S205568

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARK T. FAHLEN, M.D.,

Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, et al.

Defendants and Appellants.

After a Decision by the Court of Appeal,
Fifth Appellate District, Division Fourth
No. F063023

APPLICATION OF BETA HEALTHCARE GROUP TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS/APPELLANTS SUTTER CENTRAL VALLEY HOSPITALS, ET AL.

DiCARO, COPPO & POPCKE
CARLO COPPO, ESQ.
(SB 34226; CARLO.COPPO@DCP-LAW.COM)
MICHAEL R. POPCKE, ESQ.
(SB NO. 122215; MICHAEL.POPCKE@DCP-LAW.COM)
SHELLEY A. CARDER, ESQ.
(SB NO. 137755; SHELLEY.CARDER@DCP-LAW.COM)
2780 GATEWAY ROAD, CARLSBAD, CALIFORNIA 92009
(760) 918-0500 • FAX: (760) 918-0008

BETA Healthcare Group ("BETA") hereby applies, pursuant to California Rules of Court, Rule 8.520(f), for permission to file a brief in this case as amicus curiae in support of Defendants/Appellants Sutter Central Valley Hospitals, et al. A copy of the proposed brief is attached to this application.

STATEMENT OF INTEREST OF AMICUS CURIAE

BETA is a California joint powers authority formed in 1979, pursuant to California Government Code sections 6500 et seq. and 990 et seq., to pool the liability claims and losses of district hospitals.

During the 1940's, the State Legislature enacted the Local Hospital District Act; legislation that enabled a community, with voter approval, to form a special district and impose property taxes to support the construction and operation of hospitals. Residents in these districts elect local boards to oversee the spending of their local tax dollars in pursuit of improved community health. The meetings of these publicly-elected officials are open meetings subject to the provisions of the Ralph M. Brown Act, providing for public input and a high degree of transparency relative to the boards' decisions.

Today, there are 74 healthcare districts throughout the state, in both urban and rural settings. In many instances, healthcare districts are the sole

source of healthcare in the community and serve a critical role in the care and treatment of the state's uninsured/underinsured.

BETA is the largest writer of hospital professional liability coverage in the state, serving more than 100 county, district and nonprofit hospitals and healthcare facilities. In addition to providing comprehensive liability coverage to healthcare facilities, BETA also insures 54 medical groups and 3 hospitals through its risk retention group, Health Providers Insurance Reciprocal, RRG (HealthPro).

Quality medical care is an issue of great importance and the decision in this action will affect the people of this state far beyond the interests of the named parties. The Court of Appeal's ruling in this action not only abrogates the long-established doctrine of exhaustion, it also subverts the purpose of federal and state peer review statutes and threatens the ability of hospitals throughout California to assure the competency of their medical staffs for the protection of the public. The Court of Appeal's ruling in this matter also directly contradicts the ruling from another appellate district involving a BETA hospital. (*Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65.)

On or about October 23, 2012, BETA submitted a letter supporting the grant of review in this case. In addition, BETA also appeared as amicus curiae

in *El-Attar v. Hollywood Presbyterian Medical Center* (June 6, 2013) 56 Cal.4th 976.

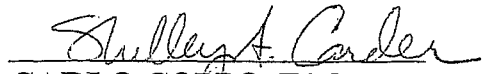
BETA's proposed brief will assist the Court in deciding this matter, because it will present argument and authorities regarding the necessity for requiring administrative and judicial exhaustion in peer review proceedings prior to permitting a physician to file a civil action seeking monetary damages.

For all the foregoing reasons, BETA's healthcare facilities are vitally interested in this action and beseech this Court to reaffirm the established principles that peer review must be performed by licentiates and that exhaustion of both administrative and judicial remedies is essential to the preservation of peer review and to assure high quality patient care in this state.

NO OTHER AUTHORS OR MONETARY CONTRIBUTORS

No party, no counsel for a party, or any other person or entity other than BETA and its counsel, authored the proposed amicus curiae brief, in whole or in part, nor made any monetary contributions intending to fund the preparation or submission of the amicus curiae brief.

DATED: July 12, 2013 **DiCARO, COPPO & POPCKE**

By: 

CARLO COPPO, ESQ.
MICHAEL R. POPCKE, ESQ.
SHELLEY A. CARDER, ESQ.
Attorneys for BETA Healthcare Group

S205568

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARK T. FAHLEN, M.D.,

Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, et al.

Defendants and Appellants.

After a Decision by the Court of Appeal,
Fifth Appellate District, Division Fourth
No. F063023

PROPOSED AMICUS CURIAE BRIEF OF BETA HEALTHCARE GROUP IN SUPPORT OF DEFENDANTS/APPELLANTS SUTTER CENTRAL VALLEY HOSPITALS, ET AL.

DiCARO, COPPO & POPCKE
CARLO COPPO, ESQ.
(SB 34226; CARLO.COPPO@DCP-LAW.COM)
MICHAEL R. POPCKE, ESQ.
(SB NO. 122215; MICHAEL.POPCKE@DCP-LAW.COM)
SHELLEY A. CARDER, ESQ.
(SB NO. 137755; SHELLEY.CARDER@DCP-LAW.COM)
2780 GATEWAY ROAD, CARLSBAD, CALIFORNIA 92009
(760) 918-0500 • FAX: (760) 918-0008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
[CONTINUED]

Pages

TABLE OF AUTHORITIES
[CONTINUED]

Pages

STATUTES

TABLE OF AUTHORITIES
[CONTINUED]

Pages

MISCELLANEOUS

I.

INTRODUCTION

Considering the process by which physicians are evaluated for membership and privileges on a hospital's medical staff, a unanimous Supreme Court declared: ". . . peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians." (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 200.) Peer review has been long-established in common law and codified in both federal and state statutes. Further, it is also well-established law that:

> . . . before a doctor may initiate litigation challenging the propriety of a hospital's denial or withdrawl of privileges, he must exhaust the available internal remedies afforded by the hospital. . . [and] whenever a hospital, pursuant to a quasi-judicial proceeding, reaches a decision to deny staff privileges, an aggrieved doctor must first succeed in setting aside the quasi-judicial decision in a mandamus action before he may institute a tort action for damages.

(*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 469.)

The Court of Appeal in this action recognized the importance of these peer review principles when it struck four of six causes of action in Dr. Fahlen's complaint. In refusing to strike the cause of action based on Health and Safety Code section 1278.5 ("Section 1278.5"), however, the court rejected these well-established essential principles, finding the Legislature

intended to create an exception to the exhaustion requirement.

In fact, the Legislature did not clearly abrogate these doctrines when it amended the statute to include physicians among those who can assert whistleblower claims pursuant to Section 1278.5. The statute more readily evidences an intent to harmonize its purpose within the established framework of medical peer review and existing employment law.

Further, if the Court of Appeal's decision in this case is allowed to stand, a chasm will be created that will likely swallow the medical peer review process, imperiling the quality of medical care provided to patients in California, which certainly would be an unintended consequence. It is due to the enormity of the potential ramifications to peer review and, ultimately, patient safety, that Amicus BETA Healthcare Group ("BETA") is compelled to join in support of Defendants/Appellants'[1] request to reverse the decision of the Court of Appeal.

II.

ARGUMENT

A. Federal And State Law Recognizes The Necessity Of Peer Review.

Peer review is the process by which a committee comprised of licensed medical personnel at a hospital "evaluate[s] physicians applying for staff

---

[1] Defendants and Appellants Sutter Central Valley Hospitals, et al. are hereinafter referred to as "Sutter."

privileges, establish[es] standards and procedures for patient care, assess[es] the performance of physicians currently on staff, and reviews other matters critical to the hospital's functioning." (*Kibler, supra,* 39 Cal.4th at p. 199, citing *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10.) Due to increasing litigation and the need to improve the quality of medical care, both the United States Congress and the California Legislature were compelled to enact statutory schemes entrusting to hospitals and their medical staffs the primary responsibility for peer review and protecting peer review participants from the threat of civil liability.

In 1986, the federal government passed the Health Care Quality Improvement Act ("HCQIA") to encourage physicians to engage in effective professional peer review. (42 U.S.C. § 11101 et seq.) Congress enacted the HCQIA after finding that the threat of damages liability "unreasonably discourages physicians from participating in effective professional peer review." (42 U.S.C. § 11101.)[2]

---

[2] BETA joins the arguments asserted by Amicus Dignity Health and Adventist Health System/West ("Dignity") that HCQIA is applicable in California and preempts any statutes, including Section 1278.5, which provide lesser incentives, immunities, or protections. BETA agrees, in connection with unexhausted peer review matters, Section 1278.5 should be recognized as preempted by the HCQIA for all the reasons asserted by Dignity. This is not to say the statute is completely preempted, as Section 1278.5 claims [including claims for injunctive relief/reinstatement] may be made by healthcare workers other than physicians. In addition, physicians may still be able to assert claims

Originally, the HCQIA had an "opt-out" provision, which California accepted, enacting its own statutory scheme imposing more protections related to peer review. (Bus. & Prof. Code, § 809 et seq.) [3] The Legislature pronounced "that peer review of professional health care services be done efficiently, on an ongoing basis, and with an emphasis on early detection of potential quality problems and resolutions through informal educational interventions." (Bus. & Prof. Code, § 809(a)(7).) Further, the Legislature mandated: "It is the policy of this state that peer review be performed by licentiates." (Bus. & Prof. Code § 809.05.) By entrusting to hospitals and their medical staffs the primary responsibility of observing, reviewing and, if necessary, disciplining staff, Congress and the California Legislature recognize the expertise of the healthcare system, as well as the necessity of peer review to protect patients and promote high quality medical care. Courts acknowledge that "[h]ospitals have special expertise in promoting quality of

---

that do not involve an unadjudicated peer review proceeding.

[3] Congress actually repealed the "opt-out" provision at or about the same time California attempted to take advantage of it. (42 U.S.C. § 11111(c)(2) amended by Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Sect. 6104(e)(6)(A), 103 Stat. 2106, 2208) Business & Professions Code Section 809, et seq. The revocation of the federal "opt-out" was effectuated "[t]o end this confusion and assure a uniform national minimum level of protection for peer review . . . ." (MJN Ex. Q at p. 1; see also 135 Cong. Rec. E4137-02 (Nov. 21, 1989), 1989 WL 234321 (Remarks of Rep. Waxman) (MJN Ex. X).)

care and in making workable administrative arrangements . . . . Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible nor desirable for the courts to act as supervening boards of directors for every . . . hospital . . . in the state." (*Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 498 citing *Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal.App.3d 1169.)

The Court of Appeal's decision in this case, at least as interpreted by Dr. Fahlen, gives ". . . physicians a right to litigate a Section 1278.5 action while a hospital peer review proceeding is pending" (ROB, p.18) and, therefore, interferes with these principles.

If the Court of Appeal decision in this action is allowed to stand, a physician need only assert unverified and vague contentions that he "presented a grievance, complaint or report" of "unsafe patient care and conditions" within 120 days of being the subject of corrective action to avoid administrative proceedings and enjoy a presumption of retaliation. This subverts the fundamental policies of peer review and contrary to clearly stated Congressional and Legislative intent.

B. Section 1278.5 Does Not Clearly Abrogate Peer Review Or Exhaustion.

BETA concurs with the arguments advanced by Sutter that, in the context of medical peer review, the Legislature did not intend to abrogate the

long-standing rule requiring exhaustion of administrative remedies or intentionally reject the principles underscoring federal and state peer review statutes. It is undisputed the statute does not explicitly contains such language.

As the Supreme Court noted: "The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof." (*People v. Overstreet* (1986) 42 Cal.3d 891, 897.) The principles underscoring the need for peer review and for both administrative and judicial exhaustion were well-established at the time the Legislature included physicians in Section 1278.5. Had they meant to abrogate this law, it should have been explicitly stated. Under settled rules of statutory construction, the Legislature's failure to expressly provide for such an exception is presumed to be intentional. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1097, citing *Fierro v. State Bd. of Control* (1987) 191 Cal.App.3d 735, 741.) Legislative silence on the exhaustion requirement does not manifest a legislative intent to eliminate it. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 327-228.)

Furthermore, the concepts of administrative and judicial exhaustion are essential elements of the peer review process. Accordingly, the most reasonable interpretation of Section 1278.5 is one that harmonizes with the

principles that peer review must be performed by licentiates, and a physician subject to peer review is precluded from filing a damages action until he or she has fully exhausted administrative and judicial remedies.

C. Section 1278.5 Expressly Supports Peer Review.

In fact, there is evidence the Legislature specifically intended to limit the opportunity for physicians to be possible whistleblowers to situations that did not involve their own peer review, just as the original enactment was careful not to conflict with employment law.[4] When it came to expanding the protections of Section 1278.5 to clearly include physicians and surgeons, the Legislature also added Subdivision (l), which states:

> 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.

(Health & Safety Code, § 1278.5, subdiv. (l).) This is clearly-stated Legislative intent not to interfere with peer review matters.[5]

---

[4] The original enactment of Section 1278.5 which afforded "patients, nurses, and other healthcare workers" whistleblowing protections was careful to include the sentence that the protections "are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations." (Section 1278.5(a).)

[5] It is also significant to note that, in lobbying for passage of Section 1278.5, the CMA repeatedly referenced cases where peer review was not at issue. (See Exhibit 1 filed by Appellants Sutter in support of their petition for review, at p.3.)

D. *Nesson* Is Correctly Decided.

Earlier in 2012, the Fourth District Court of Appeal affirmed the dismissal of a physician's lawsuit which included a cause of action based on alleged violation of Section 1278.5 as one of the five allegations asserted against the hospital defendant. (*Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65.) *Nesson* was correctly decided.

Dr. Nesson's complaint illustrates how cursory and superficial allegations of violation of Section 1278.5 would permit an "end-run" around peer review if the decision of the Court of Appeal in this action is permitted to stand.[6]

Dr. Nesson, a radiologist, was summarily suspended from membership and the exercise of his clinical privileges based on quality of care and behavioral concerns. In consequence, his exclusive contract with the hospital to provide radiology services was terminated for cause. Dr. Nesson failed to challenge the corrective action against him by failing to exhaust his internal administrative and external judicial remedies. Instead, he filed a lawsuit, including a claim for violation of Section 1278.5, as one of the five allegations against the hospital.

---

[6] See Complaint, at pp. 4-5 and 7-8; BETA respectfully requests the Court take judicial notice of the unverified complaint filed in *Nesson* and lodges a true and accurate copy as Exhibit A.

The hospital defendant in the *Nesson* case filed an anti-SLAPP motion that was granted by the trial court, which properly found all causes of action arose from protected conduct by the hospital during medical peer review that qualify as official proceedings under Code of Civil Procedure section 425.16. It further found Dr. Nesson could not meet his burden to establish a probability he would prevail on any of his claims, as all causes of action were barred under *Westlake Community Hospital, supra,* 17 Cal.3d 465, due to Dr. Nesson's failure to exhaust his administrative and judicial remedies prior to filing his lawsuit.

In effort to distinguish *Nesson*, the Court of Appeal in this matter contends *Nesson* "did not separately consider or analyze the requirement for exhaustion of judicial remedies with respect to Nesson's Section 1278.5 cause of action." (*Fahlen v. Sutter Central Valley Hospitals* (2012) 208 Cal.App.4th 557, 574, at n. 6.) It is true that Dr. Nesson did not assert, as Dr. Fahlen has here, that the Legislature intended to abrogate the exhaustion requirement when it expanded Section 1278.5 to include physicians. However, the *Nesson* court recognized: "[t]he gravaman of each cause of action asserted by Nesson is that the Hospital somehow acted wrongfully when it terminated the Agreement . . . ." (*Nesson, supra*, 204 Cal.App.4th at p. 83.) Dr. Nesson's complaint alleged numerous acts of supposed whistleblowing over

approximately two years. (Complaint, pp. 4-5.) Fully aware that each of Dr. Nesson's claims was based on retaliation and that he specifically asserted Section 1278.5, the *Nesson* court held because he "failed to exhaust his administrative and judicial remedies before filing this lawsuit . . . all of his claims are barred." (*Nesson, supra*, 204 Cal.App.4th at p. 85.)

The Court of Appeal in this matter also attempts to distinguish the *Nesson* case on the grounds that Dr. Nesson failed to exhaust both his administrative and judicial remedies, whereas Dr. Fahlen only failed to exhaust the judicial remedies portion of the administrative proceeding.[7] For the reasons noted below, administrative and judicial exhaustion are both essential elements of quasi-judicial administrative action. To excuse the necessity of judicial exhaustion fatally undermines the administrative process and would lead to the demise of peer review, imperiling the safety of patients and quality medical care in this state.

///

///

///

---

[7] The Court of Appeal's opinion in this matter may not be clearly interpreted to mandate a distinction between administrative and judicial exhaustion; some have argued Section 1278.5 will sanction filing of a lawsuit at any point in the peer review process. (See 1CT 106).

E. Exhaustion Is An Essential Element Of Peer Review.

More than thirty years ago, the Supreme Court held a physician must exhaust both administrative and judicial remedies prior to filing a lawsuit for monetary damages caused by a hospital's alleged improper disciplinary action. (*Westlake Community Hosp., supra,* 17 Cal.3d at pp. 469, 476-477.) First, "before a doctor may initiate litigation challenging the propriety of a hospital's [peer review proceeding], he must exhaust the available internal remedies afforded by the hospital." (*Id.* at p. 469.) Second, ". . . the aggrieved doctor must initially succeed in a mandamus action before pursuing a tort remedy." (*Id.* at p. 478.) If a physician fails to do this, the administrative findings are binding in later civil action and tort claims challenging the peer review are barred. (*Id.* at pp. 483-486; see also *Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 356.) As the Supreme Court explained, the exhaustion requirement is well-established and mandated because it:

- serves the salutary function of eliminating or mitigating damages;
- accords recognition to the "expertise" of the organization's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance; and
- unearths relevant evidence and provides an administrative record which the court may review.

(*Id.* at p. 476.) The doctrine of exhaustion of judicial remedies is important to the preservation of the administrative process as it provides the agency the opportunity to resolve errors, to render decisions within its area of expertise and to fairly effectuate the quasi-judicial process.

The *Westlake* court analogized judicial exhaustion of peer review proceedings to a form of collateral estoppel or issue preclusion, stating that ". . . so long as such a quasi-judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the hospital's action." (*Ibid.*)

F. Judicial Exhaustion Is Essential To Uphold The Integrity Of Quasi-Judicial Peer Review Proceedings.

The necessity for exhaustion of both administrative and judicial remedies in a quasi-judicial action, such as peer review, was explained again by the Supreme Court in *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61.

In *Johnson*, a city employee filed a lawsuit asserting a discrimination claim under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) and a claim pursuant to Title VII of the federal Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.). The Supreme Court analogized to the quasi-judicial nature of peer review finding the plaintiff must exhaust both administrative and judicial remedies in quasi-judicial FEHA proceedings. Recognizing the importance of judicial exhaustion, the Court said:

> Although our state law may provide for a court's exercise of its independent judgment in reviewing the decision of an administrative agency adverse to an employee, such review occurs in the administrative mandate proceeding, not in the employee's civil action.

(*Id.* at p. 75.) In explanation, the Court noted:

> Exhaustion of judicial remedies . . . is necessary to avoid giving binding effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action.

(*Id.* at p. 70, citing *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 646.) The *Johnson* court held the Title VII claim asserted by the plaintiff in that case was not dismissed, because Title VII explicitly provides that state administrative findings are not given binding effect. The statute requires the Federal Equal Employment Opportunity Commission to give "substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law." (*Johnson, supra,* 24 Cal.4th at p. 74, quoting 42 U.S.C. § 2000e-5(b).) Nothing in the language of Section 1278.5 specifically precludes the binding effect of administrative decisions, as is set forth in Title VII.

Without such explicit exception, federal law also recognizes the necessity of judicial exhaustion in administrative proceedings. The U.S. Supreme Court has said: ". . . exhaustion protects administrative agency authority . . . . Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into . . . court and it discourages disregard of the agency's procedures. *(Woodford v. Ngo* (2006) 548 U.S. 81, 89, internal citations omitted.)

Because Section 1278.5 does not contain an explicit exception to the requirement of exhaustion of both administrative and judicial procedure in peer review proceedings, this Court should uphold their necessity and preclude the disintegration of peer review.

G. *Arbuckle* And *Runyon* Are Distinguishable.

The Court of Appeal in this case rejected the anthology of precedent requiring exhaustion of administrative and judicial remedies, by citing to two cases that do not involve medical staff peer review. (*Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760; *State Bd. of Chiropractic Examiners v. Superior Court (Arbuckle)* (2009) 45 Cal.4th 963.) These cases are distinguishable, as they did not statutorily-mandate administrative proceedings for which judicial exhaustion is a necessary component.

Arbuckle involved the allegations of an office assistant and the court held the particular whistleblowing statutes at issue (Government Code, § 8547.8; Labor Code, § 1102.5; and a tort cause of action for violation of public policy) did not ***require*** exhaustion of administrative remedies, although such action was permissible. (*State Bd. of Chiropractic Examiners, supra,* 45 Cal.4th at p. 972.) *Runyon* involved the claims of a college professor who also alleged retaliation in violation of Section 8547.12 and the court, there, affirmed the reasoning of *Arbuckle.* Neither of these cases involved Section 1278.5 and neither involved physicians and the peer review process which is mandated by both federal and state law.

California's peer review statutes do, in fact, mandate an administrative proceeding (see Bus. & Prof. Code, § 809 et seq.), specifically anticipate appellate procedures within that administrative proceeding (see Bus. & Prof. Code, § 809.4) and specifically protect judicial exhaustion (see Bus. & Prof. Code, § 809.8). These statutes, taken together with *Westlake* and the numerous other cited cases, establish administrative and judicial exhaustion is mandated in medical peer review proceedings.

Indeed, even in other instances, courts have repeatedly required exhaustion of judicial remedies where retaliatory conduct is alleged:

> . . . any other result would permit a total retrial of the same facts and issues once decided and expose a respondent to possibly inconsistent

> ruling in different forums; furthermore, it would render the administrative hearing a meaningless and idle act if it were to be accorded no import.

(*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.34th 860, 867 [employee brought safety concerns to the attention of federal investigators and alleged this precluded his reemployment]; *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 243; *Risam v. County of Los Angeles* (2002) 99 Cal.App.4th 412, 420.) One court, in distinguishing a case where administrative proceedings were unavailable, said: "The right to have an administrative decision reviewed by the court in a writ proceeding is substantial . . . the court is empowered to review the evidence . . . and independently review the merits of any legal contentions." (*Marciario v. County of Orange* (2007) 155 Cal.App.4th 397, 406, fn.4.)

H. Retaliation Claims Can Be Raised In Peer Review.

Dr. Fahlen contends peer review proceedings do not consider or decide retaliation issues. (ROB, p. 31) Dr. Fahlen provides no support for this claim. In discussing retaliation claims, the U.S. Supreme Court recently noted:

> . . . claims of retaliation are being made with ever-increasing frequency. The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years . . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.

(*Univ. of Tex. Southwestern Med. Ctr. v. Nassar* (U.S. June 24, 2013) 2013 U.S. LEXIS 4704, 34.) These concerns led to a more heightened "but for" causation standard. Claims of retaliation are often at issue in administrative proceedings. (See, e.g., *Risam, supra,* 99 Cal.App.4th 412 [employee alleged demotion in retaliation for opposing discriminatory practices in violation of FEHA].)

If a physician succeeds in obtaining a writ of mandate, whatever reasons were given for corrective action are deemed insufficient and cannot establish a legitimate, nondiscriminatory reason for the challenged action; accordingly, the physician is well on his way to proving retaliation. (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713-714.)

Federal courts have recognized California's peer review proceedings, including the requirement of judicial exhaustion, provide a meaningful opportunity to present constitutional claims. (See *Kenneally v. Lungren* (9th Cir. 1992) 967 F.2d 329, 333.) Certainly, if allegations of denial of constitutional rights can be litigated in a peer review proceeding, surely retaliation claims can be litigated.

Furthermore, Dr. Fahlen's contention that retaliation claims cannot be adequately prosecuted in an administrative forum has previously been explicitly rejected. (*Murray, supra,* 50 Cal.34th at pp. 873, 874; see also *Wilson v. City of Fresno,* 2011 U.S. Dist. LEXIS 32965, 21-25 ["A proceeding

seeking a writ of mandate could have addressed any due process considerations that (Plaintiff) felt existed at the administrative hearing."].)

There is no valid rationale for excluding retaliation claims from the requirement of both administrative and judicial exhaustion. Indeed, the *Westlake* court recognized a physician's lawsuit arising from peer review typically "rests on a contention that defendants intentionally and maliciously misused a quasi-judicial procedure in order to injure her; such a claim is necessarily premised on an assertion that the hospital's decision . . . was itself erroneous and unjustified." (*Westlake, supra,* at p. 484.) Clearly, retaliatory conduct allegations were specifically contemplated when the Supreme Court issued its mandate of exhaustion of both administrative and judicial remedies prior to permitting a physician to file a civil action for damages.

I. The Entire Action Appears To Be An Attempt Collaterally To Attack the Administrative Decision.

The Court of Appeal in this action recognized and followed the very important principles of *Westlake* exhaustion in dismissing four of the causes of action asserted in the complaint. Two of these claims seek to "provide protection against retaliation for health care practitioners who advocate for appropriate health care for their patients." (Bus. & Prof. Code §§ 510 and 2056.) The Court of Appeal explains: "these causes of action are an attempt collaterally to attack the administrative decision, which is not the purpose of

a civil action under section 1278.5." (*Fahlen, supra,* 208 Cal.App.4th at p. 580.) Nevertheless, this is not a distinction from the Section 1278.5 claim asserted in this action, at least according to the opinion which begins: "One of the issues we must decide is whether a doctor claiming he lost his hospital privileges as a form of whistleblower retaliation must exhaust his judicial remedy of pursuing review, via writ of mandate, of the hospital's action before he can file a whistleblower lawsuit under section 1278.5." Is not a claim that loss of membership and privileges is due to retaliation, rather than legitimate peer review, a collateral attack on the administrative proceeding?

III.

CONCLUSION

As exhaustion of administrative and judicial remedies are fundamental rules of procedure, necessary to preserve the integrity of administrative proceedings mandated by federal and state law, BETA respectfully joins Sutter's request that the Court of Appeal decision in this case be reversed and the anti-SLAPP motion be granted in its entirety.

DATED: July 12, 2013 **DiCARO, COPPO & POPCKE**

By: _____

CARLO COPPO, ESQ.
MICHAEL R. POPCKE, ESQ.
SHELLEY A. CARDER, ESQ.
Attorneys for BETA Healthcare Group

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 4,179 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

DATED: July 12, 2012

SHELLEY A. CARDER

S205568

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARK T. FAHLEN, M.D.,

Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, et al.

Defendants and Appellants.

After a Decision by the Court of Appeal,
Fifth Appellate District, Division Fourth
No. F063023

DECLARATION OF SERVICE

DiCARO, COPPO & POPCKE
CARLO COPPO, ESQ.
(SB 34226; CARLO.COPPO@DCP-LAW.COM)
MICHAEL R. POPCKE, ESQ.
(SB NO. 122215; MICHAEL.POPCKE@DCP-LAW.COM)
SHELLEY A. CARDER, ESQ.
(SB NO. 137755; SHELLEY.CARDER@DCP-LAW.COM)
2780 GATEWAY ROAD, CARLSBAD, CALIFORNIA 92009
(760) 918-0500 • FAX: (760) 918-0008

I, LISA M. REMSNYDER, declare:

At the time of service I was over 18 years of age and not a party to this action. I am employed with the law offices of DiCaro, Coppo & Popcke and my business address is 2780 Gateway Road, Carlsbad, California 92009.

On July 12, 2013, I served the **APPLICATION OF BETA HEALTHCARE GROUP TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS/APPELLANTS and PROPOSED AMICUS CURIAE BRIEF OF BETA HEALTHCARE GROUP IN SUPPORT OF DEFENDANTS/ APPELLANTS SUTTER CENTRAL VALLEY HOSPITALS, ET AL.** on the following interested parties in this action by United States Mail:

Joseph M. Quinn, Esq.
Glenda M. Zarbock, Esq.
Lori C. Ferguson, Esq.
HANSON BRIDGETT LLP
425 Market Street, 26th Floor
San Francisco, CA 94105
(415) 777-3200 - Telephone
(415) 541-9366 - Facsimile
jquinn@hansonbridgett.com

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

Stephen D. Schear, Esq.
LAW OFFICES OF
STEPHEN D. SCHEAR
2831 Telegraph Avenue
Oakland, CA 94609
(510) 832-3500 - Telephone
(510) 272-0711 - Facsimile
steveschear@gmail.com

Attorneys for
Plaintiff & Respondent
MARK FAHLEN, M.D.

Jenny Huang, Esq.
JUSTICE FIRST, LLP
180 Grand Avenue, Suite 1300
Oakland, CA 94612
(510) 628-0695 - Telephone
(510) 318-7701 - Facsimile
jhuang@justicefirstllp.com

Attorneys for
Plaintiff & Respondent
MARK FAHLEN, M.D.

I placed the original or a true copy thereof enclosed in sealed Federal Express envelopes addressed to all parties listed above for "Priority Overnight" delivery. I placed the envelopes for collection and overnight delivery at a regularly utilized Federal Express drop box.

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

Executed on July 12, 2013, at Carlsbad, California.

LISA M. REMSNYDER