STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF CALHOUN

SHANNON MARTIN, M.D. and
DOUGLAS MARTIN,
Plaintiffs/Counter-Defendants Case No. 2019-110 CB

v. Hon. BRIAN K. KIRKHAM

DARREN HATHAWAY, M.D., an
Individual, SOUTH MICHIGAN
OPHTHALMOLOGY, P.C. a Michigan
Professional corporation,
Defendants/Counter-Plaintiffs.

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OPINION AND ORDER FOR SUMMARY DISPOSITION

STATEMENT OF FACTS

Plaintiff, Shannon Martin, M.D. ("Dr. Martin") commenced employment with Defendant, South Michigan Ophthalmology, P.C. ("SMO") in July 2010. Dr. Martin's employment contract was for a 2 year term with automatic renewals. On 7-1-2016 the parties renewed the employment contract for 2 years, with an expiration date of 6-30-2018.

The employment agreement between SMO and Dr. Martin contained a Confidentiality Covenants provision which provides: "You agree to maintain the confidentiality of this Agreement, and all of the provisions hereof, and any and all business records, financial information, medical records, and other proprietary information of the Practice, and shall not disclose any such matters to any third person or entity without the prior written consent."

The employment agreement between SMO and Dr. Martin does not include a "Covenant Not to Compete" nor a "Non-Solicitation Clause".

In early 2018, Defendant, Dr. Darren Hathaway M.D. ("Dr. Hathaway") began negotiating for the merger of SMO with Lansing Ophthalmology P.C. ("LO Eye"). On April 20, 2018 SMO and LO Eye executed a Letter of Intent ("LOI"). During the negotiations with SMO, LO Eye also engaged in negotiations with Dr. Martin. The negotiations with Dr. Martin in the end proved to be unsuccessful.

During the negotiations between LO Eye and Dr. Martin, Douglas Martin ("Mr. Martin") approached Executive Director of the Oaklawn Medical Group ("Oaklawn"), Kathy Rhodes ("Rhodes") and inquired if Oaklawn would be interested in hiring Dr. Martin.

Rhodes confirmed that Oaklawn was interested but Oaklawn needed productivity metrics to assess the viability of hiring Dr. Martin. The specifics of the negotiations between Oaklawn and Dr. Martin will be examined more thoroughly later. On 10-19-2018 Oaklawn extended a conditional offer of employment to Dr. Martin which she accepted. The Employment Offer provided; "After you accept this offer, your employment remains contingent upon the receipt of acceptable due diligence necessary by the Hospital (i.e. insurance credentialing, etc.) the CEO's endorsement, and the Broad of Directors' approval."

As negotiations between SMO and LO Eye took longer than anticipated, the contract between SMO and Dr. Martin was set to automatically renew on July 1, 2018. SMO and Dr. Martin, through her husband, Mr. Martin, negotiated a month-to-month contract which would pay a guaranteed salary. Previously the contract provided for a base salary and other compensation based upon work done and collected. SMO and Dr. Martin never entered into a new written agreement. Dr. Hathaway and Mr. Martin entered into a handshake agreement.

Following the negotiations between SMO and Mr. Martin, Dr. Martin began receiving the modified salary amount until her termination of employment on 12-31-2018. Dr. Martin received a letter from SMO's attorney on 12-19-2018 informing her that her last day of employment would be 12-31-2018.

On 10-23-2018 an agenda was sent to the Board which identified Dr. Martin's contract as an action item of business. When Board member Dr. Tom Neidlinger ("Dr. Neidlinger") received the agenda he contacted and then met with Dr. Hathaway.

After meeting with Dr. Hathaway, Dr. Neidlinger suggested that Dr. Hathaway write a letter to the Board to give his side of the story and to clarify information. Dr. Hathaway also talked to Board member, Catherine Yates, who also urged Dr. Hathaway to write a letter to the Board.

On 10-25-2018 Dr. Hathaway sent a letter to Mr. J.W. Townsend, the Chairman of the Oaklawn Board, which was disseminated to the entire Board.

The Oaklawn Board met on 10-26-2018 and voted 7 to 1 not to add an ophthalmology service line and did not approve Dr. Martin's contract.

PLEADINGS CONSIDERED FOR SUMMARY DISPOSITION

The parties filed voluminous pleadings in this case regarding their respective claims for summary disposition. The court has thoroughly reviewed all the following pleadings, often to the point of needing ophthalmology services.

-Complaint, dated 4-22-2019, 27 pgs.

-Answer to Complaint, dated 6-14-2019, 34 pgs.

-First Amended Complaint, dated 6-28-2019, 35 pgs.

-Amended Answer to First Amended Complaint, dated 12-28-2020, 40 pgs.

-Counter-Complaint, dated 6-13-2019 , 22 pgs.

-Plaintiffs' Motion for Summary Disposition ("SD"), dated 1-20-2021, 22 pgs.

-Plaintiffs'/Counter-Defendants' Moton for Partial SD, dated 1-20-2021, 23 pgs.

-Plaintiffs'/Counter-Defendants' Moton for SD of Defendants'/Counter-Plaintiffs' Counterclaim, dated 1-20-2021, 22pgs.

-Defendants'/Counter-Plaintiffs' Motion for Partial SD with Regard to Plaintiffs'/Counter-Defendants' Complaint, dated 1-29-2021, 23 pgs.

- Defendants'/Counter-Plaintiffs' Answer to Plaintiffs'/Counter-Defendants' Motion for SD on Defendants'/Counter-Plaintiffs' Complaint, dated 2-10-2021 20 pgs.

-Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for SD of Defendants' Counterclaim, dated 2-12-2021, 6 pgs.

-Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Partial SD of Plaintiffs' Complaint, dated 2-15-2021, 51 pgs.

-Plaintiffs' Reply to Defendants' Response to Plaintiffs' Reply Concerning Plaintiffs' Motion for SD of Plaintiffs' Complaint, dated 2-16-2021, 3 pgs.

-Defendants'/Counter-Plaintiffs' Response to Plaintiffs'/Counter-Defendants' Reply to Defendants'/Counter-Plaintiff's Response to Plaintiffs'/Counter-Defendants' Motion for Summary Judgment of Their Complaint, Dated 2-16-2021, 2pgs.

-Plaintiffs'/Counter-Defendants' Response to Defendants'/Counter-Plaintiffs'

Motion for Partial SD and Cross-Motion for SD Pursuant to MCR 2.116(I)(2), dated 2-17-2021, 150 pgs.

-Reply to Plaintiffs'/Counter-Defendants' Response to Defendants'/Counter-Plaintiffs' Motion for Partial S Judgment, dated 2-19-2021, 42 pgs.

-Defendants'/Counter-Plaintiffs' Response to Plaintiffs'/Counter-Defendants' Supplemental Brief Summarizing Pending SD Motions, dated 5-26-2023, 931 pgs.

Any pleadings not identified above were simply an oversight as all the applicable pleadings were examined.

LEGAL ANALYSIS

Plaintiffs' first Motion for SD and Plaintiffs'/Counter-Defendants' Motion for Partial SD are based on MCR 2.116 (C)(10) claiming that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law".

Defendants filed a Motion for Partial SD based on MCR 2.116 (C)(8) & (10) alleging that "[t]he opposing party has failed to state a claim on which relief can be granted" and "there is no genuine issue as to any material fact".

Further, in Defendants/Counter-Plaintiffs' Response to Plaintiffs/Counter-Defendants' Supplemental Brief Summarizing Pending SD Motions, Defendants assert that they are entitled to SD of all Plaintiffs claims pursuant to MCR 2.116 (I)(2) which provides; "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party", although there was no briefing on which standard to apply and why.

The court will therefore analyze all the competing claims pursuant to MCR 2.116(C)(8) & (10) and 2.116 (I)(2).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n,* 491 Mich 22, 206(2012). The moving party has the initial burden of supporting his or her position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v Novi,* 475 Mich 558, 569 (2006).

When evaluating a motion under MCR 2.116(C)(10), the court must consider all evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood,* 461 Mich 109, 120 (1999).

SD must be granted pursuant to MCR 2.116(C)(10) if "there is no genuine issue of material fact." *El-Khalik v Oakwood Hearthcare Inc.,* 504 Mich 152, 160 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." Id. Mere speculation or promise to offer factual support at trial is insufficient to overcome a motion for SD and the opposing party must set forth specific facts demonstrating a genuine issue for trial at the time of the motion. *Maiden*, supra at 121.

Pursuant to MCR 2.116(G)(5) the court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, … when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9)".

"In presenting a motion for SD, the moving party has the initial burden of supporting its position". *Quinto v Cross & Peters Co.,*451 Mich 358, 362 (1996). The burden then shifts to the party opposing the motion "to establish that a genuine issue of disputed fact exists." Id.

BREACH OF CONTRACT

To support a breach-of-contract claim a party must establish three elements: "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." *Bank of America, NA v First American Title Ins Co,* 499 Mich 74, 100 (2016).

Both parties in Count I of their respective complaints allege a breach of contract by the other party.

Plaintiffs allege that Defendants breached the Employment Agreement between the parties in the following particulars:

"50. When Dr. Martin and South Michigan executed the Agreement, they expressly agreed to the following provision:

> The Physician's employment may be terminated only as follows. The Practice may terminate the Physicians' employment for Cause upon 14 days' notice to Physician. The Practice may terminate Physician's employment without Cause upon ninety (90) days' written notice to Physician. In lieu of written notice, The Practice may terminate employment immediately upon payment of 90 days of Base Salary and prorated productivity bonus.

51. South Michigan breached the Agreement by its failure/refusal to make payment of "90 days Base Salary and prorated productivity bonus" to Dr. Martin on or before December 31, 2018.

52. When Dr. Martin and South Michigan executed the Agreement, they expressly agreed to the following provision:

> [T]he Practice has or will direct unassigned patients to [Dr. Martin's] medical practice.

53. South Michigan has breached the Agreement by failing to "direct unassigned patients as appropriate to {Dr. Martin's} medical practice."

(The above referenced allegations are contained in Plaintiff's First Amended Complaint.)

Defendants allege that they did not breach the employment agreement as the parties modified Dr. Martin's compensation to a month-to-month contract by the oral agreement between Dr. Hathaway and Mr. Martin which occurred on or about June 13, 2018. The month-to-month compensation agreement was negotiated due to the automatic renewal of Dr. Martin's contract on July 1, 2018 and the pending merger with LO Eye.

Dr. Hathaway and Mr. Martin negotiated a month-to-month compensation agreement for Dr. Martin. The agreement was confirmed by Mr. Martin in a communication on May 31, 2018, wherein he stated; "For next year's pay, starting

in July, I just used her average monthly pay rate which is 50% of collections to calculate the amount. It is not the full bonus she would make over the year. Just a prorated amount based on time before LO Eye takes over. Again, we can discuss more in person."

The parties also negotiated reimbursement for Continuing Medical Education ("CME") expenses through a series of e-mails on June 8, 2018 and June 9, 2018.

The primary goal in interpreting a contract is to determine and enforce the parties' intent. The court must read the agreement as a whole and attempt to apply the plain language of the contract. *Vill. Of Edmore v Crystal Automation Sys Inc,* 322 Mich App 244 (2017).

Parties to a contract are free to agree on terms in an agreement and may generally take from, add to, or modify an existing contract. *Port Huron Educ Ass'n MEA/NEA v Port Huron Area Sch Dist,* 452 Mich 309, 326 (1996).

Parties to a contract are free to modify or waive it orally or by conduct. *Quality Prods & Concepts Co v Nagel Precision, Inc,* 469 Mich 362 (2003). In the instant case, the parties did orally modify the Employment Agreement.

The burden to establish an oral modification rests on the party claiming under it. *Minkus v Sarge,* 348 Mich 415, 421 (1957). The proponent of the modification must present clear and convincing evidence establishing mutual agreement to modify or waive the original contract. *Quality Prod & Concepts Co,* supra at 365.

The parties do not dispute that they modified the original contract. The dispute focuses on whether the original contract was extinguished.

In *Joseph v Rottschafer,* 248 Mich 606, 610 (1929) the court stated:

> If parties to a prior agreement enter a subsequent contract which completely covers the same subject, but which contains terms inconsistent with those of the prior agreement, and where the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement. leaving the subsequent contract as the sole agreement of the parties.

However, in *Nib Foods, Inc v Mally,* 70 Mich App 553, 560 (1976) the court held that a subsequent agreement did not entirely supersede an earlier agreement because it covered only a portion of the subject matter in the earlier agreement.

The court's task is to attempt to reconcile the initial and subsequent agreements between the parties. In *Omnicom of Michigan v Giannetti Inv Co,* 221 Mich App 341, 346-347 (1997) the court of appeals held a later contract did not supersede an earlier contract where the subsequent contract did not address all the provisions of the earlier agreement.

The court in *Harrington-Wiard Co v Blomstrom Manfg Co,* 166 Mich 276, 286 (1911) , stated:

> It is well established rule that the necessary legal elements to establish novation are; (1) Parties capable of contracting; (2) a valid prior obligation to be displaced; (3) the consent of all parties to the substitution based upon sufficient consideration; and (4) lastly, the extinction of the old obligation and the creation of a valid new one.

Defendants seek to have it both ways. They allege that the Employment Agreement was extinguished by the modification, yet they seek to enforce the Confidentiality Covenant of the original Agreement

In the instant case, whether a novation occurred is a question of fact for the jury. Defendants' motion for SD on Breach of Contract is denied.

Further, the employment agreement provides; "You also acknowledge that the Practice has or will direct unassigned patients as appropriate to your medical practice".

The parties only gave cursory attention to this argument, insufficient for the court to adequately address. However, Defendants did in Defendants/Counter-Plaintiffs' Response to Plaintiffs/Counter-Defendants' Supplemental Brief Summarizing Pending SD Motions state, "But the SMO Agreement contains no such language requiring the direction of unassigned patients to Dr. Martin."

Page 3, of the Employment Agreement under "Confidentiality Covenants" expressly provides for this. This matter presents a question for the jury and Defendants' Motion for SD on this claim is denied.

Defendants in their Counter-Complaint allege the following breach of contract;

"25. Pursuant to the Agreement, Dr. Hathaway and Dr. Martin expressly agreed to the following provision regarding confidentiality of patient information and the use of said information:

> You agree to maintain the confidentiality of this Agreement, and all provisions hereof, and any and all business records, financial information ,medical records and other proprietary information of the Practice, and shall not disclose any such matters to any third person or entity without the prior written consent of the Practice…

26. Dr. Martin breached the Agreement when she, or through Mr. Martin, used confidential SMO patient data, patient demographics, business record, financial information, or other proprietary information of SMO contrary to the Agreement. …"

The Employment Agreement of Dr. Martin provides for the payment of a Base Salary plus a bonus "based on your net collections". To calculate Dr. Martin's bonus Dr. Hathaway provided monthly PMRG reports to Mr. Martin.

Dr. Hathaway testified to the following in his deposition:

> "Q: Have you verified how she ever came to have PMRG numbers in her possession?
> A: We gave her monthly reports. Actually, I gave Doug monthly reports. (Dr. Hathaway Dep at 168:15-18.)
> ….
> ….
> Q: What does PMRG mean?
> A: Practice Management Resource Group. That's my billing company that keeps track of all of our bill information.

Q: [t]he PMRG is that the program or the company that would produce the information from which Shannon/Doug could calculate her bonus ?
A: Right."

Dr. Hathaway testified further that , "I've never had them (the billing company) submit any data to me in RVUs."

When questioned further, Dr. Hathaway stated that the PMRG reports, "No, there wouldn't be any specific patient information in that."

When Oaklawn was considering hiring Dr. Martin they requested that she provide wRVUs which are productivity metrics for healthcare providers.

Mr. Martin testified in his deposition as follows:

"Q: Where did you get those numbers?
A: I calculated them.
Q: And how did you calculate them, from what?
A: I calculated them off of prior productivity reports that were received.
Q: And you received those from what source?
A: Productivity reports were regularly sent by Jason Hathaway."
(Mr. Martin Dep. at 20:6-23:1)

Dr. Hathaway does not dispute that he regularly provided PMRG reports to Mr. Martin. He also does not dispute that the PMRG reports do not include wRVUs.

Mr. Martin is employed as the Finance Director for Oaklawn. Dr. Hathaway regularly disclosed the PMRG reports to Mr. Martin which he now claims are privileged information. In *Leibel v GMC,* 250 Mich App 220, 242 (2002), the court stated; "our courts have held that once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party , the privilege disappears." See, *Oakland Cty Prosecutor v Dept of Corrections,* 222 Mich App 654, 658 (1997), See also, *Nash v City of Grand Haven,* 321 Mich App 587, 593 (2017); *Yates v Keane,* 184 Mich App 80, 83 (1990).

Once the privilege is waived, it is waived for all time. *In re Estate of Arnson,* 2 Mich App 478, 485 (1966).

From the PMRG reports, Mr. Martin extrapolated the wRVUs which he *provided to Oaklawn. (Mr. Martin Dep 19: 18-23:1; 48:23-57:22).*

The court finds, as a matter of law, that Dr. Hathaway waived any claim to privileged information by disclosing it to a third party, Mr. Martin. Further, the information, wRVUs, disclosed by Mr. Martin was the information he created and did not include confidential information as alleged. Plaintiffs are granted SD as to Defendants' Counter-Complaint Breach of Contract count.

Defendants allege that "Count I cannot be maintained against Dr. Hathaway individually where the SMO Agreement was executed *for South Michigan* by Dr. Hathaway , and not by Dr. Hathaway in his individual capacity". A review of the Employment Agreement reflects that it was signed; Darren Hathaway, M.D., South Michigan Ophthalmology. There is no clarifying language or notation that Dr. Hathaway was signing in a representative capacity and the court is not entitled to infer such. Whether Dr. Hathaway signed in his representative capacity is a question of fact for the jury to decide. Defendants' claim for SD in this regard is denied.

TORTIOUS INTERFERENCE WITH CONTRACT

Plaintiffs allege the following in their First Amended Complaint:

> 57. Upon learning of Dr. Martin's Oaklawn Agreement, Defendants improperly interfered by transmitting the Letter to "Mr. Townsend and the Oaklawn Board of Directors," urging, coercing, and/or influencing the Board not to approve Dr. Martin's Oaklawn Agreement, stating:
>
> …
>
> …
>
> "I say now, definitively, that I have no intention of taking cases away from the hospital because of this merger, have NEVER told Dr. Martin or her husband

otherwise, and that any claim to the contrary is a complete fabrication."

" In reality, Dr. Martin is responsible for a substantially lower percentage of revenue at SMO (and a lower percentage of surgical volume) than me, and the reason is because that is all she is capable of. She is at 100% of her potential right now.

"Right now, Oaklawn received 100% of our Marshall surgical volume and its costs them zero dollars. If you take Dr. Martin on as a new service line, it will cost hundreds (plural) of thousands of dollars to buy equipment, remodel an office to suit ophthalmology, and hire staff. She will need to be placed on a guarantee (and she has already had one Oaklawn physician guarantee and has never, not once, in all the years since produced enough revenue to cover the salary she was paid during that initial guarantee), then she will need several years to ramp back up to full productivity, which, for her, will be exactly what she is now producing and has been for the last several years. In exchange for this, I would be forced, against my will (because I have no desire to pull out whatsoever), to pull out my cases and take them elsewhere and the hospital would lose 60% or more of its ophthalmology revenue (and that's after several years of her building up. In the short term, it would effectively lose 100%). I can't imagine any scenario where this make sense for Oaklawn, particularly in the current climate.

" Regardless of what you hear from inside your organization, I am the driving force of this practice. I see more patients, I do more surgery, and I do both better (if you don't believe me, ask anyone in surgery who has seen us both work who they would prefer operate on their loved ones, or ask them who comes to The rescue of whom when a surgery isn't going well.)".

58. By Defendants' above-described actions, Defendants intended to, and did, interfere with Dr. Martin's contractual relationship and expectancy with Oaklawn Hospital as the Broad declined to approve the Oaklawn Agreement on or around October 26, 2028.

59. Defendants knew or should have known that their actions would cause a breach, interference with and/or termination of Dr. Martin's Oaklawn Agreement.

60. Defendants' acts in instigating/interfering with the Board's decision constitute a *per se* wrongful act.

Plaintiffs in Count III of their First Amended Complaint also allege Tortious Interference With A Business Expectancy, particularly stating:

> 68. Upon terminating Dr. Martin, defendants, or persons acting at their direction, refused to inform her patients of her new practice and urged Dr. Martin's patients to stop seeking care from her and instead to seek care from Defendants.

Defendants likewise assert a claim for Tortious Interference With A Business in Count II of their Counter Complaint.

Defendants allege that they had a business relationship and expectancies with their patients and Plaintiffs "improperly interfered" with the business relationship and expectancies as follows:

> 37. Dr. Martin provided SMO patients with her personal cell phone number and told said patients to not make their follow-up appointments with SMO, but rather, to wait until Dr. Martin opened her new practice to schedule their appointments.

A party bringing a claim for tortious interference with a contract must establish "(1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Knight Enterprises v RPF Oil Co,* 299 Mich App 275, 280 (2013).

Both of the parties' claims for tortious interference with a contract have the same fatal flaw. Neither party had a contract.

Dr. Martin's "Employment Offer" from Oaklawn provided; "After you accept this offer, your employment remains contingent upon … the Board of Directors' approval". The Board of Directors voted 7 to 1 against approving Dr. Martin's contract at their meeting of 10-26-2018.

Dr. Hathaway entered into a "nonbinding letter of intent" ("NLOI"), dated 4-20-2018 between Defendants and LO Eye for the purchase of Defendants assets. The NLOI contains the following provisions:

> The purpose of this letter is to set forth certain nonbinding understandings and certain binding agreements with respect to the proposed purchase of the practice assets of SMO by L.O. Eye. When signed by SMO and its members and returned to L.O. Eye, this letter will be a nonbinding letter of intent expressing our mutual present interests (except to the extent specifically set for in the Binding Provisions).
> …
> …
>
> NONBINDING PROVISIONS
>
> The following numbered paragraphs of this letter (collectively, "Nonbinding Provisions") reflect our mutual understanding of the matters described in them. The Nonbinding Provisions are not intended to create or constitute any legally binding obligation between L.O. Eye and SMO, and neither L.O. Eye nor SMO will have any liability to the other with respect to the Nonbinding Provisions unless a fully integrated, definitive purchase agreement is prepared, authorized, signed, and delivered by all necessary parties.

The binding provisions of the NLOI provide:

> E. Termination. L.O. Eye and SMO will, for a period of 60 days after the date of this letter, or any shorter period as may be necessary to reach a definitive purchase agreement, negotiate with the objective of reaching, if possible, a definitive purchase agreement consistent with this letter and mutually acceptable to the parties. If the parties have not reached and signed a definitive purchase agreement withing 60 days after the date of this letter, then neither L.O. Eye or SMO may terminate this letter (the "Termination Date"). L.O. Eye may terminate this letter at any time if it discovers any facts or circumstanced that it reasonably believes to be materially inconsistent with the assumptions on which this letter is based or it

> believes pose an unacceptable risk of a material loss or liability.
> …
> …
> G. No Liability. This letter is intended so serve as an expression of our present interests concerning a proposed transaction. This letter is not a legally binding offer or agreement to purchase and sell the Purchased Assets or to assume any liabilities of SMO. If the parties decide to proceed with the transaction, the terms of the transaction will be as set forth in a definitive purchase agreement. If a definitive purchase agreement is not prepared, authorized, signed, or delivered for any reason, no party will have any liability to another party based upon or relating to the Nonbinding Provisions.

"A mere expression of intention does not make a binding contract". *Kamamath v Mercy Men'l Hosp Corp,* 194 Mich App 543, 549 (1992).

Dr. Martin's Employment Offer was expressly contingent upon Board approval that did not materialize.

The court will note that in the depositions of all the Board members, all testified that the letter from Dr. Hathaway did not influence their decision to not pursue an ophthalmology service line. Many legitimate business reasons were given for the Board's denial of pursuing a new service line. As much as Plaintiffs wish to infer and speculate that Defendants' actions caused the Board to decline to hire Dr. Martin, there is no genuine issue of fact to support their claim. This testimony defeats the third element of unjustified instigation of the breach required to sustain this cause of action.

Dr. Hathaway's NLOI was subject to numerous conditions and qualifications *and by its express language was no more than an intention "to serve as an* expression of our present interests concerning a proposed transaction".

In *Knox v Knox* , 337 Mich 109, 118 (1953), the court quoted; "A condition precedent is a fact or event which the parties intend must exist or take place

before there is a right to performance". (citations omitted). The court went on to conclude, "[i]f the condition is not fulfilled, the right to enforce the contract does not come into existence'. Knox, supra.

In *Modern Globe Inc v 1425 Lake Drive Corp,* 340 Mich 663 (1954), Defendant offer to buy land from Plaintiff "conditional on ratification and approval by the stockholders'. A stockholders meeting was never held, and the court held that absent such approval, Defendant was not obligated to purchase the land.

In *Berkel & Co Contractors v Christman Co,* 210 Mich App 416 (1995) the court held that failure to satisfy a condition precedent precludes any cause of action for the failure of performance.

The instant case is not analogous to *Wilkinson v Powe,* 300 Mich 275 (1942) wherein a third party caused farmers to break their contract with defendant's creamery by sending a letter claiming that the defendant would not purchase their milk unless it was hauled by trucks owned by Defendant.

Wilkinson is consistent with the Restatement of Torts which states; "One may ordinarily refuse to deal with another, and the conduct is not regarded as improper but '[o]ne may not … intentionally and improperly frustrate dealings that have been reduced to the form of a contract.'" Restatement (Second) of Torts section 766 comment b, at 8.

Neither party maintained an enforceable contract. Both parties' claims for Tortious Interference with Contract fail for want of a contract. Plaintiffs and Defendants are granted SD as to the opposing parties' claims for this cause of action.

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY

The court will now address each of the parties' claims for Tortious Interference with Business Expectancy/Relationship.

"To establish a prima facie case of tortious interference with a business relationship, plaintiffs must show: (1) the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; (2)

knowledge of the relationship or expectancy on the part of the defendant interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy' and (4) resultant damage to the party whose relationship or expectancy has been disrupted." *Michigan Podiatric Medical Assoc v National Foot Care Program, Inc,* 175 Mich App 723, 735 (1988).

The court went on to state; "[o]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." Id. at 736-737.

"The interference with a business relationship must be improper in addition to being intentional. Improper means illegal, unethical, or fraudulent." Id. at 737.

The burden is on the plaintiff to prove improper and unjustified interference. *Feldman v Green,* 138 Mich App 360 374 (1984).

The plaintiff must demonstrate, with specificity, affirmative acts by the interferor which corroborate the unlawful purpose of the interference. Id. See also *CMI Int'l Inc v Intermet Int'l Corp,* 251 Mich App 125, 131 (2002).

The court in *Ceroni v Tomblinson, Harburn Assoc,* 492 Mich 40, 45 (2012) held that "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Ceroni* involved a case where the low bidder on a school project was not awarded a contract. The court held, "[b]ecause the school district retained a broad discretionary right to reject the lowest bidder, plaintiff could not have had a valid business expectancy".

In *Jim-Bob Inc v Mehling,* 178 Mich App 71, 96 (1989), the court held, "where a defendant's acts are in furtherance of legitimate personal or business interests, such defendant is shielded from liability". See also, *Christner v Anderson, Nietzke & Co, PC,* 156 Mich App 330, 348-349 (1986).

In *Puetz v Spectrum Health Hosp,* 324 Mich App 51, 78 (2018), the court quoting *Dalley v Dykema Gossett PLLC,* 287 Mich App 296, 323 (2010) stated, "to satisfy the third element, the plaintiff must establish that the defendant "acted both intentionally and either improperly or without justification. … If the defendant's act was motivated by legitimate business reasons, then the act does

not 'constitute improper motive or interference." *Dalley* at 324. Finally, the plaintiff must demonstrate that the defendant 'did something illegal, unethical, or fraudulent.' Id. "

The plaintiff must prove that the defendant's conduct induced or otherwise caused a breach or termination of the business relationship or expectancy. See, *Bahr v Miller Bros Creamery,* 365 Mich 415,425 (1961).

Likewise, Defendants must prove that Dr. Martin's actions caused a termination of the business expectancy between Defendants and LO Eye.

In Dr. Martin's defense, she claims that she contacted the American Medical Association and was informed pursuant to Ethics Opinion 7.03, she had an affirmative duty to notify patients that she was leaving SMO and to provide patients with her contract information.

Again, it must be noted that Dr. Martin's Employment Agreement with Defendants does not include a "Covenant Not to Compete" nor a "Nonsolicitation Agreement".

Plaintiffs cite to *Raymond James & Assoc v Leonard & Co,* 411 F Supp 2d 689 (E.D. Mich. 2006) which held:

> RJA's customer lists were not protectable trade secrets, so Defendants use of the information was not per se wrongful or with malice. Instead, Defendants actions were 'motivated by legitimate business reasons,' and therefore '[do] not constitute improper motive or interference.' Again, according to the Supreme Court of Michigan, ' in general, there is nothing improper in an employee establishing his own business and communication with customers for whom he had formerly done work in his previous employment.' [Id. at 698.]

In Dr. Martin's deposition she testified that she only treated patients that expressly reached out to her office to schedule an appointment. Dr. Martin Dep at 67;19-68;10. Defendants have not presented any evidence refuting Dr. Martin's testimony. Defendants have also not established that Dr. Martin did any

per se wrongful act or intentional doing of a lawful act with malice and unjustified in law.

Defendants also allege that Plaintiffs committed a Tortious Interference With A Business Expectancy because; "50. Dr. Martin and Mr. Martin failed to negotiate in good faith with LO Eye for an employment agreement for Dr. Martin."

In *In re Leix Estate,* 289 Mich App 574, 591 (2010), the court recognized, "Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing."

Defendants have not cited any authority which imposes a duty upon an individual to negotiate with another third party. A party cannot simple announce a position and then leave it up to the court to discover and rationalize the basis for its claims and then search for authority to sustain its position. *Mitcham v Detroit,* 355 Mich 182, 203 (1959).

Trial courts are not the research assistants of the litigants; parties have a duty to fully present their legal arguments to the court for its resolution of their disputes. *Walters v Nadell,*481 Mich 377, 388 (2008).

LO Eye retained A. Michael La Penna ("LaPenna"), an independent healthcare consultant, to analyze the prospective Merger. After review of the documentation, La Penna recommended against the Merger.

Dr. Hathaway subsequently acknowledged that LO Eye's withdrawal from the Merger was not due to Dr. Martin, but to financial concerns. The following exchange during Dr. Hathaway's deposition:

> Q: Okay. Would you agree with me today, Dr. Hathaway
> That Dr. Martin was not the only holdup?
> A: I would.
> …
> …
> Q: All right. What other—just out of curiosity, what other
> holdups have you since learned of after reviewing the LO
> Eye documents?
> A: Mostly financial—financial reasons. I didn't go through

it in great enough detail to be able to tell exactly what their thought process was, but it appears that they were going through a lot of financial troubles with their Battle Creek acquisition and didn't feel that it was prudent to take on another possible money losing situation in Marshall, you know, if Dr. Martin was to leave and not sign a contract.

Q: Is it your understanding that Dr. Martin was not necessary for the acquisition of SMO or that she was necessary for the acquisition of SMO?

A: …. Then in November of 2018 I got a call from Jeff Barnes who is one of the partners at LO Eye, and he tells me – and this is first time I've heard this from them. He said, "What's going on with that Dr. Martin situation? Is that irrevocable at this point?" I said, "Well, I don't know. You know, I've been hearing all along that, you know, if she decides to go somewhere else that it's not going to affect the merger." And then he said, "Well, we've looked at the numbers, and it looks like if she doesn't come we can't afford to do it so the merger will be off." … Then in March they asked me to come up to Lansing, and I sat down with Dan Badgley and Ahmed El-Sanhouri, who was the new President of the Board. That had changed in January. They had a vote and Dr. Lewis stepped down and Dr. El-Sanhouri became the new Chairman of the Board. I sat down with El-Sanhouri and Badgley and one of their financial analysis, and they give me a PowerPoint presentation and they showed me in great detail here are our numbers with Shannon, here are your numbers without Shannon, we can't afford to take the risk that this will lose money, and we can't get somebody in there is a timely manner so we're going to back out. And so that was the reason that I was given, was strictly 100 percent because Shannon wasn't on board. (Dr. Hathaway Dep at 94:14-98:21; 211:7-212:4.)

Additionally, concerns arose about Dr. Hathaway's testing:

As the compliance officer, I would like to see complete resolution of his unnecessary testing and procedures before we would consider him as a colleague. I think another independent evaluation by Corcoran would be appropriate if we get to the point where his practice is being reconsidered for purchase.

> He should be aware of this because he is so far out of the norm that he would put LO Eye at risk. (Dr. Bueche 12-7-18 email Dr. Lewis.)

It is clear that nothing Dr. Martin did caused the Merger to fail, save her deciding to not go with LO Eye. Defendants have presented no genuine issue of material fact to the contrary.

Plaintiffs are granted SD on Defendants claim for Tortious Interference of Business Relationship.

Turning to Defendants' defense of the Tortious Interference with Business Expectancy by Plaintiffs. The above cited case law is equally applicable to Defendants.

Defendants assert, as did Plaintiffs, that they were simply pursuing a legitimate business interest. After speaking to Rhodes and Neidlinger both invited Dr. Hathaway to write a letter to the Board to express "his side of the story". In response to their requests, he wrote the letter.

The letter by Dr. Hathaway was written, in part, to counter an Interoffice Memorandum written by Rhodes which stated, "[t]he new owners of the practice have indicated that they plan to move much of the work currently being done at Oaklawn to an Ambulatory Surgery Center, (ASC) also owned by them, meaning a decrease in surgery cases to Oaklawn."

Dr. Hathaway also acquired a letter from LO Eye that they did not intend to move surgical services from Oaklawn.

Dr. Hathaway clearly had a legitimate business interest in writing the letter. Therefore, pursuant to *Jim-Bob Inc,* and *Puetz* Dr. Hathaway's letter did not amount to an improper motive and he is shielded from liability.

Defendants are entitled to SD of Plaintiffs' claim for Tortious Interference of Business Expectancy.

DEFAMATION

The Plaintiffs have asserted a claim for defamation in Count V of their First Amended Complaint. The court is addressing this claim out of order as it involves the Hathaway letter directly addressed above.

Plaintiffs allege:

> 84. The Letter wrongly disparaged Dr. Martin's character commitment to the community, truthfulness, and professional capabilities by falsely asserting and/or implying, amongst other things, the following:
>
> "In reality, Dr. Martin is responsible for a substantially lower percentage or revenue at SMO (and a lower percentage of surgical volume) than me, and the reason is because that is all she is capable of. She is at 100% of her potential right now."
>
> *****
>
> "Regardless of what you hear from inside your organization, I am the driving force of this practice. I see more patients, I do more surgery, and I do both better (if you don't believe me, ask anyone in surgery who has seen us both work who they prefer operate on their loved ones, or ask them who comes to the rescue of whom when a surgery isn't going well.)"
>
> 85. The forgoing publications are false, defamatory and prejudiced Dr. Martin in the course of her business.
> 86. Dr. Hathaway's statements were not privileged.
> 87. Dr. Hathaway published these false statements negligently, with knowledge of their falsity, and/or with reckless disregard for the truth.
> 90. Because Dr. Hathaway's defamatory statements have denigrated Dr. Martin's business reputation, the remarks constitute defamation *per se* and Dr. Martin is not required to prove special or actual damages.

Defamation has 4 elements:

1. A false and defamatory statement concerning the plaintiff;
2. An unprivileged publication to a third party;
3. Fault amounting at least to negligence; and
4. Either actionability per se or the existence of special harm.

Rouch v Enquirer & News, (After Remand), 440 Mich 238, 251 (1992).

When a qualified privilege exists or where the speech involves a matter of public concern, the burden shifts to the plaintiff to prove the challenged statement is false. Id.

In *Milkovich v Lorain Journal Co,* 497 US 1 (1990), the Supreme Court held that "pure" statements of opinion, which do not imply a verifiable fact , are not actionable as defamation.

In *Greenbelt Cooperative Publ'g Ass'n v Bresler,* 398 US 6, 14 (1970), the Court held that referring to a real estate developer's position as "blackmail" was no more than "rhetorical hyperbole, a vigorous epithet used by those who considered [the] negotiating position extremely unreasonable."

In the case *Ireland v Edwards,* 230 Mich App 607, 613 (1998), the court concluded that referring to an individual as an "unfit mother" was "necessarily subjective" and not actionable.

In *Kevorkian v American Med Ass'n,* 237 Mich App 1,11 (1999), the court held that referring to the Plaintiff as a "murderer" could be both objective and subjective but, "the alleged defamatory statements, taken individually or together, taken in or out of context, do not, by implication or otherwise, considering all the circumstances, so harm plaintifff's reputation as to lower that reputation in the -community or to deter third person from associating with him."

The court stated further, "[e]ven if we were to conclude that defendants' statements are defamatory, … because the statements also are necessarily subjective and could also be reasonably understood as not stating actual facts, they are either nonactionable rhetorical hyperbole or must be accorded the special solicitude reserved for protected opinion." Id. at 13.

"There exists a qualified privilege to defame where 'the party communicating has an interest ,or in reference to which he has a duty, to a person having a corresponding interest or duty.'" *Tumborella v The Kroger Co,* 85 Mich App 482, 289 (1978). The court went on to hold that the question of whether a privilege attaches if a question of law for the judge. "Where a qualified privilege exists, plaintiff must prove actual malice in order to recover, i.e must prove that the

Communication was made with knowledge of its falsity or with reckless disregard for the truth." Id.

In *Ledsinger v Burmeister,* 114 Mich App 12, 21 (1982), the court held that "[t]he court may determine, as a matter of law, whether the works in question, alleged by plaintiff to be defamatory, are capable of defamatory meaning."

Dr. Hathaway, in his deposition, stated that the statement Dr. Martin "is responsible for a substantially lower percentage of revenue as SMO (and a lower percentage of surgical volume) is a truthful statement. Hathaway Dep. Transcript pp 279-280. Dr. Hathaway also confirmed that he "see[s] more patients" and do[es] more surgery". Hathaway Dep transcript, pp280-281. Dr. Hathaway testified that it is his opinion that he "do[es] both better." Id.

In Dr. Martin's deposition the following exchange occurred:

> Q. …First of all, "I see more patients," is that a false statement?
> A. I don't disagree.
> Q. That's not false. "I do more surgery."
> A. I don't disagree.
> Q. "I do better." Is that the part you think is false?
> A. I think that's a matter of opinion.
> Dr. Martin Dep Transcript, p75.

The remaining statements that Dr. Martin is responsible for less revenue and surgical volume "because that is all she is capable of and she is at 100% of her potential right now" are clearly expressions of opinion.

Plaintiffs cite *Heritage Optical Ctr, Inc v Levine,* 137 Mich App 793 (1984) and *Mich Microtech, Inc v Federated Publ'ns, Inc,* 187 Mich App 178 (1991), in support of their position that Defendants' statements are actionable defamation. Both of these case are distinguishable. In *Heritage,* the Defendant contact Plaintiff's clients and falsely told them the Plaintiff had moved its office or that it was closed and out of business.

In *Mich. Microtech*, Defendant published an article erroneously stating that Plaintiff's business was going to stop selling satellite dishes.

Both of the cited cases clearly represent statements of fact that can easily be refuted and are not expressions of opinion.

Michigan recognizes a shared interest qualified privilege in defamation cases. The elements of the shared interest qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. *Prysak v RL Polk Co,* 193 Mich App 1 (1992).

In *Minnis v McDonnell Douglas Technical Servs Co.* 162 F Supp 2d 718 (ED Mich 2001), the court ruled that defendant employer had a qualified privilege to discuss allegations of sexual harassment with other employees.

A qualified privilege has been extended to statements made by a former employer to a prospective employer. *Gonyea v Motor Parts Fed Credit Union,* 192 Mich App 74, 79 (1991).

When a shared interest qualified privilege attaches, the plaintiff must prove actual malice. Actual malice has been defined as knowledge that the statement was false or reckless disregard for truth of falsity, *Smith v Fergan,* 181 Mich App 594, 597 (2989).

Actual malice refers to the making of a statement "with knowledge that it [is] false, or with reckless disregard of whether it is true." Id.

> Actual malice is defined as knowledge that the published statement was false or as reckless disregard as to whether *the statement was false or not. Reckless disregard for the* truth in not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published.

Tomkiewicz v The Detroit News, Inc, 246 Mich App 662, 677 (2001) (quoting *Ireland* at 622).

The high standard of actual malice or reckless disregard are intended to avoid violating the free expression protections the First Amendment affords. *Faxon v Michigan Republican State Cent Comm,* 244 Mich App 468 (2001).

Whether evidence is sufficient to support a finding of malice is a question of law. *Tomkiewicz*, supra.

In the context of a motion for SD, general allegations that statements subject to a privilege are false or malicious are insufficient. *Reed v Michigan Metro Girl Scout Council,* 201 Mich App 10 (1993). If the statements are subject to multiple rational interpretations, plaintiff's defamatory interpretation is not enough to create a fact question under the actual malice standard. *Nichols V Moore,* 396 F Supp 2d 783, 796 (ED Mich 2005).

"In considering whether actual malice exists in the context of a motion for summary disposition, the court must consider whether the evidence is sufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Tomkiewicz,* supra at 677.

Considering all the evidence presented, the court finds that Dr. Hathaway made the statements in good faith, for a shared interest, limited in scope, and published to proper parties only, the Oaklawn Board. Dr. Hathaway maintained a shared interest qualified privilege and Plaintiffs have not alleged nor established actual malice or reckless disregard necessary to defeat the privilege.

The court will find that in the instant case, Dr. Hathaway's statements are statements of opinion for which he maintains a qualified privilege, which are not actionable. Defendants are granted SD on Plaintiff' defamation claim.

STATUTORY AND COMMON LAW CONVERSION

Plaintiffs' claim for conversion rest upon the Breach of Contract claim contained in Count I. Plaintiffs claim that Defendants failure to pay the 90 day Base Salary and prorated productivity bonus "constitute[s] an illegal conversion of Dr. Martin's property to the use of the Defendants."

Defendants' claims for conversion, like that of Plaintiffs, relies on the allegation in their Breach of Contract count, the use of "confidential SMO patient data, patient demographics, business records, financial information, or other proprietary information of SMO, also including, but not limited to, the PMRG patient data". Defendants further allege that Dr. Martins providing of her personal cell phone number constituted conversion.

In the case of *Head v Phillips Camper Sales & Rental Inc,* 234 Mich App 94, 111 (1999), the court identified the distinction between common law conversion and statutory conversion:

> The tort of conversion is 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.' Foremost Ins Co v Allstate Ins Co, 439 Mich 378,391; (parallel citation omitted) (1992). Statutory conversion, by contrast, consists of knowingly 'buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.' MCL 600.2919a; (parallel citation omitted) to support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care. Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing, 191 Mich App 614, 626; (parallel citation omitted) (1991). 'The defendant must have obtained the money without the owner's consent to the creation of the debtor and creditor relationship.' Citizens Inc Co v Delcamp Truck Center, Inc, 178 Mich App 570, 575; (parallel citation omitted) (1989).

The principle case in Michigan of *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc,* 497 Mich 337, 352 (2015), adopted the Restatement of Torts to illustrate examples of the ways conversion may be committed:

> A conversion may be committed by
>
> (a) intentionally dispossessing another of a chattel,
> (b) intentionally destroying or altering a chattel in The actor's possession,
> (c) using a chattel in the actor's possession without authority to use it,
> (d) receiving chattel pursuant to a sale, lease, pledge,

gift or other transaction intending to acquire for himself or for another a proprietary interest in it,

(e) disposing of a chattel by sale, lease, pledge, gift or other transaction intending to transfer a proprietary interest in it misdelivering a chattel, or refusing to surrender a chattel on demand.

Inherent in the courts finding in *Aroma* is the fact that the chattel, wine, was identifiable.

Courts have held that, "where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount" an action for conversion lies. *Citizens Ins Co v Delcarp,* at 576.

In the case, *Garras v Bekiares,* 315 Mich 141 (1946), the parties entered into a verbal consignment agreement whereby the Defendant was to make monthly payments to Plaintiff. Defendant defaulted on the monthly payments and Plaintiff filed suit claiming that Defendant converted merchandise or money to their use. The court in holding against Plaintiff, stated; "it is well settled that an action will lie for the conversion thereof, where there is an obligation to keep intact or deliver the specific money in question, and where such money can be identified." *Garras* at 148-149.

The court in *Lawsuit Fin, LLC v Curry,* 261 Mich App 579, 593 (2004), held that "simply retaining money does not amount to 'buying, receiving or aiding in the concealment of stolen, embezzled or converted property.' In this case, the Plaintiff was in the business of making nonrecourse capital advances to litigants in need of funds. Pursuant to the loan documents the Plaintiff had an absolute right to repayment of the funds. Defendant signed documents agreeing that if money was recovered in the underlying suit that Plaintiff would receive a portion of the recovery according to a formula set forth in the loan documents. Defendant also granted Plaintiff a lien on the recovery proceeds. When the Plaintiff was not repaid out of the litigation proceeds they filed suit. The court dismissed Plaintiff's claim to common-law conversion because the initial exercise of domain over the property was not wrongful.

In the instant case, Plaintiffs' claim is that Defendants failed to comply with the Employment Agreement and pay Dr. Martin compensation. Such a claim does

not involve identifiable cash as illustrated above, for which a cause of action for conversion exists. Defendants are granted SD on Plaintiffs' claims for conversion.

Defendants' claims involve the alleged use of confidential information and the appropriation of Defendants' clients. Although creative, both actions, even if true, are devoid of any legal basis. If Dr. Martin used confidential information, which this court already rejected, or gave her phone number to patients to redirect them, such actions do not constitute a "distinct act of domain wrongfully exerted over another's person property in denial of or inconsistent with the rights therein" (*Foremost Ins),* nor knowingly "buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property" (MCL 600.2919a).

Plaintiffs are granted SD as to Defendants' claim for conversion.

LOSS OF CONSORTIUM

Plaintiffs allege in Count VI that; "[a]s a direct and proximate result of the above-described actions of Defendants, Mr. Martin has sustained a loss of society, companionship, service, and other incidents of his marital relationship with Dr. Martin."

Defendants acknowledge that Michigan law allows a husband or wife to recover damages for loss of consortium when his or her spouse is injured by the negligence of a third party citing *Mortgomery v Stephan,* 359 Mich 33 (1959). Defendants further allege that "[a] claim of loss of consortium is derivative and recovery is contingent upon the injured spouse's recovery of damages for the injury", citing *Berryman v Mart Corp,*193 Mich App- 88, 94 (1992).

In *Montgomery*, the court recognized that a loss of consortium claim is derivative against a tortfeasor.

In *Long v Chelsea Community Hosp,* 219 Mich App 578 (1996), the court held that as the loss of consortium claim is derivative in nature and "[b]ecause plaintiff's other claims failed the loss of consortium claim must likewise fail."

In *Oldani v Lieberman,* 144 Mich App 642, 655 (1985), the court held; "Michigan case law permits a husband or wife to recover damages for loss of consortium which his or her spouse is injured y the negligence of a third party."

Plaintiffs assert that the loss of consortium claim survives because Defendants only filed for Partial SD. This position is inaccurate as Defendants/Counter-Plaintiffs' Answer to Plaintiffs/Counter-Defendants' Motion for SD on Their Complaint filed 2-11-2021 seeks SD pursuant to MCR 2.116(I)(2). When coupled with Defendants/Counter-Plaintiffs' Response to Plaintiffs/Counter-Defendants' Supplemental Brief Summarizing Pending Summary Disposition Motions all of the Plaintiffs claims are addressed pursuant to MCR 2.116(I)(2).

As all Plaintiffs claims are dismissed, save Dr. Martin's Breach of Contract cause of action, Mr. Martin's derivative claim fails as no claims survive involving a tort-feasor.

Defendants are granted SD on Mr. Martin's Loss of Consortium claim.

CONCLUSION AND ORDER

Plaintiffs are awarded SD on Defendants/Counter-Plaintiffs' claims for:

Count I-Breach of Contract
Count II-Tortious Interference With A Business
Count III-Tortious Interference With A Business Expectancy
Count IV-Statutory And Common Law Conversion

Defendants are awarded SD on Plaintiffs' claims for:

Count II-Tortious Interference With Contract
Count III-Tortious Interference With a Business Expectancy
Count IV-Statutory And Common Law Conversion
Count V-Defamation
Count VI- Loss of Consortium

IT IS SO ORDERED.

Dated: August 11 , 2023.

_____
HON. BRIAN K. KIRKHAM