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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VEERAAIAH CHUNDU, et al.,

Plaintiffs and Respondents,

v.

CYNTHIA A. CORK, et al.,

Defendants and Appellants.

G055362

(Super. Ct. No. 30-2016-00888744)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Hill, Farrer, & Burrill, Michael S. Turner, Dean E. Dennis, and Jenner C. Tseng, for Defendants and Appellants.

Jeffrey Lewis for Plaintiffs and Respondents.

Dr. Cynthia A. Cork, Fountain Valley Regional Hospital and Medical Center (Hospital), and Hospital employees (collectively referred to in the singular as Cork, unless the context requires otherwise) appeal from the trial court's order denying in part and granting in part their special motion to strike<sup>1</sup> Dr. Veeraiah Chundu (Chundu) and OC Neonatal Group, Inc.'s (Group) (collectively referred to in the singular as Chundu, unless the context requires otherwise) complaint. Cork argues the trial court erred when it concluded their claims did not arise from protected activity. We disagree and affirm the order.

## FACTS

### *I. Substantive Facts*

Chundu, a neonatologist, was a shareholder and chief executive officer of the Group. For over 25 years, he served as the Hospital's director of its neonatal intensive care unit (NICU). Beginning in 2009, the Group contracted with the Hospital to have Group physicians provide 24-hour neonatal coverage at the Hospital. Cork became the Chair of the Hospital's obstetrics and gynecology department in January 2016. In November 2016, the Hospital did not renew its contract with the Group, and it expired. The Hospital instead entered into a new non-exclusive contract with Pediatrix Medical Group (Pediatrix) for NICU services. The Hospital is an "open unit," which means it cannot enter into exclusive contracts with physician groups to provide neonatal services. Chundu, and Group physicians, retained privileges at the Hospital.

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A special motion to strike is also known as an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. (Code Civ. Proc., § 425.16, all further statutory references are to the Code of Civil Procedure, unless otherwise indicated; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

## *II. Procedural Facts*

Chundu and the Group filed a complaint against Cork for defamation, intentional interference with contract, and interference with prospective economic advantage. Chundu and the Group filed a first amended complaint (FAC) against Cork, Lisa Wilson, Peggy Schaefer, Laura Flynn, Wendy Burrell, Eileen Litchfield, Brittney Chance, Dana Starr, and Dorothy Wilson (Hospital Employees).<sup>2</sup> The FAC alleged defamation and intentional interference with contract causes of action against Cork. It alleged intentional interference with prospective economic advantage and violation of Business and Professions Code section 17200 (section 17200) causes of action against Cork, Hospital, and Hospital Employees.

The theory of the FAC was Cork wrongfully accused Chundu and the Group of keeping patients in NICU for medically unnecessary reasons to make money. Additionally, the FAC asserted Cork and Hospital employees acted to direct NICU patients away from the Group and to Pediatrix effectively creating a closed unit in violation of California law. For example, at a November 2016 obstetrician department meeting, Wilson, the Hospital's chief business development officer, stated "it is illegal for Group physicians to come to [l]abor [and] [d]elivery unless they are called." At the same meeting, Flynn, the Hospital's director of obstetrics and telemetry, said Pediatrix, and not the Group, must treat international cash patients with Blue Cross insurance.

Cork filed a special motion to strike the FAC supported by declarations from her and Hospital Employees. Chundu filed an opposition to Cork's special motion to strike, which was supported by declarations and evidentiary objections. Cork filed a reply and evidentiary objections.

In a minute order, the trial court granted in part and denied in part Cork's special motion to strike. As to claims against Cork, the court ruled she did not

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<sup>2</sup>

Chundu later amended the FAC to add Hospital as a Doe defendant.

demonstrate Chundu’s claims arose from protected activity because she did not make her statements at or in connection with a peer review proceeding. With respect to the claims against Hospital employees and Hospital, the court opined they were “‘mixed,’” containing both protected speech and non-protected speech or conduct. The court reasoned Wilson and Flynn made their statements at peer review proceedings, and Chundu did not establish a probability of prevailing because she offered no evidence of malice. Thus, the court struck the allegations regarding Wilson and Flynn. Finally, the court concluded Cork did not demonstrate Chundu’s claims arose from protected activity because he sued the remaining defendants for their conduct, not their speech, and Civil Code section 47’s privileges did not apply.

#### DISCUSSION

“In evaluating an anti-SLAPP motion, the court conducts a potentially two-step inquiry. [Citation.] First, the court must decide whether the defendant has made a threshold showing that the plaintiff’s claim *arises from* protected activity. [Citation.] To meet its burden under the first prong of the anti-SLAPP test, the defendant must demonstrate that its act underlying the plaintiff’s claim fits one of the categories spelled out in subdivision (e) of the anti-SLAPP statute. [Citation.] . . . [¶] Second—if the defendant meets its burden of showing all or part of its activity was protected—then the court proceeds to the next step of the inquiry. At this stage—applying the second prong of the anti-SLAPP test—the court asks ‘whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.] [¶] An appellate court reviews a trial court’s ruling on an anti-SLAPP motion de novo, applying the legal principles and

two-prong test discussed above. [Citation.]”<sup>3</sup> (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 859-860.) In determining whether a defendant has met the first prong burden, the trial court “shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

The FAC asserted the following general allegations before the Hospital terminated the agreement with the Group. Beginning in January 2016 when she became Chair of the Hospital’s obstetrics and gynecology department, Cork “unleashed a campaign of false statements and accusations about Chundu and [the Group].” On April 8, 2016, Cork, in the presence of two other doctors, falsely “accused Chundu and [the Group] of admitting and keeping patients in the NICU for medically unnecessary reasons to make money.” On June 17, 2016, Cork falsely told the Hospital chief executive officer (CEO) that Chundu failed to attend a mandatory Obstetrician Core Committee meeting. On June 21, 2016, Cork and Chundu met with the Hospital CEO and Cork falsely said “Schaefer . . . complained to Cork that there [were] inappropriate and medically unnecessary admissions into the NICU.” Additionally, Cork falsely stated Chundu directed Group physicians not to attend a meeting regarding Hospital policy on sepsis patients.

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Section 425.16, subdivision (e), provides as follows: “As used in this section, ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

The FAC asserted the following general allegations after the Hospital terminated the agreement with the Group. Cork and Hospital employees falsely told other physicians that Chundu and other Group physicians cannot treat patients at the Hospital and to use Pediatrix physicians. Additionally, Cork and Hospital employees told other physicians that Chundu and other Group physicians admitted babies to the NICU for medically unnecessary reasons.

*I. Defamation & Intentional Interference with Contract*

The FAC alleged the defamation and intentional interference with contract causes of action against Cork only. The elements of a cause of action for defamation are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.)

The elements of a cause of action for intentional interference with contractual relations are “(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

[Citation.]” (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.)

The basis of these causes of action were Cork’s statements Chundu and other Group physicians admit babies to NICU for medically unnecessary reasons to increase profits and Hospital Employees complained about Chundu’s practices, and Chundu failed to attend mandatory meetings. Cork cites to subdivision (e)(1) and (e)(2) of section 425.16 to support her claim Chundu’s claims arise from her protected activity (references to subdivisions, without designation of statute, are to section 425.16). Subdivision (e)(1) protects statements “made before” an official proceeding authorized by law. Chundu does not dispute the hospital peer review process is an official proceeding authorized by law. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 198 (*Kibler*); Bus. & Prof. Code, § 805, subd. (a)(1)(A).) But

Cork did not make any of the alleged statements “before” the Hospital peer review proceeding. Cork concedes the point when she states “the fact some of the statements were made outside of a committee meeting is of no import.” It is of crucial import under subdivision (e)(1). Cork offered no evidence, in her declaration or otherwise, she made the statements “before” an official peer review proceeding. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116 [subdivision (e)(1) requires statements must be made in specified proceeding or body].) Cork cites to no authority, and we found none, that supports her claim that because she is the chair of the Hospital’s obstetrics and gynecology department any “review” she conducts or “activity” she engages in is a peer review proceeding. Subdivision (e)(1) is inapplicable.

Subdivision (e)(2) protects statements “made in connection with an issue under consideration or review by . . . any other official proceeding authorized by law.” A statement is made “in connection with” a proceeding if it relates to substantive issues in the proceeding and is directed to persons having some potential interest in the proceeding. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962.)

Cork asserts the following statements were made in connection with the peer review process, and official proceeding: on April 8, 2016, Cork accused Chundu of making medically unnecessary admissions to NICU in the presence of two other doctors; on June 17, 2016, Cork told the Hospital CEO that Chundu failed to attend a mandatory Obstetrician Core Committee meeting; and on June 21, 2016, Cork told the Hospital CEO that a nurse complained Chundu made medically unnecessary admissions to NICU in Chundu’s presence.

Although we construe section 425.16 broadly, the parties pleadings and affidavits do not establish Chundu’s defamation and intentional interference with contract causes of action arise from Cork’s activity in furtherance of her constitutional right to free speech. Cork offered no evidence, through affidavits, that any of her alleged statements were made in connection with the Hospital’s peer review of Chundu. In her

declaration, Cork never stated the Hospital began a peer review of Chundu's professional conduct. On the other hand, Chundu, in his declaration, stated none of Cork's statements were made in connection with a peer review proceeding. The record is void of any evidence there was a Hospital peer review of Chundu's professional conduct.

As relevant here, Business and Professions Code section 805, subdivision (a)(1)(A), provides "[p]eer review" is defined as follows: "(i) A process in which a peer review body reviews the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct of *licentiates* to make recommendations for quality improvement and education, if necessary, in order to do either or both of the following: [¶] (I) Determine whether a licentiate may practice or continue to practice in a health care facility, clinic, or other setting providing medical services, and, if so, to determine the parameters of that practice. [¶] (II) Assess and improve the quality of care rendered in a health care facility, clinic, or other setting providing medical services. [¶] (ii) Any other activities of a peer review body as specified in subparagraph (B)." Business and Professions Code section 805, subdivision (a)(1)(B), defines "[p]eer review body."

The pleadings and affidavits support the conclusion Cork met with the Hospital CEO and other Hospital doctors and made statements concerning Chundu but there is no evidence this amounted to a peer review of Chundu. Cork offered no evidence the Hospital instituted a review of Chundu's "basic qualifications, staff privileges, employment, medical outcomes, or professional conduct." In her declaration, Cork stated the Hospital CEO asked her to investigate medically unnecessary admissions to the NICU, but again this was not evidence the Hospital instituted a peer review of Chundu. Indeed, the record before us demonstrates Chundu retained his privileges at the Hospital. Additionally, the meeting where Wilson and Flynn made the statements that the trial court struck occurred after the Hospital let its agreement with the Group expire, and there is no evidence the purpose of the meeting was to review Chundu's conduct.



Cork relies on *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, to argue her statements and conduct outside of meetings were part of an investigation and “essential to the peer review process.” In *Lieberman*, the court concluded defendant acted in furtherance of its free speech rights when it illegally recorded plaintiff’s conversations with two patients as part of defendant’s investigation and news report on doctors who improperly prescribe controlled substance. (*Id.* at p. 170.) The court stated, “Reporting the news usually requires the assistance of newsgathering, which therefore can be construed as undertaken in *furtherance* of the news media’s right to free speech.” (*Id.* at p. 166.) *Lieberman* is inapposite.

Cork analogizes newsgathering to her “investigation” of Chundu. But as we explain above, Cork failed to offer any evidence she or the Hospital instituted a peer review proceeding of Chundu and his practices. We cannot conclude a meeting where Hospital staff discussed sepsis policy and Cork’s random comments to her colleagues constituted a peer review of Chundu. Subdivision (e)(2) is inapplicable. Cork did not carry her burden of demonstrating the alleged statements related to substantive issues in and official proceeding and thus arose from protected activity.

## *II. Interference with Prospective Economic Advantage & Section 17200*

The FAC alleged the intentional interference with prospective economic advantage and violation of section 17200 against Cork, Hospital, and Hospital Employees. The elements of a cause of action for intentional interference with contractual relations are “(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant’s action. [Citation.]” (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.) The elements of a cause of action for violation of section 17200 are an unlawful, unfair, or

fraudulent business practice or act. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.)

In the intentional interference with prospective economic advantage cause of action, Chundu alleged Cork and Hospital Employees wrongfully disrupted Chundu's economic relationships with patients and steered patients to Pediatrix by making false statements, breaking Hospital rules regarding consultations, and violating California law that requires the NICU be an open unit. In the section 17200 cause of action, Chundu alleged Cork and Hospital Employees steered patients to Pediatrix in violation of California law requiring NICU be an open unit by doing the following: telling physicians Chundu and Group physicians cannot treat patients at the Hospital NICU, telling nurses to always call Pediatrix, harassing obstetricians who used the Group, and drafting a memorandum stating only Pediatrix may provide 24-hour care at the NICU.

Cork admits "these two causes of action are predicated on both protected and unprotected activity[]" but she does not cite to section 425.16, subdivision (e), or explain which category of protected activity is implicated as to these two causes of action. We treat this contention as waived because it is not the appellate court's job to develop arguments for the parties. (*Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1196, fn. 2 [not proper function of appellate court to serve as "backup appellate counsel"].) In any event, as we explain above, Cork offered no evidence the statements were made before an official proceeding, a peer review hearing (§ 425.16, subd. (e)(1)), or in connection with an official proceeding, the peer review process (§ 425.16, subd. (e)(2)). Again, the record is void of any evidence Cork or the Hospital instituted a peer review into Chundu's practices and performance.

Cork's reliance on *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, a case decided after the trial court ruled, is misplaced because a discussion about the "principal thrust or gravamen" of a complaint is inconsequential when Cork has offered no evidence she engaged in protected activity. Thus, subdivision (e)(1) and (e)(2) are inapplicable.

### *III. Public Issue or Issue of Public Interest*

Subdivision (e)(4) protects "other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cork asserts "[a]ll the actions [Chundu] ha[s] attributed to [Cork] relate to matters of health." She claims the FAC is based on her conduct of questioning Chundu's NICU admission practices and her conduct of complying with the Hospital's obstetrics procedures and practices. It is true information concerning choosing doctors can be a matter of public interest. (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344.) However, section 425.16 requires the issue to be a concern to a significant number of people and not "a relatively small, specific audience." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 481.)

Here, Cork has not established through the pleadings and affidavits that her statements were a concern to a significant number of people. Although there was evidence a group of expectant mothers sent the Hospital CEO a letter about NICU admissions and requesting Chundu not be their pediatrician, this was not sufficient evidence this issue was a concern to a significant number of people. Therefore, the trial court properly denied in part and granted in part Cork's special motion to strike Chundu's claims.

DISPOSITION

The order is affirmed. Respondents are awarded their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.