No. S205568

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARK FAHLEN, M.D.,

Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, et al.,

Defendants and Appellants.

ANSWERING BRIEF OF PLAINTIFF AND RESPONDENT

After Published Decision by the Court of Appeal
Fifth Appellate District
Case No. F063023
Stanislaus County Superior Court Case No. 662696
Hon. Timothy Salter, presiding

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ANSWERING BRIEF OF PLAINTIFF AND RESPONDENT MARK FAHLEN, MD.

INTRODUCTION

The question presented here is whether physicians have a right to initiate civil actions for the retaliatory termination of their hospital privileges under California Health and Safety Code Section 1278.5. The plain language of Section 1278.5 gives them that right. The right is consistent with the purpose and legislative history of the statute, which demonstrates that the Legislature rejected the approach advocated by Defendants Sutter Central Valley Hospitals and Steve Mitchell (hereafter jointly referred to as "Sutter"). It is also consistent with the two leading cases of this Court on the issue presented, *State Board of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 972-973, (hereafter, *Arbuckle*) and (*Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 767, hereafter, *Runyon.*)

Sutter's argument that physicians must first prevail on a writ of mandate proceeding would result in doctors almost invariably losing their right to litigate retaliation claims. The issue of retaliation is not litigated or decided in a peer review hearing and a healthcare facility's decision to terminate privileges is subject to only a substantial evidence review in a writ of mandate proceeding. The Court of Appeal's decision below effectuated the purpose of Section 1278.5 of protecting patient safety by protecting healthcare whistleblowers, while Sutter's interpretation would frustrate that purpose. The Court of Appeal's decision must therefore be affirmed.

STATEMENT OF FACTS

Dr. Fahlen is a highly competent and well-respected Modesto physician who has practiced medicine as a nephrologist for over nine years. (Clerk's Transcript ("CT") 2 CT 286 at ¶¶ 2-3.) He served on the medical staff of Memorial Medical Center[1] ("Memorial") from 2003 to 2008 and served as the Vice-Chairman of the Department of Nephrology at Memorial in 2007 and 2008. (*Id.*) He presently serves as the Chair of the Department of Medicine at Doctors Medical Center, an elected position in which he has quality assurance and administrative responsibility over 140 physicians. (*Id.* at ¶ 2.) Dr. Fahlen was appointed by the Stanislaus County Board of Supervisors to serve on the Board of Directors of the Stanislaus County Community Health Center. He also serves as the medical director of the Ceres Dialysis Center and has previously served as medical director at various other dialysis centers. (*Id.* at ¶ 2.)

Dr. Fahlen is well-known for his exceptional dedication to patients

[1] Defendant Sutter Central Valley Hospitals does business in the name of Memorial Medical Center. (1 CT 11 at ¶ 3.)

and their families. (3 CT 459-461, 464, 472-473, 484-86, 569-570.) While he served on the medical staff at Memorial, Dr. Fahlen received numerous awards for his patient care. (2 CT 287 at ¶ 6; 308-09, 311-12.)

A. Dr. Fahlen's Complaints About Nursing Care at Memorial

During his appointment at Memorial, Dr. Fahlen encountered numerous instances in which Memorial nurses provided substandard care which jeopardized the care and safety of his patients. (*Fahlen v. Sutter Central Valley Hospital* (2012) 208 Cal.App.4th 557, 562 (hereafter *Fahlen);* 2 CT 287-94 at ¶¶ 7-31.) Dr. Fahlen was an outspoken advocate for his patients in these situations, many of which were life-threatening, and he persistently complained to the hospital administration about the dangerous nursing care he encountered. (*Fahlen, supra,* 208 Cal.App.4th at p. 562; 2 CT 287-294 at ¶¶ 7-31.)

For the most part, Dr. Fahlen got along well with the nurses at Memorial. (3 CT 534-36, 579.) Most of the nursing problems that Dr. Fahlen encountered at Memorial involved the same few nurses who refused to follow his orders in ways that threatened the safety of his patients.[2] For example, Dr. Fahlen complained to hospital administration about an Intensive Care Unit nurse refusing his order to use defribrillator paddles to revive a patient with no pulse who had stopped breathing, endangering the patient's life. (*Fahlen, supra,* 208 Cal.App.4th at p. 562; 2 CT 287 at ¶ 8; 3 CT 571.) In another case, Dr. Fahlen complained after a nurse refused to follow his order that a patient who was in acute respiratory distress and at risk of dying be readmitted to the ICU, causing a life-threatening delay in the patient's admission to the ICU. (*Fahlen, supra,* 208 Cal.App.4th at p.

[2] In the interest of brevity, Dr. Fahlen provides only two examples of his complaints about substandard nursing care at Memorial. For a more thorough discussion of all of his whistleblower complaints, please refer to Respondent's Brief in the Court of Appeal at pp. 7-13. (See also 3 CT 570-576.)

562; 2 CT 288 at ¶ 11.)

From 2004 to 2008, Dr. Fahlen complained many times to nursing supervisors and the hospital administration about unsafe nursing practices at Memorial. (*Fahlen, supra,* 208 Cal.App.4th at p. 562; 2 CT 287-94 at ¶¶ 7-31; 3 CT 407-08 at ¶ 21.) Dr. Fahlen requested several times to meet with the problem nurses, but Memorial's Chief Operating Officer, Defendant Steve Mitchell, refused his requests. (2 CT 291 at ¶¶ 22-23.) The hospital failed to provide Dr. Fahlen with any response to his many complaints about poor nursing care. (2 CT 294 at ¶ 32.)

B. Memorial's Retaliation Against Dr. Fahlen

Instead of addressing Dr. Fahlen's serious concerns about patient care, Memorial engaged in a campaign of retaliation intended to drive him from the practice of nephrology in Modesto. (*Fahlen, supra,* 208 Cal.App.4th at pp. 562-563; 2 CT 294-98 at ¶¶ 33-51.) Defendant Mitchell testified at Dr. Fahlen's peer review hearing that he contacted Dr. Fahlen's medical group, Gould Medical Group ("Gould"), and provided the medical director with confidential information regarding allegations about Dr. Fahlen that had not yet been investigated. (3 CT 403 at ¶¶ 5-6; 3 CT 438-46, 449, 453.) Defendant Mitchell testified that he wanted Gould to terminate Dr. Fahlen so that he would leave Modesto and thereby eliminate the need for the hospital to go through the process of terminating his hospital privileges by way of a peer review hearing. (*Fahlen, supra,* 208 Cal.App.4th at 562; 3 CT 438-42.) Defendant Mitchell persuaded Gould to fire Dr. Fahlen and it did so on May 14, 2008. (*Fahlen, supra,* 208 Cal.App.4th at pp. 561-562.)

Contrary to Defendant Mitchell's plan, Dr. Fahlen did not leave Modesto after Gould terminated his employment. He instead decided to establish a private practice in Modesto. On May 27, 2008, soon after he

was terminated from Gould, Dr. Fahlen requested to meet with Defendant Mitchell regarding the status of his hospital privileges at Memorial. Defendant Mitchell then sent an e-mail to Dave Benn, the Chief Executive Officer of Memorial, stating that "He does not get it!" In other words, as Defendant Mitchell testified, Dr. Fahlen "did not get" that he was going to lose his privileges at Memorial. In response, Mr. Benn wrote, "Looks like we need to have the Medical Staff take some action on his MedQuals!!! Soon!!!" (*Fahlen, supra,* 208 Cal.App.4th at pp. 562-63; 2 CT 295 at ¶¶ 37-38; 3 CT 499.)

Defendant Mitchell testified that during a May 30, 2008, meeting, he suggested Dr. Fahlen move away from Modesto and practice nephrology in another community. (*Fahlen, supra,* 208 Cal.App.4th at p. 562; 3 CT 437.) Defendant Mitchell admitted that he threatened Dr. Fahlen with a medical staff investigation and a negative report to the Medical Board of California if he did not resign from Memorial. (3 CT 436, 451-52.) After Dr. Fahlen refused to succumb to Defendant Mitchell's threats, Defendants followed through with Mr. Benn's command and promptly initiated a medical staff peer review investigation of Dr. Fahlen. (*Fahlen, supra,* 208 Cal.App.4th at p. 563; 3 CT 495.)

The medical staff's investigation was conducted by an Ad Hoc Investigating Committee. (*Fahlen, supra,* 208 Cal.App.4th at p. 563; 3 CT 501.) The hospital administration influenced the investigation to reach its desired outcome, a recommendation for Dr. Fahlen's termination. It placed three individuals on the medical staff's Ad Hoc Investigating Committee, even though they were not members of the medical staff. (3 CT 501.) Those individuals were Defendant Steve Mitchell, who has admitted that he wanted to get rid of Dr. Fahlen before the hospital administration initiated the peer review action; a hospital vice-president; and an employment lawyer

paid by the hospital administration to conduct the investigation. (*Fahlen, supra,* 208 Cal.App. at 562; 3 CT 408-09 at ¶ 25; 3 CT 438-441, 501.) When three of the four physician members of the Ad Hoc Committee wanted to recommend counseling for Dr. Fahlen instead of the termination of his privileges, the hospital administrators dissuaded them. (3 CT 501-02.)

When the hospital's Medical Executive Committee (MEC) was considering whether to take action against Dr. Fahlen, one of its members asked to hear from Dr. Fahlen before making a decision. (Dr. Fahlen's Request for Judicial Notice (hereafter, "RJN"), Exh. A, hearing testimony of Dikran Bairmanian, M.D., at p. 1246.) The MEC was then falsely informed that Dr. Fahlen had refused to appear before the MEC. (Dr. Fahlen's RJN, Exh. A, Bairamian testimony at 1246, Fahlen testimony at pp. 1280-1281.) In fact, Dr. Fahlen was eager to meet with the MEC, but was never given the opportunity to do so. (Dr. Fahlen's RJN, Exh. A, Fahlen testimony at pp. 1280-1281.) In August 2008, the MEC recommended that Dr. Fahlen's reappointment to the medical staff be denied based on the hospital administration's allegations that he had engaged in "disruptive" behavior.[3] (2 CT 297 at ¶ 44; 3 CT 548.)

Most of the hospital's charges against Dr. Fahlen involved claims that he had complained about nursing problems in an inappropriate manner. (3 CT 541-545.) As Memorial's Nursing Manager admitted, almost all of the alleged incidents involved some kind of error by a nurse. (3 CT 409 at ¶ 27; 3 CT 417.) Thus, it is undisputed that Sutter terminated Dr. Fahlen's privileges because of his complaints about nursing care, although it justified the termination based on the alleged manner in which he stated his

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[3] Sutter characterized its action as a decision not to renew Dr. Fahlen's privileges. However, because the "non-renewal" had the effect of terminating Dr. Fahlen's privileges at Memorial, the term "termination" is used throughout this brief.

concerns. (3 CT 408 at ¶ 22-23.)

When Dr. Fahlen began asserting his legal rights against Sutter, the hospital brought additional charges against him for that reason. (3 CT 408-409 at ¶¶ 24-25.) The Notice of Charges includes several incidents in which Dr. Fahlen told staff members that he intended to bring legal action against the hospital. (3 CT 544.)

C. The Evidence Presented at Dr. Fahlen's Peer Review Hearing.

Pursuant to Memorial's Medical Staff Bylaws ("Bylaws"), a Judicial Review Committee ("JRC") composed of six physicians appointed by the MEC convened to review the MEC's recommendation to terminate Dr. Fahlen's privileges. (*Fahlen, supra,* 208 Cal.App.4th at p. 563; 2 CT 297 at ¶ 45; 1 CT 96 (Sect. 8.3-5); 3 CT 538-539, 551.) The JRC had responsibility for deciding whether the MEC's recommendation was reasonable and warranted. (1 CT 99 (Sect. 8.4-7(c)).) Pre-hearing discovery was limited to the identification of witnesses and production of documents. (1 CT 97 (Sect. 8.4-1).) The JRC conducted thirteen days of hearings. (3 CT 563-564.) The only issue presented at the hearing was whether the MEC's denial of reappointment was reasonable and warranted. The issue of retaliation was not litigated at the peer review hearing.

Undisputed evidence introduced at the hearing showed that Dr. Fahlen was highly respected for his clinical skills and his exceptional dedication to patients and their families. (3 CT 407 at ¶ 20; 3 CT 427, 459-61, 464-466, 468-69, 470, 472-473, 477, 479-80, 484-486.)

The hospital was unable to support its charges with competent evidence. During the JRC hearing, it failed to present any testimonial evidence on eleven of the eighteen charged incidents. (3 CT 409 at ¶ 27.)

To the extent that Dr. Fahlen had past problems with particular nurses, undisputed evidence proved that Dr. Fahlen had improved his

relations and avoided any subsequent difficulties with those nurses. (2 CT 297-298 at ¶¶ 48-49; 3 CT 535 at ¶ 8; 3 CT 549 at ¶ 13; 3 CT 579-580.) Nursing Manager Myna Gandy, a witness called by Memorial, testified that she had received numerous positive reports from nurses in the past year about Dr. Fahlen's improved relationships with nurses. Ms. Gandy was unaware of any problems between Dr. Fahlen and any nurse during the past year. She testified that Dr. Fahlen had improved his ability to treat others respectfully and courteously. (3 CT 422.) The evidence also established that Dr. Fahlen maintained positive relationships with many Memorial nurses who gave testimony or a declaration on Dr. Fahlen's behalf. (3 CT 534-536, 579.)

Memorial failed to provide ***any*** evidence to show that any of Dr. Fahlen's conduct ever had an adverse impact on patient care. (3 CT 407 at ¶ 19; 3 CT 408-409 at ¶¶ 24-26; 3 CT 410 at ¶ 30.) Sutter called as a witness Dr. Todd Smith, Chief of the Medical Staff at Memorial. Dr. Smith testified he was not aware of a single patient whose medical care was adversely affected by Dr. Fahlen's behavior. (3 CT 410 at ¶ 30; 3 CT 428.) Sutter also called the Chair of the medical staff's Ad Hoc Investigating Committee, Dr. Michael Cadra, who testified that the investigating committee was not aware of any instance in which Dr. Fahlen's alleged difficult behavior adversely affected patient care or had harmed any patient. (3 CT 410 at ¶ 30; 3 CT 423, 424.) Dr. Paul Golden, former Chair of the Nephrology Department at Memorial, testified that Dr. Fahlen's problems with nurses did not affect the care he provided to patients in any negative way. (3 CT 410 at ¶ 30; 3 CT 471.)

D. The Decision by the JRC That Dr. Fahlen Should Be Reappointed.

The JRC's decision of June 14, 2010, unanimously concluded that the MEC did not sustain its burden of proving that the denial of Dr. Fahlen's reappointment was reasonable and warranted. (*Fahlen, supra,* 208 Cal.App.4th at p. 563; 3 CT 550-51.) The JRC did not conclude that Dr. Fahlen had engaged in "disruptive" behavior.[4] Rather, it determined that:

> [T]he evidence before it did "not establish any professional incompetence on the part of [Fahlen]." Similarly, the evidence did "not establish that any behavior of [Fahlen] was, or is, reasonably likely to be detrimental to patient safety." Further, after MEC recommended termination of privileges, Fahlen "voluntarily obtained psychological counseling and attended anger management sessions." Fahlen's behavior "has appreciably improved." To the extent the evidence indicated that, prior to the MEC recommendation, anyone's conduct was "detrimental to the delivery of patient care, the nursing staff ... was more to blame for such conduct than was [Fahlen]."

(*Fahlen, supra,* 208 Cal.App.4th at pp. 563-564, quoting the JRC decision, 3 CT 549 at ¶¶ 14-18.)

Pursuant to the Bylaws, the MEC had the right to appeal the JRC's decision. (1 CT 100 (Sect. 8.5-1).) However, the MEC opted to accept the decision of the JRC and did not exercise its right to appeal. (See 1 CT 72 (fn 1).) Thus, both of the medical staff committees that considered the charges, the JRC and the MEC, agreed after the hearing that Dr. Fahlen's privileges should not be terminated.

Pursuant to the Bylaws, the Sutter Board of Directors was required to affirm the decision of the JRC if it was supported by substantial evidence.

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[4] Occasional incidents of inappropriate behavior over a four-year period, such as raising one's voice or "adopting a tone" or "condescending behavior" does not constitute "disruptive behavior" under the well-established legal standard governing behavioral allegations in a hospital setting. (CT 576.) See, *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259, 1271.

(3 CT 513-514 (Bylaw § 4.5-8(b)(2)); 1 CT 101 (Bylaw § 8.5-6(b)).) Instead, by letter dated September 16, 2010, the Sutter Board requested that the JRC reconvene and prepare answers to 84 detailed questions posed by the Board. (*Fahlen, supra,* 208 Cal.App.4th at p. 564; 3 CT 553-61.) By letter dated October 14, 2010, the JRC informed the Sutter Board that its request was not feasible because it would require the JRC to reread all the documentary evidence and the transcripts from thirteen hearing sessions in a short period of time. (3 CT 563-564.) The JRC unanimously advised the Board that it should proceed on the basis of the Findings of Fact and Conclusions previously rendered by the JRC on June 14, 2010. (3 CT 564.) Dr. Fahlen's counsel brought to the Board's attention the well-established law which held that in order to restrict a physician's privileges based on behavioral issues, the hospital must prove that the behavioral problems adversely impacted the physician's ability to provide quality care to patients. (3 CT 576.) Dr. Fahlen's counsel also reminded the Sutter Board of its own Medical Staff Bylaws which required the Board to affirm the JRC's decision if it was supported by substantial evidence. (3 CT 567.)

Nonetheless, on January 7, 2011, Sutter's lay Board of Directors terminated Dr. Fahlen's privileges to practice medicine at Memorial. (*Fahlen, supra,* 208 Cal.App.4th at p. 564; 1 CT 71-78.)[5] In its decision, the Board conceded that Dr. Fahlen's conduct had not led to any specific act or omission that compromised patient safety at Memorial. (1 CT 76.) The Board's decision did not include any determination on the issue of retaliation or the hospital's motivation in terminating Dr. Fahlen's privileges. (1 CT 71-78.)

[5] In its Opening Brief, Sutter states that its Board of Directors reversed the JRC's decision and "effectively restor[ed] the MEC's recommendation that the Hospital not renew Fahlen's privileges". (AOB at p.7.) In fact, Sutter's Board reversed the JRC's decision and refused to follow the MEC's decision to accept the JRC's findings.

ARGUMENT

I. THE PURPOSE OF HEALTH AND SAFETY CODE SECTION 1278.5 IS ONLY CONSISTENT WITH ALLOWING PHYSICIANS A DIRECT CIVIL ACTION FOR RETALIATORY PEER REVIEW.

A. The Sole Purpose of Section 1278.5 Is to Protect Whistleblowers.

The goal and primary task of statutory construction is to give effect to the law's purpose. (*In re Corrine W.* (2009) 45 Cal.4th 522, 529.)

The purpose of Section 1278.5 is stated in its title, "Whistleblower Protections" and in subdivision (a) of the law:

> The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations.

The purpose of the statute is thus to protect public safety by giving whistleblowers legal protection from retaliation.

The purpose of Section 1278.5 is also clear from its substance, which, *inter alia*:

– prohibits health facilities from discriminating or retaliating in any manner against any patient, employee or member of the medical staff for complaints or reports (subdivision (b)(1));

– subjects health facilities that violate the statute to a civil penalty (subdivision (b)(3));

– creates a rebuttable presumption that adverse actions taken within

120 days of a grievance or complaint are retaliatory (subdivision (d)(1));

– defines discriminatory treatment broadly to include discharge, demotion, suspension, or any unfavorable changes in the terms of a contract, employment, or privileges of an employee or member of the medical staff, or the threat of any of those actions. (subdivision (d)(2));

– makes willful violation of the statute a misdemeanor crime (subdivision (f));

– provides a broad remedies provision which includes reinstatement, reimbursement for lost income, and any other remedy deemed warranted by the court under any other applicable statute or the common law (subdivision (g)).

The purpose is also apparent from the legislative history of Section 1278.5. Proponents of the original 1999 legislation stated that retaliatory actions by hospitals against nurses, patients and other health care workers were on the rise. (Fahlen RJN, Exh. B, Senate Health and Human Services Committee Analysis of SB 97, March 10, 1999, p. 3.) They asserted that nurses were afraid to speak out about unsafe conditions for fear of losing their jobs. (*Ibid.*) The Department of Health Services reported that it received a number of retaliation complaints against healthcare facilities but lacked jurisdiction to act on those complaints. (*Id.* at p. 4.) In enacting Section 1278.5, the Legislature decided that legal protection of healthcare workers from retaliation was in the public interest and should be the public policy of the State.

Sutter gives scant attention to the purpose of Section 1278.5 in its opening brief. (AOB, pp. 28-29.) It does not address at all the Court of Appeal's thorough analysis of how Sutter's argument, if accepted, would defeat rather than effectuate the purpose of Section 1278.5. (See *Fahlen, supra,* 208 Cal.App.4th at 576-579.)

B. A Specific Purpose of Section 1278.5 Is to Protect Physicians from Retaliatory Actions Affecting Their Hospital Privileges.

In 2007, the Legislature decided to provide strong protection to physicians with whistleblower claims by enacting AB 632, an amendment to Section 1278.5. AB 632 added provisions specifically protecting members of a hospital medical staff from retaliation.

The California Medical Association (CMA), the sponsor of the bill, contended that Section 1278.5 needed to explicitly protect physicians because physicians were being subjected to retaliation or threats of retaliation if they reported unsafe patient conditions. (1 CT 234.) The CMA cited the example of Tenet Healthcare System having silenced physicians at a Redding hospital who knew about unnecessary open-heart surgeries and Medicare fraud. (*Ibid.*) The Committee analysis quoted the CMA as follows:

> Often physicians are faced with having to decide if they should report allegations of poor patient care or conditions knowing their practice and livelihood may be harmed. Unfortunately, too often the physician decides not to report sub-standard or questionable care. When a physician observes retaliation or discrimination against another physician who speaks out, it is less likely that any more will come forward.

(*Ibid.*)

AB 632 amended subdivision (a) to add "members of the medical staff" to the list of protected persons. Very importantly for purposes of this case, it also expanded the definition of "discriminatory treatment" in subdivision (d)(2) to include:

> **. . . any unfavorable changes in . . . the terms or conditions . . . of the . . . privileges of the . . . member of the medical staff . . . or the threat of any of those actions.**

Likewise, AB 632 amended subdivision (g) to give physicians a right to :

> **. . .reinstatement, and reimbursement for lost income . . . resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facilities . . .**

These amendments to subdivisions (d)(2) and (g) demonstrate that the Legislature determined that there was a substantial risk that healthcare facilities would use decisions on hospital privileges as a means of retaliation against physician whistleblowers, and that it intended to give physicians a statutory civil remedy when such events occurred. Thus, one of the specific purposes of the Section 1278.5, as amended in 2007, is to protect physicians from retaliatory peer review actions against their hospital privileges.

Under the California Whistleblower Protection Act (CWPA) statutes at issue in *Arbuckle, supra,* and *Runyon, supra,* the Legislature provided for administrative review of retaliation complaints by the State Personnel Board or by a designated California State University officer. There was no suggestion in either of those statutes that the Legislature was concerned that government employees would use the administrative proceedings required by the CWPA as a means of retaliation.

The Court of Appeal recognized that a different situation is presented when the administrative proceeding may itself be a retaliatory action:

> In these circumstances, the Legislature may recognize, explicitly or by implication, that the administrative decision in question should not be given preclusive effect in later judicial proceedings, even when the administrative decision has not been set aside through administrative mandate proceedings.

> When the Legislature has made this type of determination, the courts will not require exhaustion of judicial remedies in the administrative proceeding.

(*Fahlen, supra,* 208 Cal.App.4th at 573.)

When the Legislature determined that an unfavorable change of privileges may be discriminatory treatment, it implicitly recognized that such a decision should not be given a preclusive effect in later judicial proceedings under Section 1278.5.

As discussed in Section 3(B)(1) below, the issue of retaliation is not litigated in a peer review hearing. If Sutter's argument were accepted, a physician's claim of a retaliatory termination of privileges would never be litigated in any forum. Instead, as discussed in Section 3(B)(2) below, a healthcare facility would always be able to completely evade accountability for retaliatory peer review by producing any substantial evidence in support of its action. Requiring a physician to prevail in a writ of mandate proceeding would defeat the purpose of Section 1278.5 by allowing retaliatory termination of whistleblower physicians through peer review hearings, without effective legal recourse for the physician. This would defeat the purpose of the statute to protect the public health and safety by protecting physician whistleblowers.

II. SECTION 1278.5 PERMITS A DIRECT CIVIL ACTION FOR DAMAGES AND REINSTATEMENT FOR THE RETALIATORY TERMINATION OF PRIVILEGES.

A. The Plain Language of Section 1278.5 Provides a Civil Action for Physicians Claiming Retaliation Based on Actions Against Their Privileges.

In construing a statute, "[w]e begin with the statutory language, viewed in light of the entire legislative scheme of which it is a part, as the language chosen is usually the surest guide to legislative intent." (*Runyon,*

supra, 48 Cal.4th at 767.) Only to the extent that the language of the statute is subject to more than one reasonable interpretation does the Court examine other sources, such as legislative history, to determine the Legislature's intent. (*Ibid.*) The words of the statute should be given their ordinary and usual meaning. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) "The most powerful safeguard for the courts' adherence to their constitutional role of construing, rather than writing, statutes is to rely on the statute's plain language." (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 46.) The courts lack the power to rewrite a statute to make it conform to a presumed intention which is not expressed. (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 993.) "This court is limited to interpreting the statute, and such interpretation must be based on the language used." (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365.)

Here, the plain language of the statute gives a physician who claims a retaliatory change in his hospital privileges a right to sue the hospital for reinstatement and damages. The statutory language is clear and wholly consistent with the statute's purpose of encouraging physicians to report unsafe conditions at hospitals. Nothing in Section 1278.5 states or implies that a physician cannot bring an action based on an unfavorable change of privileges until after winning a writ of mandate. When, as here, there is no ambiguity in the language of a statute, courts must presume that "the Legislature meant what it said, and the plain meaning of the statute governs." (*Hunt v. Superior Court* (1999) 21 Cal. 4th 984, 1000.) The plain language of Section 1278.5 demonstrates that the Court of Appeal's decision below was correct.

B. Section 1278.5 Must Be Read In Its Statutory Context.

The words of a statute should be construed in their statutory context. (*Hassan v. Mercy American River Hospital, supra,* 31 Cal.4th at 715.) Sutter quotes *Metropolitan Water District of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 501, for the proposition that a statute "should be read in the context of the entire law." It then asserts that Section 1278.5 must be construed in "context of the law of peer review." (AOB at p. 13.) However, *Metropolitan Water District* held that the statute at issue must be read in the context of the Public Employees Retirement Law, of which it was a part, not the entire body of California law or related subject areas. *Metropolitan Water District* cited *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 (hereafter *Huntington Beach*), as precedent for using "context" in statutory construction. (*Metropolitan Water District of Southern California v. Superior Court, supra,* 32 Cal.4th at 501.) In *Huntington Beach, supra,* 4 Cal.4th at p. 468, this Court held that "all parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others."

Under *Huntington Beach, supra,* 4 Cal.4th at 468, each part of Section 1278.5 must be construed in the context of the entire statute. 1278.5 was enacted as a single piece of legislation in 1999. Therefore, it is proper to construe the statute as a whole to effectuate its purpose by analyzing the language of Section 1278.5 standing alone. The Legislature placed Section 1278.5 in Division 2, Chapter 2, Article 3, of the Health Safety and Code. Article 3 includes Health and Safety Code sections 1275 through 1289.5. If Section 1278.5 is to be construed in the context of other statutes, it should be construed in the context of these statutes, which all concern the regulation of health care facilities by the State to protect the public health and safety. None of these statutes directly concern hospital

peer review proceedings, which are governed by the separate statutory scheme of Business and Professions Code section 805 et seq. and the common law.

C. The Language of Subdivisions (h) and (l) Demonstrate That Exhaustion of Administrative Remedies Is Not Required.

The language of Section 1278.5 demonstrates that the Legislature did not intend to require exhaustion of the administrative remedy of a peer review hearing before bringing a lawsuit pursuant to the statute.

The issue of exhaustion of administrative remedies is not directly presented in this appeal, since Dr. Fahlen did complete Sutter's peer review proceedings. However, the Legislature's decision not to require exhaustion of peer review proceedings is directly relevant to the issue presented here, since it is inconsistent with a requirement for a writ of mandate reversing a peer review decision.

Section 1278.5, subdivision (h) gives the medical staff of a hospital the right to petition the trial court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing arising from an action brought under Section 1278.5. This subdivision expressly references a peer review hearing "as authorized in Section 805 and Sections 809 to 809.5, inclusive, of the Business and Professions Code." It goes on to state that "[i]f it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed."

This subdivision establishes that the Legislature intended to give physicians a right to litigate a Section 1278.5 action while a hospital peer review proceeding is pending. In effect, the superior court would have concurrent jurisdiction with the hospital's peer review procedures. Overlapping or concurrent jurisdiction is an "uncontroversial concept"

under California law. (*Pacific Lumber Co v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 936 (hereafter *Pacific Lumber*).) This provision demonstrates that the Legislature did not intend to require exhaustion of the administrative remedy of a peer review hearing before suing for a threatened or actual termination of privileges.

In addition, this subdivision indisputably acknowledges the existence of the parallel administrative remedy of hospital peer review proceedings. Under the rule of *Arbuckle, supra,* 45 Cal.4th at 972-973, and *Runyon, supra,* discussed further below, the Legislature's acknowledgment of the parallel remedy, without requiring reversal of an adverse administrative decision, shows that exhaustion of judicial remedies is not required here.

Sutter argues that perhaps subdivision (h) was directed toward a different physician other than the one who filed suit under Section 1278.5. (AOB at p. 42.) This argument has no basis in the language of subdivision (h), which nowhere suggests that it was meant to apply only to *another* physician's peer review hearing, but not to a peer review proceeding of a physician claiming retaliation. Furthermore, this theory is directly contradicted by the legislative history that Sutter describes in its brief, which demonstrates that subdivision (h) was adopted to address the concerns of the California Hospital Association (CHA) that AB 632 might "stop a peer review process in its tracks by simple filing of a § 1278.5 action . . ." (AOB at pp. 30-34; Sutter RJN, Exh. 2, Senate Judiciary Committee Analysis, p. 8.)

Section 1278.5, subdivision (l), states that "[n]othing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with the Sections 809 to 809.5, inclusive, of the Business and Professions Code."

Subdivision (l) again demonstrates the Legislature's decision to have

concurrent jurisdiction when a physician files a Section 1278.5 lawsuit. If a physician could not file a Section 1278.5 lawsuit based on threats or denial of privileges until peer review proceedings were completed and fully exhausted, then there would be no need for either subdivision (h) or subdivision (l), since the peer review process would be fully completed before a physician could file suit. "[I]nterpretations that render statutory terms meaningless as surplusage are to be avoided." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1010.) In construing a statute, courts are required to "give independent meaning and significance to each word, phrase and sentence in a statute and to avoid an interpretation that makes any part of a statute meaningless." (*San Diego Police Officers Assn. v. City of San Diego Civil Serv. Comm.* (2002) 104 Cal.App.4th 275, 284.)

Furthermore, the Legislature chose to limit this restriction to *legitimate* peer review activities of the medical staff. By using the term "legitimate", the Legislature recognized, by necessary implication, that there are also illegitimate peer review activities. As recognized by the Court of Appeal, "'legitimate peer review activities' do not include retaliation against medical staff for complaints about quality of care." (*Fahlen, supra,* 208 Cal.App.4th at p. 578.) The Legislature's determination that peer review actions can be illegitimate is consistent with its inclusion of "any unfavorable changes . . . in privileges", or threats of such changes, in the definition of "discriminatory treatment" in subdivision (d). Thus, the Legislature intentionally *excluded* illegitimate retaliatory peer review proceedings from legal protection under subdivision (l) and intentionally *included* retaliatory actions against privileges as discriminatory treatment.

Subdivision (l) also does not require exhaustion of judicial remedies following the completion of a peer review proceeding, the issue presented

here. When a peer review decision has been reached, there is no risk of a Section 1278.5 action interfering with the proceeding.

D. The Legislative History of Section 1278.5 Shows That the Legislature Knowingly Considered and Rejected the Exhaustion Requirement.

During the legislative debate over AB 632, the CHA was the primary opponent to the bill. (1 CT 237.) It persistently argued that the bill would permit a physician to go to court without exhausting the peer review process and thereby have a "chilling effect" on peer review. (Sutter RJN, Exh. 7, pp. 3-4; Exh. 9, p. 2.) Sutter's argument (AOB at pp. 28-34) that the legislative history supports an exhaustion requirement attempts to turn that history upside down. Contrary to Sutter's argument, the Legislature rejected the CHA's pleas that physicians should be required to exhaust administrative and judicial remedies before filing a Section 1278.5 action.

The Senate Judiciary Committee's analysis of AB 632 considered the CHA's position that the bill would have a "chilling effect" on hospital peer review and queried: "SHOULD A 1278.5 ACTION BE HELD IN ABEYANCE UNTIL A PEER REVIEW PROCESS, IF INITIATED, HAS BEEN COMPLETED?" (1 CT 238; Sutter RJN, Exh. 3, p. 7.) Thus, the Legislature expressly considered requiring exhaustion of the peer review process as a prerequisite for bringing a 1278.5 action. However, the Legislature rejected that approach, instead adopting subdivisions (h) and (l), discussed above. The analysis of the Senate Judiciary Committee states:

> This bill would provide equivalent whistleblower protection to a doctor that is currently available to an employee or a patient of a hospital facility and to other health care workers. The amendments would provide for an in camera hearing of evidentiary requests by a whistleblower complainant so that a court may determine whether or not the evidentiary demands would impede a peer review proceeding. The amendments would further clarify that the bill would not be construed to limit the ability of the medical staff to carry out its legitimate

peer review activities.

(1 CT 242.)

This legislative history demonstrates that the Legislature intended to permit Section 1278.5 actions to continue during a hospital peer proceeding. It also shows that physicians were intended to have the same access to the courts as other healthcare workers, who are not required to use a writ of mandate proceeding to reverse an adverse decision affecting them.

Both before and after the Senate amendments, the CHA proposed adding language to the statute to specify that:

> [S]ection 1278.5 does not apply to a proposed or taken investigation, corrective or disciplinary action by a medical staff or a hospital governing board against a member of the medical staff or an applicant unless and until there has been a determination that the member or applicant has been determined to have substantially prevailed in such action as specified in current law.

(Sutter RJN, Exh. 6, Aug. 21, 2007 CHA Senate Floor Alert, p. 2; Exh. 9, September 10, 2007, CHA Assembly Floor Alert, p. 2.) Thus, the CHA proposed to the Legislature that it require both administrative and judicial exhaustion of remedies and a writ of mandate proceeding before a physician could file a retaliation action based on peer review activities.

The Legislature acknowledged the concerns of the CHA but adopted a far more narrow approach than requiring a physician to prevail in a writ of mandate proceeding. Instead, it adopted subdivisions (h) and (l), permitting peer review hearings to proceed, but allowing a physician access to independent factfinding through a Section 1278.5 action on the question of whether the healthcare facility had retaliated using peer review activities. The Legislature thus considered and rejected the very approach that Sutter now argues that the Legislature intended and this Court should impose.

E. Both Before and After the passage of AB 632, the CHA and Hospital Counsel Recognized that the Amended Statute Did Not Require Exhaustion of Administrative or Judicial Remedies.

Even after the Legislature adopted subdivisions (h) and (l) to protect concurrent peer review proceedings, the CHA opposed AB 632 on the ground that the bill as amended would still permit a lawsuit by a physician during peer review proceedings. (Sutter RJN, Exh. 9, p. 2.) The CHA also objected that a court would be reviewing a physician's claim independently, and not pursuant to a Code of Civil Procedure section 1094.5 mandamus action, where the hospital's action would only be subject to a "substantial evidence" standard. (*Ibid.*) The CHA thus interpreted AB 632 at the time of its passage as permitting a physician to file a Section 1278.5 action without exhausting administrative remedies and without first winning a writ of mandate.

Likewise, on November 7, 2007, three weeks after AB 632 was signed into law, Lowell Brown, Sutter's former attorney in this case, published an article on the website of his law firm Arent Fox, LLP, discussing the new legislation from the perspective of hospital counsel.[6] In that article, Mr. Brown wrote that the passage of the bill "greatly undermines the well established rule that physicians must exhaust administrative remedies prior to bringing their claims to court." (1 CT 106.) The article states that the whistleblower statute gives physician plaintiffs a "green light to pursue litigation at *anytime* during the peer review process". (1 CT 106, emphasis in original.) Sutter's counsel further wrote that Section 1278.5 "contemplates that such a [whistleblower] lawsuit

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[6] Mr. Brown and Arent Fox represented Sutter in the trial court and the Court of Appeal. On October 19, 2012, Mr. Brown submitted an amicus letter in support of Sutter's Petition for Review on behalf of the CHA.

would proceed *parallel* to a peer review hearing . . ." (1 CT 107, emphasis in original.)

The positions of the CHA and Mr. Brown in 2007 squarely contradict Sutter's current position that the adoption of subdivisions (h) and (l) show that the Legislature intended to require exhaustion. (AOB at p. 34.) Sutter does not explain why, if the Legislature had intended to require exhaustion, it did not adopt the CHA's proposal set forth above. It does not explain why subdivisions (h) and (l) plainly contemplate parallel proceedings. Nor does it explain why the CHA and hospital counsel Brown interpreted Section 1278.5 in 2007 in the same way as the Court of Appeal did in 2012.

The Legislature knowingly chose concurrent jurisdiction and rejected the approach that Sutter is asserting here. It instead gave a physician the same right to bring a whistleblower action as any other health care worker, while permitting peer review to proceed during a Section 1278.5 action.

F. Requiring Exhaustion Would Be Inconsistent with Section 1278.5's Evidentiary Presumption.

As described by the Court of Appeal, requiring a physician to prevail in a writ of mandate proceeding before filing a Section 1278.5 action would make it virtually impossible for a physician to receive the benefit of the presumption of retaliation contained in subdivision (d)(1), since the presumption would not be applicable in the writ of mandate proceeding. (*Fahlen, supra,* 208 Cal.App.4th at p. 579.)

Sutter does not dispute that the presumption would not apply in a writ of mandate proceeding. It argues that a physician would only lose the benefit of the presumption if he lost the writ of mandate proceedings. In which case, "the hospital could satisfy its burden of production on any claims and issues subsumed by the mandamus judgment by offering the judgment." (AOB at p. 45.) That is, in plain English, the doctor would lose

his retaliation claim without having enjoyed the benefit of the presumption. As discussed further below, a writ of mandate proceeding gives healthcare facilities an overwhelming advantage compared to a direct civil action. Under Code of Civil Procedure Section 1094.5, subdivision (d), if a healthcare facility can produce any substantial evidence supporting a decision to terminate privileges, it wins. Healthcare facilities will always be able to muster some evidence to support their decision to unfavorably change a physician's privileges. They will therefore nearly always win a writ of mandate proceeding, whether or not they retaliated against a physician. The physician would not have the benefit of the presumption in this critical and binding judicial determination. Requiring exhaustion would effectively nullify the presumption contained in Section 1278.5 if a healthcare facility retaliated through peer review proceedings.

G. Requiring Exhaustion Would Also Be Inconsistent with Section 1278.5's Remedy of Reinstatement.

Section 1278.5, subdivision (g), provides that a physician may obtain reinstatement of his privileges through a Section 1278.5 action. As also described by the Court of Appeal, requiring a physician to set aside a peer review decision terminating his privileges through a writ of mandate proceeding would mean that there would be no necessity for the reinstatement of privileges in a subsequent civil action. Sutter's argument would make the statutory remedy of reinstatement of privileges unnecessary. "We will not impose judicial constraints on the statutory remedy where doing so makes the Legislature's language superfluous." (*Fahlen , supra,* 208 Cal.App. 4th at p. 579, citing *Arbuckle, supra,* 45 Cal.4th at p. 978.)

Sutter argues that the Court of Appeal's analysis is wrong because the reinstatement remedy would apply in cases in which privileges were terminated outside the peer review process. However, hospitals are

required to provide a quasi-judicial hearing upon request whenever they want to restrict or terminate a physician's privileges for "a medical disciplinary cause or reason." (Business and Professions Code section 805 et seq.) "A medical disciplinary cause or reason" is broadly defined as "conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care." (Business and Professions code section 805, subdivision (a)(6).) As reflected by virtually all of the Court of Appeal and Supreme Court cases addressing peer review in the past 50 years, hospitals almost always restrict or terminate privileges for a medical disciplinary cause or reason subject to a hearing under Business and Professions Code section 809 et. seq.

Sutter hypothesizes that a hospital could terminate a physician's privileges for another reason not requiring a hearing, but there is no evidence that such events are more than a rare occurrence. (AOB at p. 43.) The case of *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 62-63, cited by Sutter, has very unusual facts. The healthcare facility refused to process Dr. Smith's reapplication for privileges after a court had ordered his privileges reinstated for one year following multiple medical disciplinary hearings. (*Id.* at pp. 45-47.) Likewise, in *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 477-478 (hereafter *Westlake*), Los Robles Hospital denied privileges without notice to the physician of her right to a hearing. The pertinent events in *Westlake* took place in 1974, before a physician's right to a hearing had been well-established by case law. Sutter offers other hypothetical examples in which a hospital could terminate privileges without a hearing, but there is no evidence in this record that those events occur with any frequency or that they are used for a retaliatory purpose, the type of action Section 1278.5 was enacted to prevent.

Furthermore, the fact that there may be an occasional case in which a hospital terminates privileges for a non-medical disciplinary reason does not negate the fact that in most cases of termination of privileges, requiring exhaustion would be inconsistent with the remedy of reinstatement. In this case, if Dr. Fahlen were required to overturn Sutter's decision by a writ of mandate before filing a Section 1278.5 action, he would not receive the benefit of the reinstatement remedy contained in the law. The same would be true for all other physicians alleging that peer review proceedings were used to retaliate against them.

In effect, Sutter is arguing that the remedies contained in subdivision (g) are subject to an exception when a hospital uses peer review proceedings to act against a physician. As described above, the CHA argued for just such an exception in the Legislature, but the Legislature rejected that proposal. The exhaustion requirement is inconsistent with the remedies provided by the plain language of the law, as the Court of Appeal decided.

H. The Legislature Did Not Incorporate the CMA's List of Past Retaliatory Actions as Part of Section 1278.5.

Sutter appears to argue that because the CMA promoted passage of AB 632 by citing examples of retaliatory conduct other than peer review, the Legislature did not intend to include peer review actions as retaliatory conduct. (AOB at pp. 29-30, 33-34.) Nothing suggests that the CMA intended its list of examples to be exclusive, and the Legislature did not adopt the CMA's list as its definition of "discriminatory treatment." Rather, the Legislature broadly defined "discriminatory treatment" and prohibited any such action in subdivision (d)(2). This argument simply demonstrates the weakness of Sutter's position. By including "unfavorable changes of privileges", or threats of those actions, in both the definition of discriminatory treatment and in the remedies section of the bill, the

Legislature clearly intended to cover actions such as Sutter's termination of Dr. Fahlen's privileges.

III. A PHYSICIAN IS NOT REQUIRED TO WIN A WRIT OF MANDATE BEFORE BRINGING AN ACTION UNDER SECTION 1278.5.

A. This Court's Decisions in *Arbuckle* and *Runyon* Are Applicable Precedent Here.

Sutter's entire argument rests on the general rule requiring exhaustion of administrative remedies set forth in *Westlake, supra. Westlake,* however, did not address the issue presented here, the construction of a statute which provides a right to sue for retaliation. *Westlake* did not involve a whistleblower, a statutory cause of action or a retaliation claim.

Arbuckle, supra, and *Runyon, supra,* on the other hand, address the specific issue presented by this appeal: whether a person with a statutory whistleblower claim is required to win a writ of mandate reversing an adverse administrative decision before filing an action for damages. In both *Arbuckle* and *Runyon*, this Court unanimously concluded that requiring a whistleblower to win a writ of mandate proceeding, in which the agency would only have to produce some substantial evidence to support its decision, would be contrary to the purpose and language of the law and the intent of the legislature. The same analysis applies here, for the reasons discussed in those two cases. Requiring a whistleblower to win a writ of mandate would:

> undermine[] the Act's purpose of protecting whistleblower employees by assuring them the procedural guarantees and independent factfinding of a superior court damages action.

(*Arbuckle, supra*, 45 Cal.4th at 968.)

The Court of Appeal correctly analyzed the application of *Arbuckle* and *Runyon* in this case. (*Fahlen, supra,* 208 Cal.App.4th at pp. 575-576.) Rather than repeating that analysis, Dr. Fahlen will address Sutter's attempt to distinguish them and summarize their critical points.

Sutter argues that:

> Together, *Arbuckle* and *Runyon* stand for the proposition that where the Legislature enacts a whistleblower statute that includes an administrative process *and the process is sufficiently judicial in character*, a whistleblower will be expected to exhaust remedies, unless a legislative intent to the contrary is apparent.

(AOB at p. 40, emphasis by Sutter.)

Sutter's argument is thus premised on its assertion that the decisions in both *Arbuckle* and *Runyon* resulted from a determination that the administrative proceedings in question were not sufficiently judicial in character to have a binding effect on the plaintiff. However, this Court made no such holdings. In *Arbuckle*, the Court of Appeal had found that the administrative proceeding was a sufficient hearing to invoke the rule of exhaustion. (*Arbuckle, supra,* 45 Cal.4th at p. 974.) This Court only noted that the assertion that a writ of mandate decision upholding the agency's findings would have a collateral estoppel effect "is far from clear." (*Ibid.*) It then proceeded to make the findings set forth below, none of which were based on the non-judicial character of the administrative proceedings. In *Runyon*, the Court did not even discuss the issue of whether the administrative remedy provided to the plaintiff was sufficiently judicial in character to have collateral estoppel effect.

Arbuckle did make the following determinations, all of which are applicable here:

1. The whistleblower statute authorized "a *completely separate* damages action in the superior court in which the employee will enjoy all

the procedural protections and independent factfinding that generally accompany such actions." (45 Cal.4th at p. 973, emphasis in original.)

2. "Exhaustion of every possible stage of an administrative process is not particularly necessary where the civil action that the Legislature has authorized is not one to review the administrative decision, but rather a completely independent remedy." (*Ibid.*)

3. The whistleblower statute acknowledged the existence of a parallel administrative remedy, but did not require its exhaustion, indicating that the Legislature did not intend to require exhaustion of judicial remedies as a precondition to a damages action. (*Id.* at p. 976.)

4. A court may not give preclusive effect to a decision in a prior proceeding if doing so would be contrary to the legislative intent. (*Ibid.*)

5. Requiring exhaustion of judicial remedies by way of writ of mandate would unduly restrict the statutory remedies, because writ review pursuant to Code of Civil Procedure section 1094.5 is limited to the record compiled by the administrative agency, and the agency's findings of fact must be upheld if supported by "substantial evidence." As a result, it would be very difficult for the plaintiff to overturn the board's adverse factual findings. (*Id.* at p. 977.)

6. If a writ of mandate were required, in nearly every case an adverse decision by the board would completely deprive the plaintiff of the remedy provided by the statute. (*Ibid.*)

7. Nothing in the statute suggested that the Legislature intended the statutory remedies to be so narrowly circumscribed. (*Ibid.*)

8. Such a narrow interpretation of the statute would not serve the Legislature's purpose of protecting the right of whistleblowers to report problems "without fear of retribution." (*Id.* at pp. 977-978.)

9. The statute should be interpreted to mean what it says and the

plaintiff was therefore not required to challenge adverse administrative findings by way of a writ of mandate. (*Id.* at p. 978.)

In 2010, a year after *Arbuckle, Runyon* held that the plaintiff was not required to exhaust judicial remedies for the same reasons set forth above. (*Runyon, supra,* 48 Cal.4th at pp. 773-775.) *Runyon* stated that *Arbuckle* held that a whistleblower statute that authorized a damages action following an administrative proceeding "left no room for a requirement of judicial exhaustion." (*Id.* at p. 774.)

B. Under Sutter's Theory, a Doctor's Claim of Retaliation Would Never Be Litigated.

1. A Healthcare Facility's Peer Review Hearing Does Not Consider or Decide the Issue of Retaliation.

The Court of Appeal identified differences between hospital peer review and the administrative proceedings authorized under the California Whistleblower Protection Act (CWPA), the legislation analyzed in *Arbuckle* and *Runyon.* (*Fahlen, supra,* 208 Cal.App.4th at pp. 576-578.) The Court of Appeal correctly asserted that those differences make it more persuasive that the Legislature did not intend to require exhaustion of judicial remedies when it amended Section 1278.5.

In the CWPA, the administrative proceeding is initiated by the whistleblower and the subject of the proceeding is whether retaliation took place. The evidence for and against retaliation is therefore presented for review and decision. In a peer review proceeding pursuant to Business and Professions Code section 809 et seq., the healthcare facility initiates the hearing with charges against the whistleblower. (*Fahlen, supra,* 208 Cal.App.4th at pp. 576-577.) The focus of a peer review hearing is whether the physician committed clinical or behavioral misconduct that warrants the restriction or termination of hospital privileges. (Business and Professions Code section 809.1) Evidence of the physician's whistleblowing and the

hospital's responses to that activity may not even be admitted into evidence. The issue of retaliation is not considered or decided by the hospital's hearing panel. Likewise, the final decision by the governing body of the healthcare facility does not decide whether it had previously acted for retaliatory reasons, but rather whether the physician's alleged misconduct warrants the termination of his hospital privileges. Nor does the governing body decide whether it is committing a retaliatory act by terminating those privileges.

Dr. Fahlen's case demonstrates that retaliation is not considered or decided in a hospital peer review hearing. The presiding hearing officer gave the hospital's Judicial Review Committee (JRC) written jury instructions. (Fahlen RJN, Exh. A, pp. 1290-1295.) The instructions did not request a JRC finding on retaliation or Sutter's motivation, which were not at issue in the hearing. (*Ibid.*) The only finding the JRC was required to make was whether the termination of Dr. Fahlen's privileges was reasonable and warranted. (*Ibid.*) In Sutter's closing argument following those jury instructions, it argued that the only question before the JRC was whether the proposed termination was reasonable and warranted. (Fahlen RJN, Exh. A, pp. 1295-1296). Sutter argued that the JRC should not and could not make findings on the conduct of the hospital. (Fahlen RJN, Exh. A, pp. 360-1361.) In Dr. Fahlen's closing argument, he never claimed whistleblower retaliation, because the issue before the JRC was limited to whether there was a medical disciplinary cause or reason to terminate his privileges. (Business and Professions Code section 805 et seq.) He also explicitly informed the JRC that it did not need to decide the motivation of the hospital. (Fahlen RJN, Exh. A, pp. 1357-1359.)

Following the instructions and closing argument, the JRC issued a decision that found that the termination of Dr. Fahlen's privileges was not

reasonable and warranted. (3 CT 547-51.) It made no finding on the issue of whether Sutter had retaliated against Dr. Fahlen because of his whistleblowing or its motivation in initiating charges against him. (*Ibid.*) The decision of Sutter's Board of Directors to terminate Dr. Fahlen's privileges, despite the hearing panel's decision, also did not consider, discuss or decide whether it had previously retaliated against Dr. Fahlen or whether its decision was itself a retaliatory act. (1 CT 71-78.) Thus, Dr. Fahlen's retaliation claim was never considered or decided in any fashion before he filed his civil action for reinstatement and damages pursuant to Section 1278.5.

2. A Writ of Mandate Proceeding Would Not Determine If Retaliation Occurred or Whether A Healthcare Facility's Reasons Were Pretextual.

A writ of mandate proceeding could not review the issue of whether Sutter had retaliated against Dr. Fahlen, since that issue was not litigated in the peer review proceedings. As stated by the Court of Appeal, "the good faith or bad faith of the administrative decision maker is not an issue in the [writ] proceeding." (*Fahlen, supra,* 208 Cal.App.4th at p. 581.)

The Court of Appeal's decision recognizes that requiring a writ of mandate would cause a delay in the prosecution of a physician's retaliation action which is "incompatible with the Legislature's goals." (*Fahlen, supra,* 208 Cal.App.4th at p. 562.) However, the impact of accepting Sutter's argument would be far greater than that. In most or all cases, physicians with valid retaliation claims based on a termination of their privileges would be entirely barred from ever using Section 1278.5 to protect their rights.

The method of proof of retaliation is well-established under California law. The plaintiff must present evidence of protected activity and action taken against him, and some evidence that suggests the two were

linked by a retaliatory motive, which creates a presumption of retaliation. (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713-714.) "However, the employer may dispel the presumption merely by articulating a legitimate, nondiscriminatory reason for the challenged action." (*Ibid.*) "The plaintiff then bears the burden of persuasion with respect to all elements of the cause of the action, including the existence and causal role of discriminatory or retaliatory animus." (*Id.* at p. 715.)

Requiring a physician to win a writ of mandate following a peer review hearing would effectively make it impossible for a physician to prove that a healthcare facility's reasons for terminating his privileges were pretextual. Since retaliation is not an issue for decision in a peer review hearing and there is no discovery by deposition, there is no opportunity for the physician to use the discovery tools of civil litigation to probe the validity of the purported reasons for a termination. A judge evaluating Dr. Fahlen's writ would be limited to evaluating whether there was any substantial evidence in the record to support the Sutter Board's conclusion. (*Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1495-1497.)

Furthermore, even if a healthcare facility's charges are true, in the sense that they accurately represent past events, that does not prove that termination of a doctor's privileges is not discriminatory. A whistleblowing physician may be terminated when other physicians with similar or worse problems were not disciplined at all. Here, Dr. Thong Nguyen, a member of the Ad Hoc Investigating Committee, testified that other hospital physicians with behavioral issues were referred to counseling rather than having their privileges terminated. (Fahlen RJN, Exh. A, pp. 1222-1223.) In a retaliation case brought under Section 1278.5, Dr. Fahlen would have the opportunity to discover and prove he was treated more harshly than other

physicians with similar behavior issues. In a writ of mandate proceeding, he would have no such opportunity, since there would be no discovery and discriminatory treatment would not be an issue presented to the court.

If Sutter's argument is accepted, a healthcare facility could always defeat a claim of retaliation by simply presenting a prima facie case of a legitimate reason for its termination of privileges. No independent factfinder would ever evaluate a physician's retaliation case and the physician would never have an opportunity to prove the healthcare facility's reasons were pretextual. This scheme would obviously defeat the Legislature's express intention to give physicians a civil action for retaliation for "an unfavorable change in privileges." It would also defeat Section 1278.5's public policy of protecting the public health and safety.

As discussed above, this Court has twice recognized that requiring a writ of mandate proceeding before the filing of a retaliation action would mean that the agency accused of retaliation would win nearly every case, contrary to the purpose of the statute. (*Runyon, supra,* 48 Cal.4th at p. 774, citing *Arbuckle, supra,* 45 Cal.4th at p. 977.) That analysis compels an affirmation of the Court of Appeal's decision.

C. *Westlake* Does Not Support Sutter's Argument.

Sutter relies primarily on *Westlake, supra,* as legal authority for its argument that Dr. Fahlen must win a writ of mandate before pursuing this action. In fact, Sutter's entire argument essentially rests on two sentences from Westlake:

> Although a quasi-judicial decision reached by a tribunal of a private association may not be entitled to exactly the same measure of respect as a similar decision of a duly constituted public agency [citation omitted], we believe that so long as such a quasi-judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the hospital's action. Accordingly, we conclude that plaintiff must first succeed in

> overturning the quasi-judicial action before pursuing her tort claim against defendants.

(*Westlake,* 17 Cal.3d at p. 484, cited in AOB at pp. 18-19.)

In *Arbuckle*, this Court acknowledged the general rule of *Westlake*, but found it did not apply when, as here, the Legislature expressly acknowledged the existence of a parallel administrative remedy but did not require an adverse decision to be set aside by a writ of mandate. (*Arbuckle, supra,* 45 Cal.4th at pp. 975-976.) Sutter's argument based on *Westlake* therefore fails under more recent precedent of this Court.

Sutter correctly describes *Westlake's* objectives in requiring a writ of mandate. (See *Westlake,* 17 Cal.3d at p. 484; AOB at p. 19.) However, none of those objectives apply in a Section 1278.5 action. The first objective of according "proper respect" to a hospital's peer review decision by requiring a writ of mandate does not apply when the Legislature has recognized that peer review decisions can be used illegitimately for retaliatory purposes, as described above. The second objective of simplifying court procedures by requiring that a court rather than a jury evaluate a hospital's decision is inconsistent with the Legislature's decision to give physicians a right to a direct civil action, including independent factfinding by a jury, when they claim retaliation. The third objective, protecting those responsible for "policing medical personnel", is clearly contrary to the Legislature's intent in enacting Section 1278.5. Section 1278.5 was not intended to protect healthcare facilities, but to regulate them in order to protect the public health and safety. Applying *Westlake* to protect healthcare facilities from accountability for retaliatory actions would be diametrically opposed to the purpose of the statute to protect whistleblowers and the public health.

A rationale of *Westlake* for requiring exhaustion of administrative proceedings, deference to the "expertise" of the physicians on a peer review

hearing panel, also does not apply here. (*Westlake*, *supra,* 17 Cal.3d at p. 476.) In this case, Sutter's governing body disregarded the unanimous recommendation of the physicians on the JRC. A hospital's governing body had no special expertise in whether it is committing retaliation and the courts should not give deference to such decisions.

Westlake was silent on the standard of judicial review to be applied in a writ of mandate proceeding following a hospital's peer review. At the time the Court decided *Westlake,* independent judicial review was required whenever an administrative agency had the power to take a fundamental right. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 31; *Bixby v. Pierno* (1971) 4 Cal.3d 130.) One year after *Westlake,* this Court determined that there should also be an independent judicial review of the evidence supporting a termination of hospital privileges, because a physician's privileges are a fundamental right and a fundamental vested property interest. (*Anton v. San Antonio Community Hospital* (1977) 19 Cal. 3d 802, 823-825.) Shortly after *Anton*, the CHA persuaded the Legislature to amend Code of Civil Procedure section 1094.5 to add a new subdivision (d), mandating only a substantial evidence review of hospital peer review. The Legislature did so despite the opinion of the Legislative Counsel of California that the amendment was unconstitutional. (Fahlen RJN, Exh. C, legislative history of S.B. 1472, Opinion of Legislative Counsel, Sept. 3, 1978.) The *Westlake* Court had no reason to anticipate that a substantial evidence standard would be subsequently enacted by statute and applied in writ of mandate proceedings. This is another reason why *Westlake* is not controlling authority on the question presented here.

Sutter claims that the Court of Appeal below concluded that by enacting Section 1278.5, "the Legislature abolished the decades-old

exhaustion requirement applicable to physician peer review." However, Section 1278.5 creates an exception to *Westlake* that would not apply unless the physician had grounds to bring a retaliation case, so most peer review proceedings will remain subject to *Westlake.*

Sutter also relies on *Campbell v. Regents of Univ. of California* (2005) 35 Cal.4th 311, 321, for the proposition that exhaustion is required unless the Legislature indicates expressly or by necessary implication that exhaustion is not required. (AOB at pp. 40-41.) As discussed above, both the language of Section 1278.5 and its legislative history establish that the Legislature did not intend to require exhaustion of the administrative or judicial remedies provided by the peer review statutes.

Although Sutter's argument references *Nesson v. Northern Inyo County Local Hospital District* (2012) 204 Cal.App.4th 65, it concedes that *Nesson* "did not discuss at length why it was construing Section 1278.5 in accord with the *Westlake* requirement." (AOB at p. 28.) Indeed, *Nesson* did not analyze or even mention the purpose, language or legislative history of 1278.5. Nor did it consider *Arbuckle* or *Runyon.* "[T]he *Nesson* opinion did not separately consider or analyze the requirement for exhaustion of judicial remedies with respect to Nesson's section 1278.5 cause of action." (*Fahlen, supra,* 208 Cal.App.4th at p. 574, fn. 6.) Dr. Nesson never argued that Section 1278.5 gave him a right to an immediate civil action for damages. The defendant hospital's brief did not even mention Section 1278.5. In Dr. Nesson's reply brief, it only argued that the Hospital had failed to challenge the 1278.5 claim and therefore had waived any challenge to that claim.

There was no discussion in any of the briefs about the issue presented here. "Under these circumstances, it is not surprising that the appellate court did not delve deeply into section 1278.5." (*Fahlen, supra,* 208 Cal.App.4th

at p. 574, fn. 6.) *Nesson* has no value as precedent on the question presented here.

D. When, as Here, There Are Multiple Acts of Retaliation, Sutter's Argument Would Eliminate a Physician's Cause of Action for Pre-Termination Retaliatory Actions, Contrary to the Purpose of the Statute.

As many cases demonstrate, it is commonplace for retaliation to take place not as a single act, but as a series of actions. (See, e.g., *Arbuckle, supra,* 45 Cal.4th at p. 969; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1039-1040.)

Sutter's brief does not discuss the legal implications of the fact that Dr. Fahlen suffered from acts of retaliation other than the termination of his privileges, as alleged in his Complaint and proven by evidence submitted in opposition to Sutter's anti-SLAPP motion. (1 CT 18-19 at ¶¶ 28-29, 1 CT 31-34, 2 CT 294-96 at ¶¶ 34-38; 3 CT 403-04 at ¶¶ 6-9.) Sutter's pre-termination actions of getting Dr. Fahlen fired and then threatening him meet the description of "discriminatory treatment" contained in Section 1278.5, subdivision (d)(2). Given the proximity in time of those actions to some of Dr. Fahlen's complaints about substandard nursing care, both actions are presumed to be retaliatory under subdivision (d)(1). (2 CT 287-95at ¶¶ 7-31, ¶¶ 34-38.)

Dr. Fahlen has established a prima facie case of retaliation based on actions clearly not subject to a writ of mandate requirement, since they were both before and outside the peer review proceedings. Since the pre-termination retaliatory acts in this case remain viable, the decisions of the trial court and the Court of Appeal to deny Sutter's anti-SLAPP motion on his Section 1278.5 count must be affirmed for that reason standing alone.

Sutter's argument assumes that Dr. Fahlen's right to sue for those pre-termination actions dies on the vine unless he wins a writ of mandate on

the termination of his privileges. That position contradicts the plain language of Section 1278.5 which gives Dr. Fahlen a right to sue because of such actions. In addition, a writ of mandate would not consider the propriety of any of Sutter's pre-termination actions, which are not addressed in the decision of the Sutter Board. (1 CT 71-78.) As a consequence, pre-termination retaliatory actions would never be evaluated by any court in any proceeding. Sutter's argument, if adopted, would thus provide a perverse incentive for a healthcare facility to pursue a wrongful termination of a whistleblower's privileges: by doing so, it could eliminate the physician's ability to sue for pre-termination acts of retaliation.

Here, if Sutter's argument were accepted, the parties and the courts would be faced with a situation in which Dr. Fahlen must simultaneously pursue two judicial remedies based on overlapping facts arising out of the same events. This would obviously be contrary to judicial economy, which would be best served by having all of Dr. Fahlen's retaliation claims heard in the same forum at the same time. It would also create an anomalous situation in which a physician could immediately sue for a threat to take a peer review action, but could not sue for an actual termination of privileges without winning a writ of mandate. Judicial economy and the rational evaluation and disposition of Section 1278.5 cases would be ill-served by this procedural scheme.

E. Permitting Direct Civil Actions Will Not Inspire Non-Meritorious Litigation.

Sutter may argue in its reply brief that affirming the Court of Appeal would open a floodgate of spurious retaliation claims. There is no evidence to support such an argument and considerable evidence to the contrary. To start with, there are very few peer review hearings held each year in California. (Fahlen RJN, Exh. D, "*Comprehensive Study of Peer Review in California,*" July 31, 2008, by Lumetra, under contract with the Medical

Board of California at p. 90.) Second, since the Legislature enacted Section 1278.5 in 2007, there have been few cases in either state or federal courts in which Section 1278.5 was an issue, indicating that physicians are not using the remedy often. Third, there is no reason to expect physicians to file spurious claims of retaliation. Retaliation is difficult to prove because it almost always must depend on circumstantial evidence, since it is based on subjective motives only the person who is retaliating can directly know. (*Mamou v. Trendwest Resorts, Inc.*, *supra,* 165 Cal.App.4th at p. 713.) A physician without a history of whistleblowing is highly unlikely to pretend to be a whistleblower just to be able to sue a healthcare facility. Even physicians with valid retaliation claims will often be unable to sue a healthcare facility because of the difficulties inherent in litigating such claims. (Fahlen RJN, Exh. D, Lumetra study, p. 90.) Healthcare facilities have virtually unlimited resources to litigate and they have a variety of procedural protections.

As this Court recognized in *Runyon,* permitting a direct civil action only gives the plaintiff "the opportunity of *proving*, in court, all of the elements of a cause of action . . ." (*Runyon*, *supra,* 48 Cal.4th at p. 769, emphasis in original.) In addition to the usual guarantees of a fair trial applicable to all litigants, healthcare facilities can also file anti-SLAPP motions pursuant to *Kibler v. Northern Inyo County Local Hosp. Distr.* (2006) 39 Cal.4th 192, as Sutter did here. The risk of having to pay their opponent's attorneys fees is a powerful deterrent to retaliation claims by physicians.

F. Sutter's Argument Would Create an Exception to Section 1278.5 That Is Contrary to the Purpose and Public Policy Underlying the Law.

Section 1278.5 is a regulatory statute, set in a regulatory act, intended to prevent a specific type of misconduct by healthcare facilities – retaliation for reports concerning the care, services or conditions they are providing. Viewed in its entirety, the Legislature obviously wanted Section 1278.5 to be a strong prohibition on retaliation with effective remedies for whistleblowers.

Given the purpose and terms of the statute, it is inconceivable that the Legislature intended to give health facilities a nearly foolproof ability to escape liability for retaliation by using peer review proceedings. However, for the reasons described above, that would be the outcome if this Court accepts Sutter's argument.

Sutter in effect argues that the public policy favoring peer review trumps the language and intention of the statute. However, the courts will not find an implicit exception to the plain language of a statute based on public policy arguments. (*Pacific Lumber, supra,* 37 Cal. 4th at pp. 926-927.) This Court is "not free to substitute a contrary judgment for the Legislature's considered conclusions." (*Id.* at p. 943.)

Furthermore, there is no conflict in the fundamental public policy underlying Section 1278.5 and California's peer review statutes. Both are intended to protect the public health and safety. Business and Professions Code section 809, subdivision (a)(4) states, "Peer review that is not conducted fairly results in harm to both patients and healing arts practitioners by limiting access to care." Retaliatory peer review is not consistent with either the public policy favoring public health and safety nor the public policy favoring fair peer review. In fact, shielding peer review from accountability under Section 1278.5 would actually provide an

incentive for healthcare facilities that wanted to get rid of a physician whistleblower to use peer review as a safe vehicle for retaliation.

The Legislature reconciled any potential competing public policy interests by adding subdivision (l), preserving a hospital's ability to complete peer review while a Section 1278.5 is pending. Even if there was an irreconcilable conflict between Section 1278.5 and any aspect of California's peer review law, then the 2007 amendment to Section 1278.5 would prevail over Business and Professions Code section 809 et seq., which was enacted in 1989. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 568.)

IV. SUTTER'S NEW CONSTITUTIONAL ARGUMENT IS PROCEDURALLY IMPROPER AND HAS NO SUBSTANTIVE MERIT.

Although Sutter's argument based on the federal Health Care Quality Improvement Act of 1986 (HCQIA) is not entirely clear, it appears to argue that Section 1278.5 would be unconstitutional unless a physician is required to win a writ of mandate before filing suit for retaliatory actions taken against hospital privileges. (AOB at pp. 34-37.)

Sutter did not raise this issue in either the trial court or the Court of Appeal. Sutter's argument depends on a factual claim which it did not prove in the trial court: that its Board of Directors acted "in the reasonable belief that the action was in the furtherance of quality health care." (42 U.S.C. section 11112, subdivision (a)(1).) Sutter did not submit any facts supporting the application of HCQIA immunity to this case in its anti-SLAPP motion. "If the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal." (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340-41.)

Sutter waived this constitutional argument by failing to raise it with either the trial or appellate court below and this Court need not address it. (*Ibid.*, see also *U.S. v. Olano* (1993) 507 U.S. 725, 731.)

Sutter's HCQIA argument also lacks substantive merit. Sutter concedes that HCQIA provides only a limited immunity and that the immunity depends on proof that an action was taken in the reasonable belief that it would further quality health care. (AOB at pp. 36-37.) Sutter has not proven, and cannot prove on this record, that it is eligible for HCQIA immunity.

Furthermore, HCQIA immunity is irrelevant to the legal issue presented here, since Dr. Fahlen seeks reinstatement as well as damages. HCQIA provides immunity from damages only and does not shield a defendant from injunctive relief. (42 U.S.C. section 11111, subdivision (a)(1); *Singh v. Blue Cross/Blue Shield of Mass., Inc.* (1st Cir. 2002) 308 F.3d 25, 35.) Dr. Fahlen is therefore entitled to pursue his claim for reinstatement pursuant to Section 1278.5 whether or not HCQIA applies.

Furthermore, to prove a claim under Health and Safety Code section 1278.5, a plaintiff must prove the actions at issue were motivated by retaliation for whistleblowing. If the plaintiff proves his case, then the immunity protections of HCQIA do not apply. The HCQIA qualified immunity does not extend to an illegitimate peer review action that is motivated by retaliation (a criminal act under Section 1278.5), rather than a reasonable belief that the action is necessary to ensure quality health care. (42 U.S.C. section 11112, subdivision (a)(1).)

HCQIA provides that it should not be interpreted in a manner which changes liabilities provided under law, including state law. (42 U.S.C. section 11115, subdivision (a).) Sutter seeks to interpret HCQIA in such a way that it would render the statute wholly ineffective in preventing

retaliatory peer review.

In addition, since HCQIA immunity applies only to damages, it would not be available as a defense in a writ of mandate proceeding under Code of Civil Procedure section 1094.5, subdivision (d), which cannot award damages. There is nothing unconstitutional about requiring a healthcare facility to raise an alleged federal immunity to damages in a civil action authorized by state statute. If HCQIA provides Sutter any additional legal protection, that protection will be available to it if this case is remanded for trial.

Because the Court of Appeal's decision does not implicate the immunity protections of the HCQIA, this Court should reject Sutter's untimely argument regarding the constitutionality of the whistleblower statute.

V. DR. FAHLEN'S SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF IS PROPER.

Dr. Fahlen's second cause of action is for declaratory relief pursuant to Business and Professions Code section 803.1. It requests a finding that Sutter's termination of his privileges was in bad faith, for purposes of removing the adverse action report filed with the Medical Board of California following the termination. (1 CT 22-23 at ¶¶ 43-46.) The Court of Appeal found that the relief sought pursuant to Section 803.1 is appropriate ancillary relief to an action brought under Section 1278.5. (*Fahlen, supra,* 208 Cal.App.4th at pp. 581-582.) Sutter's only argument for striking the second cause of action is its exhaustion argument against Dr. Fahlen's Section 1278.5 action. (AOB at p. 48.) Since that argument fails, and the Court of Appeal's analysis of the second cause of action is persuasive, Dr. Fahlen's second cause of action should be allowed to proceed.

CONCLUSION

The Court of Appeal summarized this case well:

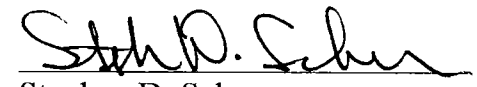
> The Legislature's intent in enacting section 1278.5 is clear: Medical personnel must be protected from retaliation when they report conditions that endanger patients. This policy of putting patients first would be undermined if retaliation victims had to pursue writ review before seeking the statute's protection.

(*Fahlen, supra,* 208 Cal.App.4th at p. 561.)

The Court of Appeal's analysis of this case was correct and should be affirmed.

Dated: April 5, 2013

Respectfully submitted,



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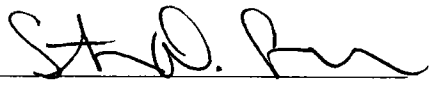
CERTIFICATE PURSUANT TO RULE 8.360, subd. (b)(1)

Pursuant to Rule 8.360, subd. (b)(1), I certify that the attached brief uses the 13 point Times New Roman font and contains 13,232 words.

Dated: April 5, 2013

By 

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20 of 26 DOCUMENTS

MARK T. FAHLEN, Plaintiff and Respondent, v. SUTTER CENTRAL VALLEY HOSPITALS et al., Defendants and Appellants.

F063023

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

208 Cal. App. 4th 557*; *145 Cal. Rptr. 3d 491*; *2012 Cal. App. LEXIS 877*; *34 I.E.R. Cas. (BNA) 383

August 14, 2012, Opinion Filed

NOTICE:

NOT CITABLE--SUPERSEDED BY GRANT OF REVIEW

SUBSEQUENT HISTORY: Review granted, Depublished by, Request granted, Stay denied by, As moot *Fahlen (Mark T.) v. Sutter Central Valley Hospitals, 149 Cal. Rptr. 3d 614, 288 P.3d 1237, 2012 Cal. LEXIS 10560 (Cal., 2012)*
Application granted by *Fahlen (Mark T.) v. Sutter Central Valley Hospitals, 2012 Cal. LEXIS 12007 (Cal., Dec. 11, 2012)*
Application granted by *Fahlen (Mark T.) v. Sutter Central Valley Hospitals, 2013 Cal. LEXIS 1002 (Cal., Jan. 15, 2013)*

PRIOR HISTORY: [***1]
APPEAL from a judgment of the Superior Court of Stanislaus County, No. 662696, Timothy W. Salter, Judge.
Safari v. Kaiser Found. Health Plan, 2012 U.S. Dist. LEXIS 98388 (N.D. Cal., July 16, 2012)

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A doctor sued a hospital alleging, among other things, that he lost his hospital privileges as a form of whistleblower retaliation (*Health & Saf. Code, § 1278.5*). The trial court denied the hospital's motion to strike under *Code Civ. Proc., § 425.16*, the anti-SLAPP statute. (Superior Court of Stanislaus County, No. 662696, Timothy W. Salter, Judge.)

The Court of Appeal affirmed the denial of the anti-SLAPP motion with respect to causes of action for retaliation under *Health & Saf. Code, § 1278.5*, and intentional interference with contractual relations, and seeking a declaratory judgment pursuant to *Bus. & Prof. Code, § 803.1*. The court reversed as to the remaining causes of action. The anti-SLAPP motion was properly denied as to the whistleblower retaliation claim because that claim would not be defeated on the merits by the doctor's failure to pursue writ relief. There is no requirement that a *§ 1278.5* plaintiff seek judicial review of administrative action taken in peer review proceedings under *Bus. & Prof. Code, §§ 809-809.9*, as a precondition to a civil action under *§ 1278.5*. The doctor's failure to pursue writ relief also did not bar his claim under *Bus. & Prof. Code, § 803.1*, for declaratory judgment concerning bad faith in the peer review process. In the current case, the allegation was not a separate cause of action but could result in additional relief under *§ 1278.5*. However, neither judicial economy nor fundamental fairness required an exception from the requirement for

exhaustion of judicial remedies as to claims of interference with the right to practice an occupation, interference with prospective advantage, retaliation for advocating for appropriate patient care, or wrongful termination of hospital privileges. Those claims were barred. (Opinion by Wiseman, Acting P. J., with Cornell and Detjen, JJ., concurring.) [*558]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Pleading § 93--Anti-SLAPP Motions--Protected Activities--Scope.--Although *Code Civ. Proc., § 425.16, subd. (b)(1)*, states that the statute is intended to protect only those persons who are sued because of any act of that person in furtherance of the person's right of petition or free speech in connection with a public issue, the statute subsequently defines that phrase in a manner specific to *§ 425.16*, the anti-SLAPP statute. *Section 425.16, subd. (e)(2)*, includes within that phrase 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. As a result, a defendant who invokes subparagraph (2) need not separately demonstrate that the statement concerned an issue of public significance.

(2) Pleading § 93--Anti-SLAPP Motions--Protected Activities--Hospital Peer Review--Governing Board.--Actions of a peer review committee are statements made in connection with an issue under consideration or review by any other official proceeding authorized by law, as provided by *Code Civ. Proc., § 425.16, subd. (e)(2)*. The statements or writings of a hospital's governing board in reviewing a determination on medical staff privileges, and in making a final decision on such termination or nonrenewal of such privileges, are also made in connection with an issue under consideration or review in an official proceeding authorized by law (*Code Civ. Proc., § 425.16, subd. (e)(2)*).

(3) Healing Arts and Institutions § 47.6--Physicians--Tort Claims Arising from Administrative Actions--Exhaustion of Judicial Remedies--Retaliation.--A doctor must exhaust all available administrative remedies and successfully set aside a hospital's final administrative determination through mandamus review before the doctor may pursue a tort claim against defendants. Under the doctrine of exhaustion of judicial remedies, once an administrative decision has been issued, provided that decision is of a sufficiently judicial character to support collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims. Generally speaking, if a complainant fails to overturn an adverse administrative decision by writ of mandate, and if the administrative proceeding possessed the requisite judicial [*559] character, the administrative decision is binding in a later civil action brought in superior court. In some circumstances, however, a quasi-judicial proceeding is alleged by a plaintiff not to be a vehicle for administrative resolution of an administrative grievance, but is alleged to be, or to be a part of, a retaliatory action itself. This retaliation cannot be resolved within the administrative grievance process when the process itself provides the forum for retaliation, it is argued, and such an administrative proceeding is not entitled to the deference traditionally afforded by the standard of review in administrative mandate cases. In these circumstances, the Legislature may recognize, explicitly or by implication, that the administrative decision in question should not be given preclusive effect in later judicial proceedings, even when the administrative decision has not been set aside through administrative mandate proceedings. When the Legislature has made this type of determination, the courts will not require exhaustion of judicial remedies in the administrative proceeding. The court may find a legislative intent not to require exhaustion of writ remedies when the Legislature has expressly acknowledged the existence of the parallel administrative remedy, yet did not require that the administrative findings be set aside by way of a mandate action.

(4) Healing Arts and Institutions § 47.6--Physicians--Tort Claims Arising from Administrative Actions--Exhaustion of Judicial Remedies--Retaliation--Whistleblowers--Anti-SLAPP Motions.--There is no requirement that a whistleblower plaintiff under *Health & Saf. Code, § 1278.5*, seek judicial review of administrative action taken in peer review proceedings as a precondition to a civil action under *§ 1278.5*. Therefore, a doctor's failure to seek

mandamus review did not render improbable his success on a *§ 1278.5* claim, and the hospital's anti-SLAPP motion was properly denied.

[Cal. Forms of Pleading and Practice (2012) ch. 295, Hospitals, § 295.13.]

(5) Employer and Employee § 9--Wrongful Discharge--Retaliation.--A retaliation lawsuit is not an action to review the decision of an administrative decision maker, but a completely separate damages action in the superior court in which the employee will enjoy all the procedural guarantees and independent factfinding that generally accompany such actions. [*560]

(6) Healing Arts and Institutions § 22--Physicians--Peer Review--Bad Faith--Actions.--*Bus. & Prof. Code, § 803.1, subd. (b)(6)*, does not rely upon somehow convincing a court in a writ proceeding that an administrative peer review decision was in bad faith, when the good faith or bad faith of the administrative decision maker is not an issue in the writ proceeding.

COUNSEL: Arent Fox, Lowell C. Brown, Debra J. Albin-Riley and Jonathan E. Phillips for Defendants and Appellants.

Jana N. DuBois; Davis Wright Tremaine and Terri D. Keville for California Hospital Association as Amicus Curiae on behalf of Defendants and Appellants.

Stephen D. Schear; Justice First and Jenny Huang for Plaintiff and Respondent.

Francisco J. Silva and Long X. Do for California Medical Association as Amicus Curiae on behalf of Plaintiff and Respondent.

JUDGES: Opinion by Wiseman, Acting P. J., with Cornell and Detjen, JJ., concurring.

OPINION BY: Wiseman

OPINION

[**493] **WISEMAN, Acting P. J.**--*Health and Safety Code section 1278.5*[1] is a whistleblower protection law designed to encourage health care workers to notify authorities of "suspected unsafe patient care and conditions." (*§ 1278.5, subd. (a).*) One of the issues we must decide is whether a doctor claiming he lost his hospital privileges as a form of whistleblower retaliation must exhaust his judicial remedy of pursuing review, via writ of mandate, of the hospital's action before he can file a whistleblower lawsuit under *section 1278.5*. A *section 1278.5* [***2] claim cannot be asserted in writ proceedings, so applying [**494] the exhaustion requirement would delay relief for a whistleblower.

1 Subsequent statutory references are to the Health and Safety Code unless noted otherwise.

In two recent cases interpreting the California Whistleblower Protection Act (*Gov. Code, § 8547 et seq.*), the California Supreme Court held that a state employee sanctioned by an agency need not file a mandate petition against the agency before suing it under the whistleblower statute. The court recognized the Legislature's intent to encourage employees to report threats to public health without fear of retribution. (*Runyon v. Board of Trustees of* [*561] *California State University (2010) 48 Cal.4th 760, 763, 774 [108 Cal. Rptr. 3d 557, 229 P.3d 985]*; *State Bd. of Chiropractic Examiners v. Superior Court (2009) 45 Cal.4th 963, 977-978 [89 Cal. Rptr. 3d 576, 201 P.3d 457].*) For the same reason, prior filing of writ proceedings also is not required here.

Dr. Mark T. Fahlen reported to hospital authorities that some nurses who worked with him at Memorial Medical Center failed to follow his instructions. In some instances, he believed the nurses endangered patients' lives. One nurse refused to follow Fahlen's order to shock a patient with defibrillator paddles. [***3] Another disobeyed Fahlen's order to transfer a patient to intensive care. Some of these incidents involved heated exchanges between Fahlen and the nurses, and complaints were made about Fahlen's behavior as well.

The hospital's chief operating officer allegedly blamed Fahlen and helped persuade Fahlen's medical group to fire him. The hospital then declined to renew Fahlen's staff privileges. A judicial review committee of six physicians reviewed the nonrenewal of Fahlen's staff privileges. It found no professional incompetence and reversed the decision. The hospital board of trustees then reversed the committee. The board found that Fahlen's conduct was not acceptable and was "directly related to the quality of medical care at the Hospital." This outcome was reported to the Medical Board of California. Fahlen did not file a petition for a writ of mandate challenging

the decision. Instead, he filed this lawsuit, asserting a *section 1278.5* claim among others.

This appeal is from an order denying the hospital's anti-SLAPP motion. (*Code Civ. Proc., § 425.16.*) The crucial issue is presented by the hospital's contention that the motion should have been granted because Fahlen's whistleblower [***4] claim will be defeated on the merits due to his failure to pursue writ relief. In light of our holding on the exhaustion issue, we reject that contention. We conclude the trial court correctly denied the motion with respect to the *section 1278.5* cause of action and one other. As to the remaining causes of action, however, we must reverse, because the exhaustion requirement does apply to them.

The Legislature's intent in enacting *section 1278.5* is clear: Medical personnel must be protected from retaliation when they report conditions that endanger patients. This policy of putting patients first would be undermined if retaliation victims had to pursue writ review before seeking the statute's protection.

This case illustrates why this is true. Fahlen reported what he thought were serious threats to patient safety. The hospital expelled him. A committee of his peers found that he should retain his staff privileges, but the hospital [*562] persisted. If we accepted the hospital's argument in this case, Fahlen could have to spend years pursuing writ relief before being able even to assert his whistleblower claim in court. This type of delay is incompatible with the Legislature's goals.

FACTUAL AND [***5] ***PROCEDURAL HISTORIES***

Plaintiff and respondent Mark T. Fahlen is a nephrologist, a physician specializing [**495] in the treatment of diseases of the kidneys. Prior to June 2008, he was employed by Gould Medical Group (Gould). Fahlen was granted provisional staff privileges at Memorial Medical Center (MMC) in 2003 and was granted medical staff privileges at MMC in September 2004. MMC is operated by defendant and appellant Sutter Central Valley Hospitals.

Twice in 2004 and twice in 2006, Fahlen argued with nurses who failed to follow his directions concerning the care and treatment of patients. Between August 16, 2007, and April 28, 2008, there were six other incidents in which Fahlen had negative interactions with particular nurses providing care to Fahlen's patients. On many of these occasions, Fahlen reported the substandard or insubordinate nursing activity to nursing supervisors or by written complaint to MMC administration.

Around the beginning of May 2008, after the last of Fahlen's negative interactions with nursing staff, defendant and appellant Steve Mitchell, MMC's chief operating officer, contacted Gould's medical director with information concerning Fahlen's interactions with MMC's [***6] nursing staff. Mitchell testified at the peer review hearing that he contacted Gould's director in the hope that the director would meet with Fahlen, that Fahlen would become angry during the meeting, and that Gould would terminate Fahlen's employment as a result of the director's "own personal experiences" in such a meeting. Mitchell said his hope was that if Fahlen were fired by Gould he would leave town, with the net effect being to eliminate the need for peer review proceedings by MMC's medical staff. "Or at least that is my plan," Mitchell wrote in an earlier e-mail to MMC's chief executive officer.

Gould terminated Fahlen's at-will employment contract on May 14, 2008. Since the termination also resulted in the cancellation of Fahlen's medical malpractice insurance, Fahlen was immediately unable to continue treating patients at MMC. On May 30, 2008, Fahlen met with Mitchell to determine the status of Fahlen's staff privileges at MMC, because Fahlen intended to open a private medical practice in Modesto. At that meeting, according to Fahlen, Mitchell advised Fahlen that he should leave Modesto and that if he did not do so, MMC would begin an investigation and peer review that would [***7] result in a report of disciplinary proceedings to the Medical Board of [*563] California. Fahlen advised Mitchell that he intended to stay in town. Ten days later, MMC made a written request to Fahlen that he provide information concerning his interactions with nurses on five occasions, beginning in December 2007. Fahlen provided a written response dated June 10, 2008. Three days prior to this meeting, after Fahlen had scheduled the meeting with Mitchell, Mitchell sent an e-mail to MMC's chief executive officer stating that Fahlen "does not get it"--that is, as Mitchell testified, that Fahlen was going to lose his staff privileges at MMC. The chief executive officer responded: "Looks like we need to have the Medical Staff take some action on his MedQuals!!! Soon!"

MMC appointed an investigative committee, which

reported to the medical executive committee (MEC) at its meeting on August 11, 2008. MEC is charged under the bylaws of MMC's medical staff with the review of applications for staff privileges at MMC and for the initiation of corrective or disciplinary action against medical staff. At the August 11, 2008, meeting, MEC recommended that MMC not renew Fahlen's staff privileges.

MEC notified [***8] Fahlen of its decision, and of his right to contest that decision, by letter dated August 28, 2008. Fahlen responded by letter from his attorney, requesting [**496] a hearing. By letter dated October 2, 2008, MMC advised Fahlen that the review hearing would be conducted by a judicial review committee (JRC) in accordance with the procedures contained in the bylaws. The letter also included a statement of charges against Fahlen, including 17 incidents of disruptive or abusive behavior toward MMC staff occurring from 2004 through 2008, and one incident of "abusive and contentious behavior" during a 2008 interview with the MEC's appointed investigative committee.

The JRC, composed of six physicians with staff privileges at MMC, and with an attorney as hearing officer, conducted an evidentiary hearing on the proposed termination of Fahlen's staff privileges over 13 sessions between October 8, 2009, and May 24, 2010. By written findings and conclusions unanimously adopted and issued on June 14, 2010, the JRC concluded that MEC "did not sustain its burden of proving that its recommendation not to reappoint Dr. Fahlen to the Medical Staff of Memorial Medical Center for medical disciplinary cause [***9] or reason is reasonable and warranted."

The JRC found that Fahlen's "interaction with the nursing staff at Memorial Medical Center was inappropriate and not acceptable" "on several occasions." In essence, the JRC concluded the medical staff should have intervened earlier with Fahlen, but failed in its responsibility to do so, leaving the matter to the administrators of MMC. MMC, in turn, delegated the primary responsibility for investigation of the matter to an outside attorney, whose investigative report, though highly influential with MEC, failed to [*564] consider other options, such as counseling. As a result, MEC failed to consider "intermediate steps short of recommending loss of Medical Staff privileges ... ." The JRC concluded that the evidence before it did "not establish any professional incompetence on the part of [Fahlen]." Similarly, the evidence did "not establish that any behavior of [Fahlen] was, or is, reasonably likely to be detrimental to patient safety." Further, after MEC recommended termination of privileges, Fahlen "voluntarily obtained psychological counseling and attended anger management sessions." Fahlen's behavior "has appreciably improved." To the extent the evidence [***10] indicated that, prior to the MEC recommendation, anyone's conduct was "detrimental to the delivery of patient care, the nursing staff ... was more to blame for such conduct than was [Fahlen]." The JRC reversed the MEC decision not to reappoint Fahlen to the MMC medical staff.

Pursuant to the medical staff bylaws, the final decision on termination of medical staff privileges rests with the MMC board of trustees. The board determined that it "need[ed] the JRC's assistance" in fulfilling its duties under the bylaws and, by letter dated September 16, 2010, propounded 21 questions, with subsidiary parts, to the JRC, asking whether each alleged incident of misconduct occurred, what findings the JRC made with respect to the individual charge, and "[w]hat evidence produced at the hearing was considered in making those findings of fact?" The board requested the JRC's response within 30 days.

The JRC met and considered the board's request. It determined that answering the board's questions would require its members to read the entire transcript of the proceedings, together with the documentary evidence, and that the request was unreasonable. As a result, the JRC advised the board that "the Board [***11] will have to proceed on the basis of all the materials available to it at this time, including the Findings of Fact and Conclusion that was previously rendered by the Judicial Review Committee."

[**497] In a lengthy letter to Fahlen's attorneys from MMC's chief executive officer dated January 7, 2011, the board conveyed its decision "to reverse the JRC's decision and not to reappoint [Fahlen] to the medical staff." The board was critical of the JRC's findings and conclusions, which the board characterized as "unlinked to any factual support in the hearing record." In summary, the board concluded from its own review of the evidence at the JRC hearing that Fahlen's conduct "was inappropriate and not acceptable, [and was] directly related to the quality of medical care at the Hospital."

Fahlen did not seek judicial review of this determination. MMC subsequently filed a report of disciplinary action with the Medical Board of California.

On March 9, 2011, Fahlen filed a complaint for damages and injunctive and declaratory relief against Sutter Central Valley Hospitals and Steve [*565] Mitchell. The first cause of action alleged retaliation in violation of *section 1278.5*, which prohibits any health facility [***12] from retaliating against, among others, members of its medical staff because the member has presented a complaint or report concerning quality of care, services, or conditions at the facility. (See *§ 1278.5, subd. (b)(1).*) The second cause of action requested a declaratory judgment "pursuant to ... *Business and Professions Code Section 803.1.*"[2] The third cause of action is for interference with the right to practice an occupation. The fourth cause of action is for intentional interference with Fahlen's contractual relations with Gould.[3] The fifth cause of action is for interference with prospective advantage, including loss of reputation and loss of the directorship of the Merced dialysis center. The sixth cause of action is for retaliation against Fahlen for "advocat[ing] for appropriate care for [his] patients," in violation of *Business and Professions Code sections 510* and *2056*. The seventh cause of action is for wrongful termination of Fahlen's hospital privileges. Along with damages and declaratory relief, Fahlen sought an injunction ordering his reinstatement to the medical staff of MMC.

2 *Business and Professions Code section 803.1* provides that the Medical Board of California [***13] shall disclose to "an inquiring member of the public" (*id., subd. (b)*) "[a]ny summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges for medical disciplinary cause or reason, unless a court finds, in a final judgment, that the peer review resulting in the disciplinary action was conducted in bad faith and the licensee notifies the board of that finding ..." (*id., subd. (b)(6)*).

3 While defendants' opening brief states that defendants seek reversal of the anti-SLAPP order "in its entirety," in their summary of the proceedings in the lower court, defendants concede that the fourth cause of action is "not subject to the anti-SLAPP Motion and this subsequent appeal."

Defendants demurred to the complaint and filed an anti-SLAPP motion. After extensive briefing and submission of evidence, the court overruled the demurrer and denied the anti-SLAPP motion. With respect to the order on the anti-SLAPP motion, the court concluded that Fahlen's causes of action did not arise from "protected activity" as described in *Code of Civil Procedure section 425.16* because "disciplinary action is not protected activity." In addition, the [***14] court concluded, "plaintiff has established a prima facie case that he will prevail on the merits," requiring denial of the motion under *Code of Civil Procedure section 425.16, subdivision (b)(1).*

DISCUSSION

I. *The parties' contentions*

The parties make several overarching arguments. Defendants' primary arguments [**498] are: First, that all of Fahlen's causes of action arise from protected activity as contemplated by *Code of Civil Procedure section 425.16* since the California Supreme Court has held that hospital peer review proceedings are [*566] official proceedings authorized by law. (See *Kibler v. Northern Inyo County Local Hospital Dist. (2006) 39 Cal.4th 192, 203 [46 Cal. Rptr. 3d 41, 138 P.3d 193]* (*Kibler*) [construing *Code Civ. Proc., § 425.16, subd (e)(2)*].) As a result, the trial court's first basis for denying the motion was erroneous. Second, that Fahlen's failure to seek judicial review of the MMC board's final administrative decision makes that determination final and precludes, as a matter of fundamental jurisdiction, an attack on that decision in collateral judicial proceedings pursuant to *Westlake Community Hosp. v. Superior Court (1976) 17 Cal.3d 465, 485-486 [131 Cal. Rptr. 90, 551 P.2d 410]* (*Westlake*). Defendants argue there is no possibility [***15] Fahlen can prevail on any of the six causes of action challenged on appeal.

Fahlen contends, primarily, that his first cause of action for retaliation under *section 1278.5* is not precluded by his failure to obtain judicial review of the MMC board's termination decision. In addition, he takes the position that he was not required to obtain judicial review because the peer review proceedings were pretextual; the result was unsupported by the evidence and conflicted with the JRC's findings. Finally, he argues he should be permitted to pursue the second through seventh causes of action even if those causes of action might otherwise require exhaustion of judicial review.

This is because requiring exhaustion would compel him to split the remedies available for remediation of a single primary right, namely, the right to practice his profession "without facing unlawful retaliation or other wrongful interference."

We review an order granting or denying an anti-SLAPP motion de novo. (*Smith v. Adventist Health System/West (2010) 190 Cal.App.4th 40, 52 [117 Cal. Rptr. 3d 805].*)

II. *The statutory framework*

This case involves two statutory provisions that are not inherently contradictory, since both provisions ultimately seek [***16] to protect and improve patient care. The parties, however, assert these statutory rights in a manner that conflicts with aspects of the opposing party's asserted statutory rights. To some extent, the statutes anticipate the type of conflicting assertion of rights presented in this case and they attempt to resolve the conflict. (See *Bus. & Prof. Code, § 809.05, subd. (d)*; *Health & Saf. Code, § 1278.5, subd. (h).*) We begin with a summary of the relevant statutes.

A. *Section 1278.5*

Section 1278.5 was enacted in 1999 to prohibit certain forms of retaliation and discrimination against patients and employees of health facilities. (See Stats. 1999, ch. 155, § 1, p. 2054.) The definition of a health facility includes [*567] a hospital. (See *§ 1250, subd. (a).*) In 2007, *section 1278.5* was amended to include among those protected from retaliation or discrimination any "member of the medical staff ... or any other health care worker of the health facility ... ." (*§ 1278.5, subd. (b)(1)*, as amended by Stats. 2007, ch. 683, § 1, p. 5809.)

Section 1278.5 implements a public policy "to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions." [***17] (*§ 1278.5, subd. (a).*) It does so, in part, by protecting persons who have "[p]resented a grievance, complaint, or report to the [health] facility ... ." (*Id., subd. (b)(1)(A).*) *Section 1278.5, subdivision (d)(1)*, [**499] establishes a rebuttable presumption that any discriminatory action taken is retaliation if the action is taken within 120 days of the filing of the grievance or complaint by the protected person and if the "responsible staff" of the facility knew about the filing of the complaint. (*Ibid.*) Discriminatory treatment includes changes in the terms or conditions of privileges of a member of the facility's medical staff. (*Id., subd. (d)(2).*)

The consequence to the facility for this type of discriminatory treatment is also specified: "A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or the entity that owns or operates a health facility ... , and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter [***18] or any other applicable provision of statutory or common law." (*§ 1278.5, subd. (g).*)

B. *Business and Professions Code Sections 809 Through 809.9*

As we previously mentioned, Fahlen seeks a declaratory judgment concerning the peer review process under *Business and Professions Code sections 809 through 809.9*. These sections were initially enacted in 1989 (see Stats. 1989, ch. 336, §§ 1-9.5, pp. 1444-1450). The goal was to provide a peer review process to "exclude ... those healing arts practitioners who provide substandard care or who engage in professional misconduct" (*Bus. & Prof. Code, § 809, subd. (a)(6)*), "with an emphasis on early detection of potential quality problems and resolutions through informal educational interventions" (*id., subd. (a)(7)*). In the case of acute care hospitals, such as MMC, the statutory requirements for the peer review process are only indirectly applicable: "*Sections 809 to 809.8*, inclusive, shall not affect the respective responsibilities of the organized medical staff or the governing body of an acute care hospital with respect to peer review in the acute care hospital [*568] setting. It is the intent of the Legislature that written provisions implementing *Sections 809 to 809.8*, [***19] inclusive, in the acute care hospital setting shall be included in medical staff bylaws that shall be adopted by a vote of the members of the organized medical staff and shall be subject to governing body approval, which approval shall not be withheld unreasonably." (*Id., subd. (a)(8).*) The parties do not dispute that the medical staff bylaws were adopted pursuant to *Business and Professions Code section 809, subdivision (a)(8)*, that the bylaws satisfy its requirements, and that the peer review proceeding for Fahlen procedurally complied with the

bylaws.

As implied by the term "peer review," a peer review body is generally composed of licensed persons of the same statutory classification (such as "physician and surgeon" or "clinical social worker") (*Bus. & Prof. Code, § 805, subd. (a)(2)*) as the individual whose work is under review. (See *id., § 805, subd. (a)(1)(B)(i) & (iv).*) In the case of an acute care hospital, however, the peer review statutes permit the final determination concerning disciplinary action to be taken by the governing body of the hospital--not by the peer review body. (*Bus. & Prof. Code, § 809, subd. (a)(8).*) Even so, however, "the governing body shall give [***20] great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." (*Bus. & Prof. Code, § 809.05, subd. (a).*) As relevant here, the governing body of a hospital has the authority to take final disciplinary action against a member of the medical staff "[i]n the event the peer review body fails [**500] to take action in response to a direction from the governing body ... ." (*Id., subd. (c).*) In doing so, the governing body "shall act exclusively in the interest of maintaining and enhancing quality patient care." (*Id., subd. (d).*)

The medical staff bylaws of MMC, in addition, provide for review of the JRC's decisions upon appeal by the MEC or by the staff member in question. If neither party appeals, as in this case, the board "shall have the ultimate responsibility to affirm or reverse the decision of the [JRC], but it shall give great weight to the actions of the [JRC], and in no event, shall act in an arbitrary or capricious manner." (Medical Staff Bylaws, MMC, § 8.5-1.) This review, when permitted by the bylaws of a hospital, is not prohibited by the statutory peer review requirements. (*Ellison v. Sequoia Health Services (2010) 183 Cal.App.4th 1486, 1494 [108 Cal. Rptr. 3d 728].*) [***21] "A hospital's final decision in a peer review proceeding may be judicially reviewed by a petition for writ of administrative mandate." (*Id. at p. 1495.*) Further, where a hospital's disciplinary decision is not set aside through judicial review, the decision becomes a final adjudication of the issues in the peer review proceeding. (*Westlake, supra, 17 Cal.3d at p. 484.*) [*569]

C. *Express Cross-related Provisions*

In addition to the general requirement of *Business and Professions Code section 809.05, subdivision (d)*, that peer review proceedings be conducted "exclusively in the interest of maintaining and enhancing quality patient care," *Health and Safety Code section 1278.5* recognizes the potential for conflict between a retaliation lawsuit under that section and peer review proceedings for a member of a medical staff. It states: "The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the [***22] health and safety of patients of the health facility during the peer review proces. ... If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm." (*§ 1278.5, subd. (h).*)

D. *Code of Civil Procedure Section 425.16*

In addition to these substantive provisions of law, this case arises in the procedural context of the anti-SLAPP statute, *Code of Civil Procedure section 425.16*. The familiar principles governing anti-SLAPP motions were summarized by the California Supreme Court in *Simpson Strong-Tie Co., Inc. v. Gore (2010) 49 Cal.4th 12 [109 Cal. Rptr. 3d 329, 230 P.3d 1117]*: "A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Id. at p. 21.*) "In 1992, out of concern over 'a disturbing increase' in these types of lawsuits, the Legislature enacted ... the anti-SLAPP statute. ... The statute authorized [***23] the filing of a special motion to strike to expedite the early [**501] dismissal of these unmeritorious claims." (*Ibid.*, citation omitted.)

"A special motion to strike involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff's 'cause of action ... aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech ... in connection with a public issue.'" (*Simpson Strong-Tie Co., Inc. v. Gore, supra, 49 Cal.4th at p. 21.*) If the defendant meets this threshold, the court considers the second step of the inquiry, i.e., whether the plaintiff has

established a probability that the plaintiff will prevail on the claim. (*Ibid.*) Ordinarily, a court should consider the two steps of the analysis in order. (*Oasis West Realty, LLC v. Goldman (2011) 51* [*570] *Cal.4th 811, 820 [124 Cal. Rptr. 3d 256, 250 P.3d 1115].*) As we mentioned, the trial court here decided that the anti-SLAPP motion failed under both the first and the second steps of the statutory analysis.

III. *First step: The complaint arises from protected activity*

(1) Although *Code of Civil Procedure section 425.16, subdivision (b)(1)*, states that the statute is intended to protect only those persons who are sued because of "any act [***24] of that person in furtherance of the person's right of petition or free speech ... in connection with a public issue," the statute subsequently defines that phrase in a manner specific to the anti-SLAPP statute. As relevant to this case, *section 425.16, subdivision (e)(2)*, includes within that phrase "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 ... ." As a result, a "defendant who invokes ... *subparagraph (2)* ... need not 'separately demonstrate that the statement concerned an issue of public significance.'" (*Kibler, supra, 39 Cal.4th at p. 198.*)

(2) In *Kibler*, a hospital peer review committee summarily suspended a doctor "after a series of hostile encounters" with other members of the hospital staff. (*Kibler, supra, 39 Cal.4th at p. 196.*) The doctor entered into a written agreement with the hospital for reinstatement of privileges upon certain conditions. The doctor then sued the hospital, together with certain physicians and nurses, "seeking damages under a variety of theories including defamation, abuse of process, and interference [***25] with [his] practice of medicine." (*Ibid.*) The Supreme Court affirmed the trial court's conclusion that these causes of action arose from protected activity under the anti-SLAPP statute. (*Kibler, supra, at p. 203.*) As particularly relevant here, the court held that actions of a peer review committee were statements "made in connection with an issue under consideration or review by ... any other official proceeding authorized by law," as provided by *Code of Civil Procedure section 425.16, subdivision (e)(2)*. (See *Kibler, supra, at p. 200.*)

In this case, as in *Kibler*, the challenged causes of action (except the fourth cause of action relating to the termination of Fahlen's employment by Gould) all arise from the hospital peer review proceedings. Fahlen contends that, notwithstanding the holding in *Kibler*, the acts alleged in his complaint are not protected activity under the anti-SLAPP statute for two reasons.

First, Fahlen argues that defendants' acts were not protected because they were retaliatory. Fahlen relies on *McConnell v. Innovative Artists Talent & Literary Agency, Inc. (2009) 175 Cal.App.4th 169 [180,* [**502] *96 Cal. Rptr. 3d 1]*, to support his contention that "[r]etaliatory actions taken against a person are [***26] [*571] not actions in furtherance of free speech, even though they are conveyed through words." *McConnell* is inapposite, however, primarily because the employment action did not occur in the context of a quasi-judicial peer review proceeding established by statute. Instead, *McConnell* involved action taken by a nonmedical employer under an ordinary employment contract. (*Id. at p. 174.*) The employer did not contend its employment decision resulted from a quasi-judicial proceeding, such as the peer review proceeding in *Kibler, supra, 39 Cal.4th at page 203*, but took the position, instead, that the letter reflecting the changes in employment was issued in connection with ongoing litigation over the terms of employment. (*McConnell, supra, at p. 176.*) The appellate court concluded that the defendant had failed to carry its burden to establish that the letter was written in connection with the ongoing litigation. (*Id. at p. 178.*) Consequently, it was not the retaliatory character of the defendant's activity that stripped that activity of protection under the anti-SLAPP statute but, rather, the fact that the acts were not in connection with an official proceeding. (*McConnell, supra, at p. 181.*)

In [***27] this case, by contrast, defendants have met their initial burden under the anti-SLAPP statute to "make a prima facie showing" (*Simpson Strong-Tie Co., Inc. v. Gore, supra, 49 Cal.4th at p. 21*) that the challenged causes of action arise from--and are based directly upon--actions taken in the peer review proceedings, an "official proceeding authorized by law" (*Code Civ. Proc., § 425.16, subd. (e)(2)*), as held in *Kibler, supra, 39 Cal.4th at page 200.*[4] We conclude this prima facie showing by defendants, as the moving party on the anti-SLAPP motion, resolves the only issue before the court in the first phase of the anti-SLAPP inquiry. (See *Simpson Strong-Tie Co., Inc. v. Gore, supra, at p. 21*

.)

4 Fahlen suggests that the causes of action do not "*arise from*" the protected activity, citing *City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78 [124 Cal. Rptr. 2d 519, 52 P.3d 695]*. In that case, mobilehome park owners sued in federal court to invalidate a city's rent control ordinance. The city sued seeking a declaratory judgment that the ordinance was constitutional. The park owners filed an anti-SLAPP motion, contending the city's suit arose from the owners' protected activity of filing the federal suit. Our Supreme Court held that [***28] the city's cause of action arose from the rent control ordinance, not from the owners' federal challenge to the ordinance. (*Cashman, supra, at p. 78.*) As a result, the anti-SLAPP motion was properly denied. (*Cashman, supra, at p. 80.*) *Cashman* is not relevant to resolution of this case, since all of Fahlen's causes of action seek to remedy injuries caused by the protected activity itself. (See *ibid.*)

Fahlen's second contention is that the determination made to terminate his privileges at MMC was not made by the JRC, composed of his "peers," but by MMC's governing board. Fahlen contends the policy reasons that attach a public interest to medical staff peer review are not applicable when the act in question is taken by the board, which is not required to be composed entirely of medical personnel. We disagree. To the contrary, the code provisions [*572] establishing the peer review process expressly recognize that, in the case of an acute-care hospital, the peer review process culminates in a final decision by the hospital's governing board. (See *Nesson v. Northern Inyo County Local Hospital Dist. (2012) 204 Cal.App.4th 65, 80-81* [**503] *[138 Cal. Rptr. 3d 446]*.) While it is true that in *Kibler, supra, 39 Cal.4th at page 196*, [***29] the action in question was taken by the medical review committee, we do not view this fact as a limitation on the scope of the court's ultimate holding. It would serve neither reason nor public policy to conclude that an intermediate decision made pursuant to the statutory peer review scheme was an "official proceeding," but to conclude that the final decision made pursuant to that same scheme was not an "official proceeding."[5]

5 Fahlen appears to take the position that the written decision of the board terminating his staff privileges was not a protected act because it was not "communicative," citing *Smith v. Adventist Health System/West, supra, 190 Cal.App.4th at pages 57-58*. The relevant discussion in *Smith* concerned the second step of analysis under the anti-SLAPP statutes, namely, the probability of prevailing step (see *Smith, supra, at pp. 56-57*), not the first, or protected-activity, step. (See *id. at p. 56* ["we will assume for purposes of this appeal that ... defendants' acts ... were protected activity for purposes of the anti-SLAPP statute"].)

We hold that the statements or writings of a hospital's governing board in reviewing a determination on medical staff privileges, and [***30] in making a final decision on such termination or nonrenewal of such privileges, are made "in connection with an issue under consideration or review [in an] ... official proceeding authorized by law." (*Code Civ. Proc., § 425.16, subd. (e)(2)*; see *Kibler, supra, 39 Cal.4th at p. 203*; see also *Nesson v. Northern Inyo County Local Hospital Dist., supra, 204 Cal.App.4th at p. 81.*) The trial court erred in concluding to the contrary.

IV. *Second step: Fahlen's probability of prevailing on the causes of action*

In the second step of consideration of an anti-SLAPP motion, the burden shifts to the plaintiff to establish "a probability that the plaintiff will prevail on the claim" (*Code Civ. Proc., § 425.16, subd. (b)(1)*). (See *Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67 [124 Cal. Rptr. 2d 507, 52 P.3d 685]*.) In order to meet this burden, the plaintiff must have stated, and substantiated by a sufficient prima facie showing of facts, a legally sufficient claim. (*Navellier v. Sletten (2002) 29 Cal.4th 82, 88 [124 Cal. Rptr. 2d 530, 52 P.3d 703]*.) Further, factual disputes are to be resolved in favor of the plaintiff. (*Ibid.*) In this case, defendants do not dispute the factual sufficiency of Fahlen's underlying allegations. They contend, however, that [***31] each cause of action is legally barred by the doctrine of exhaustion of judicial remedies and, in the case of two causes of action, the complaint fails to state a cause of action. [*573]

(3) In *Westlake, supra, 17 Cal.3d 465*, a doctor sued a hospital in tort, alleging that the hospital and various staff and board members had maliciously conspired together to deny staff privileges at the hospital through a peer review process that was unfair and in violation of the hospital's own bylaws and constitution. (*Id. at p. 470.*)

Our Supreme Court held that a doctor must exhaust all available administrative remedies and successfully set aside the hospital's final administrative determination through mandamus review before the doctor may "pursu[e] her tort claim against defendants." (*Id. at p. 484*; see *id. at p. 486.*) This rule has been repeated in numerous Supreme Court decisions and in the context of several different types of administrative proceedings. (See *Johnson* [**504] *v. City of Loma Linda (2000) 24 Cal.4th 61, 70-71 [99 Cal. Rptr. 2d 316, 5 P.3d 874].*) The rule was summarized in *Runyon v. Board of Trustees of California State University, supra, 48 Cal.4th at page 773*, citations omitted (*Runyon*): "Under the doctrine of exhaustion of judicial remedies, [***32] '[o]nce a[n administrative] decision has been issued, provided that decision is of a sufficiently judicial character to support collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. ... Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims. ...' ... Generally speaking, if a complainant fails to overturn an adverse administrative decision by writ of mandate, 'and if the administrative proceeding possessed the requisite judicial character ... , the administrative decision is binding in a later civil action brought in superior court.'" (Citations omitted.)

In some circumstances, however, the quasi-judicial proceeding is alleged by a plaintiff not to be a vehicle for administrative resolution of an administrative grievance, but is alleged to be, or to be a part of, a retaliatory action itself. This retaliation cannot be resolved within the administrative grievance process when the process itself provides the forum for retaliation, [***33] it is argued, and such an administrative proceeding is not entitled to the deference traditionally afforded by the standard of review in administrative mandate cases. In these circumstances, the Legislature may recognize, explicitly or by implication, that the administrative decision in question should not be given preclusive effect in later judicial proceedings, even when the administrative decision has not been set aside through administrative mandate proceedings. When the Legislature has made this type of determination, the courts will not require exhaustion of judicial remedies in the administrative proceeding. (*Runyon, supra, 48 Cal.4th at p. 774.*)

No Supreme Court case since *Westlake, supra, 17 Cal.3d 465*, has considered the requirement for exhaustion of judicial remedies in the context of medical peer review proceedings. Since the medical whistleblower statute, [*574] *section 1278.5*, was amended in 2007 to include staff physicians within its protections, one published opinion of the Court of Appeal has applied *Westlake* to support dismissal of a physician's *section 1278.5* retaliation cause of action. (See *Nesson v. Northern Inyo County Local Hospital Dist., supra, 204 Cal.App.4th at p. 87.*) [***34] In *Nesson*, however, the "claim for retaliation under ... *section 1278.5* also fail[ed] because the evidence show[ed] the summary suspension [of staff privileges] was unrelated to the complaints [about patient care] made more than eight months before ..." the termination. (*Ibid.*) In any event, *Nesson* did not consider the exception to exhaustion of judicial remedies established in *Runyon, supra, 48 Cal.4th 760*, and similar cases addressing other whistleblower or antiretaliation statutes. As a result, we will examine the requirements described in these more recent Supreme Court cases.[6]

6 We recognize the outcome in Fahlen's case differs from the outcome in *Nesson v. Northern Inyo County Local Hospital Dist., supra, 204 Cal.App.4th at page 86.* Although one of the claims made by Dr. Nesson was based on *section 1278.5* (*Nesson, supra, at p. 75*), the *Nesson* opinion did not separately consider or analyze the requirement for exhaustion of judicial remedies with respect to Nesson's *section 1278.5* cause of action. (*Nesson, supra, at pp. 85-86.*) Significantly, Nesson not only did not exhaust his administrative remedies, he also refused to cooperate with the hospital's peer review process and "took [***35] a leave of absence and actively thwarted any determination as to whether he should have continued in his position as the medical director of radiology," all of which form a separate and sufficient basis for resolving the case against Nesson. (*Id. at pp. 82, 85.*) Further, a review of the briefs filed in *Nesson* reflects that the parties did not focus on the *section 1278.5* claim. (We take judicial notice of the parties' briefs in *Nesson* upon Fahlen's request [see *Evid. Code, § 452, subd. (d)*].) Although Nesson mentioned *section 1278.5* in his briefs, the hospital district did not mention it at all. Under these circumstances, it is not surprising that the appellate court did not delve deeply into *section*

1278.5. For all these reasons, we consider the *Nesson* court's conclusions concerning exhaustion of judicial remedies to be dicta. (See *Nesson, supra, at p. 86.*) To the extent they are not, we disagree with *Nesson's* implicit conclusion that a plaintiff suing under *section 1278.5* first must exhaust judicial remedies in any underlying peer review proceeding.

[**505] In *Campbell v. Regents of University of California (2005) 35 Cal.4th 311 [25 Cal. Rptr. 3d 320, 106 P.3d 976]*, our Supreme Court considered whether an employee of the university [***36] was required to exhaust administrative remedies provided by the Regents "to handle complaints of retaliatory dismissal for whistleblowing" (*id. at p. 324*) before the employee was permitted to sue the university for damages for violation of *Government Code section 12653*, a whistleblower provision within the False Claims Act (*Gov. Code, § 12650 et seq.*) (*Campbell, supra, at p. 325*). The plaintiff in that case had not exhausted her administrative remedies. She contended that *Government Code section 12653* should not require exhaustion, in reliance on a related whistleblower statute within the California Whistleblower Protection Act, *Government Code section 8547.10*, which applies to University of California employees. (*Campbell, supra, at p. 327.*) The latter statute requires initiation of an administrative proceeding and permits court action if the university has [*575] not acted on the administrative complaint within a specified time. (*Ibid.*) Campbell argued that the absence of a similar requirement in *Government Code section 12653* required an inference that the Legislature did not intend to require administrative exhaustion in *section 12653*. (*Campbell, supra, at p. 327.*) The court rejected this contention. In light of [***37] the general applicability of a requirement for exhaustion of administrative remedies, "the Legislature's silence in [*Government Code section 12653*] makes the common law exhaustion rule applicable ... and requires employees to exhaust their internal administrative remedies prior to filing a lawsuit." (*Id. at p. 328.*)

The court also applied this rule in its consideration of a different whistleblower statute, *Labor Code section 1102.5*. (*Campbell v. Regents of University of California, supra, 35 Cal.4th at p. 329.*) For that statute, there was ambiguous legislative history that was "unclear on the question whether the Legislature intended to depart from the exhaustion doctrine" when it enacted the statute. (*Id. at p. 331.*) In those circumstances, the court concluded "that absent a clear indication of legislative intent, we should refrain from inferring a statutory exemption from our settled rule requiring exhaustion of administrative remedies." (*Id. at p. 333.*)

State Bd. of Chiropractic Examiners v. Superior Court, supra, 45 Cal.4th 963 [**506] (*Arbuckle*), also involved an action under the California Whistleblower Protection Act (Act). (*Arbuckle, supra, at p. 967.*) The [***38] provisions of the Act applicable in *Arbuckle* (*Gov. Code, § 8547.8, subd. (c)*) required administrative exhaustion, similar to the related *Government Code section 8547.10* discussed in *Campbell v. Regents of University of California, supra, 35 Cal.4th 311*. The plaintiff in Arbuckle had exhausted her administrative remedies before the State Personnel Board, and the board had issued a final order finding that the negative actions taken against the plaintiff "were for reasons unrelated to Arbuckle's protected disclosures," that is, her whistleblower activities. (*Arbuckle, supra, at p. 969.*) The primary issue before the Supreme Court was whether the plaintiff's action for damages was precluded under the requirement for exhaustion of judicial remedies articulated by *Westlake, supra, 17 Cal.3d 465*, and subsequent cases. (*Arbuckle, supra, at p. 974.*)

The *Arbuckle* court began its analysis by observing the general rule that a litigant is required to seek judicial review of an adverse administrative determination "before pursuing other remedies that might be available." (*Arbuckle, supra, 45 Cal.4th at p. 975.*) This general rule is applicable, however, only where the Legislature intended to "elevate[] [***39] those [administrative] findings to the same status as a final civil judgment rendered after a full hearing ... ." (*Ibid.*) Two factors led the court to conclude that the Legislature had not intended a requirement of judicial exhaustion under the relevant portions of the Act. First, the statutes "expressly acknowledged [*576] the existence of the parallel administrative remedy [but] did not require that the [administrative] findings be set aside by way of a mandate action" prior to a civil damages action. (*Arbuckle, supra, at p. 976.*) Instead, the Legislature only required a final administrative determination as a precondition to the civil remedy. (*Ibid.*) This factor distinguished the case from the *Westlake* line of cases, particularly *Johnson v. City of Loma Linda, supra, 24 Cal.4th 61*.

Second, the Legislature clearly intended to provide a civil damages remedy under the Act. Yet judicial review of the administrative action would occur either under a substantial evidence or an arbitrary and capricious standard of review (depending on the section of the Code Civ. Proc. applicable to the proceeding), making it "very [***40] difficult for a complaining employee to have the board's adverse factual findings overturned." (*Arbuckle, supra, 45 Cal.4th at p. 977.*) "Nothing in [*Government Code] section 8547.8[, subdivision] (c)* suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed, and such a narrow interpretation of the damages remedy would hardly serve the Legislature's purpose of protecting the right of state employees 'to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.' ([*Gov. Code,] § 8547.1.*)" (*Id. at pp. 977-978.*)

In *Runyon, supra, 48 Cal.4th 760*, the Supreme Court considered another portion of the Act, *Government Code section 8547.12*, which protects employees of the California State University system. (*Runyon, supra, at pp. 763-764.*) This section requires an employee [**507] to file a complaint with the appropriate university official, but permits the employee to file a civil damages action "if the university has not satisfactorily addressed the complaint within 18 months." (*Gov. Code, § 8547.12, subd. (c).*) The primary issue before the court in *Runyon* was whether a thorough and procedurally [***41] fair administrative decision could be deemed to not "satisfactorily address[]" the whistleblower complaint, thereby permitting a civil action. The court concluded that a decision that did not provide full relief to the complainant, so long as that decision constituted final action by the university, permitted the filing of a civil whistleblower complaint. (*Runyon, supra, at p. 773.*) Second, the court considered whether the whistleblower had to exhaust judicial remedies before proceeding with a civil damages action. (*Ibid.*) Applying the two considerations articulated in *Arbuckle, supra, 45 Cal.4th at page 976*, the *Runyon* court concluded the Legislature did not intend to require writ review of the administrative determination as a precondition for a civil whistleblower action. (*Runyon, supra, at p. 774.*)

There are a number of differences between medical staff peer review under *Business and Professions Code section 809 et seq.*, and the administrative proceeding authorized under the Act. In particular, peer review is a process [*577] started by a hospital (whether through the MEC or the board of trustees), with the putative whistleblower as the respondent. Under the Act, the whistleblower initiates [***42] the administrative review of retaliatory actions taken by his or her employer. Thus, the whistleblowing and alleged retaliation are at the very core of the administrative proceeding under the Act. In peer review proceedings, on the other hand, the quality of medical care provided by the putative whistleblower is the primary focus--not the hospital's response to complaints made by the doctor. In our view, the differences make it more persuasive, not less, that the Legislature did not intend to require exhaustion of judicial remedies as a precondition to filing a civil action under *section 1278.5*, applying the *Arbuckle/Runyon* analysis. In *Arbuckle, supra, 45 Cal.4th at page 976*, the court found a legislative intent not to require exhaustion of writ remedies when the Legislature "expressly acknowledged the existence of the parallel administrative remedy," yet "did not require that the [administrative] findings be set aside by way of a mandate action ... ." In these circumstances, "to hold an adverse administrative finding preclusive in the expressly authorized damages action would be contrary to the evident legislative intent." (*Runyon, supra, 48 Cal.4th at p. 774.*)

In this case, *section 1278.5*, [***43] from its adoption in 1999 through the 2007 amendments, applied primarily to retaliation against patients and employees of health facilities, persons who are not subject to [*578] the peer review process of *Business and Professions Code section 809 et seq.* When the initial amendments to *section 1278.5* were introduced in 2007, the bill simply added nonemployee doctors who had staff privileges at a health facility to those persons who were protected from discrimination and retaliation as a result of whistleblowing. (See Assem. Bill No. 632 (2007-2008 Reg. Sess.) as introduced Feb. 21, 2007.) As the bill moved through the Senate, however, opponents of the bill raised the issue of peer review proceedings in relation to the proposed civil whistleblower remedy for medical staff: "The critical question, according to the principal opponents of AB 632, is what would happen [**508] to a pending peer review action, or to the evidentiary protections and immunity from liability that attend peer review actions, once the member of the medical staff files a *§ 1278.5* action?" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007, p. 10.)

Apparently in response to [***44] these concerns, the bill was amended by the Senate on July 17, 2007, to add the provision that became a portion of *subdivision (h)* of the final version of *section 1278.5*: "The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on pending peer review matters from the complainant in an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process." (Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007, italics omitted.)

The bill was further amended in the Senate on September 5, 2007, to add the remainder of *section 1278.5, subdivision (h)* as it appears in the final legislation: "Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in *Section 805* and *Sections 809 to 809.5, inclusive, of the Business and Professions Code*, would be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing [***45] in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm." (*§ 1278.5, subd. (h).*)

It is evident from this legislative history that the Legislature was not only cognizant of the possibility of parallel peer review administrative proceedings, but that it expressly contemplated that such proceedings could, with certain limitations, occur simultaneously with a civil action under *section 1278.5*.[7] In such circumstances, "to hold an adverse administrative finding preclusive in the expressly authorized damages action would be contrary to the evident legislative intent." (*Runyon, supra, 48 Cal.4th at p. 774.*)

> 7 Because Fahlen fully exhausted his administrative remedies in this case, we need not consider whether the 2007 amendments to *section 1278.5*, particularly the addition of *subdivision (h)*, create a limited exception to the administrative-exhaustion requirement established in *Westlake, supra, 17 Cal.3d at pages 485-486.*

We have reviewed the account of the legislative history of the 2007 [***46] amendments provided by the California Hospital Association in its brief in this case as amicus curiae on behalf of defendants. We disagree with the conclusion that the amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) were intended to leave the *Westlake* rule unaffected. Instead, we find in *section 1278.5, subdivision (l)*, which provides that "[n]othing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities ... ," an implicit recognition of the limitation in *Business and Professions Code section 809.05* that peer review proceedings shall not be "arbitrary or capricious" (*id., subd. (a)*) and shall be conducted "exclusively in the interest of maintaining and enhancing quality patient care" (*id., subd. (d)*). In other words, "legitimate peer review activities" do not [**509] include retaliation against medical staff for complaints about quality of care. [*579]

As in *Runyon* and *Arbuckle*, the standard of judicial review of a peer review decision under *Code of Civil Procedure section 1094.5*--one intended in the ordinary case to give the greatest possible deference to the action of the administrative decision maker--"would mean that 'in nearly every case, [***47] an adverse decision from [the hospital] would leave the employee without the benefit of the damages remedy set forth'" in *section 1278.5*. (*Runyon, supra, 48 Cal.4th at p. 774.*) To paraphrase *Arbuckle, supra, 45 Cal.4th at pages 977-978*, nothing in *section 1278.5* suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed. Further, such a narrow interpretation of the damages remedy would not serve the Legislature's purpose of protecting the public from unsafe patient care and conditions through the adoption of *section 1278.5*.

In addition, the evidentiary presumption of *section 1278.5, subdivision (d)(1)*, is incompatible with a requirement for exhaustion of judicial remedies through writ review of the peer review decision. *Section 1278.5, subdivision (d)(1)*, creates a rebuttable presumption that any discriminatory action, such as instituting proceedings to terminate staff privileges (*§ 1278.5, subd. (d)(2)*), is prohibited retaliation for complaints about hospital care made by the staff physician within 120 days of the disciplinary action, if "responsible staff" at the facility knows about the doctor's complaints. It would be virtually [***48] impossible to implement that

presumption in a civil action under *section 1278.5* after judicial ratification of a hospital's administrative action under the narrow standard of review in writ proceedings, during which the presumption would not have been operable.

Finally, the range of remedies authorized by *section 1278.5, subdivision (g)*, is incompatible with a requirement for successful judicial review of a peer review decision. If a doctor were required to successfully set aside an administrative order terminating his or her privileges as a precondition to a *section 1278.5* action, as defendants contend in their reliance on *Westlake, supra, 17 Cal.3d at pages 485-486*, there would never be a circumstance in which reinstatement of a doctor's staff privileges would still be required in the civil action. This is true even though reinstatement is a remedy specified by the Legislature in *section 1278.5, subdivision (g)*. We will not impose judicial constraints on the statutory remedy where doing so makes the Legislature's language superfluous. (*Arbuckle, supra, 45 Cal.4th at p. 978.*)

(4) For all of these reasons, we conclude there is no requirement that a *section 1278.5* plaintiff seek judicial [***49] review of administrative action taken in peer review proceedings as a precondition to a civil action under *section 1278.5*. [*580]

V. *Exhaustion of remedies in remaining causes of action*

Fahlen contends that if he is not required to exhaust judicial writ remedies prior to his civil action under *section 1278.5*, he should not be required to do so in order to maintain his remaining causes of action because such a requirement would violate the rule against splitting causes of action. We disagree, with the exception of the second cause of action. As to the third, fifth, sixth, and seventh causes of action, these involve common law and statutory causes of action to which the *Westlake* requirement for judicial exhaustion [**510] is applicable (see *Westlake, supra, 17 Cal.3d at pp. 485-486*) and in which there is no legislative intent demonstrated to create an exception to that requirement. Under the rule of *Campbell v. Regents of University of California, supra, 35 Cal.4th at page 325*, exhaustion is required in the absence of legislative intent to the contrary, and we are bound by that rule (*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [20 Cal. Rptr. 321, 369 P.2d 937]*).

(5) In addition, all of these causes of action are ambiguous [***50] as set forth in the complaint. For example, they might refer to MMC's initiation and prosecution of the peer review proceeding as retaliation, or they might refer to the peer review decision as unsupported by the evidence, in violation of the bylaws, or otherwise defective. Thus, Fahlen argues at length in his brief on appeal that the process and the decision were defective. To that extent, these causes of action are an attempt collaterally to attack the administrative decision, which is not the purpose of a civil action under *section 1278.5*. As stated in *Runyon, supra, 48 Cal.4th at page 769*, a retaliation lawsuit is "'not an action *to review* the decision of the [administrative decision maker], but *a completely separate* damages action in the superior court in which the employee will enjoy all the procedural guarantees and independent factfinding that generally accompany such actions.'" To the extent, however, these causes of action focus purely on retaliation for whistleblowing, they add nothing to the legal theories supporting, and remedies available under, *section 1278.5*. (See *§ 1278.5, subd. (g)* [listing available remedies, including "any remedy deemed warranted by the court pursuant [***51] to this chapter or any other applicable provision of statutory or common law"].)

We conclude neither judicial economy nor fundamental fairness requires an exception from the applicable requirement for exhaustion of judicial remedies. Since Fahlen did not exhaust his judicial remedies prior to filing the third, fifth, sixth, and seventh causes of action, those causes of action are barred. As a result, Fahlen failed to establish a probability of prevailing on those causes of action, and the trial court erred in failing to dismiss them. [*581]

Somewhat different considerations apply to the second cause of action, however, for declaratory relief pursuant to *Business and Professions Code section 803.1*. This section requires the medical, osteopathic, and podiatric boards to "disclose to an inquiring member of the public" a variety of information about licensees and former licensees, including "summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges for medical disciplinary cause or reason ... ." (*Bus. & Prof. Code, § 803.1, subd. (b)(6).*)

Pursuant to an amendment to the statute adopted in 2010, however, this information is not to be disclosed, [***52] when "a court finds, in a final judgment, that the

peer review resulting in the disciplinary action was conducted in bad faith and the licensee notifies the board of that finding." (*Bus. & Prof. Code, § 803.1, subd. (b)(6)*; see Stats. 2010, ch. 505, § 2.) The amended statute provides no mechanism for a licensee to obtain such a final judgment concerning the bad faith of a peer review proceeding. However, because *Business and Professions Code section 805, subdivision (b)*, requires a hospital to file a report with the Medical Board of California whenever a doctor's staff privileges are terminated (*id., subd. (b)(2)*), the ability of a [**511] doctor to block public disclosure of such a report is an important right.

Defendants contend that Fahlen's attempt in his second cause of action to state a statutory cause of action results from "a [tortuous] mischaracterization of *subsection (b)(6)*" and is an attempt to "conjure up a cause of action where none exists." Defendants' alternative characterization of the amended language is that it is applicable only if a doctor "w[ere] somehow able to obtain a final judgment in a writ proceeding finding that the peer review at issue ... was conducted in bad [***53] faith ... ."

(6) We do not construe the amended language of *Business and Professions Code section 803.1, subdivision (b)(6)*, to rely upon "somehow" convincing a court in a writ proceeding that the administrative decision was in bad faith, when the good faith or bad faith of the administrative decision maker is not an issue in the proceeding.[8] In this case, we view the allegations of the second cause of action as functioning in much the same way as do punitive damages allegations in an ordinary tort cause of action. Under *Civil Code section 3294*, an allegation of "oppression" or "malice" is not an independent cause of action. Instead, by alleging and proving oppression or malice, the [*582] plaintiff becomes entitled to an additional remedy that is not otherwise available, namely "damages for the sake of example and by way of punishing the defendant." (*Id., subd. (a).*)

> 8 *Code of Civil Procedure section 1094.5, subdivision (b)*, states: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not [***54] proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

In the circumstances of this case, we view *Business and Professions Code section 803.1, subdivision (b)(6)*, as operating in a similar manner. Even though the mere allegation of "bad faith" is not a separate cause of action in the absence of an allegation that the peer review proceedings violated the plaintiff's statutory rights, the allegation (and proof) of "bad faith" in addition to the proof of retaliation under *section 1278.5* can result in a different, additional remedy under *section 1278.5, subdivision (g)*. It operates as a declaratory judgment that the peer review was conducted in bad faith.

We do not decide whether under certain circumstances an independent, implied cause of action is created by *Business and Professions Code section 803.1, subdivision (b)(6)*. In the circumstances before us, we simply conclude the allegations contained in the second cause of action were not intended to state an independent cause of action. To the contrary, they are there for the purpose of obtaining additional relief under the first cause of action [***55] similar to how an allegation of malice may permit additional relief in a tort cause of action. As a result, in this limited situation, the exception from the requirement for judicial exhaustion applicable to a *section 1278.5* whistleblower cause of action also applies to the additional allegations of bad faith and the request for additional declaratory relief in the second cause of action.

For all these reasons, we conclude that Fahlen has met his burden under *Code of Civil Procedure section 425.16, subdivision (b)(1)*, of establishing that he will prevail on the first and second causes of action. We conclude, however, the exhaustion of judicial remedies doctrine does apply to the third, fifth, sixth, and seventh causes of action. Consequently, the trial court erred [**512] in not dismissing those causes of action under the anti-SLAPP statute.

DISPOSITION

The court's June 27, 2011, order on defendants' anti-SLAPP motion is affirmed with respect to the first, second, and fourth causes of action. With respect to the third, fifth, sixth, and seventh causes of action, the order is reversed. The court shall enter a new order granting defendants' anti-SLAPP motion in part, and denying that

motion in [***56] part.

The request for judicial notice dated November 16, 2011 (the ruling on which previously was deferred by order of this court), is denied. The request for judicial notice dated April 26, 2012, is granted. (See fn. 6, *ante*.) The stay of trial court proceedings previously entered by this court on January 10, [*583] 2012, is vacated. The petition for writ relief filed in this case is denied as moot. The petition for writ relief filed in *Sutter Central Valley Hospitals v. Superior Court* (F063959) will be determined by separate order of this court. The parties shall bear their own costs on appeal.

Cornell, J., and Detjen, J., concurred.

DECLARATION OF SERVICE

Re: *Fahlen v. Sutter Central Valley Hospitals, et al.* No. S205568
Court of Appeal No. F063023

I declare that I am over 18 years of age, and not a party to the within cause; my business address is 108 Grand Avenue, Oakland, Suite 1300 CA 94612. I served a true copy of the attached:

ANSWERING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Joseph M. Quinn
HANSON BRIDGETT, LLP
425 Market St., 26th flr.
San Francisco, CA 94105

Court of Appeal of California
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

The Honorable Timothy W. Salter
Department 22
Stanislaus Superior Court
801 10th Street
Modesto, CA 95353

The envelope was then, on April 5, 2013, sealed and deposited for overnight delivery. I declare under penalty of perjury that the foregoing is true and correct. Executed at Oakland, California, this April 5, 2013.

Jenny Huang
Declarant