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

SUTTER CENTRAL VALLEY HOSPITALS' AND STEVE MITCHELL'S OPPOSITION TO PLAINTIFF AND RESPONDENT MARK T. FAHLEN'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

HANSON BRIDGETT LLP
*Joseph M. Quinn, SBN 171898
Glenda M. Zarbock, SBN 178890
Lori C. Ferguson, SBN 230586
425 Market Street, 26th Floor
San Francisco, California 94105
Telephone: (415) 777-3200
Facsimile: (415) 541-9366

Attorneys for Defendants and Appellants
SUTTER CENTRAL VALLEY HOSPITALS
and STEVE MITCHELL

Defendants and Appellants Sutter Central Valley Hospitals and Steve Mitchell oppose the Request for Judicial Notice in Support of Answering Brief of Plaintiff and Respondent as to the following documents:

Exhibit A: The transcript of the administrative hearing held by Sutter Central Valley Hospitals is not the proper subject for judicial notice under Evidence Code Section 452(c) because it is not an official act of an executive department of the state or federal government and, further, is not relevant, helpful or necessary to the issues in this appeal.

Exhibit C: The Report on Enrolled Bill by the Legislative Council of California is not the proper subject for judicial notice under Evidence Code Section 452(c) because, having been issued after passage of the bill, it is not evidence of legislative intent.

Exhibit D: The "Comprehensive Study of Peer Review in California" prepared by Lumetra ("Lumetra Report") is not relevant, helpful or necessary to the issues before the Court.

For the reasons more fully set forth below, the Court should deny Fahlen's request for judicial notice of these documents.

MEMORANDUM

I. THE COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE OF EXCERPTS FROM THE TRANSCRIPT OF THE ADMINISTRATIVE HEARING (EXHIBIT A).

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) Fahlen requests judicial notice of excerpts of the transcript of the

administrative hearing held by Sutter Central Valley Hospitals ("the Hospital"), a private entity, under Evidence Code Section 452(c). (Fahlen's Memorandum in Support of Request for Judicial Notice ("Fahlen RJN Memo") at p. 2.) As explained below, this document is not the proper subject of judicial notice under Evidence Code Section 452(c). Further, the cited transcript excerpts are not helpful, necessary or relevant to the issues in this appeal, precluding judicial notice. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748 n.6.)

Section 452(c) permits judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." Contrary to Fahlen's contention, however, the Hospital's records do not constitute records of a state administrative agency. (Fahlen RJN Memo at p. 2.) Indeed, as a private entity, the Hospital is not an executive department of the state or a political subdivision thereof whose records may be judicially noticed. (*Marino v. Los Angeles* (1973) 34 Cal.App.3d 461, 465 (upholding denial of judicial notice under Section 452(c) of records of municipality, which is not a political subdivision of the state); *Edna Valley Assn. v. San Luis Obispo County & Cities Area Planning Coordinating Council* (1977) 67 Cal.App.3d 444, 449 (records of council created by county but not acting for state or its subdivision not subject to judicial notice under Section 452(c)).) Thus, *Taiheiyo Cement U.S.A., Inc. v. Franchise Tax Bd.* (2012) 204 Cal.App.4th 254, 267-268, a case in which a bulletin of the Franchise Tax Board was judicially noticed – and the only case

cited by Fahlen in support of this request – is inapposite. Accordingly, judicial notice of excerpts from the transcript of the administrative hearing held by the Hospital should be denied.[1]

Even if the Court had discretion to notice the hearing transcript under Evidence Code Section 452(c), Fahlen has failed to demonstrate that the transcript excerpts are relevant, let alone helpful to the determination of the issues in this appeal. "[J]udicial notice, since it is a substitute for proof [citation], is always confined to those matters which are relevant to the issue at hand." (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064 (quoting *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301); *Jordache Enterprises, supra,* 18 Cal.4th at p. 748 n.6 (denying judicial notice of official acts where not necessary, helpful, or relevant).) Furthermore, even where records are subject to judicial notice, courts "do not take judicial notice of the truth of all matters stated therein." (*Mangini, supra,* 7 Cal.4th at pp. 1063-1064.)

Here, Fahlen seeks notice of excerpts from the transcript of the administrative hearing containing witness testimony, the hearing officer's instructions to the judicial review committee,

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[1] The transcript of the administrative hearing is not the proper subject of a motion to augment the record either. Under rule 8.155(a)(1) of the California Rules of Court, augmentation is limited to documents filed or lodged in the case in superior court or a certified transcript of oral proceedings not designated under rule 8.130. Fahlen concedes that these excerpts of the transcript were neither filed nor lodged in the superior court (Fahlen RJN Memo at p. 2); nor are they certified transcripts of oral proceedings in the trial court.

and the parties' closing arguments. None of the excerpts is helpful or relevant to the determination of this appeal.

The excerpts of witness testimony Fahlen submitted fail to support his assertions. Fahlen characterizes Appellants' accurate statement that the Hospital board's decision not to renew his privileges "effectively restor[ed] the MEC's recommendation" as an "attempt[] to legitimize" the board's action. (Fahlen RJN Memo at p. 1.) To counter this, Fahlen seeks judicial notice of hearing testimony purportedly showing "how the medical staff was influenced by the hospital administration to issue its recommendation" and that Fahlen was subjected to "discriminatory treatment." (*Ibid.*) The cited excerpts of hearing testimony themselves provide little if any evidentiary support for Fahlen's assertions. Without additional facts, one cannot conclude the testimony establishes improper influence by the Hospital on the MEC or discriminatory treatment of Fahlen. Moreover, even if the hearing transcript were judicially noticed, the Court does not take judicial notice of the truth of all matters stated therein. (*Mangini, supra,* 7 Cal.4th at pp. 1063-1064.) And more broadly, although such testimony might be relevant to the merits of Fahlen's retaliation claim, it has no bearing on whether Fahlen must first exhaust judicial remedies before bringing that claim. In short, the excerpted witness testimony is both irrelevant and not helpful.

Fahlen also seeks judicial notice of the hearing officer's instructions to the judicial review committee and the parties' closing arguments in the administrative hearing. He contends

these excerpts from the transcript are relevant "to show that the issue of discriminatory treatment and retaliation of Dr. Fahlen by Sutter was not litigated or decided in the . . . administrative hearing." (Fahlen RJN Memo at p. 2.) While the excerpts support the assertion that there was no finding as to whether Fahlen was the subject of retaliation and discriminatory treatment, they fail to establish that the parties did not litigate these issues. Indeed, according to the Court of Appeal's opinion, many facts relevant to Fahlen's retaliation claim were introduced at the hearing, including evidence that Fahlen "reported substandard or insubordinate nursing activity to nursing supervisors or by written complaint to [the Hospital's] administration." (*Fahlen v. Sutter Central Valley Hosps.* (Aug. 14, 2012, F063023), at pp. 4-5.)

Furthermore, the Court need not resort to the transcript of the administrative hearing to understand the standards applicable to medical staff hearings. Except in hearings involving initial applicants to the medical staff, "the peer review body shall bear the burden of persuading the trier of fact by a preponderance of the evidence that the action or recommendation is reasonable and warranted." (Bus. & Prof. Code, § 809.3, subd. (b)(3).)

In sum, there is no basis upon which the Court may judicially notice the excerpts from the transcript of the administrative hearing before the Hospital, a private entity. Even if there were, the excerpts are not helpful or relevant to the issues in this appeal.

II. THE COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE OF THE POST-ENROLLMENT OPINION OF THE LEGISLATIVE COUNSEL (EXHIBIT C).

Fahlen requests judicial notice of a Report on Enrolled Bill by the Legislative Counsel regarding 1978 amendments to Code of Civil Procedure Section 1094.5 on the grounds that the document is judicially-noticeable legislative history. (Fahlen RJN Memo at p. 3.) This is in error. Although opinions of the Legislative Council may be subject to judicial notice, the document Fahlen has proffered is a post-enrollment report, which is not the proper subject of judicial notice under Evidence Code Section 452(c). "Postenrollment documents are not proper indicia of legislative intent because it is not reasonable to infer that they were ever read or considered by the Legislature." (*Whaley v. Sony Computer* (2004) 121 Cal.App.4th 479, 488 n.4.)

Here, the Legislative Counsel issued the report at issue *after* the bill was enrolled. Therefore, Fahlen's assertion that the Legislature amended the statute "despite the opinion of the Legislative Counsel of California that the amendment was unconstitutional" is false. (Fahlen Answering Brief at p. 37.) There is no evidence that the Legislature ever reviewed or considered the Legislative Counsel's report. Accordingly, the report does not constitute evidence of legislative intent that may be judicially noticed under Evidence Code Section 452(c).

III. THE COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE OF THE LUMETRA REPORT (EXHIBIT D).

Although the Lumetra Report may constitute an official act of an executive department under Evidence Code Section 452(c), the Court should refuse judicial notice because Fahlen has failed to demonstrate that it is relevant or helpful to resolving the matters in this appeal.

As noted in Section I above, judicial notice "is always confined to those matters which are relevant to the issue at hand." (*Mangini, supra,* 7 Cal.4th at pp. 1063-1064.) Official acts or public records that are not relevant, helpful, and necessary do not warrant judicial notice. (*Jordache Enterprises, supra,* 18 Cal.4th at p. 748 n.6.) Even where the existence of an official act or public record may be judicially noticed, courts "do not take judicial notice of the truth of all matters stated therein." (*Mangini, supra,* 7 Cal.4th at p. 1063.)

Fahlen contends that the Lumetra Report is relevant to "a legal and policy question presented here, specifically whether a ruling in [his] favor will lead to large number [sic] of non-meritorious retaliation cases being filed by California physicians." (Fahlen RJN Memo at pp. 4-5.) In his Answering Brief, Fahlen cites the report as support for two propositions. First, "there are very few peer review hearings held each year in California." (Fahlen's Answering Brief at p. 40.) Second, "Even physicians with valid retaliation claims will often be unable to sue a healthcare facility because of the difficulties inherent in litigating such claims." (*Id.* at p. 41). Neither of these assertions

is well supported by the Lumetra Report and, even if they were, the Court does not take judicial notice of the accuracy of the substance of the report.

The Lumetra Report is a product of a study of physician peer review conducted by peer review bodies at hospitals, health plans, medical groups, and professional societies in California. (Fahlen RJN, Exh. D, at p. 1.) The study was commissioned in October 2005 and the report was issued July 31, 2008. (*Ibid.*) One-third of acute care hospitals in the state were included in the study's sample. (*Id.*, Exh. D, at p. 31.)

One aspect of the study involved an on-line survey of individuals involved in peer review in varying capacities at the health care entities included in the sample. (*Id.*, Exh. D, at pp. 54-55.) The survey respondents were peer review body chairs, physician reviewers, physicians under review, non-physician staff, and attorneys for the entity or physician. (*Id.*, Exh. D, at p. 55.) Respondents were asked to estimate the total number of hours spent by the entity on peer review hearings in the last calendar year. (*Id.*, Exh. D, at p. 90.) Of the 210 responses received from 322 eligible respondents, 93.3 percent reported between zero and 250 hours. (*Ibid.*) No data is reported about the number of peer review hearings that took place in any given year, although the report cites to the above-referenced data in support of a statement that "almost no entities had 809 hearings." (*Ibid.*) The survey revealed, however, that nearly 14 percent of respondents reported that the health care entity spent more than

$50,000 in the last year on 809 hearings, including seven percent estimating costs of over $250,000. (*Id.*, Exh. D, at pp. 90-91.)

Further, the study documents that 127 Section 805 Reports were submitted to the Medical Board of California in 2006-2007. (*Id.*, Exh. D, at p. 13.) Each of these reports could potentially give rise to a peer review hearing. (Bus. & Prof. Code, § 809.1, subd. (b)(3).)

Without any data identifying the actual number of peer review hearings, the Lumetra Report provides scant evidentiary support for Fahlen's assertion that "very few" peer review hearings are held in California each year.

Similarly, the Lumetra Report provides no evidentiary support for Fahlen's second proposition that "physicians with valid retaliation claims will often be unable to sue a healthcare facility because of the difficulties inherent in litigating such claims." (Fahlen's Answering Brief at p. 41.) The Lumetra Report says nothing about litigation of retaliation claims; its focus is on internal peer review processes at the studied health care entities.

In sum, the Court should decline to take judicial notice of the Lumetra Report because it is irrelevant to the issues in this appeal.

IV. CONCLUSION

Defendants and Appellants Sutter Central Valley Hospitals and Steve Mitchell respectfully request that the Court deny the Request for Judicial Notice in Support of Answering Brief of

Plaintiff and Respondent as to the documents identified as Exhibits A, C, and D.

DATED: April 22, 2013

Respectfully submitted,

HANSON BRIDGETT LLP

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

[PROPOSED] ORDER

Good cause appearing, IT IS HEREBY ORDERED that Plaintiff and Respondent's Request for Judicial Notice of Exhibits A, C, and D is DENIED.

Dated: _____, 2013

_____

Hon. Tani Cantil-Sakauye
Chief Justice of the State of California

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 April 22, 2013, I served a true and accurate copy of the document(s) entitled:

SUTTER CENTRAL VALLEY HOSPITALS' AND STEVE MITCHELL'S OPPOSITION TO PLAINTIFF AND RESPONDENT MARK T. FAHLEN'S REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

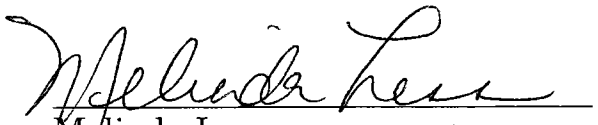
on the party(ies) in this action as follows:

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 April 22, 2013, at San Francisco, California.



Melinda Less