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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BHUPINDER BHANDARI, Plaintiff and Appellant, v. WASHINGTON HOSPITAL et al., Defendants and Appellants.	A144184 (Alameda County Super. Ct. No. RG09480372)

In August 2008, Bhupinder Bhandari, M.D., then chief of staff-elect at Washington Hospital in Fremont, appeared in a documentary film critical of the hospital. His participation generated intense and open conflict with hospital administrators, physicians, and other staff members. He was censured and removed from office.

Bhandari sued the hospital and several related entities and individuals,[1] alleging, inter alia, retaliation. Defendants filed a motion to strike pursuant to the anti-SLAPP statute (Code Civ. Proc., § 425.16),[2] which was denied. In a prior appeal, we reversed and remanded for further proceedings, holding that Bhandari's claims arose from

[1] Defendants and appellants are Washington Hospital (Hospital), Washington Township Health Care District (Hospital's parent organization; hereafter District), Medical Staff of Washington Hospital (medical staff), Nancy Farber, Khalid Baig, M.D., Ranjana Sharma, M.D., Moses Taghioff, M.D., Steven Ross, M.D., Kranthi Achanta, M.D., and Albert Brooks, M.D. (collectively, defendants). Bhandari's complaint also separately named the medical staff's executive committee (MEC), but the record indicates MEC is not a legal entity and was named in error.

[2] "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

protected activity because they arose from hospital peer review proceedings. (See *Bhandari v. Washington Hospital Group* (June 22, 2011, A128457) [nonpub. opn.] (*Bhandari I*).) On remand, the trial court granted the motion in part and dismissed Bhandari's causes of action for defamation, wrongful termination and emotional distress. Ruling Bhandari had shown a probability of prevailing, the trial court denied the anti-SLAPP motion as to the remainder of his claims. Defendants once again appeal, and Bhandari cross-appeals.

We reverse the dismissal of the libel, libel per se, and false light causes of action, conclude the trial court erred in failing to strike Bhandari's free speech claim, and otherwise affirm. We deny Bhandari's request for fees on appeal.

I. BACKGROUND

A. *Factual Background* [3]

In April 2007, the Hospital's medical staff elected Bhandari to the chief of staff-elect position, which would have resulted in his becoming chief of staff when the predecessor's term expired in June 2009. Pursuant to a contract with the District (Agreement), Bhandari received a monthly stipend. Section 9.1-7 of the Medical Staff Bylaws (Bylaws) provided: "Except as otherwise provided, recall of a Medical Staff officer may be initiated by the MEC or by a petition signed by at least one-third (1/3) of the members of the Medical Staff eligible to vote. Recall shall be considered at a special meeting called for that purpose. Removal shall require a two-thirds (2/3) vote by secret ballot of the members of the staff eligible to vote."

A documentary film entitled Life for Sale (Orb Film Productions 2008) was released in August 2008. According to a contemporaneous news article, "[t]he movie accuse[d] hospitals of discharging patients who are too sick to go home and [said] hospitals retaliate against doctors who don't act accordingly." Further, the "[Hospital] [was] singled out . . . [with allegations that] hospital administrators have taken control of

[3] The facts are taken from evidence submitted in support of and in opposition to the anti-SLAPP motion. (See Code Civ. Proc., § 425.16, subd. (b)(2); *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.)

patient care from doctors and base key decisions on profits rather than patient welfare." Evelyn Li, M.D., a member of the Hospital's medical staff, was identified as the film's medical consultant. Bhandari was interviewed in the film, but was not shown making disparaging comments about the Hospital.

Release of the film generated significant public debate within the Hospital and in the broader community. Hospital nurses and physicians circulated petitions protesting the film and the Hospital physicians who appeared in it: Bhandari, Li, and two others. At an August 2008 special MEC meeting to discuss the film, Bhandari told his colleagues Li had asked him to participate in an education film for her patients, he did not speak disparagingly about the Hospital in the film, and he believed the Hospital was an excellent organization. The MEC voted to investigate the physicians who appeared in the film. Bhandari was formally notified of the investigation and invited to submit a written statement, which he did on September 8.

Farber, the chief executive officer for the Hospital and the District, had an administrator notify Bhandari (by letter dated Aug. 27, 2008) that he was "temporarily remov[ed] . . . from the emergency room internal medicine call schedule" pending an investigation into the film. Farber allegedly made defamatory statements about Bhandari during a September 8, 2008 meeting between Bhandari, Farber and Brooks (Hospital's chief of medical services). In a letter dated September 9, 2008, Farber informed Baig, the Hospital's chief of staff and chair of the MEC, that she had reviewed the charts of patients profiled in the film and discovered they had been admitted by Bhandari or his partner; Bhandari had insisted they were Li's patients; although Li's cases required proctoring, there was no evidence she had been proctored; and Bhandari could not explain why the proctoring had not occurred. Farber asked the MEC to investigate the proctoring issue as part of its investigation of Bhandari.

At a general medical staff meeting and a public meeting of the Hospital's governing board (Board) in September 2008, Hospital physicians and community members criticized the film and the physicians who appeared in it. Allegedly defamatory statements were made at or around the time of these meetings by Baig, Brooks, Ross, and

Achanta. During the medical staff meeting, Baig called for the staff to remove Bhandari by a show of hands. Baig then circulated an allegedly defamatory petition to initiate a recall of Bhandari pursuant to Bylaws section 9.1-7. On September 19, Baig reported to the medical staff that 97 physicians favored a recall vote, 22 opposed, and one abstained; with 328 eligible voters, the signatures were insufficient to trigger a recall vote.

In October 2008 and February 2009, the MEC questioned Bhandari about his appearance in the film and his proctoring of Li. Bhandari produced evidence that he was not involved in the film's editing, financing or marketing, said he thought the film was a school project for Li's daughter, and said he disagreed with the film's negative portrayal of the Hospital. The MEC asked Bhandari to provide evidence he made favorable statements about the Hospital in his interview with the filmmakers, but Bhandari never produced such evidence. Bhandari admitted deficiencies in meeting Li's proctoring requirement, but denied he failed to show diligence in ensuring the proctoring was done. The MEC voted to review the cases of patients Bhandari had admitted for Li "to identify if in fact there is evidence to support the concern of circumventing proctoring requirements." In February 2009, the MEC voted to censure Bhandari, declare him no longer a member in good standing, and withdraw his January 2009 unconditional two-year reappointment to the medical staff.

On February 9, 2009, the MEC informed Bhandari: "1. You have failed to implement, comply with, and have even subverted, a proctoring program mandated by the MEC for a member of the Medical Staff. . . . [¶] 2. You have failed to acknowledge your active disregard for the proctoring program. . . . [¶] 3. Your active participation in the movie 'Life for Sale' . . . clearly undermined the peer review and quality assurance efforts of this Medical Staff. . . . [¶] 4. You explained to the MEC that you were misled about the movie and understood it was school project for the producer's child. The MEC found this explanation not credible and misleading. [¶] 5. Throughout the MEC investigation, you have refused to acknowledge that any of your behaviors were inappropriate or contrary to your duties as Medical Staff leader. . . . [¶] . . . [¶] A. *Your behaviors . . . warrant a letter of censure* . . . . This letter is that censure and it will be

placed in your Medical Staff credentials file. [¶] B. . . . *The MEC has concluded that you can no longer be considered to be member in good standing of this Medical Staff and are, therefore, no longer eligible to hold the position of Chief of Staff Elect* . . . . [¶] Based upon the above *the MEC declares that the position of Chief of Staff Elect is vacant*, effective February 6, 2009." (Italics added.)

In a February 20, 2009 memorandum to all active members of the medical staff, Baig wrote: "I am writing to inform you that the [MEC] recently concluded a six-month investigation of [Bhandari]. Based on that investigation, the MEC issued a letter of censure to Dr. Bhandari and found that his behavior was inconsistent with the expectations of professional behavior for Medical Staff members and, in particular, Medical Staff leaders. The MEC concluded that Dr. Bhandari was no longer a member in good standing and therefore not eligible to hold elective office within this Medical Staff. . . . [¶] The above described action creates a vacancy in the office of Chief of Staff-Elect. Bylaws, Section 9.1-8." Bhandari's termination and censure became headline news in the community. The medical staff subsequently held a new election to fill the chief of staff-elect position.

On April 17, 2009, Bhandari wrote letters to the MEC and Board protesting the adverse actions taken by the MEC. He argued his removal from the chief of staff-elect position violated Bylaws section 9.1-7 and was retaliation for his "having stood up for patient rights and care and having opposed conduct that I believe to be inappropriate." He requested reconsideration of the actions and an "immediate, independent and good faith investigation."

On May 11, 2009, Baig informed Bhandari that the MEC had recommended conditions on his reappointment, including a requirement that he complete an ethics course. The letter stated "there were no concerns with your clinical competency," and "[t]his recommendation of the MEC does not involve any restriction of your privileges, require reporting to the Medical Board or to the National Practitioner Data Bank, or provide hearing rights under the Medical Staff Bylaws. Assuming you satisfy the above requirements, you may petition the MEC to be placed back in good standing and have the

letter of censure removed from your file. This would be done as part of your next reappointment process." The Board approved the conditional reappointment later in May.

On May 14, 2009, Bhandari wrote Baig to inquire, "[W]hen did the MEC's decision become final? . . . What are my rights for [hearing for] opposing this?" Baig reiterated that "no hearing rights apply."

In April 2010, the MEC considered Bhandari's reappointment, but found he had not completed the required ethics requirement. Bhandari was again conditionally reappointed to the medical staff. In February 2011, the MEC found Bhandari had fulfilled the ethics requirement and reinstated him membership to good standing.

Bhandari averred that he lost income due to a loss of referrals and also due to his removal from the emergency room (ER) call schedule. As of February 2010, he still had not been restored to the ER call schedule. Baig and Sharma (an MEC member and former chief of staff) testified in deposition that the MEC played no role in determining who was on the ER call schedule, which was managed by Hospital administration. In June 2014, Brooks averred: "To my knowledge and information and belief, Dr. Bhandari has never made a formal request to be restored to the on-call schedule."

B. *Procedural Background*

In his October 2009 complaint, Bhandari brought the following claims against all defendants: retaliation in violation of Business and Professions Code section 2056, slander, slander per se, false light, intentional infliction of emotional distress, and intentional and negligent interference with prospective economic advantage. He brought the following claims against the Hospital, District, and medical staff only: "Infringement of Right to Freedom of Speech," "Infringement of Right to Due/Fair Process," wrongful termination in violation of public policy, breach of contract, and breach of the implied covenant of good faith and fair dealing. He brought libel and libel per se claims against the Hospital, District, medical staff, Baig, and Brooks.

In January 2010, defendants filed an anti-SLAPP motion. They argued the complaint arose from activity protected by the anti-SLAPP law and Bhandari could not

establish a probability of prevailing on his claims. The trial court denied the motion, ruling the complaint did not arise from protected activity. Defendants appealed and this court reversed. We held "the MEC acts as a peer review committee, and what it did in investigating and disciplining Bhandari was in the nature of peer review." Thus, the claims arose from protected activity as defined in Code of Civil Procedure section 425.16, subdivision (e)(1), (2). (*Bhandari I, supra,* A128457.) We remanded for the trial court to determine whether Bhandari had established a probability of prevailing on the merits.[4]

On remand, the trial court granted Bhandari an opportunity to conduct limited discovery. In June 2014, defendants filed a new anti-SLAPP motion, expanding on their arguments that Bhandari had no probability of prevailing on his claims. They argued his claims were barred by the common interest and peer review privileges (Civ. Code, §§ 47, subd. (c), 43.7, subd. (b)), immunity under the federal Health Care Quality Improvement Act of 1986 (HCQIA) (42 U.S.C. § 11101 et seq.), and government immunity from punitive damages. Defendants further argued that Bhandari failed to exhaust administrative or judicial remedies as to all claims and could not establish all elements of his defamation, retaliation, contract, wrongful discharge, emotional distress, or interference claims.

The trial court ruled that none of Bhandari's claims were barred by a failure to exhaust administrative or judicial remedies, and granted defendants' motion only as to wrongful termination, defamation, and emotional distress claims. Defendants appealed and Bhandari cross-appealed.

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[4] In *Bhandari I,* we relied on *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192. While this appeal was pending, the California Supreme Court narrowly construed *Kibler* while clarifying how courts should determine whether a cause of action arises from protected activity within the meaning of the anti-SLAPP statute. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1069–1070.) The parties brought the case to our attention and we allowed them to submit supplemental briefs on the impact of the case on this appeal. Those supplemental briefs discuss whether *Park* casts doubt on our rulings in *Bhandari I,* but neither party contends *Park* applies to any issues raised in the instant appeal.

II. DISCUSSION

On the second prong of anti-SLAPP analysis, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. . . . The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' " (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385.) "On appeal, we review de novo the trial court's ruling on the motion to strike." (*McGarry v. University of San Diego, supra,* 154 Cal.App.4th at p. 109.)[5]

A. *Exhaustion of Administrative and Judicial Remedies*

Defendants argue the trial court erred in ruling that none of Bhandari's claims was barred by a failure to exhaust administrative or judicial remedies. The court reasoned that, even assuming further administrative remedies were available to Bhandari under the Bylaws, exhaustion was excused because defendants failed to notify Bhandari of his right to pursue those remedies. We affirm the trial court's ruling.

1. Westlake *Exhaustion Requirement*

Defendants rely on *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465 (*Westlake*), where the Supreme Court held: "[B]efore a doctor may initiate litigation challenging the propriety of a hospital's denial or withdrawal of privileges, he must exhaust the available internal remedies afforded by the hospital. . . . [¶] [Further], whenever a hospital, pursuant to a quasi-judicial proceeding, reaches a decision to deny

[5] We reject Bhandari's challenges to the anti-SLAPP proceedings on policy and constitutional grounds. The anti-SLAPP statute has repeatedly been upheld as constitutional. (See, e.g., *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 746.) While we are not unsympathetic to the complaint that anti-SLAPP proceedings too often fail to meet the goal of "ending [anti-SLAPP suits] *early* and *without great cost* to the SLAPP target" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192, italics added), these are policy issues more appropriately directed to the Legislature.

staff privileges, an aggrieved doctor must first succeed in setting aside the quasi-judicial decision in a mandamus action before he may institute a tort action for damages." (*Id.* at p. 469.)

Westlake arose in a particular context that limits its holding. Our Supreme Court explained at the outset: "Recent California decisions establish that before a public or private hospital may deny a doctor the right to practice his profession at that hospital, either by the termination of existing staff privileges or by the denial of an initial application for such privileges, the hospital must provide a fair procedure which affords the doctor an opportunity to answer the 'charges' upon which his exclusion rests. (See, e.g., *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541; *Ascherman v. San Francisco Medical Society* (1974) 39 Cal.App.3d 623.) In the instant case we must decide, *in the light of these recent decisions, what procedural requisites*, if any, a doctor who has been deprived of such hospital privileges must fulfill before he may institute a tort action for damages." (*Westlake, supra,* 17 Cal.3d at pp. 468–469, italics added.) *Westlake* thus purports to impose an exhaustion requirement only in cases where the right recognized in *Pinsker* and *Ascherman* (known as the common law right to fair procedure) applies. As *Westlake* itself recognizes, this common law right applies only to a hospital's "denial or withdrawal of privileges" and possibly also in cases where the hospital has effectively "den[ied] a doctor the right to practice his profession" at the hospital. (*Westlake*, at pp. 468–469.)

As relevant here, Bhandari's claims are based on his removal from the ER call schedule, the censure, the declaration that he was not in good standing (hereafter, declaration), and his removal from office.[6] Of these adverse actions, only his removal from the ER call schedule arguably triggered a common law right to fair procedure. (See *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146, 152–153 ["petitioner's participation on the hospital's emergency room call roster is a fundamental property right

[6] We agree with the trial court that defendants have not cited authority requiring defamation claims in the hospital peer review context to be exhausted.

which cannot be suspended or revoked without notice and a hearing"]; see also *Ascherman v. San Francisco Medical Society, supra,* 39 Cal.App.3d at pp. 634–635, 648, 653–654 [fair procedure rights apply to plaintiff's removal from local medical society's physician referral list; most referrals were emergency calls]. However, the Hospital provided no internal administrative remedies for this action. The August 27, 2008 letter removing Bhandari from the call schedule said, "This action is being taken while an investigation around your participation in a 'documentary' entitled *Life for* Sale is occurring. The outcome of the investigation will determine future actions." That investigation was carried out by the MEC, but Baig and Sharma testified in deposition that the MEC had no direct role in determining who was included on the call schedule, which was decided solely by the Hospital administration. After the MEC censured and removed Bhandari from office based on the investigation, Bhandari sent letters of protest to both the MEC and the Hospital administration: the MEC responded that he had no further internal administrative remedies and the administration did not respond. The Hospital never informed Bhandari that his removal from the call schedule had been made permanent, although Bhandari apparently still had not been restored to the schedule as of June 2014, and never informed him that additional administrative remedies were available with respect to the call schedule.

Westlake clearly holds that a physician is only required to exhaust internal administrative remedies that are "afforded" or "provided" to the physician by the hospital. (*Westlake, supra,* 17 Cal.3d at pp. 474–475.) The *Westlake* court specifically held that exhaustion was *not* required in a situation where a hospital had denied an application for membership and there was no evidence "that the [hospital] bylaws afforded plaintiff [an internal administrative] remedy or that the hospital informed plaintiff of the availability of a review procedure." (*Westlake*, at p. 474; see *id.* at p. 478.) Other courts have similarly held that exhaustion of internal remedies is not required if internal remedies are not available to the plaintiff. (See *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 828–829 [no exhaustion requirement where no internal remedy available]; *Martino v. Concord Community Hosp. Dist.* (1965)

233 Cal.App.2d 51, 56–57 [no exhaustion requirement where no internal administrative remedy available for deferral, rather than denial, of application].)

Our conclusion that administrative and judicial exhaustion is not required because no internal remedies were afforded Bhandari is consistent with the policy considerations underlying the *Westlake* decision. *Westlake* held that exhaustion was required largely to accord respect to a hospital or medical staff's own quasi-judicial procedures, which provide for the prompt and efficient resolution of peer review disputes with the benefit of medical staff expertise. (*Westlake*, *supra*, 17 Cal.3d at p. 476.) Exhaustion of internal administrative remedies allows those quasi-judicial processes to operate and exhaustion of judicial remedies protects participants in the peer review process from "potential personal liability for actions taken in a quasi-judicial setting" unless and until a court determined the decision was substantively irrational or derived from unfair procedures. (*Id.* at p. 469; see *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 626.) Where the medical staff has *not* extended a quasi-judicial internal remedy to a physician, these salutary purposes are not served.

As to the other adverse actions asserted by Bhandari (the censure, declaration, and removal from office), *Westlake* does not apply because these are not acts of exclusion or expulsion from staff membership, nor are they acts that arguably prevented Bhandari from practicing his profession at the Hospital. In any event, Bhandari exhausted all administrative remedies extended to him with respect to these acts: he provided a written statement to the MEC and attended MEC meetings when invited, cooperated with the investigation at those meetings, protested the February 9, 2009 decision, and was told unequivocally no additional remedies were available. Bhandari thus fulfilled any internal exhaustion obligation he might have had.

As to judicial exhaustion with respect to the censure, declaration, and removal from office, defendants have not even established that Bhandari had a right of judicial review (a necessary prerequisite to a judicial exhaustion requirement) of these adverse actions. Our Supreme Court has confirmed there is a right to judicial review in cases governed by the common law right of fair procedure (*Anton v. San Antonio Community*

Hosp., supra, 19 Cal.3d at pp. 814–815; see Code Civ. Proc., § 1094.5, subd. (d)), and a physician likely has a right to judicial review of any peer review decision that triggers the procedural requirements of Business and Professions Code section 809 et seq.[7] (section 809 procedures) after internal exhaustion via those procedures (see §§ 809.8–809.9). The censure, declaration and removal from office, however, do not trigger the common law right, as explained *ante*. Nor do they trigger the section 809 procedures, which apply only to a "final proposed action of a peer review body for which a report is required to be filed under Section 805." (§ 809.1, subd. (a).) Section 805 requires a report to be filed when "(1) [a] licentiate's application for staff privileges or membership is denied or rejected for a medical disciplinary cause or reason[;] [¶] (2) A licentiate's membership, staff privileges, or employment is terminated or revoked for a medical disciplinary cause or reason[; or] [¶] (3) Restrictions are imposed, or voluntarily accepted, on staff privileges, membership, or employment for a cumulative total of 30 days or more for any 12-month period, for a medical disciplinary cause or reason." (§ 805, subd. (b).) " 'Medical disciplinary cause or reason' " means conduct "reasonably likely to be detrimental to patient safety or to the delivery of patient care." (§ 805, subd. (a)(6).) The censure, declaration, and removal from office do not arguably satisfy these criteria.

2. *Writ Petition to Compel Internal Administrative Proceedings*

Seizing on Bhandari's allegations he was denied fair procedures or specific procedures due under the Bylaws, defendants argue Bhandari needed to seek a writ of traditional mandamus to *compel* defendants to provide such procedures in order to fulfill his exhaustion obligation. They cite authority that a physician *may* bring a traditional mandamus writ petition to compel compliance with the common law right of fair procedure (*Haller v. Burbank Community Hospital Foundation* (1983) 149 Cal.App.3d 650, 658–658; *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, 86 [citing *Haller* in dicta], disapproved on other grounds by *Fahlen*

[7] Undesignated statutory references are to the Business and Professions Code.

v. Sutter Central Valley Hospitals (2014) 58 Cal.4th 655, 687 and by *Park v. Board of Trustees of California State University, supra,* 2 Cal.5th at p. 1070), and we cited the similar authority in *Bhandari I.* Defendants, however, cite no authority that a physician who is denied internal administrative remedies *must* file a traditional mandamus petition to compel a hospital to provide those remedies before he can bring damages claims in court.

With respect to the censure, declaration, and removal from office, defendants do not even cite authority that Bhandari *could* have compelled them to provide internal remedies by way of a mandamus petition. As already explained, these acts did not trigger the common law right to fair procedure or the section 809 procedures, which might have provided Bhandari judicially-enforceable procedural rights. *Bhandari I* suggested that Bhandari might have a right to judicial relief with respect to his removal from office under the Bylaws. With the benefit of briefing and further research, however, we conclude that legal authority for judicial enforcement of medical staff bylaws is limited to (1) a material violation of bylaws that results in injustice in a case governed by the common law right of fair procedure (*El-Attar v. Hollywood Presbyterian Medical Center* (2013) 56 Cal.4th 976, 990–991 (*El-Attar*); (2) a violation of bylaws that govern hearing and notice procedures in a case governed by the section 809 procedures (§ 809.6, subd. (a); see *Ellison v. Sequoia Health Service* (2010) 183 Cal.App.4th 1486, 1496–1497); or (3) a violation of bylaws that constituted a contract with the physician (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 808–810).[8] Again, the censure, declaration and removal from office did not trigger the common law right of

[8] *O'Byrne v. Santa Monica-UCLA Medical Center* also holds that medical staff bylaws are judicially enforceable even if they do not constitute a contract between the hospital or medical staff and an individual physician. (*O'Byrne, supra,* 94 Cal.App.4th at p. 810.) *O'Byrne* involved a physician's exclusion or expulsion from hospital staff membership and thus necessarily involved the common law right of fair procedure. (*Id.* at pp. 800–803.) To the extent *O'Byrne* purported to recognize an unrestricted right to enforce bylaws in such a case, it has been superseded by *El-Attar, supra,* 56 Cal.4th at pages 990 to 991.

fair procedure or the section 809 procedures. As to the contract theory, *O'Byrne* concluded on facts similar to this case that medical staff bylaws are not enforceable contracts with the medical staff's individual members because adoption of the bylaws is an independent legal duty of the medical staff. (*Id.* at p. 810; cf. *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 753 [holding bylaws created contract where bylaws expressly stated they formed contract].) Defendants agree that *O'Byrne* applies here. They therefore necessarily concede Bhandari had no contract-based right to judicial review.

In sum, none of Bhandari's claims is barred by failure to exhaust.

B. *Merits of Bhandari's Claims*

1. *HCQIA Immunity* (*42 U.S.C. § 11111*(*a*))

We first consider defendants' argument that the trial court erred in ruling HCQIA immunity did not bar any of Bhandari's damages claims. The court ruled that defendants' alleged retaliatory conduct did not satisfy the definition of a "professional review action" that gives rise to that immunity. We agree except with respect to the censure of Bhandari. As to claims based on the censure, Bhandari produced sufficient evidence that the MEC did not act in the reasonable belief that issuing the censure furthered quality health care, a defense to HCQIA immunity. Therefore, we agree with the trial court's ultimate ruling that none of Bhandari's claims should be dismissed based on HCQIA immunity.

HCQIA "provides immunity from money damages for peer review actions taken in compliance with the statute's requirements."[9] (*El-Attar, supra,* 56 Cal.4th at p. 988;

[9] We reject Bhandari's suggestion that the HCQIA does not apply in California. The act originally stated that HCQIA immunity "shall not apply to State laws in a State . . . if the State by legislation elects such treatment." (Former 42 U.S.C. § 11111(c)(2)(B), as enacted by Pub.L. 99-660, (Nov. 14, 1986) 100 Stat. 3784, 3785.) The California Legislature "elect[ed] such treatment" (i.e., opted out of the HCQIA) when it enacted the section 809 procedures in 1989. (See § 809, subd. (a)(9)(A); see *El-Attar, supra,* 56 Cal.4th at p. 988.) At that time, therefore, California peer review proceedings were not covered by HCQIA immunity, although state law immunity still applied. (*Ibid.*) In December 1989, the federal law was amended to eliminate the state

see Merkel, *Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L.Rev. 301, 309, 318.) The immunity applies "[i]f a professional review action . . . of a professional review body meets all the standards specified in [42 U.S.C. section 11112(a)]." (42 U.S.C. § 11111(a).) A " 'professional review action' " is "an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society,[10] of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence . . . ." (42 U.S.C. § 11151(9).)

The only "action or recommendation" of the MEC that "affect[ed] (or [might] affect) adversely the clinical privileges" of Bhandari was the letter of censure.[11] Because of the censure, conditions were placed on Bhandari's reappointment to the medical staff

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opt-out provision. (Pub.L. 101-239, (Dec. 19, 1989) 103 Stat. 2106, 2208; see *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 27, fn. 22.) Currently, HCQIA provides for immunity with respect to *all* state laws in *all* states as long as the requirements of the federal law are satisfied. (42 U.S.C. § 11111(c); *Fox v. Good Samaritan L.P.* (N.D.Cal. 2010) 801 F.Supp.2d 883, 892 ["California Business & Professions Code § 809 . . . does not serve to override HCQIA immunity now"].) Bhandari suggests California's decision to opt out of the HCQIA in 1989 was unaffected by the later repeal of the federal opt-out language, but we see no ambiguity in the current federal and state statutory scheme.

[10] We understand "membership in a professional society" to refer to a professional society independent of a hospital, not a hospital's medical staff. (See *Pinsker v. Pacific Coast Society of Orthodontists, supra,* 12 Cal.3d at pp. 543–544 [applying common law right of fair procedure to exclusion of dentist from orthodontist society].)

[11] It is not entirely clear whether the MEC's declaration that Bhandari was not in good standing was a peer review action distinct from the letter of censure, or was merely a device to effect Bhandari's removal from office outside of the Bylaw section 9.1-2 procedures. If the former, the same analysis applies to the declaration that Bhandari was not a member in good standing as applies to the censure.

and he did not regain unconditional reappointment until February 2011. (See *Hooda v. W.C.A. Service Corp.* (W.D.N.Y. Apr. 30, 2013, No. 11-CV-504A) 2013 U.S.Dist. Lexis 71809, *20 ["reprimand . . . likely qualifies as a 'professional review action' "; magistrate's recommendation adopted May 17, 2013 (2013 U.S.Dist. Lexis 70907)]; *Azmat v. Shalala* (W.D.Ky. 2001) 186 F.Supp.2d 744, 751 ["[a] minor impact is all that the HCQIA requires"].) The removal of Bhandari from the chief of staff-elect position affected Bhandari's elective office, not his clinical privileges. Bhandari's removal from the ER call schedule might have affected his clinical privileges but it was not the action of a professional review body; rather, Farber apparently acted unilaterally. The alleged defamation affected Bhandari's reputation, not his clinical privileges. Therefore, HCQIA immunity potentially applies only to claims based on the censure.

HCQIA immunity does not apply to the censure, however, for another reason. The immunity applies only if the professional review action meets standards specified in 42 U.S.C. section 11112(a) (42 U.S.C. § 11111(a)), which includes a requirement that the action be taken "in the reasonable belief that [doing so] was in the furtherance of quality health care" (42 U.S.C. § 11112(a)(1)). As the trial court found in the context of malice as a defense to speech-based privileges, Bhandari produced sufficient evidence to support an inference that the MEC acted out of a retaliatory motive or hostility toward Bhandari rather than to further quality health care or professional conduct at the Hospital. There was ample evidence of hostility toward Bhandari within the medical staff based on the critical comments made at the September 2008 general medical staff meeting and public Board meeting, the physicians' petition protesting the film, and the recall petition. There was also evidence of hostility toward Bhandari specifically from Baig, who chaired the MEC: at the general medical staff meeting, he called for the staff to remove Bhandari by a simple show of hands in contravention of the Bylaws. Retaliatory animus may further be inferred from the MEC's departure from standard procedures in disciplining Bhandari. After an effort to remove Bhandari from office consistent with Bylaws section 9.1-7

failed, the MEC relied on ambiguous language[12] to effect Bhandari's removal by a simple vote of the MEC declaring him not to be in good standing. The censure of Bhandari was effectively publicized to the entire medical staff, a departure from past practice and an apparent violation of confidentiality. (Bylaws, § 4.11-3.) In light of this evidence, Bhandari has shown a probability of demonstrating that HCQIA immunity does not defeat any of his damages claims for relief.

We further note that HCQIA immunity applies only to claims for damages. If a jury finds that HCQIA immunity applies to claims based on the censure, it would only bar a damages recovery. Liberally construed, Bhandari's complaint also prays for injunctive relief (i.e., removal of the censure from his file) with respect to the censure. The Supreme Court has suggested claims for injunctive relief may proceed despite HCQIA immunity. (See *Fahlen v. Sutter Central Valley Hospitals*, *supra*, 58 Cal.4th at p. 686.) For reasons stated *post* with respect to the punitive damages claim, an anti-SLAPP motion is not properly brought to strike a prayer for relief rather than an entire claim based on protected activity. Therefore, we conclude HCQIA immunity does not completely bar any of Bhandari's claims.

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[12] A declaration that a physician is not in good standing is not listed in the Bylaws among the corrective actions the MEC may take as are "admonition, censure, reprimand, or warning," although the list does include "other actions deemed appropriate under the circumstances." (Bylaws, § 6.1-4.) Both the Bylaws and Bhandari's Agreement with the District state that the chief of staff-elect must remain a member in good standing of the medical staff (see Bylaws, § 9.1-2), but the relevant passage in the Agreement suggests "good standing" refers to licensing requirements: "Chief of Staff-Elect shall be an Active member in good standing of the organized Medical Staff of Hospital. In the event of revocation or suspension, or in the event of imposition of disciplinary action by a State of California licensing agency, Chief of Staff-Elect shall not be permitted to provide services under this Agreement. Chief of Staff-Elect shall promptly notify Hospital of any loss, suspension, or material limitation of any license, medical malpractice insurance, or specialty qualifications for Medical Staff membership or clinical privileges. Chief of Staff-Elect shall also promptly notify Hospital when any malpractice or professional disciplinary action against Chief of Staff-Elect is asserted or initiated." The "good standing" phrase is used elsewhere in the Bylaws (§§ 3.3-1(C), 3.8-1(B), 5.4-2(4), 17.1), but the term is not defined and its meaning is not self-evident in context.

2. *Defamation Claims*

Bhandari argues the trial court erred in dismissing his defamation claims (libel, libel per se, slander, slander per se, and false light).[13] We agree in part.

Defamation is a "false and unprivileged publication" by writing or oral utterance that has a tendency to injure the plaintiff in his occupation or otherwise damage his reputation. (Civ. Code, §§ 44, 45, 46.)

a. *Statements of Fact Versus Opinion*

The trial court ruled the alleged defamatory statements were statements of opinion rather than fact. We agree in part.

To protect the " ' "breathing space" ' which ' "[f]reedoms of expression require in order to survive" ' " and "assur[e] that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation," liability may not be imposed for statements on matters of public concern if they "cannot 'reasonably [be] interpreted as stating actual facts' about an individual." (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19–20; see *id.* at 16–17; *McGarry v. University of San Diego, supra,* 154 Cal.App.4th at pp. 112–113.) Criticisms of Bhandari's participation in the film were issues of public concern, particularly at the peak of the controversy within the Hospital community in August and September 2008.

Bhandari first argues the following language in the August 2008 nurses' petition (allegedly instigated by Farber) was defamatory: the physicians who appeared in the film "have participated in a fraud, and by doing so have adversely affected patient care at

[13] In his "false light" cause of action, Bhandari alleges the defendants acted "with constitutional malice, and/or with knowledge, reckless and/or negligent disregard of [the statements'] falsity." The claim therefore presumes the falsity of the published statements. (See *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279–280 [malice requires knowledge of falsity or reckless disregard for truth where false statement published].) When a "false light" claim is based on allegedly false statements, the plaintiff must satisfy the elements of libel or slander. (See *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35, fn. 16.) Therefore, our analysis of the defamation claims applies as well to Bhandari's false light claim.

[Hospital]." In our view, this language would not reasonably have been understood by a Hospital nurse (the intended audience) as stating provably false facts in the context of the controversy. The "fraud" language would reasonably have been understood to refer to the film's allegedly false implication that Hospital had a practice of prematurely transferring patients before transfers were medically appropriate. This description of the gist of the film was within the realm of permissible opinion. The statement that the physicians "participated in" the fraud would reasonably have been understood to mean they participated in the film that allegedly made the false charge or implication about Hospital. The petition also states "by doing so"—i.e., by participating in the film—the physicians "adversely affect[ed] patient care": this statement would reasonably have been understood as contending that the public criticism of Hospital's medical practices undermined patient care either by demoralizing the Hospital staff or by dissuading patients from coming to the Hospital where they would have received quality care. We agree with the trial court that the statements in the nurses' petition were statements of opinion rather than fact.

Bhandari next argues the following statements made by Ross at the September 2008 Board meeting were defamatory: the four physicians participated in the film "because of their stupidity and they tried to damage the Hospital," and Bhandari "cannot function as Chief of Staff."[14] These statements too would reasonably have been understood by their intended audience as statements of opinion not fact. Accusing targets of criticism of "stupidity" is not unusual in public debate, and the allegation of damage to the Hospital would reasonably have been understood to describe internal disruption or a

[14] Bhandari *alleged* that Ross made certain statements at the September 10, 2008 Board meeting and that Farber made certain statements at the September 8 meeting of Farber, Brooks and Bhandari, but he *averred* only that the statements were made without identifying the speakers or the contexts of the statements. In his reply brief, Bhandari attributed the respective statements to Ross and Farber. Defendants moved to strike those representations as unsupported by the record. We will conclude that Bhandari's defamation claims based on these statements are not viable on other grounds, so we deny the motion to strike as moot. We refer to the alleged speakers and settings in our analysis simply to illustrate the full alleged context of the statements.

loss of public esteem caused by the film. Similarly, the statement questioning Bhandari's ability to function as chief of staff would have been understood as Ross's opinion about Bhandari's fitness for elective office in light of his appearance in the film: the remainder of the alleged statement was "[N]obody will attend his committees, nobody is gonna do anything with him anymore. Nobody's gonna trust him to work with him." In other words, the medical staff members' displeasure with Bhandari's decision to appear in the film would have made it difficult for him to lead the staff.[15]

Bhandari next argues several statements made by Farber at her September 8, 2008 meeting with him and Brooks were defamatory: "Bhandari is a friend of [another physician] whom the hospital has been trying to eliminate from Staff due to his disruptive behavior for more than five years"; "Bhandari is supporting [Li] . . . , candidate[] for the Hospital Board"; "Bhandari did not proctor [Li], and . . . his proctoring reports to me are a sham"; and Bhandari a liar who had failed in his official duties to proctor Li. We agree with Bhandari that these statements were factual representations rather than statements of mere opinion. However, Bhandari has not produced evidence that all of these statements were false.[16] He produced no evidence regarding his relationship with the disruptive physician or the Hospital's efforts to eliminate that physician from staff, and no evidence that Bhandari did not support Li as a candidate for the Board. We view Farber's

[15] Although not specifically addressed by Bhandari on appeal, other disparaging statements alleged in the complaint and mentioned in his declaration are subject to the same analysis. These include a statement by Achanta at a medical staff meeting that Bhandari "was in the opening scene of the movie making a preamble"; a statement at the September 2008 general medical staff meeting that Bhandari had "damaged the reputation of the Hospital"; and a statement in a recall petition circulated by Baig that Bhandari was incompetent.

[16] Although not discussed in Bhandari's appellate briefs, Bhandari's complaint and declaration identify another allegedly defamatory statement that is subject to a similar analysis. Bhandari averred that he was identified, allegedly by Brooks, as "the vice-president of . . . 'Save the Patients ORG,' an organization known to be intimately tied to *Life for Sale*." Defendants produced a September 2008 printout of a page from the website <http://www.savethepatients.org/>, which identified "Bhupinder Bhandari, MD" as vice president of the Save the Patients organization, and Bhandari has not produced contrary evidence.

proctoring comments differently: Bhandari's defense of his proctoring conduct at the MEC meetings is sufficient for purposes of this anti-SLAPP proceeding to support an inference that Bhandari did not lie to Farber about his proctoring duties or submit "sham" (i.e., fabricated) proctoring reports to Farber. These proctoring statements therefore cannot be dismissed as mere opinion.

Finally, Bhandari argues the following statements in Baig's February 20, 2009 memorandum to the entire medical staff were defamatory: "Based on [a six-month] investigation, the MEC issued a letter of censure to Dr. Bhandari and found that *his behavior was inconsistent with the expectations of professional behavior* for Medical Staff members and, in particular, Medical Staff leaders. The MEC concluded that Dr. Bhandari was *no longer a member in good standing* and therefore not eligible to hold elective office within this Medical Staff." (Italics added.) To the extent the italicized statements imply that Bhandari committed acts that were unprofessional or contrary to the expectations of medical staff membership (as distinct from merely describing the disciplinary actions taken by the MEC), we agree they are disparaging statements of fact that might support a defamation claim. Although these statements were *related* to a matter of public concern, they were not made *in the context of* a public debate about that issue. They were made by the chief of staff in his official capacity to represent the findings and conclusions of the MEC following a factual investigation into possible professional misconduct by Bhandari. Moreover, because the investigation was confidential, we cannot infer the intended audience (the entire medical staff) would have understood the factual context of the statements, i.e., the actual grounds for the disciplinary action and the evidence that supported it. Applying the minimal merit standard applicable to an anti-SLAPP motion, we cannot conclude as a matter of law that the February 20 memorandum expressed a mere opinion on a matter of public interest that was absolutely protected under the First Amendment.

In sum, Farber's statements about proctoring and the February 20, 2009 memorandum are potentially actionable defamatory statements of fact.

b. *Litigation Privilege* (*Civ. Code, § 47, subd.* (*b*))

For the first time on appeal, defendants argue the litigation privilege bars Bhandari's defamation claims. Although defendants did not raise this privilege in the trial court, the argument is not forfeited to the extent it raises a pure question of law. (See *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88, 93, fn. 4.) Where a jury could make findings of fact sufficient to defeat the privilege, on the other hand, defendants cannot prevail in this anti-SLAPP proceeding.

Civil Code section 47, subdivision (b) provides: "A privileged publication or broadcast is one made: [¶] . . . in the initiation or course of any . . . proceeding authorized by law and reviewable [by a writ of mandamus]," with certain exceptions not relevant here. The Supreme Court has expressly held that this provision applies to hospital peer review proceedings. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 202.) "The litigation privilege generally applies to 'any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' " (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780.)

Farber's statements that Bhandari's proctoring report was a sham and that Bhandari lied about proctoring Li are protected by the litigation privilege. Communications that are preliminary to an official proceeding contemplated in good faith are covered by the privilege. (See *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 773.) Here, the MEC investigation was already underway by the time of the meeting of Farber, Brooks and Bhandari. Moreover, Farber's September 9 letter to Baig demonstrates the direct link between that interview and the MEC investigation. Finally, Farber and Brooks both attended the confidential MEC meetings where the proctoring allegations were investigated and the MEC voted to take corrective action based on the allegations, and attended Board meetings where the MEC's corrective actions were confirmed.

However, a jury could reasonably find that Baig's February 20, 2009 memorandum to the medical staff was not a statement made *in* the peer review proceedings and thus was not protected by the litigation privilege. The peer review process logically encompassed the confidential MEC meetings where the charges against Bhandari were investigated and discussed; the final decision of the MEC, which was communicated in a February 9, 2009 letter to Bhandari alone; and subsequent confidential MEC meetings discussing the conditions placed on Bhandari's reappointment. While the nonconfidential February 20, 2009 memorandum *resulted* from the peer review proceedings, a jury could find it was made outside of the proceedings. A jury could also find it was not made to achieve the objects of the peer review proceeding or was not sufficiently connected to the proceeding. (See *Argentieri v. Zuckerberg, supra,* 8 Cal.App.5 at pp. 776, 785–787.) Bhandari had already been censured and removed from office in a confidential process. Baig and Sharma testified in deposition that it was not the MEC's usual practice to publish a letter of censure to the entire medical staff (in fact, publication appeared to be unprecedented). While defendants argue the medical staff needed to be informed of Bhandari's removal from office, a jury could find that the medical staff could have been informed of the vacancy without use of the allegedly defamatory language. Defendants claim a general privilege to inform Bhandari's coworkers of the reasons for his removal from office, but the case they relied on in the trial court for this proposition applied the qualified common-interest privilege not the absolute litigation privilege, and did not involve communications about confidential personnel proceedings. (See *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846–848.) Finally, a reasonable jury could find the February 20, 2009 memorandum was not made to nonparticipants with a substantial interest in the matter. (See *Argentieri,* at pp. 780, 782–784; *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291, 1299; *Brody v. Montalbano* (1978) 87 Cal.App.3d 725, 728–730, 733–734.)

In sum, Farber's statements about proctoring at the September 8, 2008 meeting are protected by the litigation privilege as a matter of law, but the February 20 memorandum is not.

c. *Qualified Privileges* (*Civ. Code, §§ 43.7, subd.* (*b*), *47, subd.* (*c*))

Defendants argue the trial court erred in ruling Bhandari's defamation claims were not barred by the common interest (Civ. Code, § 47, subd. (c)) or peer review privileges (*id.*, §43.7, subd. (b)). The court ruled Bhandari produced sufficient evidence that defendants acted with malice, i.e., a retaliatory motive, which defeats the privileges. (See Civ. Code, §§ 47, subd. (c), 43.7, subd. (b).) We agree. As noted *ante* with respect to HCQIA immunity, Bhandari produced evidence sufficient to support an inference of bad faith with respect to the censure issued by the MEC. That same evidence supports an inference of malice with respect to the February 20, 2009 memorandum. Even assuming the clear and convincing evidence standard applies because Bhandari was a limited-purpose public figure in February 2009 based on his August 2008 appearance in the film (see *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1167), the aforementioned evidence is sufficient to support a finding of malice.

In sum, we conclude Bhandari's libel, libel per se, and false light claims based on publication of the February 20, 2009 memorandum to the entire medical staff survive anti-SLAPP review.

3. *Retaliation* (*§ 2056*)

Defendants argue the trial court erred in denying the anti-SLAPP motion as to the retaliation claim. The court rejected defendants' arguments that the claim was barred by the common interest or peer review privileges or by HCQIA immunity. We affirm.

Section 2056 provides: "The application and rendering by any person of a decision to terminate an employment or other contractual relationship with, or otherwise penalize, a physician and surgeon principally for advocating for medically appropriate health care consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care violates the public policy of this state. No person shall terminate, retaliate against, or otherwise

penalize a physician and surgeon for that advocacy, nor shall any person prohibit, restrict, or in any way discourage a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care." (§ 2056, subd. (c).) " '[T]o advocate for medically appropriate health care' means . . . to protest a decision, policy, or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients." (§ 2056, subd. (b).)

Bhandari has presented sufficient evidence to support an inference that the censure, declaration, removal from office, removal from the ER schedule, and defamation via the February 20, 2009 memorandum were motivated principally by retaliation for his participation in the film, which advocated for medically appropriate health care, i.e., keeping patients in the hospital until it was safe to discharge them. In addition to the evidence already discussed with respect to HCQIA immunity and malice, hostility from the Hospital administration may be inferred from its decision to remove Bhandari from the ER call schedule before conducting an investigation into his misconduct and never to restore him to that schedule even after he had been restored to good standing on the medical staff.

Defendants argue that the purpose (and impliedly, the sole purpose) of section 2056 is to provide statutory grounds for a claim of wrongful termination in violation of public policy. They argue Bhandari cannot prevail on such a claim because, as Bhandari implicitly concedes, he was not an employee who was terminated. In our view, the plain language of subdivision (c) also supports a free-standing statutory claim for termination (see *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 51–52 & fn. 11) or any other acts that "retaliate against, or otherwise penalize a physician" for advocating medically appropriate health care. (See § 2056, subd. (c).)

Defendants next argue Bhandari failed to establish a probability of prevailing on this claim because he expressly disclaimed any intent to engage in advocacy. They cite

his statements that he made no critical comments about Hospital in the film and disagreed with the negative impression of Hospital conveyed by the film. Bhandari counters that his comments that generally criticized premature discharge of patients from hospitals satisfied the advocacy requirement. In our view, Bhandari provided sufficient evidence of advocacy. First, the statutory protection is not clearly limited to advocacy of medically appropriate care in the hospital where the plaintiff works. Although the definition of advocacy refers to practices a physician "reasonably believes impairs the physician's ability to provide medically appropriate health care *to his or her patients*" (§ 2056, subd. (b), italics added), the main anti-retaliation language in the statute does not contain similar limiting language (see § 2056, subd. (c)) and the italicized language could be construed to encompass practices that disserve patients generally. The statute declares a public policy "that a physician and surgeon be *encouraged*" to engage in such advocacy (§ 2056, subd. (b), italics added), which supports a liberal construction that bars retaliation for *indirect* participation in advocacy. (See *Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [landlord-tenant anti-retaliation statute is remedial statute that should be liberally construed].) Here, the film indisputably protested alleged practices at the Hospital that allegedly impaired physicians' ability to provide medically appropriate medical care to patients. Bhandari was publicly criticized, investigated and ultimately censured for appearing in the film. It would be absurd if Bhandari would have been protected for his participation in the film had he endorsed its criticisms of Hospital, but lost that protection because he defended the Hospital in the ensuing public debate. In the employment context, employees may be protected from retaliation based on the employer's *perception* they are or are about to be engaged in whistleblowing or if they *assist others* in their whistleblowing activity. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1254–1255.) A similarly liberal application of section 2056 is appropriate here.

Defendants further argue Bhandari failed to present expert testimony that is necessary to establish this claim. They rely on *Sarka v. Regents of University of California* (2006) 146 Cal.App.4th 261, which holds the statute "requires expert

testimony about whether a physician's advocacy was 'medically appropriate.' " (*Id.* at p. 273.) This argument is forfeited because defendants did not raise it in the trial court. Had they done so, the trial court might have allowed Bhandari to submit any expert testimony the court deemed necessary. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315–316 [in summary judgment context, trial court has discretion to consider new evidence submitted with reply brief]; *Curtis v. Santa Clara Valley Medical Center* (2003) 110 Cal.App.4th 796, 800 [expert evidence not required in medical malpractice cases where it would be obvious to a lay person the doctor's performance was below the standard of care].) We will not address the fact-intensive question of medical appropriateness for the first time on appeal.[17]

Defendants argue the litigation privilege bars Bhandari's claims that are based on noncommunicative acts *related to* privileged communications.[18] They mistakenly rely on

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[17] Defendants also make an unclear argument regarding the "standard of proof required to establish causation and damage" under section 2056. Defendants "assert it should be similar to that required for other disruptive-type claims. For example, to recover for interference with contractual or economic relations, a plaintiff must prove the defendant's interference was wrongful by some measure beyond the fact of the interference itself. (*Della Penna v. Toyota Motor Sales*[, *U.S.A., Inc.*] (1995) 11 Cal.4th 376, 393.) Bhandari fails to provide any admissible evidence of ill-will, hatred or other wrongful conduct that would suffice." Defendants do not explain how "causation and damage" standards are related to the wrongful interference standard established by *Della Penna*, at page 393. The latter standard relates more to intent or the nature of the wrongful conduct. In our view, the intent element of section 2056 is clear: any punitive action taken in retaliation for or because of a physician's "advocating for medically appropriate health care" is prohibited. (§ 2056, subd. (c).) There is ample evidence of retaliatory intent in this case.

[18] Defendants contend the trial court, in addressing this issue, improperly raised an issue that had been put to rest in *Bhandari I* and was not raised by Bhandari on remand. In *Bhandari I*, we held that all of Bhandari's claims were based on the peer review process and therefore arose from protected activity within the meaning of Code of Civil Procedure section 425.16, subdivision (e)(1), (2). In a footnote, we wrote, "One might question whether some of the causes of action are based on written or oral *statements* or *writings*, as required under section 425.16, subdivision (e)(1) and (2), when they are explicitly based on acts such as reduction of privileges, removal from positions, commencement of an investigation, failure to provide due process, wrongful discharge,

Rusheen v. Cohen (2006) 37 Cal.4th 1048, 1065, which held, "[I]f the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct . . . . [Citations.] [U]nless it is demonstrated that an independent, noncommunicative, wrongful act was the gravamen of the action, the litigation privilege applies." Here, the gravamen of Bhandari's retaliation claim are the adverse actions of removing him from the ER call list, censuring him, declaring him not in good standing, and removing him from office. Of these, the censure and declaration are arguably communicative acts. However, these were not *mere* communicative acts because they also changed Bhandari's status at the Hospital, causing the imposition of conditions on his reappointment and his removal from office. As to the February 20, 2009 memorandum, we have already held defamation claims based on the memorandum are not barred by the litigation privilege. The memorandum certainly is not the gravamen of the retaliation cause of action, with the adverse actions merely being necessarily related acts: that would be the tail wagging the dog.

4. *Free Speech*

Defendants argue the trial court erred in denying their motion as to Bhandari's claim for "Infringement of Right to Freedom of Speech (Cal. Const. Art. I, § 2)," which alleged that the Hospital, District, and medical staff retaliated against Bhandari for advocating medically appropriate health care. The Hospital and District appear to be

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and breach of contract. The parties, however, did not raise this issue in the trial court or in this court. We will therefore assume the parties are in agreement that the causes of action are based at least in part on written and oral statements or writings." On remand, the trial court ruled that Bhandari's claims other than defamation and emotional distress could not be barred by the common interest and peer review privileges because they were based on actions not speech. Defendants mistakenly argue these rulings addressed the issue we discussed in the *Bhandari I* footnote. They do not. On remand, the trial court appropriately addressed application of speech-based *privileges*, not the scope of *protected activity* under the anti-SLAPP statute. The two concepts are related but not coterminous. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322–325.)

private, not public, institutions.[19] The parties agree that the section 809 procedures and the common law right of fair procedure apply to this case, even though those legal regimes apply only to private entities. (See *Kaiser Foundation Hospitals v. Superior Court, supra,* 128 Cal.App.4th at p. 102 & fn. 15.) Free speech claims under the California Constitution must allege state action. (*Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1031.) Cases cited by Bhandari and defendants involve adverse action taken by public employers, officials or facilities. (See, e.g., *Blair v. Bethel School Dist.* (9th Cir. 2010) 608 F.3d 540, 542; *Kaye v. Board of Trustees of San Diego Public Law Library* (2009) 179 Cal.App.4th 48, 52; *Degrassi v. Cook* (2002) 29 Cal.4th 333, 335–337; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 777; but see *Degrassi*, at p. 338 & fn. 4 [doubting but not deciding whether the facts supported free speech claim under California Constitution].) Bhandari cites cases holding the general public has rights of free speech in private shopping centers under the California Constitution (see *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899; *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469), but he does not attempt to bring this case within those cases' broad definition of state action: "the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public." (*Golden Gateway Center*, at p. 1033.) Because Bhandari presents no facts which would support imposition of "state actor" liability on defendants in this case, we reverse the denial of defendants' motion as to the free speech claim.

5. *Fair Procedure*

Defendants argue the trial court erred in denying their motion as to Bhandari's claim for "Infringement of Right to Due/Fair Process (Cal. Const. Art. I, § 7)" (fair

[19] Bhandari's complaint alleges that the Hospital and District are "public, not-for-profit organization[s]," but they are more accurately not-for-profit public benefit organizations. (See *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 91 [noting that defendant hospital owner was a "not-for-profit public benefit corporation"].)

procedure claim), which alleged defendants "did not make available any fair processes in which [he] could have sought justice for issues and/or claims mentioned in this Complaint" and they "act[ed] ultra vires of their own bylaws and applicable state law." Liberally construed, the complaint alleges as supporting facts that Bhandari was (1) summarily removed from the ER call list without a hearing or opportunity to be heard; (2) censured and declared to be not in good standing "without any basis and authority to do so"; and (3) removed from the chief of staff-elect position without compliance with the relevant provisions of the Bylaws. Bhandari sought injunctive relief, inter alia, to restore him to the ER call list, reverse any related disciplinary action, and reinstate him as chief of staff-elect. We affirm.

First, although Bhandari's complaint styles this cause of action as a constitutional claim under the due process clause of the California Constitution, for the reasons stated with respect to the free speech claims, there is no state action on which to base such a claim. (See *El-Attar, supra,* 56 Cal.4th at p. 986; *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 827 ["the actions of private hospitals do not constitute 'state action' triggering the constitutional guarantees of due process"].) In discussing the claim, defendants and Bhandari cite authority on the common law right of fair procedure, which applies to private institutions. We therefore construe the claim as one for violation of this common law right.

As explained *ante*, Bhandari arguably had a common law right of fair procedure only with respect to his removal from the ER call schedule. Bhandari may pursue injunctive relief on this issue (i.e., notice and a hearing on his removal from the ER call schedule) by asking the trial court to construe his fair procedure claim as a petition for traditional mandamus. (See *Lee v. Blue Shield of California* (2007) 154 Cal.App.4th 1369, 1378–1379 [complaint for declaratory relief alleging violation of procedural rights should have been construed as traditional mandamus petition seeking court-ordered procedure so physician could exhaust those remedies before pursuing civil claims in court against health plan].) The petition would be timely, as Bhandari brought the claim within two years of his initial removal from the schedule and arguably never received a final

decision on the removal. (See Code Civ. Proc., §§ 343 [four-year residual limitation period]; 1109 [ordinary statutes of limitations apply in special proceedings such as mandamus actions]; *Barlow v. City Council of Inglewood* (1948) 32 Cal.2d 688, 693 [same]; see *Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 441–443 [section 343 limitations period applies to administrative mandamus petition from adverse peer review decision]; *Miller v. Eisenhower Medical Center, supra,* 27 Cal.3d at pp. 624–626 [laches may apply to delays within limitations period].) Alternatively, Bhandari could forgo this particular form of injunctive relief and pursue his other claims, which we have already concluded are not barred for failure to exhaust. If Bhandari chooses the latter approach, the fair procedure claim might be subject to dismissal because it is not clear any other form of relief is available under the claim, but this is an issue that may be addressed on remand outside the context of an anti-SLAPP motion. Insofar as the anti-SLAPP motion is concerned, Bhandari has shown a likelihood of prevailing on his fair procedure claim.

6. *Wrongful Termination in Violation of Public Policy*

In support of his claim for wrongful termination in violation of public policy, Bhandari alleged he was "terminated and discharged" from his position as chief of staff-elect. The trial court concluded Bhandari could not prevail on this claim because, as the record clearly demonstrates, he was not an employee of the Hospital or the District. Bhandari concedes he is not an employee, but urges us to recognize his wrongful termination claim in order to effectuate the purpose of section 2056. We have already concluded that Bhandari can pursue a statutory cause of action under that law without having to plead a tort claim under the wrongful termination theory. We therefore affirm the trial court's dismissal of the wrongful termination claim.

7. *Breach of Contract and Covenant of Good Faith and Fair Dealing*

Defendants argue the trial court erred in denying their motion as to Bhandari's contract claims. We affirm.

The Agreement between Bhandari and the District provided for early termination by either party "without cause and without penalty" on thirty (30) days' notice and

immediate termination upon violation of certain professional standards. "In the event this Agreement is terminated for any [such] reason . . . , *Chief of Staff-Elect shall continue to perform those duties of the Chief of Staff-Elect as described in the Medical Staff Bylaws and Policies unless . . . Bylaws Section 9.1-7 is invoked*." (Italics added.) The Agreement thus expressly conditioned suspension of duties (as distinct from termination of the Agreement, which provided for compensation) on invocation of Bylaws section 9.1-7. MEC removed Bhandari from office by invoking other Bylaw provisions. To the extent the District played a material role in suspending Bhandari's official duties in these circumstances, a reasonable jury could find the removal violated their contractual duties under the Agreement. Bhandari specifically protested his removal "in violation of . . . Bylaws section 9.1-7" in a letter to the Board. Insofar as the record discloses, the District took no action to ensure compliance with Bylaws section 9.1-7. (See *El-Attar, supra,* 56 Cal.4th at pp. 983, 992–993 [describing dual roles of medical staff and hospital governing board in policing physician conduct].) While the 30-day termination provision may limit Bhandari's contract damages, it does not completely bar liability for breach of contract. (See *Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 407–411.)

We also affirm the trial court's ruling as to the implied covenant claim. (See *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [discussing elements of claim].) A reasonable jury could find the District liable for breach of the implied covenant for any conduct the jury finds did not rise to the level of a direct breach of contract. Farber and a Hospital attorney encouraged the MEC, in August 2008, to investigate Bhandari's proctoring violations. If a jury found the proctoring investigation was a pretext for retaliating against Bhandari and that Farber and the attorney were acting as agents of District, it could find that these acts constituted a breach of the implied covenant.

8. *Intentional Infliction of Emotional Distress*

Bhandari argues the trial court erred in dismissing his emotional distress claim. (See *So v. Shin* (2013) 212 Cal.App.4th 652, 671 [elements of claim].) We affirm.

We agree with the trial court that allegedly defamatory statements protected by free speech privileges cannot support emotional distress claims. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 34.) Cases cited by Bhandari do not support a different result. For example, in *Lagies v. Copley* (1980) 110 Cal.App.3d 958, disapproved on other grounds in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 738 and footnote 23, where an order sustaining a demurrer as to an emotional distress claim was reversed, the claim was based on "far more than defamatory words." (*Flynn v. Higham* (1983) 149 Cal.App.3d 677, 682 [discussing *Lagies*].) Thus, the trial court's dismissal of speech-based emotional distress claims was correct on this ground as to all statements other than the February 20, 2009 memorandum, which we have held was not privileged. Emotional distress claims based on the February 20, 2009 memorandum fail for a different reason: Baig used professional language that no reasonable juror could find was extreme or outrageous.

As to emotional distress claims based on defendants' adverse actions, we agree with the trial court that, while Bhandari's evidence might demonstrate defendants acted with malice (i.e., ill will) or a retaliatory motive, it does not demonstrate outrageous conduct. The MEC took a relatively measured approach to disciplining Bhandari: they declared him to be not in good standing and removed him from office, but did not restrict his clinical privileges, expel him from the medical staff, or take disciplinary action that required reports to the Medical Board or the National Practitioner Data Bank. In contrast, two other physicians who appeared in the film apparently were expelled from the medical staff. Similarly, the Hospital administration's decision to remove Bhandari from the ER call schedule was a relatively measured punitive action. Defendants' actions might have been wrongful, but no reasonable jury would find them outrageous. Cases cited by Bhandari are again distinguishable—both involved racist tirades by work supervisors that culminated in terminations. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496–499; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 941–942, 947, disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) Here, the most inflammatory language used ("fraud"; "stupidity"; "cannot function as Chief of

Staff") did not rise to that level (see *Yurick v. Superior Court* (1989) 209 Cal.App.3d 1116, 1123–1130 [work superior's comments that plaintiff was a liar because she was over 40 did not amount to outrageous conduct]), and was uttered in the context of debate on a public controversy.

In sum, Bhandari's allegations are not analogous to those in the case he relies on, *Lagies v. Copley, supra,* 110 Cal.App.3d 958, where the plaintiff's superiors "intentionally humiliated plaintiff, refused to print his stories, singled him out for denial of merit raises, demoted him, blackballed him, thus precluding other employment, published [his] confidential sources, thus destroying his credibility as capability for being an investigative reporter, all without just cause or provocation." (*Id.* at p. 974.) Instead, Bhandari essentially alleges adverse personnel actions, which while possibly wrongful cannot reasonably be characterized as extreme and outrageous. (See *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80 ["simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged"]; *McGough v. University of San Francisco* (1989) 214 Cal.App.3d 1577, 1587–1588 [denial of tenure after suggestions he qualified for tenure and refusal to arbitrate tenure decision not outrageous conduct].)

9. *Interference with Prospective Economic Advantage*

Defendants argue the trial court erred in not striking Bhandari's claims for negligent and intentional interference with prospective economic advantage. (See *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 596 [elements of intentional claim]; *Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078 [elements of negligent claim].) We affirm. Bhandari has made a prima facie case that the publication of the February 20, 2009 memorandum[20] deterred physicians from

[20] On appeal, Bhandari argues that he suffered a loss of referrals and patients as a result of defendants' actions. In support of the claim, he cites deposition testimony from Baig discussing whether a censure and declaration that one is not in good standing would harm a physician's reputation among his colleagues. From this citation, we infer that

making referrals to Bhandari, thus causing him injury. There is sufficient evidence that defendants knew or should have known the memorandum would have this effect and that they acted intentionally or negligently in causing the effect. Defendants argue Bhandari made no showing of a wrongful purpose in interfering with the Agreement. For reasons already stated with respect to the retaliation claim, we disagree.[21]

10. *Punitive Damages*

In the prayer for relief of his complaint, Bhandari sought punitive damages for certain claims. The trial court denied defendants' motion to strike the prayer for punitive damages on the ground that the anti-SLAPP statute only authorizes a court to strike a cause of action. Defendants argue the court erred and note the issue of whether part of a cause of action may be stricken was pending before the Supreme Court in *Baral v. Schnitt, supra,* 1 Cal.5th 376 when this appeal was being briefed.

In *Baral v. Schnitt*, the Supreme Court held that Code of Civil Procedure section 425.16's language authorizing a court to strike a "cause of action" arising from protected activity (Code Civ. Proc., § 425.16, subd. (b)(1)) refers not to a pleaded cause of action in a complaint or an injured person's "primary right" that applies in the res judicata context, but to "claims that are based on the conduct protected by the statute." (*Baral, supra,* 1 Cal.5th at pp. 381–382.) Consequently, "when the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity." (*Id.* at p. 392.) *Baral* does not construe Code of Civil Procedure section 425.16 to allow a trial court to strike a *prayer for relief*. Nor do the cases cited by defendants. (See *Cho v. Chang* (2013) 219 Cal.App.4th 521, 523, 525; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 772–774.) We affirm the trial court's denial of the motion to strike

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Bhandari's interference claims are based on the MEC's February 20, 2009 memorandum to the medical staff.

[21] We will not address the multiple arguments defendants raise for the first time in their reply brief as to these claims.

the punitive damages claim. Defendants of course may challenge the punitive damages prayer by way of a demurrer or motion for summary adjudication outside the context of an anti-SLAPP motion.[22]

III. DISPOSITION

We affirm the trial court's order in part and reverse it in part. On remand, the court shall vacate the order and enter a new order granting the anti-SLAPP motion as to Bhandari's free speech, wrongful termination, slander, slander per se and intentional infliction of emotional distress claims, and denying it as to Bhandari's retaliation (§ 2056) claim based on the defendants' adverse actions and publication of the February 20, 2009 memorandum; the fair procedure claim based on Bhandari's removal from the ER call schedule; the breach of contract and breach of the implied covenant of good faith and fair dealing claims based on his removal from office in alleged violation of the Agreement; the libel, libel per se, and false light claims based on publication of the February 20, 2009 memorandum; and the intentional and negligent interference with prospective economic advantage claims based on publication of the February 20, 2009 memorandum. Bhandari's request for attorney fees is denied. Each side shall bear its own costs on appeal.

[22] Bhandari's request for fees on appeal is denied. Defendants' appeal of the trial court's anti-SLAPP order was not frivolous. (See Code Civ. Proc., § 425.16, subd. (c)(1).)

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BRUINIERS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.

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