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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JUDITH VUKOV et al., Plaintiffs and Appellants, v. GLENDALE ADVENTIST MEDICAL CENTER et al., Defendants and Respondents.	B277701 (Los Angeles County Super. Ct. No. EC064306)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed in part and reversed in part with directions.

Richards, Watson & Gershon, T. Peter Pierce; Karczag & Associates, Justin P. Karczag; Shakramy Law Firm, and Ian S. Shakramy for Plaintiffs and Appellants.

Manatt, Phelps & Phillips, Barry S. Landsberg, Doreen Wener Shenfeld, Joanna S. McCallum, and Colin M. McGrath for Defendants and Respondents.

Defendants and respondents Dr. Lukas Alexanian (Alexanian) and Glendale Adventist Medical Center (Hospital) (collectively Alexanian/Hospital) demurred to the first amended complaint (FAC) of plaintiffs and appellants, Judith Vukov, M.D. and Judith Vukov, M.D., Inc. (collectively Vukov[1]). The trial court sustained that demurrer without leave to amend. The trial court reasoned that the FAC added causes of action that were not within the scope of amendment allowed by the trial court when it sustained Alexanian/Hospital's demurrer to Vukov's original complaint and found that the FAC was a sham pleading. Because we conclude that the trial court should have overruled the demurrer as to Hospital, we reverse the judgment as to that defendant. Because we hold that a Health and Safety Code section 1278.5 (section 1278.5) claim will not lie against an individual physician, we affirm the judgment as to defendant Alexanian.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Original Complaint, Demurrer, and Preliminary Injunction Motion

Vukov was an on-call psychiatrist in Hospital's psychiatric emergency department (the Department) until she was dropped from Hospital's on-call roster when Alexanian and Hospital switched to a closed, exclusive roster thus depriving Vukov of most of her income potential. Originally, Vukov brought five causes of action against Alexanian and Hospital: (1) violation of her common law right to fair procedure, (2) unfair competition under Business and Professions Code section 17200, (3) interference with prospective promote economic advantage, (4) intentional infliction

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1 For the ease of readability, we use *singular* pronouns when referring to the plaintiffs and appellants "Vukov" throughout.

of emotional distress, and (5) negligent infliction of emotional distress.

Vukov averred that she had a vested right to staff membership "subject to divestment upon periodic review only after a showing of adequate cause . . . consistent with minimal due process requirements" and that she had been removed from the on-call roster without notice. As detailed below, Vukov further asserted that her name was removed from Hospital's on-call roster in retaliation for her complaints to Alexanian and other Hospital managers about premature discharge of patients and "*patient dumping*."

In her emotional distress causes of action, it was asserted this conduct "including statutory violations" interfered with her earning a living and rendering medical care to her patients. Among other relief sought in the original complaint was money damages, reinstatement to Hospital's on-call roster, and an injunction against terminating Vukov's on-call privileges without "fair procedure."

Alexanian/Hospital demurred to all five causes of action in the original complaint; that demurrer was unopposed despite Vukov's having been represented by counsel below. Regarding Vukov's common law fair procedure and unfair competition claims, Alexanian/Hospital argued courts should not use purported fair procedure rights to interfere with a hospital's managerial decisions absent a substantial impact on public interest and Hospital's bylaws expressly denied a hearing right to someone excluded because of Hospital's implementation of an exclusive contract to run a department. Vukov's tort actions similarly failed because a physician does not have a protectable economic interest in "speculative future patients," the averred conduct was not outrageous, and Alexanian/Hospital had no duty of care to Vukov. Alexanian also argued the claims against him should be dismissed

without leave to amend because he did not create Hospital's bylaws. Hospital, and not he, decided to implement the closed on-call roster, and under his exclusive contract with Hospital, Alexanian had discretion to remove Vukov from the roster.

Before the hearing on the demurrer, Vukov filed a preliminary injunction motion seeking reinstatement for violation of her right of fair procedure before her "vested" right to remain on the on-call roster could be terminated. The trial court denied the motion, concluding Vukov was unlikely to prevail on the merits where Hospital's decision to terminate her was based on a managerial decision that should not be "countermanded by the [c]ourts" unless the decision "seriously injure[d] a significant public interest." The trial court also concluded money damages was an adequate remedy. Vukov did not appeal this ruling.

The reluctance to interfere with a hospital's managerial decisions absent a showing of substantial impact on the public interest also formed the cornerstone of the trial court's sustaining of Alexanian/Hospital's demurrer to Vukov's common law fair procedure and unfair competition causes of action with "a single opportunity to amend." Although the trial court noted Vukov's allegations of Alexanian's "bullying" and "belligerent management style," it concluded the decision to shift from an open to closed roster was "quasi-legislative for which a hearing is not required." The trial court cited the absence of allegations that removing Vukov from the on-call roster was "clearly unlawful or that it would seriously injure a significant public interest." The trial court then adopted Alexanian/Hospital's arguments in sustaining the demurrer to Vukov's tort causes of action with "a single opportunity to amend."

B. The FAC and Demurrer Thereto

Vukov filed her FAC in which she asserted seven causes of action: (1) violation of section 1278.5, (2) tortious interference with prospective economic relations, (3) the right to pursue a lawful calling or profession, (4) unfair competition, (5) antitrust violations under Business and Professions Code sections 17200 and 16700, (6) wrongful termination of hospital privileges, and (7) intentional infliction of emotional distress. The instant appeal involves only Vukov's first cause of action under section 1278.5; Vukov does not contest the dismissal of her other causes of action.[2]

Vukov alleged Hospital had changed from a business model of providing "top quality patient care" to one of "cutting costs, skimping dangerously on patient care, and retaliating against medical professionals who dare to speak out."[3] Vukov further alleged that she was the only psychiatric doctor removed from the on-call roster and not coincidently, the only psychiatric doctor who complained about inadequate patient care. Examples of such inadequate care included patient dumping, particularly of indigent patients, and the substitution of substandard "[h]ospitalists" for emergency room internists to perform physical examinations on psychiatric patients admitted on 72-hour holds.

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[2] We thus do not address the trial court's rulings on the merits regarding the causes of action that are no longer in the FAC and not the subject of this appeal.

[3] Alexanian/Hospital argued Vukov's reference to this "policy change" is an admission that the decision to remove her from the on-call roster was quasi-legislative. This is not a fair reading of the FAC. Instead, Vukov asserted that Alexanian/Hospital used the expression "policy change" to cloak their actions in a quasi-legislative act.

Vukov further averred that Alexanian publicly belittled her after she made these complaints to him and others at Hospital,[4] including Dr. Nahapetian, who told Vukov to "forget about her concerns" including those of Alexanian's threats of retaliation. Vukov then alleged that Alexanian/Hospital did, in fact, retaliate, first by suspending her, and then terminating her medical staff privileges and removing her from the on-call roster.

Vukov asserted that these actions were taken without fair process in deprivation of her property rights and in derogation of her reputation and livelihood. She further alleged that these actions were not a mere "quasi-judicial decision," but instead, "pretext[]" for silencing her "whistleblowing."

The same allegations formed the nucleus of the first cause of action under section 1278.5—a cause of action not in the original complaint. Also in contrast to the original complaint, there is no express prayer for reinstatement or other injunctive relief in the FAC.[5]

Alexanian/Hospital demurred to the entire FAC on the theory the allegations in the FAC describes acts that are quasi-legislative, and, thus, reviewable only by writ of mandamus. As to the section 1278.5 cause of action, Alexanian/Hospital argued a hospital's quasi-legislative management decisions are not taken "against" a physician, and, thus, section 1278.5 does not apply to the decision to use a closed on-call roster even if that decision "incidentally and adversely [a]ffects the physician." In

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[4] Vukov also alleged that she complained to "the Joint Commission." Based on her declaration in support of her motion for preliminary injunction, "the Joint Commission" apparently refers to the Joint Commission Standards Interpretation Group.

[5] We note the FAC does contain a general prayer for "such other and further relief as the [c]ourt may deem just and proper."

a footnote, Alexanian/Hospital contended most of the remedies in section 1278.5, subdivision (g), are preempted by the Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq., but that the trial court did not have to address this argument if it accepted Alexanian/Hospital's other arguments.

As to the claims against defendant Alexanian, Alexanian/Hospital asked the trial court to take judicial notice of facts in certain documents[6] to argue, inter alia, that Alexanian cannot be individually liable under section 1278.5 because he was "*not* . . . the Hospital," but only a "physician member of the medical staff" when Vukov complained about Hospital's patient safety issues. Alexanian then reiterated the grounds set forth in his demurrer to the original complaint. Finally, Alexanian/Hospital discounted Vukov's allegations of complaints to Dr. Nahapetian, whom Alexanian/Hospital described as a "member of . . . Hospital's administration" as "vague" because Vukov did not allege when and how she raised those complaints to Dr. Nahapetian, or that he Alexanian retaliated against her because of those complaints.

C. The Trial Court's Ruling on the Demurrer to the FAC

The transcript of the hearing on the demurrer to the FAC refers to the absence of a motion for leave to amend to add new causes of action required under *People ex rel. Dept. Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770 (*Clausen*), as well as Vukov's argument based on *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995 (*Patrick*), that such leave was not required where the new causes of action "address[] a deficiency identified by the [c]ourt" when it sustained the demurrer to the original

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[6] Vukov opposed Alexanian/Hospital's request for judicial notice but does not pursue that opposition in this appeal.

complaint. The trial court allowed supplemental briefing and then issued its final ruling.[7]

In that ruling, the trial court stated Vukov added new causes of action including the section 1278.5 claim, and had "decided to change the entire theory of her case. Instead of claiming that [Alexanian/Hospital] removed her from the call roster . . . in denial of fair procedure, [Vukov] now claims that [Alexanian/Hospital] removed her from the roster [and she] suffered retaliation for her complaints about conditions at the hospital." The trial court reiterated its reasoning in sustaining the demurrer to the original complaint: A hospital's decision to change from an open to closed on-call panel is quasi-legislative, and Vukov had not alleged that Alexanian/Hospital's decision to use a closed panel was either "unlawful" or would "seriously injure a significant public interest." Accordingly, Vukov would have had to obtain leave before adding new causes of action, including the section 1278.5 claim.

The trial court further found that the FAC was a sham pleading because Vukov had (1) "changed the theory of her case to claim that she was removed from the call panel as retaliation for her complaints about conditions in the hospital"; (2) made "admissions" in her preliminary injunction application that showed that the move to a closed panel was a management decision of "general application"; and (3) made "admissions" in her preliminary injunction application that Alexanian enforced "requirements against her" because he was "hostile and angry towards her" and did "not like her taking longer to discharge patients." The trial court described Vukov's allegations in the original complaint about

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[7] We note that at oral argument, the trial court referred to a tentative ruling that, although not part of the record on appeal, was adopted as an exhibit to the judgment with the addition of language reflecting consideration of supplemental briefing.

Alexanian's conduct towards her as "bullying" and "turbulent" and about Alexanian's decision to remove Vukov from the on-call roster as "unprofessional."

The trial court noted that it had considered "a substantial amount of evidence" in concluding the Alexanian/Hospital's decision to use a closed roster was a management decision and not retaliation towards Vukov, which was "one of the bases" for denying the preliminary injunction, and that Vukov had not filed a motion for reconsideration of the its rulings. Citing these "inconsistencies," the trial court concluded the "omitted allegations" showing that Vukov's claims were barred by California law demonstrated that "her new pleading [was] a sham pleading because it attempt[ed] to avoid the identified defects by omitting them." The trial court found that the facts in Vukov's declaration accompanying her preliminary injunction application were "inconsistent" with that declaration and contradicted her "new" retaliation theory.

The trial court sustained the demurrer as to all causes of action without leave to amend, and entered judgment for Alexanian/Hospital deeming them the prevailing party entitled to costs.[8] Vukov timely appealed.

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[8] The trial court took Alexanian/Hospital's motion to strike off calendar "in light" of its ruling on the demurrer. We note the appellate record does not include Alexanian/Hospital's motion to strike.

DISCUSSION

A. The Parties' Arguments

Vukov contends the trial court ignored allegations in the original complaint of Alexanian/Hospital's retaliation when they removed only her from the on-call roster after Vukov complained of patient dumping, early discharge, and abuse of homeless patients. Accordingly, the trial court erred in concluding (1) Vukov had changed entirely the theory of her pleading when she added the section 1278.5 claim and dropped her prayer for reinstatement; (2) Vukov failed to plead facts that Hospital's managerial decision to go to a closed on-call roster was unlawful; and (3) the FAC was a sham pleading. The trial court also erred in supporting its finding of a sham pleading based on inconsistencies between the original complaint and FAC and Vukov's preliminary injunction application because no such inconsistencies existed. The trial court's misreading of the original complaint also led to its erroneous finding that omitting allegations of a management decision demonstrated that the FAC was a sham pleading.

Although the trial court did not address this issue, Vukov further asserts that her section 1278.5 claim is not flawed for failure to seek a writ of mandate under Code of Civil Procedure section 1085 because the "gravamen of Vukov's retaliation claim does *not* arise" from the decision to switch to a closed panel, but instead, as pleaded in the original complaint, this decision was a "pretext for singling her out for discriminatory treatment."

Vukov relies on *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655 (*Fahlen*) and *Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271 (*Melamed*), where review was granted June 21, 2017, S241146, and the cause was transferred to the Court of Appeal, Second Appellate District, Division One, for reconsideration in light of *Park v. Board of Trustees of the*

California State University (2017) 2 Cal.5th 1057 (*Park*). A subsequent opinion was filed October 6, 2017, but was not certified for publication. Review was then granted on January 17, 2018, S245420, and briefing deferred pursuant to California Rules of Court, rule 8.520.

Finally, Vukov contends that Alexanian is a proper defendant to a section 1278.5 claim because section 1278.5, subdivision (i) defines the term "health facility" to which the statute applies to "includ[e], but not [be] limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff."

Although Vukov seeks reinstatement of the FAC, she contends that under well-established demurrer practice, the court should have given her leave to amend if we were to conclude that she did not plead a cognizable claim under section 1278.5.[9]

Alexanian/Hospital retort by repeating the reasoning of the trial court when it found that the inclusion of the new causes of action in the FAC not only breached the boundaries of amendment allowed by *Clausen* and other cases, including *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018 (*Harris*), but also demonstrated that the FAC is a sham pleading. Alexanian/Hospital argue that amendment was limited to allegations demonstrating that the switch to a closed roster was not a managerial decision of general application or quasi-legislative thus requiring a prior hearing, or that the decision was unlawful. Instead, the FAC was "a total change in direction" from the original complaint.

In addressing whether the trial court abused its discretion in finding that the FAC was a sham pleading, Alexanian/Hospital

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[9] We note that in opposing the demurrer to the FAC, Vukov sought leave to amend as well.

argue the trial court did not base its finding of sham pleading on inconsistent allegations, but rather on omitted allegations without explanation when Vukov omitted references to a managerial decision and her claim for reinstatement. According to Alexanian/Hospital, Vukov's "strategy" in omitting these allegations was "self-evident" because if her removal from the on-call roster was the product of a quasi-legislative decision, she was required under Code of Civil Procedure section 1085 to seek a writ of mandate before filing a civil action. Liberal rules of pleading do not alter the limited scope of amendment set forth in *Clausen* and its progeny, and thus the trial court properly sustained the demurrer to the FAC without leave to amend.

Alexanian/Hospital raise a statute of limitations defense not argued before the trial court, to wit, under *Melamed*, this Division held that a one-year limitations period applies to section 1278.5 claims, and the FAC reveals on its face that Vukov's section 1278.5 claim is time-barred. Vukov's efforts to plead around that defense by omitting certain allegations regarding the timing of removal from the on-call roster are a sham.

Alexanian/Hospital next contend that the FAC fails to state a claim under section 1278.5 because none of Vukov's "reports" to Alexanian/Hospital qualifies as a "grievance, complaint, or report" regarding "unsafe patient care and conditions" (§ 1278.5, subds. (a) & (b)(1)(A)) on which to base a retaliation claim under that statute.

Alexanian/Hospital acknowledge that the "FAC alleged reports regarding patient care," but that those allegations are inconsistent with Vukov's allegations in the original complaint and evidence accompanying her preliminary judgment motion describing her complaints about bullying and hostile behavior towards her, and not poor patient care. Alexanian/Hospital

characterize the "complaints about patient dumping" and " 'defendant's lack of adequate discharge planning, negligence and abuse of homeless dependent adults' " alleged in the original complaint as "impermissibly vague" and "incidental to" Vukov's "reports of her problems with Dr. Alexanian's management style."

Finally, Alexanian/Hospital contend that under *Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810 (*Armin*), Alexanian, as a member of the medical staff, is "not subject to suit under section 1278.5."

B. Standard of Review

We review the trial court's sustaining of the demurrer without leave to amend de novo. "[O]ur task is to determine whether the complaint states facts sufficient to constitute a cause of action" taking all well-pleaded allegations of material fact as true. (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1323 (*Community Water Coalition*).) "In an appeal from a judgment based on an order sustaining a demurrer for failure to state a cause of action, the reviewing court treats the demurrer as admitting all material facts properly pleaded and, giving the complaint a reasonable interpretation, independently determines whether the complaint states a cause of action under any legal theory." (*Harris, supra*, 185 Cal.App.4th at p. 1022; *Amarel v. Connell* (1988) 202 Cal.App.3d 137, 141 (*Amarel*) [requiring a reading wherein facts "may be implied or inferred from those [facts] expressly alleged" and "reading [the complaint] as a whole and its parts in their context"].)

We review the trial court's finding that the section 1278.5 claim alleged in the FAC was not within the scope of the previously granted leave to amend for abuse of discretion. (*Community Water Coalition*, *supra*, 200 Cal.App.4th at p. 1329.)

C. The Trial Court Erred in Finding that Vukov's Retaliation Theory Was New to the FAC and the FAC Was a Sham Pleading

The parties do not dispute the law applicable to the scope of amendment when leave is granted after a trial court sustains a demurrer. Generally speaking, the complainant may amend only causes of action in the prior pleading. "[S]uch granting of leave to amend must be construed as permission to the pleader to amend the cause of action which he pleaded in the pleading to which the demurrer has been sustained." (*Clausen*, *supra*, 248 Cal.App.2d at p. 785 [new parties could not be added after a demurrer was sustained with leave to amend].)

An exception to the *Clausen* rule applies when the new cause of action is responsive to the infirmities identified by the trial court in sustaining the demurrer to the prior pleading. Thus, in *Patrick*, the appellate court concluded that the trial court erred in dismissing a declaratory relief claim added to the third amended complaint after the trial court had sustained a demurrer to the prior complaint on the basis of lack of standing to bring a derivative claim. (*Patrick*, *supra*, 167 Cal.App.4th at p. 1015.) "[The *Clausen*] rule is inapplicable here because the new cause of action directly responds to the court's reason for sustaining the earlier demurrer. The court found plaintiff failed to allege she had standing as a beneficial shareholder of [defendant] to bring shareholder derivative claims. The new declaratory relief cause of action supports her standing claim by seeking a declaration that she has a community property interest in [defendant]—i.e., that she is a beneficial shareholder of [defendant]. Plaintiff may not have been free to add any cause of action under the sun to her complaint, but the court should have allowed her to add *this* cause of action to establish her standing." (*Ibid.*; accord, *Harris*, *supra*, 185 Cal.App.4th at p. 1023 ["plaintiff may not amend the complaint to

add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend"].)

The trial court's dismissal of Vukov's section 1278.5 claim turns on the premise that this claim was a stranger to the original complaint. That premise is also the fulcrum on which the trial court's finding that the FAC was a sham pleading balances. A fair reading of the original complaint demonstrates that this premise is not well taken.

Section 1278.5, subdivision (b)(1) provides in pertinent part: "No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has . . . [¶] (A) Presented a grievance, complaint, or report [about "issues relating to the care, services, and conditions of a facility" (§ 1278.5, subd. (a))] to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity." Section 1278.5, subdivision (g) provides for monetary relief, reinstatement, payment of "legal costs," and "any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law."

We set forth the following allegations of retaliation from the original complaint:

(1) "[Vukov] complained against [Hospital's] Medical Director of the . . . Department, discharge planners, and hospital management about [Hospital's] lack of adequate discharge planning, negligence and abuse of homeless dependent adults."

(2) "[Vukov] was discriminated upon and singled out arbitrarily without any fair procedure because of her repeated run-ins with [Hospital's] Medical Director of the Department and

hospital management. [Vukov] was the only [p]hysician removed from the emergency room roster. . . . [Vukov's] career and livelihood [are] rapidly being diminished and destroyed by the discriminatory, irrational and retaliatory acts by [Alexanian/Hospital] disguised as an administrative business function. It was specifically directed to exclude [Vukov] and bypass [Hospital's] written . . . policies and procedures with impunity."

(3) "[Vukov] has had a turbulent relationship with . . . Alexanian due to his unprofessional and aggressive behavior toward [Vukov]. Often, . . . Alexanian's manner of communication was antagonistic towards [Vukov] and other staff members. . . . Alexanian normally resorts to yelling and on more than one occasion threatened [Vukov] that he will '*get her*[.]' . . . [Vukov] complained to [Hospital's] administration, but her reports and pleas were ignored."

(4) "[O]n August 22, 2015, . . . Hospital[,] through its Chief Executive Officer, Kevin Roberts[,] sent a mass email to all Hospital staff informing [them of] . . . unfavorable news coverage. . . . It was in reference to the complaint against . . . Hospital of illegally charging patients '*patient dumping*' to the Skid Row area of Los Angeles; . . . . [Vukov] has repeatedly brought this to the attention of . . . Alexanian but her concerns were repeatedly disregarded. In fact, . . . Alexanian repeatedly yelled at her for bringing up her concerns about early discharge and '*patient dumping*.' [Vukov] at that point was fearful that . . . Alexanian will single her out and retaliate against her. [Vukov's] fears became a reality when . . . Alexanian removed her active staff privileges . . . immediately when he was awarded the exclusive contract to manage the ER schedule for the [Department]."

(5) "[Vukov] complained verbally to Chief Medical Officer Dr. Arby Nahapetian . . . at a meeting [attended by] the former

Psychiatry Department Medical Director Dr. Estelita Calica and Director of Medical Staff Services Olivia Loeffler. . . about . . . Alexanian's behavior sometime in . . . late August 2014. She brought up the concerns about her being bullied and the disregard for her concerns about 'patient dumping' by . . . Alexanian. Dr. Nahapetian told [Vukov] to forget about the problem . . . . [Vukov] was concerned at how . . . Alexanian's bullying method of communication and belligerent management style [are] not being given ample attention by the administrators of . . . Hospital especially since the Los Angeles City Attorney filed a complaint in court."

(6) Because Vukov was worried about the "sustainability of her practice" by being removed from the on-call roster, she wrote "several formal letters to numerous members of . . . Hospital's executive management staff, including the Chief Executive Officer, Kevin Roberts. Unbelievably, she did not get a response from any of them."

All of these allegations were incorporated in each cause of action in the original complaint. As noted earlier, some of the causes of action stated that Alexanian/Hospital's conduct was "unlawful" or constituted "statutory violations."

Far from being " 'impermissibly vague' " and " 'incidental' "—as Alexanian/Hospital contend—these allegations are detailed and supported a major theme in the original complaint, to wit, that Vukov complained to Alexanian and members of Hospital's management about the poor quality of patient care, and was removed from the on-call roster for doing so.

Contrary to Alexanian/Hospital's assertions, a fair reading of the original complaint and all reasonable inferences therein show that these allegations fall within the purview of the above-quoted language of section 1278.5. Adding a section 1278.5 cause of action

merely gave a name to the statutory violation referenced, and conduct already described in the original complaint.[10] These allegations give proof to the trial court's error in applying the *Clausen* rule when it found that Vukov had "change[d]" the entire theory of her case."

They also demonstrate the error in the trial court's finding that the FAC was a sham pleading. The allegations in the original complaint and Vukov's preliminary injunction papers are not inconsistent. In her motion for preliminary injunction and declaration in support of that motion, Vukov described Alexanian's "hostile" behavior towards her, his threats to " 'get me,' " his antipathy towards her patient discharge practices, the then recent reports in the media and a complaint filed by the Los Angeles City Attorney's office about Hospital's patient dumping, and the resulting dire consequences to her livelihood when Alexanian closed the on-call roster. The trial court's description of these assertions in Vukov's declaration as merely attacking Alexanian's unprofessional and bullying management style do not give sufficient measure to the allegations in the original complaint or Vukov's declaration.

The trial court further supported its finding of sham pleading on the premise that Vukov simply removed without explanation the deficient theory of her original complaint—unfair procedure when Hospital made the management decision to use a closed roster—and

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[10] In their supplemental briefing in the trial court and their briefing on appeal, Alexanian/Hospital distinguish *Patrick*, *supra*, 167 Cal.App.4th 995, on the ground that standing to assert a derivative claim was already alleged in the prior pleading. The same reasoning applies here where retaliation allegations were in the original complaint. The fact Alexanian/Hospital ignored these earlier allegations does not make *Patrick* any less persuasive.

substituted an entirely new one—retaliation in response to Vukov's complaints about substandard patient care. In the trial court's own words: "Since these omitted allegations showed that [Vukov's] claims were barred by California law, her new pleading is a sham pleading because it attempts to avoid the identified defects by omitting them."

Amending a pleading after a demurrer has been sustained merely by omitting the deficient allegations and nothing more could be called a sham. (*Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 768.) "[T]he trial court has discretion to deny leave to amend when the proposed amendment omits or contradicts harmful facts pleaded in a prior pleading unless a showing is made of mistake or other sufficient excuse for changing the facts. Absent such a showing, the proposed pleading may be treated as a sham." (*Ibid.*)

In contrast, dropping a claim or theory does not require a finding of sham pleading. Indeed, such a finding should be reserved for "the extreme case." (*Amarel, supra*, 202 Cal.App.3d at p. 144.) In *Amarel*, the appellate court held that omitting anti-competition causes of action involving commerce with the Republic of Korea after the trial court sustained a demurrer based on interference with federal supremacy in matters of foreign relations did not make the new complaint a sham. The appellate court reasoned that "the originally destructive allegations went only to the manner in which the alleged anticompetitive practices occurred," and it was thus error to sustain the demurrer to the new complaint. (*Id*. at pp. 144-145.)

Similarly, in her FAC, Vukov asserted that the decision to employ a closed on-call roster was pretext to removing only her from the on-call roster because of her complaints to Alexanian and Hospital's management about poor patient care. Far from merely omitting "destructive allegations," Vukov (1) included allegations

about Alexanian/Hospital's decision to employ a closed roster as the mechanism or "pretext" by which to retaliate against Vukov for her complaints about poor patient care; and (2) reinforced allegations of retaliation that were omnipresent in the original complaint. The trial court erred in ignoring the allegations of retaliation in the original complaint and trivializing them as merely describing "bullying" and poor communication skills.

In a footnote, Alexanian/Hospital contend that "most of the remedies in section 1278.5[, subdivision](g) are preempted by the federal peer review law, the Heath Care Quality Improvement Act . . . 42 U.S.C. § 11101 et seq." (italics omitted), because that statute "immunizes hospitals and other peer review participants from any claims for damages or other financial penalties and forecloses state laws that disincentivize participation in peer review." The allegations in the original complaint and FAC, however, do not describe a peer review process. We thus decline to address an issue of preemption that is not even raised by the pleadings here, particularly based on the very limited analysis of that issue provided in Alexanian/Hospital's footnote.

D. Vukov Was Not Required to Seek Review by Writ of Mandate Before Bringing Her Section 1278.5 Claim

Alexanian/Hospital argue that "it was imperative" for Vukov to "recast the nature of the alleged conduct to something *other* than a quasi-legislative decision" because otherwise Vukov would have been required to seek review of that decision by way of writ of mandamus. Alexanian/Hospital do not elaborate on this contention, and the trial court did not rule on it in sustaining the demurrer to the FAC.

Alexanian/Hospital's contention is based on two apparent assumptions: The conduct alleged in the original complaint was a quasi-legislative decision of general application with which Vukov

disagreed, and retaliation claims under section 1278.5 based on managerial decisions must be pursued first by way of mandamus.

As set forth above, the first assumption is predicated on a narrow and incorrect reading of the original complaint. The second assumption does not appear to comport with the California Supreme Court's analysis in *Fahlen*, *supra*, 58 Cal.4th 655.

There, the California Supreme Court examined the legislative history and policy considerations behind section 1278.5 in ruling that before bringing a civil suit, plaintiff did not have to seek a writ of mandamus after a peer review board terminated his hospital privileges allegedly in retaliation for his reports of substandard performance by hospital nurses. (*Fahlen*, *supra*, 58 Cal.4th at p. 660.) "Here . . . the administrative proceeding at issue was not a forum for redressing a claim of retaliation, but instead is alleged to be a means by which that retaliation occurred." (*Id*. at p. 678.) The same can be said for Vukov's retaliation claim when Alexanian/Hospital made the decision to implement a closed on-call roster. In the words of the *Fahlen* Court: "A requirement that plaintiff succeed in overturning an allegedly retaliatory, as opposed to remedial, administrative decision before filing a statutory action would very seriously compromise the legislative purpose to encourage and protect whistleblowers." (*Ibid*.)

For all these reasons, we conclude that Vukov's section 1278.5 claim is not barred for failure to seek review by writ of mandamus.

E. Alexanian/Hospital's New Limitations Defense Is Not Fully Revealed from the Face of Either Complaint and Is More Properly Raised in a Dispositive Motion in the Trial Court

Alexanian/Hospital contend for the first time on appeal that (1) based on *Melamed*, a one-year statute of limitations for penalty statutes applies to section 1278.5 claims; (2) Vukov alleged in

her original complaint that on or about September 2014, she was excluded from the on-call roster and, on October 1, 2014, she complained to Hospital's management of her removal; and (3) Vukov reiterated these allegations in her preliminary injunction motion and asserted since her removal from that roster in September 2014, her revenues decreased to the point of her considering filing bankruptcy. Because Vukov filed her complaint only on October 7, 2015, her section 1278.5 claim is time-barred. Alexanian/Hospital further assert that in light of these allegations in the original complaint and preliminary injunction motion, her allegation in the FAC of "removal of her hospital staff privilege sometime in late October and/or early . . . November 2014" is a sham.

In our first opinion in *Melamed*, we expressly refused to decide whether a one-year statute of limitations applies to a section 1278.5 claim: "[W]e need not, and do not, decide which limitations period is appropriate here." (*Melamed*, *supra*, 8 Cal.App.5th at p. 1288.) Alexanian/Hospital describe *Melamed* as "persuasive authority" under California Rules of Court, rule 8.1115(e)(1). It is not.

Park and *Melamed* involved application of the anti-SLAPP statute, Code of Civil Procedure section 425.16 (anti-SLAPP statute). In *Melamed,* the limitation defense arose in the context of whether plaintiff had demonstrated a prima facie case of prevailing on his section 1278.5 claim under the second step of the anti-SLAPP statute. Because we concluded that plaintiff failed to demonstrate a prima facie case of the substantive elements of a section 1278.5, we declined to rule on the statute of limitations defense. (*Melamed*, *supra*, 8 Cal.App.5th at pp. 1288-1289.) We observe that we also did not address the limitations defense in our opinion after the

Supreme Court transferred *Melamed*[11] because we ruled plaintiff's claim did not arise out of protected activity within the purview of the anti-SLAPP statute.

It is not clear why Alexanian/Hospital could not have themselves advocated for a one-year limitations statute in the trial court even without our opinion in *Melamed*. Alexanian/Hospital, moreover, do not address when a claim under section 1278.5 accrues, specifically, whether a discovery rule applies. We note that Vukov advocates for such a rule in her reply.

This inquiry is relevant because Vukov argues that in her original complaint, she did not assert a date on which she learned that she had been removed from the panel. To the contrary, she affirmatively alleged that she was removed from the on-call roster without notice. Far from supporting Alexanian/Hospital's arguments, Vukov contends that her declaration accompanying her preliminary injunction motion demonstrates that she was still on the on-call roster as of September 11, 2014, and that on October 1, 2014, she received an email informing her Alexanian would be managing the on-call roster and those interested in serving on the roster had to contact Alexanian. Vukov did so on that same day, but Alexanian did not respond. Vukov further declared that by October 28, 2014, she was no longer on the on-call roster.

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[11] *Melamed v. Cedars-Sinai Medical Center* (Oct. 6, 2017, B263095 [nonpub. opn.]), review granted January 17, 2018, S245420. The briefing was deferred pending consideration and disposition of a related issue in *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822 [review granted March 1, 2017, S239686], and the cause was deferred pending consideration and disposition of a related issue in *Park v. Board of Trustees of the California State University*, *supra*, 2 Cal.5th 1057, S229723, or pending further order of the Supreme Court.

It is black letter law that a defense must be fully revealed from the face of the pleading for that defense to be the proper subject of a demurrer. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) It is also black letter law that "on or about" allegations do not reveal a limitations defense for purposes of sustaining a demurrer. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 160.) Under the circumstances described above, we decline Alexanian/Hospital's invitation to address their belated limitations argument. Our decision is without prejudice to Alexanian/Hospital's raising it in the trial court in an appropriate motion.

F. Section 1278.5 Does Not Apply to Vukov's Claims Against Alexanian

Alexanian/Hospital assert under *Armin*, *supra*, 5 Cal.App.5th 810, that as a mere "physician member of [Hospital's] staff," Alexanian cannot be sued individually under section 1278.5. Vukov counters with section 1278.5, subdivision (i) defining "health facility" to which the statute applies to "includ[e], but not [be] limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff "; Vukov's allegation that Alexanian was an " 'employee, agent and/or independent contractor' of . . . Hospital"; and . . . Hospital's admission Alexanian was a " 'physician member of the medical staff.' " We observe the trial court did not rule on whether Alexanian could be sued under section 1278.5.

Armin is the centerpiece of Alexanian/Hospital's argument. There, plaintiff, a neurosurgeon, brought a section 1278.5 claim against a hospital and individual physicians who had initiated a peer review process regarding his alleged malpractice that led to suspension of his hospital privileges. (*Armin*, *supra*,

5 Cal.App.5th at p. 814.) Plaintiff claimed that his suspension was the product of his previous complaints about religious discrimination. The peer review process was pending when plaintiff sued and defendants brought an anti-SLAPP motion. (*Id*. at p. 819.)

The *Armin* court considered two issues: Whether *Fahlen* required plaintiff to complete an internal peer process review before bringing a section 1278.5 claim, and whether "individual physicians involved in the peer review process who allegedly instigated the process in retaliation for the physician's whistleblowing" may be defendants in a section 1278.5 action. (*Armin*, *supra*, 5 Cal.App.5th at p. 814.) The appellate court answered both questions in the negative.[12] (*Ibid*.)

As to the second issue, the *Armin* court observed "the target defendant" under section 1275.8 is the "facility." (*Armin*, *supra*, 5 Cal.App.5th at p. 831.) This is demonstrated by the statement of intent in section 1278.5, subdivision (a),[13] and by subdivision (b),[14]

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[12] Regarding the first issue: "The Legislature is fine with peer review proceedings barreling on even if a section 1278.5 action is filed in civil court." (*Armin*, *supra*, 5 Cal.App.5th at p. 827.)

[13] "The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations."

which the appellate court described as "the operative subdivision, forbidding facilities, *and only facilities*, from retaliating against individuals who complain of potentially unsafe care or conditions—even if they complain to somebody other than a government entity." (*Armin*, *supra*, at p. 832.)

The *Armin* court acknowledged the definition of "health care facility" in section 1278.5, subdivision (i), defining "health facility" as "the facility's administrative personnel, employees, boards, and committees of the board, and medical staff." However, it rejected plaintiff's argument that the reference to "medical staff" therein demonstrates that "the statute allows suits against individual doctors on the *medical staff*." (*Armin*, *supra*, 5 Cal.App.5th at

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14 "(1) No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has done either of the following: [¶] (A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity. [¶] (B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity. [¶] (2) No entity that owns or operates a health facility, or that owns or operates any other health facility, shall discriminate or retaliate against any person because that person has taken any actions pursuant to this subdivision. [¶] (3) A violation of this section shall be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities."

p. 832, italics added.) "[N]one of the other subdivisions . . . contain[s] any hint of liability for individual doctors." (*Ibid*.)

The *Armin* court reasoned that a medical staff is a "uniplural entity" akin to a jury or church, and only the medical staff can bring peer review proceedings against individual members of that medical staff. (*Armin*, *supra*, 5 Cal.App.5th at p. 833.) In addition, all the "entities identified in [section 1278.5,] subdivision (i) that make up the definition of 'facility,' " have in common that they are the "means by which a hospital acting as its own legal person might retaliate against a complaining doctor, nurse or patient." (*Armin*, *supra*, at pp. 833-834.)

The *Armin* court observed: "[T]he most basic reason to construe 'medical staff ' not to mean 'members of the medical staff ' is to further the legislative intent which engendered section 1278.5 in the first place. The idea was to protect doctors who spotted problems with *hospital* patient care or conditions. Applying section 1278.5 liability to individual doctors could greatly complicate the achievement of that purpose." (*Armin*, *supra*, 5 Cal.App.5th at p. 835.)

Finally, the *Armin* court observed "[p]eer review proceedings are not just potential instruments of retaliation. They can also be the instrument by which alarms about patient care can be aired. . . . And it makes no difference if the *vehicle* for . . . complaints is a peer review proceeding. Construing 'medical staff ' as [the plaintiff] urges would make it harder to root out bad practices rather than easier." (*Armin*, *supra*, 5 Cal.App.5th at p. 835.) Vukov does not explain why that concern would not apply with equal force here where physicians to whom Vukov complained about early discharge and patient dumping could also be more concerned about personal liability than the merits of her complaints about substandard patient care if section 1278.5 applied to them.

Vukov would have us confine *Armin* to the peer review context in which it arose: "This case has nothing to do with peer review; Vukov alleges that she reported substandard patient care, and that Alexanian retaliated against her solely for that reporting. [¶] . . . But it does not follow that doctors who take action—not based on another doctor's alleged malpractice, but solely based on another doctor's reporting activity—should escape individual liability under [s]ection 1278.5." That argument, however, ignores Vukov's allegations in both of her complaints of substandard care by early discharge and dumping of patients, which by another name, could be called physician malpractice. Vukov's very own allegations do not give us occasion to revisit *Armin's* reasoning.[15]

DISPOSITION

The judgment is affirmed as to Dr. Lukas Alexanian and reversed as to Glendale Adventist Medical Center with instructions to reinstate Judith Vukov, M.D., and Judith Vukov, M.D., Inc.'s

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[15] In *Brenner v. Universal Health Services of Rancho Springs, Inc.* (2017) 12 Cal.App.5th 589, a wrongful death case, the same district that authored *Armin* applied its holding outside the peer review context to preclude a widow's section 1278.5 claim against physicians to whom she complained about substandard care her husband was receiving while in the defendant hospital's care. (*Id.* at p. 602 ["statute does not create a claim as against individual doctors"].)

section 1278.5 claim in the first amended complaint as to Glendale Adventist Medical Center. The case is remanded for further proceedings consistent with our opinion.

The parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.