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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

TOMMY H. CHEN, Plaintiff and Appellant, v. BRIGHT HEALTH PHYSICIANS OF PIH, Defendant and Respondent.	B246628 (Los Angeles County Super. Ct. No. BC469354)

APPEAL from a judgment of the Superior Court of Los Angeles County. Soussan G. Bruguera. Reversed.

Law Offices of John Belcher and John Belcher for Plaintiff and Appellant.

Bewley, Lassleben & Miller, Ernie Zachary Park, Jeffrey S. Baird, Kevin P. Duthoy and Leighton M. Anderson for Defendant and Respondent.

The Superior Court granted summary judgment for the defendant on defamation and other causes of action. The defendant argued it could not be held liable because its' statements were protected by the common interest privilege set forth in Civil Code section 47, subdivision (c). That privilege does not arise if malice is shown. We reverse because there was a triable issue of material fact as to whether defendant's statements were made with malice. Thus, the defendant did not show that one or more elements of plaintiff's causes of action could not be established or that defendant had a complete defense to each cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

A. General Background

The operative first amended complaint by plaintiff and appellant Tommy H. Chen, M.D. against defendant and respondent Bright Health Physicians of PIH (BHP) contains causes of action for libel, slander, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage and intentional infliction of emotional distress. All the causes of action arise from a memorandum BHP sent to its administrators and its network of doctors on September 27, 2010 and oral communications by BHP to others in September 2010. Dr. Chen appeals from the Superior Court's entry of judgment in BHP's favor following BHP's motion for summary judgment, or in the alternative, summary adjudication. The relevant facts are as follows.

BHP is a nonprofit corporation which provides medical care through a network of physicians, serving patient-subscribers (patients) in the area of Whittier, California. BHP enters into contracts with medical insurers such as Blue Cross, agreeing to provide medical care to the insurers' subscribers. BHP provides care to its patients through "employed physicians" who work directly and exclusively for BHP as employees. It also refers patients in the network to self-employed physicians who are not employees of BHP, but who have contracts with BHP to accept referrals of patients in the network. Some of the self-employed physicians are on BHP's "streamlined referral list." The effect of being on the list is that primary care physicians are permitted to refer patients to self-employed physicians on the list without prior approval from BHP.

Dr. Chen is a self-employed board certified dermatologist He maintains offices in Whittier and Pasadena. Dr. Chen has accepted referrals of BHP patients pursuant to contracts with BHP for about 15 years. In September 2010, Dr. Chen was on the streamlined referral list. There appears to be no dispute that Dr. Chen has excellent skills as a dermatologist. In fact, BHP's Medical Director and other executives have sent their own children and family members to him and one BHP executive testified he has "full confidence" in Dr. Chen.

On August 16, 2010, about a month before the facts giving rise to this appeal occurred, Rachel L. Moore, M.D. began to work as an "employed physician" of BHP, specializing in dermatology. Dr. Chen contends that BHP was in competition with him for patients and wanted to appropriate his patients to itself by having them become Dr. Moore's patients. To substantiate this, he cites BHP's affirmative defenses to the complaint as admissions. These are as follows.

"SEVENTH AFFIRMATIVE DEFENSE [¶] . . . [¶] . . . Defendant was privileged under law to seek out business for its employed physicians and to compete with Plaintiff in the marketplace. [¶] . . . [¶]

"ELEVENTH AFFIRMATIVE DEFENSE [¶] . . . [¶] . . . In publishing the [September] 27, 2010 memorandum to its own network of primary care physicians, Defendant, in addition to its statements being truthful, acted in good faith and in reasonable protection of its own business interests and those of Defendant's enrolled patients.

"TWELFTH AFFIRMATIVE DEFENSE [¶] . . . [¶] . . . As to each of Plaintiff's causes of action including, but not limited to, that for emotional distress, Defendant was privileged, in pursuing its own economic business interest to assert its claimed legal rights, and to communicate Defendant's position in good faith, even if damages, including but not limited to, emotional distress result."

B. Events occurring September 11, 2010 through September 22, 2010.

BHP's Whittier office was next door to Dr. Chen's Whittier office. BHP submitted a declaration by Guillermina Reyes, a receptionist at BHP's Whittier office. It

states that, during the period of September 15 through 20, between six and ten people approached Reyes asking the whereabouts of Dr. Chen. They said they were patients of Dr. Chen. They said they had appointments with Dr. Chen and were upset and angry. The receptionist phoned Dr. Chen's Whittier office twice but the calls went unanswered.

Jeannie Flores, an employee in BHP's customer service department, provided a declaration that contains the following allegations. On Monday September 21, 2010 she received telephone calls from four persons (whose names she sets forth). Each said he or she was a patient of Dr. Chen, that he or she had tried to contact or visit his office on September 15, 17 or 20, but found the office closed or the phone unanswered. The declarant sent an email with this information to BHP's Director of Network Management, Michael Littner, on September 22, 2010. Another BHP employee in the Whittier office received reports that the office was closed and patients were saying that they had appointments. The employee related this to another employee and they both tried without success to call Dr. Chen's Whittier office and one sent a fax marked "urgent" to the office.

Michael Littner provided a declaration that reported that he had become aware in the several days prior to September 21, 2010 of the information referenced in the foregoing declarations. He called Dr. Chen's Whittier office "on the morning of September 21, 2010, but the phone rang and rang without answer. I then called CHEN's Pasadena office" and spoke to Dr. Chen's wife and office manager. "I advised Mrs. Chen of the reports of CHEN's unattended office and missed patient appointments, and she stated that CHEN had been out of town on business for a week with no appointments scheduled. Mrs. Chen also stated that the Whittier office had telephone problems while CHEN was out, but that CHEN's receptionist had left a note on the door to notify patients that the office was closed. She stated that CHEN would be back in his Whittier office the next day, September 22, 2010." On September 22, 2010, Littner again called the Whittier office, but got voicemail this time. He then called the Pasadena office and spoke to Mrs. Chen. He "requested to speak to CHEN, but Mrs. Chen said she would not transfer the call because he was busy 'taking care of 15 patients.' I informed Mrs. Chen of BHP's

continuing need for an explanation of the events of recent days . . . . I requested that CHEN contact me and left my telephone number. [¶] [ ] Not hearing back from CHEN I personally drove to his Whittier office on the afternoon of September 22, 2010 and found the waiting room full. I again spoke to Mrs. Chen and asked to speak with CHEN. When she indicated CHEN was too busy to talk, I asked her for the names of CHEN's covering physicians who were providing patient coverage for him in his absence. Mrs. Chen indicated she could not tell me their names because those arrangements were made on a doctor to doctor basis. Mrs. Chen asked for my business card, which I provided her, and she stated that she would have CHEN call me to discuss the matter further. [¶] [ ] I never received a telephone call back from CHEN although my telephone number that I provided has 24-hour voicemail service."

Mrs. Maylo Chen supplied a declaration filed in opposition to BHP's motion for summary judgment. The trial court sustained some of BHP's objections to it. The portions as to which objections were sustained are omitted. Mrs. Chen's declaration states in pertinent part:

"I am the office manager and the accountant for my husband Tommy H. Chen, M.D.'s medical practice. [¶] [ ] On September 11, 2010 my husband and I traveled to China for a 6-weekday [*sic*] vacation that had been planned for some time. It is categorically false that Dr. Chen had any scheduled appointments between September 13, 2010 and September 21, 2010. We made sure that no patients had scheduled appointments while we were on vacation. [¶] [ ] For the time we were on vacation, medical assistant Linda Bayes was assigned to answer telephone calls. While we were in China, Linda Bayes informed us that she fell sick and could not work. I asked her to forward the phone calls so that a family member and/or a family friend can answer the calls. . . . [¶] [ ] Unfortunately, the Verizon telephone system experienced technical problems and some telephone calls did not get forwarded. After we returned from China, I had our telephone company Verizon fix the problem. Exhibit K is a true and correct copy of the letter we received from Verizon about the telephone problem. [¶] [ ] On September 22, 2010, I gave a full explanation of what had happened to Bright Health

employee Michael Littner. I told Mr. Littner that Linda Bayes unexpectedly fell sick. I also explained to Mr. Littner about our problems with the Verizon telephone system. I told Mr. Littner that Dr. Chen did have a physician covering for him during his vacation. . . . [¶] [ ] Bright Health claims that four patients had scheduled appointments with Dr. Chen between September 13th and 20th. Bright Health's contention is not true. None of the identified patients had an appointment scheduled with Dr. Chen."

Mrs. Chen explains in detail in her declaration that none of the patients identified in the declaration of BHP's customer service employee had an appointment. In addition, some were not current patients and BHP would have known that if it had checked its own computer system. Bright Health prepared and produced an "Occurrence Report" on only one of the four identified patients. That report indicated that the patient to whom it pertained was only trying to schedule an appointment and, it would have been obvious to BHP that the patient trying to schedule an appointment did not have one. She also states that BHP failed to follow its own procedures when it failed to prepare "Occurrence Reports" on three of the four persons identified. Various objections were sustained as to statements Mrs. Chen made as to whether these patients were current and statements she made about BHP failing to follow its own procedures in failing to prepare Occurrence Reports memorializing patient complaints The objections appear to have been sustained on the grounds of lack of personal knowledge, lack of expertise and relevance.

Mrs. Chen also declared that BHP had "never contacted our office to verify whether or not any of the above individuals was a patient or had an appointment." Finally, Mrs. Chen explained that the medical assistant who was supposed to be in the office on the three and one half days that it was not covered could have done the light treatments some of the patients may have wanted.

Dr. Chen also submitted his declaration in opposition the BHP's summary judgment motion that addressed the events before and after September 27, 2010. Pertinent portions addressing the events preceding September 27, 2010 are set forth below. The trial court sustained some of BHP's objections to Dr. Chen's declaration. The passages to which objections were sustained are identified by italics or omitted.

"On the evening of September 11, 2010, after seeing patients, I traveled to China for a vacation that had been planned for some time. Before leaving, I took specific steps to make sure that my vacation would not negatively impact my patients: [¶] a. I informed my patients about my vacation, so that they would not try to come in while I was gone. [¶] b. I instructed my staff not to schedule any appointments for the period I would be out of the office. I did not have any patient appointments for the time I was on my vacation. [¶] c. I instructed my medical assistant Linda Bayes to come into the office and answer telephone calls. I also instructed her to keep me apprised of the events in the office via email. Linda Bayes was qualified to administer light therapy when I am unavailable. [¶] d. The office phone system can be set up so that patients can leave messages which I can check from China. [¶] e. I asked Dr. James Esther to provide patient coverage while I was on vacation. He agreed to do so.

"[ ] Unfortunately, on September 15, 2010. Linda Bayes fell sick and could not work. My wife and office manager Maylo Chen asked Linda Bayes to turn on call forwarding so that a family member and/or a family friend could answer the telephone calls for us.

"[ ] Although Linda Bayes tried to make the phone system forward the calls, a problem with the Verizon phone system caused some phone calls not to be answered. . . .

"[ ] I returned to work at my Whittier office on September 22, 2010. . . ."

Dr. Chen also described hostile behavior by Littner on September 21 and 22, where Littner accused Dr. Chen of breach of contract, refused to accept the true statement that the Pasadena office was in operation on September 21, and refused to accept the evidence before his eyes that the Whittier office was in full operation on September 22.

No one claims there was any contact between BHP and the Chens between September 22 and September 27, 2010.

C. BHP's memorandum of September 27, 2010

On September 27, 2010, BHP sent a memorandum which gave rise to all of Dr. Chen's causes of action. The memo was sent by David G. Wortham, MD, Senior Vice President and Chief Medical Officer and Tracy Solis, Senior Vice President Managed

Care Operations. It was directed to BHP primary care providers. The recipients included primary care physicians employed by BHP and self-employed physicians who were not employed by BHP. The memorandum states in pertinent part:

"It has recently come to our attention that Dr. Tommy Chen has not been keeping his scheduled patient appointments. From the period beginning September 15th, and possibly earlier, until September 22nd, Dr. Chen was unavailable at his Whittier office, and patients were unable to reach him or his office staff by telephone. Apparently, Dr. Chen did not notify his patients about his leave of absence nor did he arrange to provide physician coverage during that period.

"Despite numerous attempts to reach Dr. Chen regarding his availability, we have as yet been unable to come to a meaningful resolution. To ensure unencumbered future patient access to dermatology services, BHP is removing Dr. Chen from the Streamlined Referral Provider list effective immediately. . . .

"You have the option of referring patients that need specialty care in dermatology to Dr. Rachel Moore . . . . Dr. Moore has the availability to accommodate all patients who have been under the care of Dr. Chen as well as new patient referrals. Pending resolution of Dr. Chen's patient access/availability issues, please refer all PPO and Managed Care BHP patients requiring dermatology care to Dr. Moore. . . ."

Dr. Chen's declaration also addresses the September 27, 2010 memorandum. It states in pertinent part as follows. Portions to which BHP's objections were sustained are set forth in italics or omitted.

"[ ] On September 27, 2010, Bright Health sent out a memorandum from David G. Wortham and Tracy Solis which contained categorically false and defamatory statements about me. Attached as Exhibit A is a true and correct copy of the memorandum. Among other things, the memorandum stated that I ignored my patients by not keeping 'scheduled appointments.' This statement is categorically false. I did not have any patient appointments scheduled for the time I was in China. At no point did anyone at Bright Health ask to see my appointment book to determine whether any patients had appointments.

"[ ] That memorandum also stated that I did not notify my patients about my 'leave of absence' and also that I failed to arrange a physician coverage. These statements are also false. I did tell all my patients about my vacation, and I did arrange physician coverage with Dr. James Esther. The accusation that I would irresponsibly go off somewhere without having physician coverage is highly derogatory in my professional field.

"[ ] No one from my office ever told Bright Health that I had taken a 'leave of absence.' In my profession, a planned vacation, with a covering physician in place, is not a leave of absence. Through its false accusations and its characterization of my short, 6-weekday vacation as a 'leave of absence,' Bright Health had represented to my professional colleagues that I had irresponsibly put my patients at risk by abandoning them. These accusations were false and defamatory and greatly impugned my integrity as a physician. [¶] . . [¶]

"[ ]*The memorandum states that Dr. Moore is capable of absorbing all my existing patients, as well as new referrals and non-Bright patients.* This statement was not true. Dr. Moore is new to dermatology, and had only recently been hired by Bright Health. Attached as Exhibit F is a true and correct copy of an August 4, 2010 letter from Bright Health, introducing Dr. Moore. *The net effect of this directive to send all patients to Dr. Moore was that, in addition to hurting my practice, Bright Health has forced my patients to be treated by a doctor they did not choose.*

"[ ] The September 27, 2010 memorandum is directed to BHP Primary Care Physicians, BHP Administration and Medical Management. *From discovery, I know that the memorandum was sent to all the physicians in the network.* Several of my colleagues have indicated to me that they have received the defamatory memorandum.

"[ ] Attached as Exhibit B is a true and correct copy of a memorandum from Bright Health, directed to 'BHP Primary Care Physicians,' which states that I have been removed from the Streamlined Referral Provider List. [¶] . . .[¶]

"[ ] The September 27, 2010 memorandum also states, that 'Despite numerous attempts to reach Dr. Chen regarding his availability, we have as yet been unable to come

to a meaningful resolution.' This statement is categorically false. At no time did Dr. Wortham, Dr. Magged or Tracy Solis attempt to communicate with me about the accusations leveled against me. At no point did Bright Health ever present me with a plan to achieve a meaningful resolution. I was never given an opportunity to respond to the accusations against me before the September 27, 2010 memorandum was distributed to my colleagues."

Exhibit B to Dr. Chen's declaration apparently was sent to all BHP primary care physicians with the September 27, 2010 memorandum described above. It is a one-page memorandum dated September 27, 2010 to all BHP primary care physicians from BHP's UM Director. It attached a "Streamlined Referral Provider List" that omitted Dr. Chen's name. The memorandum consists entirely of the following: "The BHP Streamlined Referral Provider List has been updated and is effective *immediately*. Two specialists have been removed from the list. Although these providers are still available in Health Trio Connect, they should not be selected when entering an electronic streamline. Health Trio is in the process of updating the Connect Streamlined Provider List. Please note the following specialist changes: [¶] Dr. Loan Tran, Opthalmologist has been removed as she is no longer a participating provider with BHP. [¶] Dr. Tommy Chen, Dermatologist has been removed. (Please reference attached memo) [¶] Please distribute a copy of this memo and the updated BHP Streamlined Referral Provider List to all staff and physicians."

BHP submitted the declaration of Tracy Solis, one of the authors of the September 27, 2010 memorandum that gave rise to this lawsuit. In it she claimed that, at time the September 27, 2010 letter was sent, "BHP had reasonable grounds to believe each of the statements contained therein were true." She also stated that BHP was not motivated "by any feelings or attitudes of malice, hatred or ill-will toward CHEN." BHP's medical director, Kathleen Barry, M.D. does not appear to have participated in the decision to send the memorandum or its drafting. However, she also provided a declaration to the effect that, when Dr. Wortham and Tracy Solis sent the memorandum, BHP was not motivated by malice or an "economic interest in denying CHEN future patient referrals or

shifting referrals to an in-house BHP physician." The senior co-author of the memorandum, Dr. Wortham, did not submit any declaration about his state of mind in sending the September 27 memorandum.

D. Events Following September 27, 2010, offered as proof of malice existing before that date

Dr. Chen's declaration continues: "On September 28, 2010, I wrote a letter to Bright Health explaining that the statements in its letter were false. Attached as Exhibit C is a true and correct copy of my letter. In October 2010, I provided even more information to Bright Health. Attached as Exhibit D is a true and correct copy of my letter to Bright Health dated October 8, 2010. Notwithstanding my detailed responses to the accusations against me, Bright Health never withdrew its defamatory statements.

"[ ] Attached hereto as Exhibit G is a true and correct copy of Bright Health's letter to me dated November 30, 2010. This letter states that a peer review committee held a hearing about my situation on October 14, 2010. By that time, however, the defamatory memorandum had already been distributed and I was already removed from the Streamlined Referral List. Aside from sending me a written questionnaire, I was never asked to participate in any peer review hearing. I was never told that I could present my side of the mater and I was not invited to participate in the meeting.

"[ ] Prior to this litigation, I was never provided with any Occurrence Report describing the complaints against me. After the lawsuit was filed, the only Occurrence Report produced by Bright Health was for Salvadore Nieves. Exhibit E. That Occurrence Report, however, states that Mr. Nieves wanted to schedule an appointment. In other words, he did not have an appointment when he came to the office.

"[ ] I was never specifically told how to get back on the Streamlined Referral List. [¶] . . . [¶]

"To this day, Bright Health has not withdrawn the false and defamatory statements made in its September 27, 2010 memorandum. To me, this refusal to withdraw demonstrates malice."

Dr. Chen's September 28, 2010 letter to BHP advised BHP of the following, among other matters: Dr Chen was on a planned six-weekday vacation on the dates in question; arranged coverage with James Esther, M.D., a board certified dermatologist; there were no scheduled appointments during the period in question; Linda Bayes was in the office on September 13 and 14, 2010, but was unable to go to the office on September 15, 2010 and was still not back from her medical emergency as of September 28, 2010. Dr. Chen was "stuck in China" and "could not get a flight back soon enough to attend the office." Without someone physically present in the office, the phones could not be properly forwarded to the covering doctor. Verizon's call forwarding feature had failed. "This is the only mishap in my 30 years of practice and 15 years' association with Bright. I humbly apologize for the inconvenience this has created for your patients." On September 21, 2010, despite various obstacles, he managed to care for all his scheduled patients and add-on urgent cases. After Michael Littner's September 22, 2010 visit, Dr. Chen was "not aware of any other contact from BHP. If contacted, there is no reason why I would not have responded likewise. [¶] . . . I do strongly protest being taken off the Streamline Referral Provider list based on [a] distortion of facts: [¶] — there were NO scheduled appointments during my vacation [¶] — all Non-Scheduled patients that require continued photo-therapy were informed of my absence, and their care arranged. [¶] — there was indeed good and comprehensive coverage (see attached)[referring to an attached letter from James Esther, M.D., Inc. confirming in a signed note that "I have covered for Dr. Tommy Chen in his absence for the last twelve years including his recent vacation of 9-13-10 to 9-20-10."] " What happened was an unforeseeable, uncontrollable and unfortunate mishap that regrettably happened. [¶] However, BHP's way of manipulating referrals to its in-house dermatologist, Rachel Moore, M.D., twisting facts to its own advantage, and at the expense of my reputation is highly unprofessional, unethical and illegal. [¶] Thank you very much for your attention and your past support."

Dr. Chen also responded on October 8, 2010 via fax to a series of questions posed to him by BHP. He reiterated the information he had provided earlier and added additional data, including that there was a note posted on the door of his Whittier office.

He attached a note from his medical assistant confirming that she was scheduled to work the week of the vacation, became ill abruptly on September 15, was hospitalized, made arrangements for telephone calls to be forwarded, but that it did not work, and posted a note on the office door explaining the situation. She ended it by stating that she "testified this statement is the truth and only the truth." Also attached was a note from a patient who saw the note on the door and who had been previously advised by Dr. Chen of his unavailability during the week in question.

In support of his opposition to BHP's summary judgment motion, Dr. Chen also submitted the declaration of an attorney, Daniel H. Willick, who stated, in effect, that BHP had deviated from common practice in the medical industry in its treatment of Dr. Chen. "For over 20 years, one of my areas of legal specialization has been the rights of physicians who, based on allegations of deficient professional care of patients, have been subjected to restrictions or proposed restrictions of their privileges by a health care organization with which they are affiliated." Willick provided substantial material to establish his qualifications as an expert in the field. Willick asserted that BHP "could have removed Dr. Chen from its referral list without stating to other physicians who referred patients to him that his patient care was deficient." He then opined as follows: "In my over 20 years experience with matters like this, I have never encountered a situation where physicians not involved in peer review were provided with statements that a physician was deficient in care without the accused physician being offered a fair peer review hearing or pending the resolution of such a hearing." (Citing Evid. Code, § 1157, which on its face applies to medical peer review bodies and creates testimonial and discovery privileges as to their proceedings.) The declaration also attempted to support a theory of liability not contained in the operative complaint, and attempted to provide expert opinions as to the law. Objections to these were sustained.

Dr. Chen offered a BHP policy memorandum entitled "Complaint Procedure." It states: "Complaints are documented on an 'Occurrence Report form.'" Before the complaint is resolved, BHP is required to "send a letter to the practitoners . . . requesting a documented response" and "All documented complaints and follow-up process will be

kept in a confidential file." Dr. Chen also offered evidence that the only Occurrence Report made in connection with his time off was by a patient who had not had an appointment and who merely had stopped by to schedule one. This resulted in the peer review that occurred in October 2010.

Finally, several deposition transcripts were submitted with the motion for summary judgment and quoted in Dr. Chen's response to BHP's separate statement and statement of additional material facts to establish that BHP lacked reasonable grounds for belief in the truth of the statements in the September 27, 2010 memorandum, and therefore acted in reckless disregard of plaintiff's rights, which would satisfy the test for malice required to overcome a defendant's claim that his or her communications are protected by the common interest privilege.

Lack of covering physician: Solis received an email from Michael Littner on September 22, 2010 stating that Mrs. Chen had told him they did have a covering physician the previous week. The authors of the September 27 memorandum, Dr. Wortham and Tracy Solis, each testified they "did not know" if Dr. Chen had a covering physician during the week in question

Leave of absence: Solis admitted that she did not "have any factual basis to believe that Dr. Chen took a leave of absence." Two high-level BHP employees agreed that there was a factual distinction between a "'leave of absence'" and a "'vacation.'" Dr. Wortham testified neither he nor anyone else at BHP investigated "'whether or not Dr. Chen had taken a leave of absence . . . .'" Dr. Wortham also testified that no one had ever used the words "'leave of absence'" to describe Dr. Chen's September 2010 vacation.

Capacity of Dr. Moore to handle Dr. Chen's patients: Medical Director Dr. Barry testified that, as of September 27, 2010, dermatologist Dr. Rachel Moore did not have "'more than enough accessibility to take up all of Dr. Chen's patients,'" because of the high level of demand in the network for dermatology services.

Whether any patients were scheduled: Dr. Barry, who was on the peer review committee, testified that she did not know if "Dr. Chen had any scheduled patients during

his vacation." Dr. Magged, another high level BHP doctor, also did not know. Solis admitted that no one asked to see Dr. Chen's appointment book as part of the investigation. Dr. Barry of the peer review committee did not know if Dr. Chen had any scheduled patients that week. Dr. Wortham did not know if two of the patients who allegedly had appointments were even existing patients of Dr. Chen.

Lack of reasonable basis for statements: Solis admitted that, as of September 27th, she had not come across any facts that justified cutting off new patients to Dr. Chen.

Failure to allow Dr. Chen to defend himself in investigation or peer review: Solis admitted that, as of September 27, no one had spoken to Dr. Chen to hear his side.

The above-described materials (along with others) are cited in Dr. Chen's response to BHP's separate statement and Dr. Chen's own statement of additional facts.

DISCUSSION

A. Law pertinent to motions for summary judgment

To obtain summary judgment, the moving party must establish "that there is no triable issue as to any material fact and that [it] is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A moving defendant must show one or more elements of each cause of action cannot be established or there is a complete defense to each cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).)

A moving defendant must show that plaintiff cannot reasonably obtain evidence to prove a cause of action, which is more than simply arguing that there is an absence of evidence. (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891.) As the court stated in *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709, the moving party must demonstrate that "under no hypothesis" is there a material issue of fact.

B. Law pertinent to common interest privilege

Civil Code section 47 sets forth privileges that attach to certain communications. Section 47, subdivision (c) is the privilege at issue here. It provides: "A privileged publication or broadcast is one made: [¶] . . . [¶] (c) In a communication, without malice,

to a person interested therein, (1) by one who is also interested . . . ." The privilege created by section 47, subdivision (c) is referred to as the "common interest privilege."

"[M]alice may be established either by direct proof of the defendant's state of mind, or by circumstantial evidence from which the jury might infer it as a fact." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 593, p. 870.) Whether malice may be inferred from the facts is a factual issue for the trier of fact. (*Agarwal v Johnson* (1975) 25 Cal.3d 932, 944-945, disapproved on other grounds by *White v. Ultramar* (1999) 21 Cal.4th, 574, fn. 4.)

"'"The malice necessary to defeat [the common interest privilege] is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the *defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights* (citations)."'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721, second italics added; 5 Witkin, Summary of California Law, *supra*, Torts, § 593, p. 871.)

"[M]ere negligence in investigation of the facts, in the sense of oversight or unintentional error, is not alone enough to constitute malice. It is only when the negligence amounts to a reckless or wanton disregard for the truth, so as to reasonably imply a wilful disregard for or avoidance of accuracy, that malice is shown." (*Roemer v. Retail Credit Co.* (1970) 3 Cal.App.3d 368, 372.)

In summary judgment motions brought under Civil Code section 47, subdivision (c) or similar provisions, "[t]he critical issue is the publisher's actual belief as to the truth or falsity of the statements made, which is a subjective test. Although the publisher may testify that he or she believed the statements to be true, such testimony is not determinative. Instead, the trier of fact must make its own finding concerning the good faith of the publisher and is entitled to consider such things as whether 'the story is fabricated,' 'the product of his [or her] imagination, or is based wholly on an unverified anonymous telephone call.'" (*Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1047 (*Antonovich*).)

The common interest privilege does not protect a defendant from liability for certain types of communications, even if they are made by "interested persons" to "interested persons" if they are viewed as an abuse of the common interest privilege. Our Supreme Court explained this limitation to section 47, subdivision (c) in *Brewer v, Second Baptist Church* (1948) 32 Cal.2d 791, 797 (*Brewer*): "'[p]rotection is accorded one who makes a statement, in a reasonable manner and for a proper purpose, to persons having a common interest with him in the subject matter of the communication, when the publication is of a kind reasonably calculated to protect or further it. [Citations.] . . . The occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter, by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest.' Thus the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff [citations], or by any cause other than the desire to protect the interest for the protection of which the privilege is given. [Citations.] Although there are situations where the protection of the interest involved may make it reasonable to report rumors or statements that the publisher may even know are false [citations], ordinarily the privilege is lost if defendant has no reasonable grounds for believing his statements to be true. [Citations.]" (See *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [publication must have purpose of furthering common interest]; *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 285 [common interest privilege applies where the communication "is reasonably calculated to further that interest"].

The court in *Brewer* further observed that the tenor of a communication may constitute evidence of malice: "[T]he tenor of the statement may be evidence of malice. [Citations.] 'On the subject of actual malice it is important to note further that while one may, on a privileged occasion and without malice, publish to the interested persons what may be false, if he honestly believes it to be true, he is not by this rule given a license to overdraw, exaggerate, or to color the facts in his communication. The manner of statement is material upon the question of malice, and if the facts believed to be true are

exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as evidence tending to prove actual malice, and they may be sufficient for that purpose without other evidence on the subject.'" (*Brewer, supra,* 32 Cal.2d at p. 799.)

There are additional types of proof that California courts recognize as sources of circumstantial evidence of malice. "[A] deliberate decision not to acquire knowledge" of facts may create a triable issue of fact as to the presence of malice. (*Antonovich, supra,* 234 Cal.App.3d at pp. 1048–1049.) As the court stated in *Antonovich*: "'Although failure to investigate will not alone support a finding of actual malice, [citation], the purposeful avoidance of the truth is in a different category.' [Citation.] '[I]naction,' i.e., failure to investigate, which 'was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges' will support a finding of actual malice." (*Id.* at p. 1048.)

In a case decided under the predecessor of section 47, subdivision (b), the court held that even when a defendant establishes that a defamatory communication was made on "a privileged occasion" he or she "may nevertheless be subject to liability if plaintiff persuades the fact finder that the occasion was abused. *The question of whether a privileged occasion was abused is for the determination of the jury* unless the facts permit but one conclusion." (*Frisk v. Merrihew* (1974) 42 Cal.App.3d 319, 326.) When the facts permit more than one conclusion, the matter cannot be determined as a matter of law. (*Ibid.)*

Under Civil Code section 47, subdivision (c), the defendant has the initial burden of establishing a prima facie case of the common interest privilege. Thereafter, the burden shifts to the plaintiff to establish malice. (*Taus v. Loftus, supra*, 40 Cal.4 at p. 721.)

The common interest privilege set forth in section 47, subdivision (c) has been held applicable to all the causes of action pursued here by plaintiff. (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 244, fn. 11; *Deaile v General Telephone Co. of*

California (1974) 40 Cal.App.3d 841, 849 [defamation and intentional infliction of emotional distress]; *Brody v. Montalbano* (1978) 87 Cal.App.3d 725, 737-738 [interference with prospective advantage].)

C. BHP did not establish a complete defense or negate an element of Dr. Chen's cause of action; Dr. Chen raised triable issues of fact, and the trial court erred in granting summary judgment

Dr. Chen first argues that BHP failed to establish that it is entitled to assert the common interest privilege because that privilege only applies to statements made "'in a reasonable manner and for a proper purpose'" and when the communication is of a kind reasonably calculated to further the interests of the persons who share the common interest. "The privilege is lost" if the communication is made "for an improper purpose" or "goes beyond the group interest." (*Brewer*, *supra*, 32 Cal.2d at p. 797.) Dr. Chen's argument is that the September 27, 2010 memorandum was not made to alert physicians that Dr. Chen was mistreating patients, but rather was made to appropriate Dr. Chen's patients to BHP through their "employed physician," Dr. Moore. We need not reach this issue because it is mooted as a result of Dr. Chen raising triable issues of material fact as to the issue of malice.

Dr. Chen produced a great deal of evidence from which a jury could infer that BHP ""lacked reasonable grounds for belief in the truth of the [memorandum of September 27] and therefore acted in reckless disregard of the plaintiff's rights."" (*Taus v. Loftus*, *supra*, 40 Cal.4th at p. 721.) The trial judge was not entitled to weigh the facts offered by Dr. Chen, as the test is subjective and trier of fact determines if the facts raise inferences of malice. (E.g., *Antonovich*, *supra*, 234 Cal.App.3d at p. 1047.)

The following are facts from which the jury might infer that BHP lacked reasonable grounds for belief in the truth of the statements in the memorandum, or that they were actually false.

First, Dr. Chen presented facts from which the jury could have inferred that BHP had an economic motive to discredit Dr. Chen, allowing it to take away Dr. Chen's patients.

Dr. Chen also presented evidence that BHP went out of its way to say bad things about him to the very colleagues he relied upon for referrals. For instance, the September 27 memorandum represented: "Despite numerous attempts to reach Dr. Chen regarding his availability, we have as yet been unable to come to a meaningful resolution." A jury might well ask, "What business of the other doctors was this?" and draw inferences from the inclusion of such details.

The declaration of Daniel Willick poses an important question in this regard: Why did BHP send a detailed memorandum when it could simply "have removed Dr. Chen from its referral list without stating to other physicians who referred patients to him that his patient care was deficient?" In fact, the September 27 memorandum was accompanied by a one-page memorandum that said exactly that and no more. Why was that insufficient? The import of this question is magnified by Willick's statement that, in his 20 years of experience, he has never seen an entity publish such details to doctors before a peer review. In light of the apparent consensus that Dr. Chen has excellent clinical skills, a jury might ask, "Why would BHP go out of its way to criticize his patient care except to get his patients?"

Dr. Chen also asks why BHP felt it necessary to rush to judgment. As of the date of the memorandum, BHP had observed that Dr. Chen was in his office, treating patients and the telephones had been fixed. Dr. Chen's wife had provided explanations of "unforeseeable" events causing the problem. Dr. Chen had not had a problem of this kind in his 30 years of practice and 15 years of association with BHP. If the emergency was over, why couldn't BHP wait and do a thorough investigation? Why could it not be patient with Dr. Chen and obtain further input from him? A jury might draw the inference that, as discussed in *Antonovich*, BHP had made a "'deliberate decision not to acquire knowledge'" of the facts, which would support a finding of actual malice. (*Antonovich*, *supra*, 234 Cal.App.3d at p. 1048.)

A jury might also draw inferences from Michael Littner's conduct and discrepancies between his account of events and Mrs. Chen's. Why did he rush to the office on a day on which he had been told that Dr. Chen was too busy with patients to see

him? Did Mrs. Chen give him a full explanation of the facts, as she testified? If so, why did he refuse to accept Mrs. Chen's representation that there had been a coverage arranged? Why did he refuse to believe on September 21 that the Pasadena office was in operation while he spoke to Mrs. Chen who was there? Similarly, why did he refuse to believe that the Whittier office was in full operation on September 22, even though he was there to witness that fact? Why was he so unsympathetic when he heard about the perfect storm of a medical assistant who ended up in the hospital, coupled with telephones that failed to forward calls? Since he had the telephone number that allowed him to call the working phone at Dr. Chen's Pasadena office on September 21, and since he said in his declaration that he had known about the problem with Dr. Chen's office for some days, why did he fail to call earlier, when such a call might have nipped the problem in the bud? A jury might conclude that BHP had made a "deliberate decision not to acquire knowledge" because it wanted to remove Dr. Chen from its streamline referral list.

Solis admitted that Littner sent her an email September 22, stating that Mrs. Chen had said coverage had been arranged for the time of the vacation. The jury might ask, "Why did Solis sign a letter 5 days later, without any further contact with the Chens, saying there was no coverage?" Solis and Dr. Wortham also admitted that they did not know when they sent the letter whether Dr. Chen had arranged for coverage. Yet they signed a letter saying he did not. A jury might conclude this was the kind of failure to state facts "fully and fairly" condemned in *Brewer* as an indication the privilege should not protect the defendant. (*Brewer*, *supra*, 32 Cal.2d at p. 799.)

What inferences can be drawn from the letter's choice of the words "leave of absence" when BHP already had been told that Dr. Chen had been on a vacation and when BHP's own doctors agreed that "leave of absence" had a connotation very different from "vacation?" Why did Wortham or Solis choose this word when no one had ever used it to describe Dr. Chen's absence?

On September 22, Mrs. Chen claims to have told Littner that no patients had been scheduled during Dr. Chen's vacation. However, the September 27 memorandum stated

that they had. Wortham did not seem to know whether the people who showed up at Dr. Chen's Whittier office were "scheduled" or even if they were "existing" patients. Dr. Chen has produced evidence they were not, which the jury might believe. As of the time of the peer review, the doctors involved in it still did not know if those persons were "scheduled" or existing patients. The jury might draw an inference of a desire to discredit Chen from these facts.

BHP's medical director admitted at deposition that Dr. Moore did not have the capacity to handle all of Dr. Chen's patients. Again, the jury might draw an inference that the inclusion in the September 27 memorandum of a misrepresentation about Dr. Moor's capacity to absorb Dr. Chen's patients was an "exaggeration" impermissible under the privilege and that the exaggeration might indicate a desire to get as much of Dr. Chen's business as possible.

Another set of facts from which the jury might draw inferences adverse to BHP is that it appears not to have followed its own procedures. If there were four complaints from patients with scheduled appointments, why was there only one official complaint form generated? Why did it not give Dr. Chen more opportunities to give his side of the story, as suggested in the complaint procedure? Again, a jury might infer an ulterior motive.

BHP's failure to retract its statements, deficiencies in its investigations, and failure to allow Dr. Chen to be heard at the peer review session also may raise triable issues of material fact.

The foregoing were sufficient to raise a triable issue of material fact as to whether BHP acted with malice so as to forfeit a defense based on the common interest privilege.

In light of our decision as to malice, we need not address the remaining arguments of the parties.

DISPOSITION

The judgment in favor of Bright Health Physicians of PIH is reversed and the matter remanded for further proceedings. Appellant is to recover his costs on appeal.

NOT TO BE PUBLISHED.

MILLER, J.*

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.