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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BEMA BONSU, Plaintiff and Respondent, v. RADY CHILDREN'S HOSPITAL-SAN DIEGO et al., Defendants and Appellants.	D071076 (Super. Ct. No. 37-2015-00026754-CU-WT-CTL)

APPEAL from an order of the Superior Court of San Diego County, Katherine Bacal, Judge. Affirmed.

Caietti Law Group, Robert M. Caietti, Kristin A. Kameen for Plaintiff and Respondent.

Lewis Brisbois Bisgaard & Smith, Marilyn R. Moriarty and Suzanne R. Pollack for Defendant and Appellant Rady Children's Hospital-San Diego.

Andrews Lagasse Branch & Bell, Margaret C. Bell and Lisa M. Magorien for Defendant and Appellant The Regents of the University of California.

Paul, Plevin, Sullivan & Connaughton, E. Joseph Connaughton, Sandra L. McDonough and Corrie J. Klekowski for Defendant and Appellant Children's Specialists of San Diego.

Following what he alleges was the wrongful termination of his employment, Bema Bonsu, M.D. (Plaintiff), sued Rady Children's Hospital-San Diego (Rady), The Regents of the University of California (Regents), Children's Specialists of San Diego (CSSD) and others. In one of the causes of action, Plaintiff alleges that, during the process that preceded the termination, Rady, Regents and CSSD (together, Defendants) defamed him. The trial court denied Defendants' special motions to strike the defamation cause of action under California's anti-SLAPP statute,[1] Code of Civil Procedure section 425.16 (section 425.16). The court ruled that, because Defendants did not meet their burden of showing that the allegedly defamatory statements were made "in connection with a public issue" (§ 425.16, subd. (b)), the claims resulting from the statements were not subject to being stricken under the anti-SLAPP statute.

Much of what Defendants submitted in support of their anti-SLAPP motions contains allegations from the complaint and evidence concerning the quality and availability of prompt care in Rady's emergency department, which serves the San Diego area. We will assume, without deciding, that those issues are matters of public interest and, thus, a public issue for purposes of the anti-SLAPP statute. Nonetheless, such

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1 " 'SLAPP' is an acronym for 'strategic lawsuit against public participation . . .' " (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 381, fn. 1 (*Baral*)) — which is litigation "brought to challenge the exercise of constitutionally protected free speech rights" (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 196).

allegations and evidence are merely *background or context* for Plaintiff's defamation claim. The specific statements alleged by Plaintiff to be defamatory — i.e., *the bases for Plaintiff's claim* — do not mention, deal with, or affect such healthcare issues, but rather concern only routine administrative and interpersonal employment-related issues. Because such matters are not of public interest, the trial court correctly ruled that the statements were not made in connection with a public issue.

In the language of our Supreme Court's most recent pronouncement on the topic, "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." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).) Under this standard, none of Defendants here met its burden of establishing a sufficient "nexus . . . between [the] challenged claim and the defendant's protected activity for the claim to be struck." (*Ibid.*)

Accordingly, we affirm the order denying Defendants' motions to specially strike the defamation cause of action in Plaintiff's complaint.

I.

UNDERLYING LEGAL STANDARDS

Section 425.16, subdivision (b)(1) provides in full: "A cause of action against a person 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* shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the

plaintiff will prevail on the claim." (Italics added.) As applicable here, the parties agree that the above-quoted italicized language in subdivision (b)(1) means "in connection with a public issue or an issue of public interest" as set forth in subdivision (e)(4).

In applying section 425.16, subdivision (b)(1), a court generally is required to engage in a two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16." (*Baral*, *supra*, 1 Cal.5th at p. 384.) "If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Ibid*.) " 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute — i.e., that arises from protected speech or petitioning *and* lacks even minimal merit — is a SLAPP, subject to being stricken under the statute.' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

"We review de novo the . . . denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. [Citations.] In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. [Citations.] We do not, however, weigh the evidence, but accept the plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." (*Park*, *supra*, 2 Cal.5th at p. 1067.)

II.

FACTUAL BACKGROUND

Plaintiff is a pediatrician, board-certified in pediatrics and pediatric emergency medicine. Rady is the only hospital in the San Diego area that is dedicated exclusively to pediatric healthcare. Regents is a corporation that, among other responsibilities, administers the University of California, San Diego, School of Medicine (UCSD). CSSD is a pediatric medical group. Prior to the events at issue in this lawsuit, Rady, Regents and CSSD formed a medical practice foundation (Foundation), a division of Rady, which provides medical services to pediatric patients in the San Diego area. Pursuant to a professional services agreement, CSSD provides physicians (most of whom are faculty members of UCSD and paid salaries by Regents) who provide medical services to Foundation patients at Rady.

Through a joint recruitment process in October 2011, effective June 2012 Defendants hired Plaintiff as a UCSD professor in clinical pediatrics with a working title of Chief of Pediatric Emergency Medicine at Rady. Plaintiff was hired to manage Rady's Pediatric Emergency Department (ED), and in August 2012 he became the ED medical director. Plaintiff's formal appointment terminated at the end of June 2015.

From at least the time prior to Plaintiff's employment through mid-2013, the ED experienced issues and the ED staff expressed concerns regarding the safety and quality of the emergency medical care provided at Rady. According to Plaintiff, these issues and concerns were caused in part by "too few physicians and nurses; inadequate bed space; a lack of administrative, hospital-wide and financial support; a drive to see patients at a

pace that was much faster than [the medical personnel] were comfortable staffing; concerns about medico-legal risk; and worries about being punished for not reaching unrealistic goals set by defendant Rady." Two specific concerns were the high number of patients who left without being seen and the length of time patients had to wait to receive care.

Over the course of the next year, Regents and Rady became aware "of ongoing issues with Plaintiff's management of the [ED]." On August 4, 2014, Irvin A. Kaufman, M.D., and Margareta E. Norton[2] sent a letter to Herbert C. Kimmons, M.D., and Gabriel Haddad, M.D.,[3] identifying concerns about "the operation, performance and public perception of our [ED]" (August 2014 letter). The August 2014 letter emphasized the large number of patients who leave without being seen and contained four specific "suggest[ions]" to improve patient flow in the ED.[4]

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2 At the relevant times, Kaufman was the chief medical officer for Rady, and Norton was the executive vice president and chief administrative officer of Rady.

3 At the relevant times, Kimmons was president of CSSD and executive director of the Foundation, and Haddad was chair of UCSD's department of pediatrics and physician-in-chief and chief scientific officer for Rady. Haddad considered Kaufman and Norton "hospital leadership."

4 The four items in the August 2014 letter are: (1) the appointment of a new "Operations Director of Emergency Medicine" with primary accountability to Rady's chief medical officer and Rady's chief operations officer; (2) the consistent identification of a "Medical Officer of the Day" during peak hour shifts; (3) a "Surge Plan" to call in providers at peak times; and (4) a plan to "ensure" the "expected number" of staff hours for the ED. The August 2014 letter referred to these items as "suggest[ions]"; Plaintiff considered them "recommendation[s]; and Haddad, one of the recipients of the letter, described them as "changes [that] would need to begin immediately."

When Plaintiff received a copy of the August 2014 letter, he immediately wrote Kimmons and Haddad (the two recipients of the August 2014 letter), detailing a response to each concern identified in the letter. Approximately 10 days later, on August 17, 2014, Plaintiff again wrote Kimmons and Haddad. Plaintiff especially disagreed with the suggestion to appoint an operations director who, like Plaintiff, reported directly to Rady, and Plaintiff "insist[ed]" that his "work and ongoing plans" be fully vetted before changes were made to the administrative structure of UCSD's emergency medicine division. Without explanation or specificity, Kaufman (one of the authors of the August 2014 letter) and Haddad (a recipient of the August 2014 letter and both of Plaintiff's letters in response) considered Plaintiff's August 17 response to be that "[Plaintiff] would not abide by the recommendations of [the August 2014 letter]."

Five days later (Aug. 22, 2014), Plaintiff attended a meeting with the two authors and the two recipients of the August 2014 letter — Kaufman and Norton, and Kimmons and Haddad, respectively. Randolph Siwabessy, assistant dean of business and finance at Rady and administrative vice-chair of the department of pediatrics at UCSD, also attended the meeting. He hand-delivered to Plaintiff a letter and demanded that Plaintiff sign it. Although the parties do not tell us what was in the letter, Plaintiff did not sign it, because he believed it was "vague" and "premised on several unsubstantiated claims."

At a meeting a week later (Aug. 29, 2014), Plaintiff received a letter containing a revision of his job responsibilities as medical director of the ED and a "list of 'Behavior[al] Expectations.' " Plaintiff refused to sign the August 29 letter.

According to Kaufman's and Haddad's identical declaration testimony, at "numerous" (unspecified) meetings following the August 2014 letter, Plaintiff "continued to take the position that he was not willing to following the recommendation of hospital leadership." By letter dated September 3, 2014, Kaufman notified Kimmons that since Plaintiff refused to sign a "revised position description" for his responsibilities as medical director of emergency services, Rady considered Plaintiff to have resigned from his position.

On September 9, 2014, Kaufman and Norton wrote to Plaintiff, confirming that Plaintiff had been terminated as the medical director of emergency services at Rady. Although Plaintiff had intended to continue working as chief of the ED, two days later Siwabessy (who holds positions at both Rady and UCSD) wrote Plaintiff to advise him that he had been placed on administrative leave. Regents compensated Plaintiff through the end of the term of his designated appointment in June 2015, but Rady and UCSD did not renew his appointment.

III.

PROCEDURAL BACKGROUND

In August 2015, Plaintiff filed the underlying wrongful termination lawsuit. Among the eight causes of action, Plaintiff alleged a claim for defamation per se. At paragraph 77 of the complaint (in the cause of action for defamation), Plaintiff alleges in full:

"Defendants made the following statements to third parties about Plaintiff:

"a. That Emergency Department physicians were afraid of Plaintiff;

"b. That staff members were afraid of Plaintiff;

"c. That Plaintiff sent threatening emails to faculty members;

"d. That Plaintiff no longer worked at R[ady;]

"e. That Plaintiff was incapable of leading the department[;]

"f. That Plaintiff was removed from his position because he failed to perform his duties[; and]

"g. That Plaintiff wasn't a 'team player.' "

The remainder of the claim contains allegations intended to establish the necessary elements of a cause of action for defamation.[5]

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[5] In the first paragraph of this seventh cause of action, Plaintiff incorporates all of the allegations in the preceding six causes action — including detailed allegations concerning retaliation for Plaintiff's patient advocacy. We are aware that the Supreme Court currently has pending at least three appeals in which one of the issues is the relevance of an allegation that an employer acted with a retaliatory or discriminatory motive in deciding whether an employee's claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to strike under the anti-SLAPP statute. (*Wilson v. Cable News Network*, No. S239686; *Esquith v. Los Angeles Unified School Dist.*, No. S244026; and *Bonni v. St. Joseph Health System*, No. S244148.) That issue is not present in this appeal. Defendants' motions here are directed only to Plaintiff's cause of action for defamation, not to the earlier claims in which the allegations of retaliation are at issue. As we explain at part IV., *post*, Plaintiff does not allege in the complaint or contend on appeal that any of the seven alleged defamatory statements specified at paragraph 77 was made in connection with retaliation for patient advocacy. Consistently, in their respective reply briefs on appeal, each of Defendants emphasizes (with almost identical language) that the bases of Plaintiff's defamation claim are *only* the seven specific statements alleged by Plaintiff — *not* the facts associated with the alleged retaliatory motive that Plaintiff attributes to Defendants' employment decisions.

Defendants each filed an anti-SLAPP motion directed solely to the seventh cause of action for defamation.[6] Consistent with the requirements of the anti-SLAPP statute, each of the motions was based on the arguments that (1) Plaintiff's defamation cause of action arose out of constitutionally protected activity in connection with a public issue, and (2) Plaintiff could not establish a probability of prevailing on the merits.

Plaintiff filed an opposition to each motion. Defendants each filed a reply to the applicable opposition.

After oral argument, the court denied the three anti-SLAPP motions, filing a written order that confirmed the court's tentative ruling. The court had tentatively ruled that, under the first prong of the anti-SLAPP statute, none of Defendants had shown that the allegedly defamatory statements were made "in connection with a public issue" (§ 425.16, subd. (b)(1)), because none of Defendants had shown that any of the statements concerned "an issue of public interest" (§ 425.16, subd. (e)(4)).

Defendants each timely appealed from the written order. (See § 425.16, subd. (i) [order denying anti-SLAPP motion is appealable].)

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6 Each of Defendants filed its own supporting evidence and argument; CSSD joined Rady's motion; and Regents joined the motions of both Rady and CSSD. On appeal, each of Defendants filed its own briefs, and Plaintiff responded separately to each of the three opening briefs. The parties submitted a joint appendix, and in their appellate briefing, they often cite evidence from one of the motions other than the motion at issue in the specific brief. Since there have been no objections, we too will consider the evidence in the one appendix to be in support of and in opposition to all three anti-SLAPP motions.

IV.

DISCUSSION

As we introduced *ante*, the anti-SLAPP statute provides that "[a] cause of action against a person 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* shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1), italics added.) The "critical point" is whether the cause of action itself was "*based on*" an act in furtherance of the defendant's right of petition or free speech in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) " 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .' " (*Ibid.*)

Here, Defendants contend that the acts underlying Plaintiff's defamation cause of action fall within section 425.16, subdivision (e)(4), which includes "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*." (*Ibid.*, italics added.) More specifically, each of Defendants argues:

> Rady — "[T]he allegedly defamatory statements constitute protected activity under [section 425.16,] subdivision (e)(4) because these statements were made in connection with an issue of public interest — the management and quality of children's healthcare at Rady, the region's only designated pediatric trauma center."

Regents — "[Regents] invoke[] Section 425.16, sub[division] (e)(4) because [Defendants'] discussions regarding problems in a pediatric emergency room, and its impact on pediatric patients, further free speech rights in connection with a public interest issue — the quality and availability of pediatric emergency medical care."

CSSD — "[Defendants'] communications regarding [Plaintiff's] performance and emergency room management fall squarely within the protected speech described in Code of Civil Procedure section 425.16, sub[division] (e)(4), because these statements further the constitutional right of free speech and address an issue of public interest — children's access to the best possible emergency medical care."

In short, Defendants' position is that, because pediatric emergency medical care is an issue of public interest, Defendants' communications involving problems in the ED — San Diego's only pediatric trauma center — are protected activity under the anti-SLAPP statute.

Our Supreme Court recently provided guidance for analyzing whether a defendant's act underlying the plaintiff's cause of action is in furtherance of the right of petition or free speech in connection with a public issue for purposes of the anti-SLAPP statute. (*Park, supra*, 2 Cal.5th at p. 1063; see § 425.16, subd. (b)(1).) The court held that a claim is subject to being stricken under the anti-SLAPP statute "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." (*Park*, at p. 1060.)

In *Park*, the plaintiff assistant professor sued the defendant university after the university denied the assistant professor's application for tenure. (*Park, supra*, 2 Cal.5th at p. 1061.) The assistant professor, who was Korean, alleged that the university discriminated against him based on his national origin — in part because other faculty of

Caucasian origin with comparable or lesser credentials received tenure, and in part because a university dean spoke and behaved in a manner that reflected prejudice based on national origin. (*Id.* at pp. 1067-1068.) In an anti-SLAPP motion, the university argued that the act underlying the assistant professor's causes of action was protected activity in connection with a public issue, because section 425.16, subdivision (e)(2) includes as a qualifying act "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." (§ 425.16, subd. (e)(2).)

The Supreme Court concluded that the university did not meet its burden of showing that its conduct on which the professor based his claims fell within section 425.16, subdivision (e)(2) (or any other part of subd. (e)), because the elements of the professor's claim "depend not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process [— which would have been protected conduct under section 425.16, subdivision (e)(2) —] but only on the denial of tenure itself and whether the *motive* for that action was impermissible. . . . The dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability." (*Park*, at p. 1068.)

As the Supreme Court explained, in ruling on an anti-SLAPP motion, the moving defendant must establish a "nexus . . . between a challenged claim and the defendant's protected activity." (*Park, supra,* 2 Cal.5th at p. 1060.) That is because "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 stricken only if the specifically alleged wrong *itself* is a constitutionally protected activity. (*Ibid*.) Courts must distinguish between speech that is the basis of the defendant's liability and speech that is merely evidence related to liability. (*Park*, at p. 1065.)

Thus, in evaluating whether a plaintiff's claim is subject to being stricken, courts must do more than merely determine whether the plaintiff has alleged activity protected by the anti-SLAPP statute. The alleged protected activity must also "underlie[] or form[] the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062; accord, *City of Cotati*, *supra*, 29 Cal.4th at p. 78.) To this end, our Supreme Court has directed that "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Park*, at p. 1063.) We shall do so here.

"Defamation constitutes an injury to reputation; the injury may occur by means of libel or slander. (Civ. Code, § 44.)"[7] (*Shively v. Bozanich* (2003) 31 Cal.4th 1230,

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7 "Libel is a false and unprivileged publication by writing . . . , which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.)

"Slander is a false and unprivileged publication, orally uttered, . . . which: [¶] . . . [¶] 3. Tends directly to injure [the plaintiff] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; [or] [¶] . . . [¶] 5. Which, by natural consequence, causes actual damage." (Civ. Code, § 46.)

"Certain statements are deemed to constitute slander per se, including statements . . . tending directly to injure a plaintiff in respect to the plaintiff's business by imputing

1242.) To establish a claim for defamation, the plaintiff must prove that the defendant "intentionally communicated to a third person, either orally or in writing, a false, unprivileged statement about [the plaintiff] that had a natural tendency to injure him or that caused him special damage." (*Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 855; see *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [defamation "involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage"].)

At paragraph 77 of the complaint, Plaintiff pleaded *only* the following statements as an element of his claim for defamation:

> "Defendants made the following statements to third parties about Plaintiff:
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> "a. That Emergency Department physicians were afraid of Plaintiff;
>
> "b. That staff members were afraid of Plaintiff;
>
> "c. That Plaintiff sent threatening emails to faculty members;
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> "d. That Plaintiff no longer worked at R[ady;]
>
> "e. That Plaintiff was incapable of leading the department[;]
>
> "f. That Plaintiff was removed from his position because he failed to perform his duties[; and]
>
> "g. That Plaintiff wasn't a 'team player.' "

As we explain, because Defendants did not establish that any of those seven statements can be considered "an issue of public interest" (§ 425.16, subd. (e)(4)), Defendants did

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something with reference to the plaintiff's business that has a natural tendency to lessen its profits." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1240, fn. 5.)

not meet their burden of establishing that the *specifically alleged* "*wrong complained of*" implicated constitutionally protected activity. (See *Park*, *supra*, 2 Cal.5th at p. 1060, italics added.)

We have assumed, without deciding, that the quality and availability of pediatric emergency health care at Rady is an issue of public interest.[8] However, none of the allegedly defamatory statements quoted above — i.e., none of the speech that provides *the basis for* Defendants' alleged liability — is directed to pediatric emergency health care issues. Stated differently, Defendants' constitutionally protected activity is not implicated, because Plaintiff's defamation cause of action is not "*based on*" statements involving pediatric emergency health care at Rady. (*City of Cotati*, *supra*, 29 Cal.4th at p. 78.) The statements pleaded by Plaintiff involve only issues related to Plaintiff's employment status and how Plaintiff interacted with those who supervised him and with those whom he supervised; the statements themselves do not implicate patient care.

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8 CSSD requests that we take judicial notice of a January 2013 newspaper article regarding Rady's efforts to reduce patient wait time in the ED. We grant Plaintiff's motion to accept his untimely opposition to CSSD's request.

Because appellate courts normally " 'consider only matters which were part of the record at the time the [appealable order] was entered,' " absent "exceptional circumstances" appellate courts do not take judicial notice of matters not presented to the trial court. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, fn. 3.) The newspaper article was not presented to (and thus not considered by) the trial court, and CSSD does not suggest that exceptional circumstances exist here. In any event, given our assumption that wait time in the ED *is* an issue of public interest, a newspaper article concerning wait time in the ED is not "necessary, helpful, or relevant" to our resolution of the appeal. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6.) For each of these reasons, Plaintiff's motion for judicial notice is denied.

There is no question but that Plaintiff's 20-page complaint contains significant and detailed allegations having to do with the quality and availability of pediatric emergency health care at Rady — both before and after Plaintiff was hired. Indeed, the theme throughout Plaintiff's complaint is that Rady and Regents were making decisions based on financial profit as opposed to medical advancement, and in support of this theme Plaintiff alleges numerous and varied issues of serious concern related to staffing, equipment, physical improvements and patient care at Rady. Consistently, in his three declarations (each more than 27 pages in length) in opposition to the three anti-SLAPP motions, Plaintiff testifies in significant detail to these issues of staffing, equipment, physical improvements and patient care at Rady.[9] However, *those allegations* and *that evidence* — which we have assumed relate to issues of public interest for purposes of section 425.16, subdivision (e)(4) — do not "form the basis for [Plaintiff's defamation] claim"; at most, they "merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1064.)

Graffiti Protective Coatings, Inc. v. City of Pico Rivera (2010) 181 Cal.App.4th 1207 illustrates this distinction. There, the plaintiff maintenance contractor sued the defendant city after the contractor's government contract with the city was terminated and the city awarded a new contract to a competitor. (*Id.* at p. 1211.) The Court of Appeal concluded that the city's acts were not protected speech or petitioning activity for purposes of the anti-SLAPP statute, explaining: "In deciding whether an action is a

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9 In support of his testimony, Plaintiff also submitted three sets of voluminous exhibits.

SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity. Prelitigation communications . . . may provide evidentiary support for the complaint without being a basis of liability. An anti-SLAPP motion should be granted if liability is *based on* speech or petitioning activity itself." (*Id.* at pp. 1214-1215, second italics added; accord, *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 41-42 (*Gotterba*) [complaint was *based on* "the validity of the asserted termination agreements," not on defendants' prelitigation constitutionally protected demand letters].) Here, Plaintiff's claim for defamation is *based on* Defendants' statements regarding routine administrative and interpersonal employment-related issues, not on Defendants' statements regarding the quality and availability of pediatric health care in the ED.

At oral argument, certain of Defendants' counsel suggested that, because the cause of action for defamation incorporates by reference the allegations in the preceding six causes of action,[10] the seven specified defamatory statements — in particular "[t]hat

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10 In particular, counsel mentioned the incorporation of paragraph 35, which is contained in the first cause of action and alleges that Defendants retaliated against Plaintiff for advocating for medically appropriate patient health in violation of Business and Professions Code section 2056. Referring to the August 2014 letter, Plaintiff alleges in full at paragraph 35: "In response to Plaintiff's persistent demands to improve patient care and to promote fair and ethical business practices, false accusations and misinformation about his work began to be thrown at him from senior management and their agents. On August 4, 2014, [Norton] and [Kaufman] wrote a letter questioning Plaintiff's administrative abilities and falsely claiming that he was responsible for a 'crisis' of patients leaving the [ED] without being seen and falsely claiming that Plaintiff refused to accept hospital directives. Even though Plaintiff refuted all of these false claims in a point-by-point written response, Plaintiff then learned that he was to be excluded from hospital operations and those responsibilities were transferred to a junior member of the

Plaintiff was incapable of leading the department" and "[t]hat Plaintiff was removed from his position because he failed to perform his duties" — were necessarily made in connection with patient care in the ED and Defendants' retaliation for Plaintiff's patient advocacy. We disagree.[11]

Defendants' argument conflates the conduct underlying Plaintiff's defamation claim (i.e., the seven specifically alleged statements) with the conduct underlying Plaintiff's unlawful termination claims (i.e., disagreements over patient care). Whether the parties disputed the quality and availability of medical care in the ED — issues that we have assumed, for purposes of this appeal, are matters of public interest[12] — is an

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department. Plaintiff requested an independent review of the facts and the entire ED program but this too was rejected. From and after August of 2014 Plaintiff was targeted with numerous false and defamatory accusations in a concerted efforts [*sic*] by [D]efendants to either force Plaintiff to resign or set up a pretextual justification for not renewing Plaintiff[']s contract. In fact, [D]efendants created a libelous paper trail and advised Plaintiff that his contract would not be renewed relieving Plaintiff of all responsibilities and directing him to stay home. This act in and of itself further damaged Plaintiff's reputation and caused him serious embarrassment, humiliation and other emotional harm."

11 Although we exercise our discretion to consider this new argument, we disapprove of counsel presenting it at the hearing when it was not contained in Defendants' combined 12 briefs (in the trial court and on appeal) that preceded oral argument. (See *Amerigas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 1001, fn. 4 [appellate court would not consider new arguments or newly cited cases at oral argument without "any justification for [the party's] failure to raise the new issues and additional cases in a timely fashion"].)

12 Notably, Defendants have not argued that the *choice of who should lead the ED* is a matter of public interest or in connection with a matter of public interest, and we express no opinion on that issue or the outcome of an anti-SLAPP motion that might have been brought on such grounds. (Compare, e.g., *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1526-1527 [reporting of weather is a matter of public interest;

entirely separate inquiry from whether each of the seven specifically alleged defamatory statements was *based on* or *in connection with* the quality and availability of medical care in the ED. Moreover, counsel's oral comments (i.e., Defendants' first mention of the potential effect of Plaintiff having incorporated by reference allegations concerning communications regarding patient care in the ED) do not explain how the seven statements at issue involved conduct in furtherance of *Defendants' speech* on the identified matter of public interest under section 425.16, subdivision (e)(4).

V.

CONCLUSION

Plaintiff's seventh cause of action for defamation is not based on any act in furtherance of Defendants' constitutional right of free speech *in connection with a public issue*. (§ 425.16, subd. (b)(1).) Thus, Defendants did not meet their initial burden of establishing that the challenged claim arises from activity protected by section 425.16.

Because Plaintiff's defamation claim is not based on protected activity, the burden never shifted to Plaintiff to demonstrate the potential merits of his claim. (*Park, supra,* 2 Cal.5th at p. 1061; *Baral, supra,* 1 Cal.5th at p. 384.) For this reason, we do not reach the issue whether Plaintiff established a probability of success on the merits of the defamation cause of action. (*Gotterba, supra*, 228 Cal.App.4th at pp. 43-44 [court need not discuss second prong if defendant fails to establish that claims arise from protected activity].) By not reaching the second prong, we do not express a view on the merits of

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selection of the television weather broadcaster is *in connection with* a matter of public interest].)

either Plaintiff's defamation claim (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371) or Defendants' potential defenses to the claim (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 496).

DISPOSITION

The order denying Defendants' anti-SLAPP motions is affirmed. Plaintiff is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.