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

REPLY BRIEF ON THE MERITS

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
Email: jquinn@hansonbridgett.com
Telephone: (415) 777-3200
Facsimile: (415) 541-9366

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

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

REPLY BRIEF ON THE MERITS

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
Email: jquinn@hansonbridgett.com
Telephone: (415) 777-3200
Facsimile: (415) 541-9366

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

Federal

State

RULES

OTHER AUTHORITIES

INTRODUCTION

In his answering brief, Fahlen delays discussing the controlling legal test—the clear intent rule—until page 38. He then spends a total of seven lines on a statement of the rule that avoids any analysis. The Court of Appeal similarly eschewed the rule, finding an "exception" for whistleblower statutes. (See *Fahlen v. Sutter Central Valley Hosps.* (Aug. 14, 2012, F063023) (Slip Op.), at p. 19). But no such exception exists and the clear intent rule controls. In amending Section 1278.5, the Legislature did not disclose a clear intent to abrogate the common law exhaustion rule. Fahlen's Section 1278.5 claims must be stricken because he failed to exhaust judicial remedies.

Earlier this year, this Court confirmed the clear intent rule holding that a statute should be construed consistent with settled common law, unless the Legislature clearly and unequivocally discloses an intent to abrogate:

> "As a general rule, '[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. [Citation.] "A statute will be construed in light of common law decisions, unless its language '"clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter. . . ." [Citations.]' [Citation.]."'" (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 [].)

(*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193 (*Aryeh*), all editorial marks except last brackets in *Aryeh*; see also *Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th

311, 329 (*Campbell*) [similar]; *Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779 (*Torres*) [similar].)

When the Legislature amended Section 1278.5 to cover physician reports of safety concerns, the exhaustion rule was well established and elemental to quasi-judicial medical peer review. The courts and the Legislature had repeatedly endorsed—even bolstered—the exhaustion rule. Nothing that the Legislature said or did in amending Section 1278.5 clearly and unequivocally disclosed an intent to scuttle the rule or thwart this foundational element of quasi-judicial medical peer review.

The Legislature more likely intended the statute and the peer review rules to be harmonized. A complaint about safety is only valuable if something is done about it. Exhaustion makes investigation and correction through peer review possible by encouraging physician participation. This is lost when physicians are unwilling to participate in peer review, either because their professional judgment will be second-guessed by judges and juries or because participation exposes them to burdensome litigation.

This common-sense notion is supported by Section 1278.5's text and history. When the issue of the amendments' effect on quasi-judicial peer review was raised, the Legislature added a provision protective of existing peer review:

> 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.

(§ 1278.5, subd. (l).) Section 809 and following address medical peer review, and specifically provide for review by mandamus. The Legislature did not intend to scrap the exhaustion rule, a fundamental tenet of peer review.

Below, Memorial responds to each of Fahlen's arguments in support of the Court of Appeal's abrogation holding.[1] In the end, the Court will see that the holding is untenable because, when it amended Section 1278.5, the Legislature did not clearly disclose an intent to abrogate the rule. On this issue, the Court of Appeal's judgment should be reversed.

ARGUMENT

I. THE ISSUE IS WHETHER A PHYSICIAN BRINGING A SECTION 1278.5 CLAIM BASED ON QUASI-JUDICIAL PEER REVIEW MUST FIRST EXHAUST REMEDIES

"The issue to be briefed and argued," this Court has ordered, "is limited to the issue set forth in the petition for review." (Order, filed Nov. 14, 2012, at p. 1.) The issue set forth was whether by amending Section 1278.5, the Legislature intended to abrogate the established common law rule that a physician must exhaust judicial remedies before bringing a civil claim on the grounds that quasi-judicial peer review was maliciously motivated. (See Pet. for Rev., Sept. 24, 2012, at p. 1.)

---

[1] This case involves events at Memorial Medical Center in Modesto. Defendant and Appellant Sutter Central Valley Hospitals operates Memorial and Defendant and Appellant Steve Mitchell was Memorial's COO. We refer to them collectively as "Memorial."

Fahlen opens his Answering Brief with a misstatement of the issue. (See Answering Brief on the Merits, filed Apr. 8, 2013 ("ABM"), at p. 1.) The issue is *not* "whether physicians have a right to initiate civil actions for the retaliatory termination of their hospital privileges under [Section 1278.5]." A physician may pursue civil claims *after* exhausting remedies.

Nor is the issue whether the Court of Appeal erred in allowing the Section 1278.5 claims and the claim not based on peer review to proceed without exhaustion but requiring that the non-Section 1278.5 claims based on peer review be exhausted. (See ABM at p. 40.) Fahlen asked this Court to review this issue (see Answer to Petition for Review, *etc.*, filed Oct. 14, 2012, at pp. 32-33); but, the Court denied his request (see Order, filed Nov. 14, 2012, at p. 1). His attempt to inject the issue back into this case during the merits briefing is improper.

II. THE COURT OF APPEAL'S FACTS GOVERN

Where no party sought rehearing for omission or misstatement, this Court normally accepts the Court of Appeal's statement of the facts. (See Cal. Rules of Court, rule 8.500(c)(2).) Here, no party sought rehearing. Thus, Memorial limited its discussion to the facts addressed by the Court of Appeal. Fahlen should have done the same.

But, in the answering brief, Fahlen inappropriately relies on additional facts. (See ABM at pp. 2-10.) In any event, the additional facts are not probative on the issue presented, the Legislature's intent when it amended Section 1278.5.

III. THE CLEAR INTENT RULE GOVERNS AND SECTION 1278.5 SHOULD BE CONSTRUED CONSISTENT WITH EXISTING PEER REVIEW LAW

The parties agree that the issue is one of statutory construction reviewed *de novo*. (See, *e.g.*, *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072 (*Lexin*).) They further agree that the Court must ascertain the Legislature's intent to effectuate the purpose of the law and that the analysis begins with the text.[2] (See *People v. Cruz* (1996) 13 Cal.4th 764, 774-775.) They disagree, however, about two important interpretive issues.

A. There Is No Categorical Exception to the Clear Intent Rule for Whistleblower Statutes

The parties disagree on application of the clear intent rule. (See Opening Brief on the Merits, filed Feb. 4, 2013 ("OBM"), at pp. 26-34; see ABM, *passim*.)

Where, as here, the issue is whether a statute abrogates a settled common law rule, abrogation should be found only where the Legislature expressly abrogates the rule or abrogation is necessary to give the statute effect. (See *Aryeh*, *supra*, 55 Cal.4th at p. 1193; *Campbell*, *supra*, 35 Cal.4th at p. 329; *Torres*, *supra*, 15 Cal.4th at p. 779.) In amending Section 1278.5, the

---

[2] Fahlen argues that Section 1278.5's text compels an abrogation finding; but, he fails to identify any provision expressly abrogating the rule and as discussed in the Opening Brief and explicated below, abrogation is not a necessary implication. (See ABM at pp. 15-16; *Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 78-85.)

Legislature did not expressly abrogate the exhaustion rule nor is abrogation necessary to give effect to the statute.

Section 1278.5 covers patients, employees, health care workers and medical staff. (See § 1278.5, subd. (b)(1).) It covers a wide variety of circumstances, including, but not limited to, "discharge, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee, member of the medical staff, or any other health care worker of the health facility, or the threat of any of these actions." (§ 1278.5, subd. (d)(2).) The clear common law rule is that a physician may seek civil remedies on the grounds that a quasi-judicial peer review action was maliciously motivated only after exhausting administrative and judicial remedies. (See *Westlake Comm. Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 469, 482-483 (*Westlake*).) Thus, where the alleged adverse action is quasi-judicial peer review, the physician must exhaust remedies before pursuing a Section 1278.5 claim.

As did the Court of Appeal, Fahlen argues for an exception to the clear intent rule for whistleblower statutes, relying on *State Board of Chiropractic Examiners v. Superior Court* (*Arbuckle*) (2009) 45 Cal.4th 963 (*Arbuckle*) and *Runyon v. Board of Trustees of the California State University* (2010) 48 Cal.4th 760 (*Runyon*). (See ABM at pp. 1, 28-31, 35-39.) As explained more fully in the Opening Brief at pages 38 to 42, these cases are inapposite. They involve whistleblower legislation that at the same time established (1) a barebones administrative claim process not judicial in character and (2) a civil remedy, both

governing retaliation claims. The issue for the Court was whether the Legislature intended to require administrative or judicial exhaustion. In other words, *Arbuckle* and *Runyon* construed self-contained statutes to determine how the Legislature likely intended their claim and remedy provisions to operate. (*Arbuckle*, *supra*, 45 Cal.4th at pp. 971-976; *Runyon*, *supra*, 48 Cal.4th at pp. 763-774 [following *Arbuckle* analysis].) Those cases did not involve any settled common law rule. (See, *e.g.*, *People v. Avila* (2006) 38 Cal.4th 491, 566 [it is axiomatic that an opinion is not support for a proposition not addressed therein].)

Also, significant in those cases was the Court's determination that the Legislature likely did not intend barebones claims procedures to have preclusive effect in civil actions. (See *Arbuckle*, *supra*, 45 Cal.4th at pp. 977-978; *Runyon*, *supra*, 48 Cal.4th at p. 774.) Quasi-judicial medical peer review is not barebones; it is judicial in character. Moreover, peer review is driven by the medical staff, *not* the health facility. Medical staff leaders regularly identify concerns that trigger peer review, investigate the concerns, and recommend corrective action, while other medical staff members sitting as a judicial review committee ("JRC") determine the reasonableness of any actions. (See Bus. & Prof. Code, §§ 809 – 809.8; see also 1 CT 95-102 [peer review provisions of bylaws].) While the governing board may disagree with the JRC's findings, its discretion is limited and its final action is subject to judicial review. (See Bus. & Prof. Code, §§ 809.05, 809.8; see also 1 CT 99 [board must "give

great weight" to the JRC's actions].) Quasi-judicial peer review does not give rise to the concerns of easy manipulation in play in *Arbuckle* and *Runyon*.

Fahlen casts *Arbuckle* as holding that no exhaustion is required where the Legislature "expressly acknowledge[s] the existence of a parallel administrative remedy but [does] not require an adverse decision to be set aside," then contends that since Section 1278.5 addresses peer review but does not expressly require exhaustion, the Legislature intended to abrogate the *Westlake* rule, at least "where a physician ha[s] grounds to bring a retaliation case." (See ABM at pp. 35-39.) Of course, the *Westlake* rule was created precisely for cases in which a physician has grounds to claim that quasi-judicial peer review was maliciously motivated, including by retaliatory animus. (See *Westlake*, *supra*, 17 Cal.3d at pp. 483-484.) If the Legislature intended abrogation, it needed to do more than "acknowledge" peer review; it needed to clearly and unequivocally disclose an intent to abrogate. (See, *e.g.*, *Aryeh*, *supra*, 55 Cal.4th at p. 1193.) This it did not do.

B. Section 1278.5 Should Be Construed in the Context of Peer Review Law

Fahlen prefers a construction of Section 1278.5 blind to existing peer review law. (See ABM at pp. 17-18.) But context matters.

"[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes "'in the light of such

decisions as have a direct bearing upon them.'" (*Estate of McDill* (1975) 14 Cal.3d 831, 839 []; *People v. Weidert* [(1985)] 39 Cal.3d 836, 844-846 []; *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977-978, fn. 10 [].)" (*People v. Overstreet* (1986) 42 Cal.3d 891, 897; see also *Apple Inc. v. Superior Court (Krescent)* (2013) 56 Cal.4th 128, 146 [same].)

Lexin is instructive. At issue was Government Code section 1091.5, subdivision (a)(3) ("Section 1091.5(a)(3)"), a conflict-of-interest rule for public contracts. (*Lexin, supra*, 47 Cal.4th at pp. 1085-1092.) The Court observed that a statute should be construed consistent with other laws that deal with similar issues and share a purpose or object:

> It is a basic canon of statutory construction that statutes *in pari materia* should be construed together so that all parts of the statutory scheme are given effect. (*People v. Lamas* (2007) 42 Cal.4th 516, 525 []; *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1129 []; *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 [].) Two '"[s]tatutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object."' (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4 [], quoting 2A Sutherland, Statutory Construction (Sands, 4th ed. 1984) § 51.03, p. 467; see also *Altaville Drug Store, Inc. v. Employment Development Department* (1988) 44 Cal.3d 231, 236, fn. 4 [] [in pari materia means '"[o]f the same matter"' or '"on the same subject,"' quoting Black's Law Dict. (5th ed. 1981) p. 1004].)

(*Id.* at pp. 1090-1091.) The Court found that Section 1091.5 and the separate Political Reform Act of 1974 were *in pari materia*:

"They both deal with a relatively small class of people, public officers and employees, and share the same purpose or objective, the prevention of conflicts of interests, and hence can fairly be said to be *in pari materia*. [Citations.]" (*Id.* at p. 1091.) The Court went on to construe the statutes consistent with one another. (See *id.* at pp. 1091-1092.)

Here, Business and Professions Code section 809.8 codifies the exhaustion rule, ensuring that quasi-judicial peer review actions are reviewed in a mandamus proceeding "under Section 1094.5 of the Code of Civil Procedure." By Section 1094.5(d), the Legislature replaced the common law independent judgment test with the more deferential substantial evidence test. Sections 1278.5, 809.8 and 1094.5(d) share a purpose, patient safety.[3] Section 1278.5 can and should be harmonized with these laws to preserve mandamus review and the exhaustion requirement.

---

[3] See § 1278.5, subd. (a) ["The Legislature encourages this reporting *in order to protect patients and in order to assist those accreditation and government entities charged with ensuring that health care is safe . . . .*" (Emphasis added)]; Bus. & Prof. Code, § 809, subd. (a)(6) ["*To protect the health and welfare of the people of California*, it is the policy of the [State] to exclude, through the peer review mechanism as provided for by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct, . . ." (Emphasis added)]; see also *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 12 ["[T]he 'public' protected by the peer review process is not the public at large, but is limited to the patients of the particular hospital in question."].)

IV. THE EXHAUSTION RULE IS WELL ESTABLISHED

The following notions are settled: (1) quasi-judicial peer review actions at private hospitals are reviewed by mandamus (OBM at pp. 14-16); (2) a physician must exhaust judicial remedies before pursuing damages for allegedly malicious quasi-judicial peer review and the Legislature has directed that actions supported by fair process and substantial evidence must be upheld (*id.* at pp. 16-20; ABM at pp. 15-21); (3) the Legislature has codified quasi-judicial peer review standards, including mandamus review (OBM at pp. 20-24); and, (4) courts have repeatedly reinforced the exhaustion rule's elemental importance in peer review (*id.* at pp. 24-26).

Fahlen insists that by amending Section 1278.5, the Legislature intended to undo mandamus review and the exhaustion requirement. But when the issue of the amendments' effect on quasi-judicial peer review was raised,[4] (see Memorial's RJN, Ex. 7 at pp. 3-4), the Legislature added a subdivision protective of existing peer review (see § 1278.5, subd. (l); see Memorial's RJN, Ex. 8 at p. 5).

---

[4] Memorial has demonstrated that the amendments' sponsor never suggested that the changes were directed at quasi-judicial peer review. (See OBM at pp. 29-34.) Fahlen's answer: The sponsor "cited the example of Tenet Healthcare System having silenced physicians at a Redding [California] hospital who knew about unnecessary open-heart surgeries and Medicare [billing] fraud." (ABM at p. 13, citing 1 CT 234.) There is no evidence that those physicians were "silenced" by way of quasi-judicial peer review. (See 1 CT 234.)

Fahlen argues that subdivision (l)'s phrase "legitimate peer review activities" is intended to distinguish between non-retaliatory and retaliatory peer review, the former governed by the exhaustion rule, the latter not. (See ABM at p. 20.) But, under this construction, a court would have to resolve a physician's claim before subdivision (l) would afford any protection for peer review; in which case, why have subdivision (l)? (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["[I]nterpretations that render statutory terms meaningless as surplusage are to be avoided."].) A more natural reading is that the Legislature is referring to peer review under existing legal standards. (See Shorter Oxford English Dictionary (6th ed. 2007) at p. 1577, col. 1 [defining legitimate as "a. Conformable to, sanctioned or authorized by law or principle; lawful justifiable; proper. [] b. Normal, regular, conformable to a recognized standard type. . . ."].) Whether peer review conformed to legal standards is precisely the issue addressed in a mandamus proceeding. This construction is consistent with the notion that subdivision (l) was intended to address CHA's concern that Section 1278.5 not adversely affect quasi-judicial peer review. (See OBM at pp. 31-33.)

Fahlen contends that "the Legislature rejected the CHA's pleas that physicians should be required to exhaust administrative and judicial remedies before filing a Section 1278.5 action." (See ABM at pp. 21-22.) But, the Senate responded to CHA by adding subdivision (l), which provides that the statute should not be construed to limit legitimate peer

review activities. And the Assembly understood it "to ensure that the health facility peer review committee continues to operate as it has under current law." (See OBM at pp. 32-34.) Every indication is that the Legislature intended to preserve the peer review rules.

V. THE EXHAUSTION RULE APPLIES TO CLAIMS BASED ON QUASI-JUDICIAL PEER REVIEW

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

In the Opening Brief at pages 24 through 37, Memorial explains that by Section 1278.5, the Legislature did not clearly disclose an intent to abrogate the exhaustion rule. Fahlen's contentions to the contrary are unsupported.

Fahlen contends that "one of the specific purposes of the [sic] Section 1278.5, as amended in 2007, is to protect physicians from retaliatory peer review actions against their hospital privileges." (See ABM at p. 14.) As support, he points to the inclusion of unfavorable changes in staff privileges in the list of actions that may be retaliatory and the remedies of reinstatement and reimbursement for wrongful change in privileges. (See ABM at pp. 13-14.) But, this case is limited to claims based on quasi-judicial peer review; as demonstrated in the Opening Brief, certain staff privilege determinations are made without quasi-judicial peer review. (See OBM at p. 43.) In those cases, there is no exhaustion requirement.

Echoing the Court of Appeal, Fahlen argues that by creating a cause of action that covers retaliatory quasi-judicial peer review, the Legislature must have intended to abrogate the exhaustion rule. (ABM at pp. 14-15, citing Slip Op., at p. 19; see also ABM at pp. 15-17.) Again, though, in connection with Section 1278.5 the Legislature never discussed quasi-judicial peer review. Assuming that it intended the amendments to encompass such actions, it does not follow that the Legislature intended abrogation of the exhaustion rule. To the contrary, the record suggests that the Legislature intended to preserve peer review, including the exhaustion rule.

Section 1278.5 is remedial and should be "liberally construed on behalf of the class of persons it is designed to protect." (See *California Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 295; see also *Wells v. One2One Learning Found.* (2006) 39 Cal.4th 1164, 1196 (*Wells*) [construction informed by statute's ultimate purpose].) The statute is primarily directed at *patient safety*.[5] (§ 1278.5, subd. (a).) Quasi-judicial peer review is also directed at patient safety and is the established method for identifying, investigating, and correcting unsafe conditions posed by physicians whose care or conduct jeopardizes patients.

---

[5] Fahlen initially recognizes that Section 1278.5 is directed at "patient safety" (see ABM at p. 2); later though, he argues that "the purpose of [Section 1278.5] is [] to protect *public* safety by giving whistleblowers legal protection from retaliation" (ABM at p. 11 [emphasis added]). The Legislature declared that Section 1278.5 is directed at patient safety. (See § 1278.5, subd. (a).) It should be construed in light of other patient-safety statutes and laws.

Exhaustion is fundamental to peer review in that it makes physician participation possible by providing a measure of deference to professional judgment and protecting participants from burdensome lawsuits. To construe the reporting protection afforded by Section 1278.5 as undoing a fundamental tenet of peer review would compromise, not further, patients' interests.

On the other hand, harmonizing Section 1278.5 and the exhaustion rule would further peer review and the statutory reporting protections by allowing physicians who suffer unreasonable or unwarranted quasi-judicial peer review to prove that the action was motivated by retaliatory animus. (See *Wells*, *supra*, 39 Cal.4th at p. 1190 ["In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on policy."].) This analysis is especially compelling in light of the fact that CMA, the sponsor of the amendments, never suggested that the amendments would have any effect on quasi-judicial peer review.

According to Fahlen, "[n]othing suggests that the CMA intended its list of examples to be exclusive, and the Legislature did not adopt the CMA's list as its definition of 'discriminatory treatment.'" (ABM at pp. 27-28.) But the Assembly Committee on Health incorporated CMA's list into its report on the bill. (See Memorial's RJN, Ex. 2 at p. 4; see, *e.g.*, *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 111 [considering legislative committee's explanation of evils at which bill directed].) The Legislature focused on actions that a hospital may take unilaterally; it did not consider actions such as quasi-judicial

medical peer review that require participation by the medical staff and are governed by fair-process rules.

Fahlen argues that the Legislature must have intended abrogation because, given rules of mandamus review, including a discovery ban and the substantial evidence standard, it is "effectively [] impossible for a physician to prove that a healthcare facility's reasons for terminating his privileges were pretextual."[6] (ABM at p. 34.) Fahlen focuses on the wrong

---

[6] Fahlen proffers "the method of proof" for Section 1278.5 claims. (See ABM at pp. 33-34, citing *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713-714 (*Mamou*).) The mechanics of a statutory claim should be determined consistent with the legislative intent. (See, *e.g.*, *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215 [procedure for adjudicating claim is issue of statutory interpretation directed at giving effect to Legislature's intent].) Fahlen's methodology is based on a case decided under FEHA, not Section 1278.5. (See *Mamou*, *supra*, 165 Cal.App.4th at pp. 713-714.) To date, no appellate court has published an opinion on the procedure for Section 1278.5 claims. One federal district court opinion provides that "[t]o establish a prima facie case of retaliation under § 1278.5, a plaintiff must show that: (1) he engaged in protected activity under the statute; (2) he was thereafter subjected to an adverse employment action; and (3) a causal link between the two. See [*Mendiondo v. Centinela Hosp. Med. Ctr.* (9th Cir. 2008) 521 F.3d 1097, 1105 (*Mendiondo*)]." (*Jadwin v. County of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129, 1144 (*Jadwin*).) The case cited by the *Jadwin* court—*Mendiondo*—was decided on the pleadings and does not purport to decide a procedure for resolution on the merits. Even if *Jadwin* is correct, however, it is far from settled that showing "a causal link" between a report and an adverse action requires only, as Fahlen contends, "some evidence that suggests that the two were linked by a retaliatory motive, . . ." (See ABM at pp. 33-34.) Nor does it appear that a single procedure for all Section 1278.5 claims would necessarily serve the statute's purpose—
(footnote continued)

proceeding. The record is established during peer review (see Bus. & Prof. Code, § 809.2 [physician has right to documentary discovery, pre-hearing witness list, to present case, to examine and cross-examine witnesses, and to argue issues]); nothing prevents a physician from developing a record on pretext or retaliatory animus.

Nor is mandamus review as narrow as Fahlen alleges. It includes review of evidentiary findings (see Code Civ. Proc., § 1094.5, subd. (d)), as well as whether the peer review bodies proceeded in excess of jurisdiction and whether proceedings were fair (see *id.*, § 1094.5, subd. (b)). A finding on these issues in the physician's favor could support a pretext determination in a subsequent Section 1278.5 action.

According to Fahlen, courts need not respect the judgment of medical professionals now that "the Legislature has recognized that peer review decisions can be used illegitimately for retaliatory purposes." (ABM at pp. 36-37.) But, the possibility that quasi-judicial peer review could be motivated by animus has long been recognized. (See *Westlake*, *supra*, 17 Cal.3d at pp. 483-484.) Fahlen's suggestion that by Section 1278.5 the Legislature meant to convert privileging decisions affecting patient safety into jury issues is not supported by the statute's text or history. (See ABM at p. 36.) Nor is there any support for Fahlen's claim that the Legislature intended to drop the exhaustion-related

---

patient safety—especially if uniformity means abrogation of the exhaustion rule, which itself is elemental to ensuring patient safety.

protections for peer review participants. (See *ibid.*) Indeed, subdivision (l) strongly suggests otherwise.

B. Harmonizing Section 1278.5 and the Rule Removes Doubt as to the Statute's Constitutionality

In the Opening Brief, Memorial explains that harmonizing Section 1278.5 and the exhaustion rule would help remove doubt as to the statute's constitutionality. (See OBM at pp. 34-37.) Fahlen's objection to the argument is ill founded and his response on the merits misses the mark.

Fahlen claims that the argument is factual and has been forfeited. (See ABM at pp. 43-44.) The argument, however, is legal. It seeks to reconcile Section 1278.5 with the federal Health Care Quality Improvement Act of 1986 ("HCQIA"). (See OBM at pp. 34-37.) HCQIA confers a qualified immunity on peer review bodies and participants where the action is reasonable and fair (with a rebuttable presumption that all peer review is reasonable and fair). (See 42 U.S.C. §§ 11111(a)(1) and 11112(a).) Since this immunity is largely consistent with the qualified immunity afforded by the exhaustion rule, continued enforcement of the rule, even as to Section 1278.5 claims, is most consistent with federal law and most likely to avoid preemption issues.

On the merits, Fahlen's arguments that HCQIA immunity is irrelevant or inapplicable are incorrect. Contrary to Fahlen's assertion, HCQIA impacts all litigation arising from peer review, not just claims for damages. Although HCQIA's immunity is specific to liability for damages (42 U.S.C. § 11111(a)), HCQIA

also protects peer review participants by allowing costs and attorney's fees for defendants who prevail on a claim for either damages or injunctive relief. (42 U.S.C. § 11113.)

Moreover, Fahlen's unsupported assertion that HCQIA's immunities do not apply if the peer review actions were motivated by retaliatory animus ignores the vast body of case law suggesting otherwise. The motivation behind the peer review action is irrelevant. (See 42 U.S.C. § 11112(a); *Austin v. McNamara* (9th Cir. 1992) 979 F.2d 728, 734 [assertions of hostility toward physician irrelevant to reasonableness inquiry because "[t]he test is an objective one, so bad faith is immaterial."]; *Poliner v. Texas Health Sys.* (5th Cir. 2008) 537 F.3d 368, 377 [agreeing with four sister circuits that HCQIA's reasonableness requirements create objective standard of performance, rather than a subjective good faith standard]; see also *Fox v. Good Samaritan L.P.* (N.D. Cal. 2010) 801 F.Supp.2d 883, 890, affd. (9th Cir. 2012) 467 Fed. Appx. 731, cert den. (2012) 133 S.Ct. 218 [evidence of bad faith or hostility is irrelevant and cannot serve to create a material issue of fact].) Even minority courts that are willing to considered retaliatory animus to do only in the context of the record as a whole. (See, *e.g.*, *Freilich v. Upper Chesapeake Health Sys.* (2011) 423 Md. 690, 711 ["evidence of retaliatory animus is one of many types of evidence that can contribute, in the totality of the circumstances, to a finding that an action did not meet" HCQIA immunity standard].)

Harmonizing Section 1278.5 and the exhaustion rule helps remove doubt as to the statute's constitutionality.

C. The Court of Appeal Erred in Its Construction of Section 1278.5

Nothing that Fahlen says in his Answering Brief changes the reality that the Court of Appeal's abrogation holding is untenable. (See OBM at pp. 38-47.)

1. The Court of Appeal Relied on Inapposite Case Law

In the Opening Brief, Memorial shows that the Court of Appeal based its abrogation holding on inapposite authority. (See OBM at pp. 38-42.) Above, we demonstrate why Fahlen's attempt to resuscitate those authorities fails. (*Supra* at § III(A).) The fact is that neither *Arbuckle* nor *Runyon* governs the issue presented in this case.

2. The Statutory Injunction Provision and the Exhaustion Rule Can be Harmonized

As explained in the Opening Brief, subdivision (h)—the injunction provision—addresses "peer review" generally, not solely *quasi-judicial* peer review.[7] (See OBM at pp. 42-44.) If the pending Section 1278.5 claim is based on quasi-judicial peer review, the issue of interference would not arise because by

---

[7] Fahlen points to subdivision (h)'s reference to "a peer review hearing, as authorized in Section 805 and Sections 809 to 809.5, inclusive." (See ABM at p. 18.) But subdivision (h) covers both peer review hearings and the peer review "process," which includes non-judicial peer review, such as denials of privileges that do not give rise to hearing rights. (See OBM at p. 43.)

virtue of the exhaustion requirement, the physician would have exhausted her claim before pursuing civil remedies.

Further, the peer review proceeding that is the subject of the evidentiary demand may not be the adverse action upon which the Section 1278.5 claim is based (if it were, then why not provide that the medical staff may seek an injunction to protect the peer review committee from being required to comply with evidentiary demands?). The Legislature may have foreseen that a physician would want information on proceedings brought against him after he filed suit in order to establish retaliatory motive. Or, it may have foreseen that a physician may seek information on peer review actions involving others to support a disparate treatment claim. Indeed, Fahlen suggests he will seek precisely such discovery. (See ABM at pp. 34-35.) The Legislature may well have intended the injunction provision for these situations.

"This subdivision establishes," according to Fahlen, "that the Legislature intended to give physicians a right to litigate a Section 1278.5 action while a hospital peer review proceeding is pending." (See ABM at pp. 18.) Even if true, as discussed, this would not mean that the Legislature clearly and unequivocally abrogated the exhaustion rule.

Fahlen maintains that subdivision (h) demonstrates that the Legislature intended to deny peer review bodies exclusive jurisdiction over privilege determinations whenever a physician alleges that a quasi-judicial peer review action is motivated by

retaliatory animus.[8] (ABM at pp. 18-19.) Such an objective would entirely undo *Westlake* and its exhaustion requirement. A finding that the Legislature clearly and unequivocally disclosed an intent to undo an established common law rule fully integrated into patient safety protections should be based on more than a single subsection that can be construed any number of ways.

For the notion that overlapping jurisdiction is an "uncontroversial concept," Fahlen cites *Pacific Lumber Company v. State Water Resources Control Board* (2006) 37 Cal.4th 921 (*Pacific Lumber*). (ABM at pp. 18-19.) There, this Court addressed the issue of whether the Z'berg-Nejedly Forest Practice Act of 1973 and its implementing regulations provide the exclusive mechanism for review of timber harvesting plans and their environmental effects, including effects on water quality. (See *Pacific Lumber*, *supra*, 37 Cal.4th at p. 926.) The Court's finding that the Act did not preempt other environmental laws turned on the text of a savings clause, which made room for other environmental review. (*Id.* at pp. 933-934.) Thus, agencies, like the State Board, had jurisdiction as well. "This approach simply

---

[8] In its discussion of "unintended consequences," CHA suggested that the bill could be read to allow adjudication of alleged sham quasi-judicial peer review Section 1278.5 claims prior to exhaustion. (See Memorial's RJN, Ex. 9, at pp. 1-3; see also ABM at pp. 23-24.) Whether the proposed statute *could* be so read is a question far different from whether the statute *must* be read to abrogate the exhaustion requirement. (See, *e.g.*, *Aryeh*, *supra*, 55 Cal.4th at p. 1193 [abrogation will not be found unless such intent is clear and unequivocal].)

creates a system of overlapping jurisdiction, an uncontroversial concept under our law even absent a savings clause like the one implicated here. [Citations.]" (*Id.* at p. 936.)

Overlapping jurisdiction is uncontroversial. The issue here, though, is whether by Section 1278.5, the Legislature created such a scheme. When the Legislature amended Section 1278.5, the common law clearly conferred exclusive jurisdiction, first on the peer review body, then on the courts in a mandamus proceeding. Thus, a new rule of overlapping jurisdiction may be found only if the Legislature's intent to override the common law rule is clear. (See *Aryeh*, *supra*, 55 Cal.4th at p. 1193.) There is no clear evidence that the Legislature intended to create a new system of overlapping jurisdiction.

Fahlen argues that prior to exhaustion courts must be able to adjudicate physicians' claims that quasi-judicial peer review was conducted because of retaliatory animus, otherwise "there would be no need for either subdivision (h) or subdivision (l)." (ABM at pp. 19-20.) As explained above, the injunction provision can be given effect without abrogation. As can subdivision (l); the record demonstrates that the Legislature intended the subdivision to promote, not undo, existing peer review rules.

3. The Statutory Burden Provision and the Exhaustion Rule Can Be Harmonized

The Opening Brief demonstrates that subdivision (d)(1)'s burden provision and the exhaustion rule are readily harmonized. (See OBM at pp. 44-45.) Fahlen's arguments to the contrary are unavailing.

Fahlen asserts that physicians "nearly always" lose in mandamus proceedings and from that premise argues that "[r]equiring exhaustion would effectively nullify the presumption . . . ." (ABM at p. 25.) The premise, however, is belied by the published opinions in which the physician prevails.[9] The premise that the presumption is substantive is also wrong. It shifts only the burden of production. (See ABM at pp. 24-25.)

4. Harmonization Does Not Render Superfluous the Statutory Reinstatement Remedy

The Opening Brief shows that subdivision (g)'s reinstatement remedy can be construed consistent with the

---

[9] See, *e.g. Mileikowsky v. West Hills Hosp. & Med. Center* (2009) 45 Cal.4th 1259 [directing issuance of peremptory writ]; *Miller v. Eisenhower Med. Center* (1980) 27 Cal.3d 614 [same]; *Bode v. Los Angeles Metro. Med. Center* (2009) 174 Cal.App.4th 1224 [affirming peremptory writ]; *Nasim v. Los Robles Reg'l Med. Center* (2008) 165 Cal.App.4th 1538 [same]; *Smith v. Selma Cmty. Hosp.* (2008) 164 Cal.App.4th 1478 [same]; *Yaqub v. Salinas Valley Mem. Healthcare System* (2004) 122 Cal.App.4th 474 [directing issuance of peremptory writ]; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434 [same]; *Bergeron v. Desert Hosp. Corp.* (1990) 221 Cal.App.3d 146 [affirming peremptory writ]; *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286 [directing issuance of peremptory writ]; *Haller v. Burbank Cmty Hosp. Found.* (1983) 149 Cal.App.3d 650 [same]; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648 [affirming peremptory writ]; *Hackethal v. Loma Linda Cmty. Hosp. Corp.* (1979) 91 Cal.App.3d 59 [affirming (in part) peremptory writ]; *Ascherman v. St. Francis Mem. Hosp.* (1975) 45 Cal.App.3d 507 [directing issuance of peremptory writ]; *Martino v. Concord Cmty. Hosp. Dist.* (1965) 233 Cal.App.2d 51 [same]; *Rosner v. Eden Township Hosp. Dist.* (1962) 58 Cal.2d 592 [same].

exhaustion rule. (See OBM at p. 46.) Fahlen's argument otherwise is based on an impractical construction of the law.

Fahlen argues that exhaustion would render the reinstatement remedy "superfluous" because a mandamus proceeding itself may result in reinstatement. (ABM at pp. 25-27.) Different causes of action or separate proceedings often allow the same relief. This does not render a relief provision superfluous. Further, the reinstatement remedy would be viable in a Section 1278.5 action in which the physician secured mandamus relief but not reinstatement or in an action in which privileges were suspended, denied, revoked or not renewed without quasi-judicial peer review. Fahlen's claim that the latter cases are too rare to matter is belied by two of the lead cases on peer review that deal with non-judicial peer actions. (See ABM at pp. 25-26; see also *Westlake*, *supra*, 44 Cal.4th at p. 472 [privileges denied based on peer review body's investigation without notice or hearing]; *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 62-63 [physician's application for privileges denied without hearing].) Nothing suggests that the facts of these cases were anomalous.

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

Memorial has demonstrated that Section 1278.5 and the rule can be construed consistently, without compromising the statute's intent. (See OBM at pp. 46-47.) Fahlen's claims to the contrary do not withstand even casual scrutiny.

Fahlen contends that "the Legislature obviously wanted Section 1278.5 to be a strong prohibition on retaliation with effective remedies for whistleblowers." (See ABM at p. 42.) But, the Legislature bolstered the exhaustion rule in 1979 when it added subdivision (d) to Section 1094.5 and reinforced it again years later with Section 809.8. Also true is that the Legislature in amending Section 1278.5 did not expressly abrogate the exhaustion rule. Nor is it reasonable to read Section 1278.5 or its history as clearly and unequivocally providing for abrogation. Instead, the strongest evidence of the Legislature's view is subdivision (l), which suggests that the Legislature intended to leave in place the existing peer review rules.

Fahlen's response: "[I]t is inconceivable that the Legislature intended to give health facilities a nearly foolproof ability to escape liability for retaliation by using peer review proceedings." (See ABM at p. 42.) As a means for retaliation, quasi-judicial peer review is hardly "foolproof." It is controlled by the medical staff, not the health facility. (See Bus. & Prof. Code, § 809 *et seq.*) Proceedings are burdensome and expensive, as demonstrated here, where proceedings spanned two and a half years, involved 13 hearings over eight months and consumed countless staff and hospital resources. (See Slip Op. at pp. 5-7.) Once complete, quasi-judicial peer review is subject to judicial review for factual, as well as legal, error. (See Code Civ. Proc., § 1094.5, subds. (b) & (d).) Given these circumstances, it is unsurprising that CMA did not identify quasi-judicial peer review in its list of retaliatory actions. (See Memorial's RJN, Ex. 3 at pp.

6-7.) These circumstances also help explain subdivision (l)—the statute was not directed at quasi-judicial peer review and, thus, existing rules would remain intact.

Fahlen argues that harmonization would "shield[] peer review from accountability under Section 1278.5." (See ABM at pp. 42-43.) To be clear, exhaustion does not "shield peer review from accountability." Quasi-judicial peer review is subject to active judicial scrutiny; where an action fails to pass muster, the physician may bring a civil suit on the grounds that it was maliciously motivated. (See *Westlake*, *supra*, 17 Cal.3d at pp. 482-483.) Exhaustion only prevents a physician from bringing a premature action or an action where peer review was reasonable and warranted. The rule serves important purposes and by Section 1278.5, the Legislature did not abrogate it.

6. Fahlen's Additional Arguments in Support of Abrogation Are Unfounded

Fahlen appears to argue that the Legislature must have intended abrogation, otherwise a threat of adverse action by way of quasi-judicial peer review would never be actionable. (See ABM at p. 20.) This case, however, involves peer review action.[10]

---

[10] Fahlen asks this Court to affirm the judgment on the alternative grounds that his Section 1278.5 claim need not be exhausted to the extent it is based on the pre-peer review conduct "of getting [him] fired [from Gould] and then threatening him [with peer review]." (See ABM at pp. 39-40.) This issue is not within the issue presented. Fahlen does not even contend that he made the argument in the lower courts. In any event, Fahlen's "getting fired from Gould" is covered in the fourth cause of action, (footnote continued)

Thus, the Court need not address the manner for adjudicating Section 1278.5 claims based solely on alleged threats of adverse quasi-judicial peer review.

Fahlen contends that requiring exhaustion for claims based on quasi-judicial peer review actions but not for other claims (for example, those based on pre-peer review conduct) would be inefficient and would create "a perverse incentive" for hospitals to rush into a peer review proceeding "to eliminate [a] physician's ability to sue. . . ." (See ABM at pp. 39-40.) But there is no evidence that hospitals are using quasi-judicial peer review as an end-run around Section 1278.5. If a hospital tried, it is likely that the medical staff, which largely controls peer review, would put an end to the effort.

He argues that no harm can come from allowing a Section 1278.5 claim to proceed following the administrative process but before a mandamus action because at that point, "there is no risk of a Section 1278.5 action interfering with the proceeding." (ABM at pp. 20-21.) But, the exhaustion rule is designed to promote professional and expert quasi-judicial proceedings and findings,

---

which is not currently at issue. (See Slip Op. at p. 8, n.3.) And, Mitchell's advisement that Fahlen could avoid peer review and a Section 805 Report by relocating was a pre-proceeding communication related to an official proceeding authorized by law contemplated in good faith and under serious consideration. (See Slip Op. at p. 5.) Thus, it is more than likely covered by the litigation privilege. (See Civ. Code, § 47, subd. (b); see *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 [privilege covers communication relating to litigation contemplated in good faith and under serious consideration].)

limit judicial second-guessing, and promote participation by way of protecting participants from burdensome litigation. (See, *e.g.*, *Westlake, supra*, 17 Cal.3d at p. 484; see also *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 200-201 (*Kibler*) [finding quasi-judicial peer review "official proceeding authorized by law" under anti-SLAPP statute serves an "important public interest," and facilitates peer review by discouraging "harassing lawsuits against hospitals and their peer review committee members"].) These objectives would be undermined if judicial exhaustion were abandoned.

Fahlen gives several reasons why a finding that the Legislature abrogated the rule would not change much. (See ABM at pp. 40-41.) None is availing. First, for the proposition that "there are very few peer review hearings held each year in California," he relies on the Lumetra Report. (See ABM at pp. 40-41; see also Fahlen's RJN, Ex. D at p. 90.) If the Court grants judicial notice,[11] it will see that the report covers a brief period of time and is based on narrow data. (See Fahlen's RJN, Ex. D. at pp. 1, 31.) Even so, nearly 14 percent of respondents reported that their entity spent more than $50,000 in one year on 809 hearings, with seven percent estimating costs of over $250,000. (*Id.* at pp. 90-91.) Further, the report documents that 127 Section 805 Reports were filed in 2006-2007. (*Id.* at p. 13.) A quasi-judicial peer review action likely preceded or ensued following most reports. (See Bus. & Prof. Code, §§ 809.1, subd.

---

[11] But see Memorial's Opp. to Fahlen's Req. for Judicial Notice, filed Apr. 22, 2013, at pp. 7-9.

(b)(3), 809.5, subd. (a).) It is difficult to square Fahlen's claim of "very few peer review hearings" with the data in the report.

Next, he represents that "since the Legislature enacted Section 1278.5 in 2007, there have been few cases in either state or federal courts in which Section 1278.5 was an issue, indicating that physicians are not using the remedy often." (ABM at p. 41.) He provides no support for his claim.[12] Even if true, the claim does not address the circumstances that may prevail if the exhaustion rule is deemed abrogated. At least some observers believe that abrogation may cause a rise in Section 1278.5 claims challenging quasi-judicial peer review actions and those claims may substantially change the nature of peer review in California. (See, *e.g.*, Melchior, *Revolution in Disputes Between Hospitals and Their Physicians?* S.F. Daily Journal (Aug. 24, 2012) p. 4.)

Finally, he asserts that "there is no reason to expect physicians to file spurious claims of retaliation." (ABM at p. 41.) The *Westlake* court, however, interposed an exhaustion requirement out of respect for private hospitals' quasi-judicial process, to ensure that responsibility for medical decisions rested principally with medical professionals, and to promote the integrity of peer review by, among other things, protecting medical staff from burdensome litigation. (*Westlake*, *supra*, 17

---

[12] Fahlen cites the Lumetra Report for the 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." (ABM at p. 41.) The report, however, says nothing about retaliation claims; it focuses on internal peer review processes at health care entities.

Cal.3d at p. 484.) The Legislature and the courts have repeatedly endorsed the exhaustion rule. (See, *e.g.*, Bus & Prof. Code, § 809.8 [preserving review of peer review actions by way of administrative mandamus]; *Kibler*, *supra*, 39 Cal.4th at pp. 200-201 [determination that quasi-judicial peer review is "official proceeding" under Code of Civil Procedure section 425.16 supported by importance of peer review and need to promote integrity of peer review process].) And, in amending Section 1278.5, the Legislature did not clearly and unequivocally disclose an intent to abrogate the rule. Thus, regardless of the number of claims that might be filed,[13] no Section 1278.5 claim based on allegedly sham quasi-judicial peer review should proceed unless the physician has exhausted remedies.

---

[13] Fahlen claims that few physicians will file Section 1278.5 claims because "[r]etaliation is difficult to prove." (See ABM at pp. 41.) At the same time, though, he claims that a physician's prima-facie burden is minimal, he need only "present evidence of protected activity and action taken against him, and some evidence that suggests the two were linked by a retaliatory motive, . . ." (ABM at pp. 33-34.) The last element will "almost always" be established by "circumstantial evidence." (See ABM at p. 41.) If so, it is easy to imagine a route to a claim: A physician facing peer review need only file a report. If he is displeased with peer review, he can initiate a civil action, thereby bypassing deferential judicial review, transferring patient-safety decisions from experts to juries, and exposing medical staff and others to burdensome litigation. This is precisely the scenario that the exhaustion rule was designed to avoid.

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

The viability of Fahlen's first and second causes of action turns on the Court's ruling on the abrogation issue. (See OBM at p. 48; see ABM at p. 45.) Because the exhaustion rule continues to apply, the first and second causes of action should be stricken.

CONCLUSION

The Court should find that by Section 1278.5, the Legislature did *not* intend to abrogate the common law rule that a physician must exhaust remedies before bringing a civil claim on the grounds that a quasi-judicial peer review was maliciously motivated. Because Fahlen failed to exhaust remedies, the Court should direct the lower court to strike his Section 1278.5 claims, the first and second causes of action.

DATED: May 15, 2013 HANSON BRIDGETT LLP

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

WORD CERTIFICATION

I, Joseph M. Quinn, counsel for SUTTER CENTRAL VALLEY HOSPITALS and STEVE MITCHELL, hereby certify, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing Reply Brief on the Merits, that it contains 8,088 words, including footnotes (and excluding caption, tables, signature block, and this certification).

Dated: May 15, 2013

By: _____
Joseph M. Quinn

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 May 15, 2013, I served a true and accurate copy of the document(s) entitled:

REPLY BRIEF ON THE MERITS

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

Stephen D. Schear, Esq. Law Office of Stephen Schear 2831 Telegraph Avenue Oakland, CA 94609	Counsel for Plaintiff Mark T. Fahlen, M.D.
Jenny C. Huang, Esq. Justice First, LLP 180 Grand Avenue, Suite 1300 Oakland, CA 94612	Counsel for Plaintiff Mark T. Fahlen, M.D.
Court of Appeal of the State of California Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal
The Honorable Timothy W. Salter Department 22 Stanislaus County Superior Court 801 10th Street Modesto, CA 95353	Superior Court

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

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

Executed on May 15, 2013, at San Francisco, California.

Melinda Less

Melinda Less