ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL T. KADEMIAN, M.D.,	:	Appellate Court No. 2012-0700
PLAINTIFF,	:	Case No. CA24256
v.	:	Trial Court Case No. 2002-CV-02576
DONALD MARGER, M.D., ET AL. AL.,	:	
	:	
DEFENDANTS.		

APPELLEE, MICHAEL T. KADEMIAN M.D.'S MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. Explanation of Why This is Not a Case of Public or General Interest

This is *not* a case of public or great general interest. The decision and judgment (the "Decision") of the Second District Court of Appeals (the "Court of Appeals") in this case is based upon, and supported by, a long line of Ohio Supreme Court and appellate decisions outlining the heightened fiduciary duties owed by a majority shareholder to a minority shareholder to act with the utmost good faith, loyalty and honesty, even when the action taken by the majority shareholder is technically permitted by the corporation's governing documents. There are no Ohio cases in conflict with the Court of Appeal's Decision, and it is certainly not "new" law as suggested by the Appellant.

The Court of Appeals also determined that a minority shareholder has claims for conversion and tortious interference where a majority shareholder wrongfully dissolves a corporation. Again, this is based upon well-established Ohio precedent, and there are no cases to the contrary. Accordingly, this is *not* a case of public or great general interest, and the Court should not accept jurisdiction in this case.

II. Relevant Factual Background and Statement of the Case

This is an action brought by Dr. Michael T. Kademian ("Dr. Kademian"), a physician and a shareholder in Defendant, Donald Marger, M.D. & Associates, Inc. ("Marger & Associates"), who was "squeezed out" of his interest in Marger & Associates to meet the needs and desires of Defendant, Donald Marger, M.D. ("Dr. Marger"). It is the position of Dr. Kademian that Dr. Marger wrongfully acted to bring about the dissolution of Marger & Associates in violation of his fiduciary, contractual and other legal obligations, causing Dr. Kademian to lose his shareholder interest, his

employment and effectively preventing him from practicing medicine in the Dayton, Ohio area. It is also Dr. Kademian's position that Dr. Marger dissolved Marger & Associates in response to Dr. Kademian's reporting a case of overradiation by a physician located at Miami Valley Hospital to the State of Ohio Department of Health.

The following facts are absolutely undisputed in this case:

- Dr. Marger was a 51% shareholder of Marger & Associates and Dr. Kademian was a 49% shareholder of Marger & Associates;
- Marger & Associates generated around $2 million per year;
- In 1999, the last full year that it operated, Dr. Kademian and Dr. Marger both made in excess of $450,000, but in previous years had made as much as $600,000;
- Dr. Marger, Dr. Kademian, and Dr. Rasp all had non-compete agreements with Marger & Associates;
- In early 2000, Dr. Kademian reported an overdose of radiation at Miami Valley Hospital by Dr. Robert Field to the Ohio Department of Health;
- On the same day that the inspector for the Department of Health appeared at Miami Valley Hospital, April 18, 2000, Dr. Marger held a meeting in which he stated as follows:

> ...I've had it. I can't control you. You are affecting my health, Mike, you are affecting my blood pressure, you are affecting me emotionally or psychologically...and you're going to be affecting me financially;

- During the April 18, 2000 meeting, Dr. Marger also said that he was leaving Marger & Associates, that he was leaving Dr. Kademian with Donald Marger & Associates and that he would "take care" of Dr. Rasp;
- Dr. Marger did *not* "leave" Marger & Associates and did *not* leave Marger & Associates to Dr. Kademian.
- On June 2, 2000, Dr. Marger voted to dissolve Marger & Associates over Dr. Kademian's objections.
- The minutes from the June 2, 2000 meeting stated that "the corporation will terminate its business activities in light of its affairs and will liquidate and distribute all of its assets to its shareholders in complete liquidation no later than December 31, 2000."
- Dr. Marger unilaterally distributed the assets equally among Dr. Marger, Dr. Kademian *and* Dr. Rasp, without notifying Dr. Kademian of this decision.

- All of the patients of Dr. Marger were unilaterally assigned to Dr. Rasp, without any input from Dr. Kademian and without Dr. Kademian's knowledge.
- Dr. Kademian learned through discovery in this case that Dr. Marger voted to dissolve Marger & Associates *after* reaching a secret "plan" with Dr. Rasp for the two of them to continue the practice *without Dr. Kademian.*
- Dr. Marger did not discuss the "plan" to dissolve Marger & Associates and form Cancer Consultants with Dr. Rasp with Dr. Kademian.
- Dr. Marger's "plan" was that he was going to continue an active practice with Dr. Rasp in a new entity known as Cancer Consultants of Southwest Ohio, Inc. ("Cancer Consultants") *before* dissolving Marger & Associates, and with Dr. Rasp's knowledge.
- Dr. Rasp and Dr. Marger had a "plan" to continue a "professional association to replace Marger & Associates."
- The Articles of Incorporation for the new entity founded by Dr. Marger, Cancer Consultants were executed by Dr. Marger on June 2, 200, *the same day that he voted to dissolve Marger & Associates.*
- Dr. Marger knew that Dr. Rasp and he had contractual obligations to Marger & Associates, i.e., non-compete agreements, which is why he opted to dissolve Marger & Associates.
- The "plan" was for Dr. Marger and Dr. Rasp to practice the "current style of practice. . . in the locations that [they] were at the time."
- Dr. Marger used the attorneys for Marger & Associates, Thompson Hine, both to dissolve Marger & Associates and to incorporate Cancer Consultants.
- Dr. Marger also had Thompson Hine prepare an employment contract between Cancer Consultants and Dr. Rasp.
- These contracts were never shown to Dr. Kademian.
- Dr. Kademian was never made aware that Dr. Marger had any involvement in Cancer Consultants.
- Dr. Marger and Dr. Rasp agreed to be equal partners in Cancer Consultants.
- Again, Dr. Kademian was not "privy" to *any* of the discussions between Dr. Marger and Dr. Rasp, or any of the discussions with the company's attorney, about the new venture.
- At no time did Dr. Rasp ever ask Dr. Kademian to join Cancer Consultants or suggest that he might be able to join Cancer Consultants.
- Dr. Marger also discussed his "plan" with the hospital *prior* to the dissolution of Marger & Associates.
- At trial, Bobbie Martin, the Director of Oncology at Good Samaritan Hospital in 2000, testified regarding notes she prepared in May 23, 2000:

Q. Can you read to the jury what that says?
A. It says confidential ***Marger, MK will get notice this Thursday that corporation will be dissolved by next Friday***. This only impacts MD's (inaudible) related to each other, not with Good Samaritan Hospital.
Q. Okay. Take a look at Exhibit 124, is that a continuation of your notes?
A. It appears to be.
Q. Can you read the jury your notes of May 23rd?
A. May need to separate certain functions such as billing. How communicate, etc. Consults? KDD will sign with new corporation, parenthesis -- I don't know if that says merger or Marger. (Inaudible.) ***MK will have a period of time so that patient continuity not disrupted***. Talked, talked with Joe. Marger whatever. Joe document how each consult is assigned.
Q. Who is KDD?
A. He -- Doug Deck. He was the CEO at the time.

- Other notes of Bobbie Martin also corroborate Dr. Marger's "plan" with the hospitals:

Q. Would you read this section to the jury.
A. ***Marger needs to let Greg out of exclusive. Dissolve corporation***. You want me to go on? Give, ***give Greg exclusive contract***. Have to reschedule his patients.
Q. Turn the page to 270, please. What is that?
A. More notes that I've written.
Q. Would you read the first paragraph to the jury, please.
A. ***Appoint Greg as acting medical director. Have Marger let him out of exclusive clause. Dissolve corporation. Award Greg exclusive contract.*** Greg then should be full time at (inaudible).

- Dr. Marger intended to participate in Cancer Consultants even until the end of June 2000.
- On June 26, 2000, Dr. Marger faxed an application for policy change for health insurance as an employee of Cancer Consultants.
- At some subsequent point Dr. Marger decided that he was "no longer going to be in active practice" and he transferred all of his interest in Cancer Consultants to Dr. Rasp.
- This occurred *after* Dr. Marger had already dissolved Marger & Associates.
- Subsequently, Good Samaritan Hospital and Miami Valley Hospital awarded an exclusive contract to Dr. Rasp and his new partners.
- Dr. Kademian was unable to find employment in the Dayton area.

- Dr. Marger continues to work two days a week in Dayton as a radiation oncologist.

After four days of trial, the Trial Court granted Dr. Marger's motion for directed verdict as to Dr. Kademian's remaining breach of fiduciary duty claim primarily on the basis that Dr. Marger did not personally benefit from his wrongful dissolution of Marger & Associates. In its Decision, the Court of Appeals reversed the Trial Court's ruling, and reinstated Dr. Kademian's claims for breach of fiduciary duty, conversion and tortious interference.

III. Arguments in Response to Appellant's Propositions of Law Raised in His Memorandum in Support of Jurisdiction.

In his Memorandum in Support of Jurisdiction, Dr. Marger makes three primary arguments:

1) that as a matter of law a majority shareholder has an absolute right to dissolve a corporation as permitted by the corporations' governing documents;
2) that as a matter of law, a majority shareholder cannot be held liable for the breach of this fiduciary duties owed to the minority shareholder because he did not ultimately benefit from his plan to dissolve the corporation and start a competing business; and
3) that as a matter of law a majority shareholder cannot be liable for conversion or tortious interference when he dissolves the corporation as permitted by the corporations governing documents even where such dissolution unduly oppresses a minority shareholder and causes him injury.

As set forth below, none of these arguments is supported by Ohio law or the facts of this case.

The test and analysis for determining whether a majority shareholder in a close corporation has violated his fiduciary obligation owed to a minority shareholder are well-established and well-defined under Ohio Law. A fiduciary duty is generally defined as

"[a] duty of utmost good faith, trust, confidence and candor owed by a fiduciary...to the beneficiary...***a duty to act with the highest degree of honesty and loyalty toward another person and the best interest of the other person***." *DiPasquale v. Costas* (Montgomery Co. 2010), 186 Ohio App.3d 121, 151 (emphasis added). The standard of duty has been found to be the utmost good faith and loyalty. See *Price v. Paragon Graphic* (Richland Co., December 16, 2008), 2008 Ohio App.LEXIS 5514. The heightened fiduciary duty owed by majority shareholders imposes upon them a duty to manage corporate affairs in good faith ***and in the corporation's best interests.*** *Medina v. Perumbeti* (Cuyahoga Co. December 22, 1994), 1994 Ohio App. LEXIS 5809.

Ohio Courts have also made it clear that shareholders owe each other a duty of *full disclosure:*

> We have stressed on a number of occasions that "general partners are to act toward each other with the utmost good faith and integrity."... Further, "***each partner is required to consult and inform his co-partner as to partnership matters or material questions not covered by the partnership agreement***." *Id.* notably, this rule is phrased in the alternative- "inform" * * * as to partnership matters *or* material questions."

Schafer v. RMS Realty (Montgomery Co. 2000), 138 Ohio App. 3d 244, 280-81. Moreover, a fiduciary must disclose ***"facts [that are] likely to affect a reasonable person's conduct concerning the transaction,"*** and such information does not have "***to be material to be a breach of fiduciary duty***." *Id.* at 280-81 (emphasis added).

Thus, it is clear under Ohio law that, Dr. Marger may have breached his fiduciary obligations to Kademian by secretly entering into a "plan" with Dr. Rasp, dissolving Marger & Associates and creating Cancer Consultants *utilizing the services of Marger &*

Associate's own attorneys. Again, Dr. Marger did not discuss the potential dissolution with Dr. Kademian at any time prior to the vote. Moreover, neither Dr. Marger nor Dr. Rasp discussed with Dr. Kademian that they were forming a new, competing company for the purpose of excluding Dr. Kademian from the business, or that they had disclosed the "plan" to Good Samaritan Hospital without Dr. Kademian's knowledge. Dr. Marger effectively passed the long-term relationship between Marger & Associates and Good Samaritan Hospital to Dr. Rasp and Cancer Consultants without Dr. Kademian's knowledge. It is a statement of the obvious that the existence of the "plan" for Dr. Marger and Dr. Rasp to continue in a business without Dr. Kademian, the discussion with Good Samaritan Hospital without Dr. Kademian's participation and the meeting with the attorney's of Marger & Associates for the purpose of dissolving that entity and creating Cancer Consultants, *all unknown to Dr. Kademian*, are "facts likely to affect a reasonable person's conduct concerning the transactions." See *Schafer,* 138 Ohio App.3d at 280-81.

1. It is Well-Established Under Ohio Law that a Majority Shareholder Does Not Have an Absolute Right to Dissolve a Close Corporation without Regard to the Heightened Fiduciary Obligations Owed to a Minority Shareholder.

Appellant's first Proposition of Law is as follows:

> Majority shareholders have a right, absent evidence of actual fraud or undue oppression, to dissolve a close corporation as a matter of business judgment, and to also dissolve all contracts owned by the corporation, including employee contracts and covenants. Upon dissolution, there can be no breach of a majority shareholder's fiduciary duty when a minority shareholder has an equal *chance* to benefit from the dissolution.

It is clear from his Memorandum in Support of Jurisdiction that it is Dr. Marger's

arrogant position is that he had an absolute right to dissolve Marger & Associates without regard to his fiduciary obligations as a majority shareholder:

> ***The voice of the majority is the voice of the corporation and all its shareholders. And, a person who acquires shares in a corporation as a minority shareholder comes in to be ruled by the majority in interest...***This Court *must* clearly establish the law in this state that there is a different test for the ability of a majority shareholder to dissolve a corporation as contrasted with the majority shareholder's fiduciary duty...the tenets of the duty of "utmost good faith" relative to a majority shareholder and a minority shareholder do not and cannot apply to the dissolution of a closely-held corporation. Otherwise, the corporation can never be dissolved where the minority shareholder doesn't want it dissolved...These two distinct standards must be clearly established by this Court. The first standard deals with the dissolution of a close corporation, and the second standard concerns the fiduciary duty of a majority shareholder who has dissolved corporation. The Second District Court of Appeals has blurred the distinction, as it readily admits in its Opinion. This cannot be the law.

Memorandum in Support of Jurisdiction, pp. 12-14 (emphasis).

The foregoing contentions are ludicrous. *Of course,* a majority shareholder can breach his fiduciary obligations by dissolving the corporation, just as he can breach his fiduciary obligations by taking *any* corporate action that unduly oppresses a minority shareholder. See *Schafer,* 138 Ohio App. 3d at 277-78.

The foregoing contentions completely ignore well-established Ohio law regarding the *heightened* fiduciary duties owed by majority shareholders even when the majorities actions are "authorized." While Dr. Marger may have had the technical "right" to vote to dissolve Marger & Associates, the exercise of such "right" in disregard for the rights and interests of a minority shareholder is not without consequences.

It has long been established in Ohio that "authorized" actions *can* constitute a violation of fiduciary obligations:

> We have held that, like partners, controlling shareholders of a closed corporation owe a fiduciary duty to minority shareholders, ***a duty which is violated when the majority takes action it is authorized to take which nevertheless operates to the disadvantage of the minority and was not undertaken in good faith and for legitimate business purpose***.

Busch v. Premier Integrated Medical Associates, Ltd. (Montgomery Co. Sept. 5, 2003), 2003 Ohio App. LEXIS 4255 (citing *Schafer v. RMS Realty* (Montgomery Co. 2000), 138 Ohio App. 3d 244) (emphasis added). Thus, "majority shareholders can be held liable, ***even where proper procedures are followed,*** if a plaintiff shows facts tending to establish bad faith." *Schafer v. RMS Realty* (Montgomery Co., 2000), 138 Ohio App.3d at 277-78. ("Thus, while the partnership agreement allowed the partners to vote for capital calls, as required for the purposes of the partnership," the majority's possibility in this regard was "***encumbered by the supreme fiduciary duty of fairness, honesty, good faith, and loyalty***" to their minority partner").

Here, the evidence demonstrated the dissolution of a lucrative corporation for *no value* and for the express purpose of starting a new competing business that excluded an existing shareholder. Further, the evidence clearly indicates that the "plan" was to dissolve Marger & Associates in order to avoid the noncompete provisions of the employment contracts that Dr. Marger and Dr. Rasp had with Marger & Associates. Moreover, Dr. Marger unilaterally transferred *all* of his patients and one third of the corporations receivables to Dr. Rasp. This evidence obviously raises an issue, *under existing law,* as to whether Dr. Marger acted to the detriment of Dr. Kademian in response to Dr. Kademian's reports of the Patient X matter to the Ohio Department of Health without giving Dr. Kademian an equal opportunity in the new venture, and

whether Dr. Marger acted in the best interests of the corporation.

The Court of Appeals addressed this issue as follows:

> Marger argues that he had the right to dissolve the corporation. This is true. However, we have stressed that even if a particular close corporation or partnership decision cannot be contested, "the manner in which the decision is made cannot violate the majority's fiduciary duty." *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 274, 741 N.E.2d 155 (2d Dist. 2000). In *Schafer*, a majority of partners issued a capital call, which was within their right to do under the partnership agreement. However, their action was taken in an attempt to squeeze out a minority partner. On appeal, we affirmed a jury verdict rendered in favor of the minority partner, noting that while the minority partner "could not contest the capital call itself, he could bring an action for breach of fiduciary duty if the defendants acted in bad faith or in a duplicitous manner by voting for and proceeding with the capital call." Id.

There is nothing new or unique about this case. There is already precedent in place that more than adequately governs the facts and circumstances of this case. Accordingly, the Court should not accept jurisdiction of this case.

3. A Majority Shareholder Can be Liable for a Breach of Fiduciary Duty Even Though He Did Not Financially Gain From Such Breach

It is Dr. Marger's position that because he did not *ultimately* get the benefit of dissolving Marger & Associates or the creation of Cancer Consultants, he is absolved of any liability for his prior actions relative to Dr. Kademian:

> Dr. Marger had no benefit nor reason to "funnel" work away from Marger & Associates to Cancer Consultants. Dr. Marger sold his shell company, Cancer Consultants, which he had intended to set up as his practice, to Dr. Rasp, when Dr. Marger decided to semi-retire. At the point of sale, the shell company had no clients, no business, and no income. Dr. Marger had no contact with Cancer Consultants thereafter and he received no benefit from any such "funneling" which never took place.

Memorandum in Support of Jurisdiction, pp. 11-12.

This argument fails to recognize the nature of the fiduciary duty owed by Dr.

Marger to Dr. Kademian. The primary fallacy of this argument is that for *no legitimate business purpose and for his own benefit,* Dr. Marger dissolved Marger & Associates thereby destroying the decades of business relationships between Marger & Associates and the hospitals, at a time when he *did* intend to create a competing business without Dr. Kademian. ***Completely missing from Dr. Marger's argument is any legitimate explanation for his actions***, other than a passing reference to an unexplained "schism." If Dr. Marger *desired* to "divorce" himself from Dr. Kademian, he could have done so without squeezing Dr. Kademian out of the business and he could have done so *with full disclosure to Dr. Kademian.* Instead of selling or otherwise conveying his interest in Marger & Associates to Dr. Kademian, Dr. Marger put into play a "plan" that completely stripped Dr. Kademian of the ability to continue to enjoy the relationships and goodwill that belonged to Marger & Associates, ***a very lucrative corporation in which he enjoyed a 49% interest***. This is clearly the basis for a claim of breach of fiduciary duty, whether or not Marger ultimately enjoyed any further benefit from his "plan." *See Mulholland v. Waiters' Local Union No. 106* (Cuyahoga Co. December 4, 1902), 1902 Ohio Misc. LEXIS 112. ("If any damage is sustained in consequence of the unlawful combination an action lies even though the object of the conspiracy was not attained.")

The Court of Appeals addressed this issue as follows:

> Marger argues that he cannot be held liable, because he stopped practicing in Dayton and did not ultimately receive financial benefits from the transaction. However, the appropriate consideration in breach of fiduciary duty is not whether the alleged wrongdoer benefitted — it is whether an injury proximately resulted from the breach. Harwood, 2005 Ohio 2442, at ¶ 26. As an example, an individual could intentionally ruin

> another's business, simply for motives of ill will or malice, without any desire for personal gain, and no one would suggest that an injury had not occurred to the person whose business was destroyed. Likewise, an individual could conspire to injure another's business for reasons of personal gain, yet be unable, for various reasons, to realize those gains. The fact that Marger later chose not to be part of the new corporation, which did receive exclusive contracts to practice at Good Samaritan and Miami Valley to the detriment of Kademian's ability to practice, does not negate Kademian's injury sustained as a result of Marger's actions in dissolving M&A, along with its covenants not to compete, and the transfer of its existing assets, including goodwill and patients, to another entity. Marger used his majority control to his advantage at the time he dissolved the corporation, thereby freeing himself and Rasp from non-compete clauses and allowing the new corporation to be formed. At that time, it is reasonable to infer that Marger intended to benefit from his actions.

Again, there is nothing new or unique about this case. There is no conflict among the appellate districts, and jurisdiction should be denied.

B. Under Ohio Law, a Majority Shareholder Can Be Held Liable for Conversion or Tortious Interference when He Wrongfully Dissolves the Corporation.

Appellant's second proposition of law is as follows:

> A majority shareholder in a close corporation is not subject to claims for conversion of the minority shareholders' interests in the corporation or claims for tortious interference with contracts of the dissolved close corporation. Rather, the only causes of action available to a minority shareholder are a showing of actual fraud or undue oppression in the dissolution of the corporation or evidence of breach of fiduciary duty by the majority shareholder.

1. The Conversion Claim

It is the position of Dr. Kademian that Dr. Marger effected the conversion of Kademian's interest in Marger & Associates by his "plan" with Dr. Rasp and through the dissolution of Marger & Associates. The Trial Court granted summary judgment as to Dr. Kademian's conversion claim, and the Court of Appeals reversal.

Once again, it is Dr. Marger's position that Dr. Kademian's conversion claims

must fail in that Dr. Marger had an absolute right to dissolve Marger & Associates regardless of the reason. This argument ignores the nature of a conversion claim under Ohio law. Conversion is the wrongful control or exercise of dominion over property belonging to another inconsistent or in denial of the rights of the owner. *Bench Billboard Co. v. Columbus* (1989), 63 Ohio App.3d 421. An interest in a business as reflected by a written agreement can be converted under Ohio law. *Schafer*, 138 Ohio App.3d at 286; see also *Elias v. Gammel* (Cuyahoga Co. July 1, 2004), 2004 Ohio App. LEXIS 3109 ("we find that a dental practice, as an intangible asset, can be converted.")

Here, Dr. Marger entirely eliminated Dr. Kademian's interest in a lucrative medical practice without business justification and without compensation, in response to Dr. Kademian's reporting of the Patient X matter. Thus, the corporation was dissolved entirely for the benefit of Dr. Marger and without legitimate business justification, resulting in the complete destruction of Dr. Kademian's interest in the business. Moreover, Dr. Marger unilaterally distributed one-third of the profits of Marger & Associates to Dr. Rasp upon dissolution, monies that should have been divided between Dr. Marger and Dr. Kademian. See *Werthman v. DONet, Inc.* (Montgomery Co. June 24, 2005), 2005 Ohio App.LEXIS 2968 (this Court reversing grant of summary judgment as to conversion claim for "post-dissolution profits of a partnership.").

The Court of Appeals addressed the conversion claim as follows:

> In the case before us, although Marger had the right to dissolve the corporation, there are issues of fact regarding whether his actions were taken for a wrongful purpose, in order to squeeze Kademian out of the corporation and prevent him from being able to practice at Good Samaritan and Miami Valley. Thus, arguments that Marger had a "right" to

dissolve the corporation do not absolve him from potential liability.

> Accordingly, Marger could be held liable for conversion, even if he had a right to dissolve the corporation, just as the defendants in Schafer could be held liable for conversion, even though they had the right to issue a capital call.

There is clearly no need for the Court to accept jurisdiction in this case.

2. <u>The Tortious Interference Claim</u>

Dr. Marger argues that because there was no contract between the hospitals and Marger & Associates, Dr. Kademian's tortious interference claim must fail because Marger & Associates was dissolved. Again, this argument ignores that realities of this case, Marger & Associates had an 18 year business relationship with the hospitals that was destroyed by Dr. Marger with no legitimate justification and to the detriment of Dr. Kademian. It is a statement of the obvious, that Dr. Kademian had a "business expectancy" with regard to the ongoing relationship between Marger & Associates and the hospitals and that Dr. Marger knew of such expectancy. Again, Dr. Marger does not offer any "justification for his actions other than he had the contractual right to dissolve Marger & Associates.

The Court of Appeals explained:

> The elements of the tort of tortious interference with contract are well-established in Ohio: (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, <u>85 Ohio St.3d 171, syl. Similarly,</u> "The elements essential to recovery for a tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom." *Wolf v. McCullough-Hyde Memorial Hosp.* (12th Dist. 1990), 67 Ohio App.3d 349, 355.
>
> "The main distinction between tortious interference with a contractual relationship and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet

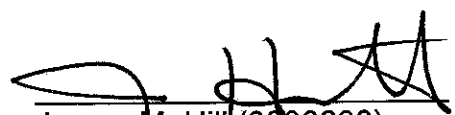
reduced to a contract." *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co. (3rd Dist).*, 148 Ohio App.3d 596, 604.

Without repeating the entirety of the previous discussion, the evidence reveals genuine issues of material fact regarding whether Marger interfered with both existing contracts, and with existing and prospective business or contractual relationships. Marger knew that both he and Rasp were bound by non-compete clauses that would have prevented them from contracting with hospitals where M&A had existing employees and relationships. Marger took action to dissolve M&A so that he and Rasp could form a corporation that would directly compete where he and Rasp would otherwise not have been permitted to practice. Kademian did have an interest in M&A, which had contracts with both these individuals that would have precluded their competition, and Marger's actions in dissolving the corporation for the purpose of voiding those contracts, would have been wrongful, if done for that purpose. Accordingly, the trial court's conclusion that Kademian did not have a claim because the dissolution of the corporation ended the contract misses the point. The fact that M&A may have been wrongfully dissolved in order to avoid the contracts is the point.

Furthermore, although Kademian did not have an existing contract with Good Samaritan or Miami Valley, he did have business relationships with both of them, which had intertwined officers, like the vice-president of oncology, who served both Good Samaritan and Miami Valley. There is evidence suggesting that Marger or Rasp, or both, attempted to interfere with Kademian's business relationships by attempting to obtain exclusive contracts with Good Samaritan and Miami Valley.

Thus, the law regarding claims for the conversion of such business interests is well-established and jurisdiction should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served via First Class U.S. Mail, this 23rd day of May, 2012, upon the following:

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