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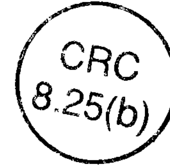

S224472

IN THE SUPREME COURT OF CALIFORNIA

JATINDER DHILLON,
Plaintiff and Respondent,

v.

JOHN MUIR HEALTH et al.,
Defendants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NO. A143195

REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF CALIFORNIA

JATINDER DHILLON,
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Defendants and Appellants.

REPLY BRIEF ON THE MERITS

INTRODUCTION

Dr. Jatinder Dhillon's answer brief is more notable for what it fails to address rather than for the arguments it makes.

John Muir Health's opening brief explained that the superior court's judgment is appealable because it resolved all issues raised in Dr. Dhillon's mandate petition, leaving no further action for the court to take, and accordingly met the definitions of a "judgment" — both generally and for special proceedings specifically — in Code of Civil Procedure sections 577 and 1064. The brief also explained that the judgment granting a writ to require John Muir to conduct Judicial Review Committee (JRC) proceedings cannot be reviewed on appeal after the JRC process is completed, and that finding the judgment to be nonappealable thus contradicts this court's

"reluctan[ce] to recognize a category of orders effectively immunized by circumstance from appellate review" (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 758 (*Baycol*)).

Dr. Dhillon's brief does not mention sections 577 and 1064. While it concedes that John Muir cannot obtain future appellate review of the superior court's judgment (ABOM 34-35 [issue whether superior court correctly ordered a JRC hearing "would be moot" after the JRC hearing takes place]), it does not mention *Baycol*. It also does not acknowledge the settled presumption in favor of appealability (see *In re S.B.* (2009) 46 Cal.4th 529, 537 [" ' "The right of appeal is remedial and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment" ' "]). Dr. Dhillon's silence regarding these critical points is striking.

Instead of addressing the key points raised in the opening brief, Dr. Dhillon's brief makes two main arguments: that John Muir already had appellate review of the superior court's judgment when the Court of Appeal summarily denied John Muir's writ petition and that the judgment is not a "judgment" under Code of Civil Procedure section 1094.5, subdivision (f). As discussed in this brief, both arguments are wrong and, tellingly, are directly contradicted by positions Dr. Dhillon himself took in the lower courts.

The Court of Appeal's dismissal of the appeal as having been taken from a nonappealable order should be reversed.

LEGAL ARGUMENT

I. JOHN MUIR HAS *NOT* HAD APPELLATE REVIEW OF THE SUPERIOR COURT'S JUDGMENT, A POSITION WITH WHICH DR. DHILLON PREVIOUSLY AGREED.

The Opening Brief on the Merits explained that it is "now or never" for appellate review of the superior court's judgment. (OBOM 13.) Dr. Dhillon responds that appellate review has already happened. (ABOM 20-24.) His current argument is contrary to law and contrary to his own earlier position.

Dr. Dhillon assures this court that John Muir "has, in fact, been afforded appellate review" of the superior court's judgment. (ABOM 21.) He bases this on the Court of Appeal's summary denial of a writ petition John Muir filed to challenge the judgment, an action the court took after it asked Dr. Dhillon to file an opposition and stated it was considering issuance of a peremptory writ in the first instance under *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180. (ABOM 20-21.)

Although appellate jurisdiction cannot be created by estoppel (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666), it is worth noting the unabashed change in Dr. Dhillon's argument. His contention here about the effect of the writ petition's summary denial is irreconcilable with what he said in the writ proceeding to advocate for that summary denial.

First, the opposition that Dr. Dhillon filed in the writ proceeding told a very different story than the one he proffers now.

Now he says that the superior court's judgment is *not* appealable and that the writ petition accomplished all appellate review of the judgment to which John Muir was entitled. In the writ proceeding, however, Dr. Dhillon urged the Court of Appeal to summarily deny John Muir's writ petition on the ground the superior court's judgment *is* appealable and John Muir thus had an adequate remedy at law. (Return to Petition for Peremptory Writ of Mandate 26-27, 43-44 (Return) [*John Muir Health v. Superior Court*, Court of Appeal case number A143256].) Moreover, he specifically said that, instead of the Court of Appeal undertaking writ review, "[t]he issues presented in [the] writ proceeding . . . should be addressed on appeal, after full briefing and oral argument." (Return 26-27.) Encouraging the Court of Appeal *not* to undertake appellate review in the writ proceeding is hardly consistent with Dr. Dhillon now saying that the writ proceeding "in fact . . . afforded appellate review." (ABOM 21.)

Second, when John Muir petitioned this court for review of the writ petition's summary denial, Dr. Dhillon continued to assert that an appeal, not a writ petition, was the appropriate method to review the merits, and he scoffed at John Muir's concern that it might never receive appellate review of the superior court's judgment. Dr. Dhillon told this court — at a time when the Court of Appeal had not yet dismissed the present appeal — that "whether *appellate review* is available is still pending with respect to the *notice of appeal* that [John Muir] also filed from the very same order/judgment from which its petition for mandate arose." (APFR 1 [*John Muir Health v. Superior Court*, Supreme Court case

number S223382], original emphases.) This court then declined to review the order summarily denying John Muir's writ petition.

At times, "perhaps, . . . the life of the law is not logic, but expedience." (*Kisbey v. State of California* (1984) 36 Cal.3d 415, 418.) Dr. Dhillon, however, takes expediency to an unacceptable level.

Regardless of Dr. Dhillon's contradictory arguments, his current position is meritless. Dr. Dhillon ignores this court's clear precedent about the limited effect of a Court of Appeal's summary denial of a writ petition.

Even when the " 'sole possible' ground of decision is on the merits," a summary denial cannot be given law of the case effect. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 897; see also *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 200.) As the *Kowis* court explained, "When the court denies a writ petition without issuing an alternative writ, it does not take jurisdiction over the case; it does not give the legal issue full plenary review." (*Kowis*, at p. 897.) The court warned against according weight to a "denial [that] followed a less rigorous procedure" than when "a writ petition is given full review by issuance of an alternative writ, the opportunity for oral argument, and a written opinion." (*Id.* at p. 899; see also *ibid.* ["the importance of oral argument also supports not giving law of the case effect to a denial where it was not available"].) The summary denial here followed a "less rigorous procedure."

Dr. Dhillon relies on *Leone v. Medical Board* (2000) 22 Cal.4th 660 (*Leone*), but that case is relevant only by way of contrast. This

court concluded there that, in limited circumstances, summarily denying a writ petition can be the equivalent of appellate review. However, those circumstances — present in *Leone* but not here — are when *the Legislature* has specifically provided that appellate review of a particular type of final judgment or order must be by writ petition alone. (See *id.* at p. 670 [if a writ petition is "the only authorized mode of appellate review . . . , an appellate court must judge the petition on its procedural and substantive merits, and a summary denial of the petition is necessarily on the merits"]; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114 (plur. opn. of Kennard, J.) (*Powers*) ["when writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters"].)

In contrast to the circumstances in *Leone* and *Powers*, the Legislature has *not* provided that the superior court's judgment here must be reviewed by writ instead of appeal. That rule has been stated in passing by a few Court of Appeal decisions. (See OBOM 30-31.) But courts cannot make a writ petition the exclusive method of appellate review for a final judgment that is otherwise made appealable by statute. "The right to appeal is wholly statutory" (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5) and courts "are not at liberty to modify [the] contours [of the common law one final judgment rule] in ways at

odds with the statutory language" (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 759, fn. 5). Rather, "[a] reviewing court's obligation to exercise the appellate jurisdiction with which it is vested, once that jurisdiction has been properly invoked, is established and not open to question." (*Leone, supra,* 22 Cal.4th at p. 669.)

Dr. Dhillon had it right when he told this court in the writ proceeding that it was in the present appeal that the issue "whether *appellate review* is available" would be decided (APFR 1 [*John Muir Health v. Superior Court,* Supreme Court case number S223382], original emphasis) and when he said to the Court of Appeal that "[t]he issues presented in [the] writ proceeding . . . should be addressed on appeal, after full briefing and oral argument" (Return 26-27). For him to now contend that John Muir obtained appellate review of the superior court's judgment when the Court of Appeal summarily denied John Muir's writ petition is not only inconsistent, it is wrong.

II. THE SUPERIOR COURT'S JUDGMENT IS A JUDGMENT UNDER SECTION 1094.5, WHETHER OR NOT THAT STATUTE AFFECTS APPEALABILITY.

John Muir's opening brief showed that the superior court's judgment was a final, appealable judgment under Code of Civil Procedure section 904.1, subdivision (a)(1) (all undesignated statutory references are to the Code of Civil Procedure) and various statutes governing judgments generally and judgments in special proceedings and writ proceedings. (OBOM 22-25.) Dr. Dhillon

counters that the judgment was not appealable because it was not a valid judgment under section 1094.5, a statute concerning writs of administrative mandate. (ABOM 24-33.)[1] Once again, he is both wrong and contradicting himself.

In this court, Dr. Dhillon says, "Because the trial court's order was not a final judgment, as defined under section 1094.5, subdivision (f), it was not appealable." (ABOM 28.) That is a very different stance than he took in the superior court, however.

After the superior court had entered an order granting in part and denying in part Dr. Dhillon's mandate petition (4 AA 782), Dr. Dhillon submitted to the court a proposed judgment his own counsel prepared (Motion to Augment 1-2 (Motion)).[2] As opposed to saying, as he does now, that the judgment is not a final judgment as defined by section 1094.5, subdivision (f) (section 1094.5(f)), Dr. Dhillon titled the document, "JUDGMENT ON WRIT OF MANDATE [CCP 1094.5(f)]," and he had the proposed judgment specifically state that it was "[p]ursuant to California Code of Civil Procedure 1094.5(f)" and that "[j]udgment is hereby entered in this matter for Petitioner, Dr. Jatinder Dhillon." (Motion 2.) Additionally, in the cover letter to the court, Dr. Dhillon's counsel explained why she thought it necessary to submit the proposed

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[1] Dr. Dhillon repeatedly refers to the final ruling on his writ petition as the superior court's "order." The court entered — a month apart — both an order *and* a judgment, and both are essentially the same. (4 AA 782, 797.) As in the opening brief, we collectively refer to them as the "judgment." (See OBOM 11, fn. 2.)

[2] The "Motion" citations are to the exhibit accompanying a Motion to Augment the Record that John Muir is filing with this brief.

judgment: "It appears that the law is not entirely clear whether a signed Order is sufficient *to trigger the time for filing any appeal.*" (Motion 1, emphasis added.)

The superior court ultimately signed and filed a later, more complete judgment, which was also drafted by Dr. Dhillon's counsel. (4 AA 797-798.) Like the first proposed judgment, the filed judgment was titled by Dr. Dhillon's counsel, "JUDGMENT ON WRIT OF MANDATE [CCP 1094.5(f)]." (4 AA 797.) Similarly, counsel drafted the judgment's preface to state, "Pursuant to California Code of Civil Procedure 1094.5(f) the Court hereby enters judgment in this matter as follows." (4 AA 797.)

To recap, Dr. Dhillon drafted a judgment to expressly state it is "pursuant to" section 1094.5(f), and he urged the superior court to sign it for the specific purpose of "trigger[ing]" the time for his litigation opponent to appeal. Now that his opponent has appealed from that judgment, he argues the judgment is not appealable because it does not comply with section 1094.5(f). That is inconsistent, to say the least. "Heads I win, tails you lose."

More important, Dr. Dhillon's current legal position is erroneous. The superior court's judgment here is a final, proper judgment in a writ of mandate proceeding.

To begin with, Dr. Dhillon does not explain how a judgment that meets the criteria of section 577 (generally defining "[a] judgment" as "the final determination of the rights of the parties in an action or proceeding") or of section 1064 (providing specifically that "[a] judgment in a special proceeding is the final determination of the rights of the parties therein") can be made not final by section

1094.5(f). But, regardless of whether section 1094.5(f) is relevant to determining the finality and appealability of a judgment (which is final and appealable under sections 577, 904.1, and 1064), the superior court's judgment here is a judgment under section 1094.5(f).

It is of course true that " '[i]t is not the form of the decree but the substance and effect of the adjudication which is determinative.' " (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698 (*Griset*).) Here, both the judgment's form and its substance and effect establish its finality and appealability.

As noted above, the judgment is titled "JUDGMENT ON WRIT OF MANDATE [CCP 1094.5(f)]" and it recites at the outset, "Pursuant to California Code of Civil Procedure 1094.5(f) the Court hereby enters Judgment in this matter as follows." (4 AA 797.) What follows is fully consistent with the judgment's title and preamble. There are eight separate paragraphs either granting or denying every request for relief in Dr. Dhillon's mandate petition. (4 AA 797-798; see 1 AA 19-20 [mandate petition prayer for relief].) Nothing was left for future adjudication. Concerning the issue that is the subject of this appeal, the judgment says in pertinent part, "A peremptory writ ordering a hearing before the Judicial Review Committee or other appropriate body on both the initial and underlying complaint as well as the subsequent suspension is <u>granted</u>." (4 AA 797.)[3]

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[3] Dr. Dhillon claims that "the trial court in this case *did not deny the writ*." (ABOM 28, original emphasis.) This ignores that the court *did* deny the writ as to most of the relief Dr. Dhillon's petition (continued...)

Dr. Dhillon contends this is not enough to comply with section 1094.5(f). Not so. The provision states, "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent." (*Ibid.*)

Dr. Dhillon's mandate petition challenged John Muir's decision not to give Dr. Dhillon a hearing concerning the requirement that he attend an anger management class and concerning the two-week suspension of his privileges. (1 AA 15-16.) In granting Dr. Dhillon the relief he requested on that issue, the judgment does not say in the precise statutory words that it is "commanding" John Muir "to set aside" the decision not to hold a hearing, but that is the judgment's substance and effect. Also, in ordering a hearing based on the finding that John Muir's bylaws require a hearing, the judgment does, as section 1094.5(f) allows, "order [John Muir] to take such further action as is specially enjoined upon it by law" (§ 1094.5(f)).

(...continued)
sought. For example, among many other adverse rulings for Dr. Dhillon, the judgment states, "A peremptory writ of mandate ordering [John Muir] to vacate its determinations on the basis that the discipline imposed on [Dr. Dhillon] was prejudicial abuse of discretion, that the determination by the Ad Hoc Committee is not supported by any findings, and/or the findings are not supported by the evidence is denied." (4 AA 798.)

There is no other way to interpret the judgment. It "grant[s]" a "peremptory writ ordering a hearing before the Judicial Review Committee or other appropriate body," it says that "John Muir must provide [Dr. Dhillon] with Judicial Committee Review and appellate rights consistent with" John Muir's bylaws, and it concludes that Dr. Dhillon "was deprived of a due process when John Muir . . . suspended his clinical privileges for less than 13 days without providing him a hearing." (4 AA 797-798.) Granting a peremptory writ to require John Muir to conduct a hearing it had decided not to conduct is commanding John Muir to set aside its decision not to conduct a hearing.

If " 'the substance and effect of the adjudication . . . is determinative' " (*Griset, supra,* 25 Cal.4th at p. 698) — and, here, it is — then the superior court's judgment does just what section 1094.5(f) anticipates.

Dr. Dhillon's reliance on *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 (*Voices of the Wetlands*) is misplaced. The court there held that, when an agency's decision is not supported by the administrative record, a trial court can order an interlocutory remand for reconsideration instead of entering judgment to set aside the decision. (*Id.* at pp. 525-530.)

However, the court did not hold that every remand is necessarily interlocutory. To the contrary, the court stated only that section 1094.5 "impose[s] no absolute bar on the use of prejudgment limited remand procedures" (*Voices of the Wetlands, supra,* 52 Cal.4th at p. 526; see *id.* at p. 527 ["We perceive no compelling reason why the Legislature would have wished to

categorically bar interlocutory remands in administrative mandamus actions"]) and it expressly concluded that "a *final judgment* ordering limited reconsideration [is] expressly authorized by subdivision (f) of section 1094.5" (*id.* at p. 529, emphasis added; see *id.* at p. 528 [section 1094.5(f) "clearly implies that, *in the final judgment itself*, the court may direct the agency's attention to specific portions of its decision that need attention, and need not necessarily require the agency to reconsider, de novo, the entirety of its prior action" (emphasis added)]).

Voices of the Wetlands is inconsistent with Dr. Dhillon's claim that "an order remanding for further proceedings necessarily *implies* continuing jurisdiction of the court and does not result in a final, appealable judgment unless and until the parties return to court to further litigate and resolve any remaining controversy." (ABOM 3.) A remand order can be a final judgment, as *Voices of the Wetlands* teaches. Moreover, delaying entry of a final judgment until after the parties return to court for further litigation after the remand could leave many actions without any judgment at all, because, as in this case, there might not *be* further litigation after remand.

Unlike the trial court in *Voices of the Wetlands*, the superior court in this case did not order an interlocutory remand. Indeed, regarding the issue that is the subject of this appeal, the court made no remand order at all. Reviewing the allegations in Dr. Dhillon's writ petition that John Muir improperly denied Dr. Dhillon a JRC proceeding mandated by John Muir's bylaws, the court did not remand the matter to have John Muir determine whether its bylaws

required a JRC proceeding. Rather, the court itself finally resolved the issue, making its own (erroneous) interpretation of the bylaws and granting writ relief that compelled the JRC proceeding.

III. DR. DHILLON'S ARGUMENT OF THE APPEAL'S MERITS IS IRRELEVANT TO WHETHER THE SUPERIOR COURT'S JUDGMENT IS APPEALABLE.

Dr. Dhillon spends considerable time arguing the appeal's merits. (ABOM 11-18.) That, of course, is irrelevant to the issue before this court — whether the superior court's judgment is appealable.[4]

Dr. Dhillon excuses his extended digression by claiming John Muir's opening brief "gives the impression that [John Muir] is seeking to litigate the merits of the trial court's determination that

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[4] Dr. Dhillon criticizes John Muir's opening brief for not referencing the issue "as articulated by this Court in granting review." (ABOM 1.) What Dr. Dhillon quotes, however, is the issue for this matter as stated in the case summaries of review-granted cases, summaries that come with the disclaimer, "The statement of the issue or issues in each case . . . does not necessarily reflect the views of the court, or define the specific issues that will be addressed by the court." (*Issues Pending before the California Supreme Court in Civil Cases* <http://www.courts.ca.gov/documents/AUG2815civpend.pdf> pp. 1, 7 [as of Aug. 28, 2015]; see <http://www.courts.ca.gov/13648.htm>.) Instead, the rules require that when, as in this case, there is no court order specifying the issues to be briefed, the opening brief "must begin by quoting . . . [¶] . . . [¶] [t]he statement of issues in the petition for review." (Cal. Rules of Court, rule 8.520(b)(2).) John Muir's opening brief did just that. (OBOM 1.)

[John Muir] was required to provide [Dr. Dhillon] with a Judicial Review Committee hearing." (ABOM 1.) He misreads John Muir's brief. John Muir said that it "believes the elaborate and burdensome JRC process is not required by statute or hospital bylaws and is particularly ill-suited for the minor disciplinary action taken against Dr. Dhillon," but it did so only to explain why it appealed the judgment. (OBOM 2.) Moreover, John Muir did not discuss the reasons the judgment is incorrect, but said only that it would do so "if it has the opportunity to brief the substantive merits of this appeal." (OBOM 13.)

John Muir can show that Dr. Dhillon's legal arguments on the merits are wrong. It just wants the chance to do so before the controversy is moot.

CONCLUSION

For the reasons stated here and in the opening brief, this court should reverse the order dismissing the appeal and should remand the case to the Court of Appeal to consider the merits of the appeal.

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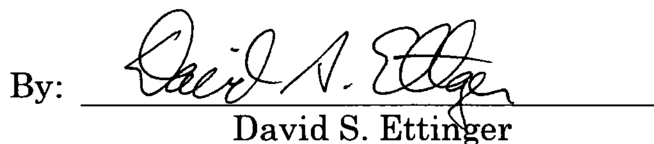
By: 
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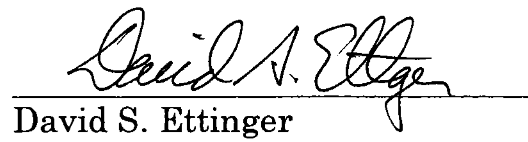
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 3,786 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: August 31, 2015



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

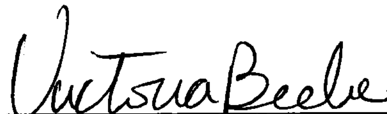
On August 31, 2015, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on August 31, 2015, at Encino, California.



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Court of Appeal Case No. A143195
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Hon. Laurel S. Brady Contra Costa County Superior Court 725 Court Street, Dept. 31 Martinez, CA 94553-1233 925.957.5731	Case No. MSN13-1353
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