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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NAYYER ALI et al., Plaintiffs and Respondents, v. DIGNITY HEALTH dba ST. MARY MEDICAL CENTER et al., Defendants and Appellants.	B331058 (Los Angeles County Super. Ct. No. 23STCV03405)

APPEAL from orders of the Superior Court of Los Angeles County, Maurice A. Leiter, Judge. Affirmed in part, reversed in part, dismissed in part, and denied in part.

Manatt, Phelps & Phillips, Barry S. Landsberg, Doreen Wener Shenfeld, Joanna S. McCallum, and Craig S. Rutenberg, for Defendants and Appellants.

Call & Jensen, Mark Eisenhut and L. Lisa Sandoval, for Plaintiffs and Respondents.

I. INTRODUCTION

Drs. Nayyer Ali and Mauricio Heilbron (plaintiffs) brought an action against Dignity Health, doing business as the hospital St. Mary Medical Center (SMMC); Carolyn Caldwell; Dr. Charles Anderson; and Christopher Pook (defendants) asserting whistleblower retaliation claims under Health and Safety Code section 1278.5 (section 1278.5). Dr. Ali also asserted claims against defendants for interference with prospective economic relations and unfair business practices. The trial court partially granted defendants' anti-SLAPP[1] motion to strike portions of plaintiffs' claims.[2] On appeal, defendants contend the court erred by failing to grant their anti-SLAPP motion in full and they are entitled to an award of all attorney fees they incurred in connection with that motion. We affirm the court's ruling on defendants' anti-SLAPP motion as to Dr. Heilbron's allegations, reverse the court's ruling on defendants' anti-SLAPP motion as to

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[1] "A 'SLAPP' is a "'strategic lawsuit against public participation"' [citation], and special motions to strike under [Code of Civil Procedure] section 425.16 [(section 425.16)] are commonly referred to as '[a]nti-SLAPP motions' [citation]." (*Bonni v. St. John Health System* (2021) 11 Cal.5th 995, 1007, fn. 1 (*Bonni*).)

[2] In footnote one on page one of defendants' anti-SLAPP motion, defendants stated, "Defendants do not seek to strike [Dr.] Ali's first cause of action for interference with prospective economic relations, or his unfair competition claim to the extent it is based on the [challenged] allegations." Defendants' argument on pages 13 and 14 of their motion concerned Dr. Ali's unfair competition claim to the extent it was "based on alleged retaliatory peer review."

Dr. Ali's allegations, dismiss defendants' appeal of the court's attorney fees award, and deny defendants' request for attorney fees on appeal.

II. BACKGROUND

A. *Plaintiffs' Complaint*

On February 16, 2023, plaintiffs filed a complaint against defendants. The complaint alleged as follows:

1. Defendants

Dignity Health operated SMMC. Caldwell was SMMC's Chief Executive Officer, Dr. Anderson was SMMC's Chief Medical Officer, and Pook was the chair of SMMC's Hospital Community Board (HCB).

2. Dr. Ali

Dr. Ali was an experienced critical care physician and a longstanding member of SMMC's medical staff. For many years, Dr. Ali taught SMMC residents pursuant to an automatically renewing contract with the hospital's residency program. He also served as a Teaching Attending physician for SMMC's intensive care unit (ICU) from 1996 until November 2022. Residents gave him uniformly positive reviews and he twice received outstanding teaching awards.

Dr. Ali served on SMMC's Peer Review Committee from 2013 to 2018, and chaired both the Peer Review Committee and

the Department of Medicine at the time the complaint was filed. He also was a current member of the Medical Executive Committee (MEC) for SMMC's medical staff.

In the Spring of 2021, Dr. Anderson asked Dr. Ali to serve as the Medical Director for the ICU and Dr. Ali accepted. Dr. Anderson, however, prevented Dr. Ali from acting as a true director, excluding him the hiring process for locums tenens intensivists (doctors who temporarily fill staffing gaps) which resulted in SMMC hiring substandard intensivists. After SMMC's administration attempted several times to influence his decisions improperly, Dr. Ali resigned as the ICU Medical Director.

Although Dr. Ali was a medical staff member of and had privileges to practice at SMMC, he maintained a private critical care consultation practice. He only had patients at SMMC if other private doctors referred their patients to him. Doctors with patients at SMMC trusted Dr. Ali who consequently had a "quite busy" practice and provided more ICU care at SMMC than any other physician in the last six months of 2022.

3. Dr. Heilbron

Dr. Heilbron was a surgeon and a member of SMMC's medical staff since 1998. At various times while a medical staff member, Dr. Heilbron served as Interim Chief and Chief of Surgery, Director of the Center for Wound Care, Member of the Board of Governors, Cancer Liaison Physician, Member and Chairman of the Medical Staff Quality/Peer Review Committee, and Vice-Chief and Chief of Staff. He twice won the SMMC Leadership Award.

Dr. Heilbron was a private physician and not an SMMC employee. Primarily he treated patients with "emergent/urgent, often life-threatening conditions." Dr. Heilbron served as an on call surgeon for Trauma Service—operating on gunshot wounds and injuries from assaults and car accidents—and for General Surgery—operating on such conditions as perforated or obstructed bowels and gangrenous gallbladders.

4. Defendants' Retaliation

SMMC was legally required to maintain on-call lists of physicians who were on its staff or had hospital privileges and were available to treat patients with emergency medical conditions. The Emergency Department's call panels were organized by specialties and subspecialties, including Trauma Service, General Surgery, Vascular Surgery, Internal Medicine, and Intensive or Critical Care.

Although SMMC was legally required to maintain emergency call panels, it did not have the authority to dictate which of the eligible physicians participated on the panels. Under the SMMC Medical Staff By-laws, participation on the panels was determined by the medical staff in collaboration with SMMC administration.

In 2019, Caldwell interfered with the Vascular Surgery call panel by imposing restrictions on the physicians who were allowed to participate causing scheduling chaos. Because of Caldwell's interference, the Hospital often failed to fill Vascular Surgery call panels with members of the SMMC medical staff and had to resort to locums tenens physicians to fill the gaps.

In 2022, SMMC started issuing internal medicine call panels for ICU admissions that excluded all private doctors and limited participation to members of ProHealth Hospitalists, a group with which SMMC had contracted to fill non-ICU internal medicine call panels, and filling gaps in coverage with locums tenens physicians.

In or around April 2022, Drs. Ali and Heilbron and other medical staff members began advocating for SMMC to open up call panel participation to private physicians on the medical staff. SMMC refused to cooperate with the medical staff to create call panels thus putting the hospital, patients, and physicians at risk. Caldwell directed the Emergency Department staff to ignore call panels the medical staff published and to use only call panels SMMC's administration published.

Defendants retaliated against Dr. Ali for his advocacy for patients and the medical staff by terminating his automatically renewing teaching contract with SMMC's residency program and by removing him from the schedule for teaching attending physicians in the ICU. Undeterred, Dr. Ali continued to advocate that SMMC's conduct was negatively impacting patient care.

Caldwell "and her ally on the HCB" then attempted to force out Dr. Ali in other ways. On one occasion, Dr. Ali was needlessly forced to come to the hospital late at night to pronounce a patient dead when doctors present at the hospital could have done so. Defendants pressured nurses to complain about Dr. Ali and used those complaints to try to force the medical staff to discipline him. Pook threatened the MEC that the HCB would take direct action against Dr. Ali unless the MEC investigated Dr. Ali's practice and took disciplinary action against him.

At some point, Caldwell assigned Vascular Surgery call panel scheduling to "a physician of her choice" (identified as Dr. Hamed Taheri during the litigation of defendants' anti-SLAPP motion). Dr. Taheri soon became the subject of several complaints, many of which were "extremely serious"—at least one of which involved a patient's death. Dr. Heilbron alerted SMMC that Dr. Taheri presented a danger to patients and expressed his concern about the standard of care at the hospital. Dr. Taheri stopped working at SMMC.

The Medical Staff Peer Review Committee reviewed reports of Dr. Taheri's dangerous practices and unanimously recommended that the MEC place Dr. Taheri on summary suspension. The MEC imposed a summary suspension on July 21, 2022.

If the summary suspension remained in place, SMMC would have had to file a Business and Professions Code section 805 report[3] (805 report) with the California Medical Board about Dr. Taheri. Instead, SMMC negotiated a resolution with Dr. Taheri's attorney that allowed Dr. Taheri to walk away from his

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[3] Business and Professions Code "[s]ection 805 requires that an officer, director, or peer review administrator of a licensed health care center or clinic must file a report with the applicable licensing agency when a physician's membership, staff privileges, or employment is terminated or revoked for a 'medical disciplinary cause or reason.' ([Bus. & Prof. Code,] § 805, subd. (b)(2).) '"Medical disciplinary cause or reason" means that aspect of a [physician's] competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care.' ([Bus. & Prof. Code,] § 805, subd. (a)(6).)" (*Alaama v. Presbyterian Intercommunity Hospital, Inc.* (2019) 40 Cal.App.5th 55, 65–66.)

practice at the hospital without officially losing his privileges thus permitting defendants to avoid filing an 805 report.

Although Dr. Taheri no longer practiced at SMMC, the Medical Staff Peer Review Committee continued its investigation which resulted in findings that Dr. Taheri's actions were deficient and fell far short of medical standards. Based on those findings, the MEC voted to suspend Dr. Taheri in December 2022. Caldwell recommended to the HCB that it not suspend Dr. Taheri. At the same time, SMMC denied it was required to file and refused to file an 805 report concerning Dr. Taheri and threatened to withhold indemnity for any medical staff member who filed an 805 report concerning Dr. Taheri if litigation resulted.

Nevertheless, as chief of staff, Dr. Heilbron was required to file and did file an 805 report concerning Dr. Taheri. Shortly thereafter, Caldwell demanded Dr. Heilbron participate in a conference call to discuss his action. Dr. Heilbron responded that any discussion of the issue should be done in writing so there would be a documentary record.

Caldwell then implemented a plan to eliminate Dr. Heilbron's practice at SMMC. On January 26, 2023, she sent a memorandum to the MEC and the General Medical Staff stating her intention to propose to the HCB that it restrict members of the medical staff from participating on Trauma Service call panels. Caldwell intended to recommend that SMMC "'enter into an exclusive contract for acute care trauma services,' meaning '[t]he newly contracted trauma group—and only those affiliated with the contracted group—would provide 24/7/365 coverage for all trauma cases, including surgery.'" Because Dr. Heilbron was

a solo practitioner, the exclusive contract Caldwell intended to recommend would eliminate his trauma practice at SMMC.

In support of her proposal, Caldwell falsely claimed there were ongoing challenges and inadequate call coverage for acute trauma and vascular services. She also falsely claimed that medical staff physicians' last minute decisions to no longer take emergency department calls cost SMMC "'considerable amounts of money.'" In truth, Caldwell's recommendation for an exclusive contract for SMMC's trauma service was motivated primarily by a desire to retaliate against Dr. Heilbron for his longstanding advocacy for medical staff independence and his decision to file the 805 Report about Dr. Taheri despite SMMC's request that he not do so.

B. *Defendants' Anti-SLAPP Motion*

On March 30, 2023, defendants filed their anti-SLAPP motion asking the trial court to strike all or part of 28 paragraphs from plaintiffs' complaint. Defendants argued the challenged allegations concerned statements made in connection with SMMC's peer review process or its exclusive contracting process, matters the anti-SLAPP law protected as "written or oral statement[s] or writing[s] made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding[s] authorized by law" (§ 425.16, subd. (e)(2)) and as "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" (§ 425.16, subd. (e)(4)). We

set forth the challenged allegations here (the allegations the court struck in partially granting defendants' motion are in bold):

Paragraph 26: "'Caldwell also falsely accused Dr. Ali of acting illegally, and threatened him with adverse actions.'"

Paragraph 27: "'Most recently, on January 26, 2023, Caldwell sent memoranda to the Medical Executive Committee and General Medical Staff stating her intention to make a proposal to the Hospital Community Board restricting participation by members of the Medical Staff on call panels for SMMC's Trauma Service. In particular, Caldwell intends to recommend to the HCB "that we [the Hospital] enter into an exclusive contract for acute care trauma services," meaning "[t]he newly contracted trauma group—and only those affiliated with the contracted group—would provide 24/7/365 coverage for all trauma cases, including surgery." Because Dr. Heilbron is a solo practitioner, the "exclusive contract" Caldwell intends to recommend to the[HCB], if accepted, will entirely eliminate his trauma practice at the Hospital.'"

Paragraph 28: "'In her memorandum, Caldwell purported to justify this naked power play against Dr. Heilbron by falsely claiming "ED call coverage for St. Mary Medical Center (SMMC) acute trauma and vascular services has been an ongoing challenge," and that "there has been inadequate coverage impacting patient care in these areas." Caldwell further claimed—again falsely— that the Hospital had faced situations where physicians on the Medical Staff "decide that they no longer want to take ED call," most times "at the last minute creating a stressful situation to find physicians and costing the organization considerable amounts of money."'"

Paragraph 29: "'In fact, as alleged above, the SMMC Medical Staff has never failed to provide coverage for the Trauma Service, and the need to use *locums* coverage for the Vascular Service (and for a short period, General Surgery) resulted directly from Administration interference. Furthermore, Caldwell's claim that trauma surgeons and general surgeons often decided not to take call "at the last minute" was pure fiction. On the contrary, to the extent the Hospital has faced challenges due to physicians backing out at the last minute—or not showing up—they have been the *locums tenens* physicians serving on the Vascular Surgery call panel.'"

Paragraph 30: "'Caldwell sent her memorandum to the SMMC Staff shortly after Dr. Heilbron filed an "805 Report" pursuant to Business and Professions Code § 805(c), which the Hospital Administration had refused to file on its own. The report notified the relevant California agency about a physician—the very same one Caldwell hand selected to head vascular surgery—who had informally agreed to absent himself from the Hospital without officially resigning in order to avoid a greater-than-fourteen days suspension in connection with the investigation of serious misconduct.'"

Paragraph 31: "'On information and belief, Caldwell's move to get rid of Dr. Heilbron by recommending an exclusive contract for SMMC's trauma service was motivated primarily by a desire to retaliate against Dr. Heilbron for his longstanding advocacy for Medical Staff independence, and his most recent decision to file the 805 Report in spite of the Hospital's pleas that he refrain from doing so.'"

Paragraph 32: "'There is no legitimate reason for Defendants' push to exclude private doctors from participating in

emergency call panels. But there is a plausible reason for the Hospital's decision to limit participation to physicians affiliated with certain groups, such as ProHealth Hospitalists or the "newly contracted trauma group" that Caldwell is now pushing for. While these groups are ostensibly owned by physicians and independent of the hospital, they are heavily influenced by Hospital Administration. Indeed, the Administration's influence is so extensive that, as a practical matter, the Hospital has treated ProHealth's members as Hospital employees, contrary to California law. Plaintiffs anticipate Caldwell will treat the "newly contracted trauma group" similarly. So long as Hospital Administration controls the call panels, physicians who wish to continue their participation on those panels must follow Hospital Administration directions.'"

Paragraph 35: "'**and efforts to subject Dr. Ali to discipline based on unfounded, manufactured complaints about his professionalism**.'"

Paragraph 43: "'In addition, Dr. Ali is informed and believes that Defendants have pressured certain nurses to complain about him, and then used those complaints as leverage to try to force the Medical Staff to subject Dr. Ali to discipline.'"

Paragraph 44: "'However, apparently frustrated that the peer review process was not yielding the desired result, Defendants directly contacted the Hospital's Risk Management Department, and obtained a spreadsheet entitled "Dr. Ali cases updated 12-7-22.xlsx," which lists the complaints submitted to peer review over the prior year.'"

Paragraph 45: "'**Shortly thereafter, the Medical Executive Committee received a letter signed by . . . Pook threatening direct action against Dr. Ali by the HCB**

unless the Medical Executive Committee complied with his demand to investigate Dr. Ali's entire practice—including complaints that were already resolved—and take disciplinary action against him.'"

Paragraph 46: "'Pook's heavy-handed attempt to circumvent the ordinary disciplinary process was directly contrary to the Board's established practice, and with the exception of a similar tactic employed against Dr. Heilbron (see below), previously unheard of. On information and belief, other than Drs. Ali and Heilbron, the Board has not taken such action with respect to any other physicians at SMMC. The only plausible reason for this action is to discriminate and retaliate against Dr. Ali because of his efforts to ensure Medical Staff independence and promote high quality care at the Hospital.'"

Paragraph 53: "'**Shortly thereafter, on February 25, 2022, Pook sent a letter to the Medical Executive Committee alleging that approximately one month earlier, in response to a request to assist in an emergency procedure Dr. Heilbron had made an "unprofessional verbal outburst" and refused to perform the procedure, requiring another physician to step in and save the patient from respiratory arrest. Pook demanded that the MEC provide a full report of the investigation of the incident, and that it permit "hospital leadership" (i.e., Caldwell) to participate in interviews with SMMC staff. Pook also demanded that the MEC force Dr. Heilbron to take an extended leave of absence.**'"

Paragraph 54: "'**Pook's allegations in his February 25 letter were false, and the Peer Review Committee's investigation resulted in a finding that he provided**

appropriate care. However, the reason why Pook demanded that the MEC attempt to force Dr. Heilbron into a leave of absence was transparent. Had he taken a leave of absence while under investigation, Defendants would have had reason to file an "805 Report" under Business & Professions Code § 805(c)(1), which requires hospitals to report to the California Medical Board whenever a licentiate "[r]esigns or takes a leave of absence from membership, staff privileges, or employment" after "receiving notice of a pending investigation initiated for a medical disciplinary cause or reason." Had Defendants succeeded in bullying Dr. Heilbron into taking a leave of absence, the resulting 805 Report would have seriously damaged his reputation and standing at SMMC and in the medical community.'"

Paragraph 55: '"**Ironically, while Defendants were busy trying to railroad Dr. Heilbron with false accusations, they were assiduously sweeping under the rug real problems with Caldwell's hand-picked head of vascular surgery. Caldwell had brought that physician in to SMMC, but he soon became the subject of several complaints—so many that outside experts were required to handle the sheer number of cases. Many of these complaints were extremely serious, and at least one involved a patient who subsequently died. Dr. Heilbron alerted Hospital Administration that the physician presented a danger to patients, and expressed his concerns about the standards of care at the Hospital.**'"

Paragraph 56: '"When the Medical Staff Peer Review Committee first reviewed reports of this physician's dangerous

practices in July 2022, it unanimously recommended that the MEC place the physician on summary suspension. The MEC imposed the summary suspension on July 21, 2022 to mitigate imminent danger to patients.'"

Paragraph 57: "'Had that summary suspension remained in place, the Hospital would have been required to file an 805 Report with the California Medical Board pursuant to Business & Professions Code § 805(e). The suspension, however, was lifted two weeks later based on certain conditions. For instance, the physician was stripped of his leadership positions, removed from ER call for 90 days, and required to submit to other requirements, all while the peer review investigation continued.'"

Paragraph 58: "'In the meantime, the Hospital negotiated a deal with the physician's attorney informally permitting him to "walk away" from his practice at the Hospital without officially losing his privileges. Rather than continuing to practice at the Hospital subject to the conditions, he just disappeared, abandoning his patients and apparently moving his practice to another city.'"

Paragraph 59: "'As a practical matter, the physician resigned his membership on the SMMC Medical Staff. In an email to the Medical Staff's attorney, the physician's attorney claimed he left SMMC due to the hostility of the work environment, and unequivocally stated the physician would "NOT work in that place EVER again." However, because the stated conditions for lifting the summary suspension did not indicate the physician had officially resigned or taken a voluntary leave of absence, Defendants maintained the fiction that the physician retained his staff membership and privileges.'"

Paragraph 60: "'Defendants pretended this physician remained a member of the Medical Staff with full privileges in order to avoid filing an 805(c) Report—the exact same kind of report they had previously attempted to set up for Dr. Heilbron. The embattled physician's attorney's email confirmed he was attempting to leave in a manner that would protect his professional reputation "to the extend [*sic*] that is still possible."'"

Paragraph 62: "'Based on the results of the investigation, the Medical Executive Committee voted to suspend the physician in December 2022. However, Caldwell recommended the HCB reject the MEC's request, purportedly on the grounds that the physician did not have any patients at the Hospital and could therefore not pose any danger supporting a summary suspension. At the same time, the Hospital denied that an 805 Report was required, and refused to submit one. In a bizarre real-life version of Catch 22, Hospital Administration simultaneously maintained that the MEC could not summarily suspend the physician from the Medical Staff because he was no longer working at the hospital, and that the MEC could not file an 805 Report because the physician was still a member of the Medical Staff.'"

Paragraph 63: "'**In short, while Defendants clearly attempted to set up Dr. Heilbron for an 805 Report in February 2022, they were more than happy to let Caldwell's favorite become someone else's problem. Not only did Caldwell refuse the MEC's request that the Hospital file the 805 Report required by California law, the Hospital's in-house lawyer threatened to withhold indemnity should litigation arise from the filing of an 805 Report by anyone on the Medical Staff.**'"

Paragraph 64: "'In spite of these threats, Dr. Heilbron filed the 805 Report as he was required to do as Chief of Staff. Shortly thereafter, Caldwell demanded that Dr. Heilbron participate in a conference call to discuss his actions. Dr. Heilbron was not willing to debate the requirements of Section 805 on a call with an Administration that had already used threats, intimidation, undue influence, and misinformation against him, and therefore declined Caldwell's demand. Instead, Dr. Heilbron maintained that any discussion of the issue should be done in writing, thereby creating a documentary record.'"

Paragraph 65: "'Apparently realizing Dr. Heilbron could not be cowed, Caldwell moved forward with her plan to eliminate—or at least marginalize—his practice at SMMC. On January 26, 2023, she sent her memoranda to the Medical Staff proposing that the Hospital enter a contract wholly excluding Dr. Heilbron and other surgeons on the Medical Staff from participation in SMMC's Trauma Service. While Dr. Caldwell indicated that she will "accept input" on the proposal from the Medical Staff until March 1, 2023, her communications have made it clear that she intends to move forward with the proposal regardless of any input she receives.'"

Paragraph 69: "'However, if the HCB approves Caldwell's plan to restrict Trauma Service to physicians affiliated with her "newly contracted trauma group," Dr. Heilbron will effectively lose nearly his entire practice.'"

Paragraph 79: "'In addition, Dr. Heilbron filed an 805 Report with a California state agency relating to the care, services, and/or conditions of SMMC, as alleged herein.'"

Paragraph 80: "'and malicious threats and pursuit of unfounded disciplinary actions against him. Defendants

discriminated and retaliated against Dr. Heilbron with intimidation and threats, and most recently by putting in place a plan to eliminate Dr. Heilbron's practice at SMMC by excluding him from participating in the SMMC trauma service.'"

On the April 28, 2023, hearing date for defendants' anti-SLAPP motion, the trial court issued a "Tentative Ruling" in which it noted that plaintiffs' "complaint details a long, complex series [of] events leading to Plaintiffs' alleged harm. Defendants generally argue that Plaintiffs' causes of action arise solely from the peer review and exclusive contracting processes and therefore must be stricken. In opposition, Plaintiffs assert that the causes of action do not seek redress for statements made in connection with peer review process, that any mention of this process is merely context, and that the exclusive contracting process is not protected activity." The court continued the hearing on defendants' motion and ordered the parties to submit supplemental briefs focusing on the specific allegations defendants sought to have stricken and identifying the exact activity that was or was not protected. Further, the briefs were to address whether plaintiffs' causes of action arose from that activity or if the allegations served as evidence of or context for plaintiffs' claims.

On May 19, 2023, the parties filed supplemental briefs. In their supplemental brief, defendants argued Paragraphs 26, 35, 43–46, and 80 concerned SMMC's medical peer review process of Dr. Ali; Paragraphs 53–55 concerned the medical peer review process of Dr. Heilbron; and Paragraphs 56–64 and 79 concerned SMMC's medical peer review process of Dr. Taheri. Defendants argued Paragraphs 27–32, 65, and 69 concerned SMMC's exclusive contracting process. In their supplemental brief,

plaintiffs argued that some of the challenged allegations concerned actions and not statements, and other of the challenged allegations did not serve as the basis of their retaliation claims but were context for those claims.

C. *The Trial Court's Ruling*

After argument by the parties at the continued hearing, the trial court took the matter under submission and later issued an order granting defendants' anti-SLAPP motion in part. The court ruled the allegations in plaintiffs' complaint concerning a medical peer review of Dr. Heilbron and some of the allegations concerning a medical peer review of Dr. Ali were protected by the anti-SLAPP law as parts of "official proceeding[s] authorized by law," but the allegations concerning a medical peer review of Dr. Taheri were not. The court also rejected defendants' claim that SMMC's exclusive contracting process was "'quasi-legislative'" and thus allegations concerning that process were protected under the anti-SLAPP law.

III. DISCUSSION

A. *Anti-SLAPP Motion*

Defendants contend the trial court erred when it did not grant their anti-SLAPP motion in full.

1. Legal Principles

a. Section 1278.5 Retaliation

Section 1278.5 "forbids health facilities from discriminating or retaliating against certain individuals, including medical staff members, for presenting complaints concerning the quality of patient care to other members of the medical staff, the facility, or other responsible entities. (. . . § 1278.5, subd. (b)(1).) A claim under this statute requires proof of discriminatory treatment, which may be shown by 'any unfavorable changes in' a medical staff member's 'contract, employment, or privileges . . . or the threat of' such changes. (*Id.*, subd. (d)(2).)"[4] (*Bonni, supra*, 11 Cal.5th at p. 1015, fn. omitted.)

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[4] Section 1278.5 provides, in relevant part:

"(b)(1) A health facility shall not discriminate or retaliate, in any manner, against a patient, employee, member of the medical staff, or 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.

"[¶] . . . [¶]

"(d)(2) For purposes of this section, discriminatory treatment of an employee, member of the medical staff, or any other health care worker includes, but is not limited to, discharge, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee, member of the medical staff, or any other health care worker of the health care facility, or the threat of any of these actions."

b. Anti-SLAPP

"The anti-SLAPP statute is 'designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern. [Citations.] To that end, the statute authorizes a special motion to strike a claim "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).)' (*Wilson* [*v. Cable News Network, Inc.* (2019)] 7 Cal.5th [871,] 883–884.)

"Litigation of an anti-SLAPP motion involves a two-step process. First, 'the moving defendant bears the burden of establishing that the challenged allegations or claims "aris[e] from" protected activity in which the defendant has engaged.' (*Park* [*v. Board of Trustees of California State University* (2017)] 2 Cal.5th [1057,] 1061 [(*Park*)].) Second, for each claim that does arise from protected activity, the plaintiff must show the claim has 'at least "minimal merit."' (*Ibid.*) If the plaintiff cannot make this showing, the court will strike the claim." (*Bonni, supra*, 11 Cal.5th at pp. 1008–1009.)

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted

liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) . . . .' [Citation.]" (*Park, supra*, 2 Cal.5th at pp. 1062–1063.)

"Assertions that are 'merely incidental' or 'collateral' are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394 (*Baral*).) Similarly, "'a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.' [Citation.]" (*Bonni, supra*, 11 Cal.5th at p. 1014.)

"[A]t the second anti-SLAPP step, "'a plaintiff responding to an anti-SLAPP motion must "'state[ ] and substantiate[ ] a legally sufficient claim.'" [Citation.] Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" [Citation.] ". . . However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that

submitted by the plaintiff as a matter of law."" [Citation.]" (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 791–792.) "[A] plaintiff's burden at the second anti-SLAPP step is a low one, requiring only a showing that a cause of action has at least 'minimal merit within the meaning of the anti-SLAPP statute.' [Citation.]" (*Id.* at p. 793.)

"We review de novo the grant or denial of an anti-SLAPP motion." (*Park, supra*, 2 Cal.5th at p. 1067.)

2. Analysis

a. Peer Review Allegations

Anti-SLAPP motions have a limited role to play in retaliation claims. (*Bonni, supra*, 11 Cal.5th at p. 1026 [observing the Court of Appeal echoed other courts in expressing its concern that "discrimination and retaliation claims should 'rarely, if ever' be seen as appropriate targets of an anti-SLAPP motion"].) Nevertheless, medical peer review proceedings are "official proceedings authorized by law" within the meaning of section 425.16, subdivision (e)(2). (*Bonni, supra*, 11 Cal.5th at p. 1013.)

"[A] claim is subject to an anti-SLAPP motion to strike if its elements arise from protected activity. (*Park, supra*, 2 Cal.5th at p. 1063.) Courts deciding an anti-SLAPP motion thus must consider the claim's elements, the actions alleged to establish those elements, and whether those actions are protected. (*Ibid.*)" (*Bonni, supra*, 11 Cal.5th at p. 1015.) "[T]o establish a prima facie case under section 1278.5, a plaintiff must show that he or she (1) presented a grievance, complaint, or report to the hospital

or medical staff [or to any other governmental agency] (2) regarding the quality of patient care and (3) the hospital retaliated against him or her for doing so. (§ 1278.5, subd. (b)(1).)" (*Alborzi v. University of Southern California* (2020) 55 Cal.App.5th 155, 179 (*Alborzi*).)

i. Dr. Heilbron

In their anti-SLAPP motion, defendants challenged allegations Dr. Heilbron made in support of his retaliation claim that they argued were protected medical peer review allegations: (1) medical peer review allegations concerning Dr. Heilbron (Paragraphs 53–55) and (2) medical peer review allegations concerning Dr. Taheri (Paragraphs 56–62, 64, and 79). As noted above, the trial court struck the medical peer review allegations concerning Dr. Heilbron and left in place the medical peer review allegations concerning Dr. Taheri. Defendants contend the court should have stricken the medical peer review allegations concerning Dr. Taheri.[5] We disagree.

Dr. Heilbron alleged defendants retaliated against him because he filed an 805 report with respect to Dr. Taheri. Dr. Heilbron's 805 report was not a part of but was outside of SMMC's medical peer review of Dr. Taheri. That is, none of the allegations concerning Dr. Taheri's medical peer review was an element of Dr. Heilbron's retaliation claim, which claim included

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[5] Defendants also contend the court erred in failing to strike the allegations concerning "[Dr.] Heilbron's peer review" in Paragraph 80. We reject defendants' contention because we do not perceive a medical peer review allegation in Paragraph 80 that concerns Dr. Heilbron.

the following elements: (1) he filed an 805 report, (2) about the quality of patient care, and (3) defendants retaliated against him for doing so. (See *Alborzi, supra*, 55 Cal.App.5th at p. 179). Instead, allegations about Dr. Taheri's peer review were "'merely incidental'" or "'collateral'" contextual allegations that did not support his claim for recovery. (*Baral, supra*, 1 Cal.5th at p. 394). Accordingly, defendants failed to meet their first step burden to show the challenged allegations arose from their protected activity. (*Bonni, supra*, 11 Cal.5th at p. 1009.)[6]

ii. Dr. Ali

Defendants challenged medical peer review allegations against Dr. Ali in Paragraphs 26, 35, 43 through 46, and 80. The trial court struck the challenged allegations in paragraphs 35 and 45. Defendants contend the court should have struck the remaining paragraphs and allegations. We agree.

The challenged part of Paragraph 26 alleged, "Caldwell also falsely accused Dr. Ali of acting illegally, and threatened him

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[6] Defendants also contend Dr. Heilbron cannot maintain a section 1278.5 retaliation action against Pook because individual hospital board members are not within the definition of "'health facilities'" under section 1278.5, subdivision (i). The viability of Dr. Heilbron's retaliation action is a second step issue under the anti-SLAPP law. (*Bonni, supra*, 11 Cal.5th at p. 1009.) Because we hold defendants did not meet their first step burden to show protected activity, we do not reach Dr. Heilbron's second step obligation to show his claim has minimal merit with respect to these allegations. (See *ibid.*) We note, however, that Dr. Heilbron's only allegations of wrongdoing by Pook were in Paragraphs 53 and 54 which the court struck and from which ruling Dr. Heilbron did not appeal.

with adverse actions." Fairly construed, the paragraph concerns a threat of a disciplinary medical peer review proceeding.

In Paragraph 41, a paragraph defendants did not challenge in the anti-SLAPP motion, Dr. Ali alleged, "If Caldwell and Anderson hoped Dr. Ali would simply go away after they caused his teaching contract to be terminated, they were wrong. Dr. Ali continued to highlight for the Administration how its conduct was having a negative effect on care at the Hospital. As such, Caldwell and her ally on the HCB focused their efforts on trying to force Dr. Ali out in other ways." In the following paragraphs, including Paragraphs 43, 44, and 46, Dr. Ali alleged the "other ways" Caldwell and her ally (presumably Pook) tried to force him out—i.e., retaliated against him.

Paragraph 43 alleged defendants pressured nurses to complain about him and then used those complaints to try to force the medical staff to discipline him. These allegations concerned communications made in an effort to initiate a medical peer review proceeding.

The challenged part of Paragraph 44 alleged, "However, apparently frustrated that the peer review process was not yielding the desired result, Defendants directly contacted the Hospital's Risk Management Department, and obtained a spreadsheet entitled 'Dr. Ali cases updated 12-7-22.xlsx,' which lists the complaints submitted to peer review over the prior year." Here, Dr. Ali directly alleged retaliatory misconduct during a medical peer review proceeding that was not proceeding as defendants wanted.

Paragraph 46 alleged, "Pook's heavy-handed attempt to circumvent the ordinary disciplinary process was directly contrary to the Board's established practice, and with the

exception of a similar tactic employed against Dr. Heilbron (see below), previously unheard of. On information and belief, other than Drs. Ali and Heilbron, the Board has not taken such action with respect to any other physicians at SMMC. The only plausible reason for this action is to discriminate and retaliate against Dr. Ali because of his efforts to ensure Medical Staff independence and promote high quality care at the Hospital." Paragraph 46 concerned the manner in which Pook and SMMC tried to discipline Dr. Ali, a medical peer review matter.

The challenged part of Paragraph 80 as to Dr. Ali alleged defendants made "malicious threats and [pursued] unfounded disciplinary action against him. Paragraph 80 directly referred to how defendants conducted the medical peer review process.

The medical peer review allegations in Paragraphs 26, 43, 44, 46, and 80 served as the retaliation element (*Alborzi, supra*, 55 Cal.App.5th at p. 179) of Dr. Ali's section 1278.5 retaliation claim and thus are "official proceedings authorized by law" within the meaning of section 425.16, subdivision (e)(2). (*Bonni, supra*, 11 Cal.5th at p. 1013.)

Having concluded that defendants met their first prong burden of establishing that the challenged allegations arose from protected activity, we now consider whether Dr. Ali can meet his burden to show that his claim has minimal merit. (*Park, supra*, 2 Cal.5th at p. 1069.) Even if Dr. Ali can show the challenged allegations support the elements of a prima facie case of retaliation under section 1278.5, he cannot show a retaliation claim based on those allegations has minimal merit because the allegations are subject to the litigation privilege in Civil Code section 47.

Civil Code section 47, subdivision (b) provides, in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] In any (1) legislative proceeding, (2) judicial proceeding, *(3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure . . . .*" (Italics added.) "The principal purpose of the litigation privilege is to afford litigants and witnesses the utmost freedom of access to the courts without fear of harassment in subsequent derivative actions. (*Action Apartment* [*Assn., Inc. v. City of Santa Monica* (2007)] 41 Cal.4th [1232,] 1241.) The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings (2) by litigants or other participants authorized by law (3) to achieve the objects of the litigation and (4) that have some connection or logical relation to the action. [Citation.] The privilege is 'not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.' [Citation.]" (*Trinity Risk Management, LLC v. Simplified Labor Staffing Solutions, Inc.* (2021) 59 Cal.App.5th 995, 1006–1007 (*Trinity*).)

"The litigation privilege is 'relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing.' (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.)" (*Trinity, supra*, 59 Cal.App.5th at p. 1006.) The litigation privilege precludes claims based on the initiation of a medical peer review process as well as "'essentially everything any defendant said in the course of the peer review process in support of [any resulting disciplinary action.]' [Citation.]" (*Bonni v. St.*

Joseph Health System (2022) 83 Cal.App.5th 288, 303; *Bonni, supra,* 11 Cal.5th at p. 1013 [medical peer review proceedings are "official proceedings authorized by law" within the meaning of section 425.16, subdivision (e)(2)].)

Dr. Ali's challenged medical peer review allegations are subject to the litigation privilege in Civil Code section 47. Because Dr. Ali cannot show a section 1278.5 retaliation claim based on those allegations has minimal merit, the trial court erred in failing to strike them.[7]

b. Exclusive Contracting Process

In their anti-SLAPP motion, defendants argued that allegations Dr. Heilbron made in support of his retaliation claim—Paragraphs 27–32, 65, and 69—were based on statements made in connection with SMMC's exclusive contracting process and thus were protected under the anti-SLAPP law as part of an official proceeding authorized by law (§ 425.16, subd. (e)(2)) and as activity in furtherance of an issue of public interest (§ 425.16, subd. (e)(4)). The trial court ruled that defendants failed to show their exclusive contracting process was protected activity.[8]

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[7] Defendants also contend Dr. Ali cannot maintain a section 1278.5 retaliation action against Pook because individual hospital board members are not within the definition of "'health facilities'" under section 1278.5, subdivision (i). Because we hold the court erred in failing to strike Dr. Ali's challenged allegations, which include the allegations as to Pook, we need not reach this argument.

[8] The court did not address defendants' section 425.16, subdivision (e)(4) claim in its ruling.

Defendants contend SMMC's exclusive contracting process was an official proceeding within the meaning of section 425.16, subdivision (e)(2) because such processes are "'quasi-legislative'" and thus subject to judicial review. As support for their argument, defendants rely on *Kibler v. Northern Inyo County Local Hospital Dist*. (2006) 39 Cal.4th 192, 199–200 (one attribute of medical peer reviews that supports the conclusion that medical peer reviews are "official proceedings" under the anti-SLAPP law is that a hospital's decision resulting from a medical peer review is subject to judicial review by administrative mandate) and *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 382 (a hospital's contract process was "quasi-legislative" subject to review by traditional mandate review).

Defendants contend their exclusive contracting process qualified as a matter of public concern because (1) it was an "official proceeding" under section 425.16, subdivision (e)(2) and/or SMMC's "provision of quality patient care for the protection of the public is necessarily a matter of great public interest" and (2) their "communications regarding the proposal to enter into the Trauma Call Contract directly furthered and promoted the HCB's ultimate vote to move forward with an exclusive contract so that appropriate, reliable, quality trauma surgery coverage for the Hospital's emergency room patients in the Long Beach community would be ensured."

Even assuming statements made in connection with a hospital's contracting process are protected under section 425.16, subdivisions (e)(2) or (e)(4), defendants have not shown that Dr. Heilbron's retaliation claim arose from their protected speech. Dr. Heilbron's retaliation claim was based on defendants'

decision or plan to exclude him from practicing in trauma service at SMMC and not on any alleged harmful statements announcing or describing that plan. Courts are to "distinguish between the challenged decisions and the speech that leads to them or thereafter expresses them . . . ." (*Park, supra*, 2 Cal.5th at p. 1067 [conflating, in the anti-SLAPP analysis, retaliatory decisions and speech involved in reaching those decisions or evidencing retaliatory animus can improperly render the anti-SLAPP law fatal for most retaliation actions].) "'[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity.'" (*Bonni, supra*, 11 Cal.5th at p. 1014.) "What gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden, on account of a discriminatory or retaliatory consideration." (*Park, supra*, 2 Cal.5th at p. 1066.)[9]

c. Dr. Ali's Unfair Business Practices Claim

Defendants argue Dr. Ali's unfair business practices claim is based on the same conduct as his other causes of action and

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[9] Because we hold defendants did not meet their first step burden to show protected activity, we do not reach Dr. Heilbron's second step obligation to show his claim has minimal merit with respect to these allegations. (*Bonni, supra*, 11 Cal.5th at p. 1009.)

should be stricken "[t]o the extent" this "claim is based on alleged retaliatory peer review that was or should have been stricken."[10]

Dr. Ali's entire unfair business practices claim states: "Defendants engaged in unlawful, unfair, and/or fraudulent business acts or practices as alleged herein. In particular, Defendants' conduct in excluding physicians from participation in the emergency call panels, their refusal to collaborate with the Medical Staff in the publication of such panels, and their retaliation against Dr. Ali is both unfair and unlawful. [¶] . . . Dr. Ali has suffered injury in fact, and has lost money as a result of Defendants' actions. He seeks an order enjoining Defendants' conduct."

Defendants' anti-SLAPP motion was brought to strike specific allegations in the complaint and did not identify any allegation in Dr. Ali's unfair business practices claim defendants wanted the trial court to strike. Likewise on appeal, defendants do not identify any allegation in Dr. Ali's unfair business practices that the court erred in failing to strike or that we should order stricken. Accordingly, we reject defendants' argument.

B. *Defendants' Attorney Fees*

A prevailing defendant on an anti-SLAPP motion is entitled to its attorney fees and costs (§ 425.16, subd. (c))

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[10] Defendants' argument is confusing in that earlier in their opening brief defendants state, "[Dr.] Ali alleged three causes of action, but only his retaliation claim arose, in part, from activity protected under the anti-SLAPP law."

including its attorney fees on appeal (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499–1500).

In a perfunctory argument unsupported by the record on appeal,[11] defendants apparently contend that because the court erred when it did not grant their anti-SLAPP motion in full, they are entitled to an award of all the attorney fees they incurred with respect to that motion and not just the partial attorney fees they claim they sought and the court awarded. We lack jurisdiction to consider defendants' contention.

Defendants filed their anti-SLAPP motion on March 30, 2023. The trial court ruled on that motion on June 15, 2023. Defendants filed their motion for attorney fees on August 14, 2023.[12] Because defendants filed their motion for attorney fees after the court ruled on their anti-SLAPP motion, their appeal from the court's ruling on their attorney fees motion is from a non-appealable interlocutory order. (*Doe v. Luster* (2006) 145 Cal.App.4th 139, 150 ["If the motion for fees under section 425.16, subdivision (c), is filed after the trial court rules on the special motion to strike . . . the order awarding or denying those fees is not an 'order granting or denying a special motion to strike'; and no plausible argument can be made that such an

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[11] Defendants did not include in their record on appeal their attorney fees motion; plaintiffs' opposition to their motion; their reply in support of their motion; the reporter's transcript of the hearing on their motion, if any; or the trial court's ruling on their motion.

[12] Because defendants did not include in their record on appeal their attorney fees motion, we rely on the filing date reflected on the superior court's docket sheet that defendants submitted with their appellants' appendix on appeal.

order is immediately appealable under section 425.16, subdivision (i)"].)

Defendants also request an award of their attorney fees incurred with respect to this appeal if they are the prevailing parties on appeal. Because defendants have not prevailed on the majority of their arguments on appeal, they are not the prevailing parties in this appeal and are not entitled to their attorney fees on appeal.

IV. DISPOSITION

The order on defendants' anti-SLAPP motion is affirmed as to Dr. Heilbron's allegations and reversed as to Dr. Ali's allegations. Defendants' appeal of the attorney fees order is dismissed and their request for attorney fees on appeal is denied. Plaintiffs are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM (D.), J.

We concur:

BAKER, Acting P. J.

MOOR, J.