No. S205568

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARK T. FAHLEN,
Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, et al.,
Defendants and Appellants.

After a Published Decision by the Court of Appeal,
Fifth Appellate District
Case No. F063023

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Dr. Fahlen's Answer to the Petition for Review confirms that the Section 1278.5 exhaustion issue is important and that this case is a proper vehicle for its resolution.[1] His attempt to dismiss the split among the appellate districts is without effect. The Court should grant review.

First, contrary to Dr. Fahlen's contentions, the split among the appellate districts on the Section 1278.5 exhaustion issue is real and substantial. Regardless whether the correct holding is the one reached by the Fourth District in *Nesson v. Northern Inyo County Local Hospital District* (2012) 204 Cal.App.4th 65 (*Nesson*), the one reached below in *Fahlen v. Sutter Central Valley Hospitals* (2012) 208 Cal.App.4th 557 (*Fahlen*) or something in between, the Court should grant review to settle the law.

Second, as Dr. Fahlen's contentions demonstrate, the issue is important. The judicial exhaustion rule is central to peer review and the judicial process. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 (*Westlake*); see also *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, 199-201 (*Kibler*) [judicial exhaustion is a bulwark of the peer review process].) It is an issue of high importance to all health care stakeholders, including hospitals, health professionals and consumers. Dr. Fahlen's arguments regarding the importance of the issue to physicians bolster the ineluctable conclusion that the exhaustion issue is, indeed, important.

Third, the Answer makes clear that this case is a proper vehicle for deciding the exhaustion issue. Dr. Fahlen does not even try to rebut the

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[1] All unspecified section references are to the Health & Safety Code.

showing that the record is sufficient and the case is free of procedural or substantive obstacles to resolving the merits of the exhaustion issue.

Dr. Fahlen presents two additional issues for review; neither is review-worthy. The Court need not review whether Dr. Fahlen's Section 1278.5 challenge to the Hospital's and Mitchell's actions arises out of protected activity under the anti-SLAPP statute because that issue is readily answered by reference to a recent and unanimous decision of this Court. Nor should the Court separately grant review on whether by Section 1278.5 the Legislature intended to abrogate the *Westlake* exhaustion rule as to any claim based on the same facts as a retaliation claim. Dr. Fahlen's position on the issue is baseless; the Fifth District holding on the issue will have no precedential value once this Court grants review; and, review would be futile because the Fifth District's independent holding that Dr. Fahlen's related claims failed on the merits is enough to support the judgment on those claims.

Finally, while the Hospital and Mitchell originally sought an immediate stay of superior court proceedings, Dr. Fahlen now disclaims any intent to pursue immediate discovery. Therefore, action on the stay request is unnecessary at this time.

DISCUSSION

I. THE COURT SHOULD GRANT REVIEW ON THE SECTION 1278.5 EXHAUSTION ISSUE

A. Review Is Necessary to Secure Uniformity of Decision

With its ruling below, the Fifth District created a split among the appellate districts on whether, by Section 1278.5, the Legislature abrogated *Westlake*'s judicial exhaustion rule where a physician alleges that a peer review action was motivated by retaliatory animus. (See Petition for

Review (PFR) at pp. 16-19.) Review is necessary to secure uniformity of decision. Dr. Fahlen's arguments to the contrary are unavailing.[2]

First, Dr. Fahlen seems to acknowledge that in *Nesson* the Fourth District held that a physician who seeks damages under Section 1278.5 on the basis that a peer review action was motivated by retaliatory animus must first exhaust his judicial remedies (see *Nesson*, *supra*, 204 Cal.App.4th at p. 85), but he goes on to argue that this holding is "dicta" because the court also independently found that Dr. Nesson's retaliation claim failed on the merits. (Ans. at pp. 2, 20-21, citing *Nesson*, *supra*, 204 Cal.App.4th at p. 87.) Dr. Fahlen misapprehends *stare decisis*. "When an appellate court bases its decision on alternative grounds, none is dictum. [Citation.]" (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485.) The Fourth District's judicial exhaustion holding is valid precedent. The split is real, and this Court should grant review to secure uniformity of decision on the Section 1278.5 exhaustion issue.

Next, Dr. Fahlen seems to suggest that the Court should ignore the split because the Fourth and Fifth districts' holdings will apply only to "cases in which physicians have a statutory retaliation claim under Section 1278.5." (See Ans. at p. 1, see also *id.*, at pp. 10-11.) Section 1278.5, however, appears to provide that presentation of any "report" followed by

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[2] In his Answer, Dr. Fahlen relies on information outside the Fifth District's opinion for the historical facts of his case. (See Answer at pp. 2-7.) "[A]s a policy matter [this Court] normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (Cal. Rules of Court, rule 8.500(c)(2).) Dr. Fahlen did not pursue rehearing or otherwise call the Court of Appeal's attention to any alleged omission or misstatement of fact. Thus, his reliance on facts other than those stated in the opinion is improper.

an adverse action is enough for a physician to make a claim, regardless of the nature of the report or the amount of time that separates those occurrences. (See § 1278.5, subd. (b)(1)(A).) Given the number of reports presented in hospitals, rare will be the case in which a physician won't be able to allege presentation of a report prior to the adverse peer review action. In other words, if Section 1278.5 creates an exception, the exception swallows the *Westlake* exhaustion rule because it will excuse most—if not all—physicians seeking damages based on claims that a peer review action was maliciously motivated from the judicial exhaustion requirement.

Dr. Fahlen also appears to argue that review is unnecessary because the Fifth District's analysis and holding are more sound. (See Ans. at pp. 1-2, 21-22.) But the fact is that the exhaustion holdings in *Nesson* and *Fahlen* are in conflict. (Compare *Nesson*, *supra*, 204 Cal.App.4th at p. 85 [physician must exhaust judicial remedies before pursuing damages under Section 1278.5 on basis that peer review action was maliciously motivated] with *Fahlen*, *supra*, 208 Cal.App.4th at p. 579 [physician need not exhaust judicial remedies before seeking damages under Section 1278.5 on basis that peer review action was maliciously motivated].) Absent review, the conflict will lead to confusion and inconsistent judgments. Regardless of which holding is right, the Court should grant review to resolve the conflict.

Dr. Fahlen goes as far as asserting that the Fourth District's holding is so clearly wrong that "[i]t is extremely unlikely that any court will follow *Nesson* rather than [*Fahlen*] on [the exhaustion] question." (Ans. at p. 22.) The justices of the Fourth District considered their opinion an important contribution to the development of the law—and the *Westlake* exhaustion issue is a principal focus of that opinion. (See Cal. Rules of Court, rule 8.1105(c) [standards for certifying opinion for publication].) And, as demonstrated by the letters supporting the petition for review, *Nesson* is on

solid ground and stands in stark contrast to *Fahlen* on the judicial exhaustion issue. Absent review, deeper splits and inconsistent judgments are virtual certainties.

Restive to argue the merits, Dr. Fahlen contends that the Fifth District got it right because an exhaustion rule never applies to a statutory whistleblower claim where the Legislature "acknowledged an administrative remedy but did not require exhaustion." (Ans. at pp. 10-11, citing *Runyon v. Board of Trustees of the Cal. State University* (2010) 48 Cal.4th 760 (*Runyon*) and *State Board of Chiropractic Examiners v. Superior Court* (*Arbuckle*) (2009) 45 Cal.4th 963 (*Arbuckle*); see also Ans. at pp. 12-13, 16-19.) By contrast, the Hospital and Mitchell believe that the *Arbuckle/Runyon* analysis applies only where the Legislature imposes a claim requirement and the issue is whether, by the claim requirement, the Legislature intended to *create* an exhaustion rule. (See *Arbuckle*, *supra*, 45 Cal.4th at pp. 971-976; *Runyon*, *supra*, 48 Cal.4th at pp. 767-774.) But, where, as here, the issue is whether the Legislature displaced an established exhaustion rule, then, consistent with the Fourth District's approach, displacement occurs only where the Legislature expressly says so or where displacement is necessary to give the statute effect. (See PFR at p. 7, citing *Campbell v. Regents of the University of Cal.* (2005) 35 Cal.4th 311, 329 (*Campbell*) and *Torres v. Auto. Club of So. Cal.* (1997) 15 Cal.4th 771, 779 (*Torres*).) While not directly relevant to the review question, the debate demonstrates that, absent review, the split is likely to spread because reasonable arguments can be made to support both the Fourth District's and the Fifth District's holdings.

Dr. Fahlen misses the mark when he argues that review is unnecessary because, by Section 1278.5, the Legislature "specifically intended" to provide a remedy for peer review actions motivated by retaliatory malice. (Ans. At pp. 11-12.) But, here, the question presented is

whether, assuming the Legislature intended to provide a damages remedy, must a physician exhaust his judicial remedies before pursuing that remedy? On this issue, the appellate districts are split.

Dr. Fahlen also seems to contend that only the Fifth District's holding is consistent with the language and history of the 2007 amendment to Section 1278.5. (See Ans. at pp. 12-16.) As illustrated by the holdings of the Fourth and Fifth districts, the statutory language and the relevant history are susceptible to different readings, particularly on the issue of whether a physician may seek damages on the basis that a peer review action was maliciously motivated without first exhausting his judicial remedies. For example, Dr. Fahlen asserts that subdivision (l) "reflects" the Legislature's "decision" that peer review committees and trial courts would have "concurrent jurisdiction."[3] (Ans. at p. 13.) But peer review includes judicial review by petition for administrative mandamus. (See Bus. & Prof. Code, § 809.8.) It is far from clear that, by subdivision (l) or any other part of Section 1278.5, the Legislature intended for trial courts to adjudicate the merits of a physician's damages claim prior, and without regard, to a mandamus judgment.

The split on the Section 1278.5 exhaustion issue is real and substantial. This Court should grant review.

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[3] Subdivision (l) of Section 1278.5 provides as follows:

> Nothing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code.

B. Review Is Necessary to Settle an Important Legal Question

Even if the appellate districts did not disagree—and they do—review should be granted to settle the important issue whether, by Section 1278.5, the Legislature meant for hospitals and health care professionals, including physicians who participate in peer review, to be subject to suit, trial by jury and substantial damages judgments, even where the peer review was fair and the outcome was justified. The judicial exhaustion rule is central to peer review and quality care and, therefore, is an issue of high importance to all health care stakeholders, including hospitals, health professionals and consumers.

For his part, Dr. Fahlen focuses on the importance of the issue to physicians. (See Ans. at pp. 23-26.) The Hospital and Mitchell agree that, in addition to hospitals and the public, physicians—those who are the subject of peer review and those who serve on peer review bodies—are major stakeholders here. (See PFR at pp. 19-22.) Dr. Fahlen's observations, however, only underscore the importance of the exhaustion issue and add to the reasons that this Court should grant review.

C. This Case Is a Proper Vehicle for Reviewing the Exhaustion Issue

This case is a proper vehicle for deciding the issue because the record is sufficiently developed and the case is free of procedural or substantive obstacles to a decision on the merits of the exhaustion issue. In his Answer, Dr. Fahlen does not dispute these facts. It is, therefore, clear that indeed this case is a proper vehicle for reviewing the exhaustion issue.

II. FAHLEN HAS NOT DEMONSTRATED THAT THE FIFTH DISTRICT'S OPINION RAISES ANY OTHER REVIEW-WORTHY ISSUES

Dr. Fahlen asks the Court to review two additional issues. Neither issue appears to be worthy of review.

First, Dr. Fahlen appears to argue that the Court should review whether his Section 1278.5 challenge to Mitchell's and the Hospital's actions arises out of protected activity under Code of Civil Procedure section 425.16, subdivision (e). (See Ans. at pp. 29-30.) But in its recent, unanimous opinion in *Kibler*, *supra*, 39 Cal.4th at page 198, this Court held that claims arising out of statements made in pursuit of a workplace-violence injunction that were related to (but not made in the course of) a peer review proceeding were made "in connection with" an official proceeding authorized by law (that is, a peer review action) and, therefore, protected activity under subparagraph (2) of subdivision (e). It follows that Dr. Fahlen's claims arising out of Mitchell's statements to Gould Medical Group and Dr. Fahlen, which were related to the peer review proceedings, were protected activity properly subject to a special motion to strike. (See *Fahlen*, *supra*, 208 Cal.App.4th at p. 562 [Mitchell spoke with Gould in order "to eliminate the need for peer review proceedings"; Mitchell told Dr. Fahlen that, if he didn't leave voluntarily, the hospital "would begin an investigation and peer review"].) In any event, these allegations are covered by Dr. Fahlen's Fourth Cause of Action, which was excluded from the special motion to strike. (See Ans. at p. 33.) As for Dr. Fahlen's claims arising out of the Board's decision to terminate his privileges, the Board's decision was based on "its own review of the evidence at the [peer review] hearing" and, thus, under *Kibler*, it was made "in connection with" the peer

review proceeding and properly subject to a special motion to strike.[4] (See *Fahlen*, *supra*, 208 Cal.App.4th at p. 564.) Thus, the issue is readily resolved by application of *Kibler*, and review should not extend to this issue.

Nor should review extend to Dr. Fahlen's second issue, which appears to be whether by Section 1278.5 the Legislature intended to abrogate the *Westlake* exhaustion rule as to all "cause[s] of action based on the same facts as a pending retaliation claim under Section 1278.5." (See Ans. at p. 26; *id.* at pp. 32-33.) First, Dr. Fahlen's position on the issue is entirely unsupported, which is likely why there isn't a hint of disagreement among the appellate districts and why the issue is not sufficiently important

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[4] In urging a contrary finding, Dr. Fahlen relies on *Smith v. Adventist Health Systems/West* (2010) 190 Cal.App.4th 40 (*Smith*). There, following a mandamus judgment ordering reinstatement, a hospital "screened out" the physician's reapplication for the medical staff, on the ground that, under the bylaws, he had not satisfied the waiting period after the prior suspension. (*Id.* at p. 46.) The physician sued challenging the decision. The defendants filed an anti-SLAPP motion arguing that the challenge arose from a peer review body's interpretation of hospital bylaws that, under *Kibler*, constituted protected activity. (*Smith*, *supra*, 190 Cal.App.4th at p. 62.) The Fifth District found that no peer review body played a role in the decision and, therefore, the decision was not protected activity under *Kibler*. (*Smith*, *supra*, 190 Cal.App.4th at pp. 63-64.) The Fifth District further concluded that the decision was not an official proceeding or in connection with an official proceeding under subdivisions (e)(1) and (e)(2) because it was not made pursuant to procedures governed by the Business and Professions Code, it did not require an 805 Report, and it was not accompanied by a right to a hearing subject to judicial review by administrative mandate. (*Smith*, *supra*, 190 Cal.App.4th at p. 64.) Here, by contrast, the Board action was part of the peer review proceeding under the applicable bylaws; was based on the record from the proceeding; did trigger an 805 Report; and is subject to mandamus review. Accordingly, under *Kibler*, Dr. Fahlen's claims arising out of the Board action are related to a peer review proceeding and, thus, protected activity under the anti-SLAPP statute.

to merit the Court's attention at this time. (See Cal. Rules of Court, rule 8.500(b)(1).) Second, the Fifth District's holding on this issue will have no precedential effect because, once this Court grants review, the opinion will be off the books. (See Cal. Rules of Court, rule 8.1105(e)(1) [unless otherwise ordered, opinion is no longer considered published if Supreme Court grants review].) Third, a substantial procedural obstacle thwarts review of the issue: The Fifth District's alternative holding that Dr. Fahlen's additional claims failed on the merits is sufficient to support judgment on those claims, thus review of the issue would be futile. (See *Fahlen*, *supra*, 208 Cal.App.4th at p. 580.)

Because Dr. Fahlen has failed to identify any additional review-worthy issues, review should be limited to whether, under Section 1278.5, a physician may pursue damages on the basis that a peer review action was maliciously motivated without first exhausting his judicial remedies.

III. AT THIS TIME, ACTION ON THE STAY REQUEST IS UNNECESSARY

The Fifth District stayed all trial court proceedings and, with its opinion on the merits, it lifted the stay. (See *Fahlen*, *supra*, 208 Cal.App.4th at p. 582-583.) By their request for a stay from this Court, the Hospital and Mitchell sought to maintain the status quo that existed during the proceedings in the Fifth District. The request was primarily directed at the period between the finality of the Fifth District proceeding and this Court's grant of review.

The Hospital and Mitchell's concern arose out of Dr. Fahlen's discovery demands immediately following the Fifth District's opinion. (See PFR at pp. 24-25; *id.*, exh. B at ¶¶ 3-4.) Dr. Fahlen now disclaims any interest in immediate discovery. (See Ans. at pp. 34-35.) Thus, it may be unnecessary for this Court to enter a stay.

Once this Court grants review, of course, all further proceedings on the merits upon the causes of action affected by the special motion to strike will be automatically stayed. (See Code Civ. Proc., § 916, subd. (a) [perfecting of appeal "stays proceedings in the trial court upon the judgment, or order appealed from or upon the matters embraced therein or affected thereby"]; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195 & fn. 8 (*Varian Medical*) ["an appeal from the denial of an anti-SLAPP motion automatically stays further trial court proceedings on the merits [of the causes of action affected by the motion]"].) If Dr. Fahlen pursues trial court proceedings limited to the Fourth Cause of Action, which was not included in the special motion to strike, the superior court will have to decide whether such proceedings are reconcilable with the appeal from the anti-SLAPP order. (See *ibid.*) Quite surprising, though, would be a finding that Dr. Fahlen's outstanding discovery is reconcilable with the appeal because it goes to the merits of all of his claims, including those covered by the anti-SLAPP motion. (See PFR, exh. B at Exh. 2.)

For now, however, this Court need not act on the request for a stay of superior court proceedings.

CONCLUSION

The Court should grant review to resolve the conflict among the appellate districts on the important issue whether, by Section 1278.5, the Legislature abrogated the *Westlake* judicial exhaustion rule for any physician who alleges that a peer review action was motivated by discriminatory or retaliatory animus. Because Dr. Fahlen's additional

issues do not satisfy the requirements for review, the Court should limit review to this issue.

DATED: October 24, 2012 HANSON BRIDGETT LLP

By: _____
JOSEPH M. QUINN
Attorneys for Defendants and Appellants SUTTER CENTRAL VALLEY HOSPITALS and STEVE MITCHELL

WORD CERTIFICATION

I, Joseph M. Quinn, counsel for SUTTER CENTRAL VALLEY HOSPITALS and STEVE MITCHELL, hereby certify, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing Reply to Answer to Petition for Review, that it contains 3,287 words, including footnotes (and excluding caption, certificate of interested entities or persons, tables, signature block, and this certification).

Dated: October 24, 2012

By: _____
Joseph M. Quinn

PROOF OF SERVICE

I, Melinda Less, declare that I am a resident of the State of California. I am over the age of 18 years and not a party to the within action; that my business address is Hanson Bridgett LLP, 425 Market Street, 26th Floor, San Francisco, California 94105. On October 25, 2012, I served a true and accurate copy of the document(s) entitled:

REPLY TO ANSWER TO PETITION FOR REVIEW

on the party(ies) in this action as follows:

Stephen D. Schear, Esq. Law Office of Stephen Schear 2831 Telegraph Avenue Oakland, CA 94609	Counsel for Plaintiff Mark T. Fahlen, M.D.
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Court of Appeal of the State of California Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal
The Honorable Timothy W. Salter Department 22 Stanislaus County Superior Court 801 10th Street Modesto, CA 95353	Superior Court

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 Hanson Bridgett 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 25, 2012, at San Francisco, California.

Melinda Less

Melinda Less