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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KOFI KESSEY, Plaintiff, Respondent, and Cross-Appellant, v. LOS ROBLES REGIONAL MEDICAL CENTER et al., Defendants, Appellants, and Cross-Respondents.	2d Civil No. B270156 (Super. Ct. No. 56-2015-00469667-CU-MC-VTA) (Ventura County)

In *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1069-1070 (*Park*), our Supreme Court recently held that peer review decisions/disciplinary actions are not protected speech activities within the meaning of the anti-SLAPP statute. (Code Civ. Proc., § 425.16, subd. (e)(2).)[1] Here, a hospital peer review was allegedly used as a pretext to

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

terminate a neuorsurgeon's on-call contract. The neurosurgeon sued Los Robles Regional Medical Center (Hospital) and its affiliate (HCA Holdings, Inc.) for violating two whistleblower statutes (Health & Saf. Code, § 1278.5; Bus. & Prof. Code, § 2056). The trial court found that the action arose out of a hospital peer review decision which was a protected speech activity, and that prong one of the anti-SLAPP statute was satisfied. (§ 425.16, subd. (e)(3).) *Park* requires that we reverse because the peer review decision was not a protected speech activity, immunizing Hospital and HCA Holdings from liability. (*Park*, *supra*, at pp. 1069-1070.) "Discrimination and retaliation claims are rarely, if ever, good candidates for the filing of an anti-SLAPP motion." (*Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, 864.)

Facts and Procedural History

Doctor Kofi Kessey, a neurosurgeon, provided neurosurgical services at the Los Robles Hospital Trauma Center Emergency Department from January 2013 through October 2014 pursuant to an Emergency Department on-call contract. As a Level II Trauma Center, Hospital was required to have a neurosurgeon on standby 24 hours a day, seven days a week. (See *Eden Hospital Dist. v. Belshe* (1998) 65 Cal.App.4th 908, 911 (*Eden*).) Kessey's contract required that he be on-site to see the patient within 30 minutes of a Trauma Center Emergency Department (ED) call. The contract provided that "[c]ontractor shall not be the subject of any quality monitoring during the term of this Agreement."

Before signing the contract, Kessey voiced concerns that Doctor X, who worked at Hospital's endoscopic skull base surgery program, was performing unnecessary and dangerous

medical procedures. In March and April 2014, Kessey again complained about Doctor X and complained about hospital equipment in disrepair and poorly trained staff.

In May 2014, Hospital added two neurosurgeons to the emergency call panel, reducing the number of $1,600/day, on-call shifts assigned to Kessey. Kessey claimed it was retaliatory. Three peer review committees reviewed Kessey's job performance and found that he did not timely respond to certain ED calls. On October 16, 2014, the Hospital Medical Executive Committee (MEC) voted to initiate a Focused Professional Practice Evaluation (FPPE) and suspend Kessey's ED on-call privileges. On October 23, 2014, a week later, Hospital terminated Kessey's ED on-call contract.

Kessey sued, alleging that Hospital and HCA Holdings violated two whistleblower statutes (Health & Saf. Code, § 1278.5; Bus. & Prof. Code, § 2056). In response, Hospital and HCA Holdings filed a special motion to strike the complaint based on the theory that the whistleblower action arises from a protected hospital peer review activity. (§ 425.16, subd. (e)(2); *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199 (*Kibler*).) Kessey opposed the anti-SLAPP motion on the ground that Hospital orchestrated the peer review decision to terminate his contract.

The Trial Court's Ruling and Appeals

Denying Hospital's motion to strike on the first cause of action,[2] the trial court found that the first prong of the anti-

[2] The first cause of action alleges that the contract termination violated Health and Safety Code section 1278.5 which prohibits a hospital from retaliating against a patient, employee, member of the medical staff, or any other health care

SLAPP statute was satisfied but concluded that, on prong two of the statute, Kessey's "evidence of retaliatory motive is relatively weak," but demonstrated a probability of prevailing on the claim. The trial court struck the first cause of action as to HCA Holdings because no facts were alleged that HCA Holdings, a Delaware corporation, was a party to the on-call contract or played a role in the decision to terminate Kessey's contract. .

On the second cause of action, the trial court granted the anti-SLAPP motion as to both defendants because Business and Professions Code section 2056 only prohibits retaliation against doctor for "advocate[ing] for medically appropriate health care to his or her patients." There was no allegation or evidence that Kessey advocated for the care of his own patients. (*Sarka v. Regents of University of California* (2006) 146 Cal.App.4th 261, 271; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 49-50.)

Hospital appeals the order denying the anti-SLAPP motion on the first cause of action. Kessey cross-appeals and argues that the trial court erred in granting the anti-SLAPP motion in whole or part because the whistleblower action does not arise from a protected speech activity. (§ 425.16, subd. (e)(2).)

Two-Step Analysis

We review the grant or denial of an anti-SLAPP motion de novo, applying the same two-step process as the trial court. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) Step one (i.e., prong one of the anti-SLAPP statute) requires that the defendant show that the challenged cause of action arises

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worker of the health facility because the individual "[p]resented a grievance, complaint, or report to the facility . . . ." (Health & Saf. Code, § 1278.5, subd. (b)(1)(A).)

from a protected activity. (§§ 425.16, subd. (b); see § 425.16, subd. (e) [defining protected activity]; *Park*, *supra*, 2 Cal.5th at p. 1061.) If the defendant carries its burden, the court proceeds to step two and determines whether the plaintiff has shown a probability of prevailing on his or her claim. (*Ibid*.) Assuming that the defendant does not satisfy the "arising from" prong of the statute (i.e., prong one), the trial court should deny the anti-SLAPP motion and need not address the second prong regarding the merits of plaintiff's claim. (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266-267, overruled on other grounds in *Park*, *supra,* 2 Cal.5th at p. 1071; *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, 1594.)

Prong One: Action Arising From Protected Speech Activity

Prong one focuses on the principal thrust or gravamen of the action, i.e., the wrongful and injury-producing conduct that provides the foundation for the claim. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-491.) "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for purposes of the anti-SLAPP statute. [Citation.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

Relying on *Kibler*, *supra*, 39 Cal.4th 192, *DeCambre v. Rady Children's Hospital-San Diego* (2015) 235 Cal.App.4th 1 (*DeCambre*), and *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65 (*Nesson*), the trial court found

that the action arose from a hospital peer review decision, which is a protected speech activity under the anti-SLAPP statute. (§ 425.16, subd. (e)(2).) In *Park,* our Supreme Court disapproved *Nesson* and *DeCambre* and clarified the scope of *Kibler*. *Park* held that a discrimination claim may be struck "only if the speech or petition 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*, *supra*, 2 Cal.5th at p. 1060.) The court cited with approval, *Nam v. Regents of University of California* (2016) 1 Cal.App.5th 1176 (*Nam*), a sexual harassment/discrimination case in which the defendant claimed the action arose from complaints about the plaintiff's/medical resident's performance which led to an investigation and plaintiff's termination. The Court of Appeal concluded that an anti-SLAPP relief could not be granted because liability was based on defendant's retaliatory conduct. (*Id.* at p. 1192.) The *Nam* and *Park* courts warned that conflating, in the anti-SLAPP analysis, discriminatory decisions and speech involved in reaching those decisions could render the anti-SLAPP statute "'fatal for most harassment, discrimination, and retaliation actions against public employers.'" (*Park*, *supra*, at p. 1067, quoting *Nam*, *supra*, at p. 1179.)

Hospital's and HCA Holdings reliance on *Kibler*, *supra*, 39 Cal.4th 192 is misplaced for the very reasons stated in *Park*. In *Kibler,* the plaintiff doctor sued a hospital for defamation based on statements made in connection with a hospital peer review proceeding. The issue on appeal was narrow: Did the peer review proceeding qualify as an "'other official proceeding authorized by law'" within the meaning of section 425.16, subdivision (e)(2)? (*Id.* at p. 198.) Our Supreme

Court concluded that it did but did not decide the issue of whether the peer review decision was a protected speech activity. (*Ibid.*; see *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 58 [*Kibler* addressed only whether hospital peer review proceedings qualify as "'official proceedings'" and courts resolving anti-SLAPP motions must still separately determine whether a given claim arises from a protected activity].) Park warns that "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements in connection with that process, are protected." (*Park*, *supra*, 2 Cal.5th at p. 1070.) The court disapproved *Nesson*, and *DeCambre* because they "overread *Kibler*." (*Ibid.*)

Kessey claims that Hospital and HCA Holdings retaliated against him by hiring two new neurosurgeons to serve on the ED on-call panel, by not requiring other doctors to be on site within 30 minutes of an ED call, and by orchestrating the peer review to terminate his employment contract. The gravamen of the action is that the peer review itself was retaliatory and used "as the means to discriminate or retaliate and thereafter capitalize on the subterfuge by bringing an anti-SLAPP motion to strike the complaint." (*Nam*, *supra*, 1 Cal.App.5th at p. 1190; see also *Bonni v. St. Joseph Health System*, *supra*, 13 Cal.App.5th at p. 861 [section 425.16 does not apply where plaintiff's claim "arises from defendants' retaliatory purpose or motive," even if it involves a hospital peer review proceeding].) *Park* holds that a defendant sued for discrimination can not convert retaliatory conduct (in this instance a peer review decision) into a protected First

Amendment activity for purposes of anti-SLAPP relief. (*Park*, *supra*, 2 Cal.5th at p. 1068.)

Kessey's retaliation claims strike at the heart of Hospital administration. He claims that three peer review committees were "tools" of the Hospital to get rid of a whistleblower. This, however, goes to prong two of the anti-SLAPP statute (§ 425.16, subd. (b)(1)) and need not be addressed because Hospital and HCA Holdings failed to satisfy prong one of the statute. "Only a [claim] 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." (*Navellier*, *supra*, 29 Cal.4th at p. 89.)

Based on *Park*, we reverse the order striking the complaint as to HCA Holdings and reverse the order striking the second cause of action (violation of Bus. & Prof. Code, § 2056) as to Hospital. Hospital and HCA Holdings argue that the second cause of action fails as a matter of law because the whistleblowing did not advocate appropriate medical care for Kessey's own patients. (Bus & Prof. Code, § 2056, subd. (a).) That may be true, but the issue cannot be decided in an anti-SLAPP motion which carries with it the sanction of attorney fees. (§ 425.16, subd. (c)(1).) Hospital and HCA Holdings were awarded $52,500 attorney fees as the prevailing party on the anti-SLAPP motion, which is the subject of another appeal, to be decided another day. (*Kessey v. Los Robles Regional Medical Center et al.*, B277523; see, e.g., *City of Riverside v. Stansbury*, *supra*, 155 Cal.App.4th at p. 1594 [reversal of order granting anti-SLAPP motion requires reversal of attorney fee award].)

Disposition

The judgment is reversed and remanded with directions to deny the anti-SLAPP motion in its entirety as to Hospital and HCA Holdings. Kessey is awarded costs and reasonable attorney fees on appeal, in an amount to be determined by the trial court. (§ 425.16, subd. (c).)

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Vincent J. O'Neill, Judge

Superior Court County of Ventura

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