

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

CONSOLIDATED ANSWER BRIEF
TO AMICI CURIAE BRIEFS

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INTRODUCTION

This court accepted eight amici briefs: five support West Hills Hospital Medical Center and Medical Staff of West Hills Hospital Medical Center (collectively, West Hills); three support Dr. Mileikowsky. In this consolidated answer brief, West Hills responds to the three amicus briefs filed in support of Dr. Mileikowsky. West Hills concurs with the arguments made by the five amici supporting West Hills' position.

LEGAL ARGUMENT

I.

THE HEARING OFFICER DID NOT MAKE A MEDICAL DECISION OR TERMINATE DR. MILEIKOWSKY'S PRIVILEGES.

The three amicus briefs supporting Dr. Mileikowsky are all based on the premise that, in this case, the hearing officer or West Hills made a medical decision concerning Dr. Mileikowsky's professional competence and/or terminated his staff privileges at West Hills.^{1/} The

^{1/} This is a representative sampling of amici's allegations:

– The question in this case is “[w]hether the quality of hospital medical care shall remain entrusted to physicians.” (Amici Curiae Brief of American Association for Justice, et al. 2 (AAJ ACB).)

– “The decision whether Dr. Mileikowsky's privileges would be renewed was seized out of the hands of the medical staff and was made solely by a hearing officer” (AAJ ACB 40.)

– Dr. Mileikowsky “had his hospital privileges revoked by a non-physician ‘hearing officer.’” (Amicus Curiae Brief of Union of American Physicians and Dentists 1 (UAPD ACB).)

– “[O]utsiders cannot dictate staff membership decisions.” (UAPD ACB 5, capitalization omitted.)

– Claiming we “argue that a hearing officer should be empowered to terminate a peer review hearing and *render a final determination on the merits.*” (Amici Curiae Brief of the American Medical Association and the California Medical Association 2, original emphasis (AMA ACB).)

– Warning against “[a]llowing hearing officers to thwart the medical staff's rightful power.” (AMA ACB 6.)

(continued...)

evidence establishes, however, that the hearing officer did neither. Nor does West Hills argue that hearing officers should have such authority.

The decision to deny Dr. Mileikowsky's staff privileges application was made by physicians. The decision came from a medical staff committee—the Medical Executive Committee, comprised of physician members of the West Hills medical staff. (CT 925-928, 2036-2039, 2540-2543.)

Dr. Mileikowsky challenged the medical staff committee's decision by seeking a hearing before a Judicial Review Committee (JRC). The hearing officer terminated that proceeding because of Dr. Mileikowsky's steadfast refusal to produce documents.

However, like the decision to deny staff privileges, the document request that Dr. Mileikowsky ignored came from *the medical staff*, not from hospital administrators or the hearing officer. (CT 115-117, 2422-2425, 2447-2448, 2478-2479, 2511, 2512-2514, 2746-2747, 2758-2760; see CT 2512.) The hearing officer specifically explained that his terminating order "follows many attempts at gaining Dr. Mileikowsky's compliance with orders to provide documentary information relevant to the charges *as requested by the Medical Staff.*" (CT 965, 1582, 2076, 3489, emphasis added.) And it was the *medical staff's* Medical Executive Committee that considered the requested

1/ (...continued)

– The hearing officer's action in this case violates "laws designed to ensure that medical decisions are made by medical professionals." (AMA ACB 11.)

documents so important that *it* asked for the JRC hearing to be terminated when Dr. Mileikowsky did not produce them. (CT 963, 2074.)

Thus, contrary to amici's rhetoric, "hospital management" did not "bombard[] the suspended physician with discovery requests" (UAPD ACB 15) and no medical staff committee had "its decisions usurped" (UAPD ACB 6-7). Rather, the discovery requests came from the *medical staff*, the request for terminating sanctions came from the *medical staff*, and the *medical staff* committee's decision to deny Dr. Mileikowsky's staff privileges application was *left in place* by the terminating sanction order.^{2/}

Also, the hearing officer's order was not, and did not purport to be, any judgment on Dr. Mileikowsky's professional qualifications. As explained in West Hills' briefs on the merits, the hearing officer did not make a medical decision, but decided a procedural issue. (OBOM 45-47; Reply Brief on the Merits 7-10 (RBOM).)

Amici rely on *Lee v. Blue Shield of California* (2007) 154 Cal.App.4th 1369, a case not even mentioned by Dr. Mileikowsky. *Lee* is inapposite. There, Blue Shield suspended the plaintiff physician from its network of medical providers and then unilaterally terminated

^{2/} Other amici contend also that West Hills claims it had no duty to obtain the documents—peer review materials from another hospital. (AAJ ACB 20-22.) The amici misrepresent West Hills' brief. West Hills in fact unsuccessfully attempted to obtain the documents (CT 2422-2425, 2512-2514) and said in its brief not that it had no *duty* but that it was *unable* to obtain them. (Opening Brief on the Merits 32 (OBOM)).

the hearing where the suspension was to be reviewed after the plaintiff did not comply with Blue Shield's discovery requests. The Court of Appeal held Blue Shield could not itself terminate the proceeding, but the court expressly declined to address the question presented here. (*Id.* at p. 1377, fn. 3 ["We need not decide in this case whether the authority to impose discovery sanctions rests with the hearing officer or the hearing panel. [Citing the Court of Appeal opinion in this case.] Our point is that under no circumstances could those sanctions be imposed by a [health care service] plan"]). Here, by contrast, the JRC proceeding was not terminated by the Hospital, but by a hearing officer at the request of the medical staff.

Finally, amici contend that no lay person should *ever* have *any* role in peer review matters, which lie in the exclusive domain of licensed physicians. (AMA ACB 7-12; AAJ ACB 15.) If that were the case, however, hospital boards would have no role in peer review matters, which is contrary to statute. (See Bus. & Prof. Code, § 809.05, subd. (a) ["The governing bodies of acute care hospitals have a legitimate function in the peer review process"].) If the amici's argument is taken to its logical conclusion, no court, including this one, could ever review a peer review decision. That has never been the law.

II.

THE LEGISLATURE GAVE HEARING OFFICERS THE AUTHORITY TO RESOLVE DISCOVERY DISPUTES.

Dr. Mileikowsky himself concedes in his brief on the merits that the question at the heart of the dispute in this peer review proceeding—“whether Dr. Mileikowsky was justified in withholding the documents—is a *legal* one.” (Answer Brief on the Merits 66, emphasis added (ABOM).) One amicus nonetheless asserts that JRC panel members are as competent as hearing officers to decide discovery disputes. (UAPD ACB 10-12.)

Regardless of the validity of the amicus’ claim, the Legislature has vested the hearing officer with authority to decide such legal matters. Business and Professions Code section 809.2 provides that the hearing officer “shall consider and rule upon any request for access to information” (subd. (d)) and “determin[e] the relevancy” of such requests (subd. (e)).

But amicus’ claim is not valid, especially in this case. Here, a critical issue was whether Evidence Code section 1157 prevented Dr. Mileikowsky from producing peer review materials from another hospital. This was a legal question, much more suited to resolution by the lawyer-hearing officer than by a physician member of the JRC.^{3/}

^{3/} Even when it comes to taking credibility into account, the amicus itself cites only a study showing that physicians are “no worse”
(continued...)

III.

THE SPECTER OF MALEVOLENT PEER REVIEW IS AN IRRELEVANT DISTRACTION.

To strip hearing officers of their authority to effectively deal with a participant's chronic dilatory and disruptive conduct, some of the amici complain at length about peer review being used for malevolent purposes. (AAJ ACB 24-39; see UAPD ACB 14-15.) That has nothing to do with this case.^{4/}

There is no evidence here that the peer review process was used for improper purposes against Dr. Mileikowsky. Rather, the medical staff denied his application for privileges because of serious concerns about his professional qualifications, in part due to other hospitals' adverse privileges actions which Dr. Mileikowsky refused to help the medical staff investigate.

More broadly, amici's fears are contradicted by a new legislatively-required, independent report concerning the peer review process in California. (See Bus. & Prof. Code, § 805.2.) Although

^{3/} (...continued)
than judges in detecting lies. (UAPD ACB 12, fn. 6.)

^{4/} We also note the internal inconsistency of the amici's briefs. At times, amici extol the physicians who conduct peer review and urge the protection and strengthening of those physicians' decision-making authority. In the next breath, however, amici ominously warn of the rampant (mis)use of the peer review system by those same physicians to harm their competitors.

finding many negatives about the process, the report concluded “there is one very positive aspect—the people in the system who try to make it function.” (Comprehensive Study of Peer Review in California: Final Report (July 31, 2008) p. 111 <http://www.medbd.ca.gov/publications/peer_review.pdf> [as of Oct. 16, 2008]; see also *id.* at p. 1 [finding that “entities make a sincere effort to conduct peer review”].)

The report’s concerns are not that the physicians under review are being treated unfairly, but that delays in the peer review process can permit those physicians to harm patients: “The delays in the process are extensive and serve as a barrier to the goal of protecting the public.” (Comprehensive Study of Peer Review in California: Final Report, *supra*, at p. 107; see also *id.* at p. 105 [“Before a physician’s privileges in an entity can be terminated, there is a lengthy (months or years) process during which the potentially substandard care continues to be provided”].) As stated in West Hills’ briefs on the merits, allowing a physician to prolong the JRC process through his own non-cooperation is inimical to the public health goals underlying the entire peer review system. (See OBOM 48-53; RBOM 10-11.)

CONCLUSION

For the reasons stated above, in West Hills' briefs on the merits, and in the amici briefs supporting West Hills, this court should reverse the Court of Appeal's judgment.

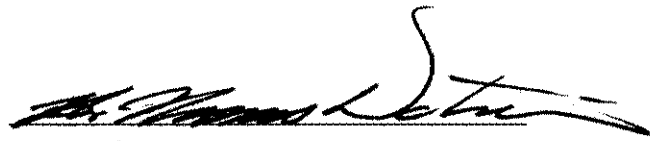
Dated: October 17, 2008

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c), 8.520(c).)

The text of this brief consists of 1609 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: October 17, 2008

A handwritten signature in black ink, appearing to read "H. Thomas Watson", with a large, stylized flourish extending upwards from the right side.

H. Thomas Watson

PROOF OF SERVICE

[C.C.P. § 1013a]

I, **Theresa Naumann**, declare as follows:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Horvitz & Levy LLP, and my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. I am readily familiar with the practice of Horvitz & Levy LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing.

On **October 17, 2008**, I served the within document entitled:

CONSOLIDATED ANSWER BRIEF TO AMICI CURIAE BRIEFS
on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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and, following ordinary business practices of Horvitz & Levy LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 15760 Ventura Boulevard, Encino, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **October 17, 2008**, at Encino, California.


Theresa Naumann