that Shalant has never personally informed her that he was disbarred. The testimony is irrelevant because Castro's wife is not a plaintiff. (See also fn. 4, *ante*.) Castro's wife also testified that she learned of Shalant's disbarment (though not *from Shalant*) at the same time as her husband.

Shalant on that claim. The judgment is affirmed with respect to the remainder of Castro's claims against Shalant and with respect to Girardi's claims against Shalant.

Appellant shall recover his costs on both of these consolidated appeals.

CERTIFIED FOR PARTIAL PUBLICATION.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.

Filed 4/23/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOSEPH L. SHALANT, Plaintiff and Appellant, v. THOMAS V. GIRARDI et al., Defendants and Respondents.	B211932 c/w B214302 (L.A.Super.Ct. No. BC 363843 c/w BC 366214) ORDER MODIFYING OPINION AND DENYING REHEARING (Teresa Sanchez-Gordon, Judge) [NO CHANGE IN JUDGMENT]
JOSE CASTRO, Plaintiff and Respondent, v. JOSEPH L. SHALANT, Defendant and Appellant.	B214302 c/w B211932 (L.A.Super.Ct. No. BC 366214 c/w BC 363843)

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part II.

THE COURT:

IT IS ORDERED that the opinion filed herein on April 5, 2010, be modified in the following particulars:

On page 14, second paragraph, add a new footnote 7 at the end of the last sentence ending with "case," which will require renumbering of all subsequent footnotes, and add as footnote 7, the following text:

> In his petition for rehearing, Castro argues that "rehearing should be granted to permit supplemental briefing pursuant to Government Code section 68081." That statute requires us to grant a petition for rehearing if we have rendered a decision "based upon an issue which was not proposed or briefed by any party to the proceeding" without first affording the parties an opportunity to submit supplemental briefs. (Gov. Code, § 68081.) No rehearing is required because, on pages 13 and 19 through 21 of his respondent's brief, Castro did brief the issues of (1) whether the judgment is supported by substantial evidence and (2) whether Shalant had a duty "to disclose his state bar status" to Castro.

This modification does not have an effect on the judgment.

Respondent Castro's petition for rehearing is denied.

ROTHSCHILD, Acting P. J. CHANEY, J. JOHNSON, J.

CERTIFICATE OF SERVICE

I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 750 B Street, Suite 3300, San Diego, California 92101. On May 12 2010, I served the foregoing **PETITION FOR REVIEW** by mailing a copy by first class mail in separate envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 12, 2010, at San Diego, California.

Martin N. Buchanan