S244148

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARAM BONNI,
Plaintiff and Appellant,

v.

ST. JOSEPH HEALTH SYSTEM, ET AL.,
Defendants and Respondents.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION 3, CASE NO. G052367
JUDGE ANDREW P. BANKS, CASE NO. 30-2014-00758655

ANSWER BRIEF ON THE MERITS

GREENE, BROILLET & WHEELER, LLP
Mark T. Quigley, SBN 123228
Christian T.F. Nickerson, SBN 281084
100 Wilshire Boulevard, 21st Floor
P.O. Box 2131
Santa Monica, California 90407
Telephone: (310) 576-1200
Email: mquigley@gbw.law
cnickerson@gbw.law

ESNER, CHANG & BOYER
Stuart B. Esner, SBN 105666
234 East Colorado Boulevard, Suite 975
Pasadena, California 91101
Telephone: (626) 535-9860
Email: sesner@ecbappeal.com

ATTORNEYS FOR PLAINTIFF AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

ISSUE FRAMED BY DEFENDANTS

In light of *Kibler* and *Park*, what stages of the official medical staff peer review process are within the protections of the anti-SLAPP statute?

INTRODUCTION

The above is the issue as framed by defendants. However, as this Court will see, the resolution of this matter here does not depend on whether particular stages of peer review should be differentiated. Rather, the resolution of this matter depends on whether the anti-SLAPP statute (Code Civ. Proc., § 425.16) applies to plaintiff Dr. Aram Bonni's claim that the two defendant hospitals (St. Joseph and Mission) violated Health and Safety Code section 1278.5 by launching an immediate campaign to sabotage Dr. Bonni's career in retaliation for his reports expressing safety concerns about defendants' robotic surgical programs through acts of suspension and termination.

According to defendants, since plaintiff alleges that defendants retaliated by using certain activity that can broadly be considered to be part of the peer review process, the retaliation claim is necessarily subject to the anti-SLAPP statute. Plaintiff will explain that for a host of reasons, defendants are wrong. In this respect, the Court of Appeal hit a bullseye: "Here, defendants' motion to strike was premised on their somewhat ipse dixit notion that because of the 'critical public interest in patient safety,' and 'the courts' overriding goal of "protect[ing] the health and welfare of the people of California,"' the peer review decision, and the statements leading up to that decision are "an inherently communicative process based on free speech and petitioning rights,' and 'should thus be "subject to a special motion to strike."'" (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 862, disapproved on other grounds in *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871.)

Nothing has changed. Defendants continue to use the same "ipse dixit" in an effort to squeeze plaintiff's retaliation claim into the anti-SLAPP statute, and this continued effort still fails. As this Court has repeatedly cautioned: "'[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89, 124 Cal.Rptr.2d 530, 52 P.3d 703; see *City of Cotati*, at p. 78, 124 Cal.Rptr.2d 519, 52 P.3d 695 [suit may be in "response to or in retaliation for" protected activity without necessarily arising from it].)" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062.)

In their opening brief, defendants engage in troubling advocacy that should play no role in the Court's analysis. In an apparent "ends justify the means" effort to sway this Court, Defendants use their Opening Brief as a platform to further smear Dr. Bonni's reputation accusing him of having "seriously injured multiple patients" (OB 12); repeating the accusation that a surgery he performed resulted in injuries resembling "gunshot wounds to the abdomen" (ibid); and suggesting that he almost killed a patient (OB 60). Defendants do not bother to mention that their own judicial review committees comprised of their own physicians, concluded that Dr. Bonni did no such thing.[1] Yet, anyone simply reading defendants' brief would not know this.

[1] St. Joseph brought 19 charges against Dr. Bonni, which included the claims now highlighted by defendants. However, the Hearing Committee found that St. Joseph only established three charges, all relating to Dr. Bonni's handling of tissue. Likewise, the Mission committee concluded that "Dr. Bonni does not present an imminent danger to the health of any individual and that a continuation of the summary suspension of his clinical privileges at Mission Hospital is not reasonable and warranted." (3-AA681.) Specifically, the Judicial Review Committee concluded that, "the great majority of these charges are found to be not established by preponderating evidence. Significantly, only eight non-duplicative charges pertaining to patient care at Mission Hospital are established by preponderating evidence. . . . The JRC also notes that of the eight established charges pertaining to patient care, none resulted in poor patient outcomes related to issues raised in these charges." (3-AA681-682.)

Plaintiff will not further dwell on this abusive advocacy other than to state the obvious: it should play no role in the straight-forward legal issue now before the Court. When that focus is placed where it should be, plaintiff is confident that this Court will agree that his retaliation claim is (1) not based on a statement or writing made by defendants during an official proceeding and (2) defendants' claim, raised for the very first time, that plaintiff's claim invokes an issue of public interest and is further based on constitutionally protected petitioning activity, has been waived and is otherwise meritless.

In short, the decision of the Court of Appeal concluding that defendants failed to meet their burden of establishing that plaintiff's retaliation claim falls within the anti-SLAPP statute should be affirmed.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

I. DR. ARAM BONNI, A DOUBLE BOARD-CERTIFIED SURGEON, PRACTICES AT THE ST. JOSEPH'S HEALTH SYSTEM FOR YEARS.

Plaintiff Dr. Aram Bonni is a surgeon board certified in Female Pelvic Medicine and Reconstructive Surgery and Obstetrics and Gynecology. (1-AA227.) After receiving his medical degree from the University of Ankara, completing an internship at Cook County Hospital in Chicago, and a fellowship at Memorial Sloan Kettering Hospital in New York City, Dr. Bonni completed a fellowship at the Department of Urogynecology and Reconstructive Pelvic Surgery at Harbor-UCLA and UCLA Medical Center. (1-AA227.) Dr. Bonni then completed a second fellowship in cosmetic surgery at the Newport Beach Center for Surgery. (1-AA227.)

After developing his expertise, Dr. Bonni began practicing at Mission Hospital Regional Center ("Mission") on September 23, 2002. (1-AA227-228.) Mission hospital is part of the St. Joseph Health System. (1-AA228.) St. Joseph Hospital of Orange ("St. Joseph") is also part of the St. Joseph Health System. (1-AA228.) Dr. Bonni began practicing at St. Joseph on July 1, 2010. (1-AA228.) During his eight years practicing at these St. Joseph Health System hospitals, Dr. Bonni performed thousands of successful surgeries; Dr. Bonni's surgeries were never found to be below the standard of care and he was always a member in good standing at the hospitals. (1-AA228.)

Dr. Bonni continued his medical education by undergoing training in laparoscopically assisted robotic surgeries as well as by taking courses for surgical treatments of pelvic floor disorders in women. (1-AA228.) As a result of this training, Dr. Bonni successfully performed thousands of minimally invasive and laparoscopically assisted surgeries. (1-AA228.) Dr. Bonni received high marks on these surgeries performed at Mission hospital. (1-AA228.) While performing these surgeries at Mission

and St. Joseph hospitals, Dr. Bonni utilized a robot called the da Vinci Robotic System. (1-AA228-229.)

Dr. Bonni's reputation was such that, in "March 22, 2010, Mission Director of Medical Staff Services Denise Rollins reported to St. Joseph that [he] was a member in good standing at Mission, that there were no disciplinary actions against [him], and that there were no significant issues with respect to [him] or [his] practice at Mission." (1-AA231.) Further, in the summer of 2010, two doctors at St. Joseph hospital, Dr. Juan Velez and Dr. Randy Fiorentino, asked Dr. Bonni to see patients out of their office and had voiced interest in learning some of Dr. Bonni's techniques. (1-AA212, 231.)

II. DR. BONNI BECOMES CONCERNED WITH THE PERFORMANCE OF THE DA VINCI ROBOTIC SYSTEM AND ALLOCATION OF HOSPITAL RESOURCES AND VOICES THOSE CONCERNS TO BOTH ST. JOSEPH HOSPITAL AND MISSION HOSPITAL.

While Dr. Bonni was practicing at Mission and St. Joseph hospitals, he observed the da Vinci robot malfunctioning. (1-AA229-231.) Dr. Bonni also believed that the robotic program at Mission hospital was understaffed and underfunded. (1-AA229.) Dr. Bonni raised these concerns to both hospitals numerous times. (1-AA229-231.)

Specifically, Dr. Bonni raised his concerns about the malfunctioning robot to St. Joseph hospital on August 20, 2010 via Dr. Velez, the Chief of Obstetrics/Gynecology at St. Joseph, while Dr. Velez was assisting Dr. Bonni on a surgery. (1-AA231-232.) Dr. Bonni reported his concerns about the robot to St. Joseph once again on September 15, 2010, this time through Dr. Fiorentino. (1-AA231.)

In regard to Mission hospital, Dr. Bonni first reported his concerns on October 19, 2009 to Dr. Dennis Haghihat, Vice President of Medical Affairs at Mission. (1-AA229, 256 ["I am writing to you because of multiple issues that we have had to care for our patients that are in need of robotic surgery."].) Dr. Bonni reported his concerns to Dr.

Haghihat again on January 11, 2010, and to Dr. Christopher Nolan and Dr. Kenneth Rexinger on April 30, 2010. (1-AA229-230.) Dr. Nolan was the Chief of Staff at Mission hospital and Dr. Rexinger was the Chief of Quality Review at the hospital. (1-AA230.)

The manufacturer of the da Vinci robot subsequently issued a recall on one of the robot's instruments. (1-AA229.)

III. ST. JOSEPH HOSPITAL SUMMARILY SUSPENDS DR. BONNI THE DAY AFTER HE REPORTS HIS CONCERNS ABOUT THE HOSPITAL'S ROBOTIC SYSTEM.

The day after Dr. Bonni voiced his concerns about the robotic program to Dr. Fiorentino, Dr. Bonni received a phone call from Dr. Velez informing him that St. Joseph had suspended his privileges and medical staff membership at St. Joseph. (1-AA231.) Dr. Bonni received a formal letter the next day. (1-AA231, 286.)

The letter stated that St. Joseph's action was "based on the fact that there have been serious and avoidable injuries to patients in three of [Dr. Bonni's] six cases at the Hospital since [he] joined the Medical Staff in July 2010." (1-AA286.) Included with the letter was a communication from Dr. Velez to Dr. Moro, the Chief of Staff, recommending that Dr. Bonni's privileges be suspended. (1-AA288.) In the three cases referenced by the hospital, Dr. Bonni was assisted by Dr. Velez for one and by Dr. Fiorentino for the other two. (1-AA232.)

A. Almost Two Years Later, The Hearing Committee Concludes A Continued Suspension Of Dr. Bonni Is Not Reasonable Or Warranted.

After learning of his suspension, Dr. Bonni requested a meeting with his department colleagues to discuss their concerns. (1-AA232.) Rather than granting Dr.

Bonni his meeting, Dr. Fiorentino, Dr. Velez, and another doctor met and chose to continue Dr. Bonni's suspension. (1-AA232.) The continuance of the suspension was significant because this meant his suspension was publicly reported to the Medical Board of California and to the National Practitioner Data Bank. (1-AA233.)

Dr. Bonni requested a formal hearing to challenge his suspension on October 15, 2010. (1-AA233.) Section 14.4.2 of the St. Joseph bylaws states that the hearing should take place between 30 and 60 days of receipt of the request for hearing. (1-AA233; 2-AA380.) Dr. Bonni's hearing took place on October 3, 2011, almost a full year after his request. (1-AA233.) The final hearing took place on June 19, 2012; Dr. Bonni's privileges remained suspended the entire time. (1-AA234.)

The Hearing Committee consisted of five physicians and the hearing took place over ten sessions. (2-AA434.) The Hearing Committee issued its final decision in August 2012. (1-AA234.) The Hearing Committee concluded that St. Joseph failed to establish that it was reasonable and warranted to summarily suspend all of Dr. Bonni's clinical privileges and that it failed to establish that Dr. Bonni's clinical privileges and Medical Staff membership should be terminated. (2-AA445.) The Hearing Committee concluded that St. Joseph did not establish any deficiencies in non-robotic surgeries; therefore, it did not make sense to suspend or terminate all of his privileges. (2-AA445.)

The Hearing Committee also made specific conclusions in regard to the three of Dr. Bonni's procedures at issue.

1. August 20, 2010 Procedure.

This procedure involved the robotic-assisted adhesiolysis and resection of a large pelvic mass. (2-AA436.) St. Joseph made four charges against Dr. Bonni in regard to this procedure: (1) that Dr. Bonni exercised poor judgment in failing to refer this case to a gynecological oncologist; (2) that Dr. Bonni exercised poor judgment in referring the patient home with instructions to remove the catheter herself; (3) that Dr. Bonni

displayed poor surgical technique with respect to rough tissue handling; and (4) that Dr. Bonni exercised poor judgment and technique in using a robot that was functioning in two-dimensional mode only. (2-AA437.)

The Hearing Committee found that St. Joseph failed to establish three (of the four charges) on which defendants focus in their brief. First, the Hearing Committee concluded that Dr. Bonni met the standard of care in performing the surgery himself. The Hearing Committee reasoned that, even though Dr. Velez testified that the case should have been referred to a gynecological oncologist, he did not mention that in his proctor report completed immediately after the surgery. Further, a board certified gynecological oncologist testified that it was in accordance with the standard of care for Dr. Bonni to perform the procedure. (2-AA437.)

Second, the Hearing Committee concluded that Dr. Bonni met the standard of care in instructing the patient to remove the catheter on her own. The Hearing Committee cited expert testimony that there is nothing inappropriate about having a patient remove her catheter at home. (2-AA437.)

Third, the Hearing Committee concluded that Dr. Bonni complied with the standard of care in continuing to use a robot functioning only in two-dimensional mode. All of the experts at the hearing, including Dr. Velez, concluded that it was appropriate for Dr. Bonni to continue using the robot. (2-AA437.)

2. August 25, 2010 Procedure.

In this procedure, Dr. Bonni performed a robotic-assisted removal of a large left adnexal mass. (2-AA437.) During this procedure, he detected a 2-cm rectal tear which he attempted to repair. (2-AA437.) St. Joseph brought five charges in respect to this procedure: (1) that Dr. Bonni exercised poor judgment in failing to refer this case to a gynecological oncologist; (2) that Dr. Bonni exercised poor judgment in attempting to remove an organ that was not within the scope of his privileges or expertise; (3) that Dr.

Bonni exercised poor judgment and technique in attempting to repair the rectal tear with inappropriate suture material; (4) that Dr. Bonni exercised poor judgment and technique in that his attempted repair of the rectal tear caused further injury to the patient; and (5) that Dr. Bonni exercised poor surgical technique in his handling of tissues. (2-AA438-439.)

Again, with respect to the charges on which defendants now focus, the Hearing Committee found that Dr. Bonni complied with the standard of care and did not exercise bad judgment. (2-AA438-439.)

3. September 16, 2010 Procedure.

This procedure involved a robotic-assisted laparoscopic supracervical hysterectomy and sacrocolpopexy on a 77-year old female. (2-AA439.) St. Joseph brought six charges against Dr. Bonni. (2-AA439-442.) The Hearing Committee again found that St. Joseph failed to prove the charges relating to the charges on which defendants now focus. (2-AA439-442.)

St. Joseph also brought charges against Dr. Bonni for lack of candor and inconsistent responses to Medical Executive Committee questions; failure to comply with his summary suspension; and refusal to cooperate and provide information regarding events in February 2012. (2-AA442-444.) The Hearing Committee found that Dr. Bonni's acts during his meeting with the Medical Executive Committee "do not violate the Bylaws and do not provide a basis for corrective action against his Medical Staff privileges and Membership." (2-AA443.) In regard to the charge of Dr. Bonni's failure to comply with his summary suspension, not only did the Hearing Committee find that Dr. Bonni acted appropriately and did not violate the bylaws, but it concluded that St. Joseph's handling of the issue "was confusing and contradictory." (2-AA444.) Further, it found that St. Joseph's charge against Dr. Bonni for refusal to cooperate and provide information regarding events in February 2012 were "unreasonable." (2-AA444-445.)

B. Dr. Bonni Enters Into A Settlement Agreement With St. Joseph; St. Joseph Breaches The Agreement.

Despite the Hearing Committee's decision overwhelmingly in Dr. Bonni's favor, St. Joseph threatened to appeal the decision. (1-AA235.) Rather than go through the appeal process, Dr. Bonni chose to enter into a settlement agreement with St. Joseph. (2-AA451-455.) As part of the settlement agreement, St. Joseph agreed to an exact wording of the report it filed with the Medical Board of California and the National Practitioner Data Bank. (2-AA451-452.) St. Joseph breached this agreement by using language that was materially different to what it agreed to. (3-AA806.)

IV. AFTER DR. BONNI'S NUMEROUS COMPLAINTS ABOUT MISSION HOSPITAL'S ROBOTIC SYSTEM, MISSION SUMMARILY SUSPENDS DR. BONNI.

Dr. Bonni continued to report his concerns about the da Vinci robot and robotics program at Mission. (1-AA236, 266-272.) Mission continued to fail to address or investigate his concerns. (1-AA236.)

On November 1, 2010, Dr. Bonni received a letter informing him that Mission was summarily suspending Dr. Bonni's privileges and his membership with the Mission medical staff. (1-AA236-237.) Dr. Bonni was surprised to receive this letter as he had been in good standing at Mission since 2002 and had received positive performance reviews earlier that year. (1-AA228, 231, 236-237.) In enacting this suspension, Mission failed to follow its own bylaws which required a review of Dr. Bonni's cases by a specialist before any disciplinary actions are imposed. (1-AA238.) Mission did not have a physician with the same specialty as Dr. Bonni review his cases for more than two years after it imposed his summary suspension. (1-AA238.)

Despite Dr. Bonni's suspension, he continued to report his concerns about the robotics program to Mission. (1-AA236.) Days after another report to the hospital, Dr. Bonni was notified that his summary suspension would remain in effect, and therefore would be publicly reported to the Medical Board of California. (1-AA236-237.) Dr. Bonni's suspension was reported to the Medical Board of California and to the National Practitioner Data Bank. (1-AA237-238.)

Pursuant to Mission's bylaws, Dr. Bonni formally requested a hearing to challenge his suspension on December 3, 2010. (1-AA238.) The bylaws state that a hearing shall be scheduled for between 30 and 60 days from the receipt of the request for hearing. (1-AA238.) Mission did not give Dr. Bonni a hearing until May 17, 2012. (1-AA238.)

Despite it being procedurally improper, Mission instructed Dr. Bonni to fill out an application for reappointment in May 2011. (1-AA238.) Dr. Bonni submitted the application before he completed it. (1-AA239.) Mission requested Dr. Bonni provide the missing information, but processed it at a point Mission knew he lacked the opportunity to do so. (1-AA239.)[2]

A. Mission Files Four Notices of Charges Against Dr. Bonni.

Mission filed its first set of charges against Dr. Bonni on June 24, 2011 (see 3-AA723) which launched a series of ever-moving targets. It sent a First Amended Notice of Charges on November 1, 2011. (1-AA239.) Mission then amended its Notice of Charges again on May 1, 2013 and a third and final time on October 1, 2013. (1-AA239; 3-AA599-615.) Mission's bylaws do not allow amendments to a Notice of Charges. (1-AA240.) Mission's final iteration of its charges against Dr. Bonni named 10 charges consisting of approximately 125 allegations. (1-AA239.)

[2] The doctor at Mission that requested Dr. Bonni provide the missing information testified under oath that Dr. Bonni never responded to the request; the doctor later acknowledged that Dr. Bonni had in fact responded, but the doctor never reported Dr. Bonni's response to Mission's credentialing committee. (1-AA239.)

Mission cited to 16 different cases as the bases for its 10 charges against Dr. Bonni. (3-AA599-615.) Of these 16 different cases Mission cited, three were from 2003, three were from 2004, four were from 2005, two were from 2006, one was from 2007, one was from 2008, and two were from 2009. (3-AA599-615, 751.) None were from the year Mission decided to summarily suspend Dr. Bonni. The Notice of Charges also referenced Dr. Bonni's suspension from Mission's sister hospital, St. Joseph, as "further confirmation of a pattern of poor surgical skills and medical judgment in robotic cases." (3-AA608.)

B. Mission's Review Exonerates Dr. Bonni of the Principal Charges Against Him.

The Judicial Review Committee was comprised of five doctors. (3-AA631.) After 30 evidentiary hearings, the Judicial Review Committee rendered its decision on April 22, 2014. (3-AA685.) The Judicial Review Committee concluded that "Dr. Bonni does not present an imminent danger to the health of any individual and that a continuation of the summary suspension of his clinical privileges at Mission Hospital is not reasonable and warranted." (3-AA681.) Specifically, the Judicial Review Committee concluded that, "the great majority of these charges are found to be not established by preponderating evidence. Significantly, only eight non-duplicative charges pertaining to patient care at Mission Hospital are established by preponderating evidence. . . . The JRC also notes that of the eight established charges pertaining to patient care, none resulted in poor patient outcomes related to issues raised in these charges." (3-AA681-682.)

Mission appealed the Judicial Review Committee's decision. (3-AA692.) The Appellate Committee, consisting of *three non-doctors*, rendered its decision on December 5, 2014. (3-AA738-790.) The Appellate Committee affirmed the Judicial Review Committee's conclusion that the imposition of Dr. Bonni's summary suspension was

reasonable and warranted. (3-AA771-775.) In regard to the Judicial Review Committee's conclusion that Dr. Bonni's suspension was no longer reasonable or warranted, the Appellate Committee concluded that the Judicial Review Committee did not have the authority to make that decision. (3-AA775-777.) The Appellate Committee did not reach the merits of whether Dr. Bonni's continued suspension was reasonable or warranted. Lastly, the Appellate Committee concluded that Mission's recommendation to deny Dr. Bonni's incomplete reappointment application was reasonable and warranted. (3-AA777-781.)

The Mission Hospital Board of Trustees met on December 15, 2014 and affirmed the Appellate Committee's decision on December 18, 2014. (3-AA793.)

V. DR. BONNI FILES SUIT AND DEFENDANTS FILE A SPECIAL MOTION TO STRIKE. THE TRIAL COURT GRANTS THE MOTION AND THE COURT OF APPEAL REVERSES.

Dr. Bonni's First Amended Complaint alleged a cause of action for retaliation in violation of Health & Safety Code § 1278.5, Bus. & Prof. Code § 510 et seq., and § 2056 et seq. (1-AA6.) Plaintiffs listed a series of retaliatory steps taken by defendants beginning with their summary suspension of plaintiff's staff privileges. (1-AA13.)

Defendants filed a special motion to strike the statutory violation causes of action ("Anti-SLAPP motion"). (1-AA28-50; 4-AA920.) Defendants argued that the Anti-SLAPP statute applies because Dr. Bonni's claim arises from a hospital's peer review activity, which constitutes conduct protected under the Anti-SLAPP statute. (1-AA40-42.) Next, Defendants argued that Dr. Bonni could not demonstrate a probability of success because he could not establish a causal link between his protected activity and the adverse employment actions taken against him. (1-AA42-47.) Dr. Bonni opposed (1-AA203-225) and, following a hearing, the trial court granted the motion concluding that the peer review activities are not merely incidental to the cause of action, and therefore,

the Anti-SLAPP statute applied. (RT 4.) Dr. Bonni timely appealed (4-AA912-914) and the Court of Appeal reversed.

The Court concluded that "plaintiff's retaliation claim under the whistleblower statute arose from defendants' alleged acts of retaliation against plaintiff because he complained about the robotic surgery facilities at the hospitals, and *not* from any written or oral statements made during the peer review process or otherwise." (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 855.)

The Court explained:

> [M]erely because a process is communicative does not mean that plaintiff's claim necessarily arises from those communications, and merely because the peer review process serves an important public interest does not make it subject to the anti-SLAPP statute where the process is employed for a retaliatory purpose. The anti-SLAPP statute protects "*any written or oral statement or writing* made in connection with an issue under consideration or review by [an] official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(2), italics added.) Plaintiff did not allege *any* specific "written or oral statement or writing" which allegedly formed the basis of his retaliation claim. Instead, he alleged that an abusive peer review process was initiated by the hospitals because he made complaints about unsafe conditions at the hospitals. Thus, his claim was *not* based merely on defendant's act of initiating and pursuing the peer review process, or on statements made during those proceedings—but on the retaliatory purpose or motive by which it was undertaken.

(*Id.* at pp. 862-863.)

The Court also reasoned that defendants alleged retaliatory motive was significant in concluding that defendants were not entitled to ant-SLAPP protections. (*Id.* at pp. 863-864.) It was this aspect of the Court of Appeal decision that this Court disapproved of in *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871.

ARGUMENT

I. DEFENDANTS FAIL TO ESTABLISH THAT EITHER THE GIST OF DR. BONNI'S FIRST CAUSE OF ACTION FOR RETALIATION OR ANY ASPECT OF THAT CLAIM, IS BASED ON STATEMENTS PROTECTED UNDER SECTION 425.16, SUBDIVISION (E)(2).

Defendants reference certain allegations of Dr. Bonni's first cause of action for retaliation and statements in his declaration in opposition to their anti-SLAPP motion and argue that because specific aspects of the retaliation claim are based upon statements made in connection with peer review (an official proceeding), the first prong of the SLAPP statute is satisfied. (OB 34.) A threshold issue for purposes of resolving this argument is whether this Court should now analyze these discrete allegations in the retaliation claim to determine whether they are protected speech or should the Court instead analyze the retaliation cause of action, as a whole, to determine whether the gist of that cause of action is protected speech. As now explained, since defendants' motion to strike was not targeted to limited aspects of the retaliation cause of action, the Court should view that claim, as a whole, to determine whether its gist is protected speech. Plaintiff will then explain why the gist of plaintiff's retaliation cause of action is not protected speech.

A. Since Defendants Only Sought To Strike Plaintiff's Retaliation Cause Of Action In Its Entirety, Defendants Should Not Be Able To Assert That Limited Aspects Of That Claim Fall Within The SLAPP Statute.

The principal thrust of Defendants' Opening Brief is that so long as any allegation in the operative complaint implicates protected speech then their motion to strike should have been granted. Thus, defendants spend much of their brief discussing aspects of

plaintiff's claim in isolation. However, that was not the approach taken in defendants' anti-SLAPP motion.

In their notice of motion, Defendants stated: "This Motion is made pursuant to Code of Civil Procedure Section 425.16, on the ground that Plaintiff's First Cause of Action targets speech and other activity protected by the federal and California constitutions. Specifically, Plaintiff's First Cause of Action for retaliation in violation of Health and Safety Code Section 1278.5; Business & Professions Code Sections 510 *et seq.* and 2056 *et seq.*, set forth at paragraphs 12 through 23 of the FAC (I) arises from acts of Defendants in furtherance of their right of petition or free speech under the United States and California Constitutions in connection with a public issue; and (2) is legally insufficient and cannot be supported by competent evidence." (1-AA29.)

Then, in their points and authorities, Defendants argued that "the entirety of the conduct alleged in Plaintiff's First Cause of Action is based on the peer review process. Plaintiff has alleged that specific actions taken in the context of peer review processes at St. Joseph Hospital and Mission Hospital were retaliatory acts. . . ." (AA41.)[3]

This was the extent of defendants' analysis. It is therefore evident that, according to express terms of the motion, defendants sought to strike plaintiff's retaliation cause of action in its entirety and was not seeking to strike limited aspects of that claim. As a threshold issue, it is therefore necessary to analyze whether, in determining prong one should this Court look to the gist of the retaliation cause of action as a whole or should it separately analyze specific allegations in the retaliation cause of action to determine whether those allegations, standing alone, fall within the anti-SLAPP statute.

Near the end of its brief, defendants argue that plaintiff's retaliation cause of action is, at a minimum, 'mixed' with protected activity" (OB 67) and therefore the first prong is met under *Baral v. Schnitt* (2016) 1 Cal.5th 376. As defendants acknowledge,

[3] Defendants then referenced certain specific allegations in paragraph 16 of the Amended Complaint for purposes of demonstrating that the gist of the entire cause of action was within the anti-SLAPP statue. (Ibid.)

there is a split of authority in the Courts of Appeal on this issue. As now explained, the latest, better reasoned and greater number of authorities agree that, where an anti-SLAPP motion does not seek to strike specific, limited allegations but instead seeks to strike only a cause of action in full, then the Court should determine whether the gist of that entire cause of action is protected activity.

In *Baral* this Court concluded that it was permissible for a defendant to target an anti-SLAPP motion to aspects of a plaintiff's claim that satisfy prong one of the analysis even if other aspects of that claim are not captured. After *Baral*, several cases have addressed whether the "primary thrust" or "gravamen" approach should be used to determine whether an entire cause of action arises out of protected activity in a so-called "mixed" cause of action when, as here, the defendant only moves to strike the entire cause of action. (Compare *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 111, 112 & fn. 5, 226 Cal.Rptr.3d 246 [applying the gravamen approach]; *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 586-588, 591 [same]; *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 48 with *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1170, 215 Cal.Rptr.3d 606 [rejecting "'primary thrust' or 'gravamen' approach"].)

Plaintiff urges the Court to adopt the approach recognized in the former cases concluding that, when a defendant files a motion to strike and seeks to strike a cause of action in its entirety – rather than selected aspects of that cause of action – it should not be able to argue for the first time on appeal that the motion to strike should have been granted as to only those limited aspects. Rather, the moving defendant should be required to establish that the "primary thrust" or "gravamen" of the cause of action arose from protected activity. In *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 111, fn 5, the Court explained why the approach taken by the singular case that has rejected the "primary thrust" or "gravamen" approach, was misguided:

> First, *Sheley's* wholesale rejection of the principal thrust or gravamen analysis is based largely on an extrapolation from *Baral*, supra, 1 Cal.5th 376, 205 Cal.Rptr.3d 475, 376 P.3d 604. (*Sheley*, supra, 9 Cal.App.5th 1147, 215 Cal.Rptr.3d 606.) In *Baral*, our highest court disapproved a number of cases that used the "primary right theory" to determine whether a cause of action is based on protected activity. (*Baral*, at pp. 394–395, 205 Cal.Rptr.3d 475, 376 P.3d 604.) . . . *Baral*, however, (as *Sheley* concedes) did not address, let alone disapprove, the principal thrust or gravamen analysis. (See *id*. at p. 1170, 215 Cal.Rptr.3d 606.)
>
> Second, Sheley's rejection appears to be based, in part, on an overbroad reading of *Baral*, supra, 1 Cal.5th 376, 205 Cal.Rptr.3d 475, 376 P.3d 604. (*Sheley*, supra, 9 Cal.App.5th 1147, 215 Cal.Rptr.3d 606.) In *Baral*, our Supreme Court simply held that a special motion to strike can reach distinct claims within pleaded counts, thereby disapproving the so-called *Mann* rule that only entire causes of action can be stricken (*Mann v. Quality Old Time Service, Inc*. (2004) 120 Cal.App.4th 90, 15 Cal.Rptr.3d 215). (See *Baral*, at p. 396 & fn. 11, 205 Cal.Rptr.3d 475, 376 P.3d 604.) But *Baral* did not say that a special motion to strike must always be limited to challenges within a pleaded count. Rather, *Baral* adopted a permissive approach…. In other words, a special motion to strike, like a conventional motion to strike may be used to attack an entire pleading, such as a complaint, and various subparts of a pleading, such as a cause of action or pleaded count, as well as component paragraphs, words or phrases. Critically, in this case, Defendants did not move to strike certain subparts of Plaintiffs' complaint. Instead, they expressly moved to strike Plaintiffs' entire complaint and all claims asserted against them.

(*Ibid*.)

Likewise, *Okorie, supra,* 14 Cal.App.5th at pp. 588–590, expressed the same reasoning as to why, although it is permissive for a special motion to strike to target a discrete aspect of a cause of action, the motion should be expressly targeted to such an aspect. Otherwise, the gravamen approach continued to control. The *Okorie* Court also added:

> "in *Baral*, *supra*, 1 Cal.5th 376, 205 Cal.Rptr.3d 475, 376 P.3d 604, the court's holding was based on a conclusion that a special motion to strike was substantially similar to a conventional motion to strike. (See *id.* at p. 394, 205 Cal.Rptr.3d 475, 376 P.3d 604.) However, when a conventional motion to strike is directed at something less than an entire pleading or an entire cause of action, the notice of motion must quote in full the portions to be

> stricken so that there is no confusion among the parties and the trial court as to what is at issue and, if the motion is successful, what exactly is to be stricken. (Cal. Rules of Court, rule 3.1322.) There is, however, no such similar rule for special motions to strike either in the text of section 425.16 or the California Rules of Court. *Baral* did not address this practical but vital aspect of special motions to strike, because the anti-SLAPP motion at issue in that case did not seek to strike the entire complaint or even entire causes of action, but instead was limited to "isolated allegations within causes of action," namely all references to an audit. (*Baral*, at p. 384, 205 Cal.Rptr.3d 475, 376 P.3d 604.) Thus, *Baral* is silent on how the parties, the trial court, and (given the immediate right of appeal for special motions to strike) a reviewing court are to proceed where the plaintiff's protected and unprotected claims, as here, are not well delineated and are even enmeshed one within another and the moving party has sought to strike the entire complaint." (*Id.* at p. 589.)

These cases have thus concluded that a defendant can target an anti-SLAPP motion on limited aspects of a claim, only if that defendant identifies with precision the statements it seeks to strike, just as with other types of motions to strike. The reasoning of these cases is correct. Code of Civil Procedures section 1010 requires that, "Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based." Notice is sufficient even if the grounds are not specified in the notice itself, where they appear in documents that are referred to by the notice and attached to it or included in the record. (*Shields v. Shields* (1942) 55 Cal.App.2d 579, 583.) Notice will be deemed adequate to meet the code requirements if it fairly advises opposing counsel of the issues to be raised. (*Estate of Parks* (1962) 206 Cal.App.2d 623, 630; see also *Westphal v. Westphal* (1943) 61 Cal.App.2d 544, 550 ["The grounds of the motion must be stated in the notice (sec. 1010, Code of Civil Procedure) and the court can only consider the grounds so stated. [Citations.] The propriety of this rule is well exemplified in this case, for many facts might be urged to excuse a delay of less than five years in the prosecution of an action which would not be open to a plaintiff who had delayed for over five years. 9 Cal.Jur. 537, 540, 542."]; *Haldane v. Haldane* (1962) 210 Cal.App.2d 587, 593 [A notice of motion must state the grounds of the motion and the papers on which it

is to be based. (Code Civ.Proc. § 1010.)"]; *Jimenez v. Protective Life Ins. Co.* (1992) 8 Cal.App.4th 528, 534 ["a court may not properly grant summary adjudication of issues when the notice of motion was only for summary judgment."].) Anti-SLAPP motions with their serious implications for years of delay through the appeal process (as reflected by the *over four years* this appeal has been pending) and significant exposure to fees, should be no exception.

Since defendants here moved to strike plaintiff's retaliation claim in full, that is how this Court should now evaluate their position. As now explained, the gist of plaintiff's retaliation cause of action is not protected activity.

B. Under The Gist Or Gravamen Approach, Plaintiff's Retaliation Cause Of Action Is Not Protected Speech.

In evaluating whether a cause of action in full is based on protected conduct, the Court "examine[s] the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies." (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519–520.) The Court assesses "the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim.' " (*Hylton v. Frank E. Rogozienski, Inc*. (2009) 177 Cal.App.4th 1264, 1272.)

"[I]f the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v. Metabolife Internat., Inc*. (2004) 115 Cal.App.4th 404, 414, 9 Cal.Rptr.3d 242; accord, *Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 967–968, 179 Cal.Rptr.3d 198; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc*. (2009) 172 Cal.App.4th 1561, 1574, 92 Cal.Rptr.3d 227.) A claim based on protected activity is incidental or collateral if it

"merely provide[s] context, without supporting a claim for recovery." (*Baral*, at p. 394, 205 Cal.Rptr.3d 475, 376 P.3d 604.)

Here, defendants first argument is that plaintiff's retaliation claim falls within section 425.16, subdivision (e)(2): "any written or oral statement or writing made in connection with an issue under consideration or review by . . . any other official proceeding authorized by law." (OB 30.) Under *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, defendants are wrong.

In *Park*, this Court answered the following question: "What nexus must a defendant show between a challenged claim and the defendant's protected activity for the claim to be struck?" (*Id.* at p. 1060.) This Court concluded that "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Ibid*.)

Just as with Dr. Bonni, the plaintiff in *Park* alleged that he suffered an adverse action for an illegal reason. Dr. Bonni alleges that Defendants retaliated against him for blowing the whistle on patient safety concerns while the plaintiff in *Park* alleged he was denied tenure due to his Korean national origin. (*Id.* at p. 1061.) The defendant in *Park* argued that it was entitled to protection by the anti-SLAPP statute because it reached its adverse employment decision through the tenure decision making process—an "official proceeding" protected by the anti-SLAPP statute. (*Ibid*. ["The University argued Park's suit arose from its decision to deny him tenure and the numerous communications that led up to and followed that decision."].)

The identical is true here. Defendants argue they are entitled to protection by the anti-SLAPP statute because they reached their adverse employment decision through the peer review proceeding—also an "official proceeding" protected by the anti-SLAPP statute. (OB 39.)

In *Park*, this Court concluded the defendant did not carry its burden of proving its complained-of conduct falls within one of the four categories of conduct protected by the anti-SLAPP statute. (*Id.* at p. 1073; see Code of Civ. Proc. § 425, subd. (e).) The Court explained that the focus of a reviewing court's analysis should be on the complained-of conduct constituting an element of the plaintiff's claim, rather than conduct constituting mere evidence of the plaintiff's claim: "What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration." (*Id.* at p. 1066.) The Court noted that, "[c]onflating, in the anti-SLAPP analysis, discriminatory decisions and speech involved in reaching those decisions or evidencing discriminatory animus could render the anti-SLAPP statute 'fatal for most harassment, discrimination and retaliation actions against public employers.'" (*Id.* at p. 1067, quoting *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176, 1179.)

Applying this analysis to the claims before it, this Court concluded the defendant had not met its burden of establishing the applicability of the anti-SLAPP statute to the plaintiff's claims:

> Park has alleged that he is of Korean national origin, was qualified for tenure, and was denied tenure while other faculty of Caucasian origin with comparable or lesser records were granted tenure. The complaint also alleges a school dean "made comments to Park and behaved in a manner that reflected prejudice against him on the basis of his national origin" and that Park pursued an internal grievance, which was denied. The elements of Park's claim, however, depend not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible.

(*Id.* at p. 1068.)

Significantly, the Court then proceeded to reject specific arguments the defendant in that case made, which are identical to defendants' arguments here. Of particular note was the Court's rejection of the defendant's reliance on *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 for the proposition that its tenure decision and

the communications that led up to it are intertwined and inseparable. (*Park*, 2 Cal.5th at p. 1069.) In *Kibler*, this Court held that peer review proceedings constitute "official proceedings" within the meaning of the anti-SLAPP statute. (*Ibid*.) The *Park* Court concluded *Kibler* provided the defendant no support: "We did not consider whether the hospital's peer review decision and statements leading up to that decision were inseparable for purposes of the arising from aspect of an anti-SLAPP motion, because we did not address the arising from issue." (*Id.* at p. 1070 ["[Kibler] did not address whether every aspect of a hospital peer review proceeding involves protected activity, but only whether statements in connection with but outside the course of such a proceeding can qualify as 'statement[s] . . . in connection with an issue under consideration' in an 'official proceeding.'"]; see also *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 60–61 ["We conclude that the summary suspension of Smith for allegedly wrongful purposes was a noncommunicative act. The suspension itself is more like the act of levying on property (a noncommunicative act) than the filing of a false declaration (a communicative act). We recognize that communicative acts necessarily were related to the act of suspending Smith's privileges. For example, sending Smith the March 23, 2004, letter informing him of the suspension was a communicative act. Sending the letter, however, was not the wrongful act or the gravamen of the action, and it does not convert the wrongful act (suspension) into a communication."].)

The *Park* Court then disapproved of two cases which relied on *Kibler* to conclude that the anti-SLAPP statute to alleged discriminatory and retaliatory decisions to terminate a doctor's privileges, *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65 and *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1. (*Park*, 2 Cal.5th at p. 1069.) In disapproving of these cases, the Court observed that they both over-read *Kibler*: "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected." (*Park*, 2 Cal.5th at p. 1070.)

This Court's disapproval of *Nissan* is particularly significant because the analysis employed in *Nesson* resembles the analysis defendants urge this Court to engage in here. (Indeed, in their Respondents' Brief below, defendants argued "the facts in this case are most analogous to *Nesson*. . . ." (RB 35).) In *Nesson*, the plaintiff "a radiologist, sued defendant Northern Inyo County Local Hospital District (Hospital) after the medical executive committee (MEC) summarily suspended his medical staff privileges and the Hospital terminated his contract to provide radiology services." (*Nesson*, 204 Cal.App.4th at 72.)

Just as with defendants here, the *Nesson* Court began its analysis of prong one with an explanation of the peer review process, the importance of that process and the breadth of that process, just as defendants do. (*Id.* at p. 81.) The Court continued that Prong One was satisfied because "[t]he gravamen of each cause of action asserted by Nesson is that the Hospital somehow acted wrongfully when it terminated the Agreement because Nesson's privileges were summarily suspended, as he was deemed by the MEC to be a likely imminent danger to patient safety. . . ." (*Id.* at p. 83.)

This is precisely why defendants claim the activity alleged in plaintiff's complaint is protected. While defendants focus on statements that were made implementing the summary suspensions by Mission and St. Joseph and the later termination of privileges by Mission, the adverse employment actions suffered by plaintiff were either (1) the act of suspension and termination themselves; (2) the natural consequences of those acts; or (3) conduct that had no alleged connection with the peer review process.

In the operative complaint plaintiff alleges 16 acts by both defendant-hospitals and three additional acts by St. Joseph. (1-AA13-14.) Summary suspension is the lead act of retaliation referenced in the complaint and other retaliatory acts related to their issuance (examples 2, 12, 13); and the government reports required due to the longevity of the suspensions (example 3). Plaintiff further alleges that the termination of staff privileges was an act of retaliation (example 14). (1-AA14.) The other acts ether simply a

byproduct of the suspensions or had no alleged connection to peer review.[4] Finally, as described below, the separate alleged retaliatory acts by St. Joseph related to its breach of a settlement agreement with plaintiff (1-AA13) and is not protected speech.

Simply put, plaintiff's claim of alleged liability does not arise merely from the initiation and pursuit of the proceedings or from statements made during those proceedings. While the proceedings may be evidence of the hospitals alleged liability, they are not the basis for it. Because a claim "may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability." (*Park*, *supra*, 2 Cal.5th at p. 1060.)[5]

As now explained, the specific allegations which Defendants argue are protected are certainly not the gist of plaintiff's retaliation claim. Further, even if this Court concludes that defendants have preserved the right to challenge only specific allegations

---

[4]For example, the following acts have no express connection to peer review: (7) "[o]ngoing hostility in the work environment;" (8) "[o]bstructing other economic and career opportunities for Plaintiff;" (9) '[f]ailing to protect Plaintiff from retaliation for whistleblowers and adverse actions;" (10) "[i]ntolerable working conditions;" (11) [e]ngaging in a campaign of character assassination which caused irreparable damage to Plaintiff's reputation;" (15) "[i]mproperly using Plaintiff's confidential and private health information." (1-AA13-14.)

[5]Compare *Okorie supra,* 14 Cal.App.5th at pp. 581–583, on which defendants rely. There, the plaintiff's claims were based entirely on statements and writings. The Court was careful to note that "Plaintiffs do not allege that LAUSD ever terminated Okorie's employment. Instead they allege that "[a]s a result of the [accumulation] of the above described incidents.... Plaintiffs ... faced unimaginable humiliation and embarrassment" due to Defendants' conduct." The Court distinguished *Park*, reasoning: "Plaintiffs' complaint here is based collectively on a handful of decisions (unsupported by any evidence of discriminatory animus) *and* a wide array of allegedly injury-causing statements and communicative conduct by Defendants. In other words, the speech complained of here does not merely "supply evidence of animus." (*Ibid.*) Rather, the speech at issue is explicitly alleged to be the injury-producing conduct. Because LAUSD's speech and communicative conduct is the wrong complained of, the next question in our inquiry is whether that speech and communicative conduct was protected." (*Id.* at p. 593.) This is in sharp contrast to the present case where the acts – not just the statements – are the focus of plaintiff's retaliation claim.

in isolation, the allegations on which defendants' focus did not satisfy prong one of the anti-SLAPP statute.

1. Peer review committee discussions.

First, defendants argue that plaintiff's "initially" claimed acts of retaliation by "peer review committee discussions and otherwise 'defaming' him." (OB 34.) But the allegations defendants cite demonstrates this is not basis of plaintiff's claim. Defendants first reference the 16th and final example of retaliatory conduct plaintiff listed in his amended complaint which alleges generally: "Making defamatory statements about Plaintiff" (1-AA14) which is not even expressly linked to the peer review process.

Defendants then cite to three other passages in the appendix:

(1) AA 12-14: These are three pages of the operative complaint where plaintiff describes the various acts of retaliation engaged in by defendants. Defendants again zero in on the allegations of making defamatory statements and the allegation that defendant engaged "in a campaign of character assassination." (OB 35.) Again, these allegations do not reference peer review discussions;

(2) AA 230: This is a page from plaintiff's declaration in opposition to the anti-SLAPP motion in which he describes plaintiff's reports and defendants' failure to adequate respond to them instead referring the matter for outside review; and

(3) AA 235-236: On these pages, plaintiff initially describes his settlement with St Joseph regarding the language that was to be reported and St. Josephs breach of that contract by instead reporting different language. Plaintiff then describes Mission's retaliation by summarily suspending his privileges. In the course of this discussion (1-AA236) there is brief mention that "Dr. Rexinger had communicated to the committee that I had a high complication rate with my surgeries without any basis for his claim." (1-AA236.)

Defendants extrapolate from these record references that the lead reason why it has met prong one is that "'[t]his wide array of allegedly injury-causing statements and communication by Defendants' constitutes a necessary element of Plaintiff's claims – the alleged retaliatory acts." (OB 35.) But a review of plaintiff's complaint and his declaration reveal that removal of all reference to these communications would not alter the nature of his claim. His harm arose from the acts of suspension and revocation. In any event, the communications are not linked to the peer review process.

2. MEC "Recommendations."

Next, defendants focus on St. Joseph MEC's "recommendation' to terminate plaintiff's privileges and Mission's MEC recommendation denying his reappointment application. (OB 36.) This argument relates to the largely false charges that were brought against plaintiff in the immediate aftermath of his report regarding patient safety. Plaintiff states that the St Joseph's trumped up charges were "false and brought against me in retaliation for my reports related to patient safety" (1-AA234) and claimed the same as to Mission. (1-AA240.) But this does not bring his retaliation claim within Prong One. The leveling of these false accusation is evidence of defendants' retaliatory animus and is not itself an adverse employment action necessary to state a claim under section 1278.5.

But as this Court explained in *Park*, 2 Cal.5th at pp. 1062–1063:

> A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, "the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." [Citations.] "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89, 124 Cal.Rptr.2d 530, 52 P.3d 703; see *City of Cotati*, at p. 78, 124 Cal.Rptr.2d 519, 52 P.3d 695 [suit may be in "response to or in retaliation for" protected activity without necessarily arising from it].) Instead, the focus is on determining

> what "the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." [Citation.] "The only means specified in section 425.16 by which a moving defendant can satisfy the ['arising from'] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e)...." [Citation.]

It was the fact that these false charges were used to justify the summary suspension and ultimately the actions that were taken by the Hospital Board that caused the harm which forms the gist of plaintiff's claim. And, as already explained, those disciplinary acts are not statements or writings that implicate the anti-SLAPP statute.

None of the cases on which defendants rely bring this action within Prong One simply because plaintiff states in his declaration that defendants leveled false charges against him in retaliation for his protected activity. First, in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114–1115, the plaintiff's claims for defamation and intentional infliction of emotional distress were based entirely upon statements made during official proceedings. This Court simply held that, in order to fall with the ant-SLAPP statute, it was not necessary for those claims to also implicate a public issue. (*Id.* at p. 1113.) Unlike *Briggs*, here plaintiff is not simply claiming that defendants said harmful things against him during an official proceeding. Rather, plaintiff is alleging that the false charges were harmful because they ultimately lead to an act.

Likewise, in *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1270, the Court held that a claim against a lawyer based solely upon statements in a letter he wrote in contemplation of litigation was within the anti-SLAPP statute. Again, the actionable conduct entirely consisted of a writing or a statement, in stark contrast to here. The same is true as to *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479, where the actionable conduct in question was statements and writing of a lawyer representing a client during a probate proceedings.

3. Medical Board and NPDB Reports.

Next, defendants argue that plaintiff's reference to the fact that the reports made to the California Medical Board and NPBD inured him, brings this action with the anti-SLAPP statute. (OB 41.) Defendants are mistaken. The fact that these Reports constitute part of an official proceeding does not automatically mean that the anti-SLAPP statute applies. First, as to Mission Hospital plaintiff alleges that reporting the summary suspension to the National Practitioner Data Bank – which was the automatic byproduct of the summary suspension itself – was part of the retaliatory conduct that harmed him. But, with a limited example, plaintiff is not alleging that there was anything independently actionable as to the manner in which that Report was drafted. Thus, this conduct is another example of evidence of the hospitals alleged liability, they are not the basis for it. Because a claim "may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability." (*Park*, *supra*, 2 Cal.5th at p. 1060.)

As to St. Joseph, plaintiff does allege that the Report was drafted using language different from plaintiff's agreement with St. Joseph as to the specific language that would be used. The violation of this agreement is not protected speech (see *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc*. (2008) 164 Cal.App.4th 1108, 1118) or even privileged under Civil Code section 47 to which defendants seek analogize. (See *Stacy & Witbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, 7-8 ["The paper trail of contractual performance and course of dealing between parties under a contract cannot be immunized from use in later judicial proceedings just because that paper trail is also a publication that serves a litigation purpose. If that same paper trail amounts to wrongful performance or conduct under the contract, it escapes section 47(b)."].)

Further, the fact that plaintiff claims to have suffered damages as a result of those reports does not mean that his claims are based on those reports. As explained, those

reports were the natural consequence of the length of the suspensions imposed by defendants. Since the act of suspension is not a writing or statement during an official proceeding that is protected under the SLAPP statute, neither can the reports which are mandated due to those suspensions be protected. (See *Anderson v. Geist* (2015) 236 Cal.App.4th 79, 87.)

4. Written notices submitted during the hearing and appellate process.

Defendants next argue that plaintiff's claim "Defendants retaliated against him by affording him the very peer review hearings and appellate rights he requested to challenge the MEC recommendations." (OB 45.) Defendants cite to AA13-14. However, a review of those pages from the operative complaint leaves it unclear just what defendants are arguing. While plaintiff alleges that, as a part of defendants' campaign of retaliation, they engaged in a lengthy and humiliating peer review process for over two years" resulting in a delay of the summary suspensions and that the Appellate Committee reversed the favorable findings of the JRC (1-AA13), there are no writings and statements which plaintiff alleges were the actionable. Again, this simply demonstrates that what plaintiff is ultimately concerned with was the fact that the summary suspensions continued and that ultimately Mission terminated his staff privileges. It was not simply that there was an appeal of the JRC determination favorable to plaintiff. It was the fact that defendants orchestrated the reversal of those findings.

Finally, defendants argue that plaintiff's claims arise from defendants' participation in the JRC proceedings reviewing the charges against him. (OB 47.) Once again the fact that plaintiff claims an act of retaliation included the false charges that were reviewed during the JRC proceedings and that they dragged out those proceedings to prolong plaintiff's summary suspension, does not mean that the gist of this action was the statements or writings in an official proceeding.

In short, nothing defendants argue establishes that the gist of plaintiff's retaliation action as a whole was based on protected conduct. Further, even if the isolated allegations on which defendants now focus are evaluated, their argument fails.

C. Defendants' Effort To Salvage Its Prong One Claim By Reliance On Section 425.16's Provision Capturing Claims Arising From Conduct "Furtherance Of The Exercise Of The Constitutional Right Of Petition Or The Constitutional Right Of Free Speech In Connection With A Public Issue Or An Issue Of Public Interest," Fails.

Defendants next argue that even if they cannot establish that plaintiff's retaliation is based on a statement or writing in an official proceeding, they are still entitled anti-SLAPP protection because plaintiff's claim supposedly falls with section 425.16(e)(4). (OB 49.) That provision defines protected activity as including "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." This belated effort fails for several reasons.

D. Defendants Have Forfeited This Argument.

First, defendants have not preserved this argument since: (1) it was not argued in their anti-SLAPP motion in the trial court (1-AA40-42); (2) it was not raised in their Court of Appeal briefing; and (3) it was not raised in their Petition for Review or in their brief arguing why this Court should maintain review of this matter following *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871. Simply put, plaintiff urges this Court to decline addressing this issue which was raised for the very first time in defendants' Opening Brief on the Merits. (See Cal. Rules of Court, 8.516(b).)

The general rule is that "'issues not raised in the trial court cannot be raised for the first time on appeal.' [Citation.]" (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.) This is equally true in the context of appeals reviewing special motions to strike under the anti-SLAPP statute. (See, e.g., *Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 685 & fn. 11, disapproved on other grounds by *Lee v. Hanley* (2015) 61 Cal.4th 1225; *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1526; *Bently Reserve L.P. v. Papaliolios* (2013) 218 Cal.App.4th 418, 436.) And of course, has even more vigor whereas here an issue has been raised for the first time in briefing on the merits in this Court. (See *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 627, fn 5 [Court refuses to address issue not briefed below]; *Park*, 2 Cal.5th at p. 1072 [In rejecting a similar argument in *Park*, this Court explained that as to the tenure decision in that case "the University would have had to explain how the choice of faculty involved conduct in furtherance of *University speech* on an identifiable matter of public interest. But the University has not developed or preserved any such argument before us."].)

Defendants attempt to justify raising this argument at this late date by claiming that *Wilson*, *supra*, changed the legal landscape as to the application of section 425.16 (e)(4). But, to the extent *Wilson* changed the legal landscape in this area, it did so by clarifying the extent to which the defendant's subjective retaliatory intent affects the application of the anti-SLAPP statute, generally. (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 889 ["we do not hold that a defendant's motives are categorically off-limits in determining whether an act qualifies as protected activity under the anti-SLAPP statute. We hold only that the plaintiff's allegations cannot be dispositive of the question."]). The Court's discussion of whether the claims in that case were and were not an issue of public interest, was based on already existing and well-developed case law.

In any event, defendants cannot establish that plaintiff's retaliation claim falls with section 425.16(e)(4). First, this argument fails because plaintiff's retaliation claim is not a "public issue or an issue of public interest."

E. Plaintiff's Retaliation Claim Is Not A Public Issue.

Courts have identified "three nonexclusive and sometimes overlapping categories of statements that have been given anti-SLAPP protection." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 371, 373.) These statements "either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest." (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.)

In attempting to fit this standard, defendants make the sweeping claim that public health and public safety are generally matters of public interest. Of course, that is generally the case and in fact that is the reason why section 1278.5 was enacted in the first place. But that does not mean that every retaliation claim under section 1278.5 where one of the acts of retaliation concerned the manner in which the peer review was conducted is a matter of public interest.

As this Court has observed, "[a]t a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 625.)

In other words, "[t]he fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements" of the anti-SLAPP statute. (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280.) "In

evaluating the first prong of the anti-SLAPP statute, we must focus on 'the *specific nature of the speech* rather than the generalities that might be abstracted from it.' " (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570; *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 378.)

Further, "'it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." [Citations.]'" (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 150; *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 900.) Again, *Park* is dispositive: "Whether the grant or denial of tenure to this faculty member is, or is not, itself a matter of public interest has no bearing on the relevant questions—whether the tenure decision furthers particular University speech, and whether that speech is on a matter of public interest—and cannot alone establish the tenure decision is protected activity under section 425.16, subdivision (e)(4)." (*Park, supra,* 2 Cal.5th at p. 1072.) Just as the University in *Park* failed to establish that the tenure decision in that case was protected, defendants here fail to establish that the decisions to suspend and terminate plaintiff furthered defendants' speech on a matter of a public interest.

Wilson illustrates why defendants cannot meet this standard. There, with respect to the plaintiff's defamation claim against his employer, CNN argued that even if the plaintiff was not a public figure, his defamation claim implicated a "larger issue that indisputably *is* of public interest—journalistic ethics." (*Id.* at p. 902.)

This Court characterized arguments such as being made by defendants here as resting on "'what might be called the synecdoche theory of public issue in the anti-SLAPP statute' [Citation.]: that the discussion of a purported lapse on the part of one of its writers is equivalent to a conversation about the ethical lapses of all journalists everywhere." (*Id.* at pp. 902-903.) The Court concluded that "CNN's alleged statements about an isolated plagiarism incident did not contribute to public debate about when authors may or may not borrow without attribution. 'What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the

prospects that such speech may conceivably have indirect consequences for an issue of public concern.'" (*Id.* at p. 903.)

Likewise, to the extent plaintiff's retaliation claim implicates speech at all, it concerns matters relating to him alone and not a broader discussion of public interest just as in *Wilson*. Just because the backdrop of plaintiff's claim relates to patient health (as does every section 1278.5 retaliation claim) and just because peer review was a manner in which defendants retaliated against plaintiff, does not serve to elevate this action as to one that relates to an ongoing manner of public significance. Indeed, under defendants' analysis, since virtually every statutory retaliation claim by definition implicates matters of public interest, that would mean each and every one of them would fall under section 425.16(e)(4), which is precisely the opposite of what this Court observed in *Wilson*:

> We see no realistic possibility that anti-SLAPP motions will become a routine feature of the litigation of discrimination or retaliation claims. The anti-SLAPP statute does not apply simply because an employer protests that its personnel decisions followed, or were communicated through, speech or petitioning activity. A claim may be struck under the anti-SLAPP statute "only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted."

(*Id.* at p. 890.)

In short, defendants have failed to demonstrate that plaintiff's retaliation claim concerns a public issue or an issue of public interest.

F. Defendants Cannot Demonstrate That Plaintiff's Retaliation Claim Is Based On Defendants' Constitutional Right To Petition.

Defendants next make scatter-shot arguments as to why plaintiff's claim is supposedly based on constitutionally protected petitioning activity. (OB 57-67.) As an initial matter, petitioning activity under section 425.16(e)(4) is protected only if it also concerns an issue of public interest. (*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 870–877; 876-877 ["To avoid

underinclusion, the Legislature extended this protection to all *essential* petitioning activity, i.e., *statements* made in, or concerning, official proceedings, including lawsuits. (§ 425.16, subds.(e)(1), (e)(2).) It also extended the statute's special protections to some public speech (§ 425.16, subd. (e)(3)) and some noncommunicative conduct (§ 425.16(e)(4)); but in order to avoid *over* inclusiveness—or any more overinclusiveness than was necessary—it extended this special protection to those forms of conduct only to the extent that they implicate public issues."]; *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc*. (2010) 183 Cal.App.4th 1186, 1201 ["lf, however, the defendant's alleged acts fall under the third or fourth prongs of subdivision (e), there is an express 'issue of public interest' limitation. [Citation.]" (*Trimedica, supra,* 107 Cal.App.4th at p. 600, 132 Cal.Rptr.2d 191.)"].)

As just explained, no such public interest exists here and therefore this argument fails. In any event, even if petitioning conduct applies beyond issues of public interest, this argument is still meritless. "The right of petition refers to the right to petition the government for the redress of grievances." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1131.)

Defendants first raise a series of argument as to why summary suspensions are supposedly protected petitioning activity: (1) because they initiate peer review hearings (OB 57); (2) because they protect public safety; (3) further the purpose of the anti-SLAPP statute (OB 60); and (4) further candid reporting to law enforcement and judicial appellate rights (OB 63).

To the extent defendants argue that summary suspensions are protected because they must be reported to the Medical Board and NPDB (if of a specified duration), then this is the tail wagging the dog. The summary suspension were retaliatory in part because defendants knew that suspensions of a particular duration must be reported. The act of making such a mandatory report is therefore not protected petitioning activity. (See *Anderson v. Geist* (2015) 236 Cal.App.4th 79, 87 ["The execution of a warrant is not an exercise of rights by the peace officer; it is the performance of a mandatory duty, at the

direction of the court. . . . Because peace officers have no discretion in whether or not to execute a warrant issued by the court, it seems unlikely that a lawsuit asserting claims arising from such activity could have the chilling effect that motivated the Legislature to adopt the anti-SLAPP statute, or that extending protections of the anti-SLAPP statute to such activity would serve the statute's goals. (See § 425.16, subd. (a).)"].)

None of the cases on which defendants rely come close to justifying application of this provision to summary suspensions and the resulting reports. For instance, in *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, the cross-complainant asserted "causes of action arising from a civil enforcement action brought by Feather River Air Quality Management District against Harmun Takhar for multiple violations of state and local air pollution laws." (*Id.* at p. 18.) The plaintiff alleged a claim for waste or use of tax revenues and a claim for declaratory relief challenging the District's enforcement efforts against him. The parties agreed that the District's filing of its civil enforcement action was protected. (*Id.* at p. 27.) The Court then concluded that the District's work in preparing for the filing of that action was likewise protected because it was "'(1) incidental or reasonably related to an actual petition or actual litigation or to a claim that could ripen into a petition or litigation and (2) the petition, litigation, or claim is not a sham.'" (*Id.* at p. 769.)

Plaintiff's claim here is the opposite of *Takhar*. Defendants' summary suspensions of plaintiff were not simply acts in preparation for the mandatory reports. Rather, the summary suspensions were the wrongful conduct in and of themselves and, as already explained, the mandatory reports were simply the required harmful byproduct of the suspensions.

Next, defendants argue that the summary suspensions are in furtherance of their "petitioning" activity because those suspensions caused plaintiff to initiate peer review proceedings to challenge them. But just because defendants' wrongful conduct caused the plaintiff to initiate an administrative proceeding does not mean that the plaintiff's later retaliation claim falls within section 425.16(e)(4). (OB 49.) Rather, that provision

applies when the plaintiff seeks to impose liability *because the defendant itself has engaged in protected petitioning activity*. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66 ["The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate *that the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'"]; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 ["the statutory phrase "cause of action ... arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech."]; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193 ["Indeed, '[t]he point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights.'"].)

To repeat what defendants continue to ignore: "[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, *supra*, 2 Cal.5th at p. 1060; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) Defendants do not explain why they have "the constitutional right of petition" here or why plaintiff's retaliation claim was triggered because defendants exercised that right.

Young v. Tri-City Healthcare Dist. (2012) 210 Cal.App.4th 35, 57, is on point. There, the Defendant-District argued that its involvement in peer review proceedings implicated petitioning and speech. In rejecting this argument, the Court explained: "Even though the District had such official duties in the peer review area, *its acts of governance do not necessarily amount to its own exercise of free speech or petition*

rights. (*San Ramon, supra,* 125 Cal.App.4th 343, 354, 22 Cal.Rptr.3d 724.)" (Italics added.)

Likewise, defendants' argument that summary suspensions are protected because they further petitioning activity (OB 59), fails. Defendants seek to analogize summary suspensions to preliminary injunctions. But again, defendants still do not explain how the peer review process represents a constitutional right to petition by defendants (as opposed to plaintiff). And even if that were the case, then it is not true that summary suspensions are entitled to protection because they facilitate peer review. The summary suspension triggers the physician's right to peer review process. It is not correct to therefore say that the summary suspicion somehow simply facilitates the peer review hearing itself.

Defendants' next argument focuses on the role summary suspensions play in the peer review process. According to defendants, when used properly, summary suspensions allow hospitals to immediately prevent to immediately remove unsafe physicians. But this purpose begs the issue of whether a summary suspension facilitates a hospital's "exercise of the constitutional right of petition or the constitutional right of free speech. . . ." Just because a summary suspension may have a legitimate purpose is not the equivalent of saying that they further the exercise of these constitutional rights.

Defendants next assert that summary suspensions somehow further the anti-SLAPP statute's goal of protecting participation of public interest. (OB 60.) At the outset, the issue here is of course not whether the goal of the anti-SLAPP statute is furthered. It is whether plaintiff's retaliation claim falls within the express terms of that statute. In any event, the passage from *Park* on which defendants rely concerns "the distinction between a government entity's decisions and the individual speech or petitioning that may contribute to them." (*Park*, 2 Cal.5th at p. 1071.) Defendants thus ignore that it is necessary to establish that plaintiff's retaliation claim is based on speech or petitioning conduct. This they have not done.

Finally, defendants argue that Hospital Board disciplinary decisions are in furtherance of speech and petitioning rights. (OB 61.) They claim that such disciplinary actions (1) further petitioning rights "because they encourage petitioning to law enforcement agencies . . . ." and (2) "because they protect patients while the physician exercise appellate rights in court. . . ." (OB 62.) The gist of defendants' argument is that if hospitals are burdened with frivolous lawsuits when they discipline a physician then they may be deterred from imposing such discipline which will in turn limit the reporting of discipline to the Medical Board and the NPDB. (OB 63.)

In this way, defendants seek to distinguish *Park* where this Court stated that there the University "failed to explain how the choice of faculty involved conduct in furtherance of *University speech* on an identifiable matter of public interest." (*Park,* 2 Cal.5th at p. 1072.) According to defendants, this is not the case here because "the hospital itself engages in speech and petitioning through reporting to government agencies, specifically the Medical Board and NPDB." (OB 64.) But as already explained, these reports which were automatically triggered when plaintiff was suspended for the prescribed period are the University's exercise of its constitutional right to petition and are not the basis for plaintiff's retaliation claim.

In any event, the cases on which defendants rely do not support treating the summary suspension as an adjunct to any petitioning activity. In *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512, the Court agreed that to the extent the plaintiff's claim concerned the defendant's report of child abuse to the police, it was protected. Thus, in that case it was the law enforcement report itself which was the alleged actionable conduct. Defendants struggle to argue that this is the case here because, the mandatory nature of the reports transmutes the discipline itself into a report. But as explained above, just the opposite is true. Since the gist of plaintiff's claim is the discipline itself and since that discipline mandates the subject reports, the reports themselves are not protected. It certainly is not the case that the reports bootstrap the discipline into protected conduct.

Next, defendants appear to argue that because the ultimate decision of the Hospital could be challenged by a petition for mandate (although in a retaliation action no such challenge is required), that Hospital Board decision is simply one step in the appellate process and is therefore protected under the ant-SLAPP statute. (OB 65-66.) Defendants grasp at straws. First, as defendants acknowledge, plaintiff did not and was not required to petition for mandate prior to bringing this retaliation action. Moreover, there is no authority that all decisions that could be challenged by mandate are within the protection of the anti-SLAPP statute – regardless whether a mandate petition has been filed and regardless whether a mandate petition is the basis for the plaintiff's tort claim. Indeed, precisely the same argument if accepted would have resulted in a different outcome in *Park* as the University's tenure decisions was also subject to challenge by way of mandate. (See *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1722.)

G. The Aspect Of Plaintiff's Claim Alleging That St. Joseph Breached Its Settlement Agreement, Is Not Protected.

Finally, as to St. Joseph, defendants argue that there is protected activity because plaintiff alleges the breach of its settlement agreement as to the language that was to be used in reporting to the Medical Board and the NPDB. (OB 67.) This argument also fails.

Plaintiff is alleging that defendants' conduct in violation of that settlement was tortious. This is not protected. (See *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc*. (2008) 164 Cal.App.4th 1108, 1118 ["Defendant's entering into the settlement agreement during the pendency of the federal case was indeed a protected activity, but defendant's subsequent alleged breach of the settlement agreement after the federal case was concluded is not protected activity because it cannot be said that the alleged breaching activity was undertaken by defendant in furtherance of defendant's right of petition or free speech, as those rights are defined in section 425.16."]; *Wong v.*

Wong (2019) 43 Cal.App.5th 358, 364; *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1307–1308 [same].)

GeneThera, Inc. v. Troy & Gould Professional Corp. (2009) 171 Cal.App.4th 901, 905, on which defendants rely is easily distinguishable. There, the plaintiff was one of two defendants in an underlying action. The plaintiff sued the law firm that had represented the plaintiff in the underlying suit alleging that a settlement offer made by the firm to the second defendant in the underlying suit was tortious. The Court concluded that "[b]oth causes of action in appellants' complaint are based on TG's communication of an offer to settle the ongoing lawsuit, a matter connected with issues under consideration or review by a judicial body.[Fn] An attorney's communication with opposing counsel on behalf of a client regarding pending litigation directly implicates the right to petition and thus is subject to a special motion to strike." (*Id.* at pp. 222–223.)

Thus, it was the fact that the alleged actionable conduct consisted of the communication of a settlement offer during litigation that lead the Court to conclude that the anti-SLAPP statute applied.[6] Here, in contrast, plaintiff is not claiming that the communication of a settlement offer was tortious. Rather, plaintiff is alleging that St. Joseph simply failed to live up to its bargain. Such a breach is not protected conduct.

[6] Similarly, in *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1408, the Court did not hold that a claim was protected just because it alleged the breach of a settlement agreement. Rather, the Court held that the claim in that case was protected because the plaintiff alleged that the settlement was breached by "filing a complaint against her in a second action. The filing of a complaint fits the definition of an act in furtherance of a person's right of petition because it is a 'written ... statement or writing made in connection with an issue under consideration or review by a ... judicial body.'" (Ibid.)

CONCLUSION

For the foregoing reasons, plaintiff urges this Court to agree with the Court of Appeal that defendants have not met their burden under Prong One of the anti-SLAPP statute to establish that plaintiff's retaliation claim is based on protected activity.

Dated: May 18, 2020

GREENE, BROILLET & WHEELER, LLP

ESNER, CHANG & BOYER

By: *s/ Stuart B. Esner*
Stuart B. Esner
Attorneys for Plaintiff and Appellant

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 13,888 words as counted by the word processing program used to generate the brief.

s/ Stuart B. Esner
Stuart B. Esner

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **ANSWER BRIEF ON THE MERITS**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

☒ BY ELECTRONIC SERVICE VIA TRUEFILING Based on a court order, I caused the above-entitled document(s) to be served through TrueFiling at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the TrueFiling Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

☒ STATE I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 18, 2020, at Pasadena, California.

s/ Marina Maynez
Marina Maynez

SERVICE LIST

Aram Bonni v. St. Joseph Health System, et al.

(S244148 | G052367 | 30-2014-00758655)

Lowell C. Brown, Esq.
Debra J. Albin-Riley, Esq.
Karen Van Essen, Esq.
Diane Roldán, Esq.
ARENT FOX LLP
555 West 5th Street, 48th Floor
Los Angeles, CA 90013-1065
Telephone: (213) 629-7400
Email: lowell.brown@arentfox.com
debra.riley@arentfox.com
karen.vanessen@arentfox.com
diane.roldan@arentfox.com

Attorneys for Defendants and Respondents

Mark Quigley, Esq.
Christian T.F. Nickerson, Esq.
GREENE BROILLET & WHEELER LLP
100 Wilshire Blvd., 21st Floor
P.O. Box 2131
Santa Monica, CA 90407
Telephone: (310) 576-1200
Email: mquigley@gbw.law
cnickerson@gbw.law

Attorneys for Plaintiff and Appellant

California Court of Appeal
FOURTH APPELLATE DISTRICT, DIV. 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

(Via Mail)

Honorable Andrew P. Banks [Ret.]
Honorable Melissa McCormick
ORANGE COUNTY SUPERIOR COURT
Central Justice Center, Dept. C13
700 Civic Center Drive West
Santa Ana, CA 92701

(Via Mail)

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BONNI v. ST. JOSEPH HEALTH SYSTEM**
Case Number: **S244148**
Lower Court Case Number: **G052367**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **sesner@ecbappeal.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Answer Brief on the Merits

Service Recipients:

Person Served	Email Address	Type	Date / Time
Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	5/18/2020 5:06:56 PM
Mark Quigley Greene Broillet & Wheeler	mquigley@gbw.law	e-Serve	5/18/2020 5:06:56 PM
Lowell Brown Arent Fox LLP 108253	lowell.brown@arentfox.com	e-Serve	5/18/2020 5:06:56 PM
Debra Albin-Riley Arent Fox LLP 112602	debra.riley@arentfox.com	e-Serve	5/18/2020 5:06:56 PM
Stuart Esner Esner, Chang & Boyer 105666	sesner@ecbappeal.com	e-Serve	5/18/2020 5:06:56 PM
Karen Van Essen 278407	karen.vanessen@arentfox.com	e-Serve	5/18/2020 5:06:56 PM
Diane Roldn 288224	diane.roldan@arentfox.com	e-Serve	5/18/2020 5:06:56 PM
Christian T.F. Nickerson	cnickerson@gbw.law	e-Serve	5/18/2020 5:06:56 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/18/2020
Date

/s/Marina Maynez

Signature

Esner, Stuart (105666)

Last Name, First Name (PNum)

Esner, Chang & Boyer

Law Firm