

IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

ANTHONY B. SCHWENDINGER, CRNA,)
)
 Plaintiff,)
)
 vs.)
)
 MERCY MEDICAL CENTER-CLINTON,)
 INC., a Delaware Corporation; MEDICAL)
 ASSOCIATES OF CLINTON, IOWA, PLC,)
 An Iowa Company; GATEWAY SURGERY)
 CENTER, LC, an Iowa Company; MORRISON)
 COMMUNITY HOSPITAL, an Illinois)
 Corporation; MARK LEDING, DO; STEPHEN)
 JEWELL, CRNA; and JAMES BABESHOFF,)
 CRNA,)
)
 Defendants.)

Case No. LACV 040843

**RULING AND ORDER ON
DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

There are four Motions for Summary Judgment pending before the Court. Each motion seeks judgment in the movant's favor on all counts asserted against the movant in Plaintiff's petition.

THE PARTIES AND PENDING MOTIONS

Mercy Medical Center-Clinton, INC. ("Mercy") and Morrison Community Hospital District's ("Morrison") Motions for Summary Judgment came before the Court for oral argument on May 11, 2016.

Defendants Medical Associates of Clinton, Iowa ("Medical Associates") and Gateway Surgery Center, LC's ("Gateway") Motion for Summary Judgment came before the Court for oral argument on June 9, 2016.

Finally, Defendants Mark Leding, DO ("Leding"), Stephen Jewell, CRNA ("Jewell"), and James Babeshoff, CRNA ("Babeshoff") filed a Motion for Summary Judgment which came before the Court for oral argument on June 23, 2016.

Plaintiff and his attorney Paul Scheuerlein were personally present for all of the hearings on Defendants' motions. Mercy, Leding, Babeshoff, and Jewell were represented by attorney Robert Slovek. Morrison was represented by attorney Michael Byrne. Medical Associates and Gateway were represented by David Pillers. Dr. Leding was also personally present for the hearing on his Motion for Summary Judgment. Michael Byrne was not present for that hearing.

After having considered the parties' briefs and arguments, the applicable law, and having taken the material facts in the light most favorable to Plaintiff, the Court enters the following ruling on all pending summary judgment motions:

BACKGROUND FACTS

Plaintiff is a Certified Registered Nurse Anesthetist (CRNA). Mercy is a hospital located in Clinton Iowa. Morrison is a hospital in Morrison, Illinois. Medical Associates is a company composed of a group of approximately 40 doctors with varying specialties practicing in the Clinton area. Gateway is a surgery center. Medical Associates is the corporate owner of Gateway. Leding is a Doctor of Osteopathic Medicine (DO) specializing in anesthesiology. Babeshoff and Jewell are both CRNAs.

Plaintiff worked for a company called Pain Consultants, P.C. ("PC"). Plaintiff signed an employment agreement with PC in February of 2005. Along with Plaintiff, PC also employed Babeshoff and Jewell as CRNAs. Jewell was hired by PC in April of 2006. Babeshoff was hired by PC in early 2007. Additionally, PC hired Dr. Leding as an independent contractor in July of 2008. PC was owned and operated by Dr. John Dooley. PC had medical service contracts with Mercy and Gateway (including Gateway's corporate owner, Medical Associates).¹ These contracts provided that PC was to be the exclusive provider of anesthesiology services at each

¹ Dr. Dooley had a nearly identical company called Anesthesia and Pain Consultants (APC) that contracted similarly with Morrison.

facility. The contract between PC and Mercy obligated PC, exclusively, to “directly provide all professional anesthesiology services...as may be required to meet [Mercy]’s requirements for such services in a timely manner...”

Dr. Dooley testified in his deposition that Rod Tokheim, a Vice President of Mercy, “leaned on” Dr. Dooley to hire Dr. Leding to have an anesthesiologist on site at Mercy. Dr. Dooley and Plaintiff testified at their depositions that there was friction between Plaintiff and his coworkers once Leding was hired. Plaintiff also testified that his coworkers engaged in conduct that he characterized as “bullying.” In February of 2012, this conduct escalated to accusations that Plaintiff was an alcoholic, was drunk while at work, and was sleeping on the job. These accusations were made by Babeshoff, Jewell, and Leding. Their concerns were reported up the chain of Mercy’s administration. When asked by Mercy administrators, Leding reported concerns about Plaintiff’s performance in three specific cases, and repeated allegations that Plaintiff was an alcoholic, was drunk at work, and had fallen asleep at work.

Eventually, these concerns were communicated to Mercy’s CEO, Sean Williams. Mr. Williams contacted Dr. Dooley, Plaintiff’s employer and president of PC, and asked Dr. Dooley to be part of an informal investigatory committee, the purpose of which was to investigate claims that Plaintiff did not meet whose purpose was to look into three specific cases in which it was alleged that Plaintiff underperformed his duties of patient care as a CRNA. Dr. Dooley expressed concern that the committee was too informal and requested that a formal procedure be used to afford Plaintiff due process rights similar to the rights required by Mercy’s bylaws. Nevertheless, Dr. Dooley agreed to participate on the informal investigatory committee².

The three-person committee was comprised of Dr. Dooley, Dr. Kumar (a member of

² Mercy has submitted evidence to suggest that this informal process was at least partially for Plaintiff’s benefit. Mercy argues that a formal investigation and process to “officially” revoke Plaintiff’s privileges at Mercy would be widely recognized as a “mark” against Plaintiff that would have severe lasting effects.

Mercy's leadership team), and Linda Hoppe (Mercy's Director of Quality and Risk Management). The committee interviewed Babeshoff, Leding, Jewell, Plaintiff, and two other hospital employees. The committee also received written statements from Leding and Plaintiff detailing their recollections of the three specific cases that were the subject of the informal investigation. Dr. Dooley testified that following the interviews, the committee's focus shifted from Plaintiff's actions in the three specific cases to whether Plaintiff was an alcoholic and appeared drunk at work. After further discussion, there was no consensus as to what course of action the committee should recommend. Mercy's CEO, Sean Williams met with members of Mercy's staff, namely Hoppe, Dr. Kumar, Dr. James Olney, and Dr. Kent Jorgensen. At this meeting, they decided that it was no longer safe to allow Plaintiff to continue caring for patients at Mercy. Dr. Dooley was not present at this meeting. Williams and some Mercy staff then met with Dr. Dooley. Dr. Dooley testified at his deposition that again, the discussion was focused on allegations that Plaintiff was an alcoholic, rather than whether Plaintiff had performed adequately in the three cases being investigated by the committee. Williams told Dr. Dooley to no longer send Plaintiff to work at Mercy.

Dr. James Olney and Dr. Kent Jorgensen, mentioned above, were on Mercy's leadership team. Dr. Olney was also the Chairman and Medical Director at Gateway. Dr. Jorgensen was the CEO of Morrison. As part of Mercy's leadership team, they were aware of the allegations, investigation, and decision not to allow Plaintiff to work at Mercy any longer. Others at Morrison learned of the concerns about Plaintiff's abilities to treat patients stemming from the allegations at Mercy. Shortly after Mercy asked Dr. Dooley to stop sending Plaintiff to Mercy, Morrison's Chief Nursing Officer, Marcia Krogmann, called Dr. Dooley and informed him that Plaintiff was no longer welcome to provide services at Morrison. Similarly, Dr. Olney and

Gateway's Chief Nursing Officer, Robin Kroyman, both called Dr. Dooley and told him that Plaintiff was no longer allowed to provide services at Gateway. There were no specific complaints regarding Plaintiff and his professional services at either Morrison or Gateway. Plaintiff contends that neither Morrison nor Gateway followed their own bylaws in dismissing Plaintiff.

In March of 2012, Amy Berentes, Chief Nursing Officer at Mercy, filed a complaint with the Iowa Board of Nursing (IBON) accusing Plaintiff of working impaired, being a "known alcoholic," and providing inadequate care.³ During a subsequent Gateway board meeting concerning whether Gateway would allow Plaintiff to provide services at Gateway, Plaintiff alleges that Dr. Robert Donnelly received a text message from Dr. Leding. In the message, Dr. Leding allegedly remarked that Plaintiff had been reported to the IBON, and that Plaintiff no longer had his nursing license. Dr. Donnelly shared the text message with the Gateway board, and the board decided the issue was moot based on the information in Dr. Leding's text message to Dr. Donnelly.

Because Plaintiff was unable to work at Mercy, Morrison, or Gateway and was unable to find work elsewhere, Dr. Dooley terminated Plaintiff's contract with PC in April 2012. As a result of Plaintiff's termination, PC was no longer able to meet all of Mercy's anesthesia and pain management needs. The contract between PC and Mercy was terminated in August of 2012. Additionally, Dr. Dooley released Babeshoff, Jewell, and Leding from their employment agreements, all of which contained non-compete clauses. Dr. Dooley received \$150,000 in consideration for releasing the non-compete agreements.

In September of 2012, after all of the events that gave rise to Plaintiff's claims had

³ The IBON dismissed the charges in 2014 following a hearing. The IBON did not find either Jewell's or Babeshoff's testimony credible.

transpired, Babeshoff, Jewell, and Dr. Leding were all hired by Mercy. Dr. Leding is still employed by Mercy as Mercy's Director of Anesthesiology. Babeshoff and Jewell worked for Mercy from September of 2012 until the end of February of 2014. All three of them made more money employed directly by Mercy than they had through their employment at PC.

Following the termination of his employment with Dr. Dooley's companies, Plaintiff attempted to find work elsewhere. However, these efforts were fruitless because, Plaintiff asserts, Mercy, and Leding, Babeshoff, and Jewell, failed to respond either adequately or entirely to requests from prospective employers for references regarding Plaintiff's work history and experience.

Plaintiff filed this Petition against Defendants. Plaintiff maintains the following causes of action against Defendants: 1) Civil Conspiracy (Count I) against all defendants; 2) Tortious Interference with a Contract (Count II) against all defendants; 3) Tortious Interference with a Prospective Business Advantage (Count III) against all defendants; 4) Defamation (Count IV) against only defendants Mercy, Leding, Babeshoff, and Jewell; and 5) Intentional Infliction of Emotional Distress (Count V) against all defendants.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3) (2013). The moving party carries the burden of proving the absence of a material fact issue. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (citations omitted). "If reasonable minds could differ on how to resolve an issue, then a genuine issue of material fact exists." *Id.* However, speculation and mere

allegations are not material facts. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005) (citations omitted).

In ruling on a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. *Id.* Thus, the Court considers “on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record.” *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001) (citations omitted). “An inference is legitimate if it is ‘rational, reasonable, and otherwise permissible under the governing substantive law.’” *Smith v. Shagnasty’s Inc.*, 688 N.W.2d 67, 71 (Iowa 2004) (quoting *McIlravy*, 653 N.W.2d at 328). But an inference based on mere “speculation or conjecture” is not to be indulged. *Id.* “If reasonable minds could draw different inferences from the undisputed facts, summary judgment is inappropriate.” *Borlaug v. City of Cedar Falls*, 710 N.W.2d 541, 543 (Iowa Ct. App. 2006).

ANALYSIS

Count I – Civil Conspiracy

The parties agree that *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159 (Iowa 2002) provides the applicable law for the Court to consider for purposes of summary judgment as it pertains to Count I. The function of civil conspiracy is to impose vicarious liability on all conspirators for each other’s actions which cause injury in furtherance of the conspiracy. *Id.* at 172. Conspiracy is “merely an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert.” *Id.* In order to establish a *prima facie* case of conspiracy, a plaintiff must show “an agreement...between the two persons to commit a wrong against another.” *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994). “The principal element of the conspiracy is the agreement.” *Shea v. Lorenz*, 869 N.W.2d 196 (Table), 2015 WL

4158781, 8 (Iowa Ct. App. 2015).

Mere association, relationship, or companionship alone do not necessarily establish a conspiracy. *Ezzone*, 525 N.W.2d at 398. This is not to say that direct evidence of an agreement is required, however, for civil conspiracies, because of their very nature, are generally proven with circumstantial evidence. *Id.* See also *McFarland v. McFarland*, 684 F. Supp. 2d 1073, 1085 (N.D. Iowa 2010); see also *Weber v. Paul*, 40 N.W.2d 8, 11 (Iowa 1949) noting (“It is of course elementary that a conspiracy may be proven by circumstantial evidence. It is frequently incapable of direct proof.”). At the summary judgment stage, plaintiff must set forth enough evidence to generate a question of fact as to whether defendants had an agreement, and while mere allegations are insufficient, an agreement may be inferred by circumstantial evidence. See *Shea*, 2015 WL 4158781 at 8. “[C]ourts are liberal in allowing proof of circumstances to show whether a conspiracy exists.” *Id.* citing *Stover v. Hindman*, 159 N.W.2d 422 (Iowa 1968). Put another way, to successfully resist Defendants’ Motions for Summary Judgment on Count I, Plaintiff needs only to submit facts which, when viewed in the light most favorable to Plaintiff, demonstrate enough direct or circumstantial evidence for a finder of fact to infer that Defendants may have entered into an agreement to harm Plaintiff.

1. Mercy and Leding, Babeshoff, and Jewell

Dr. Dooley testified in his deposition that a Mercy Vice President, Rod Tokheim, “leaned on” Dooley to hire Leding so that Mercy could have a full-time anesthesiologist on site. Dooley and Plaintiff further testified that once Leding came on board, Plaintiff began experiencing friction and bullying in the workplace. This friction and bullying was allegedly instigated by Leding, Babeshoff, and Jewell. Later, Leding, Babeshoff, and Jewell accused Plaintiff of being drunk and falling asleep at work. Leding also cited three specific cases in which he alleged that

Plaintiff did not perform his CRNA duties adequately.

When these complaints were brought to Mercy, Mercy did not undertake a formal investigation process which could have led to the revocation of Plaintiff's privileges at Mercy. Instead, an informal committee was formed to investigate Dr. Leding's complaints about Plaintiff's performance in the three different cases. After the committee determined that Plaintiff's performance in the three cases was did not fall below their standards, the committee began discussing the allegations of Plaintiff's alcoholism, coming to work drunk, and falling asleep at work. Mercy's leadership then decided to ask Dr. Dooley not to send Plaintiff to work at Mercy anymore.

Because Mercy asked Dr. Dooley to stop sending Plaintiff to work at Mercy, Dr. Dooley was unable to meet his obligations under PC's contract with Mercy to provide enough anesthesiology staff to meet Mercy's needs. This led to not only a termination of the contract between PC and Mercy, but also the termination of Leding's, Babeshoff's, and Jewell's employment contracts with Dr. Dooley. Once Leding, Babeshoff, and Jewell were no longer subject to the exclusivity and noncompete clauses in their individual employment contracts with PC, they were all hired by Mercy, and all made more money than they did when they were employed at PC. Dr. Leding became Mercy's Director of Anesthesiology, a position which was formerly held by Dr. Dooley.

The Court finds that the events leading up to, but especially following, the termination of PC's contract with Mercy, give rise to two separate but reasonable inferences. There are disputed material facts that are central to this case, namely whether Plaintiff was in fact drunk and falling asleep at work, and whether Leding, Babeshoff, and Jewell lied—or at least wrongfully spread rumors to that effect—in an attempt to get Plaintiff fired and cause PC to breach its contract with

Mercy. The fact-finder's answer to that question will greatly affect how the remaining operative facts, all or most of which are undisputed, may be viewed. Depending on how the fact-finder answers that question, the fact-finder will likely adopt only one of two disparate, but reasonable, inferences based on the undisputed facts. The inference in favor of Defendants proceeds as follows:

- 1) Defendants honestly believed that Plaintiff was abusing alcohol
- 2) Defendants were concerned, and were right to be concerned about this observation
- 3) Defendants reported these concerns to certain members of Mercy's leadership
- 4) These reports were appropriate considering the seriousness of the concerns
- 5) Mercy used an informal process to investigate Plaintiff in order to protect Plaintiff from long-term and serious consequences of formally and officially revoking his privileges
- 6) After Plaintiff was *de facto* terminated, PC could not fulfill its contractual obligations to meet Mercy's anesthesiology needs
- 7) Mercy hired Leding, Babeshoff, and Jewell directly because the three were already familiar with Mercy's staff, facilities, and procedures
- 8) Mercy did not have an agreement with Leding, Babeshoff, and Jewell to harm Plaintiff

The inference in favor of Plaintiff proceeds as follows:

- 1) Mercy's Vice President leaned on Dr. Dooley to hire Dr. Leding because Tokheim wanted Leding to work at Mercy
- 2) Because of the exclusivity agreement between PC and Mercy, the only way for Leding to work at Mercy was through employment with PC
- 3) Plaintiff was one of Dr. Dooley's best CRNAs and was crucial to PC's performance at Mercy
- 4) Leding, Babeshoff, and Jewell falsely accused Plaintiff of being an alcoholic, coming to work drunk, and falling asleep at work
- 5) The three made up these accusations with the intent to give Mercy cause to ask Dr.

Dooley to stop sending Plaintiff to work at Mercy

6) Mercy chose to use an informal investigation to avoid the requirements of a formal process that would have given Plaintiff due process rights and would have required the investigation and disciplinary process to take place in a more formalized setting.

7) The fact that, following the termination of their noncompete agreements with PC, Leding, Babeshoff, and Jewell were hired directly by Mercy and made more money is evidence of a financial motive to cause PC to breach its agreement with Mercy

8) Based on Dr. Collah's deposition testimony, one could find that Dr. Leding sent a text message to Dr. Donnelly at Gateway during a Gateway board meeting that contained false information about the status of Plaintiff's nursing license

9) Leding sent this text maliciously and to further the goals of a larger scheme against Plaintiff

The Court must liberally allow proof of circumstances as evidence of whether or not a conspiracy exists. Given the law related to civil conspiracy, the standard for summary judgment, and upon taking the evidence record in the light most favorable to the Plaintiff, the Court concludes that there exist genuine issues of material fact as to whether Plaintiff in fact was drunk and falling asleep at work, and whether Leding, Babeshoff, and Jewell falsely and maliciously spread rumors that the Plaintiff appeared drunk at work, fell asleep at work, and fell below the standard of care in three specific cases.

2. Gateway, Medical Associates, and Morrison⁴

The summary judgment record does not implicate the remaining three Defendants in the same way it implicates Mercy, Leding, Babeshoff, and Jewell in Count I. First, the record does not show any financial motive on the part of Gateway, Medical Associates, and Morrison. Second, neither Morrison, Gateway, nor Medical Associates hired any of the individually-named Defendants following the termination of their employment contracts with PC. Finally, there is no indication that any of the leadership at Morrison, Gateway, or Medical Associates, exerted any

⁴ Morrison briefed a choice of law and statute of limitations issue in writing. At the hearing on Morrison's motion, counsel abandoned that issue.

pressure or influence on PC with regard to whom PC hired as Mercy did with Dr. Leding.

The extent of Morrison's involvement may be summarized as follows: Morrison's then-CEO, Kent Jorgensen, was part of Mercy's leadership team. As such, Jorgensen was aware of the accusations regarding Plaintiff. A woman named Pam Pfister, who later became Morrison's CEO, overheard a conversation between Morrison's Chief Nursing Officer, Marcia Krogmann, and Jorgensen in which Krogmann relayed that she was told by Amy Berentes, Mercy's Chief Nursing Officer, that Plaintiff was no longer allowed to provide services at Mercy. Jorgensen instructed Krogmann to inform Dr. Dooley to no longer send Plaintiff to work at Morrison. Jorgensen changed his mind, but then changed it back, affirming his decision to not allow Plaintiff to work at Morrison anymore. There were no complaints specifically about Plaintiff's work at Morrison, and Plaintiff had never been reprimanded or disciplined in connection with his work at Morrison. Plaintiff alleges that this dismissal was not in conformity with Morrison's bylaws.

"Speculation, relationship, or association and companionship do not establish a conspiracy." *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994). Morrison learned of the accusations regarding Plaintiff because Jorgensen was both Morrison's CEO and a member of Mercy's leadership team. This is nothing more than a relationship and association. The mere fact that Mercy's Chief Nursing Officer informed Morrison's Chief Nursing Officer does not generate a genuine issue of material fact that implicates Morrison in a conspiracy. Morrison's failure to abide by its bylaws might have conceivably given rise to a separate cause of action. However, even if the Court found that Morrison's dismissal of Plaintiff ran afoul of the rules prescribed in Morrison's bylaws, this would not per se create a genuine issue of material fact as to whether Morrison was engaged in a conspiracy with Mercy and the individually-named

Defendants. Viewing all of the undisputed facts in the light most favorable to Plaintiff, the Court determines that as to Count I, Plaintiff has not submitted anything more than speculation based on the association and relationship between Morrison's and Mercy's leadership to serve as the basis of an inference that Morrison was involved in a conspiracy against Plaintiff..

Gateway's and Medical Associates's involvement with this case is more similar to Morrison's involvement than to that of Mercy and the individually named defendants. Medical Associates is the corporate owner of Gateway. Dr. Olney was both a Medical Director and Chairman for Gateway, and a medical director for Mercy. Dr. Olney was aware of the accusations regarding Plaintiff's care and alleged issues at Mercy. Eventually, Dr. Olney and Marcia Krogmann, Gateway's Chief Nursing Officer, told Dr. Dooley not to send Plaintiff to work at Gateway anymore. Gateway argued that the request was actually not to send Plaintiff to work at Gateway unless there was another CRNA or anesthesiologist who was also working with Plaintiff.⁵ Again, Plaintiff asserts that this de facto dismissal or limitation on Plaintiff's abilities to work at Gateway was not in line with Gateway's bylaws. Plaintiff did not have any documented disciplinary or performance issues at Gateway.

Perhaps Gateway's bylaws were violated when Dr. Dooley was asked to no longer send Plaintiff to Gateway. Even so, this would not generate a reasonable inference that Gateway (including its corporate owner, Medical Associates) was involved in a conspiracy to harm Plaintiff. There is no evidence that Jewell, Babeshoff, and Jewell had any potential relationship with Gateway and Medical Associates. There is no evidence that Gateway or Medical Associates had anything to do with Dr. Dooley's decision of whether to hire Dr. Leding. There is no evidence of any financial motive underpinning Gateway's actions. The Court finds that the

⁵ This is not a material fact. Either way, Dr. Dooley was unable to place Plaintiff at Gateway, and this was the next domino to fall in a line that Plaintiff alleges eventually caused his damages.

undisputed facts do not give rise to a reasonable inference of a conspiracy involving Gateway and Medical Associates. Additionally, the Court finds that there are no genuine issues of material fact that, if resolved in favor of Plaintiff, would meet the elements required to prove that Gateway, Medical Associates, and Morrison were involved in a civil conspiracy against Plaintiff.

Count II – Tortious Interference With Contract

“To recover for intentional interference with an existing contract, a plaintiff must show: (1) plaintiff had a contract with a third-party; (2) defendant knew of the contract; (3) defendant intentionally *and improperly* interfered with the contract; (4) the interference caused the third-party not to perform, or made performance more burdensome or expensive; and (5) damage to the plaintiff resulted.” *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 151 (Iowa 2013) (internal quotations and citations omitted) (emphasis added). “The interference must be both intentional and *improper*.” *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 244 (Iowa 2006) (emphasis in original).

The fighting issue on this count is whether there is a genuine issue of material fact as to whether Defendants improperly or wrongfully interfered with Plaintiff’s contract with PC. The wrongfulness element of the interference claim must be a legal wrongfulness separate from the interference itself. *See Compiano v. Hawkeye Bank & Trust*, 588 N.W.2d 462, 464 (Iowa 1999). Some of the Defendants in this case have argued that tortious interference requires an underlying tort. This is incorrect. Tortious interference requires conduct that is wrongful, not a tort that was wrongful.⁶ *See Jones*, 836 N.W.2d at 151 (enumerating the elements for tortious interference

⁶ Torts are, by definition, wrongful. *See* TORT, Black's Law Dictionary (10th ed. 2014) (“a civil wrong...for which a remedy may be obtained”). Requiring proof of an underlying tort as an element of the tort of tortious interference would be redundant, and is clearly not required under Iowa law.

with an existing contract).

In assessing whether conduct was wrongful or improper, the Court should consider the following factors: (1) the nature of the conduct; (2) the Defendant's motive; (3) the interests of the party with which the conduct interferes; (4) the interest sought to be advanced by the Defendant; (5) the social interests in protecting the freedom of action of the Defendant and the contractual interests of the other party; (6) the nearness or remoteness of the Defendant's conduct to the interference; and (7) the relations between the parties. *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 244 (Iowa 2006). "If the sole motive is a legitimate purpose derived from the law, then any interference is not improper as a matter of law." *Id.* at 245.

1. Mercy and Leding, Babeshoff, and Jewell

As discussed at length in the Court's analysis of Count I, a reasonable fact-finder, taking the evidence in the light most favorable to Plaintiff, could find that there was a contract between Plaintiff and PC, and that Defendants Mercy, Leding, Babeshoff, and Jewell knew about the contract. A finder of fact could also find that Mercy, Leding, Babeshoff, and Jewell, engaged in a scheme to damage or terminate the relationship between PC and Mercy in order that Leding, Babeshoff, and Jewell could attain employment directly from Mercy. A fact-finder could further find that part of this plan involved making statements⁷ deriding Plaintiff's abilities and accusing him of being an alcoholic and coming to work drunk, all in an attempt to cause Mercy to request that he no longer be sent to work at Mercy. A fact-finder could infer that this scheme further caused Dr. Dooley to terminate the employment agreement between Plaintiff and PC, while simultaneously disrupting the contracts between PC and Mercy, which eventually resulted in the termination of the individual employment contracts between PC and Leding, Babeshoff, and Jewell. In regard to Mercy, a fact-finder might infer that the informal investigation and dismissal

⁷ Defendants' qualified privilege argument will be addressed in the Court's analysis of Count IV

of Plaintiff suggests that Mercy's actual goal was to oust Plaintiff from Mercy.

In *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 768 (Iowa 1999), a jury found Deere liable for intentional interference with a contract because Deere induced employees of Revere to reveal certain trade secrets. These employees of Revere had nondisclosure and confidentiality agreements with Revere, which prohibited them from disclosing trade secrets. *Id.* In affirming the jury's verdict that Deere had intentionally and improperly interfered with a contract, the Iowa Supreme Court held that "[w]hile Deere certainly had the right to persuade Delfino and Eckart to work for Deere at some time in the future, Deere had no right to induce Delfino and Eckart to breach their agreement with Revere concerning disclosure of Revere's confidential information." *Id.*

In the same way, a fact-finder in this case could determine that Mercy, Leding, Babeshoff, and Jewell caused Dr. Dooley to terminate the contract between PC and Plaintiff by spreading false rumors about his alcoholism, thereby creating a situation in which Plaintiff was no longer able to work at Mercy and other healthcare facilities. The facts taken in the light most favorable to Plaintiff could support an inference that Defendants' wrongfully caused PC to breach its contract with Mercy, just as, in *Revere*, Deere wrongfully induced Revere's employees to breach their confidentiality and nondisclosure agreements.

The Court's analysis of the seven factors outlined in *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 245 (Iowa 2006) also supports the conclusion that a finder of fact could find that Mercy, Leding, Babeshoff, and Leding tortiously interfered with Plaintiff's contract with PC. (1) A jury could find that the nature of the conduct was, on Mercy's part, an attempt to avoid the due process requirements of a formal investigation and disciplinary process that was required by Mercy's bylaws. On the individual defendants' parts, a jury could find that the nature of their

conduct involved the bullying of and spreading rumors about Plaintiff. (2) As previously discussed in the Court's analysis of Count I, a jury could find that the collective motive of Defendants Mercy, Leding, Babeshoff, and Jewell was to oust Plaintiff and terminate the contracts between PC, the defendants, and Plaintiff. (3) The interest of Plaintiff and PC was financial in nature. PC offered Plaintiff work, and PC supplied Mercy with adequate pain management and anesthesiology staff in exchange for money. (4) A finder of fact could find that the interests of Defendants were also financial and professional, as evidenced by the fact that all three individual defendants were hired directly by Mercy after PC terminated its contracts with Mercy, Leding, Babeshoff, and Jewell. Additionally, Leding became Mercy's Director of Anesthesiology, replacing Dr. Dooley. (5) The social interests in protecting Defendants' freedom to professionally associate with whom they desire is significant, but not so significant as to outweigh Plaintiff's contract and common law rights. (6) Defendants' alleged conduct was significantly proximate to the interference. A jury could find that Defendants' conduct was precisely the catalyst for the situation which caused Dr. Dooley to terminate the contract between Plaintiff and PC. Finally, (7) the Court considers that the parties are closely related via their professional association and contractual relationships.

Based on the foregoing analysis, the Court concludes that based on the summary judgment record, a finder of fact could find that Mercy, Leding, Babeshoff, and Jewell knew about Plaintiff's contract with PC, intentionally interfered with said contract, that this interference was improper, and that Plaintiff was damaged as a result of said interference.

2. Gateway, Medical Associates, and Morrison

The Court determines that there are no issues of genuine issues of material fact regarding the claims of tortious interference with a contract asserted against Gateway, Medical Associates,

and Morrison. Plaintiff asserts that these claims should be allowed to proceed to trial because even though there were no complaints about Plaintiff at either Gateway or Morrison, each institution *de facto* dismissed Plaintiff without following the specific procedures and processes outlined in their respective bylaws. Defendants argue that the bylaws should not apply to their actions because Defendants did not actually revoke Plaintiff's privileges at their facilities; they merely told Dr. Dooley not to send Plaintiff to work at their facilities any longer.

However, even if one assumes that these Defendants did not have the authority, pursuant to their respective bylaws, to ask Dr. Dooley to no longer send Plaintiff to work at their facilities, the Court finds that this would not rise to the level of "wrongfulness" required for tortious interference with the contracts between Plaintiff and PC and Plaintiff and APC. Whether the Defendants had the legal authority to tell Dr. Dooley to cease sending Plaintiff to their institutions is not the issue before the Court in Count II because this is not a cause of action based on Defendants' alleged failure to abide by their own bylaws. The undisputed facts also fail to raise a genuine issue as to whether Morrison or Gateway intended to sabotage Plaintiff's contract with PC.⁸ One might speculate that that was the intent of these Defendants, but there is a lack of support in the summary judgment record for such speculation. The Court concludes that based on the current record before the Court, Gateway, Medical Associates, and Morrison are entitled to summary judgment in their favor on the claims that they intentionally and improperly interfered with the contracts between Plaintiff and PC and Plaintiff and APC.

Count III – Tortious Interference With Prospective Business Relations

The tort of intentional interference with prospective business advantage imposes liability on a person who intentionally and improperly interferes with the claimant's business

⁸ Plaintiff has not provided evidence of a motive for Gateway and Morrison. While proof of a motive is not an essential element of the cause of action asserted in Count II, the Court finds the absence of any evidence of such a motive to be significant.

expectancies whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation. *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 151 (Iowa 2013) (internal quotations and citations omitted). “In order to recover under this theory, the plaintiff must prove the defendant acted with the sole or predominant purpose to injure or financially destroy the plaintiff.” *Godfredson v. Lutheran Bhd.*, No. 0-431, WL 1675869, at *5 (Iowa Ct. App. 2000). This imposes a “higher standard of proof requiring substantial evidence that the defendant’s predominant or sole motive was to damage the plaintiff.” *Compiano v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 462 (Iowa 1999).

1. Mercy and Leding, Babeshoff, and Jewell

The same factual questions that preclude summary judgment on Counts I and II for these Defendants also preclude summary judgment on Count III. The Court finds that there are genuine issues of material fact that could lead a jury to conclude that Leding, Babeshoff, and Jewell, engaged in some sort of agreement with Mercy, spread damaging rumors about Plaintiff, and thereby caused him significant financial harm. Count III turns on these same disputed facts. The Court therefore concludes that Mercy, Leding, Babeshoff, and Jewell are not entitled to summary judgment in their favor on Count III.

2. Gateway and Medical Associates

At the summary judgment hearing on Gateway’s and Medical Associates’s motions, Plaintiff’s attorney conceded that he could not point to any specific facts or acts taken by Gateway and Medical Associates that would constitute the factual basis for interference with a prospective business advantage. Consequently, the Court determines that Gateway’s and Medical Associates’s Motion for Summary Judgment as it pertains to Count III should be granted.

3. Morrison

Intentional interference with a prospective business advantage requires evidence that Morrison's sole or predominant purpose was to injure or financially destroy plaintiff. The undisputed facts in the summary judgment record provide no evidentiary support for such a claim. For that reason, and for the reasons stated in the Court's analysis of Morrison's motion as it pertains to Count II, the Court concludes that the motion as to Count III should be granted.

The Limitation of Damages

1. Defendant's Time Frame Argument

Mercy, Leding, Babeshoff, and Jewell assert in the alternative that if the Court denies their Motions for Summary Judgment as to Counts II and III, the Court should grant them partial summary judgment and hold that Plaintiff's damages should be limited from the time of the termination of his contract until September 1, 2012, which is the date that PC ended its contract with Mercy, and released Leding, Babeshoff, and Jewell from the restrictive covenants in their individual contracts.

The Defendants' argument is incongruous in that if the jury were to find for Plaintiff on Counts II or III, it would by definition be finding that Defendants engaged in conduct that was intended to, and did in fact lead to, the premature termination of PC's contracts with both the Plaintiff and Defendants, and/or with the diminution of Plaintiff's prospective employment opportunities. At this juncture in the trial proceedings, the Court concludes that there is no appropriate basis for limiting the time frame of Plaintiff's damages as sought by Defendants Mercy, Leding, Babeshoff, and Jewell.

2. Damages

Additionally, Defendants seek a ruling that would preclude Plaintiff's claims for punitive damages, lost profits, bonuses, or contributions to his retirement account. An award of punitive damages is permissible where defendant was guilty of malice, fraud, gross negligence, or an illegal act. Punitive damages require less than actual ill-will or express malice. *Syester v. Banta*, 133 N.W.2d 666, 676 (1965) (internal quotation and citation omitted). In considering whether punitive damages should be permitted, the nature of the conduct is more significant than the legal label which is attached to it. *Woods v. Schmitt*, 439 N.W.2d 855, 870 (Iowa 1989) (internal citations omitted). "It is not an essential element of malice that defendant's actual spite or wicked intent be demonstrated: An issue may be made by evidence of legal malice, which may be established by showing wrongful or illegal conduct committed or continued with a willful or reckless disregard of another's rights." *Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 920 (Iowa 1979).

The Iowa Supreme Court upheld a jury's verdict awarding punitive damages based on a finding of malice in a case with similar facts. *Lara v. Thomas*, 512 N.W.2d 777, 786 (Iowa 1994). In *Lara*, the defendant, who employed the plaintiff, made statements alleging that he was concerned about the plaintiff because he suspected that she abused alcohol and drugs. *Id.* at 785. The jury found that the defendant's reckless disregard for the truth constituted malice, and awarded punitive damages. *Id.* at 786.

The case before the Court involves similar allegations and issues. A jury could find, based on the summary judgment record, that Defendants acted with a willful or reckless disregard for Plaintiff's rights. The Court finds that the summary judgment record presented contains genuine issues of material fact which, if resolved in favor of Plaintiff, could allow a jury to award him with punitive damages.

The other issues related to damages raised by Defendant involve factual questions that must be resolved at trial based on the evidence presented. The Court therefore finds that Defendants' arguments to limit Plaintiff's recovery should be denied.

Count IV – Defamation

1. Defendants' Qualified Privilege Argument

Plaintiff has alleged the tort of Defamation against Defendants Mercy, Leding, Babeshoff, and Jewell. All of these defendants have moved for summary judgment on Count IV, asserting a defense of qualified privilege. These defendants also assert that Plaintiff is a public figure, and thus Plaintiff has a higher burden and must prove that Defendants made the defamatory statements with actual malice. Additionally, Mercy asserts that statements made by one of its registered nurses, Elizabeth Macke, were not made within the scope of her employment and thus, cannot serve as the basis for a defamation claim against Mercy. Finally, Mercy argues that it cannot be held liable for any statements made by Leding, Babeshoff, and Jewell prior to their direct employment by Mercy on September 1, 2012.

In order to grant summary judgment under Defendants' theory, the Court must find that there is no genuine issue of material fact as to whether Defendants Mercy, Leding, Babeshoff, and Jewell are entitled to the protection of qualified immunity. "In general, a question whether a statement is qualifiedly privileged is for the judge and the question whether the privilege was abused⁹ is for the jury." *Newell v. JDS Holdings, L.L.C.*, 834 N.W.2d 463, 473 (Iowa Ct. App. 2013). "The burden is on the defendant to establish the existence of a qualified privilege." *Lara*

⁹ A qualified privilege is abused if the person claiming the privilege makes a defamatory statement with malice. *Barreca v. Nickolas*, 683 N.W.2d 111, 117 (Iowa 2004)

v. Thomas, 512 N.W.2d 777, 785 (Iowa 1994). To demonstrate qualified privilege in an action for defamation, a defendant must prove:

(1) the statement was made in good faith, (2) the defendant had an interest to uphold, (3) the scope of the statement was limited to the identified interest, and (4) the statement was published on a proper occasion, in a proper manner, and to proper parties only.

Jones v. Univ. of Iowa, 836 N.W.2d 127, 149 (Iowa 2013). In this case, whether Defendants are entitled to a qualified privilege turns on whether Defendants acted in good faith. The case law defining good faith in the context of qualified privilege is scant. *See Godfredson v. Lutheran Broth.*, Nos. 0-431, 99-1712, 2000 WL 1675869 (Iowa Ct. App. 2000) n.4 (“We find no Iowa authority addressing the meaning of good faith in the context of a qualified privilege. Generally, good faith means the speaker must have had reasonable grounds for believing the statement made was correct.”).

In *Lara*, 512 N.W.2d at 785, the Iowa Supreme Court upheld a jury’s determination that a defendant did not act with good faith, and in fact, acted with malice, when he made statements to the plaintiff’s coworker about the plaintiff potentially having substance and alcohol abuse problems. Even though the defendant in *Lara* “clearly had a valid interest in safeguarding his business reputation and the health of his clients’ animals,” the Court upheld the jury’s verdict that the defendant did not make the defamatory statements in good faith and in fact made the statements with malice. *Id.* In the unpublished case of *Godfredson*, 2000 WL 1675869 at *5, the Iowa Court of Appeals held:

Because the summary judgment record discloses factual issues concerning the honesty of Peterson’s statements, we cannot say, as a matter of law, they were made in good faith or without actual malice. These issues should have been submitted to the jury based on appropriate instructions on the elements of proof essential to establish the defense of qualified privilege and actual malice.

This case revolves around the accusation that Defendants conspired together to spread false rumors about Plaintiff in order to both cause his termination with PC, and to cause PC (and APC) to sever its business relationships with all Defendants. Defendants are asking the Court to find that there is no genuine dispute of any material fact regarding whether Defendants made these statements in good faith. Whether Defendants acted in good faith is inextricably tied to the central disputed factual questions in this case, namely whether Defendants lied or spread false rumors about Plaintiff falling asleep or being under the influence of alcohol at work in order to disrupt the professional associations between Plaintiff, Defendants, and PC. There is contradictory evidence from both sides on this issue. “The court is not entitled to make credibility findings on summary judgment because such determinations are reserved for the fact finder.” *Newell*, 834 N.W.2d at 473-74. The fact finder must determine credibility and, based on that determination, will answer the question of whether Defendants acted in good faith. Because the question of whether Defendant acted in good faith turns on disputed issues of material fact, the Court cannot conclude as a matter of law that Defendants are entitled to judgment on Count IV.

2. Defendants’ Public Figure Argument

Defendants Mercy, Leding, and Babeshoff assert that Plaintiff is a public figure for purposes of Count IV. In support of this argument, Mercy cites an Iowa District Court ruling from Polk County in 1983, a New Jersey Appellate decision, and a Louisiana Court of Appeals decision. Iowa law, however, provides that:

[f]or defamation purposes, a person becomes a public figure in two ways. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public

questions.

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 826 (Iowa 2007) (internal citations and quotation omitted). Defendants simply have not provided undisputed evidence sufficient for the Court to find, as a matter of law, that Plaintiff has become a public figure under either theory supported by Iowa law.

3. Mercy's Remaining Arguments

Mercy finally argues that it cannot be held liable for (1) statements made by an employee not in the course and scope of their employment and (2) communications made by nonemployees. By asserting these arguments, Mercy is asking the Court to hold as a matter of law that Plaintiff should not be able to use specific statements as a basis for recovery on Count IV. These issues are not properly before the Court on a motion for summary judgment, because Mercy is seeking summary judgment on statements, not a claim. The Court withholds ruling on these issues until they are appropriately before the Court at or in advance of trial.

Count V – Intentional Infliction of Emotional Distress

Plaintiff did not file a written resistance to Defendants' motions with respect to Count V, Intentional Infliction of Emotional Distress. Moreover, at the hearing, Plaintiff indicated he was not resisting Defendants' Motions for Summary Judgment as to Count V.

RULING

For all of the above-stated reasons, it is the Ruling of the Court that:

1. Defendant Mercy's Motion for Summary Judgment should be, and is, DENIED with respect to Counts I, II, III, and IV, and GRANTED with respect to Count V.
2. Defendants Gateway and Medical Associate's Motion for Summary Judgment should be, and is, GRANTED as to all counts asserted against them.
3. Defendant Morrison's Motion for Summary Judgment should be, and is, GRANTED as to all counts asserted against it.
4. Defendants Leding, Babeshoff, and Jewell's Motion for Summary Judgment should be, and is, DENIED with respect to Counts I, II, III, and IV, and GRANTED with respect to Count V.



State of Iowa Courts

Type: OTHER ORDER

Case Number LACV040843
Case Title SCHWENDINGER, ANTHONY VS MERCY MEDICAL, MEDICAL ASSOC, ET AL

So Ordered

A handwritten signature in black ink, appearing to read 'Mark D. Cleve', written over a horizontal line.

Mark D. Cleve, District Court Judge,
Seventh Judicial District of Iowa