2ND Civil 168705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GIL N. MILEIKOWSKY, M.D. Plaintiff & Appellant vs. TENET HEALTHSYSTEM, ENCINO TARZANA REGIONAL MEDICAL CENTER, A CALIFORNIA CORPORATION, Defendants & Respondents	2nd Civil No. B168705 L.A.S.C. NO. BS079131

APPEAL FROM THE SUPERIOR COURT

OF THE COUNTY OF LOS ANGELES

HONORABLE DAVID P. YAFFE, JUDGE PRESIDING

APPELLANT'S PETITION FOR REHEARING

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APPELLANT'S PETITION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR:

Plaintiff and Appellant Gil N. Mileikowsky ("Mileikowsky") respectfully petitions this Court for rehearing to reconsider its decision filed April 18, 2005. The decision is not only an incorrect statement of the law, it omits important, relevant evidence. If Supreme Court review is sought Mileikowsky will have to demonstrate to the Supreme Court if he provides additional facts not mentioned in the opinion that he sought rehearing and gave

this Court an opportunity to correct its opinion and include the omitted facts.

Overall, the opinion of this Court stands peer review on its head and elevates the hearing officer to a status above that of the physicians comprising the peer review committee. Inasmuch as Mileikowsky's peers never voted to terminate the proceeding this Court's opinion is fundamentally flawed and should be reconsidered.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Plaintiff and Appellant

April 26, 2005
Mileikowsy
APetRehg

BRIEF IN SUPPORT OF PETITION

I

INTRODUCTION

On April 6, 2005 this Court filed its opinion in the companion case of Mileikowsky v. Tenet Healthsystem, B159733, for which Mileikowsky sought rehearing on April 21, 2005. On April 18, 2005 this Honorable Court of Appeal rendered its opinion in the second Mileikowsky case and Mileikowsky now seeks rehearing also.

II

CRITICAL AND RELEVANT FACTS WERE OMITTED FROM THE OPINION OF APRIL 18,2005

A. Importance of Peer Review Decision

This Court fails to mention the overriding importance of peer review and the severe, adverse consequences which flow to a physician who has the unfortunate experience of being subjected to discipline by his peers. At the Hearing Committee hearing of September 24, 2001 Mileikowsky asked Gerald Clute, the Chief Executive Officer, whether he understood the significance and consequences of the termination of staff privileges. Dr. Mileikowsky asked the following question:

> "Did it ever appear to you as a drastic and extreme gesture or action to terminate the privileges of any physician?"

Clute answered, "Oh, yes."

Clue went on to acknowledge that he understood that the termination of staff

privileges would be reported to the Medical Board by virtue of Business & Professions Code Section 805. Clute also acknowledged that within 30 days the hospital would report the fact of staff privileges termination to the National Data Bank. See Transcript of September 24, 2001, pp. 825-826.

Clute acknowledged that if any physician applied for staff privileges at a hospital where he was the Chief Executive Officer he would not like that physician at his hospital.

Clute acknowledged that the chances of a physician practicing medicine anywhere in the civilized world were not favorable if a physician had his staff privileges terminated. See pp. 828-829 of the transcript of September 24, 2001.

B. Hearing Committee Must Make Decision To Terminate Hearing

At the first paragraph of p. 5 of its Slip Opinion filed April 18, 2005 the Court briefly mentions that the hearing officer at the first hearing submitted the issue of whether the first hearing should be terminated to the Hearing Committee, which decided that Mileikowsky had waived his right to a hearing. Although this Court did briefly mention this point, since it is the most critical point in the entire case this Court should have provided more details, which Mileikowsky presented beginning at p. 5 of his Opening Brief. In particular, Mileikowsky in his Opening Brief advised this Honorable Court of Appeal that the first hearing was presided over by an attorney, Lowell Brown. See Clerk's Transcript , pp. 115-121, 129-130. Moreover, as Mileikowsky set forth at page 5 of his Opening Brief, the first hearing presided over by Lowell Brown was terminated by a written decision of November 30, 2000 which was approved by the Hearing Committee. Please

see Clerk's Transcript, p. 116, Supplemental Administrative Record, pp. 10,000 to 10,012.

The decision of this Court filed April 18, 2005 briefly mentions a critical fact but provides no emphasis. Specifically at the top of page 5 of the Slip Opinion the Court acknowledged the following:

> ". . . The hearing officer submitted the issue to the Hearing Committee which ruled that Dr. Mileikowsky had waived his right to a hearing..."

The sentence quoted above which is in the first paragraph at the top of page 5 of the Slip Opinion of this Court's decision of April 18, 2005 contradicts the first full paragraph at p. 37 of this Court's opinion, where this Court states,

> "Dr. Mileikowsky argues alternatively that the decision to terminate the hearing should have been made by the Hearing Committee rather than the hearing officer acting alone. As can be seen from the above - quoted provisions, nothing in the Bylaws or relevant statute suggests that the Hearing Committee rather than the presiding officer or hearing officer is to decide procedural questions. To the contrary, the provisions we have quoted uniformally indicate that procedural matters are addressed to the presiding officer or hearing officer. The alternative that Dr. Mileikowsky advocates – that contested procedural issues be argued to and decided by the Hearing Committee – is simply unworkable...."

How can this Court state at page 37, as quoted above, that the point advocated by Dr. Mileikowsky – that the issue of termination should be submitted to the Hearing Committee - is unworkable. It did work. The first hearing was conducted by attorney Lowell Brown on behalf of the hospital. Lowell Brown did submit the issue of termination to the Hearing

Committee and the Hearing Committee made its ruling. How can this Court state that it is unworkable for a hearing officer to submit the question of whether the matter should be terminated to the Hearing Committee when that is exactly what the first hearing officer, Lowell Brown did? . It is especially outrageous for this Court to state at page 37 that it is unworkable to do so when at page 5 this Court mentioned, although extremely briefly, that that is precisely what occurred with respect to the first hearing.

To arrive at this improper conclusion this Honorable Court misstated the argument made by Mileikowsky . Mileikowsky did not advocate that all contested procedural issues be argued to and decided by the Hearing Committee. What Mileikowsky did argue, which this Court ignored, was that the final decision to terminate the proceeding should be decided by the Hearing Committee, just as it was done with respect to the request by Lowell Brown to have the matter terminated.

At the bottom of page 37 this Court states,

> ". . . If such panels were to be charged with determining procedural matters in addition to the difficult substantive questions, there would be little hope of having these types of proceedings resolved in any reasonable time."

Again, to reach this conclusion the Court misstates the argument advanced by Mileikowsky. He did not say that all procedural matters must be decided by the Hearing Committee. Indeed, he argued only that the final decision to terminate the proceeding should be made by the Hearing Committee, just as it was done with respect to the first hearing. It is fundamentally unfair for any tribunal, whether a hearing officer, a trial court,

or an appellate court, to misstate the argument advanced by one side in order to then "refute" it . Because this does happen in the practice of law a phrase has developed to describe it. It is called the "strawman" argument. Simply stated – the side advocating a particular position (in this case this Court of Appeal) attributes to the other side an argument which that other side did not make, and then refutes it.

At page 5 of Mileikowsky's Opening Brief Mileikowsky set forth quite clearly that the first hearing officer, Lowell Brown, did submit the decision to terminate the hearing to the Hearing Committee. As Mileikowsky noted in his Opening Brief the first hearing was terminated by a written decision of the Hearing Committee. It was the written decision which was appealed to the Appeals Body.

Mileikowsky made the following point at page 43 of his Opening Brief:

> "It is significant that the first hearing officer, Lowell Brown, at least knew enough to have the medical hearing committee sign the decision. Here Willick could not gamble that the committee would agree with him. . . ."

C. Hearing Committee Can See Conduct of Doctor at Hearing

In this particular case it was especially important that the final decision to terminate the proceeding be decided by the Hearing Committee because it was the Hearing Committee that observed the conduct or alleged conduct of Mileikowsky, and it was that purported conduct that justified termination of the proceedings according to Willick and apparently according to this Court of Appeal.

This Court stated that the evidentiary phase of this case began on August 16, 2001.

There were 16 hearings from August 16, 2001 to December 17, 2001 and according to this Court at these sessions, September 5, November 29, and December 17, Mileikowsky yelled. At the bottom of page 19 of this Court's Slip Opinion, this Court stated that Mileikowsky was noisy and yelling on September 5, November 29, and December 17, 2001. Also he allegedly made statements containing "invective and personal facts directed towards witnesses. . . ." If this were true presumably the Hearing Committee would have observed the conduct. Why not let the members of the Hearing Committee decide whether or not the conduct of the doctor is disruptive.

Whether or not Mileikowsky was disrupting the proceedings in front of the doctors who comprised the Hearing Committee was something that those doctors could decide for themselves since the conduct allegedly occurred in their presence. Disruptive conduct is not some technical activity that requires an expert legal mind to detect. If some witness or party is yelling and screaming in a tribunal the jury or the Hearing Committee can observe it first hand.

D. <u>A Neutral Hearing Committee Member, Dr. Pleet, Did Not Believe Willick Should Terminate Hearing</u>

The Court minimizes the statement made by Committee member Dr. Larry Pleet mentioned at pages. 8 and 9 of Appellant's Opening Brief. This Court stated that on March 19, 2002 a member of the Hearing Committee reportedly called the hospital to complain about Willick and his treatment of Mileikowsky.

This Court did not mention in its Opinion that the "member" was Dr. Larry Pleet,

who had been the subject of extensive voir dire when he was selected to participate on the Hearing Committee. His voir dire was conducted on January 30, 2001, as indicated in the Opening Brief, which referenced the administrative record. Dr. Pleet was on the staff of the Encino-Tarzana Regional Medical Center since 1965. He received his MD degree from UCLA in 1960 and is board certified in otolaryngology. He did not know Mileikowsky prior to the hearing but did know the prosecutor, Dr. Richard Wulfsberg for 25 years. They referred patients to each other. See transcript, pages. 63-64.

Dr. Pleet left a recorded message with the hospital. The message was quoted by the attorneys for Tenet in their letter to Dan Willick on March 19, 2002. See Tab 120 contained in "Encino-Tarzana Regional Medical Center, Mileikowsky, Medical Executive Committee correspondence, Volume 11. The attorneys requesting Willick to terminate the proceeding quoted the message as follows:

> "Debbie, this is Dr. Pleet calling. My opinion is Mr. Willick's request to deny Gil [petitioner] from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the rulings and the procedure and the legal things behind it, I think it is an outrageous thing to do to him. Based upon this brief and the information in it, if Mr. Willick has made these requirements, he is out to lunch and should be replaced (CT 242, lines 19-20; CT 243, lines 1-4)."

This reference to Dr. Larry Pleet's phone message, which is undisputed, is the key to this case. As Mileikowsky argued in his Opening Brief, Willick could not afford to have the Committee make the decision as to whether to terminate the proceedings because he knew the Committee would reject his contention that Mileikowsky had been out of order.

Dr. Pleet was at least neutral. Again, as stated, he knew Dr. Wulfsberg for 25 years and did not know Mileikowsky. Yet he disagreed with Willick.

If Mileikowsky were as disruptive during the hearings as Willick claimed (which this Court rubber stamped), why would Dr. Pleet have made the comment he did definitely make?

Willick and Mileikowsky obviously became adversaries. It is impossible to tell from this record who was at fault. But since Willick was basically a facilitator, and not the equivalent of a trial judge, the ultimate decision to dismiss the case should have been made by the Hearing Committee itself, just as Lowell Brown allowed the Committee to do with respect to the first hearing.

E. Court of Appeal Refutes An Argument Never Made

Mileikowsky returns to page 37 of this Court's Slip Opinion and again points out that he never argued that every single procedural decision must be made by the Hearing Committee. He only argued that the ultimate decision – dismissal – should be made by the Committee, could be made by the Committee, and was made by the first Committee after the first hearing conducted by Lowell Brown.

This is not simply some insignificant technical argument – the identity of the body making the ultimate decision to terminate – the hearing officer or the Committee. This is significant because it is important for the peer review process to be completed if at all possible. Who better than the Hearing Committee to make the decision. If the Committee does not believe that the doctor has been disruptive why should the hearing officer, who has

certain biases, make that decision?

F. Neither By-Laws Or Statutes Authorize Hearing Officer To Terminate Hearing

It is especially important to note, as this Court reluctantly concedes, the Bylaws and the governing statutes do not give the authority to the hearing officer to make the decision. This Court infers that such a right impliedly exists because it believes that without this right there could be prolonged disruption with no remedy. This, of course, is simply not true. In particular, Mileikowsky referred to Section 4(L) of Article VIII of the Bylaws, which covers disruption specifically.

> "L. Exclusion: No person shall disrupt any hearing. Any person in attendance who disrupts a hearing after being warned by the Hearing Officer to cease such disruption on penalty of exclusion, shall, at the discretion of the Hearing Officer, leave the hearing. If such excluded person is the affected practitioner or a witness, s/he shall have the right to submit to the Hearing Committee, not later than ten days after such exclusion, a written affidavit of his/her testimony or other evidence, with copies thereof to the other party."

This provision makes it quite clear that even the most disruptive physician would not have his case terminated. Rather, he would simply be excluded from the hearing.

Because this Court has no answer to the contention that the removal provision of the Bylaws provided both Willick and the Hearing Committee with a remedy, this Court simply ignored the entire argument. Nowhere in its opinion does this Court mention or discuss the exclusion provision of the Bylaws. Mileikowsky challenges this Honorable Court to answer this contention. This Honorable Court of Appeal could not respond to this

irrefutable argument, so it ignored the argument altogether!

G. Mileikowsky Was Held To The Standards Of An Attorney; He Was Denied The Services Of An Attorney

This Court essentially has treated Mileikowsky as though he were an attorney fully versed in all of the niceties of procedure. He was simply attempting to preserve his record for a court challenge should he lose. He did not want to acquiesce in rulings for fear that he would be deemed to have waived his objections. The hospital cannot simultaneously bar Mileikowsky from having legal representation and then treat him as a lawyer and hold him to the high standard of a legal practitioner of many years experience.

H. This Court Selectively Quoted Trial Judge

This Court suggests that Mileikowsky was physically combative but ignores the trial court's statement that after reviewing the record there was no evidence that Mileikowsky physically assaulted or challenged anyone (CT 401, lines 17-21). See page 18 of Appellant's Opening Brief. This Court selectively quoted from the trial court's comments but ignored the favorable part regarding the lack of any evidence regarding physical activity on the part of Mileikowsky

I. Prior Rulings of Hearing Officer Already Contained Sanctions.

This Court states at page 22 that Mileikowsky violated a ruling of Dan Willick but acknowledges that that ruling was allegedly for his benefit. Yet Mileikowsky had his hearing terminated because he allegedly violated a provision that would have helped him. In other words Willick contended that he was attempting to protect Mileikowsky from

himself and when Mileikowsky violated the rule Willick had no choice but to terminate the hearing. With friends like this who needs enemies?

This Court ignores the fact that prior alleged indiscretions by Mileikowsky already resulted in certain sanctions of an evidentiary nature.

J. Cedars' Trap (Attorney Manipulations)

Finally, this Court ignored the whole issue regarding the trap set by Tenet's attorneys who claimed a desire to obtain certain records from Cedars Sinai Medical Center. The attorney for Cedars Sinai, Gordon Simonds of Lathan & Watkins sent a letter notifying Mileikowsky not to release records and to go through the proper procedure, which Mileikowsky did by signing a release. Appellant Mileikowsky attached a copy of that release as an Exhibit to his Reply Brief, but this Court totally ignored it in its opinion because mentioning the fact that Mileikowsky did sign a Cedars Sinai release would have undermined the entire theory of this Court's decision, which is that Mileikowsky was disruptive, disobedient, was not cooperative , and tried to conceal evidence.

III

THIS COURT FAILED TO DEAL WITH YAQUB V. SALINAS VALLEY MEMORIAL HEALTHCARE SYSTEM, 122 CAL.APP.4TH 474 (2004)

The heart of this case was the clash between Dan Willick, the attorney hired by the hospital, and Mileikowsky, a non lawyer whose request for an attorney was denied. Mileikowsky's request for counsel was rejected because the By-Laws authorized the hospital's board to deny attorneys for both sides. See By-Laws, Article VIII, Section 4,

paragraph C. It is noteworthy that at the end, the hospital did participate (in violation of the By-Laws) by requesting Willick terminate the hearing.

Had Mileikowsky been an attorney, he would have objected to Willick's participation in the proceedings. At the time Willick terminated the proceedings, March 30, 2002, the Supreme Court had not yet filed its landmark decision in Haas v. County of San Bernardino, 27 Cal.4th 1017 (2002) (decided May 6, 2002):(Supreme Court requires hearing officers to be fair and impartial and disqualifies hearing officers with financial incentive to rule for institution which hires them).

On September 16, 2004, the Court of Appeal extended the Haas case to hospital hearing officers facilitating peer review at hospitals. This case implicitly recognizes the reality that hearing officers in peer review proceedings at hospitals may be biased and that their biases may affect their decisions on procedural points. Even though hearing officers do not make the ultimate decision, their authority to rule on evidentiary matters and other procedural issues requires them to meet the requirements of the Haas case.

Mileikowsky submitted a letter to this Court citing the Yaqub caes when it was decided, but this Court ignored it in its decision. It is noteworthy the Yaqub Court also cited Nightlife Partners v. City of Beverly Hills, 108 Cal.App. 4th 81 (2003), which Mileikowsky did cited in his Opening Brief. This case is significant because it involves the attorney controlling the hearing officer. That is what happened here to Mileikowsky, but this Court ignored the case altogether.

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IV

CONCLUSION

It is respectfully requested that this Honorable Court of Appeal vacate its decision of April 18, 2005 and reconsider the matter in light of this Petition for Rehearing. The decision not only makes bad law, it ignores key facts and legal principles . Mileikowsky may not have acted as a perfect gentleman during the contentious hearings but his conduct clearly did not rise to the level justifying the termination of the entire proceedings. At a minimum, the final decision should have been made by the physicians on the Hearing Committee.

If the decision of this Honorable Court stands the importance of hearing officers will have been elevated far beyond the importance of the peer review physicians themselves. After all, the entire process was developed to allow physicians to judge physicians. The hearing office is simply a facilitator to schedule breaks, coordinate witnesses, and handle other procedural matters. The hearing officer was never intended to have the power and authority which this Court has given to the hearing officer. This type of power should not be granted by judicial fiat. Rather, the Legislature should have a statute specifically governing this point or the By-Laws, in the absence of specific statutory authority, should authorize the hearing officer to exert the absolute authority given to him by the decision of this Court. Had Mileikowsky known from the outset that the hearing officer would have the ultimate authority to terminate the proceeding and had he known about the Haas case, which had yet to be decided, Mileikowsky would have been motivated to object to Dan

Willick. Mileikowsky understands that he did not specifically object to Willick but it is clear based upon what occurred during the hearing that Willick and Mileikowsky did not get along as they might have. However, to attribute the deterioration of the relationship to Mileikowsky is not fair. The physicians who were present and able to observe the interaction of Willick and Mileikowsky and who were able to observe Mileikowsky's participation in the process should have been the ones to make the ultimate decision. No statute or By-Law took that authority from the doctors on the Hearing Committee. Willick simply arrogated to himself that authority, and this Court has mistakenly upheld the non existent authority of Willick to make the decision.

This case cries out for rehearing.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Petitioner & Appellant
Gil N. Mileikowsky, M.D.

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 3,744 words which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 27, 2005

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Plaintiff-Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2115 Main Street, Santa Monica, California 90405.

On the date shown below I served the foregoing document described as: **APPELLANT'S PETITION FOR REHEARING** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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(4 copies)

Hon. David P. Yaffe
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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on April 28, 2005

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the 28 day of April 2005.

JUDITH A. BURGDORF