**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

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| DR. DONNA L. D'ELIA and DR. JONEL M. DERSHEM, | : | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION \| CAMDEN COUNTY |
| ***Plaintiffs,*** | : | DOCKET NO. CAM-L-2500-21 |
| v. | : | Civil Action<br>(CBLP) |
| DR. WENDY MARTINEZ, | : | **OPINION** |
| ***Defendant.*** | : | |

Decided: May 2, 2025

George J. Lavin, III, Esquire, George J. Lavin, III & Associates, PLLC, Counsel for Plaintiff, Dr. Donna L. D'Elia

Joseph A. Natale, Esquire, Greenbaum, Rowe, Smith & Davis LLP, Counsel for Plaintiff, Jonel M. Dershem

Michael J. Miles, Esquire and Taylor L. Johnson, Esquire, Brown & Connery, LLP, Counsel for Defendant, Dr. Wendy Martinez

STEVEN J. POLANSKY, P.J.Cv.

## I. INTRODUCTION

This litigation involves the breakup of a medical practice originally known as The Women's Group for Obstetrics and Gynecology, Inc. (WGOB Gyn). Subsequently in 2012, the three doctors then practicing with that entity joined Advocare The Women's Group Ob/Gyn (AWG), a division of Advocare, LLC, which continued to operate at the same location. The Women's Group for Obstetrics and Gynecology, Inc. stopped practicing medicine or providing services in 2012 when

the parties joined Advocare, and all three parties signed employment agreements with Advocare. Plaintiffs' Complaint alleges the following Counts:

**Count I** – Breach of Contract

**Count II** – Fraud and Misrepresentation

**Count III** – Defamation

**Count IV** – Negligence

**Count IV (Second)** – Interference with Prospective Economic Advantage and Contractual Relationships

**Count VI** – Conversion and Unjust Enrichment

Defendant filed an Answer and Counterclaim denying the allegations of the Complaint. The Counterclaim contains the following affirmative claims:

**Count I** – Breach of Contract

**Count II** – Breach of Fiduciary Duty

**Count III** – Tortious Interference with Prospective Economic Gain

**Count IV** – Defamation

**Count V** – Conversion

**Count VI** – Unjust Enrichment

**Count VII** – Violation of New Jersey Trade Secrets Act

**Count VIII** – Breach of Implied Covenant of Good Faith and Fair Dealing

Defendant has now filed a Motion for Summary Judgment. Both plaintiffs have filed briefs opposing summary judgment but have not cross-moved for summary judgment.

The Court takes note that plaintiff Dershem filed a separate action on December 12, 2023 against Advocare, LLC under Docket No. L-3472-23 which is not the subject of this motion or

this action. The Court denied consolidation given that this case already had extensive discovery exceeding 900 days and consolidation would substantially delay this matter.

## II. BACKGROUND

In or about September, 1994, a Shareholder's Agreement was entered into by Wendy Martinez and Donna D'Elia. (Exhibit 4 to Defendant's Motion). The entity was named The Women's Group for Obstetrics and Gynecology, Inc., a professional services corporation. At the same time, Donna D'Elia on September 1, 1994 entered into an Irrevocable Proxy giving Wendy Martinez the right to vote or give or decline consent with respect to all of the shares of the corporation. (Exhibit 1 to Defendant's Motion for Summary Judgment). The proxy provided that it would remain irrevocable until terminated in writing by all parties to the agreement.

The proxy was limited to the following matters:

(a) Any purchase or lease of any property or equipment having a value of Five Thousand ($5,000.00) Dollars or more; any excess of $50,000 requires majority vote of shareholders;

(b) The hiring and firing of all employees except physician employees of the corporation;

(c) The terms and conditions of all employment arrangements with the Corporation, including without limitation, working hours, vacation schedules, compensation amounts and bonuses except recited in physician's respective employment agreements;

(d) The selection of an independent certified public account and selection of attorneys for the Corporation;

(e) The terms and conditions of any managed care; preferred provider or similar agreements with the Corporation;

(f) The making of any loans or advances to or from the Corporation other than to suppliers in the ordinary course of business;

(g) The sale of assets of the Corporation (other than in the ordinary course of business), liquidation, merger, consolidation, combination, joint venture or similar transaction of the Corporation.

Bylaws for The Women's Group for Obstetrics and Gynecology, P.A. were provided although the date on which they were prepared or approved is unknown. (Exhibit 7 to Dershem's Opposition to the Summary Judgment Motion). Paragraph 2.08 provides that "no proxy shall be valid for more than 11 months unless a longer time is expressly provided for in the proxy." Paragraph 2.08 further provides "unless it is coupled with an interest or is otherwise irrevocable as provided in New Jersey §14A:5-19.3, a proxy shall be revokable at will". Defendant Martinez is identified as the president in the bylaws.

Jonel Dershem entered into an Employment Agreement with the WGOB Gyn in May of 1995. (See Exhibit 1 to Dershem's Opposition to the Motion for Summary Judgment). In 1997, plaintiff Dershem joined the medical practice as a shareholder. D'Elia entered into a Stock Acquisition Agreement on September 1, 1997.

A new Shareholder Agreement was executed September 1, 1997. (Exhibit 3 to Defendant's Summary Judgment Motion). Dershem signed an Irrevocable Proxy identical to that executed by D'Elia three years earlier. (Exhibit 2 to Defendant's Motion for Summary Judgment). Each of the parties signed an Employment Agreement on September 1, 1997. (Exhibits 5, 6 and 7 to Defendant's Motion for Summary Judgment). The Employment Agreements were with The

Women's Group for Obstetrics and Gynecology, P.A., a New Jersey Professional Services Corporation.[1]

Under the Employment Agreement signed by Defendant Martinez with WGOB Gyn, she was entitled to be paid during the period September 1, 1997 through August 31, 1998 "an amount not to exceed $100,000.00 for performing administrative services". Her Employment Agreement further provided that in addition to other compensation, the amount to be paid should be adjusted upward every two years to reflect cost of living increases within the two year period. The Employment Agreements signed by D'Elia and Dershem did not provide for any payment for administrative services. The Shareholder Agreement did not provide for such payments.

In March, 2012, Martinez on behalf of WGOB Gyn signed a Letter of Intent with Advocare to become a Care Center with Advocare. (Exhibit 8 to Defendant's Motion for Summary Judgment). The Letter of Intent relates to proposed terms to integrate WGOB Gyn into Advocare and to become a division of Advocare. Pursuant to the Letter of Intent, WGOB Gyn would be designated a Care Center of Advocare and operate and bill under Advocare's provider number and taxpayer identification number. Administrative fees as part of this contract were to be paid by AWG to Advocare. The monthly management fee paid by the Care Center to Advocare was to be 9.5%. The Letter of Intent further reflected that while WGOB Gyn would own all Care Center-specific income accrued up to the date of closing, Advocare would own all Care Center-specific income accruing after the date of closing.

Defendant Martinez had communications with Advocare but not with plaintiffs indicating that she was concerned that all internal agreements prior to joining Advocare would remain in

[1] The Employment Agreement and proxies were with The Women's Group for Obstetrics and Gynecology, P.A., however the Shareholder Agreement was for The Women's Group for Obstetrics and Gynecology, Inc.

force. Exhibit 9 to Defendant Martinez's certification contains this inquiry and handwritten notes regarding the same. The documents reflect the intent that a new agreement be entered since the medical practice would now be operating as a division of Advocare and not as WGOB Gyn.

Recognizing this requirement, a Care Center Founder's Agreement was prepared. (Exhibit 16 to the Certification of Defendant Martinez). That proposed Founder's Agreement incorporated the earlier WGOB Gyn agreements and specifically indicated that the irrevocable proxies would continue. Plaintiff D'Elia objected to a continuation of the proxy. Exhibit 18 to Defendant Martinez's certification. The December 16, 2012 email from D'Elia to Martinez specifically noted that they were entering into a new business endeavor and that she did not agree to continuation of the irrevocable proxy. The parties dispute whether they reached an agreement on a Founder's Agreement with respect to the practice as a division of Advocare, and no signed agreement was ever located.

In 2012, all parties entered into separate Employment Agreements with Advocare, LLC. (Exhibits 10, 11 and 12 to Defendant's Motion for Summary Judgment). The agreements required the employees to provide their full working time and attention to the practice of medicine for "the Company" which is defined as Advocare, LLC. Paragraph 7.1 further provided that "all revenues and receivables that result from any patient care or other professional services provided by employee, shall be the property of the Company…". The agreement in paragraph 13 provides that the employee shall be compensated "pursuant to the compensation arrangements established for the members of employee's Care Center[s] pursuant to Sections 10.3.1 and 16.10.1 of the Operating Agreement (Dershem Exhibit 12).

Advocare, LLC was governed by the Amended and Restated Operating Agreement dated January 1, 2009. All three parties signed onto the agreement after they joined Advocare. Under the

agreement, Care Center is defined as the "specific administrative and operational wholly-owned division within the company". Under the agreement, each member is entitled to one unit vote. Paragraph 10.3.2 of the Operating Agreement provides that all Care Center's specific income remaining after payment of Care Center specific expenses belongs to the company. Company is defined as Advocare, LLC. The agreement in paragraph 10.3.1 allows members in each Care Center to develop compensation arrangements for the physicians in the Care Center subject to approval by the Board of Managers of Advocare. No approval of any such agreement is identified. The agreement does permit proxies valid for a period up to eleven months in paragraph 14.7, but specifically permits any member executing a proxy to revoke such a proxy at any time by giving written or oral notice to Advocare. No proxies with respect to this agreement have been provided by any party. The Advocare agreement specifically provides that it supersedes any prior agreement or understanding and may not be a modified or amended in any manner other than as permitted by the Advocare Amended and Restated Operating Agreement. (Exhibit 12 to Plaintiff Dershem's Opposition to the Summary Judgment Motion).

A later Amended and Restated Operating Agreement of Advocare, LLC became effective June of 2019. All three parties signed a joinder to the amended and restated Operating Agreement of Advocare, LLC in 2019, but on different dates. (Exhibit 13 to Defendant's Motion for Summary Judgment). The relevant provisions of this Agreement are not materially changed.

On July 20, 2012, an accountant sent a letter to Wendy Martinez advising her that her management fee should have been increased after August 31, 1998, and that as of July 20, 2012, her administrative fee should have been $141,604.00. (See Exhibit 20 to Defendant's Motion). As a result of this letter, Martinez determined the amount she should have been paid between August of 1998 and the joinder of the medical malpractice with Advocare, determined the appropriate

compound interest on the sums, and allegedly then instructed Advocare to begin paying off this debt from monies received by Advocare for the new Advocare Care Center practice. There is a factual dispute as to when plaintiffs learned about this arrangement and these payments. Plaintiffs contend they first learned of this in 2020. Martinez further continued to receive payments for administrative services from Advocare for the Care Center for the period after the group joined Advocare. No agreement for the payment of any administrative fee to Martinez while employed by Advocare has been identified. The only document permitting such payments is the Martinez Employment Agreement with WGOB Gyn.

Beginning in 2012, plaintiffs and defendant began receiving schedule K-1 forms reflecting their partner share of income and deductions from Advocare, LLC. (See Exhibits 26 and 27 to Defendant's Motion for Summary Judgment). They did not show any income from WGOB Gyn in the motion exhibits.

By separate letters dated December 31, 2020, plaintiffs D'Elia and Dershem resigned from AWG effective the same day as the letter. Those letters in addition also reflect their resignation as employees of The Women's Group for Obstetrics and Gynecology, Inc. "to the extent that such entity is still in existence and has a limited business purpose other than for providing medical services". (Exhibits 23 and 24 to Defendant's Motion for Summary Judgment). The Court notes that the former entity, The Women's Group for Obstetrics and Gynecology, did enter into a new lease for their business premises on April 13, 2016. Each of the parties in this case executed a guarantee to that lease.

There is a factual dispute between the parties regarding when notice was provided by plaintiffs to leave the practice with defendant. Plaintiffs assert that they gave notice in October and point to a series of emails marked as Exhibit 14 to the Opposition to the Summary Judgment

Motion. An email on October 20 addressing the proxies and the repayment schedule which had been set up by defendant, allegedly without the knowledge of plaintiffs, indicated that unless they had an agreement "we will regrettably be forced to leave the practice and pursue all legal avenues...". An October 23, 2020 email indicates that the parties have been meeting during the preceding three months in person but had not found the meetings productive. This email at 11:50 a.m. concludes with language "please let us know by Monday morning where you stand on these issues and if we can move forward and practice together".

**ANALYSIS**

A. Legal Standard

Summary Judgment "is designed to provide a prompt, businesslike and inexpensive method of disposing of" cases when the "pleadings, depositions and admissions on file, together with the affidavits submitted on the motion" clearly show the absence of "any genuine issue of material fact requiring disposition at a trial." Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 641 (1995). Although the purpose of Summary Judgment in part is to provide immediate relief to deserving litigants by obviating the need for a "long and worthless trial," Courts must also bear in mind that Summary Judgment should never have the effect of shutting a deserving litigant from his trial. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540-41 (1995).

When presented with a motion for Summary Judgment the Court "without assessing credibility, weighing the evidence, or determining its truth" must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." DeWees v. RCN Corp., 380 N.J. Super. 511, 523 (App. Div. 2005) (quoting Brill, 142 N.J. at 540). A party cannot "defeat a motion for summary judgment merely by pointing

to *any* fact in dispute;" they must instead offer evidence that creates a genuine issue of material fact. Brill, 142 N.J. at 529.

On a motion for Summary Judgment, the court must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law'." Id. at 533 (citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 251-52 (1986)). When weighing the evidence, the Court is to follow "the same evidentiary standard of proof that would apply at the trial on the merits when deciding whether there exists a "genuine" issue of material fact. Id. at 533-34.

B. Contract Claim

"A contract is an agreement resulting in obligation enforceable at law. . . . To be enforceable as a contractual undertaking, an agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty." W. Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958) (citing Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956)). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv. v. Gimbel Bros., 249 N.J. Super. 487, 492 (App. Div. 1991).

"Generally, the terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet v. N.J. DOT, 171 N.J. 378, 396 (2002). "[W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales, 249 N.J. Super. at 493 (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)); see also Cty. of Morris v. Fauver, 153 N.J. 80, 103 (1998).

Courts may not "remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and the detriment of the other." Ibid. (citing James v. Fed. Ins. Co., 5 N.J. 21, 24 (1950)). "A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument." E. Brunswick Sewerage Auth. v. E. Mill Assocs., Inc. 365 N.J. Super. 120, 125 (App. Div. 2004).

"[T]he mere anticipation of a written memorialization of an oral agreement does not as a matter of law vitiate an oral contract if the elements of a contract are contained in the oral agreement." McBarron v. Kipling Woods, L.L.C., 365 N.J. Super. 114, 116 (App. Div. 2004). Parties may contract orally and be bound by that agreement, but the party must show that the parties agreed upon all the terms, and if so, whether they intended an obligation to arise only on the execution of a formal writing. Trustees of First Presbyterian Church in Newark v. Howard Co. Jewelers, 22 N.J. Super. 494, 502 (App. Div. 1952). Whether an oral agreement was intended not to bind the parties until a written contract was executed is a matter of intent determined in large part by a credibility evaluation of witnesses. McBarron, 365 N.J. Super. at 117.

After forming the contract, the parties "may, by mutual assent, modify it." Cty. of Morris v. Fauver, 153 N.J. 80, 99 (1998) (citing Bohlinger v. Ward & Co., 34 N.J. Super. 583, 587 (App. Div. 1955)). "A modification can be proved by 'an explicit agreement to modify or by the actions and conduct of the parties as long as the intention to modify is mutual and clear.'" Wells Reit II-80 Park Plaza, LLC v. Director, Div. of Taxation, 414 N.J. Super. 453, 466 (App. Div. 2010) (quoting DeAngelis v. Rose, 320 N.J. Super. 263, 280 (App. Div. 1999)). A court can find an agreement to modify a contract based on the parties' actions. *See* Cty. of Morris, *supra*, 153 N.J. at 99. A proposed modification by one party to a contract must be accepted by the other to

constitute mutual assent to modify the agreement. Wheaton, *supra;* County of Morris v. Fauver, 153 N.J. at 100. Parties to a contract may orally agree to modify contract provisions, even when the original agreement precludes oral modifications. Sodora v. Sodora, 338 N.J. Super. 308, 312 (Ch. Div. 2000).

Regardless of the form of the purported modification, "[a] proposed modification by one party to a contract must be accepted by the other to constitute mutual assent to modify." Cty. of Morris, *supra*, 153 N.J. at 100 (citation omitted). The parties must clearly and mutually intend to modify the contract. *Id.* at 99. If a party to a contract "might reasonably infer that the original contract is still in force," modification of the contract is not established. *Id.* at 99-100.

An agreement to modify a contract "must be based upon new or additional consideration." *Id.* at 100 (citing Ross v. Orr, 3 N.J. 277, 282 (1949)). A determination of whether consideration was given should be based on "an objective examination of all of the relevant circumstances." Oscar v. Simeonidis, 352 N.J. Super. 476, 486 (App. Div. 2002). The value of consideration need not be substantial and "whatever consideration a promisor assents to . . . is legally sufficient consideration." *Id.* at 485 (internal quotation omitted). An act or forbearance of a legal duty that is not uncertain or doubtful is insufficient to establish consideration. *Id.* at 487.

The parties to an existing contract can abandon that contract, however, mutual assent of all parties is required for a contract to be abandoned. County of Morris v. Fauver, 153 N.J.at 95-96. This can be done either expressly or inferred from conduct and circumstances. Mossberg v. Standard Oil Co., 98 N.J. Super. 393, 406 (Law Div. 1967).

The law applies a covenant of good faith and fair dealing in every contract. Sons of Thunder v. Borden, Inc., 148 N.J. 396 (1996); Pickett v. Lloyd's, 131 N.J. 457, 467 (1993). Parties to a contract must act in a way that is honest and faithful to the agreed purposes and consistent with

the reasonable expectations of the parties. Sons of Thunder at 420-421. Even where a party complies with the express terms of the contract entitling them to terminate the agreement, they can still be in breach of the covenant of good faith and fair dealing if they fail to act in good faith and deal fairly with the other party until the contract is terminated. Sons of Thunder at 421-424; Price v. New Jersey Manufacturers Ins. Co., 182 N.J. 519 (2005); Wilson v. Amerada Hess Corp., 168 N.J. 236, 251 (2001). The factors to be established are that (1) there was a contract in existence; (2) that the defendant acted in bad faith for the purpose of depriving the plaintiff of rights or benefits under the contract and (3) that defendant's conduct caused the plaintiff to suffer injury, damage or loss or harm.

Here, the Advocare Agreement contemplated that a separate agreement would be entered into by plaintiffs and defendant. The parties were no longer operating under the old WGOB Gyn, but rather now operating as a new Division of Advocare. The Court therefore finds that the original agreement did not automatically transfer over to the medical practice operating as a Division of Advocare. Defendant Martinez proposed a Founder's Agreement which incorporated the prior operating agreement for WGOB Gyn. This was explicitly rejected by Plaintiff D'Elia who objected to inclusion of the irrevocable proxy. The Court is not presented with any communication in response to the proposed Founder's Agreement from Plaintiff Dershem. It is undisputed that no signed Founder's Agreement containing the signatures of D'Elia or Dershem has been located, and neither have admitted to signing that agreement.

A significant issue is presented with respect to the basis for the claim by Defendant Martinez that she was entitled to receive management fees once the practice became a Division of Advocare. Even if a fact finder accepts the argument that the prior operating agreement for WGOB Gyn continued to be applicable by agreement of the parties, no provision for the payment of

administrative fees to Martinez is contained in that operating agreement. Rather, the only document providing Martinez with a right to collect management fees is contained in her employment agreement with WGOB Gyn.

The Court concludes that issues of fact exist for a jury to determine the oral contractual provisions under which plaintiffs and defendant continued to operate once they became a Division of Advocare. Acquiescence does not necessarily require a conclusion that the prior agreement remained in effect or that plaintiffs had acquiescenced in payment of a specific administrative fee to defendant or to continuation of the right to an irrevocable proxy.

C. Fraud and Misrepresentation

A claim for common law fraud requires proof of five elements:

> "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages."

Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997); Rezem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 122 (App. Div. 2011).

The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. Restatement (Second) of Torts § 874 cmt. a (1979); see In re Stroming's Will, 12 N.J. Super. 217, 224 (App.Div.), certif. denied, 8 N.J. 319 (1951) (explaining essentials of confidential relationship "are a reposed confidence and the dominant and controlling position of the beneficiary of the transaction"); Blake v. Brennan, 1 N.J.

Super. 446, 453 (Ch.Div.1948) (describing "the test [as] whether the relationship between the parties were of such a character of trust and confidence as to render it reasonably certain that the one party occupied a dominant position over the other"). The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Restatement (Second) of Trusts §§ 170, 174 (1959). The fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. Restatement (Second) of Torts § 874 (1979). F.G. v. MacDonell, 150 N.J. 550, 563–64 (1997). Where a manager or partner controls the finances of the business, they have a fiduciary duty to deal with the other members with trust, confidence and good faith, and without any secret benefits or advantages. Silverstein v. Last, 156 N.J. Super. 145, 152 (App. Div. 1978); Fortugno v. Hudson Manore Co., 51 N.J. Super. 482, 499 (App. Div. 1958).

Here, giving the plaintiffs the benefit of all favorable inferences, there is evidence that defendant learned that she could have or should have been receiving a higher management fee while acting in that capacity with WGOB Gyn through 2012 prior to joining Advocare. Once the three doctors became employees of Advocare and became a division of Advocare, Defendant Martinez elected to use money received from Advocare for the benefit of their division to pay herself additional management fees for earlier years before the practice joined Advocare along with interest on those amounts. This was allegedly done without the knowledge of plaintiffs. It is further asserted that after joining Advocare, which was taking a 9.5% fee for management, defendant continued to take management fees without discussing the same with plaintiffs and without authorization.

A jury could conclude that plaintiff breached her position of trust by improperly using Advocare revenue to pay herself pre-Advocare expenses without the knowledge or consent of

plaintiffs. A jury could further conclude that by unilaterally determining the amount she was entitled to receive for managing AWG, without the knowledge or consent of plaintiffs, she further breached a fiduciary duty. For these reasons, questions of fact exist precluding summary judgment with respect to this count of the complaint.

Defendant also asserts that the fraud and misrepresentation claim is barred by the statute of limitations, since any alleged misrepresentations would have taken place in 2012. This however ignores the discovery rule which provides that the cause of action does not accrue until the injured party discovers, or by the exercise of reasonable diligence should discover, that they may have a basis for an actionable claim. Guichardo v. Rubinfeld, 177 N.J. 45, 51 (2003); Lopez v. Swyer, 62 N.J. 267, 272 (1973).

Here, plaintiffs have alleged that they were unaware that defendant had been making payments to herself once they joined Advocare for management fees. Specifically, this includes fees which defendant was paying herself for WGOB Gyn obligations with interest out of Advocare funds. This would preclude applicability of the statute of limitations to this claim, since plaintiffs allege they only discovered these facts in 2020.

D. Defamation

The elements to establish a cause of action for defamation of a private citizen are: (1) the statement must be defamatory; (2) the statement must concern the plaintiff; (3) the statement must be false; (4) the statement must be communicated to at least one person other than the plaintiff; and (5) the statement must be made with actual knowledge that the statement was false, or be made with reckless disregard by defendant of the statement's truth or falsity, or be made negligently by defendant in

failing to determine the falsity of the statement. Lutz v. Royal Insurance Company, 245 N.J. Super. 480, 492-493 (App. Div. 1991); Bainhauer v. Manoukian, 215 N.J. Super. 9, 31-34 (App. Div. 1987).

"A defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt[,] or ridicule or subjects another person to a loss of the good will and confidence in which he or she is held by others." Romaine v. Kallinger, 109 N.J. 282, 289 (1988) (internal quotation marks and citations omitted). The threshold inquiry for courts that is dispositive of whether a statement is defamatory "is whether the statement at issue is reasonably susceptible of a defamatory meaning." Id. at 290. "Whether the statement is susceptible of a defamatory meaning is a question of law for the court. In making this determination, courts must consider three factors: (1) the content, (2) the verifiability, and (3) the context of the challenged statement." DeAngelis v. Hill, 180 N.J. 1, 14 (2004) (internal quotation marks and citations omitted). However, "[c]ertain kinds of statements denote such defamatory meaning that they are considered defamatory as matter of law," a "prime example" being "the false attribution of criminality." Romaine v. Kallinger, 109 N.J. 282, 291 (1988). "[T]he false, unprivileged imputation of theft or larceny is slanderous per se, whether the offense is indictable or not." Hall v. Heavey, 195 N.J. Super. 590, 597 (App. Div. 1984).

> [T]o evaluate a statement's content, a court must consider the fair and natural meaning that will be given to the statement by reasonable persons of ordinary intelligence. When considering verifiability, a court must determine whether the statement is one of fact or opinion. While a statement of opinion generally enjoys absolute immunity, a statement of fact is actionable [o]nly if the statement suggested specific factual assertions that could be proven true or false. Finally, to decide whether a statement is capable of a defamatory meaning, a court must consider the listener's reasonable interpretation, which will be based in part on the context in which the statement appears. In general, words that subject a person to ridicule or contempt, or that clearly sound to the disreputation of an individual are defamatory on their face.

NuWave Inv. Corp. v. Hyman Beck & Co., Inc., 432 N.J. Super. 539, 552 (App. Div. 2013) (quoting DeAngelis v. Hill, 180 N.J. 1, 14 (2004).

Plaintiff's claim they were defamed by defendant in a notice sent by defendant to patients which reads as follows:

> It has come to my attention that you may have received a notice from either Dr. D?Elia or Dr. Dershem which contains inaccurate information, and which advises you to schedule your next appointment at a different Advocare location. I have also received comments from patients indicating they were confused about the change of locations. I am sending this to you to provide an explanation of what has happened. Without advance notice, on New Year?s Eve, Drs. D?Elia and Dershem notified me that effective immediately they would be continuing their medical practices at a different Advocare location. In addition to leaving in such a manner, they, without permission, took with them patient information which enabled them to send notices to all of the patients who are regularly seen at 2301 Evesham Road in an effort to change their future appointments with the practice. This is to advise you that I and the staff (none of the

> staff has gone with either Dr. D?Elia or Dr. Dershem) at 2301 Evesham Road remain committed to continue to provide the medical care and treatment you have been provided in the past. You, the patient, have the right to choose your providers. If you prefer to continue to be seen by Advocare the [Women's] Group for OB/GYN at 2301 Evesham Road, we would be more than happy to accommodate your wishes. Just let us know. Sincerely, Dr. Wendy Martinez, MD, FACOG.

Exhibit 31 to Dr. Martinez certification.

Whether the email or the statement provided to patients by defendant is true is an issue of fact. Plaintiffs assert based upon communications in October that they provided sufficient notice when they indicated they could not continue working with defendant if she did not agree there was no irrevocable proxy. These discussions began after plaintiffs assert they learned that defendant had been paying herself management fees from the prior practice before joining Advocare as well as after joining Advocare with increases to the amount. Whether the statement that plaintiffs left the practice without notice is true is an issue of fact. Such a statement could subject plaintiffs to the loss of goodwill and confidence in which they are held by others based upon such a statement. The assertion that they took without permission patient information potentially suggests that they either stole information or otherwise took private information which could be found to hold plaintiffs up to ridicule or subject them to the loss of goodwill and confidence of others.

The Court concludes that sufficient issues of fact exist with respect to the defamation claim to preclude summary judgment.

E. Negligence

Defendant moves to dismiss the negligence claim, asserting that it violates the Economic Loss Doctrine which prohibits a party from recovering in tort economic losses following from an alleged breach of contract, citing Namerow v. PediatriCare Associates, LLC, 461 N.J. Super. 133, 145 (Ch. Div. 2018). Plaintiffs respond that their negligence claim is based upon the breach of the duty of good faith and fair dealing that members of a limited liability company have with each other.

To prove a defendant was negligent, a plaintiff must establish that: (1) the defendant owed her a duty of care; (2) the defendant breached that duty; and (3) the plaintiff suffered an injury proximately caused by defendant's breach. Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div.), certif. denied, 150 N.J. 27 (1997).

The Economic Loss Doctrine prohibits a plaintiff from recovering in tort those economic losses for which the entitlement flows only from a contract. Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 559 (1985); Namerow v. PediatriCare Associates, LLC, 461 N.J. Super. 133, 145-146 (Ch. Div. 2018). As previously discussed, the duty of good faith and fair dealing is part of the contract action, and not part of a separate independent negligence claim. Plaintiffs'

opposition cites only to a case involving a business owner's duty of care to a patron, but cites no caselaw which would support a negligence claim under the facts presented in this case.

The Court finds that plaintiffs have failed to establish any tort duty as a matter of law that is owed to plaintiffs by defendant. The Court further finds that the Economic Loss Doctrine precludes the claim asserted. For these reasons, plaintiffs' negligence claims will be dismissed.

F. Interference with Prospective Economic Advantage and Contractual Relationships

Establishing "the tort of interference with a business relation or contract [requires] four elements: (1) a protected interest; (2) malice—that is, defendant's intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the prospective gain; and (4) resulting damages." DiMaria Const., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001). The elements for a claim of tortious interference with prospective economic advantage are:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, 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.

Nostrame v. Santiago, 213 N.J. 109, 122 (2013) (quoting *Restatement (Second) of Torts* § 766B (Am. Law Inst. 1979)).

Plaintiffs first assert that this claim must fail because the defamation claim must be dismissed. Defendant argues that plaintiffs have failed to present any evidence of malice. Malice is a required element to prove an intentional interference claim, including a claim for intentional interference with future economic advantage. Jenkins v. Region 9 Housing Corp., 306 N.J. Super. 258, 265 (App. Div. 1997); Kopp, Inc. v. United Technologies, Inc., 223 N.J. Super. 548, 559 (App. Div. 1998).

Plaintiffs respond that Defendant Martinez stormed out of the office when given the resignation letters on December 31, 2020 and acknowledged she was very angry. Three days later on January 3, 2021, it is asserted that Martinez instructed the office manager to send an email blast to all of the patients advising them that plaintiffs had taken patient information without permission, enabling them to send the notifications received by patients. Plaintiffs assert the communication falsely stated that information was taken without permission. Plaintiffs point to certifications regarding five patients who responded to the email expressing concern or as plaintiffs describe it, contempt, which they assert caused the loss of goodwill.

Without hearing the testimony of the various witnesses, the court concludes that the information provided on the motion suffices to create an issue of fact as to whether all elements can be satisfied, precluding summary judgment.

G. Conversion and Unjust Enrichment

This count of the complaint joins two claims which are somewhat dissimilar, namely the claim for conversion and the claim for unjust enrichment.

To prevail on a claim for conversion, a plaintiff must prove "the wrongful exercise of dominion and control over property owned by another inconsistent with the owner's rights." LaPlace v. Briere, 404 N.J. Super. 585, 595 (App. Div. 2009). "To constitute an act of conversion, '[i]t is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. It is the effect of the act which constitutes the conversion.'" Charles Bloom & Co. v. Echo Jewelers, 279 N.J. Super. 372, 381 (App.Div.1995) (quoting McGlynn v. Schultz, 90 N.J. Super. 505, 526 (Ch.Div.1966), *aff'd*, 95 N.J. Super. 412 (App.Div.), *certif. denied*, 50 N.J. 409 (1967)).

To establish a claim for unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust. Associates Commercial Corp. v. Wallia, 211 N.J. Super. 231, 243 (App. Div. 1986); Russell-Stanley Corp. v. Plant Industries, Inc., 250 N.J. Super. 478, 510

(Ch. Div. 1991). "The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994) (citing Associates Commercial Corp., 211 N.J. Super. at 244.

Unjust enrichment is not an independent theory of liability in New Jersey. Goldsmith v. Camden County Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009). Courts have recognized "that a claim for unjust enrichment may arise outside the usual quasi-contractual setting." County of Essex v. First Union Nat. Bank, 373 N.J. Super. 543, 550 (App. Div. 2004).

Plaintiffs assert that defendant took funds to which she was not entitled beginning in 2012. Viewing the facts most favorable to plaintiff, at this point in time the existence of and terms of any contract which govern the rights of the respective parties to this litigation are disputed. Unless a jury were to find that the terms of the prior WGOB Gyn were in full force and effect, defendant may not have been entitled to funds from AWG, and a jury could find a conversion of those funds by defendant. Further, since AWG was now paying Advocare 9.5% of its revenue for administrative services, a jury could find that defendant was unjustly enriched by continuing to take the full amount of the administrative fees she received prior to joining Advocare.

The court therefore finds issues of fact remain precluding summary judgment on these claims.

H. Defendant's Request for Summary Judgment on her Counterclaims

The analysis set forth in the preceding sections of this Opinion equally address with one exception the claims on which defendant seeks affirmative relief on her counterclaims. Issues of fact for the same reasons exist precluding summary judgment in favor of defendant on the counterclaim.

The one claim not addressed in the earlier portion of this Opinion involves defendant's claim that plaintiffs violated the New Jersey Trade Secrets Act.

To establish a claim of misappropriation of a trade secret, the trade secret owner must establish that: (1) a trade secret exists; (2) the information comprising the trade secret was communicated in confidence by plaintiff to the employee; (3) the secret information was disclosed by that concern/employee and in breach of that confidence; (4) the secret information was acquired by a competitor with knowledge of the employee's breach of confidence; (5) the secret information was used by the competitor to the detriment of plaintiff; and (6) the plaintiff took precautions to maintain the secrecy of the trade secret. Rycoline Products, Inc. v. Walsh, 334 N.J. Super. 62, 71 (App. Div. 2000).

Six factors are analyzed in determining whether the information sought is a trade secret: (1) the extent to which the information is known outside of the business;

(2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 637 (1988).

In January 2012, the New Jersey Trade Secrets Act, N.J.S.A. 56:15-1, was signed into law, which establishes principles governing protection of trade secrets and remedies for their misappropriation. A "trade secret" is defined under the statute as:

> [I]nformation, held by one or more people, without regard to form, including a formula, pattern, business data compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other person who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.J.S.A. 56:15-2.

Plaintiffs assert that the patient information belonged to Advocare, and not to defendant. They further assert that the information was available to them on the Advocare computer system, and was used for Advocare's business purposes.

There are significant questions as to whether defendant has standing to bring this claim given that the trade secrets did not belong to defendant. There further are significant questions as to whether there was a misappropriation of trade secrets since the information belonged to Advocare and was used by Advocare. For these reasons, the cross-motion for summary judgment on this claim will also be denied.

## III. CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment seeking to dismiss plaintiffs' claims and requesting summary judgment on defendant's counterclaims is denied in all respects except that Count IV of plaintiff's Complaint alleging negligence is dismissed with prejudice.