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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

MUHAMMAD ANWAR,

Plaintiff and Respondent,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendant and Appellant.

F066874

(Super. Ct. No. MCV034056)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Dale J. Blea,
Judge.

Oviedo Law Group and Ovidio Oviedo, Jr., for Defendant and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Michael F. Ball, Todd W.
Baxter and Scott M. Reddie for Plaintiff and Respondent.

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The California Department of Corrections and Rehabilitation (CDCR) provides medical treatment to inmate/patients, in part, by contracting with physicians in the community. Plaintiff, Muhammad Anwar, a board-certified general surgeon, was one of the community physicians who contracted with CDCR to treat the inmate/patients at Central California Women's Facility (CCWF) and Valley State Prison for Women (VSPW). At the relevant time, Anwar did not contract directly with CDCR, but provided services through a contract CDCR had with a physicians group medical corporation, Madera Multi Specialty Group (MMSG).¹

On July 11, 2005, Anwar was informed he would no longer receive any referrals for treatment of the inmate/patients at CCWF. Within weeks, he also was informed he would not receive any referrals for the treatment of inmate/patients at VSPW. This decision allegedly was devastating to Anwar's medical practice because he had been treating inmate/patients for approximately 15 years and had devoted the majority of his practice to doing so. Despite numerous requests, CDCR never provided an explanation for these decisions.

Anwar filed suit, which included causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and a violation of due process. The jury found in favor of Anwar on the contract causes of action and awarded him \$3,300,000.

CDCR raises three arguments in this appeal. First, it contends Anwar was not a party to the contract and thus cannot recover for breach of the contract. As we shall explain, the contract prepared by CDCR, and which forms the basis of recovery, was

¹CDCR requests we take judicial notice of various documents from the Secretary of State's office related to the incorporation of MMSG. These documents were not before the trial court. Generally, reviewing courts do not take judicial notice of documents not presented to the trial court, and we decline to do so here as no exceptional circumstances exist that would justify deviating from the general rule. (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

prepared in such a way that the effect was to include all the physicians who provided services to the inmate/patients as parties to the contract. While it appears this was not CDCR's unspoken intent, we conclude our reading of the contract is the only logical interpretation of the agreement.

Second, CDCR argues that even if Anwar was a party to the agreement, and CDCR breached the agreement, damages must be limited to the 60 days following the discontinuation of referrals to him because the contract included a provision permitting either party to terminate the contract upon giving the other party written notice. We agree with this contention, as prior cases, including one from this court, directly apply to the facts of this case.

Third, CDCR claims the trial court erred in excluding a letter offered by CDCR as impeachment of Anwar. We conclude that even if the trial court's ruling was erroneous, CDCR cannot establish the error resulted in a miscarriage of justice.

We will remand the matter to the trial court to determine the amount of damages Anwar incurred in the 60-day period immediately following CDCR's decision to stop referring patients to him.

FACTUAL AND PROCEDURAL SUMMARY

The Fourth Amended Complaint and CDCR's Answer

The fourth amended complaint is the operative pleading in this case and contains five causes of action. The second and third causes of action were resolved without being submitted to the jury. We focus on the remaining causes of action.

The general allegations require only a brief summary. Anwar admitted he was at all relevant times a member of MMSG, his membership formalized with a provider agreement. MMSG provided medical services to two prisons run by the CDCR in Madera County—CCWF and VSPW. These services were provided pursuant to two contracts between MMSG, CDCR and Anwar. In the alternative, Anwar alleged he was a third party beneficiary to the contract between MMSG and CDCR. In either event,

Anwar provided services to inmate/patients at CCWF and VSPW for many years and was paid for his services. The relationship between Anwar and CDCR allegedly became a fiduciary or quasi-fiduciary relationship, giving Anwar additional protections.

Anwar alleged he provided appropriate medical services and complied with all rules and regulations of the prisons. In reliance on the contract between CDCR and MMSG, Anwar limited his practice primarily to treating inmate/patients.

On July 11, 2005, Anwar was advised his services would no longer be utilized for treating inmate/patients. Anwar alleged he was prevented from treating inmate/patients for arbitrary and capricious reasons, and CDCR acted in violation of the rules and regulations of CCWF and VSPW. The contract between CDCR and MMSG allegedly did not provide CDCR with the authority to prevent any particular member of MMSG from treating inmate/patients. Moreover, CDCR ignored repeated requests from Anwar and requests made on behalf of Anwar for an explanation for this action.

These allegations formed the basis for the various causes of action in the complaint. The first cause of action is titled "DEPRIVATION OF RIGHTS SECURED BY THE CALIFORNIA STATE CONSTITUTION" and alleges CDCR's actions deprived Anwar of his constitutional right that precludes the state from taking property from him without just compensation and to be free from any law that impairs his right to contract as defined in article I, sections 1 and 7 of the California Constitution. The acts of CDCR allegedly prevented Anwar from treating inmate/patients at the two prisons. CDCR's actions allegedly caused Anwar to lose income and seek medical treatment for emotional distress.

The fourth cause of action is titled "BREACH OF CONTRACT" and alleges CDCR breached the contract between CDCR and MMSG under the theory that Anwar was a party to the contract or was a third party beneficiary of the contract. The breach occurred when CDCR prevented Anwar from treating inmate/patients.

The fifth cause of action is titled “BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING” and alleges CDCR’s actions breached the covenant of good faith and fair dealing that is implicit in every contract when it stopped referring inmate/patients to Anwar without good cause or any cause.

CDCR’s answer denied each and every allegation and asserted numerous affirmative defenses.

The Testimony

Although the trial was lengthy, there are not any significant factual disputes about the events that led up to the decision to stop referring patients to Anwar. Anwar was a board-certified general surgeon who began seeing inmate/patients in 1990. He found the practice beneficial because over time he devoted the vast majority of his efforts into treating inmate/patients. Initially, he worked well with CDCR and provided significant assistance in adopting cost-saving procedures that benefited CDCR and the inmate/patients.

When Anwar first decided to treat inmate/patients, he presented the contract to the local physicians association, Madera Valley Physicians Association (MVPA). MVPA, however, rejected the contract because many of the physicians did not want to treat inmates. Anwar then entered into an individual independent contractor agreement with CDCR. He also recruited other physicians to treat inmate/patients. These physicians also signed independent contractor agreements with CDCR.

At one point, the chief medical officer at one of the prisons, Dr. Anthony DiDomenico, approached Anwar and asked if all of the physicians could bill for their services through Madera Community Hospital to reduce the paperwork submitted to CDCR. In approximately 1997, DiDomenico again approached Anwar and asked him to form a medical group so CDCR could have a single contract for the whole group instead of numerous individual independent contractor agreements. In 1998 Anwar formed MMSG to accomplish this result. In response to Anwar’s concerns, DiDomenico

promised Anwar that as long as the new group continued to do a good job, it would continue to get the contract with CDCR.

DiDomenico died prior to the dispute between Anwar and CDCR. Accordingly, Anwar's testimony about the discussions that led to the formation of MMSG was the only evidence presented on the issue.

Anwar testified that because of his concern that MVPA would begin competing for the CDCR contract, DiDomenico promised that as long as the new group continued to do a good job, it would continue to get the contract. "After the MMSG was formed in June of 1998 with the promise of Dr. DiDomenico that we will have the contract with the [CDCR] with MMSG that is when we signed that contract." "[DiDomenico] was the one who told me to start [MMSG] for the convenience of the [CDCR]. And he promised me that as long as you provide the services at the level you are providing it, you will have the contract." "Because [DiDomenico's] promise with me was that, as long as you are performing the great services you are doing and your group is doing, we will have a long-term relationship. And that was the reason why when he asked me to form the MMSG and I had my concern about it on forming MMSG that is the promise he made that we are going to have a long relationship with you and not only this contract, VSPW, but they were promising a long relationship."

MMSG signed its first contract with CDCR in 1998 (contract No. VSPW 98054) (hereafter the 1998 Contract). Anwar then entered into an independent provider agreement with MMSG. Anwar was president of MMSG from its inception until 2004, when Dr. Mazhar Javaid succeeded him.

MMSG entered into a second contract with CDCR with a stated term of July 1, 2001, to June 30, 2005 (contract No. ICJ01009) (hereafter the 2001 Contract). The only items open to negotiation were rates. The remaining provisions of the contract were not negotiable.

A third contract was entered into between the parties with a stated term of July 1, 2005, through June 30, 2008 (contract No. ICHC05133) (hereafter the 2005 Contract). This contract was not approved by CDCR until March 20, 2006, but apparently was treated by the parties as retroactive to July 1, 2005. The jury also apparently concluded the contract was retroactive to July 1, 2005, because it is the only contract CDCR was found to have breached.

Forrest Follett, M.D., began working at the prisons in 1991 and retired in early 2005. He was the chief medical officer (CMO) at VSPW at the time of his retirement. He testified Anwar had done a wonderful job treating the inmate/patients for as long as he had known him. He did not report any problems with the care or the charges for the treatment provided by Anwar.

Nonetheless, on July 11, 2005, after the expiration of the 2001 Contract and before the 2005 Contract was signed, Anwar was called into the office of the CMO for CCWF, Dr. Sampath Suryadevara. Suryadevara, who had been the CMO at CCWF since 2001, told Anwar CDCR would no longer utilize his services at CCWF. On August 11, 2005, Anwar was informed his services were no longer required at VSPW. No explanation was given for the decision not to utilize Anwar's services at either facility, despite numerous requests from various individuals for an explanation.

Verdict and Posttrial Motions

The jury found (1) Anwar was a party to the 2001 Contract, but CDCR did not breach the contract; (2) Anwar was a party to the 2005 Contract and CDCR breached the contract, which caused Anwar damage; (3) CDCR did not breach the implied covenant of good faith and fair dealing regarding the 2001 Contract; (4) CDCR breached the implied covenant of good faith and fair dealing in the 2005 Contract, which caused Anwar damage; and (5) CDCR failed to provide Anwar with adequate notice of the reasons he was no longer referred patients by CCWF and VSPW and failed to provide him with an opportunity to respond to the alleged reasons for no longer referring him patients at

CCWF and VSPW. The jury awarded damages for breach of contract and breach of the implied covenant of good faith and fair dealing in the amount of \$3,300,000.

The trial court granted Anwar's motion for prejudgment interest (Civ. Code, § 3287, subd. (b)), but denied CDCR's motion for a new trial.

DISCUSSION

CDCR raises three arguments in this appeal. First, it argues the verdict must be reversed because the jury erred when it determined Anwar was a party to the 2005 Contract. If Anwar was not a party to the contract, he is precluded from recovering damages for either breach of contract or breach of the covenant of good faith and fair dealing.

Second, CDCR asserts that even if Anwar was a party to the contract, and he is entitled to recover damages, those damages are limited to a 60-day period because the contract contained a provision that permitted either party to cancel the contract on 60 days' written notice to the other party.

Third, CDCR claims the trial court erred when it precluded CDCR from introducing an exhibit that established it provided Anwar with an explanation for the decision to stop referring patients to him, although the letter was sent long after July 11, 2005.

I. Jurisdiction

We begin with Anwar's contention that CDCR failed to file its notice of appeal within the time permitted by law, thus depriving this court of jurisdiction to decide the issues raised by CDCR.

The facts are not in dispute. CDCR timely filed a motion for a new trial on December 20, 2012. (Code Civ. Proc., § 659, subd. (a)(2).) The trial court's power to rule on the motion for new trial expired 60 days after the mailing of notice of entry of judgment by the clerk or 60 days after service on the moving party by any party of written notice of entry of judgment, whichever was earlier, or, if no notice of entry of

judgment was served, then 60 days after the filing of the first notice of intention to move for a new trial. (*Id.*, § 660.) The notice of entry of judgment was filed and served by Anwar on December 7, 2012. The time for the trial court to rule on the motion, therefore, expired on February 5, 2013 (60 days after December 7, 2012).

On January 31, 2013, the trial court held a hearing on CDCR's motion for new trial and denied the motion. Anwar's counsel was ordered to prepare an order. The record contains a minute order dated January 31, 2013, that reflects the trial court denied the motion for new trial. In addition, the register of actions in the clerk's transcript indicates that on January 31, 2013, a hearing was held on the motion for new trial and the result was a denial of the motion. The order denying the motion for a new trial was signed and filed on February 11, 2013. Anwar's counsel served the notice of entry of order on February 20, 2013. The notice of appeal was filed on March 8, 2013.

The general rule is that a notice of appeal must be filed within 60 days after the notice of entry of judgment is served. (Cal. Rules of Court, rule 8.104(a)(1)(A), (B).) The time to file a notice of appeal is extended when a motion for new trial is filed. (*Id.*, rule 8.108.)

“If the motion for a new trial is denied, the time to appeal from the judgment is extended for all parties until the earliest of:

- (A) 30 days after the superior court clerk, or a party serves an order denying the motion or a notice of entry of that order;
- (B) 30 days after denial of the motion by operation of law; or
- (C) 180 days after entry of judgment.” (Cal. Rules of Court, rule 8.108(b)(1).)

The dispute in this case is whether the motion for new trial was denied by operation of law because the trial court failed to rule on the motion within the time permitted by law. CDCR filed its notice of appeal within 30 days of service of the order denying its motion for new trial, but *not* within 30 days after the motion would have been denied by operation of law.

A motion for new trial is denied by operation of law when it is not *determined* within the time parameters discussed above (in this case by February 5, 2013). “[T]he effect [of not determining a new trial motion in a timely manner] shall be a denial of the motion without further order of the court,” i.e., the motion is denied by operation of law. (Code Civ. Proc., § 660.) Section 660 defines the term “determined” as follows: “A motion for a new trial is not determined within the meaning of this section until an order ruling on the motion (1) is entered in the permanent minutes of the court or (2) is signed by the judge and filed with the clerk.”

Anwar acknowledges the January 31, 2013, minute order denying the motion in the record. Nonetheless, Anwar argues this minute order was not entered into the permanent minutes of the trial court until February 6, 2013, the day after the time for ruling on the motion for new trial expired. Since the written order that Anwar prepared at the direction of the trial court was not signed and filed until February 11, 2013, which was well after the time allowed the trial court to determine the motion, Anwar argues the motion for new trial was denied by operation of law.

The record indicates the January 31, 2013, minute order was entered into the trial court’s computer system on that date. Therefore, it would appear the minute order was entered in the permanent minutes of the trial court on that date. This conclusion comports with the presumption that an official duty has been regularly performed. (Evid. Code, § 664.)

Anwar, however, argues the minute order was not entered into the permanent minutes of the trial court until it was electronically signed by the court clerk on February 6, 2013. We disagree for two reasons.

First, Anwar’s argument is based on the declaration filed by his counsel (hereafter the declaration), which was included in a motion to dismiss the appeal he filed with this court. That motion was denied on August 5, 2013. As we shall explain, there is no evidentiary value to the declaration.

The relevant portion of the declaration is paragraph 6, which states:

“On February 6, 2013, one day after the trial court lost jurisdiction to rule on the Motion for New Trial, I am informed and believe, based upon telephone and e-mail communications with the Madera County Superior [Court], the court clerk signed (not by hand but in the court computer system) a minute order denying the Motion for New Trial. I am further informed and believe that the purpose for signing the minute order in the court’s computer system is so that the minute order cannot be thereafter changed or altered by anyone other than the clerk who actually signs the minute order. Attached hereto as Exhibit 5 is a true and correct printout of a March 19, 2013 e-mail to me from Doina McFarland, Legal Clerk II/Appeals, Madera County Superior Court, including the full e-mail chain before Ms. McFarland’s response, all of which explains the statements made in this paragraph. The actual minute order currently found in the court file, a true and correct copy of which is attached hereto as Exhibit 6, is not dated, signed or file stamped and was not served on the parties.”

The e-mail chain to which the declaration refers consists of at least two e-mails from Anwar’s counsel to the Madera County Superior Court Clerk’s Office seeking to determine when the January 31, 2013, minute order was entered into the permanent minutes of the court. Counsel was routed to McFarland, who responded:

“Thank you for your email, very helpful to me. I was able to find out that the court clerk signed (in the system, not by hand) the minute order on February 6, 2013. The signing is so that another clerk would not be able to change/alter the minute order, only the signatory can do so. [¶] I very seldom see minute orders actually signed and those that I’ve seen are in the criminal files by the judge, not the clerk. I wonder if that is something we should be doing when it comes to orders made in open court. I was always under the impression that the date of the minute order is the date of the judgment/order unless court orders counsel to prepare the order.”

The problems with the declaration are numerous. It is sufficient to note (1) counsel’s statements lacked foundation and were not based on personal knowledge (*Brown v. Superior Court* (1987) 189 Cal.App.3d 260, 265 [declaration made on information and belief is not competent evidence of the facts stated therein]); (2) McFarland did not sign anything under penalty of perjury; (3) there is no foundation to establish counsel communicated with the Madera County Superior Court Clerk’s

Office;² (4) there is no foundation for McFarland's conclusion about when the minute order was "electronically signed" (it appears from the e-mail that she spoke with an unknown third person who advised her of this "fact," but we cannot be certain from this e-mail); (5) there is no foundation to establish McFarland was qualified to determine (a) when the minute order was electronically signed, or (b) the purpose of the electronic signature; and (6) there is no evidence the "electronic signature" is required before the minute order becomes part of the permanent minutes of the court (the e-mail suggests the minute order can be changed, even after it is electronically signed, so the addition of the signature simply limits who can go into the system and change the minute order).

Since the declaration presents no evidence to support the assertions on which Anwar relies, the only reliable evidence before this court is the January 31, 2013, minute order, a document on which we routinely rely.

Second, even if we were to assume the January 31, 2013, minute order was not electronically signed until February 6, 2013, there is nothing in this record, or in any cases or statute, that suggests an electronic signature must be affixed to a computerized minute order before it becomes part of the permanent minutes of the court. The cases cited by Anwar predate the substantial change in recordkeeping that has occurred with the computerization of court records and thus do not provide any assistance in this case.

Moreover, the lack of admissible and reliable evidence to establish the procedures used in Madera County Superior Court leaves us without any basis to conclude what procedures are necessary before a minute order becomes part of the permanent record, and if those procedures were followed in this case. Anwar conceded as much when he stated in his motion that he was "not aware of all the procedural steps that are required to enter an order into the 'permanent minutes' of the Madera County Superior Court."

²We are not suggesting counsel fabricated this evidence, only pointing out the lack of foundation in the declaration.

The record establishes a minute order denying the motion for new trial was entered in the records of the Madera County Superior Court on January 31, 2013. There is no evidence this minute order was entered into anything other than the permanent minutes of the court. Accordingly, we conclude the trial court retained jurisdiction to sign the written order prepared by counsel. Since CDCR filed its notice of appeal within 30 days of service of the notice of the order denying CDCR's motion for new trial, it was timely.

II. Was Anwar a Party to the 2005 Contract?³

The primary argument put forth by CDCR is that Anwar was not a party to the 2005 Contract, thus absolving CDCR of any liability for breach of contract or breach of the covenant of good faith and fair dealing. To support its claim, CDCR first focuses on the face page of the contract, which clearly identifies the parties to the contract as CDCR and MMSG. CDCR also argues the extrinsic evidence that was presented either did not pertain to the 2005 Contract or supported its view that Anwar was not a party to the contract. In response, Anwar argues the extrinsic evidence was admitted properly and established he was a party to the contract.

As we shall explain, we conclude it is unnecessary to resort to extrinsic evidence to resolve the question of whether Anwar was a party to the 2005 Contract.⁴ Instead, we

³Normally, interpretation of a contract, including the identity of the parties, is a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; see Evid. Code, § 310, subd. (a) [construction of statutes and other writings to be decided by court]; *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 545, fn. 1 (*Super 7 Motel*) [dispute over who were the parties to the contract is a question of law].) We do not know why the trial court impaneled a jury to interpret the contract.

⁴Much of the extrinsic evidence that was offered should have been excluded because it did not aid in determining the intent of the parties when the contract was formed. Both parties provided testimony about their interpretation of the contract, but such testimony is not relevant to the facts of this case.

apply the established rules of contract interpretation to conclude Anwar was a party to the 2005 Contract. While it seems probable CDCR did not intend this result, the only logical interpretation of the contract drafted on its behalf compels this result. We begin with contract interpretation principles.

“The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the ‘mutual intention’ of the parties. ‘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.]” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 (*Waller*)). The entire contract must be viewed together, giving effect to every part, with each clause helping to interpret the other. (Civ. Code, § 1641.)

Here, the parties argue the contract is ambiguous. The determination of whether a contract is ambiguous requires us to look not only at the entire contract, but also the circumstances of the case. (*Waller, supra*, 11 Cal.4th at p. 18.) A contract cannot be found to be ambiguous in the abstract, and courts will not strain to create ambiguity where none exists. (*Id.* at pp. 18-19.) Extrinsic evidence is not admissible to ascribe a meaning to an agreement to which it is not reasonably susceptible. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.) In the case where a contract is uncertain, even after applying the rules of contract interpretation, the language of a contract “should be interpreted most strongly against the party who caused the uncertainty to exist.” (Civ. Code, § 1654.)

We review de novo conclusions regarding the interpretation of the contract, even where extrinsic evidence has been admitted and such evidence is susceptible to multiple

interpretations. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267.) We rely on the substantial evidence test only when interpretation of the contract depends on the credibility of the offered extrinsic evidence. (*Ibid.*) “[W]here ... the extrinsic evidence is not in conflict, construction of the agreement is a question of law for our independent review. [Citation.]” (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 556.) Our review is de novo, even when we must determine the parties to the contract. (*Super 7 Motel, supra*, 16 Cal.App.4th at p., 545, fn. 1.)

The 2005 Contract

We now turn to the 2005 Contract, since this was the contract the jury found was breached by CDCR. As stated, CDCR relies on the face page of the contract, which clearly identifies CDCR and MMSG as the parties to the contract. We, however, must interpret the entire contract, not just the face page of the contract. Before we get into the contractual provisions that guide our analysis, we think it will be useful to point out some of the numerous problems with this contract.

The testimony on the relationship between the parties described a situation where MMSG provided services in two situations. First, when a prisoner had a medical emergency, the prisoner would be transported to Madera Community Hospital and a MMSG physician who was included on the “on-call” list would be called to provide appropriate treatment. Second, when a prisoner needed nonemergency medical treatment beyond the expertise of the prison staff, the CMO would obtain treatment from a physician on the MMSG roster. MMSG provided the roster to the prison, which included the specialties of the various physicians listed.

Since the testimony focused on Anwar’s prison practice, the record is unclear on how a specific referral was made in a nonemergency situation. The record indicates that for years Anwar received approximately 90 percent of the general surgery referrals, both emergency and nonemergency. The record also indicates that at least one other general surgeon asked to receive some of these nonemergency referrals but was told by Follett

that he made his general surgery referrals to Anwar. The record does not indicate how referrals were made to physicians with other specialties, such as obstetrics/gynecology.

The gaps in the record, while not important in this case, point out one of the major deficiencies in the 2005 Contract. CDCR suggested that it had the absolute right to choose any MMSG physician when making a referral. Anwar's claim for damages was based on his right to receive at least 90 percent of the general surgery referrals. The contract, however, is silent on the issue.

The contract does not state the CMO has discretion to choose any MMSG physician when making a referral. Nor does it address how the referral process is supposed to work. Was the CMO required to call MMSG and ask for a physician? Was the CMO to call Madera Community Hospital and ask for a physician? Was the CMO permitted to choose any physician on the MMSG roster he or she preferred to treat a specific inmate/patient? None of these questions is answered in the contract. Instead, the contract provides the CMO with discretion to determine when a referral is to be made and the right to approve any nonemergency procedure before it is performed. (For example, see exhibit A to the 2005 Contract, pars. 1.a., d., 3.b.1.) Nothing more. It is surprising a \$13,000,000 contract would not address this issue.

We discovered a number of other deficiencies in the 2005 Contract. Instead of drafting a contract to define the relationship between the parties, and each party's rights and responsibilities under the contract, it appears someone put various forms together that had been drafted sometime in the past for a different purpose, without any consideration of how such forms would fit the relationship between MMSG and CDCR.

We now turn to the relevant portions of the Contract. The face page of the contract is titled "STANDARD AGREEMENT" and begins: "This Agreement is entered into between the State Agency and the Contractor named below[.]" The state agency is identified as CDCR, CCWF and VSPW. The contractor is identified as "Madera Multi Specialty Group, A Medical Corporation." Twelve exhibits were made a part of the

contract.⁵ The signature block on the first page identifies the Contractor as Madera Multi Specialty Group, A Medical Corporation, and is signed by Mazhar Javaid, M.D., President. The other signature block identifies the state agency as CDCR and is signed by Susan Lew, Chief, Institution Medical Contracts Section.

The heading on exhibit A includes the contract number, and the names “Madera Multi Specialty Group, A Medical Corporation” and “California Department of Corrections and Rehabilitation (CDCR),” an apparent reference to the parties to the contract. Paragraph 1.a. of exhibit A states: “This is a Master Agreement which [*sic*] the Provider shall provide all labor, materials, staff, transportation, licenses, permits, certificates and every other item of expense necessary to provide Physician/Medical Specialty Services on-site, offsite, and at Madera Community Hospital as needed to any inmate/patient referred for such medical services by the California Department of Corrections and Rehabilitation (CDCR).” This provision identifies CCWF and VSPW, apparently indicating that services were to be provided for inmates at those two facilities.

Until this point, a strong argument exists that the term “provider” refers to MMSG. Paragraph 1.b. of exhibit A, however, provides the first indication that the contract is not so limited. This section requires the provider to “possess and maintain ... a valid medical license and board certification to practice specialty services in the State of California” MMSG is a medical corporation and does not possess a valid medical license. Nor is it board certified in any specialty. Only the physicians providing services have those qualifications.

⁵The exhibits are: Exhibit A (scope of work), exhibit A-1 (scope of oncology services), exhibit A-2 (scope of radiology services), exhibit B (budget detail and payment provisions), exhibit B-1 (contractor rate sheet), exhibit B-2 (rate sheet), exhibit B-3 (rate of compensation), exhibit C (general terms and conditions), exhibit D (special terms and conditions), exhibit E (additional provisions), exhibit F (definitions), and exhibit G (business associates agreement (HIPPA)).

Paragraph 1.c. of exhibit A states: “Provider or personnel referred by the Provider shall be able to perform the tasks associated with providing the above medical services, and assumes full responsibility for the provision of these services.” Paragraph 2.a. of exhibit A states: “Provider agrees that all personnel responsible for discharging Provider’s duties and obligations under this Agreement are individuals qualified to perform the various functions under this Agreement, as defined by applicable statutes and regulations related to their scope of health care practice. Provider agrees that all medical and professional staff and contracted subcontractors are duly licensed, certified and/or registered as required by the laws of this State and that no restrictions exist on said licensure, certification and/or registration.”

Paragraph 3.d. of exhibit A is titled “Required Notices” and addresses where and to whom any notices required under the contract shall be mailed. The “Provider’s Address” given in this section is “Madera Multi Specialty Group, A Medical Corporation, 1250 East Almond Avenue, Madera, CA 93637.” Except for the one exception noted, exhibit A appears to be consistent with the theory that MMSG is the party to the contract, although the contract could also be read to include the physicians providing the treatment as parties to the contract.

Exhibit B addresses invoicing and payment and states in paragraph 1.a.: “For services satisfactorily rendered, and upon receipt and approval of Provider’s invoices, the State agrees to compensate the Provider for actual expenditures incurred in accordance with” the agreed-upon schedules. Paragraph 1.b. of exhibit B requires invoices to include, along with other information, the provider’s name, address and agreement number, as well as the name of the attending physician. Paragraph 4 of exhibit B provides that “nothing contained in this Agreement, or otherwise, shall create any contractual relation between the State and any subcontractors” Once again, this section appears to be consistent with the theory that MMSG is the party to the contract.

Paragraph 12.a. of exhibit E provides either party with the right to terminate the agreement without cause by giving not less than 60 days' notice to the other party. A termination-for-cause provision also is included in exhibit E. Paragraph 12.c. of exhibit E requires the provider to assist CDCR in making alternative arrangements for the care of the inmate/patients upon termination of the contract for those inmate/patients receiving inpatient care at the time of termination. The provider also is required to provide health care to such inmate/patients until alternative arrangements are made for the care of the inmate/patients. Paragraph 17 of exhibit E establishes a procedure for the appeal of disputes arising under the terms of the contract. Paragraph 18 of exhibit E provides CDCR with the authority to review the course of medical treatment provided to inmate/patients by the provider and/or the provider's subcontractors.

Exhibit F contains the definitions of terms used in the agreement. The agreement is defined as the contract and the contract means the agreement. (Exhibit F, pars. 1, 7.)

Throughout the contract the terms "contractor" and "provider" are used. As explained above, these terms, as used in most of the contract, could be considered consistent with CDCR's position that the parties to the contract are only CDCR and MMSG. However, the definitions of these terms supplied by CDCR in exhibit F greatly expand the terms "contractor" and "provider."

The definition for "contractor" is: "Contractor means Provider: the physician and/or attending physician under locum tenens providing the medical specialty services under this Agreement, or the hospital, hospital's allied professional health care staff or hospital's physician and ancillary service contractors." (Exhibit F, par. 8.) Similarly, the definition for "Provider" is: "Provider means Contractor: the physician and/or attending physician under locum tenens providing the medical specialty services under this Agreement, or the hospital, hospital's allied professional health care staff or hospital's physician and ancillary service contractors." (Exhibit F, par. 32.)

“Locum tenens” “means a free benefit to professional liability insurance policies which provides the policyholders forty-five (45) free days, (more or less, depending on carrier) for substitute physicians to perform the duties of the policyholder while he/she is on vacation or temporarily away for the office. A locum tenens shares the limits of liability with the named insured (Provider) and is identified on the evidence of valid coverage.” (Exhibit F, par. 22.)

“Physician” is defined as “a person licensed to practice medicine or osteopathy in the State of California.” (Exhibit F, par. 28.)

“Subcontractor” is defined as “any person or entity that has entered into an agreement with said Provider, either expressed or implied, for the specific purpose of performing any service under this Agreement.” (Exhibit F, par. 38.)

We think Anwar’s argument that these definitions can be interpreted only to mean that he was a party to the contract is well taken. We cannot conceive of any set of circumstances in which the definitions of “contractor” and “provider” CDCR included in the contract can be interpreted as meaning anything other than the physicians providing services under the contract. Since the face page identifies the contractor as MMSG, the only logical interpretation of the contract is that by including the above definitions of “contractor” and “provider,” CDCR expanded the parties to the agreement to include not only MMSG but also all of the physicians providing services to the inmate/patients.

CDCR argues this is the incorrect result because the face page clearly identifies MMSG as the contractor, and the face page was signed only by Javaid as the president of MMSG. This argument ignores the definitions of “provider” and “contractor” included in the contract prepared by CDCR. We must interpret the contract as a whole, not in isolated parts. (Civ. Code, § 1641.) Moreover, where uncertainty exists, the language of the contract must be interpreted “most strongly” against the party who drafted the contract. (Civ. Code, § 1654.) The evidence is undisputed that CDCR drafted the contract. Therefore, to the extent there may be some uncertainty whether the physicians

were parties to the contract, this uncertainty was caused by CDCR. Accordingly, Civil Code section 1654 requires we interpret the contract “most strongly” against CDCR. This requirement leads to the inevitable conclusion that CDCR included the physicians as parties to the contract.

CDCR does not address this issue directly in its briefs. The failure to do so supports our conclusion. We think there is no logical reason for it to have included the definitions of “contractor” and “provider” in the contract unless it intended to include the physicians as parties to the contract. To suggest these definitions referred only to MMSG ignores the language CDCR included in the contract, or ascribes a meaning to the words used that simply does not comport with the English language.

Instead of directly addressing the issue of the definitions it included in the contract, CDCR spends considerable time arguing that the extrinsic evidence did not establish CDCR and MMSG intended to include the physicians as parties to the contract. Most of the evidence offered by the parties as extrinsic evidence should have been excluded because it was not relevant to the issue of the intent of CDCR and MMSG at the time the 2005 Contract was negotiated. Moreover, neither this court nor CDCR can reconcile a plain reading of the contract in the manner suggested by CDCR. Since our task in interpreting a contract is to look first at the words included by the parties in the contract, and CDCR failed to provide a rational explanation for the definitions found in the contract, we are bound by those words. We do not find the contract to be ambiguous, so extrinsic evidence was unnecessary to interpret the agreement.

CDCR’s response to the definitions of “provider” and “contractor” is an attempt to explain why the trial court erred when it found the contract ambiguous. While we have explained why ambiguity is not an issue, we will explain why we would reject the argument advanced by CDCR if we considered it.

CDCR’s argument is that the trial court based its ruling to admit extrinsic evidence on the theory that MMSG could not practice medicine. CDCR argues a medical

corporation can practice medicine through its agents. To support this assertion, CDCR sites numerous code sections and one case.

Corporations Code section 13406, subdivision (a), the first statute cited, merely provides that shares in a professional corporation may be issued only to a person licensed to render the same professional services as the corporation. In other words, shares in a medical corporation, such as MMSG, can be issued only to licensed physicians. That shares in a medical corporation can be issued only to licensed physicians does not suggest the trial court's conclusion was incorrect.

The remaining statutes cited by CDCR are found in the Business and Professions Code. CDCR relies on Business and Professions Code sections 2402, 2406, 2408, 2410, and 2418. These sections miss the mark at which CDCR appears to be aiming. Instead, it appears CDCR intended to refer to Corporations Code section 13404, which provides that a professional corporation may render professional services only if it has obtained a "currently effective certificate of registration issued by the governmental agency regulating the profession in which such corporation is ... to be engaged." Corporations Code section 13405, subdivision (a) provides, in part, that "a professional corporation may lawfully render professional services in this state, but only through employees who are licensed persons." Accordingly, a properly incorporated and registered professional medical corporation may render professional services through licensed employees, a rather unremarkable conclusion.

These statutes, however, do not address the point the trial court was making, and on which we base our conclusion. Even if a medical corporation can provide medical services, this conclusion does not explain why the 2005 Contract defines "provider" and "contractor" as the physicians providing services. CDCR appears to be suggesting the terms "provider" and "contractor" mean a medical corporation, in this case MMSG. This suggestion, however, conflicts with the words CDCR used when it prepared the contract. The contract defines these two terms as "the physician ... providing the medical specialty

services under this” contract. The definition uses the term “physician,” not “medical corporation.” If CDCR did not intend to expand the definition of these terms, it should have drafted a contract that made clear that “contractor” and “provider” was the medical corporation providing the medical specialty services through its employees or independent contractors. CDCR’s failure to draft the contract to reflect this hidden intent is the crux of the problem with which it is now faced.

We must base our analysis on the contract that was drafted and signed by the parties, not the contract CDCR wishes it had drafted, or intended to draft. The contract that was drafted and signed by the parties expands the definition of “contractor” and “provider” to include the physicians providing services.

The only case CDCR cites, *California Physicians’ Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, does not affect our analysis. It is unnecessary to provide a complete explanation of this case. It is sufficient to note the dispute was between a health care service plan and a nonprofit corporation that provided health care services to the subscribers of the health care service plan. One argument presented by the health care service plan was that the contract was illegal because nonprofit corporations are prohibited by law from practicing medicine. The corporation argued the contract was between the physicians providing the treatment and the health care service plan. The appellate court confirmed that nonprofit corporations were precluded by law from practicing medicine, but rejected the corporation’s suggesting the contract was between the physicians and the health care service plan. “[T]he fact remains that the contract was expressly between [the health care service plan] and [the corporation]. It was [the corporation] that agreed to render professional services. Of course [the corporation] itself would not provide medical services—it is a corporation, an artificial entity, that necessarily acts through the agency of natural persons. [Citation.] This fact does not convert the contract into one between [the health care service plan] and the corporate actors.” (*Id.* at p. 1515.)

California Physicians' Service is inapposite. While it is true that the issue addressed in *California Physicians' Service* is similar to the one presented in this case, one crucial fact distinguishes the two cases. In *California Physicians' Service* the contract was expressly between the health care service plan and the corporation. Here, however, the contract was written so that the parties to the contract included not only CDCR and MMSG, but also the physicians providing the services through MMSG. Since *California Physicians' Service* does not address the definitions that are included in the 2005 Contract, it provides no support for CDCR's argument.

The plain language of the 2005 Contract expands the definition of "contractor" and "provider" to include not only MMSG, but also the physicians providing services under the contract. Since the contract was prepared by CDCR, it cannot now complain this provision means something other than what it actually states.

III. Limitation of Damages

CDCR contends the trial court erred when it failed to limit the amount of damages that Anwar could recover to those incurred in a 60-day period. Relying on *Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396 (*Martin*), CDCR argues that because the 2005 Contract contained a provision that permitted either party to cancel the contract on 60 days' written notice, the reasonable expectation of any party in the event of a breach would limit recoverable damages to this 60-day period.

Martin was a U-Haul independent dealer for several years. The dealership agreement required Martin to remit all rental receipts to U-Haul. U-haul then paid him a percentage of the receipts as a commission on the sales. U-Haul received reports that Martin was renting U-Haul equipment, but retaining the receipts and not reporting the rentals to U-Haul. U-haul conducted an investigation and concluded Martin was violating the dealership agreement. U-Haul then terminated the dealership agreement. Martin contended U-Haul terminated the dealership agreement because he was

successfully competing against a corporate rental store, and U-Haul wanted to end the competition.

Martin sued on several theories and, after a jury trial, prevailed on his cause of action for breach of contract. The jury awarded Martin \$29,000 in damages, but the trial court denied U-Haul's new trial motion if Martin consented to a reduction of damages to \$725. Otherwise, the motion would be granted. The trial court reasoned that because the dealership agreement contained a provision that permitted either party to terminate the agreement on 30 days' written notice, damages could not extend beyond this 30-day period.

This court reviewed numerous cases, most from California but some from out of state, a treatise, and Civil Code section 3300, which limits damages for a breach of contract to those damages "which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." This court then summarized the law with the following observation: "The specific rule that a termination clause limits recoverable damages to the notice period is consistent with the general requirement that contract damages are limited to those foreseeable by the parties at the time of contracting. Parties who agree that a contract may be terminated for any reason, or no reason, upon the giving of the specified notice could not reasonably anticipate that damages could exceed that notice period." (*Martin, supra*, 204 Cal.App.3d at p. 409.) This court then held:

"Civil Code section 3358 provides in pertinent part, 'no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides.' 'Thus, courts will not, except where exemplary damages are awarded, permit a party to a contract to recover more on the breach thereof than he would have received by due performance of the agreement.' [Citation.] If U-Haul had followed the notice requirements in its dealership contract, it could have terminated Martin's dealership after providing a 30-day notice. Full performance by U-Haul would only have resulted in an additional 30 days of U-Haul dealership business for Martin. That 30-day period is all that Martin could reasonably be assured of remaining in business.

“Because of the 30-day notice provision neither party to the dealership contract could reasonably anticipate that damages resulting from a breach of that contract would exceed those potentially accruing during a 30-day period after the breach. Furthermore, awarding the wronged party damages which exceed those attributable to the 30 days immediately following the breach would place that party in a better position than that resulting if the breaching party had performed in accordance with the terms of the agreement. Therefore, the trial court was correct when it granted the new trial motion conditioned upon Martin’s consent to a reduction in the damage award from \$29,000 to \$725.” (*Martin, supra*, 204 Cal.App.3d at pp. 410-411.)

The contract in this case contains a provision permitting either party to cancel the contract without cause on 60 days’ written notice to the other party. (Exhibit E, par. 12.a. of the 2005 Contract.) We thus see no basis for distinguishing the position of Anwar from the position of Martin.

Anwar presents several arguments to justify retention of the full amount of damages awarded by the jury. First, he claims *Martin* does not apply for reasons explained in *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060 (*Potvin*) and *Golden Day Schools, Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695.

Anwar’s argument begins with the observation that the jury found CDCR failed to provide Anwar with notice of the reasons his services were no longer being utilized and failed to provide him with an opportunity to defend against the charges. These findings were identified as a due process claim for each of the involved prisons. CDCR did not challenge these findings in its opening brief.

Potvin is a case that addresses the common law right to fair procedure “which forbids arbitrary expulsions from private organizations under certain circumstances.” (*Potvin, supra*, 22 Cal.4th at p. 1063.) The defendant, Metropolitan Life Insurance Company (MetLife), entered into an agreement with Potvin, an obstetrician/gynecologist, to include him as one of 16,000 participants on its preferred provider list that permitted Potvin to provide medical services to MetLife’s insureds for agreed-upon payment by MetLife. The agreement did not create an employment or agency relationship and

permitted Potvin to contract with other insurance providers. It also provided either party the right to terminate the agreement at any time without cause upon 30 days' written notice to the other party. (*Id.* at p. 1064.)

Subsequently, MetLife invoked this termination provision, replying to Potvin's inquiries that it was relying on the provision that permitted termination without cause. MetLife also notified Potvin that even though it was not required to provide a reason for its decision, it had concluded that Potvin did not meet its "current selection and retention standard for malpractice history." (*Potvin, supra*, 22 Cal.4th 1060 at p. 1064.)

Potvin filed suit after MetLife failed to respond to his request for a hearing. Potvin asserted MetLife's decision devastated his practice and resulted in other provider associations removing him from their preferred provider lists when they learned of MetLife's decision.

The issue before the Supreme Court was whether the common law doctrine of fair procedure applied to MetLife's decision to remove Potvin from its preferred provider list. The Supreme Court began by noting that when the doctrine applied, the decision made "must be both substantively rational and procedurally fair." (*Potvin, supra*, 22 Cal.4th at p. 1066.) The doctrine's purpose was identified as intended to protect against arbitrary decisions by private organizations in certain situations. (*Ibid.*)

In explaining which type of situations the doctrine would apply, the Supreme Court noted prior cases applied the doctrine to private entities affecting the public interest, i.e., entities that were quasi-public in nature. (*Potvin, supra*, 22 Cal.4th at p. 1070.) The Supreme Court then explained why the doctrine applied to the case before it. "One practical effect of the health care revolution, which has made quality care more widely available and affordable through health maintenance organizations and other managed care entities, is that patients are less free to choose their own doctors for they must obtain medical services from providers approved by their health plan. The Managed Health Care Improvement Task Force stressed in its 1997 report to the

California Legislature that the provision of health care ‘has a special moral status and therefore a particular public interest.’ [Citation.] But an even greater public interest is at stake when those medical services are provided through the unique tripartite relationship among an insurance company, its insureds, and the physicians who participate in the preferred provider network. As the New Hampshire Supreme Court noted recently in *Harper v. Healthsource New Hampshire* (1996) 140 N.H. 770, the removal of a physician from a preferred provider list ‘affects more than just [the doctor’s] own interest,’ adding that ‘[t]he public has a substantial interest in the relationship between health maintenance organizations and their preferred provider physicians.’” (*Ibid.*)

The Supreme Court, however, went on to note that simply because the public interest was involved did not necessarily mandate application of the doctrine in the situation before it because the obligation to apply the doctrine “arises only when the insurer possesses power so substantial that the removal significantly impairs the ability of an ordinary, competent physician to practice medicine or a medical specialty in a particular geographic area, thereby affecting an important, substantial economic interest.” (*Potvin, supra*, 22 Cal.4th at p. 1071.) The Supreme Court concluded that remand was necessary to permit evidence to determine whether MetLife wielded power so substantial “as to significantly impair an ordinary, competent physician’s ability to practice medicine or a medical specialty in a particular geographic area, thereby affecting an important, substantial economic interest.” (*Id.* at p. 1072.)

In the final paragraph of the majority opinion, the Supreme Court addressed the issue Anwar believes is dispositive. MetLife argued that even if Potvin was entitled to fair procedure, he waived that right when he agreed MetLife could terminate the provider agreement without cause. The Supreme Court held this provision “is unenforceable to the extent it purports to limit an otherwise existing right to fair procedure under the common law.” (*Potvin, supra*, 22 Cal.4th at p. 1073.)

Anwar cites *Golden Day Schools* for the proposition that the common law right to fair procedure is analogous to the due process right of notice and an opportunity to be heard, which the jury found was violated by CDCR in this case. Anwar concludes that since the without-cause-termination provision was not enforceable in *Potvin*, it cannot be enforced in this case.

We need not decide whether the two rights identified by Anwar are analogous because, even if they are, *Potvin* does not aid his case. The Supreme Court's holding on this issue was clear—the termination-without-cause provision was unenforceable *to the extent it could be construed as limiting Potvin's right to fair procedure*. If due process and fair procedure are analogous, *Potvin* stands only for the proposition that in a due process case, a termination-without-cause provision is unenforceable to the extent it could be construed as limiting one's right to due process. *Potvin* does not stand for the proposition that a termination-without-cause provision is unenforceable in its entirety whenever the right to fair procedure or due process is involved.

The issue in this case is not whether Anwar was entitled to due process. As Anwar repeatedly states in his brief, CDCR does not challenge the jury's finding that he was so entitled and that CDCR violated this right. The issue is the appropriate remedy for a breach of contract, not the remedy for a violation of due process. Indeed, Anwar did not seek or obtain any remedy for the violation of his right to due process, thereby raising the question of why the issue was submitted to the jury. Nonetheless, *Potvin* is inapposite because it does not address the question of the effect of a termination-without-cause provision when the plaintiff is seeking contract damages.

Anwar next argues *Martin* is inapposite because “there are specific provisions in the [2005 Contract] that called for continuing obligations by ‘Providers’ and the continuing right to payment for services by ‘Providers’ beyond the contract’s termination date, and the pattern and practice of the relationship between the parties is consistent with

the fact that there were continuing obligations well beyond any 60-day notice period.”
(RB 63.)

The contract provision to which Anwar directs us is found in exhibit E., paragraph 12.c. Paragraph 12. is titled “Right to Terminate” and includes the without cause provision (par. 12.a.), as well as an entire paragraph covering termination with cause (par. 12.b.(1), subds. (a)-(c)). Paragraph 12.c. is titled “Alternative Arrangements Upon Termination” and states:

“Upon cancellation of this Agreement, Provider agrees to assist CDCR in securing alternative arrangements for the provision of care from another CDCR contracted facility or health care provider for those inmates receiving inpatient care at the time of termination. Provider further agrees to continue to provide adequate levels of health care services to inmates until alternative arrangements can be obtained. The rate of pay shall be consistent with the terms of this Agreement.”

Anwar argues that since *Martin* is based on the theory that Martin could not have anticipated damages beyond the 30 days provided in the termination-without-cause provision, that rationale does not apply to this case because paragraph 12.c. anticipates Anwar would provide services for an indefinite period of time in the event the contract was terminated pursuant to the 60-day termination provision in the 2005 Contract.

We disagree with this analysis. First, the contract was not terminated, as MMSG and the other physicians continued to provide services for the entire term of the 2005 Contract. Second, this provision did not apply to Anwar because there were other general surgeons in MMSG who immediately took over the provision of services once referrals were no longer made to Anwar. Third, the pattern of practice referred to by Anwar does not exist. Anwar refers to MMSG physicians continuing to provide medical care to the inmate/patients during the period of time between the expiration of the 2001 Contract and the signing of the 2005 Contract. The 2001 Contract was not terminated; it expired. More importantly, CDCR and MMSG were negotiating a new contract during this time.

This situation is not analogous to finding replacement physicians when a contract has been terminated by one party.

Finally, even if this provision had some application to this case, these alternative arrangements would not continue indefinitely, as suggested by Anwar. The only interpretation in which this provision could possibly apply is one in which Anwar conceded that while damages could be limited, the recovery period should be extended beyond the 60 days provided in the without cause provision. Anwar has never made this argument.

Next, Anwar argues *Martin* does not apply because he *believed* the 60-day termination provision would not be utilized by CDCR unless the prisons were closed, and it was never intended to be applied to the decision to stop referring patients to a single physician. This is an example of parole evidence that should not have been admitted. Anwar's testimony directly contradicts the express, nonambiguous terms of the agreement. Such testimony is inadmissible. (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 [parole evidence inadmissible to vary, alter, or add to the terms of an integrated agreement].)

What is clear, however, is that Anwar was aware of the provision permitting termination of the contract on 60 days' written notice in the 2001 Contract. This is important because Anwar attempts to distinguish *Martin* on the basis that Martin not only knew of the termination-without-cause provision, but testified that he agreed to it. We see no reason to distinguish *Martin*. Anwar's testimony establishes he knew of the termination-without-cause provision in the 2001 Contract and impliedly agreed to all of the provisions of the agreement when he provided services. The fact the same provision is included in the 2005 Contract could not have been a surprise to Anwar.

Finally, Anwar contends the termination-without-cause provision is an adhesive provision and thus unenforceable. Anwar provides no legal analysis of this theory in his brief, but instead directs this court to a brief he filed in the trial court. This brief argues

the provision is unconscionable as that term is defined in Civil Code section 1670.5 and thus should not be enforced.

We begin by noting the absence of legal authority cited by Anwar in his respondent's brief. Generally, we would deem the argument to be without foundation and reject it on this basis alone. (*Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 571-572.) Nonetheless, the argument fails.

Civil Code section 1670.5, subdivision (a) allows a court to refuse to enforce a contract, or any clause in a contract, if it finds as a matter of law the contract or clause was unconscionable at the time it was made. "Unconscionability consists of both procedural and substantive elements. 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. [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 Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle Museum Tower*).

Anwar argues the 2005 Contract was one of adhesion. This fact alone, according to Anwar, renders the contract unenforceable. Procedural unconscionability generally takes the form of an adhesion contract, which is a contract drafted by the party of superior bargaining strength and offered to the other party with the option of either adhering to the contract or rejecting it. (*Little v. Auto Stiegler* (2003) 29 Cal.4th 1064, 1071.)

While the 2005 Contract may have been a contract of adhesion, this argument fails to address the issue of substantive unconscionability, which requires the contract, or in this case the term of the contract, to be so overly harsh or one sided as to shock the conscience. The provision in question is neither overly harsh nor one sided. This

provision provides both parties with the right to terminate the contract on 60 days' written notice. It is a bilateral provision applying equally to both parties. Moreover, Anwar's testimony establishes he was not surprised by the contract provision because he knew it was in the 2001 Contract.

Anwar argued in the trial court that substantive unconscionability existed, in essence, because of CDCR's actions in breaching the contract. This has never been a consideration when addressing Civil Code section 1670.5. Instead, 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, supra*, 55 Cal.4th at p. 246.) Subsequent events are not relevant in determining whether the terms of the agreement are overly harsh or one sided.

IV. Exhibit No. 34

CDCR sought to introduce exhibit No. 34, a letter it sent to Anwar's counsel on November 18, 2005, explaining CDCR's decision to stop referring patients to Anwar. This letter referred to nine different inmate/patients who had complaints about the treatment provided by Anwar and also referred to unspecified billing practices and unidentified self-referrals made by Anwar. CDCR contends the trial court erred in excluding the letter.

We review evidentiary rulings for an abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "A trial court's exercise of discretion in admitting or excluding evidence ... will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Or, stated another way, a trial court abuses its discretion when it appears that its decision exceeds the bounds of reason when all of the circumstances are considered. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) Any error in evidentiary rulings will require reversal only if the error resulted in a miscarriage

of justice. (Cal. Const., art. VI, § 13.) A miscarriage of justice occurs where it appears reasonably probable the complaining party would have achieved a more favorable result had the error not occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)

The trial court ruled the letter inadmissible for several reasons. For example, the trial court found the letter not relevant as evidence justifying the decision to stop referring inmate/patients to Anwar because there was no evidence Suryadevara knew of any of the alleged incidents included in the letter prior to informing Anwar he would not receive any further referrals. As far as we can tell from CDCR's rather rambling brief, it does not challenge this ruling.

Instead, CDCR argues the letter was relevant as evidence to impeach Anwar and as evidence in the bad faith causes of action. We need not decide whether the trial court abused its discretion in excluding the letter for these purposes because, even if we were to assume the trial court erred, we conclude CDCR cannot establish a miscarriage of justice occurred. In other words, we conclude it is not reasonably probable CDCR would have achieved a more favorable result had the error not occurred.

Our conclusion is based on the jury's verdict. First the jury concluded CDCR breached the 2005 Contract. The letter was not relevant to that issue. Since the damages recovered by Anwar were the same for both the breach of contract and implied covenant causes of action, the outcome of the trial would not have been affected by admission of the letter.

Second, the letter had little impeachment value. It is true Anwar testified that neither he nor his attorney at any time was advised of the reasons for the decision to stop referring patients to him. Nonetheless, the letter would have provided little benefit to CDCR. The letter was written four months after CDCR stopped referring inmate/patients to Anwar. Moreover, Anwar's credibility was not the issue in the trial. There was little, if any, dispute about the events that occurred in this case. Instead, the issue was whether Anwar was a party to the contract and whether the actions CDCR took were done in a

manner that violated the covenant of good faith and fair dealing, as well as Anwar's right to due process. Impeaching Anwar with a letter written four months after the events took place would have had no impact on the jury, and surely would not have led to a more favorable result for CDCR.

V. Remedy

We asked the parties to provide additional briefing on the question of the correct remedy in this case. The response from Anwar's counsel was not helpful. The response from CDCR's counsel was helpful, but failed to provide a definitive suggestion.

We have concluded we must remand the matter to the trial court for further proceedings on the damage issue. We reach this conclusion because the trial court ruled before the damage evidence was presented that *Martin* did not apply to this case, so the parties did not present testimony on damages limited to this timeframe. While we could calculate damages for this 60-day period from the information in the record, it is possible that additional evidence, including expert testimony, would result in facts that were not presented to the jury. Hence, we will reverse the damages portion of the judgment and remand the matter to the trial court to permit the parties to present additional evidence on the damages incurred by Anwar for the 60 days immediately after the breach occurred.

DISPOSITION

The portion of the judgment finding that CDCR breached the 2005 Contract and breached the covenant of good faith and fair dealing implied in that contract is affirmed. The portion of the judgment fixing damages is reversed and the matter is remanded to the trial court to permit the parties to present additional evidence on the damages incurred by Anwar. Any award of damages to Anwar is limited to losses sustained as a result of no longer receiving referrals at CCWF for the time period of July 11, 2005, through

September 9, 2005, and for losses sustained as a result of no longer receiving referrals at VSPW for the time period of August 11, 2005, through October 10, 2005. Each party is to bear its own costs on appeal.

CORNELL, Acting P.J.

WE CONCUR:

KANE, J.

SMITH, J.