LIU, J.

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S196830

IN THE SUPREME COURT OF CALIFORNIA

OSAMAH EL-ATTAR
Plaintiff and Appellant,

v.

HOLLYWOOD PRESBYTERIAN MEDICAL CENTER,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR
CASE NO. B209056

REPLY TO ANSWER TO PETITION FOR REVIEW

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REPLY TO ANSWER TO PETITION FOR REVIEW

INTRODUCTION

According to Dr. El-Attar, if this court were to grant review and file an opinion it would likely muck up the law, creating "more confusion, rather than clarification, in the law relating to the medical peer review process and the balance of power" between hospital management and the medical staff. (APFR 3.)

We disagree. This court's decisions do not cause confusion; they cure it. And, in this case in particular, clarity in the law is needed regarding the important issue of a hospital board's duty to oversee the medical staff peer review process when—as here—the medical staff's failure to provide meaningful peer review threatens

patient health and the hospital's ability to keep its doors open to the patients it serves.

Under the Court of Appeal's opinion, the medical staff's Medical Executive Committee (MEC) retains total control over whether necessary peer review proceedings can take place. That is poor public policy, and why review should be granted.

LEGAL ARGUMENT

I. THE HOSPITAL'S PETITION PRESENTS AN ISSUE OF STATE-WIDE IMPORTANCE THAT THIS COURT HAS NEVER ADDRESSED.

The issue presented for review is whether hospital peer review statutes and/or the common law rule of necessity allow a hospital's governing board to appoint physician members of the medical staff to conduct necessary peer review of a possibly dangerous physician when the medical staff declines to make such appointments and expressly asks the board to do so. (PFR 1-7, 14-15, 21-28.) This is a significant public health issue of state-wide importance, and it is an issue that this court has never addressed.

Dr. El-Attar thinks otherwise. He believes this court's decision in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259 (*Mileikowsky*) is dispositive, citing it *16* times in his 14-page answer to the petition for review. That is puzzling.

Mileikowsky held that a hearing officer presiding over medical staff peer review proceedings is not authorized to enter terminating sanctions based on discovery abuse. (*Mileikowsky, supra,* 45 Cal.4th at pp. 1270-1272.) *Mileikowsky* did not address or purport to decide the issue presented here. However, *Mileikowsky* and this court's other medical staff peer review decisions underscore the significance of medical peer review and the need for this court to guide the development of this law in order to protect public health.

II. THIS COURT SHOULD DISREGARD DR. EL-ATTAR'S MISSTATEMENTS REGARDING THE RECORD.

A. Evidence regarding the hospital's potential loss of Medicare and other funding due to Dr. El-Attar's substandard care is highly relevant to whether the rule of necessity allowed the governing board to act when the medical staff did not.

Dr. El-Attar asks this court to ignore all evidence that his substandard care threatened patient health and the ability of Hollywood Presbyterian Medical Center (Hospital) to stay in business. (APFR 4.) Evidence regarding the federal Center for Medicare and Medicaid Services' (CMS) investigation of the Hospital, the CMS's recommendation to withdraw the Hospital's Medicare and other funding, and the audits identifying Dr. El-Attar's substandard care as threatening patient health and the Hospital's primary source of funding, cannot be ignored. It forms

the basis for applying the common law rule of necessity to the board's actions. (PFR 7-15, 21-28; see 8 CT 1718-1723.)

Dr. El-Attar also complains that considering evidence why the board's actions were necessary to protect patient health and ensure the Hospital could keep its doors open fails to give proper deference to the Court of Appeal's decision, which essentially ignored the evidence altogether. (APFR 4.) Dr. El-Attar misunderstands the standard of review. This court does not rely on the Court of Appeal's statement of facts when, as here, a party calls the Court of Appeal's attention to factual omissions and misstatements in a rehearing petition. (Cal. Rules of Court, rule 8.500(c)(2); see PFR 7, fn. 1.)

Moreover, the Supreme Court *"independently* review[s] a decision by a lower appellate court . . . ." (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.) This court has "no need to defer" to the Court of Appeal because this court conducts "the same analysis" as that court. (*Ibid.*) Indeed, this court has a need "*not* to defer [to the Court of Appeal] in order to be free to further the uniform articulation and application of the law within our jurisdiction." (*Ibid.*; see Eisenberg, Horvitz & Wiener, Cal Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶¶ 8:148.2, 13:6, pp. 8-111 to 8-112, 13-2.)

B. The MEC was no puppet of the Hospital board. To the contrary, there was great tension between them.

Dr. El-Attar repeatedly asserts it was the Hospital's board, not the MEC, that was responsible for the MEC's express decision to not appoint physicians to the Judicial Review Committee (JRC) and to delegate that responsibility to the board. (APFR 3, 10-11.) He claims that the "MEC was not given the opportunity to appoint the JRC and hearing officer, and certainly did not refuse to do so." (APFR 10.)

Tellingly, Dr. El-Attar provides no record citations to support his contentions. Indeed, nothing in the record (or in actual fact) supports his attempt to rewrite the history of this case. There was no cooperation between the MEC and the Hospital board, only friction. (27 AR 5802; see 12 AR 2505; 27 AR 5833; 8 CT 1723; see also PFR 9, fn. 2.) And the MEC's own minutes, from both its March 12, 2003 and April 9, 2003, meetings make clear that "since the MEC did not summarily suspend [Dr. El-Attar's] privileges, did not recommend any adverse action relating to [Dr. El-Attar] and has not filed any Section 805 report relating to [Dr. El-Attar]; and since the requested hearing would be to review actions by the Governing Board; *it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing.*" (9 AR 1890-1891, emphasis added; see 9 AR 1890 ["A motion was made, seconded and carried . . . that the Medical Executive Committee leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board"], 1894; PFR 14-15.)

Moreover, substantial evidence supports express and implied findings of the Hospital's appeal's board and the trial court that the Hospital board's appointment of JRC physicians and hearing officer was necessary, substantially complied with the bylaws, and did not violate any rule of fair procedure. (19 AR 4111; 8 CT 1728-1730; PFR 16-17.) If deference is owed by this court, it is to those findings. (See *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136-1137 [" 'Like the trial court, [the appellate court must] review the administrative record to determine whether its findings are supported by substantial evidence in light of the whole record' "].)

CONCLUSION

For these reasons, this court should grant review.

October 28, 2011

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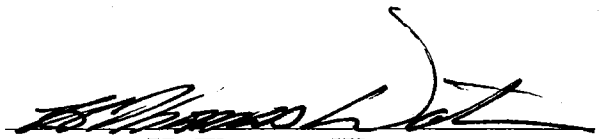
By: 
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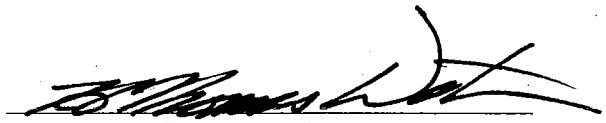
CERTIFICATE OF WORD COUNT

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

The text of this petition consists of 1123 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: October 28, 2011



H. Thomas Watson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On October 28, 2011, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 28, 2011, at Encino, California.

Robin Steiner

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