

No. S259364
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUNDAR NATARAJAN, M.D.,

Petitioner and Appellant,

vs.

DIGNITY HEALTH,

Respondent.

After a Decision of the Court of Appeal
Third Appellate District, No. C085906

San Joaquin County Superior Court
No. STK-CV-UWM-2-16-4821

**RESPONDENT'S OPPOSITION TO NATARAJAN'S
THIRD MOTION FOR JUDICIAL NOTICE**

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A. Preliminary statement

Defendant and Respondent Dignity Health opposes Sundar Natarajan’s Third Motion for Judicial Notice.¹ The materials of which he requests judicial notice—the parties’ appellate briefing in *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474—are irrelevant to Natarajan’s argument that *Yaqub* was correctly decided. If anything, the *Yaqub* briefing further demonstrates the infirmity of the *Yaqub* opinion and confirms that it should be overruled.

B. Natarajan’s reliance on *Yaqub* and the Court of Appeal’s rejection of it.

Natarajan has consistently argued in this litigation (and during the administrative proceeding that preceded the litigation) that the hearing officer in his administrative hearing should have been disqualified for financial bias. He has consistently relied for that argument on *Yaqub*.

In *Yaqub*, the court held that a peer review hearing officer had an impermissible financial bias due in part to an array of prior connections to the hospital and its medical staff, including that the hearing officer had served as the hearing officer in the physician’s prior administrative hearing, as well as two other hearings; that he had been a mediator and arbitrator in cases involving the hospital; and that he had served on the board of the hospital’s foundation, which had a mission of fundraising for the hospital and whose board members were elected by the hospital’s

¹ Dignity Health did not oppose Natarajan’s first and second motions for judicial notice.

board. (*Yaqub*, 122 Cal.App.4th at 484-485.) None of those facts exists in this case. The *Yaqub* court relied on the due process analysis in *Haas v. San Bernardino County* (2002) 27 Cal.4th 1017, which was not a physician peer review case and involved an adjudicative administrative law judge hired by a state agency. As Dignity Health has repeatedly pointed out in the briefing at all levels in this case, *Yaqub* did not cite Business & Professions Code section 809.2, subdivision (b), the statute that governs peer review hearing officer financial bias.

In the Opinion in this case, the Court of Appeal correctly applied section 809.2, subdivision (b) to hold that the hearing officer in Natarajan’s case did not have an impermissible financial bias because he would “gain no direct financial benefit from the outcome.” (Bus. & Prof. Code, § 809.2, subd. (b).) In response to Natarajan’s reliance on *Yaqub* for the opposite conclusion, the court here recognized that:

Given *Yaqub*’s failure even to consider the distinction between the strict standard under due process for pecuniary interest and the statutory restatement of the principles of fair procedure limited to a *direct* financial interest in the outcome under section 809.2, we consider *Yaqub* to be a deviation from the strong current of precedent and therefore ““a derelict on the waters of the law” ’” that we have not found to be followed on this point in any published decision.

(*Natarajan v. Dignity Health* (2019) 42 Cal.App.5th 383, 391 [emphasis in original; citation omitted].)

In his Third Motion for Judicial Notice, Natarajan submits the parties’ appellate briefs in *Yaqub* to “explain[] why the Court did not analyze or rely upon Section 809.2 in its opinion” and to

assert that “[t]he briefs are therefore relevant to this appeal to rebut the contention that the *Yaqub* opinion was deficient and therefore should not be followed.” (3rd MJN 5.)² The motion is founded on speculation and contributes nothing of relevance to this case, except perhaps to serve as another reminder why *Yaqub* is a dereliction.

C. The parties’ briefing in *Yaqub* is irrelevant.

Section 809.2, subdivision (b) is the governing statute applicable to the financial bias of hearing officers in peer review proceedings at hospitals in California. *Yaqub* involved an allegation that a peer review hearing officer should be disqualified for financial bias. Section 809.2, subdivision (b) was controlling on that issue. The court was not free to choose to disregard the statute, and it was error to do so. The court could not have rendered a meaningful or valid decision on the subject of peer review hearing officers’ financial bias without considering that statute.

Natarajan suggests—based on nothing but pure speculation—that the *Yaqub* court failed to cite the statute because the parties failed to substantively brief the statute. That conclusion requires an enormous leap, and Natarajan provides nothing other than the absence of discussion in the briefs to justify the absence of discussion in the decision. This leap is unsupported, particularly because the respondent’s brief and the

² All three briefs are available on Westlaw. (See 2003 WL 23209454, 2004 WL 1080536, 2004 WL 1061043.)

appellant's reply brief both *do* cite section 809.2, subdivision (b).³ While the court's failure to cite the statute could easily have been based on its own determination that the statute was not relevant, for whatever reason that will remain unknown.

There is further indication that the *Yaqub* court's failure to cite section 809.2, subdivision (b) was not mere oversight due to the parties' failure to substantively brief it. In its separate discussion of the alleged bias of the adjudicatory hearing panel, the *Yaqub* opinion does cite section 809.2, subdivision (a), which governs bias of members of the hearing panel. (*Yaqub*, 122 Cal.App.4th at 487.) This makes clear that the court in *Yaqub* was aware of section 809.2. It addressed one subdivision of the statute, but did not address the immediately neighboring subdivision that speaks directly to peer review hearing officer bias. This reinforces the conclusion that the *Yaqub* court's failure to cite section 809.2, subdivision (b) was error, no matter why it happened.

The absence of substantive argument about the hearing officer bias statute in *Yaqub* does not excuse the court's failure even to cite it. It certainly does not invite speculation nor does the omission of such a discussion in the *Yaqub* opinion help to resurrect it as something other than a dereliction, as the Opinion

³ The hospital's respondent's brief cited section 809.2, subdivision (b) only for its restriction on a hearing officer voting on the matter. (2004 WL 1080536, at *28.) The physician's reply brief quoted section 809.2, subdivision (b) and argued that *Haas* explained what a "direct financial benefit" is. (2004 WL 1061043, at *7.)

here found. If anything, the omission underscores that the Opinion here is the only reliable decision on the subject.

D. Natarajan fails to explain why he did not previously request judicial notice of the briefs.

Since the inception of this case, Natarajan has urged the courts to follow *Yaqub*, and Dignity Health has pointed out that *Yaqub* ignored section 809.2, subdivision (b). Thus, if the *Yaqub* briefing were relevant to this case (it is not), it was equally relevant before the trial court. Natarajan did not request judicial notice of the briefing until he reached this Court—and then only in his third piecemeal request for judicial notice, after Dignity Health had filed its Answer Brief.

Natarajan’s motion was required to inform this Court “[w]hether the matter to be noticed was presented to the trial court” (Cal. Rules of Court, rule 8.252(a)(2)(B).) Natarajan does not address this issue, nor does he explain his failure to submit the briefs at an earlier stage of the proceeding. He tacitly *implies* that the matter of *Yaqub* ignoring section 809.2, subdivision (b) did not arise until the Court of Appeal’s decision in this case and Dignity Health’s Answer Brief. (3rd MJN 4.) In fact, Dignity Health made the identical point in its opposition to Natarajan’s Petition for Writ of Mandate in the superior court (8-CT-2112), its Respondent’s Brief in the Court of Appeal, and its Answer to Petition for Review in this Court.

E. Conclusion

Dignity Health respectfully requests that the Court deny Natarajan's Third Motion for Judicial Notice.

Dated: September 11, 2020 MANATT, PHELPS & PHILLIPS, LLP

By: s/Barry S. Landsberg
BARRY S. LANDSBERG
Attorneys for Respondent
DIGNITY HEALTH

PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **September 11, 2020**, I served the within:

RESPONDENT’S OPPOSITION TO NATARAJAN’S THIRD MOTION FOR JUDICIAL NOTICE on the interested parties in this action addressed as follows:

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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 **September 11, 2020**, at Los Angeles, California.



Brigette Scoggins

STATE OF CALIFORNIA
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA
Supreme Court of CaliforniaCase Name: **NATARAJAN v. DIGNITY HEALTH**Case Number: **S259364**Lower Court Case Number: **C085906**

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9/11/2020

Date

/s/Joanna McCallum

Signature

McCallum, Joanna (187093)

Last Name, First Name (PNum)

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