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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| MOHSEN KHERADPEZHOUH, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>PHILIP J. FAGAN, JR., et al.,<br><br>Defendants and Respondents. | B283233<br><br>(Los Angeles County Super. Ct. No. BC577921) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Fenton Law Group, Nicholas D. Jurkowitz, Dennis E. Lee and Randy Hsieh for Plaintiffs and Appellants, Mohsen Kheradpezhouh and Mohsen Kherapdezhouh, M.D., Inc.

Jackson Lewis, Theresa M. Marchlewski, Sherry L. Swieca and JeeHyun Yoon for Philip J. Fagan, Jr. and Fagan E.R. Medical Group, Inc., Defendants and Respondents.

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Dr. Mohsen Kheradpezhouh appeals from the judgment entered after the trial court granted summary judgment in favor of Fagan E.R. Medical Group, Inc. and Dr. Philip J. Fagan, Jr. on Dr. Kheradpezhouh's claims for breach of written contract and breach of the implied covenant of good faith and fair dealing against Fagan Medical Group and for intentional infliction of emotional distress and negligence against Fagan Medical Group and Dr. Fagan.[1] On appeal Dr. Kheradpezhouh contends the trial court disregarded triable issues of material fact and committed plain legal error, requiring reversal of the judgment as to all four causes of action. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Hospitalist Independent Contractor Agreement*

In June 2009 Dr. Kheradpezhouh and Fagan Medical Group entered into a written agreement entitled "Hospitalist Independent Contractor Agreement." Under the terms of their agreement Dr. Kheradpezhouh was to provide professional medical services to patients at Good Samaritan Hospital in Los Angeles who were assigned to him by Fagan Medical Group.

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[1] In his opposition to the motion for summary judgment, Dr. Kheradpezhouh abandoned the claims asserted by Mohsen Kheradpezhouh, M.D., Inc., his corporate entity, which had been a plaintiff in the action. Dr. Kheradpezhouh's opening brief similarly addresses only his claims as an individual. Accordingly, although the trial court granted the motion for summary judgment against both Dr. Kheradpezhouh and Mohsen Kheradpezhouh, M.D., Inc. and the notice of appeal identifies both Dr. Kheradpezhouh and Mohsen Kheradpezhouh, M.D., Inc. as appellants, we consider the issues raised on appeal only as they relate to Dr. Kheradpezhouh individually.

Dr. Kheradpezhouh was to be paid for those services by Fagan Medical Group.

The agreement, which identified Dr. Kheradpezhouh as "Physician," described Dr. Kheradpezhouh's duties in section 1 in the following language: "Physician will render professional medical services ("Services") to the patients of Hospital . . . in accordance with the applicable bylaws, policies, rules, and requests of Hospital and all applicable directives of any and all applicable governmental and regulatory bodies having competent jurisdiction. . . . Physician agrees to evaluate and treat all patients assigned to him through [Fagan Medical Group], including but not limited to, patients who are in managed-care plans with which Hospital and/or [Fagan Medical Group] contracts. . . ."

Section 7 of the agreement expressly incorporated by reference the attached Exhibit B, Fagan Medical Group's "Standard Terms and Conditions," which was "made a part hereof as though fully repeated herein verbatim."[2] Section 7 also stated that "Physician agrees to abide by the Standard Terms and Conditions set forth in Exhibit 'B.'"

The Standard Terms and Conditions provided that Dr. Kheradpezhouh's relationship to Fagan Medical Group was that of an independent contractor. The same paragraph also specified that "Physician does not perform services on behalf of [Fagan Medical Group]. In performing Services as an independent contractor, Physician does so on behalf of Physician's patients in accordance with Physician's responsibility

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[2] The Standard Terms and Conditions likewise stated it was "a part of" the Agreement "to the same extent as if it were set forth in full" in the agreement.

to exercise independent professional medical judgment in the performance of Physician's duties hereunder. [Fagan Medical Group] does not exercise any control or direction over the methods by which Physician performs Services to patients. Physician agrees to perform Services in accordance with currently approved and established methods and practices in the field of medicine. . . ." The Standard Terms and Conditions also contained an integration clause providing the "Agreement and the attached exhibits represent the complete agreement between the parties."

2. *Termination Provisions in the Agreement*

Section 6 of the Standard Terms and Conditions contained provisions for termination of the agreement. Section 6.2 authorized either party to terminate the agreement without cause by giving a minimum of 90 days' written notice of termination to the other party.

Section 6.1 provided Fagan Medical Group could terminate the agreement for cause upon any material breach by Dr. Kheradpezhouh, which included "Physician's failure to follow the ordinary standards of medical care or other similar medical cause as determined by the standard of care in the community" (section 6.1.2). It also included "[a]cts of Physician which involve professional misconduct, dishonesty, moral turpitude, criminal acts or any act which in the good faith judgment of [Fagan Medical Group] impairs or adversely affects the relationship between [Fagan Medical Group] and a hospital, healthcare facility or other entity with which [Fagan Medical Group] does business" (section 6.1.8). The agreement contained no provision allowing termination for cause by Dr. Kheradpezhouh.

3. *The Events of December 9, 2014*

a. *The patient*

On December 8, 2014 at 11:10 p.m. a 20-year-old transgender patient walked into the emergency room at Good Samaritan Hospital complaining of abdominal pain caused by part of a dildo that had broken off in the patient's rectum. On December 9, 2014 at approximately 8:00 a.m. Dr. Kheradpezhouh first saw the patient in the emergency room. Dr. Kheradpezhouh examined the patient for approximately 30 minutes. During the examination the patient stated she had a pain level of seven-to-eight out of 10. Dr. Kheradpezhouh, however, observed that the patient appeared calm and comfortable despite the claimed intensity of pain.

At 8:40 a.m. Dr. Kheradpezhouh admitted the patient to the hospital from the emergency room. Dr. Kheradpezhouh was the patient's admitting and attending physician and discharged her from the hospital on December 10, 2014.

b. *Dr. Kheradpezhouh's assessment of the patient as a drug-seeker*

At approximately 10:30 a.m. on December 9, 2014 Dr. Kheradpezhouh issued an order for Toradol, a nonnarcotic pain reliever. After the patient refused Toradol, Dr. Kheradpezhouh changed the order to acetaminophen (Tylenol) IV Drip, another nonnarcotic pain reliever. A nurse acknowledged the Toradol and acetaminophen orders at approximately 11:12 a.m. Dr. Kheradpezhouh prescribed nonnarcotic medication because he assessed the patient as a drug-seeker. He based this assessment on what he viewed as several red flags.

The patient demanded Dr. Kheradpezhouh prescribe Dilaudid, a narcotic pain reliever. Dr. Kheradpezhouh, having

assessed the patient as drug-seeking and the narcotic as not being medically indicated under the circumstances, refused.

The patient was agitated because Dr. Kheradpezhouh refused to prescribe the narcotic. According to Dr. Kheradpezhouh, the patient "started cursing everyone" and "started running around the nursing station and disturbing patient care."

c. *Dr. Fagan's Dilaudid prescription and Dr. Kheradpezhouh's resignation*

At approximately 11:00 a.m. the hospital nursing staff telephoned Dr. Fagan, who was on vacation in Texas, regarding the patient. Dr. Fagan prescribed Dilaudid for the patient. He had not personally examined the patient and had not consulted with Dr. Kheradpezhouh prior to doing so. Dr. Kheradpezhouh resigned sometime that same day.

The parties disagree as to the time Dr. Fagan prescribed Dilaudid and its relationship to the timing of the resignation. Dr. Kheradpezhouh asserts that Dr. Fagan ordered the Dilaudid no later than 11:10 a.m. and, believing the act of prescribing Dilaudid for the patient improperly interfered with his care of the patient in breach of the agreement, he resigned at 11:16 a.m. in an email sent to Dr. Fagan. Dr. Fagan contends he prescribed the Dilaudid around noon and that Dr. Kheradpezhouh had already tendered his resignation in an email sent to Janice Neubauer at 11:19 a.m.

4. *The Instant Lawsuit*

a. *The second amended complaint*

Dr. Kheradpezhouh and his individual medical corporation filed their original complaint on April 7, 2015 and, following demurrers to that pleading and the first amended complaint, filed the operative second amended complaint on July 13, 2016.

The second amended complaint alleged causes of action for breach of written contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress and negligence, with the express allegation the negligence claim was for "[n]egligent [p]erformance of [c]ontract."

Focused on Dr. Fagan's prescription of Dilaudid, the second amended complaint alleged Dr. Fagan's action constituted unsafe patient care and unprofessional conduct, violated various provisions of the Health and Safety Code and the Business and Professions Code and breached the provision in the parties' agreement that ensured it was Dr. Kheradpezhouh's responsibility to exercise independent professional medical judgment in the performance of his duties without any control or direction by Fagan Medical Group—all in breach of the agreement between Dr. Kheradpezhouh and Fagan Medical Group.

b. *The summary judgment motion*

On November 17, 2016 Dr. Fagan and Fagan Medical Group moved for summary judgment or, in the alternative, summary adjudication as to each of the four causes of action. Dr. Fagan and Fagan Medical Group argued, in part, the contract-based claims failed because Dr. Kheradpezhouh had resigned before Dr. Fagan prescribed the Dilaudid, precluding any claim for breach of contract by Fagan Medical Group. They also asserted no express provision in the agreement supported Dr. Kheradpezhouh's theory of breach; the actions of Dr. Fagan, a nonparty to the agreement between Dr. Kheradpezhouh and Fagan Medical Group, could not provide the basis for a breach of contract; there could be no breach of the implied covenant of good faith and fair dealing because it was Dr. Kheradpezhouh who

breached the contract by resigning; and the implied covenant claim should be disregarded as merely duplicative of the breach of contract claim.

As to Dr. Kheradpezhouh's tort claims, Dr. Fagan and Fagan Medical Group argued Dr. Fagan's act in prescribing Dilaudid did not constitute extreme and outrageous conduct; there was no evidence of intent to cause Dr. Kheradpezhouh severe emotional distress when Dr. Fagan ordered Dilaudid; and Dr. Kheradpezhouh's claim of nightmares and extreme anger as a result of Dr. Fagan's alleged wrongful conduct did not constitute severe emotional distress. Finally, Dr. Fagan and Fagan Medical Group argued they owed no duty of care to Dr. Kheradpezhouh on which to base a negligence claim and Dr. Kheradpezhouh could not establish he had been damaged as a result of Dr. Fagan's conduct.

c. *The trial court's order granting the summary judgment motion*

After receiving Dr. Kheradpezhouh's opposition and a reply memorandum from Dr. Fagan and Fagan Medical Group and hearing oral argument, the trial court issued a minute order granting the summary judgment motion in its entirety.

The court found triable issues of material fact existed as to when Dr. Fagan had prescribed Dilaudid and when Dr. Kheradpezhouh resigned. Nonetheless, the court agreed with Dr. Fagan and Fagan Medical Group that no express provision in the parties' agreement was breached when Dr. Fagan prescribed the narcotic painkiller. The court explained, even if Dr. Fagan had violated provisions of the Health and Safety or Business and Professions Codes ensuring safe patient care, as Dr. Kheradpezhouh alleged, nothing in the parties' agreement required Dr. Fagan or Fagan Medical Group to comply with those

statutes. Citing the language of section 1 of the parties' agreement ("Physician Duties"), the court found the agreement provided for the "exact opposite" by imposing a duty on Dr. Kheradpezhouh, not Fagan Medical Group, to comply with "applicable bylaws, policies, rules, and requests of Hospital and all applicable governmental and regulatory bodies having competent jurisdiction."

The trial court also ruled, "While [Dr. Kheradpezhouh] argues that Dr. Fagan's actions interfered with [Dr. Kheradpezhouh's] own obligations under the agreement to use his own professional judgment, interference or frustration of [Dr. Kheradpezhouh's] obligations under the contract is simply an affirmative defense that discharges [Dr. Kheradpezhouh's] remaining obligations." Nowhere in the agreement, the court continued, did Fagan Medical Group promise not to provide services to Dr. Kheradpezhouh's patients or not to interfere with Dr. Kheradpezhouh's treatments. Accordingly, "[w]hether or not Defendant's actions frustrated or interrupted the Plaintiff's obligations to perform competent legal services is not controlling on whether Defendant violated the explicit terms of the agreement between the parties, absent an explicit provision in the agreement to that effect."

The court granted the motion with respect to the cause of action for breach of implied covenant of good faith and fair dealing because there was no evidence Dr. Kheradpezhouh had been deprived of any benefits of the parties' agreement. In addition, the court found Dr. Kheradpezhouh had failed to present any evidence of injury caused by Dr. Fagan's conduct.

The court rejected the cause of action for intentional infliction of emotional distress, finding as a matter of law that

Dr. Kheradpezhouh's evidence of a single instance of alleged wrongdoing—prescribing a narcotic painkiller to the patient after Dr. Kheradpezhouh refused to do so—did not constitute outrageous conduct sufficient to satisfy this element of the tort.

Finally, the trial court ruled Dr. Fagan and Fagan Medical Group did not owe Dr. Kheradpezhouh any duty under traditional negligence principles. To the extent Dr. Kheradpezhouh was arguing his negligence claim was actually a claim for negligent or tortious breach of contract, the court reiterated there had been no breach of contract and no separate tort had been committed by Dr. Fagan in prescribing the narcotic painkiller.

## DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

2. *The Trial Court Properly Ruled on Dr. Kheradpezhouh's Cause of Action for Breach of Contract*

a. *No express provision of the agreement was breached*

Dr. Kheradpezhouh contends the trial court erred in concluding the parties' agreement did not prohibit Fagan Medical Group from providing services to his patients or interfering with his treatment of them, asserting that, because he was an independent contractor, the agreement gave him sole responsibility to provide medical services to his patients at Good Samaritan Hospital and that under the agreement Dr. Fagan and Fagan Medical Group had a duty not to interfere with his provision of those services.[3]

In support of his argument Dr. Kheradpezhouh cites the following language from section 1 of the Standard Terms and Conditions, incorporated into the parties' agreement: "In performing Services as an independent contractor, Physician does so on behalf of Physician's patients in accordance with Physician's responsibility to exercise independent professional medical judgment in the performance of Physician's duties hereunder. [Fagan Medical Group] does not exercise any control or direction over the methods by which Physician performs Services to patients. Physician agrees to perform Services in

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[3] The second amended complaint names only Fagan Medical Group, not Dr. Fagan individually, as a defendant in the causes of action for breach of contract and breach of the covenant of good faith and fair dealing. Contrary to Dr. Kheradpezhouh's contention on appeal, the trial court did not deem Dr. Fagan to be a party to the agreement between Dr. Kheradpezhouh and Fagan Medical Group. However, the trial court did rule the actions of Dr. Fagan, as president of Fagan Medical Group, were attributable to Fagan Medical Group.

accordance with currently approved and established methods and practices in the field of medicine." At the very least, Dr. Kheradpezhouh insists, this provision creates a triable issue of material fact whether Dr. Fagan's prescribing the narcotic painkiller constituted a breach of Fagan Medical Group's "express duty of non-interference."

Whether the parties' agreement prohibited Dr. Fagan and Fagan Medical Group from providing services to Dr. Kheradpezhouh's patients or from overriding his treatment decisions is a question of contract interpretation that we review de novo in the absence of any conflict in extrinsic evidence presented to prove the meaning of an ambiguous contract term. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1127; see *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439 ["[i]t is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence"].) No such extrinsic evidence was presented in this case.

Based on the language of the parties' agreement considered as a whole,[4] we agree with Dr. Fagan and Fagan Medical Group,

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[4] The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.*, *supra*, 59 Cal.4th at p. 288; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; see Civ. Code, § 1636.) That intent is interpreted according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at p. 1126.) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (See Civ.

as well as the trial court, that neither section 1 of the Standard Terms and Conditions nor any other term in the agreement provides that Dr. Kheradpezhouh is to have sole responsibility for the treatment of patients to whom he has provided medical services or prohibits Dr. Fagan and Fagan Medical Group from supplying medical services to those patients, whether or not those additional services interfere with or override Dr. Kheradpezhouh's professional judgment. The intent of the parties as evident from the agreement was to create an independent contractor relationship between Fagan Medical Group and Dr. Kheradpezhouh with Dr. Kheradpezhouh providing medical services to patients assigned by Fagan Medical Group. Much of the agreement is devoted to ensuring that Dr. Kheradpezhouh's performance as an independent contractor conformed to standards acceptable to Fagan Medical Group and satisfied general standards of medical care. For example, section 1 of the agreement provides that Dr. Kheradpezhouh is to render medical services that comply with applicable bylaws, policies, rules and requests of Good Samaritan Hospital and all applicable directives of governmental and regulatory bodies. Section 7 of the agreement shows that the Standard Terms and Conditions attached as Exhibit B to the agreement were imposed

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Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) The words are to be understood "in their ordinary and popular sense" (Civ. Code, § 1644), and the "whole of [the] 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.)

by Fagan Medical Group and were intended to ensure Dr. Kheradpezhouh's compliance with their provisions. Section 1 of the Standard Terms and Conditions, the provision relied upon by Dr. Kheradpezhouh, requires Dr. Kheradpezhouh to perform services "in accordance with currently approved and established methods and practices in the field of medicine" and imposes no similar obligations on Dr. Fagan or Fagan Medical Group. Section 6 of the Standard Terms and Conditions grants Fagan Medical Group a right to terminate the agreement for cause if Dr. Kheradpezhouh fails to follow the ordinary standards of medical care but does not contain a reciprocal provision allowing Dr. Kheradpezhouh to terminate the agreement for cause for Fagan Medical Group's failure to abide by any of its obligations under the parties' agreement.

Similarly, the provision in section 1 of the Standard Terms and Conditions that obligates Dr. Kheradpezhouh to exercise his "independent professional medical judgment in the performance of [his] duties" is intended to benefit Fagan Medical Group and does not impose on Fagan Medical Group a duty to permit Dr. Kheradpezhouh to maintain sole authority over the care of his patients or prohibit Fagan Medical Group from having any of its other doctors treat Dr. Kheradpezhouh's patients. Indeed, contrary to Dr. Kheradpezhouh's paraphrasing, nowhere in the parties' agreement is there language granting Dr. Kheradpezhouh "sole responsibility to provide medical services" to his patients. Dr. Kheradpezhouh's obligation to exercise independent medical judgment in the performance of his duties in the first instance, as the agreement actually provides, is not reasonably interpreted to mean only he may play a role in providing medical services or that another physician cannot also

treat the patient if, for example, there is a professional disagreement over patient care.

The contractual provision stating that Fagan Medical Group "does not exercise any control or direction over the methods by which Physician provides Services to patients" does not alter this conclusion. Viewed in the context of an agreement that repeatedly emphasizes Dr. Kheradpezhouh's responsibility to provide medical services that meet certain professional standards, that provision, located in the section of the Standard Terms and Conditions labeled "Independent Contractor Relationship," simply confirms Dr. Kheradpezhouh's status as an independent contractor. It does not prohibit Fagan Medical Group from electing to have another of its doctors provide medical services to the same patient.

In sum, the trial court properly concluded Dr. Fagan and Fagan Medical Group established as a matter of law that no express provision of the parties' agreement was breached when Dr. Fagan prescribed Dilaudid.

b. *Dr. Kheradpezhouh's frustration-of-performance argument fails to establish breach of the agreement*

Dr. Kheradpezhouh is correct, contrary to the trial court's ruling, that frustration of performance may under certain circumstances constitute breach of contract by the defendant. (See, e.g., *Sullivan v. Dorsa* (2005) 128 Cal.App.4th 947, 960; 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 876, p. 922.) Nonetheless, the trial court properly rejected this alternate theory for breach of contract.

Dr. Kheradpezhouh contends that Dr. Fagan, by prescribing Dilaudid to Dr. Kheradpezhouh's patient without having consulted with Dr. Kheradpezhouh, and thereby "second-guess[ing]" and "overrid[ing]" Dr. Kheradpezhouh's medical

judgment, made it impossible for Dr. Kheradpezhouh to perform his duties independently, as required by the parties' agreement, because "he could no longer have any confidence that such interference would not recur in the future." As discussed, however, Dr. Fagan's prescription of Dilaudid for a patient to whom Dr. Kheradpezhouh also rendered medical services did not conflict with Dr. Kheradpezhouh's responsibility under the agreement to exercise independent professional medical judgment in the performance of his own duties to the patient. The agreement does not provide that Dr. Kheradpezhouh has sole responsibility to provide medical services to a patient being treated by him and does not prohibit Fagan Medical Group from having any of its other doctors also render medical services to the patient. In sum, Dr. Kheradpezhouh has failed to raise a triable issue of material fact precluding summary judgment in favor of Fagan Medical Group on the breach of contract claim.

3. *The Trial Court Properly Ruled on the Claim for Breach of the Implied Covenant*

Every contract contains an implied covenant of good faith and fair dealing that "'neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400.) This implied covenant is "read into contracts 'in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.'" (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373 (*Carma Developers)*; see *Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at p. 1120 ["the implied covenant will only be recognized to further the contract's purpose"].)

"[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing." (*Schwartz v. State Farm Fire & Casualty Co.* (2001) 88 Cal.App.4th 1329, 1339; accord, *Carma Developers*, *supra*, 2 Cal.4th at p. 373 ["breach of a specific provision of the contract is not a necessary prerequisite" to an action for breach of the implied covenant of good faith; "[w]ere it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract"].) However, a claim for breach of the implied covenant "must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Ibid.*)

Paragraph 36 of the second amended complaint alleged Fagan Medical Group breached the implied covenant of good faith and fair dealing in the parties' agreement by "committing unsafe patient care, violating statutes ensuring safe patient care, committing unlawful and unprofessional conduct and/or violating

the provisions of the contract with Dr. K whereby it was Dr. K's responsibility to exercise independent professional medical judgment in the performance of his duties without any control or direction on the part of the Fagan Defendants over the methods by which Dr. K performed services"—virtually identical language to that used to allege Fagan Medical Group's purported breach of the express provisions of the agreement.

Even were we to agree Dr. Kheradpezhouh proffered evidence that prescribing Dilaudid under the circumstances here constituted unsafe patient care or unlawful and unprofessional conduct by Dr. Fagan, Dr. Kheradpezhouh failed to present any evidence that such conduct frustrated his right to receive benefits set forth in an express covenant or promise of the parties' agreement, as required under California law to establish a claim for breach of the implied covenant. (See *Carma Developers*, *supra*, 2 Cal.4th at p. 373; *Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at p. 1120.) The agreement provides that Fagan Medical Group will assign patients at Good Samaritan Hospital to Dr. Kheradpezhouh and he will be paid for providing medical services to them that comply with the requisite standards of care. It contains no promise to Dr. Kheradpezhouh that Fagan Medical Group or its physicians will similarly comply with the requisite standards of care when treating those same patients.

Dr. Kheradpezhouh attempts to remedy this analytic gap by arguing Dr. Fagan's conduct in prescribing Dilaudid "creat[ed] intolerable work conditions" and exposed Dr. Kheradpezhouh, "as the party with the express and sole responsibility under the Agreement to provide medical services, to potential liability to both the patient and to licensing authorities for the unsafe

practices of Dr. Fagan." As a consequence, Dr. Kheradpezhouh continues, he was forced to resign, thereby depriving him of future payments under the parties' agreement. Whatever other flaws may exist in this theory, Dr. Kheradpezhouh proffered no evidence of intolerable work conditions caused by Dr. Fagan's allegedly unsafe patient care and unlawful conduct. Nor did he support his assertion he could be held liable for another doctor's unlawful acts.

To the extent Dr. Kheradpezhouh purports to assert a cause of action for breach of the implied covenant based on his allegation that Fagan Medical Group violated the provisions of the agreement purportedly giving him sole responsibility for patient care, this claim duplicates Dr. Kheradpezhouh's cause of action for breach of express contract provisions and is properly disregarded as superfluous. (See *Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at p. 1394.)

4. *The Trial Court Properly Ruled on the Claim for Intentional Infliction of Emotional Distress*

"'The elements of the tort of intentional infliction of emotional distress are: "'(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." [Citation.] The defendant must have engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result."'" (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; accord, *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050; *Cornell v. Berkeley Tennis Club*

(2017) 18 Cal.App.5th 908, 945.) "Whether behavior is extreme and outrageous is a legal determination to be made by the court, in the first instance." (*Faunce v. Cate* (2013) 222 Cal.App.4th 166, 172; accord, *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 87; *Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 44.)

The trial court correctly ruled the single instance of alleged wrongdoing by Dr. Fagan—prescribing a narcotic painkiller to Dr. Kheradpezhouh's patient—does not constitute extreme and outrageous conduct as required for a claim of intentional infliction of emotional distress even if, as Dr. Kheradpezhouh alleges, that conduct violated statutory provisions regarding treatment of patients outside the usual course of practice and without prior examination.

Citing *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, Dr. Kheradpezhouh contends Dr. Fagan's conduct was "outrageous" because Dr. Fagan and Fagan Medical Group abused their position of power over Dr. Kheradpezhouh's interests by interfering with his medical judgment. Dr. Kheradpezhouh misapprehends *Hailey*, which explained, ""'Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.'"" (*Id.* at p. 474.) Reversing the trial court's ruling sustaining a demurrer without leave to amend, the *Hailey* court held plaintiffs had adequately alleged a cause of action for intentional infliction of emotional distress against a health care plan that they claimed had

obtained information entitling it to rescind a health care services contract yet deliberately waited to rescind to see if the subscriber suffered a serious injury or illness. (*Id.* at p. 476.) By adopting such a "'wait-and-see' attitude," the court stated, the plan risked liability for intentional infliction of emotional distress "if the plan knows the subscriber 'is peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity.'" (*Ibid.*)

Here, unlike the situation in *Hailey*, one physician allegedly interfering with the professional judgment of another physician does not come close to being conduct that "exceed[s] all bounds of that unusually tolerated in a civilized community." Nor did Dr. Kheradpezhouh submit evidence that Dr. Fagan or others at Fagan Medical Group knew Dr. Kheradpezhouh was particularly susceptible to mental distress or that they acted intentionally or unreasonably with the recognition that overriding Dr. Kheradpezhouh's nonnarcotic prescription would likely result in Dr. Kheradpezhouh's illness through mental distress.

5. *The Trial Court Properly Ruled on Dr. Kheradpezhouh's Negligence Claim*

Dr. Kheradpezhouh's cause of action for negligence is, in actuality, simply a claim for negligent breach of contract. Paragraph 51 of the second amended complaint alleged, "On December 9, 2014, Defendant Fagan negligently and carelessly breached the [agreement] by committing unsafe patient care and unlawful and unprofessional conduct when he negligently prescribed Dilaudid, a schedule II narcotic, without conducting an appropriate prior examination (Bus. & Prof. Code, § 2242), by ordering the narcotic outside of the usual course of his professional practice (Health & Saf. Code, § 11153), and by

ordering the narcotic for a person not under his care or treatment. (Health & Saf. Code, § 11154.)" As discussed, Fagan Medical Group did not breach the parties' agreement, either intentionally or negligently.

To the extent Dr. Kheradpezhouh attempted to allege a different theory of negligence in his opposition to the motion for summary judgment, he was not entitled to do so. (See *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 585 [defendant moving for summary judgment need address only the issues raised by the complaint]; *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264 ["[t]o create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings"; a party cannot oppose summary judgment with evidence that "would show some factual assertion, legal theory, defense or claim not yet pleaded"].)

**DISPOSITION**

The judgment is affirmed. Dr. Fagan and Fagan E.R. Medical Group are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.