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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARK T. FAHLEN, Plaintiff and Respondent, v. SUTTER CENTRAL VALLEY HOSPITALS et al., Defendants and Appellants.	F063023 (Super. Ct. No. 662696) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.

Arent Fox, Lowell C. Brown, Debra J. Albin-Riley, and Jonathan E. Phillips for Defendants and Appellants.

Jana N. DuBois; Davis Wright Tremaine and Terri D. Keville for California Hospital Association as Amicus Curiae on behalf of Defendants and Appellants.

Stephen D. Schear; Justice First, Jenny Huang for Plaintiff and Respondent.

Francisco J. Silva and Long X. Do for California Medical Association as Amicus Curiae on behalf of Plaintiff and Respondent.

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Health and Safety Code section 1278.5[1] is a whistleblower protection law designed to encourage health care workers to notify authorities of "suspected unsafe patient care and conditions." (§ 1278.5, subd. (a).) One of the issues we must decide is whether a doctor claiming he lost his hospital privileges as a form of whistleblower retaliation must exhaust his judicial remedy of pursuing review, via writ of mandate, of the hospital's action before he can file a whistleblower lawsuit under section 1278.5. A section 1278.5 claim cannot be asserted in writ proceedings, so applying the exhaustion requirement would delay relief for a whistleblower.

In two recent cases interpreting the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.), the California Supreme Court held that a state employee sanctioned by an agency need not file a mandate petition against the agency before suing it under the whistleblower statute. The court recognized the Legislature's intent to encourage employees to report threats to public health without fear of retribution. (*Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 763, 774; *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 977-978.) For the same reason, prior filing of writ proceedings also is not required here.

Dr. Mark T. Fahlen reported to hospital authorities that some nurses who worked with him at Memorial Medical Center failed to follow his instructions. In some instances, he believed the nurses endangered patients' lives. One nurse refused to follow Fahlen's order to shock a patient with defibrillator paddles. Another disobeyed Fahlen's order to transfer a patient to intensive care. Some of these incidents involved heated exchanges between Fahlen and the nurses, and complaints were made about Fahlen's behavior as well.

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[1]Subsequent statutory references are to the Health and Safety Code unless noted otherwise.

The hospital's chief operating officer allegedly blamed Fahlen and helped persuade Fahlen's medical group to fire him. The hospital then declined to renew Fahlen's staff privileges. A judicial review committee of six physicians reviewed the nonrenewal of Fahlen's staff privileges. It found no professional incompetence and reversed the decision. The hospital board of trustees then reversed the committee. The board found that Fahlen's conduct was not acceptable and was "directly related to the quality of medical care at the Hospital." This outcome was reported to the Medical Board of California. Fahlen did not file a petition for a writ of mandate challenging the decision. Instead, he filed this lawsuit, asserting a section 1278.5 claim among others.

This appeal is from an order denying the hospital's anti-SLAPP motion. (Code Civ. Proc., § 425.16.) The crucial issue is presented by the hospital's contention that the motion should have been granted because Fahlen's whistleblower claim will be defeated on the merits due to his failure to pursue writ relief. In light of our holding on the exhaustion issue, we reject that contention. We conclude the trial court correctly denied the motion with respect to the section 1278.5 cause of action and one other. As to the remaining causes of action, however, we must reverse, because the exhaustion requirement does apply to them.

The Legislature's intent in enacting section 1278.5 is clear: Medical personnel must be protected from retaliation when they report conditions that endanger patients. This policy of putting patients first would be undermined if retaliation victims had to pursue writ review before seeking the statute's protection.

This case illustrates why this is true. Fahlen reported what he thought were serious threats to patient safety. The hospital expelled him. A committee of his peers found that he should retain his staff privileges, but the hospital persisted. If we accepted the hospital's argument in this case, Fahlen could have to spend years pursuing writ relief before being able even to assert his whistleblower claim in court. This type of delay is incompatible with the Legislature's goals.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiff and respondent Mark T. Fahlen is a nephrologist, a physician specializing in the treatment of diseases of the kidneys. Prior to June 2008, he was employed by Gould Medical Group (Gould). Fahlen was granted provisional staff privileges at Memorial Medical Center (MMC) in 2003 and was granted medical staff privileges at MMC in September 2004. MMC is operated by defendant and appellant Sutter Central Valley Hospitals.

Twice in 2004 and twice in 2006, Fahlen argued with nurses who failed to follow his directions concerning the care and treatment of patients. Between August 16, 2007 and April 28, 2008, there were six other incidents in which Fahlen had negative interactions with particular nurses providing care to Fahlen's patients. On many of these occasions, Fahlen reported the substandard or insubordinate nursing activity to nursing supervisors or by written complaint to MMC administration.

Around the beginning of May 2008, after the last of Fahlen's negative interactions with nursing staff, defendant and appellant Steve Mitchell, MMC's chief operating officer, contacted Gould's medical director with information concerning Fahlen's interactions with MMC's nursing staff. Mitchell testified at the peer review hearing that he contacted Gould's director in the hope that the director would meet with Fahlen, that Fahlen would become angry during the meeting, and that Gould would terminate Fahlen's employment as a result of the director's "own personal experiences" in such a meeting. Mitchell said his hope was that if Fahlen were fired by Gould he would leave town, with the net effect being to eliminate the need for peer review proceedings by MMC's medical staff. "Or at least that is my plan," Mitchell wrote in an earlier e-mail to MMC's chief executive officer.

Gould terminated Fahlen's at-will employment contract on May 14, 2008. Since the termination also resulted in the cancellation of Fahlen's medical malpractice insurance, Fahlen was immediately unable to continue treating patients at MMC. On

May 30, 2008, Fahlen met with Mitchell to determine the status of Fahlen's staff privileges at MMC, because Fahlen intended to open a private medical practice in Modesto. At that meeting, according to Fahlen, Mitchell advised Fahlen that he should leave Modesto and that if he did not do so, MMC would begin an investigation and peer review that would result in a report of disciplinary proceedings to the Medical Board of California. Fahlen advised Mitchell that he intended to stay in town. Ten days later, MMC made a written request to Fahlen that he provide information concerning his interactions with nurses on five occasions, beginning in December 2007. Fahlen provided a written response dated June 10, 2008. Three days prior to this meeting, after Fahlen had scheduled the meeting with Mitchell, Mitchell sent an e-mail to MMC's chief executive officer stating that Fahlen "does not get it"—that is, as Mitchell testified, that Fahlen was going to lose his staff privileges at MMC. The chief executive officer responded: "Looks like we need to have the Medical Staff take some action on his MedQuals!!! Soon!"

MMC appointed an investigative committee, which reported to the Medical Executive Committee (MEC) at its meeting on August 11, 2008. MEC is charged under the bylaws of MMC's medical staff with the review of applications for staff privileges at MMC and for the initiation of corrective or disciplinary action against medical staff. At the August 11, 2008, meeting, MEC recommended that MMC not renew Fahlen's staff privileges.

MEC notified Fahlen of its decision, and of his right to contest that decision, by letter dated August 28, 2008. Fahlen responded by letter from his attorney, requesting a hearing. By letter of dated October 2, 2008, MMC advised Fahlen that the review hearing would be conducted by a Judicial Review Committee (JRC) in accordance with the procedures contained in the bylaws. The letter also included a statement of charges against Fahlen, including 17 incidents of disruptive or abusive behavior toward MMC

staff occurring from 2004 through 2008, and one incident of "abusive and contentious behavior" during a 2008 interview with the MEC's appointed investigative committee.

The JRC, composed of six physicians with staff privileges at MMC, and with an attorney as hearing officer, conducted an evidentiary hearing on the proposed termination of Fahlen's staff privileges over 13 sessions between October 8, 2009 and May 24, 2010. By written findings and conclusions unanimously adopted and issued on June 14, 2010, the JRC concluded that MEC "did not sustain its burden of proving that its recommendation not to reappoint Dr. Fahlen to the Medical Staff of Memorial Medical Center for medical disciplinary cause or reason is reasonable and warranted."

The JRC found that Fahlen's "interaction with the nursing staff at Memorial Medical Center was inappropriate and not acceptable" "on several occasions." In essence, the JRC concluded the medical staff should have intervened earlier with Fahlen, but failed in its responsibility to do so, leaving the matter to the administrators of MMC. MMC, in turn, delegated the primary responsibility for investigation of the matter to an outside attorney, whose investigative report, though highly influential with MEC, failed to consider other options, such as counseling. As a result, MEC failed to consider "intermediate steps short of recommending loss of Medical Staff privileges …." The JRC concluded that the evidence before it did "not establish any professional incompetence on the part of [Fahlen]." Similarly, the evidence did "not establish that any behavior of [Fahlen] was, or is, reasonably likely to be detrimental to patient safety." Further, after MEC recommended termination of privileges, Fahlen "voluntarily obtained psychological counseling and attended anger management sessions." Fahlen's behavior "has appreciably improved." To the extent the evidence indicated that, prior to the MEC recommendation, anyone's conduct was "detrimental to the delivery of patient care, the nursing staff … was more to blame for such conduct than was [Fahlen]." The JRC reversed the MEC decision not to reappoint Fahlen to the MMC medical staff.

Pursuant to the medical staff bylaws, the final decision on termination of medical staff privileges rests with the MMC board of trustees. The board determined that it "need[ed] the JRC's assistance" in fulfilling its duties under the bylaws and, by letter dated September 16, 2010, propounded 21 questions, with subsidiary parts, to the JRC, asking whether each alleged incident of misconduct occurred, what findings the JRC made with respect to the individual charge, and "[w]hat evidence produced at the hearing was considered in making those findings of fact?" The board requested the JRC's response within 30 days.

The JRC met and considered the board's request. It determined that answering the board's questions would require its members to read the entire transcript of the proceedings, together with the documentary evidence, and that the request was unreasonable. As a result, the JRC advised the board that "the Board will have to proceed on the basis of all the materials available to it at this time, including the Findings of Fact and Conclusion that was previously rendered by the Judicial Review Committee."

In a lengthy letter to Fahlen's attorneys from MMC's chief executive officer dated January 7, 2011, the board conveyed its decision "to reverse the JRC's decision and not to reappoint [Fahlen] to the medical staff." The board was critical of the JRC's findings and conclusions, which the board characterized as "unlinked to any factual support in the hearing record." In summary, the board concluded from its own review of the evidence at the JRC hearing that Fahlen's conduct "was inappropriate and not acceptable, [and was] directly related to the quality of medical care at the Hospital." Fahlen did not seek judicial review of this determination. MMC subsequently filed a report of disciplinary action with the Medical Board of California.

On March 9, 2011, Fahlen filed a complaint for damages and injunctive and declaratory relief against Sutter Central Valley Hospitals and Steve Mitchell. The first cause of action alleged retaliation in violation of section 1278.5, which prohibits any health facility from retaliating against, among others, members of its medical staff

because the member has presented a complaint or report concerning quality of care, services, or conditions at the facility. (See § 1278.5, subd. (b)(1).) The second cause of action requested a declaratory judgment "pursuant to … Business and Professions Code Section 803.1."[2] The third cause of action is for interference with the right to practice an occupation. The fourth cause of action is for intentional interference with Fahlen's contractual relations with Gould.[3] The fifth cause of action is for interference with prospective advantage, including loss of reputation and loss of the directorship of the Merced Dialysis Center. The sixth cause of action is for retaliation against Fahlen for "advocat[ing] for appropriate care for [his] patients," in violation of Business and Professions Code sections 510 and 2056. The seventh cause of action is for wrongful termination of Fahlen's hospital privileges. Along with damages and declaratory relief, Fahlen sought an injunction ordering his reinstatement to the medical staff of MMC.

Defendants demurred to the complaint and filed an anti-SLAPP motion. After extensive briefing and submission of evidence, the court overruled the demurrer and denied the anti-SLAPP motion. With respect to the order on the anti-SLAPP motion, the court concluded that Fahlen's causes of action did not arise from "protected activity" as described in Code of Civil Procedure section 425.16 because "disciplinary action is not protected activity." In addition, the court concluded, "plaintiff has established a prima

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[2]Business and Professions Code section 803.1 provides that the Medical Board of California shall disclose to "an inquiring member of the public" (*id*. at subd. (b)) "[a]ny summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges for medical disciplinary cause or reason, unless a court finds, in a final judgment, that the peer review resulting in the disciplinary action was conducted in bad faith and the licensee notifies the board of that finding.…" (*Id*. at subd. (b)(6).)

[3]While defendants' opening brief states that defendants seek reversal of the anti-SLAPP order "in its entirety," in their summary of the proceedings in the lower court, defendants concede that the fourth cause of action is "not subject to the anti-SLAPP Motion and this subsequent appeal."

facie case that he will prevail on the merits," requiring denial of the motion under Code of Civil Procedure section 425.16, subdivision (b)(1).

DISCUSSION

I. The parties' contentions

The parties make several overarching arguments. Defendants' primary arguments are: First, that all of Fahlen's causes of action arise from protected activity as contemplated by Code of Civil Procedure section 425.16 since the California Supreme Court has held that hospital peer review proceedings are official proceedings authorized by law. (See *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 203 [construing Code Civ. Proc., § 425.16, subd. (e)(2)] (*Kibler*).) As a result, the trial court's first basis for denying the motion was erroneous. Second, defendants contend Fahlen's failure to seek judicial review of the MMC board's final administrative decision makes that determination final and precludes, as a matter of fundamental jurisdiction, an attack on that decision in collateral judicial proceedings pursuant to *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 485-486 (*Westlake*). Defendants argue there is no possibility Fahlen can prevail on any of the six causes of action challenged on appeal.

Fahlen contends, primarily, that his first cause of action for retaliation under section 1278.5 is not precluded by his failure to obtain judicial review of the MMC board's termination decision. In addition, he takes the position that he was not required to obtain judicial review because the peer review proceedings were pretextual; the result was unsupported by the evidence and conflicted with the JRC's findings. Finally, he argues he should be permitted to pursue the second through seventh causes of action even if those causes of action might otherwise require exhaustion of judicial review. This is because requiring exhaustion would compel him to split the remedies available for remediation of a single primary right, namely, the right to practice his profession "without facing unlawful retaliation or other wrongful interference."

We review an order granting or denying an anti-SLAPP motion de novo. (*Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 52.)

II. The statutory framework

This case involves two statutory provisions that are not inherently contradictory, since both provisions ultimately seek to protect and improve patient care. The parties, however, assert these statutory rights in a manner that conflicts with aspects of the opposing party's asserted statutory rights. To some extent, the statutes anticipate the type of conflicting assertion of rights presented in this case and they attempt to resolve the conflict. (See Bus. & Prof. Code, § 809.05, subd. (d); § 1278.5, subd. (h).) We begin with a summary of the relevant statutes.

A. Section 1278.5

Section 1278.5 was enacted in 1999 to prohibit certain forms of retaliation and discrimination against patients and employees of health facilities. (See Stats. 1999, ch. 155, § 1.) The definition of a health facility includes a hospital. (See § 1250, subd. (a).) In 2007, section 1278.5 was amended to include among those protected from retaliation or discrimination any "member of the medical staff … or any other health care worker of the health facility …." (See § 1278.5, subd. (b)(1), as amended by Stats. 2007, ch. 683, § 1.)

Section 1278.5 implements a public policy "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." (§ 1278.5, subd. (a).) It does so, in part, by protecting persons who have "[p]resented a grievance, complaint, or report to the [health] facility …." (*Id.*, subd. (b)(1)(A).) Section 1278.5, subdivision (d)(1), establishes a rebuttable presumption that any discriminatory action taken is retaliation if the action is taken within 120 days of the filing of the grievance or complaint by the protected person and if the "responsible staff" of the facility knew about the filing of the

complaint. (*Ibid*.) Discriminatory treatment includes changes in the terms or conditions of privileges of a member of the facility's medical staff. (*Id*., subd. (d)(2).)

The consequence to the facility for this type of discriminatory treatment is also specified: "A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or the entity that owns or operates a health facility …, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law." (§ 1278.5, subd. (g).)

B. Business and Professions Code sections 809 through 809.9

As we previously mentioned, Fahlen seeks a declaratory judgment concerning the peer review process under Business and Professions Code sections 809 through 809.9. These sections were initially enacted in 1989 (see Stats. 1989, ch. 336, §§ 1-9.5). The goal was to provide a peer review process to "exclude … those healing arts practitioners who provide substandard care or who engage in professional misconduct" (Bus. & Prof. Code, § 809, subd. (a)(6)), "with an emphasis on early detection of potential quality problems and resolutions through informal education interventions." (*Id*., subd. (a)(7).) In the case of acute-care hospitals, such as MMC, the statutory requirements for the peer review process are only indirectly applicable: "Sections 809 to 809.8, inclusive, shall not affect the respective responsibilities of the organized medical staff or the governing body of an acute care hospital with respect to peer review in the acute care hospital setting. It is the intent of the Legislature that written provisions implementing Sections 809 to 809.8, inclusive, in the acute care hospital setting shall be included in medical staff bylaws that shall be adopted by a vote of the members of the organized medical staff and shall be subject to governing body approval, which approval shall not be withheld unreasonably." (*Id*., subd. (a)(8).) The parties do not dispute that the medical staff

bylaws were adopted pursuant to Business and Professions Code section 809, subdivision (a)(8), that the bylaws satisfy its requirements, and that the peer review proceeding for Fahlen procedurally complied with the bylaws.

As implied by the term "peer review," a peer review body is generally composed of licensed persons of the same statutory classification (such as "physician and surgeon" or "clinical social worker" (Bus. & Prof. Code, § 805, subd. (a)(2)) as the individual whose work is under review. (See *id*., § 805, subds. (a)(1)(B)(i) & (a)(1)(B)(iv).) In the case of an acute-care hospital, however, the peer review statutes permit the final determination concerning disciplinary action to be taken by the governing body of the hospital—not by the peer review body. (Bus. & Prof. Code, § 809, subd. (a)(8).) Even so, however, "the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." (Bus. & Prof. Code, § 809.05, subd. (a).) As relevant here, the governing body of a hospital has the authority to take final disciplinary action against a member of the medical staff "[i]n the event the peer review body fails to take action in response to a direction from the governing body …." (*Id*., subd. (c).) In doing so, the governing body "shall act exclusively in the interest of maintaining and enhancing quality patient care." (*Id*., subd. (d).)

The medical staff bylaws of MMC, in addition, provide for review of the JRC's decisions upon appeal by the MEC or by the staff member in question. If neither party appeals, as in this case, the board "shall have the ultimate responsibility to affirm or reverse the decision of the [JRC], but it shall give great weight to the actions of the [JRC], and in no event, shall act in an arbitrary or capricious manner." (Medical Staff Bylaws, MMC, § 8.5-1.) This review, when permitted by the bylaws of a hospital, is not prohibited by the statutory peer review requirements. (*Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1494.) "A hospital's final decision in a peer review proceeding may be judicially reviewed by a petition for writ of administrative mandate."

(*Id.* at p. 1495.) Further, where a hospital's disciplinary decision is not set aside through judicial review, the decision becomes a final adjudication of the issues in the peer review proceeding. (*Westlake, supra,* 17 Cal.3d at p. 484.)

C. Express cross-related provisions

In addition to the general requirement of Business and Professions Code section 809.05, subdivision (d), that peer review proceedings be conducted "exclusively in the interest of maintaining and enhancing quality patient care," section 1278.5 recognizes the potential for conflict between a retaliation lawsuit under that section and peer review proceedings for a member of a medical staff. It states:

> "The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process.… If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm." (§ 1278.5, subd. (h).)

D. Code of Civil Procedure section 425.16

In addition to these substantive provisions of law, this case arises in the procedural context of the anti-SLAPP statute, Code of Civil Procedure section 425.16. The familiar principles governing anti-SLAPP motions were summarized by the California Supreme Court in *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12: "A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Id.* at p. 21.) "In 1992, out of concern over 'a disturbing increase' in these types of lawsuits, the Legislature enacted … the anti-SLAPP

statute.… The statute authorized the filing of a special motion to strike to expedite the early dismissal of these unmeritorious claims." (*Ibid*.)

"A special motion to strike involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff's 'cause of action … aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech … in connection with a public issue.'" (*Simpson Strong-Tie Co., Inc. v. Gore, supra,* 49 Cal.4th at p. 21.) If the defendant meets this threshold, the court considers the second step of the inquiry, i.e., whether the plaintiff has established a probability that the plaintiff will prevail on the claim. (*Ibid*.) Ordinarily, a court should consider the two steps of the analysis in order. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) As we mentioned, the trial court here decided that the anti-SLAPP motion failed under both the first and the second steps of the statutory analysis.

III. First step: The complaint arises from protected activity

Although Code of Civil Procedure section 425.16, subdivision (b)(1), states that the statute is intended to protect only those persons who are sued because of "any act of that person in furtherance of the person's right of petition or free speech … in connection with a public issue," the statute subsequently defines that phrase in a manner specific to the anti-SLAPP statute. As relevant to this case, section 425.16, subdivision (e)(2), includes within that phrase "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 …." As a result, a "defendant who invokes … subparagraph (2) … need not 'separately demonstrate that the statement concerned an issue of public significance.'" (*Kibler, supra,* 39 Cal.4th at p. 198.)

In *Kibler,* a hospital peer review committee summarily suspended a doctor "after a series of hostile encounters" with other members of the hospital staff. (*Kibler, supra,* 39 Cal.4th at p. 196.) The doctor entered into a written agreement with the hospital for reinstatement of privileges upon certain conditions. The doctor then sued the hospital,

together with certain physicians and nurses, "seeking damages under a variety of theories including defamation, abuse of process, and interference with [his] practice of medicine." (*Ibid*.) The Supreme Court affirmed the trial court's conclusion that these causes of action arose from protected activity under the anti-SLAPP statute. (*Kibler, supra,* at p. 203.) As particularly relevant here, the court held that actions of a peer review committee were statements "made in connection with an issue under consideration or review by … any other official proceeding authorized by law," as provided by Code of Civil Procedure section 425.16, subdivision (e)(2). (*Kibler, supra,* at p. 200.)

In this case, as in *Kibler*, the challenged causes of action (except the fourth cause of action relating to the termination of Fahlen's employment by Gould) all arise from the hospital peer review proceedings. Fahlen contends that, notwithstanding the holding in *Kibler*, the acts alleged in his complaint are not protected activity under the anti-SLAPP statute for two reasons.

First, Fahlen argues that defendants' acts were not protected because they were retaliatory. Fahlen relies on *McConnell v. Innovative Artists Talent & Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 180, to support his contention that "[r]etaliatory actions taken against a person are not actions in furtherance of free speech, even though they are conveyed through words." *McConnell* is inapposite, however, primarily because the employment action did not occur in the context of a quasi-judicial peer review proceeding established by statute. Instead, *McConnell* involved action taken by a nonmedical employer under an ordinary employment contract. (*Id*. at p. 174.) The employer did not contend its employment decision resulted from a quasi-judicial proceeding, such as the peer review proceeding in *Kibler, supra,* 39 Cal.4th at page 203, but took the position, instead, that the letter reflecting the changes in employment was issued in connection with ongoing litigation over the terms of employment. (*McConnell, supra,* at p. 176.) The appellate court concluded that the defendant had failed to carry its burden to establish that the letter was written in connection with the ongoing litigation.

(*Id*. at p. 178.) Consequently, it was not the retaliatory character of the defendant's activity that stripped that activity of protection under the anti-SLAPP statute but, rather, the fact that the acts were not in connection with an official proceeding. (*McConnell, supra,* at p. 181.)

In this case, by contrast, defendants have met their initial burden under the anti-SLAPP statute to "make a prima facie showing" (*Simpson Strong-Tie Co., Inc. v. Gore, supra,* 49 Cal.4th at p. 21) that the challenged causes of action arise from—and are based directly upon—actions taken in the peer review proceedings, an "official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(2)), as held in *Kibler, supra,* 39 Cal.4th at page 200.[4] We conclude this prima facie showing by defendants, as the moving party on the anti-SLAPP motion, resolves the only issue before the court in the first phase of the anti-SLAPP inquiry. (See *Simpson Strong-Tie Co., Inc. v. Gore, supra,* at p. 21.)

Fahlen's second contention is that the determination made to terminate his privileges at MMC was not made by the JRC, composed of his "peers," but by MMC's governing board. Fahlen contends the policy reasons that attach a public interest to medical staff peer review are not applicable when the act in question is taken by the board, which is not required to be composed entirely of medical personnel. We disagree.

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[4]Fahlen suggests that the causes of action do not "*arise from*" the protected activity, citing *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78. In that case, mobile home park owners sued in federal court to invalidate a city's rent control ordinance. The city sued seeking a declaratory judgment that the ordinance was constitutional. The park owners filed an anti-SLAPP motion, contending the city's suit arose from the owners' protected activity of filing the federal suit. Our Supreme Court held that the city's cause of action arose from the rent control ordinance, not from the owners' federal challenge to the ordinance. (*Cashman, supra,* at p. 78.) As a result, the anti-SLAPP motion was properly denied. (*Cashman, supra,* at p. 80.) *Cashman* is not relevant to resolution of this case, since all of Fahlen's causes of action seek to remedy injuries caused by the protected activity itself. (See *ibid*.)

To the contrary, the code provisions establishing the peer review process expressly recognize that, in the case of an acute-care hospital, the peer review process culminates in a final decision by the hospital's governing board. (See *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 80-81.) While it is true that in *Kibler, supra,* 39 Cal.4th at page 196, the action in question was taken by the medical review committee, we do not view this fact as a limitation on the scope of the court's ultimate holding. It would serve neither reason nor public policy to conclude that an intermediate decision made pursuant to the statutory peer review scheme was an "official proceeding," but to conclude that the final decision made pursuant to that same scheme was not an "official proceeding."[5]

We hold that the statements or writings of a hospital's governing board in reviewing a determination on medical staff privileges, and in making a final decision on such termination or nonrenewal of such privileges, are made "in connection with an issue under consideration or review [in an] … official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(2); see *Kibler, supra,* 39 Cal.4th at p. 203; see also *Nesson v. Northern Inyo County Local Hospital Dist., supra,* 204 Cal.App.4th at p. 81.) The trial court erred in concluding to the contrary.

IV. Second step: Fahlen's probability of prevailing on the causes of action

In the second step of consideration of an anti-SLAPP motion, the burden shifts to the plaintiff to establish "a probability that the plaintiff will prevail on the claim" (Code

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[5]Fahlen appears to take the position that the written decision of the board terminating his staff privileges was not a protected act because it was not "communicative," citing *Smith v. Adventist Health System/West, supra,* 190 Cal.App.4th at pages 57-58. The relevant discussion in *Smith* concerned the second step of analysis under the anti-SLAPP statutes, namely, the probability of prevailing step (see *Smith, supra,* at pp. 56-57), not the first, or protected-activity, step. (See *id*. at p. 56 ["we will assume for purposes of this appeal that … defendants' acts … were protected activity for purposes of the anti-SLAPP statute"].)

Civ. Proc., § 425.16, subd. (b)(1)). (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) In order to meet this burden, the plaintiff must have stated, and substantiated by a sufficient prima facie showing of facts, a legally sufficient claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) Further, factual disputes are to be resolved in favor of the plaintiff. (*Ibid*.) In this case, defendants do not dispute the factual sufficiency of Fahlen's underlying allegations. They contend, however, that each cause of action is legally barred by the doctrine of exhaustion of judicial remedies and, in the case of two causes of action, the complaint fails to state a cause of action.

In *Westlake, supra*, 17 Cal.3d 465, a doctor sued a hospital in tort, alleging that the hospital and various staff and board members had maliciously conspired together to deny staff privileges at the hospital through a peer review process that was unfair and in violation of the hospitals' own bylaws and constitution. (*Id*. at p. 470.) Our Supreme Court held that a doctor must exhaust all available administrative remedies and successfully set aside the hospital's final administrative determination through mandamus review before the doctor may "pursu[e] her tort claim against defendants." (*Id*. at p. 484; see also *id*. at p. 486.) This rule has been repeated in numerous Supreme Court decisions and in the context of several different types of administrative proceedings. (See *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70-71.) The rule was summarized in *Runyon v. Board of Trustees of California State University, supra*, 48 Cal.4th at page 773 (*Runyon*): "Under the doctrine of exhaustion of judicial remedies, '[o]nce a[n administrative] decision has been issued, provided that decision is of a sufficiently judicial character to support collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims. Generally speaking, if a complainant fails to overturn an adverse administrative decision

by writ of mandate, 'and if the administrative proceeding possessed the requisite judicial character, the administrative decision is binding in a later civil action brought in superior court.'" (Citations omitted.)

In some circumstances, however, the quasi-judicial proceeding is alleged by a plaintiff not to be a vehicle for administrative resolution of an administrative grievance, but is alleged to be, or to be a part of, a retaliatory action itself. This retaliation cannot be resolved within the administrative grievance process when the process itself provides the forum for retaliation, it is argued, and such an administrative proceeding is not entitled to the deference traditionally afforded by the standard of review in administrative mandate cases. In these circumstances, the Legislature may recognize, explicitly or by implication, that the administrative decision in question should not be given preclusive effect in later judicial proceedings, even when the administrative decision has not been set aside through administrative mandate proceedings. When the Legislature has made this type of determination, the courts will not require exhaustion of judicial remedies in the administrative proceeding. (*Runyon, supra,* 48 Cal.4th at p. 774.)

No Supreme Court case since *Westlake, supra,* 17 Cal.3d 465, has considered the requirement for exhaustion of judicial remedies in the context of medical peer review proceedings. Since the medical whistleblower statute, section 1278.5, was amended in 2007 to include staff physicians within its protections, one published opinion of the Court of Appeal has applied *Westlake* to support dismissal of a physician's section 1278.5 retaliation cause of action. (See *Nesson v. Northern Inyo County Local Hospital Dist., supra,* 204 Cal.App.4th at p. 87.) In *Nesson,* however, the "claim for retaliation under … section 1278.5 also fail[ed] because the evidence show[ed] the summary suspension [of staff privileges] was unrelated to the complaints [about patient care] made more than eight months before" the termination. (*Id.* at p. 87.) In any event, *Nesson* did not consider the exception to exhaustion of judicial remedies established in *Runyon, supra,* 48 Cal.4th 760, and similar cases addressing other whistleblower or anti-retaliation

statutes. As a result, we will examine the requirements described in these more recent Supreme Court cases.[6]

In *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, our Supreme Court considered whether an employee of the university was required to exhaust administrative remedies provided by the Regents "to handle complaints of retaliatory dismissal for whistleblowing" (*id*. at p. 324) before the employee was permitted to sue the university for damages for violation of Government Code section 12653, a whistleblower provision within the False Claims Act. (*Campbell, supra,* at p. 325.) The plaintiff in that case had not exhausted her administrative remedies. She contended that Government Code section 12653 should not require exhaustion, in reliance on a related whistleblower statute within the California Whistleblower Protection Act, Government Code section 8547.10, which applies to University of California employees. (*Campbell, supra,* at p. 327.) The latter statute requires initiation of an administrative proceeding

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[6]We recognize the outcome in Fahlen's case differs from the outcome in *Nesson v. Northern Inyo County Local Hospital Dist., supra,* 204 Cal.App.4th at page 86. Although one of the claims made by Dr. Nesson was based on section 1278.5 (*Nesson, supra,* at p. 75), the *Nesson* opinion did not separately consider or analyze the requirement for exhaustion of judicial remedies with respect to Nesson's section 1278.5 cause of action. (*Nesson, supra,* at pp. 85-86.) Significantly, Nesson not only did not exhaust his administrative remedies, he also refused to cooperate with the hospital's peer review process and "took a leave of absence and actively thwarted any determination as to whether he should have continued in his position as the medical director of radiology," all of which form a separate and sufficient basis for resolving the case against Nesson. (*Id.* at pp. 82, 85.) Further, a review of the briefs filed in *Nesson* reflects that the parties did not focus on the section 1278.5 claim. (We take judicial notice of the parties' briefs in *Nesson* upon Fahlen's request (see Evid. Code, § 452, subd. (d).) Although Nesson mentioned section 1278.5 in his briefs, the hospital district did not mention it at all. Under these circumstances, it is not surprising that the appellate court did not delve deeply into section 1278.5. For all these reasons, we consider the *Nesson* court's conclusions concerning exhaustion of judicial remedies to be dicta. (See *Nesson, supra,* at p. 86.) To the extent they are not, we disagree with *Nesson's* implicit conclusion that a plaintiff suing under section 1278.5 first must exhaust judicial remedies in any underlying peer review proceeding.

and permits court action if the university has not acted on the administrative complaint within a specified time. (*Ibid*.) Campbell argued that the absence of a similar requirement in Government Code section 12653 required an inference that the Legislature did not intend to require administrative exhaustion in section 12653. (*Campbell, supra,* at p. 327.) The court rejected this contention. In light of the general applicability of a requirement for exhaustion of administrative remedies, "the Legislature's silence in [Government Code section 12653] makes the common law exhaustion rule applicable … and requires employees to exhaust their internal administrative remedies prior to filing a lawsuit." (*Id.* at p. 328.)

The court also applied this rule in its consideration of a different whistle-blower statute, Labor Code section 1102.5. (*Campbell v. Regents of University of California, supra,* 35 Cal.4th at p. 329.) For that statute, there was ambiguous legislative history that was "unclear on the question whether the Legislature intended to depart from the exhaustion doctrine" when it enacted the statute. (*Id*. at p. 331.) In those circumstances, the court concluded "that absent a clear indication of legislative intent, we should refrain from inferring a statutory exemption from our settled rule requiring exhaustion of administrative remedies." (*Id*. at p. 333.)

State Bd. of Chiropractic Examiners v. Superior Court, supra, 45 Cal.4th 963 (*Arbuckle*), also involved an action under the California Whistleblower Protection Act (Act) (Gov. Code, § 8547 et seq.). (*Arbuckle, supra,* at p. 967.) The provisions of the Act applicable in *Arbuckle* (Gov. Code, § 8547.8, subd. (c)) required administrative exhaustion, similar to the related Government Code section 8547.10 discussed in *Campbell v. Regents of University of California, supra,* 35 Cal.4th 311. The plaintiff in *Arbuckle* had exhausted her administrative remedies before the State Personnel Board, and the board had issued a final order finding that the negative actions taken against the plaintiff "were for reasons unrelated to Arbuckle's protected disclosures," that is, her whistleblower activities. (*Arbuckle, supra,* at p. 969.) The primary issue before the

Supreme Court was whether the plaintiff's action for damages was precluded under the requirement for exhaustion of judicial remedies articulated by *Westlake, supra,* 17 Cal.3d 465, and subsequent cases. (*Arbuckle, supra,* at p. 974.)

The *Arbuckle* court began its analysis by observing the general rule that a litigant is required to seek judicial review of an adverse administrative determination "before pursuing other remedies that might be available." (*Arbuckle, supra,* 45 Cal.4th at p. 975.) This general rule is applicable, however, only where the Legislature intended to "elevate[] those [administrative] findings to the same status as a final civil judgment rendered after a full hearing …." (*Ibid.*) Two factors led the court to conclude that the Legislature had not intended a requirement of judicial exhaustion under the relevant portions of the Act. First, the statutes "expressly acknowledged the existence of the parallel administrative remedy [but] did not require that the [administrative] findings be set aside by way of a mandate action" prior to a civil damages action. Instead, the Legislature only required a final administrative determination as a precondition to the civil remedy. (*Arbuckle, supra,* at p. 976.) This factor distinguished the case from the *Westlake* line of cases, particularly *Johnson v. City of Loma Linda, supra,* 24 Cal.4th 61.

Second, the Legislature clearly intended to provide a civil damages remedy under the Act. Yet judicial review of the administrative action would occur either under a substantial evidence or an arbitrary and capricious standard of review (depending on the section of the Code Civ. Proc. applicable to the proceeding), making it "very difficult for a complaining employee to have the board's adverse factual findings overturned." (*Arbuckle, supra,* 45 Cal.4th at p. 977.) "Nothing in [Government Code] section 8547.8[, subdivision] (c) suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed, and such a narrow interpretation of the damages remedy would hardly serve the Legislature's purpose of protecting the right of state employees 'to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.' ([Gov. Code,] § 8547.1.)" (*Id.* at pp. 977-978.)

In *Runyon, supra,* 48 Cal.4th 760, the Supreme Court considered another portion of the Act, Government Code section 8547.12, which protects employees of the California State University system. (*Runyon, supra,* at pp. 763-764.) This section requires an employee to file a complaint with the appropriate university official, but permits the employee to file a civil damages action "if the university has not satisfactorily addressed the complaint within 18 months." (Gov. Code, § 8547.12, subd. (c).) The primary issue before the court in *Runyon* was whether a thorough and procedurally fair administrative decision could be deemed to not "satisfactorily address[]" the whistleblower complaint, thereby permitting a civil action. The court concluded that a decision that did not provide full relief to the complainant, so long as that decision constituted final action by the university, permitted the filing of a civil whistleblower complaint. (*Runyon, supra,* at p. 773.) Second, the court considered whether the whistleblower had to exhaust judicial remedies before proceeding with a civil damages action. (*Ibid.*) Applying the two considerations articulated in *Arbuckle, supra,* 45 Cal.4th at page 976, the *Runyon* court concluded the Legislature did not intend to require writ review of the administrative determination as a precondition for a civil whistleblower action. (*Runyon, supra,* at p. 774.)

There are a number of differences between medical staff peer review under Business and Professions Code section 809 et seq., and the administrative proceeding authorized under the Act. In particular, peer review is a process started by a hospital (whether through the MEC or the board of trustees), with the putative whistleblower as the respondent. Under the Act, the whistleblower initiates the administrative review of retaliatory actions taken by his or her employer. Thus, the whistleblowing and alleged retaliation are at the very core of the administrative proceeding under the Act. In peer review proceedings, on the other hand, the quality of medical care provided by the putative whistleblower is the primary focus—not the hospital's response to complaints made by the doctor. In our view, the differences make it more persuasive, not less, that

the Legislature did not intend to require exhaustion of judicial remedies as a precondition to filing a civil action under section 1278.5, applying the *Arbuckle/Runyon* analysis. In *Arbuckle, supra,* 45 Cal.4th at page 976, the court found a legislative intent not to require exhaustion of writ remedies when the Legislature "expressly acknowledged the existence of the parallel administrative remedy," yet "did not require that the [administrative] findings be set aside by way of a mandate action …." In these circumstances, "to hold an adverse administrative finding preclusive in the expressly authorized damages action would be contrary to the evident legislative intent." (*Runyon, supra,* 48 Cal.4th at p. 774.)

In this case, section 1278.5, from its adoption in 1999 through the 2007 amendments, applied primarily to retaliation against patients and employees of health facilities, persons who are not subject to the peer review process of Business and Professions Code section 809 et seq. When the initial amendments to section 1278.5 were introduced in 2007, the bill simply added nonemployee doctors who had staff privileges at a health facility to those persons who were protected from discrimination and retaliation as a result of whistleblowing. (See Assem. Bill No. 632 (2007-2008 Reg. Sess.) as introduced Feb. 21, 2007.) As the bill moved through the Senate, however, opponents of the bill raised the issue of peer review proceedings in relationship to the proposed civil whistleblower remedy for medical staff: "The critical question, according to the principal opponents of AB 632, is what would happen to a pending peer review action, or to the evidentiary protections and immunity from liability that attend peer review actions, once the member of the medical staff files a § 1278.5 action?" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007, p. 8.)

Apparently in response to these concerns, the bill was amended by the Senate on July 17, 2007, to add the provision that became a portion of subdivision (h) of the final version of section 1278.5: "The medical staff of the health facility may petition the court

for an injunction to protect a peer review committee from being required to comply with the evidentiary demands on a pending peer review matters from the complainant in an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process."

The bill was further amended in the Senate on September 5, 2007, to add the remainder of subdivision (h) as it appears in the final legislation: "Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in Section 805 and Sections 809 to 809.5, inclusive, of the Business and Professions Code, would be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm." (Section 1278.5, subd. (h).)

It is evident from this legislative history that the Legislature was not only cognizant of the possibility of parallel peer review administrative proceedings, but that it expressly contemplated that such proceedings could, with certain limitations, occur simultaneously with a civil action under section 1278.5.[7] In such circumstances, "to hold an adverse administrative finding preclusive in the expressly authorized damages action would be contrary to the evident legislative intent." (*Runyon, supra,* 48 Cal.4th at p. 774.)

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[7]Because Fahlen fully exhausted his administrative remedies in this case, we need not consider whether the 2007 amendments to section 1278.5, particularly the addition of subdivision (h), create a limited exception to the administrative-exhaustion requirement established in *Westlake, supra,* 17 Cal.3d at pages 485-486.

We have reviewed the account of the legislative history of the 2007 amendments provided by the California Hospital Association in its brief in this case as amicus curiae on behalf of defendants. We disagree with the conclusion that the amendments to Assembly Bill No. 632 were intended to leave the *Westlake* rule unaffected. Instead, we find in section 1278.5, subdivision (*l*), which provides that "[n]othing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities," an implicit recognition of the limitation in Business and Professions Code section 809.05 that peer review proceedings shall not be "arbitrary or capricious" (*id.*, subd. (a)) and shall be conducted "exclusively in the interest of maintaining and enhancing quality patient care." (*Id.*, subd. (d).) In other words, "legitimate peer review activities" do not include retaliation against medical staff for complaints about quality of care.

As in *Runyon* and *Arbuckle*, the standard of judicial review of a peer review decision under Code of Civil Procedure section 1094.5—one intended in the ordinary case to give the greatest possible deference to the action of the administrative decision maker—"would mean that 'in nearly every case, an adverse decision from [the hospital] would leave the employee without the benefit of the damages remedy set forth'" in section 1278.5. (*Runyon, supra,* 48 Cal.4th at p. 774.) To paraphrase *Arbuckle, supra,* 45 Cal.4th at pages 977-978, nothing in section 1278.5 suggests that the Legislature intended the damages remedy created in that provision to be so narrowly circumscribed. Further, such a narrow interpretation of the damages remedy would not serve the Legislature's purpose of protecting the public from unsafe patient care and conditions through the adoption of section 1278.5.

In addition, the evidentiary presumption of section 1278.5, subdivision (d)(1), is incompatible with a requirement for exhaustion of judicial remedies through writ review of the peer review decision. Section 1278.5, subdivision (d)(1), creates a rebuttable presumption that any discriminatory action, such as instituting proceedings to terminate

staff privileges (§ 1278.5, subd. (d)(2)), is prohibited retaliation for complaints about hospital care made by the staff physician within 120 days of the disciplinary action, if "responsible staff" at the facility knows about the doctor's complaints. It would be virtually impossible to implement that presumption in a civil action under section 1278.5 after judicial ratification of a hospital's administrative action under the narrow standard of review in writ proceedings, during which the presumption would not have been operable.

Finally, the range of remedies authorized by section 1278.5, subdivision (g), is incompatible with a requirement for successful judicial review of a peer review decision. If a doctor were required to successfully set aside an administrative order terminating his or her privileges as a precondition to a section 1278.5 action, as defendants contend in their reliance on *Westlake, supra,* 17 Cal.3d at pages 485-486, there would never be a circumstance in which reinstatement of a doctor's staff privileges would still be required in the civil action. This is true even though reinstatement is a remedy specified by the Legislature in section 1278.5, subdivision (g). We will not impose judicial constraints on the statutory remedy where doing so makes the Legislature's language superfluous. (*Arbuckle, supra,* 45 Cal.4th at p. 978.)

For all of these reasons, we conclude there is no requirement that a section 1278.5 plaintiff seek judicial review of administrative action taken in peer review proceedings as a precondition to a civil action under section 1278.5.

V. Exhaustion of remedies in remaining causes of action

Fahlen contends that if he is not required to exhaust judicial writ remedies prior to his civil action under section 1278.5, he should not be required to do so in order to maintain his remaining causes of action because such a requirement would violate the rule against splitting causes of action. We disagree, with the exception of the second cause of action. As to the third, fifth, sixth, and seventh causes of action, these involve common law and statutory causes of action to which the *Westlake* requirement for

judicial exhaustion is applicable (see *Westlake, supra,* 17 Cal.3d at pp. 485-486) and in which there is no legislative intent demonstrated to create an exception to that requirement. Under the rule of *Campbell v. Regents of University of California, supra,* 35 Cal.4th at page 325, exhaustion is required in the absence of legislative intent to the contrary, and we are bound by that rule. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

In addition, all of these causes of action are ambiguous as set forth in the complaint. For example, they might refer to MMC's initiation and prosecution of the peer review proceeding as retaliation, or they might refer to the peer review decision as unsupported by the evidence, in violation of the bylaws, or otherwise defective. Thus, Fahlen argues at length in his brief on appeal that the process and the decision were defective. To that extent, these causes of action are an attempt collaterally to attack the administrative decision, which is not the purpose of a civil action under section 1278.5. As stated in *Runyon, supra,* 48 Cal.4th at page 769, a retaliation lawsuit is "'not an action *to review* the decision of the [administrative decision maker], but *a completely separate* damages action in the superior court in which the employee will enjoy all the procedural guarantees and independent factfinding that generally accompany such actions.'" To the extent, however, these causes of action focus purely on retaliation for whistleblowing, they add nothing to the legal theories supporting, and remedies available under, section 1278.5. (See § 1278.5, subd. (g) [listing available remedies, including "any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law"].)

We conclude neither judicial economy nor fundamental fairness requires an exception from the applicable requirement for exhaustion of judicial remedies. Since Fahlen did not exhaust his judicial remedies prior to filing the third, fifth, sixth, and seventh causes of action, those causes of action are barred. As a result, Fahlen failed to

establish a probability of prevailing on those causes of action, and the trial court erred in failing to dismiss them.

Somewhat different considerations apply to the second cause of action, however, for declaratory relief pursuant to Business and Professions Code section 803.1. This section requires the medical, osteopathic, and podiatric boards to "disclose to an inquiring member of the public" a variety of information about licensees and former licensees, including "summaries of hospital disciplinary actions that result in the termination or revocation of a licensee's staff privileges for medical disciplinary cause or reason …." (Bus. & Prof. Code, § 803.1, subd. (b)(6).)

Pursuant to an amendment to the statute adopted in 2010, however, this information is not to be disclosed, when "a court finds, in a final judgment, that the peer review resulting in the disciplinary action was conducted in bad faith and the licensee notifies the board of that finding." (Bus. & Prof. Code, § 803.1, subd. (b)(6); see Stats. 2010, ch. 505, § 2.) The amended statute provides no mechanism for a licensee to obtain such a final judgment concerning the bad faith of a peer review proceeding. However, because Business and Professions Code section 805, subdivision (b), requires a hospital to file a report with the Medical Board of California whenever a doctor's staff privileges are terminated (*id*., subd. (b)(2)), the ability of a doctor to block public disclosure of such a report is an important right.

Defendants contend that Fahlen's attempt in his second cause of action to state a statutory cause of action results from "a [tortuous] mischaracterization of subsection (b)(6)" and is an attempt to "conjure up a cause of action where none exists." Defendants' alternative characterization of the amended language is that it is applicable only if a doctor "w[ere] somehow able to obtain a final judgment in a writ proceeding finding that the peer review at issue … was conducted in bad faith …."

We do not construe the amended language of Business and Professions Code section 803.1, subdivision (b)(6), to rely upon "somehow" convincing a court in a writ

proceeding that the administrative decision was in bad faith, when the good faith or bad faith of the administrative decision maker is not an issue in the proceeding.[8] In this case, we view the allegations of the second cause of action as functioning in much the same way as do punitive damages allegations in an ordinary tort cause of action. Under Civil Code section 3294, an allegation of "oppression" or "malice" is not an independent cause of action. Instead, by alleging and proving oppression or malice, the plaintiff becomes entitled to an additional remedy that is not otherwise available, namely "damages for the sake of example and by way of punishing the defendant."

In the circumstances of this case, we view Business and Professions Code section 803.1, subdivision (b)(6), as operating in a similar manner. Even though the mere allegation of "bad faith" is not a separate cause of action in the absence of an allegation that the peer review proceedings violated the plaintiff's statutory rights, the allegation (and proof) of "bad faith" in addition to the proof of retaliation under section 1278.5 can result in a different, additional remedy under section 1278.5, subdivision (g). It operates as a declaratory judgment that the peer review was conducted in bad faith.

We do not decide whether under certain circumstances an independent, implied cause of action is created by Business and Professions Code section 803.1, subdivision (b)(6). In the circumstances before us, we simply conclude the allegations contained in the second cause of action were not intended to state an independent cause of action. To the contrary, they are there for the purpose of obtaining additional relief under the first cause of action similar to how an allegation of malice may permit

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[8]Code of Civil Procedure section 1094.5, subdivision (b), states: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

additional relief in a tort cause of action. As a result, in this limited situation, the exception from the requirement for judicial exhaustion applicable to a section 1278.5 whistleblower cause of action also applies to the additional allegations of bad faith and the request for additional declaratory relief in the second cause of action.

For all these reasons, we conclude that Fahlen has met his burden under Code of Civil Procedure section 425.16, subdivision (b)(1), of establishing that he will prevail on the first and second causes of action. We conclude, however, the exhaustion of judicial remedies doctrine does apply to the third, fifth, sixth, and seventh causes of action. Consequently, the trial court erred in not dismissing those causes of action under the anti-SLAPP statute.

DISPOSITION

The court's June 27, 2011, order on defendants' anti-SLAPP motion is affirmed with respect to the first, second, and fourth causes of action. With respect to the third, fifth, sixth, and seventh causes of action, the order is reversed. The court shall enter a new order granting defendants' anti-SLAPP motion in part, and denying that motion in part.

The request for judicial notice dated November 16, 2011 (the ruling on which previously was deferred by order of this court), is denied. The request for judicial notice dated April 26, 2012, is granted. (See fn. 6, *ante*.) The stay of trial court proceedings previously entered by this court on January 10, 2012, is vacated. The petition for writ relief filed in this case is denied as moot. The petition for writ relief filed in case

No. F063959 will be determined by separate order of this court. The parties shall bear their own costs on appeal.

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Wiseman, Acting P.J.

WE CONCUR:

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Cornell, J.

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Detjen, J.