2d Civil No. B263095

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HOOMED MELAMED, M.D.,

Plaintiff and Appellant,

v.

CEDARS-SINAI MEDICAL CENTER, et al.,

Defendants and Respondents.

Appeal from The Los Angeles Superior Court, Central District
Honorable Michael Johnson, Judge Presiding
Los Angeles Superior Court Case No. BC551415

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second APPELLATE DISTRICT, DIVISION One	Court of Appeal Case Number: B263095
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: Hoomed Melamed, MD RESPONDENT/REAL PARTY IN INTEREST: Cedars-Sinai Medical Center et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Cedars-Sinai Medical Center, William Brien MD, Rick Delamarter, MD, Michael Langberg, MD, and Neil Romanoff, MD
2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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Date: May 17, 2016

Jeffrey E. Raskin ▶ _____

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

Dr. Melamed decided to continue elective spinal surgery for at least eight hours despite realizing that he could not adequately stabilize the patient. A few days later, he confessed that he should have stopped the surgery. His bad decision contorted his patient's spine so severely that it immediately shocked other medical personnel.

In peer review proceedings, Dr. Melamed tried to defend himself against charges that his poor judgment posed a substantial risk to patients that warranted the summary suspension and termination of his medical staff privileges. Never once did he suggest that Cedars-Sinai's real motive was to retaliate against him. He expressed no such claim until he filed this action.

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

First prong: The anti-SLAPP statute covers claims for wrongful deprivation of staff privileges, including summary suspensions, and other claims arising out of the peer review process. Contrary to Dr. Melamed's argument, it is well established that for purposes of the first prong, it does not matter that Dr. Melamed alleges an improper motive—retaliation—for that conduct.

Second prong: Dr. Melamed failed to meet his burden of showing a probability of success on the merits:

1. His claim for retaliation under Health and Safety Code section 1278.5 is both time-barred and utterly lacking in support—he made no protected complaint about patient safety concerns.

2. The remainder of his claims are barred by his failure to exhaust judicial remedies.

The judgment should be affirmed.

STATEMENT OF FACTS[1]

A. Dr. Melamed Performs Spinal Surgery On A Twelve-Year-Old Despite Being Unable To Stabilize The Patient.

On July 11, 2011, Dr. Melamed performed elective surgery on a twelve-year-old patient to correct scoliosis. (1 AA 69; 2 AA 335, 350-353, 360.)

Dr. Melamed selected the operating table that he typically uses for this kind of surgery, although he had not used it on a patient with such a small a waist. (1 AA 70; 3 AA 563.) He was also the one who positioned the patient. (3 AA 563.) During the surgery, he realized that he had a problem: The patient's back was not stable and her pelvis dipped, exacerbating her spinal curvature and making the surgery extremely difficult. (1 AA 216 [transcript of Melamed's peer review testimony]; 2 AA 335 [Melamed Decl.], 352 [Melamed's operation report]; 1 AA 70 [Brien Decl.].) It was then that he realized that he had made the wrong choice regarding the table and pads. (3 AA 563-564 [Brien Decl.]; 2 AA 352 [Melamed Decl.].)

Dr. Melamed attempted to reposition the patient. He asked the nurses about replacing the hip and thigh pads with "much bigger pads" than he had originally chosen. (2 AA 352 [Melamed Decl.].) They responded that those pads were not available. (*Ibid.*) He then asked a nurse to go under the table to stabilize the

[1] We cite evidence that was submitted with Cedars-Sinai's trial court reply brief. The court relied on this evidence over Dr. Melamed's objection. (3 AA 597 [relying on supplemental declarations]; see 3 AA 577-579 [objections], 582-587 [response].) Dr. Melamed never sought to file a sur-reply or suggested that any of this evidence was untrue. On appeal, he does not challenge the trial court's evidentiary ruling. In fact, his opening brief itself relies on this evidence. (E.g., AOB 47-49, citing 3 AA 555, 558.)

patient. (1 AA 208 [peer review transcript]; 2 AA 352 [Melamed Decl.], 352 [operation report].) Dr. Melamed also asked whether a different type of operating table—a "four-poster" table—was available so that the patient could be transferred mid-surgery, but learned that it was not. (2 AA 336 [Melamed Decl.], 352 [operation report].)

Even though he could not properly stabilize the patient, Dr. Melamed chose to continue the surgery. (2 AA 335-336 [Melamed Decl.], 352 [operation report]; 1 AA 70 [Brien Decl.].) He even expanded the surgery, moving to the upper spine to correct the lower spine. (2 AA 352 [operation report]; 1 AA 69 [Brien Decl.].)

The operation lasted far longer than it should have—somewhere between eight and eleven hours instead of the normal three to five. (1 AA 237 [transcript of Melamed's peer review testimony], 240 [same]; see *id.* at 142 [Notice of Action].)

B. Dr. Melamed's Misjudgment Causes The Young Patient To Have A "Freakish-Looking" Deformity.

Dr. Melamed's surgical efforts left the patient in far worse condition, with an "exaggerated inward curvature of the lumbar (lower) spine," that one physician described as "freakish-looking." (1 AA 70 [Brien Decl.], 199 [peer review transcript].) The patient "couldn't even lay flat on a bed." (*Ibid.*) A registered nurse who specializes in spine surgery saw the patient after surgery. (1 AA 249, 251 [transcript of nurse's peer review testimony].) She felt compelled to ask the anesthesiologist whether the patient had looked like this before the surgery, and she had photographs taken to document the deformity. (1 AA 251-254 [same]; 1 RA 20 [photograph].) Dr. Melamed himself described the deformity as "clearly obvious" and as necessitating correction within a few days. (2 AA 353 [operation report].)

Additionally, the surgery caused abrasions on the patient's face and body. (1 AA 70.)

Dr. Melamed planned to take the patient back into surgery within a few days. (1 AA 71; 2 AA 336 [operation report].) The patient's parents requested references for a second opinion. (3 AA 558 [e-mail].)

C. Multiple Individuals Express Concern About Dr. Melamed's Actions. Dr. Melamed Admits That He Should Have Closed Up The Patient Rather Than Continuing For Eight Hours.

On July 13, 2011, the Manager of Patient Safety and the operating room manager contacted Dr. William Brien (then-Director of the Orthopedic Center at Cedars-Sinai and Executive Vice Chairman for the Department of Surgery) and Dr. Neil Romanoff (Vice President of Medical Affairs), "request[ing] review" of Dr. Melamed's conduct. (1 AA 69, 82; 3 AA 555, 558.) A registered nurse also filed a formal electronic incident report. (1 AA 255.)

As part of his Medical Staff responsibilities, Dr. Brien was routinely required to participate in medical peer review procedures. (1 AA 69.) Dr. Romanoff emailed Dr. Brien to advise him to prepare the case for peer review. (1 AA 82; 3 AA 558.) Dr. Brien confirmed that he was already aware of the case and was expediting the investigation because the patient was awaiting corrective surgery. (3 AA 558.)

On July 14, 2011, Dr. Brien interviewed Dr. Melamed. (1 AA 69-70.) According to Dr. Melamed, Dr. Brien began by asking him, "Are you going around the hospital and telling everyone that Cedars doesn't have the capability to do this

case?" (2 AA 336.) Dr. Brien had received an e-mail in which the operating room manager said that Dr. Melamed had told the patient's parents that, to perform the upcoming second surgery, "he needs a special table which we do not have." (AOB 43-44; see 3 AA 558.) That e-mail, however, also stated that Dr. Melamed had later recognized that he could use a different table that Cedars-Sinai did have. (3 AA 558.) Dr. Melamed told Dr. Brien that he had not told the patient's parents or anyone else that the hospital lacked the correct equipment, and he confirmed that Cedars-Sinai did have the appropriate equipment—a table with gel rolls. (*Ibid*.)

Dr. Melamed also confirmed that it was he who positioned the patient and that he had "chose[n] the wrong table as he did not realize how small the patient was and other patients he has done were larger." (3 AA 563-564.) He explained that when he discovered his error mid-surgery, a replacement operating table and pads were not available, but that his surgery would have been successful had he used the correct equipment. (2 AA 336-337 [Melamed Decl.].)

Dr. Melamed confessed that he was aware of the problem early on and that "in hind sight [sic] he should have closed the patient and moved her to another table to stabilize her using bolsters before attempting to complete the surgery." (1 AA 70.) As one doctor described it, because the patient's pelvis was slipping, the x-ray showed a curvature that looked different than it actually was and Dr. Melamed misinterpreted the information. (1 AA 199; see also 3 AA 563.) Dr. Melamed acknowledged that he had "'made the [patient's] upper curve worse.'" (1 AA 70; 2 AA 352.)

D. Cedars-Sinai Summarily Suspends Dr. Melamed's Staff Privileges To Perform Similar Surgeries And Reports That Action As Required By Law.

Dr. Brien consulted with the Chairman of the Department of Surgery. (1 AA 71.) Both agreed that Dr. Melamed posed an imminent risk to hospital patients—including the young patient, whom Dr. Melamed planned to take back into surgery within a few days. (1 AA 69, 71, 83.) Chief among those concerns was Dr. Melamed's judgment in continuing surgery for many hours despite being unable to stabilize the patient. (1 AA 82-83.) They recommended that Dr. Romanoff summarily suspend Dr. Melamed's privileges. (*Ibid.*) The Chief of the Medical Staff concurred. (*Ibid.*)

On July 15, 2011, in consultation with Dr. Michael Langberg—Senior Vice President of Medical Affairs and Chief Medical Officer—Dr. Romanoff summarily suspended Dr. Melamed's medical staff privileges. (1 AA 82-83, 142-143; 2 AA 337.) In its bylaws, the Medical Staff designated both Dr. Langberg and his designee (Dr. Romanoff) as having the Medical Staff's power to make summary suspensions as part of the hospital peer review mechanism. (1 AA 81-82, 95-96 at §§ 12.2-12.3, 140 at § 2.5.)

That same day, Dr. Romanoff sent Dr. Melamed a written Notice of Action as required by the Medical Staff bylaws. (1 AA 83, 95-96, 142-143; 2 AA 337 [Melamed Decl.].) As required, it advised Dr. Melamed of the charges and of his hearing rights. (1 AA 142-143.) On August 1, 2011, Cedars-Sinai reported the summary suspension to the California Medical Board as required by Business and Professions Code section 805. (1 AA 83-84; 2 AA 338-339.)

E. Dr. Melamed's Operation Report.

Operation reports are routine documents that become part of the patient's medical records. (2 AA 528.) Under Medical Staff Rules and Regulations, surgeons must file them within twenty-four hours of all procedures. (*Ibid.*)

When Dr. Brien initially questioned Dr. Melamed, he asked why Dr. Melamed's operation report was still missing three days after the operation. (3 AA 555.) Dr. Melamed acknowledged that his operation report was late and assured Dr. Brien that he would complete it. (*Ibid*.) The report was not transcribed until July 15, 2011—the same day that Dr. Romanoff suspended Dr. Melamed's privileges. (2 AA 350 [computer timestamp on report], 529 [explaining timestamp].)

As required by the Rules and Regulations, Dr. Melamed's report summarized the patient's pre-existing scoliosis, the process by which he obtained informed consent, and the procedural aspects of the operation. (2 AA 350-353, 528.) In that context, the report noted the reason for Dr. Melamed's difficulty during the surgery. (2 AA 352-353.) In particular, it noted that when Dr. Melamed realized that the patient's pelvis was slipping, he had asked nurses for larger pads or a four-poster table, but was told that they were not immediately available. (2 AA 352.) It also stated that Dr. Melamed spoke to the patient's parents and explained that he would perform a second surgery using the "correct" table, which could be done within a couple of days. (2 AA 353.)

F. Dr. Melamed's Initial Attempts To Challenge His Summary Suspension: Dr. Melamed Never Suggests A Retaliatory Motive.

On July 21, 2011, Dr. Melamed's attorney wrote Cedars-Sinai challenging the propriety of the summary suspension. (2AA 337, 359-361.) The letter argued that Dr. Melamed posed no threat to patient safety because there was no pattern of substandard conduct and because he followed appropriate procedures. (*Ibid.*) The letter did not mention any safety or equipment concern. Nor did it suggest that retaliation was Cedars-Sinai's real motivation. To the contrary, the letter stated that Dr. Melamed's chosen operating table is "medically appropriate for this type of surgical procedure" and that the same type of table was used by the surgeon who corrected the deformity that Dr. Melamed's surgery had caused. (2 AA 360.)

Dr. Melamed then filed a petition for mandamus and a TRO to set aside the summary suspension. (2 AA 266-290.) Neither suggested any concern about equipment safety or retaliation. Dr. Melamed voluntarily dismissed that action shortly after filing it. (2 AA 305.)

G. The Peer Review Hearing: Dr. Melamed Never Suggests A Retaliatory Motive.

Dr. Melamed requested a peer review hearing. (1 AA 154.) Based on new information, Cedars-Sinai issued an Amended Notice of Action, which lifted the suspension as to adult patients. (1 AA 156-159.) It kept the suspension in place for pediatric privileges and stated that those privileges would be terminated upon final adoption of the action through the peer review hearing process. (1 AA 156.)

Throughout the peer review proceeding, Dr. Melamed attempted to demonstrate that no disciplinary action was or would be appropriate. However, he never attempted to defend himself by suggesting that Cedars-Sinai's real motive was to retaliate against him for making safety complaints. (1 AA 76.)

The hearing committee unanimously found that:

- Cedars-Sinai had acted reasonably in investigating Dr. Melamed's case;
- Based on the information available at the time, the failure to take immediate action may have resulted in imminent danger to the health of a patient; and
- The summary suspension was "reasonable and warranted."

(2 AA 408-409, 412.) The hearing committee recommended that Dr. Melamed's privileges not be terminated and that summary suspension end. (2 AA 409-411.)

H. Dr. Melamed's Internal Appeal: Dr. Melamed Still Does Not Suggest A Retaliatory Motive.

Over the next several months, Dr. Melamed appealed through the internal review process, challenging the hearing committee's determination to uphold the summary suspension. (3 AA 566, 569.) He still never suggested that retaliation was the real motivation for his suspension. (1 AA 76.)[2]

The Medical Executive Committee (the first level of review), the Appeal Committee (the second level), and Cedars-Sinai's Board of Directors (the final

[2] Under the bylaws, only the disciplined physician—not the medical staff—possesses appeal rights. (1 AA 103-105.) But even without an appeal, several bodies automatically review the hearing committee's report. (1 AA 103-104.)

level) each upheld the hearing committee's determinations that the summary suspension was reasonable and warranted. (1 AA 419-428.) Dr. Melamed did not seek mandamus review. (1 AA 76-77.)

I. Dr. Melamed Files This Action, In Which—For The First Time—He Alleges A Retaliatory Motive.

On July 11, 2014, Dr. Melamed filed this action against Cedars-Sinai Medical Center, its Medical Staff and specific physicians involved with the summary suspension decision (collectively, Cedars-Sinai). (1 AA 6-26; 3 AA 631.) For the first time, he alleged that Cedars-Sinai was motivated by an intent to retaliate against him for complaining about patient safety concerns. (1 AA 8-26.) This allegation is central to all seven causes of action. (*Ibid.*)

J. Trial Court Proceedings.

Cedars-Sinai filed an anti-SLAPP motion. (1 AA 46-67.) It maintained that the claims arose out of the medical staff peer review process (first prong), and that Dr. Melamed could not show a probability of success on the merits (second prong) because (1) his claims were barred by the statute of limitations; (2) he had not exhausted judicial remedies; and (3) Dr. Melamed had failed to establish a prima facie case of retaliation. (1 AA 46-67; 2 AA 513-524.)

The trial court granted the motion, sustaining objections to some of Dr. Melamed's evidence in the process. (3 AA 592-600.) Cedars-Sinai's demurrer, which the court overruled as moot, further addressed these issues. (1 AA 66; 3 AA 615; 1 RA 12-17, 46-55.)

STANDARD OF REVIEW

The anti-SLAPP statute establishes a two-prong analysis. First, Cedars-Sinai must show that the causes of action arise from protected activity—conduct in furtherance of Cedars-Sinai's engagement in an official proceeding. (*Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 76-77 (*Nesson*), disapproved on other grounds by *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 687 (*Fahlen*).) Second, "the burden shifts to [Dr. Melamed] 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 DR. MELAMED'S CHALLENGE TO CEDARS-SINAI'S PEER REVIEW ACTIONS.

A. The Anti-SLAPP Statute Applies To Claims Based On Peer Review Conduct.

1. Peer review conduct is protected activity under the anti-SLAPP statute.

Actions for wrongful deprivation of staff privileges, including summary suspensions, come within the purview of the anti-SLAPP statute. (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 198 (*Kibler*); *Nesson*, *supra*, 204 Cal.App.4th at pp. 78, 83-84, 87, disapproved only as to second-prong analysis by *Fahlen*, *supra*, 58 Cal.4th at p. 687.) Anti-SLAPP protection is necessary because of the legislatively-recognized importance of the peer review process as "'essential'" to "protecting the public against incompetent, impaired, or negligent physicians." (*Kibler*, *supra*, 39 Cal.4th at pp. 199-200; *Nesson*, *supra*, 204 Cal.App.4th at p. 79.) If peer review activities were not protected, physicians would be discouraged from participating in the peer review process. (*Kibler*, *supra*, 39 Cal.4th at p. 201.)

2. Dr. Melamed's complaint challenges peer review conduct.

Dr. Melamed's complaint unambiguously challenges peer review conduct.

First, his central allegation is that Cedars-Sinai wrongfully deprived him of staff privileges when it imposed the summary suspension. (1 AA 13-14, 20-25;

AOB 33 ["Dr. Melamed's criticism is of Defendants for suspending Dr. Melamed"].) *Nesson* is directly on point. Just like Dr. Melamed, the physician in *Nesson* alleged that the hospital summarily suspended his privileges in retaliation for his complaints about patient safety issues. (*Nesson*, *supra*, 204 Cal.App.4th at pp. 75, 83-84, 87.) As the Court of Appeal held, that claim is protected by the anti-SLAPP statute because summary suspension is a form of discipline under the peer-review mechanism and "the California Supreme Court has held that lawsuits arising from a challenge to hospital peer review activities, including the discipline imposed upon a physician" are protected. (*Id.* at pp. 78, 83.)

Nor could it be any other way. Summary suspensions are a critical component of the peer review process. They are authorized by statute to protect California citizens where the failure to take immediate action may result in imminent danger. (Bus. & Prof. Code, § 809.5.) Without anti-SLAPP protection, harassing lawsuits would discourage summary suspensions as much as any other act in furtherance of the peer review mechanism. We are not certain what Dr. Melamed means when he tries to distinguish *Nesson* as a "situation where the claim arises out of the process itself." (AOB 33.) His summary suspension likewise arose from the peer review process, using the procedure authorized by statute and defined in Cedars-Sinai's bylaws. (P. 17, *ante*.)

Second, Dr. Melamed alleges that he was injured when Cedars-Sinai reported the summary suspension to the California Medical Board—the report allegedly injured his reputation and caused other hospitals to suspend or deny privileges. (E.g., 1 AA 13-20; AOB 17, 19-20.) But the report is protected conduct. Reporting is an inherent—indeed mandatory—part of the peer review system that plays

an important role in physician licensing. (Bus. & Prof. Code, § 805, subd. (b) [requiring report after summary suspension]; *Kibler*, *supra*, 39 Cal.4th at pp. 199-200.)

Third, Dr. Melamed alleges that he was injured by being forced to undergo the peer review hearing and appeals process (AOB 33-34)—in other words, that Cedars-Sinai is liable for engaging in the peer review process itself. That too is a claim that necessarily arises from peer review conduct.

B. Dr. Melamed's Claims Arise Out Of Peer Review Conduct Even Though They Allege A Retaliatory Motive For That Conduct.

1. Motive is irrelevant to the first-prong analysis.

Dr. Melamed argues that his claims do not arise from peer review conduct because they allege retaliation as a motive. (AOB 28-32 ["retaliation" is the prohibited "conduct"]; 2 RT 24 [case challenges "defendants' retaliatory motive for engaging in that process to begin with"].) But it is well established that the first prong of the anti-SLAPP analysis does not consider the defendant's alleged motive.

"[T]he first step of the anti-SLAPP analysis focuses on the acts the plaintiff alleges as the basis for his or her claims, *not the motive* or purpose the plaintiff attributes to the defendant's acts . . . ." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 53, italics added.) California decisions have warned again and again that "[w]hen evaluating whether the defendant has carried its burden under the first prong of the anti-SLAPP statute, courts must be careful to distinguish allegations of conduct on which liability is to be based from allegations of motives for such conduct. '[C]auses of action do not arise from motives; they arise from acts.'"

(*Id.* at p. 50; *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1520 (*Hunter*).)

It does not matter that the conduct would not be actionable without the alleged bad motive. (*Collier*, *supra*, 240 Cal.App.4th at pp. 49-50.) Indeed, the California Supreme Court has clarified that "courts must distinguish between the acts underlying a plaintiff's causes of action and the '"claimed illegitimacy of [those] acts[, which] is an issue . . . the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case."'" (*Hunter*, *supra*, 221 Cal.App.4th at p. 1522, brackets and ellipsis in original, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 (*Navellier*).) Conflating the alleged injury-producing conduct with the alleged motive for that conduct is "at odds with the language and purpose of the anti-SLAPP statute." (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 268-269.) For instance, in *Hunter*, the first prong was satisfied because the "injury-producing conduct" in the plaintiff's employment discrimination claim was the employer's decision about whom to hire as a television news anchor—an exercise of free speech. (221 Cal.App.4th at pp. 1521-1522.) The alleged discriminatory motive for that decision was relevant only to the second prong. (*Ibid.*)

In fact, *Nesson* applied this familiar rule under the same facts presented here. As it explained, "the anti-SLAPP statute applies to claims made in connection with the protected activity, regardless of defendant's motive, or the motive the plaintiff may be ascribing to the defendant's conduct." (*Nesson*, *supra*, 204 Cal.App.4th at p. 83, citing *Navellier*, *supra*, 29 Cal.4th at pp. 89-90.) Accordingly, it held that the

first prong was satisfied where the plaintiff-physician alleged that a hospital improperly summarily suspended his privileges (1) in retaliation for complaints about patient-safety and (2) because of disability discrimination. (*Nesson*, *supra*, 204 Cal.App.4th at pp. 75, 83-84, 87-88.)

As we next demonstrate, Dr. Melamed's contrary arguments are meritless.

2. *Fahlen* does not support Dr. Melamed's argument that retaliation claims do not arise from protected activity.

Dr. Melamed argues that *Nesson*'s first-prong analysis "should not be followed in the aftermath of *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655." (AOB 31-32.) But *Fahlen* wrought no such change in the law.

For one thing, *Nesson* merely applied well-recognized law that the first-prong inquiry does not consider the alleged motive—law recognized by the Supreme Court itself. (§ I.B.1., *ante*.)

For another, *Fahlen* has no impact on the first-prong inquiry. In the underlying decision, the Court of Appeal had held that all of the claims arose out of protected activity. (58 Cal.4th at pp. 665-666.) The Supreme Court addressed only a *second prong* issue, holding that the plaintiff had shown a probability of succeeding on the merits of his Health and Safety Code section 1278.5 claim because—unlike his other causes of action—he was not required to exhaust judicial remedies on a section 1278.5 claim. (*Id.* at p. 666.)

Dr. Melamed notes that *Fahlen* recognized that the peer review hearing is not a venue to seek monetary relief for retaliation. (AOB 31-32, citing *Fahlen*, *supra*, 58 Cal.4th at pp. 661, 676-677.) But that's irrelevant to the first-prong

analysis, which turns on whether the alleged injury-producing conduct—summary suspension, reporting, and engaging in the peer review hearing mechanism—constitutes protected activity.

3. *Donovan* does not support Dr. Melamed's argument that retaliation claims do not arise from protected activity.

Nor does *Donovan v. Dan Murphy Foundation* (2012) 204 Cal.App.4th 1500 (*Donovan*) aid Dr. Melamed. (AOB 26-27.) In *Donovan*, the plaintiff alleged he was wrongfully removed from a charitable organization's board of directors. (204 Cal.App.4th at pp. 1502-1504.) The Court of Appeal held that the anti-SLAPP statute did not apply because a non-profit's board of directors meeting is not an official proceeding authorized under law for purposes of the anti-SLAPP statute. (*Id.* at p. 1508.) The court distinguished such meetings from the peer review process because (1) statutes did not prescribe the procedures for a board of director's meeting, (2) the meeting was not related to any issue of public interest, and (3) its decisions were not subject to judicial review by administrative mandamus. (*Id.* at pp. 1508-1509.) Dr. Melamed attempts to draw a parallel to *Donovan*, arguing that his retaliation claims are not subject to administrative mandamus (AOB 26-28), but that analogy fails.

Again, this argument conflates the alleged injury-producing conduct with the alleged motive. (See § I.B.1., *ante*.) In *Donovan*, the alleged injury-producing conduct—the removal of plaintiff as a director—did not arise from an official proceeding because the removal decision was not subject to judicial review by mandamus regardless of alleged motive. As *Kibler* and its progeny hold, the alleged injury-producing conduct *in medical peer review* cases is different because

of the special nature of peer review proceedings, which *are* subject to mandamus review. (*Kibler, supra*, 39 Cal.4th at p. 200; *Nesson, supra*, 204 Cal.App.4th at p. 79.)

4. *McConnell* and *Paul* do not support Dr. Melamed's argument that retaliation claims do not arise from protected activity. In fact, they further confirm that Cedars-Sinai established the first prong.

Dr. Melamed argues at length that his claims are analogous to those in *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169 (*McConnell*) and *Paul v. Friedman* (2002) 95 Cal.App.4th 853 (*Paul*). (AOB 28-31.) There is no analogy. Not even close.

In *McConnell*, two employees brought suit for a declaration of their right to terminate their employment and to thereafter solicit business from their former employer's clients. (*McConnell, supra,* 175 Cal.App.4th at p. 173.) In the wake of that suit, the employer sent the employees a letter barring them from the office and from contacting clients. (*Ibid.*) The employees then amended their complaints, alleging the letter was retaliatory. (*Id.* at p. 174.) The employer then filed an anti-SLAPP motion, asserting that the retaliation claim arose out of the employer's letter. (*Ibid.*) The Court of Appeal held that the employer's letter did not constitute protected activity because although the lawsuit preceded the letter, the letter was not written "in connection with '*an issue under consideration or review* by a . . . judicial body.'" (*Id.* at pp. 176-177, italics and ellipses in original.)

Paul applied the same rule. There, several individuals brought an arbitration against a securities broker. (*Paul, supra,* 95 Cal.App.4th at pp. 856-857.) Before

and during the arbitration, those individuals conducted an invasive investigation into the broker's "personal matters bearing no relationship to the claims asserted in the arbitration" and disclosed the resulting details about the broker's personal life to the broker's clients and prospective clients. (*Id.* at pp. 857, 866.) The broker sued for invasion of privacy and interference with economic advantage. Not surprisingly, the court held that the broker's suit was not subject to the anti-SLAPP statute since the alleged investigation had no bearing on the "issues" to be considered in the arbitration. (*Id.* at pp. 866-868.)

Dr. Melamed argues that his case is similar to *McConnell* and *Paul* because the peer review "proceedings were simply one of the manifestations" of Cedars-Sinai's allegedly retaliatory conduct. (AOB 30-31.) Not so. In fact, *McConnell* and *Paul* further demonstrate why Dr. Melamed's claims fall squarely within the first-prong of the anti-SLAPP statute.

First, in the words of *McConnell* and *Paul*, Cedars-Sinai's participation in the peer review hearing and appeal process was directly connected to the "issue[s] under consideration or review" in that quasi-judicial process. Indeed, Dr. Melamed complains about the fact that Cedars-Sinai litigated those issues. There is no closer connection between alleged conduct and the "issues" to be decided in a proceeding.

Second, Dr. Melamed's summary suspension was itself part of the peer review process. (Pp. 23-24, *ante*.) It is an official act of the peer review body. It too has everything to do with the "issues under consideration or review" throughout the peer review proceedings. As required by law and Cedars-Sinai's bylaws, the summary suspension was effected by the Notice of Action, which set forth Cedars-Sinai's basis for summarily suspending and seeking the termination of

Dr. Melamed's privileges—that is, the charges against Dr. Melamed. (P. 17, *ante*.) The "issue" considered in the remainder of the peer review process was whether those charges warranted the discipline sought (or already imposed, in the case of summary suspensions) by the Notice of Action.

5. Dr. Melamed's policy arguments do not support his theory that retaliation claims do not arise from protected activity.

Dr. Melamed contends that it "would seriously compromise the legislative purpose to encourage and protect whistleblowers" to find that his retaliation claims fall within the first prong of the anti-SLAPP statute. (AOB 34-35.) He urges that doctors will not speak out about patient safety concerns if they are unable to prosecute a retaliation claim without "undergo[ing] the burdensome process of defending an anti-SLAPP motion." (AOB 34.)

The argument not only is meritless, but also contradicts Dr. Melamed's concession that the anti-SLAPP standard is *not* burdensome. In his words, a physician need only show that his retaliation claim has "minimal merit." (AOB 40.) Nor is it true, as Dr. Melamed contends, that physicians would be discouraged by facing an anti-SLAPP motion after "being forced to undergo years of dispute resolution." (AOB 34.) That's the whole point of *Fahlen*: Physician-whistleblowers need not exhaust remedies in order to file a retaliation action under Health and Safety Code section 1278.5. (*Fahlen*, *supra*, 58 Cal.4th at p. 687.)

In fact, public policy very much cuts the other way. The peer review mechanism serves a vital role in protecting the health and safety of California citizens, and individuals and entities would be reluctant to serve that vital role if faced with the burden and expense of defending meritless suits that the anti-SLAPP

procedure could have weeded out. (*Kibler*, *supra*, 39 Cal.4th at p. 201.) It is true that this interest must be balanced against that of encouraging whistleblowers. (AOB 34-35.) But the law already provides that balance: The peer review process is protected because the plaintiff must show a probability of success on the merits, and true whistleblowers are protected because, as Dr. Melamed himself argues, the second prong is not overly burdensome.

Contrary to Dr. Melamed's contention, *Fahlen* does not suggest otherwise. (AOB 35.) Dr. Melamed cites a portion of *Fahlen* that discusses the balancing of interests regarding the requirement to exhaust administrative remedies. (*Fahlen*, *supra*, 58 Cal.4th at p. 679.) *That* "balance of competing interests," the Court recognized, led the Legislature to permit a physician to bring a Health and Safety Code retaliation claim without exhausting other remedies. (*Ibid.*) But that is a far cry from holding that there should be no anti-SLAPP protections *at all*. Rather, it is a second-prong issue concerning the physician's ability to succeed on the merits. While *Fahlen* excused physicians from exhaustion under certain circumstances, it did not excuse them from the anti-SLAPP process.

C. Dr. Melamed's Argument About Mixed Causes Of Action Is Meritless.

In the alternative, Dr. Melamed argues that his claims are "not subject to the anti-SLAPP statute" because they involve mixed causes of action. (AOB 36-39.) That is, he argues that Cedars-Sinai cannot establish the first prong of the anti-SLAPP statute because, for each cause of action, parts of his claims arise from protected activity—the parts that arise from peer review conduct—and others do not.[3] The argument is meritless for two independent reasons.

1. Contrary to Dr. Melamed's argument, courts uniformly agree that the first prong of the anti-SLAPP statute is satisfied in mixed causes of action.

Courts have uniformly rejected Dr. Melamed's absolutist theory that the very existence of a mixed cause of action defeats an anti-SLAPP motion on the first prong.

First prong analysis. When a "cause of action is based on both protected activity and unprotected activity, it is subject to [the anti-SLAPP statute] 'unless the protected conduct is "merely incidental" to the unprotected conduct.'" (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551 (*Haight Ashbury*); see *Mann v. Quality Old Time Service, Inc.* (2004)

[3] Although as shown below, cases involving mixed causes of action can implicate second-prong issues, it is clear that Dr. Melamed intends to make only a first-prong argument. It appears in section I of the opening brief, which addresses the first prong, before Dr. Melamed turns to his second-prong arguments in section II. Moreover, Dr. Melamed does not contend that he has shown a probability of success as to the portions of his claim that he says are unrelated to peer review conduct. (See § II.D., *post*.)

120 Cal.App.4th 90, 100 (*Mann*) [first prong satisfied "where a defendant has shown that a substantial part of a cause of action" arises from protected conduct; on second prong, plaintiff avoids anti-SLAPP entirely by showing a probability of success on any portion of his claim]; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 767 [first prong satisfied if protected activity is not merely an incidental part of the cause of action].)

Dr. Melamed nowhere mentions this standard. Nor could he possibly contend that the portions of his claims that relate to protected activity are merely incidental to his claims. Summary suspension and the peer review hearing are the centerpiece of each of his claims.

Second prong analysis. Dr. Melamed discusses a debate about the impact of mixed causes of action and argues in favor of one of the two approaches the Courts of Appeal have adopted (AOB 36-39), but that debate relates only to the second prong: Whether a plaintiff entirely defeats an anti-SLAPP motion by showing a probability of success on any part of his mixed cause of action, or whether the court can sever and strike those parts on which the plaintiff cannot show a probability of success. (*Mann*, *supra*, 120 Cal.App.4th at pp. 105-106 [severance not allowed on second prong]; *Haight Ashbury*, *supra*, 184 Cal.App.4th at pp. 1554-1555 [discussing competing views on severance under second prong, noting no debate exists as to first prong]; *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1195-1210 [discussing debate regarding second-prong treatment of mixed causes; courts may strike portion of claim arising from protected conduct if plaintiff does not carry his burden]; *City of Colton*, *supra*, 206 Cal.App.4th at pp. 769-775 [deciding second-prong treatment of mixed causes of action]; *Cho v. Chang* (2013)

219 Cal.App.4th 521, 526-527 [published portion of decision relates only to analysis of plaintiff's probability of success].) Indeed, every citation that Dr. Melamed provides is to the second-prong analysis of the cited cases. (See AOB 37.) And cases that disallow severance still hold that the first prong is satisfied. (E.g., *Mann*, at pp. 100, 105-106.) This second prong issue is what the Supreme Court is considering in *Baral v. Schnitt* (cited at AOB 38).

The second-prong issue has nothing to do with Dr. Melamed's first-prong argument—that the mere existence of a mixed cause of action makes the anti-SLAPP statute inapplicable. In an abundance of caution, we address the second-prong issue—which Dr. Melamed does not argue—in section II.D.

2. Dr. Melamed's complaint does not raise mixed causes of action.

In any case, Dr. Melamed cannot establish the existence of a mixed cause of action. He asserts, without explanation, that three of his allegations are "unrelated to any protected activity." (AOB 39.) The argument does not withstand scrutiny: In each instance, the allegations are directly related to peer review conduct.

Alleged obstruction of other economic and career opportunities.

Dr. Melamed claims that Cedars-Sinai obstructed his other economic and career opportunities. (AOB 39; 1 AA 14.) His complaint provides no elaboration. Nor does his declaration, which merely parrots the minimal language of the complaint. (2 AA 344 ¶ 23.) Without any additional information, this allegation certainly appears to arise out of protected conduct: Dr. Melamed alleges that Cedars-Sinai denied him "economic and career opportunities" (1) by summarily suspending his privileges to perform surgery at Cedars-Sinai and (2) by reporting the summary

suspension to the California Medical Board, which resulted in other hospitals suspending or denying his applications for privileges (1 AA 11-19; 2 AA 338-339 345-346 [effect of Medical Board report]). This is just a specification of the damages allegedly flowing from that protected peer review conduct. (§ I.A.2., *ante*.)

Dr. Melamed's declaration does not suggest that the allegation means anything more. Moreover, the trial court rightly concluded that the relevant language in Dr. Melamed's declaration is "so conclusory that [it has] no evidentiary value." (3 AA 611.) Dr. Melamed has not challenged that trial court ruling and cannot do so now. (E.g., *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015 [Court of Appeal considers evidence properly excluded when appellant does not challenge evidentiary rulings]; *Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115 [appellants forfeit issues by failing to raise them in their opening brief].) So, it is difficult to see how Dr. Melamed's allegation can relate to anything but peer review conduct.

Alleged campaign of character assassination and ongoing hostility. The same is true of Dr. Melamed's other two supposedly distinct allegations. Again, neither Dr. Melamed's complaint nor his declaration provides any clarification. He may mean that the reporting of his summary suspension and the peer review hearing of the charges against him constituted the "campaign of character assassination" and "ongoing hostility." After all, he alleged that the entire process was retaliatory and damaging to his reputation. But that wouldn't show a mixed cause of action; it's just a different label for the peer review process. Again, if he meant something else, there is no way of knowing it from his complaint or from

what the trial court found to be worthless conclusory statements in his declaration. (2 AA 344 ¶ 23; 3 AA 611.)

As the trial court determined, the first prong of the anti-SLAPP analysis is satisfied. Dr. Melamed's claims squarely arise out of protected peer review conduct even if he alleges a retaliatory motive for that conduct.

II. SECOND PRONG: DR. MELAMED FAILED TO SUSTAIN HIS BURDEN OF SHOWING A PROBABILITY OF SUCCESS ON THE MERITS.

A. Dr. Melamed's Health And Safety Code Section 1278.5 Claim Is Barred By The Statute Of Limitations.

Dr. Melamed filed his complaint on July 11, 2014—nearly three years after Cedars-Sinai imposed the summary suspension, reported the summary suspension to the California Medical Board, and notified Dr. Melamed of the intent to terminate his privileges upon confirmation in the peer review process. (1 AA 6, 82-83, 142-143, 156-159.) His cause of action under Health and Safety Code section 1278.5 (section 1278.5) is barred by the two-year statute of limitations.

1. A two-year statute of limitations applies to Dr. Melamed's section 1278.5 claim.

Contrary to Dr. Melamed's suggestion, his section 1278.5 claim is not subject to the three-year statute of limitations for a "liability created by statute." (AOB 59-60, relying on Code Civ. Proc., § 338, subd. (a).) Instead, the two-year statute of limitations for tort claims applies (Code Civ. Proc., § 335.1) because this

type of liability existed at common law. Indeed, Dr. Melamed's complaint is the best proof of this, since he alleges three common law claims based on the same alleged misconduct and harm. (1 AA 15-19, 23-24 [2nd, 3rd and 7th causes of action].)

"'A cause of action is based upon a liability created by statute "only where the liability is embodied in a statutory provision *and was of a type which did not exist at common law*."'" (*West Shield Investigations and Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 952, italics altered, quoting *Briano v. Rubio* (1996) 46 Cal.App.4th 1167, 1177.) "[W]here a cause of action is based upon a statute which did not 'create a new form of liability . . . but merely codified and refined existing law,' the section 338 three-year limitations period for actions based upon statutory liability does not apply." (*Ibid.*, ellipses in original; e.g., *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 754-760 [Unruh Act claims alleging denial of free speech and access to public accommodations derive from common law and are therefore not subject to three-year statute of limitations].)

The three-year statute of limitations does not apply here because Dr. Melamed's causes of action for retaliatory denial of medical staff privileges derive from common law—not a new form of liability created by section 1278.5. Dr. Melamed himself brought several common law causes of action for the identical retaliation—alleging the same misconduct and harm—including one styled as a claim for wrongful deprivation of staff privileges. (Compare 1 AA 15-19 with 1 AA 24-25; see also 1 AA 15-19.) Since his common law claims allege well-established causes of action, a substantively identical claim cannot be purely the creation of statutes.

Indeed, California courts have long recognized the "common law principles" that authorize claims when a hospital excludes a physician from staff membership for reasons that are "substantively capricious or contrary to public policy." (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550-553.) In the 1970s, the Supreme Court described the "century-old progression of common law" in this regard. (*Id.* at p. 552; see also *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1063-1064, 1066-1070 [describing doctrinal development since the late 19th century].) Since at least 1888, the common law prevented an organization's expulsion of members for reasons that were "'not in good faith.'" (*Potvin, supra,* 22 Cal.4th at p. 1066, quoting *Otto v. Tailors' P. & B. Union* (1888) 75 Cal. 308, 315.) It goes without saying that excluding a physician out of retaliatory animus would be improper, "capricious," and "not in good faith," in violation of these long-established common law rights.

What's more, the same common law doctrine that protects physicians against expulsion for capricious reasons also protects employees from capricious termination, such as because of racial discrimination. (*Potvin, supra,* 22 Cal.4th at pp. 1066-1068 [discussing development of doctrine to include claims for racial discrimination by employers and unions before its application to physician-hospital relationships].) Not surprisingly, it is well recognized in employment cases that the common law authorizes claims for retaliation for making safety complaints. (*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 300-304.) It defies logic to suggest that this shared common law doctrine prohibits safety-complaint retaliation in one setting but not the other.

At least one Court of Appeal has held that Code of Civil Procedure section 338's three-year statute of limitations does not apply to claims for terminations allegedly motivated by retaliation for an employee's reporting of unsafe conditions—"the cause of action itself is a common law, judicially recognized cause of action, not a liability created by statute." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1203, 1209, fn. 6 (*Barton*).) When the Legislature enacted section 1278.5, it did not create a new form of liability for physicians. It merely codified and refined the physician's existing common law rights against capricious membership decisions. Accordingly, the two-year statute of limitations applies.

Dr. Melamed's contrary argument is essentially a single sentence. He says that "defendants point to no case law recognizing a preexisting common law claim for retaliation based on reports concerning patient care." (AOB 60.) While this very narrow statement is literally true—there is no reported decision addressing section 1278.5's statute of limitations—as shown above, the common law has long recognized claims against employers and hospitals/medical staffs who exclude employees and physicians based on bad faith motive and it has long recognized claims based on retaliation for safety complaints. That Dr. Melamed cites only *Barton* speaks volumes, since that case directly supports applying the common law statute of limitations.

2. Equitable tolling does not salvage Dr. Melamed's section 1278.5 claim.

Although Dr. Melamed acknowledges that he did not need to pursue the peer review remedy before bringing a retaliation claim under section 1278.5,

he nevertheless contends that equitable tolling applies when a plaintiff voluntarily participates in a process to resolve his claims. (AOB 60, 62.) That rule doesn't apply here. Even the opening brief's discussion of the cited cases makes clear that equitable tolling applies only when the plaintiff gives defendant timely notice of his claims. (AOB 61-62.) Here, Dr. Melamed never gave any such notice prior to filing his time-barred civil complaint. (Pp. 19-20, *ante*.)

As Dr. Melamed's opening brief explains, equitable tolling is "'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.'" (AOB 61, quoting *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*) and *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) Both the opening brief and those cases demonstrate that the essential ingredient is notification of the claims that the plaintiff ultimately brings. (AOB 61-62.) For instance, in *McDonald*, the plaintiff alleged that her employer discriminated based on race in refusing to consider her application for promotion. (45 Cal.4th at p. 97.) Although she filed her complaint after the statute of limitations lapsed, she had previously raised and tried to informally resolve the exact discrimination claim with her employer. (*Id.* at pp. 97-98.) She complained of the discrimination in a letter to the employer's Vice Chancellor of Human Resources and then in a formal, internal discrimination complaint. (*Id.* at p. 97.) At her employer's suggestion, she then worked with her employer to resolve the matter and then appealed the employer's no-discrimination findings within the employer's internal administrative system. (*Id.* at pp. 97-98.)

Not surprisingly, the Court held that equitable tolling was appropriate because the employer was on notice of the plaintiff's discrimination claim from the beginning.

Here, equitable tolling is impermissible because Dr. Melamed did not provide timely notice of his retaliation claim. Not once during the peer review process did he claim to be the victim of retaliation for making safety complaints. (Pp. 19-20, *ante.*) While he did mention that he encountered difficulty during the surgery because of his inability to stabilize the patient, that is nowhere near notice of his claim that he was *retaliated against* for complaining about a patient safety issue. In fact, Dr. Melamed affirmatively relies on the fact that the peer review hearing did not consider whether retaliation was the real motivation for his summary suspension. (AOB 53 [none of the peer review findings "relate to the issue" of retaliation].) And his counsel says that it was a "strategic decision by [Dr. Melamed] and his counsel, at that point, not to raise those issues." (2 RT 27.) Having made a strategic decision to hide his retaliation claim, he cannot now contend that Cedars-Sinai had notice of that claim.

Dr. Melamed's failure to provide notice of his retaliation claims eliminates any basis for applying equitable tolling.

3. The continuing violation doctrine does not salvage Dr. Melamed's section 1278.5 claim.

Dr. Melamed's continuing violation argument (AOB 62-65) also fails—and once again, the opening brief itself shows why: When Cedars-Sinai summarily suspended Dr. Melamed and provided notice that it would terminate his privileges, his claim acquired a degree of permanence that made the continuing violation doctrine inapplicable.

As Dr. Melamed's opening brief explains, the continuing violation doctrine recognizes the difficulties posed when an injury is the "product of a series of small harms, any one of which may not be actionable on its own." (AOB 62.) Courts developed the doctrine to prevent plaintiffs from being "handicapped by the inability to identify with certainty when harm has occurred or has risen to a level sufficient to warrant action." (AOB 63.) Thus, the continuing violation doctrine applies when the allegedly unlawful actions (1) are sufficiently similar in kind; (2) have occurred with reasonable frequency; and (3) "'have not acquired a degree of permanence.'" (AOB 64, quoting *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.)

While the opening brief argues that the alleged unlawful acts satisfy the first two elements of that test (AOB 64-65), it is silent on the third element—the degree of permanence. That's not surprising. Well outside the limitations period, Cedars-Sinai's allegedly injurious actions were unquestionably definitive: Cedars-Sinai summarily suspended Dr. Melamed's privileges, reported the suspension to the Medical Board, and sent Dr. Melamed a Notice of Action informing him that Cedars-Sinai intended to terminate his privileges. (Pp. 17, 19, *ante*.)

These acts and claimed injuries were as concrete and permanent as anything could be. There was no uncertainty as to whether small harms would ultimately rise to a level that warranted action. As Dr. Melamed himself alleges, the suspension of his staff privileges itself caused economic injury, and the reporting of his suspension caused reputational damage that would continue at least as long as the suspension remained on his Medical Board records. By July 2011, Dr. Melamed had told the court that his summary suspension was causing and would continue to

cause "irreparable harm"—not some small injury that might not rise to the level warranting action. (E.g., 2 AA 272 [verified mandamus petition], 279, 288-289 [TRO application]; see p. 19, *ante* [discussing mandamus and TRO proceedings, which did not raise retaliation].) Even St. Johns Health Center's decision to summarily suspend Dr. Melamed's privileges—which he alleges was a result of Cedars-Sinai's alleged misconduct—occurred well outside the statutory period. (2 AA 339, 345 [alleged harm included St. John's action], 387-388 [August 23, 2011 suspension based on adverse outcome of Dr. Melamed's surgery at St. John's and his failure to disclose his summary suspension at Cedars-Sinai].)

What's more, Cedars-Sinai's formal Notice of Action made clear that the alleged wrongful conduct had acquired a degree of permanence that could only be altered by legal action—either in the quasi-judicial peer review process or in the courts. It announced a final and complete decision that would end the relationship between Dr. Melamed and the Cedars-Sinai Medical Staff, subject only to the result of a peer review hearing if Dr. Melamed chose to exercise his right to that hearing. (P. 19, *ante*.)

All of this occurred well outside of the two-year statute of limitations. That Cedars-Sinai allegedly "continued" to retaliate by litigating through the automatic reviews of Cedars-Sinai's peer review process (see p. 20, n. 2, *ante*) does not bring the case within the continuing violation doctrine.

Dr. Melamed's section 1278.5 claim is barred by the statute of limitations. As we next demonstrate, the remainder of his causes of action are barred by his failure to exhaust judicial remedies.

B. Dr. Melamed Fails To Demonstrate A Probability Of Success On His Second Through Seventh Causes Of Action.

1. Long-settled law dictates that, except for the section 1278.5 claim, exhaustion of judicial remedies is a prerequisite to a civil action. Dr. Melamed did not do so.

Before a physician can bring a damages suit for deprivation of his medical staff privileges, he must first exhaust his remedies—both administrative (peer review) and judicial (mandamus review of the peer review determination). While Dr. Melamed completed the first step, he never sought mandamus to overturn the determination that his summary suspension was "reasonable and warranted." (2 AA 408-409.) That failure bars his second through seventh causes of action.

The Supreme Court has detailed both of these requirements. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 474-478 [administrative exhaustion], 482-485 [judicial exhaustion] (*Westlake*).) As to judicial exhaustion, it held that a physician must set aside an adverse peer review decision before he may seek tort damages. (*Id.* at p. 469.) There, the physician's "position rest[ed] on a contention that defendants intentionally and maliciously misused a quasi-judicial procedure in order to injure her; such a claim is necessarily premised on an assertion that the hospital's decision to revoke plaintiff's privileges was itself erroneous and unjustified." (*Id.* at p. 484.) The Court explained that, much like claims for malicious prosecution, important public policies required the physician to overturn the hospital's determination by mandamus before the physician may bring a tort claim for damages. (*Id.* at pp. 469, 483-485.) "[S]o long as such a quasi-

judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the hospital's action." (*Id.* at p. 484.)

Here too, Dr. Melamed alleges that his summary suspension and the reporting of that suspension were the result of a conspiracy—a conspiracy to retaliate against him. But at every level, the peer review process concluded that Cedars-Sinai acted reasonably in investigating and determining that failing to take immediate action might have resulted in imminent danger to patients and therefore that summary suspension was "reasonable and warranted." (2 AA 408-409; 1 AA 419-428.) Dr. Melamed appealed those determinations throughout the administrative process. (3 AA 566, 569.) But he made no attempt to set them aside by mandamus. (1 AA 76-77.)

As the trial court found (3 AA 594-595), Dr. Melamed cannot show a probability of success on the merits of his second through seventh causes of action because those claims are barred by *Westlake*'s exhaustion requirement.

Only Dr. Melamed's first cause of action, under section 1278.5, avoids the exhaustion requirement. The Supreme Court has held that the statutory language and legislative history of section 1278.5 demonstrate a clear legislative intent that exhaustion not be a prerequisite to filing a section 1278.5 claim. (*Fahlen*, *supra*, 58 Cal.4th at pp. 675-687.) But no legislative intent similarly immunizes causes of action sounding in other statutory or common law grounds, although they too allege retaliation. (See *id.* at pp. 660-661, 665-666 [limiting holding to section 1278.5 claims; not addressing Court of Appeal decision that other retaliation-based claims were subject to exhaustion requirements].) Dr. Melamed does not argue otherwise. (AOB 50-57.)

2. Dr. Melamed's attempts to sidestep the exhaustion requirement are meritless.

a. Dr. Melamed's policy analysis misses the mark.

The fallacy in Dr. Melamed's attempt to show that *Westlake*'s policy rationales do not apply here (AOB 51, 55-56) is his failure to recognize that *Westlake* outlines two distinct policy rationales—one for administrative exhaustion and another for judicial exhaustion. (*Westlake, supra,* 17 Cal.3d at pp. 476, 484.) Dr. Melamed failed to exhaust his *judicial* remedies after completing the full administrative process. So, the policies requiring *judicial* exhaustion are the only relevant policies. But the opening brief focuses entirely on the inapplicable policies for *administrative* exhaustion. (AOB 51, 55-56.)

Westlake considered the two exhaustion requirements separately because the plaintiff made claims against two hospitals and each claim had its own, separate exhaustion facts. (*Westlake*, *supra*, 17 Cal.3d at pp. 469-474.)

The Court held that requiring administrative exhaustion satisfies the policies of allowing the hospital to quickly determine that it committed error and to minimize damages, recognizing the expertise of the hospital's quasi-judicial system, and unearthing the relevant information for judicial review. (*Id.* at p. 476.) The opening brief is correct that those policies are satisfied here since Dr. Melamed exhausted his administrative remedies. (AOB 51, 55-56.)

But the Court identified an entirely different set of policies as compelling judicial exhaustion: (1) simplifying court procedure by uniformly requiring judicial rather than jury review of administrative decisions; (2) according proper respect to

the administrative determination; and (3) providing a justified measure of protection to individuals who take on the socially-important role of policing physicians. (*Westlake*, *supra*, 17 Cal.3d at p. 484.) Dr. Melamed does not argue that this case satisfies any—much less all—of these three policy reasons for requiring *judicial* exhaustion. His opening brief does not even mention them. Nor is there any basis for claiming that they are or can be satisfied, since filing a tort action directly undermines them.

b. Contrary to Dr. Melamed's assertion, he could have sought mandamus review of the administrative findings that Cedars-Sinai acted reasonably and that the summary suspension was "reasonable and warranted."

Dr. Melamed argues that there was no need to exhaust judicial remedies because he "ultimately prevailed as to any finding that even remotely relate [sic] to this action." (AOB 54.) Not so.

Dr. Melamed's core allegations are that he was harmed by the summary suspension and by the reputational damage that resulted from reporting that summary suspension. (1 AA 11-25.) The peer review process found that the summary suspension was "reasonable and warranted"—that Cedars-Sinai's Medical Staff acted reasonably in investigating the case and in determining that Dr. Melamed would pose an imminent threat to patient safety if immediate action was not taken. (2 AA 408-409; pp. 20-21, *ante*.)

Dr. Melamed argues that "there were no rulings he would want set aside" (AOB 54) and that the finding validating the summary suspension is "moot" since,

under the peer review hearing committee report, the suspension has expired and his privileges were not terminated (AOB 57). These statements are obviously untrue—otherwise we would not be in litigation. The clearest proof of the importance of these rulings is that Dr. Melamed challenged them through every level of the administrative process. (2 AA 343; 3 AA 566, 569.) He had no reason to do so if the rulings were moot.

His own allegations and declaration establish ample reason. Dr. Melamed himself argues that the summary suspension has ongoing, real-world impact for him. (1 AA 13-14, 16-17; 2 AA 338-339, 345.) By law, Cedars-Sinai is required to report physician discipline—including this summary suspension—to the California Medical Board. (Bus. & Prof. Code, § 805; see pp. 17, 24-25, *ante*.) The Medical Board uses these reports in considering physician licensing. (*Kibler*, *supra*, 39 Cal.4th at pp. 199-200.) Other hospitals allegedly denied or suspended his privileges because of his summary suspension at Cedars-Sinai. (E.g., 1 AA 14, 19.) And Dr. Melamed alleges that the report to the California Medical Board has caused and will continue to cause reputational and career damage—it remains a "permanent mark on [his] record under National Practitioner Data Bank" that he "will have to explain" every time he applies to a medical faculty and which has caused him to stop applying due to fear of rejection. (1 AA 13-14, 16-17; 2 AA 338-339, 345-346.)

Had Dr. Melamed succeeded in overturning the determination that his summary suspension was "reasonable and warranted," Cedars-Sinai or Dr. Melamed would have reported those finding to the Medical Board, which would have cleared his record and avoided these ongoing detriments.

c. Dr. Melamed's collateral estoppel theory is meritless.

Dr. Melamed argues that *Westlake*'s judicial exhaustion requirements "derive from collateral estoppel," and that exhaustion cannot apply here because collateral estoppel requires that the issue have been "actually litigated," and the parties did not litigate whether the summary suspension was motivated by retaliation. (AOB 52-54.) Not so.

First, Dr. Melamed's premise is wrong. While in other contexts courts may discuss exhaustion as an application of collateral estoppel principles, the Supreme Court has defined it otherwise in the medical peer review context. *Westlake* held that judicial exhaustion of peer review determinations is analogous to the favorable termination element of a malicious prosecution claim (*Westlake, supra*, 17 Cal.3d at pp. 483-483), which involves entirely different concepts than collateral estoppel (*Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 829 ["it is important to note the requirement of favorable termination for purposes of pursuing a malicious prosecution action is distinct from the circumstances which give rise to application of the doctrines of res judicata and collateral estoppel"]; see generally *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735 [holding that under certain circumstances, a settlement could constitute a favorable termination]). *Westlake* drew this analogy from three public policies, including at least one that is specific to peer review: protection for individuals who undertake the socially-important role of safeguarding the public by policing physicians. (17 Cal.3d at p. 484.) Dr. Melamed chose, for strategic reasons, not to raise his retaliation theory before the peer review body. (P. 42, *ante*.) But as a matter of policy, he cannot proceed with his tort claim

based on the peer review proceedings without first overturning the result of those proceedings by mandamus. (§ II.B.1., *ante*.)

Second, Dr. Melamed would lose even if the issue were considered as a matter of collateral estoppel. His argument acknowledges that peer review decisions have preclusive effect. (AOB 52.) "[S]o long as such a quasi-judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the hospital's action." (*Westlake*, *supra*, 17 Cal.3d at p. 484.) Because Dr. Melamed chose not to seek judicial review of the peer review decision, it is now preclusively established that Cedars-Sinai acted reasonably and that Dr. Melamed's summary suspension was "warranted" by the then-known medical facts—his apparently poor judgment in continuing spine surgery for at least eight hours despite realizing that he could not stabilize the patient, causing her to become "freakishly" deformed. (Pp. 13-17, 20, *ante*.) Dr. Melamed himself admitted that in hindsight he should have stopped. (P. 16, *ante*.)

Since Dr. Melamed's summary suspension was "warranted" by the medical facts and by Cedars-Sinai's legal duty to protect patients, Cedars-Sinai cannot be held liable for wrongfully imposing or reporting the summary suspension. Cedars-Sinai had no option. It was obligated by law to protect patient safety by imposing a summary suspension if the facts warranted doing so. That would be so even if it were true that some individuals also wanted to retaliate against Dr. Melamed.

At the very most, Dr. Melamed could argue that Cedars-Sinai had mixed motives for his summary suspension—both a proper medical-discipline reason and a retaliatory reason. Although mixed motives permit very limited remedies in

another context—FEHA claims for employment discrimination (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232-235 (*Harris*))—there is no reason to think that mixed-motive theories are available here. Unlike FEHA, Dr. Melamed's statutory and non-statutory claims do not require broad protections that permit mixed-motive theories in the FEHA context.

Even if a mixed-motive theory could exist, Dr. Melamed cannot show a probability of success on the merits:

- He cannot show that retaliation was a "*substantial* motivating factor, rather than simply a motivating factor," as our Supreme Court requires where mixed-motive theories are allowed (*Harris*, *supra*, 56 Cal.4th at p. 232, original italics). Since summary suspension was "warranted," Cedars-Sinai *had* to suspend Dr. Melamed's privileges given the medical facts and its duty to protect patient safety. In these circumstances, retaliation could not have risen to the level of an additional "substantial" factor. Indeed, any other determination would thwart the protections for peer reviewers that the Supreme Court has recognized they must have. (See p. 23, *ante*.)

- A mixed-motive claim would also fail because Dr. Melamed does not seek any recoverable remedy. He seeks only damages. (1 AA 26.) Our Supreme Court has held that, where a mixed motive can be proven, the plaintiff cannot recover economic or non-economic damages because they would constitute an impermissible windfall to the plaintiff and

an impermissible interference with the defendant's legitimate decisions. (*Harris*, *supra*, 56 Cal.4th at pp. 232-234.)[4]

C. Dr. Melamed Fails To Demonstrate A Probability Of Success On The Merits Of His Section 1278.5 Claim.

We have already shown that Dr. Melamed's section 1278.5 claim is barred by the statute of limitations. (§ II.A., *ante.*) But Dr. Melamed cannot show a probability of success even if that were not true, because he has not established a prima facie case.

1. Dr. Melamed has not established a prima facie case for his section 1278.5 claim.

Under section 1278.5, Dr. Melamed must demonstrate that he engaged in protected activity—that he (1) "[p]resented a grievance, complaint, or report" (2) concerning the "quality of patient care" (3) "to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity"—and that Cedars-Sinai retaliated against him for doing so. (§ 1278.5, subd. (b)(1)(A); *Fahlen*, *supra*, 58 Cal.4th at p. 667, fn. 6 [statute requires subject be quality of care].) He cannot meet that burden.

For a communication to constitute a "grievance, complaint or report," it must be reasonably tailored to put the hospital on notice of a suspected patient care

[4] *Harris* held that a plaintiff in a mixed-motive case could at most obtain declaratory relief, an injunction against further discrimination, and attorney's fees under FEHA for vindicating the plaintiff's right to such declaratory and injunctive relief. (*Id.* at pp. 234-235.)

problem that needs to be investigated and remedied. As the trial court put it, "[w]hile protected activity does not require a formal procedure, it at least requires a clear communication that puts the employer on notice as to what wrongful conduct it should investigate or correct." (3 AA 596.)

That is the only interpretation of section 1278.5 that effectuates the Legislature's purpose of encouraging safety reports "in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe." (§ 1278.5, subd. (a).) A communication can only serve those goals if it alerts a hospital or a governmental entity and urges them to investigate and correct a perceived problem.

California courts have repeated this same standard again and again in the context of other retaliation claims. For instance, the Labor Code authorizes an employee to sue for retaliation because of the employee's complaints about workplace health and safety concerns. (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1350-1351 (*Ferrick*).) But to be protected, the "employee 'must convey the information in a form which would reasonably alert his or her employer of the *nature of the problem* and the *need to take corrective action*.'" (*Ibid.*, italics added, quoting *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1434.) In *Ferrick*, the employee informed her employer that another employee was driving a golf cart around the work site without a license. (*Id.* at p. 1350.) The court held that this communication could not support a retaliation claim because it was not sufficiently specific to identify a workplace safety hazard that needed to be investigated and corrected. (*Id.* at pp. 1350-1351.) Other cases are in accord. (E.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th

1028, 1047 [for FEHA retaliation, "vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct"]; *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1384 [principal's request for additional safety staff was not protected whistleblowing about a violation of law].)

Not surprisingly, the cases finding a protected complaint under section 1278.5 unquestionably satisfy the requirement that the plaintiff identified and urged the hospital to investigate and correct a perceived problem. For instance, in *Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1228-1229, 1244-1246, a nurse made protected complaints by repeatedly urging her supervisors and the hospital that the nurse-led cardiac stress tests the hospital had implemented were "unsafe and unethical" and outside of the scope of services that a licensed nurse could permissibly perform. Likewise, in *Mendiondo v. Centinela Hospital Medical Center* (9th Cir. 2008) 521 F.3d 1097, 1101, 1104, a nurse alleged that she complained to her supervisor and the hospital CEO that the hospital was compromising patient care by, as a matter of policy, performing unnecessary catheterizations, implanting inappropriate pacemakers, refusing to use the safest drug for heart attacks and using outdated cardiac equipment—practices allegedly designed to save money and to obtain higher Medicare reimbursements.

As we demonstrate in the following sections, none of Dr. Melamed's proffered evidence comes close to this standard. Dr. Melamed was not reporting an equipment problem that needed to be investigated and remedied. Although he now repeatedly asserts that he believed the hospital's equipment was "inadequate and substandard" (AOB 14; 2 AA 335-336), what he told Cedars-Sinai—both

verbally and in writing—was that the hospital possessed the necessary equipment and that the equipment he used was "medically appropriate." (Pp. 58, 60-63, *post*.) He essentially assured Cedars-Sinai (and Dr. Brien specifically) that there was nothing to investigate or correct at the institutional level.

Instead, Dr. Melamed explained why his surgery reached a bad outcome. Mid-surgery, he realized that the operating table and pads that he had selected were much too small for his thin-waisted, adolescent patient. (Pp. 16, *ante*, 59-60, 63, *post*.) He struggled in the surgery because he decided to continue despite the mid-surgery unavailability of substitute table and pads. (Pp. 60-62, *post*.) But he assured Dr. Brien that Cedars-Sinai had the correct equipment and that nothing would go wrong in his planned subsequent surgery on this same patient. (Pp. 16, *ante*, 58, *post*.)

That wasn't a protected complaint about patient safety concerns. It pointed to nothing requiring investigation or correction. It was a *mea culpa*. Indeed, far from being the one making a complaint about patient safety concerns, Dr. Melamed was the *subject* of safety concerns expressed by a seasoned nurse, the operating room manager, and the hospital's Manager of Patient Safety. (P. 15, *ante*.)

2. Dr. Melamed's request for supplies during surgery does not support a section 1278.5 claim.

Dr. Melamed first contends that he "presented his concern about the hospital's inadequate equipment" by notifying the operating room nurse. (AOB 42, citing 2 AA 335.)

The cited evidence does not show protected conduct. Rather, it merely states that Dr. Melamed "asked the nursing personnel at Cedars to replace the hip and thigh pads with much bigger pads" and was told that they were not available at that point in his surgery. (2 AA 335.) That is a request for particular supplies—not whistleblowing about the quality of patient care at Cedars-Sinai. (See *Patten*, *supra*, 134 Cal.App.4th at p. 1385 [school principal's request for additional safety staff was not protected whistleblowing].) It did nothing to alert the hospital that it should investigate and correct some institutional problem.

3. Dr. Melamed's alleged statements to the patient's parents do not support a section 1278.5 claim.

Dr. Melamed contends that he reported his safety concerns when he "told the patient's parents that we had some mechanical problems with the table and pads during the surgery." (2 AA 336; see AOB 42.) But under the Health and Safety Code, protected complaints are complaints addressed to the hospital, the medical staff or a governmental entity. (§ 1278.5, subd. (b)(1)(A).) Statements to a patient's parents are not protected.

Dr. Melamed insists this conversation counts as a protected complaint because Dr. Brien supposedly had actual knowledge of the conversation based on an e-mail that he received from operating room manager Kyung Jun. (AOB 43-44, citing 3 AA 558.) Not so.

First, that e-mail did not say anything about safety concerns regarding "mechanical problems with the table and pads" (2 AA 336). Rather, it stated that Dr. Melamed had told the patient's parents that their daughter was "too small for

the table" he had chosen and that before performing the corrective surgery, "he needs a special table which we do not have." (3 AA 558.)

Second, according to the information that Dr. Brien received—Kyung Jun's e-mail and his subsequent conversation with Dr. Melamed—Dr. Melamed was *not* making any complaint about needing a special table that Cedars-Sinai did not have. To the contrary, Dr. Melamed repeatedly said that Cedars-Sinai *did* have the necessary equipment. In other words, he told Cedars-Sinai that there was no equipment problem to investigate or correct:

- The same e-mail from Kyung Jun that noted Dr. Melamed's statement to the patient's parents also stated that Dr. Melamed confirmed that Cedars-Sinai *did* have the necessary equipment for the surgery—the "slider with gel bolsters" would work and there was no necessary "special table" that Cedars-Sinai lacked. (3 AA 558.)

- Dr. Melamed confirmed this again when he spoke to Dr. Brien. (3 AA 563.) Dr. Brien asked Dr. Melamed whether he was telling people that Cedars-Sinai did not have the necessary equipment to perform this case. (2 AA 336; 3 AA 563.) Dr. Melamed responded that he did *not* say this to the patient's parents or anyone else. (3 AA 563.) And he confirmed that Cedars-Sinai had the appropriate equipment. (*Ibid*.)

Regardless of whether Dr. Melamed told the patient's parents anything about inadequate or non-existent equipment, he never made any such complaint to Cedars-Sinai. He only ever told Cedars-Sinai that it had the necessary equipment—

and thus that there was nothing to investigate or correct. Again, no protected complaint.

4. Dr. Melamed's operation report does not support a section 1278.5 claim.

Dr. Melamed argues that his operation report constituted a report of the hospital's inadequate equipment. (AOB 42.) Not true.

First, it is undisputed that an operation report is a routine document that is part of a patient's medical records. (2 AA 528.) Under Medical Staff rules and regulations, it must be prepared within twenty-four hours of surgery and must provide the reasons for the procedure, a detailed account of the operation's procedures, the techniques used, the specimens removed and the patient's post-operative diagnosis. (*Ibid.*) These sorts of patient records are neither designed nor treated as ways to alert the hospital to a concern about general patient care problems. (2 AA 529.) They stand in stark contrast to any of the multiple methods that Cedars-Sinai provides to physicians and other personnel to report concerns for investigation. (2 AA 527-528.) And they fail to satisfy the requirement that a protected complaint be reasonably tailored to alerting the hospital to an issue that needs to be investigated and corrected. (§ II.C.1, *ante*; *Lee-Tzu Lin v. Dignity Health-Methodist Hosp. of Sacramento* (E.D.Cal. 2014, No. S-14-0666) 2014 WL 3401451, *1, *6-7 [routine death discharge report does not constitute a complaint protected by section 1278.5 although it included information indicating the patient had not been stable enough for the procedure performed].)

Second, contrary to his declaration, Dr. Melamed's operation report did not report at all, much less "in great detail," any concerns about "inadequate and

substandard hospital equipment." (2 AA 336, 350-353.) It summarized the surgical procedure and noted his mid-surgery request for and unavailability of much larger pads and a different surgical table. (2 AA 350-353; see 2 AA 335.) Particularly in light of Dr. Melamed's other communications, it merely explained that Dr. Melamed had "chose[n] the wrong table as he did not realize how small the patient was and other patients he has done were larger" (3 AA 563-564) and that his decision to persist with the surgery had damaging results. Nothing in the operation report was targeted to alert the hospital that there was any quality-of-care issue that should be investigated and corrected. It wasn't a protected complaint or report. (See pp. 53-56, *ante*.)

Indeed, Dr. Melamed's other statements to Cedars-Sinai confirm that he was not making a complaint about substandard equipment. For instance, when his attorney wrote to Cedars-Sinai in response to the summary suspension, he stated that the table that Dr. Melamed used was "medically appropriate for this type of surgical procedure" and noted that it was used by the surgeon who subsequently performed the corrective surgery on the same patient. (2 AA 360.)

Besides, no reasonable jury could possibly conclude that Cedars-Sinai retaliated against Dr. Melamed for his operation report. As the trial court recognized, that report was not even available to Cedars-Sinai until after it decided to summarily suspend Dr. Melamed's privileges. (2 AA 529; 3 AA 597.) In fact, during the investigation that Dr. Melamed claims was retaliatory, Dr. Brien told Dr. Melamed that—contrary to Cedars-Sinai's policy—his operation report had not yet been submitted. (3 AA 555.) It wasn't transcribed until July 15, 2011, the day after their first conversation. (2 AA 529, 550; 3 AA 597.) By that point, Cedars-

Sinai had already decided to prepare the case for peer review and to summarily suspend his privileges. (Pp. 15-17, *ante.*) No reasonable juror would conclude that Cedars-Sinai instituted the peer review investigation and summary suspension based on a legitimate determination that Dr. Melamed posed an imminent danger to patient safety, but would have ended this "reasonable and warranted" suspension (p. 20, *ante*) had it not received and wanted to retaliate for Dr. Melamed's mea culpa operation report.

5. Dr. Melamed's conversations with Drs. Brien and Delamarter do not support a section 1278.5 claim.

Dr. Melamed relies on various conversations with Dr. Brien and Dr. Delamarter. (AOB 42-44.) Yet again, those conversations do not constitute a protected complaint about the quality of patient care:

- Dr. Brien did ask Dr. Melamed whether he was telling the patient's parents that Cedars-Sinai lacked a special table that was necessary for the surgery. But, as demonstrated above, Dr. Melamed not only denied that he had done so, but also confirmed that he was *not* making any such complaint. (P. 58, *ante*.) The e-mail that precipitated this conversation said the same thing. (*Ibid.*) So, there was no quality-of-care complaint that Cedars-Sinai could even investigate, much less correct.

- Dr. Melamed states that he told Dr. Brien "what happened during the surgery" and explained that "it had been difficult to stabilize the patient due to the inadequate table/pads." (2 AA 336-337.) But that too was not a complaint about the quality of patient care provided by Cedars-Sinai.

Like his operation report, it was an explanation of what occurred, nothing more. After all, during the same conversation, Dr. Melamed confessed that he was the one who had chosen the table and pads that were too small for his patient, that Cedars-Sinai had other equipment that would have accommodated this patient's size, and that in hindsight he realized that he should have ended the surgery when he was unable to stabilize the patient. (Pp. 15-16, *ante*.) His statement to Dr. Brien confirmed that the only safety risk had been caused by his own poor judgment in selecting equipment and in deciding to continue in the face of a known problem—not any general patient care issue for Cedars-Sinai to investigate and remedy.

- In his post-summary-suspension conversation with Dr. Brien and Dr. Delamarter, Dr. Melamed "told them exactly what I had included in my operation report." (3 AA 338.) But since the operation report was not a complaint about the quality of patient care (§ I.C.4., *ante*), repeating its contents to two physicians cannot be a complaint either. Again, this communication has all the hallmarks of a mea culpa—not a suggestion that Cedars-Sinai investigate and resolve an institutional problem.

6. Only now does Dr. Melamed contend that he believed the hospital's equipment was "inadequate or substandard." At the time, he told Cedars-Sinai the exact opposite.

Both Dr. Melamed's declaration and his opening brief repeatedly assert that he believes the problem with his surgery was Cedars-Sinai's "inadequate and substandard hospital equipment." (AOB 14; 2 AA 335-336.) This claim further

underscores the recent vintage of Dr. Melamed's theory that he made a complaint about patient safety.

His operating report does not contain a single word about the hospital's operating table or pads being "substandard." (See 2 AA 350-353.) Nor do any of his other communications. To the contrary, Dr. Melamed told Cedars-Sinai that the equipment was medically appropriate for the type of surgery he performed, but that his particularly thin-waisted patient was too small for the operating table and pads that he initially selected—that he needed a different table or much larger pads that Cedars-Sinai owned but that were not available at the particular moment that he asked for them mid-surgery. (Pp. 15-16, 19, *ante*.) That Dr. Melamed chose the wrong table and pads does not make Cedars-Sinai's hospital equipment inadequate or substandard. And it certainly does not convert Dr. Melamed's mea culpa explanation for what happened into a complaint that Cedars-Sinai needs to investigate and correct substandard equipment.

Dr. Melamed made no protected complaint about the quality of patient care at Cedars-Sinai. Nor at any time during the entire peer review process—formal and informal—did he ever suggest that he had been retaliated against for making a complaint about patient safety, although he had every motivation to assert that theory in an effort to demonstrate that he really did not pose a safety threat to patients.

D. Dr. Melamed Has Not Even Attempted To Carry His Burden On Any Supposedly Unrelated Portion In His So-Called Mixed Causes Of Action.

As discussed above, Dr. Melamed makes a meritless first-prong argument regarding mixed causes of action. (§ I.C., *ante*.) In so doing, he points to a debate that—despite what he says—concerns the *second* prong. (*Ibid*.) Courts disagree regarding what should happen when a plaintiff prevails on an anti-SLAPP motion by showing a probability of success on the portions of a claim that do not arise from anti-SLAPP-protected conduct. (*Ibid.*) Here, the Court need not consider that second-prong debate because Dr. Melamed has not shown a probability of success on the supposedly unprotected portions of his claims. He hasn't even tried.

First, as demonstrated above, Dr. Melamed's complaint does not allege any mixed causes of action. (§ I.C.3., *ante*.)

Second, Dr. Melamed's opening brief does not make any second-prong argument as to the supposedly mixed causes of action. He does not attempt to show a probability of success on what he considers to be the unprotected portions of his claims. (See p. 33, n. 3, *ante.*) Nor did he make such an argument below. (See 2 RT 24-25 [Melamed's only mixed-cause-of-action argument].)

Third, Dr. Melamed could not possibly make such an argument. He submitted no evidence whatsoever to support these portions of his claims. The closest he came was paragraph 23 of his declaration (2 AA 344 ¶ 23), but this Court cannot consider that evidence because Dr. Melamed does not challenge the evidentiary rulings that this portion of his declaration must be "disregarded"

because it is "so conclusory that [it has] no evidentiary value." (3 AA 611; see p. 36, *ante* [Dr. Melamed waived challenge to evidentiary rulings].)

CONCLUSION

Cedars-Sinai established the first prong: Dr. Melamed's claims arise out of protected activity because the alleged injury-producing conduct was peer review conduct. It does not matter that he alleges a retaliatory motive for that conduct.

Dr. Melamed cannot carry his burden on the second prong: He cannot show a probability of success. His causes of action are barred by exhaustion requirements and the statute of limitations. And on the merits, he cannot show that he engaged in protected activity: He didn't make complaints about the quality of patient care at Cedars-Sinai. Rather, other individuals complained that *he* was a threat to patient care.

The Court should affirm the order granting Cedars-Sinai's anti-SLAPP motion.

Dated: May 17, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached **RESPONDENTS' BRIEF** is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains **13,878 words**.

DATED: May 17, 2016

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.

On May 17, 2016, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the parties in this action by serving:

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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 party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on May 17, 2016, at Los Angeles, California.

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

Pauletta L. Herndon