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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

MICHAEL MARTINUCCI, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP et al., Defendants and Appellants.	B215453 (Los Angeles County Super. Ct. No. BC365398)

APPEAL from orders of the Superior Court of Los Angeles County. Mary Thornton House, Judge. Affirmed in part and reversed in part.

Charles T. Mathews & Assoc., Charles T. Mathews; The Rager Law Firm, Jeffrey A. Rager; Law Offices of Roxanne Huddleston and Roxanne Huddleston for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Ashfaq G. Chowdhury; Morrison & Foerster, Miriam A. Vogel and Linda E. Shostak for Defendants and Appellants.

Plaintiff Michael Martinucci, M.D., was employed by defendant Southern California Permanente Medical Group (SCPMG).[1] After SCPMG asked plaintiff to resign, plaintiff filed the instant action against defendants SCPMG, KFHP, Keith Terasaki, M.D. (Terasaki), who was the head of SCPMG's radiology department, and Don Bruzzi (Bruzzi), SCPMG's human resource risk manager. Following a three-week jury trial on plaintiff's claims for defamation per se and retaliatory termination in violation of public policy and Business and Professions Code section 2056,[2] the jury returned a verdict in favor of plaintiff, awarding substantial compensatory and punitive damages. Defendants filed a motion for judgment notwithstanding the verdict (JNOV) and a motion for a new trial.

The trial court granted defendants' motion for JNOV on the issue of punitive damages and granted defendants' motion for a new trial on the defamation and wrongful termination claims. Plaintiff appeals these trial court orders. Defendants appeal the trial court's order denying JNOV on all issues other than punitive damages.

We reverse the trial court's order denying defendants' motion for JNOV on plaintiff's defamation cause of action; defendants were entitled to judgment on this cause of action. In all other respects, we affirm the trial court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

The Operative Pleading

Plaintiff initiated this action on January 29, 2007. According to his first amended complaint (FAC), plaintiff, a licensed radiologist, entered into an employment contract

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[1] Later in this opinion, we address the question of whether plaintiff was employed by SCPMG and Kaiser Foundation Health Plan, Inc. (KFHP) pursuant to the single employer doctrine. (See, e.g., *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727 (*Laird*).)

[2] All further statutory references are to the Business and Professions Code unless otherwise indicated.

with SCPMG[3] on January 31, 2003; he began working at the Kaiser Sunset location. After entering into the contract, pursuant to defendants' request, plaintiff created protocols in the "Ultrasound, Computerized tomography, and Gastrointestinal subsections of the Radiology Department." Despite his attempt to raise the level of excellence at the medical facility, plaintiff's "efforts were met with resistance, complaints, passive aggressive negative behavior, limited support and resentment. Additionally, [p]laintiff discovered that there was a long-standing history of racial and ethnic tension in some of [SCPMG and KFHP's] departments," including the Diagnostic Imaging department.

According to plaintiff, "in the course of performing his duties and in order to ensure the highest standards for patient care, [p]laintiff demanded that the technology staff and clerks in his department devote full and complete attention to detail when performing patient examinations and other procedures and work speedily and efficiently to deliver quality patient care. In seeking to ensure that high standards of patient care were maintained[, p]laintiff alienated many of the supporting personnel and staff who resented being held accountable for their conduct." Eventually, on June 1, 2005, plaintiff was compelled to write up a number of the technologists for unsatisfactory performance.

"Thereafter, the technologists and other support staff began complaining about [p]laintiff to the corporate defendants. The corporate defendants, upset that [p]laintiff refused to hazard patient health, used the complaints of [the] technologists and other staff to help create a justification to either force [p]laintiff to resign or terminate [his] employment[,] barring him from 'partnership' and the benefits of his bargain under the contract."

In particular, Gary Bernard Golden (Golden) "falsely claimed that [p]laintiff had sexually harassed him in a formal complaint to the corporate defendants' human resources department. Thereafter the KFHP human resources department conducted an 'investigation' during which several technologists and staff allegedly claimed that [p]laintiff had made racially insensitive comments."

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3 Plaintiff alleges that KFHP and SCPMG "were joint and single employers."

Although there was an investigation, defendants "refused to tell [p]laintiff who the accusers were and denied him any fair opportunity to respond to these charges."

On February 3, 2006, defendants "demanded that [p]laintiff resign or be fired." He resigned on February 6, 2006.

His FAC alleges claims for retaliatory termination in violation of public policy (based upon section 2056), retaliation in violation of section 2056, retaliatory harassment in violation of public policy (based upon section 2056), retaliatory failure to promote in violation of public policy and section 2056, defamation per se, breach of contract, and breach of the implied covenant of good faith and fair dealing. Specifically, in the retaliatory termination cause of action, plaintiff alleges that his constructive termination constitutes "retaliation for patient advocacy . . . in violation of . . . section 2056." And, "a motivating factor in his termination was his patient advocacy." In the defamation per se cause of action, plaintiff claims that defendants "falsely accused [him] of homosexual harassment and making racially offensive remarks. In attributing homosexual behavior and racial intolerance to [p]laintiff, [d]efendants did so with knowledge that these claims were false and that they would hold [p]laintiff up to ridicule and scorn, and would tend to injure him in his reputation, profession and career. These remarks therefore constitute defamation per se."

Plaintiff requested compensatory economic damages and noneconomic damages as well as punitive damages.

Trial

A jury trial commenced on November 12, 2008, on plaintiff's claims for retaliation (against SCPMG and KFHP) and defamation per se (against all defendants).[4] The parties presented conflicting stories and theories regarding what led to plaintiff's resignation. According to plaintiff, he worked in an environment filled with racial

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[4] Plaintiff dismissed his four retaliation claims against Terasaki and Bruzzi and his breach of contract and breach of the implied covenant of good faith and fair dealing causes of action before trial.

tension. Because he was enforcing performance protocols (necessary to protect and ensure proper patient care), he became the victim of a conspiracy among African-American radiology technologists who were unhappy with his enforcement of the protocols. Plaintiff theorized that the technologists concocted a false claim of sexual and racial harassment against him in order to get him fired. Defendants, on the other hand, contended that the claims of sexual and racial harassment were confirmed after a thorough investigation, and termination of plaintiff's employment relationship with SCPMG was the only just and appropriate result.

The evidence presented at trial included the following:

1. Plaintiff establishes protocols; technologists resist them

After commencing his employment at SCPMG, plaintiff established critical protocols[5] in the radiology department. All persons working in the radiology department were expected to meet or exceed the established protocols.

The technologists, however, resisted plaintiff's protocols.[6] So, plaintiff began giving lectures on how to comply and why compliance was important. Despite plaintiff's lectures, he still faced "persistent resistance" from the technologists. He spoke with administration and was instructed to try talking to technologists to get them to comply. When that did not work, he began documenting—or writing up—individual technologists' noncompliance and poor performance. He criticized their work performance because he wanted to provide quality patient care. Plaintiff testified: "It had 100 percent to do with patient advocacy and patient care and making sure the patients weren't harmed and we were doing everything in our power to give them everything they needed."

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[5] The protocols are used to standardize the radiology images and improve patient care.

[6] There was evidence that plaintiff's efforts to enforce adherence to the protocols were at times so abrasive and demanding that some technologists complained.

Specifically, plaintiff "wrote up" Cynthia Toni Bowen (Bowen), a technologist, for her failure to comply with protocols. Plaintiff's complaints about Bowen went to her supervisor, Cynthia L. Payne (Payne).

According to plaintiff, documenting the technologists' poor performance "only created more passive-aggressive behavior or resistance by the techs to—they would either go to other physicians to show cases or they would make inappropriate comments." The technologists did not like being written up or criticized for their work.

2. Racial tension

In addition to the problems with the protocols, there apparently was racial tension at Kaiser Sunset. As a result, in the summer of 2005, defendants contracted with an outside consulting team, the Visions group, to conduct a study of racial and ethnic relations in the facility. The report noted that there was a "culture of blaming others for inefficiency in performance and workflow problems based on rank in the hierarchy and/or racial ethnic group membership." According to plaintiff, the Visions report empowered employees to use charges of racism as a weapon.

3. Investigation in charges of sexual harassment

In October 2005, a KFHP human resource consultant (Marsha Niles) notified Bruzzi of a complaint that plaintiff had sexually harassed Golden. Ms. Niles had heard of the alleged sexual harassment from Bowen and Payne, both of whom are African-American.

Bruzzi did not discuss the matter with Golden. He turned the investigation over to Kelly Torley (Torley), who worked in KFHP's human resources department.

Torley explained how an investigation is conducted. The accused is not allowed to consult an attorney, but the investigator may consult an attorney as necessary. The investigator is allowed to interview witnesses; the accused is not. The investigator does not ask the accused for the names of witnesses who could substantiate his version of the incident, but the accused may volunteer the names of witnesses. The investigator starts with the accuser, who gives other names of witnesses who are interviewed, but the investigator does not interview anyone other than those whose names are given in this

chain. The investigator tests the motives of the accusers by asking what their relationship with the accused is. The accused is not allowed to know the names of the accuser or witnesses, although plaintiff was told that Golden was the alleged victim of the sexual harassment.

In the course of this investigation, Torley interviewed Bowen, Payne, and others about the alleged sexual harassment charges. She never spoke with Golden because he was on medical leave.[7] Golden, on the other hand, testified that he did speak to Torley. Notably, Golden was unable to identify plaintiff at trial.

4. Allegations of racial and ethnic slurs

While the sexual harassment investigation was pending, plaintiff was then accused of making racial and ethnic slurs.

5. Torley's conclusion

At the conclusion of her investigation, Torley concluded that the evidence substantiated the charges of sexual and racial harassment by plaintiff. Although plaintiff insisted that he had not engaged in any inappropriate behavior, Torley did not find him credible.

6. Follow-up with plaintiff

In late December, plaintiff met with Torley to discuss the alleged racial and ethnic slurs. Later, in January 2006, plaintiff met with Bruzzi and Terasaki and denied making the statements.

After the meeting, plaintiff sent a memorandum to Bruzzi asking him to interview certain witnesses. He reminded Bruzzi of the Visions report, confirming a long history of racial and ethnic tensions in the department. And, he explained that he had created protocols that were met with "'resistance, complaints, passive-aggressive behavior, poor support and resentment.'" In other words, plaintiff was suggesting that he was a "target and/or a scapegoat" and someone may have been "out to get [him]."

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[7] She wrote to him, but he never responded.

7. Plaintiff resigns

Terasaki and Bruzzi had a discussion regarding the reports about plaintiff and, after consulting with SCPMG's senior counsel, Bruzzi recommended that plaintiff's employment be terminated. Bruzzi prepared two drafts of a termination memorandum, which were to be used if plaintiff did not resign. They were not used because plaintiff signed a resignation letter.

Jury Instructions

Following the presentation of evidence, the trial court instructed the jury. As is relevant to this appeal, the trial court gave the following instructions on plaintiff's wrongful termination cause of action:

"[Plaintiff] claims he was constructively discharged and/or not promoted for reasons that violate a public policy. To establish this claim, [plaintiff] must prove all of the following:

"1. That [plaintiff] was employed by [SCPMG].

"2. That [SCPMG] constructively discharged or failed to promote [plaintiff].

"3. That [plaintiff's] advocacy for medically appropriate healthcare was a motivating reason for [plaintiff's] constructive discharge and/or the failure to promote.

"And 4. That the constructive discharge and/or failure to promote him caused [plaintiff] harm.

"A motivating factor is something that moves the will and induces the action even though other matters may have contributed to the taking of the action.

"It is the public policy of the State of California that a physician, surgeon be encouraged to advocate for medically appropriate healthcare for his or her patients. . . . [¶] . . . For purposes of this section [section 2056], to advocate for medically appropriate healthcare means to protest a decision, policy or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate healthcare to his or her patients.

"The application and rendering by any person of a decision to terminate an employment or other contractual relationship with or otherwise penalized a physician and surgeon principally for advocating for medically appropriate healthcare consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care violates the public policy of this state.

"No person shall terminate, retaliate against or otherwise penalize a physician, surgeon for that advocacy. Nor shall any person prohibit, restrict or in any way discourage a physician and surgeon from communicating to a patient information in furtherance of medically appropriate healthcare."

Verdict

On December 8, 2008, the jury returned a verdict in favor of plaintiff. It found that SCPMG, KFHP, Terasaki, and Bruzzi made eight statements about plaintiff that were not substantially true, including (1) plaintiff inappropriately touched Golden; (2) plaintiff's behavior towards Golden and Monica Amantia was in violation of SCPMG's commitment to a harassment-free work environment; (3) plaintiff is a liability to the organization; (4) the results of an investigation into plaintiff's conduct brought into question his ability to continue to perform his duties as a physician for SCPMG; (5) plaintiff said he did not like it when African-Americans dyed their hair certain colors, and that if he were partner or chief, he would put a stop to it; (6) plaintiff said he would fire all the black people in the department; (7) plaintiff said that Filipinos are as dumb as a box of rocks; and (8) plaintiff said that El Salvadorans have nice legs but are not that smart. The jury also found that SCPMG, KFHP, Terasaki, and Bruzzi failed to use reasonable care to determine the truth or falsity of those statements. And, the jury determined that SCPMG, KFHP, Terasaki, and Bruzzi acted with hatred or ill will towards plaintiff.

The jury next found that plaintiff was employed by SCPMG, that plaintiff was constructively discharged from his employment, that plaintiff was denied a promotion at his employment, that plaintiff protested a decision, policy, or practice of SCPMG that he reasonably believed impaired his ability to provide medically appropriate health care to

his patients, and his "advocacy for medically appropriate healthcare on behalf of his patients [was] a motivating factor for a decision to" constructively discharge him from his employment and to deny him a promotion.

The jury awarded plaintiff damages against SCPMG, KFHP, Terasaki, and Bruzzi for past loss of earnings ($485,444), future loss of earnings in its present cash value ($636,115), past noneconomic loss ($720,000), and future noneconomic loss ($2,100,000), for a total of $3,941,559.

In connection with punitive damages, the jury found that SCPMG and KFHP were a single employer of plaintiff and awarded plaintiff $1.1 million against SCPMG and $6.4 million against KFHP.

Defendants' Motion for JNOV

1. Defendants' motion

Defendants promptly filed a motion for JNOV. First, they argued that plaintiff did not establish defamation per se because he did not prove that defendants made statements suggesting that plaintiff was incompetent or unable to do his job. Alternatively, the common interest privilege applies. After all, the alleged comments were made in the course of a required investigation into the complaints of sexual and racial harassment.

Next, defendants asserted that plaintiff failed to establish his claims for wrongful discharge or wrongful failure to promote in violation of section 2056. Relying upon *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32 (*Khajavi*), they claimed that there was no evidence that plaintiff ever protested a decision, policy, or practice that he reasonably believed impaired his ability to provide medically appropriate healthcare to his patients.

Citing section 2056, subdivision (c), and *Sarka v. Regents of University of California* (2006) 146 Cal.App.4th 261, 271 (*Sarka*), defendants argued that plaintiff could not prevail because he did not present evidence that he was fired *principally* for advocating medically appropriate healthcare. "Rather, undisputed evidence shows that the sole bases for [plaintiff's] termination were the allegations of sexual harassment and racially inappropriate statements."

Compounding this error, defendants asserted, was the erroneous instruction given to the jury. "Instead of telling the jurors that section 2056 prohibits termination of a physician '***principally*** for advocating for medically appropriate health care,' CACI 2430 instructed them that [plaintiff] could prevail on this claim merely by proving that his 'advocacy for medically appropriate healthcare was ***a motivating reason***' for his termination. . . . Although the word 'principally' is buried in the middle of a later instruction regarding section 2056, it was never stated as an element of [plaintiff's] claim, leaving the jury with fatally flawed instructions."

Defendants further contended that plaintiff's single employer theory failed; KFHP and SCPMG were not a single employer. While there was some overlap in employment decisions, it was undisputed that SCPMG was plaintiff's sole employer.

Finally, defendants argued that plaintiff's claim for punitive damages should have failed as a matter of law. He presented no evidence of malice, oppression, or fraud, and there was no evidence of corporate ratification.

2. Plaintiff's opposition

Plaintiff opposed defendants' motion. First plaintiff argued that the evidence established numerous defamatory statements. In support, plaintiff directed the trial court to the jury's finding that defendants falsely stated that the results of an investigation brought plaintiff's ability to continue to perform his duties as a physician into question. Plaintiff also asserted defendants mischaracterized Civil Code section 46, subdivision (3). That "statute is not limited to statements which explicitly accuse the plaintiff [of] being incompetent. It covers any false statement made by the defendant which '[t]ends directly to injure [the plaintiff] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profits.'"

Plaintiff next asserted that defendants' malice prevented application of the common interest privilege. The jury found malice and found that defendants acted in

reckless disregard of the truth. It follows that the common interest privilege cannot apply.

Thereafter, plaintiff argued that the evidence supported the jury's finding that plaintiff engaged in patient advocacy and was fired for it.

Next plaintiff asserted that the evidence supported the jury's finding that SCPMG and KFHP were plaintiff's single employer.

Finally, plaintiff defended the punitive damages award.

3. Trial court order

On March 16, 2009, the trial court granted defendants' motion for JNOV "with respect to the punitive damages award; alternatively, in the event that the JNOV does not withstand appeal, the court grants a new trial on the issue of punitive damages." The trial court found that plaintiff did not meet his burden in demonstrating that defendants acted with malice, fraud, or oppression.

Defendants' Motion for New Trial

1. Defendants' motion

Defendants also filed a motion for new trial, which largely repeated or incorporated by reference their motion for JNOV. Again they argued that plaintiff should not have prevailed on his defamation per se claim because the statements at issue were nonactionable opinions or statements of true fact and/or the common interest applied. As for plaintiff's claim pursuant to section 2056, defendants asserted that plaintiff did not present sufficient evidence that he advocated for medically appropriate healthcare, there was no evidence of any SCPMG decision, policy, or practice to allow technologists to disregard the protocols, and there was no evidence that plaintiff was fired for "'principally'" protesting anything.

In a single sentence, defendants contended that plaintiff's single employer theory was insufficient.

Furthermore, defendants challenged the damage award. With respect to loss of earnings and noneconomic damage, defendants claimed that the award was excessive. As for punitive damages, defendants argued that (1) there was no evidence of malice,

oppression, or fraud; (2) there was no evidence of corporate ratification; (3) punitive damages could not be imposed against KFHP vicariously or as a single employer along with SCPMG; and (4) the punitive damage award was excessive.

Finally, as in defendants' motion for JNOV, defendants contended that the trial court committed reversible error in its instruction regarding section 2056.

2. Plaintiff's opposition

Plaintiff opposed defendants' motion. As pertains to this appeal, he argued that substantial evidence supported the jury's finding that defendants committed nonprivileged defamation per se. Not only were the statements not protected opinion, but they also were not privileged as there was ample evidence of malice.

Second, plaintiff asserted that the loss of earnings award was not excessive. After all, "[t]he jury accepted uncontradicted expert testimony establishing [that] the wrongful termination deprived [plaintiff] of a highly valuable partnership pension and benefits. It was not clearly wrong in doing so; thus, the award for loss of earnings should be left untouched."

Third, plaintiff defended the noneconomic damage award, arguing that it was not excessive based upon plaintiff's testimony and the testimony of plaintiff's psychologist.

Fourth, plaintiff contended that the punitive damage award was proper because it was at the lowest end of constitutional limits and because defendants' conduct was highly reprehensible.

Fifth, plaintiff asserted that the trial court correctly instructed the jury on section 2056. He claimed that there "is no authority for [the] proposition" that the trial court was "obligated to use the term 'principally' in instructing the jury." Moreover, the trial court gave a specific special instruction regarding section 2056.

With respect to the question of whether plaintiff engaged in patient advocacy and was fired because of his actions, plaintiff's single employer theory, and the question of whether plaintiff is entitled to punitive damages, plaintiff's opposition to the motion for new trial incorporated by reference his opposition to defendants' motion for JNOV.

3. Trial court order

On March 16, 2009, the trial court granted defendants' motion for new trial on the following grounds: "excessive damages, insufficiency of the evidence to justify the verdict or other decision, and error in law, occurring at the trial and excepted to by the parties making the application."

First, the trial court found that it committed instructional error in connection with plaintiff's section 2056 cause of action. "Specifically, the modified CACI 2430 and BAJI 12.01.1 used the words 'motivating reason,' instead of 'principally for,' as delineated in the statute itself. There was a Special Instruction Regarding Business and Professions Code Section 2056 that did not contain the word 'principally' in its last paragraph. However, the combination of the instructions—preceding this Special in conjunction with the verdict form interrogatories that asked whether patient advocacy was a 'motivating factor' for termination of the plaintiff—created error sufficient enough to warrant a new trial."

In so ruling, the trial court granted defendants' request for judicial notice of the legislative history behind section 2056. "That history is critical to this court's determination that the instruction given in this matter regarding wrongful termination in violation of public policy for patient advocacy should have used the words primarily or principally. These words, when viewed with the legislative history, constitute more than adjectives; rather, they achieve status as an element of proof and/or a higher degree of proof required of the plaintiff. The language from the legislative history comments is instructive."

Citing *Sarka, supra,* 146 Cal.App.4th at page 275, the trial court continued: "Case law dealing with this code section further emphasizes that in order for the public policy protection of [section] 2056 to kick in, it must be shown that a physician was fired 'principally' for advocating appropriate medical care."

The trial court was persuaded by defendants' argument that the instructions given by the trial court "were fatally flawed because they read the 'principally' standard out of the elements of the cause of action plaintiff ha[d] to prove, and substituted a more lenient

'motivating reason' standard instead." It concluded: "Based upon the state of the evidence in this trial, these instructional errors caused the jury to misapply the law to the facts. When the facts of this case are applied to an instruction that sets the reason for terminating a physician at a lower bar of 'motivating factor,' rather than 'principally for,' a result more favorable to the defendant would have been reached in the absence of that error."

The trial court also found that the evidence was insufficient to sustain a verdict. Applying the standard set forth in Code of Civil Procedure section 657 "in conjunction with the instructional error committed as set forth above, a different verdict or decision clearly could have been reached."

Moreover, the trial court determined that SCPMG did not terminate plaintiff's employment because of his patient advocacy. Citing section 2056, the trial court concluded that "[t]here existed no specific decision or policy that plaintiff pointed to in this trial over which he protested. Plaintiff's own evidence revealed that he was thanked for his hard work, that the protocols were accepted by physicians, and that he had the personal approval of the department head, Dr. Terasaki, with an acknowledgement of his success. . . . Even when asked directly by his counsel, plaintiff failed to articulate that he directly told (i.e., protested to) Dr. Terasaki that there were staff members specifically violating standards of patient care. [¶] Giving all due deference to plaintiff's evidence, it might be said that plaintiff was protesting a policy that permitted substandard work to be performed by technologists. He testified, as did Dr. Radner, that he did not 'feel supported' by Dr. Terasaki when complaints were made about the technologists. In light of the evidence that plaintiff was advised to write up the problems with technologists, advised to continue his quest for improving the quality of radiology studies, but told to do so without alienating the staff, such evidence viewed favorably to plaintiff still fails to rise to the level of a 'protest.'"

Next, the trial court considered the jury verdict on the defamation cause of action. It found that the "evidence was insufficient to prove the requisite malice that would defeat the common-interest privilege espoused in California Civil Code [section] 47

[subdivision (c)(1)]." "Plaintiff cannot and did not contest that defendants were required by law to investigate claims brought to their attention concerning alleged sexual harassment and racial remarks. Indeed, their dispute centered upon the inadequacies of the investigation carried out by [Torley]. [¶] . . . [¶] It is undisputed that defendants received reports of a nature that required them to open an investigation. The investigation was conducted by Human Resources according to their protocols. The investigation involved interviews of doctors, staff, and technologists. Dr. Terasaki and [Bruzzi] received this information in the course of the investigation and learned that all persons interviewed were percipient witnesses to alleged statements and/or actions made by plaintiff. It is undisputed that they did not personally seek out witnesses; rather, after plaintiff learned of the investigation and was interviewed by [Torley], he spoke with his colleagues about the investigation. In turn, they approached Dr. Terasaki, concerned about this development. Further Dr. Terasaki and [Bruzzi] spoke with plaintiff himself about the allegations. Dr. Terasaki testified at trial that following the meeting with plaintiff, he was not of a state of mind to believe the plaintiff. [¶] . . . [¶]

"At oral argument, plaintiff's counsel discussed the large discrepancy between Torley's testimony and [Golden's] regarding whether or not she had interviewed him and what the substance of the information was. Counsel also emphasized that [Golden] never made a complaint. Indeed, the complaint was initially generated by a witness. All of these facts, taken at face value, do not impact the respective duties of defendants nor impact a consideration of the existence of malice.

"They would be required to investigate reports of possible harassment and inappropriate contact, even without a complaining victim. It is recognized that in the workplace, particularly one with various classes of workers, there exists a reluctance for workers to complain directly. [Citation.] Even if it were to be determined that Torley lied about her interview with [Golden], the record of this trial demonstrates that Mr. Golden testified that he was touched from behind, it was not invited or consented to, and that he was so angry, he was afraid he was going to hit [plaintiff].

"While the jury chose not to believe Mr. Golden, issues of malice do not require that Dr. Terasaki and [Bruzzi's] good faith belief be predicated on what a jury may later determine. Whether or not the information provided to them by [Torley] was accurate is beside the point when reckless disregard is evaluated. The question becomes, did they have a reason to disbelieve her? She testified that she had conducted numerous investigations for SCPMG and Kaiser as well as while in the Navy. The report, on its face, reflects that most all witnesses were interviewed, including plaintiff. Further, Dr. Terasaki sat in on some of the interviews and judged the efficacy of the information first-hand and also[,] he, with Mr. Bruzzi, spoke with plaintiff. It simply cannot be said that evidence existed to show that they acted in reckless disregard for the truth."

Finally, the trial court granted a new trial on damages.

Appeal and Cross-Appeal

Plaintiff timely appealed from the trial court's order granting defendants' motion for JNOV on the issue of punitive damages and the order granting defendants' motion for a new trial. Defendants timely appealed the trial court's order denying the remainder of their motion for JNOV.

DISCUSSION

Plaintiff's Appeal

Plaintiff contends that the trial court erred in granting defendants' motion for a new trial based upon insufficient evidence, instructional error, and excessive damages. He also argues that the trial court erred in granting either a new trial or a JNOV on the issue of punitive damages. Finally, he claims that should the matter be remanded for a new trial, that trial should be limited to damages only.

I. *Defendants' Motion for New Trial*

A. Standard of review

Code of Civil Procedure section 657 provides, in relevant part: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of

such party: [¶] . . . [¶] 5. Excessive or inadequate damages. [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application. [¶] . . . [¶] A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."

In ruling on a motion for new trial, the trial court sits as an independent trier of fact. "[T]he trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. [¶] The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) In ruling upon a motion for a new trial, "the trial court is vested with the authority to disbelieve witnesses and draw inferences from the evidence contrary to those drawn by the jury." (*Eltolad Music, Inc. v. April Music, Inc.* (1983) 139 Cal.App.3d 697, 705.)

An order granting a new trial under Code of Civil Procedure section 657 must be sustained on appeal unless the opposing party demonstrates that no reasonable trier of fact could have found for the moving party on the trial court's theory. (*Jones v. Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710.) An abuse of discretion "cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached. . . ." (*Id*. at p. 711.) Hence the conflicting evidence, which the court could not properly consider in ruling on the motion for judgment notwithstanding the verdict, is determinative in affirming the court's order granting a new trial. "In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced

by a presumption in favor of the [new trial] order.'" (*Lane v. Hughes Aircraft Co., supra*, 22 Cal.4th at p. 412.)

B. The trial court did not misapply Code of Civil Procedure section 657

As set forth above, the trial court granted defendants' motion for a new trial, properly quoting Code of Civil Procedure section 657, which mandates that a new trial not be granted unless the jury "*should* have reached a different verdict or decision," and then stating: "Applying this standard, taken in conjunction with the instructional error committed as set forth above, a different verdict or decision clearly *could* have been reached." (Italics added.)

Preliminarily, the parties dispute whether the trial court applied the proper standard. According to the plaintiff, the trial court erred in granting the motion for new trial because it mistakenly believed that it could grant a new trial if the jury could have reached a different result. According to defendants, the trial court simply made a typographical error; based upon the accurate quotation of the applicable statute and the lengthy analysis that followed, the trial court applied the proper standard.

Reading the trial court's order as a whole, we agree with defendants. First, in all capital letters, the trial court determined that "[t]he evidence is insufficient to sustain a verdict." (Capitalization omitted.) It did not hold that the evidence "could have been" insufficient; rather, the trial court unequivocally held that the evidence was in fact insufficient. Second, the trial court properly quoted Code of Civil Procedure section 657. Finally, the trial court's lengthy review and analysis of the evidence and affirmative findings of insufficiency and inadequacy confirm that the trial court determined that the evidence was insufficient. Thus, we conclude that the trial court applied the proper standard.

Having concluded that the trial court applied the proper standard, we turn to the merits of plaintiff's argument, namely whether the evidence supported the verdict.

C. The trial court's order granting defendants' motion for a new trial on plaintiff's defamation cause of action is moot

As set forth below, we agree with defendants that a JNOV should have been entered in their favor on plaintiff's defamation cause of action. Thus, this portion of plaintiff's appeal is moot.

D. The trial court did not abuse its discretion in granting defendants' motion for new trial on plaintiff's wrongful termination claim on the grounds of insufficient evidence

Plaintiff contends that the trial court abused its discretion in ruling that the evidence was insufficient to support the judgment in his favor on his wrongful termination cause of action. Defendants rejoin, arguing that the trial court rightly granted their motion because (1) plaintiff never pointed to a specific decision or policy that he protested, and (2) there is no evidence that he was terminated principally as a result of any protest.

We conclude that the trial court did not abuse its discretion in ordering a new trial on this cause of action. At the close of the trial, the outcome was uncertain. Plaintiff presented evidence[8] that he complained about the technicians' failure to comply with protocols and that their conduct compromised patient healthcare.[9] But, defendants offered evidence that plaintiff never protested. Under these circumstances, we conclude that the trial court did not abuse its discretion in ordering a new trial.

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[8] We note that some of plaintiff's record citations are inaccurate.

[9] Admittedly, the evidence presented in the instant case is not as strong as that in *Khajavi*, *supra*, 84 Cal.App.4th 32. Nevertheless, plaintiff's evidence supports his theory that his complaints about the technicians' failure to comply with protocols amounted to a protest about patient healthcare, and the fact that he was asked to resign after he complained raises an issue for trial as to whether he was terminated for lodging those complaints.

E. The trial court did not abuse its discretion in granting defendants' motion for a new trial on the grounds of instructional error

As noted above, the jury was instructed that plaintiff had to prove that his "advocacy for medically appropriate healthcare was a *motivating reason* for [his] constructive discharge and/or the failure to promote." (Italics added.) The trial court found that this instruction was erroneous and therefore granted defendants' motion for a new trial.

On appeal, plaintiff argues that this instruction was correct and that defendants' motion for a new trial should have been denied. Specifically, as spelled out in his reply brief, plaintiff argues that the "motivating factor" instruction was proper because "a plaintiff may bring a *Tameny*[**10**] cause of action as long as the public policy is reflected in a statute or [C]onstitution, even if those sources do not state the policy in words exactly applicable to the particular facts of the case. That being so, it cannot be said that the exact words used in the statute or [C]onstitution become an element a *Tameny* plaintiff must prove." In other words, the word "principally" is not an element of plaintiff's wrongful termination cause of action because plaintiff's claim is for common law wrongful termination in violation of public policy, not wrongful termination in violation of section 2056.

We are not convinced by plaintiff's arguments. As noted in *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889, "[i]n the context of a tort claim for wrongful discharge, . . . public policy [must be tethered] to specific constitutional or statutory provisions." The specific statutory provision here is section 2056, subdivision (c), which prohibits the termination of a physician's employment "*principally* for advocating for medically appropriate health care." (§ 2056, subd. (c), italics added.)

The basic premise of statutory interpretation is to effectuate legislative intent, looking first to the plain meaning of the statutory language to determine such intent.

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10 *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.

(*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777; see also *Khajavi*, *supra*, 84 Cal.App.4th at p. 46.) Applying these principles to section 2056, we conclude that by using the word "principally," the statute contemplates a level of proof higher than "motivating factor," as exists in a traditional *Tameny* cause of action. (See, e.g., *Sarka*, *supra*, 146 Cal.App.4th at p. 275 ["To summarize, the record is replete with documentation and testimony supporting the University's position. Dr. Sarka's claim he was practicing the best medicine he could does not transform his termination into a violation of Business and Professions Code section 2056. Even if his discharge penalized him for advocating appropriate medical care—a position that was not supported by expert testimony—he was not fired '*principally*' for that reason. (§ 2056, subd. (c), italics added.)"]; *Khajavi*, *supra*, at p. 52.) After all, the plain meaning of the word "principally" is "chiefly" or "mainly" or "primarily." (<http://www.dictionary.reference.com > [as of Mar. 23, 2011].) Because the word "principally" is clear, our analysis could stop here. (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519 ["If the statutory language is clear and unambiguous, then we need go no further"].)

The cases cited in plaintiff's reply brief are distinguishable. In none of those cases did the courts consider statutory language that espoused a higher level of proof than "motivating factor." Rather, those cases involved fundamental public policies as found in generic statutory schemes, such as in the state's penal statutes, and wide-reaching statutes, such the Fair Employment and Housing Act, which broadly prohibits discrimination. (*Tameny*, *supra*, 27 Cal.3d at p. 176; *Stevenson v. Superior Court*, *supra*, 16 Cal.4th at p. 889.) These cases and the statutes cited therein are distinguishable from the instant appeal, in which we consider specific statutory language that prohibits a physician from having his employment terminated for "principally" protesting inadequate patient care.

Moreover, it is well-established that "[w]e do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.) Allowing the "motivating

factor" instruction originally given by the trial court (and what plaintiff proposes was proper) would nullify the word "principally" set forth in section 2056, subdivision (c). We cannot, and will not, endorse any omission of the word "principally" to allow for a claim broader than that permitted by the Legislature.

To the extent the statute is ambiguous, our conclusion is bolstered by the comments to the Senate Committee on the Business and Professions Code.[11] (*Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729, 735 [if the language of a statute allows for more than one reasonable construction, the court should turn to aids such as the legislative history]; see also *Khajavi*, *supra*, 84 Cal.App.4th at pp. 49–50 [discussing analyses of section 2056].) The comments provide: "[The California Medical Association] argues that the bill's provisions are intended to provide physicians with some viable protection against employment or other contractual termination or penalties by employers or third party payors because the physician has protested or challenged their [utilization review]/cost containment decisions. The sponsor notes that the physician would still have the burden of proving, in a lawsuit brought on the basis of wrongful termination of contract in violation of the covenant of good faith and fair dealing, that the termination or penalty was *primarily* the result of his or her advocacy for medically appropriate health care." (Italics added.) In other words, these comments confirm the Legislature's awareness of a physician's level of proof in a claim based upon violation of section 2056.

In sum, section 2056 should be construed as its text reads: To provide that the termination of a physician's employment "principally" for advocating medically appropriate heath care violates public policy. This construction conforms to the statute's plain language, is supported by the statute's legislative history, and gives effect to all of

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11 We grant defendants' request for judicial notice of the Senate Committee's notes.

its words. It follows that the trial court did not abuse its discretion in granting a new trial on the grounds that it committed instructional error.[12]

F. Excessive damages

Plaintiff argues that the trial court erred in granting defendants' motion for a new trial on the grounds of excessive damages. For the same reasons as discussed above, this issue is moot.

II. *Defendants' Motion for JNOV*

Plaintiff asserts that the trial court erred in granting defendants' motion for JNOV on the issue of punitive damages.[13]

A. Standard of review

The trial court's discretion in granting a motion for judgment notwithstanding the verdict (Code Civ. Proc., § 629) is severely limited. The trial judge cannot reweigh evidence or judge witnesses' credibility. If the evidence conflicts or gives rise to several reasonable inferences, the trial court should deny the motion for judgment notwithstanding the verdict. That motion may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that substantial evidence does not support the verdict. The trial court should deny the motion if substantial evidence, or reasonable inferences drawn from it, supports the verdict. (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 568.) When reviewing an order denying a motion for judgment notwithstanding the verdict, an appellate court determines whether any substantial evidence, contradicted or uncontradicted, supports the jury's conclusion, i.e., whether the plaintiff proved every element of his cause of action. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.)

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[12] In light of our conclusion that the trial court did not abuse its discretion in ordering a new trial on the grounds of insufficient evidence, it follows that this instructional error was prejudicial.

[13] We disagree with plaintiff's assertion during oral argument that defendants waived this issue.

B. The trial court did not err in granting defendants' motion for JNOV on the issue of punitive damages

Punitive damages must be supported by clear and convincing evidence that the defendant acted with malice, fraud, or oppression in the conduct giving rise to liability for the underlying claim. (Civ. Code, § 3294; *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68.) This burden "'requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.' [Citations.]" (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 846.)

More specifically, "malice" requires proof that the defendant intended to cause injury or engaged in despicable conduct with willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).) "Oppression" means despicable conduct subjecting a person to cruel and unjust hardship in conscious disregard of his or her rights. (Civ. Code, § 3294, subd. (c)(2).) Put another way, there must be some evidence "'inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing.'" (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1288, fn. 14.)

There is no such evidence here. Plaintiff only directs us to the investigation of the charges of sexual harassment and racial slurs, which he believes was incomplete and unfair. Even assuming plaintiff's theory is true, there is no evidence to suggest that defendants acted intentionally or with malice in failing to gather all available evidence or in refusing to accept plaintiff's speculation about a conspiracy theory. (See *Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 995 [negligent, legally erroneous and overzealous conduct was insufficiently evil, criminal, or recklessly indifferent to support punitive damages]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 910 [lack of fairness does not show malice].)

To the extent plaintiff suggests that there was per se malice and/or oppression because defendants retaliated against him for protesting inadequate patient care, this claim has been waived on appeal. "It is a general rule of appellate review that arguments waived at the trial level will not be considered on appeal." (*California State Auto. Assn. Inter-Ins. Bureau v. Antonelli* (1979) 94 Cal.App.3d 113, 122.) As noted in the trial court's order granting defendants' motion for JNOV, the trial court "expressly asked [plaintiff] what the facts were presented at trial that demonstrated that defendants acted with malice, fraud, or oppression. Plaintiff pointed to inadequacies with [the] investigation, Dr. Terasaki's comment about 'getting along with the techs is more important tha[n] being a great radiologist,' and that when plaintiff sought to explain the allegations that were being made about him, he referenced . . . Bruzzi to the Visions report regarding racial tensions in the radiology department." Plaintiff did not claim that he was entitled to punitive damages because he was the victim of retaliation. Thus, he cannot do so on appeal.

Defendants' Appeal

Defendants assert that the trial court erred in denying their motion for JNOV on the (1) defamation cause of action, and (2) wrongful termination cause of action. They also contend that there was no legal basis for a judgment against KFHP.

I. *The trial court erred in denying defendants' motion for JNOV on the defamation cause of action*

Defendants contend that the trial court erred in denying their motion for JNOV on the slander per se cause of action.

In his FAC, plaintiff alleged a claim for defamation per se. To prove a cause of action for defamation per se, the plaintiff must present evidence that the defendant intentionally published a false and unprivileged statement of fact that tends to injure him in his profession or that causes special damages. (Civ. Code, § 46; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) "'[T]o be actionable *per se*, a defamatory statement must tend "directly" to injure the person defamed in respect to his office, profession,

trade or business . . . .' [Citation.]" (*Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 368.)

Defendants argue that plaintiff could not prevail on his defamation cause of action because he did not present evidence that suggested that he was "incompetent or unable to do his job." We agree. Plaintiff directs us to no evidence in his briefs to support his defamation cause of action. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [appellate court is not required to make an independent, unassisted search of the appellate record].)

In his opening brief, plaintiff argues that his defamation per se cause of action is not defeated by the common interest privilege (Civ. Code, § 47, subd. (c)). But plaintiff skips a step. He does not point us to the allegedly defamatory statements; nor does he argue why those statements fall within the parameters of a claim for defamation per se.

Plaintiff attempted to cure this defect in his reply brief, but his efforts fail. The only "evidence" plaintiff directs us to is (1) the jury's special verdict, and (2) a termination letter drafted by Bruzzi. As for the special verdict, it is not evidence, and plaintiff never tells us where the evidence of the allegedly defamatory statements to support the jury verdict can be found in the appellate record. With respect to the termination letter, it was never sent. Bruzzi testified that this letter was a draft, which would be used if plaintiff did not resign. Because plaintiff resigned, he was not terminated.

Finally, plaintiff argues that the false statements attributing racist comments and sexual harassment to him were defamatory because "[i]n modern society, employers do not tolerate sexual harassers or racist people for moral and political reasons and from the self-interested recognition that they pose a legal liability which threatens to harm the company's bottom line." We agree that a false accusation attributing racist comments and sexual harassments could be defamatory. But that would be "slander per quod," as opposed to slander per se, and would require proof of special damages in order for the plaintiff to prevail. (*Regalia v. The Nethercutt Collection*, *supra*, 172 Cal.App.4th at

p. 367.) Thus, plaintiff here was not foreclosed from prevailing on a defamation claim; he just pursued the wrong one.

II. *The trial court did not err in denying defendants' motion for JNOV on the wrongful termination cause of action*

As set forth above, we conclude that the trial court properly granted defendants' motion for a new trial on the wrongful termination cause of action. Plaintiff presented ample evidence to support a trial on his wrongful termination claim. It follows that we conclude that the trial court did not err in denying defendants' motion for JNOV on this claim.

III. *Single employer*

Defendants contend that there was no legal basis for imposing liability[14] on KFHP. Rather, all of the evidence confirms that plaintiff worked only for SCPMG, and there is no evidence that SCPMG and KFHP were a single employer. Presumably, defendants are claiming that judgment should have been entered in favor of KFHP on all causes of action, and that the trial court erred in implicitly denying KFHP's request for judgment.[15]

Pursuant to the integrated enterprise doctrine, two ostensibly separate business entities may be treated as a single employer if certain factors are present. (*Laird, supra*, 68 Cal.App.4th at p. 737.) These factors include the "interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control." (*Ibid*.) A plaintiff need not establish all four of these factors before the integrated enterprise doctrine applies; "the heart of the inquiry is whether there is an absence of an arm's-length relationship among the companies." (*Knowlton v. Teltrust Phones, Inc.* (10th Cir. 1999) 189 F.3d 1177, 1184.) When the evidence indicates "'an

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[14] The parties do not address the fact that the single employer issue was presented to the jury only in connection with punitive damages.

[15] Even though defendants raised this issue in their motion for JNOV, it appears that the trial court never ruled on this aspect of their motion.

interrelationship between the immediate corporate employer and the affiliated corporation [sufficient] to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer,'" a jury is justified in finding that the two entities are the employee's single employer. (*Lockard v. Pizza Hut, Inc.* (10th Cir. 1998) 162 F.3d 1062, 1070.)

Ample evidence supports the trial court's implicit order denying defendants' request that judgment be entered in favor of KFHP. Jeffrey Weisz, the executive medical director of SCPMG, testified that there are three entities that are collectively known in Southern California as Kaiser Permanente—KFHP, SCPMG, and Kaiser Foundation Hospitals, an entity through which KFHP owns hospitals. KFHP contracts with SCPMG for medical services for its members. SCPMG's only source of money is from KFHP. In fact, barring emergencies or extremely rare instances, SCPMG doctors are only allowed to work for KFHP members. Billing for SCPMG's medical services is done by KFHP. Members buying health care coverage only pay money to KFHP, not to SCPMG; they buy insurance from KFHP and they receive services through SCPMG. All of this evidence indicates that KFHP financially controls SCPMG.

Plaintiff also presented evidence that the operations of the two entities are interrelated. A single department handles the payroll functions for KFHP and SCPMG employees. KFHP keeps the checking accounts for SCPMG. Advertising for the health care offered by KFHP as health insurance and provided through SCPMG doctors is done predominantly by KFHP, advertising as "Kaiser Permanente."

Moreover, there is evidence that KFHP and SCPMG share headquarters. KFHP owns or provides the facilities where SCPMG physicians work; SCPMG does not own hospitals, medical buildings, clinics, or leases. SCPMG does not even own telephones or telecommunications systems; KFHP provides all telephone, fax, and e-mail services for it. KFHP also provides health insurance for and medical malpractice insurance to SCPMG's doctors.

Furthermore, there is evidence that the labor relations of the two entities are interrelated. In addition to the shared functions already noted, KFHP provides SCPMG

with some human resource functions. In fact, in connection with the issues in this litigation, Torley, a KFHP employee, conducted the investigation into the allegations against plaintiff, a SCPMG physician. Torley's report was directed to Maria Rodriguez, a KFHP attorney. And, Terasaki conceded that the decision to terminate plaintiff was based upon the report prepared by KFHP.

Terasaki summed it up best: "To tell you the truth, most [of] the time when I deal with people at our place, I have no idea whether they're [KFHP employees] or [SCPMG employees]."

In light of this evidence, the trial court rightly denied (albeit implicitly) defendants' motion for JNOV in favor of KFHP.

DISPOSITION

The trial court's order denying defendants' motion for JNOV on the defamation cause of action is reversed. All other orders are affirmed. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ