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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WILLIAM MOORES,  
Plaintiff and Appellant,

v.

PHILIP MADVIG et al.,  
Defendants and Respondents.

A106200

(San Francisco County  
Super. Ct. No. 409706)

In this case, plaintiff William Moores, M.D., appeals after a summary judgment for defendants Philip Madvig, M.D., Bruce Blumberg, M.D., William Strull, M.D., Keith Flachsbart, M.D., Douglas S. Grey, M.D., The Permanente Medical Group (TPMG), and Kaiser Foundation Health Plan. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

***I. Moores's Employment with TPMG***

Plaintiff William Moores is a cardiovascular surgeon who was employed by TPMG at the Kaiser Foundation Hospital in San Francisco. On September 28, 1998, following the report of an unexpectedly bad surgical outcome in one of his cases, Moores was placed on paid administrative leave by TPMG. Moores was notified that while on leave he would undergo a fitness for duty evaluation and a formal practice review. He was given some time to straighten out his professional affairs, and was banned from the hospital.

In accordance with the notice to Moores, an independent physician was selected to perform a focused review of Moores's practice. At the conclusion of that review, the expert issued a report and concluded that Moores should be removed from practice at Kaiser Foundation Hospital. Thereafter, Moores was notified that his termination would be recommended to the TPMG board of directors, and that effective November 30, 1998, he would be summarily suspended from employment without pay for disciplinary reasons.

## ***II. Proceedings Related to Moores's Termination of Employment***

Pursuant to hospital policies, Moores sought and obtained review by a judicial hearing panel of the decision to terminate his employment. That panel concluded unanimously that the summary suspension of Moores's hospital privileges, the recommendation to terminate his employment and the proposed termination of his staff and clinical privileges were all reasonable and warranted. Moores requested a review by the TPMG board of directors. The board of directors sustained Moores's summary suspension and termination. Moores then requested, and received, a review by the appellate review panel of the board of directors of Kaiser Foundation Hospital. Once again, the decision to terminate Moores's employment was upheld. Specifically, the appellate review panel rejected Moores's claims that there were procedural irregularities in the process used to terminate him, and that the decision to terminate was not supported by substantial evidence.

Moores challenged his termination with a petition for writ of mandate filed in the San Francisco Superior Court pursuant to Code of Civil Procedure section 1094.5.<sup>1</sup> The court denied the writ, and found that Moores "received a fair trial in all respects; [TPMG's and Kaiser's] decisions are supported by the findings, and the findings were supported by a preponderance of the evidence."

After his writ of mandate was denied by the superior court, Moores filed the civil action that gives rise to this appeal. His third amended complaint sought damages,

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure.

including lost wages and benefits, as a result of breaches of contract and the implied covenant of good faith and fair dealing. Specifically, he claimed that the defendants utilized defective and unauthorized procedures in effectuating Moores's summary suspension and practice review.

The defendants moved for summary judgment. In part, defendants claimed this civil action was barred under the doctrine of collateral estoppel due to the determination adverse to Moores in the prior mandate proceeding. The trial court agreed and granted the motion for summary judgment after finding that Moores's claims for breach of contract do not exist independently of his previously unsuccessful claim for wrongful termination of his employment.

This appeal followed.

## **DISCUSSION**

### ***I. The Standard of Review***

Summary judgment is properly granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (§ 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment, a moving defendant may show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (§ 437c, subd. (o)(2); *Aguilar, supra*, at p. 849.)

Once the moving defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to the cause of action or the defense thereto. (§ 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 849.) On appeal, we exercise our independent judgment in determining whether there are triable issues of material fact and whether the moving party is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335.)

### ***II. The Preclusive Effect of the Prior Mandate Action***

Moores first challenged his termination through the proper judicial remedy—a petition for writ of administrative mandamus filed in the superior court. (See *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 469; § 1094.5.) He lost. But

he now claims that in spite of this unsuccessful challenge, he should be allowed to sue TPMG for breach of contract and breach of the implied covenant of good faith and fair dealing. Moores argues that the claims in this case arose in connection with his summary suspension and the process used to review his medical practice, and that they are independent from those claims related to his termination. Moores believes he should be allowed to litigate these claims because the issues were not within the administrative scope of his termination proceedings, he was unable to offer evidence on them and they do not involve the same primary right.<sup>2</sup>

So, we must consider the proper scope and preclusive effect of the order denying the petition for writ of mandamus. A writ of mandate brought pursuant to section 1094.5 is a special proceeding of a civil nature. (§§ 1084-1097.) When a special proceeding relates to the “personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the . . . condition or relation of the person.” (§ 1908, subd. (a)(1).) Moores’s writ petition challenged the fact of his termination and the exclusion by administrative tribunals of evidence on collateral issues proffered by Moores. The question for us then is whether the claims Moores now makes are so related to the personal and legal condition at issue in his mandate case that the order denying the petition precludes his ability to litigate his breach of contract and covenant of good faith and fair dealing claims.

In order to determine whether a successive action relates to the same “personal . . . or legal condition” as a prior one and is therefore barred, California case law employs a “primary right” analysis. “Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) In California, a

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<sup>2</sup> Moores claims his inability to advance the claims was, in part, due to the fact that when Moores was barred from his office he did not have access to certain TPMG and Kaiser procedural manuals that specified employee rights. But there is no indication in the record that Moores ever requested access to these documents or that defendants refused to provide them to him.

‘cause of action’ is defined by the ‘primary right’ theory. ‘The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.’ (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right. (*Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 898.) ‘ “If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. [Citations.]” [Citation.]’ (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.)” (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589-590.)

Here, Moores claims the breaches of contract and good faith and fair dealing alleged in his civil complaint do not relate to his loss of employment, but instead to the process that led to his suspension and ultimate termination. These processes are claimed by Moores to involve different primary rights. But we are hard pressed to view Moores’s rights so narrowly. There seems little value in the processes attacked by Moores apart from retention of his job or as a basis to seek compensation for his possibly wrongful termination or suspension. In fact, as a result of the breaches alleged in his complaint, Moores claims he “continues to suffer substantial losses in earnings,” and he seeks “damages for loss of wages and benefits.”

“A single cause of action is based on the harm suffered, rather than the particular legal theory asserted or relief sought by the plaintiff. [Citations.]” (*Gamble v. General Foods Corp.*, *supra*, 229 Cal.App.3d at p. 899.) The ultimate harm to Moores was the loss of his job, and the primary right involved in the mandamus case as in this one is Moores’s right to fair treatment from his employer. Similar employment cases reach the

same result as we do. Whether a complaint by an aggrieved employee is barred by a prior action does not turn on the title given a cause of action or the nature of the procedural defect challenged by the employee, but rather depends on the harm suffered. That harm is unfair treatment by an employer. (*Id.* at p. 901; *Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 992; *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1427; accord, *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1474.) Thus, the personal or legal condition related to Moores's mandamus case is the same as related to this one: Moores's right to fair treatment by TPMG.<sup>3</sup>

Had he received the process he claims due, Moores says he could not have been summarily suspended from the hospital and he would have received an alternate form of remedial discipline instead of outright termination. Both of these claims go to the fairness of proceedings that resulted in his suspension and termination and Moores's right to be free from arbitrary treatment. It makes no difference that Moores's earlier action was brought upon his employment contract and this one is premised in tort for an alleged breach of the implied covenant of good faith and fair dealing. All Moores's claims arise from breaches of the same contract that occurred before the first action was filed, and the fact that his cause of action gives rise potentially to contract and tort relief does not change the fact that he is suing for violation of a single primary right. (See *Lincoln Property Co. N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 915.)

Moores's summary suspension and possible remedial alternatives available to TPMG are part and parcel of an ongoing dynamic between TPMG as employer and Moores as employee, and do not involve separate primary rights. (See *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 679 [an employee's promise to render

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<sup>3</sup> We are aware that the Third District recently identified a narrower primary right in an employment context. (See *Pitts v. City of Sacramento* (2006) 138 Cal.App.4th 853.) Unlike this case, *Pitts* did not involve the application of issue preclusion to operative facts that were complete at the time of earlier litigation between the parties. (*Id.* at pp. 856-858.)

service may support an employer’s promise to pay and to refrain from arbitrary action].) The superior court denied Moores’s petition for mandamus with the finding that he “received a fair [administrative] trial in all respects.”<sup>4</sup> Accordingly, the judgment against Moores on his petition for administrative mandamus operates to bar this civil action.

**DISPOSITION**

The judgment entered in favor of the defendants is affirmed.

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Siggins, J.

We concur:

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Parrilli, Acting P.J.

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Pollak, J.

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<sup>4</sup> Moores also argues that the mandamus proceeding should not be res judicata because certain procedural issues surrounding his September 1998 suspension were never litigated in superior court. But the record reflects that Moores advanced procedural claims in his administrative hearings, and that he was free to do so in the mandate action. Res judicata applies to “ ‘matters which were raised or could have been raised, on matters litigated or litigable.’ ” (*Tensor Group v. City of Glendale, supra*, 14 Cal.App.4th at p. 160.) There is no indication Moores was precluded from raising any issues he considered crucial to his claims.