Case No.: _____

IN THE SUPREME COURT OF CALIFORNIA

ARAM BONNI

Plaintiff and Appellant,

vs.

ST. JOSEPH HEALTH SYSTEM, et al.

Defendants and Respondents;

PETITION FOR REVIEW

After a Decision by the Court of Appeal, Fourth Appellate District,
Division Three
Case No. G052367

Appeal From The Superior Court Of Orange County
Case No. 30-2014-00758655
The Honorable Andrew P. Banks, Judge

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR REVIEW

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal arises from the vital relationship between the legally-mandated medical staff peer review process, which protects hospital patients in California, and the anti-SLAPP statute, which protects the peer review process itself. In its recent decision in *Park v. Board of Trustees of California State University*, (2017) 2 Cal.5th 1057 (*Park*), the Court determined that final adverse decisions could fall outside of the protections of the anti-SLAPP statute. Although not a peer review case, the Court in *Park* affirmed that peer review proceedings continue to be official proceedings under the statute as held in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 (*Kibler*), but raised important questions about the particular aspects of such proceedings that remain protected speech or petitioning conduct.

In the wake of the *Park* decision, the Court of Appeal issued its decision in this case, *Bonni v. St. Joseph Health System*, 13 Cal.App.5th 851 [220 Cal.Rptr.3d 598] (*Bonni*). Here, Plaintiff faced peer review of his competency to practice at two hospitals after several of his surgical patients suffered severe injuries, one nearly fatal. Following lengthy administrative hearings at both hospitals, the peer review bodies made findings adverse to him. Plaintiff then brought a lawsuit alleging retaliation against him by his physician peers and the hospitals. In its decision, the *Bonni* Court determined that Defendants failed to satisfy prong one of the anti-SLAPP analysis because Plaintiff's claims arise from Defendants' retaliatory *intent.* In doing so, the Court of Appeal disregarded whether Defendants' allegedly retaliatory actions were protected speech or petitioning activity. Accordingly, the *Bonni* decision raises two issues that remain unresolved:

A. In a lawsuit alleging retaliation or discrimination, should a defendant's purported motive or intent be considered in prong one of the anti-SLAPP analysis of whether conduct is protected speech or petitioning activity, or is motive or intent properly considered in prong two regarding plaintiff's probability of success on the merits?

B. 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?

II. INTRODUCTION

In 1992, the California legislature adopted section 425.16 of the Code of Civil Procedure (the "anti-SLAPP statute") in response to a disturbing increase in Strategic Lawsuits Against Public Participation ("SLAPP"). SLAPP suits are brought primarily to chill free speech and "continued participation in matters of public significance." (Code Civ. Proc., § 425.16(a).) Twenty-five years later, fundamental questions remain about how courts should apply the anti-SLAPP statute to retaliation and discrimination claims generally, and to the medical staff peer review process more specifically. Here, in light of the Supreme Court's recent decision in *Park*, the flawed *Bonni* decision brings into sharp relief two issues of public significance.

Under the first prong of anti-SLAPP analysis, courts must determine whether a claim arises from protected activity, meaning "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (Code Civ. Proc., § 425.16(e)(2).) If the claim arises from protected activity, the plaintiff then must establish a

probability of prevailing on the merits of its claim.

However, a conflict exists among California appellate courts as to how to apply this two-prong analysis to discrimination and retaliation claims. Some courts, including *Bonni*, hold that such claims *arise* from the discriminatory and retaliatory motive and intent, and not from the way in which that motive or intent is carried out through an adverse action. Under this framework, most, if not all, discrimination and retaliation claims will survive an anti-SLAPP motion to strike under the prong one analysis because the plaintiff need only allege discriminatory or retaliatory intent.

Other courts have concluded that discrimination and retaliation claims arise not from the motive or intent, but from the injury-producing conduct allegedly inflicted on the plaintiff, *i.e.* the adverse action. Applying this reasoning, those courts leave motive out of prong one analysis, and determine instead whether the adverse action is protected activity under the anti-SLAPP statute. Then if such conduct falls within the statute's protections, the courts proceed to prong two and consider motive or intent in determining the plaintiff's probability of prevailing on the merits.

Bonni presumes that the Supreme Court resolved this question in *Park*, but, as set forth below, a close analysis of *Park* and the pre-existing line of divergent cases reveals that the divide remains. This persistent split among the courts has wide-ranging implications for all discrimination and retaliation claims involving matters of public significance. Here, the peer review process involves not only official proceedings, but also matters that are clearly protected speech and petitioning activity. In particular, if an allegation of discriminatory or retaliatory intent is sufficient to defeat an anti-SLAPP motion in a peer review case under prong one, this effectively guts anti-SLAPP protection for peer review participants without requiring a plaintiff to show some probability of success on the merits under prong

two. By a mere allegation of retaliatory intent, hospitals and medical staffs will face lawsuits brought to chill all aspects of the peer review process.

Because *Bonni* presumed that alleged retaliatory motive bars anti-SLAPP protection on the first prong, it summarily disregarded without analysis whether the sixteen different retaliatory acts Plaintiff alleged—all within the scope of peer review—constituted acts in furtherance of Defendants' speech and petitioning rights within the meaning of the anti-SLAPP statute. If *Bonni* erred in doing so, new important questions arise as to what aspects of peer review remain protected under *Park*. *Park* affirmed that peer review proceedings constitute protected official proceedings for purposes of anti-SLAPP analysis, but explicitly questioned whether anti-SLAPP protection applies to disciplinary *decisions* reached in a peer review process, as opposed to *statements* in connection with that process. The existing conflict of law and new issues raised in *Park* affect peer review cases throughout California. Given that the peer review process "is essential to preserving the highest standards of medical practice" throughout California (Bus. & Prof. Code, § 809(a)(3)), hospitals, physicians and peer review bodies require a clear roadmap as to when and whether anti-SLAPP protection applies in a retaliation case.

III. FACTUAL BACKGROUND

Plaintiff Aram Bonni, M.D., is a urogynecologist who held active medical privileges at Mission Hospital (from 2002 to November 2010) and St. Joseph Hospital (from July to September 2010). (1 AA 35, 3 AA 741.) Defendants St. Joseph Hospital and Mission Hospital are independent nonprofit hospitals within the St. Joseph Health System. Defendants Christopher Nolan, Michael Ritter, Kenneth Rexinger, Farzad Masoudi, and Tod Lempert, are individual physicians serving on the Mission Hospital

medical staff. Defendants Randy Fiorentino, Juan Velez, and George Moro are individual physicians serving on the St. Joseph Hospital medical staff.

A. Dr. Bonni's Serious Mistakes During Robotic Surgery in 2009 Triggered Patient Care Investigations by Mission Hospital.

Between December 2009 and September 2010, four of Dr. Bonni's surgeries at defendant hospitals resulted in severe injuries to patients. The first injury occurred at Mission Hospital in December 2009. Dr. Bonni mistakenly perforated an elderly patient's mesentery and bowel tissue five times, causing "serious patient safety issues." (3 AA 742; 1 AA 229.) "The patient suffered various complications following the procedure, required a second surgery to repair the perforations, etc., and endured a protracted hospital stay." (3 AA 742.) Following the surgery, Dr. Bonni met with Mission Hospital's Chief of Staff and voluntarily agreed not to attempt any more robotic surgeries pending an investigation of his surgery skills and patient care. (1 AA 237; 2 AA 442; 3 AA 743.)

This December 2009 surgery also triggered a review of Dr. Bonni's surgical skills and clinical judgment by several Mission Hospital committees. (3 AA 741-742.) These committees identified other cases that raised concerns, including "one in which Dr. Bonni continued surgery for an hour after being advised by the anesthesiologist to stop because the anesthesiologist believed the patient was in danger, a case involving a 2,000 ml blood loss, and a case where the slender patient had a large pelvic tumor that Dr. Bonni failed to identify preoperatively." (3 AA 742.) Based on the recommendation of this committee process, Mission Hospital's Chief of Staff summarily suspended Dr. Bonni on November 1, 2010. (3 AA 743.) After reviewing the committee reports and conducting further

investigation, the Mission Medical Executive Committee ("MEC") subsequently concluded that "Dr. Bonni presented an imminent threat to patient safety, and thus the summary suspension was warranted and necessary to protect patients." (*Ibid.*)

B. Dr. Bonni's Mistakes Threatened Patient Safety in Three of Six Robotic Surgeries He Performed at St. Joseph Hospital.

Dr. Bonni withheld from St. Joseph Hospital information about the investigation ongoing at Mission Hospital and his agreement not to perform robotic surgeries there. In July 2010, Dr. Bonni began performing robotic surgeries St. Joseph. (2 AA 442.) Within Dr. Bonni's first three months at St. Joseph, three of his first six robotic surgery patients suffered severe injuries, one nearly fatal. (2 AA 434.) During that surgery, Dr. Bonni tore a patient's iliac vein while attempting a robotic-assisted dissection. (2 AA 439.) The general cardiothoracic surgeon, who took over in the operating room, testified during the peer review process that the tear Dr. Bonni made was more severe than anything else he had seen except in "gunshot wounds to the abdomen." (2 AA 440.)

The same day this surgery occurred, September 16, 2010, the St. Joseph MEC voted to summarily suspend Dr. Bonni's privileges pending an investigation. (2 AA 433.) On September 27, 2010, the OBGYN quality review committee reviewed Dr. Bonni's proctoring reports and identified "a number of concerns including poor physician technique, poor handling of tissue, texting/phoning/emailing during surgery, poor management skills and poor patient selection." The committee agreed with the recommendation to terminate Dr. Bonni's privileges. (2 AA 435.) On September 28, 2010, the St. Joseph MEC voted to continue the summary

suspension and to recommend termination of Dr. Bonni from the Medical Staff at St. Joseph Hospital. (2 AA 433.)

C. The St. Joseph and Mission Hospital Judicial Review Committees Found that Dr. Bonni Repeatedly Violated Minimum Standards of Patient Care.

Pursuant to the hospitals' respective bylaws, Dr. Bonni challenged St. Joseph and Mission's summary suspensions of his clinical privileges by requesting Judicial Review Committee ("JRC") hearings at both hospitals. Dr. Bonni had a full opportunity to present his case at both hearings. The St. Joseph JRC hearing lasted for 10 evidentiary hearing sessions and included testimony from 10 witnesses, including Dr. Bonni. (2 AA 434.) The Mission JRC hearing lasted for 30 evidentiary hearing sessions and included 16 hours of Dr. Bonni's own testimony. (3 AA 783.) Dr. Bonni also had the support of his legal counsel and expert witness at both hearings. (2 AA 434; 3 AA 775.) According to the Mission Appellate Committee, Dr. Bonni's expert generally testified that "no problem in any of [Dr. Bonni's] cases was ever his fault." (3 AA 775.)

After considering extensive evidence, committee reports, colleague physician assessments, and witness testimony, the St. Joseph JRC issued its decision in August 2012, and the Mission JRC issued its decision in April 2014. Both committees found that Dr. Bonni had exhibited poor surgical technique that endangered patients. (*See, e.g.*, 2 AA 440, 3 AA 664.)

1. Mission JRC and Appellate Committee decisions.

By a unanimous vote, the Mission Hospital JRC found that Dr. Bonni's initial summary suspension on November 1, 2010, "was reasonable and warranted." (3 AA 647.) By a vote of 3 to 2, however, the JRC recommended lifting the suspension against Dr. Bonni, concluding that he

"does not present an imminent danger." (3 AA 681.)

Both Dr. Bonni and the MEC appealed the Mission JRC's decision. (3 AA 738.) Based on a thorough review of the record, briefings, and oral argument by counsel, the Appellate Committee of the Governing Body of Mission Hospital found against Dr. Bonni. (3 AA 740.) In a lengthy written opinion, it agreed with the JRC's unanimous decision that "summary suspension of Dr. Bonni was reasonable and warranted when it was imposed in November, 2010" because he posed an "imminent danger to patients." (3 AA 771, 775.) The Appellate Committee noted Dr. Bonni's failure to accept responsibility for problems that arose during surgery and his tendency to blame the robotic equipment or other people. (3 AA 772.) The Appellate Committee cited "serious concerns about Dr. Bonni's clinical skills, judgment, and behavior" and credited evidence that Dr. Bonni showed a "significant deviation from the standard of care and [causing] a negative impact on the patient's outcome [a]s a result of this deviation." (3 AA 771.) The Mission Appellate Committee further recommended that Dr. Bonni's reappointment application be denied because he had "violated the hospital's ethical requirements when he omitted mention of disciplinary actions … in his 2011 reappointment application." (3 AA 772, 781, 788.) The Mission Board of Trustees adopted these recommendations in December 2014, thereby terminating Dr. Bonni's medical staff privileges at Mission Hospital. (3 AA 793-794.) Dr. Bonni has never sought a writ of mandate pursuant to Civil Code of Procedure section 1094.5 to overturn the Mission Board's decision.

2. St. Joseph JRC decision and settlement.

The St. Joseph Hospital JRC concluded that Dr. Bonni "demonstrated poor surgical technique" leading to patient injuries in all

three of the surgeries it reviewed, "represent[ing] a troubling trend." (3 AA 437, 439, 440.) In the third case, the JRC found that "Dr. Bonni's poor surgical technique … almost caused the death of th[e] patient." (2 AA 440.) The JRC also noted that it was "mystified" by Dr. Bonni's "casual and cavalier manner" regarding the proceedings. (2 AA 443.) Nevertheless, the JRC concluded that "the MEC could have undertaken further efforts to determine if Dr. Bonni's robotic practices could be rehabilitated." (2 AA 445.) The JRC voted against terminating Dr. Bonni and found that the MEC's suspension of Dr. Bonni's non-robotic privileges was unsupported. (*Ibid.*)

The St. Joseph MEC appealed the JRC's decision to the Board of Trustees. (1 AA 53.) However, just prior to the appellate hearing, in May 2013, Dr. Bonni entered into a settlement agreement with St. Joseph Hospital and the medical staff, to avoid further litigation and proceedings. (1 AA 53, 75.) Under the settlement agreement, Dr. Bonni agreed to resign from the medical staff and never again to apply for medical staff membership or clinical privileges at St. Joseph Hospital or any other St. Joseph Health hospital, clinic, or facility. (1 AA 75.) Dr. Bonni also released the St. Joseph entities "for all acts or omissions related to the imposition of the Adverse Action and/or the Adverse Recommendation." (1 AA 76.)

D. Dr. Bonni Sued for Retaliation Against Eight Individual Physicians and Several Health Entities Involved in the Peer Review Processes at the Two Hospitals.

On November 25, 2014, Plaintiff filed this lawsuit. Plaintiff's First Amended Complaint ("FAC") alleges retaliation in violation of California whistleblower statutes, including Health and Safety Code, section 1278.5,

against eight individual physicians and six separate health facilities, including entities that did not participate in the events giving rise to this lawsuit. (1 AA 6.)

Dr. Bonni's FAC alleges that all Defendants conspired to engage in sixteen different acts amounting to "a continuous course of conduct … designed to retaliate against Plaintiff" during the Mission and St. Joseph hospital peer review processes by, *inter alia*, summarily suspending his medical staff privileges, filing the legally-mandated report with the Medical Board of California, and invoking their appellate rights. (*See* 1 AA 13-14.)

1. Dr. Bonni's Alleged Protected Activity at Mission Hospital.

Dr. Bonni claims that Defendants purportedly took these actions in retaliation for various reports he allegedly made regarding patient safety. In the first alleged report, an email to another physician at Mission Hospital dated October 19, 2009, Dr. Bonni complained about cancelling surgeries due to difficulty scheduling surgical assistants. (1 AA 256-257.) Dr. Bonni made no claim that the Mission Hospital surgical robot was malfunctioning or causing him to tear patients' bowels. (*Ibid.*)

Two months later, on December 22, 2009, Dr. Bonni perforated a patient's bowel tissue five times, triggering patient care investigations by Mission Hospital. (1 AA 229; 3 AA 742-743.) In January 2010, Dr. Bonni emailed the same physician at Mission Hospital and stated that he "need[ed] some people that are well trained robotically to be in the room to help trouble shoot the problems that are encountered." (1 AA 260.) After Dr. Bonni agreed not to perform additional robotic surgeries at Mission Hospital pending an investigation, Dr. Bonni sent the Mission Hospital Chief of Staff a letter listing additional alleged shortcomings of the Mission robotics program. (1 AA 263-264, 237; 3 AA 743.)

2. Dr. Bonni's Alleged Protected Activity at St. Joseph Hospital.

None of these reports were made to individuals at St. Joseph Hospital. Rather, to support his claim of retaliation as to that facility, Dr. Bonni relies exclusively on general statements in his declaration that he made two presumably oral reports regarding the allegedly malfunctioning robot to two physicians at St. Joseph Hospital. (*See* Bonni Brief p. 44; 2 AA 231.) He produced no other evidence to support the claim that he reported patient safety concerns to St. Joseph.

IV. PROCEDURAL BACKGROUND

A. The Trial Court Granted Defendants' Special Motion to Strike.

On April 8, 2015, Defendants moved to strike the retaliation cause of action from the FAC pursuant to the anti-SLAPP statute. (1 AA 34.) The trial court granted Defendants' motion. (4 AA 891-892.) The court found that the gravamen of Plaintiff's retaliation cause of action "is based on defendants' protected peer review activities (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199)" and thus "the anti-SLAPP statute applies." (4 AA 892.) Regarding the St. Joseph entities, the trial court held that "Plaintiff has failed to demonstrate a probability of prevailing on his claim" because "Plaintiff's evidence does not show he engaged in any protected activity." (*Ibid.*) "Plaintiff's declaration is uncertain as to what plaintiff reported, if anything, to St. Joseph Hospital; and failed to affirmatively demonstrate plaintiff reported any concerns or advocated for any care at that facility." (*Ibid.*) Regarding the Mission Hospital entities, the trial court found that Mission had articulated a legitimate, non-retaliatory reason for disciplining Dr. Bonni

and that Dr. Bonni had failed to show the proffered explanations were mere pretext. (*Ibid.*)

B. The Court of Appeal Reversed the Dismissal of Dr. Bonni's Claim.

The Court of Appeal reversed the trial court's order granting Defendants Anti-SLAPP motion, concluding: "plaintiff's retaliation claim under the whistleblower statute [section 1278.5] 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, supra,* 220 Cal.Rptr.3d at p. 600] [emphasis in original].)

V. WHY REVIEW SHOULD BE GRANTED

A. A Split Among California Courts of Appeal Creates Confusion as to Whether Retaliatory Motive or Intent Must be Considered in the First or Second Prong of the Anti-SLAPP Analysis.

Prong one of anti-SLAPP statute requires the moving defendant to show the plaintiff's claim arises from activity protected under the statute. (*See Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) This initial test is based on the anti-SLAPP statute, which provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike…. (Code Civ. Proc., § 425.16(b)(1).)

The anti-SLAPP statute further defines an "act in furtherance of a person's right of petition or free speech" as including oral statements or writings "made in connection with" official proceedings, or other conduct in furtherance of free speech in connection with an issue of public interest. (*See* Code Civ. Proc., § 425.16(e)(2).) If a defendant satisfies the first prong, then the burden shifts to the plaintiff on the second prong to show a probability of prevailing on the merits. (*Equilon, supra,* 29 Cal.4th at p. 67.)

The Supreme Court's recent decision in *Park* addressed what it means to "arise from" protected activity. Put simply: "A claim arises from protected activity when that activity underlines or forms the basis for the claim." (*Park, supra,* 2 Cal.5th at p. 1062.) The Court explained that "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.'" (*Id.* at p. 1063, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) Thus in the tort context, the first prong of the anti-SLAPP statute is met where "the defendant's conduct by which plaintiff claims to have been injured" is the protected activity. (*Ibid.*, quoting *Equilon, supra,* 29 Cal.4th at p. 66, [italics removed].) The Supreme Court also cautioned 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." (*Id.* at p. 1060.)

This holding, however, did not directly address a lingering split in Court of Appeal cases as to whether alleged retaliatory or discriminatory motive or intent should be considered on the first or second prong of anti-

SLAPP analysis. As a result, there remains a critical question: Does a retaliation or discrimination claim arise from the adverse action itself or from discriminatory or retaliatory intent? The *Bonni* decision brought this split to the forefront when it held that discriminatory or retaliatory motive constitutes unprotected conduct under its prong one analysis and did not consider whether any of the specific actions pertaining to the peer review process are protected.[1] In other words, *Bonni* held that once discriminatory or retaliatory intent is alleged, anti-SLAPP analysis ends.

1. *Park* Holds that the Anti-SLAPP Statute Does Not Protect an Action or Decision Merely Because It Follows Protected Speech or Petitioning Activity.

The central holding of *Park* is: "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." (2 Cal.5th at p. 1060.) The Court emphasized the need to distinguish between "activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Id.* at p. 1064.)

The Court applied this principle to Professor Sungho Park's claim for employment discrimination based on national origin. First, the Court focused on "determining what 'the defendant's activity [was] that gives rise to his or her asserted liability.'" (*Park, supra,* 2 Cal.5th at p. 1063.) Park alleged that the injury he suffered, and a necessary element of his claim, was that the university denied him tenure. (*Id.* at p. 1068.) Allegations

[1] As discussed *infra*, the *Park* Court did not challenge the holding in *Kibler* that the peer review process is an official proceeding within the meaning of the anti-SLAPP statute. (*Park, supra,* 2 Cal.5th at p.1069.)

about the University's speech, namely the dean's comments, only offered evidence of animus. Thus, Park's cause of action "depend[ed] 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." (*Ibid.*)

Second, the Court considered whether the university's denial of tenure alone, as Park's only alleged injury, constituted protected activity under the anti-SLAPP statute. (*Park, supra,* 2 Cal.5th at p. 1068.) It answered no. The Court distinguished between the university's final denial of tenure and the prior deliberations that led to that decision. (*Ibid*.) The Court held that the university failed to show that its ultimate decision to deny tenure *itself* was an "act of that person in furtherance of the person's right of petition or free speech," and thus protected by the anti-SLAPP statute. (*See id.* at p. 1062; Code Civ. Proc., § 425.16(b)(1).) *Park* did not resolve the split in the Courts of Appeal as to whether discriminatory or retaliatory motive should be considered in the first or second prong of the anti-SLAPP analysis.

2. The *Bonni* Court Bypassed *Park*'s Analysis of the Action or Decision Giving Rise to Liability Under the First Prong and Concluded that Plaintiff's Claims Arose from Unprotected Retaliatory Intent.

Although the *Bonni* Court referenced *Park,* it failed to consider the nature of the speech and petitioning activity aspects of the peer review process. Defendants have consistently argued that the sixteen allegedly retaliatory actions that Dr. Bonni lists each constitute peer review activity protected by anti-SLAPP pursuant to *Kibler*, 39 Cal. 4th 192. But the *Bonni* Court disregarded whether these actions are protected activity.

Instead, *Bonni* focused its prong one analysis on whether Plaintiff's claim arose from the alleged retaliatory purpose or motive. The *Bonni* Court reasoned:

> [T]he *basis* for a retaliation claim under section 1278.5 is the retaliatory purpose or motive for the adverse action, not the adverse action itself. In the language of the anti-SLAPP statute, the claim under section 1278.5 *arises from* defendants' *retaliatory purpose or motive*, and not from how that purpose is carried out, even if by speech or petitioning activity.

(Bonni, supra, 220 Cal.Rptr.3d at p. 605[emphasis added].) As a result, *Bonni* concluded that "[d]iscrimination and retaliation claims are rarely, if ever, good candidates for the filing of an anti-SLAPP motion. This case is no exception." *(Id.* at p. 600). *Park* reached no such sweeping conclusion, but rather warned that a failure to distinguish between challenged administrative decisions and "the speech that leads to them or thereafter expresses them" would chill legitimate judicial oversight. (*Park, supra*, 2 Cal.5th at p. 1067.)

Veering from the precise holding in *Park,* the *Bonni* Court relied on *Nam v. Regents of the Univ. of California* (2016) 1 Cal. App. 5th 1176 (*Nam*). In *Nam*, a resident brought suit against a university hospital for, *inter alia*, alleged retaliation and discrimination after she rebuffed sexual advances and made complaints regarding patient care. (*See, e.g.*, *id*. at pp. 1183-84.) *Nam* determined at the outset that its "resolution of this appeal rests on the first prong of the requisite anti-SLAPP analysis . . ." (*Id*. at p. 1181.) The *Nam* Court reasoned that precedent did not "require us to ignore the defendant's alleged motive in a harassment, discrimination, or retaliation case. To conclude otherwise would subject most, if not all, harassment, discrimination, and retaliation cases to motions to strike." (*Id*.

at p. 1189.) The Court further determined that "the anti-SLAPP statute was not intended to allow an employer to use a protected activity as the means to discriminate or retaliate and thereafter capitalize on the subterfuge by bringing an anti-SLAPP motion to strike the complaint. In that case, the conduct giving rise to the claim is discrimination and does not arise from the exercise of free speech or petition." (*Id*. at pp. 1190–91.)

Relying on *Nam*, *Wilson v. Cable News Network, Inc.*, concluded that "[d]iscrimination and retaliation are not simply motivations for defendants' conduct, they are the defendants' conduct." ((2016) 6 Cal.App.5th 822, 835, *review granted*.) The plaintiff's claim for race discrimination and retaliation, the *Wilson* Court held, arose from the alleged discriminatory and retaliatory motive, not from the defendant's employment decision in furtherance of First Amendment right to decide who presents the news and how. (*Id.* at p. 836.) This decision is currently pending Supreme Court review. (*Wilson v. Cable News Network,* (2017) 389 P.3d 861.)

Nam and *Wilson* notably fail to consider the line of Supreme Court cases holding that courts only consider the merits of the plaintiff's allegations that protected conduct is invalid or illegal in the second prong of anti-SLAPP analysis. In *Jarrow Formulas, Inc. v. LaMarche*, the Court rejected the argument that malicious prosecution claims fall outside of anti-SLAPP because such conduct is by definition not a valid exercise of speech and petitioning rights. Citing *Navellier*, the Court reasoned that validity goes to the second prong merits inquiry, not the first prong threshold issue of whether the conduct is protected. ((2003) 31 Cal.4th 728, 739–740 [citing *Navellier*, *supra,* 29 Cal.4th at pp. 94–95].) The Court concluded that to hold otherwise would improperly "create a categorical exemption from the anti-SLAPP statute for malicious prosecution claims." (*Id.* at pp. 745-746.) *Bonni, Nam,* and *Wilson* effectively create such an exemption

for retaliation and discrimination claims.

Further, the Court's recent decision in *City of Montebello v. Vasquez* provides that as to the first prong, plaintiff can only defeat a defendant's showing that the conduct is protected if the plaintiff can establish its illegality as a matter of law. (2016) 1 Cal.5th 409, 424 [citing *Flately v. Mauro*, (2006) 39 Cal.4th 299, 316-318].) If the illegality is not established as a matter of law, then the court considers the alleged illegality on the second prong. (*Ibid.* at p. 424–425.) Neither *Bonni, Nam,* nor *Wilson* purport to find that the conduct at issue in those cases was illegal as a matter of law.

3. Other Court of Appeal Cases Analyze Prong One Based on Conduct Rather than Alleged Motives or Intentions.

In other cases, the Courts of Appeal have not analyzed intent or motive in the way *Nam* did. Those decisions analyzed whether the alleged conduct is protected under prong one, without analyzing the motives or subjective intentions of the defendants. For example, in *Hunter v. CBS Broad., Inc.* (2013) 221 Cal. App. 4th 1510 (*Hunter*), plaintiff brought suit alleging gender and age discrimination when defendant hired its weather news anchor. The *Hunter* Court first assessed "[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim." (*Id*. at 1520 [citation omitted]). In conducting its analysis, the *Hunter* Court distinguished conduct from alleged motives. The Court stated:

> When evaluating whether the defendant has carried its burden under the first prong of the anti-SLAPP statute, courts must be careful to distinguish allegations of conduct on which liability is to be based from allegations of motives for such conduct. Causes of action do not arise from motives; they arise from acts.

(*Ibid*. [citations omitted].)

In support of its position, *Hunter* cited to *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94, which held that "courts must distinguish between the acts underlying a plaintiff's causes of action and the claimed illegitimacy of those acts, which is an issue . . . the plaintiff must raise and support in the context of the discharge of the plaintiff's secondary burden to provide a prima facie showing of the merits of the plaintiff's case." (*Hunter, supra,* 221 Cal.App.4th at p. 1522 [internal alterations, quotations, and citations omitted].) *Hunter* then distinguished the defendant's employment decisions from plaintiff's allegations of the "purportedly unlawful motive underlying that conduct—employment discrimination." (*Ibid*.)

Hunter also rejected the suggestion "that discrimination claims are generally not subject to section 425.16" as such a conclusion would be "directly contrary to the California Supreme Court's instruction that '[n]othing in the statute itself categorically excludes any particular type of action from its operation.'" (*Hunter, supra,* 221 Cal.App.4th at pp. 1524-25 [quoting *Navellier, supra,* 29 Cal.4th at p. 92].)[2] In addition, *Hunter* did not base its holding, as *Nam* did, on the concern that a failure to consider motive on prong one would subject all harassment, discrimination, and retaliation claims to motions to strike. (*Id.* at p. 1525.) Indeed, *Hunter* noted that, "a plaintiff may pursue a discrimination claim or any other cause of action based on protected activity if he or she is able to present the 'minimal' evidence necessary to demonstrate a reasonable probability of prevailing on the merits." (*Ibid*. [citation omitted].) Accordingly, under the *Hunter* analysis, any alleged discriminatory motive properly falls within

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[2] *Wilson v. Cable News Network* concluded that the *Hunter* Court misread *Navellier* and *Tuszynska v. Cunningham* (2011) 199 Cal. App. 4th 257, 268–269 to stand for the principle that "a defendant's motives are always irrelevant to a determination of whether the defendan's acts were in furtherance of its free speech or petitioning rights." (*Wilson, supra*, 6 Cal.App.5th at p. 836.)

the second prong analysis.

Consistent with *Hunter*, other appellate cases have focused prong one analysis on whether the alleged conduct is protected, regardless of the defendant's purported motives. (*See, e.g.*, *Tuszynska, supra,* 199 Cal. App. 4th at p. 269, *disapproved of on other grounds by Park*, 2 Cal. 5th 1057 [explaining in a gender-discrimination case, the anti-SLAPP statute "applies to claims 'based on' or 'arising from' statements or writings made in connection with protected speech or petitioning activities, regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant's activities." [citation omitted]]; *see also Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271, review granted and cause transferred (Cal. 2017) 219 Cal.Rptr.3d 27 [explaining that "'the first step of the anti-SLAPP analysis focuses on the acts the plaintiff alleges as the basis for his or her claims, not the motive or purpose the plaintiff attributes to the defendant's acts; the first step considers whether those acts constitute acts in furtherance of the constitutional rights of free speech or petition.'" [quoting *Collier v. Harris* (2015) 240 Cal.App.4th 41, 53–54].)

Ultimately, the *Park* decision clearly does not specifically endorse the *Nam* line of cases over the *Hunter* line of cases. Rather, it does not address the conflict of law as it distinguishes *Hunter* on other grounds.[3] As a result, the split among the Courts of Appeal remains and merits further guidance from the Supreme Court.

[3] *Park* held that *Hunter* was inapplicable because the University failed to preserve the argument that its *decision* regarding selection of faculty itself was an exercise of free speech. (*Park*, *supra*, 39 Cal.4th at p. 1071-1072 [citing *Hunter*, *supra*, 221 Cal.App.4th at pp. 1518-1521].)

B. *Park* Leaves Open Questions about Application of the Anti-SLAPP Statute to the Peer Review Process.

Assuming that under the framework of *Park*, the *Bonni* Court should have analyzed whether the sixteen different alleged adverse actions constituted protected activity, the next question is, how does *Park* apply to peer review cases? *Park* was not a hospital medical staff peer review case. It did not grapple with the complex, legally-mandated process designed to ensure that California residents are protected from "incompetent, impaired, or negligent physicians." (*Kibler, supra,* 39 Cal.4th at p. 200.) This leaves open "whether the hospital's peer review decision and statements leading up to that decision [are] inseparable for purposes of the arising from aspect of an anti-SLAPP motion." (*Park, supra,* 39 Cal.4th at p. 1069.)

Review of the *Bonni* decision will permit the Supreme Court to provide health care providers with guidance as to what, if any, anti-SLAPP statute protection applies to whistleblower claims pursuant to Health & Safety Code section 1278.5 specifically, and peer review proceedings more broadly.

1. The Supreme Court Held in *Kibler* that Peer Review Activities Are Protected Activities under the Anti-SLAPP Statute.

By way of background, in *Kibler*, the Supreme Court held that "hospital peer review proceedings constitute official proceedings authorized by law within the meaning of section 425.16, subdivision (e)(2)." (*Kibler, supra,* 39 Cal.4th at p. 200.) In *Kibler*, as in *Bonni*, the plaintiff physician sued after the hospital's peer review committee summarily suspended him. (*Id.* at p. 196.) The hospital responded by filing an anti-SLAPP motion, arguing that all of Dr. Kibler's actions arose from protected peer review

activity, including his summary suspension. (*See Kibler v. Northern Inyo County Local Hosp. Dist.* (2005) 126 Cal.App.4th 713 [appellate court decision], aff'd (2006) 39 Cal.4th 192.) On the second prong of the anti-SLAPP statute, the trial and appellate court agreed that Dr. Kibler could not meet his burden of showing a probability of success on the merits. (*Ibid.*)

The California Supreme Court granted review and affirmed. For purposes of review, the Supreme Court accepted the trial court's finding "that Kibler's lawsuit against the hospital arose out of oral or written statements or writings made 'in connection with' (but not during the course of) the hospital's peer review proceeding that resulted in Kibler's summary suspension." (*Kibler, supra,* 39 Cal.4th at p. 198.) The Supreme Court determined that such statements made in connection with peer review, and resulting in a summary suspension, are protected activity under the first prong of the anti-SLAPP statute. (*Id.* at pp. 198, 203.)

In reaching this conclusion, the *Kibler* Court conducted an exhaustive review of the legislative intent behind the anti-SLAPP statute and the peer review regulatory scheme codified in the Business and Professions Code. (*See Kibler, supra,* 39 Cal.4th at pp. 199-201.) The Court specifically noted the important role of disciplinary decisions in the peer review process as a reason why peer review must be protected under the anti-SLAPP statute. (*See id.* at p. 200.) The Court found it undeniable that "peer review committees oversee 'matters of public significance,' as described in the anti-SLAPP statute." (*Id.* at p. 201.)

2. The *Park* Decision Left Open How the Court's Anti-SLAPP Analysis Applies to Peer Review.

The *Park* decision did not disturb *Kibler*'s holding that "a lawsuit arising out of a peer review proceeding is subject to a special motion under

section 425.16 to strike the SLAPP suit." (*Kibler, supra*, 39 Cal.4th at p. 198.) Indeed, the *Park* Court reaffirmed the basic holding in *Kibler* that peer review proceedings qualify as official proceedings pursuant to the anti-SLAPP statute. (*Park, supra,* 39 Cal.4th at p. 1069.) *Park* did, however, caution that "*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." (*Id.* at p. 1070, disapproving of *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, to the extent they indicate otherwise.) In discussing university tenure, *Park* did not decide whether any particular phase of the hospital peer review process, such as a summary suspension, the legally-mandated filing of reports to the California Medical Board, appeals of peer review decisions, or final hospital board decisions to terminate privileges, falls outside of the anti-SLAPP statute's protections. The peer review process often involves several phases and actions, some, if not all of which comprise legally-mandated speech and petitioning.

3. *Bonni* Raises Important Questions Regarding the Application of *Park* to the Peer Review Process.

Because *Bonni* sidestepped the issue entirely by examining only retaliatory intent in the prong one analysis, trial courts and litigants lack guidance in applying *Park* to the complex and multi-stage peer review process. The roadmap is not self-evident as the underlying adverse acts alleged in *Park* and *Bonni* differ significantly. In *Park*, the plaintiff's discrimination claim relied upon only one adverse action, namely the decision to deny tenure. In contrast, Dr. Bonni's FAC alleges that each and every one of the myriad peer review activities form the basis of his

retaliation claim.

Indeed, Dr. Bonni alleges that Defendants retaliated against him by engaging in sixteen specific actions, all of which are potentially inseparably tied to peer review activity.[4] (1 AA 14.) Because Dr. Bonni alleges that each of these acts constitutes a separate adverse action against him, the *Park* framework requires the Court to determine whether each part of the peer review process at issue independently constitutes an act in furtherance of Defendants' speech and petitioning rights.

a. Dr. Bonni's Allegations Regarding the Abuse of Process and Denial of His Rights Could be Construed as Inseparable from the Peer Review Process.

Most broadly, Dr. Bonni alleges that "Defendants retaliated against Plaintiff by abusing the powers of the peer review process and by subjecting him to a lengthy and humiliating peer review process…" (1 AA 11.) This allegedly abusive process includes "challeng[ing] the favorable findings of the [Judicial Review Committee]," "refusing to lift Plaintiff's summary suspensions," and failing to "give appropriate weight to the findings which were favorable to the plaintiff." (1 AA 13.) He further alleges that in an effort to retaliate against him Defendants denied him "due process, a hearing, an investigation, [and other] procedural protection[s]." Dr. Bonni's retaliation claim directly challenges Defendants' exercise of their right (and obligation) to conduct hearings (that Dr. Bonni initiated), to

[4] The peer review process is defined by statute as including any process by which "a peer review body reviews … staff privileges" to "[d]etermine whether a [physician] may practice or continue to practice in a health care facility…." (Bus. & Prof. Code § 805(a)(1)(A).)

appeal rulings by a judicial review committee, and, in the case of the Mission Appellate Committee, to set forth in a written decision the basis for its findings. These activities include core petitioning rights, such as each party's right to appeal. Moreover, the conduct of the hearings necessarily involves speech. This includes the right of both parties to have a record of the proceedings, to call, examine and cross-examine witnesses, present and rebut evidence, and to submit a written statement at the close the hearing. (Bus. & Prof. Code, § 809.3(a).)

Park only addresses whether the decisions, not the communicative activity involved in the process itself, are protected. (*Park, supra,* 2 Cal.5th at p. 1070.) Most of the activities alleged to have constituted abuse of the peer review process would still qualify, at minimum, as an "act in furtherance" of Defendants' right of petition or free speech" as part of the protected peer review process. (*See Kibler, supra,* 39 Cal.4th at p. 198.) Even the more vague retaliatory acts alleged, such as "defamation" and "character assassination"[5] clearly refer to speech made in connection with the peer review process. (*See* Respondent's Brief at p. 35.)

b. Legally Mandated Reporting of Summary Suspensions and Termination of Privileges Likely Constitute Written Statements Made in Connection with the Peer Review.

Park considered whether "disciplinary *decisions* reached in the peer review process, as opposed to statements made in connection with that

[5] The complaint alleges no facts associated with "defamation" or "character assassination," except that physicians participated in peer review proceedings, and that the hospitals reported his summary suspensions, as required by law, to the California Medical Board.

process, are protected." (*Park, supra,* 2 Cal.5th at p. 1070 [emphasis added].) Here, Business and Professions Code Section 805 *requires* Defendants to file an "805 Report" with the Medical Board of California and a report with the National Practitioner Data Bank following a termination or extended suspension. (Bus. & Prof. Code § 805(b), (c), (e).) Defendants' compliance with this obligation to report could be construed as a statement made directly in connection with the protected peer review process, and thus, still protected under *Park*. (*See* Bus. & Prof. Code § 805(b), (c), (e); Bus. & Prof. Code § 809.8; Civ. Code Pro. § 425.16(a)(16).)

c. As Integral Parts of the Hospital Peer Review Process, Summary Suspensions and Terminations Could be Considered Protected Peer Review Activity under the Anti-SLAPP Statute.

Summary suspensions and ultimate adoption of termination recommendations are critical to, and integrated into, the peer review process. Summary suspensions and terminations are core authorized activities of a peer review body. (Bus. & Prof. Code, § 809.5(a); Bus. & Prof. Code § 805(a)(5).) As such, they constitute "act[s] in furtherance of a person's right of petition or free speech" . . . "made in connection with" . . . "official proceedings." (*Kibler, supra,* 39 Cal.4th at p. 199, citing Code Civ. Proc., § 425.16(a).)

Summary suspensions and terminations also inherently involve speech as they must be communicated in writing by law. (*See e.g.* Bus. & Prof. Code § 805(b), (c), (e) [peer review bodies must file an 805 report with the Medical Board of California following a termination or extended

suspension]; Bus. & Prof. Code § 809.1 [peer review bodies must provide written notice to physicians of any "final decision or recommendation of the peer review body after informal investigatory activity or prehearing meetings" and their rights to request a hearing"]; Bus. & Prof. Code §809.8 [peer review bodies must provide written statements regarding physicians' suspensions when properly requested by another peer review body].)

No such regulations applied to the tenure decision in *Park*. Unlike in *Park*, the written notice communicating the decision to suspend or terminate privileges is not merely incidental. (*Cf Park, supra,* 2 Cal.5th at p. 1068 ["The tenure decision may have been communicated orally or in writing, but that communication does not convert Park's suit to one arising from such speech."].) Pursuant to Business and Professions Code section 809.4, subsection (a), peer review bodies issuing decisions following a hearing must provide a "written decision … including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached" as well as "a written explanation of the procedure for appealing the decision, if any appellate mechanism exists."

Further, summary suspensions are distinct from the decision to deny tenure in *Park* because these suspensions mark the beginning of the peer review process, not the end. Summary suspensions are only permitted on an emergency basis "where the failure to take that action may result in an imminent danger to the health of any individual." (Bus. & Prof. Code, § 809.5 [permitting summary suspensions, "provided that the licentiate is subsequently provided with the notice and hearing rights set forth in Sections 809.1 to 809.4"].) In contrast, the termination of a physician's privileges, such as happened with Dr. Bonni's privileges at Mission,

typically follows extensive peer review, due process, hearing rights afforded to the embattled physician, appellate rights of both parties, and a hospital Board review. The hospital Board makes the final decisions, based on the medical staff's robust petitioning activity and recommendation.

Recent case law further distinguishes temporary summary suspensions from the final denial of tenure presented in *Park*. Under the recently-decided case *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, the Court held that physicians are not required to exhaust either administrative or judicial remedies prior to filing a lawsuit for retaliation based on their summary suspensions. In other words, as soon as a medical staff suspends a physician, the physician may immediately sue the medical staff for retaliation (and perhaps *in* retaliation for the suspension). Because the peer review proceedings will proceed in parallel with the retaliation lawsuit, there is a dramatically increased risk that peer physicians' "continued participation in matters of public significance"—the peer review process—will be chilled "through abuse of the judicial process." (*See Kibler, supra,* 39 Cal.4th at p. 199, quoting Code Civ. Proc., § 425.16(a).)

4. Dr. Bonni's Claim May Still "Arise From" Protected Activity Even If One or More of the Sixteen Alleged Acts of Retaliation Is Unprotected.

Even if some of the allegations supporting Dr. Bonni's retaliation cause of action describe unprotected activity, the cause of action could still "arise from" protected activity. Pursuant to *Baral v. Schnitt*, if a claim arises from both protected and unprotected activity, the court should only consider the protected activity for purposes of ruling on the motion to strike. ((2016) 1 Cal.5th 376, 396.) If plaintiff is unable to show that it is

likely to succeed on the merits of the claim based on protected activity, then those allegations are stricken. (*Ibid.*) Further guidance on the application of *Park* to the steps of peer review at issue in *Bonni* will determine what, if any, impact the holding in *Baral* has.

C. Removing Anti-SLAPP Protections from Peer Review Discipline Would Undermine the Legislature's Goal of Protecting Patients.

The policy implications of denying anti-SLAPP protection to any and all aspects of the peer review process in a retaliation case should not be ignored. (*Kibler, supra,* 39 Cal.4th at p. 199 [anti-SLAPP statute should be "broadly" construed to encourage physicians' voluntary participation in peer review proceedings].) The *Bonni* Court's misreading of *Park* has serious, and untenable, consequences both for this and future cases. Doctors who have endangered patients' lives would be able to derail all aspects of the peer review processes by merely *alleging*, *without any proof,* that they previously engaged in protected activity and that the actions taken against them were retaliatory. Indeed, that is precisely what Dr. Bonni did in this case.

According to the *Bonni* Court, the analysis should end there. Because Dr. Bonni alleges, without further proof, that the peer review process was motivated by retaliatory intent, he has the unfettered right to proceed with litigation and discovery against the hospitals, medical staffs and individual doctors responsible for evaluating and disciplining him after he endangered several patients' lives. As a result, any time a physician is subjected to any kind of scrutiny or discipline in peer review proceedings, he or she could make an unmeritorious and unsubstantiated complaint about the facility or its personnel, just as the trial court found Dr. Bonni did in the

case of Mission Hospital. (3 AA 742.)

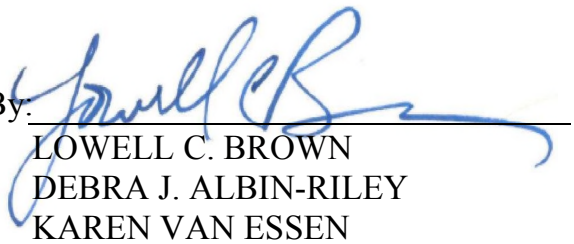
Indeed, the *Bonni* Court's overbroad reading of *Park* means that physicians need not even show that the defendant imposed an adverse decision. Under *Bonni*, any part of the peer review process escapes anti-SLAPP protection so long as a retaliatory motive is alleged. These abuses are contrary to the purposes of the anti-SLAPP statute. This result cannot serve California's patient protection goals and has further undermined the purposes of official peer review process that necessarily invokes the protections of the California anti-SLAPP statute.

VI. CONCLUSION

Peer review participants face important new questions about the application of anti-SLAPP protection to retaliation and discrimination claims generally and the peer review process specifically. Appellate courts, including the *Bonni* Court, have reached inconsistent decisions as a result of differing views of when and how motive should be considered under the two-step anti-SLAPP analysis. And *Park* raises new questions about the application of anti-SLAPP protection to peer review, which remain unresolved in *Bonni*. By reviewing *Bonni*, the Supreme Court could provide resolution and certainty to California's medical community.

Dated: September 5, 2017

ARENT FOX LLP

By: 

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CERTIFICATE OF WORD COUNT

It is hereby certified that, pursuant to California Rule of Court 8.504(d)(1), the attached Petition uses 13-point Roman type and contains approximately 8144 words, including footnotes and excluding the cover, tables, signature block and this certificate.

Counsel relies on the word count Microsoft Word used to prepare this brief.

Dated: September 5, 2017

ARENT FOX LLP

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OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ARAM BONNI, Plaintiff and Appellant, v. ST. JOSEPH HEALTH SYSTEM et al., Defendants and Respondents.	G052367 (Super. Ct. No. 30-2014-00758655) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Andrew P. Banks, Judge. Reversed.

Greene, Broillet & Wheeler, Mark T. Quigley, Scott H. Carr, Christian T.F. Nickerson; Esner, Chang & Boyer, Stuart B. Enser and Joseph S. Persoff for Plaintiff and Appellant.

Arent Fox, Lowell Brown, Debra J. Albin-Riley and Diane Roldan for Defendants and Respondents.

* * *

Plaintiff Aram Bonni, a surgeon, sued St. Joseph Hospital of Orange (St. Joseph), Mission Hospital Regional Medical Center (Mission), and other defendants for, inter alia, retaliation under Health and Safety Code, section 1278.5 (the whistleblower statute).[1] Plaintiff alleged defendants retaliated against him for his whistleblower complaints by summarily suspending his medical staff privileges and conducting hospital peer review proceedings.

In response to plaintiff's filing of his first amended complaint (FAC), defendants filed a special motion under Code of Civil Procedure section 425.16 (the anti-SLAPP statute)[2] to strike plaintiff's retaliation cause of action, asserting his claim arose from the protected activity of hospital peer review proceedings.

The court granted defendants' anti-SLAPP motion as to both St. Joseph and Mission. The court determined, first, that defendants had met prong one of the anti-SLAPP statute's two-part test, which requires a moving defendant to show the plaintiff's claim arose from activity protected under that statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

The court then proceeded to prong two of the anti-SLAPP test, which requires a plaintiff to show a probability of prevailing on his or her claim. (*Equilon*, *supra*, 29 Cal.4th at p. 67.) The court concluded plaintiff's proof failed as to both defendants.

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[1] Plaintiff's operative complaint also named as defendants some other entities and individuals related to Mission and/or St. Joseph.

The whistleblower statute prohibits health facilities from retaliating against, inter alia, a member of the medical staff of the health facility because that person has presented a grievance, complaint, or report to the facility or its medical staff. (Health & Saf. Code, § 1278.5, subd. (b)(1)(A).)

[2] The acronym SLAPP (strategic lawsuit against public participation) refers to a harassing lawsuit brought to challenge the exercise of constitutionally protected free speech rights. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 196 (*Kibler*).)

We conclude 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. Discrimination and retaliation claims are rarely, if ever, good candidates for the filing of an anti-SLAPP motion. This case is no exception. Accordingly, defendants' motion to strike fails on prong one of the anti-SLAPP test and we reverse the order granting defendants' motion.

FACTS

Plaintiff's FAC

Plaintiff's FAC alleged, inter alia, that defendants violated the whistleblower statute by retaliating against him for reporting "suspected unsafe and substandard conditions and services" at defendants' hospitals, including defendants' lack of committed assistants for robotic surgical procedures, and defendants' malfunctioning robot, camera, and bleeding-control devices. The FAC alleged defendants retaliated against plaintiff for his whistleblower complaints by, inter alia, suspending and ultimately denying him his medical staff privileges, after subjecting him to a lengthy and humiliating peer review process.

Defendants' Anti-SLAPP Motion

In response, defendants filed an anti-SLAPP motion to strike the FAC's retaliation cause of action. Defendants argued: "Plaintiff . . . exhibited consistent patterns of poor judgment and surgical techniques that caused serious complications — and in some cases near death — for his patients. . . . In light of the imminent danger to future patients of these serious and life-threatening behaviors, Defendants summarily suspended Plaintiff and thereafter conducted peer review proceedings according to

California law and the Hospitals' bylaws, to ensure patient safety." Defendants further argued that (1) plaintiff's retaliation claim arose from defendants' peer review processes; (2) such processes constitute protected activity under the anti-SLAPP statute; and (3) plaintiff could not show a probability of success on his retaliation claim because he lacked "admissible evidence indicating Defendants acted to retaliate against him."[3]

Defense counsel filed a declaration in support of defendants' anti-SLAPP motion. Exhibit 1 to counsel's declaration was the decision of St. Joseph's judicial review hearing committee, which stated that plaintiff experienced complications in three of the first six robotic procedures he performed at St. Joseph. Exhibit 3 to counsel's declaration included Mission's appellate committee report, which stated that the "focused review process was triggered by a December, 2009 case in which [plaintiff] perforated the patient's mesentery and bowel tissue five . . . times. The patient suffered various complications following the procedure, required a second surgery to repair the perforations, . . . and endured a protracted hospital stay."

Plaintiff's Opposition

Plaintiff opposed defendants' anti-SLAPP motion, arguing defendants failed to show his claim was a SLAPP, and alternatively, that plaintiff could make "the minimal showing necessary to establish a probability of prevailing on the merits."

In plaintiff's declaration supporting his opposition, he declared, inter alia: "In or about March of 2009, I became aware of numerous patient safety issues involving the da Vinci robot . . . robotic surgery program at Mission Hospital. Specifically, the robotic surgery program at Mission was grossly understaffed and underfunded, which had a direct and adverse impact on patient safety. At times, I was unable to complete

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[3] Defendants further argued, as to St. Joseph, that plaintiff had signed a release. Plaintiff's declaration supporting his opposition to defendants' anti-SLAPP motion contended St. Joseph breached the "settlement agreement."

scheduled surgeries due to inadequate staffing. On October 19, 2009, I reported these patient safety concerns to Dennis Haghighat M.D., vice president of medical affairs at Mission. I requested that these issues be corrected in order to improve the safety of patients at Mission and St. Joseph. A true and correct copy of this report is attached hereto as Exhibit 2. Unfortunately, Mission and St. Joseph did nothing to correct or address these patient safety concerns."

Exhibit 2 is plaintiff's October 19, 2009 e-mail message to Haghighat, in which plaintiff stated he had been forced to cancel a few robotic surgeries due to the unavailability of an assistant surgeon and asking if Mission could allocate a scrub technician to serve as the assistant. The subject line of plaintiff's e-mail message is "Robotic Surgery at Mission." In this e-mail message, plaintiff never mentions St. Joseph.

Plaintiff's declaration continued: "On December 22, 2009, I performed a robotic surgical procedure at Mission on an elderly woman . . . . During this surgery, the da Vinci robot malfunctioned which caused serious patient safety issues, including complications during the surgery, as well as a 42 minute delay. Specifically, the 3D Camera on the robot malfunctioned. Due to inadequate staffing and training, the Mission Staff had extreme difficulties correcting the problem with the robot. After some delay, the Mission Staff finally located the replacement camera and brought it in. Unfortunately, the Mission Staff were unfamiliar with [the] existence and location of that camera. Following the issue with the camera, the Monopolar scissors, as well as the cautery, on the robot malfunctioned. This is the instrument that is used to cauterize and cut tissues. This instrument was later recalled by Intuitive Surgical Inc., the manufacturer of the da Vinci robot. . . . [¶] . . . Once again, I reported these patient safety concerns regarding the malfunctioning da Vinci robot to Dennis Haghighat, M.D on January 11, 2010. . . . A true and correct copy of this report is attached hereto as Exhibit 3. Instead of addressing these issues, Mission referred the case to the Quality Review Committee

for outside review of my performance of the December 22, 2009 surgery. I believe that this was done in retaliation for my reports regarding the inadequate robotics program and substandard hospital equipment and staff."

Exhibit 3 is a string of e-mail messages, starting with plaintiff's December 22, 2009 e-mail statement to an alleged da Vinci representative that the camera, port assistant, and other problems had consumed 42 minutes. The da Vinci representative acknowledged "the camera had some issues," but also stated "no other robotically trained surgeons at Mission [have had] this many repeated issues on every case." Plaintiff then e-mailed Haghighat that "[w]e need some people that are well trained robotically to be in the room to help trouble shoot the problems that are encountered" and that "losing about 42 minutes to side issues during an already long and winding surgery could and should be avoided."

Plaintiff's declaration continued: "On or about April 30, 2010, in the interest of patient safety, I once again reported my concerns regarding the malfunctioning da Vinci robot and inadequate robotic program to [Nolan, Mission's chief of staff, and Kenneth Rexinger, M.D., Mission's chief of quality review]. . . . Specifically, I again reported the following patient safety concerns: (1) the lack of a committed assistant for the procedure, (2) lack of committed [operating room] staff, (3) lack of appropriately trained scrub techs, (4) lack of availability of appropriate instruments in general, (5) the malfunctioning camera on the da Vinci robot and (6) the malfunctioning of the devices on the da Vinci robot to control bleeding. A true and correct copy of this report is attached hereto as Exhibit 4. . . ."

Exhibit 4 is plaintiff's letter to Nolan, explaining the circumstances surrounding the December 22, 2009 robotic surgery and reciting the above six patient safety concerns. The letter is undated, but allegedly sent in March 2010.

Plaintiff's declaration continued: "On August 20, 2010, I reported my concerns regarding the malfunctioning robot again to Defendant Dr. Juan Velez, Chief of

Obstetrics/Gynecology at St. Joseph. On September 15, 2010 I reported these same concerns to Defendant Randy Fiorentino at St. Joseph. As outlined in further detail below, I also reported these patient concerns yet again to Mission on October 1, 2010 and November 11, 2010. See Exhibits 5 and 6." (Italics added.)

Exhibit 5 is plaintiff's October 1, 2010 letter to Thomas Bailey, M.D., chief of Mission's department of women and infants, attaching a copy of plaintiff's March 2010 letter to Nolan and a copy of an October 1, 2010 letter to Bailey from Dr. Michael Hibner of the Creighton University School of Medicine, opining that "during the December 2[2], 2009 surgery," plaintiff "did *not* deviate from the standard of care." (Italics added.)

Exhibit 6 consists of plaintiff's November 11, 2010 e-mail communications with Jane Kessinger of Mission's medical staff office, attaching copies of documents for purposes of plaintiff's peer review process.

Plaintiff's declaration continued: "The December 22, 2009 case . . . was reviewed by Mission's own expert Dr. Moses, who determined that my performance during this surgery was within the standard of care. . . . Dr. Hibner also reviewed my performance during this surgery, and found that I was within the standard of care. Dr. Hibner is double board certified in Urogynecology and minimally invasive surgery. He teaches robotic surgery to advanced pelvic surgeons, and has performed thousands of robotic surgeries. . . . Further, and perhaps most telling, on March 22, 2010, Mission Director of Medical Staff Services Denise Rollins reported to St. Joseph that I was a member in good standing at Mission, that there were no disciplinary actions against me, and that there were no significant issues with respect to me or my practice at Mission."

Defendants' Reply

In their reply memorandum, defendants argued that all activities at issue in plaintiff's retaliation claim constituted protected peer review activities at Mission and St.

Joseph. Plaintiff could not show a probability of success because he had no admissible evidence that such "peer review activities were motivated by retaliatory animus." Defendants' actions "were motivated by concerns for patient safety because of Plaintiff's poor surgical technique . . . ." As to St. Joseph, plaintiff failed to submit any admissible evidence "that he actually made a complaint to St. Joseph's Dr. Velez on August 20, 2010 or to Dr. Fiorentino on September 15, 2010." As to Mission, even assuming Mission took adverse actions within 120 days of plaintiff's reporting patient safety concerns (so as to trigger the rebuttable presumption of retaliation under subdivision (d)(1) of the whistleblower statute), an employer can rebut the presumption "by articulating a legitimate, nondiscriminatory reason for the challenged action." "Once the employer does so, the presumption disappears and the employee must point to evidence which nonetheless raises a rational inference that retaliation occurred."

The Court's Ruling

The court granted defendants' anti-SLAPP motion as to both Mission and St. Joseph. Applying the first prong of the anti-SLAPP test, the court determined that the gravamen of plaintiff's retaliation claim was based on defendants' protected hospital peer review activities.

Proceeding to the second prong of the anti-SLAPP statute, the court ruled that the plaintiff had failed to meet his burden to demonstrate a probability of prevailing on his retaliation claim.

DISCUSSION

General Principles of Applicable Law

In evaluating an anti-SLAPP motion, the court conducts a potentially two-step inquiry. (*Equilon*, *supra*, 29 Cal.4th at p. 67.) First, the court must decide whether

the defendant has made a threshold showing that the plaintiff's claim *arises from* protected activity. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) To meet its burden under the first prong of the anti-SLAPP test, the defendant must demonstrate that its act underlying the plaintiff's claim fits one of the categories spelled out in subdivision (e) of the anti-SLAPP statute. (*Navellier*, at p. 88.) One such category of protected activity includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(2).)

Second — *if* the defendant meets its burden of showing all or part of its activity was protected — then the court proceeds to the next step of the inquiry. At this stage — applying the second prong of the anti-SLAPP test — the court asks "whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon*, *supra*, 29 Cal.4th at p. 67.)

An appellate court reviews a trial court's ruling on an anti-SLAPP motion de novo, applying the legal principles and two-prong test discussed above. (*Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 998.) Here, we conclude defendants' motion fails on the first prong. Plaintiff's cause of action for retaliation under the whistleblower statute is not a SLAPP. It does not arise from protected activity. Thus, we need not analyze whether plaintiff has demonstrated a probability of prevailing.

Plaintiff's Retaliation Claim Does Not Arise From Protected Activity

We turn then to the first prong of the anti-SLAPP test, i.e., whether plaintiff's retaliation claim *arose from* protected activity under the anti-SLAPP statute. Plaintiff concedes he alleged retaliatory acts by defendants "that arose during [hospital] peer review proceedings." (*Kibler*, *supra*, 39 Cal.4th at p. 198.) But he argues his retaliation claim against defendants "arises out of [their] decisions to initiate the summary suspensions."

Recently, in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 (*Park*), our Supreme Court reiterated and clarified what it had said 15 years ago in *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78: "'[T]he 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.'" (*Park,* at p. 1063.) The plaintiff in *Park* was a tenure-track assistant professor at the defendant university. When the university denied his application for tenure, Park, who was of Korean national origin, sued the university for national origin discrimination. The university responded with an anti-SLAPP motion. (*Id*. at p. 1061.) Our Supreme Court concluded the plaintiff's claim did not *arise from* an act in furtherance of speech or petitioning activity and therefore was not subject to the anti-SLAPP statute. (*Id*. at pp. 1060-1061.) The *Park* decision was issued after oral argument in this case. At our request, the parties submitted supplemental letter briefs on the applicability, if any, of the *Park* decision to the issues presented by this appeal.

In *Park*, the high court examined the nexus that must be shown "between a challenged claim and the defendant's protected activity," and held 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." (*Park*, *supra*, 2 Cal.5th at p. 1060.) "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*.) The lower appellate court in *Park* had ruled that a "claim alleging a discriminatory decision is subject to a motion to strike so long as protected speech or petitioning activity contributed to that decision." (*Id*. at p. 1061.) The Supreme Court *reversed* that reasoning as erroneous. (*Ibid*.)

Thus, the *Park* court made clear that in evaluating whether plaintiff's claim is a SLAPP, it is not sufficient merely to determine whether plaintiff has alleged activity protected by the statute. The alleged protected activity must also form the basis for

plaintiff's claim. The *Park* court counseled that "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park*, *supra*, 2 Cal.5th at p. 1063.)

Accordingly, as suggested by *Park*, we first consider the elements of a claim under the whistleblower statute at issue here, Health and Safety Code, section 1278.5. As relevant to our inquiry, it provides, "No health facility shall discriminate or retaliate, in any manner, against any . . . member of the medical staff . . . of the health facility because that person has" "[p]resented a grievance, complaint, or report to the facility . . . or the medical staff of the facility . . . ." (Health & Saf. Code, § 1278.5, subd. (b)(1)(A).) Plainly, a defendant health facility may take all manner of adverse actions against an employee or medical staff member (including protected activities defined in subdivision (e) of the anti-SLAPP statute) without violating section 1278.5, so long as the adverse action is not taken to discriminate or retaliate because the employee or staff member made a complaint to the facility. In the absence of a retaliatory or discriminatory purpose motivating the adverse action, there is simply no liability under Health and Safety Code section 1278.5. Thus, the *basis* for a retaliation claim under section 1278.5 is the retaliatory purpose or motive for the adverse action, not the adverse action itself. In the language of the anti-SLAPP statute, the claim under section 1278.5 *arises from* defendants' retaliatory purpose or motive, and not from how that purpose is carried out, even if by speech or petitioning activity.

In defendant's letter brief, they argue that summary suspensions and terminations of a physician's medical privileges are protected activities under prong one of the anti-SLAPP test. Defendants attempt to distinguish the hospital peer review process from the "deliberative process involving a university president's tenure"[4] that

[4] *Park* involved the denial of tenure to "a tenure-track assistant professor," not a university president. (*Park*, *supra*, 2 Cal.5th at p. 1061.)

was at issue in *Park*. Defendants note that the "complex, multi-faceted" hospital peer review process is based on a statutory scheme intended to "protect the health and welfare of the people of California." (Bus. & Prof. Code, § 809, subd. (a)(6).) Defendants conclude, "Given the critical public interest in patient safety, [defendants] contend that notwithstanding the *Park* decision, all acts in furtherance of the [hospital] peer review process — including preliminary physician reviews, initial investigations, summary suspensions, committee hearings, and a hospital governing board's decision to accept disciplinary recommendations such as termination of privileges — are 'subject to a special motion to strike.'"

But the defendant in *Park*, *supra*, 2 Cal. 5th 1057, similarly argued "that decisions and the deliberations that underlie them are indistinguishable for anti-SLAPP purposes" (*id*. at p. 1069), relying on *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, which involved hospital peer review proceedings. (*Park*, at p. 1069.) The Supreme Court rejected the defendant's argument. The *Park* court clarified that the *only* issue decided in *Kibler* was whether a hospital peer review proceeding was an """official proceeding""" within the meaning of the anti-SLAPP statute. *Kibler* 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." (*Park*, at p. 1069.) *Park* disapproved *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, to the extent they "overread *Kibler*," noting that *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*, at p. 1070.) To that we would add: It matters not whether activity can be described as "protected" as meeting one of the definitions of protected activity in subdivision (e) of the anti-SLAPP statute. What matters is whether plaintiff's claim arises from that activity. Here, where liability under the whistleblower statute is

premised on retaliatory adverse action taken in response to a protected complaint, the plaintiff's claim arises from the retaliatory motive or purpose.

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.'" But merely 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.

The *Park* decision cannot be easily distinguished. Although *Park* involved a university tenure process conducted in an allegedly discriminatory fashion, its rationale translates easily to the allegedly retaliatory peer review process at issue here. Here is what the court said in *Park*, "The elements of Park's claim . . . 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. The tenure decision may have been communicated orally or in writing,

but that communication does not convert Park's suit to one arising from such speech. The dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability." (*Park*, *supra*, 2 Cal.5th at p. 1068, italics added.)

The high court's analysis in *Park* relied in part on the recent case of *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176 (*Nam*), a case not involving a peer review process, but nevertheless bearing similarity to the case at bar. (*Park*, *supra*, 2 Cal.5th at p. 1066.) As described in *Park*, the *Nam* case concerned a "plaintiff, a University of California, Davis, medical resident, [who] sued for sexual harassment, discrimination, and wrongful termination. The defendant Regents of the University of California's (Regents) anti-SLAPP motion contended the suit arose from communicated complaints about the plaintiff's performance, written warnings it issued her, an investigation it conducted, and the written notice to the plaintiff of her termination. Not so; the basis for liability was instead the Regents' alleged retaliatory conduct, including '"subjecting [the plaintiff] to increased and disparate scrutiny, soliciting complaints about her from others, removing [her] from the workplace, refusing to permit her to return, refusing to give her credit towards the completion of her residency, failing to honor promises made regarding her treatment, and ultimately terminating her . . . ."'" (*Park*, at p. 1066.) The *Park* court summed up its analysis of the *Nam* decision stating, "*Nam* illustrates that while discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech. 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*." (*Park*, at p. 1066, italics added.)

The *Nam* court itself was quite direct in announcing its decision: "[W]e conclude the anti-SLAPP statute was not intended to allow an employer to use a

protected activity as the means to discriminate or retaliate and thereafter capitalize on the subterfuge by bringing an anti-SLAPP motion to strike the complaint. In that case, the conduct giving rise to the claim is discrimination and does not arise from the exercise of free speech or petition." (*Nam*, *supra*, 1 Cal.App.5th at pp. 1190-1191.) The *Nam* court further observed that to ignore the defendant's alleged motive in a harassment, discrimination, or retaliation case "would subject most, if not all, harassment, discrimination, and retaliation cases to motions to strike. Any employer who initiates an investigation of an employee, whether for lawful or unlawful motives, would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to the employee, who, without the benefit of discovery and with the threat of attorney fees looming, would be obligated to demonstrate the likelihood of prevailing on the merits. Such a result is at odds with the purpose of the anti-SLAPP law, which was designed to ferret out meritless lawsuits intended to quell the free exercise of First Amendment rights, not to burden victims of discrimination and retaliation with an earlier and heavier burden of proof than other civil litigants and dissuade the exercise of their right to petition for fear of an onerous attorney fee award." (*Nam*, at p. 1189.)

We agree with the *Nam* court's observation. Discrimination and retaliation claims are rarely, if ever, good candidates for the filing of an anti-SLAPP motion.

Accordingly, we conclude that defendants' alleged retaliatory motive in suspending plaintiff's staff privileges and subjecting him to a lengthy and allegedly abusive peer review proceeding is the basis on which liability is asserted. The alleged liability does not arise from the statements made during those proceedings. The court erred in ruling otherwise.

DISPOSITION

The order granting defendants' anti-SLAPP motion is reversed. Plaintiff shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065. My email address is Katryn.smith@arentfox.com.

I hereby certify that on September 5, 2017, I caused to be electronically filed the foregoing **PETITION FOR REVIEW** with the California Supreme Court, using the TrueFiling system.

I certify that, except as noted, and on information and belief, all participants in this action are registered to use TrueFiling and that service will be accomplished by TrueFiling. All other parties will be served as indicated on the service list by either:

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

Executed on September 5, 2017, at Los Angeles, California.

Katryn F. Smith

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