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

OPENING BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure the vitality of the common law, courts strive to harmonize statutes with pre-existing common law rules. A statute will be found to abrogate a rule only if the Legislature discloses a clear and unequivocal intent to accomplish that end. In this case the lower court concluded that, by Health and Safety Code section 1278.5 (Section 1278.5), the Legislature abolished the decades-old exhaustion requirement applicable to physician peer review.[1] But this conclusion cannot stand because the Legislature disclosed no clear intent to abrogate the exhaustion requirement, and the statute can be comfortably harmonized with the common-law requirement.

Established in the common law is the principle that a physician who seeks civil remedies on the basis that a quasi-judicial peer review action was maliciously motivated must first exhaust judicial remedies by securing a writ of administrative mandamus. (See *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 (*Westlake*).) The rule promotes several objectives, including respect for professional and expert quasi-judicial proceedings and findings, a preference for judicial, rather than jury, review of proceedings and findings, and promotion of the difficult process of peer review, which is essential to ensuring quality care. (*Ibid.*) Peer review and the exhaustion requirement are now elemental to health care law in California.

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[1] The full text of Section 1278.5 is set out in attachment "A."

In 2007, the Legislature extended a health care whistleblower statute, Section 1278.5, to physicians. Following the amendment, a physician against whom adverse action is taken because he reported unsafe conditions at a health facility may bring an action for civil remedies. (See § 1278.5, subd. (g).) Below, the Court of Appeal concluded that, as to claims under Section 1278.5, the Legislature abrogated the exhaustion requirement.

A statute abrogates an established rule only if the Legislature clearly discloses such an intent. In Section 1278.5, the Legislature did not address the exhaustion requirement. Nowhere did it articulate—let alone "clearly" articulate—an intent to abrogate the requirement. Nor is abrogation necessary to give full effect to the statute's terms or intent. Thus, Section 1278.5 does not abrogate the requirement and the statute and the requirement should be construed together.

In holding that Section 1278.5 abrogated the rule, the Court of Appeal relied on case law addressing whether administrative processes trigger exhaustion requirements. Here, though, it is settled that the quasi-judicial peer review is sufficiently judicial to trigger exhaustion. The Court of Appeal also relied on misperceptions about the practical effect of construing Section 1278.5 consistent with the exhaustion requirement. Section 1278.5 can—and should—be construed consistent with the exhaustion requirement.

The Court of Appeal's legal error led to error in its disposition. Plaintiff Mark T. Fahlen, a nephrologist, enjoyed

staff privileges at Memorial Medical Center in Modesto; but during his tenure, he clashed repeatedly with nurses. After quasi-judicial peer review, the Hospital's board of trustees found that Fahlen's conduct was inappropriate and detrimental to patient care, and decided not to renew his privileges. Without exhausting judicial remedies, Fahlen brought Section 1278.5 claims against Sutter Central Valley Hospitals, which operates the Hospital, and the Hospital's chief operating officer, alleging that the quasi-judicial peer review action amounted to retaliation for Fahlen's complaints about nursing staff.

Defendants filed a special motion to strike under the anti-SLAPP statute, arguing that Fahlen could not demonstrate probable success on his Section 1278.5 claims because he had failed to exhaust judicial remedies. The trial court denied the motion finding that Defendants failed to establish that Fahlen's claims arose from protected speech activity. The Court of Appeal reversed on that issue, but held that, in Section 1278.5, the Legislature abrogated the exhaustion requirement. Fahlen's Section 1278.5 claims, therefore, survived the special motion to strike.

This Court should reverse the Court of Appeal's judgment on the Section 1278.5 claims because the Legislature did not abrogate the exhaustion requirement and, in light of the requirement, Fahlen cannot demonstrate a probability of success on his Section 1278.5 claims.

ISSUE PRESENTED

A physician who seeks civil remedies on the basis that a quasi-judicial peer review action was maliciously motivated must first pursue mandamus relief. In 2007, the Legislature extended Section 1278.5, a health care whistleblower statute, to cover physicians; it did not clearly disclose an intent to abrogate the exhaustion requirement. As to Section 1278.5 claims based on allegedly retaliatory quasi-judicial peer review, has the exhaustion requirement been abrogated?

FACTUAL AND PROCEDURAL BACKGROUND

The following discussion is based on the Court of Appeal's factual account. (See Cal. Rules of Court, rule 8.500(c)(2).)

A. Fahlen Clashes with Nurses While Holding Staff Privileges at the Hospital; by 2007, Clashes Are More Frequent

Fahlen is a nephrologist who was employed by Gould Medical Group (Gould) in Modesto. (*Fahlen v. Sutter Central Valley Hosps.* (Aug 14, 2012, F063023) (Slip Op.), at p. 4.) Starting in 2004, he enjoyed staff privileges at Memorial Medical Center, a hospital operated by defendant Sutter Central Valley Hospitals. (*Ibid.*) Between 2004 and 2006, Hospital officials received four reports of Fahlen clashing with nurses over care issues. (*Ibid.*) In the eight-month period starting in August 2007, officials received reports of six more incidents of Fahlen clashing with nurses. As to some of the incidents, Fahlen reported the nurses to nursing supervisors or filed written reports. (*Ibid.*) Hospital officials became concerned about

Fahlen's behavior, which, as a principal hospital accrediting body has determined, imperils patient care and safety. (See The Joint Commission, Sentinel Event Alert, Issue 40, "Behavior that undermines a culture of safety," July 9, 2008, available at www.jointcommission.org/-assets/1/18/SEA_40.pdf, last visited 2/4/2013 (Sentinel Event Alert #40) [intimidating and disruptive behavior, including verbal outbursts, adversely affects patient care and safety and "must [be] address[ed]"].)

In May 2008, Steve Mitchell, the Hospital's chief operating officer, contacted Gould officials. (Slip Op. at p. 4.) He hoped that they would talk to Fahlen, Fahlen would become disruptive, Gould would fire Fahlen, and he would leave town. (*Ibid.*) Gould did fire Fahlen. (*Ibid.*) The termination resulted in the cancellation of his malpractice insurance and, without insurance, Fahlen could not treat patients at the Hospital. (*Ibid.*) Fahlen scheduled a meeting with Mitchell, apparently to tell him that he planned to open his own practice and continue to treat patients at the Hospital. (*Id.* at p. 5.) A meeting was set for May 30. (See *ibid.*) According to Fahlen, Mitchell advised him that he should leave Modesto or the Hospital would begin an investigation and peer review that would result in an report to the Medical Board. (*Id.* at p. 5.)

B. The Medical Staff Initiates Peer Review and, Based on the Record, the Board of Trustees Declines to Renew Fahlen's Privileges

The medical staff initiated a peer review proceeding by asking Fahlen for information regarding his interactions with

nurses on five occasions beginning in December 2007. (Slip Op. at p. 5.) Fahlen responded. (*Ibid.*) The medical staff appointed an investigative committee that would report to the medical executive committee (MEC), which, under the medical staff bylaws, reviews applications for staff privileges and initiates corrective or disciplinary actions against medical staff. (*Ibid.*) The investigative committee reported its findings. (*Ibid.*) On the strength of that report, the MEC recommended against renewal of Fahlen's privileges. (*Ibid.*) The MEC notified Fahlen of its recommendation and his right to contest it. (*Ibid.*)

Fahlen asked for a hearing. (Slip Op. at p. 5.) The MEC issued a statement of charges describing 17 incidents of disruptive or abusive behavior toward staff and one incident of abusive and contentious behavior during an interview with the investigative committee. (*Id.* at pp. 5-6.) A judicial review committee (JRC) was formed and an evidentiary hearing was held. (*Id.* at p. 6.) The JRC concluded that Fahlen's "interaction with the nursing staff at [the Hospital] was inappropriate and not acceptable" "on several occasions." (*Ibid.*) The JRC, however, disagreed with the MEC's recommended disposition. In its view, Fahlen's behavior "appreciably improved" after counseling and anger management sessions, which he solicited after the MEC issued its recommendation. (*Ibid.*) To the extent the record revealed conduct "detrimental to the delivery of patient care, the nursing staff . . . was more to blame for such conduct than was [Fahlen]." (*Ibid.*) The medical staff, in the JRC's opinion, should have intervened earlier and the MEC should have considered

other dispositions. (*Ibid.*) The JRC concluded that Fahlen's privileges should be renewed. (*Ibid.*)

Consistent with the bylaws, the board of trustees made the final decision. (Slip Op. at p. 7.) The board asked the JRC for additional information regarding the evidence it relied upon and its findings. (*Ibid.*) The JRC declined to provide more. (*Ibid.*) The board reviewed the record as it was presented and found that Fahlen's conduct "was inappropriate and not acceptable, [and was] directly related to the quality of medical care at the Hospital." (*Ibid*; see Sentinel Event Alert #40 at p. 1 [to assure quality care and safety health care organizations "must address" intimidating and disruptive behavior.) It criticized the JRC's findings and conclusions as "unlinked to any factual support in the hearing record." (Slip Op. at p. 7.) It reversed the JRC's decision, effectively restoring the MEC's recommendation that the Hospital not renew Fahlen's privileges. (*Ibid.*) Fahlen did not pursue mandamus relief and the Hospital filed an 805 Report with the Medical Board. (*Ibid.*)

C. Fahlen Sues for Civil Remedies Alleging Retaliation by Quasi-Judicial Peer Review

Fahlen filed a complaint for damages and other relief against the Hospital and Mitchell. (Slip Op. at p. 7.) He alleged seven causes of action: (1) whistleblower retaliation under Section 1278.5; (2) a right to declaratory relief that the peer review was conducted in bad faith under Business and Professions Code section 803.1 (Section 803.1); (3) interference with the right to practice an occupation; (4) intentional

interference with his contractual relations with Gould; (5) interference with prospective business advantage; (6) retaliation against him for "advocat[ing] for appropriate care for [his] patients," in violation of Business and Professions Code sections 510 and 2056; and (7) wrongful termination of hospital privileges. (*Id.* at pp. 7-8.)

D. Defendants Pursue a Demurrer and Special Motion to Strike; the Trial Court Denies Both

Well established is the rule that quasi-judicial peer review proceedings are "official proceeding[s] authorized by law" within the meaning of subdivision (e)(2) of Code of Civil Procedure section 425.16 (Section 425.16), the anti-SLAPP statute, such that causes of action arising from quasi-judicial peer review are subject to an anti-SLAPP special motion to strike. (See *Kibler v. Northern Inyo County Local Hosp. Distr.* (2006) 39 Cal.4th 192, 200 (*Kibler*).) Also established is the common law rule that before seeking civil remedies for allegedly maliciously-motivated quasi-judicial peer review action, a physician must first exhaust judicial remedies by securing a writ of administrative mandamus. (See *Westlake, supra*, 17 Cal.3d at p. 484.) Fahlen did not allege that he had pursued mandamus relief. (Slip Op. at p. 7.) Thus, Defendants demurred and filed a special motion to strike arguing that Fahlen's failure to exhaust judicial remedies meant that he could not establish probable success on his claims. (*Id.* at p. 8)

The trial court overruled the demurrer. (Slip Op. at p. 8.) On the special motion to strike, the trial court found that Fahlen's claims did not arise from protected speech activity.

(*Ibid.*) Defendants appealed the latter ruling. (*Id.* at p. 9; see Code Civ. Proc., § 425.16, subd. (i) [order denying special motion to strike immediately appealable].)

E. The Court of Appeal Finds That, by Section 1278.5, the Legislature Abrogated the Exhaustion Requirement

The Court of Appeal affirmed in part and reversed in part. It noted that the fourth cause of action for intentional interference with contractual relations with Gould was not covered by the anti-SLAPP motion. (Slip Op. at p. 8, n.3.) It found, however, that the rest of Fahlen's claims were based on the quasi-judicial peer review proceeding and, therefore, they arose from protected activity under the anti-SLAPP statute. (*Ibid.*)

Defendants, again, argued that Fahlen could not demonstrate probable success on these claims because he failed to exhaust judicial remedies. (Slip Op. at p. 9; see *Westlake*, *supra*, 17 Cal.3d at p. 484.) Fahlen argued that the exhaustion requirement did not apply to his claims, especially his Section 1278.5 claim. (Slip Op. at p. 9.)

The Court of Appeal found that the exhaustion requirement applied to Fahlen's third, fifth, sixth and seventh causes of action. (Slip Op. at pp. 27-28.) Because Fahlen had not demonstrated that he had exhausted judicial remedies, the court directed the trial court to strike these claims. (*Id.* at p. 28-29.) It further held, though, that Section 1278.5 claims came within "[an] exception to exhaustion of judicial remedies" established in

Runyon v. Board of Trustees of California State University (2010) 48 Cal.4th 760 (*Runyon*) "and similar cases addressing other whistleblower or antiretaliation statutes." (Slip Op. at p. 19.)

First, the court considered *State Board of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963 (*Arbuckle*). There, the court observed, this Court held that when the Legislature enacted the California Whistleblower Protection Act (CWPA), specifically Government Code section 8547.8, subdivision (c) (Section 8547.8), requiring a complainant to file an administrative claim before filing a tort action for damages, it did not intend to impose a judicial exhaustion requirement. (Slip Op. at p. 22; citing *Arbuckle, supra*, 45 Cal.4th at pp. 974-976.) The *Arbuckle* holding was based on two factors. First, by providing an administrative process but not requiring that the resulting findings be set aside in a mandamus action, the Legislature did not provide a judicial remedy for a whistleblower to exhaust. (*Id.* at p. 22, citing *Arbuckle, supra*, 45 Cal.4th at p. 976.) Second, the narrow standard that would govern a mandamus proceeding brought by a whistleblower would frustrate the Legislature's clear intent to provide civil remedies. (Slip Op. at pp. 22-23, citing *Arbuckle, supra*, 45 Cal.4th at pp. 977-978.)

The Court of Appeal next discussed *Runyon*, which also involved the CWPA, specifically Government Code section 8547.12 governing CSU employees. (Slip Op. at p. 23, citing *Runyon, supra*, 48 Cal.4th at pp. 763-764.) While "[t]he primary issue" in *Runyon* was exhaustion of administrative remedies, the Court also addressed judicial exhaustion. (See Slip Op. at p. 23;

citing *Runyon*, *supra*, 48 Cal.4th at pp. 773-774.) For the reasons articulated in *Arbuckle*, the Court found that the Legislature did not intend to require that a CSU employee succeed in a mandamus action before filing a civil action. (Slip Op. at p. 23; citing *Runyon*, *supra*, 48 Cal.4th at p. 774.)

The Court of Appeal discerned a rule to the effect that where the Legislature authorizes broad civil whistleblower remedies and acknowledges a claim procedure but does not require that findings be set aside in a mandamus action, then civil claims under the statute need not be exhausted. (Slip Op. at pp. 23-24.) This rule, the court held, applied to Section 1278.5 claims because the Legislature provided whistleblower civil remedies and, in subdivision (h), the Legislature acknowledged "the possibility of parallel peer review administrative proceedings" without requiring that findings be set aside. (See *id.* at p. 24.)

As further support for its holding, the court cited subdivision (d)(1)'s provision that, under certain circumstances, an adverse action taken within 120 days of a complaint about hospital care would be presumed to be retaliatory; an exhaustion requirement would nullify the presumption. (Slip Op. at pp. 26-27.) The court cited subdivision (g)'s reinstatement provision; "there would never be a circumstance in which reinstatement of a doctor's staff privileges would still be required in a civil action" "[i]f a doctor were required to successfully set aside an administrative order terminating his or her privileges as a precondition to a section 1278.5 action." (*Id.* at 27.) And, the

court cited the Legislature's "purpose of protecting the public from unsafe patient care and conditions" and Section 1278.5's damages remedy, both of which, according to the court, would be frustrated if a complaining physician were required to pursue mandamus review. (*Ibid.*)

Having found that Fahlen had overcome the judicial exhaustion defense, the court affirmed the trial court's anti-SLAPP order on the first cause of action under Section 1278.5. (Slip Op. at p. 27.) The court also found that Fahlen had demonstrated the requisite probability of success on his Section 803.1 declaratory relief "claim": Even though Fahlen's "bad faith" allegation did not amount to a separate cause of action, proof of bad faith "in addition to the proof of retaliation under section 1278.5 can result in a different, additional remedy under section 1278.5, subdivision (g), [i.e., a declaration that the peer review was conducted in bad faith]." (*Id.* at pp. 30-31.) "[T]he exception from the requirement for judicial exhaustion applicable to a section 1278.5 whistleblower cause of action also applies to the additional allegations of bad faith and the request for additional declaratory relief in the second cause of action." (*Id.* at p. 31.)

F. This Court Agrees to Review the Court of Appeal's Abrogation Holding

Defendants asked this Court to review the issue whether, by amending Section 1278.5 to cover physicians, the Legislature intended to abrogate the judicial exhaustion requirement where a physician alleges that quasi-judicial peer review was retaliatory.

(See Pet. for Rev., filed Sept. 24, 2012, at p. 1.) Fahlen opposed review but argued that if review were granted, the Court should also decide whether: (1) his challenges to the actions that led up to the renewal of his privileges arose from protected activity under the anti-SLAPP statute; and, (2) by its amendments to Section 1278.5, the Legislature intended to abrogate the *Westlake* requirement as to all causes of action based on the same facts as a Section 1278.5 claim. (See Ans. to Pet. for Rev., filed Oct. 15, 2012, *passim*.) This Court granted the petition and limited review to the issue presented in the petition. (See Order, filed Nov. 14, 2012.)

STANDARD OF REVIEW

When construing a statute, a court must seek to "'ascertain the intent of the drafters so as to effectuate the purpose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of legislative intent, [courts] first examine the words themselves, giving them their usual and ordinary meaning and construing them in context.' [Citation.]" (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) The statute "should be read in the context of the entire law." (*Metropolitan Water Dist. of So. Cal. v. Superior Court* (2004) 32 Cal.4th 491, 501 (*Metropolitan Water Dist.*).)

ARGUMENT

Below, we discuss Section 1278.5 in the context of the law of peer review, the well-established exhaustion requirement, and legislative enactments reinforcing peer review and the exhaustion requirement. Then, we explain why Section 1278.5

should be construed consistent with the exhaustion requirement and why Fahlen's first and second causes should have been stricken due to his failure to exhaust judicial remedies.

I. UNDER THE COMMON LAW, A PHYSICIAN MUST EXHAUST REMEDIES BEFORE BRINGING A TORT ACTION FOR RETALIATORY PEER REVIEW

A. Quasi-Judicial Peer Review Actions at Private Hospitals Are Reviewable by Administrative Mandamus

Medical peer review is the process by which a committee of licensed medical personnel establishes standards and procedures for patient care, evaluates physicians applying for staff privileges, assesses physician performance, and reviews other matters critical to the hospital's functioning. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10; see also *Mileikowsky v. West Hills Hosp. & Med. Ctr.* (2009) 45 Cal.4th 1259, 1267 (*Mileikowsky*); Bus. & Prof. Code, § 805, subd. (a)(1).)

This case involves a quasi-judicial peer review action regarding staff privileges at a private hospital. Privilege determinations made by private associations, including hospitals, must satisfy common-law "fair process" principles. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 549-555 (*Pinsker*) [discussing common-law fair-process review and applying principles to professional association's decision to deny admission]; *Ascherman v. Saint Francis Mem. Hosp.* (1975) 45 Cal.App.3d 507, 511-512 [applying *Pinsker* analysis to private hospital's privilege determination].)

"Fair process" is not fixed, and hospitals "retain the initial and primary responsibility for devising a method which provides [a physician] adequate notice of the 'charges' against him and a reasonable opportunity to respond. In drafting such procedure . . . the organization should consider the nature of the tendered issue and should fashion its procedure to insure a *fair* opportunity for an applicant to present his position. Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief in the event of the abuse of such discretion." (*Pinsker, supra,* 12 Cal.3d at pp. 555-556, emphasis in original.) Staff privileges are subject to divestment, but only after an adequate showing in a proceeding conducted consistent with fair-process principles. (*Anton v. San Antonio Comm. Hosp.* (1977) 19 Cal.3d 802, 824-825 (*Anton*).)

A physician may challenge an adverse action by way of a petition for administrative mandamus. (*Anton, supra,* 19 Cal.3d at p. 820; see Code Civ. Proc., § 1094.5.) "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc., § 1094.5, subd. (b).) "Abuse of discretion is established if the [hospital] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (*Ibid.*) Generally, the petitioner is entitled to an independent determination of the legal issues and the court's judgment will be based on the administrative record, plus additional evidence

admissible under section 1094.5, subdivision (e). (See *Pomona Valley Hosp. Med. Ctr. v. Superior Court* (1997) 55 Cal.App.4th 93, 102.)

Initially, courts exercised their independent judgment to determine whether the findings offered in support of the decision were supported by the weight of the evidence. (*Anton, supra*, 19 Cal.3d at p. 825.) The Legislature, however, changed that when it added current subdivision (d) to Section 1094.5, which provides that, except in limited circumstances involving podiatrists, in cases arising from hospital boards, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (d).)

B. A Physician Must Exhaust Judicial Remedies Before Pursuing Damages for Allegedly Malicious Quasi-Judicial Peer Review

In its unanimous decision in *Westlake*, this Court established that a physician must exhaust administrative and judicial remedies before pursuing damages on the basis that quasi-judicial peer review was maliciously motivated.

There, Westlake Community Hospital accorded staff privileges to Kaiman, a physician. (*Westlake, supra*, 17 Cal.3d at pp. 469-470.) Approximately a year later, a committee of physicians reviewed Kaiman's patients' medical records and treatment records and recommended that the credentials committee revoke her privileges. (*Id.* at p. 471.) The credentials committee adopted the recommendation, as did the board of

directors. (*Ibid.*) Westlake notified Kaiman of the decision and advised her of her right to a hearing before a judicial review committee. (*Ibid.*) A hearing was held. Both sides, through counsel, called witnesses and introduced evidence. (*Ibid.*) The JRC determined that Kaiman's staff privileges should be revoked. (*Ibid.*) Westlake advised her of her right to appeal to the board of directors and she exercised that right by appearing before the board and presenting her objections to the committee's determination. (*Id.* at pp. 471-472.) The board affirmed. (*Id.* at p. 472.)

In the meantime, Kaiman sought staff privileges at Los Robles Hospital. (*Westlake, supra*, 17 Cal.3d at p. 470.) Los Robles formed a committee to consider Kaiman's application and the committee denied the application solely based on the hospital's own internal investigation of Kaiman's qualifications. (*Id.* at p. 472.) Los Robles did not tell Kaiman that she had a right to appeal the committee's decision. (See *ibid.*)

Kaiman sued the hospitals and numerous committee and board members. She alleged that the determinations were the result of a malicious conspiracy against her, and she sought tort damages under several theories. (*Westlake*, *supra*, 17 Cal.3d at p. 470.) The defendants moved for summary judgment arguing that, before seeking damages, Kaiman had to first challenge the actions in mandamus proceedings; her failure to do so meant that her claims were barred. (*Id.* at p. 473.) The trial court denied the motion. The Supreme Court agreed to hear defendants' request for a writ of prohibition. (*Id.* at p. 474.)

In a unanimous opinion authored by Justice Tobriner, the Court held that, prior to maintaining a claim for civil remedies based on a quasi-judicial peer review action, a physician must exhaust the hospital's administrative procedure. (*Westlake*, *supra*, 17 Cal.3d at pp. 469, 476-477.) "[B]efore a doctor may initiate litigation challenging the propriety of a hospital's [decision], he must exhaust the available internal remedies afforded by the hospital." (*Id.* at p. 469.) Administrative exhaustion serves to mitigate the physician's damages, recognizes the expertise of the private hospital association, and "promote[s] judicial efficiency by unearthing the relevant evidence and [thus] providing a record which the court may review." (*Id.* at p. 476.)

The Court also imposed a judicial exhaustion requirement where a physician alleges that a quasi-judicial peer review action was maliciously motivated. Such a claim, the Court found, was akin to a malicious prosecution action based upon the initiation of an "ordinary 'public' administrative proceeding," "which can only be maintained after the allegedly maliciously initiated proceeding has terminated in favor of the person against whom it was brought. [Citations.]" (*Westlake*, *supra*, 17 Cal.3d at p. 483.) A quasi-judicial decision reached by a private hospital is sufficiently similar to a decision by a duly constituted public agency that, as against claims of malicious motivation, it should be deemed proper if it survives appropriate judicial review. (*Id.* at p. 484.) "Accordingly, we conclude that plaintiff must first succeed in overturning the quasi-judicial action before pursuing

her tort claim[s] against defendants." (*Id.* at p. 484.) The Court made clear, though, that the judicial exhaustion rule does *not* apply when a hospital has not provided quasi-judicial process; when a hospital takes adverse action "without affording [a physician] the basic procedural protection to which he is legally entitled, the hospital . . . can offer no convincing reason or justification why [it] should be insulated from an immediate tort suit. . . ." (*Id.* at p. 478.)

The judicial exhaustion requirement promotes three objectives. First, the requirement "accords a proper respect to an association's quasi-judicial procedure, precluding an aggrieved party from circumventing the established avenue of mandamus review." (*Westlake*, *supra*, 17 Cal.3d at p. 484.) Second, it "simplifies court procedures by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions." (*Ibid.*) Third, "[the] procedure affords a justified measure of protection to the individuals who take on, often without remuneration, the difficult, time-consuming and socially important task of policing medical personnel." (*Ibid.*)

Applying its holdings, the Court found that Kaiman's challenge to Westlake's action was premature because Westlake provided quasi-judicial process and Kaiman failed to exhaust judicial remedies. (*Westlake*, *supra*, 17 Cal.3d at p. 485.) Her challenge to Los Robles' action, though, survived because Los Robles did not provide quasi-judicial process. (*Id.* at p. 478.)

The *Westlake* requirement quickly became a fixture of California law and now governs quasi-judicial proceedings in a

variety of contexts. (See, e.g., *Edgren v. Regents of Univ. of Cal.* (1984) 158 Cal.App.3d 515, 520, 523 [former employee's tort challenge to termination barred by failure to exhaust administrative remedies]; *Logan v. Southern Cal. Rapid Transit Dist.* (1981) 136 Cal.App.3d 116, 123-124 [former employee's state-law tort challenge to termination barred by failure to exhaust judicial remedies]; *Interior Systems, Inc. v. Del E. Webb Corp.* (1982) 121 Cal.App.3d 312, 320 [subcontractor's tort claims over substitution on public hospital project barred by failure to exhaust judicial remedies]; *Ferguson v. Writers Guild of Am.* (1991) 226 Cal.App.3d 1382, 1390 [member's tort challenge to association's credits determination barred by failure to exhaust administrative remedies]; *Holder v. Cal. Paralyzed Veterans Ass'n* (1980) 114 Cal.App.3d 155, 164-165 [member's tort challenge to expulsion premature because not preceded by successful mandamus action]; *Bartschi v. Chico Comm. Mem. Hosp.* (1982) 137 Cal.App.3d 502, 508 [physician's challenge to privileges action barred by failure to exhaust private hospital's administrative remedies].)

C. The Legislature Has Codified Quasi-Judicial Peer Review Standards and Integrated Peer Review Into the State's Regulatory System

Since *Westlake*, the Legislature has endorsed quasi-judicial peer review, integrating it into the State's system for monitoring physician conduct.

A key provision is Business and Professions Code section 805 (Section 805). "Peer review body" includes "[a] medical or

professional staff of any health care facility or clinic [duly licensed]. . . ." (Bus. & Prof. Code, § 805, subd. (a)(1)(B).) Peer review includes staff privilege determinations involving peer review bodies:

> A process in which a peer review body reviews the basic qualifications, staff privileges, employment, medical outcomes, or professional conduct of licentiates to make recommendations for quality improvement and education, if necessary, in order to do either or both of the following:
>
> (I) Determine whether a licentiate may practice or continue to practice in a health care facility, clinic, or other setting providing medical services, and, if so, to determine the parameters of that practice.
>
> (II) Assess and improve the quality of care rendered in a health care facility, clinic, or other setting providing medical services.

(Bus. & Prof. Code, § 805, subd. (a)(1)(A).) When privileges are denied for "a medical disciplinary cause or reason," designated individuals must file a report, known as an "805 Report," with the Medical Board. (Bus. & Prof. Code, § 805, subds. (b) & (c); see *Mileikowsky, supra*, 45 Cal.4th at p. 1268.) "[M]edical disciplinary cause or reason" refers to "that aspect of a [physician's] competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care." (Bus. & Prof. Code, § 805, subd. (a)(6).) Prior to making granting or renewing staff privileges, the medical staff must ask the Medical Board whether the physician has been the subject of an 805 Report. (See Bus. & Prof. Code, § 805.5.)

Also key are Business and Professions Code sections 809 through 809.9. There, the Legislature further integrated peer

review into the regulatory scheme and required that acute care facilities provide for quasi-judicial peer review in their medical staff bylaws. (Bus. & Prof. Code, § 809, subd. (a)(8); see *Mileikowsky, supra*, 45 Cal.4th at p. 1267.) Where, as here, a physician is the subject of a final proposed peer review action that requires an 805 Report, the physician is entitled to written notice of the proposed action and a hearing. (Bus. & Prof. Code, § 809.1 subd. (b).) If a hearing is timely requested, then the peer review body must give the physician written notice stating the reasons for the final proposed action, including the acts or omissions with which he is charged, and the time, place, and date of the hearing. (Bus. & Prof. Code, § 809.1, subd. (c); *Mileikowsky, supra*, 45 Cal.4th at pp. 1268-1269.)

The hearing must conform to the medical staff bylaws and fair-process requirements. (See Bus. & Prof. Code, §§ 809.2, 809.3; *Mileikowsky, supra*, 45 Cal.4th at p. 1268.) Specifically, though, the parties have a right to documentary discovery. (Bus. & Prof. Code, § 809.2, subd. (d).) The hearing must be held before a neutral fact-finding panel, often a panel drawn from the physician's peers. (Bus. & Prof. Code, § 809.2, subds. (a) & (b); see *Mileikowsky, supra*, 45 Cal.4th at p. 1264.) The physician "shall have the right to a reasonable opportunity to voir dire the panel members and any hearing officer, and the right to challenge the impartiality of any member or hearing officer." (Bus. & Prof. Code, § 809.2, subd. (c).) At the hearing, the peer review body generally bears the burdens of production and persuasion, and the parties must be allowed to call, examine, and

cross-examine witnesses and submit a written closing statement. (Bus. & Prof. Code, § 809.3.)

The trier of fact must prepare a written decision with findings of fact and a conclusion connecting the decision to the evidence. (Bus. & Prof. Code, § 809.4, subd. (a)(1).) The physician and the peer review body must be advised of any appellate mechanism. (Bus. & Prof. Code, § 809.4, subd. (a)(2).) The appeal must provide for de novo review and allow for the right to appear and respond and the right to be represented by an attorney or designated representative. (Bus. & Prof. Code, § 809.4, subd. (b).) The appellate body must issue a written decision. (*Ibid.*)

Hospitals have a dual structure in which the organized medical staff is responsible for providing medical services and "responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital;" the hospital's governing board, however, has ultimate responsibility for care quality and hospital performance. (Cal. Code Regs., tit. 22, § 70703, subd. (a); see also Cal. Code Regs., tit. 22, § 70701, subd. (a)(1)(F); Bus. & Prof. Code, § 805.5.) A governing board "ha[s] a legitimate function in the peer review process." (Bus. & Prof. Code, §§ 809.05, subd. (a), 809, subd. (a)(8); see *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 80 (*Nesson*) ["[Section 809, subd. (a)(8)] recognizes the role of both a hospital and its medical staff in fulfillment of peer review."].) The board may exercise its independent judgment regarding the evidence presented to the hearing body and the

disposition, provided that it "give[s] great weight to the actions of peer review bodies and, in no event, act[s] in an arbitrary or capricious manner." (Bus. & Prof. Code, § 809.05, subd. (a); *Ellison v. Sequoia Health Servs.* (2010) 183 Cal.App.4th 1486, 1496-1497.)

"Peer review, fairly conducted is essential to preserving the highest standards of medical practice." (Bus. & Prof. Code, § 809, subd. (a)(3).) As part of the peer review process, the Legislature acknowledged and preserved the availability of review by administrative mandamus. (Bus. & Prof. Code, § 809.8.)

D. Courts Recognize the Elemental Importance of Quasi-Judicial Peer Review and the Related Exhaustion Requirement

Also, since *Westlake*, courts have acknowledged peer review's public-safety and quality-of-care underpinnings, as well as peer review's heightened regulatory significance.

"[T]he overriding goal of the state-mandated peer review process is protection of the public and [] while important, physicians' due process rights are subordinate to the needs of public safety. [Citations.]" (*Medical Staff of Sharp Mem. Hosp. v. Superior Court* (2004) 121 Cal.App.4th 173, 181-182.) "We do not wish to denigrate the importance of due process rights; however, it must be emphasized that this is not a criminal setting, where the confrontation is between the state and the person facing sanctions. Here the rights of patients to rely upon competent medical treatment are directly affected, and must

always be kept in mind." (*Id.* at p. 182, quoting, *Rhee v. El Camino Hosp.* (1988) 201 Cal.App.3d 477, 489.)

This Court has held that, for purposes of the anti-SLAPP statute, quasi-judicial hospital peer review proceedings are '"other official proceeding[s] authorized by law'." (*Kibler, supra,* 39 Cal.4th at pp. 199-201.) In its analysis, the Court emphasized that quasi-judicial peer review is legally mandated, and serves the essential role of assisting public agencies to regulate the medical profession and "protect[] the public against incompetent, impaired, or negligent physicians." (*Id.* at pp. 199-200; Bus. & Prof. Code, § 809.05.) The Court pointed out that "the Legislature has accorded a hospital's peer review decisions a status comparable to that of quasi-judicial public agencies" by providing that decisions of both entities are reviewable by administrative mandate after a quasi-judicial hearing. (*Kibler, supra*, 39 Cal.4th at p. 200.)

Further, the Court emphasized an important reason for protecting peer review. "[M]embership on a hospital's peer review committee is voluntary and unpaid," the Court explained, "and many physicians are reluctant to join peer review committees so as to avoid sitting in judgment of their peers." (*Kibler, supra*, 39 Cal.4th at p. 201.) "To hold . . . that hospital peer review proceedings are not 'official proceeding[s] authorized by law' . . . would further discourage participation in peer review by allowing disciplined physicians to file harassing lawsuits against hospitals and their peer review committee members rather than seeking judicial review of the committee's decision by

the available means of a petition for administrative mandate." (*Ibid.*)

II. A SECTION 1278.5 CLAIM BASED ON ALLEGED RETALIATORY QUASI-JUDICIAL PEER REVIEW IS GOVERNED BY THE EXHAUSTION REQUIREMENT

A. In Amending Section 1278.5, the Legislature Did Not Clearly Disclose an Intent to Abrogate the Exhaustion Requirement

A court should not presume the Legislature intended to overthrow a well-established common law rule "unless that intention is made clearly to appear either by express declaration or by necessary implication." (*Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779 (*Torres*), citing *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92; see *Campbell v. Regents of the Univ. of Cal.* (2005) 35 Cal.4th 311, 329 (*Campbell*) [same]; *Metropolitan Water Dist., supra*, 32 Cal.4th at p. 501 [common law controls unless Legislature "must have intended" different result]; see also *United States v. Texas* (1993) 507 U.S. 529, 534 ["[I]n order to abrogate a common-law principle, [a] statute must 'speak directly' to the question addressed by the common law. [Citations.]"].) Abrogation is a necessary implication only where such a construction must be given to give the statute "full effect." (See *Torres, supra*, 15 Cal.4th at pp. 779-780.)

As recently reiterated by this Court: "'As a general rule, "*[u]nless expressly provided,* statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. [Citation.] 'A statute will be construed

in light of common law decisions, unless *its language* "'*clearly and unequivocally* discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter. . . .' [Citations.]" [Citation.]"" (*California Ass'n. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.)" (*Aryeh v. Canon Business Solutions, Inc.* (Jan. 24, 2013, S184929) ___ Cal.4th ____ [p. 7], emphasis in italics added.)

Here, in Section 1278.5, the Legislature did not clearly disclose an intent to unravel peer review or abrogate the exhaustion requirement. (See § 1278.5.) Nor is there any suggestion that the Legislature sought to undermine *Westlake*'s premise that quality-of-care issues are best left to medical professionals, except where the procedure is unfair or the result unjustifiable, in which case tort claims may proceed.

Nesson is instructive. There, a radiologist complained about the quality of the hospital's transcription services and, sometime later, the MEC suspended his privileges, which caused the hospital to terminate its radiology services agreement with the doctor. (*Nesson, supra,* 204 Cal.App.4th at pp. 73-74.) The physician sued, alleging, among others, a Section 1278.5 claim. (*Id.* at p. 75.) The hospital filed an anti-SLAPP motion, arguing that Nesson could not demonstrate probable success on his Section 1278.5 because he had failed to exhaust administrative and judicial remedies. (*Ibid.*) The trial court granted the motion. (*Id.* at p. 76.) Nesson appealed. (*Ibid.*)

The Court of Appeal affirmed. (*Nesson, supra,* 204 Cal.App.4th at p. 89.) The court analyzed common-law and

statutory medical peer review and held that the suspension and termination of the agreement were peer review actions, protected activity under the anti-SLAPP statute. (*Id.* at pp. 78-82.) Next, the court analyzed the "steps a physician who claims he is the victim of faulty medical peer review must take to rectify the situation, before filing a lawsuit." (*Id.* at p. 84.) After discussing *Westlake* and related authorities, the court held that before seeking statutory damages, a physician must exhaust "his administrative and judicial remedies." (*Id.* at p. 85.) It is unremarkable that the court did not discuss at length why it was construing Section 1278.5 in accord with the *Westlake* requirement; after all, a statute must be construed consistent with the common law, unless its language clearly and unequivocally discloses an intent to abrogate. (See *Aryeh*, *supra*, at p. 7; *Campbell*, *supra*, 35 Cal.4th at p. 329; *Torres*, *supra*, 15 Cal.4th at p. 779.) Here, there was no clear statement.

The legislative history supports the plain reading. In 1999, the Legislature enacted Section 1278.5 to promote patient care and safety by encouraging patients and employees to report unsafe patient care and conditions at health facilities to government entities charged with evaluating the facilities. (Request for Judicial Notice in Support of Opening Brief on the Merits (RJN), Ex. 1 at pp. 1-2. [Assem. Com. on Health, Analysis of Sen. Bill No. 97 (1999-2000 Reg. Sess.) as amended June 8, 1999].) The Legislature prohibited retaliation or discrimination against patients or employees who complained to government agencies or cooperated in a government investigation or

proceeding related to care, services or conditions. (§ 1278.5, subd. (b).) Employees who suffered discrimination could seek reinstatement, lost wages, and costs. (§ 1278.5, subd. (g).) Section 1278.5 was modeled on an existing statute that applied to long-term health care facilities. (RJN, Ex. 1 at p. 2.)

In 2007, the Legislature extended Section 1278.5 to physicians. (RJN, Ex. 2 at p. 3 [Assem. Com. on Health, Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as introduced Feb. 21, 2007].) The Legislature tailored several provisions of the existing statute to the hospital-physician relationship. In particular, it extended to physicians the rebuttable presumption that an adverse action was retaliatory if responsible staff knew of the complaint or cooperation and the adverse action occurred within 120 days thereafter. (§ 1278.5, subd. (d)(1).) And it provided that a physician subjected to discriminatory treatment was entitled to reinstatement, reimbursement for lost income resulting from changes in the terms or conditions of her privileges, and legal costs. (§ 1278.5, subd. (g).)

The California Medical Association (CMA) sponsored the amendment. Early on, CMA enumerated the methods that hospitals use to suppress reports by physicians, such as: (1) "direct retaliation," where a hospital sues a physician for voicing concerns; (2) "[u]nderwriting the salary and/or practice expense of a competing physician;" (3) "recruiting competing physicians to the community in the absence of a community deficit for that specialty;" (4) "[b]uying the medical building with a physician's office and refusing to renew the physician's lease;" or (5)

"providing special scheduling priorities for hospital facilities." (RJN, Ex. 2 at pp. 3-4.) Conspicuously absent was any suggestion that hospitals use quasi-judicial peer review to suppress reporting or that the amendment would meaningfully impact peer review. (See *id.*, at p. 4; RJN, Ex. 3 at pp. 6-7 [Sen. Judiciary Com., Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007].)

The California Hospital Association (CHA) expressed concern about the bill's "'unintended consequences'" to medical staff members and, particularly, the "'chilling effect it would have on peer review.'" (RJN, Ex. 3 at pp. 7-8.) Specifically, CHA believed "the bill could stop a peer review process in its tracks by the simple filing of a §1278.5 action." (*Id.*, at p. 8.) CHA expressed further concern about "the lack of clarity as to when the §1278.5 action would have to be filed." (*Ibid.*) In the Senate's view, CHA's "critical question" was "what would happen to a pending peer review action, or to the evidentiary protections and immunity from liability that attend peer review actions, once the member of the medical staff files a § 1278.5 action?" (*Ibid.*) The concerns prompted the Senate Judiciary Committee to question whether "a §1278.5 action [should] be held in abeyance until a peer review process, if initiated, has been completed?" (*Ibid.*, emphasis omitted.)

CHA also wanted clarification "to ensure that hospitals retain the right to take disciplinary action with regard to disruptive behavior by employees, patients and physicians, regardless of their protected activity." (RJN, Ex. 4 at p. 5 [Sen.

Health Com., Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007].)

The Senate amended the bill to protect pending peer review hearings by adding subdivision (h) to Section 1278.5:

> The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on pending peer review matters from the complainant in an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process.

(RJN, Ex. 5 at p. 4 [Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007].)

CHA continued to have concerns. According to CHA, the existing "appropriate avenues of redress" for physicians to challenge peer review actions—specifically the medical staff fair hearing process and the physician's ability to sue for damages if he prevails at the peer review hearing or "if the ultimate decision is later set aside by a reviewing court" – "are significantly obfuscated" by the bill. (RJN, Ex. 6 at p. 2 [Cal. Hosp. Ass'n, Floor Alert to State Senate on Assem. Bill No. 632 (2007-2008 Reg. Sess.) Aug. 21, 2007].) CHA proposed amendments, including: (1) adding a statement in subdivision (a) that "this section does not conflict with medical staff peer review actions or proceedings conducted pursuant to current law"; (2) replacing language in subdivision (h) to specify that Section 1278.5 "does not apply to a proposed or taken investigation, corrective or disciplinary action by a medical staff or a hospital governing

board . . . unless and until there has been a determination that the member or applicant has been determined to have substantially prevailed in such action as specified in current law"; and (3) adding a new paragraph to subdivision (d) that exempts appropriate remedial action from the definition of a discriminatory act. (*Id.*, at p. 2, and attached amendments.)

The Senate amended the bill to ensure that the existing peer review process would not be adversely affected and, thereby, "deal with some objections made by the hospitals regarding the impact of the bill on [] peer review." (RJN, Ex. 7 at pp. 3-4 [Assem. Floor Bill Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended Sept. 5, 2007].) Specifically, the Senate added subdivision (l):

> 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.

(RJN, Ex. 8 at p. 5 [Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) Sept. 5, 2007].) This amendment is substantially similar to the first proposed amendment identified in CHA's floor alert.

The Senate also added the remaining portion of the current subdivision (h), which provides:

> Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in Section 805 and Sections 809 to 809.5, inclusive, of the Business and Professions Code, would be impeded. If it is

> determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm.

(*Id.* at p. 5; § 1278.5, subd. (h).)

CHA continued its opposition. (RJN, Ex. 9 at p. 2 [Cal. Hosp. Ass'n, Floor Alert to State Assem. on Assem. Bill No. 632 (2007-2008 Reg. Sess.) Sept. 10, 2007].) It claimed that the Senate's latest amendments were inadequate on several grounds. The injunction provision, while preventing "'premature'" access to peer review information (before an action is taken that gives rise to a hearing), did not address the "real issue, which is allowing someone to get into court on a retaliation claim while a peer review action is either still in the investigatory stage [when] peer review action [has] not yet [been] taken or recommended or underway [or] a peer review action has been recommended or taken, but the hearing/appeal is not yet completed and the governing body has not taken final action." (*Ibid.*) In CHA's view, the problem created by forcing the hospital to defend a retaliation claim before it has taken action is that the court itself will assess the validity of peer review outside the context of an action and independent of administrative mandamus standards. (*Ibid.*)

In a late Floor Alert to the Assembly, CMA again identified retaliatory conduct that the bill was designed to prevent; again, quasi-judicial peer review action was not listed. (RJN, Ex. 10

[Cal. Medical Ass'n, Floor Alert to State Assem. on Assem. Bill No. 632 (2007-2008 Reg. Sess.) Sept. 11, 2007].) CMA characterized the Senate amendments as "further clarify[ing] that this bill is not to interfere with legitimate peer review activities." (*Id.*) In concurring with the Senate amendments, the Assembly Floor Bill Analysis noted, "According to the Senate Judiciary Committee, the Senate amendment . . . was added by their committee to ensure that the health facility peer review committee continues to operate as it has under current law." (RJN, Ex. 7 at p. 3.)

The Senate's adoption in substantial part of CHA's proposal to include an instruction that Section 1278.5 should not be construed to conflict with existing peer review law and the Assembly analysis that Section 1278.5 should be construed consistent with existing peer review suggest that the Legislature intended *not* to abrogate any part of peer review, including the exhaustion requirement.

B. Harmonizing Section 1278.5 with the Exhaustion Requirement Removes Doubt as to the Statute's Constitutionality

Additionally, statutes should be construed to avoid constitutional questions. "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety,

or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*Miller v. Municipal Ct. of Los Angeles* (1943) 22 Cal.2d 818, 828; see also *In re Jesusa V.* (2004) 32 Cal.4th 588, 664.) Construing Section 1278.5 to abrogate the exhaustion requirement would put California at odds with the federal Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101 *et seq.* Such a construction can—and should—be avoided.

In 1986, Congress enacted HCQIA to address the national problem of increasing medical malpractice by implementation of effective professional peer review.[2] (42 U.S.C. § 11101(1), (3).)

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[2]Based on language in Business and Professions Code section 809(a)(9)(A), some have presumed that California opted out of HCQIA. However, at the time Section 809 took effect, HCQIA had already been amended to eliminate the opt-out option. (42 U.S.C. § 11111(c)(2) *amended by* Omnibus Reconciliation Act of 1989, Pub. L. No. 101-239, § 6103(e)(6)(A), 103 Stat. 2106, 2208 (1989); see also Cong. Rec. E4137-02, 1989 [remarks of Rep. Waxman, noting the "specter of time-consuming litigation arguing over [the scope and interpretation of HCQIA's opt-out provision]" and stating that "[t]o end this confusion and assure a uniform national minimum level of protection for peer review, the opt-out has been eliminated"]; see also June 17, 2009 Modification of Opinion in *Mileikowsky v. West Hills Hosp. & Med. Ctr.* (2009) 45 Cal.4th 1259, 2009 Cal. LEXIS 5415 [removing statement that California had opted out of HCQIA]; *Smith v. Selma Comm. Hosp.* (2010) 188 Cal.App.4th 1, 27 n.22 [recognizing that "Congress amended the federal statute to repeal the so-called opt out provision"]; *Fox v. Good Samaritan L.P.* (N.D. Cal. 2010) 801 F. Supp. 2d 883, 892 ["Congress . . . revoked that option [to opt out of HCQIA] . . . Whatever force California Business & Professions Code § 809 may continue to have in other

(footnote continued)

Recognizing that the threat of civil lawsuits and damages awards "unreasonably discourages physicians from participating in effective professional peer review," Congress sought to immunize those involved from damages awards and preempt state laws that provide lesser "incentives, immunities, or protections" to peer reviewers. (42 U.S.C. §§ 11101(4)-(5), 11111(a)(1), 11115(a).) The immunity is broad:

> If a professional review action . . . of a professional review body meets all the standards specified in section 412(a) [42 U.S.C. § 11112(a)], except as provided in subsection (b)—
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body,
>
> (C) any person under a contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action,
>
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

(42 U.S.C. § 11111(a)(1).) To qualify, the review action must be taken "(1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to

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settings, it does not serve to override HQCIA [sic] immunity now."].)

obtain facts and after meeting the requirement of paragraph (3)." (42 U.S.C. § 11112(a).) A professional review action is presumed to have met these standards "unless the presumption is rebutted by a preponderance of the evidence." (*Ibid.*)

Courts ordinarily determine whether a plaintiff physician has overcome the presumption of validity in a summary judgment proceeding. To assess whether the presumption has been overcome, the peer review procedure must be completed and the record available. (See *Reg'l Hosp. v. Altaras* (Tex. App. Waco 1994) 903 S.W.2d 36, 42-43 [focusing on the first and second requirements and holding "[w]ithout the evidence and record developed during the review process, a court is substantially hindered in—if not precluded from—determining whether the participants met these two 'reasonableness' requirements at the time they acted."].)

Construing Section 1278.5 to allow claims against peer review participants before exhaustion would undermine HCQIA's immunities and protections by exposing participants to burdensome civil litigation and effectively nullifying HCQIA's presumption of validity, which, as it happens, is quite consistent with the legal standards applied in an administrative mandamus action reviewing a quasi-judicial peer review. (See Code Civ. Proc., § 1094.5.) Conversely, harmonizing Section 1278.5 with the exhaustion requirements avoids these problems and, in fact, promotes HCQIA's objectives by providing participants a limited immunity and ensuring that actions are reviewed under proper standards and on an appropriate record.

C. The Court of Appeal Erred in Construing Section 1278.5 as Abrogating the Exhaustion Requirement

The Court of Appeal gave several bases for its conclusion that in Section 1278.5, the Legislature abrogated the exhaustion requirement. Upon close scrutiny, the court's rationales don't hold up.

1. The Authorities Relied Upon by the Court of Appeal Are Inapposite

The Court of Appeal eschewed the clear-intent rule, preferring "an exception to exhaustion of judicial remedies." (See Slip Op. at p. 19.) But the cases from which the court discerned the exception—*Arbuckle* and *Runyon*—are inapposite.

In *Arbuckle*, this Court observed that Section 8547.8 by its terms required only that a putative plaintiff's civil claim be preceded by an administrative complaint addressed to the State Personnel Board and either an initial decision by SPB's executive officer or the expiration of time for issuance of a decision, "nothing more." (*Arbuckle*, *supra*, 45 Cal.4th at p. 971.) The Court found that the Legislature could not have intended for administrative exhaustion, or it would have required the complainant to secure more than an initial decision. (See *id.* at pp. 971-973.) Nor could the Legislature have intended judicial exhaustion by mandamus because it required only that the complainant file the administrative complaint and either secure the initial decision or establish a timely decision had not been issued, *nothing more*; and, in any event, the initial decision would

not qualify for review under Section 1094.5. (*Id.* at pp. 975-976.) Further, judicial exhaustion is essentially a form of collateral estoppel: the administrative determination is of such a judicial character that it should be binding in a later civil action and an initial decision does not bear the requisite judicial hallmarks. (*Id.* at p. 976.) The Court concluded that the lower court was wrong to "read into the statutory scheme" exhaustion requirements that were not there. (*Id.* at p. 971.)

Runyon is similar. There, a CSU employee had exhausted the administrative process provided under the CWPA, specifically Government Code section 8547.12, subdivision (c) and related CSU regulations, and CSU had issued a timely final determination. (*Runyon, supra*, 48 Cal.4th at pp. 763-765.) The issues were whether the employee could pursue civil remedies and, if so, whether he must first exhaust judicial remedies. First, the Court held that "the most natural reading" of the statute is that the employee may bring an action for damages if he or she is unsatisfied by CSU's determination. (*Id.* at p. 768.) Second, relying on *Arbuckle*, the Court acknowledged that *generally* an administrative decision of a sufficiently judicial character to support collateral estoppel will be binding in a later civil action. (*Id.* at p. 773.) The general rule, however, yields where the Legislature that created the administrative process indicates an intent that the findings not be binding:

> An administrative finding will not be given preclusive effect in a later judicial proceeding, however, " ' "if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged." '

> " (*Arbuckle, supra*, 45 Cal.4th at p. 976, quoting *Pacific Lumber Co. v. State Water Resources Control Bd.* [(2006)] 37 Cal.4th [921,] 945, quoting *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 326 [].)

(*Runyon, supra*, 48 Cal.4th at p. 774.) By expressly authorizing a damages action following an *adverse* administrative decision, the Legislature evidenced an intent that the administrative process not be binding. (*Ibid.*)

Together, *Arbuckle* and *Runyon* stand for the proposition that where the Legislature enacts a whistleblower statute that includes an administrative process *and the process is sufficiently judicial in character*, a whistleblower will be expected to exhaust remedies, unless a legislative intent to the contrary is apparent. This rule has no application where, as here, a well-established quasi-judicial process that includes exhaustion is in place when the Legislature acts. In the latter circumstances, the issue is whether the Legislature intended to abrogate the existing rule.

Campbell is apt. There, the Regents maintained an administrative procedure that covered employee claims of retaliatory dismissal. (See *Campbell, supra*, 35 Cal.4th at pp. 317-318, 324.) Without resorting to the administrative procedure, Campbell filed a civil action alleging retaliatory dismissal and stating claims under Government Code section 12653 (interference with disclosure of false claims) and Labor Code section 1102.5 (interference with disclosures under the False Claims Act). (*Id.* at pp. 318-319.) The Regents demurred, arguing that Campbell's claims were barred because she failed to exhaust administrative remedies. (*Id.* at p. 319.) The trial court

sustained the demurrer, the Court of Appeal affirmed, and this Court granted review. (See *ibid.*)

The Court agreed that the general rule that a plaintiff must exhaust an available administrative remedy before filing suit applied to Campbell's claims and her failure to exhaust barred her claim. (*Campbell, supra*, 35 Cal.4th at p. 329.) The Court rejected Campbell's argument that exhaustion was not required because neither Section 12653 nor Section 1102.5 called for it. Where a quasi-judicial process is provided, the general exhaustion rule will not be defeated by legislative silence. (*Id.* at p. 328.) Further, "as *Torres* recognized, 'courts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication.' (*Torres, supra*, 15 Cal.4th at p. 779.)" (*Campbell, supra*, 35 Cal.4th at p. 329.) No such clear intent appearing in either statute, the general exhaustion rule governed. (*Id.* at pp. 325-331.)

Campbell demonstrates the vitality of the clear-intent rule. Where a legislative enactment addresses an area covered by a well-established rule, the legislation will be harmonized with the rule, unless the Legislature clearly discloses a contrary intent.

It's easy to imagine circumstances where it might be appropriate to deviate from the clear-intent rule. A different test may apply where the common law rule is of an ancient vintage, of marginal relevance given social or technical changes, or less than clearly defined. The exhaustion requirement, however, is none of

these. It is current and, as recognized in *Kibler*, of increasing significance; it is clearly defined, and quite well known. Under these circumstances, the clear-intent rule should govern.

2. The Exhaustion Requirement Does Not Subvert the Injunction Provision

The Court of Appeal found that, unless it were contemplating the possibility of "parallel peer review administrative proceedings," the Legislature would not have empowered health facilities to seek injunctions "to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section." (See Slip Op. at pp. 24-26; see § 1278.5, subd. (h).) The court, though, is assuming that the ongoing peer review is the adverse action that is the basis of the Section 1278.5 claim.

The ongoing peer review hearing, however, may involve a different physician and the demand may be directed at establishing disparate treatment. Subdivision (h)'s specific wording supports the latter construction: Alternatively, the ongoing peer review hearing may have commenced after the physician filed his Section 1278.5 claim and the physician's "evidentiary demands" may be directed at proving ongoing retaliation.

Even if the ongoing hearing were the adverse action upon which the Section 1278.5 claim is based, the injunction provision does not necessarily imply abrogation. As suggested by the final Assembly Floor Analysis, the Legislature likely assumed the

statute would be applied consistent with the common law: If the alleged retaliatory act was quasi-judicial peer review, the physician would have to exhaust remedies before filing a civil suit, whereas exhaustion would not be an issue where the allegedly retaliatory peer review was *not* judicial, but there still may be a need to prevent interference with the peer review. For example, the hospital may have screened out the physician's application or reapplication for privileges; in such a case, exhaustion is not required because there is no quasi-judicial proceeding. (See *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 62-63.) Another example is where a peer review committee denies privileges based solely on its own internal investigation and without giving the physician notice or a hearing; again, there's no quasi-judicial proceeding to review.[3] (See *Westlake, supra,* 44 Cal.4th at p. 472.) An injunction, though, may be appropriate to allow the non-judicial peer review to proceed uninterrupted.

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[3]Examples abound. A hospital may decline to renew a physician's privileges on the basis that she failed to maintain a sufficient caseload. Such a decision would likely involve some process, but not a quasi-judicial proceeding. Therefore, there would be no remedies to exhaust and the physician could immediately pursue Section 1278.5 relief. Or, a hospital may summarily suspend a physician's privileges on the basis that she could not find another medical staff colleague with equivalent privileges to provide coverage for her practice (such coverage is mandatory for continued medical staff privileges in most hospitals). Here, again, there would be no remedies to exhaust and she could immediately pursue Section 1278.5 relief.

Further, the final sentence of subdivision (h)—which was the last part added—strongly suggests that a Section 1278.5 claim is subordinate to ongoing quasi-judicial peer review, which includes exhaustion. The sentence reflects the adoption in substantial part of CHA's proposal to include a statement that Section 1278.5 should be construed consistent with existing peer review and, upon passage, the Assembly analysis provided as much.

Finally, the Court of Appeal's analysis proves too much. If the Legislature intended to allow Section 1278.5 claims to proceed during the quasi-judicial peer review process that is the subject of the physician's claim, then the Legislature also necessarily intended to abrogate the administrative exhaustion requirement and, by extension, several statutes, including key parts Business and Professions Code sections 805 and 809 through 809.8. (See *Metropolitan Water Dist.*, *supra*, 32 Cal.4th at p. 501 [statute "should be read in the context of the entire law].) Surely, if the Legislature intended a wholesale revision of peer review, it would not have used such a subtle approach.

3. The Exhaustion Requirement Does Not Subvert the Presumption Provision

The Court of Appeal also pointed to subdivision (d)(1)'s rule that, under certain circumstances, adverse action will be presumed retaliatory; the Court of Appeal concluded that such a rule is inconsistent with the idea that a physician would first have to succeed in a mandamus action in which a court defers to the peer review body's judgment. (See Slip Op. at pp. 26-27.)

The presumption, however, is not one affecting the burden of proof, but only a presumption "affecting the burden of producing evidence as provided in Section 603 of the Evidence Code." (See § 1278.5, subd. (e).) The trier of fact must assume the existence of the fact but only until evidence to the contrary is introduced, in which case the presumption is defeated. (Evid. Code, § 604.) This type of presumption is not designed to implement any public policy, but rather to facilitate the determination of a particular fact, such as where evidence of the nonexistence of the fact would be more readily available to the party against whom the presumption operates. (Evid. Code, § 603; see Cal. Law Commission Comm., 29B West's Ann. Evid. Code (1995 ed.) foll. § 603, p. 57.)

Here, again, we are talking about only the subset of Section 1278.5 claims in which a physician claims that quasi-judicial peer review was retaliatory. As to this subset of physician claims, the presumption and the exhaustion requirement are readily harmonized. Imagine that Fahlen had exhausted his judicial remedies. If the mandamus court denied a peremptory writ, then the hospital could satisfy its burden of production on any claims and issues subsumed by the mandamus judgment by offering the judgment. If the mandamus court granted a peremptory writ, the hospital would have to present evidence that the action was taken for a legitimate, non-retaliatory reason. If the hospital introduced evidence of a non-retaliatory reason, the trier of fact would decide whether the action was retaliatory from the evidence, without regard to the presumption. (Evid. Code, § 604.)

4. The Exhaustion Requirement Does Not Subvert the Reinstatement Remedy

The Court of Appeal further found that "there would never be a circumstance in which reinstatement of a doctor's staff privileges would still be required in the civil action" "[i]f a doctor were required to successfully set aside an administrative order terminating his or her privileges as a precondition to a section 1278.5 action." (Slip Op. at p. 26.) This is incorrect.

As explained above, a physician may lose privileges as a result of an action, peer review or otherwise, that does not involve quasi-judicial process. If she believes the action was retaliatory, then she may pursue a Section 1278.5 claim without exhausting remedies (because there are no remedies to exhaust) and reinstatement could be an appropriate remedy. Thus, construing Section 1278.5 consistent with the *Westlake* requirements would in no way render "the Legislature's language superfluous." (See Slip Op. at p. 27.)

5. The Exhaustion Requirement Is Not Inconsistent with the Intent Behind Section 1278.5

The Court of Appeal pointed to Section 1278.5's intent to protect the public from unsafe patient care and to provide physicians who experience retaliation with a damages remedy; these objectives, according to the court, would be undermined by requiring physicians to first succeed in a "narrow" mandamus proceeding. (See Slip Op. at pp. 22-23) The court, however, failed to acknowledge that the exhaustion requirement is also

directed at protecting quality care by, for example, ensuring that medical professionals who provide substandard care are excluded through the peer review process (Bus. & Prof. Code, § 809, subd. (a)(6)), ensuring that medical professionals stay involved in peer review (*Westlake*, *supra*, 17 Cal.3d at p. 484; *Kibler*, *supra*, 39 Cal.4th at p. 201), and ensuring that the judgments of professionals responsible for peer review actions receive appropriate deference (see *Kibler*, *supra*, 39 Cal.4th at p. 201). Moreover, nowhere in Section 1278.5 does the Legislature state that a physician whistleblower claim must take priority over a justifiable staffing decision affecting care, deference to medical professional judgment and the limited immunity provided to participants through the exhaustion requirement. As discussed above, the statute and the common law can—and should—be harmonized.

As for the court's observation regarding civil remedies, it is settled that the Legislature's authorization of remedies is *not* enough to defeat the well-established exhaustion requirement. (See *Campbell*, *supra*, 35 Cal.4th at p. 323 [civil remedies made available in Gov. Code, § 12653 and Lab. Code, § 1102.5 do not defeat administrative exhaustion].) The question is whether, by amending Section 1278.5, the Legislature intended to strip a well-established quasi-judicial proceeding—rooted in the common law and reinforced by independent statutory enactments—of much of its force. This Court should not presume that a statute unravels established law, where, as here, the Legislature did not clearly disclose an intent to do so.

III. THE FIRST AND SECOND CAUSES OF ACTION SHOULD BE STRICKEN

The exhaustion requirement applies to Section 1278.5 claims for alleged retaliatory quasi-judicial peer review and, therefore, Fahlen's first and second causes of action fail on the second prong of the anti-SLAPP analysis.

By his first cause of action under Section 1278.5, Fahlen complains regarding threats to initiate peer review, initiation of the peer review, and the peer review action, which, he argues, were retaliation for his complaints about nursing care; he seeks reinstatement to the Hospital's medical staff, as well as damages. (Slip Op. at p. 7.) Having failed to challenge the Hospital's final decision by a writ of administrative mandamus, the finding that the denial of reappointment was reasonable and justifiable is now binding. This finding is fatal to Fahlen's claim. His Section 803.1 declaratory relief claim (his second cause of action) should also have been stricken. The Court of Appeal found that this claim was an extension of the Section 1278.5 claim covered by the same "exception from the requirement for judicial exhaustion." (See *id.* at pp. 29-30.) But since Fahlen's Section 1278.5 claim is not excepted from the exhaustion requirements, neither is this claim. Given that he did not establish a probability of success on either claim, the claims should have been stricken.

CONCLUSION

This Court should hold that a physician must exhaust judicial remedies before pursuing Section 1278.5 claims based on allegedly retaliatory quasi-judicial peer review. In light of

Fahlen's failure to exhaust judicial remedies, the Court should direct the lower courts to strike his Section 1278.5 claims, the first and second causes of action.

DATED: February 4, 2013 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 Opening Brief on the Merits, that it contains 11,894 words, including footnotes (and excluding caption, tables, signature block, and this certification).

Dated: February 4, 2013

By: _____
Joseph M. Quinn

HEALTH AND SAFETY CODE
Division 2. Licensing Provisions
Chapter 2. Health Facilities
Article 3. Regulations

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 1278.5 (2013)

§ 1278.5. Whistleblower protections

(a) The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations.

(b)

(1) No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has done either of the following:

(A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity.

(B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to, the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.

(2) No entity that owns or operates a health facility, or which owns or operates any other health facility, shall discriminate or retaliate against any person because that person has taken any actions pursuant to this subdivision.

(3) A violation of this section shall be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities.

(c) Any type of discriminatory treatment of a patient by whom, or upon whose behalf, a grievance or complaint has been submitted, directly or indirectly, to a governmental entity or received by a health facility administrator within 180 days of the filing of the grievance or complaint, shall raise a rebuttable presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint.

(d)

(1) There shall be a rebuttable presumption that discriminatory action was taken by the health facility, or by the entity that owns or operates that health facility, or that owns or operates any other health facility, in retaliation against an employee, member of the medical staff, or any other health care worker of the facility, if responsible staff at the facility or the entity that owns or operates the facility had knowledge of the actions, participation, or cooperation of the person responsible for any acts described in paragraph (1) of subdivision (b), and the discriminatory action occurs within 120 days of the filing of the grievance or complaint by the employee, member of the medical staff or any other health care worker of the facility.

(2) For purposes of this section, discriminatory treatment of an employee, member of the medical staff, or any other health care worker includes, but is not limited to, discharge, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee, member of the medical staff, or any other health care worker of the health care facility, or the threat of any of these actions.

(e) The presumptions in subdivisions (c) and (d) shall be presumptions affecting the burden of producing evidence as provided in *Section 603 of the Evidence Code.*

(f) Any person who willfully violates this section is guilty of a misdemeanor punishable by a fine of not more than twenty thousand dollars ($20,000).

(g) An employee who has been discriminated against in employment pursuant to this section shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law. A health care worker who has been discriminated against pursuant to this section shall be entitled to reimbursement for lost income and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law. A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or the entity that owns or operates a health facility or any other health facility that is owned or operated by that entity, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law.

(h) The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on a pending peer review hearing from the member of the medical staff who has filed an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process. Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in Section 805 and *Sections 809 to 809.5, inclusive, of the Business and Professions Code*, would be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest

of justice for the duration of the peer review process to protect the person from irreparable harm.

(i) For purposes of this section, "health facility" means any facility defined under this chapter, including, but not limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff.

(j) This section shall not apply to an inmate of a correctional facility or juvenile facility of the Department of Corrections and Rehabilitation, or to an inmate housed in a local detention facility including a county jail or a juvenile hall, juvenile camp, or other juvenile detention facility.

(k) This section shall not apply to a health facility that is a long-term health care facility, as defined in Section 1418. A health facility that is a long-term health care facility shall remain subject to Section 1432.

(l) 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.*

(m) Nothing in this section abrogates or limits any other theory of liability or remedy otherwise available at law.

HISTORY:

Added Stats 1999 ch 155 § 1 (SB 97). Amended Stats 2007 ch 683 § 1 (AB 632), effective January 1, 2008.

NOTES:

Amendments:

2007 Amendment:

(1) Amended subd (a) by adding (a) "members of the medical staff," in the first sentence; and (b) "accreditation and" in the second sentence; (2) substituted subd (b)(1) for former subd (b)(1) which read: "(1) No health facility shall discriminate or retaliate in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility."; (3) added subds (b)(1)(A) and (b)(1)(B); (4) substituted subd (b)(2) for former subd (b)(2) which read: "(2) A health facility that violates this section shall be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities."; (5) added subd (b)(3); (6) substituted "a governmental entity" for "any governmental entity" in subd (c); (7) substituted subd (d) for former subd (d) which read: "(d) Any discriminatory treatment of an employee who has presented a grievance or complaint, or has initiated, participated, or cooperated in any investigation or proceeding of any governmental entity as specified in subdivision (b), if the health facility had knowledge of the employee's initiation, participation, or cooperation, shall raise a rebuttable presumption that the discriminatory action was taken by the health facility in retaliation, if the discriminatory action occurs within 120 days of the filing of the grievance or complaint. For purposes of this section, "discriminatory treatment of an employee" shall include discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of employment, or the threat of any of these actions."; (8) added ", or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law. A health care worker who has been discriminated against pursuant to this section shall be entitled to reimbursement for lost income and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law. A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or the entity that owns or

operates a health facility or any other health facility that is owned or operated by that entity, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law" in subd (g); (9) added subds (h), (i) and (*l*); (10) redesignated former subds (h)-(j) to be subds (j), (k) and (m); and (11) substituted "correctional facility or juvenile facility of the Department of Corrections and Rehabilitation," for "correctional facility of either the Department of the Youth Authority or the Department of Corrections" in subd (j).

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 February 4, 2013, I served a true and accurate copy of the document(s) entitled:

OPENING BRIEF ON THE MERITS

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.
Jenny C. Huang, Esq. Justice First, LLP 180 Grand Avenue, Suite 1300 Oakland, CA 94612	Counsel for Plaintiff Mark T. Fahlen, M.D.
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 February 4, 2013, at San Francisco, California.

Melinda Less