Case No. S156986 Filed on October 29, 2007

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 REVIEW

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
12400 Wilshire Boulevard, 15th Floor
Los Angeles, CA 90025-1023
Telephone: (310) 442-0555
pmhpc@earthlink.net

Table of Contents

Table of Authorities

Cases

Statutes

I. INTRODUCTION

The relief that Respondent West Hills Hospital Medical Center (West Hills) seeks here – Supreme Court review and reversal of the Court of Appeal's well-reasoned decision – is a solution in search of a problem.

Prior to 2005, the issue of whether the hearing officer in a medical peer review proceeding could unilaterally terminate that proceeding never surfaced, anywhere. In that year, the Second District Court of Appeal affirmed the denial of a writ of administrative mandamus sought by Dr. Gil Mileikowsky because the hearing officer had unilaterally terminated his medical peer review proceeding. There is no indication in the reported authorities (or anywhere else) that any court ever had an occasion to follow that short-lived decision. The issue simply never arose again, until Dr. Mileikowsky brought it back to that same court.

When he did so, less than two years later, the same Court of Appeal reexamined its earlier conclusion and reached a different one. It decided that a hearing officer in a medical peer review proceeding does not have the power to terminate the proceeding unilaterally. In the unlikely event that the issue arises again in the foreseeable future, the decision in the present case clearly shows the current view of the Second

District, the only Court of Appeal that has ever had occasion to speak on the matter.

Perhaps even more importantly, the difficulties that West Hills suggests could flow from the Court of Appeal's decision in this case are totally illusory. The decision below – that termination of a peer review proceeding must be effected by the subject's peers instead of by a lawyer hired to assist those peers – does not in anyway handicap the peer review process or burden those who are participating in it.

Thus, the Petition for Review presents no sound basis for this Court's intervention.

II. STATEMENT OF THE CASE

West Hills' Statement of the Case (Petition for Review at 6-12), to the extent it attempts to characterize the underlying facts, is incomplete and, at many points, inaccurate. For present purposes, however, the Statement is sufficient to show that review is not warranted. This Answer will present its argument on the basis of West Hills' Statement, without digressing into an argument over the facts.

III. THE PETITION PRESENTS NO GROUNDS FOR SUPREME COURT REVIEW

This case presents no basis for Supreme Court review. It is not, as West Hills would have it, "a case presenting an issue of statewide

importance about which the Courts of Appeal are in express disagreement." (Petition at 13.)

A. The Courts of Appeal Are Not in Disagreement

The Courts of Appeal do not disagree about the subject of this Petition. The decision in this case is not, as West Hills would have it, "at odds with the published decision of another Court of Appeal." (Petition at 13.) Only one Court of Appeal – the Second District Court of Appeal – has ever ventured an opinion on the issue West Hills brings to this Court – whether a hearing officer in a Business and Professions Code section 809.2 medical peer review proceeding has the unilateral power to terminate the proceeding.

Dr. Mileikowsky raised this issue in the Second District Court of Appeal in his appeal in the case *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531 (*Tenet Healthsystem*). The Court ruled against him. *Id.* at 566. However, Dr. Mileikowsky continued to advocate his position when the question arose again. Soon after the *Tenet Healthsystem* decision, in the present case, he brought another appeal to the same Court, in which he argued that the Court should reexamine the issue because *Tenet Healthsystem* had been wrongly decided. The Court agreed and issued the decision below, for which

West Hills seeks review. (*Mileikowsky v. West Hills Hospital Medical Center* (2007) 154 Cal.App.4th 752 (*West Hills HMC*).)

The power of a Court of Appeal to reexamine its earlier decisions is well recognized:

> [B]ecause there is no "horizontal stare decisis" within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court is not absolutely binding on a different panel of the appellate court. So, in appropriate and rare cases, appellate court precedent is open for reexamination and critical analysis.

(*In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.)

There is no need for Supreme Court intervention to "secure uniformity of decision" every time a Court of Appeal reexamines its own rulings. The Second District Court of Appeal has rethought the question and revised its prior decision. No court disagrees with it.

B. This Case Does Not Raise an Issue of Statewide Importance

This case is important to the parties. But there is no indication that the issue has ever had any importance for anyone other than Dr. Mileikowsky and the two hospitals against whom he has sought writs of mandate.

Hospitals have been required to conduct formal administrative proceedings to determine physician credentialing matters at least since

this Court's 1977 decision in *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802. The present statutory framework under which these proceedings are conducted, Business and Professions Code section 809 *et seq.*, was enacted in 1989. In all of those years, no reported decision ever had to address the issue for which West Hills seeks review, or any issue remotely related to it – until Dr. Mileikowsky raised the issue before the Second District Court of Appeal in *Tenet Healthsystem,* and then persuaded the same court to reexamine that decision in *West Hills HMC*. After *Tenet Healthsystem* was decided, no other reported authority (other than *West Hills HMC*) even cited that decision for the issue that West Hills now contends requires Supreme Court review.

In particular, *Tenet Healthsystem* was not cited on this point in *Lee v. Blue Shield v. California* (2007) 154 Cal.App.4th 1369, the lone authority West Hills advances to argue that "the issue is a recurring one." (Petition at 4.) In that case, again decided by the Second District Court of Appeal, the court merely held that the trial court should have not have dismissed, on demurrer, a physician's complaint that a health plan terminated his privileges without initiating a section 809.2 proceeding. Indeed, the *Lee* court forcefully acknowledged that the issue for which West Hills seeks review here was *not* before it:

> We need not decide in this case whether the authority to impose discovery sanctions rests with the hearing officer or the hearing panel. (See *Mileikowsky v. West Hills Hospital and Medical Center* (2007) 154 Cal.App.4th 752, 64 Cal.Rptr.3d 888.)

(*Lee*, 154 Cal.App.4th at 1377 n. 3.) Consequently, even if this issue had earlier been resolved by this Court, that resolution would have been of no assistance to the *Lee* court.

The *West Hills HMC* court perhaps best encapsulated the continuing importance of this issue when it observed: "[S]uch instances can be expected to be as rare as the facts of *Tenet Healthsystem*." (*West Hills HMC*, 154 Cal.App.4th at 773.)

There is just no history of any controversy coming to the courts concerning the issue of whether a hearing officer can unilaterally terminate a section 809.2 medical peer review proceeding. This is not a problem that has arisen anywhere at any time for anyone, except for Dr. Mileikowsky.

The specific issue is also one that almost never arises in the wider context of administrative proceedings, of which section 809.2 proceedings are but a unique and specialized part. The *Tenet Healthsystem* and *West Hills HMC* decisions are striking in the extent to which they dealt with a problem that never has arisen in any form in the

state of California. Neither one could cite another California authority in which the court had been asked to rule on any even remotely related issue.

Indeed, the *Tenet Healthsystem* decision could cite only one earlier case that had to address the issue of whether an administrative hearing officer of any sort had the power to terminate a proceeding prematurely. (128 Cal.App.4th at 561.) That decision was *Metadure Corp. v. United States* (1984) 6 Cl.Ct. 61 – a 20-year old Court of Claims decision that considered the powers of a federal administrative law judge acting for the Armed Services Board of Contract Appeals. The *West Hills HMC* decision cited no instance (other than the *Tenet Healthsystem* decision) in which the issue had arisen; that decision was purely a matter of statutory interpretation.

In short, the issue that West Hills would like this court to review is one that has never been a matter of concern to anyone other than Dr. Mileikowsky, in any form or in any court. It is not an "important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

C. The Decision Below Does Not Hamper Peer Review

The largest section of the Petition (pages 14 to 21) is devoted to an elaborate argument as to why *West Hills HMC* was wrongly decided.

This is not the place to argue the merits. The question presently before the Court is whether the decision is sufficiently pressing to require immediate review.

For now, it is enough to note that the Court of Appeal was undoubtedly correct when it held that the peer review panel – the physicians who were supposed to pass on Dr. Mileikowsky's fitness to hold privileges as a physician – was the proper body to make the final decision of whether the absence of certain documents from the record of the administrative proceeding was sufficient ground to deny him privileges, rather than the lawyer hired to help the peer review panel. This conclusion certainly appears to be what the Legislature intended when it declared that "[i]t is the policy of this state that peer review be performed by licentiates." (Bus. & Prof. Code § 809.) Moreover, denying the hearing officer the lone vote in determining Dr. Mileikowsky's fate certainly seems to be in harmony with the Legislature's directive that the hearing officer "shall not be entitled to vote." (Bus. & Prof. Code § 809.2(b).) Giving a hearing officer the unilateral power to terminate a proceeding would take the peer review process out of the hands of the physician's peers, where the Legislature

squarely put it, and place it in the hands of a lawyer selected and paid by the prosecuting body.

More worthy of discussion at this stage, though, is the subtext of West Hills' argument on the merits: that peer review will be crippled unless the hearing officer has the unilateral power to terminate section 809.2 proceedings. West Hills argues that the decision below will hamstring future hearing officers and hearing panels by holding them hostage to any doctor who does not play by the rules. This contention mischaracterizes what the Court of Appeal held.

For example, West Hills asserts that "[t]he *West Hills HMC* court reasoned that, under the pertinent statute, the hearing officer's sole remedy for controlling discovery abuses was to continue the hearing." (Petition at 18, citing *West Hills HMC*, 154 Cal.App.4th at 767.) To the contrary, the Court of Appeal actually held:

> The only *procedural* consequence of failure to provide information requested under section 809.2(d) is that it "shall constitute good cause for a continuance." . . . [T]he failure to provide requested documentation may have also substantive consequences . . . .

(*West Hills HMC*, 154 Cal.App.4th at 767 (emphasis in original).)

These substantive consequences can extend to premature termination of the proceeding. *West Hills HMC* does not bar the hearing officer from referring the matter to the panel for such a resolution:

> We agree that, generally, procedural matters should be consigned to the hearing officer; in fact, the hearing officer's function is precisely that. The decision to terminate a hearing before a final decision of the trier of fact on the merits, with the attendant effect of allowing the final proposed action to stand, however, is not merely a procedural decision. It is, effectively, a decision on the merits.
>
> We do not think that it would unduly burden the trier of fact to require it to make the decision to terminate a hearing before a final decision on the merits.

(*West Hills HMC*, 154 Cal.App.4th at 773.)

Indeed, *West Hills HMC* expressly recognizes that the hearing panel has the power that in this case the hearing officer improperly assumed for himself: "[I]t cannot be doubted that the integrity of the system of peer review requires that the trier of fact can terminate, upon a proper showing, the hearing convened pursuant to section 809.2 before a decision on the merits." (*West Hills HMC*, 154 Cal.App.4th at 771.)

West Hills is correct when it implies that the physicians who sit on a peer review panel are busy professionals whose time should not be wasted. (Petition at 19 n. 4.) But West Hills is not correct when it suggests that the decision below consigns these physicians to an endless

limbo of continuances without any possibility of resolution. The decision requires only that the panel, not the lawyer hired to assist it, make the decision to terminate the proceeding.

This requirement need not delay resolution of the proceeding. For example, in the early stages of the proceeding underlying the *Tenet Healthsystem* decision, Dr. Mileikowsky found himself unable to produce documents related to the earlier Cedars-Sinai proceeding – precisely the same discovery problem that provoked termination of the proceeding in the present case. (*Tenet Healthsystem*, 128 Cal.App.4th at 538; *West Hills HMC*, 154 Cal.App.4th at 757.) The impasse was swiftly dealt with, without any need for the hearing officer to supplant the panel: "The hearing officer submitted the issue to the Hearing Committee which ruled that Dr. Mileikowsky had waived his right to a hearing." (*Tenet Healthsystem*, 128 Cal.App.4th at 538-39.) (The *Tenet Healthsystem* proceeding continued beyond that ruling, to the point at which the hearing officer ultimately seized power and dismissed the proceeding on his own, only because the administrative appellate review body held that dismissal on the basis of the discovery problem was unwarranted. (*Tenet Healthsystem*, 128 Cal.App.4th at 539.))

Analogously, in West Hills' authority *Webman v. Little Company of Mary Hospital* (1995) 39 Cal.App.4th 592, all of the charges against the physician revolved around his failure to provide certain information to the peer review body. The matter was resolved with a hearing of a day or less, upholding the decision not to reappoint the physician. (39 Cal.App.4th at 599.)

The statutory scheme itself belies West Hills' suggestion that peer review proceedings will be stymied unless hearing officers are ceded life-and-death power over the proceedings. The Legislature made the hearing officer an optional part of the medical peer review process. (Bus. & Prof. Code § 809.2(b) ("*If* a hearing officer is selected to preside at a hearing held before a panel . . . ." (emphasis added)) It is hard to imagine that the viability of the peer review process turns on whether a specific unwritten power is given to an officer whose very presence is optional.

Certainly, physician peer review proceedings should be conducted efficiently and expeditiously. The decision below fully accommodates that concern. But peer review proceedings should also remain in the control of the peers. The decision below accommodated this latter concern as well, without sacrificing the former.

IV. CONCLUSION

Supreme Court review is not appropriate. Courts of Appeal are not in conflict. The supposed problem of statewide concern has never arisen in any form for anyone other than Dr. Mileikowsky. And the decision below closely adheres to the legislative mandate that peer review should be performed by peers, while doing nothing to compromise the viability of that process.

DATED: October 29, 2007

SPIEGEL LIAO & KAGAY, LLP

By_____
Charles M. Kagay
Attorneys for
Petitioner/Appellant
Dr. Gil M. Mileikowsky

S:\611 MILEIKOWSKY\Answer to Petition for Review 2.wpd

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

The text of this brief consists of 2605 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

DATE: October 29, 2007

_____
Charles M. Kagay
Attorney for Petitioner/Appellant