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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

RICHARD B. FOX, Plaintiff and Appellant, v. GOOD SAMARITAN HOSPITAL, Defendant and Respondent.	H024597 (Santa Clara County Super. Ct. No. CV802341)

Richard B. Fox, M.D. petitioned for a writ of mandate, seeking to compel Good Samaritan Hospital (Hospital) to set aside the suspension of his Intensive Care Unit (ICU) and ventilator management privileges and to reconsider its decision according to requirements of fair procedure. After the trial court denied his writ petition, Dr. Fox moved for a new trial and for judgment notwithstanding the verdict. The motions were denied. Dr. Fox appeals, arguing that (1) Welfare and Institutions Code section 14087.28 requires that the judgment be reversed; (2) he was entitled to a hearing before having his privileges suspended; and (3) the Hospital's actions were arbitrary, capricious, and an abuse of discretion. We will affirm.

FACTS AND PROCEDURAL BACKGROUND

Dr. Fox is a physician specializing in pediatric critical care and pediatric pulmonology. He has been a member of Good Samaritan medical staff since 1989, assigned to its Department of Pediatrics.

Good Samaritan is a private, for profit hospital located in San Jose, California. The Hospital and its medical staff are governed according to the Bylaws for the Medical Staff of Good Samaritan Hospital and by its Medical Staff Rules and Regulations.

To admit or treat patients at Good Samaritan Hospital, a physician must obtain membership on the Hospital's medical staff and must apply for specific clinical privileges that define specific areas of clinical practice. (Cal. Code Regs., tit. 22, § 70703, subds. (a), (b).) The application process must be repeated at least every two years. (Cal. Code Regs., tit. 22, § 70701, subd. (a)(7).) Once granted, clinical privileges within any department may only be exercised "subject to the rules and regulations of that department and to the authority of that department's director." (Joint Commission on Accreditation of Healthcare Organizations 2002 Comprehensive Accreditation Manual For Hospitals (JCAHO Manual), § MS.5.15.6; see also Hospital Bylaws, § 5.1.)[1]

For approximately 10 years, Dr. Fox had practiced his specialty in pediatric pulmonology and pediatric critical care by exercising privileges granted by Good Samaritan to provide ICU care without consultation and ventilator management. The ICU care without consultation privilege authorizes the physician to treat ICU patients without assistance from other physicians. The ventilator management privilege permitted Dr. Fox to assist a patient's respiration artificially using an ICU ventilator device.

In April 1999, on recommendation from the Credentials Committee and the Department of Pediatrics, the Medical Staff Executive Committee decided to amend the alternative call coverage requirements for the Pediatrics Department. Alternate call

[1] We granted Hospital's request for judicial notice of the JCAHO Manual.

coverage physicians treat patients during the primary physician's unanticipated absence. The Medical Staff Executive Committee decided that the severity of illness of ventilator-dependent and intensive care patients in the pediatric group warranted more stringent alternate call coverage requirements than those applicable to the medical staff generally. Thus, under the new rule, any physician designated to provide alternate call coverage for pediatric ICU care without consultation and ventilator care was required to have those same privileges—ICU care without consultation and ventilator management. On April 28, 1999, the Hospital's Board of Trustees approved the recommendations.

Before the rule change, as well as thereafter for the physician staff members in the clinical departments not affected by the new rule, physicians designated as alternates were required to have "appropriate privileges." For many years, Dr. Fox had designated as his alternate call coverage physicians Dr. Marjorie McCracken and Dr. Anders Dahlstrom. Before 1999, the Hospital deemed their privileges "appropriate" to provide call coverage for Dr. Fox even though their privileges were not identical to Dr. Fox's privileges.

On April 29, 1999, the Hospital notified all affected physicians of the new alternate call coverage rule. According to the notice, "If within 30 days of Board approval of these requirements you have not provided alternate call coverage as noted above, any privileges effected [*sic*] will be administratively suspended until appropriate coverage has been provided. Please note that this suspension is administrative in nature and not reportable to any regulatory or licensing agency."

At Dr. Fox's request, the medical staff office provided him with a list of all pediatric department members having both ICU care without consultation and ventilator privileges. The three physicians listed practiced as a group at the same address, and are affiliated with Columbia San Jose Hospital. Dr. Fox had previously declined an invitation to join their group. Dr. Fox did not want to designate these physicians as his alternate call coverage physicians because he believed they did not support continuation

of pediatric critical care at Good Samaritan. Dr. Fox also believed that designating those physicians as his alternate call coverage physicians would lead to the absorption and forced relocation of his private practice; these concerns are largely grounded on business considerations.

At the end of the 30-day period, Dr. Fox still had not designated two physicians with identical privileges to provide alternate call coverage.

On June 2, 1999, the Hospital notified Dr. Fox that his privileges for ICU care without consultation and ventilator care were "administratively suspended until such time as documentation of call coverage . . . or a written request for waiver by the Staff Executive Committee has been approved."

On June 22, 1999, Dr. Fox wrote a letter to the Chief of the Medical Staff. In the letter, he questioned the wisdom and fairness of the new rule. In response, the Hospital informed Dr. Fox of his right under Section 7.5-8 of the Medical Staff Bylaws to challenge the rule before the Medical Staff Executive Committee and Board of Trustees.

In November 1999, Dr. Fox appeared before the Medical Staff Executive Committee. He argued that the rule was discriminatory because it only applied to Department of Pediatrics members, that it was unnecessary, and that the Hospital had no right to administratively suspend his privileges for failing to comply with its terms. The Medical Staff Executive Committee upheld the rule.

On April 26, 2000, Dr. Fox challenged the rule before the Board of Trustees. The Board of Trustees unanimously agreed with the Medical Staff Executive Committee. The Board of Trustees found that "the rules regarding coverage further the interests of patient care and have been appropriately applied in your case."

When Dr. Fox submitted his biennial application for reappointment and privileges in November 1999, he did not designate two call coverage providers with privileges for ICU care without consultation and ventilator management. On November 10, 1999, the

Hospital informed Dr. Fox that those privileges "[were] being withheld pending receipt of alternate call coverage about which you have been previously notified."

In October 2001, Dr. Fox petitioned for a writ of mandate. In his amended petition, Dr. Fox asked the Hospital to set aside its decision applying the alternate call coverage rule to Dr. Fox and provide him with fair procedure.

On February 13, 2002, the trial court denied the writ petition. The trial court issued a statement of decision on March 8, 2002, finding that the alternate call coverage rule was quasi-legislative in nature, was not arbitrary or capricious, and that Dr. Fox was not entitled to an adjudicatory hearing.

Dr. Fox moved for a new trial and for judgment notwithstanding the verdict. In the motions, Dr. Fox raised a new argument that the alternate call coverage rule violated Welfare and Institutions Code section 14087.28 because Hospital was a Medi-Cal provider.[2]

The trial court did not rule on the motion for a new trial or motion for judgment notwithstanding the verdict within the jurisdictional time limit. The motions were therefore denied by operation of law.

After the trial court's jurisdiction expired, Dr. Fox submitted new evidence to support another new argument—that the alternate call coverage rule had been applied in a discriminatory manner. Even though its jurisdiction to rule had expired, the trial court held a hearing on this new evidence. The trial court subsequently issued a written order upholding its judgment.

STANDARD OF REVIEW

We review de novo the trial court's determination that the Hospital's adherence to its alternate call coverage rule was a quasi-legislative decision, rather than adjudicatory.

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[2] All further unspecified statutory references are to the Welfare and Institutions Code.

(*Major v. Memorial Hosps. Ass'n*. (1999) 71 Cal.App.4th 1380, 1400.) If we determine that the Hospital's decision was in fact quasi-legislative, then we must examine " ' "the proceedings before the [hospital] to determine whether [its] action had been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notice required by law." [Citation.]' [Citation.]" (*Id*. at p. 1398.)

DISCUSSION

I. *Welfare and Institutions Code Section 14087.28*

Dr. Fox argues that the judgment must be reversed because the Hospital's actions violated section 14087.28.[3] He contends section 14087.28 authorizes denial of medical staff membership or clinical privileges only (1) because of the physician's individual qualifications, as determined by professional and ethical criteria; and (2) where those criteria are uniformly applied to all medical staff applicants and members. Dr. Fox believes Hospital violated section 14087.28 because Dr. Fox's privileges were revoked for administrative reasons unrelated to his individual qualifications. Dr. Fox also says the statutory language "uniformly applied to all medical staff applicants and members" means that the Hospital's alternate call coverage rule had to be the same for every

[3] Section 14087.28 provides: "A hospital contracting with the Medi-Cal program pursuant to this chapter, shall not deny medical staff membership or clinical privileges for reasons other than a physician's individual qualifications as determined by professional and ethical criteria, uniformly applied to all medical staff applicants and members. Determination of medical staff membership or clinical privileges shall not be made upon the basis of: [¶] (a) The existence of a contract with the hospital or with others. [¶] (b) Membership in or affiliation with any society, medical group or teaching facility or upon the basis of any criteria lacking professional justification, such as sex, race, creed or national origin. [¶] The special negotiator may authorize a contracting hospital to impose reasonable limitations on the granting of medical staff membership or clinical privileges in the following instances: [¶] (a) To permit an exclusive contract for the provision of pathology, radiology, and anesthesiology services, except consulting services requested by the admitting physician."

Hospital department. Because the rule only applied to the Department of Pediatrics, Dr. Fox contends it therefore violated section 14087.28.[4]

In response, the Hospital contends that, read as a whole, section 14087.28 prevents hospitals from discriminating against physicians on certain enumerated grounds, none of which applies in this case. Hospital says that the statute "has no application to departmental privileging criteria such as the alternate call coverage rule."

Hospital also emphasizes that Dr. Fox's interpretation of section 14087.28 would conflict with hospital accreditation standards, recognized by state and federal law, that require each medical staff department to recommend criteria for privileging that are appropriate to the care provided by that department. Citing the JCAHO manual, Hospital notes that section MS.5.15.6 provides: "The exercise of clinical privileges within any department is subject to the rules and regulations of that department and to the authority of that department's director." According to Hospital, "If Dr. Fox's interpretation were correct, it would be unlawful for the department of surgery, for example, to require completion of a surgical residency as a prerequisite to privileges."

In interpreting a statute, "the provision must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citations.]" (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18.)

Reading section 14087.28 as a whole, and in light of the JCAHO manual, we conclude Hospital's alternate call coverage rule did not violate the statute. The statute appears aimed at preventing certain enumerated types of discrimination, such as ensuring

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[4] Dr. Fox asked the trial court to take judicial notice of the fact that Hospital is a Medi-Cal provider. The trial court did not rule on the request. We may take judicial notice of the fact that Hospital is a Medi-Cal provider. (Evid. Code., §§ 452, subd. (h); 459.)

that medical staff membership or privileges are not determined based upon "the existence of a contract with the hospital or with others" or based upon membership or affiliation "with any society, medical group, or teaching facility" or based upon "*criteria lacking professional justification*, such as sex, race, creed or national origin." (§ 14087.28, italics added.)

In fact, letters from the California Medical Assistance Commission show that the statute is in large part directed at preventing a contracting hospital from denying clinical privileges to a physician based upon the existence of a contract with other physicians.[5] It does not appear as if the statute is intended to prevent any single hospital department from enacting rules applicable to that department, so long as the rule does not make the determination of privileges dependent upon "[t]he existence of a contract with the hospital or others" or upon "[m]embership in or affiliation with any society, medical group, or teaching facility" or based upon "*criteria lacking professional justification*, such as sex, race, creed or national origin." (§ 14087.28, italics added.)

The fact that the words "uniformly applied to all membership staff applicants and members" are not set apart as a separate enumerated ground upon which privileges may not be denied indicates that those words are merely meant to emphasize the statute's nondiscriminatory thrust. The fact that the statute does not refer to separate hospital departments also undercuts Dr. Fox's claim that the words "uniformly applied to all membership staff applicants and members" mean that every department must enact the same rules for determining medical staff membership and privileges. The fact that the statute refers to professional criteria, and "criteria lacking professional justification" indicates to us that professional criteria, rather than uniformity among hospital departments, is the benchmark for deciding whether to grant or deny medical staff membership or clinical privileges.

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[5] We granted Dr. Fox's request to take judicial notice of these materials.

Finally, as Hospital points out, the JCAHO manual expressly provides that "The exercise of clinical privileges within any department is subject to the rules and regulations of that department and to the authority of that department's director." (JCAHO Manual, § MS.5.15.6.) Were we to accept Dr. Fox's construction of section 14087.28, then the department director would not have the ability to enact rules and regulations applicable only to that department, thereby largely eviscerating the JCAHO manual provision. And requiring that each department make privilege determinations based upon the same rules and regulations would indeed mean, as Hospital points out, that it would be unlawful for the department of surgery to require completion of a surgical residency as a prerequisite to privileges. Such a result would be impractical, result in mischief, and not represent wise public policy.

Accordingly, we conclude that Hospital's alternate call coverage rule was based upon "professional criteria" and was "uniformly applied to all medical staff applicants and members." The "professional criteria" was the Department of Pediatrics determination that each member of the department with privileges for ICU care without consultation and ventilator management name two other physicians with the same privileges who would be available to treat his or her patients during any unscheduled or unanticipated absence. The rule was uniformly applied to all physicians within the Pediatrics Department. Section 14087.28 was not violated.[6]

II. ***Requirement Of A Hearing***

Dr. Fox argues that he was entitled to a hearing before having his privileges suspended. We disagree.

Hospital's action was quasi-legislative and therefore no hearing was required. "A decision is considered quasi-legislative if it is one of general application intended to

[6] Dr. Fox's suggestion that the alternate call coverage rule violated the exclusive contract provisions within the statute is not supported by the evidence in the record.

address an administrative problem as a whole and not directed at specific individuals." (*Major v. Memorial Hospitals Assn., supra*, 71 Cal.App.4th 1380, 1398.) "Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts. [Citations.]" (*Strumsky v. San Diego County Employees Retirement Assn*. (1974) 11 Cal.3d 28, 34, fn. 2.) "There is, . . . a definite distinction in the case law between the intentional actions of a hospital directed specifically toward the exclusion of a particular physician or group of physicians, and the actions of a hospital which may, as a practical matter, result in the exclusion of individual practitioners but were undertaken for less personally directed reasons." (*Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98, 104.) When a physician is denied medical staff privileges "because of the implementation of a 'policy' of the hospital, the administrative action is classified as 'quasi-legislative'. . . ." (*Hay v. Scripps Memorial Hospital* (1986) 183 Cal.App.3d 753, 758.)

Hospital's alternate call coverage rule is quasi-legislative because it is a department-wide policy that applies to all physicians in the Department of Pediatrics. The policy was not directed only at Dr. Fox. It was directed at all physicians within the Pediatrics Department. Implementation of the policy did not automatically result in suspension of Dr. Fox's privileges; it was Dr. Fox's noncompliance with the policy, despite the fact that he could have complied, that resulted in his privileges being suspended. The suspension of Dr. Fox's privileges was not something that called into question Dr. Fox's character, qualifications or competence. (See *Major v. Memorial Hospitals Assn., supra*, 71 Cal.App.4th at pp. 1404-1405.) In short, Dr. Fox's suspension stemmed from the application of a department wide policy intended to address an administrative problem as a whole—tightening the requirements for alternate call coverage—and was not directed at Dr. Fox specifically. Consequently, the implementation of the alternate call coverage rule was a quasi-legislative act.

Because the Hospital's action was quasi-legislative, Dr. Fox was not entitled to a hearing. There is no constitutional right to any hearing in a quasi-legislative proceeding. (*Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal.App.3d 1169, 1183; *Major v. Memorial Hospitals Assn., supra,* 71 Cal.App.4th at p. 1398.) As stated by the court in *Mateo-Woodburn v. Fresno Community Hospital & Medical Center, supra*, 221 Cal.App.3d at page 1186, "when the action is quasi-legislative, no particular notice and hearing is required. [Citation.]" (See also *City of Santa Cruz v. Local Agency Formation Com*. (1978) 76 Cal.App.3d 381, 388.)

According to Dr. Fox, the Hospital Bylaws provide for a hearing before a physician's privileges may be suspended. He relies upon Bylaws Section 7.1-4, which provides that "[r]ecommended adverse actions described in Section 7.2 shall become final only after the hearing and appellate rights set forth in these bylaws have either been exhausted or waived." Under Section 7.2, "[e]xcept as otherwise specified in these bylaws, any one or more of the following actions or recommended actions shall be deemed actual or potential adverse action and constitute grounds for a hearing:
[¶ . . . [¶] (g) Suspension of privileges."

Hospital disagrees, says Bylaws Section 7.1-4 is inapplicable and maintains that Bylaws Section 7.5-8 controls. Section 7.5-8 provides: "The hearing provided for in [Article VII] shall not be utilized to make determinations as to the substantive validity of a Bylaw, rule, regulation, or policy. Where the substantive validity of such Bylaw, rule, regulation, or policy is the only issue, the petitioner shall have a direct appeal and hearing, in the first instance to the Staff Executive Committee with an appeal to the Board of Trustees. Such hearing and appeal must be utilized prior to any legal action."

We agree with Hospital and conclude that Section 7.5-8 is the applicable Bylaws provision. Dr Fox challenged the alternate call coverage rule adopted by Hospital. His attack was upon the "substantive validity of such Bylaw, rule, regulation, or policy . . . ." Thus, under Bylaws Section 7.5-8, he was entitled to "a direct appeal and hearing, in the

first instance to the Staff Executive Committee with an appeal to the Board of Trustees." As Dr. Fox concedes, he did receive an appeal and hearing before the Staff Executive Committee and Board of Trustees. The procedure afforded Dr. Fox fully complied with the Hospital Bylaws.

Dr. Fox claims Section 7.5-8 does not apply because he challenged not only the validity of the alternate call coverage rule, but also questioned whether he had in fact violated that rule. This argument is disingenuous. Dr. Fox's position has been that the rule was invalid. It has not been his position that he in fact designated two physicians with privileges identical to his and therefore complied with the rule. It is undisputed that Dr. Fox did not comply with the rule within the 30-day period provided for compliance. Similarly, it is undisputed that Dr. Fox did not designate two alternate call coverage physicians with identical privileges when he filed his application for privileges in November 1999. Dr. Fox's claim has been that the rule was invalid, or applied in a discriminatory way; it has not been that he satisfied the rule because he designated two alternate call coverage physicians with privileges identical to his.

Dr. Fox's remaining potpourri of contentions regarding his entitlement to a hearing are without merit. Because the Hospital's alternate call coverage rule was a quasi-legislative decision, Dr. Fox was not entitled to an adjudicatory hearing. The provisions within the Hospital Bylaws entitled Dr. Fox to a certain procedure, that procedure was proper, and it was followed.

III. ***Arbitrary/Capricious***

Dr. Fox contends the Hospital's actions were arbitrary, capricious, and an abuse of discretion. We disagree.

Dr. Fox argues that the alternate call coverage rule is arbitrary because there is no evidence of deficiencies in patient care that the rule would remedy. But hospitals need not wait for deficiencies to develop before implementing changes to improve the quality of patient care. "It cannot be denied that the providing of high quality patient care is,

quite properly, the primary concern of all hospital institutions. The governing authority bears the responsibility for assuring that this goal is achieved to the greatest extent possible, and its decisions relating to medical staff must take into account all factors which have a legitimate relationship to it." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 628.)

Dr. Fox says the alternate call coverage rule is arbitrary and capricious because it does not apply to every department whose members treat patients in ICU. But the fact that one department institutes a rule, and another department chooses not to implement the same rule, hardly constitutes a basis for finding that a policy is arbitrary and capricious given that the stated basis for the rule is to improve patient care. It was appropriate for the Pediatrics Department to decide that more stringent alternate call coverage requirements were required due to the severity of illness of ventilator dependent and ICU patients in the pediatric group. It was proper for the Hospital to apply the rule only to members of the Pediatrics Department.

Dr. Fox says that the rule is arbitrary and capricious because, among other things, the only three physicians eligible under the alternate call coverage rule to provide coverage for Dr. Fox were "members of a Hospital-contracted group." But that fact certainly does not make the Hospital rule arbitrary and capricious. Dr. Fox's claim that the rule is arbitrary and capricious because Dr. Fox was a board certified Pediatric Pulmonologist, and possessed "credentials possessed by no other physician on the Good Samaritan staff," is similarly unpersuasive. Quite obviously, the rule is not made arbitrary or capricious merely because Dr. Fox is competent, qualified, and possessed of impressive credentials.

In short, despite Dr. Fox's far-ranging attacks upon the rule, our review is sharply circumscribed. For us to uphold the Hospital's decision, all that is required is that "there be some reasonable basis for a decision in order to pass muster on review. ' "If reasonable minds may well be divided as to the wisdom of an administrative board's

action, its action is conclusive. Or, stated another way, if there appears to be some reasonable basis for the classification, a court will not *substitute its judgment* for that of the administrative body." ' [Citation.]" (*Major v. Memorial Hosp. Assn., supra,* 71 Cal.App.4th at pp. 1389-1399.) " 'A managerial decision concerning operation of the hospital made rationally and in good faith by the board to which operation of the hospital is committed by law should not be countermanded by the courts unless it clearly appears it is unlawful or will seriously injure a significant public interest. [¶] Judges are untrained and courts ill-equipped for hospital administration, and it is neither possible or desirable for the courts to act as supervening boards of directors for every . . . hospital . . . in the state.' [Citations.] Even bias or prejudice in favor of the selected policy does not invalidate such decisions. [Citation.]" (*Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, 72-73.)

Here, the Hospital's actions pass muster under our standard of review. Explaining the reasons for adoption of the rule, the Chief of Staff stated, "The Department of Pediatrics, through its Executive Committee, indicates that severity of illness issues surrounding care of ventilator-dependent and intensive care patients in the pediatric group require coverage under Article V [of the Rules and Regulations] by practitioners with <u>like</u> privileges." As there is a reasonable basis for the rule, we decline to substitute our judgment for that of the administrative body.

IV. *Post Trial Evidence*

In support of his arguments on appeal, including his claim that the rule was applied in a discriminatory manner, Dr. Fox cites evidence that was not submitted until after the denial by operation of law of his motions for a new trial and for judgment notwithstanding the verdict. As we explain, this evidence may not be considered upon appeal.

Background

On February 13, 2002, the trial court denied Dr. Fox's writ petition. In its March 8, 2002 statement of decision, the trial court found that the alternate call coverage rule was quasi-legislative in nature, was not arbitrary or capricious, and that Dr. Fox was not entitled to an adjudicatory hearing.

On March 26, 2002, Dr. Fox moved for a new trial and for judgment notwithstanding the verdict. In the motions, Dr. Fox raised a new argument and claimed that the alternate call coverage rule violated section 14087.28.

On May 3, 2002, the trial court heard argument on the motions. The trial court asked questions regarding the status of the applications of Dr. McCracken and Dr. Dahlstrom for privileges. Hospital's counsel told the trial court at the May 3, 2002 hearing that it would be "happy [to] submit a declaration" on that issue to the trial court. Dr. Fox's counsel's asked, "Your Honor, may I inquire of the Court when I will get that declaration and how long I will have? May I respond to it before the hearing?" The trial court said that counsel could respond. The trial court set another hearing for May 24, 2002.

The trial court's jurisdiction to rule on the motion for a new trial and motion for judgment notwithstanding the verdict expired on May 10, 2002. As of that date, the parties agree that the motions were denied by operation of law.

On May 17, 2002, Dr. Fox's counsel submitted a large amount of additional evidence, including declarations from Dr. Dahlstrom and Dr. McCracken. On May 24, 2002, Hospital's counsel objected to the new evidence. Hospital's counsel noted that the trial court's jurisdiction to grant a new trial had lapsed, and argued that submitting new evidence was improper. At the conclusion of the May 24, 2002 hearing, the trial court stated, "The Court adheres to its former ruling, and request for a new trial for entry of judgment, notwithstanding the verdict, respectfully denied."

On June 4, 2000, the trial court's order was entered, which stated: "Petitioner's Motion For Judgment Notwithstanding the Verdict and Motion For New Trial came on for hearing in this Court May 3, 2002, at 9:00 a.m. in Department 19, and continued on May 24, 2002. All parties received adequate notice and an opportunity to be heard. . . . [¶] Having read and considered the papers submitted in support of and opposition to the motions, and good cause appearing, therefore it is hereby ordered and adjudged that Petitioner's Motion For Judgment Notwithstanding the Verdict and Motion For New Trial are denied."

Analysis

Dr. Fox argues that we may consider the new evidence on appeal because the trial court's actions were the equivalent of a Code of Civil Procedure section 662 decision to reopen the case and receive additional evidence.[7] We disagree.

The trial court never indicated that it was reopening the case under Code of Civil Procedure section 662. The trial court never stated that it was "vacat[ing] and set[ting] aside the statement of decision and judgment and reopen[ing] the case for further proceedings and the introduction of additional evidence. . . ." (Code Civ. Proc., § 662.) The trial court's June 4, 2002 order, stating that Dr. Fox's post-trial motions were denied, also does not indicate that the trial court had been proceeding under Code of Civil Procedure section 662; it only indicates that the trial court decided to continue the May 3,

[7] Code of Civil Procedure section 662 provides: "In ruling on such motion [for a new trial], in a cause tried without a jury, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, *may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened* after the submission thereof and before a decision had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code." (Italics added.)

2002 hearing. Further, the trial court's June 4, 2002 order does not show that the trial court in fact considered Dr. Fox's new evidence; it shows only that the court considered the parties' papers and then denied the new trial motions and motion for judgment notwithstanding the verdict. Even though the trial court did request a declaration from Hospital's counsel concerning the applications for privileges of Doctors Dahlstrom and McCracken, the trial court's comments at the May 3, 2002 hearing cannot be fairly construed as authorizing Dr. Fox to submit the large amount of additional evidence that he submitted on May 17, 2002, and the trial court's subsequent ruling and actions also do not lend themselves to that conclusion. We conclude that the evidence submitted May 17, 2002, may not be considered on appeal.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

_____
ELIA, J.

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MIHARA, J.