S244148

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ARAM BONNI,
Plaintiff and Appellant,

v.

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

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

PLAINTIFF'S COMBINED RESPONSE TO AMICI CURIAE BRIEFS

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

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

ATTORNEYS FOR PLAINTIFF AND APPELLANT

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I. CONTRARY TO THE APPROACH TAKEN IN BOTH OF THE DEFENSE AMICI BRIEFS, THE STARTING POINT FOR DETERMINING WHETHER THE ANTI-SLAPP STATUTE APPLIES TO PLAINTIFF'S CLAIMS IS THE TERMS OF THE ANTI-SLAPP STATUTE ITSELF AND NOT THEIR VIEW OF THE IMPORTANCE OF THE PEER REVIEW PROCESS.

The Amicus Curiae Brief of the California Medical Association ("CM") and the Amicus Curiae Brief of Dignity Health, Sutter Health, Memorial Care and Sharp Healthcare ("Dignity") share one very telling feature in common. Both briefs launch their legal discussion with an extended discussion of their one-sided version of the role the peer review process plays to further quality medical care (ignoring the role peer review plays in protecting physicians from unwarranted termination of staff privileges). Only then does each Amici attempt to explain why causes of actions which have peer review proceedings as their backdrop satisfy prong one of Code of Civil Procedure section 425.16. Thus, these Amici argue in the same way as the two defendant hospitals (St. Joseph and Mission): Because the backdrop of plaintiff's claims involve peer review proceedings, that necessarily means that plaintiff's claim for retaliation under Health and Safety Code section 1278.5, satisfies prong one of the Anti-SLAPP statute.

Due to this similarity, it is again necessary to quote the Court of Appeal's observation (which now applies equally to Amici):

> "Here, defendants' motion to strike was premised on their somewhat ipse dixit notion that because of the 'critical public interest in patient safety,' and 'the courts' overriding goal of "protect[ing] the health and welfare of the people of California,"' the peer review decision, and the statements leading up to that decision are "an inherently communicative process based on free speech and petitioning rights,' and

> 'should thus be "subject to a special motion to strike."'" (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 862, disapproved on other grounds in *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871.)

As the Court of Appeal recognized, there is in fact no such "ipse dixit" application of section 425.16. Instead, in determining whether that section applies to the particular claims in question, the first stop on the journey should be the language of the anti-SLAPP statute itself. As this Court has repeatedly observed:

> "When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls." (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519, 128 Cal.Rptr.3d 658, 257 P.3d 81.) We consider first the words of the statute because " ' "the statutory language is generally the most reliable indicator of legislative intent." ' " (*People v. King* (2006) 38 Cal.4th 617, 622, 42 Cal.Rptr.3d 743, 133 P.3d 636.) "[W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330, 87 Cal.Rptr.2d 423, 981 P.2d 52.) However, section 7 cautions that "words and phrases must be construed according to the context...." (§ 7, subd. (16).) Accordingly, we have held that words in a statute " ' "should be construed in their statutory context" ' " (*People v. King, supra,* 38 Cal.4th at p. 622, 42 Cal.Rptr.3d 743, 133 P.3d 636), and that "we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results" (*Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27, 109 Cal.Rptr.3d 329, 230 P.3d 1117), or "would result in absurd consequences that the Legislature could not have intended." (*In re J.W.* (2002) 29 Cal.4th 200, 210, 126 Cal.Rptr.2d 897, 57 P.3d 363.) Additionally, we adhere to "the precept 'that a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its

validity.' " (*Young v. Haines* (1986) 41 Cal.3d 883, 898, 226 Cal.Rptr. 547, 718 P.2d 909.)

(*People v. Leiva* (2013) 56 Cal.4th 498, 506–507.)

Further, it is "[o]nly where the statutory language allows for more than one reasonable interpretation may courts consider other aids, such as the statute's purpose, legislative history, and public policy." (*Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 817–818.)

As now explained, employing these settled rules for statutory interpretation, it is simply not the case that the policies behind peer review reflexively justifies an anti-SLAPP motion whenever a plaintiff's cause of action includes evidence of the manner in which a hospital has evaluated a physician's staff privileges.

Before ending this section, it is also important to state that CHA and Dignity's discussion of peer review is entirely one-sided from the perspective of hospitals. The California Medical Association's Amicus Curiae brief provides an insightful discussion of the historic origins of the peer review process and a balanced discussion of its purpose, which includes protecting physicians. In the interest of brevity, plaintiff will not repeat that discussion here.

II. SIMPLY BECAUSE HOSPITAL PEER REVIEW ACTIVITIES PROVIDE EVIDENTIARY SUPPORT FOR A RETALIATION CLAIM DOES NOT MEAN THAT THE RETALIATION CLAIM FALLS WITHIN THE ANTI-SLAPP STATUTE.

Amici mirror defendants in arguing that there are two provisions of the anti-SLAPP statute that apply here. First, they argue that plaintiff's retaliation claim falls within Section 425.16, subdivision (e)(2): "any written or oral statement or writing made in connection with an issue under consideration or review by . . . any other official proceeding authorized by

law." Amici's argument in this regard suffers from the same flaws as defendants' similar claims.

In *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198, this Court held that peer review proceedings constitute "official proceedings" within the meaning of the anti-SLAPP statute. But that does not mean that simply because the evidentiary support for a plaintiff's claim includes peer review proceedings, then it necessarily follows that the plaintiff's claims arise from "written or oral statements" made during that official proceeding.

Indeed, in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, this Court expressly said as much, explaining that in *Kibler* "[w]e did not consider whether the hospital's peer review decision and statements leading up to that decision were inseparable for purposes of the arising from aspect of an anti-SLAPP motion, because we did not address the arising from issue." (*Id.* at p. 1070 ["[*Kibler*] did not address whether every aspect of a hospital peer review proceeding involves protected activity, but only whether statements in connection with but outside the course of such a proceeding can qualify as 'statement[s] . . . in connection with an issue under consideration' in an 'official proceeding.'"]; see also *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 60–61 ["We conclude that the summary suspension of Smith for allegedly wrongful purposes was a noncommunicative act. The suspension itself is more like the act of levying on property (a noncommunicative act) than the filing of a false declaration (a communicative act). We recognize that communicative acts necessarily were related to the act of suspending Smith's privileges. For example, sending Smith the March 23, 2004, letter informing him of the suspension was a communicative act. Sending the letter, however, was not the wrongful act or the gravamen of the action, and it does not convert the

wrongful act (suspension) into a communication."].)

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

Thus, a physician's retaliation action against a hospital following peer review activities should be evaluated the same way as claims by employees in other settings where there have been official proceedings: was the petitioning activity the wrong which forms the basis for the plaintiff's cause of action?

Further still, since this Court is reviewing an actual case and is not simply engaging in an abstract academic exercise, it is important to keep in mind that, as explained in plaintiff's Answer Brief on the Merits, defendants moved to strike plaintiff's retaliation claim in its entirety without singling out only limited allegations of that claim to strike. It was therefore defendants' burden to establish that plaintiff's retaliation claim was in full is based on protected conduct. In making that determination the Court "examine[s] the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies." (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519–520.) The Court assesses "the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim.' " (*Hylton v. Frank E. Rogozienski, Inc*. (2009) 177 Cal.App.4th

1264, 1272.)

"[I]f the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v. Metabolife Internat., Inc*. (2004) 115 Cal.App.4th 404, 414, 9 Cal.Rptr.3d 242; accord, *Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 967–968, 179 Cal.Rptr.3d 198; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc*. (2009) 172 Cal.App.4th 1561, 1574, 92 Cal.Rptr.3d 227.) A claim based on protected activity is incidental or collateral if it "merely provide[s] context, without supporting a claim for recovery." (*Baral*, at p. 394, 205 Cal.Rptr.3d 475, 376 P.3d 604.)

The first question is therefore whether the gist of plaintiff's retaliation claim concerns "a written or oral statement or writing made in connection with an issue under consideration or review by . . . any other official proceeding authorized by law." In his Answer Brief, plaintiff has thoroughly discussed why the answer to that inquiry is "no." (See Answer Brief pages 22-37.) Nothing Amici justifies a different response. First, according to the CHA, causes of cation "targeting" the investigative aspect of the peer review proceeding are necessarily within the anti-SLAPP statute:

> Because a peer review committee investigation leading to a recommendation to restrict or terminate a physician's staff privileges is inherently communicative activity that consists entirely of written or oral statements "in connection with an issue under consideration or review by" a peer review proceeding—which is an "official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(2); see Kibler, supra, 39 Cal.4th at pp. 199-200)—any such lawsuits targeting acts undertaken as part of this phase of the peer review process are protected by the anti-SLAPP statute. This is so because the elements of such claims consist of speech or petitioning

> activities—i.e., the investigatory process involved in a peer review proceeding—protected by subdivision (e)(1) or (2) of the statute. (Ante, pp. 19-21.)

(CHA AC 32.)

In the pages of its brief which CHA references in this quote, CHA engages in an abstract discussion of the variety of writings that are routinely generated during the investigative aspect of the peer review proceeding. In other words, it appears to be CHA's position that because (1) peer review is an official proceeding; and (2) writings are routinely generated during the investigative aspect of that official proceeding; then (3) it is necessarily the case that a physician's action for retaliation "targeting" any activity during that investigation are based upon statements or writings. CHA then engages in a similar analysis with respect to injuries resulting from the peer review committee votes regarding privileges. (CHA 34.)

This analysis simply assumes that a plaintiff's claims are actually based on the writings or statements that it claims are generated during the peer review proceeding. However, it is necessary for a moving defendant to do more than assume. The defendant moving to strike has the affirmative burden of establishing that is the case. (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420 [205 Cal.Rptr.3d 499, 508 ["the moving defendant must make a prima facie showing "that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon, supra,* 29 Cal.4th at p. 67, 124 Cal.Rptr.2d 507, 52 P.3d 685.) 376 P.3d 624, 631]"].)

Here, that burden was to establish that the gist of plaintiff's claims was seeking recovery for writings and statements during peer review. It

was not simply to establish that there were writings and statements made in peer review and that plaintiff was seeking recovery for harm flowing from supposed peer review decisions. It is still necessary for the defendant to connect the dots between the conduct which the plaintiff alleged was the actual wrong causing him or her an injury and the writings and statements made during that peer review proceeding. This is where defendants' anti-SLAPP Motion failed and it is why CHA's arguments only serve to highlight the absence of this necessary nexus.

CHA's reliance on *Montebello v. Vasquez* (2016) 1 Cal.5th 409, underscores this point. There, the City's filed an action against certain of its councilmembers based on their vote to award a refuse hauling contract. After concluding that the plaintiff City's claim against the defendant arising from an allegedly illegal refuse hauling contract was not within the public enforcement exemption of the anti-SLAPP statute, this Court determined that the plaintiff's claim fell within the anti-SLAPP statute. In reaching this conclusion, the Court rejected the plaintiff's argument that there was no anti-SLAPP protection because the unlawful votes might not be protected speech under the First Amendment. This Court quoted the four categories of claims specified in Section 425.16 and explained:

> Because of these specifications, courts determining whether a cause of action arises from protected activity are not required to wrestle with difficult questions of constitutional law, including distinctions between federal and state protection of free expression. "The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct ... falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (*Equilon, supra,* 29 Cal.4th at p. 66, 124 Cal.Rptr.2d 507, 52 P.3d 685; see *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17–18, 92 Cal.Rptr.3d 286, 205 P.3d 207 (*Vargas*); *Jarrow Formulas,*

> *Inc. v. LaMarche, supra,* 31 Cal.4th at p. 734, 3 Cal.Rptr.3d 636, 74 P.3d 737; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, 124 Cal.Rptr.2d 519, 52 P.3d 695.) As explained in *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 85 Cal.Rptr.3d 880, courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions in section 425.16, subdivision (e). (*Schaffer,* at p. 1001, 85 Cal.Rptr.3d 880; accord, *City of Costa Mesa v. D'Alessio Investments* (2013) 214 Cal.App.4th 358, 372, 154 Cal.Rptr.3d 698; see *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1548–1549, 110 Cal.Rptr.3d 129.)

(*Id.* at p. 422.)

This Court then went on to conclude that the anti-SLAPP statute applied because "[h]ere, the councilmembers' votes, as well as statements made in the course of their deliberations at the city council meeting where the votes were taken, qualify as "any written or oral statement or writing made before a legislative ... proceeding." § 425.16, subd. (e)(1).) Anything they or City Administrator Torres said or wrote in negotiating the contract qualifies as "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative ... body...." (§ 425.16, subd. (e)(2).)" (*Id.* at pp. 422–423.)

Thus, in *Montebello*, this Court held it is not proper to drift beyond the clear terms of Section 425.16 in evaluating whether the plaintiff's claims do or do not fall within the anti-SLAPP umbrella. In *Montebello*, this Court applied that principle to conclude that, contrary to the plaintiff's argument, it was not necessary for the defendant to also establish that the speech in question was constitutionally protected in order to find that the anti-SLAPP statute applied, because that constitutional standard was not included in the statute itself. The converse is necessarily also true: it is improper to rely upon the supposed significance of a particular type official proceeding (here peer review) and then, because of that supposed

importance, allow the defendant to avoid proving that the plaintiff's claims fall within the actual language of one of the four categories of protected activity in Section 425.16.

In *Montebello,* it was because the wrongful conduct was the vote (i.e. speech) by the councilmembers in an official proceeding that led this Court to conclude that the anti-SLAPP statue applied. Here, it is because the gist of plaintiff's retaliation claim is *not* based on speech or a writing made during a peer review proceeding that the Court should conclude that defendants have not met their prong one burden.

Finally, CHA attempts to distinguish *Park, supra*, 2 Cal.5th 1057, on the ground that the tenure decision which this Court concluded was not entitled to anti-SLAPP protection (even though it followed an official proceeding) was different than the peer review proceeding here. CHA argues: "Peer review is a categorically different process, and as explained ante, pages 18-27, 31-37, many physician lawsuits arising out of the peer review process are indeed based on protected speech or petitioning activity inherent in the various stages of that process that precede the final disciplinary decision itself. For instance, the written decision of the judicial review committee recommending discipline to the hospital's governing board is protected activity, unlike the final tenure denial decision on which the plaintiff based his discrimination claim in *Park*, which is therefore inapposite here." (CHA AC 38.)

Once again, CHA hinges its argument on the notion that a different set of rules applies to peer review than with other official proceedings because, in its estimation, peer review is an official proceeding of greater import than the others. Unfortunately for CHA, however, there is absolutely nothing in Section 425.16 that justifies a stratification of official proceedings. Rather, that section simply talks of "official proceedings" generally. For purposes of prong one, the issue is not the type of official

proceeding that is involved. Rather, the issue is whether the wrongful conduct the plaintiff alleges is a statement or writing that was made during that official proceeding – of any type.

Nor does it matter whether or not many physician lawsuits are based upon protected speech during official proceedings, as CHA argues without evidentiary support. The issue is whether the retaliation claim by the plaintiff in this case is based on such protected speech. Once again, as explained in plaintiff's Answer Brief (at pages 27-33), the answer to this inquiry is "no."

Next, as to 425.16, subdivision (e)(2), Amici Dignity argues "[t]he essential nature of the peer review process is inherently communicative, and thus all or nearly all peer review activity is protected under subdivision (e)(2). . . ." (Dignity AC 40.) Thus, Dignity takes precisely the same position as CHA. There are lots of communications that take place during peer review and therefore it must be the case that a physician's retaliation claim against a hospital following a peer review proceeding is based on a writing or statement that was made during an official proceeding.

Dignity's argument is as flawed as CHA's. Even if one were to accept that it is the case that there are numerous writings or statements made during peer review, then that would not serve to distinguish peer review from myriad other official proceedings that are laden with writings or statements. But the Legislature did not say that anti-SLAPP applies so long as the claim arose from an official proceeding that was laden with statements or writings. Rather, the Legislature said that the anti-SLAPP statute applied to claims arising from "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law. . ."

III. AMICIS' EFFORT TO FIT PLAINTIFF'S CLAIMS WITHIN THE "ISSUE OF PUBLIC INTEREST" PRONG OF THE ANTI-SLAPP STATUTE SUFFERS FROM THE SAME INFIRMITIES AS DEFENDANTS' SIMILAR EFFORT.

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

A. Defendants Have Forfeited This Argument.

First, as explained in plaintiff's answer brief (at pages 38-39), defendants did not preserve this argument for review since: (1) it was not argued in their anti-SLAPP motion in the trial court (1-AA40-42); (2) it was not raised in their Court of Appeal briefing; and (3) it was not raised in their Petition for Review or in their brief arguing why this Court should maintain review of this matter following *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871. Simply put, plaintiff again urges this Court to decline addressing this issue which was raised for the very first time in defendants' Opening Brief on the Merits. (See Cal. Rules of Court, 8.516(b).)

B. Amici Are Wrong On The Merits.

Further, nothing Amici argue demonstrates that plaintiff's claims against defendants for retaliation in violation of Health and Safety Code section 1278.5 is a public issue under this Court's standard articulated in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133. There, the

plaintiff was an internet-based film company that brought suit against the defendant for reporting to its subscribers in which the plaintiff's internet-based film company was characterized as "Copyright Infringement-File Sharing" and "Adult Content." In analyzing whether the plaintiff's suit was within the public issue catchall provision of Section 425.16, this Court first described: "The inquiry under the catchall provision instead calls for a two-part analysis rooted in the statute's purpose and internal logic. First, we ask what "public issue or [ ] issue of public interest" the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful." (*Id.* at pp.149–150.)

This Court then continued that "the catchall provision demands 'some degree of closeness' between the challenged statements and the asserted public interest. (*Weinberg*, *supra*, 110 Cal.App.4th at p. 1132, 2 Cal.Rptr.3d 385.) So even if adult content on the Internet and FilmOn's particular streaming model are in fact issues of public interest, we agree with the court in *Wilbanks* that 'it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.' (*Wilbanks*, *supra*, 121 Cal.App.4th at p. 898, 17 Cal.Rptr.3d 497; see also *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280, 55 Cal.Rptr.3d 544 ['[t]he fact that "a broad and amorphous public interest" can be connected to a specific dispute' is not enough].)" (*Id.* at p. 150.)

Under this standard it is apparent that Amicis' (and defendants') argument as to the application of this provision fails. They each rely upon the generalized public interest in quality medical care. However, they each fail to demonstrate that the statements on which plaintiff's claims in this

case are supposedly based contributed to the public debate about that generalized issue of public interest.

At the outset, CHA argues that "[p]eer review activity easily satisfies *FilmOn's* "in connection with . . . an issue of public interest" test, so summary suspensions and terminations of privileges in furtherance of peer review petitioning activities are protected under the anti-SLAPP statute." (CHA AC 43.) But as already explained, plaintiff's claims here are not based on the peer review process itself. Rather, the gist of plaintiff's Section 1278.5 is the ultimate termination of his staff privileges. The fact that this occurred after the peer review process was initiated, as already explained, is not enough. Rather, the claim must itself be based upon the claimed protected conduct.

CHA next argues that this Court's recent *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, opinion aids its argument. Just the opposite is true. *Wilson* underscores why CHA is mistaken. In *Wilson*, this Court separately evaluated separate claims by a journalist against CNN, including a claim for wrongful termination (based on retaliation and discrimination) which CNN defended on the ground the journalist was terminated because he was guilty of plagiarism and a defamation claim which was based in part on the journalist's claim that CNN wrongfully accused him of committing that same plagiarism.

Amici seeks to analogize plaintiff's Section 1278.5 claim here to the termination claim in *Wilson*. It fails. It was because of the fact that CNN was a news organization that ultimately led to this Court to conclude that the plaintiff's termination claim fell within the catch-all provision. This Court explained: "The question we must consider is whether, and when, a news organization's selection of its employees bears a sufficiently substantial relationship to the organization's ability to speak on matters of public concern to qualify as conduct in furtherance of constitutional speech

rights." (*Id.* at p. 894.)

This Court initially concluded that CNN's generalized right to select personnel in its news organization was not sufficiently connected to conduct in furtherance of constitutional speech rights as to fall within the catch-all provision. (*Id.* at pp. 894-895 ["news organization's hiring or firing of employees—like virtually everything a news organization does—facilitates the organization's speech to some degree. But it does not follow that everything the news organization does qualifies as protected activity under the anti-SLAPP statute."].)

The Court then considered whether the fact that CNN claimed that the reason for its termination decision was plaintiff's alleged plagiarism satisfied that standard. In analyzing this question, the Court first discussed a line of cases explaining that "'[p]rotection of the editorial integrity of a newspaper lies at the core of publishing control. In a very real sense, that characteristic is to a newspaper or magazine what machinery is to a manufacturer. At least with respect to most news publications, credibility is central to their ultimate product and to the conduct of the enterprise. . . .'" (*Id.* at p. 897.)

Then, based on the premise that policing against plagiarism furthered the core speech functions of news gathering organizations such as CNN, the Court concluded that because an issue embedded within plaintiff's termination claim was whether or not he committed plagiarism, the catch-all provision was implicated.

This Court summed up:

> Online and on air, CNN covers myriad "matters of public significance." (§ 425.16, subd. (a).) Its broadcasts and publications include extensive "speech in connection with a public issue or an issue of public interest." (*Id.*, § sub. (e)(4).) CNN presented evidence tending to show that its ability to participate meaningfully in public discourse on these subjects depends on its integrity and credibility. Plagiarism is

> universally recognized as a serious breach of journalistic ethics. Disciplining an employee for violating such ethical standards furthers a news organization's exercise of editorial control to ensure the organization's reputation, and the credibility of what it chooses to publish or broadcast, is preserved. These objectives lie "at the core" of the press function. (*Newspaper Guild*, *supra*, 636 F.2d at p. 560; see *id.* at p. 561.) CNN has made out a prima facie case that its staffing decision was based on such considerations, and that such decisions protect the ability of a news organization to contribute credibly to the discussion of public matters. The staffing decision thus qualifies as "conduct in furtherance" of CNN's "speech in connection with" public matter. (§ 425.16, subd. (e)(4).)

(*Id.* at p. 898.)

Here – and unlike *Wilson* -- plaintiff's Section 1278.5 targeted defendants' conduct "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech. . . ." Defendants are hospitals and are not news organizations whose core purpose itself implicates speech. Simply put, a first reason why Amicis' catch-all arguments fail is that they do not demonstrate why plaintiff's Section 1278.5 implicates "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech. . . "

A second reason why that argument fails is that plaintiff's claim here is much closer to the *Wilson* plaintiff's defamation claim (which was based in part on plaintiff's contention that he was falsely charged with the same plagiarism at issue in the termination claim), which the Court concluded did not fall within the catch-all provision. As to that claim, this Court explained that "a defendant who claims its speech was protected as 'conduct in furtherance of the exercise of [free speech rights] in connection with a public issue or an issue of public interest' (*id.*, subd. (e)(4)) must show not only that its speech referred to an issue of public interest, but also that its speech contributed to public discussion or resolution of the issue

(see *FilmOn.com Inc. v. DoubleVerify Inc.*, *supra*, 7 Cal.5th at pp. 150–152, 246 Cal.Rptr.3d 591, 439 P.3d 1156; *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 217–218, 129 Cal.Rptr.3d 433; *Wilbanks v. Wolk*, *supra*, 121 Cal.App.4th at p. 898, 17 Cal.Rptr.3d 497)." (*Id.* at p. 900.)

This Court rejected CNN's argument that "even if *Wilson* is not a figure in the public eye, discussion of his termination implicates a larger issue that indisputably *is* of public interest—journalistic ethics." (*Id*. at p. 902.) This Court explained that CNN's "argument rests on 'what might be called the synecdoche theory of public issue in the anti-SLAPP statute' (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34, 1 Cal.Rptr.3d 390): that the discussion of a purported lapse on the part of one of its writers is equivalent to a conversation about the ethical lapses of all journalists everywhere. But for anti-SLAPP purposes, as courts have long recognized, "[t]he part is not synonymous with the greater whole." (*Ibid.*) Contrary to arguments that various defendants have pressed over the years, "[s]elling an herbal breast enlargement product is not a disquisition on alternative medicine. Lying about the supervisor of eight union workers is not singing one of those old Pete Seeger union songs (e.g., 'There Once Was a Union Maid'). And ... hawking an investigatory service is not an economics lecture on the importance of information for efficient markets." (*Ibid.*; accord, *FilmOn.com Inc. v. DoubleVerify Inc.*, *supra*, 7 Cal.5th at p. 152, 246 Cal.Rptr.3d 591, 439 P.3d 1156; *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 601, 132 Cal.Rptr.2d 191; *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, *supra*, 105 Cal.App.4th at pp. 919, 924, 130 Cal.Rptr.2d 81.)" (*Id.* at pp. 902-903.)

This Court then continued that CNN's statement that the plaintiff had committed plagiarism "did not contribute to public debate about when authors may or may not borrow without attribution." (*Id.* at p. 903.) The same is true here. Defendants (and Amici) have failed to demonstrate that the retaliatory investigation of plaintiff in any way contributed to any debate about quality medical care.

Yang v. Tenet Healthcare Inc. (2020) 48 Cal.App.5th 939, 947–949, on which Amici relies serves to prove this point. There, the Court concluded that the issue of quality medical care was an issue of public interest. But that was not the end of the Court's analysis. Rather, the Court explained that "'it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.'" (*FilmOn*, at p. 150, 246 Cal.Rptr.3d 591, 439 P.3d 1156.) "What it means to 'contribute to the public debate' [citation] will perhaps differ based on the state of public discourse at a given time, and the topic of contention," but ultimately "we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest." (*Id.* at pp. 150-151, 246 Cal.Rptr.3d 591, 439 P.3d 1156.)" (*Id.* at p. 948.)

The Court then analyzed why the plaintiff's (Yang's) claims met this standard:

> Here, Yang's allegations that defendants informed her "patients" and the "general public" that she was generally unqualified, as well as Olmos's statement that the hospital had directed several doctors to "no longer refer patients" to Yang "due to the fact she was suspended and under investigation for fraud," demonstrates that defendants directly participated in and contributed to the public issue.
>
> This is so for two reasons. *For one, as Yang alleges, the defamatory statements were communicated to the public, not*

> *just to discrete doctors or hospital staff members. This context is significant, because speech to the public about a doctor's qualifications furthers the public discourse on that matter*. (See *FilmOn, supra*, 7 Cal.5th at pp. 153-154, 246 Cal.Rptr.3d 591, 439 P.3d 1156 [DoubleVerify's reports did not fall under subdivision (e)(4) in part because "DoubleVerify issues its reports not to the wider public ... but privately, to a coterie of paying clients"].)
>
> *Secondly, the hospital's directive that doctors should no longer refer patients to Yang is similar to a statement made by a third party to aid and protect consumers, the latter of which has consistently been held to constitute protected activity under the anti-SLAPP statut*e. (See, e.g., *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1146, 147 Cal.Rptr.3d 496; *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 343-344, 37 Cal.Rptr.3d 480; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 900, 17 Cal.Rptr.3d 497.) Defendants telling doctors to not refer patients to Yang is akin to consumer protection information in that defendants ostensibly seek to protect the patients' interests. If anything, such statements about a medical provider are more readily categorized as contributing to a debate on a public issue than are statements aiming to protect consumers' purchasing of a product (i.e., protecting their commercial or financial interests), given that an individual's health and safety are more directly implicated with medical services. (See *Healthsmart Pacific, Inc. v. Kabateck, supra*, 7 Cal.App.5th at p. 429, 212 Cal.Rptr.3d 589 ["If [a doctor] and facilities with which he is affiliated are or have been engaged in wrongful conduct toward patients, the public has an interest in being informed about such conduct."].) Stating that a doctor should not have patients referred to her because she is unqualified and unethical is not a "slight reference to the broader public issue" of physicians' qualifications (*FilmOn, supra*, 7 Cal.5th at p. 152, 246 Cal.Rptr.3d 591, 439 P.3d 1156); rather, it directly contributes to the discourse by contending a physician lacks those qualifications.

(*Id.* at p. 947-949, italics added.)

Dignity's comparison of this case to *Yang*, demonstrates the shortcoming of its position. It argues that "[p]eer review conduct such as disciplining or recommending the termination of a physician as part of the

peer review process directly contributes to the public debate about a physician's competence and meets the context/functional relationship test. When a hospital's medical staff initiates a peer review investigation, suspends or terminates a physician, or imposes restrictions on her privileges, it is preventing that physician from practicing medicine on patients in a harmful manner and it is communicating to the public as well as the doctor's peers that there are serious problems with the doctor's competence and qualifications—purely patient-protective and public-oriented matters." (Dignity AC 53.)

This analysis is precisely the synecdoche theory of public issue this Court has expressly rejected. Nothing about it shows why the particular peer review activity as to this particular plaintiff contributed to the public debate about patient safety. It is simply an argument based on what Dignity asserts is the generalized interest the public has in this issue. Both of the specific reasons identified by the *Yang* Court as justifying anti-SLAPP protection, are missing here (1) plaintiff's claims are not premised on communicating actionable statements to the general public as to arguably further a public discourse on an issue of public interest and (2) there was no showing that the defendant hospitals took specific steps to prevent referral of patients to plaintiff.

The same is true as to Dignity's assertion that because there are statutory requirements to report the discipline to the Medical Board and to the NPDB, as well as to share the information with other hospitals, this standard is met. (Dignity AC 53-64.) Again, unlike *Yang*, this argument is untethered to plaintiff's actual claims (which in *Yang* included speech to third parties furthering debate about the public issue) and is instead again just a generalized reliance on a byproduct of certain of the activities in question.

In short, Amici fail to establish that plaintiff's Section 1278.5 claim in this case falls within Section 425.16(e)(4) simply because peer review may serve as the backdrop of that claim.

CONCLUSION

For the foregoing reasons and for the reasons explained in his Answer Brief on the Merits, plaintiff urges this Court to agree with the Court of Appeal that defendants have not met their burden under prong one of the anti-SLAPP statute to establish that plaintiff's retaliation claim is based on protected activity.

Dated: October 14, 2020

GREENE, BROILLET & WHEELER, LLP

ESNER, CHANG & BOYER

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

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s/ Stuart B. Esner
Stuart B. Esner

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Lowell C. Brown, Esq. Debra J. Albin-Riley, Esq. Karen Van Essen, Esq. Diane Rodán, Esq. ARENT FOX LLP 555 West 5th Street, 48th Floor Los Angeles, CA 90013-1065 Telephone: (213) 629-7400 Email: Lowell.brown@arentfox.com debra.riley@arentfox.com karen.vanessen@arentfox.com diane.roldan@arentfox.com	***Attorneys for Defendants and Respondents***
Mark Quigley, Esq. Christian T.F. Nickerson, Esq. GREENE BROILLET & WHEELER LLP 100 Wilshire Blvd., 21st Floor P.O. Box 2131 Santa Monica, CA 90407 Telephone: (310) 576-1200 Email: mquigley@gbw.law cnickerson@gbw.law	***Attorneys for Plaintiff and Appellant***
Barry S. Landsberg, Esq. Doreen Wener Shenfeld, Esq. Joanna S. McCallum, Esq. MANATT, PHELPS & PHILLIPS, LLP 2049 Century Park East, 17th Floor Los Angeles, CA 90067 Telephone: (310) 312-4000 Email: JMcCallum@Manatt.com	***Attorneys for Amici Curiae*** Dignity Health, Sutter Health, Adventist Health, MemorialCare, and Sharp Healthcare

Jeremy B. Rosen, Esq. Felix Shafir, Esq. John F. Querio, Esq. Megan S. Wilson, Esq. HORVITZ & LEVY LLP 3601 W. Olive Ave., 8th Floor Burbank, CA 91505 Telephone: (818) 995-0800 Email: jrosen@horvitzlevy.com fshafir@horvitzlevy.com jquerio@horvitzlevy.com mwilson@horvitzlevy.com	***Attorneys for Amicus Curiae*** California Hospital Association
Francisco J. Silva, Esq. Stacey B. Wittorff, Esq. Joseph M. Cachuela, Esq. CALIFORNIA MEDICAL ASSOCIATION 1201 K Street, Suite 800 Sacramento, CA 95814 Telephone: (916) 444-5532 Email: fsilva@cmadocs.org swittorff@cmadocs.org jcachuela@cmadocs.org	***Attorneys for Amicus Curiae*** California Medical Association
Long X. Do, Esq. ATHENE LAW, LLP 5432 Geary Blvd., Ste. 200 San Francisco, CA 94121 Telephone: (415) 680-7419 Email: long@athenelaw.com	***Attorneys for Amicus Curiae*** California Medical Association
California Court of Appeal FOURTH APPELLATE DISTRICT, DIV. 3 601 W. Santa Ana Blvd. Santa Ana, CA 92701	***Appellate Court*** ***(Unbound Brief Via Mail)***
Honorable Andrew P. Banks [Ret.] Honorable Melissa McCormick ORANGE COUNTY SUPERIOR COURT Central Justice Center, Dept. C13 700 Civic Center Drive West Santa Ana, CA 92701	***Trial Court*** ***(Unbound Brief Via Mail)***

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Lowell Brown Arent Fox LLP 108253	lowell.brown@arentfox.com	e-Serve	10/14/2020 4:46:28 PM
Debra Albin-Riley Arent Fox LLP 112602	debra.riley@arentfox.com	e-Serve	10/14/2020 4:46:28 PM
Long Do Athene Law, LLP 211439	long@athenelaw.com	e-Serve	10/14/2020 4:46:28 PM
Jo-Anne Novik Horvitz & Levy LLP	jnovik@horvitzlevy.com	e-Serve	10/14/2020 4:46:28 PM
Stuart Esner Esner, Chang & Boyer 105666	sesner@ecbappeal.com	e-Serve	10/14/2020 4:46:28 PM
Joanna Mccallum	jmccallum@manatt.com	e-	10/14/2020 4:46:28

Manatt Phelps & Phillips, LLP 187093		Serve	PM
Barry Landsberg Manatt Phelps & Phillips 117284	blandsberg@manatt.com	e-Serve	10/14/2020 4:46:28 PM
Jeremy Rosen Horvitz & Levy LLP 192473	jrosen@horvitzlevy.com	e-Serve	10/14/2020 4:46:28 PM
Brigette Scoggins Manatt Phelps & Phillips LLP	bscoggins@manatt.com	e-Serve	10/14/2020 4:46:28 PM
Christian T.F. Nickerson	cnickerson@gbw.law	e-Serve	10/14/2020 4:46:28 PM
Karen Van Essen 278407	karen.vanessen@arentfox.com	e-Serve	10/14/2020 4:46:28 PM
Diane Rodn 288224	diane.roldan@arentfox.com	e-Serve	10/14/2020 4:46:28 PM
Megan S. Wilson	mwilson@horvitzlevy.com	e-Serve	10/14/2020 4:46:28 PM
Francisco J. Silva	fsilva@cmadocs.org	e-Serve	10/14/2020 4:46:28 PM
Stacey B. Wittorff	swittorff@cmadocs.org	e-Serve	10/14/2020 4:46:28 PM
Joseph M. Cachuela 285081	jcachuela@cmadocs.org	e-Serve	10/14/2020 4:46:28 PM

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/s/Marina Maynez

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Esner, Stuart (105666)

Last Name, First Name (PNum)

Esner, Chang & Boyer

Law Firm