COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 8

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.	No. B186238 Los Angeles County Superior Court No. BS091943 Honorable Dzintra Janavs, Judge Presiding

APPELLANT'S PETITION FOR REHEARING

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I. INTRODUCTION

Appellant Gil Mileikowsky, M.D. respectfully petitions this Court for rehearing of certain limited aspects of this matter. First, he asks the Court to rule on a crucial issue raised on this appeal that was not addressed in any way in the Opinion. Second, he asks the Court to rehear and redecide one issue for which the resolution is demonstrably contrary to direct California Supreme Court precedent.

II. THE OPINION'S FAILURE TO ADDRESS A CRITICAL ISSUE REQUIRES REHEARING

"A rehearing may be granted on the ground that the court's opinion . . . failed to address any material issue." (Eisenberg, Horvitz, and Wiener, Civil Appeal and Writs ¶ 12:16 (The Rutter Group 2007), citing *In re Jessup's Estate* (1889) 81 Cal. 408, 471.)

Appellant raised and thoroughly briefed an important issue that was not addressed in this Court's decision. If the matter is remanded to the trial court without a decision on this issue, the trial court will at best be in the difficult position of grappling with the question without this Court's guidance. At worst, the trial court will repeat the error that it made before, perhaps even necessitating another appeal.

The important issue not addressed by this Court's opinion is: whether West Hills' improper termination of Dr. Mileikowsky's clinical privileges before resolution of the administrative proceeding compels issuance of a preliminary injunction pending completion of the administrative proceeding.

The facts and law on the issue of the premature termination of Dr. Mileikowsky's privileges were presented in detail in Appellants' Opening Brief at pages 69 to 71. We repeat them here.

The Medical Staff was so eager to remove Dr. Mileikowsky that it barred him from exercising clinical privileges that were his legal right until a legitimate administrative determination took them away. The law prohibits the abusive tactic of starving a physician into submission by cutting off his clinical privileges pending hearing, but that is precisely what West Hills did here. The Superior Court's disposition of this case must necessarily include a mandate or injunction to protect Dr. Mileikowsky's right to practice pending hearing, after the case is remanded.

On April 24, 2002, West Hills denied Dr. Mileikowsky's application for reappointment. (4/24/02 letter, AR P003330-34.) However, as the California Supreme Court has declared, because Dr.

Mileikowsky already had privileges at West Hills, he had a vested right to continue with those privileges unless and until the hospital revoked them *after* a proper administrative proceeding:

> [T]he previously admitted physician, unlike the normal applicant for a license or franchise, *may not be denied reappointment to the medical staff absent a hearing and other procedural prerequisites* consistent with minimal due process protections. . . . In short, the full rights of staff membership vest upon appointment, subject to divestment upon periodic review only *after* a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements.

(*Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 824-25 (citations and footnotes omitted, emphasis added); *accord*, *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1146-47.)

However, even *before* any proceeding commenced, West Hills acted illegally by peremptorily stripping him of his clinical privileges, denying him his vested right to practice his livelihood and placing on him the burden of winning his clinical privileges back through administrative proceedings.

The Medical Staff's attorney Mr. Lahana threw down this gauntlet in a letter to the Hearing Officer immediately after his appointment, announcing peremptorily that Dr. Mileikowsky no longer held privileges. (6/17/02 letter, AR P 003348.) Dr. Mileikowsky protested

to Mr. Lahana, to the Medical Staff, and to the Hearing Officer. (6/23/02 letter, AR P 000099-106; 6/26/02 letter, AR P 000107-121; 7/12/02 letter, AR P003390-401; 7/16/02 letter at 3, AR P003414.) His protests fell on deaf ears. (6/26/02 letter, AR P 001040-41; 7/16/02 letter at 3, AR P003414.)

Sahlolbei is precisely on point here. In that case, as in this one, the hospital denied the physician's application for reappointment. In that case, as in this one, the hospital terminated the physician's privileges *before* prevailing in the administrative hearing mandated by the statute. In those circumstances, the Court of Appeal determined that the hospital "was required to provide plaintiff with a hearing prior to, not after, terminating his staff membership, and that plaintiff was entitled to an injunction reinstating his membership pending such a hearing." (112 Cal.App.4th at 1142.) The same result is compelled here.

Thus, the applicable precedents dictate that Dr. Mileikowsky must retain his privileges unless and until the Medical Staff prevails against him in the administrative proceeding. But Mr. Lahana, the Medical Staff's attorney, single-handedly terminated Dr. Mileikowsky's privileges before the administrative proceeding even began. Unless this

Court takes action now, this blatantly illegal act might well be allowed to continue well into the future, denying Dr. Mileikowsky as a practical matter the relief he won on this appeal.

This is not to say that a hospital does not have the power to suspend a physician who is actually a danger to his patients. The applicable statute allows a summary suspension, but only after a finding that "failure to take that action may result in an imminent danger to the health of any individual." (Bus. and Prof. Code § 809.5(a).) West Hills' bylaws allow for summary suspension, but only on a finding that immediate action is required "to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury to the health or safety of any patient, employee or other person present in the Hospital, or damage to the Hospital . . . ." . (Bylaws at 34-35 §§ 8.2 - 8.2-5, AR P003857-58.)

These procedures were not followed for Dr. Mileikowsky. Instead, an attorney acted on his own to decree Dr. Mileikowsky's privileges summarily suspended. The fact that he and West Hills scrupulously avoided the strict standards of the statute and the bylaws speaks eloquently to the fact that those standards could not be met, and that Dr. Mileikowsky should not have been suspended.

This Court has now directed the trial court to issue a writ of mandate overturning the administrative determination against Dr. Mileikowsky. However, that relief will be incomplete and deficient unless it also addresses the premature removal of Dr. Mileikowsky's privileges. Specifically, the trial court must be directed to issue a writ or an injunction compelling West Hills to reinstate Dr. Mileikowsky's privileges unless and until it properly terminates them in an administrative proceeding consistent with the principles of fair procedure. Any lesser relief would simply allow West Hills to win its war with Dr. Mileikowsky even though it has lost the battle of this appeal.

III. THE OPINION'S RELIANCE ON A POINT OF LAW DIRECTLY CONTRARY TO CALIFORNIA SUPREME COURT PRECEDENT REQUIRES REHEARING

"A rehearing can also be granted on the ground that the court reached an erroneous decision because of a mistake of law." (Eisenberg, Horvitz, and Wiener, Civil Appeal and Writs ¶ 12:16 (The Rutter Group 2007), citing *In re Jessup's Estate* (1889) 81 Cal. 408, 471.)

The Opinion rejected Appellant's contention that the Hearing Officer in Dr. Mileikowsky's administrative proceeding was disqualified by his financial conflict of interest. (Opinion at 23-25.) This result

raises the specter that the same Hearing Officer could be appointed yet again on remand. Because it is unequivocally wrong on both the law and the facts, the problem should be addressed now rather than on further appeal.

Appellant's contention, of course, is that the Hearing Officer Mr. Harwell was disqualified by reason of financial conflict of interest because he was selected by the prosecuting body, the Medical Staff, on an *ad hoc* basis with the possibility of future financial gain from future reappointments. Appellant contends that, in this circumstance, disqualification is automatic under *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017.

> According to the Opinion, the relevant questions are these:
>
> > whether, in future cases, the medical staff will request the appointment of Harwell and whether the Hospital will honor those requests and appoint Harwell. If the answer to these questions is yes, it appears that, under *Haas*, Harwell is disqualified.

(Opinion at 24.) Furthermore, the Opinion concludes that "the necessary factual predicates to Harwell's disqualification under Haas are not shown by the current record." (Opinion at 25.) We respectfully submit that this is not a correct statement of the law as set forth by the Supreme Court, or of the record.

The questions stated above are *not* the relevant questions under *Haas*. If these were the questions to be answered, *Haas* would be toothless and the Supreme Court would have laid down a principle of constitutional law that could be evaded in every case. A prosecuting body can always state, with some degree of honesty, that it does not know whether it will request the same hearing officer in the future. A hospital can always state, with some degree of honesty, that it does not know whether it will appoint the same hearing officer if its prosecuting body so requests. These are always decisions that can be postponed to the future. Quite simply, there is no way that a party to an administrative proceeding who is subjected to a hearing officer chosen by the prosecuting body could ever make the showing that the Opinion demands – that the Medical Staff *will* request reappointment, and that the Hospital *will* honor these requests.

Not surprisingly, the Supreme Court did not place on the party objecting to the hearing officer the burden stated in the Opinion. Quite to the contrary, the Supreme Court held as follows:

> A procedure holding out to the adjudicator, *even implicitly*, the *possibility* of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias.

(*Haas*, 27 Cal.4th at 1034.) Thus, the Supreme Court held that disqualification is automatic where "plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled." (*Id.* at 1024-25.)

The Supreme Court did not impose the impossible requirement of showing that the hearing officer *will* be reappointed. All the Supreme Court required was a showing that the Medical Staff and the Hospital retain the freedom to appoint the same hearing officer in the future. In and of itself, the freedom to reappoint the same hearing officer again "create[s] the risk that favorable decisions will be rewarded with future remunerative work," and requires reversal. (*Haas*, 27 Cal.4th at 1020-21.) This is not because the appellant has shown that the hearing officer *will* be reappointed if he makes a favorable decision, but because "adjudicators selected and paid in this manner have a *possible* temptation not to hold the balance nice, clear and true." (*Id.* at 1029 (emphasis added, quotation marks, ellipses, and citation omitted).)

Thus, contrary to the implication of the Opinion at page 24, it was not necessary under *Haas* for Appellant to show that the Medical Staff's attorney Mr. Lahana had repeatedly selected Mr. Harwell in the past. Appellant was required only to show that the procedure followed held

out to Mr. Harwell, at least implicitly, the possibility that he could be reappointed in exchange for a favorable decision. When Dr. Vener, the prosecuting body's representative at the hearing, wrote to Mr. Harwell to inform him that the prosecuting MEC had instigated his appointment as Hearing Officer (RT 7/1/02 25:11-26:11, AR P001582-83) , no one could have missed the implication that the prosecuting body, not Dr. Mileikowsky, had the power to influence future appointments, and that there was the possibility it could wield that influence again if it was pleased with the outcome.

Nevertheless, we would also point out that the Opinion misconstrues the factual showing that Appellant made. The Opinion states that Appellant made two factual assertions without record support – that Mr. Lahana "selected the same Hearing Officer repeatedly" and that Mr. Harwell's "future income from presiding over similar hearings depends upon the Medical Staff's election . . . to hire him again." (Opinion at 24.) We must respectfully disagree with the suggestion that Appellant failed to give record citations for these points.

The quoted passages appear in a paragraph at page 30 of Appellant's Opening Brief. That paragraph is an introductory paragraph that summarizes the factual points to be made in the paragraphs that

follow. The record citations to the evidence that supports these assertions appear in the following paragraphs.

With respect to the assertion that that Mr. Lahana "selected the same Hearing Officer repeatedly," the following appears on page 31 of Appellant's Opening Brief: "Mr. Harwell indicated that Mr. Lahana had selected him to be the hearing officer in six prior proceedings. (RT 7/1/02 16:13-17:17, AR P001573-74.)"

The opinion goes on to conclude that the cited evidence does not show that Mr. Lahana selected Mr. Harwell in the past. (Opinion at 24.) However, we submit that this is indeed a fair assessment of this testimony. In pertinent part, it reads as follows:

> Q Now, let's explore your relationship with different law firms.
>
> How often are you seeked, or asked to serve, as a hearing officer by Erwin Cohen Jessup?
>
> A Once.
>
> . . .
>
> Q Right. How about the law firm of Christensen & Auer?
>
> A Never.
>
> Q How about the law firm of Mr. James Lahana?

> A I think I've – I thought about this because of the *Haas* case. I think in the 15 years that I have been doing this sort of thing I've bumped into Mr. Lahana seven times. . . . And then there have been seven cases where I have been the hearing officer. In one I was asked to be the hearing officer by the doctor's lawyer, not by Mr. Lahana. And then, in the other six, two of them were resolved before the hearing started . . . . In two of them Mr. Lahana's client prevailed, and in two of them Mr. Lahana's client did not prevail.

(RT 7/1/02 16:11-17:17, AR P001574.)

This testimony is not unambiguous. It was elicited by a *pro per* litigant in an informal administrative proceeding. But it certainly carries a strong implication that Mr. Lahana, like Erwin Cohen Jessup and unlike Christensen & Auer, had selected Mr. Harwell as a hearing officer, and that he had done so six of the seven times Mr. Harwell had "bumped into" Mr. Lahana as a hearing officer. This was the rational finding that the Superior Court took from the testimony. (Tentative Decision[1] at 4, CT 19:3989.)

With respect to the assertion that Mr. Harwell's "future income from presiding over similar hearings depends upon the Medical Staff's election . . . to hire him again," the following appears at page 31 of

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[1]After the hearing on Dr. Mileikowsky's Petition, the trial court ordered that the previously-issued tentative decision be filed and deemed the Statement of Decision. (6/30/05 Minute Order, CT 19:3984.)

Appellant's Opening Brief: "Presiding as a hospital hearing officer is a major part of Mr. Harwell's business. (RT 7/1/02 12:2-13:3, AR P001569-70.)" No one disputes the fact that Mr. Harwell sits as a hearing officer for remuneration. Given this fact, and the fact that the Medical Staff selected Mr. Harwell for this proceeding, the assertion that his future income from presiding over similar hearings depends on the Medical Staff's election to hire him again is a tautology.

Again, these facts provide useful background, but they are not necessary to the *Haas* determination. Even if Mr. Harwell, like the haring officer in *Haas*, had never previously been hired by the prosecuting body or its attorney, the procedure held out to Mr. Harwell, at least implicitly, the possibility of future employment in exchange for favorable decisions. For this reason alone, Mr. Harwell had the appearance of a financial conflict of interest and was disqualified to serve.

IV. CONCLUSION

Rehearing should be granted so that the Opinion can be modified to address a vital issue that was left unresolved, and to correct an error

that sets the Opinion directly contrary to the law as set down by the California Supreme Court.

DATED: June 18, 2007

SPIEGEL LIAO & KAGAY, LLP

By_____
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DATE: June 18, 2007

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