Case No. S224472
(1 Civil No. A143195 – Division 3)
(Contra Costa Superior Court Case No. MSN131353)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JATINDER DHILLON,
Plaintiff and Respondent,

v.

JOHN MUIR HEALTH, et al.,
Defendants and Appellants.

After a Decision by the Court of Appeal,
First Appellate District
(Division 3)

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS JOHN MUIR HEALTH, et al.

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INTRODUCTION

In an administrative mandate proceeding in which the court grants a peremptory writ to vacate the administrative decision, "[c]omplex appealability questions may also be created when the trial court remands the case back to the administrative agency." (Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed. 2015 update) § 16.11, p. 16-9). Because of uncertainty created by multiple conflicting decisions, the best that CEB can advise is, "When attempting to seek appellate review of a remand order, the most conservative course of action is to file an appeal and a writ from the remand order at the same time." (*Id.*, p. 16-10.)

This brief will show that the correct answer to the question before the court—whether a remand order in an administrative mandate proceeding is appealable—is that such an order is as final and appealable as any other order or judgment granting a writ of mandate. The order or judgment for remand must be appealable. A trial court can err in remanding, most obviously when affirmance of the administrative order is the only permissible result. Appealability is necessary to provide the means to correct an erroneous remand order and avert the injustice of forcing the parties to endure the burden and expense of administrative proceedings that the trial court could not legally compel.

I

A JUDGMENT GRANTING A WRIT OF ADMINISTRATIVE MANDATE THAT REMANDS THE CASE FOR FURTHER ADMINISTRATIVE PROCEEDINGS IS APPEALABLE

The Legislature provides in subdivision (a) of Code of Civil Procedure section 904.1 that "a judgment" is appealable, with exceptions specified in the statute.[1] There is no exception for an order in an action for a writ of administrative mandate that remands the case for further administrative proceedings.

A judgment must be final to be appealable. (9 Witkin, Cal. Procedure (5th ed. 2008), Appeal § 96, pp. 158-160.) A judgment in an administrative mandate proceeding is a final judgment.

- A petition for writ of administrative mandate is a special proceeding of a civil nature within Title 1 of Part 3 of the Code of Civil Procedure. "A judgment in a special proceeding is the final determination of the rights of the parties therein." (§ 1064.)
- The right to appeal a final judgment extends to special proceedings "unless the Legislature has expressly prohibited an appeal in the particular case." (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696,

[1] Further statutory references are to the Code of Civil Procedure unless otherwise stated.

705.) Neither section 1094.5 nor any other statute expressly prohibits an appeal from a judgment granting a peremptory writ of administrative mandate and remanding the case for further proceedings.

- A judgment is final and appealable "'*where no issue is left for future consideration except the fact of compliance or noncompliance with the terms*'" of the decree. (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5, quoting *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698) (italics added by court). A judgment that grants a writ of mandate under section 1094.5 and remands the case for further proceedings does exactly that: it directs respondent to perform what the court has determined to be respondent's legal duty to conduct further proceedings in accordance with the court's decree. There is nothing more for the court to consider but whether respondent has or has not complied with the terms of the judgment. Although the remand requires further *administrative* action, it requires nothing further "in the nature of *judicial* action on the part of the court [that] is essential to a final determination of the rights of the parties. . . ." (*Dana Point*, *supra*, 51 Cal.4th at p. 5 [emphasis added]).

II

AN APPEAL MUST BE AVAILABLE TO CORRECT AN ERRONEOUS REMAND ORDER

A. The trial court, having granted a writ of mandate vacating an administrative hearing decision, may err in remanding when respondent has no further discretion to be exercised or further proceedings are unauthorized.

Because remand does not necessarily follow when a court grants a writ of mandate to set aside an administrative decision, the superior court may err if it remands the case for further proceedings. (*Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41, 50 [reversing order remanding case]; *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 352 [same, citing *Newman*]).[2]

Subdivision (f) of section 1094.5 authorizes the court to "order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent." The statute carries into effect the rule that the court articulated more than a century ago:

> "While, of course, it is the general rule that mandamus will not lie to control the discretion of a court or officer, meaning

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[2] This Court partially disapproved *Newman* and *Ashford* to the extent they might suggest that section 1094.5 precludes a remand for further proceedings in every case where the administrative record does not support the agency's decision. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 535).

> by that that it will not lie to force the exercise of discretion in a particular manner, . . . mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, when the law clearly establishes the petitioner's right to such action."

(*Inglin v. Hoppin* (1909) 156 Cal. 483, 491; *Manjares v. Newton* (1966) 64 Cal.2d 365, 370 (quoting *Inglin*); accord, *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 31).

So, when the administrative record *requires* the respondent to make a particular determination that it has failed to make—when its discretion can be exercised in only one way—remanding for further administrative proceedings is improper. Rather, as this court has held, the proper action is to grant a peremptory writ directing the respondent to take the legally required action. (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 678, overruled on another ground in *Frink v. Prod* (1982) 31 Cal.3d 166, 180.)

In *Tripp*, the Director of Social Welfare affirmed the denial of plaintiff's application for Aid to the Disabled (ATD), finding that she was ineligible because her condition would improve. The trial court held that the Director's decision was unsupported by substantial evidence and granted judgment for a writ of mandate to vacate the decision and pay plaintiff ATD from the date of her application.

In affirming, this court rejected the Director's argument that the trial court should have remanded the case for further proceedings. The Director had no further discretion to exercise. The trial court, having determined that plaintiff was wrongfully denied ATD as a matter of law, "merely rendered a judgment ordering defendant to discharge his legal obligation" to pay plaintiff the benefits to which she was entitled, and "there was no issue remaining on which the trial court could invade the Director's discretion." (*Id.*)

The Court of Appeal reached a similar result in *Ross General Hospital, Inc. v. Lackner* (1978) 83 Cal.App.3d 346. There, a hospital applied to the Department of Health for a statutory certificate for a project it had undertaken. The department denied the application on the ground that the project did not meet conditions of a departmental regulation. The trial court held that the project satisfied the conditions of the relevant statute; therefore, the regulation was contrary to the statute and invalid. The court granted a writ of mandate ordering the director to set aside the denial and grant the certificate. In affirming, the appellate court held that the trial court was not limited to remanding the case. "Where the record of the administrative proceedings requires as a matter of law that a particular determination be made, the court may order that the agency carry out its legal obligation." (*Id.*, 83 Cal.App.3d at p. 354, citing *Tripp.*)

Remanding for further proceedings is erroneous in other circumstances, as well. In *Newman*, *supra*, 10 Cal.App.4th 41, the California Highway patrol terminated plaintiff from her office assistant position for medical reasons based on a psychiatrist's letter stating that she could not perform the duties of her position or other related positions. But the CHP did not terminate her until almost five months later. In the interim, another psychiatrist sent a letter stating that plaintiff's condition had improved and she was able to return to work at least part-time.

The trial court held that the board's decision upholding her termination was not supported by substantial evidence that she was still unable to work by the time she was terminated. The court ordered a writ of mandate vacating the board's decision and remanded the case to the board. The court of appeal agreed that substantial evidence did not support the board's decision, but it reversed the remand order.

The court reasoned that first psychiatrist's report, if viewed alone, would have supported medical termination. But the issue was plaintiff's condition when she was terminated almost five months later and the intervening letter from the second psychiatrist deprived the first psychiatrist's report of "current validity. . . ." (*Id.*, 10 Cal.App.4th at p. 49.) Accordingly, there was no basis to remand. "[W]here, as here, the administrative agency errs not in the conduct of the hearing but in the results reached, there is no basis for reconsideration." (*Id.*)

In *Ashford*, 130 Cal.App.4th 344, the court, citing *Newman*, among others, also reversed the portion of a judgment in a section 1094.5 proceeding that remanded the case. Plaintiff, a school employee, was discharged for doing private work on days that he called in sick. The school board upheld the discharge based on wholly unauthenticated videotapes, to which plaintiff's counsel objected, which purported to show him working on days when he was supposed to be sick. The trial court ruled that the unauthenticated videotapes were improperly admitted and entered judgment granting a peremptory writ of mandate directing the board to set aside its decision and remanding the case for further proceedings. The appellate court affirmed the trial court's decision setting aside plaintiff's discharge, but citing *Newman*, it reversed the remand order.

The appellate court explained that the only purpose of remanding would be to permit the district to present foundational evidence authenticating the videotapes. Subdivision (e) of section 1094.5 permits a court to remand so the agency may reconsider its decision in light of new evidence if the evidence was excluded from the administrative hearing or it could not have been produced earlier in the exercise of due diligence. But foundational evidence to authenticate the videotapes was not excluded from the hearing; the district did not produce such evidence. The district did not show that foundational evidence could not have been produced at the hearing in the exercise of due diligence and never explained why it did not

present authenticating evidence despite plaintiff's repeated objections. Therefore, there was no legal basis to remand for further proceedings since the district did not show that it could properly hold another hearing when it did not claim it had new evidence that met one of the criteria of subdivision (e). (*Id.*, 130 Cal.App.4th at p. 351.)

The necessity of appeal from an erroneous remand order is particularly warranted in an administrative mandate case where the trial court exercises independent judgment. As the court pointed out in *Levingston v. Retirement Bd.* (1995) 38 Cal.App.4th 996, the trial court's power of independent review would be meaningless if, after the court made its own factual findings, "the trial court were then required to return the matter to the administrative agency for retrial and redecision. . . . [T]he process could go on forever." (*Id.* at p. 1000.)

B. If an erroneous remand order is not immediately appealable, it can never be reviewed.

As appellants show, if an order or judgment erroneously remanding for further proceedings cannot be appealed immediately, the respondent will have to comply with the writ and incur the significant burden and substantial expense of the further proceedings. Once those proceedings are held, if the court erred in remanding the matter, the error will be a moot issue. As appellants say, "it will then be pointless to adjudicate whether the

proceeding should have occurred in the first place." (Opening brief on the merits, at p. 14.)

There is another reason why an order or judgment requiring further administrative proceedings cannot be reviewed on appeal if the respondent conducts those proceedings: "When the trial court issues its judgment granting a peremptory writ, the respondent has two choices: to appeal that judgment or to comply with it. If the respondent elects to comply with the writ, it waives its right to appeal from the judgment granting the writ petition." (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348, 1354.)

C. Petitioning the Court of Appeal for writ review is not a realistic alternative for the right to appeal an erroneous remand order.

As this Court noted five years ago in *Brown, Winfield, Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233 statistics then available indicated that approximately 94 percent of petitions for writ relief in the Courts of Appeal were summarily denied. (*Id.* at p. 1241, fn. 3.) The summary denial rate is still over 92 percent. (Judicial Council of Cal., Court Statistics Rep. (2015) p. xiv <http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf>.) Petitioning for writ review, in short, means the expenditure of yet more time and money in what will almost certainly be an exercise in futility.

The Legislature may constitutionally provide that an order or judgment is not appealable but subject to appellate review only by petition for extraordinary writ. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85). Under Business and Professions Code § 2337, when administrative mandate proceedings involve revocation, suspension or restriction of a physician's license, "review of the superior court's decision shall be pursuant to a petition for an extraordinary writ." As § 2337 demonstrates, had the Legislature intended to preclude appeal of an order in a section 1094.5 proceeding when the court remands for further administrative proceedings and to limit appellate review to a petition for extraordinary writ, "it would have said so; it unquestionably knew the words to employ." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 393.)

D. Precluding appeal from an erroneous order remanding for further proceedings results in injustice to both parties.

As a practical matter, if a judgment in a section 1094.5 proceeding that erroneously remands the case for further administrative proceedings is not appealable, the respondent must suffer the burden and expense of complying with a writ of mandate that should never have issued and cannot be overturned.

That cannot be just. It is particularly unjust to deny appealability of a judgment that includes an order remanding for further administrative proceedings when the writ petition should have been denied altogether.

Moreover, it is not only the respondent that faces injustice from an erroneous remand order. So does the petitioner. Consider a case such as *Newman*, *Tripp* or *Ross General Hospital*, in which the administrative record legally requires the respondent to take action in petitioner's favor, or a case such as *Ashford* in which there is no legal basis for further proceedings. If the court erroneously orders a remand but an appeal is not available, the petitioner must incur the unjustifiable burden and expense of going through the unnecessary, even legally unauthorized, proceedings that respondent is compelled to conduct. And, once those proceedings are concluded, whether the trial court erred in ordering them is as moot an issue for petitioner as it is for respondent.

The injustice extends far beyond disciplinary proceedings between hospitals and their physicians. Section 1094.5 applies mainly to review of decisions and orders of public agencies. It is "'the procedure by which judicial review can be had by the writ of mandate after a formal adjudicatory decision by *any* administrative agency.'" (*Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 101 [citation omitted; italics added by court].)

When the court remands for further proceedings by a public agency or officer, those proceedings are at public expense. If the order is erroneous, but appellate review is unavailable, the proceedings will be conducted at needless expense to the public.

Such a waste of public funds is indefensible.

CONCLUSION

An order or judgment granting a writ of administrative mandate and remanding for further administrative proceedings is as final, and appealable, as any other order or judgment granting a writ of mandate. The judgment must be appealable to correct erroneous orders for remand and to avoid foisting on the parties, and especially public agencies, the unjust and unjustifiable burden and expense of further administrative proceedings that, as a matter of law, should never have been held.

The judgment of the Court of Appeal should be reversed.

Dated: November 2, 2015 Respectfully submitted,

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CERTIFICATION

I certify, pursuant to rule 8.504, Subdivision (d)(1), California Rules of Court, that the attached **Amicus Curiae Brief in Support of Defendants and Appellants John Muir Health, et al.** contains 2,806 words, as measured by the word count of the computer program used to prepare this brief.

Dated: November 2, 2015

JAY-ALLEN EISEN LAW CORPORATION

By: 

JAY-ALLEN EISEN

PROOF OF SERVICE (CCP Sections 1013a, 2015.5)

I, Michelle Micciche, declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 1000 G Street, Suite 210, Sacramento, CA 95814.

On Monday, November 02, 2015, I served the within **Amicus Curiae Brief in Support of Defendants and Appellants John Muir Health, et al.** on the interested parties in said action by depositing true copies, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows:

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There is delivery by United States mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 2, 2015 at Sacramento, California.

Michelle Micciche

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