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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

G. FRANK POURZIA, Plaintiff, Appellant and Respondent, v. ST. MARY MEDICAL CENTER etc., et al., Defendants, Respondents and Appellants.	B178159 (Los Angeles County Super. Ct. No. NC034332)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. James L. Wright, Judge (Ret.) Judgment reversed and remanded with directions; order affirmed.

Jonathan G. Shibley for Plaintiff and Appellant

Manatt, Phelps & Phillips, Barry S. Landberg, Terri D. Keville and Doreen Wener Shenfeld for Defendants and Respondents

Dr. Jack Rabin and Dr. Myrvin H. Ellestad as Amici Curiae on behalf of Plaintiff and Appellant.

After exhausting his administrative remedies plaintiff brought this action against a hospital and individual members of its judicial review committee. Plaintiff seeks

damages resulting from the hospital's revocation of his staff privileges. Defendants moved for judgment on the pleadings on the ground *Westlake Community Hosp. v. Superior Court*[1] required plaintiff to first obtain a writ of administrative mandate setting aside the hospital's revocation decision before instituting an action for damages. It was undisputed plaintiff had not obtained such a writ. Defendants also filed a belated special motion to strike plaintiff's complaint as a SLAPP suit.[2] The trial court granted defendant's motion for judgment on the pleadings. It denied their first SLAPP motion as untimely and denied their request to set a second motion as moot. Each party filed a timely notice of appeal.

We reverse the judgment. Under well-settled law the trial court should have treated plaintiff's complaint as a petition for the writ of administrative mandate required by *Westlake*. We uphold the trial court's order denying defendants a hearing on their SLAPP motion on the ground of mootness.

FACTS AND PROCEEDINGS BELOW

Doctor G. Frank Pourzia is a cardiologist who had been a member in good standing on the staff of St. Mary Hospital from 1991 until the hospital suspended him in 1998.

Pourzia and St. Mary disagree about the reasons for his summary suspension and ultimate termination. St. Mary maintains it acted to protect its patients and personnel from conduct by Pourzia "reasonably likely to be detrimental to patient safety or to the delivery of patient care." Pourzia contends the hospital suspended him in retaliation for his complaints to hospital officials about inadequate conditions at the medical center including lack of adequate supplies, instruments and quality personnel "so as to endanger the public."

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

Following his suspension Pourzia exercised his right to an administrative hearing before a "judicial review committee" made up of active members of the medical staff. A hearing was held presided over by a hearing officer, in this case an attorney. Upon completion of the hearing the committee recommended to the hospital governing body Pourzia's suspension be made permanent. The governing body accepted this recommendation which resulted in termination of Pourzia's medical privileges at St. Mary.

Pourzia challenged his termination in a complaint against St. Mary and the members of the judicial review committee alleging defendants conducted the judicial review hearing in a way that denied him due process. Count One of the first amended complaint alleged, among other things, the hospital's usual and customary procedures for suspension and termination were not followed; the hearing was unreasonably delayed; the hearing officer was biased against Pourzia and in favor of his accusers; Pourzia was denied the opportunity to present a full and complete defense including exculpatory evidence; the hospital paid one witness $10,000 to testify against Pourzia; the review committee denied him the right to appeal from its report and recommendations; and the members of the review committee had financial and professional conflicts of interest with Pourzia.

Defendants demurred on the ground the trial court lacked subject matter jurisdiction because the complaint was barred by *Westlake* which held physicians cannot seek damages against a hospital for wrongful termination of their staff privileges unless they have exhausted the hospital's administrative remedies and had the hospital's adverse decision overturned in an action for administrative mandamus.[3] In opposition, Pourzia argued St. Mary's due process violations excused him from having to first obtain mandamus relief before suing the hospital for damages.

The trial court agreed with Pourzia and overruled the demurrer.

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[2] Code of Civil Procedure section 425.16.

[3] *Westlake, supra,* 17 Cal.3d at pages 469, 478, 482.

Defendants answered Pourzia's first amended complaint raising his failure to seek administrative mandamus as an affirmative defense. They then filed a special motion to strike the complaint as a SLAPP suit[4] and a "common law" motion for judgment on the pleadings. The trial court denied the SLAPP motion as untimely but "without prejudice to defendants seeking request for special setting pursuant to [Code of Civil Procedure] section 425.26 (f)."[5] The court denied defendants' "common law" motion for judgment on the pleadings without prejudice to their seeking relief under Code of Civil Procedure section 438.[6]

Defendants subsequently filed a motion for judgment on the pleadings under Code of Civil Procedure section 438, subdivision (c)(1)(B)(ii),[7] the functional equivalent of a general demurrer.[8] Pourzia's complaint failed to state a cause of action, defendants argued, because it did not and could not allege Pourzia had obtained a writ of mandate setting aside the hospital's termination of his privileges. Defendants also filed a motion to specially set their SLAPP motion for hearing at the same time as their motion for judgment on the pleadings.

This time the trial court granted the motion for judgment on the pleadings because Pourzia had failed to exhaust his judicial remedy as required by *Westlake*. The court declined to hear the defendants' SLAPP motion on the ground it was moot.

Pourzia appeals from the judgment dismissing his complaint. Defendants appeal from the order denying their SLAPP motion.

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[4] Code of Civil Procedure section 425.16.

[5] As discussed below, Code of Civil Procedure section 425.16, subdivision (f) allows the filing of a SLAPP motion more than 60 days after service of the complaint at the discretion of the court. See discussion at pages 10-13, below.

[6] The legislature enacted Code of Civil Procedure section 438 in 1993 (Stats. 1993, ch. 456, § 5) to replace the common law motion for judgment on the pleadings.

[7] "The complaint does not state facts sufficient to constitute a cause of action against the defendant."

[8] *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259.

DISCUSSION

I. COUNT ONE OF POURZIA'S FIRST AMENDED COMPLAINT SHOULD BE TREATED AS A PETITION FOR A WRIT OF ADMINISTRATIVE MANDATE.

The principal issue in the trial court was whether, under *Westlake,* Pourzia had to obtain a judgment setting aside the order revoking his staff privileges before he could bring a civil action against St. Mary and the members of the judicial review committee.

In *Westlake,* a hospital revoked the staff privileges of the plaintiff physician. Plaintiff obtained a hearing before a judicial review committee of the hospital which upheld her revocation. After plaintiff exhausted the hospital's internal administrative remedies she sued the hospital and some of its individual staff members for general and exemplary damages under a variety of tort theories. The complaint alleged in part the revocation of plaintiff's staff privileges "'was pursued and perfected [by defendants] in a manner contrary to established principles of fairness and justice,' and contrary to Westlake's own bylaws and constitution."[9]

Our Supreme Court ordered the trial court to grant the hospital's motion for summary judgment.[10] Even though plaintiff exhausted her administrative remedies, the court concluded this alone did not entitle her to bring a tort action against the hospital and its staff members. In reaching this conclusion the court reasoned "so long as [the hospital's] quasi-judicial decision is not set aside through appropriate review procedures the decision has the effect of establishing the propriety of the hospital's action. [Citation.]"[11] The appropriate review procedure according to the court is a petition for administrative mandate.[12] Thus, the court held, "whenever a hospital, pursuant to a quasi-judicial proceeding, reaches a decision to deny staff privileges, an aggrieved doctor must

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[9] *Westlake, supra,* 17 Cal.3d at page 470.

[10] *Westlake, supra,* 17 Cal.3d at page 486.

[11] *Westlake, supra,* 17 Cal.3d at page 484.

first succeed in setting aside the quasi-judicial decision in a mandamus action before he may institute a tort action for damages."[13]

We need not decide whether, as Pourzia argued below, an exception to the *Westlake* holding should apply when the hospital's judicial review process has violated "due process" as embodied in the statutes governing judicial review committees,[14] common law notions of fair procedure,[15] or the hospital's own bylaws.[16] Pourzia's new counsel on appeal has tacked in a fresh direction contending Pourzia's complaint should be deemed a petition for administrative mandamus or Pourzia should be allowed to amend his complaint to transform it into a writ petition.

It is black letter law a general demurrer will be overruled if the complaint "has stated a cause of action under any possible legal theory."[17] Under this rule a complaint for damages in an "ordinary" civil action may be treated as a petition for a writ in a mandamus action if the pleading contains the necessary allegations to support writ relief.

In *Boren v. State Personnel Board*[18] the plaintiff brought "a complaint in a civil action" seeking to annul an order of defendant dismissing him from his civil service position and to recover salary lost from the time of his suspension.[19] The trial court dismissed the action after sustaining a demurrer to the complaint without leave to amend. Writing for the Supreme Court, Justice Traynor agreed with the trial court that "[f]or this

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[12] *Westlake, supra,* 17 Cal.3d at page 483

[13] *Westlake, supra,* 17 Cal.3d at page 469. There is no doubt this same rule applies to contract actions.

[14] Business and Professions Code sections 809.2-809.4.

[15] *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265-1266.

[16] See Merkel, Physicians Policing Physicians: The Development of Medical Staff Peer Review Law at California Hospitals (2004) 38 U.S.F.L. Rev. 301, 322-329.

[17] *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.

[18] *Boren v. State Personnel Board* (1951) 37 Cal.2d 634.

[19] *Boren v. State Personnel Board*, *supra,* 37 Cal.2d at page 637.

relief an ordinary civil action is inappropriate."[20] The appropriate relief, he stated, was a writ of administrative mandate.[21] But this did not end Justice Traynor's analysis. He went on to explain: "As against a general demurrer . . . it is unimportant that plaintiff's pleading was not in form a petition for mandamus or certiorari. All that is required is that plaintiff state facts entitling him to some type of relief, and if a cause of action for mandamus or certiorari has been stated, the general demurrer should have been overruled. [Citation.]"[22]

In *Haller v. Burbank Community Hospital Foundation*[23] we echoed this rule, stating that in a case where the appropriate relief is mandamus: "A demurrer must be overruled if a proper basis for issuance of mandamus is alleged; it is unimportant that plaintiff's pleading was not in form a petition for mandamus. [Citation.]"[24]

In *Westlake* itself the court acknowledged "the allegations in plaintiff's complaint could conceivably be found sufficient to warrant treating the complaint as a petition for writ of mandate" citing *Boren v. State Personnel Board* disused above.[25] The court did not pursue the point, however, because at oral argument plaintiff's counsel disclaimed any desire to have the complaint recast in such a light.[26]

A judgment commanding the respondent to set aside an order or decision will issue under Code of Civil Procedure section 1094.5 when the respondent has denied the petitioner a fair trial or committed a prejudicial abuse of discretion. "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the

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[20] *Boren v. State Personnel Board*, *supra*, 37 Cal.2d at page 637.

[21] *Boren v. State Personnel Board*, *supra,* 37 Cal.2d at page 637.

[22] *Boren v. State Personnel Board*, *supra*, 37 Cal.2d at page 638.

[23] *Haller v. Burbank Community Hospital Foundation* (1983) 149 Cal.App.3d 650.

[24] *Haller v. Burbank Community Hospital Foundation*, *supra*, 149 Cal.App.3d at page 655.

[25] *Westlake, supra,* 17 Cal.3d at page 485, footnote 10.

[26] *Westlake, supra,* 17 Cal.3d at page 485, footnote 10.

order or decision is not supported by the findings, or the findings are not supported by the evidence."[27]

Count One of Pourzia's first amended complaint alleges he was denied a fair trial, the judicial review hearing was not conducted in the manner required by law, and the review committee's findings are not supported by the evidence. It also alleges Pourzia has exhausted the administrative remedies afforded by St. Mary. The only things missing are a prayer for an order setting aside the decision revoking Pourzia's staff privileges and a verification of the complaint. The prayer is not a problem because the trial court "may grant the plaintiff relief consistent with the case made by the complaint and embraced within the issue."[28] The verification can be added following remand as an amendment *to* the complaint (as opposed to an amendment *of* the complaint) under Code of Civil Procedure section 473, subdivision (a)(1) which states in relevant part: "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading . . . by correcting a mistake in the name of a party, or a mistake in any other respect[.]" Here, the mistake was the failure to verify the complaint. As the correction of this mistake does not make any substantive change in the pleading the amendment does not raise a statute of limitations issue.

Because we are holding Pourzia's complaint states a cause of action for administrative mandamus we need not address issues involving the statute of limitations and the proper exercise of our discretion, which would be relevant if we were granting Pourzia leave to amend the substantive content of his complaint. Nevertheless we briefly consider these issues below.

The statute of limitations for a petition by a doctor seeking a writ of administrative mandamus against a hospital to reinstate his staff privileges has been held to be four years from the date of accrual of the cause of action under Code of Civil Procedure

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[27] Code of Civil Procedure section 1094.5, subdivision (b).

[28] Code of Civil Procedure section 580, subdivision (a).

section 343.[29] Here, the cause of action accrued at the earliest in November 2002 when St. Mary's executive committee adopted the recommendation of the judicial review committee thus terminating the administrative hearing process. We note the cases applying the four year limitations period were decided before the Legislature enacted the statutes governing the procedures to be followed by judicial review committees.[30] Thus the question arises whether the limitation period is now three years under Code of Civil Procedure section 338, subdivision (a) which applies to "[a]n action upon a liability created by statute . . . ." We conclude section 338, subdivision (a) is not applicable to an action for administrative mandate challenging the decision of a judicial review committee because the liability of the hospital to a writ of mandate was not "created by" the procedural statutes governing judicial review committees. Rather, the courts' examination of the exclusion practices of hospitals "reflect the contemporary application of common law principles embodied in California decisions for almost a century."[31]

In any event, as we explained in *Kolani v. Gluska*, where a new claim is based on the same operative facts as alleged in the original complaint the new claim "relates back" for limitations purposes to the date of filing of the original complaint.[32]

St. Mary insists Pourzia should not be given a second chance to comply with the clear holding of *Westlake* when he insisted throughout the proceedings below the *Westlake* holding did not apply to this case. Pourzia's epiphany on the way to the Court of Appeal came too late to save his lawsuit against defendants who had to expend considerable time and money opposing a legal theory he now concedes was erroneous. We do not find these arguments persuasive.

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[29] *Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 442-443; *Lasko v. Valley Presbyterian Hospital* (1986) 180 Cal.App.3d 519, 526. (Code of Civil Procedure section 343 states: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.")

[30] See footnotes 14 and 16, above.

[31] *Westlake, supra,* 17 Cal.3d at page 474.

[32] *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.

As noted above, we take no position in this case on the question whether there should be some flexibility in the *Westlake* rule when the administrative hearing process is fundamentally flawed. The dissent cites language from Code of Civil Procedure section 1094.5, subdivsion (b) and two Court of Appeal decisions suggesting administrative mandamus is the appropriate vehicle for inquiring into whether the petitioner received a fair hearing.[33] However, the fact that in the trial court *neither* side could find a case directly on point and an experienced trial judge initially agreed with Pourzia's argument leads us to conclude the legal battle over the interpretation of *Westlake* was legitimate and defendants did not suffer any "prejudice" beyond what is commonly suffered by a party whose opponent puts up a fair fight.

We will reverse the judgment and remand the cause to the trial court with directions to enter a new order granting defendants' motion for judgment on the pleadings only as to counts two through ten of the first amended complaint and to allow Pourzia an opportunity to file a verification as to count one of the complaint.[34]

II. THE TRIAL COURT PROPERLY DENIED DEFENDANTS LEAVE TO BRING A SECOND SLAPP MOTION ON THE GROUND THE MOTION WAS MOOT.

After the trial court granted defendants' motion for judgment on the pleadings it denied their request to specially set a second motion to strike the complaint as a SLAPP suit.[35] Because it had granted the defendants' motion for judgment on the pleadings, the court ruled there was nothing left for it to strike.

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[33] Of course, our Supreme Court, which created the *Westlake* rule, could amend it if it were convinced some "flexibility" was appropriate.

[34] Under Code of Civil Procedure section 438, subdivision (c)(2)(A) a motion for judgment on the pleadings may be granted as to "[t]he entire complaint or cross-complaint or as to any of the causes of action stated therein."

[35] Code of Civil Procedure section 425.16. A hospital's peer review is an "official proceeding authorized by law" for purposes of Code of Civil Procedure section 425,

Defendants contend the trial court erred because the cases uniformly hold if the defendant files its SLAPP motion before the court disposes of the action by sustaining a general demurrer or a motion for judgment on the pleadings the defendant is entitled to a hearing on its motion. These cases reason the SLAPP motion is not moot because if the defendant is successful an attorney fee award is mandatory.[36] The present case is distinguishable because the trial court did not deny a pending SLAPP motion; it denied a motion to renew a motion previously denied as untimely, as we explain below.

As a general rule a special motion to strike a complaint as a SLAPP suit must be filed "within 60 days of the service of the complaint."[37] However, the motion may be filed "in the court's discretion, at any later time upon terms [the court] deems proper."[38]

In the present case it is undisputed defendants did not file their initial SLAPP motion within 60 days of the service of the complaint. When the motion came on for hearing the trial court ordered it off calendar because "[t]he motion was brought without consent of the court more than 60 days from service of the complaint." The court made its order "without prejudice to defendants' . . . request for special setting pursuant to [Code of Civil Procedure section 425.16, subdivision (f)] on such terms the court deems proper." Following this order defendants filed a motion to specially set their SLAPP motion to be heard the same day as their motion for judgment on the pleadings.

The two motions were heard together. After the trial court granted defendants' motion for judgment on the pleadings it denied their motion to specially set their SLAPP motion as moot. The trial court had discretion whether to allow defendants to file a late SLAPP motion and we find no grounds for holding the court abused its discretion.[39] As the trial court correctly pointed out, once it granted the motion for judgment on the

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subdivision (e). (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, ___)

[36] Code of Civil Procedure section 425.16, subdivision (c); *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1323.

[37] Code of Civil Procedure section 425.16, subdivision (f).

[38] Code of Civil Procedure section 425.16, subdivision (f).

pleadings there was nothing left for it to strike. Moreover the purpose of a SLAPP motion—to provide a fast and inexpensive dismissal of the plaintiff's suit—had been accomplished.[40]

We disagree with defendants' claim the court's ruling unfairly prejudiced them by denying them the mandatory attorney fees they would have been awarded under the SLAPP statute.

Defendants lost their entitlement to bring a SLAPP motion by waiting to bring it until after the trial court had overruled their demurrer and they had answered the complaint—hardly the conduct of defendants looking for the "prompt exposure and dismissal" of an unmeritorious action.[41] As a result of their delay, their ability to bring a SLAPP motion rested within the discretion of the trial court.

This case is analogous to *Chambers v. Miller* in which the court upheld the denial of a SLAPP motion filed after the plaintiff had voluntarily dismissed her complaint.[42] The court noted even if defendants were successful on their motion the most they could have recovered was attorney fees expended for the motion, not the entire action. Allowing the defendants to bring a motion which had no "substantive purpose" solely to obtain the fees incurred in bringing it "would create an anomaly virtually unprecedented in California statutory law."[43] In the present case, defendants are attempting to bring a SLAPP motion after the trial court already granted their motion for judgment on the pleadings, leaving the SLAPP motion with no "substantive purpose." Having lost their initial SLAPP motion for lack of timely filing defendants are essentially attempting to collect attorney fees for their motion for judgment on the pleadings. The Legislature has not authorized such fee-shifting and the trial court properly interpreted sections 425.16 and 438 to avoid it.

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[39] Code of Civil Procedure section 425.16, subdivision (f) quoted above.

[40] *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823.

[41] *Wilcox v. Superior Court*, *supra*, 27 Cal.App.4th at page 817.

[42] *Chambers v. Miller* (2006) 140 Cal.App.4th 821.

[43] *Chambers v. Miller*, *supra*, 140 Cal.App.4th at page 826.

Furthermore, a dismissal of a plaintiff's complaint for a "technical or formal defect" such as failure to exhaust a prerequisite to bringing suit is not a decision on the merits.[44]

Finally, if upon mandamus review the court upholds defendants' termination of Pourzia's staff privileges defendants would be entitled to attorney fees under Business and Professions Code section 809.9 if the court finds Pourzia's conduct in bringing or litigating his suit was "frivolous, unreasonable, without foundation, or in bad faith."

For these reasons we hold the trial court properly exercised its discretion in not allowing defendants to bring a second SLAPP motion after it had granted their motion for judgment on the pleadings.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to vacate its order granting defendants' motion for judgment on the pleadings and to enter a new order granting defendants' motion only as to counts two through ten of the first amended complaint. The court shall set a reasonable time in which plaintiff may file and serve a verification as to count one of the first amended complaint if he can truthfully do so. If plaintiff fails to file and serve a verification within the time allowed the trial court shall issue an order to show cause why count one of plaintiff's first amended complaint should not be dismissed. If no good cause is shown the court shall dismiss count one of the first amended complaint and enter judgment for defendants. If good cause is shown for not verifying the first count the court shall make such further orders as are just under the circumstances.

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[44] See *Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 52.

The order denying defendants' motion to specially set their SLAPP motion for hearing is affirmed.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

I concur:

WOODS, J.

PERLUSS, P. J., Dissenting.

I respectfully dissent.

In *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465 (*Westlake*), the Supreme Court held that, unless a party to a quasi-judicial proceeding challenges the adverse findings made in that proceeding by means of a mandate action in superior court, those findings are binding in later civil actions. "[P]laintiff must first succeed in overturning the quasi-judicial action [by the hospital] before pursuing her tort claim against defendants. [¶] In our view, the above requirement accords a proper respect to an association's quasi-judicial procedure, precluding an aggrieved party from circumventing the established avenue of mandamus review. In addition, this result will simplify court procedures by providing a uniform practice of judicial, rather than jury, review of quasi-judicial administrative decisions. [Citations.]" (*Id.* at p. 484.)[1]

Dr. G. Frank Pourzia filed an unverified, 10-count first amended complaint against St. Mary Medical Center (St. Mary) and three individual St. Mary staff members, purporting to allege both tort and contract causes of action and seeking compensatory and punitive damages, based on the suspension and ultimate revocation of Dr. Pourzia's staff privileges at St. Mary. In response to St. Mary's demurrer to the complaint on the ground Dr. Pourzia had failed to challenge the adverse findings made through the hospital's quasi-judicial peer review process by a timely mandamus petition as required by *Westlake*, *supra*, 17 Cal.3d 465, Dr. Pourzia argued judicial review by administrative

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[1] In *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 the Supreme Court distinguished the *Westlake* requirement of exhaustion of judicial remedies from the requirement of exhaustion of administrative remedies. "Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation.] Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.' [Citation.]" (*Id*. at pp. 69-70.)

mandamus pursuant to Code of Civil Procedure section 1094.5[2] is not required when a denial of due process has been alleged: According to Dr. Pourzia, St. Mary's due process violations "excused" and "obviated[d] the necessity of a mandamus proceeding."[3]

After the trial court overruled the demurrer, St. Mary filed a motion for judgment on the pleadings, again asserting Dr. Pourzia's damage claims were precluded by the requirement of exhaustion of judicial remedies. Once again Dr. Pourzia argued he need not file a mandamus proceeding pursuant to section 1094.5 as a prerequisite to pursing his damage claim against St. Mary. At no time did Dr. Pourzia request that his complaint be construed as a section 1094.5 petition for mandamus if the trial court concluded *Westlak*e barred his damage complaint, nor did he seek leave in the trial court to amend his complaint to add or substitute a section 1094.5 claim either before or after the trial court granted St. Mary's motion.

For the first time on appeal Dr. Pourzia, represented by new counsel, acknowledges the binding force of *Westlake, supra*, 17 Cal.3d 465, and requests an opportunity to file an amended pleading for administrative mandamus. (Dr. Pourzia's new counsel also requests that we direct the trial court to allow him sufficient time to obtain and consider the administrative record before filing the amended pleading.)[4]

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[2] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] Notwithstanding his position in the trial court, in an earlier judicial challenge to one aspect of St. Mary's peer review process, Dr. Pourzia had conceded, if he were unsuccessful at the peer review hearing at St. Mary, "Pourzia's only remedy would be to challenge the decision of the Hospital pursuant to Code of Civil Procedure Section 1094.5."

[4] Although finally conceding his damage claims are precluded by *Westlake*, *supra*, 17 Cal.3d at page 484, so long as St. Mary's action in revoking his staff privileges is not set aside through a section 1094.5 mandamus action, Dr. Pourzia does not entirely abandon his argument that his damage action *should* be permitted without first pursuing mandamus relief, calling *Westlake* "judicial activism of the worst kind" and urging the courts to reconsider the doctrine. The majority goes even further and implies (in the guise of "tak[ing] no position") the question remains open "whether there should be some flexibility in the *Westlake* rule when the administrative hearing process is fundamentally

Undaunted by Dr. Pourzia's belated recognition of the binding force of *Westlake*, the majority gives him more than he asks and concludes there is no need to file an amended pleading in the form of a petition for administrative mandamus under section 1094.5. Because the first count of the first amended complaint (for intentional interference with profession) contains the necessary allegations to support writ relief -- save only for a verification[5] and a request that the discipline imposed and the findings supporting that discipline be set aside[6] -- the majority concludes Dr. Pourzia's complaint should be deemed a petition for administrative mandamus.[7]

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flawed." The majority's suggestion there may be some merit to Dr. Pourzia's argument that mandamus review is inappropriate when the plaintiff claims the quasi-judicial hearing process denied him or her a fair trial is directly at odds with the language of section 1094.5 itself (§ 1094.5, subd. (b) ["The inquiry in such a case shall extend to the questions . . . whether there was a fair trial . . . ."]), as well as with a large number of Court of Appeal decisions holding this is "precisely the purpose of mandamus review -- to ferret out such flaws and rectify them." (E.g., *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 978; *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1729-1730.)

[5] I have considerable doubt whether adding a verification that was not inadvertently omitted constitutes "correcting a mistake in the name of a party, or a mistake in any other respect," within the meaning of section 473, subdivision (a)(1). Nonetheless, I agree with the majority the trial court may permit a party to amend a pleading by adding a verification under section 473, subdivision (a)(1), which, in addition to correcting mistakes, authorizes, in furtherance of justice and on any terms as may be proper, an amendment to any pleading or proceeding "in other particulars[.]"

[6] The majority correctly notes section 580, subdivision (a), authorizes the trial court to grant the plaintiff "any relief consistent with the case made by the complaint and embraced within the issue." However, section 425.10, subdivision (a)(2), requires a complaint to contain "[a] demand for judgment for the relief to which the pleader claims to be entitled." I am not as confident as the majority that Dr. Pourzia's prayer for compensatory and punitive damages on his claim for intentional interference with profession "is not a problem" and that the pending action can be tried as a petition for administrative mandamus under section 1094.5 without an amended pleading or, at least, a further amendment to the pleading under section 473, subdivision (a)(1).

[7] Dr. Pourzia's cause of action for intentional interference with profession is directed not only to St. Mary but also to the three individual staff-member defendants.

I agree, as a general matter, "it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967.) But that statement of "black letter law" does not require the trial court to overrule a demurrer on a theory that has been expressly disavowed by the plaintiff, as was done in this case by Dr. Pourzia and his counsel. Indeed, the majority itself recognizes that in *Westlake*, *supra*, 17 Cal.3d 465 the Supreme Court found it inappropriate to recast a complaint for damages as a petition for writ of mandate when the plaintiff disclaimed any desire to have the court do so. (*Id*. at p. 485, fn. 10; see *CAMSI IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1543 ["The trial court could rationally have regarded [the plaintiff's] choice among theories as essentially tactical and not subject to interference by the court."].) Simply put, the trial court did not err by granting the motion for judgment on the pleadings rather than forcing Dr. Pourzia to pursue a legal theory and claim for relief he had rejected.

What, then, are we to do with Dr. Pourzia's change in legal strategy on appeal? In most instances, in pursuing an appeal from an order sustaining a demurrer or granting a motion for judgment on the pleadings without leave to amend, the plaintiff may advance a new legal theory explaining to the appellate court why the allegations of the complaint or petition state a cause of action. (See, e.g., *20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139, fn. 3; *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 629-630; see generally § 472c, subd. (a) ["When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made."].) But in this case Dr. Pourzia is not simply advancing a new theory for his damage case against St. Mary but rather a whole new approach to the litigation that he expressly rejected in the trial court. Normally, one who induces or invites the commission of error by the trial court is

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Presumably those defendants must be dismissed and the damage claims stricken as part of the "amendment to the complaint" permitted by the majority.

estopped from asserting it as a ground for reversal on appeal. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 ["the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court"]; see *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 ["[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error."].)

Dr. Pourzia's tactical decision to avoid pursing administrative mandamus under section 1094.5 distinguishes both the Supreme Court's decision in *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 637, and our own decision in *Haller v. Burbank Community Hospital Foundation* (1983) 149 Cal.App.3d 650, 655, upon which the majority rely. In each of those cases, recasting the pleading on appeal as a petition for writ of mandamus, although not the plaintiff's preferred approach, was nonetheless consistent with the plaintiff's general theory of the case. In *Boren* the plaintiff had filed a simple civil complaint that sought to annul the order of the State Personnel Board dismissing him from his civil service position and an award of back salary. The relief sought, as Justice Traynor explained, was unavailable in a civil action, but was appropriate for a cause of action for mandamus. (*Boren*, at pp. 637-639.) In *Haller* a surgeon filed a section 1094.5 mandamus proceeding to set aside a hospital's decision restricting his staff privileges. This court held the mandamus action was properly section 1085, not section 1094.5: "'Of course, mandamus pursuant to section 1094.5, commonly denominated as "administrative" mandamus, is mandamus still. . . .'" (*Haller*, at pp. 655-656.)

The plaintiff in *Boren v. State Personnel Board, supra*, 37 Cal.2d 634 and the petitioner in *Haller v. Burbank Community Hospital Foundation, supra*, 149 Cal.App.3d 650, never wavered as to the general type of relief they sought; what changed was only the procedural vehicle utilized to accomplish the desired result. (See also *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 546 ["an action for declaratory relief to review an administrative order should be regarded as a petition for a writ of mandate for purposes of ruling upon a general demurrer."].) Dr. Pourzia, on the other hand, consciously -- and

repeatedly -- rejected the one potentially viable cause of action that might be available to him to challenge St. Mary's decision to revoke his staff privileges. In my view, it is too late for him to now think better of his decision.

Even though a request for leave to amend may be raised for the first time on appeal, the question remains, in light of that request, whether the trial court abused its discretion in sustaining the demurrer or granting a motion for judgment on the pleadings without leave to amend. (See *Branick v. Downey Savings & Loan Assn*. (2006) 39 Cal.4th 235, 242 ["'Leave to amend a complaint is thus entrusted to the sound discretion of the trial court. ". . . The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. *More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court.* Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record."' [Citations.]"].) As the Court of Appeal explained in *CAMSI IV v. Hunter Technology Corp., supra*, 230 Cal.App.3d at pages 1542-1543, "[I]t is the *trial court's* discretion that is at issue; the reviewing court may only determine, as a matter of law, whether the trial court's discretion was abused. In our view an abuse of discretion could be found, absent an effective request for leave to amend in specified ways, only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case. . . . Absent any indication whatsoever that [the plaintiff] might wish to change theories, the trial court was by no means obliged to invite [the plaintiff] to do so. . . . The trial court could rationally have regarded [the plaintiff's] choice among theories as essentially tactical and not subject to interference by the court."

In light of Dr. Pourzia's steadfast insistence that he neither needed nor wanted to file a petition for administrative mandamus prior to pursing his claim for damages against St. Mary, the trial court did not abuse its discretion in granting the motion without leave to amend. In sum, I would neither deem the first amended complaint a petition for administrative mandamus under section 1094.5 nor allow Dr. Pourzia the opportunity at this late date to amend the pleading to include a request for administrative mandamus. I

note, however, in view of the majority's conclusion the applicable statute of limitations for a physician seeking a writ of administrative mandamus against a hospital to reinstate his staff privileges is four years -- an issue I do not reach[8] -- nothing would preclude Dr. Pourzia at this point from filing a new superior court action in the form of a petition for administrative mandamus.

PERLUSS, P. J.

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[8] The majority holds the three-year limitations period provided by section 338, subdivision (a), is not applicable to an action for administrative mandate challenging a decision reached in hospital peer review proceedings because the right to judicial review of such decisions was not "created by" the provisions of the Business & Professions Code governing hospitals' peer review practices. I leave to another day the question whether that conclusion is consistent with the Supreme Court's recent decision that a private hospital's peer review process constitutes an "official proceeding authorized by law" within the meaning of section 425.16, subdivision (e)(1) and (e)(2). (See *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192.)