2nd Civil No. B247957

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CAMERON ADAMS, M.D., et al.,

Plaintiffs and Appellants,

vs.

CEDARS-SINAI MEDICAL CENTER, et al.,

Defendants and Respondents.

Appeal from Los Angeles, Case No. BC496717
Honorable Abraham Kahn, Department 51

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/PETITIONER: Cameron Adams, M.D., et al. RESPONDENT/REAL PARTY IN INTEREST: Cedars-Sinai Medical Center, et al.	

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INTRODUCTION

There was a time and a place for Dr. Adams to challenge Cedars-Sinai's summary suspension of his Medical Staff privileges: The administrative remedy that Cedars-Sinai's Medical Staff bylaws required him to initiate within 30 days of the suspension. Cedars-Sinai reminded Dr. Adams that under the bylaws his failure to request a Medical Staff peer review hearing would constitute a waiver of his right to challenge the suspension. And even without that reminder, settled law required him to exhaust this administrative remedy before any court could assume jurisdiction over his claims. But Dr. Adams never requested a hearing—not within the 30-day deadline, nor at any other time during the two years between his suspension and the filing of this lawsuit.

The trial court correctly struck Dr. Adams' complaint under the anti-SLAPP statute.

First prong: It is well settled that the anti-SLAPP statute covers claims arising from medical staff peer review, including claims based on discipline imposed through that process. Dr. Adams' contrary arguments ignore or mischaracterize both controlling case law and express statutory language.

Second prong: Dr. Adams failed to meet his burden of showing a probability of success for several independent reasons:

1. The trial court had no jurisdiction to hear his case because Dr. Adams failed to exhaust his administrative remedies.

2. In complaining that Cedars-Sinai should have presented more evidence, Dr. Adams fails to confront the central problem that the trial court recognized—his *own* failure to submit relevant evidence, when *he* bore the burden of proof.

3. The opening brief assiduously ignores or trivializes the reasons for Dr. Adams' summary suspension. Claiming that he was suspended for violating a non-existent photography policy, Dr. Adams argues that taking pictures posed no safety risk. But the undisputed record, including some of Dr. Adams' own evidence, shows something quite different. It shows that he was suspended for mental instability, manifested in aggressive behavior and lack of judgment accompanied by the paranoid delusion that nearly everyone he encountered (including Cedars-Sinai staff and visitors, taxi drivers and retailers) was an FBI or Homeland Security officer out to get him. Dr. Adams said he drew that conclusion from "erratic toilet flushing and flickering lights in his apartment, and individualized messages on his television." (JA 9/187.) Neither in the trial court nor here has he confronted the obvious safety issues involved with allowing such a physician to care for patients during surgery.

The judgment should be affirmed.

STATEMENT OF FACTS

A. Dr. Adams' Practice And His History Of Drug Use.

Dr. Adams is a member of Cedars-Sinai's Medical Staff, where he provides neurological monitoring to patients during surgeries and conducts neurological studies for patients with various dysfunctions. (JA 8/180 [Tab 8, page 180 of the Joint Appendix].)

According to a psychiatric examination performed at Cedars-Sinai's request, Dr. Adams reported that twice a month, while clubbing, "he binge[d] on robitussin DM (up to 8 shots), nitrous oxide, and Sudafed." (JA 9/188.) He used this cocktail to provide what he called an "'enema from neurosis.'" (*Ibid.*)

B. Dr. Adams' Bizarre, Aggressive, And Paranoid Conduct In December 2010.

On December 3, 2010, Cedars-Sinai learned of the first incident in what was to become a pattern of strange, paranoid, and aggressive behavior. Dr. Adams confronted a Cedars-Sinai visitor in one of the hospital's elevators. (JA 4/37:13-19.) He harassed and intimidated the visitor and insisted on taking the visitor's photograph. (*Ibid.*)

Dr. Adams explained his reasons to Cedars-Sinai: He thought that he was being followed by agents of the FBI, DEA, Homeland Security, and local authorities, and that the person in the elevator might have been one of them. (JA 4/37:13-19, 41, 45; 9/187.)

The basis for Dr. Adams' belief was what he described as "erratic toilet flushing and flickering lights in his apartment, and individualized messages on his television." (JA 9/187.) This convinced him that the government thought that he was taking drugs and was following him because of his "'theories about what was going on in the world.'" (JA 4/37:17-19.)

His paranoid behavior continued over the next two days. (JA 4/37:13-27.) On December 4, Cedars-Sinai security detained Dr. Adams after he videoed several people and their vehicles in a hospital parking structure. (JA 4/37:20-23.) The next day, he confronted a nurse outside of the hospital, demanding to know who had sent the nurse to follow him and telling the nurse, "I know who you are." (JA 4/37:24-27.) When the nurse asked Dr. Adams to leave him alone, Dr. Adams started videoing the nurse. (*Ibid.*)

And it didn't stop there. A few days later, Cedars-Sinai learned of three additional complaints about Dr. Adams' behavior. (JA 4/38:1-9.) According to these complaints, Dr. Adams appeared intoxicated, was making "squealing and squeaking noises" outside of a patient room, and was acting strangely at a nursing station while pretending to smoke a fake cigarette and advocating that fake cigarettes can save lives. (*Ibid.*)

On December 6, another hospital, Brotman Medical Center, involuntarily hospitalized Dr. Adams under Welfare and Institutions Code section 5150, which authorizes a 72-hour psychiatric evaluation and

treatment period when "as a result of mental disorder" the person "is a danger to others, or to himself . . . ." (JA 9/188; Welf. & Inst. Code, § 5150, subd. (a).)

C. Cedars-Sinai Summarily Suspends Dr. Adams' Staff Privileges And Notifies Him Of His Right To A Hearing.

On December 3, 2010, Dr. Neil Romanoff, Cedars-Sinai's Vice President of Medical Affairs, summarily suspended Dr. Adams' Medical Staff privileges. (JA 4/37:2-10.) In its bylaws and constitution, the Medical Staff had designated both Dr. Michael Langberg (Cedars-Sinai's Senior Vice President for Medical Affairs and Chief Medical Officer) and Dr. Langberg's designee (Dr. Romanoff) with the Medical Staff's power to make summary suspensions as part of the hospital's peer review mechanism. (JA 4/36-37 ¶ 2, 75 § 12.3-1; JA 11/214 § (u), 228 § 10(c).)

On December 7, 2010, Dr. Langberg sent Dr. Adams a written Notice of Action. (JA 4/37:7-12, 41-42.) The notice confirmed that the Chair of the Neurology Department recommended the suspension. (JA 4/41.) It noted that the basis for the suspension was Dr. Adams' aggressive and paranoid behavior on December 3, which led Dr. Romanoff to conclude that failure to summarily suspend Dr. Adams might result in imminent danger to Cedars-Sinai's patients and employees. (*Ibid.*) By this point, Dr. Adams had already engaged in further disconcerting conduct. (JA 4/37:13-27; see p. 4, *ante*.)

The Notice of Action was required by the Medical Staff bylaws as part of Cedars-Sinai's peer review mechanism. (JA 4/37:8-10, 75 § 12.3-2, 79-82; 11/228.) The notice advised Dr. Adams of his peer review hearing rights and of the 30-day deadline for requesting a hearing. (JA 4/42, 75 ¶ 12.3-3, 79 ¶ 13.2.) Under the bylaws, a physician who fails to request a hearing within 30 days "shall be deemed to have waived any right to a hearing and accepted the recommendation or action involved." (JA 4/79 § 13.3-1.)

D. A Preliminary Psychiatric Review Diagnoses Dr. Adams With An Active Psychiatric Disorder That Impairs His Judgment.

The Notice of Action also advised Dr. Adams that he was being referred to Cedars-Sinai's Well-Being of Physicians Committee (JA 4/41), a procedure that included a psychiatric evaluation (JA 9/187-190).

The psychiatrist, Dr. Itai Danovitch, reported on December 9, 2010 that Dr. Adams presented "with impairments in judgment, bizarre behavior, paranoid beliefs, and signs of psychosis and elevated mood in the setting of recreational use of dissociative anesthetic/psychedelic and stimulant substances." (JA 9/189.) He expressed concern that Dr. Adams was "experiencing an active psychiatric disorder." (JA 9/190.) While there was not yet any "direct evidence" of impairments in Dr. Adams' practice, Dr. Danovitch opined that Dr. Adams' behavior constituted a "highly concerning example of impaired professional judgment" and that

Dr. Adams' lack of insight into the "seriousness of these developments . . . may well impede" his treatment. (JA 9/189.)

Dr. Danovitch noted that for the previous two months, Dr. Adams had frequent seven-day periods during which he only required four hours of sleep. (JA 9/188.) He also described Dr. Adams' self-reported proclivity for binging on Robitussin and Sudafed while clubbing, noting that Dr. Adams had left his position on Cedars-Sinai's faculty (while remaining on the Medical Staff) because he refused to follow his Department Chair's requirements on drug use. (*Ibid.*)

According to Dr. Danovitch's evaluation, Dr. Adams also reported that he had recently engaged in other odd behaviors that had led to brief periods of police detainment. (JA 9/187.) For instance, Dr. Adams would go jogging in Hollywood at 3 a.m. while wearing a clown mask, or would "mak[e] odd postures alongside city streets." (*Ibid.*) Dr. Adams later explained that he did these things to lure undercover law enforcement into revealing themselves. (JA 11/222.)

Dr. Adams declined Dr. Danovitch's recommendation that he take medication for his psychiatric condition, "stating that he likes the way he feels." (JA 9/190.) He also declined the recommendation that he be admitted to a hospital to facilitate an expedited work-up in light of the significant "potential neurocongnitive impairments." (*Ibid.*)

Dr. Danovitch "recommend[ed] continued suspension until fitness for duty is established" and that any initial return to work include structured follow-ups, urine screening, and worksite monitoring. (*Ibid.*)

On December 17, 2010, the Well-Being of Physicians Committee held an emergency meeting to discuss Dr. Adams' case. (JA 6/113-115.) Dr. Danovitch informed the committee that Dr. Adams was "at high risk" and needed "[r]eality testing." (JA 6/114.) The committee members decided that Dr. Adams "ha[d] not been fully engaged with [his] treatment" and that he posed a risk of harm to patients. (JA 6/115.) Accordingly, the committee members "agreed they do not find any reason to recommend lifting the suspension at this time." (JA 6/113.)

E. Cedars-Sinai Again Reminds Dr. Adams Of His Right To A Hearing, But Dr. Adams Never Requests One.

On December 20, 2010, Dr. Langberg continued the summary suspension. (JA 4/38:10-18.) As required by law, Cedars-Sinai reported the suspension to the California Medical Board and the National Practitioner Data Bank. (JA 4/38:19-25; Bus. & Prof. Code, § 805, subds. (b) & (e).)[1]

Dr. Langberg sent Dr. Adams a supplemental Notice of Action. (JA 4/38:16-18, 45-46.) That notice again advised Dr. Adams of his peer review hearing right, warning that "[i]f you do not request a hearing within

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[1] Except where noted otherwise, all further statutory references are to the Business and Professions Code.

thirty (30) days, you will be deemed to have waived your right to a hearing." (JA 4/46.)

Despite receiving two notices of his hearing rights, Dr. Adams never requested a peer review hearing. (JA 4/38:26-27.) Under Cedars-Sinai's Medical Staff bylaws, by failing to request a hearing, Dr. Adams "waived any right to a hearing and *accepted the recommendation or action* involved." (JA 4/79 § 13.3-1, emphasis added.)

F. Post-Suspension Events.

Further psychiatric evaluations. Over the next two months, Cedars-Sinai received reports from another psychiatrist's evaluation of Dr. Adams. (JA 11/217-224.)

These reports discussed an instance in which Dr. Adams allegedly pushed a patient—a polio victim—to the ground. (JA 11/221-222.) Although he denied pushing the patient to the ground, Dr. Adams explained that the timing of the encounter was "'interesting'" and that Dr. Adams felt so "'suspicious'" of the patient that he felt a need to confirm whether the patient actually suffered from polio. (JA 11/222.) Dr. Adams also reported that he believed that taxi drivers and "entities pretending to be shops" were working with the government to "keep[] track of the general population or what was going on." (*Ibid.*) The psychiatrist concluded that Dr. Adams was "not fit to perform the duties of his position." (JA 11/218.)

Dr. Adams' reinstatement. Cedars-Sinai continued Dr. Adams' suspension for another year. In March 2012, it reinstated Dr. Adams'

privileges. (JA 4/39:1-3.) In all that time, Dr. Adams never requested a peer review hearing to challenge his suspension. (JA 4/38:26-27.)

Criminal convictions and Medical Board Accusation. Shortly after Dr. Adams' reinstatement, the Medical Board of California informed Cedars-Sinai that it had filed a formal Accusation against Dr. Adams seeking the suspension or revocation of his license. (JA 4/39:3-7, 56-62.) The Medical Board's Accusation was based on two criminal convictions against Dr. Adams during the period of his suspension from Cedars-Sinai's Medical Staff:[2]

1. Dr. Adams had pleaded no contest to trespassing charges arising from an incident in which he had become "enraged" when a cafe owner said he had not seen Dr. Adams' cell phone. (JA 4/60:8-12.) Dr. Adams then allegedly shattered a hookah pipe by throwing it to the floor while declaring "I'm not scared of you." (JA 4/60:11-13.) Dr. Adams later found his cell phone on the ground near his car. (JA 4/60:14-17.)

2. A jury had convicted Dr. Adams of vandalizing a car and setting off a fire alarm. (JA 4/60:21-61:16.)

G. Trial Court Proceedings.

Although under the Medical Staff bylaws Dr. Adams had long since "accepted" the summary suspension and "waived any right to a hearing"

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[2] The Medical Board's website does not currently show a pending disciplinary matter or an adverse finding, suggesting that the Medical Board might have recently withdrawn its Accusation.

(p. 6, 8-9, *ante*), in December 2012 Dr. Adams and his corporation (appellant Tower Neurological Services Medical Corporation) sued Cedars-Sinai Medical Center and its Medical Staff (collectively Cedars-Sinai) for allegedly depriving Dr. Adams of his right to practice medicine during the summary suspension. (JA 1/1-10.) They also claimed that by reporting the suspension to the California Medical Board, Cedars-Sinai "permanently marred Dr. Adams'" reputation because other hospitals will discover the suspension. (JA 1/4:15-23, 7:12-16.)

Cedars-Sinai filed a Special Motion to Strike. It maintained that the claims arose out of a medical staff peer review process, which constitutes an official proceeding under the anti-SLAPP statute (JA 2/19-23), and that Dr. Adams could not show a probability of success on the merits because he failed to exhaust administrative remedies and failed to show that Cedars-Sinai had no basis for suspending his privileges (JA 2/23-29).

The trial court granted the motion. (JA 13/254-258.) It ruled that Dr. Adams did not present a prima facie case, but did not explicitly address the administrative exhaustion issue. (JA 13/257-258.)

STANDARD OF REVIEW

The anti-SLAPP statute establishes a two-prong analysis. (*Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 76-77.) First, Cedars-Sinai must show that Dr. Adams' cause of action arises from protected activity "in furtherance of [Cedars-Sinai's] constitutional right of petition or free speech." (*Ibid.*, citing Code Civ. Proc., § 425.16, subd. (b)(1).) Second, if the court determines that Cedars-Sinai has met that burden, "the burden shifts to [Dr. Adams] to demonstrate a reasonable probability of prevailing on the merits of his cause of action." (*Id.* at p. 77.)

This Court reviews both prongs de novo. (*Ibid.*)

ARGUMENT

I. FIRST PRONG: THE ANTI-SLAPP STATUTE COVERS CEDARS-SINAI'S PEER REVIEW PROCEEDINGS AND THE RESULTING SUMMARY SUSPENSION.

Our Supreme Court has squarely held that actions for wrongful deprivation of medical staff privileges, including summary suspensions, come within the purview of the anti-SLAPP statute because they arise out of "official proceedings." (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 198 (*Kibler*); see also *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 78, 83-84 (*Nesson*).)

In urging a different result, Dr. Adams ignores the portions of *Kibler* that are against him, and never even mentions *Nesson* or the portions of the anti-SLAPP statute that conclusively refute his argument.

A. The Anti-SLAPP Statute Applies To Actions Arising From Peer Review, Including Actions Claiming Wrongful Summary Suspension.

Contrary to Dr. Adams' argument (AOB 23-27), anti-SLAPP protections clearly do apply to claims arising out of the discipline imposed through the medical staff peer review process, including summary suspensions. The supposed speech-conduct distinction that Dr. Adams advocates doesn't exist.

1. *Kibler* is directly on point: Anti-SLAPP covers medical staff peer review proceedings and the resulting discipline.

Kibler held that anti-SLAPP protections apply to claims not only for defamation but also for "interference with Kibler's practice of medicine." (39 Cal.4th at p. 196.) The Court framed the issue as whether the anti-SLAPP procedure is "available in a lawsuit brought by a hospital staff physician and arising out of a disciplinary recommendation by the hospital's peer review committee?" (*Ibid.*) "We conclude that it is[.]" (*Ibid.*)

Despite the clarity of the Court's holding, Dr. Adams asserts that the Court found that the "gravamen of the claims centered on defamation" and that its "analysis centered on where the allegedly defamatory statements were made, i.e., during peer review or outside peer review." (AOB 24.)

Kibler said no such thing. Its holding applied to claims that are identical to Dr. Adams'. This fact emerges even more clearly from the physician's briefs, which described his claims as that he "was damaged by the summary suspension of his hospital privileges . . . ." (Petitioner Kibler's Opening Brief on the Merits, *Kibler v. Northern Inyo County Local Hosp. Dist.*, 2005 WL 1871873 at *49; see also *id.* at *18 [complaint alleged " summary suspension was in retaliation for" physician's appropriate conduct], *15, 50 ["summary deprivation of" privileges damaged physician's earnings and reputation during and beyond the

suspension].)[3] That is the same as Dr. Adams' complaint. (E.g., JA 1/6:2-3 & ¶ 28 [claiming "denial of fundamental vested right to practice medicine"], 7:12-16 [causing loss of income], 4:15-23, 7:12-16 [causing loss of reputation].)

The Supreme Court held that the anti-SLAPP statute applied to the *entire complaint*. (*Kibler, supra,* 39 Cal.4th at pp. 197, 203.) There is no basis for Dr. Adams' narrower interpretation.

2. *Nesson* is directly on point: Anti-SLAPP covers summary suspensions resulting from medical staff peer review proceedings.

Although Dr. Adams purports to review and distinguish "[t]he cases cited by Cedars" (AOB 24), he fails to mention the principal case Cedars-Sinai relied on in the trial court—*Nesson, supra*, 204 Cal.App.4th 65 (JA 10/199). *Nesson* is directly on point and compels affirmance as to the first prong of the anti-SLAPP analysis.

Just like Dr. Adams, the physician in *Nesson* alleged matters that involved only the hospital's conduct, not speech:

- He alleged that the hospital summarily suspended his privileges in retaliation for his complaints about patient safety issues, in

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[3] "Reference to briefs is a permissible method of ascertaining what issues were before a court." (*McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277; see also *Moore v. Superior Court* (1970) 13 Cal.App.3d 869, 873-874 [interpreting decision in light of issues raised in appellate briefs].)

violation of Health and Safety Code section 1278.5 (*Nesson, supra*, 204 Cal.App.4th at pp. 75, 83-84, 87);

- He alleged that the hospital summarily suspended his privileges based on a perception that he suffered from a disability, a violation of FEHA's disability-discrimination protections (*id.* at pp. 75, 83-84, 88); and
- He alleged that the hospital breached its contract with him by terminating the contract on the basis that he could not perform his obligations once his privileges were suspended. (*Id.* at pp. 75, 83.)

Retaliation, discrimination, and breach of contract can only be described as conduct-based claims. They asserted that the hospital wrongfully *acted* in imposing the summary suspension. That is how the Court of Appeal saw it: "The gravamen of each cause of action asserted by Nesson is that the Hospital somehow *acted wrongfully* when it terminated the Agreement because Nesson's privileges were summarily suspended, as he was deemed by the MEC to be a likely imminent danger to patient safety." (*Id.* at p. 83, emphasis added.) The court held that all three claims satisfied the first prong of the anti-SLAPP analysis. (*Id.* at pp. 83-84.) It explained that "the California Supreme Court has held that lawsuits arising from a challenge to hospital peer review activities, *including the discipline imposed upon a physician*," fall within the protection of the anti-SLAPP statute. (*Id.* at p. 78, citing *Kibler*, emphasis added.)

3. The anti-SLAPP statute expressly covers "acts." In any event, it is impossible to separate the act of summary suspension from the words and writings effecting the suspension.

The express language of the anti-SLAPP statute also negates Dr. Adams' theory. That language contemplates application not only to oral and written speech, but also to "any *act* of [the defendant] in furtherance of [its] right of petition or free speech," and it includes "*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." (Civ. Proc. Code, § 425.16, subds. (b)(1), (e)(4), emphasis added.) As he did in the trial court, Dr. Adams ignores this explicit statutory language.

In any event, the anti-SLAPP statute's express terms would apply even if Dr. Adams were correct that the lawsuit must arise out of oral or written statements. Just as in *Kibler* and *Nesson*, oral and written statements are integral to Dr. Adams' claims:

- His claims arise from the oral and written notices effecting his suspension, both those addressed directly to Dr. Adams and those addressed to the hospital's departments and physicians.
- His claims for damage to his reputation and practice arise from Cedars-Sinai's written reports to the California Medical Board and National Practitioner Data Bank. (JA 1/4 ¶¶ 15-16.) As his

complaint puts it, "[e]very hospital where Dr. Adams has, or will have clinical privileges, has, or will, research his name and record on the data bases of the Medical Board of California and the National Practitioner Data Bank. Cedars has permanently marred Dr. Adams' record." (JA 1/4 ¶ 17.)

4. Dr. Adams' contrary argument is based on a mischaracterization of the decisions that he contends support him.

Dr. Adams bases his contrary theory on a misreading of two cases, *Smith v. Adventist Health System* (2010) 190 Cal.App.4th 40 (*Smith*) and *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35 (*Young*). (AOB 26-27.) In both instances, he ignores the fundamental precept that the "language of an opinion must be construed with reference to the facts presented by the case." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157; see *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court"].)

Smith v. Adventist Health System. In *Smith*, a physician sued for damages arising from his summary suspension. (190 Cal.App.4th at pp. 53, 55-56.) The trial court denied the hospital's anti-SLAPP motion. (*Id.* at p. 43.) Although the Court of Appeal affirmed, it did so solely on the basis of the *second prong* of the anti-SLAPP analysis. (*Id.* at pp. 56-61.)

The Court of Appeal devoted just a few sentences to the first prong. (*Id.* at p. 56.) Like Dr. Adams, the physician in *Smith* contended that *Kibler* applied only to defamation claims—not to cases arising from peer review discipline. (*Ibid.*) But the court did not decide that issue. As it explained, "we need not address [the physician's] contention" about *Kibler*, because the physician had established the second prong—he had "demonstrated that his claim concerning the 2004 summary suspension has sufficient merit to withstand the anti-SLAPP motions filed by defendants." (*Id.* at pp. 56-61 [quotations at pp. 56, 61].) So, the first-prong issue was moot.

Nonetheless, Dr. Adams' first-prong argument says that the "key inquiry" in *Smith* was "whether the conduct alleged was 'communicative.'" (AOB 26, quoting *Smith, supra*, 190 Cal.App.4th at pp. 59-60.) There was indeed such an inquiry, but it wasn't part of the first-prong analysis. It addressed the *second prong*—the plaintiff's "probability of prevailing" on the merits. (*Smith, supra,* 190 Cal.App.4th at pp. 56-61.) The question was whether the physician's claim was barred by the absolute privilege of Civil Code section 47. (*Ibid.*) The court held it was not, because the suspension was not a communicative act *within the meaning of that statute.* (*Ibid.*) Dr. Adams' discussion of *Smith* is irrelevant to the *first-prong* analysis of whether anti-SLAPP protections apply.[4]

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[4] In addition to the 2004 summary suspension, *Smith* also decided a second claim—that the hospital had wrongly "screened out" the physician's 2007

Young v. Tri-City Healthcare District. In *Young*, the physician alleged that his summary suspension was based on an improper review of his records carried out by unqualified committees. (*Young, supra*, 210 Cal.App.4th at pp. 43-44.) He invoked his internal right to challenge the determination, and when that effort was unsuccessful he filed a petition for writ of administrative mandate. (*Id.* at pp. 43-44, 57-58.) He sought no damages, but only compliance with appropriate internal procedures. (*Ibid.*) The Court of Appeal held that the anti-SLAPP statute did not apply.

Dr. Adams misstates *Young*'s holding, claiming that the decision distinguishes between challenges to summary suspensions and actions arising out of statements made during a peer review process. (AOB 27.) *Young* drew no such distinction. The distinction it did draw was procedural, and utterly irrelevant to our facts.

Young cited *Nesson* approvingly for the proposition that the anti-SLAPP statute applies when the gravamen of the claims (for breach of contract and discrimination) is "that the hospital *acted* wrongfully when it terminated his privileges based on an earlier summary suspension." (*Young, supra*, 210 Cal.App.4th at pp. 57-58, emphasis added.) The court

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application. (190 Cal.App.4th at pp. 61-64.) This latter claim failed the first prong of the anti-SLAPP analysis, but for a reason that is irrelevant here. Unlike summary suspensions, the application screening based on a bylaw waiting period was not subject to a peer review hearing, administrative mandamus, or reporting to the Medical Board, and thus did not constitute an "official proceeding." (*Ibid.*) Dr. Adams does not—and could not—contend that *Smith*'s second issue is relevant. (See AOB 26 [citing only pages of *Smith* that pertain to summary suspension].)

agreed that the "complaint for damages [in *Nesson*] was properly stricken." (*Id.* at p. 58.)

The court then explained that the case before it required a different result because the plaintiff was only seeking administrative mandamus—not damages. (*Id.* at pp. 58-59.) In the court's view, administrative mandamus actions fall outside the anti-SLAPP statute's protection because they are specifically authorized by statute. (*Ibid.*) That is what the court meant in the concluding sentence that Dr. Adams quotes: "We think this claim of entitlement to judicial review of allegedly prejudicial administrative action is based in and arose out of his statutory rights under section 1094.5, and is *separate and different from an action for damages* that arose out of the content of the allegedly wrongful peer review statements, such as the courts in *Kibler, supra*, 39 Cal.4th 192 and *Smith, supra*, 190 Cal.App.4th 40, were considering (damages for defamation *or business interference*)." (*Young, supra*, 210 Cal.App.4th at p. 59, parentheses in original, emphasis added, parallel citations omitted.)

Young's central holding has no application where, as here, the physician seeks only monetary damages. To the contrary, *Young* reaffirms *Nesson*'s holding, further compelling affirmance on the first prong of the anti-SLAPP analysis.

B. Dr. Adams' Attack On Cedars-Sinai's Summary Suspension Procedures Provides No Basis For Avoiding The Anti-SLAPP Statute.

Dr. Adams makes one other first-prong argument. He contends that the statute should not apply to Cedars-Sinai's summary suspension procedure because, he says, it was improper for Cedars-Sinai's Medical Staff to name Dr. Langberg as its designee for imposing summary suspensions. (AOB 17-23; see also AOB 7-16.)

As in the trial court, Dr. Adams ignores explicit statutory language that authorizes the Medical Staff to make that designation. (See § I.B.2, *post*.) But the Court need not reach that issue, because even if Dr. Adams were correct, the case would still be subject to anti-SLAPP protections. (See § I.B.1., *post*)

1. The anti-SLAPP statute applies even if Dr. Adams were correct that Cedars-Sinai's peer review process was procedurally insufficient.

Kibler held that anti-SLAPP protections are available when a physician sues for deprivation of medical staff privileges. (*Kibler, supra*, 39 Cal.4th at p. 196.) Contrary to Dr. Adams' unsupported suggestion (AOB 17), that result does not change merely because the physician claims that the hospital's peer review mechanism was procedurally defective. *Kibler* is founded on two rationales, both of which apply regardless of supposed procedural errors.

First, the Court held that a medical staff peer review process constitutes an "official proceeding" because of its quasi-judicial *nature*. (*Kibler, supra*, 39 Cal.4th at pp. 198-201.) Statutes mandate that hospitals and their medical staff engage in this process and that they report certain kinds of findings to California's licensing body. (*Id.* at pp. 199-200.) And, as with quasi-judicial public agencies, peer review discipline is subject to judicial review by administrative mandate. (*Id.* at p. 200.) The Legislature designed the mechanism as the primary means for monitoring physician competence—investing the process with control over matters of public significance. (*Id.* at p. 201.)

The quasi-judicial nature of peer review proceedings remains the same regardless of whether a hospital's medical staff commits some procedural error. Even if Cedars-Sinai's Medical Staff did not act appropriately in designating Dr. Langberg to carry out the first step of the process—summary suspension—the suspension and the right to challenge that suspension through a quasi-judicial peer review hearing process and then administrative mandate still constitute medical staff peer review and are still "official proceedings" for anti-SLAPP purposes.

Second, the Court expressed concern that not applying anti-SLAPP protections would damage the Legislature's goals. (*Id.* at p. 201.) The Court noted that the system depends on the involvement of peer reviewers, who are often reluctant to sit in judgment of other physicians. (*Ibid.*) "To hold, as plaintiff Kibler would have us do, that hospital peer

review proceedings are *not* 'official proceeding[s] authorized by law' within the meaning of section 425.16, subdivision (e)(2), would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate." (*Ibid.*, emphasis in original.)

That concern is equally applicable here: If a procedural defect in the peer review process were enough to eliminate anti-SLAPP protections, peer review committee members and other participants in the process would be discouraged from participating in a process that the Legislature deemed critically important to the health of California patients. (*El-Attar v. Hollywood Presbyterian Med. Ctr.* (2013) 56 Cal.4th 976, 988 [discussing legislative purpose].) Participation would not be worth the risk of a harassing suit by disciplined physicians alleging—with whatever little merit—some procedural defect. It certainly would not be worth the risk of liability if the disciplined physician were able to prove a procedural defect.

In fact, Dr. Adams' approach would do more damage to the Legislature's goal than just discouraging committee participation: It would enable disciplined physicians to bypass the process entirely. Physicians subject to actual or proposed actions, like Dr. Adams, would not bother to invoke the peer review mechanism if they could instead sue under the theory that something about the hospital's peer review mechanism was not

quite right. Procedural irregularities are supposed to be challenged by administrative mandate—not by the physician's declaration that the process is something other than peer review so that he can proceed with a damages claim years after waiving a hearing.

The situation might be different if a hospital did something that bore no resemblance to a peer review process—for instance, if a hospital simply barred a physician from entering the building without any pretense of offering a hearing. (Cf. *Smith, supra*, 190 Cal.App.4th at pp. 63-64 ["screening out" a physician's application for failing to comply with hospital's waiting period policy did not qualify as an "official proceeding" for anti-SLAPP purposes because it could not be challenged by peer review or mandamus and was not subject to reporting to the Medical Board].) But that isn't remotely what happened here. The Cedars-Sinai Medical Staff made Dr. Langberg its designee for purpose of making summary suspensions on the peer review body's behalf, and Dr. Adams was fully advised of his rights to challenge his suspension through the normal medical staff peer review mechanism. (JA 4/36:27-37:3, 42, 46, 75-82.) Whether it was procedurally perfect or not, a peer review process is what underlies Dr. Adams' claims. The anti-SLAPP statute therefore applies.

2. Contrary to Dr. Adams' assertion, the Medical Staff's decision to designate Dr. Langberg as the peer review body's designee does not transgress California law.

In any event, there is nothing wrong with Dr. Langberg's serving as the Medical Staff's designee for purposes of imposing summary suspensions. Dr. Adams argues that Business and Professions Code section 809.5 generally empowers only a "peer review body" to impose summary suspension, from which he concludes that a "body" can't be an individual person. (AOB 7-8, 11-12, 21.) But, just as he did in the trial court, Dr. Adams completely ignores the statutory definition of "peer review body," which expressly authorizes Cedars-Sinai's procedure.

Under section 809, which provides the definitions applicable to the peer review statutes, "'peer review body' means a peer review body as specified in paragraph (1) of subdivision (a) of Section 805, and *includes any designee of the peer review body*." (Bus. & Prof. Code, § 809, subd. (b), emphasis added.) That definition applies to section 809.5, the summary suspension statute. And section 809.5 itself underscores the understanding that an individual designee may impose summary suspension: It authorizes the "governing body" to act "[w]hen no *person authorized by* the peer review body is available to" act. (Bus. & Prof. Code, § 809.5, subd. (b), emphasis added.)

Our Supreme Court recently relied on this same statutory definition to recognize a medical staff's power to designate hospital administrators to carry out a different peer review task that is supposed to be performed by a "peer review body" in *El-Attar v. Hollywood Presbyterian Med. Ctr.* (2013) 56 Cal.4th 976. As the Court explained, section 809.2 states that "the peer review body" determines how a hearing will be conducted. (*Id.* at p. 989.) But under section 809, "peer review body" is defined to include designees. (*Ibid.*) "Thus, the peer review body that determines how a hearing will be conducted is the medical staff *or* its designee, and the designee may be the hospital's governing board if the medical staff so designates through its bylaws or otherwise." (*Ibid*, emphasis in original.)

Here, it is undisputed that the Medical Staff designated Dr. Langberg and his delegate, Dr. Romanoff, to impose summary suspensions. (JA 4/36-37 ¶ 2, 75 § 12.3-1; 11/214 § (u), 228 § 10(c).) Under the statutory definition, that makes each of them a "peer review body" for purposes of summary suspensions.

Dr. Adams has never offered any real response. The opening brief avoids any discussion of the statutory definition and does not even cite section 809, subdivision (b). Instead, it makes the irrelevant point that nothing in *El-Attar* "contemplated wholesale delegation of all peer review activities to the Governing Body, thus eliminating the need for peer review body involvement." (AOB 20.) Nothing of the sort occurred here. For one thing, the Medical Staff has not delegated *anything* to the Governing Body.

It delegated power to Dr. Langberg—who is not only the Senior Vice President for Medical Affairs but also the Chief Medical Officer and therefore a member of the Medical Staff (JA 4/36:26-37:2; 11/211 § 2.5; see also JA 4/75 § 12.3-1; 11/228 § 10(c))—and to Dr. Langberg's designee, Dr. Romanoff (JA 4/37:2-3; 11/214 § (u)). For another, the Medical Staff hasn't "wholesale delegat[ed] all peer review activities . . . thus eliminating the need for peer review body involvement." (AOB 20.) As the notices sent to Dr. Adams repeatedly stated, the bylaws entitled Dr. Adams to a peer review hearing by a committee of physicians appointed from the Medical Staff. (4/42, 46, 75, 78-82.) Besides, it would not matter if *El-Attar* were silent on the subject—the statute authorizes the designation.

None of Dr. Adams' other arguments suggests any violation of the peer review process.

First, Dr. Adams relies on a purported expert witness—an attorney familiar with staff privileges litigation—who declares that he has never heard of another medical staff that designates an administrator to carry out summary suspensions (and who, like Dr. Adams himself, never mentions the statutory definition of "peer review body"). (AOB 18; JA 7/118-125.) Similarly, Dr. Adams notes that two model bylaws contain no such designation. None of this is even marginally relevant. The only question is whether the law permits what the Medical Staff has done. It clearly does.

Second, Dr. Adams asserts that it would be absurd "if a hospital administrator could choose to sometimes be the designee of both the peer review body and the governing body." (AOB 21-22.) But Dr. Langberg is not "choos[ing]" to do anything. The peer review body made the choice—in its bylaws. That is no more absurd than the designation that the Supreme Court blessed in *El-Attar*. And anyway, Dr. Adams offers no explanation of what he thinks is "absurd" about Cedars-Sinai's process. That is because there is none:

- The designation serves the "primary purpose" of the statutory peer review scheme, which as our Supreme Court has repeatedly recognized "is 'to protect the health and welfare of the people of California by excluding through the peer review mechanism those healing arts practitioners who provide substandard care or who engage in professional misconduct. (§ 809, subd. (a)(6).)'" (*El-Attar*, *supra*, 56 Cal.4th at p. 988, emphasis added, quoting *Mileikowsky v. West Hills Hosp. and Med. Ctr.* (2009) 45 Cal.4th 1259, 1267.) A "second purpose" is to establish a fair procedure that protects competent practitioners from being barred for arbitrary or discriminatory reasons. (*Ibid.*) There is nothing absurd about "protect[ing] the health and welfare of the people of California" by allowing a medical staff to give its chief medical officer the power to make summary suspensions. The ability to act quickly protects the California public while ensuring a fair procedure for the physician, who can immediately challenge the suspension by requesting a peer review hearing. And that process is made all the more reasonable where, as here, the

Wellbeing of Physicians Committee concurs with the suspension. (JA 6/113.)

- The opening brief's lengthy quotation of *El-Attar* actually undermines Dr. Adams' apparent argument that Cedars-Sinai's process frustrates what he calls the intended "separation of authority between the peer review body and the hospital administration." (AOB 20-21.) The quoted language says just the opposite: It recognizes that "the statute does *not* contemplate a strict separation between the medical staff and the governing body as a prerequisite for a fair peer review system." (*El-Attar*, *supra*, 56 Cal.4th at p. 992, emphasis added; quoted at AOB 20.)

The Legislature contemplated a scheme under which (1) the "peer review body"—including a designee, who may be a member of the hospital's administration—may impose summary suspensions subject to a peer review hearing, and (2) "[w]hen no person authorized by the peer review body is available," the governing body—as an entity—may act to protect patients. (Bus. & Prof. Code, §§ 809, subd. (b), 809.5.) If Dr. Adams thinks the Legislature's choice is unwise, he should seek new legislation. This Court cannot help him.

II. SECOND PRONG: DR. ADAMS CANNOT SUSTAIN HIS BURDEN OF SHOWING A PROBABILITY OF SUCCESS ON THE MERITS.

A. Dr. Adams' Failure To Exhaust Administrative Remedies Means That The Court Lacks Jurisdiction.

1. Dr. Adams failed to exhaust administrative remedies because he did not request a peer review hearing.

It is a "jurisdictional rule" that a physician who seeks judicial relief against a hospital must first exhaust his administrative remedies. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 474-477 (*Westlake*); see *Lee v. Blue Shield of California* (2007) 154 Cal.App.4th 1369, 1378 [exhaustion requires both completion of peer review hearing mechanism and judicial review by administrative mandate].) It follows that a physician who has not exhausted his administrative remedies cannot prove a probability of prevailing on his staff-privileges claim and thus cannot withstand an anti-SLAPP motion. (*Nesson, supra,* 204 Cal.App.4th at pp. 78, 84-86.)[5]

It is undisputed that Dr. Adams failed to exhaust his administrative remedies: Despite multiple notices of his rights, he *never* requested a peer

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[5] Although the trial court did not explicitly discuss the exhaustion issue, this Court may affirm "on any basis presented by the record whether or not relied upon by the trial court." (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 425-426.)

review hearing. (JA 4/38:26-27, 42, 46.) Just as in *Nesson*, Dr. Adams cannot prevail because he "voluntarily and knowingly waived his right to a hearing and failed to exhaust his administrative and judicial remedies, barring the claims he asserts in this action." (*Nesson, supra,* 204 Cal.App.4th at p. 86; see JA 4/46, 79 § 13.3-1 [bylaw provision and warnings that failure to timely request a hearing would waive Dr. Adams' hearing rights].)

2. Dr. Adams cannot be excused from administrative exhaustion merely because over a year later Cedars-Sinai reinstated his privileges.

Dr. Adams offers a single argument in attempting to excuse his failure to exhaust administrative remedies: He says that "[b]y the time [he] filed the instant suit, he had already been reinstated at Cedars." (AOB 31-32.) The argument distorts how administrative exhaustion works.

Dr. Adams failed to exhaust his administrative remedy by failing to request a hearing on or before January 19, 2011—30 days after the amended Notice of Action. (JA 4/45-46, 79 § 13.3-1.) On that date, he was "deemed to have waived any right to a hearing and *accepted the recommendation or action involved.*" (JA 4/79 § 13.3-1, emphasis added; see also JA 4/46.) Cedars-Sinai's decision to reinstate his privileges more than a year later (JA 4/39 ¶ 12) does not negate his acceptance of the suspension. Nor does it excuse his failure to exhaust administrative remedies a year earlier.

Contrary to Dr. Adams' suggestion, *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360 (*Joel*) does not excuse his failure. That decision only recognizes a nuance in the exhaustion requirement when a physician *does* pursue his administrative remedy—when the "administrative machinery *has been commenced*, but the parties resolve the dispute before its completion through settlement which awards the physician the maximum benefit he or she could have been afforded administratively." (*Id.* at pp. 366-367, emphasis added.)

Neither *Joel* nor its reasoning applies where, as here, the physician does nothing to avail himself of the peer review process. Contrary to Dr. Adams' suggestions (AOB 31, fn. 5), he did not "reach[] a 'settlement'" with Cedars-Sinai. Unlike *Joel*, the parties did not mutually agree to resolve a dispute that would otherwise have been adjudicated. Rather, Dr. Adams waived his right to that adjudication, and more than a year later, Cedars-Sinai determined that he was *then* fit to be reinstated. That isn't enough to excuse exhaustion of administrative remedies.[6]

Joel makes this absolutely clear. It held that a physician can be excused from exhaustion only when "none" of *Westlake*'s three policy justifications would be furthered by requiring exhaustion. (*Joel*, *supra*,

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[6] The opening brief cites no record support for its footnoted claim that "[l]ike the doctor in *Joel*, Dr. Adams has reached a 'settlement,' if not so named, with Cedars and has been fully reinstated." (AOB 31, fn. 5.) That is because there is no record support. That should be the end of the matter, but in an abundance of caution Cedars-Sinai denies that the reinstatement constituted any kind of settlement, whether "so named" or otherwise.

68 Cal.App.4th at pp. 366-367.) Unlike *Joel*, Dr. Adams cannot show that "none" of those policies applies. In fact, he hasn't even tried—he doesn't discuss any of them.

1. *Quick reversal of decision mitigates damages.* Exhaustion is required because "'[i]f an organization is given the opportunity *quickly* to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the plaintiff by *immediately* reversing its initial decision . . . .'" (*Id.* at p. 366, emphasis added, quoting *Westlake, supra*, 17 Cal.3d at p. 476.) In *Joel*, that concern was satisfied by the physician's prompt pursuit of his rights and the quick settlement, which made the suspension much shorter than it would have been had the parties proceeded through the full peer review process. (*Id.* at p. 367.)

Unlike *Joel*, Dr. Adams never challenged the summary suspension and thus never gave Cedars-Sinai "the opportunity *quickly* to determine through the operation of its internal procedures that it ha[d] committed error . . . ." (*Id.* at p. 366, emphasis added.) Quite to the contrary, his failure to request a hearing constituted his acceptance of the suspension, so Cedars-Sinai had no reason to pursue the matter further. (JA 4/79 § 13.3-1.)

2. *Medical expertise.* Insisting on exhaustion also allows courts to "'accord recognition to the expertise'" of the quasi-judicial peer review tribunal. (*Joel, supra*, 68 Cal.App.4th at p. 366, quoting *Westlake, supra*,

17 Cal.3d at p. 476.) In *Joel*, that concern was satisfied: The hospital's quick decision to reinstate the physician evidenced "reflective and experienced analysis by [the hospital] as to whether the decision to suspend was well-advised *in the first place*" and whether there was any patient-safety risk. (*Id.* at p. 367, emphasis added.)

The same is not true where, as here, the hospital does not reinstate the physician until over a year later. Unlike *Joel*, that long delay allowed for the intervention of other factors—a change in Dr. Adams' condition because of psychiatric treatment, a change in drug habits, etc. To use Dr. Adams' words, Cedars-Sinai's decision to reinstate him more than a year later is *not* the same as Cedars-Sinai "declar[ing] what its ruling" would have been as to the appropriateness of the initial suspension. (AOB 31 [quoting *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1130.)[7]

Without the quick timing exhibited in *Joel*, there must be some evidence that Cedars-Sinai determined that the summary suspension was wrong *in the first place* in order to satisfy *Westlake*'s second concern. And because Dr. Adams bears the burden on the second prong of the anti-SLAPP analysis (p. 12, *ante*), it is *he* who must present evidence that

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[7] *Bollengier* addresses the futility exception, which "is very narrow and will not apply unless the petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case." (222 Cal.App.3d at p. 1126.) The exception speaks to when the physician is called upon to exercise his administrative rights—not a year after his failure to exercise them.

Westlake's policy concern is inapplicable. That evidence would have to show that the circumstances surrounding the reinstatement were such that a fact-finder could infer that Cedars-Sinai had decided that there was no basis for the suspension in the first place. But Dr. Adams offered no such evidence because there is none—the suspension was well founded from the start, and he has utterly failed to show otherwise.

3. *Promotion of judicial efficiency.* Lastly, the exhaustion requirement promotes judicial efficiency. (*Joel*, *supra*, 68 Cal.App.4th at p. 366, citing *Westlake*, *supra*, 17 Cal.3d at p. 476.) In *Joel*, there was no judicial efficiency to be gained in compelling parties to continue an initiated peer review hearing when they would rather avoid the time and expense by settling—doing so would only hamper California's policy favoring settlements. (*Id.* at p. 369.)

The opposite is true here: It promotes judicial efficiency to require physicians to timely engage the internal peer review process before filing a civil suit.

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Dr. Adams' waiver of his right to a hearing and his acceptance of the summary suspension are nothing like what happened in *Joel*. (See *Nesson, supra,* 204 Cal.App.4th at p. 86 [granting anti-SLAPP because physician waived his hearing rights].) Dr. Adams cannot show that *any* of the *Westlake* concerns are satisfied, much less *all* of them. His single-sentence discussion of *Joel* doesn't even try. (AOB 31.)

The Court need not decide anything else. Dr. Adams' failure to exhaust administrative remedies means that he cannot show a probability of prevailing on the merits. (*Nesson, supra,* 204 Cal.App.4th at p. 78.) But as we next demonstrate, Dr. Adams cannot sustain his burden on the merits either.

B. On The Merits, Dr. Adams Has Failed To Establish Any Basis For His Claim.

Dr. Adams maintains that he was summarily suspended because Cedars-Sinai wanted to increase profits by shifting his work to a faculty member. (AOB 42.) He offers no evidence to support that contention. Instead, he reaches that conclusion by claiming that there was no justification for the summary suspension. (*Ibid.*)

The undisputed evidence negates that claim.

1. Dr. Adams presented no evidence to satisfy his burden of establishing probable merit.

On the second prong of the anti-SLAPP analysis, *the burden rests with Dr. Adams*. (*Nesson, supra,* 204 Cal.App.4th at p. 77.) *He* must show that Dr. Langberg's and Dr. Romanoff's concerns were baseless—that they were fabricating or exaggerating the reports of bizarre and aggressive conduct and paranoid statements. As the trial court noted, the lack of declarations on Dr. Adams' side is glaring. (JA 13/257-258 [Dr. Adams' own declaration "curiously fails to address the (complaint's) allegation that Plaintiff was never a danger to anyone's health"].) Dr. Adams didn't deny

committing the acts or making the statements attributed to him. And he didn't even suggest, much less present evidence, that his paranoid delusions and aggressive behavior posed no risk to patients or staff.

Instead, Dr. Adams repeatedly complains that Cedars-Sinai did not submit declarations by those who actually witnessed his behavior. (AOB 33, 35-36.) So what? Dr. Adams' failure to meet *his* burden of proof would have required the trial court to grant Cedars-Sinai's motion even if Cedars-Sinai had submitted no evidence at all. Beyond that, Dr. Adams didn't object to any of Cedars-Sinai's evidence, and he never denied engaging in any of the reported activities. To the contrary, Dr. Adams explained that those actions were motivated by his belief that the government was after him.

Similarly, Dr. Adams complains that Cedars-Sinai did not submit the declaration of Dr. Patrick Lyden, who Dr. Adams says is the person who telephonically advised him about the suspension. (AOB 33-34; JA 8/181:5-8.) From this, Dr. Adams argues that "[t]here is absolutely no evidence in the record indicating what knowledge Dr. Lyden or anyone else at Cedars had prior to Dr. Adams' suspension." (AOB 33, emphasis omitted.) Apart from the fact that Dr. Adams—not Cedars-Sinai—had the burden of proof, the statement just isn't true: The Notice of Action itself states what Cedars-Sinai knew. (JA 4/41.) Whatever role Dr. Lyden played in communicating Drs. Romanoff's and Langberg's decision is irrelevant.

2. Dr. Adams ignores or trivializes the reasons for his summary suspension.

The core of Dr. Adams' theory is that Cedars-Sinai was not concerned with patient care (AOB 32-33) and that he was suspended because he was "eccentric," violated the hospital's photography policy, and advocated the use of fake cigarettes (AOB 33-36). This leads the opening brief to make such remarks as that "photography, [*sic*] does not rise to the level of posing a threat of imminent danger." (E.g., AOB 34.) The argument ignores reality.

Cedars-Sinai summarily suspended Dr. Adams because he was displaying paranoid behaviors that indicated a break with reality, an inability to exercise judgment and aggressiveness—traits that pose a very real threat to patient and staff safety.

1. There is no evidence that Dr. Adams was suspended for violating a photography policy and Dr. Adams does not cite any. Although the Notice of Action did state, in a four-word parenthetical, that taking pictures was "against Medical Center policy," its focus was squarely on Dr. Adams' mental condition. (JA 4/41.) The core concerns were unmistakable: "[Y]ou appeared paranoid, and you stated that people and agencies such as the FBI were following you." (*Ibid.*) Likewise, the notice explained that because the reasons for Dr. Adams' behavior were then unknown, he was being referred to the Well-Being of Physicians Committee "for an assessment of any health circumstances that may impact your ability to

deliver quality patient care." (*Ibid.*) The resulting psychiatric examinations confirm that the concern was the impact of Dr. Adams' active psychiatric disorder accompanied by his habit of binging on a cocktail of drugs. (JA 9/187-190.)

2. The rather transparent reason why Dr. Adams avoids addressing the actual basis for his suspension is that it is fully consistent with a legitimate concern of imminent risk to patient and staff safety. Dr. Adams' own words evidence his difficulty in distinguishing reality from his paranoid fantasy of hostile government agents out to get him. (See pp. 3-4, 6-7, 9, *ante.*) He said that his paranoid ideations stemmed from what he described as "erratic toilet flushing and flickering lights in his apartment, and individualized messages on his television." (JA 9/187.)

It is hard to imagine any responsible hospital not fearing that Dr. Adams' mental condition posed an imminent safety threat. His paranoid delusions had led him to mistake Cedars-Sinai visitors and nurses for hostile federal agents and to act in an aggressive, harassing, and intimidating manner toward them. (JA 4/37:13-27; pp. 3-4, 6-7, 9, *ante.*) He offered no reason to doubt that he was just as capable of acting the same way toward patients—including patients in surgery that he was supposed to be monitoring for neurological issues. (See JA 8/180:15-17.) It was only a matter of time and chance before Dr. Adams' serious mental condition harmed a patient or employee.

Later events confirm the soundness of that fear. For instance, Dr. Adams admitted that he saw a patient who was a polio victim and was so "suspicious" that he felt a need to confirm whether the man actually suffered from polio. (JA 11/222.) He was accused of pushing the polio victim to the ground—quite a method to confirm the diagnosis. (*Ibid.*) Likewise, Dr. Adams' criminal convictions involved aggressive instances of vandalism, pulling a fire alarm, and throwing glass while making threats in order to recover a cell phone that he himself had misplaced. (See p. 10, *ante*.)

Dr. Adams has never tried to show that these concerns are unfounded. And he does not offer any argument as to why they do not rise to the level of justifying a summary suspension. That is *his* burden of proof. Having failed to make such an argument below or in his opening brief, he is foreclosed from doing so.

3. Dr. Adams' argument regarding fake cigarettes is another straw man. (AOB 36.) It is an effort to avoid the totality of the circumstances, which included the "squealing and squeaking noises" that he made outside of a patient's room and his paranoid confrontations with nurses and visitors. (See pp. 3-4, *ante*.) Taken together, Dr. Adams' behavior further reinforces the reasonableness of concerns about a medical condition that could easily involve a dangerous lack of judgment.

3. It is irrelevant that Dr. Langberg did not initially know the reason for Dr. Adams' conduct or that there was no evidence of intoxication.

Dr. Adams next complains that Dr. Langberg did not know the reason for Dr. Adams' behavior. (AOB 39.) He couples this with a similar argument that although witnesses told Cedars-Sinai that Dr. Adams was "acting as if intoxicated," there is no evidence of such intoxication because Cedars-Sinai chose not to perform a drug test. (AOB 36-37; JA 4/38 ¶ 8.)

The medical cause of Dr. Adams' bizarre, paranoid, and dangerous behavior is irrelevant. Regardless of whether his breaks with reality were the result of being under the influence of some substance, a then-undiagnosed mental disorder, or some combination, any reasonable person would have become concerned about his ability to practice without risk to patients and staff.

Cedars-Sinai responded appropriately by summarily suspending Dr. Adams' privileges and referring him to the Well-Being of Physicians Committee, which required him to undergo a psychiatric evaluation and drug screening in light of his self-reported delusional beliefs and recreational drug use. (JA 4/41; 6/114; 9/187-190.)

4. It does not matter that some of Dr. Adams' conduct occurred after December 3, 2010.

Dr. Adams attempts to confine the basis for Cedars-Sinai's actions to the events of December 3, 2010, arguing that Cedars-Sinai cannot justify its decision to summarily suspend him with evidence of later-occurring events. (AOB 38.) The argument is spurious. Indeed, Dr. Adams himself relies (albeit meritlessly) on events occurring after December 3. (AOB 37, 39-41; see §§ II.B.5.-6., *post.*)

Cedars-Sinai made two suspension decisions in quick succession. On December 3, 2010, Cedars-Sinai imposed the initial suspension. (JA 4/37:4-5.) It sent the first Notice of Action a few days later, on December 7. (JA 4/45-46.) That notice stated that Dr. Langberg contemplated contacting Dr. Adams within fourteen days "to provide a final determination on this action based on the Department's final recommendation and [Dr. Langberg's] evaluation of that recommendation." (JA 4/46.) On December 20, 2010, Dr. Langberg decided to continue the suspension and therefore, to report the suspension to the California Medical Board. (JA 4/45-46.)

Dr. Adams' complaint seeks damages encompassing the entire period of his suspension. (JA 1/1-10.) In fact, his complaint focuses on the reputation-damaging report to the Medical Board and continuing economic loss, which resulted from the decision to continue the suspension. (*Ibid.*) Cedars-Sinai is more than entitled to present all of the evidence justifying

its determinations, including the events in the days immediately following December 3, and those between the initial notice and the second suspension determination. (See pp. 4, 6-8, *ante*.)

The information that Cedars-Sinai learned after the second suspension determination is also relevant. This includes Dr. Adams' multiple convictions for aggressive and dangerous conduct during the suspension period, and reports that Dr. Adams was so suspicious of a polio patient that he pushed the patient to the ground. (Pp. 9-10, ante.) Cedars-Sinai did not offer these incidents as the basis for its prior suspension decisions. Rather, they are relevant to show just how well-founded Cedars-Sinai's concern was—they are examples of the types of incidents that Cedars-Sinai was attempting to prevent when it identified Dr. Adams' mental condition as posing an imminent safety threat.

5. Brotman Medical Center's decision to release Dr. Adams from a 5150 psychiatric hold does not establish any probability that Dr. Adams can prevail on the merits.

Dr. Adams notes that he told Cedars-Sinai that another hospital subjected him to a 5150 psychiatric hold for one day. (AOB 37; JA 9/188.) He asserts that Cedars-Sinai should have been aware that his release in less than 72 hours meant that he did not pose a danger to himself or others. (AOB 37.) The argument does not withstand scrutiny.

As a threshold matter, Dr. Adams should not be heard to talk out of both sides of his mouth. He argues that analysis of the summary suspension must be restricted to events on or before December 3, 2010. (AOB 38.) But Brotman Medical Center didn't impose the psychiatric hold until December 6, 2010. (JA 9/187-188 [Dr. Danovitch's December 9, 2010 report noting Dr. Adams' hospitalization "this Monday"].) Even on December 9, Cedars-Sinai had no written records about the hold and Dr. Adams only provided "vague" details. (JA 9/188.)

In any event, the release from a psychiatric hold is utterly irrelevant. It said nothing about whether Dr. Adams could be expected to safely care for hospital patients or effectively monitor them during surgery.

Welfare and Institutions Code section 5150 authorizes individuals to be held for 72 hours of evaluation and treatment when "any person, as a result of mental disorder, is a danger to others, or to himself or herself . . . ." There is no basis for supposing—and Dr. Adams does not suggest one—that psychiatrists making 5150 decisions consider the risk that a physician will injure others *through the subject's incompetent practice of medicine.* The statute does not say that such an analysis is included, and the manuals for various counties would never embrace such an analysis. They state that whether someone poses a threat to others within the meaning of 5150 turns on "words or actions indicating a serious intent to cause bodily harm to another person." (Los Angeles County Department of Mental Health LPS Training Manual, p. 13, available at http://lacdmh.lacounty.gov/

Training&Workforce/documents/LPS_Training_Manual_updated.pdf; see also Santa Clara Valley Health & Hospital System Mental Health Department LPS Training Manual, p. 3, available at http://www.sccgov.org/sites/mhd/Providers/Documents/5150-Trng-Manual-rev-05Jan11.pdf.)

This is hardly surprising. "[C]onfinement in a mental institution constitutes a 'massive curtailment of liberty' even for relatively short periods of time . . . ." (*Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 941, quoting *Humphrey v. Cady* (1972) 405 U.S. 504, 509.) The state could not deprive a person of his freedom solely for the purpose of assessing his competency to practice medicine. Likewise, being released from a 5150 hold sheds no light on that question.

Theoretically, Dr. Adams could have put on contrary evidence establishing that Cedars-Sinai knew that 5150 determinations included an evaluation of risk to Dr. Adams' patients in the course of his medical duties. *He* bears the burden of proof, but didn't try to show any such thing.

6. Dr. Danovitch's reports do not establish that Cedars-Sinai's concerns were fictional or that it was actually motivated by hopes of making higher profits.

Dr. Danovitch was the psychiatrist who evaluated Dr. Adams after the summary suspension. Dr. Adams' reliance on Dr. Danovitch's report

and statements to the Well-Being of Physicians Committee are misplaced. (AOB 39-41.)[8]

Once again Dr. Adams relies on post-December 3 evidence, which according to him is irrelevant. (AOB 38; JA 9/187-190 [Dr. Danovitch's report authored on December 9]; 6/113-115 [Dr. Danovitch's statements at December 17 emergency meeting].) But Dr. Adams' argument is meritless for other reasons as well:

For one thing, Dr. Adams fails to mention the core conclusion in Dr. Danovitch's written report: Under "Fitness for Duty," Dr. Danovitch observed that Dr. Adams appeared to be experiencing an active psychiatric disorder, so he recommended "continued suspension until fitness for duty is established." (JA 9/190.)

For another, Dr. Adams relies on Dr. Danovitch's assessment under 5150, which as explained above, is irrelevant. Dr. Adams quotes Dr. Danovitch's statement that "'[t]here is no current evidence of imminent danger to self or others." (AOB 40, quoting JA 9/190.) But he omits the portion of the quotation indicating that Dr. Danovitch was speaking in the context of 5150's understanding of "danger to others." In full, the quotation reads: "[t]here is no current evidence of imminent danger to self or others, *and Dr. Adams does not meet psychiatric hold criteria*."

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[8] The opening brief asserts that redacted text refers to Dr. Danovitch. (AOB 41, citing JA 6/113-115.) In the interests of clarity, we assume that is correct.

(JA 9/190, emphasis added.) The sentence appears under the heading for the "Level of Care" *that Dr. Adams should receive*—not his ability to safely give care to others. When Dr. Danovitch turned to the suspension issue, he agreed that Dr. Adams was not then fit to practice. (*Ibid.*) In fact, Dr. Danovitch later confirmed to the Well-Being of Physicians Committee that "(a)t the time of the initial evaluation, (he) felt the suspension was appropriate given his findings." (JA 6/114.) This context only confirms why the 5150 psychiatric hold issue is irrelevant. (§ II.B.5., *ante*.)

Dr. Adams further notes that on December 17, 2010, Dr. Danovitch said he was "not sure" whether Dr. Adams met the "criteria for suspension and reporting to the State." (AOB 41; JA 6/114.) That isn't surprising. Dr. Danovitch explained that Dr. Adams was "at high risk," but before a psychiatrist confidently declares another physician incompetent, it is only natural that he will want a thorough evaluation. Dr. Danovitch wanted to expedite a full workup of Dr. Adams' psychiatric and medical condition, but Dr. Adams declined. (JA 6/114; 9/190.) This is the only possible meaning of Dr. Danovitch's words, since he simultaneously confirmed that at the time of the initial evaluation, he felt the suspension was appropriate. (JA 6/114.)

In any event, that Dr. Danovitch was "not sure" on December 17, 2010 does not mean that Dr. Adams has shown a probability of convincing a jury that Cedars-Sinai had no legitimate concern about the risks he posed to patient and employee safety, and instead must have been motivated by

a desire to fill his role with a more profitable faculty member. *That* is Dr. Adams' burden. He comes nowhere near meeting it.

7. Dr. Adams' discussion of the federal Health Care Quality Improvement Act does not show any probability that he will prevail.

Dr. Adams devotes two pages of his opening brief to the federal Health Care Quality Improvement Act of 1986 (HCQIA). (AOB 29-30.) That discussion adds nothing.

First, Dr. Adams did not raise HCQIA below. It was neither cited in his opposition papers (JA 5/86-106) nor mentioned at the motion hearing (JA 12/230-250), even though Cedars-Sinai's anti-SLAPP motion argued that HCQIA does not create a cause of action (JA 2/24-25). Whatever argument Dr. Adams might have made about HCQIA is therefore waived.

Second, the opening brief's discussion of HCQIA reveals no basis for a claim. It concludes that physicians are "entitled to a fair and adequate investigation prior to summary suspension *unless a real threat of imminent danger* to anyone's health actually exists." (AOB 30, emphasis in original.) That is the same standard as that in section 809.5. As demonstrated above, Dr. Adams failed to establish his burden of showing that there was some other reason for his suspension. (§ II.B.1.-6., *ante*.)

III. TOWER NEUROLOGICAL CANNOT SUSTAIN ITS BURDEN OF SHOWING A PROBABILITY OF SUCCESS ON THE MERITS.

A. For The Same Reasons As Dr. Adams, Tower Neurological Cannot Show A Probability Of Prevailing.

Tower Neurological Services Medical Corporation's suit is entirely derivative, claiming that Dr. Adams was wrongfully suspended for financial rather than patient-safety issues. With the same claim come the same defects. Tower Neurological is no more able to show a probability of success than Dr. Adams. (§ II., *ante*.)

B. Tower Neurological Also Cannot Show A Probability Of Prevailing Because It Lacks Standing.

Tower Neurological's claim suffers from an even more fundamental flaw: It does not allege a violation of *its own rights*.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Civ. Proc. Code, § 367.) "'It is elementary that a plaintiff who lacks standing cannot state a valid cause of action . . . .'" (*Sherwyn & Handel v. Department of Social Services* (1985) 173 Cal.App.3d 52, 58, quoting *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90.) This principle prohibits suits in which Part A challenges Party B's action "on the ground that it infringes a right of [Party] C." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 992.)

Tower Neurological lacks standing because it does not assert a violation of *its own rights*. It only challenges Cedars-Sinai's action on the ground that it infringes on *Dr. Adams' rights*. It is undisputed that Tower Neurological is not itself a member of the Cedars-Sinai Medical Staff (JA 11/208 ¶ 7) and that Dr. Adams is the only plaintiff with "a fundamental vested right to continue to practice medicine at Cedars" that was allegedly infringed (JA 1/6-7). Tower Neurological only complains that the deprivation of Dr. Adams' rights meant that Tower Neurological could not profit from Dr. Adams' work. (AOB 43.)

Tower Neurological cites no authority that confers standing under these circumstances (AOB 42-43) and we are not aware of any. Indeed, it is difficult to imagine permitting an employer standing to assert a deprivation of its employee's rights merely by virtue of the fact that the employee's injury rendered the employee unable to perform work for the employer. Although a statute authorizes Tower Neurological to render professional medical services through licensed physician-employees (AOB 42), that statute says nothing about conferring standing to sue for violations of the employee's rights.

CONCLUSION

If Dr. Adams wanted to challenge his summary suspension, he had to avail himself of the peer review hearing process provided by law and by Cedars-Sinai's Medical Staff bylaws. Despite being fully and repeatedly reminded of his hearing rights, Dr. Adams waived those rights and thereby accepted the suspension. Having waived his administrative remedy, he cannot put the hospital, the Medical Staff or the courts through this suit. And he certainly can't do so without any evidence and by ignoring and minimizing the very real reasons for his suspension.

The judgment should be affirmed.

Dated: November 25, 2013

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Mitchell J. Green

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Jeffrey E. Raskin

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/s/ Jeffrey E. Raskin

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENTS' BRIEF** contains **11,446 words**, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

Dated: November 25, 2013

/s/ Jeffrey E. Raskin

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036-3697.

On October __, 2013, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

*** ***

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on October __, 2013, at Los Angeles, California.

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

Charice L. Lawrie

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036-3697.

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