S156986

IN THE SUPREME COURT OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D.,
Plaintiff and Appellant,

vs.

WEST HILLS HOSPITAL MEDICAL CENTER, et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B186238

PETITION FOR REHEARING OR, ALTERNATIVELY, REQUEST FOR MODIFICATION OF DECISION

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Defendants and respondents West Hills Hospital Medical Center and the Medical Staff of West Hills Hospital Medical Center (collectively, West Hills) petition this court for rehearing under California Rules of Court, rule 8.536, or in the alternative, request this court modify its opinion under California Rules of Court, rule 8.532(c), to address the following points:

1. This court should expressly recognize that the hospital's governing board has "a legitimate function in the peer review process" instead of stating that peer review is not "the province" of the governing board.

At page 18, the *Mileikowsky* opinion states: "And, *as decisions relating to clinical privileges are the province of a hospital's peer review bodies and not its governing body*, West Hills's governing board similarly lacked the authority to ratify the order of dismissal." (*Mileikowsky v. West Hills Hospital Medical Center* (Apr. 6, 2009, S156986) __ Cal.4th __ [typed opn., 18], emphasis added.) This language suggests that peer review is never the province of a hospital's governing board. That is not true.

The Legislature has specifically declared that "[t]he governing bodies of acute care hospitals have a legitimate function in the peer review process." (Bus. & Prof. Code, § 809.05, subd. (a).) It is true that the governing body must "give great weight to the actions of peer review bodies" in all peer review matters, and is prohibited from acting "in an arbitrary or capricious manner." (*Ibid.*) However, if "the peer review body's failure to investigate, or initiate disciplinary action, is contrary to the weight of the evidence, the governing body shall have the authority to direct the peer review body to initiate an investigation or a disciplinary action, . . . [¶] . . . [and if] the peer review body fails to take action in response to a direction from the governing body, the governing body shall have

the authority to take action against a licentiate." (Bus. & Prof. Code, § 809.05, subds. (b) & (c).)

Accordingly, a more accurate statement would be: "Because a hospital's peer review body must have the opportunity to decide peer review matters in the first instance, the governing board lacked authority to directly ratify the hearing officer's order of dismissal."

2. This court's opinion could be read as unduly limiting the circumstances under which a physician should be denied medical staff privileges.

At pages 11-12, the *Mileikowsky* opinion states: "it also is settled that a physician may not be denied staff privileges merely because he or she is argumentative or has difficulty getting along with other physicians or hospital staff, when those traits do not relate to the quality of medical care *the physician* is able to provide." (Emphasis added.) Similarly, at the end of footnote 5, this court states, "whether Dr. Mileikowsky's conduct disclosed that *he* was unable to deliver high quality medical care at West Hills was a question for the reviewing panel, not the hearing officer." (Emphasis added.) A physician's conduct, however, may justify the denial of privileges even if the conduct does not detract from the quality of care the physician himself can provide.

Settled California law allows the medical staff to decline privileges when a physician's disruptive behavior adversely impacts

the quality of medical care provided by nurses and other physicians, regardless of the quality of medical care administered by the disruptive physician. (See *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 629 & fn. 16 ["It is quite true, of course, that certain forms of disruptive or noncooperative conduct may have an adverse effect upon the level of patient care." For example, "'staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, *could* severely hinder the effective treatment of patients"']; *Miller v. National Medical Hospital* (1981) 124 Cal.App.3d 81, 93.) Thus, the proper question is whether the physician's behavior impairs *any* healthcare provider's medical care, not just the medical care rendered by the physician.

Indeed, this court's opinion recognizes that "a reviewing panel reasonably could infer from a physician's failure to provide information that the information in question is unfavorable or tends to show the *physician cannot or will not cooperate with others and for that reason may be unwilling or unable to function effectively in a hospital setting*." (Typed opn, pp. 15-16, emphasis added.)

This concern is well founded. As the Joint Commission on Accreditation of Healthcare Organizations (Joint Commission)[1]

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[1] The Joint Commission is a private organization which sponsors voluntary accreditation of hospitals nationwide. (See *People v. Barksdale* (1972) 8 Cal.3d 320, 336-338.) California courts have taken judicial notice of the Joint Commission's publications. (See, e.g., *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 818-819; *Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 627 & fn. 2.)

recently warned, "Intimidating and disruptive behaviors can foster medical errors, contribute to poor patient satisfaction and to preventable adverse outcomes, increase the cost of care, and cause qualified clinicians, administrators and managers to seek new positions in more professional environments." (The Joint Commission, Sentinel Event Alert (July 9, 2008) Issue 40 <http://www.jointcommission.org/SentinelEvents/SentinelEventAlert/sea_40.htm> [as of April 16, 2009].) The Joint Commission alert directs that hospitals "must address the problem of behaviors that threaten the performance of the health care team." (*Ibid.*) It is doubtful that this court intended to restrict a hospital from complying with Joint Commission standards and heeding its directives since this could imperil the hospital's accreditation.

Forcing hospitals and their medical staffs to grant privileges to disruptive physicians whose presence will likely lead to medical errors by others and adverse patient outcomes would be poor public policy. Instead, this court should expressly recognize that, where a physician's behavior prevents other health care providers from administering appropriate care (e.g., such as when the physician interrupts or interferes with medical procedures being administered by another physician), such conduct is good cause for denial of staff privileges regardless of the physician's own ability to perform medical procedures. (See *Miller v. Eisenhower Medical Center, supra,* 27 Cal.3d at pp. 628-629 & fn. 16; see also *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278.)

Additionally, the medical staff should be allowed to deny privileges to a physician whose conduct creates a hostile work

environment (e.g., a physician who sexually harasses hospital employees), who engages in other unethical behavior (e.g., stealing drugs or other medical supplies), or who refuses to comply with administrative requirements (e.g., not purchasing a requisite level of malpractice insurance), regardless of the level of medical care provided by the physician.

The court's opinion should be modified to account for the wide variety of circumstances that justify the denial of medical staff privileges. At the very least, the opinion should not suggest that privileges must be granted to physicians simply because they provide competent medical care themselves, regardless of any other circumstances. One way to accomplish this is by modifying the above-quoted language from pages 11-12 of the opinion to track Business and Professions Code section 805, subdivision (a)(6), so it reads as follows: "it also is settled that a physician may not be denied staff privileges merely because he or she is argumentative or has difficulty getting along with other physicians unless those traits have the potential to be detrimental to patient safety or the delivery of patient care." Footnote 5 could be modified to read, "whether Dr. Mileikowsky's conduct may adversely impact patient safety or the delivery of patient care at West Hills was a question for the reviewing panel, not the hearing officer."

3. This court should expressly recognize that hospitals have a legitimate need to investigate the details of why a physician lost privileges at another hospital.

At pages 16-17 of the *Mileikowsky* opinion, this court "question[s] West Hills's assertion that it could not proceed without evidence only Dr. Mileikowsky could provide" and states that "[t]here seems little reason to conclude Dr. Mileikowsky's refusal to provide information would have prevented West Hills from making its case had the hearing been held within the 45-day period set forth in West Hills's bylaws or the 60-day period contained in section 809.2, subdivision (h)." West Hills understands this court's comments to mean there were abundant reasons for denying Dr. Mileikowsky's application for privileges regardless of whether he ever produced the Cedars-Sinai peer review documents. However, West Hills is concerned this language could be misconstrued as holding that a hospital has no legitimate basis for seeking production of another hospital's peer review documents to learn the details of why a physician lost privileges at the other hospital and that the medical staff may not insist on such information in order to present a thorough case to the hearing panel.

In fact, a hospital is obligated to review the details of peer review proceedings at other hospitals, especially if the physician being reviewed is attempting to present his own, one-sided recitation of what allegedly happened. (See *Medical Staff of Sharp*

Memorial Hospital v. Superior Court (2004) 121 Cal.App.4th 173, 182 [a ""“hospital which closes its eyes to questionable competence and resolves all doubts in favor of the doctor does so at the peril of the public”""]; accord, *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1266; *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 600; *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489; see also *Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1048; *Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 944 [a medical staff securing another hospital's peer review information serves an important public interest].) Indeed, in *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1505-1511, the Court of Appeal held that a hospital's peer review proceedings were required to consider the evidentiary basis for an adverse peer review determination at another hospital. Moreover, such an inquiry is needed not just because hospitals may have different standards for staff membership but also because the care or conduct may be so egregious that a physician should not be allowed to hide the specific information behind the generic and abbreviated language in a section 805 report.

In any event, the medical staff should be allowed to determine what evidence it needs to demonstrate to the reviewing panel that its recommended action should be affirmed. Provided the hearing officer agrees that the evidence sought by the medical staff is relevant to the charges (see Bus. & Prof. Code, § 809.2, subds. (d) & (e)), the physician should not be allowed to deprive the medical staff of the evidence it seeks to support its recommended action.

Accordingly, this court should modify its opinion to remove any suggestion that the medical staff is not entitled to secure from a physician the peer review documents concerning that physician's loss of privileges at another hospital.

CONCLUSION

For the foregoing reasons, West Hills respectfully requests this court grant rehearing or, in the alternative, modify its decision.

April 17, 2009

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rules 8.204(c)(1), 8.268(b)(3), 8.536(b).)

The text of this brief consists of 1,814 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: April 17, 2009

H. Thomas Watson