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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

REPLY TO ANSWER TO PETITION FOR REVIEW

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REPLY TO ANSWER TO PETITION FOR REVIEW

INTRODUCTION

This is the quintessential case for Supreme Court review because the Court of Appeal's decision creates an express split of authority regarding an important issue that broadly affects the public's health and welfare. Dr. Mileikowsky's arguments to the contrary in his answer to the petition to review are unavailing.

LEGAL ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN EXPRESS SPLIT OF AUTHORITY ON AN IMPORTANT ISSUE AFFECTING THE PUBLIC'S HEALTH AND WELFARE.

A. Expressly conflicting published opinions from two different appellate courts—even though they are in the same appellate district—create a split of authority in the Courts of Appeal.

The Court of Appeal in this case stated in its published opinion that it must "respectfully part company with the court in [*Mileikowsky v.*] *Tenet Healthsystem* [(2005) 128 Cal.App.4th 531 [Second Dist., Div. Four] (*Tenet Healthsystem*)] on the question whether the hearing officer, acting on his or her own authority, can terminate a [hospital peer review] hearing . . . ." (*Mileikowsky v. West Hills Hosp. Medical Center* (2007)154 Cal.App.4th 752, 772 [Second Dist., Div. Eight] (*West Hills HMC*).) Dr. Mileikowsky nonetheless claims there is no split of authority in the Courts of Appeal because both opinions are from the Second District and the later opinion overrules the earlier one. (APFR 1, 3-4.) He is wrong.

The divergent opinions come from different divisions of the Second District. That both divisions are in the same district does not

make the split of authority go away. Decisions by one division are not binding on another division, even though both divisions are in the same district. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 ["because there is no 'horizontal stare decisis' within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court [citation] is not absolutely binding on a different panel of the appellate court"]; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4 ["'A decision of a court of appeal is not binding in the courts of appeal. One district or division may refuse to follow a prior decision of a different district or division'"]; *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

Equally important, conflicting decisions from different divisions within the same district require trial courts to "pick and choose between conflicting lines of authority." (*McCallum v. McCallum, supra,* 190 Cal.App.3d at p. 315, fn. 4; see *Auto Equity, supra,* 57 Cal.2d at p. 455.) "Th[e] dilemma . . . endure[s] until *the Supreme Court resolves the conflict,* or the Legislature clears up the uncertainty by legislation.'" (*McCallum,* at p. 315, fn. 4, emphasis added; accord, 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 933, p. 971.)

Due to the above circumstances, this court has routinely granted review to resolve just such splits of authority between divisions in the same district. (E.g., *People v. Salas* (2006) 37 Cal.4th 967, 974; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1023; *Robert F. Kennedy Medical Center v. Belshé* (1996) 13 Cal.4th 748, 750.)

Thus, Dr. Mileikowsky's repeated assertions that the "same court" decided both the *West Hills HMC* and *Tenet Healthsystem* appeals does not mean that no split of authority exists.

B. The issue presented for review has statewide importance affecting the public's health and welfare.

Dr. Mileikowsky does *not* dispute the critical importance of an efficient peer review process to the public's health and welfare. Nor can he since both the Legislature and this court have affirmed its importance. (Bus. & Prof. Code, § 809, subds. (a)(3), (a)(6) & (a)(7); *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199-200; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10-12; see PFR 3, 14.)

Dr. Mileikowsky nevertheless argues that the issue presented for review here is not an important one because, before his own lawsuits, there were no published decisions delineating the power of the hearing officer to control the peer review proceedings. He is mistaken.

Dr. Mileikowsky's actions are not the only ones involving impeding the efficient conduct of peer review proceedings by withholding discovery. (See *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 596-599; *Lee v. Blue Shield of California* (2007) 154 Cal.App.4th 1369, 1375, 1379.) More importantly, the *West Hills HMC* decision unfortunately allows physicians whose staff privileges are under review to prolong the peer review process by a series of continuances stemming from the physician's disregard for the hearing

officer's discovery orders. (*West Hills HMC, supra,* 154 Cal.App.4th at p. 767 ["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'"]; see PFR 4-5, 18-19.) Thus, even if few peer review proceedings prior to *West Hills HMC* had been stymied by a physician's discovery abuses, future proceedings are not destined to run so smoothly.

In most corrective actions cases, the physician under review remains on staff until the Governing Board makes its final decision regarding staff privileges following the termination of proceedings by the peer review committee. If, as *West Hills HMC* holds, the only procedural consequence for disobeying a hearing officer's order to provide discovery mandated by Business and Professions Code section 809.2 is a continuance of the hearing, physicians faced with the possible loss of their staff privileges will be encouraged to disobey discovery orders in the hope that the hearing will be continued ad infinitum while they continue to practice at the hospital. Discoverable documents germane to the proceedings will be withheld—as Dr. Mileikowsky has done repeatedly—leaving the peer review committee with the Hobson's choice of either (a) deciding the physician's fitness for staff privileges without adverse information the physician chooses to withhold, or (b) continuing the hearing for as long as the physician refuses to provide the information he was ordered to produce. Because this situation is inconsistent with the statutory goal of protecting patients from harm through prompt and efficient peer

review based on all available information, this court should grant review and reverse the Court of Appeal's decision in this case.

C. Recognizing the authority of hearing officers to terminate peer review proceedings—subject to review of that order by the governing board—is consistent with the statutory scheme.

The petition for review explains in detail why the Legislature's statutory scheme for peer review authorizes the hearing officer to terminate the proceedings for participant abuses. (PFR 14-21.) In response, Dr. Mileikowsky argues that the *West Hills HMC* decision was correct because only licentiates, not the hearing officer, are entitled to vote on the merits of a peer review decision. (APFR 7-9.)

We need not repeat here the explanation why the statutory scheme authorizes the hearing officer to terminate proceedings based on participant abuses. (See PFR 14-21.) We do note that, had the Legislature wanted only the licentiates on the judicial review committee to rule on every procedural matter that could affect the outcome of the peer review proceedings, it would not have authorized the use of hearing officers at all. Instead, the Legislature expressly authorized hearing officers to preside over the peer review proceedings and terminate those proceedings when necessary to protect the peer review process. (Bus. & Prof. Code, § 809.2, subds. (b) & (d) [the hearing officer "may impose any safeguards the protection

of the peer review process and justice requires"]; see *Tenet Healthsystem, supra,* 128 Cal.App.4th at p. 558.)

Moreover, the Legislature left it to the hospital to select which decision maker, the hearing officer or judicial review committee, should rule on procedural matters. (See Bus. & Prof. Code, § 809.2, subd. (b).) When, as here, the hospital's bylaws allow the hearing officer to make such rulings, there is no legitimate reason for disregarding a hearing officer's rulings in favor of rulings by a different decision maker.

In any event, the hospital's governing board has the final say whether to uphold or reverse the hearing officer's decision. (See Bus. & Prof. Code, § 809.4; 2 CT 349-350 [hospital bylaws].) That is precisely what happened in both of Dr. Mileikowsky's published appeals. (*West Hills HMC, supra,* 154 Cal.App.4th at p. 762; *Tenet Healthsystem, supra,* 128 Cal.App.4th at p. 552.) The fact the governing boards upheld the hearing officers' termination orders in both cases is strong evidence that the hospital's bylaws authorized the hearing officers to make such orders. (*Tenet Healthsystem,* at p. 555.; see *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

Dr. Mileikowsky contends that it is preferable for licentiates, rather than the hearing officer, to make the *initial* decision to terminate peer review proceedings based on participant abuses. (APFR 10-12.) He claims that forcing the merits panel to determine whether to terminate proceedings will result in swift conclusions. (APFR 11-12.)

The reported decisions do not support Dr. Mileikowsky's optimism regarding the merits panel's ability to bring proceedings to a swift conclusion. (See *Tenet Healthsystem, supra,* 128 Cal.App.4th at pp. 542-549 [describing how Dr. Mileikowsky's abuses successfully extended the peer review proceedings for months]; *West Hills HMC, supra,* 154 Cal.App.4th at 759-761 [same]; *Webman v. Little Co. of Mary Hospital, supra,* 39 Cal.App.4th at pp. 597-599 [physician's discovery abuses protracted peer review proceedings for a year].) Additionally, hearing officers—typically attorneys with substantial experience presiding over peer review proceedings—are perfectly capable of determining when their orders for production of materials germane to the proceedings are being ignored or a participant's conduct is otherwise disrupting the orderly progress of those proceedings. (See *Tenet Healthsystem, supra,* 128 Cal.App.4th at p. 560; PFR 18.)

Thus, regardless of Dr. Mileikowsky's preference for having licentiates rather than the hearing officer rule on procedural matters that affect the outcome of peer review proceedings, such as the initial decision whether to terminate peer review proceedings based on participant abuses, neither the statutory scheme nor common sense requires this court to accede to Dr. Mileikowsky's preference.

CONCLUSION

For the reasons stated in the petition for review and this reply, this court should grant review and reverse the Court of Appeal's judgment.

Dated: November 8, 2007

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this brief consists of 1,676 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: November 8, 2007

H. Thomas Watson

PROOF OF SERVICE [C.C.P. § 1013a]

I, **Millie Gandola**, 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 **November 8, 2007**, I served the within document entitled **REPLY TO ANSWER TO PETITION FOR REVIEW** 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 **November 8, 2007**, at Encino, California.

Millie Gandola

Millie Gandola