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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

HRAYR SHAHINIAN, Plaintiff and Respondent, v. MARTIN WEISS et al., Defendants and Appellants.	B170016 (Los Angeles County Super. Ct. No. BC288530)

APPEAL from an order of the Superior Court of Los Angeles County, John P. Shook, Judge. Affirmed.

Paul, Hastings, Janofsky & Walker, J. Al Latham, Jr., and Patricia M. Berry for Defendants and Appellants.

Baker, Keener & Nahra, Robert C. Baker, Phillip A. Baker, and El Mahdi Young for Plaintiff and Respondent.

I. INTRODUCTION

This action arises out of a firmly held disagreement between two competing doctors, one of whom disputes the other's qualifications to perform brain surgery.

Statements made by defendant, Dr. Martin Weiss, led plaintiff, Dr. Hrayr Shahinian, to file suit for defamation and interference with contractual and economic relationships. Defendants, Dr. Weiss and his employer, the University of Southern California (the university), appeal from an order denying their special motion to strike plaintiff's first amended complaint. (Code Civ. Proc.,[1] § 425.16.) We conclude the special motion to strike has to be denied pursuant to section 425.17, subdivision (c). Accordingly, we affirm the order.

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[1] All further statutory references are to the Code of Civil Procedure except where otherwise noted.

II. BACKGROUND[2]

The events at the root of this action took place in late 1996 and early 1997. Plaintiff is a licensed physician who, in 1996, had been employed by Cedars Sinai Medical Center (Cedars) for five years. Dr. Weiss is a neurosurgeon. Since 1978, he has been the Chairman of the Department of Neurological Surgery at the university's Keck School of Medicine. In 1996, Dr. Weiss was also a: neurosurgery consultant to Cedars; past Chairman of the American Board of Neurological Surgery; past Chairman of the Residency Review Committee for Neurological Surgery; and the Secretary of the American Association of Neurological Surgeons (the association). According to a former president of the association, Dr. J. Charles Rich, the association is a "nationally recognized organization dedicated to advancing the specialty of neurological surgery in order to provide the highest quality of neurosurgical care to the public . . . ."

On November 20, 1996, Dr. Achilles A. Demetriou, the chair of Cedars's surgery department, announced that a Division of Skull Base Surgery had been established at the medical center. Dr. Demetriou further stated plaintiff had been named the director of the new division. The written announcement stated in part: "Dear Colleague, [¶] I am pleased to announce the establishment of the Division of Skull Base Surgery at [Cedars]. . . . [¶] . . . [¶] Hrayr K. Shahinian, M.D., has been named as the director of the Division. Most recently, Dr. Shahinian was the director of the Skull Base Institute at the State University of New York at Stony Brook. [¶] Dr. Shahinian received his medical training at the American University of Beirut and the University of Chicago,

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2 The parties raised evidentiary objections in the trial court. However, the trial court never ruled on those objections. As a result, the objections have been waived. (E.g., *People v. Millwee* (1998) 18 Cal.4th 96, 126; *People v. McPeters* (1992) 2 Cal.4th 1148, 1179; *Goodale v. Thorn* (1926) 199 Cal. 307, 315; *Campbell v. Genshlea* (1919) 180 Cal. 213, 220; see also *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186-1187, fn. 1, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.)

Pritzker Medical School. He completed his residencies in surgery at Vanderbilt University and reconstructive surgery at New York University. His fellowship in skull base surgery was at the University of Zurich, Switzerland, under the direction of Professor Ugo Fisch. Working with Dr. Joseph G. McCarthy, Dr. Shahinian completed a second fellowship in pediatric craniofacial surgery at New York University." Dr. Weiss received a copy of the announcement in his capacity as a neurosurgery consultant at Cedars.

Following Cedars's announcement, Dr. Weiss was contacted by several members of the Los Angeles neurological community: Dr. Martin Cooper, the outgoing neurosurgery chair at Cedars; Dr. Jeffrey Rush, the incoming neurosurgery chair at Cedars; and Dr. Todd Lanman, Clinical Chief of Neurosurgery at Cedars. Drs. Cooper, Rush, and Lanman expressed concern that, as director of Cedars's new Department of Skull Base Surgery, plaintiff would be called on to conduct intradural surgery. Drs. Cooper, Rush, and Lanman believed plaintiff had no prior training or experience in this field. Drs. Cooper, Rush, and Lanman told Dr. Weiss they had expressed their concerns to Dr. Demetriou, but Cedars nevertheless intended to go ahead with its plans. Dr. Rush also contacted Dr. Dan Becker, who apparently was the neurosurgery chair at the University of California at Los Angeles, about "patient safety" questions. On April 10, 1997, Dr. J. Charles Rich, a neurosurgeon and the then association president, after consulting with Dr. Weiss, wrote a letter to Dr. Rush. The April 10, 1997, letter stated that the association shared Dr. Rush's concern for patient welfare in that the Cedars's skull base surgery division would extend privileges for the performance of "intracranial intradural neurosurgery" to individuals who had not graduated from an accredited "neurosurgery residency." Dr. Rich, as president of the association, wrote, "[W]e would encourage you to bring your concerns to the attention of your County and State Medical Societies who have authority to review hospital accreditation policies to assure that patient welfare remains pre-eminent in such policy decisions. We are happy to support your expressions of concern for patient welfare to these oversight agencies."

Copies of Dr. Rich's April 10, 1997, letter were sent to: the Los Angeles County Medical Association; the California Medical Association; the California Association of Neurological Surgeons; the American College of Surgeons; the Joint Commission on Accreditation of Healthcare Organizations; and Dr. Michael L. Langberg, Cedars's medical affairs senior vice president.

In their opening brief on appeal, defendants explain: "[T]he 'skull base' is the lower half of the human skull, where the brain sits. 'Skull base surgery' denotes many procedures, including surgery reaching areas in the innermost part of the skull." Dr. Weiss further explains, "The dura forms a barrier between the skull and the brain." Intradural surgery requires a physician to penetrate that barrier. Simply stated, Drs. Weiss, Rush, Cooper, and Lanman believed that doctors who are not brain surgeons should not perform intradural surgery. Plaintiff, who is not a neurosurgeon, views the matter differently. Plaintiff maintains that he offers an alternative procedure that avoids the invasive treatment advanced by neurosurgeons. Plaintiff describes Dr. Weiss as a competitor whose approaches to surgery differ from his own. Plaintiff's first amended complaint alleges, "The surgeries performed by plaintiff . . . are delicate surgical procedures at the bases of the skull which directly compete with the surgical techniques employed by Dr. . . . Weiss."

Dr. Weiss reviewed information as to plaintiff's appointment. Dr. Weiss reviewed plaintiff's qualifications, including, among other things, a letter from Dr. Ugo Fisch. Dr. Fisch's letter discussed plaintiff's training in Switzerland. Based on this review, Dr. Weiss believed plaintiff was unqualified to conduct intradural surgery. Dr. Weiss believed intradural surgery was a medical procedure that is "exclusively the province of neurosurgeons and a handful of neurotologists." Dr. Weiss stated: "I learned that [p]laintiff[']s accredited fellowship training was in a type of plastic surgery, and his previous experience at Stony Brook Hospital and with Dr. Ugo Fisch in Switzerland failed to reveal that [p]laintiff possessed any hands on clinical intradural surgery training nor had he been credentialed to do intradural neurosurgery by any Department of

Neurosurgery. Moreover, I could find no record of [p]laintiff having completed a residency in neurosurgery or any record of him being board certified in neurosurgery." Dr. Weiss further observed that Cedars's material promoting its new Division of Skull Base Surgery "did not list any neurosurgeons or neuro[]tologists as part of [plaintiff's] staff."

After consulting with Drs. Rush, Cooper, and Lanman, on December 18, 1996, Dr. Weiss sent a letter addressed to Dr. Demetriou—who, as the chairman of Cedars's surgery department, had announced the creation of the Division of Skull Base Surgery. Dr. Weiss expressed, "the concerns of the Southern California neurosurgical community" as to plaintiff's hiring. Dr. Weiss's December 18, 1996, letter raised two principal issues. First, Dr. Weiss believed that to create the Division of Skull Base Surgery within the surgery department without oversight by the Department of Neurosurgery was "unprecedented and dangerous." Second, Dr. Weiss asserted that plaintiff was unqualified to head the new department. This was because, in Dr. Weiss's words, plaintiff had "no recognized neurosurgical training."[3] Copies of Dr. Weiss's December

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[3] Dr. Weiss's December 18, 1996, letter to Dr. Demetriou stated: "Dear Dr. Demetriou: [¶] I read with dismay your announcement of the creation of a Division of Skull Base Surgery at [Cedars] to be headed by [plaintiff]. It is laudable to consider the establishment of a skull base division in a Department of Neurosurgery which we have had at USC for the past seven years and is a common practice in many academic neurosurgical programs throughout the country. For that matter, Dr. Shlomo Melmed, Director of the Division of Endocrinology at Cedars, has spoken with me on several occasions about his desire to develop legitimate skull base surgery at Cedars; and I have offered my assistance with any recruit or programmatic development that your institution wishes to undertake. [¶] My dismay concerns your actions in creating an independent Division of Skull Base Surgery within the Department of Surgery independent from peer review and oversight from the Department of Neurosurgery. This is unprecedented and dangerous!! According to your letter of November 20, 1996, to the staff of [Cedars] (I am a consultant in Neurosurgery to the Medical Center), you have recruited an individual who has no recognized neurosurgical training but is soliciting patients who harbor some of the most complex neurosurgical problems. [¶] Allow me to digress for a moment by way of introduction. I am a past Chairman of the American Board of Neurological Surgery, the immediate past Chairman of the RRC for Neurological Surgery, and

18, 1996, letter to Dr. Demetriou were sent to: Joseph D. Mandel, Vice Chancellor for Legal Affairs at the University of California at Los Angeles; Thomas Priselac, Cedars's president; Dr. Shlomo Melmed, of Cedars's Division of Endocrinology; Dr. Glenn Braunstein, of Cedars's Department of Medicine; Dr. Becker; Dr. Rush; the American Board of Neurological Surgery; and Dr. Steve Uman, "COS" at Cedars. Dr. Weiss also sent copies to Dr. E. Carmack Holmes, the surgery department chair, and Dr. Gerald Levy, the medical school dean, at the University of California at Los Angeles. Copies were sent to Drs. Holmes and Levy because, as Dr. Weiss explained to Dr. Demetriou, full time Cedars directors often had appointments at the University of California at Los Angeles. In addition, Dr. Becker, chair of the University of California at Los Angeles neurosurgery division, told Dr. Weiss that plaintiff had requested an appointment to teach

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presently Secretary of the American Association of Neurological Surgeons in addition to my role as Chairman of Neurosurgery at USC since 1978. Consequently, I believe that I have a broadly based understanding of the requirements necessary to practice complex skull base surgery. [¶] You have appointed an individual to head the Division of Skull Base Surgery who offers no evidence of qualification to do so based upon his educational background. It is my understanding that this was done over the objection of the Department of Neurosurgery, the single most important peer review that would be necessary to establish a legitimate appointment. The letter of support from Professor Fisch dated November 1, 1996, indicates that [plaintiff] had a six month fellowship in Otology and Skull Base Surgery with Professor Fisch in which he 'was not in charge of patients' but did review 72 patients who had been operated upon by Professor Fisch over the previous ten years with parapharyngeal tumors. There is absolutely no indication of technical experience as an independent surgeon as would be required in any training program under ACGME accreditation policies. More importantly, there is no evidence of education in the management of the complex intracranial disorders that constitute skull base surgery including pre and post operative strategies as well as the technical performance of surgical procedures. Neither of the two 'fellowships' to which you refer in your note of November 20, 1996, would be acceptable to the ABNS for certification or to our Department at the University for privileges in intracranial skull base surgery. In truth, this proposal could be considered unethical and perhaps even fraudulent with respect to representation to the lay community! [¶] Since full time Directors at [Cedars] frequently have appointments at UCLA (as you do), I am copying the Chairman of Surgery at UCLA and Dean Levy as well as appropriate individuals at Cedars."

at that school. According to Dr. Weiss, Dr. Becker was opposed to plaintiff's appointment. Dr. Becker asked Dr. Weiss to send copies of the December 18, 1996, letter to specific individuals at the University of California at Los Angeles's medical school.

On December 18, 1996, Robin Prendergast, Cedars's Associate Legal Counsel, immediately sent Dr. Weiss a letter threatening litigation. In addition, Dr. Weiss was asked to retrieve and destroy all copies of his December 18, 1996, letter.[4] In a December 19, 1996, letter, Dr. Weiss set forth a detailed chronology of the information known to him following the appointment. Dr. Weiss, who had consulted with legal counsel, threatened counter-litigation.[5]

Cedars reviewed the process by which the skull base surgery division was created and plaintiff was credentialed as its director. Cedars concluded it was "comfortable" with all of its decisions. In a letter that was apparently mailed to all recipients of Dr. Weiss's December 18, 1996, letter, Thomas F. Zenty, III, Cedars's Senior Vice President, Clinical

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[4] Ms. Prendergast's December 18, 1996, letter stated in part: "I have no personal knowledge of any of the facts set forth in your letter and have been asked to investigate your allegations to determine if there is any basis to them. [¶] Please be advised that should your allegations be untruthful or exaggerated, your publication [of] them to third parties may well constitute slander and we will consult litigation counsel to address our remedies and damages. Accordingly, to the extent possible, please ask your secretary and your mail department to locate and destroy all outside copies of your December 18 letter until we have had an opportunity to investigate this matter."

[5] Dr. Weiss's response to Ms. Prendergast's letter, dated December 19, 1996, stated in part: "I am sending this material to you in the interest of aiding your investigation. I have sought advice of counsel, Mr. Michael Connell of Morrison & Foerster, and he agrees to my submitting this chronology in the interest of aiding you in your investigation although he did not encourage me to do so. However, if, after a thorough and impartial investigation, you seek to harass and intimidate me from exercising my right as a member of the staff at [Cedars] and my responsibility to express concerns about patient care as an academic and elected representative of the neurosurgical community by instituting a frivolous law suit, I will be compelled to institute a suit for malicious prosecution against all parties concerned."

Care Services, and Chief Operating Officer, concluded, "[W]e respectfully request that you not further distribute, discuss or publish your copy of Dr. Weiss['s] letter pending our demand for a retraction and consideration of appropriate action."

Several letters were subsequently exchanged between Dr. Demetriou and Dr. Weiss.[6] In addition, the two physicians met in person. Ultimately, they agreed to disagree about plaintiff's qualifications to head the skull base surgery division. Drs. Rush and Rich also continued to express concern about Cedars's actions.

Several years later, one of plaintiff's patients, Susan Piponniau, consulted with Dr. Weiss concerning a proposed third surgery. Ms. Piponniau testified at her deposition about her consultation with Dr. Weiss: "Q. And what did Dr. Weiss tell you? [¶] A. Oh, what he told me is that Dr. Shahinian is not [a] licensed neurosurgeon. [¶] Do you want more? [¶] Q. Keep going. [¶] A. He said that—he looked at my MRI. I took that with me. And he said that this type of problem—I didn't have to have surgery twice. He

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[6] Dr. Demetriou's initial letter to Dr. Weiss stated: "I am in receipt of your [letter] which you circulated to representatives of UCLA's Department of Surgery, UCLA's School of Medicine, UCLA's Chancellor's office, UCLA's Division of Neurosurgery, the American Board of Neurological Surgery, a former Chief of Staff at [Cedars]. While an academic debate over medical credentials is generally welcome, you have apparently received and published misleading and defamatory information which has a high likelihood of damaging the career of a well-trained, qualified colleague. Additionally, your letter impugns and defames the [Cedars] Department of Surgery and its Division of Skull Base Surgery. [¶] Had your letter stopped at its reference to your opposition to Skull Base Surgery being conducted outside of a Department of Neurosurgery, I would have reacted differently. However, your insinuation that our program is dangerous, that the Director has 'no evidence of qualification . . . based upon his education background' or 'evidence of education in the management of complex intracranial disorders that constitute Skull Base Surgery including pre and post-operative strategies as well as the technical performance of surgical procedures' which you categorize as 'unethical' and 'even fraudulent,' are as offensive and damaging, as they are false. [¶] The review of all of the information in our files overwhelmingly attests to the superior qualifications of the Director of our Division of Skull Base Surgery to perform such operations. . . . Your oral statement to others that [plaintiff] is the subject of malpractice actions, is likewise false." Dr. Demetriou went on to request that, within three days, plaintiff either forward information supporting his concerns or issue a written retraction and apology.

was surprised that I had two times surgery. He says with this type of thing, he treats patients with medication, and they'll go away. He prescribed me the medication that I take now called Dustinex. [¶] . . . [¶] Q. And what else did Dr. Weiss tell you about Dr. Shahinian other than he was not a licensed neurosurgeon? [¶] A. He was surprised that he does the surgery, that he's doing this type of surgery, and he's not registered at medical—I mean, not as a neurosurgeon. [¶] . . . [¶] Q. Did Dr. Weiss indicate to you that the procedures that were performed on you were done incorrectly? [¶] A. No; he didn't say that. But he said that he had similar cases from Dr. Shahinian. In fact, the day that we went there, he had another one from Dr. Shahinian. [¶] . . . [¶] Q. Did Dr. Weiss indicate to you at all that you could sue Dr. Shahinian for having performed those procedures? [¶] A. That I'm—he recommended you mean? No. [¶] Q. Did he suggest that you should file a lawsuit against Dr. Shahinian? [¶] A. Says he would have done it himself if it was him patient. [*Sic*] [¶] Q. Did he recommend to you that you contact an attorney? [¶] A. Yes."

In his declaration filed in support of the section 425.16 motion, Dr. Weiss states: "As to the specific allegations in [p]laintiff's first amended complaint relating to my alleged conversation with Ms. Susan Piponniau, I can only state that I recall that consultation differently, and that [p]laintiffs are relying on the hearsay statements of a 71 year old woman who has had brain surgery by the [p]laintiff that caused a complication (brain hemorrhage) affecting the frontal lobe of her brain where memory is stored. My recollection of my consultation with Ms. Piponniau is that we discussed her medical condition in the context of whether she needed the third surgery [p]laintiff was recommending at that time. My medical opinion was that she did not require the third surgery, and that her condition had never required surgery in the first place. I informed her of this and provided her with a prescription for an oral medication to treat the problem that has worked successfully. Her daughter-in-law, who was also present during the consultation, then asked me 'how this could have happened' and 'what she could do about it.' I told her to seek whatever recourse she deemed appropriate. I cannot claim to

know how she interpreted that comment. My concern during that consultation was for my patient's health and well-being. [¶] [] I do not recall commenting on whether I had seen other patients from [p]laintiff to Ms. Piponniau. In the course of my practice I often see patients for second opinions that have already seen other [d]octors that I know, and I am aware that many of my patients go to other [d]octors for second opinions. If I mentioned that I had other patients from [p]laintiff, that would have been a matter of fact, as I have had several patients of [p]laintiff come to me for second opinions over the years. I would not be surprised if some of my patients have consulted with [p]laintiff as well. [¶] [] Subsequent to that consultation, I received a phone call from Ms. Piponniau's attorney, who inquired regarding my availability to serve as an expert witness for Ms. Piponniau. I informed him that I was a treating physician and that I did not want to get involved in litigation involving my patient. I subsequently spoke with Ms. Piponniau's son about this phone call. During the course of our conversation, he asked me for the name of a [p]laintiff's attorney, as he stated that he had found his attorney by 'looking in the yellow pages.' At his request, I called a friend of mine who does defense work as a medical malpractice attorney and obtained the names of four attorneys, which I then passed on to Ms. Piponniau's son."

Plaintiff was unaware of the above-outlined controversy concerning his appointment as head of Cedars's Division of Skull Base Surgery until December 2002. This was six years after Dr. Weiss wrote the December 18, 1996, letter to Dr. Demetriou. Plaintiff learned of the statements Dr. Weiss had made when documents were produced as part of the discovery process in unrelated litigation. Plaintiff then sued Dr. Weiss and the University of Southern California. The first amended complaint alleges: Dr. Weiss had made and continued to make libelous statements; Dr. Weiss made the libelous statements in an attempt to enhance his own position in the medical community; and Dr. Weiss advised at least one patient to sue plaintiff for medical malpractice. Plaintiff's first amended complaint contains causes of action for: trade libel; slander; intentional and negligent interference with his contractual relations with Cedars; and intentional and

negligent interference with plaintiff's professional and economic relationships with his patients. Each of the statements by Dr. Weiss as alleged in the first amended complaint is incorporated into the various causes of action. Plaintiff seeks compensatory and punitive damages as well as injunctive relief.

Defendants filed a special motion to strike pursuant to section 425.16. Plaintiff opposed the motion. Plaintiff presented evidence he: was qualified to head Cedars's skull base surgery division; was qualified to perform intradural surgery; and had performed such surgery successfully in the past. In addition, plaintiff presented evidence that: he had a clean malpractice record up to the time of his appointment; but following his appointment he was suddenly served with three medical malpractice lawsuits, "all of which contained similar language"; and in September 2002, Cedars advised it was terminating its relationship with plaintiff. There was also evidence, as to which no objection was sustained, that Dr. Weiss was "cooperating" in Cedars's "efforts to remove" plaintiff. Further, there was evidence that plaintiff had "insulted" Dr. Demetriou.

III. DISCUSSION

A. The Law Governing Special Motions to Strike

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Section 425.16 authorizes a court to summarily dismiss such meritless suits. The purpose of the statute is set forth in section 425.16, subdivision (a), 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. . . ." Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . . ," in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.)

Under section 425.17, however, certain actions are exempt from the summary disposition provisions of section 425.16. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 112; *Metcalf v. U-Haul International, Inc.* (2004) 118 Cal.App.4th 1261, 1265.) Section 425.17, subdivision (c), provides in relevant part: "Section 425.16 *does not apply* to any cause of action brought against a person primarily engaged in the business of selling . . . services . . . arising from any statement or conduct by that person if *both* of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about . . . a business competitor's . . . services, that is . . . made in the course of delivering the person's . . . services. [¶] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . ." (Italics added.)

Section 425.17 was enacted in 2003, effective January 1, 2004. (Stats. 2003, ch. 338, § 1, No. 7 West's Cal. Legis. Service, p. 2311; *Physicians Com. for Responsible Medicine v. Tyson Foods* (2004) 119 Cal.App.4th 120, 125.) The Court of Appeal has explained, "[Section 425.17] was intended to curb abuse of [section 425.16] . . . ." (*Physicians Com. for Responsible Medicine v. Tyson Foods, supra,* 119 Cal.App.4th at p. 125; *Mann v. Quality Old Time Service, Inc., supra,* 120 Cal.App.4th at p. 112; *Metcalf v.*

U-Haul International, Inc., supra, 118 Cal.App.4th at p. 1265; *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 687; § 425.17, subd. (a).) Section 425.17 applies retroactively to appeals pending at the time of its enactment, including the present case. (*Physicians Com. for Responsible Medicine v. Tyson Foods, supra,* 119 Cal.App.4th at p. 127; *Metcalf v. U-Haul International, Inc., supra,* 118 Cal.App.4th at pp. 1265-1266; *Brenton v. Metabolife International, Inc., supra,* 116 Cal.App.4th at pp. 688-691; see also *Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 815, fn. 5.)

We conduct independent review of the trial court's ruling on a special motion to strike. (*Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1364, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68, fn. 5; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, disapproved on another point in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.) Moreover, where section 425.17 applies, it provides an independent basis for affirming a trial court order denying a section 425.16 special motion to strike. (*Brenton v. Metabolife International, Inc., supra,* 116 Cal.App.4th at p. 691.)

B. Application to the Present Case

We asked the parties to brief the question whether section 425.17 applies in this case. We conclude that it does. As the Supreme Court recently observed: "The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*People v. Trevino* (2001) 26 Cal.4th 237, 240 []; *People v. Gardeley* (1996) 14 Cal.4th 605, 621 [].) To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. ([*People v.*]*Trevino,* [*supra,* 36 Cal.4th] at p. 241 []; *Trope v. Katz* (1995) 11 Cal.4th 274, 280 [].) When the language of a statute is clear, we need go no further. However, when the language is

susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744 []; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008 [].)" (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.)

1. Dr. Weiss's December 1996 statements are subject to section 425.17, subdivision (c)

Plaintiff alleges in part that in December 1996, Dr. Weiss, a university employee, stated orally and in writing that: "the creation of [the skull base surgery] department was 'unprecedented and dangerous'"; plaintiff was unqualified "to head the Division of Skull Based Surgery based on his educational background"; and "the proposal to create such a department could be considered 'unethical and perhaps even fraudulent with respect to representation to the lay community.'" The first amended complaint also alleges, "[I]n or around this same period of time [, December 1996,] Dr. . . . Weiss made at least one oral statement to individuals that [plaintiff] was the subject of 'malpractice actions.'" The university's liability for Dr. Weiss's alleged conduct is premised on its status as his employer.

With respect to the alleged December 1996 statements, they fall within the confines of each relevant element of section 425.17, subdivision (c). First, plaintiff's causes of action are brought against Dr. Weiss, a university employee and a person primarily engaged in the business of providing, i.e., "selling [medical] services" within the meaning of section 425.17, subdivision (c). Second, plaintiff's causes of action arise from Dr. Weiss's alleged "statement[s] or conduct" as those words appear in section 425.17, subdivision (c)(1). Third, Dr. Weiss's alleged statements consisted of "representations of fact" about a "business competitor's . . . services." These

representations included: creation of the skull base surgery division was unprecedented and dangerous; its operation could be considered unethical or even fraudulent; there was no evidence plaintiff was qualified to head the division based on his educational background; and plaintiff was the subject of malpractice actions. These representations are about "services" provided by plaintiff, a competitor of Dr. Weiss, within the meaning of section 425.17, subdivision (c)(1). Fourth, these statements were "made in the course of delivering [Dr. Weiss's] services." (§ 425.17, subd. (c)(1).) Dr. Weiss, a university employee, wrote to Dr. Demetriou and spoke to others. Dr Weiss did so in his capacity as: a concerned neurosurgeon; a neurosurgery consultant to Cedars; and secretary of the American Association of Neurological Surgeons. Fifth, the intended audience—Dr. Demetriou, neurosurgeons, and related medical professionals in the Los Angeles community—were likely to influence actual or potential buyers or customers of skull base surgery. (§ 425.17, subd. (c)(2).) Therefore, the statements at issue fall under section 425.17, subdivision (c), and the causes of action based thereon are exempt from the provisions of section 425.16.

There is no merit to defendants' argument that they are not "primarily engaged in . . . business" within the meaning of section 425.17, subdivision (c). As to Dr. Weiss, he treats patients and is paid for the services he provides. The issue is closer though as to the university. In fact, as to the university, the issue is very close. The issue in this case involves the university as a health care provider. The university, which is affiliated with other hospitals, is a major health care provider that profits from its world renowned research and patient care. The university's liability in this case is based on the fact it employs Dr. Weiss. The university normally charges money for the medical services it provides. The bottom line is this, if the university spends more money than it takes in, it will go out of business. When it provides medical care and charges money for it, the university is "primarily engaged in . . . business" within the meaning of section 425.17, subdivision (c).

2. Dr. Weiss's statements to a patient

Plaintiff alleges in part: "In or about 2001, Dr. Martin Weiss advised Susan Piponniau that he had other patients which he had seen following surgery with [plaintiff]. Dr. Martin Weiss advised Ms. Piponniau to file a lawsuit against [plaintiff] and stated that he would have done it himself. Dr. Martin Weiss even went further in that he recommended that Ms. Piponniau contact an attorney. Plaintiff believes that Dr. Weiss likely made similar statements to other patients regarding [plaintiff]." As noted above, the alleged liability of the university for Dr. Weiss's alleged conduct is premised solely on its status as his employer.

To the extent plaintiff's causes of action are premised on the allegation Dr. Weiss advised Ms. Piponniau to sue plaintiff, the claim is exempt under section 425.17, subdivision (c) from the provisions of section 425.16. First, as noted previously, the cause of action is brought against Dr. Weiss, a person primarily engaged in the business of selling medical services. (§ 425.17, subd. (c).) Second, the claim arises from "statement[s]" as that term is used in section 425.17, subdivision (c), made by Dr. Weiss. Third, the statements consist of "representations of fact" about "services" provided by plaintiff, a "business competitor[]" of Dr. Weiss. (§ 425.17, subd. (c)(1).) These representations included: plaintiff was not a licensed neurosurgeon; Ms. Piponniau did not need the two prior surgeries; Dr. Weiss was surprised plaintiff was performing this type of surgery; Dr Weiss's surprise arose because plaintiff was not a neurosurgeon; Dr. Weiss had seen similar cases involving plaintiff; if Dr. Weiss were the patient, he would file suit; and Ms. Piponniau should contact an attorney. These statements collectively were made about plaintiff's "services" as that term is used in section 425.17, subdivision (c)(1). Fifth, the statements were made by Dr. Weiss in the course of delivering his medical services to Ms. Piponniau. (§ 452.17, subd. (c)(2).) Sixth, the intended audience, Ms. Piponniau, was an actual buyer or customer. (§ 425.17, subd. (c)(2).)

C. Defendant's Commercial Speech Argument

Defendants assert section 425.17 is inapplicable to the present case; it was enacted in response to *corporate* defendants' abuse of section 425.16—bringing meritless section 425.16 motions as a litigation weapon—and was intended to make actions involving *pure commercial speech* not subject to section 425.16 special motions to strike. The Supreme Court has held that even when the language of a statute is clear, its literal meaning must be in accord with its purpose. As our Supreme Court noted in *Lakin* v. *Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659: "We are not prohibited 'from determining whether the literal meaning of a statute comports with its purpose . . . . [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the [statute] . . . .'" In *Lungren* v. *Deukmejian* (1988) 45 Cal.3d 727, 735, our Supreme Court added: "The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.]" The Supreme Court has held: "'The courts must give statutes a reasonable construction which conforms to the apparent purpose and intention of the lawmakers.' (*Clean Air Constituency* v. *California State Air Resources Bd.* (1974) 11 Cal.3d 801, 813 [].)" (*Webster* v. *Superior Court* (1988) 46 Cal.3d 338, 344.) As discussed above, we find the statutory language supports application of section 425.17, subdivision (c) to the facts of this case. We turn to the question whether our construction of section 425.17, subdivision (c) is in accord with the Legislature's purpose and intent.

Application of section 425.17, subdivision (c) to this case contravenes no legislative intentions. Section 425.17, subdivision (a) states: "The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16." The Legislative Counsel's Digest of Senate Bill No. 515, passed during the 2003-2004 regular legislative session, states, "This bill would provide that certain actions are not subject to a special motion to strike, as specified . . . ." (Legis. Counsel's Dig., Sen. Bill No. 515, No. 7 West's Cal. Legis. Service (2003-2004 Reg. Sess.) ch. 338, p. 2310.) Needless to note, the foregoing express findings do not support defendants' contention that application of section 425.17, subdivision (c) to them is contrary to the apparent legislative intent.

Rather, defendants ask us to infer such an intent and cite to: a statement in a committee report that the Consumer Attorneys of California desired to stop corporate abuse of section 425.16 (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 4); a statement by a University of Denver professor complaining that section 425.16 had been abused by corporations (*id*. at p. 6); an expressed desire by the Consumer Attorney of California to overturn the holding of *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 565-566. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 8); and language in a committee report distinguishing between commercial activity and a person opposing the building of a waste treatment facility. (*Id*. at pp. 9-10.) The application of section 425.17, subdivision (c) to defendants does not contravene any legislative intentions expressed in these reports.

As noted previously, defendants are involved in commercial activities. Moreover, the Legislative Counsel's Digest and section 425.17, subdivision (a) never indicate the Legislature's concern as to the misuse of section 425.16 was limited to corporations. Further, the language of section 425.17, subdivision (c) applies to defendants. The best indicator of legislative intent is the language appearing in a statute. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1253; *People v. Farell* (2002) 28 Cal.4th 381, 386.)

Moreover, section 425.17, subdivision (d)[7] lists a series of exceptions to the statute. Defendants are not in any of the express exceptions the Legislature intended to exclude from the scope of section 425.17, subdivision (c). As a result, there is no merit to defendants' contention that the application of section 425.17, subdivision (c) to them violates any legislative purpose.

IV. DISPOSITION

The order denying the special motion to strike brought by defendants, Dr. Martin Weiss and the University of Southern California, is affirmed. Plaintiff, Dr. Hrayr Shahinian, is to recover his costs on appeal jointly and severally from defendants.

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[7] Section 425.17, subdivision (d) states: "Subdivisions (b) and (c) do not apply to any of the following: [¶] (1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public. [¶] (2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation. [¶] (3) Any nonprofit organization that receives more than 50

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TURNER, P.J.

I concur:

ARMSTRONG, J.

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percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered."

MOSK, J., Concurring.

I concur.

Code of Civil Procedure section 425.17,[1] subdivision (c) provides that "Section 425.16 does not apply to any cause of action brought against a person *primarily* engaged in the business of selling or leasing goods or services. . . ." (Italics added.) The burden of establishing that the "cause of action [is] brought against a person primarily engaged in the business of selling or leasing goods or services . . . arising from any statement or conduct by that person" (§ 425.17, subd. (c)) is on the party bringing the motion. This is because the moving party must establish that section 425.16 applies, and section 425.17 is in effect an amendment of section 425.16, limiting the scope of the latter statute. (See, e.g., *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 689-690 (*Brenton*) ["Section 425.17 does nothing more than amend section 425.16 to except certain claims from applicability of the statutorily conferred remedy of the screening mechanism provided by section 425.16"].) Section 425.16, which gives a defendant a "procedural mechanism" to enforce a right to be free of "meritless lawsuits," (*Brenton, supra,* 116 Cal.App.4th at p. 691, fn. 6) sets forth certain requirements to qualify for its application. Section 425.17 added further requirements. Thus, a party invoking section 425.16 must establish the requirements set forth in sections 425.16 and 425.17.

Even if a plaintiff must at least point to or submit facts suggesting that section 425.17 applies, thereby requiring a defendant to establish that the section does not apply in order to prevail, from the material in the record, there is evidence from which one could conclude the defendants are engaged primarily in the business of selling services.

That the University of Southern California and its hospital may be nonprofit institutions does not mean they are not engaged in the business of selling services. There

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

is evidence that Dr. Weiss engages in neurosurgery. His curriculum vitae shows that he is affiliated with a number of hospitals and is part of a medical group. He sees patients. Thus, defendants did not establish that they were not primarily engaged in the business of selling services.

Although section 425.17 removes "one procedural mechanism" for the defendants' right to be free of what they consider to be "meritless lawsuits" (*Brenton, supra,* 116 Cal.App.4th at p. 691, fn. 6), they still have other procedures or remedies available to enforce any such right.

MOSK, J.