

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 13 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ADVANCED BUILDING &
FABRICATION, INC., a California
corporation and ROBERT HONAN,

Plaintiffs-Appellees,

v.

CALIFORNIA HIGHWAY PATROL and
JOHN WILSON,

Defendants,

and

CURTIS AYERS,

Defendant-Appellant.

No. 17-16618

D.C. No.

2:13-cv-02380-MCE-CKD

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted December 19, 2018
San Francisco, California

Before: M. SMITH and NGUYEN, Circuit Judges, and RESTANI,** Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jane A. Restani, Judge for the United States Court of
International Trade, sitting by designation.

Defendant-Appellant Curtis Ayers, a former employee of the state Board of Equalization, appeals from a denial of summary judgment, alleging that the district court erred in denying him state-law immunity.¹ We have jurisdiction under 28 U.S.C. § 1291 to consider a claim of immunity that does not turn on resolution of a material dispute of fact. *See Plumhoff v. Rickard*, 572 U.S. 765, 771–73 (2014). We affirm in part, reverse in part, and remand.

1. The district court did not err in denying Ayers immunity under California Government Code section 821.6. *See Garmon v. Cty. of Los Angeles*, 828 F.3d 837, 847 (9th Cir. 2016) (holding that, despite contrary decisions in the Courts of Appeal, the California Supreme Court would adhere to *Sullivan v. Cty. of Los Angeles*, 527 P.2d 865 (Cal. 1974), which limits section 821.6 immunity to claims of malicious prosecution). “[W]e are bound by our prior decisions interpreting state as well as federal law in the absence of intervening controlling authority.” *F.D.I.C. v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992). Because Plaintiffs did not bring a claim of malicious prosecution, section 821.6 does not apply, and, on this ground, we affirm the district court’s denial of immunity.

2. The district court erred in denying Ayers absolute immunity under California Civil Code section 47(b) for his statements reporting the May 7, 2012

¹ Ayers also appealed the district court’s denial of qualified immunity for his participation in a May 2012 search, which we address in a concurrently filed opinion.

incident to law enforcement. This provision protects “publication or broadcast[s]” made in “any (1) legislative proceeding, (2) judicial proceeding, (3) . . . other official proceeding authorized by law, or (4) . . . initiation or course of any other proceeding authorized by law.” Cal. Civ. Code § 47(b). The California Supreme Court has read this immunity broadly as “encompass[ing] not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit.” *Hagberg v. Cal. Fed. Bank*, 81 P.3d 244, 249 (Cal. 2004). Plaintiffs do not identify a material factual dispute that would preclude section 47(b) immunity for Ayers’s statements. In fact, at oral argument, Plaintiffs conceded that section 47(b) immunity applies to the statements Ayers made regarding the investigation. Therefore, we reverse the denial of immunity as to Ayers’s statements to law enforcement.

The parties shall bear their own costs on appeal. *See* Fed. R. App. P. 39(a)(4).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.