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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DESERT VALLEY HOSPITAL, INC., Plaintiff and Appellant, v. ALANNA WAITSCHIES et al., Defendants and Respondents.	E038210 (Super.Ct.No. VCV35773) OPINION

APPEAL from the Superior Court of San Bernardino County. Kurt J. Lewin, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Ronald S. Hodges, Michael J. Sarrao, and Shulman, Hodges & Bastian LLP for Plaintiff and Appellant.

David P. Pruett and Carroll, Kelly, Trotter, Franzen & McKenna for Defendants and Respondents.

I

INTRODUCTION

Defendants filed a special motion to strike the complaint and dismiss this action pursuant to Code of Civil Procedure[1] section 425.16. The trial court agreed with defendants that the complaint was a SLAPP (Strategic Lawsuit Against Public Participation) suit within the meaning of section 425.16. It therefore granted the motion, dismissed the action and ordered plaintiff Desert Valley Hospital to pay the attorney fees incurred by defendants.

Desert Valley Hospital's appeal from the trial court's decision requires us to determine de novo (1) whether defendants made the threshold showing that the complaint arises from protected activity; and (2) if so, whether plaintiff has demonstrated a probability of prevailing on its claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers "'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Ibid.*)

We conclude that defendants established that the gravamen of the complaint was based on protected activity, and that plaintiff has not sufficiently demonstrated a probability of prevailing on the merits. We therefore affirm the trial court's decision.

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[1] All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

A. *SLAPP Suits*

Section 425.16 authorizes a special motion to strike causes 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 or California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1).) The section also provides that the motion shall be granted unless plaintiff establishes that there is a probability that plaintiff will prevail on the claim.

The statute states the legislative purpose as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." (§ 425.16, subd. (a).)

Accordingly, the statute is directed against SLAPP suits. "Litigation which has come to be known as SLAPP is defined by the sociologists who coined the term as 'civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.' [Citation.] The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans. [Citations.] SLAPP's, however, are by no means limited to environmental issues [citation], nor are the defendants necessarily local organizations with limited resources.

[Citation.] [¶] The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress. [Citation.] Plaintiffs in these actions typically ask for damages which would be ruinous to the defendants. [Citations.] [¶] SLAPP suits are brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. [Citations.] . . . [¶] Thus, while SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. [Citation.]" (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815-817, overruled on other grounds in *Equilon, supra*, 29 Cal.4th 53, 68, fn. 5.)

The statute therefore requires that the motion be granted if the trial court makes a determination that a cause of action is subject to the statute, i.e., that it is a SLAPP cause of action, unless the trial court also finds a probability that the plaintiff will succeed on the claim.[2]

[2] Specifically, the heart of the statute, section 425.16, subdivision (b), states: "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 or 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."

II

FACTUAL AND PROCEDURAL HISTORY

A. *The Complaint*

Desert Valley Hospital is an 84-bed acute care hospital in Victorville. The three defendants were officers or employees of the hospital.

1. *Defendant Waitschies*

Although not clearly alleged in the complaint, the parties agree that defendant Waitschies was employed by Desert Valley Hospital as a registered nurse from 2001 through March 8, 2003. The fourth and fifth causes of action are against her for intentional interference with prospective economic advantage and intentional interference with contractual relations. She is also named in the eighth cause of action for conspiracy as a coconspirator.

The factual allegations underlying these causes of action against Ms. Waitschies are summarized by Desert Valley Hospital as follows: Although her work as a registered nurse was satisfactory, Ms. Waitschies (1) conspired with her codefendants and two other persons "to create a 'sub-culture' of hatred and intimidation and contempt for any of Plaintiff's employees who were not within the cliques created by them"; (2) she ordered her subordinates not to attend a meeting with Dr. Reddy, the chairman of Desert Valley Hospital; (3) she encouraged staff members to call in sick or to not report for work; (4) she conspired with others to fabricate allegations of wrongdoing against another employee; and (5) after she left the employment of Desert Valley Hospital she solicited employees of Desert Valley Hospital to disclose proprietary information to her.

2. *Defendant Williams*

Ms. Williams was a respiratory therapist at Desert Valley Hospital from 2001 through April 24, 2003. She is sued for intentional interference with prospective economic advantage (sixth cause of action) and intentional interference with contractual relations (seventh cause of action). She is also named in the eighth cause of action as an alleged coconspirator.

In support of these causes of action, the complaint alleges, (1) Williams was also a member of the same sub-culture of hate and intimidation as defendant Waitschies; (2) Williams spread false rumors of illegal conduct at Desert Valley Hospital; (3) Williams conspired with codefendants and others to create false rumors of wrongdoing at Desert Valley Hospital; (4) Williams disclosed confidential information to third persons without authority to do so; and (5) Williams solicited other employees to disclose confidential and proprietary information.

3. *Defendant Jeyakumar*

The third named defendant is Dr. Panch Jeyakumar. The complaint alleges that Dr. Jeyakumar was employed by Desert Valley Medical Group, Inc. in 1986 and he became medical director of Desert Valley Hospital in September 1996. He resigned his position in 1999 but returned to Desert Valley Hospital in 2001 as medical director and chief operating officer. Dr. Jeyakumar is sued for breach of fiduciary duty in the first cause of action; intentional interference with prospective economic advantage in the second cause of action; negligent interference with prospective economic advantage in the third cause of action; and conspiracy in the eighth cause of action.

Desert Valley Hospital summarizes the factual allegations underlying these causes of action as follows: Dr. Jeyakumar (1) harmed Desert Valley Hospital by conspiring to create the sub-culture of hate and intimidation described above; (2) thwarted the efforts of chairman Reddy to improve the operations and efficiency of the Emergency Department; (3) engaged in "a close and improper personal relationship" with an employee which led to doctors and staff leaving the employment of Desert Valley Hospital. According to plaintiff, this wrongful and unprofessional behavior led to a departure of nursing staff and resulted in greatly increased nursing registry costs.

B. *Defendants' Motion to Strike and Plaintiff's Response*

After defendants answered the complaint with a general denial, they filed their motion to strike under section 425.16. The motion alleged that the complaint attempted to chill their free speech rights in connection with the public issue of health care. Specifically, they asserted a right to speak regarding the operations of Desert Valley Hospital, including the right and duty to report problems to the California Department of Health Services (DHS) and to the Joint Commission on Accreditation of Health Care Organizations (JCAHO).

The motion also argued that the complaint was based upon depositions given by defendants in another case.[3] A copy of the complaint in that action was attached to the motion, together with a cross-complaint. Also attached were excerpts of defendants' depositions in that action.

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[3] *Desert Valley Hospital Inc. v. Tina Buchanan et al.*, San Bernardino Superior Court No. VCVVS030193 (*Buchanan*).

At oral argument on the motion, defendants' counsel argued that this lawsuit was retaliation for defendants' testimony in the *Buchanan* case. Defendants' counsel also argued that the speech which was the basis for the complaint included reports to health plans and insurance companies concerning patient care. Defendants asserted that their speech was protected activity under Business and Profession Code sections 510, 2056 and 2191.1.

In response to the motion to strike, plaintiff filed various declarations, including a declaration of its counsel which included seven excerpts from the depositions of defendants and others in the *Buchanan* litigation. Plaintiff's argument in opposition to the motion denied that the complaint was based upon defendants' statements to DHS or JCAHO, or that it was based on statements made in depositions. Accordingly, plaintiff argued that the defendants had not brought themselves within any of the categories listed in section 425.16, subdivision (e). Plaintiff also argued that it had demonstrated a probability of success on its causes of action. As noted above, the trial court disagreed and granted the motion.

III

DISCUSSION

A. *Did Defendant Establish that the Complaint Arises from Protected Activity?*

Desert Valley Hospital asserts that defendants failed to meet their burden of showing that the challenged causes of action arise from protected activity under section 425.16, subdivision (e). It cites *City of Cotati v. Cashman* (2002) 29 Cal.4th 69: "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. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .' [Citations.]" (*Id.* at p. 78.) We agree that this is the dispositive issue.

But we also agree with defendants that it is the gravamen of the complaint which governs: "We conclude it is *the principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

We therefore test the allegations of the complaint against the sub-categories set out in section 425.16, subdivision (e).

1. *Subdivisions (e)(1) and (e)(2)*

Section 425.16, subdivision (e) defines the statutory phrase "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" to 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;" and "(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."

Defendants argue that section 425.16, subdivisions (e)(1) and (e)(2) apply here because the complaint alleges that defendants spread rumors of illegal conduct at Desert Valley Hospital, which led to investigations by DHS and JCAHO. Defendants contend that they were statutorily obligated to inform DHS, a state agency, of unsafe patient care and conditions, and that the investigative response by DHS qualifies as an issue under consideration by an executive body.

Defendants cite Health and Safety Code section 1278.5, subdivision (a): "The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations." Defendants point out that subdivision (b) of that section prohibits retaliation against such employees, as does Labor Code section 1102.5, subdivision (b).[4]

[4] The parties disagree on the question of whether the non-governmental accrediting agency, JCAHO, is an entity included within subdivisions (e)(1) and (e)(2). Although its accreditation and surveys are regularly used by governmental agencies, we find it unnecessary to decide the issue in this case. (See, e.g., Health & Saf. Code, § 1228.)

We agree with defendants that, to the extent the complaint alleges that defendants reported alleged wrongdoing to DHS, the complaint falls within section 425.16, subdivisions (e)(1) and (e)(2). However, this does not answer the question of whether protected activity is the gravamen of the complaint.

Defendants also argue that their deposition testimony in the *Buchanan* case was the impetus for this retaliatory litigation. They contend that their deposition testimony was protected by the litigation privilege of Civil Code section 47, subdivision (b), and falls within section 425.16, subdivision (e)(1).

This contention is answered by *City of Cotati v. Cashman*, *supra*, 29 Cal.4th 69: "[A] claim filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. [Citation.] That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. To focus on City's litigation tactics, rather than on the substance of City's lawsuit, risks allowing Owners to circumvent the showing expressly required by section 425.16, subdivision (b)(1) that an alleged SLAPP *arise from* protected speech or petitioning. [Citation.]" (*Id.* at p. 78; see also *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 924: "We publish this opinion, however, to emphasize that a cross-complaint or independent lawsuit filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. No lawsuit is properly subject to a special motion to

strike under section 425.16 unless its allegations arise from acts in furtherance of the right of petition or free speech.")

2. *Subdivisions (e)(3) and (e)(4)*

Defendants next argue that the allegations of the complaint refer to activity protected by section 425.16, subdivisions (e)(3) and (e)(4). Subdivision (e) defines the statutory phrase "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" to include "(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;" and "(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."

We find little support for defendants' contention that the statements were made in a place open to the public or in a public forum under subdivision (e)(3) because the complaint does not allege such statements. At most, it refers to defendants' statements to regulatory agencies and employee groups, as well as spreading false rumors of illegal conduct. The statements were apparently primarily made to other employees in connection with hospital operations. The complaint does, however, base allegations on the alleged disclosure of confidential information to DHS and to plaintiff's counsel in the *Buchanan* action. Although these allegations do not refer to disclosure in a public forum, they appear to be allegations which fall within subdivision (e)(4).

The more general issue, however, is whether the causes of action in the complaint arise from defendant's exercise of their free speech rights in connection with an issue of public interest.

We agree with defendants that the providing of health care is an issue of public interest. "The definition of "'public interest'" within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. [Citations.] '"[M]atters of public interest . . . include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals."' [Citation.]" (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.)

Although the parties do not cite any cases arising in a hospital context, defendants cite holdings in other contexts. For example, in *Tunkl v. Regents of the University of Cal.* (1963) 60 Cal.2d 92, our Supreme Court held that a release agreement between a hospital and an entering patient affects the public interest. (*Id.* at p. 94.) The court also noted that "The hospital . . . holds itself out as willing to perform its services for those members of the public who qualify for its research and training facilities. While it is true that the hospital is selective as to the patients it will accept, such selectivity does not negate its public aspect or the public interest in it." (*Id.* at p. 102.) Similarly, in *Muccianti v. Willow Creek Care Center* (2003) 108 Cal.App.4th 13, the court noted that: "There is no question that the public has an interest in issues related to health care facilities." (*Id.* at p. 22.) Defendants also cite *Goodstein v. Cedars-Sinai Medical Center* (1998) 66

Cal.App.4th 1257: "'[S]ince the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process. Fair procedure rights apply when the organization involved is one affected with a public interest, such as a private hospital.'" (*Id.* at p. 1265; see also *Delta Dental Plan v. Banasky* (1994) 27 Cal.App.4th 1598, 1608.)

In addressing the public interest issue, Desert Valley Hospital urges us to focus on the specific nature of the alleged speech or conduct, rather than generalities attributed to the speech or conduct. Desert Valley Hospital cites *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117. Under *Briggs*, "The rule is now that if the speech was made or the activity was conducted in an official proceeding authorized by law, there is no need that it be connected to a public issue. But if made or conducted apart from an official proceeding, then there is a public issue requirement. (*Id.* at p. 1117 [differentiating § 425.16, subdivision (e), clauses (1) and (2) from same section and subdivision, clauses (3) and (4)].)" (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 32, fn. omitted (*Commonwealth Energy*).)

Desert Hospital also cites *Commonwealth Energy* for its statement that the court should examine the specific nature of the speech. (*Commonwealth Energy*, *supra*, 110 Cal.App.4th at p. 34.) *Commonwealth Energy* concerned a telemarketing spiel which was found not to fit within the public interest categories described in *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913 (*Rivero*). *Rivero* described three categories of cases in which the public interest requirement is met. These categories are cases in which "[1] the subject statements either

concerned a person or entity in the public eye [citations], [2] conduct that could directly affect a large number of people beyond the direct participants [citations] or [3] a topic of widespread, public interest [citation]." (*Id.* at p. 924.) But in *Rivero* the statements concerned a union's complaints of wrongdoing by the supervisor of a staff of eight custodians at the International House on the Berkeley campus of the University of California. The court held that the allegations were not a matter of public interest. In other words, "[t]o extrapolate a series of personal incidents into a public policy debate would mean that *every* workplace dispute would qualify as a matter of public interest. [Citation.]" (*Commonwealth Energy, supra*, at p. 34.)

Desert Hospital argues that this is an ordinary workplace dispute that is not based on speech or conduct regarding a matter of public interest. While we agree with plaintiffs that ordinary workplace disputes are not and should not fall within section 425.16, the question is whether the alleged actions, inactions and statements, as alleged in the complaint, involved the public's interest in the provision of care by a hospital. In other words, did this otherwise unremarkable workplace dispute become a matter of public interest because it involved officers and employees of a hospital?

Desert Valley Hospital contends that the statements and actions of defendants were motivated by private interests, such as domination and control over employees, rather than appropriate health care. Defendants, on the other hand, contend they are being punished for reporting illegal conduct to DHS, JCAHO, and for truthfully testifying in the *Buchanan* litigation.

We cannot determine the motivations of the defendants, or even whether they made the statements or took the actions attributed to them. A section 425.16 motion does not require us to do so. We can only decide that some of the activity alleged in the complaint is protected activity, and some is not. Specifically, we have determined that section 425.16, subdivisions (e)(1) and (e)(2) are implicated by the allegations that defendant reported alleged wrongdoing to DHS.

With regard to section 425.16, subdivision (e)(4), we conclude that, due to the public's interest in issues relating to patient care at hospitals, the allegations of workplace misconduct are protected speech under that subsection. This conclusion follows from allegations in the complaint relating to such issues as (1) problems in the emergency room which could have led to closure of the hospital and/or the emergency room facilities; (2) unauthorized disclosure of confidential patient records, including disclosure of allegedly improper conduct to Kaiser Foundation Health Plan; (3) contacting state licensing agencies to report allegedly illegal activity at Desert Valley Hospital; (4) using confidential patient information to support complaints to DHS and JCAHO which led to investigations by those entities; and (5) disclosing confidential patient information to plaintiffs' counsel in the *Buchanan* action. These issues all impact patient care at Desert Valley Hospital and are therefore issues of interest to the general public. They therefore fall within section 425.16, subdivision (e)(4).

B. *Gravamen of the Complaint*

As noted above, defendants need only make a threshold showing that the complaint arises from protected activity. Our Supreme Court has defined the defendants'

burden as follows: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).)" (*Equilon, supra,* 29 Cal.4th at p. 67.)

Other issues raised by the complaint relate to unprotected activity. When, as here, both protected activity and unprotected activity are alleged in the complaint, the principal thrust or gravamen of the complaint governs. (*Martinez v. Metabolife, Inc., supra,* 113 Cal.App.3d at p. 188.) While we would agree with plaintiff that this dispute would not be subject to section 425.16 sanctions if it was an ordinary workplace dispute (*Rivero, supra,* 105 Cal.App.4th 913), this is not an ordinary workplace dispute because it involves the public interest in the operation of a local hospital, including allegations of illegal conduct affecting patients and unauthorized disclosure of patient information. Accordingly, we agree with the trial court that the gravamen of the complaint is protected activity. As the trial court stated: "The revelation of questionable, unethical or illegal practices by any health care provider which might result in harm or injury to patients is an 'issue of public interest.'" Accordingly, defendants have met their threshold burden of showing that the complaint arises from protected activity.

C. *Plaintiff's Probability of Prevailing on the Merits*

The next issue is whether plaintiff has met its burden of demonstrating a probability of prevailing on its claim. The trial court found that it utterly failed to do so.

We agree with the trial court that plaintiff failed to present evidence showing a reasonable probability of success on its claims. Plaintiff filed three evidentiary declarations and seven excerpts from the depositions taken in the *Buchanan* action.

Emily Steed's declaration concerns allegations that Dr. Jeyakumar was having a relationship with Lisa Crouch, who was then head of the Emergency Department.[5] Ms. Steed, an employee, complained about the relationship because her husband, who was also an employee, was having an affair with a different employee and Ms. Steed felt that Ms. Crouch was setting a bad example. Ms. Steed was fired and eventually received unemployment benefits.

Luis Leon's declaration merely states he is a physician's assistant at Desert Valley Hospital and in September 2004 he had a telephone conversation with Theresa Williams, a former employee of the hospital. He does not state what the telephone call was about.

Dr. Reddy, chairman of the hospital, declares that the hospital's labor costs are lower if the work is performed by its own employees rather than staff provided by registries. He states that nursing registry costs increased by over a million dollars from March to December 2003, in comparison to the same period a year earlier. He also states that employees were required to sign confidentiality agreements, and he was told that defendant Waitschies had sought to obtain a copy of "Desert Valley Hospital, Inc.'s Superbill." As a result, he states that "Desert Valley Hospital, Inc., was forced to incur additional costs to ensure that its confidential information is not disclosed."

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[5] Dr. Jeyakumar filed a declaration denying that he had an affair with Ms. Crouch.

Defendants are, of course, correct that their deposition testimony is subject to the litigation privilege of Civil Code section 47, subdivision (b). But since they would presumably repeat their testimony if their depositions were taken in this action, we will briefly recap the deposition excerpts furnished by plaintiff.

Dr Jeyakumar testified that he asked Dr. Reddy not to go to the emergency room after drinking alcohol, and he agreed not to do so. Dr. Jeyakumar testified regarding the employment of Tina Buchanan and the alleged practice of keeping Kaiser patients in the hospital rather than transferring them to a Kaiser hospital. He also testified about differential treatment of insured and noninsured patients, and his lack of investigation of the issue. He testified to other complaints about Dr. Reddy.

Phyllis Armstrong testified about the termination of Ms. Steed and the circumstances surrounding the alleged affairs mentioned in Ms. Steed's declaration. She believed Dr. Jeyakumar was having an affair with Ms. Crouch.

Sheri Badders also testified about the relationship between Dr. Jeyakumar and Ms. Crouch.

Mr. Leon testified that he was a physician assistant in the emergency room in 2002.

Defendant Waitschies testified that she was employed by Desert Valley Hospital in March 2001 as emergency department clinical coordinator. She left in March 2003.

Defendant Williams testified that she was appointed as director of respiratory care on July 1, 2000.

Wanda Ruben testified about a farewell party for Lisa Crouch. After Ms. Crouch left, the nurses "were all upset about what happened, and they were questioning the ethical issues and where Desert Valley was standing when it came to patient care." She was told that the state was going to investigate and close the hospital. She also testified that defendant Waitschies told other nurses not to go to a subsequent meeting scheduled by Dr. Reddy.

When measured against the causes of action, Desert Hospital's evidentiary showing is inadequate. For example, Dr. Jeyakumar is sued for breach of fiduciary duty. As a corporate officer, he owed a fiduciary duty of loyalty to the corporation. "We conclude an officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a 'nominal' officer with no management authority is not a fiduciary. Whether a particular officer participates in management is a question of fact." (*GAB Business Services v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 420-421, overruled on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154 (*Reeves*).)

Assuming that Dr. Jeyakumar was a fiduciary, Dr. Jeyakumar was obligated to use his judgment to act in the best interests of the corporation. "The general rules applicable to the duties of a corporate officer have been frequently stated. In the leading case of *Guth v. Loft, Inc.*, 23 Del.Ch. 255 . . . , these obligations were cogently described as follows: 'Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy,

existing throughout the years, derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers.' [Former] [s]ection 820 of the Corporations Code provides that an officer must exercise his powers in good faith, with a view to the interests of the corporation." (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 345.)

Plaintiff's evidentiary showing does not establish a probability that plaintiff will prevail on its breach of fiduciary duty claim. Specifically, it does not establish that Dr. Jeyakumar was a fiduciary as a matter of law, or that he breached his fiduciary duties to the corporation. At most, it establishes that Dr. Jeyakumar disagreed with Dr. Reddy as to the operations of the hospital in general, and the emergency department in particular. But, as defendants point out, such disagreements are not a breach of duty, although they may result in a termination of employment. Indeed, two code sections specifically protect physicians who act as advocates on behalf of patients. (Bus. & Prof. Code, §§ 510, 2056.) Nor does the evidence establish that Dr. Jeyakumar was acting in his own interests, rather than the interests of the corporation.

Similarly, the interference causes of action are not supported by the evidence submitted. "We start by observing that, in California, the law is settled that 'a stranger to

a contract may be liable in tort for intentionally interfering with the performance of the contract.' [Citation.] To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. [Citation.] To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action. [Citation.]" (*Reeves*, *supra*, 33 Cal.4th at p. 1148.)

Similarly, "To prevail on a cause of action for intentional interference with prospective economic advantage in California, a plaintiff must plead and prove (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's acts. [Citation.]" (*Reeves*, *supra*, 33 Cal.4th at p. 1152, fn. 6.)

In *Reeves*, our Supreme Court held: "Consistent with the decisions recognizing that an intentional interference with an at-will contract may be actionable, but mindful that an interference as such is primarily an interference with the future relation between the contracting parties, we hold that a plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard

applicable to claims for intentional interference with prospective economic advantage. That is, to recover for a defendant's interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act—i.e., an act 'proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard' [citation]—that induced an at-will employee to leave the plaintiff. Under this standard, a defendant is not subject to liability for intentional interference if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment." (*Reeves*, *supra*, 33 Cal.4th at pp. 1152-1153, fn. omitted.) Desert Valley Hospital failed to produce evidence of an independently wrongful act by any defendant.

Defendants cite *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503: "However, consistent with its underlying policy of protecting the expectations of contracting parties against frustration *by outsiders* who have no legitimate social or economic interest in the contractual relationship, the tort cause of action for interference with a contract does not lie against a party to the contract. [Citations.]" (*Id*. at p. 514.) They point out that Dr. Jeyakumar and the other two defendants were not outsiders to the contract but rather the officer and agent and employees of one of the contracting parties. Accordingly, the agent immunity rule applies: "The rule 'derives from the principle that ordinarily corporate agents and employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract since being in a confidential relationship to the corporation their action in this

respect is privileged.' [Citation.] We have endorsed and applied the agent's immunity rule . . . . " (*Id.* at p. 512, fn. 4.)

This case does not involve an employee raiding his employer for employees before leaving to join another company, or other breach of the duty of loyalty. (Cf. *Reeves, supra,* 33 Cal.4th 1140; *Bancroft-Whitney Company v. Glen, supra,* 64 Cal.2d 327.) There is simply no showing that Dr. Jeyakumar or the other defendants acted in their own interests rather than in the interests of their employer.

The conspiracy cause of action is equally unsupported: "The invocation of conspiracy does not alter this fundamental allocation of duty. Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles. [Citations.] *Because a party to a contract owes no tort duty to refrain from interference with its performance, he or she cannot be bootstrapped into tort liability by the pejorative plea of conspiracy*." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra,* 7 Cal.4th at p. 514.)

IV

DISPOSITION

The judgment is affirmed. Defendants to recover costs and attorney fees on appeal. (§ 425.16, subd. (c); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ RAMIREZ
P.J.

We concur:

/s/ RICHLI
J.

/s/ KING
J.