Filed 10/6/17 Melamed v. Cedars-Sinai Medical Center CA2/1
Opinion on remand from Supreme Court

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| HOOMAN MELAMED,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CEDARS-SINAI MEDICAL CENTER et al.,<br><br>Defendants and Respondents. | B263095<br><br>(Los Angeles County Super. Ct. No. BC551415) |

APPEAL from an order of the Superior Court of Los Angeles County, Michael M. Johnson, Judge. Reversed.

Law Offices of John D. Harwell, John D. Harwell; Golding + Lamothe, Rae Lamothe; Fenton Law Group, Henry R. Fenton, Dennis E. Lee; Esner, Chang & Boyer, Stuart B. Esner; Greene, Broilett & Wheeler, Mark T.

Quigley and Christian T.F.Nickerson for Plaintiff and Appellant.

Glaser Weil Fink Howard Avchen & Shapiro, Patricia L. Glaser, Joel N. Klevens; Nossman, Mitchell J. Green; Greines, Martin, Stein & Richland, Robin Meadow and Jeffrey E. Raskin for Defendants and Respondents.

Horvitz & Levy, Jeremy B. Rosen and Joshua C. McDaniel for Amicus Curiae on behalf of California Hospital Association.

---

Dr. Hoomad Melamed (Melamed), a physician at Cedars-Sinai Medical Center (Cedars), operated on a 12-year-old patient, causing complications requiring corrective surgery. The hospital suspended Melamed, who requested a peer review hearing challenging the suspension. Every level of administrative review upheld the suspension. Melamed did not seek mandamus review of these decisions. Melamed then filed suit against Cedars, William Brien, M.D., Rick Delamarter, M.D., Michael Langberg, M.D., Neil Romanoff, M.D., and medical staff (collectively the hospital) involved in the summary suspension decision. The hospital filed an anti-SLAPP motion,[1] contending that Melamed's claims arose out of a protected activity—the medical staff's peer review process—and that Melamed could not show a probability of success on the merits. The trial court granted

---

[1] SLAPP is the acronym for strategic lawsuit against public participation.

the motion. Melamed appeals the order granting the motion. We agree and therefore reverse the order.

## BACKGROUND

### A. The Surgery

On July 11, 2011, Melamed performed elective surgery on a 12-year-old patient for scoliosis. Melamed selected the operating table and also positioned the patient on the table. Due to the patient's small size, however, Melamed ran into trouble during the surgery. The patient's back was unstable and her pelvis dipped, which exacerbated her spinal curvature and made the surgery extremely difficult. Melamed then realized he had chosen both the wrong sized table as well as hip and thigh pads for this patient.[2]

During the surgery, Melamed asked the nurses if he could get much bigger pads than what he had chosen but was told those pads were not available. He then asked a nurse to go under the operating table to stabilize the patient. Melamed also asked for a different kind of operating table but was told the specific kind of table he had requested mid-surgery was not available.

Although he was unable to physically stabilize his patient, Melamed continued, and even expanded, the

---

[2] Melamed later confirmed that he was responsible for positioning the patient and that he had chosen the wrong table for this sized patient. He admitted that he should have stopped and moved her to another table before attempting to complete the surgery. By not doing so, Melamed admitted he had worsened the patient's condition.

surgery. As a result, the operation lasted eight to eleven hours, rather than the normal three to five hours.

The surgery left the patient in far worse condition, and she now had an exaggerated inward curvature of the lower spine as well as abrasions on her face and body. Indeed, Melamed described the deformity as "clearly obvious" and needing correction within a few days.

**B. Melamed's Summary Suspension**

On July 13, 2011, the hospital's operating room manager (Kyung Jun) visited the patient to check on the abrasions caused by her prolonged surgery. The patient's parents were present at the time. According to the parents, Melamed had told them that the patient was too small for the table he had used during the surgery, and that he needed a special table, which the hospital did not have. Jun reassured the parents that the hospital had the necessary equipment for the patient's corrective surgery. Jun then spoke with Melamed to discuss what he needed for the upcoming surgery. Melamed confirmed that the hospital did in fact have the equipment he needed for the surgery. Jun emailed this information to Dr. William Brien that same day.[3]

---

[3] Dr. Brien was the director of Cedars-Sinai's Orthopedics Center and executive vice chairman for the department of surgery at that time.

On or about July 14, 2011, Dr. Brien initiated a peer review investigation into the surgery.[4] The hospital expedited its investigation because the patient was still hospitalized and awaiting additional corrective surgery. Dr. Brien called Melamed about the case that day. Melamed confirmed he was responsible for choosing the wrong surgical table and for positioning the patient. He also denied complaining to anyone, including the patient's parents, that the hospital did not have the appropriate surgical table available. Melamed also admitted he had not yet completed his required postoperation report.

According to Melamed's description of the call, however, Dr. Brien began by immediately asking, "Are you going around the hospital and telling everyone that Cedars doesn't have the capability to do this case?" Melamed says he told Dr. Brien that it had been difficult to stabilize the patient due to the inadequate table and pads, and that if the correct equipment had been available, the patient would have had a successful surgical outcome.

---

[4] The hospital has two formal systems—the MIDAS Event Reporting System and MD Feedback—which allow medical staff members "to report any event or occurrence that could be inconsistent with the provision of high quality patient care, or any event that could adversely affect the health or safety of patients." Here, hospital staff members submitted MIDAS reports (and sent emails to management) outlining their concerns with the surgery, especially the dermal abrasions the patient had suffered as a result of the surgery. Melamed did not file a report using either system.

Dr. Brien consulted with the chairman of Department of Surgery, who concurred that Melamed posed an immediate and imminent risk to hospital patients, especially since Melamed had chosen to continue surgery on his 12-year-old patient even though he could not stabilize her body, and would have to perform corrective surgery on her within the next few days.

On July 15, 2011, Cedars summarily suspended Melamed's medical staff privileges. As required, the hospital provided Melamed with a notice of action, advising Melamed of the charges and his hearing rights. The hospital based the summary suspension on the surgery, which raised "concerns regarding [Melamed's] judgment, technical skill, and competency in managing scoliosis cases." These concerns were based on his choice of the wrong table for the patient's size and procedure, his failure to adequately stabilize the patient, and his continued attempts to manipulate the patient's spine despite his inability to stabilize her. In addition, the notice stated, "the surgery lasted in excess of 11 hours, which apparently contributed to the pressure areas that the patient sustained."

That same day, Melamed belatedly dictated his operative report.[5] The report noted the difficulty Melamed had during the surgery. It also noted that Melamed had

---

[5] Operative reports are routine reports that become part of the patient's medical record. Surgeons must file these reports within 24 hours of all procedures.

asked for a different table and pads during the surgery but was told they were not immediately available.

On July 21, 2011,Melamed's attorney wrote the hospital, challenging the summary suspension. The letter did not criticize the hospital for failing to provide a different table and pads once Melamed realized he had chosen the wrong equipment. Instead, it stated that the table chosen by Melamed was in fact medically appropriate for this type of surgical procedure, noting that the surgeon who subsequently operated on the 12-year-old patient had used the same table. Notably, the letter did not contend that the hospital had suspended Melamed in retaliation for any complaints.

On July 27, 2011, Melamed filed a petition for mandamus and a TRO to set aside the summary suspension. As with the letter from Melamed's counsel, these filings did not suggest Melamed was concerned with equipment safety or believed he had been suspended in retaliation for any complaints.[6] Instead, Melamed's primary challenge focused upon his suspension by a hospital administrator rather than

---

[6] Indeed, Melamed repeated his prior claim that the operating table he had used was medically appropriate for the type of surgery he had conducted, and was used during the patient's corrective surgery. Melamed also maintained that the patient was stabilized when the operation began and remained stabilized for a significant period of time during the procedure.

a peer review committee.[7] On August 1, 2011, the hospital reported Melamed's summary suspension to the state medical board and the National Practitioner Data Bank as required by law.

### C. The Peer Review Hearing

On August 29, 2011, Melamed requested a peer review hearing to challenge his summary suspension. The hospital issued an amended notice of action, lifting the suspension as to adult patients. It maintained the suspension with respect to pediatric patients. The evidentiary portion of the peer review hearing lasted from September 2012 to November 2013. The hearing committee heard from 17 witnesses and had 60 exhibits at its disposal. As before, Melamed did not contend he had complained to the hospital about available equipment or patient safety. Nor did he contend that his summary suspension or his peer review hearing were retaliation for making that complaint.

The hearing committee issued its report on January 13, 2014. The committee found that the Department of Surgery had "acted reasonably in conducting an investigation of the case" due to the "unsatisfactory correction of the patient's spinal curvature and the harm to the patient of a worsened post-surgical spinal curvature, pressure sores, an extended fusion, a prolonged hospitalization and a second surgery."

---

[7] Melamed voluntarily dismissed the petition on November 4, 2011.

Based on this evidence, the hearing committee found that Melamed's summary suspension had been reasonable and warranted. However, the committee concluded that terminating Melamed's clinical privileges to treat pediatric, adolescent and adult scoliosis was not reasonable or warranted.[8]

Melamed appealed the hearing committee's decision to uphold the summary suspension.[9] Melamed's appeal did not claim that the hospital had suspended Melamed for any retaliatory reasons. Each level of review upheld the hearing committee's finding Melamed's summary suspension reasonable and warranted. Melamed did not seek mandamus review of this decision.

**D. Melamed's Subsequent Lawsuit**

Melamed filed suit on July 11, 2014—exactly three years after the surgery. On July 21, 2014, Melamed filed a first amended complaint (FAC), the operative complaint in this case, against Cedars-Sinai Medical Center, its medical staff, and the specific doctors involved in the summary

---

[8] Nevertheless, the committee found it would be reasonable and warranted for the medical executive committee to authorize a prospective review of the clinical management of Melamed's pediatric and adolescent scoliosis cases.

[9] Melamed had three levels of review available to him after the hearing committee issued its ruling: the medical executive committee (first level), the appeal committee (second level), and the board of directors (final level).

suspension decision. For the first time, Melamed contended that the hospital's actions were taken in retaliation after Melamed complained about patient safety at the facility.[10]

Based on this contention, the FAC alleged seven causes of action: (1) violation of Health and Safety Code section 1278.5, (2) tortious interference with prospective economic relations, (3) tortious interference with contractual relations, (4) unfair competition in violation of Business and Professions Code section 17200 et seq., (5) violation of Business and Professions Code section 16700 et seq., (6) violation of Business and Professions Code sections 510 and 2056, and (7) wrongful termination of hospital

---

[10] According to Melamed, the hospitals retaliatory conduct included, but was not limited to, suspending his medical staff privileges; unilaterally taking retaliatory action against Melamed without affording him due process; reporting Melamed's summary suspension to the Medical Board of California and National Practitioner Data Bank; abusing the powers of the peer review process and subjecting Melamed to a "lengthy and humiliating" peer review process; ongoing hostility in the work environment; obstructing other economic and career opportunities for Melamed; failing to protect Melamed from retaliation for whistleblowing; subjecting Melamed to "[i]ntolerable" working conditions; engaging in a "campaign of character assassination" which caused irreparable damage to Melamed's reputation; depriving Melamed of his "property right and interest" to use certain hospital facilities and privileges; interfering with Melamed's right to practice his occupation; and wrongfully terminating Melamed's hospital privileges.

privileges. The hospital filed an anti-SLAPP motion in response, contending that Melamed's claims arose out of a protected activity—the hospital's peer review process—and that Melamed could not show a probability of success on the merits. According to the hospital, Melamed could not prevail on his claims because they were barred by the statute of limitations. Moreover, Melamed had failed to exhaust his judicial remedies and could not establish a prima facie case of retaliation.

## THE TRIAL COURT'S RULING

### A. Overview

As correctly noted by the trial court, an anti-SLAPP motion involves a two-step process: "(1) the defendant must establish that the challenged causes of action arise from protected activity; and (2) if the defendant makes this showing, the burden shifts to the plaintiff to establish a probability of success on the merits." With respect to the first step, the trial court noted that "[a]ll of [Melamed]'s causes of action are based on the allegations that he made reports of unsafe and substandard hospital conditions and services that posed a threat to patients . . . and that [the hospital] responded to this action by summarily suspending his medical staff privileges, reporting the summary suspension to state authorities, and subjecting [Melamed] to a protracted and unfair peer review process."

The trial court ultimately held that Melamed's allegations all related and arose from the hospital's peer review proceedings, which qualified as an "official proceeding

authorized by law" and thus constituted protected activity under Code of Civil Procedure[11] section 425.16, subdivision (e)(2).[12] Because Melamed's claim arose from the hospital's protected activity, the burden shifted to Melamed to submit admissible evidence supporting a prima facie case in his favor. However, the trial court found, Melamed could not establish a probability of success on the merits on any of his seven claims.

**B. Melamed's First Claim**

Health and Safety Code section 1278.5 provides, in relevant part, that "[n]o health facility shall discriminate or retaliate, in any manner, against any . . . member of the medical staff" because that person has "[p]resented a grievance, complaint, or report to the facility . . . or the medical staff of the facility" or "[h]as initiated, participated, or cooperated in an investigation or administrative proceeding related to, the quality of care, services, or conditions at the facility that is carried out by an entity or

---

[11] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[12] In so holding, the trial court relied upon *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198 (*Kibler*), and *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 78 (*Nesson*). The California Supreme Court recently disapproved *Nesson* in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 (*Park*) and clarified the scope of *Kibler*. We discuss the applicability of *Park* to this case below.

agency responsible for accrediting or evaluating the facility." (Health & Saf. Code, § 1278.5, subd. (b)(1)(A), (B).) The statute expressly provides a rebuttable presumption that the health facility took discriminatory action in retaliation against a member of the medical staff if responsible staff at the facility knew about the medical staff member's actions and the discriminatory treatment occurred within 120 days of the medical staff member filing a grievance or complaint.[13] (Health & Saf. Code, § 1278.5, subd. (d)(1).)

With respect to Melamed's first claim, the court found that Melamed had failed to submit a sufficiently explicit complaint regarding improper or inadequate procedures at the hospital. Thus, Melamed could not show, as required by Health and Safety Code section 1278.5, subdivisions (b)(1)(A) and (B), that he had filed "a grievance, complaint, or report" regarding "the quality of care, services, or conditions at the facility." Although the hospital had two channels for reporting safety and quality concerns, Melamed did not use either one. Instead, he "merely reported his surgical procedures and complications to the parents of his patient and in his post-operation surgical report." While protected activity does not require a formal procedure, the court observed, "it at least requires a clear communication that

---

[13] Discriminatory treatment includes "demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the . . . medical staff member, . . . or the threat of any of these actions." (Health & Saf. Code, § 1278.5, subd. (d)(2).)

puts the employer on notice as to what wrongful conduct it should investigate or correct." Melamed's routine postsurgical reports did not meet this standard.

Even if Melamed's postsurgical reports did meet the statutory notice requirements, the court found he could not show a causal connection between this protected activity and the hospital's allegedly retaliatory conduct. Although Melamed contended that the hospital initiated the peer review process based on his complaints, the court found this was not the case. Instead, the hospital began the process because of a complaint that a surgical manager made *against* Melamed. Indeed, Melamed's postsurgical report was not transcribed, let alone received by the hospital until after the hospital had initiated the peer review process.[14] Thus, in addition to failing to present a sufficiently detailed grievance regarding conditions at the hospital. Melamed could not establish a presumption of retaliation under Health and Safety Code section 1278.5, subdivision (d)(1).

**C. Melamed's Remaining Claims**

The trial court also held that Melamed did not show a reasonable probability that he could succeed on his remaining causes of action. Citing *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465,469, the court

---

[14] The hospital began its peer review process on July 14, 2011. Melamed dictated his postsurgical report that same day. Melamed's report was not transcribed until July 15, 2011. Until it was transcribed, the report was not available to anyone at the hospital.

found that although the claims were expressly based on Melamed's summary suspension and the hospital's peer review process, Melamed had not attempted to overturn any aspect of the peer review determinations in a mandamus action.[15] Consequently, these claims were barred for failure to exhaust judicial remedies.

## DISCUSSION

### I. Standard of Review

Known as the anti-SLAPP statute, section 425.16 provides that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Resolving an anti-SLAPP motion is a two-step process. First, the trial court must determine whether the defendant has made a prima facie showing that the challenged cause of action arises from protected activity. (*People ex rel. Fire Ins.*

---

[15] Melamed argued that judicial exhaustion was not required because many of the peer review determinations were in his favor, but the court found that this argument greatly misstated his case. Furthermore, although Melamed repeatedly asserted that the peer review process had been protracted and unfair, he never petitioned for mandamus on the ground that he did not receive a fair hearing.

*Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 822.) If the defendant makes that showing, the trial court proceeds to the second step, determining whether the plaintiff has shown a probability of prevailing on the claim. (*Ibid.*)

Subdivision (e) of section 425.16 delineates the type of speech or petitioning activity protected. Such acts include: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[16] (§ 425.16, subd. (e).)

Courts have not precisely defined the boundaries of a cause of action "arising from" such protected activity. (§ 425.16, subd. (b).) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's

---

[16] A defendant who invokes subparagraph (1) or (2) need not "separately demonstrate that the statement concerned an issue of public significance." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) In determining whether a cause of action is based on protected activity, "[w]e examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies." (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519–520.) "We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' " (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.)

Second, "[i]f the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) The plaintiff must do so with "admissible evidence." (*Kreeger v. Wanland* (2006) 141 Cal.App.4th 826, 831.) "We decide this step of the analysis 'on consideration of "the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b).) Looking at those affidavits, "[w]e do not weigh credibility, nor do we evaluate the weight of the evidence. Instead, we accept as true all evidence favorable to the plaintiff." ' "

(*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 378–379, disapproved in part by *Baral*, at p.396, fn. 11.)

This second step has been described as a " 'summary-judgment-like procedure.' " (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) A court's second step "inquiry is limited to whether the[opposing party] has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. [The court] . . . evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Id.* at pp. 384–385.) "Only a [claim] that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action is a SLAPP. (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266–267.) "[I]f the defendant does not meet its burden on the first step, the court should deny the motion and need not address the second step." (*Tuszynska*, at p. 266.)

**II. Merits**

Because we review the trial court's ruling on the motion to strike de novo, (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325), we must determine whether the hospital have made a prima facie showing that the challenged cause of

action arises from the hospital's protected activity. (*People ex rel. Fire Ins. Exchange v. Anapol*, *supra*, 211 Cal.App.4th at p. 822.) If the hospital have made that showing, we then proceed to the second step, determining whether Melamed has shown a probability of prevailing on his claims. (*Ibid*.)

In *Kibler*, *supra*, 39 Cal.4th at page 198, our Supreme Court held that an anti-SLAPP motion was available to a hospital and its medical staff regarding their actions in a peer review proceeding where the disciplined physician later sued for interference with his practice of medicine. There, the hospital summarily suspended the physician's staff privileges for two weeks, but reinstated them after he agreed to refrain from certain behaviors. (*Id*. at p. 196.)

*Kibler*, *supra*, 39 Cal.4th 192 reasoned that a lawsuit arising from a peer review proceeding is subject to a special motion to strike because it qualifies as " 'any other official proceeding authorized by law' " pursuant to section 425.16, subdivision (e)(2). (*Id*. at p. 198.) In so holding, the court relied on three considerations. First, peer review proceedings are required of hospitals and heavily regulated. (*Id*. at pp. 199–200.) Second, because hospitals are required to report the results of peer review proceedings to the state medical board, peer review proceedings play a "significant role" in aiding the appropriate state licensing boards in their responsibility to regulate and discipline errant practitioners. (*Id*. at p. 200.) Third, "[a] hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. [Citation.] Thus, the Legislature

has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate." (*Ibid.*) As such, peer review proceedings constituted "official proceedings authorized by law" under section 425.16, subdivision (e)(2). To hold otherwise would discourage participation in medical peer reviews by allowing disciplined physicians to sue hospitals and their peer review committee members rather than seeking administrative relief. (*Id.* at p. 201.)

Relying on *Kibler*, *supra*, 39 Cal.4th 192 and *Nesson*, *supra*, 204 Cal.App.4th 65, we initially held in an opinion published on February 27, 2017, that the hospitals acts relating to Melamed's suspension and peer review process constituted protected activity under the anti-SLAPP statute and that Melamed's claims arose from this protected activity. Melamed then filed a petition for review, raising several issues he believed merited our reconsideration. We denied the petition. On June 21, 2017, the California Supreme Court remanded the case for reconsideration in light of *Park*, *supra*, 2 Cal.5th 1057.[17]

In *Park*, *supra*, 2 Cal.5th 1057, a professor who was denied tenure sued the university alleging national origin discrimination. (*Id.* at p. 1061.) In response, the university filed an anti-SLAPP motion. The trial court denied the

---

[17] *Park*, *supra*, 2 Cal.5th 1057 was handed down on May 4, 2017.

motion, ruling that "the complaint was based on the University's decision to deny tenure, rather than any communicative conduct in connection with that decision." (*Ibid.*) Our colleagues in Division Four, reversed, holding that a claim alleging a discriminatory decision is subject to an anti-SLAPP motion so long as the protected speech and activity contributed to that decision. (*Id.* at p. 1061.)

Our highest court reversed, holding that a discrimination claim "may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, *supra*, 2 Cal.5th at p. 1060.) As the court further explained, "What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration." (*Id.* at p. 1066.) "Failing to distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them 'would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power.' [Citations.] . . . [Citation.] Conflating, in the anti-SLAPP analysis, discriminatory decisions and speech involved in reaching those decisions or evidencing discriminatory animus could render the anti-SLAPP statute 'fatal for most harassment, discrimination and retaliation actions against public employers.' " (*Id.* at p. 1067.) The *Park* court observed that while "[t]he tenure decision may have been

communicated orally or in writing . . . that communication does not convert [the plaintiff's] suit to one arising from such speech."[18] (*Id.* at p. 1068.)

In so holding, the California Supreme Court distinguished *Kibler*, *supra*, 39 Cal.4th 192. "There, the plaintiff doctor sued a hospital and various individual defendants for defamation and related torts. The trial court in *Kibler* found, and we accepted for purposes of review, that these tort claims arose from statements made in connection with a hospital peer review proceeding. The only issue

---

[18] We note that the California Supreme Court cited with approval the Third Appellate District's decision in *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176. *Nam* held that a medical resident's claims against a university for wrongful termination, breach of contract and related causes of action that were premised on the university's allegedly wrongful disciplinary actions and, ultimately, its termination of the plaintiff from her position did not "arise from" any protected activity, so as to warrant anti–SLAPP protection. (See *id.* at pp. 1185–1193.) This was true even though the adverse employment actions were the culmination of various oral and written communications, including complaints about the plaintiff, an investigation, disciplinary warnings and written notice of her termination. (See *id.* at p. 1186.) As our Supreme Court explained, "*Nam* illustrates that while discrimination may be carried out by means of speech, such as a written notice of termination, and an illicit animus may be evidenced by speech, neither circumstance transforms a discrimination suit to one arising from speech." (*Park*, *supra*, 2 Cal.5th at p. 1066.)

before us was whether, assuming this to be so, the peer review proceeding was an ' "official proceeding" ' within the meaning of the anti-SLAPP statute." (*Park*, *supra*, 2 Cal.5th at p. 1069.) "We did not consider whether the hospital's peer review decision and statements leading up to that decision were inseparable for purposes of the arising from aspect of an anti-SLAPP motion, because we did not address the arising from issue." (*Ibid.*) In short, "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected." (*Park*, at p. 1070; see *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 58 ["*Kibler* addressed only whether hospital peer review proceedings can be ' "official proceedings" ' and courts resolving anti-SLAPP motions must still separately determine whether a given claim arises from any protected activity"].)

Adding to this holding, the Fourth District recently determined: "It [also] matters not whether activity can be described as 'protected' as meeting one of the definitions of protected activity in subdivision (e) of the anti-SLAPP statute." (*Bonini v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 862 (*Bonini*).) "What matters is whether [the] plaintiff's claim arises from that activity." (*Ibid.*) "[W]here liability . . . is premised on retaliatory adverse action taken in response to a protected complaint, the plaintiff's claim arises from the retaliatory motive or purpose." (*Ibid.*)

*Bonini*, *supra*, 13 Cal.App.5th 851 involved a plaintiff surgeon's claims that a hospital retaliated against him for whistleblowing, in violation of Health and Safety Code section 1278.5. The defendant brought an anti-SLAPP motion claiming that its actions arose out of protected activity of hospital peer review proceedings. Relying on *Park*, *supra*, 2 Cal.5th 1057, the court wrote: "[I]t is not sufficient merely to determine whether [the] plaintiff has alleged activity protected by the statute. The alleged protected activity must also form the basis of plaintiff's claim." (*Bonini*, at p. 861.) The court then analyzed the whistleblower statute at issue and concluded that: "In the absence of a retaliatory or discriminatory purpose motivating the adverse action, there is simply no liability under Health and Safety Code section 1278.5. Thus, the *basis* for the retaliation claim under section 1278.5 is the retaliatory purpose or motive for the adverse action, not the adverse action itself." (*Ibid.*) The court held that section 425.16 did not apply because the plaintiff's claim "*arises from* defendants' retaliatory purpose or motive, and not from how that purpose is carried out, even if by speech or petitioning activity." (*Ibid.*)

The anti-SLAPP statute protects "any written or oral statement or writing made in connection with an issue under consideration or review by [an] official proceeding authorized by law." (§ 425.16, subd. (e)(2).) However, here, as in *Bonini*, *supra*, 13 Cal.App.5th 851, Melamed "did not allege *any* specific 'written or oral statement or writing' which

allegedly formed the basis of his retaliation claim. Instead, he alleged that an abusive peer review process was initiated by the hospital because he . . . complain[ed] about unsafe conditions at the hospital[ ]. Thus, his claim was *not* based merely on [the hospitals] act of initiating and pursuing the peer review process, or on statements made during those proceedings—but [rather] on the retaliatory purpose or motive by which it was undertaken." (See *id.* at p. 863.)

Although *Park*, *supra*, 2 Cal.5th 1057 involved a university tenure process conducted in an allegedly discriminatory fashion, its rationale applies to the allegedly retaliatory peer review process at issue here. (*Bonini*, *supra*, 13 Cal.App.4th at p. 863.) As noted in *Park*, "The elements of [the plaintiff's] claim . . . depend not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible. The tenure decision may have been communicated orally or in writing, but that communication does not convert [the plaintiff's] suit to one arising from such speech." (*Park*, at p. 1068.)

Here, as noted by the trial court, "[a]ll of [Melamed]'s causes of action are based on the allegations that he made reports of unsafe and substandard hospital conditions and services that posed a threat to patients . . . and that [the hospital] responded to this action by summarily suspending his medical staff privileges, reporting the summary suspension to state authorities, and subjecting Melamed to a

protracted and unfair peer review process." Nevertheless, under case law in effect at that time, the trial court held that the hospitals conduct constituted protected activity under section 425.16, subdivision (e)(2). But this determination no longer ends the inquiry. Instead, what matters is whether Melamed's claim arises from that activity. (See *Bonini, supra,* 13 Cal.App.5th at p. 862.) Thus, we must distinguish between protected activity that is mere evidence related to liability and protected activity that is the basis for liability. (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215.)

In this case, as in *Bonini*, *supra*, 13 Cal.App.5th 851, the hospitals alleged retaliatory motive in suspending Melamed and subjecting him to a lengthy and allegedly abusive peer review proceeding is the basis on which liability is asserted. The alleged liability does not arise merely from the initiation and pursuit of the proceedings or from statements made during those proceedings. (See *id.* at p. 864.) While the proceedings may be evidence of the hospitals alleged liability, they are not the basis for it. Because a claim "may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability." (*Park*, *supra*, 2 Cal.5th at p. 1060.) Accordingly, the hospital cannot make a prima facie showing that Melamed's causes of action arose from their protected activity.[19] (See *People ex rel. Fire Ins.*

---

[19] Although the Fourth Appellate District noted that retaliation claims are rarely good candidates for anti-SLAPP

*Exchange v. Anapol, supra,* 211 Cal.App.4th at p. 822.) Consequently, we cannot proceed to the second step to determine whether Melamed has shown a probability of prevailing on his claims. (See *ibid*.)

**DISPOSITION**

The order is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J. LUI, J.

---

motions, *Bonini*, *supra*, 13 Cal.App.5th at page 855, we recently reaffirmed that the SLAPP statute continues to apply to claims of discrimination, harassment, and retaliation, notwithstanding *Park*, *supra*, 2 Cal.5th 1057. (See *Okorie v. Los Angeles Unified School District* (2017) 14 Cal.App.5th 574.) Indeed, if the California Supreme Court had intended otherwise, *Park* would have so held. Instead, *Park* instructs lower courts to look closely at such claims when deciding whether they are subject to an anti-SLAPP motion, and to "respect the distinction" between speech that provides the basis for liability and speech that provides evidence of liability. (*Park*, at p. 1064.)