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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALEXANDER MARMUREANU et al., Plaintiffs and Respondents, v. HILLEL LAKS, Defendant and Appellant.	B173813 (Los Angeles County Super. Ct. No. BC302686)

APPEAL from an order of the Superior Court of Los Angeles County, Rodney E. Nelson, Judge. Affirmed.

Blecher & Collins, Maxwell M. Blecher and Alicia G. Rosenberg for Defendant and Appellant.

Reuben & Novicoff, Timothy D. Reuben, Teri T. Pham and Daniel A. Windler for Plaintiffs and Respondents.

This is an action by one doctor against another, with allegations that the defendant doctor misused the peer review process at the UCLA Medical Center to interfere with the plaintiff doctor's competitive medical practice. The trial court denied the defendant's special motion to strike under the anti-SLAPP statute, section 425.16 of the Code of Civil Procedure. We affirm that order.

FACTS

A.

Hillel Laks, M.D., a cardiac surgeon, is Chief of the Division of Cardiac Surgery in the Department of Surgery at the UCLA School of Medicine, the director of UCLA's heart and heart-lung transplant programs, a full-time professor, and (in all these capacities) an employee of the University of California, a constitutionally created branch of state government. (Cal. Const., art. IX, § 9; *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135; 30 Ops. Cal. Atty. Gen. 162 (1957).)

Although the UCLA Medical Center is primarily a teaching hospital staffed by faculty members, non-faculty members may apply for staff privileges as members of the Medical Center's Courtesy Attending Medical Staff. As Division Chief, Dr. Laks makes recommendations to the Surgical Service peer review committee regarding the qualifications of non-faculty member physicians applying for staff privileges in cardiac surgery.

B.

In 2002, Alexander Marmureanu, M.D., a cardiothoracic surgeon, completed his residency at the UCLA Medical Center and applied for staff

privileges in three categories of cardiac surgery and thoracic surgery, and those privileges were granted in February 2003.

Under California law, the governing body of a hospital grants applications for privileges based on the medical staff's recommendations made in accordance with peer review procedures established by the hospital. (Cal. Code Regs., tit. 22, §§ 70035, 70701(a)(1)(B), 70701(a)(7), 70703(b).) UCLA Medical Center grants surgical privileges based on the recommendations of the Medical Staff Executive Committee, the Medical Staff Credentials Committee, and the Chief of the Surgical Service (who, at the times relevant to this case, was E. Carmack Holmes, M.D.). At the time Dr. Marmureanu applied for staff privileges, Dr. Laks's role was to make recommendations to Dr. Holmes's committee with regard to all applications for cardiac surgery privileges.

In early 2003, Dr. Marmureanu applied for additional privileges. Dr. Holmes reviewed Dr. Marmureanu's application, granted some but not all of the privileges he sought, and deferred a decision on the remaining privileges. Dr. Marmureanu did not challenge the Medical Center's decision through its administrative procedures or in court.

In March, Dr. Marmureanu argued to the Medical Center's administration that, as a non-faculty member of the attending staff, he was entitled to require the residents to care for his patients when he was not at the hospital. According to Dr. Marmureanu, Dr. Laks argued against that position. Around the same time, the Medical Center adopted a policy limiting access to certain patient

records to faculty members.[1] Dr. Marmureanu objected to the policy but did not challenge it through the Medical Center's administrative procedures or in court. In June, Dr. Holmes wrote to Dr. Marmureanu to express concerns that Dr. Marmureanu might have breached the confidentiality of one or more of Dr. Laks's patients who received care at the Medical Center.[2]

C.

In September, Dr. Marmureanu (and his professional corporation, which is included in our references to Dr. Marmureanu) sued Dr. Laks (and only Dr. Laks), alleging causes of action for unfair competition, restraint of trade, tortious interference with contract, and tortious interference with the right to practice a profession. Dr. Marmureanu alleged, among other things, that Dr. Laks made false statements about Dr. Marmureanu's qualifications, causing the Medical Center to restrict his privileges in complex pediatric cardiac surgery; that Dr. Laks caused the Medical Center to adopt the policy that all patient care by residents had to be supervised by a faculty member; that Dr. Laks caused UCLA

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[1] The Medical Center is required to hold regular peer review meetings to review deaths and complications. In the Surgical Service, this is done by the Division's Mortality and Morbidity Conferences, during which cases are discussed and evaluated, and about which reports are prepared for the Medical Staff Peer Review Committee. Under the rule in question, the records used at these conferences may only be viewed by the resident presenting the case, the attending physician, the head of the Division's Quality Improvement Committee, the Division Chief, and the Performance Review Coordinators responsible for preparing the particular report. Dr. Marmureanu claimed that the Medical Center's policy prevented him from meaningfully participating in cardiac surgery conferences, and he alleges in this lawsuit that the rule was adopted at Dr. Laks's behest.

[2] Among other things, the letter states: "Although I do not know the source of your information regarding Dr. Laks' patients, conversations with third parties about a patient's medical condition suggest that patient confidentiality may have been breached. The breach would be further exacerbated if the source of your information was a Medical Staff peer review committee. In addition to breaching patient confidentiality, your conversations about Dr. Laks' patients are having a disruptive impact on the Department of Surgery and need to stop."

to adopt the privacy policy that restricted access to certain patient records; and that Dr. Laks's unfounded complaints about Dr. Marmureanu's alleged disclosure of confidential information caused UCLA to investigate Dr. Marmureanu's conduct. All of these things, claims Dr. Marmureanu, were done by Dr. Laks as part of a personal campaign to exclude, isolate, ostracize, embarrass and interfere with Dr. Marmureanu's ability to establish his medical practice.

In proceedings held at or about the time Dr. Marmureanu filed this lawsuit, Dr. Laks's lawyer represented that Dr. Laks had recused himself from "matters involving Dr. Marmureanu," and that Dr. Marmureanu would be allowed to participate in the conferences he had been excluded from "on the same basis as other members of the medical staff." Discovery was stayed while the parties attempted to resolve their dispute.

On the day before the stipulated stay expired, Dr. Laks filed a special motion to strike Dr. Marmureanu's complaint. (Code Civ. Proc., § 425.16, the anti-SLAPP statute.)[3] Dr. Marmureanu sought and obtained leave to conduct limited discovery, took a deposition, then filed his opposition to the motion to strike. An unreported hearing was held, after which the motion was denied by a minute order stating no more than the fact of denial. Dr. Laks appeals.

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[3] Undesignated section references are to the Code of Civil Procedure.

DISCUSSION

Dr. Laks contends the anti-SLAPP statute applies to all of Dr. Marmureanu's causes of action, and that Dr. Marmureanu failed to show a probability of success on the merits. We agree with the trial court's implied finding that the statute does not apply to this case (and thus do not reach the other issues).

A.

As relevant, subdivision (b)(1) of section 425.16 provides that, unless the plaintiff establishes that there is a probability he will prevail on the merits of his claim, 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*** . . . in connection with a public issue shall be subject to a special motion to strike . . . ." (Emphasis added.) As relevant, subdivision (e) of section 425.16 defines the italicized language to include "(1) any written or oral statement . . . made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement . . . 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 . . . made in a place open to the public . . . ; (4) or 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."

A two-step analysis determines whether the statute applies. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16,

subd. (b)(1).) '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)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1) [citation].)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) We review the issue de novo. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.)

B.

1.

While this appeal was pending, a strikingly similar case was decided by Division One of the Fourth Appellate District, *O'Meara v. Palomar-Pomerado Health System* (2005) 125 Cal.App.4th 1324 [23 Cal.Rptr.3d 406]. The plaintiff in *O'Meara,* the former chair of the Department of Orthopedic Surgery at the Palomar Medical Center, sued Palomar and various individuals on its peer review committee, alleging (in numerous causes of action for statutory violations and tort, including interference with economic interests) that the defendants had placed him on probation and otherwise retaliated against him because he had expressed dissatisfaction about a managed care entity's involvement in medical decisions. The defendants filed a special motion to strike (§ 425.16), claiming their statements about disciplinary matters were made in an "official proceeding," and that their conduct involved a public issue (managed health care). (*O'Meara v. Palomar-Pomerado Health System, supra,* 23 Cal.Rptr.3d at p. 409.)

In a carefully reasoned opinion, *O'Meara* rejects the contention that the medical peer review process is an "official proceeding" within the meaning of

section 425.16. We agree with *O'Meara* and thus quote from it to explain our rejection of Dr. Laks's claim that the peer review system at the UCLA Medical Center is an "official proceeding" within the meaning of the anti-SLAPP statute:

"Palomar's Executive Committee is a legally mandated hospital peer review organization established under Palomar's medical staff bylaws. [Citation.] The Executive Committee acts on behalf of Palomar's medical staff and, as with all California hospital peer review bodies, is charged with adopting rules for appropriate hospital practices and procedures, evaluating physicians applying for staff privileges, establishing standards and procedures for patient care, assessing the performance of staff physicians, reviewing performed surgeries, and investigating a complaint or incident involving a staff physician. [Citations.]

"Although these functions serve important public purposes of improving patient care and ensuring quality health services [citation], the California Supreme Court has recognized that a hospital peer review committee differs from a governmental agency in several fundamental ways. [Citation.] 'First, [a hospital peer review committee] is not a public agency created and funded by the state, but a group of private physicians selected by and from the staff of a hospital.[4] Second, the conduct of the errant physician is not reviewed by

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4 Although the Medical Center is not a private hospital, its peer review committee is nonetheless a group of physicians selected by and from its staff. More to the point, Dr. Laks is the only defendant in this action, and the claims against him are quite obviously personal. In our view, the fact that the conduct at issue in our case occurred at the UCLA Medical Center is insufficient to justify a rule that would give the members of its peer review committees a shield (in the form of a motion to strike under section 425.16) that is plainly unavailable to other medical peer review committees and their members. We note also that the hospital defendant in *O'Meara* is a public entity in the sense that it is a "hospital district" created by statute. (*O'Meara v. Palomar-Pomerado Health System, supra,* 23 Cal.Rptr.3d at p. 409.)

independent, professional investigators, but by the physician's own colleagues practicing in the same hospital: it is, by definition, a *peer* review committee. By weeding out incompetent or impaired staff physicians, therefore, the peer review process -- in addition to its public protection function -- inevitably also serves the private purpose of reducing the exposure of the hospital to potential tort liability. Third, the "public" protected by the peer review process is not the public at large, but is limited to the patients of the particular hospital in question. The process is institution specific: a physician stripped of staff privileges by one hospital is not ipso facto prevented from obtaining or maintaining such privileges at other hospitals -- the only entity with the power to prevent that from happening is the [state medical board].' [Citation.]

"Based on these essentially private functions of a hospital peer review body and the legislative background of the anti-SLAPP statute, we conclude the Executive Committee's proceedings in this case cannot be fairly viewed as 'official' under the anti-SLAPP statute. In 1979, the California Supreme Court addressed the issue whether a peer review proceeding conducted by a private medical society was an "'official proceeding authorized by law'" under a former version of the litigation privilege statute, Civil Code section 47. (*Hackethal v. Weissbein* (1979) 24 Cal.3d 55, 58-61.) At the time, Civil Code section 47, subdivision (2) provided for an absolute privilege for publications made "'in any (1) legislative, or (2) judicial proceeding, or (3) *in any other official proceeding authorized by law . . . .*'" (*Hackethal v. Weissbein, supra,* 24 Cal.3d at p. 57, fn. 1, italics added.) Interpreting this former statute, the *Hackethal* court held that a peer review proceeding was not an "'official proceeding'" because a peer review committee was not a governmental body. [Citation.] The *Hackethal* court 'explicitly rejected the contention that merely because state law required

the creation of a review committee, every body so created was "official.'" [Citation.] The court reasoned that the word 'official' before the word 'proceeding' was intended to preclude the application of the privilege in 'nongovernment proceedings.' (*Hackethal v. Weissbein, supra* [24 Cal.3d] at p. 60.)

"Shortly thereafter, the Legislature amended Civil Code section 47 with the intent 'effectively to overrule the *Hackethal* decision,' by adding a new subsection, which extends the privilege to "'any other proceeding authorized by law and reviewable [by an administrative writ of mandate]. . . .'" (*Moore v. Conliffe* (1994) 7 Cal.4th 634, 652-653.) The language of that amendment is now included in the statute as Civil Code section 47, subdivision (b)'s fourth category, in addition to the 'legislative,' 'judicial,' and 'official proceeding' categories. (Civ. Code, § 47, subd. (b).) As the *Moore* court explained, 'by its immediate unanimous response to *Hackethal,*' the Legislature intended to make clear that the statutory litigation privilege 'should not be confined narrowly only to witnesses who testify in peer review proceedings conducted by *governmental* agencies, but rather should apply also to witnesses who testify in analogous peer review proceedings conducted by *private* entities. . . .' [Citation.]

"Approximately 13 years later, the Legislature enacted the anti-SLAPP statute [citation], and in referring to the type of speech/petitioning activities that are covered by the statute, the Legislature used *some* of the same language used in the amended version of Civil Code section 47, subdivision (b) -- providing that the anti-SLAPP statute applies to statements '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*.' (§ 425.16, subds.

(e)(1) & (e)(2), italics added.) The Legislature, however, did *not* add the additional clause that was contained in the amended version of Civil Code section 47, subdivision (b)(2): 'or . . . in the initiation or course of *any other proceeding* authorized by law and reviewable pursuant to [an administrative writ of mandate]. . . .' (Italics added.)

"Based on this omission, we necessarily infer the Legislature did not intend to include proceedings of a nongovernmental body, such as a hospital peer review committee, in the definition of an 'official proceeding' within the meaning of section 425.16, subdivisions (e)(1) and (e)(2). The Legislature is presumed to be aware of existing law and judicial decisions interpreting the law . . . .

"This conclusion is further supported by the analysis in *Briggs* [*v. Eden Council for Hope & Opportunity* (1999)] 19 Cal.4th 1106, where the high court construed section 425.16, subdivisions (e)(1) and (e)(2) as not imposing a separate 'public issue' requirement. . . . [*Briggs*] support[s] the conclusion that the purpose of section 425.16, subdivisions (e)(1) and (e)(2) was to establish a bright-line test for matters that necessarily meet the test of public significance, i.e., those before a governmental body. This purpose would be undermined if section 425.16, subdivisions (e)(1) and (e)(2) were extended to include proceedings by private entities merely because those proceedings were legally 'authorized.'

" . . . *[O]ur conclusion is unaffected by the fact that one of the defendants -- Palomar-Pomerado Health System -- is a public entity in the sense that it is a hospital district created by statute*. [Citation.] Because the factual basis of

defendants' 'official proceeding' claim is Palomar's peer review proceedings, and not the structure, ownership, or proceedings of the affected hospital, the ownership status of Palomar Medical Center is not material on this issue." (*O'Meara v. Palomar-Pomerado Health System, supra,* 23 Cal.Rptr.3d at pp. 411-414, fns. omitted.)

2.

O'Meara (by Division One of the Fourth Appellate District) was filed on January 21, 2005. About 10 days earlier (on January 11), Division Two of the Fourth Appellate District had filed an unpublished opinion in which it reached the opposite result, *Kibler v. Northern Inyo County Local Hospital District* (Jan. 11, 2005, mod. Feb. 4, 2005, E035085) ___ Cal.App.4th ___ [2005 WL 45047]. On February 4, Division Two filed an order modifying *Kibler* to disagree with *O'Meara* and, as modified, certifying the opinion for publication.

In *Kibler,* a hospital suspended a doctor's staff privileges and sought two "workplace violence" injunctions against him. The suspension and the injunctions were resolved by an agreement that included the doctor's stipulation to a permanent injunction -- but the doctor nevertheless sued the hospital (and individuals involved in the suspension proceedings), alleging seven causes of action for intentional interference with his right to practice his profession, defamation, restraint of trade, and a variety of other torts. The hospital, in turn, filed a special motion to strike (§ 425.16), contending its conduct arose out of an exercise of free speech related to an official proceeding. (*Kibler v. Northern Inyo County Local Hospital District, supra,* ___ Cal.App.4th at p. ___ [Westlaw printout at pp. 1-2].) Over the doctor's opposition, the motion was granted. (*Id.* at p. 3.)

In the portion of the opinion written before it was modified, the *Kibler* court affirmed the order granting the motion, holding that because all of the doctor's causes of action stemmed from his suspension and from the hospital's application for injunctions against him, the action was within the ambit of the anti-SLAPP statute -- because "petitions for injunctions are expressly subject to section 425.16, subdivision (a)(1), as judicial proceedings and official proceedings . . . ." (*Kibler v. Northern Inyo County Local Hospital District, supra,* ___ Cal.App.4th at p. ___ [Westlaw printout at pp. 3-4].) The court rejected the doctor's contention that the suspension proceeding was confidential and thus not "official" within the meaning of section 425.16, and rather summarily concluded that "an issue concerning public health care has public significance," thus triggering the anti-SLAPP statute. (*Id.* at p. 4.)

The order modifying *Kibler* adds this: "We note that Division One of our Fourth Appellate District has recently rendered an opinion in which it reaches a result contrary to our opinion in this case. The facts in that case are similar to those in this case insofar as the plaintiff sued a medical peer review committee, alleging that the committee improperly investigated some of his actions and placed him on probation. Division One denied a medical committee's SLAPP motion, finding that the proceedings by the hospital peer review committee did not constitute an 'official proceeding' under . . . section 425.16, subdivision (e)(1) and that the medical review committee action was not conduct in furtherance of the constitutional right of free speech in connection with an issue of public interest under . . . section 425.16, subdivision (e)(4).

"We disagree with those conclusions. Business and Professions Code section 809, subdivision (a)(3) observes that 'Peer review, fairly conducted, is

essential to preserv[e] the highest standards of medical practice.' Subdivision (a)(6) observes that it is the policy of the State of California to protect the health and welfare of the people of California, through the peer review mechanism. Business and Professions Code, section 805, subdivision (1)(A) defines a peer review body to include the medical or professional staff of any properly licensed health care facility.

"We conclude, contrary to the *O'Meara* court, that the defendant peer review committee in this case is protected under the anti-SLAPP statute both because its action was an official proceeding clearly authorized by the California Business and Professions Code and because its decision involved a public issue, namely the protection of the health and welfare of the people of California. A contrary conclusion would ignore California's stated purpose to create a mechanism to insure the health of its residents and would dissuade medical and professional staffs of health care facilities or clinics from participating in the peer review process." (*Kibler v. Northern Inyo County Local Hospital District, supra,* ___ Cal.App.4th at p. ___ [Westlaw printout at pp. 5-6, fn. omitted].)

3.

We agree with *O'Meara's* legislative intent analysis and its recognition of the inherently non-public nature of the medical peer review process. With specific reference to our case, we note once again that a claim of unfair competition is at the heart of Dr. Marmureanu's claims against Dr. Laks, and that the UCLA Medical Center and its peer review committee are not parties to this lawsuit. The complaint alleges intentional torts against Dr. Laks personally, not

negligence against an employee of the hospital, and not anything at all against the hospital itself.

C.

Dr. Laks contends that, to the extent Dr. Marmureanu attempts to impose liability on him by reason of his statements to the Medical Center's governing bodies and others, his motion to strike should have been granted. We disagree.

A motion to strike under section 425.16 must be directed at an entire cause of action, not at isolated allegations. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.) Here, the substance of Dr. Marmureanu's causes of action -- unfair competition, restraint of trade, tortious interference with contract, and tortious interference with the right to practice a profession -- is his claim that Dr. Laks was trying to force Dr. Marmureanu out of the Medical Center to avoid the competition. The fact that part of Dr. Laks's conduct might have been protected by the First Amendment is immaterial. (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 631-632; *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188; *Globetrotter Software v. Elan Computer Group* (N.D. Cal. 1999) 63 F.Supp.2d 1127, 1130.) Because the substance of the causes of action at issue is not based on an exercise of free speech, the fact that some of the matters at issue were of interest to the public (such as managed care) is immaterial. (*Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th 1106; *O'Meara v. Palomar-Pomerado Health System, supra,* 23 Cal.Rptr.3d at pp. 411-414.)

D.

Our conclusion that Dr. Marmureanu's claims do not trigger the anti-SLAPP statute makes it unnecessary to consider Dr. Laks's other contentions.

DISPOSITION

The order is affirmed. Dr. Marmureanu is entitled to his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

MALLANO, J.