No. S182629

# IN THE SUPREME COURT

# OF THE STATE OF CALIFORNIA

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**JOSEPH L. SHALANT,**

*Plaintiff and Appellant,*

vs.

**THOMAS V. GIRARDI, et al.,**

*Defendants and Respondents.*

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After a 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

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# REPLY BRIEF ON THE MERITS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES

## ARGUMENT

### I. SHALANT HAS FAILED TO MAKE ANY MEANINGFUL LEGAL ARGUMENT THAT SUPPORTS HIS POSITION

Our opening brief offered three reasons why Code of Civil Procedure section 391.7 should be applied to cases in which a vexatious litigant becomes self-represented during a pending action, as the court decided in *Forrest v. Department of Corrections* (2007) 150 Cal.App.4th 183. First, the statutory definition of "litigation" includes a "pending" civil action or "proceeding" (Code Civ. Proc., § 391, subd. (a)), and the word "proceeding" itself refers to any procedural step in a pending action. (Op. Br. at pp. 12-18.) Second, the purposes of the statute would best be served by applying it to pending actions. (*Id.* at pp. 18-20.) Third, a contrary interpretation would allow vexatious litigants to circumvent the law. (*Id.* at pp. 20-23.)

Shalant's answer brief fails to respond to any of these legal arguments. Shalant disregards the definitions of the key terms used in the vexatious litigant statute, fails to cite any case authority other than *Forrest*, makes no mention of the purposes of the statute, and engages in gratuitous and unsupported attacks against Girardi that have no bearing on the issue before this Court. On the real legal issue, Shalant does little more than to assert that the Court of Appeal got it right. Accordingly, there is precious little to reply to in this brief. Just a few short points are in order.

1. Shalant devotes the first few pages of his nine-page brief to a discussion of an "odd situation" that he admits is "not present here" and is "not relevant to this instant case." (Ans. Br. at pp. 2-4.) It is unclear what point Shalant is trying to make about this "interesting and instructive

anomaly." (*Id.* at p. 2.) Since Shalant is correct that it is not relevant here, we will not address it.

2. Shalant relies solely on the statutory language of Code of Civil Procedure section 391.7 in arguing that the term "new litigation" refers only to the initiation of a new lawsuit. (Ans. Br. at p. 6.) However, Shalant completely ignores the statutory definition of the term "litigation" contained in section 391. Although it is difficult to decipher from his brief, Shalant appears to be claiming that the definitions contained in section 391 do not apply to section 391.7. (*Id.* at p. 7 ["Prefiling permission is a distinct and separate issue from the matters dealt with under CCP §391-391.6 and those portions of Title 3a are mutually exclusive and stand independent of each other."].) If this is Shalant's argument, he is plainly wrong. As explained in the opening brief, the prefatory language of section 391 makes clear that the definitions contained therein apply to all of Title 3A, including section 391.7. (Op. Br. at p. 16.) Indeed, the Legislature amended these definitions as part of the same 1990 bill that enacted section 391.7. (Op. Br. at pp. 9-11.) Thus, the meaning of the term "new litigation" in section 391.7 cannot be determined without reference to the statutory definition of the word "litigation" contained in section 391, subdivision (a), which includes a "pending" civil action or "proceeding." (Code Civ. Proc., § 391, subd. (a).)

3. Furthermore, the security provisions of sections 391.1 through 391.6 and the prefiling permission requirement of section 391.7 are *not* "mutually exclusive" and "independent of each other." (Ans. Br. at p. 7.) For example, section 391.7, subdivision (b) expressly states that the presiding judge when granting permission to proceed "may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants *as provided in Section 391.3*." (Emphasis added.) Section

391.3 provides that the court may issue an order to furnish security upon motion made pursuant to section 391.1, and section 391.1 authorizes such a motion "[i]n any litigation pending in any court of this state ...." Because sections 391.1 and 391.3 apply only to pending cases, it necessarily follows that section 391.7 must also apply to pending cases, otherwise it would make little sense to allow the presiding judge to issue an order pursuant to section 391.3 when granting leave to proceed under section 391.7.

4. Shalant makes much of the fact that section 391.7 requires a vexatious litigant to obtain the permission of the *presiding judge* to proceed in pro per. However, this does not shed any light one way or another on the legal question presented here—whether section 391.7 requires a vexatious litigant to obtain permission to proceed if he or she becomes self-represented while the case is pending. If a trial judge has not yet been assigned, the presiding judge is the most logical person to make the section 391.7 determination. Even if a trial judge has been assigned and has some familiarity with the case, nothing prevents the presiding judge from consulting with the trial judge in making the section 391.7 determination. Thus, the mere fact that the section 391.7 decision is entrusted to the presiding judge does not help resolve the issue before this Court.

5. Shalant also points out that section 391.7, subdivision (d) defines the term "litigation" to include a "petition." Again, he fails to explain how this supports his position. Subdivision (d) actually defines the term "litigation" to include "any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order." (Code Civ. Proc., § 391.7, subd. (d).) A "petition, application, or motion" can obviously be filed in a pending case. As noted in the opening brief, the Legislature added subdivision (d) in 2002

intending it to clarify existing law. (Op. Br. at p. 11, fn. 3.) Accordingly, this subdivision provides further support for the conclusion that section 391.7 applies to pending cases. If Shalant were correct, then section 391.7 *would* apply to pending cases under the Family Code or Probate Code, but would *not* apply to any other types of pending cases. Nothing suggests that the Legislature intended to create such an anomalous result.

6. Shalant makes no effort to demonstrate that his interpretation of the statute best serves its purposes, nor does he dispute that a contrary interpretation would allow vexatious litigants to circumvent the law. (Op. Br. at pp. 18-23.) When the Legislature amended section 391.7 in 1990, it expressed particular concern about *attorney* vexatious litigants by amending the definition of a "plaintiff" to include "an attorney at law acting in propria persona." (§ 391, subd. (d).) As this case vividly and regrettably demonstrates, vexatious litigants who are attorneys (or disbarred attorneys) are particularly likely to find creative ways around the statute by using their friends or associates as "mere puppets" to act on their behalf. (See also *In re Shieh* (1993) 17 Cal.App.4th 1154, 1167 [involving another attorney vexatious litigant].) Shalant's repeated substitutions of himself for various attorneys, both in the trial court and this Court, are comparable to a criminal defendant who is "'playing the *Faretta* game.'" (*People v. Horton* (1995) 11 Cal.4th 1068, 1111; see *People v. Williams* (1990) 220 Cal.App.3d 1165, 1168-1170 [defendant who juggled his *Faretta* right of self-representation with right to counsel interspersed with *Marsden* motions to discharge appointed counsel found to be "playing 'the *Faretta* game'"].) This Court should not endorse an interpretation of the statute that would facilitate this type of manipulative conduct by a vexatious litigant who already has a demonstrated history of abusing the judicial system.

## CONCLUSION

The court in *Forrest* correctly decided that section 391.7 requires a vexatious litigant to obtain permission to proceed with an action if he or she becomes self-represented while the action is pending. This construction of the statute best comports with the statutory definition of "litigation" and best serves the basic purposes of the law. Moreover, a contrary interpretation would only facilitate circumvention by vexatious litigants intent on finding a way around the statute. Accordingly, the judgment of the Court of Appeal should be reversed.

Dated: Oct. 22, 2010

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## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Reply Brief on the Merits 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 1,308 words.

Dated: Oct. 22, 2010

NIDDRIE, FISH & BUCHANAN, LLP

By: _____

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## 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 Oct. 22, 2010, I served the foregoing **REPLY BRIEF ON THE MERITS** by mailing a copy by first class mail in separate envelopes addressed as follows:

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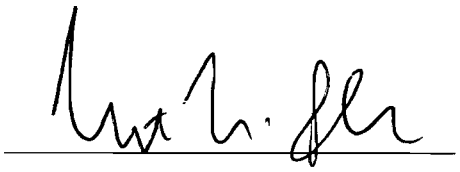
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Oct. 22, 2010, at San Diego, California.



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