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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KEVIN H. HOVEIDA, Plaintiff and Appellant, v. SCRIPPS HEALTH et al., Defendants and Respondents.	D046313 (Super. Ct. No. GIC800304)

APPEAL from a judgment of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Affirmed.

Beginning in 1991, Kevin H. Hoveida, M.D. (Hoveida) provided internal medicine services to patients in the Behavioral Health Unit (BHU) of Scripps Mercy Hospital (the Hospital) who were not already assigned to an internist (unassigned BHU patients). From July 2001 to October 2002, Hoveida provided those services through a contract with Emergency and Acute Care Medical Corporation (EACMC), which had an agreement with Scripps Health (the owner of the Hospital) to provide internal medicine

services to unassigned BHU patients. In October 2002, Scripps Health gave an entity other than EACMC the exclusive right to provide internal medicine services to unassigned BHU patients. Accordingly, EACMC, at the direction of Scripps Health, terminated its contract with Hoveida, and Scripps Health terminated a contract between it and Hoveida under which he provided services to unassigned BHU patients covered by Medicare. Hoveida did, however, retain his staff privileges at the Hospital.

Hoveida filed suit against Scripps Health, EACMC, and Davis Cracroft, M.D. (Cracroft), alleging: (1) intentional interference with economic relations; (2) breach of contract; (3) violation of Business and Professions Code section 2056; (4) violation of the right to common law fair procedure; (5) intentional interference with his right to practice his profession; (6) violation of the Cartwright Act, Business and Professions Code section 16700 et seq.; and (7) unfair competition in violation of Business and Professions Code section 17200 et seq.

The trial court entered judgment against Hoveida following two summary adjudication motions. We conclude that there is no triable issue of material fact and the trial court properly interpreted the contract at issue in the breach of contract cause of action. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *The BHU*

The BHU is an in-patient psychiatric hospital that serves patients who are transferred from the Hospital's emergency department. Although the BHU exists to provide psychiatric services, BHU patients also commonly require the attention of

internal medicine specialists. Unassigned BHU patients are referred to internists by their treating psychiatrists. Hoveida has provided internal medicine services to BHU patients since 1991 through these referrals. Hoveida estimates that by 1999 he was providing the majority of the internal medicine services for unassigned BHU patients, and that work made up approximately 95 percent of his practice.

B. *Hoveida's Participation in the EA Program*

In mid-2001, Scripps Health contracted with EACMC to provide on-call internal medicine services to unassigned BHU patients. EACMC's provision of services to the BHU was controlled by a March 2001 agreement between EACMC and Scripps Health under which EACMC agreed to provide on-call, specialty physician services at all of Scripps Health's hospital emergency departments (the EACMC-Scripps Health Agreement) through what is commonly referred to as the "EA Program."[1]

EACMC provides services under the EA Program by contracting with a panel of physicians. Under the EA Program, EACMC compensates the physicians at the rate of 130 percent of the prevailing Medicare rate and it bills payors (such as insurance carriers and patients) for the cost of the physicians' services. The EA Program is not a fixed-cost contract for Scripps Health because Scripps Health is obligated by the EACMC-Scripps

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1 The EACMC-Scripps Health Agreement states that the parties entered into the agreement because "[i]n recent months appropriate specialty physician coverage at [Scripps Health] hospitals has become seriously threatened by the inadequate compensation received by specialty physician payors. In order to address this issue, [Scripps Health] is implementing a physician on-call program . . . whereby [Scripps Health] will authorize EACMC to contract with physicians to provide necessary professional services at its [h]ospitals."

Agreement to make up any shortfall in collections between what EACMC collects from payors and what EACMC pays to the physicians. As of April 2004, there were approximately 617 physicians in the EA Program throughout all of Scripps Health's hospitals, with 187 physicians at the Hospital.

To fulfill its obligation to provide internal medicine services to BHU patients under the EA Program, EACMC contracted with Hoveida and four other internists in July 2001, and Hoveida continued to provide the majority of internal medicine services to unassigned BHU patients. Two agreements established Hoveida's role in the EA Program: (1) a "Professional Services Agreement (Medicare Patients)" between Hoveida and Scripps Health (Hoveida-Scripps Contract) and (2) a "Professional Services Agreement" between Hoveida and EACMC (Hoveida-EACMC Contract) (collectively the Service Contracts).

Under the Hoveida-EACMC Contract, Hoveida agreed to provide care for unassigned BHU patients except Medicare beneficiaries. Hoveida's care for unassigned Medicare beneficiaries in the BHU was covered by the Hoveida-Scripps Contract.[2] The Service Contracts both provided: "Either party shall have the right to terminate this

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2 The Hoveida-Scripps Contract was necessary because the EACMC-Scripps Health Agreement provided that the provision of services to Medicare patients would not be covered by the agreements that EACMC entered into with physicians in the EA Program. Instead, Scripps Health would enter into an agreement with each physician participating in the EA Program for the provision of services to Medicare patients.

Agreement, without cause, by giving no less than thirty (30) days written notice to the other party."[3]

C. *Hoveida's Coding Disputes Under the EA Program*

EACMC and Scripps Health determined the amount that the payors were billed and the amount that the physicians were paid based on standard codes that certified independent coders assigned to the physician services after the patients were discharged from the BHU. The codes were assigned according to information recorded by the physicians in the patients' charts. The coders' selection of codes to describe a service performed by the physician determined the amount the physician would be paid for that service. A higher code meant greater compensation.[4]

The EA Program included a process through which physicians could review and dispute the codes assigned to their services. Hoveida disagreed about the assigned codes, as did many other physicians in the EA Program.[5] When disagreements arose with Hoveida, the coders reviewed the patients' charts and occasionally made adjustments, but in most cases the adjustments were not made because Hoveida had provided insufficient

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[3] The EACMC-Scripps Health Agreement provides that EACMC "shall terminate" an agreement with a physician providing services in the EA Program "at the direction of [Scripps Health] and the [EA] Steering Committee."

[4] The practice of assigning a code that results in a lower payment to the physician is known as "downcoding."

[5] Hoveida also complained about occasions when he was mistakenly not paid for treatment of certain patients that were misidentified as outside of the EA Program, and for the delay in payment caused by coding disputes and the volume of patients' charts that the coders had to review.

documentation in the patients' charts to support the requested code.[6] Hoveida stated that although he disagreed with the coding practices, the Hospital never prevented him from providing medically appropriate health care, and neither the Hospital nor EACMC ever refused to pay for any test, drug, or medical procedure that Hoveida deemed appropriate for his patients. The issue was simply how those procedures should be coded, and correspondingly how much he should be paid for the services he had already performed.

In November 2001, Thomas Gammiere, who is the administrator of the Hospital, and Cracroft, who is EA Program Physician Advisor at the Hospital and head of the steering committee overseeing the EA Program (EA Steering Committee), sent a letter to Hoveida about his coding disputes. The letter explained that an outside expert had reviewed Hoveida's patients' charts and had confirmed the validity of the Hospital's coding practices. The letter noted that there were "considerable discrepancies" in Hoveida's documentation of his services on the patients' charts, and that Hoveida had been invited to, but did not, attend meetings of the advisory committee overseeing coding issues or a coding education session for all physicians at the Hospital. The letter put Hoveida on notice that that "continued problems with similar disputes of Scripps Mercy coding practices may result in the discontinuation of your participation in the [EA] Program."

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[6] The Hospital retained a coding expert to review a sample of Hoveida's patients' charts. The coding expert found no evidence of downcoding for Hoveida's services.

D. *Termination of the EA Program for Internal Medicine Services in the BHU*

Effective October 2002, the Hospital discontinued the use of the EA Program to provide internal medicine services to unassigned BHU patients in favor of an exclusive arrangement with Hospital Based Physicians Group (HBPG). The exclusive arrangement with HBPG left Hoveida without the ability to provide care for unassigned BHU patients because he was not one of the doctors employed by HPBG.

Declarations and deposition testimony by Gammiere and Cracroft explained the reasons for the change. They explained that after operating the EA Program in the BHU for several months, the Hospital discovered that it was incurring more costs for internal medicine services than it had anticipated and the costs were proving to be a considerable drain on the Hospital's financial resources. Several factors appeared to contribute to this unanticipated expense, including the high rate at which the contracting internists were paid, overutilization of services by Hoveida, and the administrative costs incurred in coding and billing for the services performed.

In approximately January 2002, in an attempt to find a way to save costs, Cracroft asked Arthur Gruen, M.D. (Gruen), who worked for EACMC, to compare the current cost of internal medicine services for the BHU under the EA Program with what those services would hypothetically cost under a "case rate" system.[7] The study concluded that the Hospital would save money by changing to a case rate system.

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7 The record does not define what Gruen meant by a case rate system.

Gammiere explained that in July 2002 after analyzing the situation and consulting with legal counsel and other Hospital administrators, he decided to discontinue the EA Program for internal medicine services in the BHU. HBPG, which was already providing internal medicine services in the emergency department and other areas of the Hospital, agreed to provide internal medicine services in the BHU for a flat, fixed rate. Gammiere determined that the Hospital would obtain quality internal medicine services for the BHU at a considerably lower, fixed cost under an exclusive contract with HBPG and would attain added stability in the Hospital's relationship with HPBG — which had an important role in teaching the hospital's physician residents. Further, because HBPG had agreed to code for the physicians' services and to bill the payors directly, the Hospital would eliminate administrative costs associated with coding and billing.

Because HPBG was to be the exclusive provider of internal medicine services to unassigned BHU patients, Scripps Health terminated the Hoveida-Scripps Contract and its contracts of the other four internists who provided services to unassigned BHU patients under the EA Program. Scripps Health also directed EACMC to terminate its contracts with Hoveida and the other four internists. Hoveida and the other physicians were provided formal written notice of termination on August 1, 2002, and again on September 1, 2002. The termination took effect on October 1, 2002.

Hoveida still enjoys staff privileges at the Hospital and still provides internal medicine services at the BHU to patients that are referred to him from BHU psychiatrists, as long as they are not unassigned BHU patients covered by the exclusive arrangement with HBPG.

On November 19, 2002, Hoveida filed suit against Scripps Health, EACMC, and Cracroft, alleging causes of action against each of them for: (1) intentional interference with economic relations, (2) breach of contract, (3) violation of Business and Professions Code section 2056, (4) violation of the right to common law fair procedure, (5) intentional interference with his right to practice his profession, (6) violation of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), and (7) unfair competition (Bus. & Prof. Code, § 17200 et seq.).

Defendants filed a motion for summary adjudication on all of the causes of action except breach of contract. The trial court granted the motion.[8] Hoveida then amended the breach of contract cause of action to allege that defendants breached a duty to terminate the EACMC-Scripps Health Agreement before terminating the Service Contracts. The trial court granted summary adjudication on the issue of duty encompassed in this aspect of the breach of contract cause of action, ruling that defendants did not owe Hoveida a duty to first terminate the EACMC-Scripps Health Agreement.

Applying the one-final-judgment rule, we rejected Hoveida's initial attempt to appeal the summary adjudication rulings because the remaining aspects of the breach of contract cause of action had been dismissed by Hoveida without prejudice in a stipulation

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8 Hoveida stated in his opposition to the summary adjudication motion that he had chosen not to pursue the Cartwright Act and unfair competition causes of action. On that basis, the trial court granted summary adjudication as to those causes of action. The summary adjudication of those two causes of action is not at issue on appeal.

that tolled the statute of limitations. (*Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466.) Hoveida then dismissed all of the remaining aspects of the breach of contract cause of action with prejudice. The trial court entered final judgment, and Hoveida filed the appeal that is currently before us.

Hoveida challenges the two summary adjudication rulings, arguing that (1) a triable issue of material fact exists on the causes of action at issue in the first summary adjudication motion, and (2) the second summary adjudication motion should not have been granted because defendants owed him a contractual duty to refrain from terminating the Service Contracts before terminating the EACMC-Scripps Health Agreement.

II. DISCUSSION

A. *Standard of Review*

We review a summary adjudication ruling de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary [adjudication]." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.)

A defendant "moving for summary [adjudication] bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant may meet this burden either by showing that one or more elements of a

cause of action cannot be established or by showing that there is a complete defense. "[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action[;] the defendant need not himself conclusively negate any such element . . . ." (*Id.* at pp. 853-854.) If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of fact with respect to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (o)(2); *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) On appeal, we apply the same three-step analysis used by the trial court. "We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva,* at p. 261.)

B. *The Trial Court Properly Granted the First Summary Adjudication Motion*

1. *The Fourth and Fifth Causes of Action*

We first consider Hoveida's fourth and fifth causes of action, which allege that defendants violated his right to common law fair procedure and intentionally interfered with his right to practice. As we will explain, although the two causes of action have distinct elements, whether they survive summary adjudication depends on a common issue: Is there a material factual dispute about defendants' legitimate, non-retaliatory reasons for terminating the Service Contracts? We will conclude that no triable issue of material fact exists, and accordingly summary adjudication is proper for the fourth and fifth causes of action.

a. *Right to Common Law Fair Procedure (Fourth Cause of Action)*

We first discuss the legal basis for Hoveida's claim that he was denied his common law right to fair procedure. A cause of action for violation of a physician's right to common law fair procedure is based on the principle that, generally, "a physician may neither be refused admission to, nor expelled from, the staff of a hospital, *whether public or private,* in the absence of a procedure comporting with the minimum common law requirements of procedural due process." (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 815.) A physician's common law right to fair procedure arises when a hospital's decision, specific to that individual, impairs his or her ability to practice and thus "affect[s] an important, substantial economic interest." (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1072 (*Potvin*) [insurance company decision to exclude physician from preferred provider list may affect an important substantial economic interest, giving rise to the right to fair procedure].) "[W]hen the right to fair procedure applies, the decisionmaking 'must be both substantively rational and procedurally fair.'" (*Id.* at p. 1066.) Hoveida contends that the decision to terminate the Service Contracts (1) was substantively irrational because the termination was in retaliation for his complaints about coding determinations and (2) was procedurally unfair because defendants did not provide him with adequate notice of their decision to terminate the Service Contracts or give him an opportunity to respond.[9]

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9 "Fair procedure" is a common law concept not synonymous with constitutional due process. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541,

As defendants point out and as the trial court recognized, Hoveida's claims for substantive and procedural due process violations are subject to the crucial limitation that "the requirement of a proceeding with minimal due process prior to termination of a physician's staff privileges is not applicable if it is the result of *a quasi-legislative act* by the hospital" instead of the result of an "adjudicative decision." (*Major v. Memorial Hospitals Assn.* (1999) 71 Cal.App.4th 1380, 1397-1398 (*Major*), italics added; see also *Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal.App.3d 1169, 1183 (*Mateo-Woodburn*) ["In a quasi-legislative proceeding there is no constitutional right to *any* hearing"].)[10] "A decision is considered quasi-legislative if it is one of general application intended to address an administrative problem as a whole and not directed at specific individuals." (*Major*, at p. 1398.)

Specifically relevant to the facts presented here, "[n]umerous cases recognize that the governing body of a hospital, private or public, may make a rational policy decision or adopt a rule of general application to the effect that a department under its jurisdiction shall be operated by the hospital itself through a contractual arrangement with one or more doctors to the exclusion of all other members of the medical staff except those who

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550, fn. 7.) "The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . , nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position." (*Id.* at p. 555, citation omitted.)

10 In the context of a hospital's decisionmaking, it may be more understandable to refer to a quasi-legislative decision as "policy-making." (*Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 384.)

may be hired by the contracting doctor or doctors." (*Mateo-Woodburn, supra*, 221 Cal.App.3d at p. 1183, citing cases.) In such a case, the action is "clearly quasi-legislative in nature." (*Id.* at p. 1184.) "[W]hen terminations of staff privileges are incidental to a hospital's reorganization of one of its departments[,] the terminations are the result of administrative/quasi-legislative decisions, rather than adjudicatory/quasi-judicial decisions about a doctor, and hence do not require a due process hearing." (*Abrams v. St. John's Hospital & Health Center* (1994) 25 Cal.App.4th 628, 636.) "[T]here is no reason why entry into an exclusive . . . medical services contract and its enforcement constitute a denial of due process to those doctors who are not included in the contract." (*Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, 75 (*Centeno*).)[11]

Thus, in light of the exclusion of quasi-legislative decisions from the requirements that physicians be afforded fair procedure before losing hospital privileges, the following dispositive factual issues arise: (1) whether the decision to terminate the Service Contracts was an administrative decision about how to operate the hospital, making it a quasi-legislative decision; or (2) whether, on the contrary, the decision was made to

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11 A hospital's quasi-legislative decision announcing a generally applicable rule contrasts with the case where a hospital takes action to suspend an individual physician from the provision of certain services as a result of specific suspected misconduct, which is an adjudicative decision requiring that the hospital afford the physician fair procedure. (*Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146, 152 [suspension of physician from hospital's emergency room call roster because of misconduct in discharging patients invokes "a fundamental property right which cannot be suspended or revoked without notice and a hearing"].)

retaliate for Hoveida's complaints about coding determinations, making it an adjudicatory decision.[12]

b. *Interference with the Right to Practice* (*Fifth Cause of Action*)

A similar dispositive factual issue arises regarding Hoveida's cause of action for interference with his right to practice. That cause of action is based on the principle that a hospital acts unlawfully, giving rise to a cause of action for damages, when "the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means otherwise unlawful when there is a lack of sufficient justification." (*Willis v. Santa Ana etc. Hospital Assn.* (1962) 58 Cal.2d 806, 810 (*Willis*), overruled on other grounds by *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 925; see also *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 812 [discussing cause of action for interference with right to practice]; *Centeno, supra*, 107 Cal.App.3d at p. 69 [same].)

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12 Hoveida argues that the reported cases deciding whether a hospital's decision was quasi-legislative were cases in which the court weighed evidence and found facts, such as after a bench trial. From this observation, Hoveida infers that summary adjudication is never appropriate on the issue of whether a hospital's decision is quasi-legislative. We are not persuaded by Hoveida's reasoning. He has cited no authority that would exempt a cause of action for violation of the common law right to fair procedure from the operation of the summary judgment statute, which states that "[a]ny party may move for summary judgment in any action or proceeding" (Code Civ. Proc., § 437c, subd. (a)), or from the policy in favor of using summary judgment to "cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar, supra*, 25 Cal.4th at p. 843.)

"Whether there is justification is determined not by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other." (*Willis, supra*, 58 Cal.2d at p. 810.) Thus, for example, "[a] cause of action [for interference with the right to practice] is stated . . . where . . . it is alleged that a physician of the highest qualifications is denied access to necessary hospital facilities as the result of a conspiracy designed to restrain competition and deprive him of his practice in order to benefit competing members of the conspiracy." (*Ibid*.)

As we understand his position, Hoveida claims that defendants unlawfully interfered with his right to practice in the BHU by terminating the Service Contracts with insufficient justification, in that they were terminated in order to retaliate against him.

To prevail on his claim for interference with the right to practice, Hoveida would have to show, at a minimum, that there was "lack of sufficient justification" for the termination of the Service Contracts or some sort of illegality.[13] (*Willis, supra*, 58 Cal.2d at p. 810.) Case law establishes that when a hospital has, for legitimate and lawful administrative reasons, decided to close a department and award an exclusive contract to other physicians, while not revoking the staff privileges of the excluded physicians, there is sufficient justification for the decision to defeat a cause of action for interference with

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13 The only illegality that Hoveida has alleged is based on his claim that defendants violated Business and Professions Code section 2056. As we conclude, *post*, Hoveida has identified no factual basis for that claim.

the right to practice. (*Blank v. Palo Alto-Stanford Hospital Center* (1965) 234 Cal.App.2d 377, 385-386 (*Blank*) [sufficient justification existed for an action that cut off physicians with continuing staff privileges from their prior hospital-based practice when the hospital "provide[d] by regulation, or otherwise, that certain facilities shall be operated by the hospital itself to the exclusion of all members of the staff except those who may be coincidently employed in such operation"]; *Centeno, supra,* 107 Cal.App.3d at pp. 69-74) [hospital's decision to enter into an exclusive contract with a physician group did not constitute inference with physician's right to practice because it was justified by the difficulties with the previous arrangement and by the improvement in hospital operations].) Hospitals have "the right . . . to make rational management decisions, even when exercise of that right might prove adverse to the interests of specific individual practitioners," and this type of rational management decision will defeat a cause of action for intentional interference with the right to practice. (*Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98, 106, 100 [rejecting cause of action for "interference with present and prospective contractual rights and professional relationships" because the hospital had provided a sufficient justification in that it had chosen, for administrative reasons, to adopt a closed staff structure for its heart surgery program].)

Accordingly, the dispositive factual issue in the cause of action for interference with the right to practice is whether the decision to terminate the Service Contracts was without sufficient justification in that it was made to retaliate against Hoveida rather than to reap the operational benefits of an exclusive arrangement with HBPG.

c. *Analysis of Evidence*

We next analyze whether there is a triable issue of material fact on the single factual issue dispositive of both the fourth and fifth causes of action: whether the Service Contracts were terminated to fulfill the Hospital's legitimate administrative goals of saving costs and stabilizing its relationship with HBPG rather than to retaliate against Hoveida for raising disputes about coding.

i. *Defendants Met Their Initial Burden on Summary Adjudication on the Fourth and Fifth Causes of Action*

We first consider whether defendants have met their initial burden on summary adjudication to produce evidence sufficient for a finding in their favor. (See *Aguilar, supra,* 25 Cal.4th at p. 850 [a defendant makes a prima facie showing and satisfies its burden of production on summary judgment by showing "'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense'" to that cause of action].)

Defendants argue that they met their initial burden on the fourth and fifth causes of action by producing the declarations of Gammiere and Cracroft. They argue that these declarations establish that the Service Contracts (along with the contracts of the four other participating physicians) were terminated because Gammiere, as administrator of the Hospital, had determined to save costs and stabilize the relationship with HBPG. Accordingly, the Hospital entered into an exclusive flat-rate, fixed-cost contract with HBPG instead of continuing with the EA Program for internal medicine services in the BHU.

Hoveida argues that we should not consider the Gammiere and Cracroft declarations. Relying on Code of Civil Procedure section 437c, subdivision (e), which gives the trial court *discretion* to deny summary adjudication "where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof," Hoveida argues that we should not consider the declarations to the extent that they provide evidence of Gammiere's and Cracroft's intent in terminating the Service Contracts. We reject this argument for two reasons.

First, to the extent that Code of Civil Procedure section 437c, subdivision (e) applies to any of the statements in the declarations, our application of section 437c, subdivision (e) on appeal is limited to reviewing whether the trial court abused its discretion. (*City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1288 ["The only exception to the independent review standard [for summary judgment] applies when we review a trial court's exercise of discretion as allowed by Code of Civil Procedure section 437c, subdivision (e)"]; see also 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 235, p. 646 [citing the provisions of Code of Civ. Proc., § 437c, subd. (e) as the only instance where a portion of a summary judgment ruling is reviewed for abuse of discretion].) Here, Hoveida objected to the Gammiere and Cracroft declarations, but the trial court considered them in ruling that defendants met their burden on summary adjudication. Hoveida has identified no reason to conclude that the trial court abused its discretion in deciding to consider the declarations. Instead, he has erroneously argued that we have the discretion to disregard those declarations in the first instance.

Second, even if we had discretion to disregard declarations describing "an individual's state of mind" (Code Civ. Proc., § 437c, subd. (e)), we do not believe that defendants' summary adjudication motion depends on state-of-mind evidence. Instead, the Gammiere and Cracroft declarations carry defendants' burden by describing the facts surrounding an administrative decision. The declarations establish the high cost of using the EA Program to provide internal medicine services for the BHU, describe the steps the Hospital took in response (i.e., an exclusive contact with HBPG), and explain how these steps led to the termination of the Service Contracts.

Hoveida also contends that the Gammiere and Cracroft declarations do not meet the requirements of the summary judgment statute (Code of Civ. Proc., § 437c, subd. (d)) because they are not made by persons with personal knowledge and do not show that the declarants are competent to testify. We reject this argument because it is not supported by the content of the declarations. Both the Cracroft and Gammiere declarations state: "I have personal knowledge of the facts stated herein, except for those matters stated on information and belief, which I believe to be true." The declarations do not identify any material facts as based on information and belief. Moreover, the declarations explain why Gammiere and Cracroft have personal knowledge about the decision to discontinue the EA Program for the provision of internal medicine services in the BHU. As the Hospital's EA Program Physician Advisor, Cracroft had responsibility for "chairing the EA Steering Committee, reviewing coding disputes and facilitating resolution of any conflicts, facilitating the development of EA Steering Committee policies, and directing review of financial and utilization matters within the EA Steering Committee." As

administrator of the Hospital, Gammiere was responsible for overseeing the day-to-day operations of the Hospital, including the BHU, and he was responsible for making the decision to switch to an exclusive contract with HBPG for BHU internal medicine services.[14]

Having rejected Hoveida's arguments as to the lack of admissibility and probative value of the Gammiere and Cracroft declarations, we conclude that defendants satisfied their initial burden by submitting those declarations. Under the authorities discussed above, which establish that a hospital's award of an exclusive contract to another provider constitutes a quasi-legislative decision and provides sufficient justification to defeat a cause of action for interference with the right to practice, the Hospital's explanation for the termination of the Service Contracts met defendants' burden of production on summary adjudication. Defendants made a prima facie case showing that (1) Hoveida cannot establish that termination of the Service Contracts was without sufficient justification as required for his cause of action for interference with the right to practice,

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[14] Similarly, Hoveida challenges the Gammiere and Cracroft declarations because they do not refer to or attach any financial analyses supporting the statement that the Hospital was experiencing unacceptably high costs in operating the EA Program in the BHU. We reject this argument because Hoveida has not identified any relevant authority requiring a court to reject declaration testimony by a competent declarant on the basis that statements in the declaration that are within the personal knowledge of the declarant were not accompanied by supporting documentation. The summary judgment statute requires only that "[s]upporting . . . declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated . . . ." (Code Civ. Proc., § 437c, subd. (d).) The Gammiere and Cracroft declarations met these qualifications. No more was required.

and (2) Hoveida cannot show that the decision was adjudicatory rather than quasi-legislative, as required for his cause of action for violation of the right to fair procedure. (See, e.g., *Blank, supra*, 234 Cal.App.2d at pp. 385-386; *Mateo-Woodburn, supra*, 221 Cal.App.3d at p. 1183.)

ii. *Hoveida Did Not Identify Evidence Creating a Triable Issue of Material Fact*

Next, we analyze whether Hoveida has produced evidence showing the existence of material factual disputes about the reason for the termination of the Service Contracts. Hoveida argues that he has produced evidence sufficient to create an inference that defendants terminated the Service Contracts to retaliate for his coding disputes. "'When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647 (*Waschek*); see also *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 44-45 [an inference may not be illogically and unreasonably drawn or be based on mere possibility or suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork].)

Considering Hoveida's arguments in turn, we conclude that Hoveida has not identified any evidence creating a reasonable inference that defendants terminated the Service Contracts to retaliate against him for coding disputes instead of to save costs and stabilize the Hospital's relationship HBPG. Thus, there is no triable issue of material fact precluding summary adjudication on the fourth and fifth causes of action.

(a) *Disproportionate Impact on Hoveida*

Hoveida argues that because the other four internists terminated from the EA Program rarely treated unassigned patients in the BHU — and one of them (Grant Kingsbury, M.D.) obtained a position with HBPG treating patients in the BHU — those internists were not harmed by Scripps Health's decision to enter into an exclusive arrangement with HBPG. Hoveida argues that that "[t]he evidence . . . gives rise to the reasonable inference that Hoveida *was* singled out for retaliation, as his was the only practice that suffered by the [defendants'] acts."

We reject Hoveida's argument because evidence that Hoveida was the physician primarily affected by the exclusive contract with HBPG does not call into question the legitimate and rational administrative purposes for the decision as described in the Gammiere and Cracroft declarations and does not create an inference in his favor. (See *Major*, *supra*, 71 Cal.App.4th at p. 1403 [rejecting as a non-sequitor plaintiff physicians' argument that "the fact they were deprived of their staff privileges as a result of [the hospital's] decision . . . is evidence that eliminating them was the purpose of the action," when in fact the decision was a general administrative decision to enter into an exclusive provider arrangement with a provider who decided not to offer positions to plaintiffs].) The trial court observed, and we agree, that "[w]hile [the Hospital's] administrative decision disproportionately affected plaintiff's practice, no case law has been cited demonstrating that this is a material distinction. Five contracts were terminated, and even plaintiff's interpretation of the evidence shows that at least three other doctors were accepting EA patients, though on a more limited basis. Plaintiff's argument, taken to its

logical conclusion, would render all decisions adjudicatory in nature where one of several doctors happens to treat the majority of patients. This is not the law."

(b) *Documentary Evidence*

Hoveida relies on several documents in an attempt to create an inference that defendants terminated the Service Contracts to retaliate against him rather than to address legitimate administrative problems with the cost of the EA Program. He points to an e-mail sent by Cracroft to colleagues on August 12, 2002, discussing whether the Hospital was at risk from potential legal action by Hoveida by terminating the Service Contracts. The e-mail states,

> "I thought about this more and concluded that the problem that was identified leading to this change was simply overutilization and the significant unjustified cost overrides that were principally the fault of one individual. We did discuss the relative advantages and disadvantages of just terminating one contract [versus] switching the coverage to a different reimbursement scheme. This was a decision made to save money and have a fixed 'cost' to the hospital [versus] the runaway cost we had seen. The decision was also made to augment an existing program — HBP[G] — and encourage that group to be more stable with added 'business[.]' We did not try to change any of the individual practices as I think trying to dictate how to practice from a utilization standpoint can be fraught with danger. So, I think we're on solid ground in doing what is right."

It is undisputed that the "one individual" causing runaway costs refers to Hoveida.[15] Hoveida argues that the reference to him in the e-mail creates an inference

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15 Cracroft's deposition testimony explained what he meant by "overutilization": "overordering of tests, seeing patients for prolonged periods on a daily basis when perhaps they didn't need to be seen anymore, extensive workups for entities that may or may not be justified."

that the Service Contracts were terminated to retaliate against him for disputing coding determinations rather than because of "broad administrative concerns."

For several reasons, we do not agree that the e-mail creates such an inference. First, Cracroft's focus in the e-mail on saving costs and adding stability to the HBPG relationship, corroborates, rather than calls into question, the claim that the Service Contracts were terminated to reduce costs and support HBPG. Second, Cracroft's e-mail does not support a reasonable inference that defendants retaliated against Hoveida for *coding disputes*, as the e-mail does not mention *coding disputes*. Instead, the e-mail expresses Cracroft's concern over Hoveida's "overutilization." Third, evidence that Cracroft was concerned about Hoveida's "overutilization" does not advance Hoveida's case, as Hoveida does not claim (either in the complaint or in his briefing) that defendants acted impermissibly by focusing on his alleged overutilization in deciding whether to switch to a contract with HBPG. Hoveida's consistent theory in support of his fourth and fifth causes of action is that he was retaliated against solely because he disputed the Hospital's coding determinations.[16]

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16 Further, even if Hoveida's alleged overutilization motivated Scripps Health to enter into an exclusive contract with HBPG and terminate the Service Contracts, this causal relationship would not mean that the decision was an adjudicatory decision "directed at" Hoveida, giving rise to the right to fair procedure. (*Major*, *supra*, 71 Cal.App.4th at pp. 1402-1403 [hospital's decision to "close" a department in favor of an exclusive provider was quasi-legislative even though "plaintiffs' conduct accounted for a disproportionate share of the . . . department's problem" and "plaintiffs' names came up in the course of discussing the troubles within the department" in that the hospital's decision generally addressed administrative concerns rather than showing "an intent to specifically exclude plaintiffs"].)

The next document cited by Hoveida is a November 14, 2001 letter to Hoveida from Gammiere and Cracroft discussing the coding disputes and putting Hoveida on notice that he may be terminated from the EA Program if problems continue.[17] This letter does not create a reasonable inference that defendants retaliated against Hoveida because of coding disputes. Hoveida has shown no link between this warning, made in November 2001, and the Hospital's decision to terminate the Service Contracts, along with those of four other physicians, almost one year later in favor of an exclusive contract with HPBG. Because of the letter's remoteness in time from the termination of the Service Contracts and the lack of any other connection between it and the eventual termination decision, any inference from the letter that the Service Contracts were eventually terminated because of Hoveida's coding disputes would be based solely on "'speculation, conjecture, imagination, or guesswork.'" (*Waschek*, *supra*, 59 Cal.App.4th at p. 647.)

The next documents that Hoveida points to are statistical analyses and e-mail concerning Gruen's study of the cost of providing internal medicine services to the BHU through the EA Program compared to through a case-rate system, which used Hoveida's data as the basis for the study.[18] Gruen's focus on Hoveida's data does not support an

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17 The letter was sent shortly after the EA Steering Committee approved the practice of recommending that an individual physician who continues to have concerns with coding be asked to withdraw from the EA Program.

18 Although his argument is not completely clear, Hoveida also refers to an analysis that Gruen performed comparing Hoveida's services with that of another internist working in the BHU.

inference that defendants retaliated against Hoveida for coding disputes and does not call into question defendants' claim that the Hospital switched to an exclusive arrangement with HBPG to save costs. On the contrary, the study supports that claim because it shows the Hospital was focused on costs and was shown that there were less costly ways to provide the same services. Further, Gruen's uncontradicted deposition testimony is that he was not asked by anyone to focus on Hoveida's data and did so only because Hoveida treated the most patients, negating any claim that any of the defendants singled out Hoveida in a plan to retaliate against him.

(c) *Decisionmaking Process*

Hoveida argues that the process by which the Hospital decided to terminate the Service Contracts shows that defendants intended to retaliate against him. Hoveida points out that the decision to terminate the Service Contracts was primarily made by two people: Gammiere and Cracroft. He argues that if the Hospital was truly making an administrative decision rather than a decision designed to retaliate against him, more people would have been involved, including the hospital medical director (Joseph Shaw, M.D.) (Shaw), the BHU director (Peter Seymour, M.D.) (Seymour), and the BHU administrator (Jerrald Gold, Ph.D.) (Gold).

We reject this argument because the evidence does not show that any of the people identified by Hoveida had responsibility for the administration of contracts to provide internal medicine services in the BHU. Shaw, the Chief of Staff and Medical Director of Cardiology, testified at his deposition that he is not involved in or responsible for contracting for internal medicine services at the BHU, and the medical staff would not be

consulted about a contract for those services. Gold testified he has "no oversight of the physicians that are responsible for internal medicine coverage" and is not involved in contracting for those services. The record contains no evidence that Seymour, who was medical director for the BHU, had responsibility for contracts with internists or the EA Program. [19] The decision to enter into an exclusive contract with HPBG in place of the EA Program for BHU internal medicine services was made at a high administrative level by Gammiere, who is the Hospital's administrator, with the help of Cracroft, who oversaw the EA Program. Nothing in the evidence suggests that this decisionmaking process was unusual or unreasonable.

Hoveida also argues that the decision to terminate the Service Contracts was not a neutral administrative decision, because the decision was purportedly made in January 2002, although he was not put on notice until September 2002, and the EA Steering Committee was purportedly not informed until long after the decision was made. We reject this argument without even considering its logic because it finds no support in the record. All of the evidence shows that in January 2002 Gammiere and Cracroft were focusing on finding an alternative to the high cost of providing internal medicine services to the BHU, but they did not make the decision to solve the problem by entering into an

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19 We note that Hoveida submitted excerpts from transcripts of Seymour's deposition, but did not include the page containing Seymour's response to the request that he "outline . . . what your duties are as the director of the BHU." Failure to include this information leaves Hoveida without any support for his claim that Seymour, as medical director for the BHU, was someone who should have been consulted about the termination of the EA Program for internal medicine services in the BHU.

exclusive contract with HBPG until July 2002.[20] The EA Steering Committee was consulted and consented to the change on July 17, 2002.

Finally, Hoveida argues that defendants must have intended to retaliate against him because the record contains no evidence that they considered other alternatives to reduce costs, such as renegotiating the Service Contracts or reverting to an "open staff" system where any physician with staff privileges could provide the needed care, billing payors for the services.[21] This argument fails because it is Hoveida's burden to create a triable issue of material fact as to defendants' motives by showing that other viable alternatives were *not* considered. He has not done so. In fact, the evidence shows the contrary. Gammiere explained that he analyzed the situation and decided that an exclusive contract with HBPG was the best option because it would guarantee the needed

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20 Hoveida claims that "the [e]-mails between Cracroft and . . . Gruen of EACMC" show that the decision to terminate the Service Contracts was made in January 2002, but he does not identify any document that supports his assertion. E-mail from this period discusses projected savings from a case rate system, with Cracroft stating that the Hospital "will likely proceed with an RFP [request for proposals]," showing only that solutions were being considered at that time.

21 "'In an "open staff" system, all "qualified" physicians with medical staff privileges are permitted to work at the [h]ospital in their respective medical departments. Under a "closed system," the hospital contracts with an "exclusive provider" or particular physician group for certain medical services, thereby "closing" the medical practice to other physicians who are not members or employees of the contracted physician group.'" (*Major*, *supra*, 71 Cal.App.4th at p. 1388, fn. 2.)

services at a fixed cost, HBPG had demonstrated its ability to deliver quality services, and it would provide additional stability to the Hospital's relationship with HBPG. [22]

In sum, finding no merit to Hoveida's attempts to create a triable issue of material fact as to defendants' reasons for terminating the Service Contracts, we conclude that the trial court properly granted summary adjudication on the fourth and fifth causes of action.

2. *Third Cause of Action*
(Violation of Bus. & Prof. Code, § 2056)

The third cause of action is for violation of Business and Professions Code section 2056, which provides:

> "The application and rendering by any person of a decision to terminate an employment or other contractual relationship with, or otherwise penalize, a physician and surgeon principally for advocating for medically appropriate health care consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care violates the public policy of this state. No person shall terminate, retaliate against, or otherwise penalize a physician and surgeon for that advocacy, nor shall any person prohibit, restrict, or in any way discourage a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care." (*Id.*, subd. (c).)

The purpose of Business and Professions Code section 2056 "is to provide protection against retaliation for physicians who advocate for medically appropriate health care for their patients." (*Id.*, subd. (a).) "[S]ince [Business and Professions Code]

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22 Hoveida also argues that the defendants must have retaliated against him because they terminated the Service Contracts without first terminating the EACMC-Scripps Health Agreement, which Hoveida argues is a contractually required condition precedent. We discuss and reject this argument, *post*, in connection with the breach of contract cause of action.

section 2056 expresses a public policy to protect physicians and surgeons from retaliation for advocating medically appropriate health care, a wrongful discharge action can be premised on a termination in violation of that public policy." (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 51 (*Khajavi*).)[23]

For purposes of Business and Professions Code section 2056, the term "'to advocate for medically appropriate health care'" means "to appeal a payor's decision to deny payment for a service pursuant to the reasonable grievance or appeal procedure . . . or to protest a decision, policy, or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients." (*Id.*, subd. (b).) Applying this definition, Hoveida argues "a triable issue of material fact exists as to whether or not the [defendants] retaliated against Hoveida for his complaints and a triable issue of fact exists as to whether those complaints *concerned the ability of the EA Program to provide appropriate health care to patients.*" (Italics added.)

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23 Because we reject Hoveida's Business and Professions Code section 2056 cause of action on other grounds, we need not and do not decide whether a plaintiff may assert a cause of action titled "violation of section 2056" as Hoveida has done, or whether Business and Professions Code section 2056 may only be cited as the basis for another claim such as wrongful discharge in violation of public policy. We leave open this issue, as did *Khajavi*. (*Khajavi*, *supra*, 84 Cal.App.4th at p. 52, fn. 11 [not deciding whether the language in Bus. & Prof. Code, § 2056, providing that "[n]o person shall terminate, retaliate against, or otherwise penalize a physician and surgeon for that advocacy" creates a statutory claim for violation of [Bus. & Prof. Code,] § 2056, as that provision was added after the alleged wrongful acts alleged in *Khajavi*].)

Hoveida's claim lacks merit because, by his own description, he did not protest a decision, policy or practice that he reasonably believed to impair his ability to provide medically appropriate health care to his patients. According to Hoveida's uncontradicted deposition testimony, his problems with the Hospital's coding practices did not concern or affect the type of care that he provided to his patients, and he was never denied payment for a procedure that he performed in the BHU. Instead, his dispute with the Hospital centered on his belief that different codes should be assigned to the procedures he chose to perform. In short, he wanted to be compensated at a higher level for the work that the Hospital gave him free rein to perform. That sort of dispute is not covered by Business and Professions Code section 2056.

Hoveida argues that his complaints about coding determinations were attempts to advocate for medically appropriate health care because he was trying to fix a problem that discouraged well-qualified physicians from continuing to participate in the EA Program. This argument fails because it stretches the term "advocate for medically appropriate health care" beyond any rational interpretation. Nothing in Business and Professions Code section 2056 suggests that it covers a physician's disputes with a hospital's policies that, for reasons completely unrelated to decisions about appropriate and compensable treatment, make the hospital a less desirable place to practice and may drive away other qualified physicians.[24]

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[24] Hoveida claims to cite evidence showing that coding problems in the EA Program caused the program to suffer from a lack of qualified physicians. Hoveida's evidence does not support this claim. He cites a recital in the EACMC-Scripps Health Agreement

3. *First Cause of Action*
(Intentional Inference with Economic Relations)

To support his first cause of action for intentional interference with economic relations, Hoveida alleges that defendants interfered with the BHU psychiatrists' potential referrals of unassigned BHU patients to him, either by (1) agreeing to enter into an exclusive arrangement with HBPG or (2) prior to the exclusive agreement with HBPG, asking psychiatrists not to refer patients to him. Because Hoveida alleges interference with *future* referrals, we understand him to be making a claim for interference with *prospective* economic relations, not a claim for interference with an existing contract. (See *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392) (*Della Penna*).)

To prevail at trial on a claim for interference with prospective economic relations, Hoveida would have to establish "'(1) an economic relationship . . . containing the probability of future economic benefit . . . , (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, [and] (5) damages to the plaintiff proximately caused by the acts of the defendant.'" (*Della Penna, supra,* 11 Cal.4th at p. 389, quoting *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827.) A claim for

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acknowledging problems with obtaining appropriate specialty physician coverage because of inadequate compensation from payors, but this recital was made *before* the EA Program was put into effect and cited a shortage of physicians as the reason for *implementing* the EA Program. It does not say that coding practices under the EA Program caused a physician shortage.

intentional interference with prospective economic relations also requires a showing that defendants "engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna,* at p. 393.)

Hoveida's first theory in support of his interference claim is that the violations of law alleged in the third, fourth and fifth causes of action supply the independently wrongful conduct that interfered with his ability to practice in the BHU. We reject this argument because we have concluded that there is no merit to Hoveida's third, fourth, fifth and causes of action.

Hoveida's second argument is that Seymour, a psychiatrist who practices in the BHU and who became BHU medical director in February 2002, prevented referrals to Hoveida from other psychiatrists in the BHU by making defamatory comments about Hoveida.[25] Seymour testified at his deposition that he told other BHU psychiatrists that he believed Hoveida performed too many tests, was reluctant to listen to other physicians and was over-aggressive in his treatment. We conclude that, for two reasons, Seymour's testimony does not support Hoveida's interference claim.

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25 Hoveida's complaint alleged that defendants interfered with potential referrals from BHU psychiatrists by approaching those psychiatrists in the Spring of 2002 "and urging them to cease referring their EA Patients to [p]laintiff" with the false representation "that [p]laintiff was unreliable and engaged in improper billing practices." During his deposition, Hoveida was not able to identify support for his claim that defendants urged BHU psychiatrists not to make referrals to him. Hoveida has not advocated this theory of his interference claim on appeal and instead focuses on statements made by Seymour relating to Hoveida's practice of medicine.

First, Seymour testified that he made the negative comments only from the late 1990's until early 2001, which was while he was a psychiatrist with staff privileges at the Hospital. He did not make any of the comments after he became medical director of the BHU in February 2002. Thus, in light of when the comments were made, the uncontradicted evidence supports the conclusion that they were made in Seymour's individual capacity as one of the staff psychiatrists. Hoveida has identified no basis for a finding that Seymour made the comments while acting as an agent of Scripps Health, EACMC or Cracroft. Accordingly, Seymour's statements about Hoveida could not support a claim against any of the defendants.[26]

Second, Hoveida's attempt to rely on Seymour's statements to other psychiatrists to support his cause of action for interference also fails because Hoveida has not presented any evidence to establish that Seymour's comments caused psychiatrists to stop referring patients to him. Accordingly Hoveida cannot establish an essential element of his cause of action: "'actual disruption.'" (*Della Penna, supra*, 11 Cal.4th at p. 389.)

C. *The Trial Court Properly Granted the Second Summary Adjudication Motion*

Defendants' second summary adjudication motion challenged Hoveida's claim that defendants' owed him a contractual duty to refrain from terminating the Service Contracts in favor of an exclusive arrangement with HBPG while the EACMC-Scripps Health

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26 We do not consider whether Seymour's statements about Hoveida might, under any circumstances, constitute defamatory conduct, as the record has not been fully developed in that regard and the parties do not brief the issue.

Agreement was still in force. Hoveida relies on section 3 of the EACMC-Scripps Health Agreement, and section 9 of the Hoveida-EACMC Contract. Both contain similar language acknowledging that upon termination of the EACMC-Scripps Health Agreement, Scripps Health may enter into exclusive agreements with other physicians or entities, to the exclusion of EACMC and physicians working in the EA Program.

Section 3 of the EACMC-Scripps Health Agreement states in full:

> "The parties acknowledge and agree that during the term of this Agreement EACMC will not have the exclusive right to provide or arrange for the provision of Specialty Physician Services to Covered patients and that members of the applicable hospital medical staff who do not have an agreement with EACMC, but who otherwise meet the requirements of [Scripps Health] and the applicable hospital medical staff, may provide such services to Covered Patients. The parties acknowledge and agree that any such physicians will not receive any payment from EACMC and will not participate in EACMC's utilization review activities. EACMC acknowledges and agrees that upon the termination of this Agreement, [Scripps Health] may enter into a new agreement(s) with one or more physicians or entities other than EACMC for the provision of Specialty Physician Services, and that such agreement(s) may confer an exclusive right upon such physicians or entities to the exclusion of EACMC and Specialty Physicians."

Section 9 of the Hoveida-EACMC Contract provides:

> "9. No Exclusivity. The parties acknowledge and agree that during the term of this Agreement, EACMC will not have the exclusive right to provide or arrange for the provision of Specialty Physician Services to EA Patients and that members of the [Scripps Health] medical staff who do not have an agreement or other relationship with EACMC, but who otherwise meet the requirements of [Scripps Health] and the [Scripps Health] medical staff, may provide such services to EA Patients. Specialty Physician acknowledges that upon the expiration or earlier termination of the [EACMC-Scripps Health] Agreement, [Scripps Health] may enter into a new agreement or agreements with one or more physicians or entities other than EACMC for the provision of the services covered by the [EACMC-Scripps Health] Agreement, and that such agreement or agreements may confer an exclusive right upon such

physicians or entities to the exclusion of EACMC and Specialty Physician."

Hoveida contends that these contractual provisions obligated Scripps Health to dismantle the EA Program (by terminating the EA-Scripps Health Agreement, which encompasses 617 participating physicians at five hospitals) before it entered into an exclusive arrangement with a provider other EACMC to provide the internal medicine services to the BHU covered by the Service Contracts.

In analyzing Hoveida's claim, we first note that Hoveida is not a party to the EACMC-Scripps Health Agreement, and he does not claim to be an intended third party beneficiary of it.[27] As a result, the EACMC-Scripps Health Agreement does not give rise to any contractual duty toward Hoveida on the part of EACMC or Scripps Health. (See *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1069 [entity that was not a party to a lease agreement could not claim the benefit of a contractual provision because it was not a party or an intended third party beneficiary]; *Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724 [nonparty to an insurance contract could not state a cause of action for breach of an insurance carrier's contractually based duty].) Thus, we examine only the Hoveida-EACMC Contract, to which Hoveida *is* a party, to determine whether it gives rise to the contractual duty claimed by Hoveida.

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27 Even if Hoveida's argument for a duty owing to him from the EACMC-Scripps Agreement was interpreted as a claim to be an intended third party beneficiary of the EACMC-Scripps Health Agreement, neither the contractual language nor any other evidence in the record would support such a claim.

Turning to the Hoveida-EACMC Contract, we first observe that neither Scripps Health nor Cracroft are parties to it. Thus, the Hoveida-EACMC Contract does not support Hoveida's claim that Scripps Health and Cracroft owe a contractual duty to him.[28] (See *Brown v. California State Lottery Com.* (1991) 232 Cal.App.3d 1335, 1339, fn. 1 ["'"Mutual consent is necessary to the existence of any contract, and one cannot be made to stand on a contract to which he never consented"'"]; Civ. Code, §§ 1550, 1565 [essential elements of a parties' contract include "[t]heir consent," "[c]ommunicated by each to the other"].)

Thus, the only issue left is whether the Hoveida-EACMC Contract gives rise to a duty on the part of EACMC, as claimed by Hoveida. Because we need not resolve any conflict in extrinsic evidence, we decide the issue as a matter of law based on the rules of contract interpretation. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.) Central to our analysis, we rely on the principle that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Further, we apply the rule that "[t]he words of a contract are to be understood in their ordinary and popular sense" unless used in a technical sense by the parties or a special meaning is given to them by usage. (Civ. Code, § 1644.)

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28 The Hoveida-Scripps Contract does not contain language similar to that relied on by Hoveida in the EACMC-Scripps Health Agreement and the Hoveida-EACMC Contract.

We start our contractual analysis with the sentence in section 9 of the Hoveida-EACMC Contract that Hoveida cites in support of his argument (the Section 9 Clause):

> "Specialty Physician acknowledges that upon the expiration or earlier termination of the [EACMC-Scripps Health] Agreement, [Scripps Health] may enter into a new agreement or agreements with one or more physicians or entities other than EACMC for the provision of the services covered by the [EACMC-Scripps Health] Agreement, and that such agreement or agreements may confer an exclusive right upon such physicians or entities to the exclusion of EACMC and Specialty Physician."

Several items in the Section 9 Clause assist our analysis as to whether the Hoveida-EACMC Contract obligates EACMC to refrain from terminating it (in favor of Scripps Health's exclusive contract with another provider) unless the EACMC-Scripps Health Agreement is first terminated. First, we observe that the Section 9 Clause is expressly identified as an *acknowledgement made by Hoveida alone* ("Specialty Physician acknowledges"). It is not identified as an *agreement between* Hoveida and EACMC. This word choice is especially significant because the preceding sentence states that EACMC and Hoveida *both* "acknowledge and *agree*" to the terms set forth (i.e., that due to the lack of exclusivity, other members of the Hospital staff may provide internal medicine services to unassigned BHU patients).

Second, we observe that the Section 9 Clause is not phrased as an obligation on the part of EACMC. It does not use term "shall," which is consistently employed in the rest of the contract to indicate the affirmative obligations of the parties. Instead, the Section 9 Clause simply acknowledges a situation that "may" come to pass in that Scripps Health (who is not a party to the contract) "may" decide to terminate the EACMC-

Scripps Health Agreement in favor of an exclusive contract with another provider.[29] Both of these observations undermine Hoveida's argument that the Section 9 Clause creates a contractual duty on the part of EACMC.

Further, we look to the rest of the Hoveida-EACMC Contract to determine if Hoveida's interpretation of the Section 9 Clause is reasonable in relation to the contract as a whole. We focus on section 6 of the Hoveida-EACMC Contract, which directly addresses whether the parties intended any limitations on EACMC's ability to terminate the Hoveida-EACMC Contract. Sections 6(a) and 6(b) of the Hoveida-EACMC Contract state that although the "term" of the Hoveida-EACMC Contract "shall continue in effect for so long as the [EACMC-Scripps Health] Agreement remains in effect," either party "shall have the right to terminate [the Hoveida-EACMC Contract], without cause, by giving no less than thirty (30) days written notice to the other party."

Hoveida's interpretation of the Section 9 Clause does not give effect to section 6 of the Hoveida-EACMC Contract, which allows for termination without cause, and thus is not a reasonable interpretation under the principle that "'[l]anguage in a contract must be construed in the context of that instrument as a whole.'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265, italics omitted.)[30] Accordingly, we conclude that the

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[29] We agree with the trial court's observation that "[s]ection 9 uses the term 'acknowledges' repeatedly, whereas the remainder of the [Hoveida-EACMC Contract] uses terminology such as 'shall.' This is further evidence that the section was meant to be advisory, but was not intended to bind EACMC to a particular course of action."

[30] Hoveida argues that the "without cause" language of section 6 in the Hoveida-EACMC Contract could be reconciled with his interpretation of the contract if the

Hoveida-EACMC Contract, when read as a whole, does not create a duty on the part of EACMC to refrain from terminating it in favor of Scripps Health's exclusive arrangement with another provider until the EACMC-Scripps Health Agreement is terminated.[31]

Hoveida argues that we should not rely on the "termination without cause" provision in section 6 to interpret the Hoveida-EACMC Contract because that provision is unenforceable under *Potvin v. Metropolitan Life Ins. Co., supra*, 22 Cal.4th 1060. We reject this argument because *Potvin* is inapplicable here. *Potvin* held that a "termination

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Section 9 Clause is read to create an obligation on the part of Scripps Health not to enter into an exclusive arrangement with another provider while the EACMC-Scripps Health Agreement is still in force, but *not* to address whether EACMC may terminate the Hoveida-EACMC Contract. We reject this argument to the extent it attempts to create a contractual duty on the part of Scripps Health toward Hoveida based on the Hoveida-EACMC Contact, because Scripps Health is not a party to the Hoveida-EACMC Contract.

[31] Hoveida suggests that we look not only to the Hoveida-EACMC Contract to interpret the Section 9 Clause, but also to the EACMC-Scripps Health Agreement and the Hoveida-Scripps Contract. (Cf. Civ. Code, § 1642 ["Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together"].) Although we note that the documents share overlapping but *not* identical parties and that the EACMC-Scripps Health Agreement was entered into four months before the other two agreements, we accept Hoveida's invitation to consider the documents together to the extent that they may illuminate the parties' intent. We conclude that Hoveida fails to present a convincing argument that the three contracts, when read together, support his claim that defendants owed him a duty to refrain from terminating the Service Contracts without first terminating the EACMC-Scripps Health Agreement. On the contrary, the Hoveida-Scripps Contract undermines Hoveida's argument because that agreement lacks language similar to the Section 9 Clause in the Hoveida-EACMC Contract. The absence of such a provision in the agreement between Scripps Health and Hoveida is conspicuous because Scripps Health, not EACMC, is the party that controls whether and when it enters into an exclusive arrangement with another party to the detriment of Hoveida.

without cause" provision in a contract between an insurance company and a physician is unenforceable "*to the extent it purports to limit an otherwise existing right to fair procedure under the common law*." (*Id*. at p. 1073, italics added.) Here, as we have concluded with respect to the fourth cause of action, Hoveida did not have a common law right to fair procedure.[32]

Based on the foregoing analysis, we conclude that the trial court properly granted summary adjudication on the issue of duty in the breach of a contract cause of action.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

MCCONNELL, P. J.

BENKE, J.

32 Hoveida also argues that "the implied covenant of good faith and fair dealing required that both Scripps Health and EACMC refrain from all conduct that would prevent Hoveida from treating EA [p]atients and the BHU," including termination of his contracts in favor of an exclusive arrangement with another provider. We reject Hoveida's argument for any such implied term because it is directly contradicted by the express terms of the termination at will provision in section 6 of the Hoveida-EACMC Contract and a similar termination at will provision in the Hoveida-Scripps Contract.