Case No. S156986

SUPREME COURT

FOR THE STATE OF CALIFORNIA

Gil N. Mileikowsky, M.D.,

Petitioner/Appellant

v.

West Hills Hospital Medical Center and Medical Staff of West Hills Medical Center, Medical Staff of West Hills Hospital Medical Center, Hospital Corporation of America a/k/a HCA, Inc., John D. Harwell, and James R. Lahana,

Respondents/Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Eight
Case No. B186238

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

Charles M. Kagay – SBN 73377
SPIEGEL LIAO & KAGAY, LLP
388 Market Street, Suite 900
San Francisco, CA 94105
Telephone: (415) 956-5959
cmk@slksf.com

Paul Hittelman – SBN 33449
LAW OFFICES OF PAUL M. HITTELMAN
11999 San Vicente Blvd. Suite 350
Los Angeles, CA, 90049
Telephone: (310) 471-7600
pmhpc@earthlink.net

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I. INTRODUCTION

In its Petition for Rehearing, West Hills does not ask for a different overall result on this appeal. Instead, it asks the Court to rewrite some of the language in the Opinion – in part to predecide issues that will arise in the administrative proceeding on remand, and in part to suggest that the Court is siding with West Hills and other hospitals on issues that were not raised in this appeal. The Opinion correctly resolved the issues that were actually before the Court, and the Court should not accept the invitation to insert dictum favorable to West Hills (and contrary both to existing law and the facts of this case) on other issues.

II. THE OPINION CORRECTLY CHARACTERIZES THE HOSPITAL BOARD'S FUNCTION IN THE PEER REVIEW PROCESS

West Hills objects to the portion of the Opinion that reads:

> "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."

(Petition at 2, quoting decision at 18 (emphasis added by West Hills).)

It would prefer that this passage read:

> "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."

(Petition at 3.)

West Hills criticizes the Opinion for supposedly failing to recognize that a hospital's governing body has the authority to initiate peer review in the unusual circumstance in which the peer review body fails and/or refuses to do so. Specifically, it says the Opinion should be rewritten so no one will forget that the pertinent statute allows the governing body to direct the peer review body to investigate or initiate disciplinary action where the failure to do so is contrary to the weight of the evidence, and, if the peer review body fails to respond to such a direction, to take action itself against the licentiate. (Petition at 2-3, citing Bus. & Prof. Code, § 809.05, subds. (b) & (c).)

The Opinion does not, of course, suggest in any way that a hospital governing body lacks these powers. In this case, the peer review body proceeded aggressively against the doctor, and the governing body never had any reason to direct it to initiate an investigation or disciplinary action. No one could rationally read the Opinion as limiting a governing body from doing so in the future, should the occasion arise.

However, West Hills is not really concerned with preserving a governing body's right to initiate action when a peer review body does not. If that issue really needed to be flagged in the Opinion, a simple footnote could be added to the language at page 18, stating something like:

> "The governing body is empowered to initiate investigative and disciplinary action only where the peer review body fails and refuses to do so. (Bus. & Prof. Code, § 809.05, subds. (b) & (c).)"

The alternative language that West Hills proposes at page 3 of the Petition is aimed at reaching an entirely different result. That language makes absolutely no mention of the governing body's role of filling a vacuum left by a peer review body's inaction. Instead, the language is designed to suggest that the governing body has almost unlimited power to control peer review, subject only to the peer review body's making an initial decision. West Hills would have the Court acknowledge the peer review body's power only to "decide peer review matters in the first instance," thereby suggesting that the governing body has the power to take peer review matters fully into its own hands from then on.

The Legislature did not intend that the peer review body would be limited merely to deciding peer review matters "in the first

instance." The Legislature decreed that "[i]t is the policy of this state that peer review be performed by licentiates." (Bus. & Prof. Code, § 809.05.) Thus, the peer review body is not simply a warm-up act for a governing body waiting in the wings to carry the process to its conclusion; the peer review body is the body that performs peer review.

The Legislature did acknowledge that governing bodies have "a legitimate function in the peer review process." (Bus. & Prof. Code, § 809.05.) However, it did not give governing bodies any express function other than the one noted above – i.e., to initiate action where the peer review body fails or refuses to do so.

West Hills would like for this Court to insert language into the Opinion that it might be read as suggesting there are no limits on a hospital governing body's powers once a peer review body has made an initial decision. The language that the Court used correctly states the law, and West Hills' proposed alternative does not. This request should be denied.

III. THE OPINION DOES NOT UNDULY LIMIT THE CIRCUMSTANCES UNDER WHICH A PHYSICIAN SHOULD BE DENIED MEDICAL STAFF PRIVILEGES

West Hills objects to the portions of the Opinion that read:

> "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,"

and

> "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."

(Petition at 3, quoting Opinion at 11-12 (emphasis added by West Hills).) It would prefer that these passages read:

> "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,"

and

> "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."

(Petition at 6.)

West Hills says that the language change it requests is necessary to allow hospitals to address "[i]ntimidating and disruptive behaviors [that] can foster medical errors," "behaviors that threaten the performance of the health care team," "disruptive physicians whose

presence will likely lead to medical errors by others and adverse patient outcomes," and "behavior [that] prevents other health care providers from administering appropriate care." (Petition at 4-5.) It also suggests that the language change is necessary to allow hospitals to deal with "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) . . . ." (Petition at 5-6.)

In reality, there is no likelihood that the Court's conclusions could be interpreted as limiting a hospital's power to exclude a physician in such extreme situations, because the facts in this case have nothing to do with these scenarios. Dr. Mileikowsky was not ousted for intimidating, disruptive, or threatening behavior, or for hostility, unethical behavior, or failure to comply with administrative requirements. He could not practice at West Hills because, after his application was denied, he was not allowed to challenge the denial before a hearing panel. He was not allowed to go to the hearing panel because he declined to produce documents related to a peer review

proceeding at Cedars-Sinai Hospital, in the face of Cedars-Sinai's refusal to authorize him to do so, and instead repeatedly signed releases authorizing Cedars-Sinai to give West Hills the same documents. (8/11/99 Authorization, AR CH00138; 12/5/00 Authorization, AR P003269.)[1]

Consequently, West Hills's supposed concerns over future instances of extreme physician behavior have nothing to do with this case. Instead, it wants to establish rules to govern other situations not before this Court. It asks this Court to reconsider other controversies in which it reached resolutions that West Hills would like it to alter.

The thrust of the language changes that West Hills requests is to move the focus of peer review from the doctor himself to the general environment of the hospital surrounding the doctor. It wants the peer review proceeding to turn not on "the quality of medical care *the physician* is able to provide," or whether "*he* was unable to deliver high quality medical care," and instead to turn on a general assessment

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[1]The "Amended Notice of Charges" did accuse Dr. Mileikowsky of what it called "Disruptive Behavior," but the only "disruptive behavior" it identified was that he allegedly had sent the other side voluminous facsimiles in the course of the administrative proceedings. (8/21/02 letter at 2, AR P003432.) This strongly suggests that behavior West Hills considers "disruptive" does not necessarily have anything to do with patient safety.

of patient care or safety in the hospital in which the physician practices.

Obviously, patient care and safety are central concerns of peer review, and the Opinion does not suggest otherwise. The language change that West Hills asks for, however, has a different goal. Ironically, although West Hills' argument relies almost exclusively on this Court's decision in *Miller v. National Medical Hospital* (1980) 27 Cal.3d 614, the principal thrust of its requested language change is to tip, in favor of hospitals seeking to rid themselves of unwanted physicians, the careful balance the Court struck in that case.

Miller followed *Rosner v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592, which precluded a hospital from excluding a physician on the basis of a bylaw that made the physician's privileges turn on his "apparent ability to get along with others." (*Id.* at 598.) *Miller*, in contrast, upheld a bylaw that made the physician's privileges turn on the physician's "ability to work with others." (27 Cal.3d at 628.) The first passage of the Opinion to which West Hills objects in this part of its Petition is simply the Court's accurate summary of those two decisions. (Opinion at 11-12.)

Although *Miller* upheld the hospital bylaw that was at issue in that case, the Court was also careful not to give a hospital *carte blanche* to exclude a physician merely on "'conjectural grounds." (27 Cal.3d at 629.) It crafted the applicable rule to "avoid the danger of arbitrary and irrational application and the concomitant danger that such a bylaw may be used as a subterfuge where considerations having no relevance to fitness are present . . . ." (*Id.* at 628 (citation and internal quotation marks omitted).) Consequently, the Court required that the credentialing decision be grounded in the individual physician's effect on his or her patients, and not just in the alleged impact the physician has on the hospital environment.

Specifically, the Court held that the bylaw "must be read to demand a showing, in cases of rejection on this ground, that an applicant's inability to 'work with others' in the hospital setting is such as to present a real and substantial danger that patients treated *by him* might receive other than a 'high quality of medical care' at the facility if he were admitted to membership." (*Ibid.* (emphasis added).) The Court recognized the potential for abuse in a hospital's assumption that "a physician's ability to 'work with others' in the hospital setting has an inherent effect on the level of patient care

provided," and therefore disallowed such a standard as a basis for automatic exclusion from a hospital's staff. (*Id.* at 629.)

There might come a day when the Court will want to revisit or revise the *Miller* rule. This case, however, does not present an opportunity for doing so. The facts of the case do not raise the issues addressed in *Miller*, and the parties have not attempted to brief them. The Court should leave the completely accurate statement of the law now in the Opinion intact. It should not accept West Hills' invitation to address this area of law, when no controversy that raises it is before the Court.

IV. THE OPINION CORRECTLY CHARACTERIZES THE STATE OF THE EVIDENCE IN THIS CASE, AND DOES NOT PRESENT AN OCCASION FOR THE COURT TO SPECULATE ABOUT THE EVIDENCE REQUIRED IN OTHER CASES

West Hills objects to the portions of the Opinion that read:

> "[This court] question[s] West Hills's assertion that it could not proceed without evidence only Dr. Mileikowsky could provide,"

and

> "[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)."

(Petition at 7, quoting Opinion at 16-17.) It does not suggest alternative language, but it does ask the court to "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." (Petition at 9.)

West Hills' professed concern is clearly misplaced. The Opinion says nothing about whether, in the general case, peer review documents from another hospital would be necessary to perform peer review. It merely states that, in this case, those documents do not appear to have been necessary to the proceeding. This conclusion follows immediately from the fact that, although the Medical Staff was thoroughly familiar with the Cedars-Sinai proceedings,[2] they provided no basis at all for its decision to deny Dr. Mileikowsky's application for privileges. (4/24/02 letter, AR P003330-34.) Instead, *after* it had denied Dr. Mileikowsky's application, the Medical Staff through its attorney began to demand the documents, knowing that Cedars-Sinai had constrained Dr. Mileikowsky not to produce them (4/16/99 letter

[2]Dr. Mileikowsky informed the West Hills Medical Staff of the Cedars-Sinai outcome, in writing, no later than July of 1999. (Addendum to 1999Application, AR P003230.) In fact, the West Hills Medical Staff's attorney was the Cedars-Sinai hearing officer. (11/29/00 letter at pp. 2, AR P003235.)

at pp. 1-2, AR P003240-41), and then made his unsurprising failure to produce the documents another ground for denying his application. (8/21/02 letter, AR P003431-34.) West Hills demonstrated by its own actions that it did not really need or even want the documents; throughout the pendency of the proceeding concerning his 2001 application, it declined to take the routine step of simply approaching Cedars-Sinai, with Dr. Mileikowsky's signed releases in hand, and asking for the documents. (8/11/99 release, AR CH00138; 12/5/00 Authorization, AR P003269; 7/24/03 letter, AR P003801; 12/12/00 letter, AR P003802-03.)

West Hills' real purpose seems to be to fish for helpful language from this Court that it can use to short-circuit the administrative process on remand. West Hills claims, hopefully, to "understand[] 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." (Petition at 7.) The Opinion, of course, says no such thing. Nor could it, since such an assessment is the province of the hearing panel, not of the courts. The cited pages of the Opinion, 16 and 17, simply observe what was obvious from the start – that the Cedars-Sinai

documents had nothing to do with the actual grounds on which the Medical Staff purported to deny Dr. Mileikowsky's application.

This is not to say that in a different case, where the peer review proceeding in another hospital actually is the basis for a credentialing decision, production of such documents cannot be required. In the case before the Court they were not necessary, but nothing in the Opinion rules out the possibility that such documents might be required in other cases where they actually do bear on the issues before the hearing panel.

West Hills also seeks to have this Court go beyond the circumstances of this case and articulate a sweeping rule that a medical staff should be able to demand of a doctor any evidence it wants, limited only by the hearing officer's determination that the evidence is relevant. It asserts: "Provided the hearing officer agrees that the evidence sought by the medical staff is relevant to the charges, the physician should not be allowed to deprive the medical staff of the evidence it seeks . . . ." (Petition at 8 (citation omitted).) To the contrary, in any adjudicative setting, relevant evidence is usually but not necessarily discoverable. Other factors such as privilege, burden, overreaching, and relative costs of procurement necessarily bear on

whether discovery should be allowed. This case is not a proper vehicle for this Court to consider, let alone issue, the type of sweeping proclamation West Hills seeks here, which would allow a medical staff to insist on any discovery it claims to want.

V. CONCLUSION

This Court correctly decided all the issues before it on this appeal, and West Hills' Petition for Rehearing does not show otherwise. The Petition asks the Court to add language suggesting resolution of issues not before the Court, and in particular suggesting resolution contrary to existing law and to the facts of this case. It should be denied in its entirety.

DATED: April 28, 2009

SPIEGEL LIAO & KAGAY, LLP

By_____
Charles M. Kagay
Attorneys for
Petitioner/Appellant
Gil N. Mileikowsky, M.D.

CERTIFICATE OF WORD COUNT
(California Rules of Court, rule 14(c)(1))

The text of this Answer consists of 2855 words, as counted by the Corel WordPerfect version X4 word-processing program used to generate the Answer.

DATE: April 28, 2009

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Charles M. Kagay
Attorney for Petitioner/Appellant

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