Supreme Court Case No.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HOOMAN MELAMED, M.D.,

Plaintiff and Appellant,

v.

CEDARS-SINAI MEDICAL CENTER, et al.,

Defendants and Respondents.

After A Decision of the Court of Appeal,
Second Appellate District, Division One, 2d Civil No. B263095
Appeal from The Los Angeles Superior Court, Central District
Honorable Michael Johnson, Judge Presiding
Los Angeles Superior Court Case No. BC551415

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

Statute

Other Authorities

Docketed Cases

ISSUES PRESENTED

This Court has already granted review in three cases that pose one of the anti-SLAPP issues presented in this case. Fairness demands the same here.

The plaintiff physician alleges that he was injured by the defendant hospital's "initiation and pursuit" of the medical peer review process, which is an official proceeding for purposes of the anti-SLAPP statute. Nonetheless, the Court of Appeal held that because the physician alleges a retaliatory motive, his claims do not arise from protected conduct for purposes of the first prong of the anti-SLAPP analysis. The Court of Appeal expressly adopted this holding from another recent medical peer review opinion of which this Court granted review on November 1, 2017.

The opinion here presents these issues:

1. In deciding whether a plaintiff's claims for discrimination or retaliation arise from protected activity for purposes of a special motion to strike (Code Civ. Proc., § 425.16), what is the relevance of an allegation that the defendant acted with a discriminatory or retaliatory motive?

    - The identical issue is currently under review in three cases: *Wilson v. Cable News Network, Inc.*, S239686 (employment); *Bonni v. St. Joseph Hospital System*, S244148 (medical peer review context); *Esquith v. Los*

Angeles Unified School District, S244026 (employment).

2. If alleged discriminatory or retaliatory motive is *not* relevant to the first prong of the anti-SLAPP analysis, under what circumstances does peer review conduct constitute protected activity for purposes of a special motion to strike?

INTRODUCTION

This Court has long recognized that anti-SLAPP protections play a vital role in the medical peer review mechanism that, in the words of our Legislature, is "'essential'" to protecting patients and preserving the highest standards of medical practice throughout California. (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 199.) This petition presents two issues that implicate whether anti-SLAPP protections will continue to have any meaningful vitality in this area.

First, the opinion turns on the same issue that is currently pending before this Court in multiple cases: Whether the mere allegation of a discriminatory or retaliatory motive for otherwise protected conduct is enough to defeat an anti-SLAPP motion on the first prong of the analysis. The Court granted review of this issue in *Wilson v. Cable News Network*, No. S239686, on March 1, 2017; briefing is currently under way. On November 1, it granted review of two other opinions (one unpublished) that pose the same issue—including *Bonni*, No. S244148, on which the Court of Appeal relied here. As it did with those other motive cases, the Court should grant review here and hold briefing until the Court resolves the common issue in the lead case, *Wilson*.

Second, once the Court decides the motive issue in *Wilson*, it should review important issues raised by *Bonni* and this case concerning the extent to which the anti-SLAPP statute applies to a variety of different peer-review actions, including claims that the physician was injured by (1) the initiation of the process; (2) litigation activity during the process;

(3) reporting of peer review actions to the California Medical Board and National Practitioner Data Bank; (4) summary suspensions in anticipation of the proceedings; and (5) mixed claims based on one or more of these actions. All of these are alleged in the present case.

The Court recently noted that *Kibler*—the Court's only anti-SLAPP decision in the peer review context—did not define which peer review-related claims are protected. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1069-1070.) Uncertainty about this question is a recurring problem confronting the Courts of Appeal. That uncertainty does more than drain court and private-party resources. Exemplifying a concern that *Kibler* expressed, it also casts a shadow on the willingness of hospitals and physicians to play their societally-important roles in ensuring that the peer review process functions as intended.

STATEMENT OF FACTS

A. The Surgery.

On July 11, 2011, Dr. Melamed performed elective surgery on a 12-year-old patient to correct scoliosis. (Opn., p. 3.) He selected the operating table and positioned the patient on the table. (*Ibid.*) During the surgery, he realized that he had a problem: Because of the patient's small size, the patient's back was unstable and her pelvis dipped, exacerbating the spinal curvature and making the surgery extremely difficult. (*Ibid.*)

Dr. Melamed attempted to reposition the patient. He asked the nurses if he could get "much bigger pads than what he had chosen," but was told that those pads were not immediately available. (*Ibid.*) He then asked a nurse to go under the operating table to stabilize the patient. (*Ibid.*)

"Although he was unable to physically stabilize his patient, Melamed continued, and even expanded, the surgery. (Opn., pp. 3-4.) "As a result, the operation lasted eight to eleven hours, rather than the normal three to five hours." (Opn., p. 4.) The surgery left the patient in a "far worse condition," with an exaggerated inward curvature of the lower spine and abrasions on her face and body. (*Ibid.*) Dr. Melamed himself described the surgery-induced deformity as "'clearly obvious'" and requiring correction within a few days. (*Ibid.*) Another physician described the patient's condition as "freakish-looking," unable to lay flat on a bed. (1 AA 76, 199.) A registered nurse who specializes in spine surgery was so shocked that she had photographs taken. (1 AA 249, 251-254.)

B. Cedars-Sinai Initiates Peer Review Proceedings.

Hospital staff submitted electronic reports and sent emails outlining their concerns about Dr. Melamed's surgery. (Opn., p. 5, fn. 4.) Cedars-Sinai Medical Center (Cedars-Sinai) responded by immediately initiating a peer review investigation into the surgery. (Opn., p. 5.) The hospital expedited its investigation because the patient was awaiting urgent corrective surgery, which Dr. Melamed planned to perform. (*Ibid.*; 1 AA 71; 2 AA 336.)

In the course of the investigation, 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.) He "confirmed that he was responsible for choosing the wrong surgical table and for positioning the patient" and that "the hospital did in fact have the equipment he needed for the surgery." (Opn., pp. 4-5.) "He also denied complaining to anyone, including the patient's parents, that the hospital did not have the appropriate surgical table available." (Opn., p. 5.)

Dr. Brien (then the Director of the Cedars-Sinai Orthopedic Center) consulted with the chairman of the Department of Surgery, who concurred that Dr. Melamed posed an imminent risk to hospital patients, especially the 12-year-old on whom he planned to operate within the next few days. (Opn. p. 6.) Both agreed that substantial concerns existed regarding Dr. Melamed's judgment—particularly his choice to continue surgery for

hours after it became obvious that he should have terminated the surgery. (1 AA 82-83; Opn., p. 6.)

Cedars-Sinai issued a notice of action to Dr. Melamed, summarily suspending his privileges pending resolution of the medical peer review hearing process. (Opn., p. 6.)

That same day, Dr. Melamed belatedly dictated his operative report, noting that he had asked for a different table and pads mid-surgery, but that neither was immediately available. (Opn., pp. 6-7.)

C. Dr. Melamed's Response Does Not Criticize The Hospital's Equipment And Does Not Accuse The Hospital Of Initiating The Peer Review Process In Retaliation For Equipment Complaints.

On July 21, 2011, Dr. Melamed's attorney wrote the hospital, challenging the summary suspension. (Opn., p. 7.) "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." (*Ibid*.) Instead, the letter stated that the chosen table was "in fact medically appropriate" and was used subsequently by a different surgeon to perform the operation on the same 12-year-old patient. (*Ibid.*) "Notably, the letter did *not* contend that the hospital had suspended Melamed in retaliation for any complaints." (*Ibid.*, italics added.)

On July 27, 2011, Dr. Melamed filed a petition for mandamus and a TRO to set aside the summary suspension. (*Ibid.*) Again, neither filing

"suggest[ed] Melamed was concerned with equipment safety or believed he had been suspended in retaliation for any complaints." (*Ibid.*)

On August 1, 2011, Cedars-Sinai reported Dr. Melamed's summary suspension to the California Medical Board and the National Practitioner Data Bank. (Opn., p. 8.)

D. Peer Review Hearing And Appeal Process.

The evidentiary portion of the peer review hearing lasted from September 2012 to November 2013. (Opn., p. 8.) "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." (*Ibid.*)

The hearing committee found that Cedars-Sinai "'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.'" (*Ibid.*) The hearing committee also found that the summary suspension had been "reasonable and warranted." (Opn., p. 9.) However, the hearing committee concluded that termination of Dr. Melamed's medical staff privileges would not be justified. (*Ibid.*)

Dr. Melamed appealed the hearing committee's decision. (*Ibid.*) His appeal "did not claim" retaliation. (*Ibid.*) Each level of review upheld the hearing committee's findings. (*Ibid.*)

Dr. Melamed did not seek mandamus review of the peer review decision. (*Ibid.*)

STATEMENT OF THE CASE

A. Dr. Melamed's Complaint.

On July 11, 2014, Dr. Melamed filed his complaint, in which for the first time he asserted a retaliatory motive—that Cedars-Sinai wanted to retaliate for Dr. Melamed's supposed complaints about equipment safety. (Opn., pp. 9-10.)

Nothing in the complaint alleges that the ultimate decision—at the conclusion of the peer review process—was unlawful or retaliatory. Rather, as the Court of Appeal opinion states, all of Dr. Melamed's claims are based on the allegedly retaliatory "initiation and pursuit" of the peer review process itself. (Opn., p. 26.) Specifically, Dr. Melamed alleges that he reported unsafe hospital conditions and that Cedars-Sinai responded 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." (Opn., pp. 25-26; see 1 AA 13-14.) Dr. Melamed's claims are all based on these same core allegations and allege that defendants' conduct violated various statutory and common law rights.

B. The Court Of Appeal's Initial Opinion: Anti-SLAPP Bars Dr. Melamed's Claims.

On February 27, 2017, the Court of Appeal affirmed the trial court's order granting Cedars-Sinai's anti-SLAPP motion.

On the first prong of the anti-SLAPP analysis, the Court of Appeal held that under *Kibler v. Northern Inyo County Local Hosp. Dist*. (2006) 39 Cal.4th 192 (*Kibler*) and *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65 (*Nesson*), Dr. Melamed's claims arise from an official proceeding and thus trigger the protections of the anti-SLAPP statute. (2/27/17 Opn., pp. 17-19.) The court also held that the alleged retaliatory motive for Cedars-Sinai's otherwise protected conduct was not relevant to the first prong. (*Id.* at p. 20.) Rather, the court ruled, the alleged motive was only properly considered as part of the analysis of the second prong. (*Ibid.*)

On the second prong, the Court of Appeal held that Dr. Melamed had not carried even his minimal burden of establishing a probability of success on the merits. (*Id.* at pp. 23-32.) The court explained that Dr. Melamed (1) failed to exhaust remedies that are a prerequisite to most of his claims and (2) could not establish a prima facie showing of retaliation. (*Ibid.*)

C. This Court Grants Review And Transfers The Case Back To The Court Of Appeal.

Dr. Melamed petitioned for review. While his petition was pending, this Court decided *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 (*Park*). *Park* held that a decision to deny academic tenure was not protected activity for purposes of the anti-SLAPP statute.

In the course of doing so, *Park* noted that *Kibler, supra*, 39 Cal.4th 192—which had held that the medical peer review process is an official proceeding under the anti-SLAPP statute—did not consider whether "every part of the peer review process was protected activity" or whether the "disciplinary decisions reached in a peer review process" are protected and that *Nesson, supra*, was wrong to read *Kibler* as reaching these issues. (2 Cal.5th at pp. 1069-1070.)

On June 21, 2017, this Court granted review and transferred the present case back to the Court of Appeal for reconsideration in light of *Park*.

D. The Court Of Appeal's Decision On Remand.

This time, the Court of Appeal reversed.

The new opinion held that Dr. Melamed's claims do not arise from protected activity. (Opn., pp. 23-26.) The opinion's analysis relies extensively on—indeed, it essentially adopts—*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, review granted November 1, 2017,

S244148 (*Bonni*). (Opn., pp. 23-26.)[1] It repeatedly states that the claims here are the same "as in" *Bonni*. (Opn., pp. 24, 26.)[2]

The court described Dr. Melamed's claims as all based on Cedars-Sinai's "initiation and pursuit of the proceedings . . . ." (Opn., p. 26.) However, quoting *Bonni*, the court held that the claim does not arise "'merely'" from the initiation and pursuit of the process, but on the hospital's "'retaliatory purpose or motive'" for doing so. (Opn., p. 25.) According to the opinion, the allegedly injurious "initiation and pursuit of" the peer review process was just "evidence of the hospital's alleged liability"—not the "basis" for the liability. (Opn., p. 26.)

Because the Court of Appeal concluded that Cedars-Sinai had not satisfied the first prong of the anti-SLAPP analysis, it did not consider the second prong.

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[1] The Court of Appeal's opinion erroneously refers to *Bonni* as *Bonini*.

[2] That is not entirely true for reasons not relevant to the Court of Appeal's opinion. Both *Bonni* and the present case allege retaliatory initiation and conduct of the peer review process. *Bonni*, however, also involves a claim for retaliatory termination of staff privileges, which was imposed through the peer review process. In contrast, Dr. Melamed's privileges were only summarily suspended pending resolution of the peer review process, but were ultimately restored.

GROUNDS FOR REVIEW

Review should be granted with respect to two issues. The first is already pending before this Court in a growing series of published and unpublished decisions. As it did in those cases, the Court should grant review here and hold briefing pending resolution of the common issue.

The second issue is unique to medical peer review cases and poses important, recurring, unresolved issues of California law that impact fundamental California public policy—specifically, public safety through monitoring of negligent and incompetent physicians.

I. ISSUE 1: AS THE COURT HAS ALREADY RECOGNIZED, THE CORRECT ROLE OF DISCRIMINATORY AND RETALIATORY MOTIVE IN ANTI-SLAPP ANALYSIS DESERVES REVIEW.

A. The Nature And History Of The Issue.

The holding in the present case turns on the same important, recurring issue that this Court has before it in several other cases. The Court initially granted review of this issue in *Wilson v. Cable News Network, Inc.* (S239686) (*Wilson*). And very recently, it granted review in *Bonni* and *Esquith v. Los Angeles Unified School District* (S244026) (*Esquith*), deferring briefing in those cases until the common issue is decided in *Wilson.* The Court should do the same here.

As stated in *Wilson*, the issue is: "In deciding whether [a plaintiff's] claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to strike (Code of Civ. Proc., § 425.16), what is the relevance of an allegation that the employer acted with

a discriminatory or retaliatory motive?" (Supreme Court's Oct. 30, 2017 Weekly Summary of Cases Accepted, p. 2 [discussion of *Bonni* and *Esquith*], available at http://www.courts.ca.gov/documents/ws103017.pdf.)

Wilson and *Esquith* both present this motive issue in the context of anti-SLAPP motions involving an employee's wrongful termination claims. (*Ibid.*) *Bonni* and the instant case present the same issue in the context of anti-SLAPP motions involving a physician's claims of discriminatory or retaliatory treatment in the medical peer review process. All four follow the identical analytical path, expressly adopting *Nam v. Regents of the University of California* (2016) 1 Cal.App.5th 1176 (*Nam*). (*Bonni, supra*, 13 Cal.App.5th at pp. 863-865; *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 834-836; *Esquith v. Los Angeles Unified School District* (2017 B276432) 2017 WL 3083474 at **7-8 [unpublished; review granted] [adopting *Nam* and *Wilson*]; Melamed Opn., pp. 22-26, fn. 18 [adopting *Nam* and *Bonni*].)

In fact, the opinion here expressly adopted *Bonni*'s holding on this issue. (Opn., pp. 23-26.) It repeatedly stated that the allegations here are substantively the same "as in" *Bonni* and that the result thus needed to be the same "as in" *Bonni*. (Opn., pp. 24, 26.) Thus, the opinion held that when a physician alleges "that an abusive peer review process was initiated by the hospital" for retaliatory reasons, anti-SLAPP protections cannot apply because the claim "'was *not* based merely on [the hospitals (*sic*)] 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.'" (Opn., p. 25, italics in *Bonni*, brackets in

Melamed.) Likewise, the opinion adopted the *Bonni-Wilson* notion that a claim arises from the "alleged retaliatory motive." (Opn., p. 26.)

B. Review Is Appropriate For The Same Reason As In The Trio Of Other Cases Involving The Identical Issue: A Deep Split Among The Courts Of Appeal.

By granting review in *Wilson*, *Bonni* and *Esquith*, the Court itself recognized that the motive issue is a substantial, recurring problem that well deserves review.

The issue is the subject of a direct—and growing—split among the Courts of Appeal. For instance, the Court of Appeal in *Wilson* expressly rejected *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510 (*Hunter*), which held that alleged retaliatory and discriminatory motives are relevant only to the *second* prong of the anti-SLAPP analysis. (*Wilson, supra*, 6 Cal.App.5th at pp. 834-836.) *Bonni*, *Esquith* and the present case are still more examples. And in the last two months alone, the Courts of Appeal have filed four more unpublished opinions addressing—and disagreeing about—this motive issue.[3] That does not even

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[3] We cite these unpublished cases not as authority, but as evidence of the regularity with which the Courts of Appeal have recently confronted the motive issue, of the conflict that persists, and of the fact that the courts do not seem to delve deeply into the conflicting views:

Adopting *Hunter*'s view: *Gutierrez v. Vasquez* (B275500) 2017 WL 4230432 at *3 (unpublished opinion filed Sept. 25, 2017) (alleged motive for making defamatory statement is irrelevant to first prong; "causes of action do not arise from motives; they arise from acts"); *Chodosh v. Trotter* (D070952) 2017 WL 4020447 at *5 (unpublished opinion filed Sept. 13, 2017) ("'[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is alleged to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless'"); *Perry v. Xenon Investment Corp.* (B265949) 2017 WL 3392707 at *5 (unpublished opinion filed Aug. 8, 2017) (alleged retaliatory motive for eviction is "irrelevant" to first prong).

(continued. . .)

account for very recent anti-SLAPP cases that implicated discrimination and retaliation claims, in which the courts could have, but did not, explicitly discuss the motive issue—cases that show how prevalent the issue can really become.[4]

What's more, the post-*Park* decisions on the motive issue highlight the extent of the confusion that reigns in the Courts of Appeal. *Bonni*, *Esquith*, and the present opinion all noted that *Park* cited approvingly to *Nam, supra*, 1 Cal.App.5th 1176—the first in the line of cases that recently departed from existing case law holding that allegations of discriminatory motive for otherwise protected conduct is only relevant to the second prong. (See p. 20, *ante*; *Bonni, supra*, 13 Cal.App.5th at pp. 863-865; *Melamed* Opn., p. 8 fn. 18; *Esquith, supra*, 2017 WL 3083474 at *8-10.) But *Park*'s citation to *Nam* could not have been intended to bless *Nam*'s holding that allegations of motive are relevant to the first prong. If that were *Park*'s intent, the Court would not be reviewing this very issue in *Wilson*, *Bonni*, and *Esquith*.

Adopting *Bonni*'s view: *Kessey v. Los Robles Regional Medical Center* (B270156) 2017 WL 5085071 at *3 (unpublished opinion filed Nov. 6, 2017) (retaliatory peer review claim).

[4] In these cases, the courts seem to have taken it for granted that motive allegations raise a second-prong issue. *Okorie v. Los Angeles Unified School District* (2017) 14 Cal.App.5th 574 (affirming application of anti-SLAPP to employment discrimination and retaliation claim; considering alleged discriminatory and retaliatory motive only in second-prong inquiry); *Waszczuk v. Regents of the University of California* (C079524) 2017 WL 4510638 (unpublished opinion filed Oct. 10, 2017) (affirming grant of anti-SLAPP motion in retaliatory employment termination case); *Leiferman v. Konocti Unified School District* (A147300) 2017 WL 2793835 (unpublished opinion filed June 28, 2017) (anti-SLAPP applies to teacher's claim for employment discrimination under FEHA); *Bhandari v. Washington Hospital* (A144184) 2017 WL 2570660 (unpublished opinion filed June 14, 2017) (anti-SLAPP applies to peer review case; retaliation allegation considered only in second prong).

The split among the Courts of Appeal stems from *Nam*'s and *Hunter*'s competing interpretations of this Court's decision in *Navellier v. Sletten* (2002) 29 Cal.4th 82 (*Navellier*). Here is what happened: As *Hunter* explained, *Navellier* "clarified that when assessing whether claims arise from protected activity, 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, quoting *Navellier*, *supra*, 29 Cal.4th at p. 94, italics added.) An alleged discriminatory motive for protected conduct, of course, is a claim of "illegitimacy" for acts that are otherwise protected. This Court has repeatedly reaffirmed *Navellier*'s holding that the alleged "illegitimacy" and "illegality" of otherwise protected conduct is a second prong issue—not a first prong issue. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 318-320 (*Flatley*) [recognizing exception only when illegality is conceded or established as a matter of law]; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 739-740 (*Jarrow*); *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424 (*City of Montebello*).)

But in considering *Hunter*'s reliance on *Navellier*, *Nam* and *Wilson* addressed only a separate, earlier holding in *Navellier*. Rather than addressing the portion of *Navellier* that *Hunter* quoted, *Nam* and *Wilson* looked exclusively at a separate, earlier holding in *Navellier*. From this, they concluded that *Navellier* determined only "that the SLAPPer's, not the defendant's, intent was irrelevant."

(*Nam, supra*, 1 Cal.App.5th at p. 1189; *Wilson, supra*, 6 Cal.App.5th at p. 835 [same].)

Nam and *Wilson* failed to recognize that *Navellier* actually decided *both* issues. It first held, as *Nam* states, that it is irrelevant whether the plaintiff intended to chill protected conduct. (*Navellier, supra,* 29 Cal.4th at pp. 88-94 [applying holding of companion case which discussed this issue "at length"].) But *Navellier* then turned to a "further" issue: The separate argument "that the anti-SLAPP statute does not apply to this action because any petitioning activity on which it is based was not 'valid.'" (*Id.* at p. 94.) On that second issue, the Court held that the alleged illegitimacy of the defendant's conduct was irrelevant to the first-prong analysis—it was relevant only to the second-prong inquiry into whether the plaintiff's claim has merit. (*Ibid*.) In fact, in *Flatley*, the Court recognized and further elaborated on *Navellier*'s second holding—the one that *Nam* and *Wilson* ignored. (39 Cal.4th at p. 319.)

The result has been an irreconcilable split of authority that did not culminate with *Wilson*, but rather continued through *Bonni, Esquith*, the present case, and other even more recent decisions.

C. The Court's Decision On The Motive Issue Will Extend Far Beyond Cases Involving Discrimination And Retaliation.

The motive issue also deserves review because of its far-reaching impact beyond discrimination and retaliation claims. Courts routinely confront whether other alleged illegitimate or illegal motives remove protection under the first prong of the anti-SLAPP analysis. This Court has itself repeatedly considered that issue. If, as *Bonni, Esquith* and the present case held, some illegitimate motives *can*

properly be considered under the first prong, it becomes unclear whether and why other illegitimate motives should be treated differently. The anti-SLAPP statute does not appear to permit such a distinction, but if a distinction exists, the Court should illuminate it.

For instance:

Defamation. As the Court's statement of the issue in *Wilson*, *Bonni*, and *Esquith* shows, motive allegations play a role in the anti-SLAPP analysis of defamation claims. (Supreme Court's Oct. 30, 2017 Weekly Summary of Cases Accepted, p. 2 [discussion of *Bonni* and *Esquith*], available at http://www.courts.ca.gov/documents/ws103017.pdf.)

A plaintiff who is a public figure must allege a bad motive for the speech—"actual malice," meaning that the defendant either knowingly made a false statement or acted with reckless disregard of whether they were false. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 722-723.) If alleged bad motive defeats anti-SLAPP on the first prong, a public figure could pursue a defamation claim unhindered by the anti-SLAPP statute while ordinary individuals could not. And perhaps any defamation plaintiff could avoid anti-SLAPP scrutiny by gratuitously alleging a bad motive or by alleging malice to seek punitive damages.

Malicious prosecution. *Bonni* and the present case addressed the motive issue in virtually the same context that presents itself in every malicious prosecution action. As *Bonni* and the present opinion put it, the claims here arise from (1) an illegitimate motive for (2) the "initiation and pursuit" of an official proceeding. (Opn., p. 26.) The same is true of malicious prosecution claims: The plaintiff must show that the underlying plaintiff instituted a suit with "malice."

(*Jarrow, supra,* 31 Cal.4th. at p. 739.) In the words of *Bonni* and the present opinion, liability for malicious prosecution is "'*not* based merely on [the defendant's] act of initiating and pursuing'" a civil or criminal action. (Opn., p. 25, quoting *Bonni, supra,* 13 Cal.App.5th at p. 863, italics in *Bonni,* bracketed language altered.) Rather, it is also based on the "purpose or motive" for instituting the action. (*Ibid.*)

Jarrow rejected the argument that these motive allegations eliminate anti-SLAPP protection for malicious prosecution cases. (31 Cal.4th at pp. 739-740.) And for anti-SLAPP purposes there is no distinction between initiating a civil suit and initiating an official proceeding—both are core petitioning activities. (See *Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 703 (*Mission Beverage Co.*).) There are two daunting questions: Is *Jarrow* still valid? If so, does some anti-SLAPP principle allow consideration of certain types of illegal motives (discrimination, retaliation, etc.) but not other illegal motives (malice, etc.)? If a principled reason does exist to distinguish certain motives, it is unclear where (or why) that line should be drawn.

Protected voting. Yet another context is public-official voting, which was involved in this Court's recent decision in *City of Montebello, supra*, 1 Cal.5th at p. 424. There, liability was based not "merely" on a city council member's protected act of voting, but on the alleged illegal motive or purpose behind the council member's vote (a conflict of interest). But the Court held that voting did not lose its protected status for purposes of the first-prong analysis by virtue of the alleged illegality. Again, it is far from clear how to reconcile this result with the test in *Bonni*, *Esquith* and the present case.

D. The Heightened Importance Of The Motive Issue In The Peer Review Context.

The motive issue has particularly significant consequences in the medical peer review context. As this Court has recognized, medical peer review is "essential" to California's mechanism for "protecting the public against incompetent, impaired, or negligent physicians." (*Kibler, supra*, 39 Cal.4th at pp. 199-200.) It constitutes the "primary" means of monitoring physician's professional conduct and plays a substantial role in allowing the state licensing board to fulfill its responsibility. (*Id.* at pp. 199-201.) Anti-SLAPP protections are critical to the proper functioning of this system. (*Id*. at p. 201.) "[M]any physicians are reluctant" to sit in judgment of their peers. (*Ibid.*) If peer review proceedings were not afforded anti-SLAPP protections, it "would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by the available means of a petition for administrative mandate." (*Ibid.*)

If the mere allegation of a retaliatory or discriminatory motive is sufficient to remove anti-SLAPP protection, anti-SLAPP may disappear as a means for protecting the peer review system and its public policy benefits. It is all too easy for a physician to allege an improper motive for a peer review action—and under *Bonni* and the present case, that allegation *alone* would strip peer review defendants of all anti-SLAPP protection, regardless of whether the physician's claim had any merit.

Indeed, the problem is so prevalent that just days ago, yet another anti-SLAPP opinion held that a physician avoided anti-SLAPP consideration of his peer-review-based claim because he alleged a retaliatory motive. (*Kessey v. Los Robles Regional Medical Center* (B270156) 2017 WL 5085071 (unpublished opinion filed Nov. 6, 2017) (*Kessey*).) There too, the court relied on *Bonni.*

Similar allegations of discrimination and retaliation could easily be attached to any of the many medical peer review cases that the Courts of Appeal regularly hear.[5] Until this Court resolves the issue, the uncertainty will grow and, with it, harm to the medical peer review process.

E. Fundamental Fairness Requires Granting Review Here, Just As The Court Did In *Bonni* And *Esquith*.

The Court's grant of review in *Bonni* (published) and *Esquith* (unpublished) suggests that the Court appreciates that fairness demands granting review of this rash of opinions that all turn on the identical issue. However the Court decides *Wilson*, the result will affect a large group of litigants in pending cases. At least for those who request review, the Court should not allow their decisions to become final simply because it has already granted review in other cases that raise the motive issue. That would unfairly make their ultimate results arbitrarily dependent on the fortuity of timing.

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[5] For instance, in the last several months, the appellate courts decided *Tabel v. Hospital Corporation of America* (E065719) 2017 WL 4564239 (unpublished opinion filed Oct. 13, 2017); *Clinica Sierra Vista v. Subramaniam* (F072467) 2017 WL 2652983 (unpublished opinion filed June 20, 2017); and *Bhandari v. Washington Hospital* (A144184) 2017 WL 2570660 at *4 fn. 4 (unpublished opinion filed June 14, 2017)—in addition to *Bonni*, *Melamed*, and *Kessey*.

As the Court did with *Bonni* and *Esquith*, the Court should grant review and defer briefing until the issue is resolved in *Wilson*.

II. ISSUE 2: ANTI-SLAPP APPLICATION TO A VARIETY OF PEER REVIEW-RELATED CLAIMS.

Like *Bonni*, the present case also poses other important and recurring issues that relate specifically to peer review cases.

Physician suits stemming from the peer review process come in many permutations. Peer review cases occur with great frequency, as is evidenced by the number of peer review decisions authored in just the last several months. (See p. 28 fn. 5, *ante.*) In *Park*, this Court made clear that it has never previously defined which peer review-related claims are subject to anti-SLAPP protections. (*Park, supra*, 2 Cal.5th at pp. 1069-1070.)

Along with *Bonni*, the present case provides a much-needed opportunity for this Court to clarify what is and is not protected. For instance:

Initiation of and litigation during the peer review process. Another Court of Appeal recently held that a party's initiation of an official proceeding is "certainly protected activity," as are "subsequent acts during the proceeding." (*Mission Beverage Co., supra,* 15 Cal.App.5th at p. 703.) Similarly, this Court has established that initiating and pursuing civil and criminal cases constitutes fundamental petitioning activity, protected by the anti-SLAPP statute. (*Jarrow, supra*, 31 Cal.4th at p. 734.)

But *Bonni* and the present opinion introduce a conflict (or at least confusion) regarding this issue. They hold that this Court's decision in *Park* means that

a hospital's "initiation and pursuit" of the peer review process through hearings and administrative appeals are *not* protected. (Opn., pp. 25-26; *Bonni, supra*, 13 Cal.App.5th at pp. 862-863.) As *Bonni* and the present opinion see it, a physician's claim that he was harmed by being subjected to an "abusive peer review process . . . cannot be easily distinguished" from the facts of *Park*. (*Bonni, supra*, 13 Cal.App.5th at p. 863; Opn., p. 26 [adopting *Bonni* and relying on *Park*] .)

Park compelled no such result. *Park* held that anti-SLAPP did not apply to a university professor's claims for wrongful denial of tenure because the elements of his claim "depend[ed] *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." (*Park, supra*, 2 Cal.5th at p. 1068, italics added.) That seems a far cry from the claims in *Bonni* and the present case, in which the physicians' claims *do* "depend" on the "process": The initiation and pursuit of the process are *themselves* essential elements of the claims in both cases and are *themselves* the source of the alleged injury. Indeed, Dr. Melamed's claims are *entirely* about the process—not the decision imposed at the end of the process, which was mostly favorable to Dr. Melamed. (See pp. 14-15, 18, *ante*.)

This issue can affect almost every conceivable case stemming from medical peer review. The current uncertainty is particularly troubling given that—as this Court itself has declared—the improper denial of anti-SLAPP protections will harm the mechanism that is "essential" to "protecting the public against incompetent, impaired, or negligent physicians." (*Kibler, supra*, 39 Cal.4th at pp. 199-201.)

Reporting peer review actions. Hospitals report a variety of peer review actions to the California Medical Board and the National Practitioner Data Bank. These reports serve a communicative role to the public, other hospitals, and the Board. They also arguably constitute petitioning activity directed to the Board, which considers such reports in deciding whether to revoke or suspend a physician's license. Dr. Melamed, like many other physicians, claims that he suffered injury *from this reporting*. (Opn. p. 10, fn. 10; 1 AA 13:26-27, 16-17.) This Court should resolve whether such reporting constitutes protected speech or petitioning activity.

Various other types of peer review decisions. Hospitals and medical staffs can impose medical discipline as a final peer review determination, as happened in *Bonni*. But that is not the basis of Dr. Melamed's claims. Rather, Dr. Melamed claims that he was injured by Cedars-Sinai's imposition of a temporary, summary suspension at the *outset* of his dispute with Cedars-Sinai, as part of and in furtherance of the initiation of the peer review process itself.

Between this initiation and conclusion are multiple, multi-featured steps in the process, any one of which could theoretically form the basis of a physician's claim and any one of which could, depending on its nature, be a pure *Park*-type unprotected decision or a core component of the peer review process. All of these types of actions are to varying degrees fundamentally communicative and petitioning acts in ways not true of the denial of tenure in *Park*. And one act—summary suspension—is tightly bound with the initiation of the peer review process. The Court should provide guidance on how to determine when a given step in the process is protected by anti-SLAPP.

Mixed causes of action. Finally, the Court should resolve whether and to what extent anti-SLAPP protections apply when a physician's claim combines some or all of the above theories. The Court recently set forth general guidance regarding consideration of mixed causes of action. (*Baral v. Schnitt* (2016) 1 Cal.5th 376.) In the peer review context, however, this question poses more tailored concerns about whether and how a physician can be permitted to finely craft a claim to address certain parts of the peer review process while avoiding other parts even though those two parts are tightly bound together.

Hospitals and physicians deserve answers to these important, recurring questions. So does the public. As this Court has recognized, the proper application of anti-SLAPP to peer review cases is necessary to one of California's highest public policies: Protecting the health and safety of California citizens. (*Kibler, supra*, 39 Cal.4th at p. 201.) Uncertainty should not reign.

CONCLUSION

The Court should grant review and hold the present case until it resolves *Wilson*—just as the Court has done with *Bonni* and *Esquith*. Hopefully, the Court's decision in *Wilson* will include the consideration of input from the medical community as amicus curiae, which the Court did not have when it decided *Park*.

Depending on its decision on the motive issue, the Court should then resolve the additional important issues concerning which peer review acts constitute protected speech or petitioning activities.

Both issues frequently recur. Both impact fundamental California public policy. The Court should grant review.

Dated: November 15, 2017 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 **PETITION FOR REVIEW** 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 **6,247** words.

DATED: November 15, 2017 /s/Jeffrey E. Raskin
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 November 15, 2017, I served the foregoing document described as: **PETITION FOR REVIEW** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

(X) By Envelope: by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: 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 November 15, 2017 at Los Angeles, California.

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

/s/Leslie Barela
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