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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SUNIL SUJAN et al., Plaintiffs and Appellants, v. UHS CORONA, INC. et al., Defendants and Appellants.	E084185 (Super.Ct.No. RIC1717505) OPINION

APPEAL from the Superior Court of Riverside County. Chad W. Firetag, Judge. Affirmed.

Milstein Jackson Fairchild & Wade, Lee Jackson and Mayo L. Makarczyk, for Plaintiffs and Appellants.

Manatt, Phelps & Phillips; Epstein Becker & Green, Charles E. Weir, Joanna S. McCallum and Colin M. McGrath, for Defendants and Appellants.

Plaintiff Sunil Sujan, a physician who formerly practiced medicine with defendant Corona Regional Medical Center (CRMC), filed this lawsuit alleging CRMC and three individual defendants (Alaa Afifi, M.D., Imdad N. Yusufaly, M.D., and Ahmed El-

Bershawi, M.D.) engaged in a concerted scheme to defame him and ruin his professional reputation, and summarily suspended his admitting privileges. Sujan's wife Nina Patel also sued defendants alleging a single cause of action for loss of consortium.

Sujan appeals from the judgment entered for defendants after the trial court granted their motion for summary judgment. The trial court found, inter alia, that Sujan failed to exhaust his administrative remedies before suing for damages. According to Sujan, he was excused from exhausting his remedies in the available peer review process because he had entered into an agreement with CRMC to lift his suspension and reinstate his admitting privileges, and, because that agreement avoided the requirement that CRMC report the suspension to the California Medical Board, it rendered futile any relief he might have achieved through an administrative appeal. He also appeals from a postjudgment order granting, in part, defendants' motion for attorney fees as provided for in CRMC's bylaws. Sujan contends the fee provision in the bylaws conflicts with Business and Professions Code[1] section 809.9, which provides for attorney fees in lawsuits challenging peer review decisions, and he argues defendants cannot recover fees under that statute because the trial court made no finding that the lawsuit was frivolous or that Sujan had acted in bad faith during the litigation. Finally, even if the fee provision under the bylaws is not preempted by statute, Sujan argues it is unconscionable and unenforceable.

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[1] All undesignated statutory references are to the Business and Professions Code.

In a cross-appeal from the attorney fees order, defendants argue the trial court erred by (1) finding Patel could not be held liable for attorney fees because she was not a signatory to the bylaws, (2) finding the attorney declaration filed with the fee motion was insufficient to introduce billing invoices in support of their claim for attorney fees incurred for work performed by the prior attorneys, and (3) reducing the hourly rates for work performed by two of their current attorneys.

On Sujan's appeal, we conclude (1) he has not met his burden of establishing with evidence a triable issue of material fact on defendants' defense by establishing he was excused from exhausting his administrative remedies and (2) the trial court correctly found defendants were entitled to recover attorney fees from Sujan as provided in the bylaws.

On defendants' cross-appeal, we conclude the trial court correctly denied the motion for attorney fees in part.

Therefore, we affirm the judgment and postjudgment order on attorney fees.

I.

FACTS AND PROCEDURAL BACKGROUND[2]

A. *Sujan's Complaint.*

Sujan has been a board certified physician for over 20 years. He had admitting privileges at CRMC and practiced internal medicine there from August 2010 to July

[2] We take much of the background to this lawsuit from our decision in a prior appeal (*Sujan v. Corona Regional Medical Center Inc.* (E071217, Mar. 8, 2021) [nonpub. opn.] (*Sujan I*)), which we judicially notice. (Evid. Code, §§ 452, 459.)

2016. In an introductory paragraph to his complaint, Sujan claimed he was damaged by defendants' "wrongful efforts to harm [his] practice." Defendants' alleged "scheme" included "the filing of false and defamatory internal complaints designed to destroy [Sujan's] professional reputation" and "summarily suspending [his] admitting privileges under false pretenses." Those acts were "intended to unfairly compete with [Sujan] and to convert [his] patients," and they caused him "financial, mental, and emotional injury."

Sujan alleged he provided his patients at CRMC "with a high degree of care and maintained strong professional relationships with his patients and many of his colleagues." His "success [was] well documented" and, according to a data management system used by CRMC "to monitor physician performance," the "mortality rate, readmission rate, and length-of-stay average" for his patients "were much lower than that of his peers." Sujan achieved financial success at CRMC and signed "lucrative contracts" with insurance providers that expanded his practice and placed him in direct competition with Drs. Afifi, Yusufaly, and El-Bershawi, the individual defendants.

According to Sujan, the individual defendants responded to his competition and "growing practice" by "organiz[ing] certain members of the physician staff and registered nursing staff at CRMC" to engage in a "concerted and ongoing" campaign to defame Sujan's reputation through CRMC's peer review process "by falsely depicting him as unresponsive, dilatory, and ill-tempered," with the goal of having Sujan censured and/or

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"'Consistent with our standard of review of orders granting summary judgment, we will recite the historical facts in the light most favorable to . . . the nonmoving party.'" (*Mackey v. Trustees of California State University* (2019) 31 Cal.App.5th 640, 647, fn. 3.)

suspended. CRMC abetted and/or conspired with the individual defendants in their campaign to defame Sujan, and it was financially motivated to do so because it had an economic interest in recruiting and hiring physicians from EmCare (a healthcare recruiting and staffing company) and ousting physicians like Sujan, who were unaffiliated with EmCare.

Sujan alleged the individual defendants organized members of the physician and nursing staff to file dozens of "MIDAS reports" claiming Sujan "failed to adequately respond to pages and calls he received from the nursing staff." A MIDAS report is a report from a staff member about an alleged violation of CRMC's bylaws and/or state or federal law by a physician. If the director of risk management concludes the report meets CRMC's peer review criteria, it is submitted to the relevant departmental quality review committee (QRC) to determine whether the bylaws or law(s) have been violated and, if so, it is forwarded to CRMC's medical executive committee (MEC) to conduct a peer review and determine whether to restrict, supervise, or revoke the physician's privileges.

According to Sujan, the allegations in the 86 MIDAS reports filed against him were "virtually all fabricated," and "[n]early all of [them] failed to meet the hospital's criteria for review." While auditing the reports, the director of risk management learned of the scheme to defame Sujan and was shocked Sujan was being targeted. Most, if not all, of the reports alleged Sujan did not return calls or pages, but he showed his phone to the director to prove that "on several occasions" he did return calls or pages, or he was never called or paged to begin with. And while investigating the matter, the director

spoke to nurse managers and was told that "some of the nurses at CRMC were being directed to submit MIDAS reports against [Sujan] based on false and/or misleading allegations."[3]

In June 2016, a patient died of heart failure while under Sujan's care. The patient suffered from various ailments, including a potentially deadly heart condition, and he was a heavy drug user. At the time, Dr. Afifi was chief of staff for the MEC. When Dr. Afifi learned of the death, he convened the MEC and summarily suspended Sujan's admitting privileges "based on its conclusory finding [that] the suspension was necessary to avoid an imminent risk to patients." According to Sujan, Dr. Afifi conducted no investigation to determine whether Sujan committed any wrongdoing, and he declined to conduct an analysis to determine the "root cause" of the patient's death or to interview key witnesses such as Sujan or the head of the intensive care unit (ICU) at the time.

Some of Sujan's colleagues who were familiar with his practice, including the "head of the ICU," were shocked to learn of the summary suspension and wrote letters on his behalf. The patient's insurance provider investigated the death and found no evidence of wrongdoing by Sujan, but no other investigation was conducted. According to Sujan, defendants had no interest in investigating the cause of the patient's death or in determining whether Sujan had committed any wrongdoing. And, once Sujan's

[3] Sujan does not expressly allege the director of risk management found *none* of the MIDAS reports met the criteria for peer review and declined to forward *any* of them to the relevant QRC, but that is clearly the implication.

privileges were suspended, defendants "converted all of [his] patients" and reassigned them to physicians affiliated with EmCare.

On July 7, 2016, the MEC voted to maintain the summary suspension of Sujan's privileges unless he entered into an agreement establishing the terms and conditions of his reinstatement. The agreement, drafted by Dr. Afifi and the MEC, expressed concerns about (1) Sujan's ability to adequately care for his patients, (2) his failure to respond to requests from nursing staff, (3) his failure to comply with requirements for medical record keeping, and (4) two patients deaths (the patient whose death prompted the summary suspension and another who died two years earlier).

The detailed list of conditions for lifting Sujan's suspension included in the agreement were as follows:

(1) Sujan was to "comply fully with all Medical Staff bylaws and rules," with specific mention of those related to timely record keeping;

(2) he was to sign an updated code of conduct within 10 days;

(3) he was to provide his office, beeper, cellular, and home phone numbers to the emergency and nursing departments "and take all steps necessary to assure that hospital staff will be able to contact him without delay";

(4) he was to identify one or more members of the medical staff in good standing and with similar admitting privileges "to be his backup for the care of his patients," provide written notice to the medical staff office of any change to his

backup, and "take all steps necessary to assure that either he or his backup physician will always be available without delay";

(5) he was to "take all steps necessary to assure that he or his backup physician will come to the hospital and provide care for ER patients while on call within thirty (30) minutes from being called by hospital staff";

(6) he was to complete within 90 days, at his own expense, a training course approved by the chief of medicine on the care and treatment of patients with diabetes and pancreatitis;

(7) he was to ensure that he or his backup would see and provide care to every non-ICU patient admitted to his care within eight hours of accepting responsibility for the patient, and ensure that he or his backup see and provide care to every ICU patient within four hours of accepting responsibility for the patient;

(8) he was to complete, at his own expense, training programs on medical record keeping and anger management;

(9) he was to personally respond in writing to all letters of concern sent to him by the department of medicine or medical staff committee within the time and manner specified in the letters, but within no less than five business days;

(10) he was to identify, in consultation with the chair of the department of medicine, one or more members of the department to mentor him and "provide

concurrent review and guidance . . . relating to the care of patients," and the mentor or mentors were to submit written reports to the MEC every ninety days[4];

(11) he was not to retaliate, by word or deed, against anyone who had complained about him or participated in reviewing complaints about him, though he retained the right to lodge a complaint or grievance as provided in the bylaws; and

(12) he was to meet with the MEC as requested.

The agreement provided the MEC would promptly review any report of a violation of those conditions and provide Sujan with the opportunity to respond to such a report orally and/or in writing. If the MEC determined Sujan had violated the agreement, it would reinstatement the summary suspension "or take whatever alternative action the MEC deem[ed] reasonable." If the MEC reinstated the summary suspension or took another action that triggered Sujan's right to request a hearing, the MEC would give him notice of his fair procedure rights under the bylaws.

Sujan disagreed with the factual basis of his suspension, which was based on the allegedly false and defamatory MIDAS reports, and he disagreed with the suggestion in the agreement that the patients' deaths were the result of his wrongdoing. However, Sujan believed he had "no reasonable choice" but to sign the agreement because otherwise his summary suspension would have been reported to the California Medical Board and the National Practitioner Data Bank (NPDB) with potentially "ruinous"

[4] The agreement provided the imposition of a mentorship "will not be considered to be a restriction of privileges."

consequences for his medical career. (See Bus. & Prof. Code, § 805; 42 U.S.C. § 11133.) Therefore, he signed the agreement on July 13, 2016. Shortly thereafter, he voluntarily ended his relationship with CRMC.

In the summer of 2017, Sujan was offered a position as a full-time hospitalist with Good Samaritan Hospital, contingent on the hospital verifying his dates of employment at CRMC. After Good Samaritan contacted CRMC for verification, CRMC e-mailed Sujan on August 21, 2017, and told him it would not provide the requested information to Good Samaritan unless Sujan signed an attached release, in which he would agree to release CRMC from all claims related to its transmission of the verification. Attached to the e-mail from CRMC was also a copy of the verification to be sent to Good Samaritan. In addition to basic employment information requested by Good Samaritan, the verification included a detailed summary of the false and defamatory allegations made in support of Sujan's summary suspension. Sujan refused to sign the release. As of the date of the complaint, CRMC had not transmitted the verification to Good Samaritan, and the status of his offer of employment was in jeopardy.

Sujan alleged he suffered mental, emotional, and physical injury from defendants' conduct, including depression, strain on his marriage and family relationships, and a heart attack brought on by the stress of his suspension. He also alleged the loss of his patients at CRMC and his contracts with insurance providers has resulted in him losing between $500,000 and $600,000 in annual income, and he has lost opportunities to work at other hospitals.

In a first cause of action for conversion, Sujan alleged the records and protected health information for his patients at CRMC are his personal property, and he invested substantial time, money, and effort into developing the confidentiality and protection of those records. The false and defamatory MIDAS reports filed at defendants' instigation were designed to destroy Sujan's professional reputation and, after Sujan's suspension under false pretenses, defendants "converted [his] business, patient relationships, and patient medical agreements."

Sujan's second cause of action for intentional interference with a prospective economic interest alleged he enjoyed a long-term and mutually beneficial relationship with his patients, of which defendants were aware. The false and defamatory MIDAS reports were designed to destroy Sujan's professional reputation, and defendants summarily suspended his privileges "under false pretenses, with the intent and purpose of terminating [Sujan's] relationship with his patients during his suspension." Defendant succeeded in terminating Sujan's relationship with his patients and caused him economic harm.

The third cause of action for intentional interference with contractual relations alleged Sujan had valid contracts with his patients, of which defendants were aware. Defendants filed false and defamatory MIDAS reports designed to ruin Sujan's professional reputation and summarily suspended his privileges under false pretenses with the intent of inducing a breach of the contracts between Sujan and his patients during his suspension. Defendants succeeded in inducing a breach and/or disruption of

the contractual relationship between Sujan and his patients and harmed him economically.

In a fourth cause of action, Sujan alleged defendants conspired and aided and abetted each other in committing the torts alleged in the second and third causes of action.

Sujan's fifth cause of action for defamation alleged the MIDAS reports filed at defendants' instigation claimed Sujan failed to return calls or pages, was unresponsive, and did not adequately attend to his patients' needs and requests. The claims made in the reports were false and resulted in irreparable damage to Sujan's professional reputation among his patients and peers.

In his sixth cause of action for intentional infliction of emotional distress, Sujan alleged the individual defendants' conduct in instigating the filing of false and defamatory MIDAS reports, and their act of summarily suspending Sujan's admitting privileges, were outrageous and committed with the express intent to cause, or with reckless disregard for the possibility they would cause, emotional distress. Those acts caused Sujan severe emotional distress, anguish, and anxiety.

Finally, the seventh cause of action alleged "defendants' acts and omissions" toward Sujan caused his wife Patel to suffer loss of consortium.

Sujan alleged defendants caused him irreparable and incalculable harm, including loss of reputation and goodwill, and he prayed for injunctive relief to prevent further irreparable harm. In addition to monetary damages according to proof, Sujan alleged

defendants' conduct was intentional, despicable, and subjected him to unjust hardship and loss with conscious disregard of his rights, and he prayed for punitive damages.

Defendants answered and, among other affirmative defenses, pleaded Sujan failed to exhaust his administrative and judicial remedies. Thereafter, defendants filed Anti-SLAPP motions to dismiss, which the trial court denied. We affirmed the denials. (*Sujan I*, *supra*, E071217.)

B. *Summary Judgment*.

In an amended motion for summary judgment, defendants argued, inter alia, they were entitled to judgment as a matter of law on their defense to the causes of action for intentional interference with prospective economic advantage and intentional interference with contractual relations because, by accepting the agreement to lift his summary suspension and reinstate his admitting privileges, Sujan did not exhaust his available administrative and judicial remedies.[5] CRMC's bylaws provide administrative remedies to challenge adverse actions against medical staff. Article VIII of CRMC's bylaws is entitled "Hearing and Appellate Reviews." Under section 8.1-4, a physician whose privileges are summarily suspended for less than 14 days has the right to contest that action by delivering a written request to the MEC within 30 days of notice of the suspension. The MEC has the duty to provide the physician with notice of the reasons

[5] Sujan does not argue the trial court erred by granting summary judgment on the five other causes of action stated in his complaint. Therefore, we need not address defendants' additional arguments in their motion.

for the summary suspension and to provide them with a reasonable opportunity to respond and a "resolution of the matter by an unbiased panel."

Section 8.1-5 requires all "members . . . to exhaust all remedies provided in this Article or elsewhere in medical staff bylaws, rules and regulations or policies before initiating legal action," and provides that "[a]ny practitioner who fails to exhaust the remedies (including all hearing and appeal remedies) provided in these bylaws before initiating legal action shall be liable to pay the full costs, including legal fees, required to respond to such legal action." In addition, section 8.1-8 provides: "Recommended adverse actions described in Section 8.2 shall become final only after the hearing and appellate rights set forth in these bylaws have either been exhausted or waived, and only upon being adopted as final actions by the Governing Board of Directors." In turn, section 8.2 provides that an administrative hearing may be requested about a list of completed or recommended adverse actions, including "summary suspension of staff membership or staff privileges for greater than 14 days."

Sujan did not dispute that he did not avail himself of the available peer review appeals process. Instead, relying heavily on the futility exception to the exhaustion doctrine and the decision in *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360 (*Joel*), Sujan argued he could not have obtained more relief through the peer review appeals process than he did through the agreement to reinstate his admitting privileges, which avoided his suspension from being reported, so he was excused from exhausting his administrative remedies. In his declaration submitted with the opposition, Sujan

stated, "I was extremely concerned about this suspension remaining in place for 14 days, because this would trigger a requirement that it be reported to the California Medical Board, which I believed would be extremely harmful to my career as a physician."

The trial court granted the motion, finding Sujan was not excused from exhausting his administrative remedies. The court distinguished *Joel*, finding, "unlike the doctor in *Joel*, Dr. Sujan did not obtain a full reinstatement and therefore did not achieve the maximum relief he could have been afforded administratively." The court entered judgment for defendants and ruled they were entitled to recover their costs and attorney fees. Thereafter, the court denied Sujan's motion for new trial.

Sujan timely appealed.

C. *Attorney Fees*.

Relying on the contractual attorney fee provision in the bylaws, defendants filed a motion seeking $892,417 in attorney fees, which represented services provided by six law firms, including their current attorneys. Inter alia, Sujan opposed the motion arguing (1) the contractual fee provision conflicts with section 809.9, which provides for attorney fees in a lawsuit challenging a peer review decision only when the lawsuit was frivolous or the losing party acted in bad faith, and (2) even if the contractual fee provision applies to this case, it is unconscionable and unenforceable. And, in a proposed supplemental opposition filed just before the scheduled hearing, Patel argued she was not a signatory to the bylaws and is therefore not liable to pay attorney fees. Sujan filed no written

objections to the evidence defendants submitted with their fee motion, and he did not argue the declaration in support of the fee motion was insufficient in any way.

In its tentative ruling granting the motion in part and denying it in part, the trial court ruled section 809.9 is not the exclusive basis for defendants to seek their attorney fees, and the court rejected Sujan's argument that the contractual fee provision in the bylaws is unconscionable. Acting sua sponte, the court ruled the declaration of defendants' current counsel filed in support of the motion was based in part on information and belief, and defendants had not properly introduced evidence of attorney fees billed by their former attorneys and denied the request for those fees entirely. With respect to defendants' current attorneys, the court ruled the total hours claimed for work performed by four attorneys and the hourly rate claimed for two junior attorneys was reasonable. However, the court found the hourly rate claimed for two partners was not comparable to prevailing rates in Riverside County and, after adjusting the hourly rate for those two attorneys, awarded defendants $313,830 in attorney fees. Finally, the court ruled Patel was not liable for attorney fees as a non-signatory to the bylaws. Neither party requested oral argument on the motion, so the trial court adopted its tentative ruling as its order.

Both sides appealed the attorney fee order.

II.

DISCUSSION

A. *The Trial Court Correctly Granted Summary Judgment for Defendants on Sujan's Causes of Action for Intentional Interference with Prospective Economic Relations and Intentional Interference with Contractual Relations.*

Sujan argues the trial court erred in ruling he was required to exhaust his administrative remedies before suing for damages and seeks reversal of the summary judgment on his causes of action for interference with prospective economic advantage and interference with contractual relations. According to Sujan, his settlement with the CRMC to reinstate his admitting privileges avoided the need for his suspension to be reported to the California Medical Board and provided him with all the relief he might have obtained during a review hearing, so pursuing an administrative remedy would have been futile. We disagree and affirm.

1. Standard of Review.

"Code of Civil Procedure section 437c, subdivision (c), provides that summary judgment is to be granted 'if 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.' A defendant 'moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant may meet this burden either by showing one or more elements of a cause of action cannot

be established or by showing there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850.)" (*Gonzalez v. Interstate Cleaning Corp.* (2024) 106 Cal.App.5th 1026, 1033 (*Gonzalez*).)

"If the defendant's prima facie case is met, the burden shifts to the plaintiff to show the existence of a triable issue of material fact with respect to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 850.) '[T]o meet that burden, the plaintiff ". . . shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ."' (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.) Ultimately, the moving party 'bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.' (*Aguilar*, at p. 850, fn. omitted.)" (*Gonzalez*, *supra*, 106 Cal.App.5th at p. 1033.)

"""'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] "'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."""" (*Gonzalez*, *supra*, 106 Cal.App.5th at p. 1034, quoting *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.)

2. Peer Review and the Requirement That Physicians Exhaust Administrative and Judicial Remedies Before Filing Suit.

"Under state law, a licensed hospital facility must have 'a formally organized and self-governing medical staff responsible for "the adequacy and quality of the medical care rendered to patients in the hospital." (Cal. Code Regs., tit. 22, § 70703, subd. (a).)' (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10, italics omitted; [citation].) The medical staff acts primarily through a number of peer review committees, which, along with other responsibilities, assess the performance of physicians currently on staff, review the need for and results of each surgery performed in the hospital, and the control of in-hospital infections. (Cal. Code Regs., tit. 22, § 70703, subds. (b) & (d).) If a peer review committee recommends that the privileges of the physician be restricted or revoked because of the manner in which he or she exercised those privileges, a series of procedural mechanisms kick into play—all governed by state law. (Bus. & Prof. Code, §§ 809-809.8; Cal. Code Regs., tit. 22, § 70703, subd. (b).)" (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616 (*Unnamed Physician*).)

"In 1989, the state Legislature enacted California Business and Professions Code section 809 et seq. for the purpose of opting out of the federal Health Care Quality Improvement Act of 1986 (42 U.S.C. § 11101 et seq.), which was passed to encourage physicians to engage in effective peer review. California chose to design a peer review system of its own, and did so with the enactment of these sections. (Stats. 1989, ch. 336, § 1, pp. 1444-1445.) Section 809 provides generally that peer review, fairly conducted, is

essential to preserving the highest standards of medical practice and that peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care. (§ 809, subd. (a)(3), (4).) The statute thus recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts." (*Unnamed Physician*, *supra*, 93 Cal.App.4th at pp. 616-617, fn. omitted.)

"The statutory scheme delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights, all specified in the statute. [Citations.] A hospital is required to establish high professional and ethical standards and to maintain those standards through careful selection and review of its staff. [Citation.] To comply with the statute's mandate, the hospital's medical staff must adopt bylaws that include formal procedures for '"the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate." [Citation.]' [Citation.] It is these bylaws that govern the parties' administrative rights." (*Unnamed Physician*, *supra*, 93 Cal.App.4th at p. 617.)

"A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate. (Bus. & Prof. Code, § 809.8.)" (*Kibler v.*

Northern Inyo County Local Hospital Dist. (2006) 39 Cal.4th 192, 200; see Code Civ. Proc., § 1094.5.)

"'In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.' (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 . . . .) The rule 'is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts.' (*Id.* at p. 293.) We have emphasized that 'Exhaustion of administrative remedies is "a jurisdictional prerequisite to resort to the courts." [Citation].' (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.)" (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321.) "Under this doctrine, '"a party must go through the entire proceeding to a 'final decision on the merits of the entire controversy' before resorting to the courts for relief."'" (*Eight Unnamed Physicians v. Medical Executive Com.* (2007) 150 Cal.App.4th 503, 511, italics omitted (*Eight Unnamed Physicians*).)

"[U]nless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions. This requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies." (*Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at pp. 69-70, fn. omitted.) Whereas exhaustion of administrative remedies is a jurisdictional prerequisite to filing suit, "[e]xhaustion of *judicial* remedies . . . is necessary to avoid giving binding 'effect to

the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.'" (*Ibid*.)

In *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465 (*Westlake*), our Supreme Court held "that before a doctor may initiate litigation challenging the propriety of a hospital's denial or withdrawal of privileges, he [or she] must exhaust the available internal remedies afforded by the hospital." (*Id*. at p. 469.) The court found several compelling policy reasons to support applying that doctrine to claims for reinstatement and/or damages. "In the first place, even if a plaintiff no longer wishes to be either reinstated or admitted to the organization, an exhaustion of remedies requirement serves the salutary function of eliminating or mitigating damages. If an organization is given the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the plaintiff by immediately reversing its initial decision and affording the aggrieved party all membership rights; an individual should not be permitted to increase damages by foregoing available internal remedies. [Citation.] [¶] Moreover, by insisting upon exhaustion even in these circumstances, courts accord recognition to the "expertise" of the organization's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance. [Citation.] Finally, even if the absence of an internal damage remedy makes ultimate resort to the courts inevitable [citation], the prior administrative proceeding will still

promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review." (*Id*. at p. 476.)

"'Although the decision in *Westlake* applied to the "fair procedure" a hospital was required to provide under California common law [citation], rather than to the statutory peer review procedure now required by [Business and Professions Code] section 809 et seq.[,] . . . the exhaustion doctrine applies under the new statutory scheme as much as it did under the previous common law scheme.'" (*Eight Unnamed Physicians*, *supra*, 150 Cal.App.4th at p. 511, quoting *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 100, fn. 13.)

3. Sujan Has Not Established He Was Exempt From Exhausting His Administrative Remedies.

The party alleging they are not required to exhaust applicable administrative remedies has the burden of proving an exception. (*Public Employees' Retirement System v. Santa Clara Valley Transportation Authority* (2018) 23 Cal.App.5th 1040, 1048.) "'The [exhaustion] doctrine is inapplicable where "the administrative remedy is inadequate [citation]; where it is unavailable [citation]; or where it would be futile to pursue such remedy [citation]."'" (*Unnamed Physician*, *supra*, 93 Cal.App.4th at p. 620.)

As indicated, *ante*, section 8.1-5 of the bylaws requires all "members . . . to exhaust all remedies provided in this Article or elsewhere in medical staff bylaws, rules and regulations or policies before initiating legal action." Sujan argues he was excused

from exhausting those administrative remedies before filing suit because to do so would have been futile. The futility exception is very narrow, and "applies only if the party invoking it can positively state that the administrative agency has declared what its ruling will be in a particular case." (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313; accord, *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080-1081.) The party asserting this exception must submit "solid objective evidence to illustrate [the] claimed futility. 'His own speculative, subjective feelings about the matter do not allow him to unilaterally ignore avenues of review. If that were the case, exhaustion would be a dead doctrine.'" (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1130; see *Upshaw v. Superior Court* (2018) 22 Cal.App.5th 489, 507 [party fails to establish futility where there is "no evidence the [respondent] had taken any position, let alone declared what its ruling would be"].)

Sujan does not explicitly contend the MEC had already declared what it would decide had he timely requested a review hearing. Instead, relying on *Joel*, *supra*, 68 Cal.App.4th 360, Sujan argues the agreement to lift his summary suspension and reinstate his admitting privileges rendered futile the exhaustion of his available administrative remedies.

In *Joel*, a physician had his hospital privileges summarily suspended for failing to obtain authorization before administering an anesthetic pain block to a patient. After the hospital's MEC met with the physician to discuss the suspension, the MEC reaffirmed its

decision and informed the physician he could request a hearing before the hospital's review committee as provided in the hospital's bylaws, which the physician requested. (*Joel*, *supra*, 68 Cal.App.4th at pp. 363-364.)

The hospital sent the physician a notice of the charges against him and scheduled a review hearing. (*Joel*, *supra*, 68 Cal.App.5th at p. 364.) However, the parties settled their dispute before the hearing could take place. "The agreement confirmed that the suspension would immediately end, and [the physician's] privileges would be reinstated 'without limitation or restriction,' provided that [he] withdraw his request for an administrative hearing. The parties agreed: 'The summary suspension of [the physician's] privileges would be ended immediately conditioned upon [him] immediately thereafter withdrawing his pending request for a hearing with respect thereto.' [¶] The agreement also stated: 'This settlement of the privileges dispute regarding the summary suspension has no legal effect on any other matter or any damages claim resulting from the summary suspension. Accordingly, nothing in this settlement or agreement releases either party from any claim or action which might otherwise exist or relieves any party from any legal obligation to satisfy or complete any action or proceeding as a precedent to asserting any claim.'" (*Ibid*.) Thereafter the physician sued for damages and the hospital demurred, arguing, inter alia, the physician had failed to exhaust his administrative remedies. The trial court sustained the demurrer. (*Id*. at p. 364.)

On appeal, the court addressed whether the doctrine of administrative exhaustion from *Westlake*, *supra*, 17 Cal.3d 465 applied to the physician. After summarizing that

decision and discussing the policy reasons behind the doctrine, the appellate court concluded "none of the policies underlying the *Westlake* decision are furthered under the facts here, and thus, the decision is inapplicable where the administrative machinery has been commenced, but the parties resolve the dispute before its completion through settlement which awards the physician the maximum benefit he or she could have been afforded administratively." (*Joel*, *supra*, 68 Cal.App.4th at pp. 366-367.)

The court found the settlement to reinstate the physician's hospital privileges "satisfies all three principal concerns found important to the *Westlake* court in requiring administrative exhaustion as a prelude to an action for damages. First, by agreeing to reinstate [the physician], [the hospital] mitigated any damages to [the physician] occasioned by the suspension. Had the parties not settled and had [the physician] been successful in achieving through a hearing what he was able to obtain through settlement, damages resulting from the suspension would arguably be greater, if for no other reason than the period of suspension would have been longer." (*Joel*, *supra*, 68 Cal.App.4th at p. 367.)

"Second, the relief obtained by [the physician] through settlement was not a partial or conditional reinstatement, but was the maximum relief he could have achieved administratively. Certainly, unconditional reinstatement would not have been agreed to without a reflective and experienced analysis by [the hospital] as to whether the decision to suspend was well advised in the first place, and perhaps more importantly, whether reinstatement constituted a future risk to the patients of [the hospital]. Implicit in the

decision to reinstate is that [the hospital] addressed and evaluated the merits of reinstatement as it related to the future quality of patient care, thus bringing to bear the 'expertise' of [the hospital's] administrators on the dispute." (*Joel*, *supra*, 68 Cal.App.4th at p. 367.)

For the third policy consideration—"the potential for the administrative proceeding to unearth evidence and to produce a record which might be of use to the court in a subsequent lawsuit"—the appellate court noted Evidence Code section 1157 barred the discovery of records of hospital peer review committees for use in litigation. (*Joel*, *supra*, 68 Cal.App.4th at pp. 367-368.) "Thus, even if the peer review process 'unearth[ed] the relevant evidence,' [the physician] would not be entitled to discovery of any of the documents in his action for damages. (*Westlake Community Hosp. v. Superior Court*, *supra*, 17 Cal.3d at p. 476.) Therefore, *Westlake* is factually inapposite and its rationale supporting exhaustion through appropriate review procedures before bringing a suit for damages is inapplicable to the circumstances presented here." (*Joel*, at p. 368.)

Last, the court indicated, "we do not see any judicial efficiency to be gained in compelling parties to litigate issues when they would rather avoid the time, money, and uncertainty of an administrative hearing by settling their dispute." (*Joel*, *supra*, 68 Cal.App.4th at p. 369.) The court rejected the hospital's suggestion that permitting the physician to sue, without first exhausting his administrative remedies, would inhibit settlements. "First, we do not accept the premise that a medical care facility would choose to continue administrative proceedings evaluating and reviewing a questionable

administrative decision rather than dealing with the issue of staff competency on its merits. We reject as unfounded the necessary inference from [the hospital's] argument that facility administrators might be motivated to resist reinstatement of deserving and productive staff because of an irrelevant concern that to do so might result in a claim for damages. It implies that the reviewing body would base staffing decisions on irrelevant factors and not matters affecting the best interests of the institution's patients, an assumption we are unwilling to accept." (*Ibid*.)

Therefore, the appellate court agreed with the physician "that further pursuit of an administrative hearing was rendered futile by the settlement agreement because the administrative process had nothing more to offer, and that the settlement gave him everything the administrative hearing could have provided—namely, the full reinstatement of all his privileges." (*Joel*, *supra*, 68 Cal.App.4th at p. 369.)

Joel is distinguishable. The appellate court took pains to emphasize the settlement in that case "was not a *partial* or *conditional* reinstatement" of admitting privileges. (*Joel*, *supra*, 68 Cal.App.4th at p. 367, italics added.) Instead, the hospital gave the physician "the *maximum relief* he could have achieved administratively," and such a settlement "would not have been agreed to without a reflective and experienced analysis by [the hospital] as to *whether the decision to suspend was well advised in the first place*, and perhaps more importantly, whether reinstatement constituted a future risk to the patients of [the hospital]." (*Ibid*., italics added.) Under those circumstances, requiring the physician to exhaust his administrative remedies would have been futile because a

review hearing had nothing more to offer than he had already received from the settlement, to wit, *full vindication* that his suspension had been unwarranted and that he should be reinstated unconditionally. (*Id*. at pp. 369-370.)

In contrast, the settlement to lift Sujan's summary suspension was heavily conditioned on him agreeing to the detailed and onerous list of terms and provisos outlined, *ante*, and further provided that the MEC could reinstate Sujan's summary suspension or take other reasonable, remedial steps if it concluded he had violated those terms and conditions. In addition, the settlement reaffirmed the MEC's *continuing concerns* about Sujan's ability to safely care for his patients and it imposed various requirements specifically calculated to address those concerns, such as requiring Sujan to take additional training courses (at his own expense), select one or more backup physicians, and be paired with a mentor to provide ongoing review and guidance in his treatment of patients. In other words, the settlement did not fully vindicate Sujan's claim that his suspension had been unwarranted from the beginning.

As he did in the trial court, Sujan argues his "primary motive" in signing the agreement to reinstate his admitting privileges was to avoid the summary suspension being reported to the California Medical Board. He contends that by accepting the terms of the agreement and not challenging the suspension in the peer review process, he avoided the "inherently harmful" consequences of having the suspension reported and received the maximum relief he would have received had he pursued his administrative remedies. To repeat, Sujan bore the burden of establishing the futility exception to the

exhaustion doctrine. (*Public Employees' Retirement System v. Santa Clara Valley Transportation Authority*, *supra*, 23 Cal.App.5th at p. 1048.) But, other than his own statements in his declaration, Sujan introduced no evidence, such as expert testimony, to support the allegation in his complaint that a report would have had ruinous consequences for his career. (See., e.g., *Miller v. Huron Regional Medical Center* (8th Cir. 2019) 936 F.3d 841, 845 [Plaintiff's expert witnesses testified a report to the NPDB "that a physician voluntarily reduced her privileges while under investigation would be 'absolutely devasting,'" and the contents of the report were "the 'kiss of death.'"].) In other words, he did not meet his burden of showing a triable issue of material fact on the defense of failure to exhaust administrative and judicial remedies by demonstrating that pursuing those remedies would have been futile. (Code Civ. Proc., § 437c, subd. (p)(2).)

In his brief, Sujan cites the decision in *Mileikowsy v West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259. There, the Supreme Court suggested that a report to the California Medical Board and NPDB that a hospital has denied or failed to renew admitting privileges to a physician "may have the effect of ending the physician's career" if the physician later seeks employment at another hospital. (*Id*. at p. 1268.) The physician in that case challenged a hospital's decision not to renew his staff privileges, but he was not afforded a full hearing during the peer review process because the hearing officer entered a terminating sanction and dismissed the review hearing when the physician failed to disclose information. (*Id*. at pp. 1265-1266.) The Supreme Court did not address what the consequences of a report would be to a physician who is provided a

full and fair hearing in the peer review process and is vindicated and obtains a full reinstatement of their admitting privileges.[6]

Like the trial court, we find the decision in *Ennix v. Stanten* (N.D. Cal. Aug. 28, 2007, No. C 07-02486 WHA) 2007 U.S. Dist. Lexis 66032 (*Ennix*) to be instructive.[7] In *Ennix*, a heart surgeon was summarily suspended by the president of the hospital's medical staff for failing to make rounds and visit a patient. The surgeon produced letters from nurses to dispute the basis for the suspension, but the MEC upheld the decision pending further investigation by an ad hoc committee. Faced with losing his ability to practice at the hospital, the surgeon asked the president to permit him to continue working on a reduced capacity as a surgical assistant. The MEC accepted the request but told the surgeon he had no right to a hearing because he had stipulated to the reduction in capacity in lieu of a suspension. (*Id*. at p. *5.) The ad hoc committee completed its investigation and recommended the surgeon have his privileges reinstated subject to the

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[6] In addition, Sujan cites a law review comment that claims a report to the NPDB has the effect of blacklisting a physician. (van Geertruyden, *The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 and State Peer Review Protection Statutes Have Helped Protect Bad Faith Peer Review in the Medical Community* (2001) 18 J. Contemp. Health L. & Pol'y 239, 257; see also Van Tassel, *Blacklisted: The Constitutionality of The Federal System for Publishing Reports of "Bad" Doctors in the National Practitioner Data Bank* (2012) 33 Cardozo L. Rev. 2031.) The article appears to have based its claim of blacklisting on anecdotal evidence and does not satisfy Sujan's burden of establishing the futility exception to the doctrine of exhaustion of administrative remedies.

[7] "The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to unpublished decisions from the lower federal courts. [Citation.] Like published decisions of the lower federal courts, unpublished decisions are not binding on us even on questions of federal law, but they are persuasive authority." (*Barriga v. 99 Cents Only Stores LLC* (2020) 51 Cal.App.5th 299, 316, fn. 8.)

requirement that he have a surgical proctor present during all surgeries, and the MEC upheld the recommendation. (*Id*. at pp. *5-*6.) About a month and a half later, the hospital gave the surgeon the choice between appealing the decision of the MEC or accepting the condition that a proctor be present during surgeries, and the surgeon chose the latter option. (*Id*. at p. *6.) Later, the president of the medical staff again summarily suspended the surgeon's privileges, but after consulting with the MEC reinstated his "proctor restricted privileges." The MEC upheld the restricted reinstatement and eventually voted to fully reinstate the surgeon with no requirement of a proctor. (*Id*. at pp. *6-*7.)

When the surgeon sued in federal district court for damages, the hospital and individual defendants moved to dismiss and argued the surgeon's state law claims were barred for failure to exhaust administrative and judicial remedies. (*Ennix*, *supra*, 2007 U.S. Dist. Lexis 66032 at p. *9.) The district court treated the motion to dismiss as a motion for summary judgment. (*Ibid*.) The court first observed that under California and Ninth Circuit authority a physician whose staff privileges are modified because of a hospital peer review process may not sue for damages without first exhausting available administrative and judicial remedies. (*Id*. at pp. *9-*13, citing *Westlake*, *supra*, 17 Cal.3d 465 & *Mir v. Little Co. of Mary Hospital* (9th Cir. 1988) 844 F.2d 646.) Although

the surgeon conceded he failed to exhaust his available administrative remedies, relying on *Joel* he argued he was excused from doing do.[8] (*Ennix*, at p. *18.)

The district court distinguished *Joel.* "The key to the holding [in *Joel*] was that the settlement agreement provided for the *full reinstatement* of [the physician's] privileges. The *Westlake* requirement could be excused where 'the administrative machinery has been commenced, but the parties resolve the dispute before its completion through settlement which awards the physician the *maximum* benefit he or she could have been afforded administratively.'" (*Ennix*, *supra*, 2007 U.S. Dist. Lexis 66032 at p. *19, quoting *Joel*, *supra*, 68 Cal.App.4th at pp. 366-367, italics added.) "The results of the agreements with plaintiff in this case were incomplete. In [both cases of summary suspension], the parties resolved their disputes by compromise—an agreement that plaintiff be limited to surgical-assisting privileges and then to imposed proctorship. Plaintiff does not dispute that full reinstatement could have been sought had he exercised his hearing rights. If he thought he was entitled to a hearing despite the mutual acceptance of an alternative action against his privileges, he 'could have sought a writ of mandate from the superior court to compel the Hospital to begin the hearing.' [Citation.] *Joel* is inapplicable here." (*Ennix*, at pp. *19-*20.) Therefore, the district court granted summary judgment against the surgeon on his state law causes of action. (*Id*. at p. *21.)

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[8] The surgeon in *Ennix* also argued the exhaustion doctrine did not apply to him because the hospital's administrative remedies were unavailable or inadequate. (*Ennix*, *supra*, 2007 U.S. Dist. Lexis 66032 at pp. *13, *20-*21.)

Like the surgeon in *Ennix*, Sujan's agreement to lift his summary suspension and to reinstate his admitting practices was "incomplete." (*Ennix*, *supra*, 2007 U.S. Dist. Lexis 66032 at p. *20.) Therefore, like the district court in *Ennix*, we find the futility exception recognized in *Joel* does not apply in this case.

Sujan contends the trial court erred because it focused solely on *Joel*'s analysis of the second *Westlake* consideration—maximization of relief—and did not weigh all four considerations. Even if the trial court was required to weigh all four considerations, something we need not decide here, failure to do so is not sufficient ground for reversal. "Because 'we review "the ruling, not the rationale,"' on this appeal from summary judgment, we may affirm on any basis supported by the record and the law." (*Vulk v. State Farm General Ins. Co.* (2021) 69 Cal.App.5th 243, 255, quoting *Skillin v. Rady Children's Hospital & Health Center* (2017) 18 Cal.App.5th 35, 43.)

Overall, we find the remaining *Westlake* considerations do not support Sujan's assertion that exhaustion of remedies would have been futile. In *Joel*, the physician entered into the agreement to be fully reinstated in exchange for withdrawing his request for a review hearing that he submitted after his summary suspension had already been reported to the California Medical Board and the NPDB. (*Joel*, *supra*, 68 Cal.App.4th at p. 364.) The appellate court found the settlement mitigated the physician's damages caused by the suspension because, had the parties not settled and the physician had pursued the review hearing and received a full reinstatement, the damages "would

arguably be greater, if for no other reason than the period of suspension would have been longer." (*Id*. at p. 367.)

Again, *Joel* is distinguishable. The settlement in that case mitigated the physician's damages because his summary suspension, *that had already been reported*, was lifted much sooner than it would have remained in place had he proceeded with the review hearing *and* received the same maximum relief he obtained from the settlement. Once more, the key fact in *Joel* was that the settlement to reinstate the physician provided him with everything he could have achieved in a review hearing, i.e., full vindication that the suspension had been unwarranted. Although the agreement in this case short-circuited a review hearing and the requirement to report Sujan's summary suspension to the California Medical Board, the highly conditioned lifting of his suspension simply did not represent the maximum relief he might have achieved in a review hearing.

The fourth consideration also favors applying the exhaustion doctrine to Sujan. To repeat, in *Joel* the appellate court found that requiring the physician to exhaust his administrative remedies would not have resulted in any judicial efficiency because the settlement demonstrated the hospital had already exercised its expertise by reevaluating the issue of staff competency on the merits, finding the summary suspension had been unwarranted from the beginning, and concluding a full and unconditional reinstatement was in the best interest of the hospital and its patients. (*Joel*, *supra*, 68 Cal.App.4th at p. 369.) The fact the settlement gave the physician everything he wanted and could have achieved from a review hearing was again key because it demonstrated the settlement

was an acknowledgement by the hospital that all parties would be best served by a speedy resolution. (*Ibid*.)

In contrast, the agreement here—with its restatement of the reasons for the summary suspension and of the hospital's continuing concerns, and the onerous terms and conditions imposed on Sujan—does not necessarily reflect a reevaluation of the merits of the summary suspension by the MEC and a decision that a full and unconditional reinstatement was in the best interest of the hospital and its patients. On these facts, we cannot say that requiring Sujan to pursue a review hearing to its completion would not have resulted in any judicial efficiency.

Finally, Sujan argues the third consideration—the potential of the administrative hearing to unearth evidence and produce a record that might be used in a subsequent lawsuit—weighs against application of the exhaustion doctrine in his case because "the record of any administrative proceeding concerning [his] suspension would have been confidential under Evidence Code section 1157." Defendants respond that *Joel*, *supra*, 68 Cal.App.4th at pages 367-368, overstated the importance of Evidence Code section 1157.

As defendants contend, the bar on discovery found in Evidence Code section 1157 does not apply in an administrative mandate proceeding in the superior court seeking reinstatement of admitting privileges, and the courts have not yet decided whether peer review documents discovered in a successful mandate proceeding are admissible in a subsequent suit for damages. (Evid. Code, § 1157, subd. (c); *California Eye Institute v.*

Superior Court (1989) 215 Cal.App.3d 1477, 1481 [holding the "narrow exception to section 1157" permits discovery by physician of peer review records "only if he/she is 'requesting hospital staff privileges'" in administrative mandamus proceeding]; *id*. at p. 1486, fn. 5 ["We are not presently called on to determine whether evidence discovered in a successful petition for administrative mandamus would be admissible should a damage action subsequently be filed."].) But we need not resolve that question here. *Joel* did not hold that all four *Westlake* considerations must be satisfied before requiring compliance with the exhaustion doctrine, and Sujan has cited no authority that does.

In sum, we hold Sujan has not met his burden of demonstrating that exhaustion of his administrative remedies would have been futile. Therefore, the trial court correctly granted summary judgment based on Sujan's failure to exhaust his available remedies.

B. *Defendants Are Entitled to Recover Attorney Fees from Sujan as Provided in the Bylaws*.

Sujan argues the trial court erred by granting defendants their attorney fees. First, he argues the attorney fee provision in the bylaws conflicts with and is preempted by section 809.9, a specific statute that governs fees to the prevailing party in a lawsuit that challenges peer review decisions, and he argues defendants were not entitled to their fees under that statute because his lawsuit was not frivolous or prosecuted in bad faith. In the alternative, Sujan argues the contractual fee provision under the bylaws is unconscionable and the trial court erred by enforcing it. We disagree and conclude defendants, as the prevailing parties, were permitted to recover their attorney fees as provided in the bylaws.

"'In general, the trial court's determination whether a party is entitled to attorneys' fees, and the amount of any such award, is reviewed under the abuse of discretion standard. [Citation.] Where, as here, however, the propriety of the award turns on an issue of statutory interpretation or implicates the legal basis for such an award, the issue is reviewed de novo as a question of law.'" (*Haun v. Pagano* (2026) 118 Cal.App.5th 667, 674-675.) "'The normal rules of appellate review apply to an order granting or denying attorney fees; i.e., the order is presumed correct, all intendments and presumptions are indulged to support the order, conflicts in the evidence are resolved in favor of the prevailing party, and the trial court's resolution of factual disputes is conclusive.'" (*Baer v. Tedder* (2025) 115 Cal.App.5th 1139, 1149.)

1. Attorney Fees in this Lawsuit Are Governed by the Contractual Fee Provision, Not Business and Professions Code section 809.9.

"'California follows the "American rule," under which each party to a lawsuit ordinarily must pay his or her own attorney fees. [Citations.] Code of Civil Procedure section 1021 codifies the rule, providing that the measure and mode of attorney compensation are left to the agreement of the parties "[e]xcept as attorney's fees are specifically provided for by statute.' (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) 'Code of Civil Procedure section 1033.5 provides, in subdivision (a)(10), that attorney fees are "allowable as costs under [Code of Civil Procedure s]ection 1032" when they are "authorized by" either "Contract," "Statute," or "Law." Thus, recoverable litigation costs do include attorney fees, but only when the party entitled to costs has a legal basis,

independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees.' (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*).)" (*Martinez v. SAI Long Beach B, Inc.* (2025) 108 Cal.App.5th 367, 373-374.)

As noted, *ante*, in addition to requiring a physician to exhaust review and appeal remedies before filing suit, section 8.1-5 of the bylaws provides: "Any practitioner who fails to exhaust the remedies (including all hearing and appeal remedies) provided in these bylaws before initiating legal action shall be liable to pay the full costs, including legal fees, required to respond to such legal action."[9] Section 809.9 provides in relevant part: "In any suit brought to challenge an action taken or a restriction imposed which is required to be reported pursuant to Section 805, the court shall, at the conclusion of the action, award to a substantially prevailing party the cost of the suit, including a reasonable attorney's fee, if the other party's conduct in bringing, defending, or litigating the suit was frivolous, unreasonable, without foundation, or in bad faith."

In its order, the trial court correctly observed that section 809.9 does not "indicate it is the exclusive basis for seeking attorney's fees involving an action challenging his

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[9] There is no question the bylaws and the fee provision contained therein were part of the contract between Sujan and CRMC. Section 16.5 of the bylaws specifically states: "Upon adoption and approval as provided in Article XV, in consideration of the mutual promises and agreements contained in these bylaws, the hospital and the Medical Staff, intending to be legally bound, agree that these Bylaws shall constitute part of the contractual relationship existing between the hospital and the medical staff members, both individually and collectively." (See *Smith v Adventist Health System/West* (2010) 182 Cal.App.4th 729, 753 [nearly identical language in hospital bylaws "removed any uncertainty . . . that they form part of a contract between the hospital and medical staff members"].)

suspension," and the court found "no basis to conclude that section 809.9 nullified the contracts present here." True, section 809.9 does not explicitly state it is the exclusive basis for attorney fees in lawsuits challenging a peer review decision, but that does not necessarily end our analysis. Section 8.1-5 of the bylaws and section 809.9 differ in significant ways, notably in that the contractual term is one-sided in favor of the hospital whereas section 809.9 applies generally to the prevailing party, and section 809.9 only applies if the court finds the losing party acted frivolously or in bad faith whereas the contractual term provides fees to the hospital if it prevails in a lawsuit alleging claims that have not been exhausted, regardless of whether the medical staff member's lawsuit was frivolous. Therefore, if section 809.9 applies to Sujan's lawsuit, it potentially conflicts with the contractual fee provision.

"When attorney fees are specifically provided for by statute, 'the question is whether the statutory attorney fees provision *expressly*, or the policy of the statute *implicitly*, overrides the freedom to contract for a different outcome.'" (*Soni v. Cartograph, Inc.* (2023) 90 Cal.App.5th 1, 11, quoting *County of Sacramento v. Sandison* (2009) 174 Cal.App.4th 646, 651, italics added.) To determine whether a statutory attorney fee provision prevails over a contractual one, we must apply the normal rules of statutory interpretation. (*Dorsey v. Superior Court* (2015) 241 Cal.App.4th 583, 595.) "When a court attempts to discern the meaning of a statute, 'it is well settled that we must look first to the words of the statute, "because they generally provide the most reliable indicator of legislative intent." [Citation.] If the statutory language is clear and

unambiguous our inquiry ends. "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." [Citations.] In reading statutes, we are mindful that words are to be given their plain and commonsense meaning.'" (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 639-640.)

On its face, section 809.9 does not apply to every lawsuit challenging the summary suspension of a physician's admitting privileges. It only applies to a lawsuit "challenging a disciplinary action or restriction reportable under section 805." (*Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1480-1481, fn. omitted; *id*. at p. 1475, fn. 3 ["Section 809.9 makes reference to matters required to be reported pursuant to section 805, i.e., to written reports known as '805 reports.'"]; see § 805, subd. (a)(7) [defining "'805 report'"].) Inter alia, an "805 report" must be submitted to the appropriate state licensing agency "within 15 days following the imposition of summary suspension of staff privileges, membership, or employment, if the summary suspension remains in effect for a period in excess of 14 days." (§ 805, subd. (e); see *Lin v. Board of Directors of PrimeCare Medical Network, Inc.* (2025) 108 Cal.App.5th 1163, 1177, fn. 8; *Asiryan v. Medical Staff of Glendale Adventist Medical Center* (2024) 100 Cal.App.5th 947, 957.)

Sujan agreed to the settlement less than 14 days after his summary suspension went into effect, to avoid the suspension from having to be reported under section 805. Relying on the legislative history of section 809.9, however, Sujan contends there is no

sound reason why it should not apply to his case. But the plain language of section 809.9 clearly demonstrates it only applies when the lawsuit challenges a peer review decision that *must* be reported pursuant to section 805. "'"[W]here . . . the language [of a statute] is clear, there can be no room for interpretation."'" (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121.) And, the Supreme Court has "consistently stated that when statutory language is clear and unambiguous, resort to the legislative history is unwarranted." (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1264.) Because Sujan's summary suspension did not remain in place for 14 or more days, CRMC was not required by law to report it to the California Medical Board and section 809.9 simply does not apply here. Therefore, we need not decide whether that statute conflicts with the contractual fee provision.

Last, Sujan argues in passing that interpreting section 809.9 to not apply to cases such as his, where the parties agree to settle their dispute during the brief window of time before the summary suspension must be reported, would result in absurd consequences. "We must, of course, interpret statutes to avoid anomalous or absurd results that the Legislature could not have intended and that would frustrate the Legislature's intent. (*Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 522; *People v. Birkett* (1999) 21 Cal.4th 226, 231.) But '[w]e must exercise caution using the "absurd result" rule; otherwise, the judiciary risks acting as a "'super-Legislature'" by rewriting statutes to find an unexpressed legislative intent. [Citation.]' (*California School Employees Assn. v. Governing Bd. of South Orange County Community College Dist.*

(2004) 124 Cal.App.4th 574, 588.)" (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 187-188 (*PGA West*).)

To repeat, section 809.9 is clear on its face that statutory attorney fees are only available in lawsuits challenging a peer review action that must be reported pursuant to section 805 and when the court finds the lawsuit was frivolous or that the losing party acted in bad faith, so there is no room for an interpretation that might lead to absurd results. We must presume the result Sujan laments is the one the Legislature intended. (*Meyer v. Sprint Spectrum L.P.*, *supra*, 45 Cal.4th at p. 640; *PGA West*, *supra*, 14 Cal.App.5th 156 at p. 188.) Nor do we find any absurdity in that result. The Legislature could have reasonably concluded attorney fees should be recoverable when a party acts frivolously or in bad faith in a lawsuit challenging a peer review decision that must be reported—an act that is otherwise immunized as a matter of law (Bus. & Prof. Code, § 805, subd. (j))—as opposed to a lawsuit challenging a peer review decision that need not be reported. We are not free to add language to section 809.9 so it will apply more broadly to Sujan's case. (Code Civ. Proc., § 1858; *Hampton v. County of San Diego*, *supra*, 62 Cal.4th at p. 350 ["Ordinarily we are not free to add text to the language selected by the Legislature."].)

In sum, we conclude section 809.9 does not apply to this lawsuit.

2. The Contractual Fee Provision Is Not Unconscionable.

The trial court rejected outright Sujan's argument that the fee provision was an unconscionable and unenforceable contract of adhesion because the cases Sujan cited

"provide for the standards for a valid arbitration agreement," and he "fail[ed] to cite any legal authorities providing that these standards are to be applied beyond the context of a dispute over the validity of an arbitration agreement." But the common law doctrine of unconscionability applies to *all contracts*, not just arbitration agreements. (Civ. Code, § 1670.5; *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125; *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 978-979; *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 638.)

"The general principles of unconscionability are well established. A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. ([*Sonic-Calabasas A, Inc. v. Moreno* (2013)] 57 Cal.4th [1109,] 1133.) Under this standard, the unconscionability doctrine '"has both a procedural and a substantive element."' (*Ibid*.) 'The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided.' ([*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*] (2012) 55 Cal.4th [223,] 246 [(*Pinnacle*)].)" (*OTO, L.L.C. v. Kho*, *supra*, 8 Cal.5th at p. 125.)

"Procedural unconscionability 'addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining

power.' (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.) This element is generally established by showing the agreement is a contract of adhesion, i.e., a 'standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.] Adhesion contracts are subject to scrutiny because they are 'not the result of freedom or equality of bargaining.' [Citation.] However, they remain valid and enforceable unless the resisting party can also show that one or more of the contract's terms is substantively unconscionable or otherwise invalid." (*Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, 492-493 (*Ramirez*).)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."'" (*Pinnacle*, *supra*, 55 Cal.4th at p. 246.) Ultimately, the question of substantive unconscionability turns on "whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 912 (*Sanchez*).)

"'Both procedural and substantive elements must be present to conclude a term is unconscionable, but these required elements need not be present to the same degree.' (*Ramirez*, *supra*, 16 Cal.5th at p. 493.) Courts 'apply a sliding scale analysis under which "the more substantively oppressive [a] term, the less evidence of procedural

unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."' (*Ibid*.)" (*Fuentes v. Empire Nissan, Inc.* (2026) 19 Cal.5th 93, 103.) "Where, as here, no disputed factual issue bears upon our unconscionability analysis, we review unconscionability de novo." (*Cook v. University of Southern California* (2024) 102 Cal.App.5th 312, 321.)

With respect to the procedural element of unconscionability, section 5.1 of the bylaws requires a physician to agree to be bound by all the bylaws, including the attorney fee provision, before being appointed to the medical staff or being granted admitting privileges. In support of his opposition to defendants' motion for attorney fees, Sujan declared that he was required to agree to the bylaws on a "take-it-or-leave-it basis" and he could not negotiate the terms thereof. Defendants submitted no contrary evidence with their reply and merely argued that, even if the court were to find the fee provision is a contract of adhesion, it was not substantively unconscionable. Therefore, we will assume for the purposes of this appeal that the attorney fee provision is a contract of adhesion.

As for the substantive element, in his opposition Sujan argued the fee provision in the bylaws is unconscionable because it only provides attorney fees to *CRMC* if it prevails in litigation. The trial court rejected this argument, noting Civil Code section 1717 mandates that contractual attorney fee provisions apply reciprocally. However, the rule of reciprocity under section 1717 does not apply to tort or other non-contract claims. (*Santisas*, *supra*, 17 Cal.4th at p. 615; *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 745.)

"Section 1717 and its reciprocity principles . . . have 'limited application. [They] cover[] *only* contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce that contract. [Section 1717's] only effect is to make an otherwise unilateral right to attorney fees reciprocally binding upon all parties to actions to enforce the contract.'" (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 820.) Because none of Sujan's claims are based on a contract, section 1717 simply does not apply.

In any event, one-sided contract terms are not necessarily unenforceable. """[U]nconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it."""" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117-118 (*Armendariz*), quoting *A & M Produce Co. v. FMC Corp*. (1982) 135 Cal.App.3d 473, 487.) The party seeking to enforce a one-sided contract term must establish "some reasonable justification for such one-sidedness based on 'business realities,'" and if the need for the special advantage is not explained in the contract itself, it must be established with evidence. (*Armendariz*, at p. 117.)

Defendants did not argue in their briefs that there is a reasonable business justification for the one-sided fee agreement, but one is apparent on its face. (See *Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 450 [finding "'reasonable justification for [a] lack of mutuality' . . . evident on the face" of a contract term].) Fees for the hospital under the bylaws are only recoverable if a member prosecutes a lawsuit in which he or she alleges claims they did not fully exhaust in the peer review process. To repeat,

the exhaustion doctrine from *Westlake*, *supra*, 17 Cal.3d 465, "furthers a number of important societal and governmental interests, including: (1) bolstering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; (3) mitigating damages; and (4) promoting judicial economy." (*Rojo v. Kilger* (1990) 52 Cal.3d 65, 86.) The salutary benefits of exhausting the peer review process are lost when a physician circumvents it and sues unsuccessfully, and it does not shock the conscience for the bylaws to provide that only the hospital should be permitted to recover its fees in this situation.[10]

Under these circumstances, we conclude the fee provision under the bylaws is not unconscionable.

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[10] During oral argument, Sujan contended that *Armendariz*, *supra*, 24 Cal.4th at page 117, strictly limits our analysis to the text of the bylaws or to evidence in the record when determining whether the one-sided fee provision is justified by business realities. Defendant responded that we may consider the wider circumstances and dynamics at play in conjunction with the text of the fee provision.

We agree with defendants. The bylaws specifically tether the hospital's ability to recover fees to a member failing to fully exhaust their peer review remedies before filing suit. Therefore, we may consider the well-settled policy reasons behind the doctrine of exhaustion of remedies when determining whether the one-sided nature of the fee provision is reasonably justified by business realities. (See *Sanchez*, *supra*, 61 Cal.4th at p. 912 [when determining whether one-sided contract term is substantively unconscionable, courts must consider "all relevant circumstances"].)

C. *The Trial Court Did Not Abuse Its Discretion By Finding Patel Was Not Liable For Attorney Fees, By Finding Defendants Did Not Properly Introduce Billing Records From Their Prior Attorneys, and By Applying Lower Hourly Rates to Defendants' Current Counsel's Fees*.

In their cross-appeal, defendants argue the trial court erred three ways in its order granting in part and denying in part their motion for attorney fees: (1) by finding Patel was not a signatory to the CRMC bylaws and, therefore, she was not liable for attorney fees; (2) by ruling the declaration in support of defendants' motion was insufficient to prove the attorney fees incurred for work performed by prior defense counsel; and (3) by applying a lower hourly rate to the work performed by two partners with defendants' current attorneys. We find no reversible error and affirm the order.

1. Defendants Cannot Recover Their Attorney Fees from Patel.

Well after defendants' motion for attorney fees had been fully briefed and just before the trial court posted its tentative ruling, Patel filed an ex parte application seeking permission to submit a supplemental opposition to the motion and, if necessary, requesting a continuance of the hearing on the motion to permit defendants to file a supplemental reply. In her proposed supplemental opposition, Patel argued she was not a member, applicant or practitioner for purposes of section 8.1-5 of the bylaws, so there was no contractual basis for ordering her to pay attorney fees. Defendants opposed the ex parte application arguing it was untimely, and in the alternative requested permission to argue the merits at the hearing. In the minute order in which the trial court adopted the

tentative as the final ruling, after neither party requested oral argument on the motion (see Cal. Rules of Court, rule 3.1308(a)(1)), the court ruled there was no need for a continuance and found there was no basis to impose fees against Patel because she was not a signatory to the bylaws.

Defendants argue the court erred because Patel's cause of action for loss of consortium was derivative of or dependent on Sujan's claims, so she too was required to establish the unlawfulness of Sujan's suspension and that he was excused from exhausting his administrative remedies. And, having failed to do so, she cannot escape liability for attorney fees under the bylaws. Patel responds that, regardless of whether her claim for loss of consortium was legally dependent on Sujan's claims, she was a nonsignatory to the bylaws and cannot be held liable for attorney fees. We agree with Patel that she was not liable for attorney fees, but for a different reason.

As defendants state, Patel's cause of action rises or falls with her husband's claims. "'A cause of action for loss of consortium is, by its nature, dependent on the existence of a cause of action for tortious injury to a spouse.'" (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 285; see *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1060, fn. 4 [wife's claim for loss of consortium "is derivative of and dependent on her husband's negligence action"].) But that does not necessarily mean defendants were entitled to recover their attorney fees, pursuant to the bylaws, from both Sujan and Patel.

In a lawsuit alleging contract based causes of action, "A nonsignatory will be bound by an attorney fees provision in a contract when the nonsignatory party '"stands in the shoes of a party to the contract."'[11] (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966, quoting *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 897.) In that situation, the nonsignatory party is liable for attorney fees if it would have been entitled to fees if it prevailed. (*Blickman Turkus, LP*, *supra*, at p. 897; *Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 679.)" (*Apex, LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1017-1018.) Put another way, "in cases involving nonsignatories to a contract with an attorney fee provision, the following rule may be distilled from the applicable cases: A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed." (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382.)

The same rule applies to nonsignatories and contractual attorney fees related to tort claims. (*Hom v. Petrou* (2021) 67 Cal.App.5th 459, 466-470 [finding no blanket rule that nonsignatories cannot recover attorney fees related to tort claims].) Whether a prevailing nonsignatory party may recover attorney fees for tort claims and, conversely, should also be liable for those fees if they lose, "is a question of contractual intent." (*Id.*

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11 A nonsignatory may also be entitled to recover attorney fees if they are a third party beneficiary of the contract. (*Cargill, Inc. v. Souza*, *supra*, 201 Cal.App.4th at pp. 966-967.)

at p. 470.) "To interpret the scope and meaning of a contractual fees provision, 'we apply the ordinary rules of contract interpretation. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation. [Citation.] Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning."'" (*Id.* at p. 465, quoting *Santisas*, *supra*, 17 Cal.4th at p. 608.)

Neither party points to extrinsic evidence of contractual intent in the record, "so our analysis focuses solely on . . . the language of the [bylaws], which we interpret as a question of law." (*Hom v. Petrou*, *supra*, 67 Cal.App.5th at p. 471.) To repeat, section 8.1-5 of the bylaws unilaterally provides that a physician or other practitioner who sues for claims that were not fully exhausted in the peer review process "shall be liable to pay the full costs, including legal fees, required to respond to such legal action." And, because Sujan's and Patel's causes of action are not based on the bylaws, the rule of reciprocity under Civil Code section 1717 does not apply. (*Santisas*, *supra*, 17 Cal.4th at p. 615.) In other words, even if Patel had prevailed in the litigation, under the clear terms of the bylaws, defendants would not have been liable to pay her attorney fees. Therefore, defendants cannot recover their attorney fees from Patel. (See *Leach v. Home Savings &*

Loan Assn. (1986) 185 Cal.App.3d 1295, 1306 [attorney fees not recoverable in noncontract lawsuit to remove a cloud on title to real property because "signatory defendants [sought] fees from . . . a nonsignatory plaintiff who would have no contractual or statutory right to receive fees if she had prevailed"].)

In sum, we conclude the trial court properly ruled defendants cannot recover attorney fees from Patel.

2. Denial of Attorney Fees for Defendants' Former Attorneys.

Defendants argue they properly introduced evidence of attorney fees billed by their former attorneys in this litigation, and, in the absence of an evidentiary objection by Sujan to the declaration in support of the fee motion, the trial court erred by ruling on its own motion that defendants did not properly introduce records of the fees they incurred from their former counsel's representation and denying that portion of their fee request. Sujan responds that, "[b]y failing to contest the tentative ruling, Defendants have waived the right to claim that this portion of the court's ruling is in error."[12] Moreover, Sujan argues the trial court properly ruled defendants' declaration was insufficient to introduce the billing records of their former attorneys. We agree with Sujan.

In support of their motion for attorney fees, defendants submitted the declaration of Colin M. McGrath, formerly a partner with Manatt, Phelps & Phillips, LLP (Manatt),

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[12] "'[T]he correct term is "forfeiture" rather than "waiver," because the former term refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege. [Citations.] As a practical matter, the two terms on occasion have been used interchangeably.'" (*PGA West*, *supra*, 14 Cal.App.5th at p. 175, fn. 13, quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

defendants' attorneys of record. McGrath declared he had "personal knowledge of the matters set forth herein, and if called as a witness [he] could and would testify competently thereto under oath." McGrath described how, "[i]n the regular course of business, Manatt's timekeepers keep detailed, contemporaneous time records," and he declared he was "familiar with the work performed by Manatt attorneys on behalf of Defendants in this matter" and he had personally reviewed the fees and invoices Manatt "sent to Defendants for payment in this matter."

However, McGrath also declared he was "familiar with the work performed by Defendants' *prior* counsel in this matter," having reviewed the fees and invoices from five other law firms that represented defendants through various stages of the litigation.[13] (Italics added.) McGrath declared the attorneys from all six firms who represented defendants "were cost-efficient in their management and defense of this action, performing only work that was necessary for the case and the task at hand," and that he "carefully reviewed the time entries billed to Defendants" from all six firms and deleted any entries that appeared to be duplicative. McGrath summarized the billing and attached copies of the modified invoices sent to defendants from all six firms.

Sujan did not object to any of the evidence submitted with defendants' fee motion and he did not argue McGrath's declaration was insufficient to introduce the billing records from defendants' prior attorneys. Yet, in its tentative order, the trial court ruled the evidence submitted with defendants' motion was "insufficient to meet the evidentiary

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[13] In order of appearance, those firms were Nossaman, LLP; Lewis Brisbois; Barber Ranen, LLP; Daugherty & Lourdan, LLP; and Dinsmore & Shohl.

standard in demonstrating the nature and the amount of work performed by their prior counsels." The court found McGrath's declaration and the attached spreadsheets "are not evidence of the services actually performed by Defendants' prior counsels."[14]

Citing authorities for the propositions that a declaration must state facts showing the declarant may competently testify to the facts averred therein, and a declaration based on information and belief instead of personal knowledge is hearsay, the court found McGrath's declaration was incompetent to prove the attorney fees for work performed by defendants' prior attorneys. "Other than the portion representing fees billed by Defendants' present counsels, this exhibit [i.e., the invoices attached to McGrath's declaration] is unaccompanied by a declaration by a source with personal knowledge of the truth of the information stated therein and is therefore inadmissible hearsay. Therefore, Defendants have demonstrated entitlement to only the fees properly supported by evidence, that is the fees billed by attorneys of Manatt, . . . and not their prior counsels." When neither party requested oral argument on the trial court's tentative ruling, the court adopted the tentative as its order denying the motion in part.

By not requesting oral argument on the trial court's tentative ruling and arguing McGrath's declaration was legally sufficient to introduce their former counsel's billing records, or, in the alternative, by not timely moving the trial court to reconsider its ruling,

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[14] Inter alia, the trial court relied on Code of Civil Procedure section 1030. That statute only applies when a plaintiff "resides out of the state[] or is a foreign corporation," and it permits the defendant to apply to the trial court for an order requiring the plaintiff to post an undertaking in the amount of costs and attorney fees that might be awarded in the event the defendant prevails. (Code Civ. Proc., § 1030, subd. (a); see *Yao v. Superior Court* (2002) 104 Cal.App.4th 327, 331.) It has no application here.

defendants have forfeited their claim of error. "It is axiomatic that arguments not raised in the trial court are forfeited on appeal." (*Kern County Dept. of Child Support Services v. Camacho* (2012) 209 Cal.App.4th 1028, 1038.) "The forfeiture rule generally applies in all civil and criminal proceedings. [Citations.] The rule is designed to advance efficiency and deter gamesmanship." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.) "[T]he purpose of the forfeiture rule 'is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.'" (*Unzueta v. Akopyan* (2019) 42 Cal.App.5th 199, 215, quoting *In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

Defendants respond that their mere act of submitting on the tentative ruling does not constitute a forfeiture of their claim of error on appeal. True, the courts have held a party is not required to object to a tentative ruling and reiterate arguments made on a motion to preserve their right to challenge the ruling on appeal. (*Lindsay v. Patenaude & Felix APC* (2024) 107 Cal.App.5th 335, 343; *Parkford Owners for a Better Community v. Windeshausen* (2022) 81 Cal.App.5th 216, 226.) But those cases only apply "if the argument was previously raised." (*Department of Water Resources Environmental Impact Cases* (2022) 79 Cal.App.5th 556, 574, fn. 6.) To repeat, Sujan did not object to any of the evidence defendants submitted with their motion for attorney fees and he did not argue McGrath's declaration contained hearsay or was otherwise incompetent to introduce the billing records of defendants' former attorneys. That evidentiary argument was simply not addressed in the moving papers when the trial court issued its tentative decision. Therefore, once the trial court raised the issue on its own motion and ruled

defendants had not properly introduced those billing records, it was incumbent on defendants to request oral argument and argue the sufficiency of McGrath's declaration or make that argument in a motion for reconsideration. Having failed to do so, they cannot make that argument on appeal.

Moreover, even if the argument was not forfeited, we agree with Sujan that the trial court did not err. "In order for the trial court to determine a reasonable rate and a reasonable number of hours spent on a case, a party must present some evidence to support its award request. [Citation.] The declaration of an attorney as to the number of hours worked on a particular case may be sufficient evidence to support an award of attorney fees, even in the absence of detailed time records. [Citation.] Indeed, sufficient evidence to support an attorney fee award may include '[d]eclarations of counsel setting forth the reasonable hourly rate, the number of hours worked and the tasks performed.' [Citation.] There is no requirement that an attorney provide time records or billing statements." (*Cruz v. Fusion Buffet, Inc*. (2020) 57 Cal.App.5th 221, 237-238; see Cal. Rules of Court, rule 3.1306(a) ["Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown"].)

"The Evidence Code provides that 'the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter.' (Evid. Code, § 702, subd. (a).) 'A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.' (*Id*., subd. (b).)"

(*Preciado v. Freightliner Custom Chassis Corp.* (2023) 87 Cal.App.5th 964, 974.) "Personal knowledge is '"a present recollection of an impression derived from the exercise of the witness'[s] own senses."'" (*Chambers v. Crown Asset Management, LLC* (2021) 71 Cal.App.5th 583, 601, quoting *People v. Lewis* (2001) 26 Cal.4th 334, 356.)

"Evidentiary rulings by the trial court are reviewed for prejudicial abuse of discretion. [Citation.] 'Claims of evidentiary error under California law are reviewed for prejudice applying the "miscarriage of justice" or "reasonably probable" harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, that is embodied in article VI, section 13 of the California Constitution. Under the *Watson* harmless error standard, it is the burden of appellants to show that it is reasonably probable that they would have received a more favorable result at trial had the error not occurred.'" (*Mountain View Police Dept. v. Krepchin* (2024) 106 Cal.App.5th 480, 506; see Code Civ. Proc., § 475; Evid. Code, §§ 353, 354.)

Although McGrath purported to declare he had personal knowledge of every fact stated in his declaration, and that if called to testify he could do so competently, we agree with the trial court that the declaration was insufficient with respect to the attorney fees billed by defendants' prior attorneys. Presumably, McGrath had personal knowledge of and could testify about the work performed by *his own firm*, of *its* timekeeping and billing practices, and that the work performed by *its* lawyers was cost-effective and necessary. However, at most his declaration establishes he could testify truthfully to having received and reviewed the invoices sent to him from the other firms. As the trial

court noted, McGrath simply did not lay a sufficient foundation to establish he had personal knowledge of the truth of the *information contained within* the invoices from those other firms.

In effect, the portions of McGrath's declaration addressing attorney fees billed by defendants' prior firms is based solely on information and belief. "[I]t is true that an affidavit is normally presumed to state matters personally known to the affiant and lacks evidentiary value, in a variety of civil contexts, when based on information and belief, or hearsay." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 87; see *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 624 ["A statement made without personal knowledge and solely upon information and belief is hearsay and no proof of the facts contained therein"].) "It is decidedly *not* true, however, that an affidavit upon information and belief is an anomaly in the law, bereft of legal significance." (*City of Santa Cruz*, at p. 87.) An affidavit may properly allege facts based solely on information and belief when a statute expressly or impliedly permits it, or when "the facts would otherwise be difficult or impossible to establish." (*Ibid*.) Defendants point to no statute that permits declarations in support of motions for attorney fees to be based on information and belief. And nothing in the record supports the inference that it would have been impossible or especially difficult for defendants to obtain declarations from attorneys with their prior firms, based on personal knowledge, to properly introduce into evidence their billing invoices in support of the fee motion.

Last, we reject defendants' suggestion that the trial court abused its discretion by acting on its own motion to address the evidentiary sufficiency of McGrath's declaration. "[A] court may find evidence to be inadmissible without an objection having been raised by a party." (*Estate of Herzog* (2019) 33 Cal.App.5th 894, 911.) It has been suggested "this power should be exercised only where the evidence is irrelevant, unreliable, misleading, or prejudicial, and that relevant and useful evidence that is merely incompetent under technical exclusionary rules ought to be received in the absence of objection by counsel'" (*Gonzalez v. Santa Clara County Dept. of Social Services* (2017) 9 Cal.App.5th 162, 173), and that the proponent should be given the opportunity to cure the defect before the court excludes evidence on technical grounds (*id*. at p. 174). Here, the trial court gave defendants notice in the tentative ruling of its intention to exclude the billing records of their former attorneys, yet defendants did not request oral argument on the tentative or request leave to cure the defect, for example, by submitting declarations from their former attorneys to prove the hourly rate and number of hours they reasonably spent on the defense and billed to defendants. By not doing so, they cannot now claim the ruling was a prejudicial abuse of discretion.

Therefore, we conclude the trial court did not abuse its discretion by denying defendants' request for attorney fees incurred by representation from their former attorneys.

3. Reduced Hourly Rate for Partners.

Last, defendants argue the trial court erred by ruling they were limited to the reasonable hourly rates charged in the Riverside County area, and reducing the hourly rate claimed for work performed by two partners with defense counsel's firm. We find no abuse of discretion.

"The courts repeatedly have stated that the trial court is in the best position to value the services rendered by the attorneys in his or her courtroom [citation], and this includes the determination of the hourly rate that will be used in the lodestar calculus. [Citation.] In making its calculation, the court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees [citation], the difficulty or complexity of the litigation to which that skill was applied [citations], and affidavits from other attorneys regarding prevailing fees in the community and rate determinations in other cases." (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 437.)

In its fee motion and the supporting declaration of McGrath, defendants claimed the hourly rates at which attorneys with Manatt billed for their services were reasonable based on prevailing rates for similarly experienced attorneys in the Los Angeles and San Francisco areas. In total, defendants requested an award of $448,317.50 in attorney fees billed by Manatt. In its order, the trial court stated it had no issue with the total number of hours claimed by four attorneys, including McGrath (558.7), and had no issue with the hourly rates claimed for two associate attorneys ($515 and $425, respectively). However,

the court indicated the hourly rate of $875 claimed by both McGrath and Charles Weir, another partner with Manatt, "exceeds the prevailing hourly rate for attorneys practicing in the community, which in this case is Riverside County." Therefore, the court adjusted the hourly rate for Weir downward from $875 to $650 and for McGrath downward from $875 to $550, which the court found were "reasonable" rates. Applying those lower hourly rates, the court awarded defendants a total of $313,830.00 in attorney fees, or $134,487.50 less than what defendants had requested for work performed by their attorneys with Manatt.

"'The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong"'—meaning that it abused its discretion." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award.' [Citation.] The reasonable hourly rate is that prevailing in the community for similar work." (*Ibid*.)

"The relevant 'community' is generally based on where the services are rendered, i.e., where the court is located." (*Tidrick v. FCA LLC* (2025) 112 Cal.App.5th 1147, 1157.) "[A] court's use of reasonable rates in the local community, as an integral part of

the initial lodestar equation, is one of the means of providing some objectivity to the process of determining reasonable attorney fees. Such objectivity is ""'vital to the prestige of the bar and the courts.'"" (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1243, quoting *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.)

Defendants state they "did not seek out or attempt to engage a local Riverside County firm to handle this matter," and argue "they should not have had to do so in order to be entitled to recover their reasonable attorneys' fees when they prevailed in the action." They also assert CRMC is owned by a corporation that operates hospitals nationwide, and it should not be penalized for not hiring "inexperienced and unfamiliar local counsel" in every market.[15]

A trial court may deviate from the default rule and award fees based on higher hourly rates in the attorney's "home" market "where justified by the circumstances." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 72.) For example, "'in the unusual circumstance that local counsel is unavailable,' or that 'hiring local counsel was impracticable,' the trial court is not limited to the use of local rates and may instead use the hourly rate of out-of-town counsel from a higher fee market in calculating the lodestar amount." (*Marshall v. Webster* (2020) 54 Cal.App.5th 275, 286.)

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[15] Here too, Sujan argues defendants forfeited this claim of error by not objecting to the tentative ruling. Defendants did argue in their motion that the prevailing rates in the Los Angeles and San Francisco areas were reasonable, so we conclude their mere submission to the tentative ruling did not forfeit their claim of error on this point.

However, the main decision defendants cite in support of their argument emphasizes the trial court's broad discretion when deciding whether to apply *or* to deviate from the default rule. "While courts tend to default to the rates in the location in which the case was litigated to determine reasonableness [citation], the law does not *require* this approach. [Citation.] This is because the court's determination of the relevant legal '"market rate" . . . *lie[s] within [its] broad discretion*.' [Citation.] In setting a reasonable rate, the court *may consider* various factors beyond the applicable legal community, such as the attorney's skill and experience, the nature of the work performed, the relevant area of expertise, and the attorney's customary billing rates. [Citation.] As a result, the trial court *is not legally confined* to the four corners of the county where the case is tried to determine a reasonable rate." (*Hoglund v. Sierra Nevada Memorial-Miners Hospital* (2024) 102 Cal.App.5th 56, 82, first italics in original, other italics added.)

Nothing in the record supports the implication in defendants' brief that it was impossible or impracticable for them to retain competent local counsel. The trial court could have reasonably determined, based on its experience and knowledge of the local legal community, that defendants could have obtained representation in the Riverside County area by attorneys with similar experience and expertise.

Moreover, it bears repeating here that we must afford to the trial court great deference when reviewing a ruling for abuse of discretion. "As to what such showing requires, it has been described in terms of a decision that 'exceeds the bounds of reason'

(*People v. Beames* (2007) 40 Cal.4th 907, 920), or one that is arbitrary, capricious, patently absurd, or even whimsical. (See, e.g., *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 390 [""'arbitrary, capricious, or patently absurd'""]; *People v. Benavides* (2005) 35 Cal.4th 69, 88 [ruling ""'falls "outside the bounds of reason"""']; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614 ['arbitrary, whimsical, or capricious'].) In [a more] recent observation on the subject, our Supreme Court said that 'A ruling that constitutes an abuse of discretion has been described as one that is "so irrational or arbitrary that no reasonable person could agree with it."' (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)" (*Artus v. Gramercy Towers Condominium Assn.* (2022) 76 Cal.App.5th 1043, 1051 [trial court did not abuse its discretion by denying plaintiff's motion for attorney fees].)

On this record, we simply cannot conclude the trial court's ruling on the reasonable hourly rates for defense counsel exceeded the bounds of reason or was arbitrary and capricious.[16]

[16] In addition, we find the court's selection of a $100 difference between the hourly rate for Weir's and McGrath's work was not an abuse of discretion. At the time of the motion, Weir had been practicing for 24 years whereas McGrath had been practicing for half that time.

III.

DISPOSITION

The judgment and postjudgment order on attorney fees are affirmed.

Defendants shall recover their costs in plaintiffs' appeal. Plaintiffs shall recover their costs in defendants' cross-appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

CERTIFIED FOR PUBLICATION

McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.