# STATE OF MICHIGAN

# COURT OF APPEALS

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| HEALTH CALL OF DETROIT,<br><br>Plaintiff-Appellant,<br><br>v<br><br>ATRIUM HOME & HEALTH CARE SERVICES INC.; KATRINA JOHNSON, LPN; DWIGHT ROBINSON, LPN; and DAMITA BORNER, LPN,<br><br>Defendants-Appellees. | FOR PUBLICATION<br>September 8, 2005<br>9:00 a.m.<br><br>No. 244633<br>Wayne Circuit Court<br>LC No. 01-135282-CK<br><br>Official Reported Version |

Before: Whitbeck, C.J., and Sawyer, Murphy, Neff, Jansen, Fitzgerald, and Markey, JJ.

WHITBECK, C.J. (*dissenting*).

The majority today concludes that a blanket rule limiting recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts is not "legally sound." The majority then gives us a new rule. That rule is that in all actions arising out of or related to the termination of at-will contracts, juries will be allowed to speculate on the amount of future lost profits on the basis of *any* evidence that *might* support a damage award for such lost profits. I cannot imagine a surer or more certain invitation to baseless conjecture than such a rule, and I respectfully dissent.

## I. Overview

As the majority opinion states, this Court convened this special panel under MCR 7.215(J)(3) to resolve the conflict between the vacated portion of the prior opinion in this case and *Environair, Inc v Steelcase, Inc*.[1] In this case, the individual defendants, Katrina Johnson, Dwight Robinson, and Damita Borner (the nurse defendants), provided home nursing services for an infant, Cierra Harris, as independent contractors of plaintiff Health Call of Detroit (Health Call). The nurse defendants had independent contractor agreements with Health Call (the Nurse

[1] *Environair, Inc v Steelcase, Inc*, 190 Mich App 289; 475 NW2d 366 (1991).

Independent Contractor Agreements)[2] that included noncompetition clauses. *The Nurse Independent Contractor Agreements were terminable at will by either party.*[3] Health Call had a contract with Cierra Harris's mother, Wendy Williams, for the provision of nursing care (the Williams Care Contract)[4] to Cierra Harris. *The Williams Care Contract was also terminable at will by either party.*

According to Health Call, defendant Atrium Home & Health Call Services (Atrium) eventually contacted one of the nurses, which led to all the nurse defendants terminating their Nurse Independent Contractor Agreements with Health Call and then continuing to provide nursing services to Cierra Harris as agents of Atrium. Ms. Williams also terminated the Williams Care Contract. Following these terminations, Health Call sued.[5] The trial court granted partial summary disposition, but a panel of this Court reversed to allow Health Call's claims to be reinstated with instructions that, should Health Call prevail on these claims, it could recover no more than nominal damages to the extent its damages were caused by the loss of the Williams Care Contract.[6] However, the *Health Call* panel stated that, but for the decision in *Environair*, it would not have so limited the damages on these claims on remand, thereby declaring a conflict under MCR 7.215(J)(2).

The majority of this special panel today resolves the conflict "in favor of the analysis and reasoning in *Health Call*" and overrules *Environair* "to the extent that [it] is read as limiting recovery to nominal damages as a matter of law in all cases in which there is a request for damages arising out of or related to the termination of at-will contracts . . . ."[7] I reach the polar

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[2] The majority opinion refers to these contracts as the "independent contractor agreements."

[3] Health Call argued in its initial brief that paragraph 12 of the Nurse Independent Contractors Agreement, which contained the phrase that the covenant not to compete "shall endure for a period of two years (24 months) from expiration of this Agreement," meant that this paragraph was not terminable at will. This language does not obviate the fact that the Nurse Independent Contractor Agreements were at-will contracts, as evidenced by the language in paragraph 7 giving either party "the right to terminate the Agreement" with a 30-day written notice.

[4] The majority opinion refers to this contract as the "home nursing contract."

[5] In its count I, Health Call asserted claims of tortious interference with a contract against Atrium and one of the nurse defendants, Damita Borner. Specifically, Health Call asserted that (a) Atrium tortiously interfered with Health Call's Nurse Independent Contractor Agreement with Damita Borner, (b) Atrium and Damita Borner tortiously interfered with Health Call's Nurse Independent Contractor Agreements with Katrina Johnson and Dwight Robinson, and (c) Atrium and Damita Borner tortiously interfered with Health Call's Williams Care Contract and "business relationships and expectancies" concerning Cierra Harris. In its count II, Health Call brought breach of contract claims against the nurse defendants for allegedly breaching their Nurse Independent Contractor Agreements by violating their noncompetition agreements in connection with their continuing work for Cierra Harris as agents of Atrium.

[6] *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 265 Mich App 79; 695 NW2d 337 (2005), vacated in part 265 Mich App 801 (2005).

[7] *Ante* at ___.

opposite conclusion. I would therefore reaffirm this Court's decision in *Environair*, and I would retain the rule that limits recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts.

## II. The Cases, the Law, and the Issues

### A. Standard of Review

We review de novo a trial court's grant or denial of summary disposition.[8] We must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law.[9] "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim."[10] When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party.[11]

### B. *Environair*

*Environair* involved a claim of tortious interference with a business expectancy that arose when the defendant allegedly induced the termination of an exclusive sales agent agreement that was terminable at will.[12] The *Environair* panel considered *Sepanske v Bendix Corp*,[13] in which this Court had earlier held that only nominal damages were available for breach of a contract resulting in the loss of at-will employment because there was no tangible basis on which to assess damages. The *Environair* panel concluded that this holding regarding the speculative nature of damages applied equally to at-will contracts outside the employment context, noting that a party to an at-will contract may terminate it "at any time without consequence . . . ."[14] Thus, the *Environair* panel affirmed the trial court's limitation of damages for loss of the at-will sales contract to nominal damages.[15]

### C. *Health Call*

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[8] *First Pub Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003).

[9] *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

[10] *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003).

[11] *Id.*

[12] *Environair*, *supra* at 290-291, 294-295.

[13] *Sepanske v Bendix Corp*, 147 Mich App 819, 828-829; 384 NW2d 54 (1985).

[14] *Environair*, *supra* at 294.

[15] *Id*. at 293-295.

The *Health Call* panel disagreed with the view that attempting to assess damages for the loss of an at-will contract is necessarily speculative.[16] While recognizing that it may be difficult to prove damages resulting from the termination of an at-will contract, the *Health Call* panel noted the established principle that "'damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate.'"[17] The *Health Call* panel observed that an award of damages for the count I tortious interference claims "would be neither speculative nor uncertain, as the time during which the defendant nurses continued to provide nursing services to Harris would operate as a basis for measuring damages."[18] Similarly, the *Health Call* panel stated with regard to the count II breach of contract claims that "damages might plausibly be measured on the basis of the continued provision of care" by the nurse defendants.[19]

D. Defining the Issues

The *Health Call* panel stated that a plaintiff may properly maintain an action for tortious interference with an at-will employment contract[20] and that an at-will employment contract may properly contain a noncompetition clause.[21] I agree. I note, however, that Health Call spent considerable effort in its initial brief to the *Health Call* panel attempting to persuade that panel that there is abundant authority that allows a cause of action for interference with an at-will contract. As mentioned above, the *Health Call* panel agreed, although in cursory fashion, because it cited *Patillo*—a case on which Health Call relied. More to the point, however, Atrium did not seriously dispute the proposition that a plaintiff may sue for alleged tortious interference with an at-will contract. Indeed, Atrium cited *Prysak v R L Polk Co*[22] for that exact proposition. Atrium's point in its brief to the *Health Call* panel was that, even if Health Call could bring such an action, under the holding in *Environair* it could recover no more than nominal damages.

Therefore, the issue here is not whether a plaintiff may sue for alleged tortious interference with, or breach of, an at-will contract. Rather, I understand the issue here to be whether a plaintiff who brings a claim or claims for tortious interference with, or breach of, an at-will contract can recover more than nominal damages for future lost profits. In the context of this case, I would break this issue down further:

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[16] *Health Call, supra* at 85.

[17] *Id*., quoting *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

[18] *Health Call, supra* at 86.

[19] *Id*.

[20] *Id*. at 83, citing *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 457; 502 NW2d 696 (1993).

[21] *Health Call, supra* at 83, citing MCL 445.774a and *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998).

[22] *Prysak v R L Polk Co*, 193 Mich App 1; 483 NW2d 629 (1992).

*First*, can Health Call recover more than nominal damages for future lost profits resulting from the alleged tortious interference (a) by Atrium with the Nurse Independent Contractor Agreement with Damita Borner, (b) by Atrium and Damita Borner with the Nurse Independent Contractor Agreements with Katrina Johnson and Dwight Robinson, and (c) by Atrium and Damita Borner with the Williams Care Contract and with Health Call's "business relationships and expectancies" concerning Cierra Harris?

*Second*, can Health Call recover more than nominal damages for future lost profits resulting from the alleged breach by the nurse defendants of the noncompetition provisions of the Nurse Independent Contractor Agreements?

## III. Damages for Future Lost Profits Resulting from Alleged Tortious Interference with At-Will Contracts

### A. Articulating Atrium's Syllogism

Reduced to its essence, Atrium's position in this matter is a syllogism:

*Major Premise*: Damages based on mere speculation are not recoverable.

*Minor Premise*: Damages based on the termination of an at-will contract are speculative.

*Conclusion*: Therefore, damages based on the termination of an at-will contract are not recoverable.

There is no indication that the parties, the *Health Call* panel, or the majority here seriously disagree with the major premise. Indeed, as Atrium points out, it is black letter law in Michigan that damages may not be based on mere speculation.[23] Rather, the disagreement is with the minor premise. As the *Health Call* panel put it:

> [D]amages for the tortious interference by Atrium and Borner with the [Nurse Independent Contractor Agreements] between [Health Call] and the [nurse defendants], and for interference by all defendants with the [Williams Care Contract] between [Health Call] and Williams, would be neither speculative nor uncertain, as the time during which the [nurse defendants] continued to provide

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[23] See, for example, the cases that Atrium cites: *Woodyard v Barnett*, 335 Mich 352, 358-359; 56 NW2d 214 (1953) (remote, contingent, and speculative damages will not be considered); *Theisen v Knake*, 236 Mich App 249, 258; 599 NW2d 777 (recovery not permitted for remote, contingent, or speculative damages); *Hayes-Albion Corp v Kuberski*, 108 Mich App 642, 653; 311 NW2d 122 (1981) (damages may not be contingent, speculative, or uncertain), rev'd in part on other grounds, 421 Mich 170 (1984); *Indemnity Marine Assurance Co, Ltd v Lipin Robinson Warehouse Corp*, 99 Mich App 6, 14; 297 NW2d 846 (1980) (lost profits must be reasonably certain and not unduly speculative).

> nursing services to Harris would operate as a basis for measuring damages. Similarly, should the fact-finder conclude regarding count II [breach of contract] that the [nurse defendants] had breached the noncompetition clause of their respective [Nurse Independent Contractor Agreements] by going to work for Atrium and that Williams terminated her contract with [Health Call] and entered an agreement with Atrium only to secure continuity of care, damages might plausibly be measured on the basis of the continued provision of care for Harris by the [nurse defendants].[24]

B. Focusing the Analysis

Although neither Health Call nor the *Health Call* panel made this point explicitly,[25] it is reasonably clear that the recovery that Health Call seeks here is for future lost profits, that is, profits that Health Call will not receive after the date of the termination of the Williams Care Contract. Equally clearly, these future lost profits relate solely to the Williams Care Contract. Self-evidently, Health Call received no revenue from the Nurse Independent Contractor Agreements. Rather, under those contracts, Health Call *paid* the nurse defendants for the services that they rendered. Thus, there could be no revenue coming directly to Health Call from the Nurse Independent Contractor Agreements; the only revenue that Health Call received here came to it under the Williams Care Contract.

It is also reasonably clear that Health Call's claim against Atrium and Damita Borner for tortious interference with its "business relationships and expectancies" concerning Cierra Harris stands on the same basis as its claim against these defendants for tortious interference with the Williams Care Contract; that is, if damages for tortious interference with the Williams Care Contract are speculative, so too are damages for tortious interference with its "business relationships and expectancies" concerning Cierra Harris.

In short, the Williams Care Contract is the pivot on which all aspects of this case turn. Any future lost profits that Health Call might suffer derive solely from the termination of the Williams Care Contract. And if those future lost profits can be measured with reasonable certainty, then Health Call should be allowed to present its proofs on this issue to a jury. But if any measure of such future lost profits is merely speculative, then as a matter of law recovery of

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[24] *Health Call*, *supra* at 86.

[25] However, the majority here does. See, for example, the statement, *ante* at ___, that "[t]he issue of damages presented to us ultimately ties directly into the at-will home nursing contract *and the loss of future profits under that contract*, regardless of whether the underlying theory of liability is breach of contract, tortious interference with a contract, or tortious interference with a business relationship or expectancy." (Emphasis supplied.) See also the statement, *ante* at ___, that "[a]s in *Environair*, plaintiff seeks *future damages in the nature of lost profits* for defendants' alleged improper role in facilitating Williams's termination of the at-will home nursing contract." (Emphasis supplied.)

more than nominal damages cannot go before a jury *even if* there is a showing of tortious interference with the Williams Care Contract.

C. Measuring Health Call's Future Lost Profits

1. Health Call's Methodology

As Atrium points out, Health Call has attempted to quantify its future lost profits resulting from the termination of the Williams Care Contract. In count I of its complaint, it stated that the "business relationship and expectancies" between Cierra Harris and Health Call "had a reasonably likelihood of future economic benefit" for Health Call of $700,000. This amount was apparently calculated at $350,000 a year "with the expectation that said services would be provided for a period of two-years [sic]." In its answers to Atrium's interrogatories, Health Call again referred to "two year" contracts with the nurse defendants. In a deposition, one of the owners of Health Call, when asked where the amount of $700,000 came from, responded that "[t]he billings based upon—the billings on the [Cierra Harris] case for two years would represent $700,000."

With all due respect to Health Call, its reasoning leads nowhere. The duration of the noncompetition provision in the Nurse Independent Contractor Agreements has nothing whatsoever to do with the loss of future profits that Health Call might suffer as a result of the termination of the Williams Care Contract. Assuming for the sake of this appeal that, as Health Call asserts, Atrium and Damita Borner tortiously interfered with the Williams Care Contract, and with Health Call's "business relationships and expectancies" concerning Cierra Harris, the fact that Borner promised in her Nurse Independent Contractor Agreement not to compete with Health Call for two years does not bear in any fashion on the issue of Health Call's loss of future profits from the Williams Care Contract. As in *Environair*, there is no cognizable tortious interference cause of action independent of the contract that is the source of all possible future revenues to the plaintiff—here, the Williams Care Contract.[26]

2. The *Health Call* Panel's Methodology

The *Health Call* panel, without subscribing to Health Call's calculation of $700,000 in lost future profits, followed something of the same logic. The *Health Call* panel stated that "[i]f the finder of fact were to conclude that Williams discontinued the [Williams Care Contract] with [Health Call] and entered into the contract with Atrium only because she wanted the care provided by the [nurse defendants] to continue unabated, such a finding would support the conclusion that the termination of the [Williams Care Contract] had no relation to the fact that the [Williams Care Contract] was at will."[27]

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[26] See *Environair*, *supra* at 295.

[27] *Health Call*, *supra* at 85-86.

Here, in my view at least, the *Health Call* panel erroneously relied on the wrong factor: the motivation of Ms. Williams. Let us assume that the sole motivation of Ms. Williams in terminating the Williams Care Contract was to assure that the care the nurse defendants provided to Cierra Harris would continue unabated. Ms. Williams's reasons for terminating the Williams Care Contract were and are entirely irrelevant to the termination of that contract. The Williams Care Contract was at-will and could be terminated at any time *for any reason or for no reason at all*. Thus, any conclusion by a jury concerning Ms. Williams's motivation would have no bearing whatsoever on the issue of Health Call's future lost profits as a result of the termination of the Williams Care Contract.

If this is so, then the time during which the nurse defendants continued to provide nursing services to Cierra Harris cannot operate as a basis for measuring damages for much the same reason. Let us assume that, but for the allegedly tortious interference by Atrium and Damita Borner with the Williams Care Contract, Ms. Williams would have continued to use Health Call pursuant to that contract. Because that contract was at-will, there can be no reasonable basis on which a jury could determine how long that contractual relationship would continue. Ms. Williams could have terminated the Williams Care Contract the next day, the next month, or the next year, again for any reason or for no reason at all.

Moreover, I note that in her deposition, Ms. Williams stated that she was dissatisfied with the care from Health Call and that she was unhappy with one of the owners of Health Call because of his negative comments about her. It is certainly possible to conclude that this dissatisfaction might have led Ms. Williams to terminate the Williams Care Contract even had there been no allegedly tortious interference with that contract by Atrium and Damita Borner. But this conclusion would be entirely speculative. Similarly, it is entirely speculative—and entirely open-ended—to conclude that the time during which the nurse defendants continued to provide nursing services to Cierra Harris might serve as a basis for measuring damages. Under this formulation, Health Call's lost future profits could continue indefinitely and they would be, literally, without measure.

3. The Majority's Methodology

The majority initially skirts the question of how a jury might reasonably go about measuring Health Call's lost future profits. Rather, the majority's opinion simply announces its conclusion that the "facts are sufficient to survive summary disposition" and that, therefore, "more than nominal damages may be recoverable . . . ."[28] The facts with which the majority begins its analysis relate to a "continuum of care by defendant nurses before, during, and after the termination of the home nursing contract[.]"[29]

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[28] *Ante* at ___.

[29] *Ante* at ___.

Let us assume that there are facts of record that establish such a "continuum of care." Standing alone, these facts would merely establish that the nurse defendants provided medical care to Cierra Harris for a certain period. The majority then refers to "Williams's apparent satisfaction with and reliance on defendant nurses . . . ."[30] Let us also assume that this was so. Standing alone, this additional fact also advances our analysis not at all. Indeed, I note that while Ms. Williams may have been satisfied with and relied on the nurse defendants, she stated that she was *dissatisfied* with the care from Health Call. In any event, and rather self-evidently, neither the fact that the nurse defendants provided medical care to Cierra Harris for a given time nor the fact that Ms. Williams was apparently satisfied with and relied on the nurse defendants constitutes evidence sufficient to survive summary disposition.

To reason its way past this dilemma, the majority turns to a "but for" analysis. In that analysis, the majority contrasts the nurse defendants' "continuum of care" and Ms. Williams's apparent satisfaction and reliance on the nurse defendants with Ms. Williams's decision to terminate the Williams Care Contract. "[A] reasonable trier of fact," the majority states, "could find that, but for the alleged tortious interferences by Atrium and Borner or the alleged breach of contract by defendant nurses, Williams would have continued using plaintiff pursuant to the contract beyond the date of actual termination because a bond or relationship had developed between Williams, Harris, and the nurses."[31]

Here we enter into the world of what might have happened or, more succinctly, of speculation. It *might* have happened that Ms. Williams *might* have chosen to continue her contractual relationship with Health Call indefinitely. It also *might* have happened that, because Ms. Williams was dissatisfied with Health Call, she *might* have terminated that contractual relationship the next day, the next month, or the next year entirely because of that dissatisfaction . . . or, for that matter, entirely because of a passing whim. The blunt fact remains that Ms. Williams could terminate the Williams Care Contract at any time, for any reason, or for no reason at all. That the nurse defendants provided medical care to Cierra Harris for a particular period and that Ms. Williams was apparently satisfied with and relied on the nurse defendants do not alter in the slightest the fact that the Williams Care Contract was an at-will contract. In the end, the majority's "but for" analysis is itself simply an exercise in conjecture, divorced from the reality that we are here dealing with an at-will contract about whose duration there can be no reasonable certainty whatsoever.

To buttress its analysis, the majority gives us something of a head fake. Health Call, it asserts, "had a manifest interest and expectation in Williams's freedom and ability to exercise her judgment and continue the contractual business relationship with plaintiff for her infant's care without having the relationship undermined by defendants' wrongful interference."[32] But the issue in this case is not whether there is a sound intellectual basis for actions for tortious

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[30] *Ante* at ___.

[31] *Ante* at ___.

[32] *Ante* at ___.

interference with contractual relations. And the issue is not whether Health Call has asserted facts concerning Atrium's alleged commission of that tort sufficient to survive summary disposition. Rather the issue is whether Health Call, when bringing an action for tortious interference with, or breach of, an at-will contract can recover more than nominal damages for future lost profits. Health Call's interest in the ability of Ms. Williams to exercise her judgment without being undermined by defendants' alleged wrongful interference with the Williams Care Contract has nothing whatsoever to do with that issue.

Ultimately, the majority does make its way to the bottom-line question: How does one reasonably measure the loss of future profits following the termination of an at-will contract? But the majority in essence simply rearticulates the *Health Call* panel's methodology. "The period," it states, "beyond the date of termination during which defendant nurses continued to provide nursing care to Williams and Harris could reasonably serve as a measurement of damages with regard to lost profits, along with any other evidence eventually presented at trial that might support a damage award . . . ."[33]

First, as I noted in part III (C)(2), under this approach, Health Call's lost future profits could continue indefinitely and would be quite literally without measure. Second, if in its earlier "but for" analysis the majority opened the door to jury speculation, here it kicks that door down entirely. After concluding that a blanket rule limiting recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts is not "legally sound,"[34] the majority has given us a new rule. That rule is that in all actions arising out of or related to the termination of at-will contracts, juries will be allowed to engage in unanchored conjecture regarding the amount of future lost profits on the basis of *any* evidence that *might* support a damage award for such lost profits. There is a word for such conjecture, and that word is speculation.

D. The Majority's Response

The majority responds at some length to this dissent. Several of the points in this response are quite interesting. First, the majority places considerable emphasis on the uniqueness of the fact situation in this case, indicating that "plaintiffs may struggle to present evidence sufficient to proceed to trial on the issue of future damages," and that it will likely be the rare case that parallels the factual situation here.[35] Here the majority protests too much. Despite its disclaimers, the fact remains that the majority has concluded that a blanket rule limiting recovery to nominal damages as a matter of law in actions arising our of or related to the termination of at-will contracts "is not legally sound."[36] Moreover, I would be considerably

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[33] *Ante* at ___.

[34] *Ante* at ___.

[35] *Ante* at ___.

[36] *Ante* at ___, ___.

more comfortable with the majority's positioning of this matter as an outlier case if there were some level of guidance to the trial bench and bar in the majority's opinion regarding the criteria that a trial judge should use to determine whether to utilize the *Environair* rule—which apparently remains generally applicable—or the exception to that rule that the majority creates in this case. Unfortunately, such guidance is, at least in my view, entirely lacking in the majority's opinion.

Second, the majority explicitly concedes that its approach invites jury speculation when it states that

> [a]lthough there might be a need to speculate somewhat as to how long the [Williams Care Contract] would have continued in effect beyond the date of termination, or in other words *how much* in lost profits should be awarded, assuming liability, this issue is within the province of the jury and could be determined on the basis of a finding relative to the intensity of Williams's desire to maintain the existing nursing care and, more specifically, her desire to maintain the services of defendant nurses.[37]

Pure speculation is, of course, not within the province of any jury. Moreover, the majority invites the jury in this case to speculate on the amount of the award for lost profits on the basis of its speculation about the "intensity" of Williams's desire to maintain the existing nursing care. I can only observe that compound speculation is not like compound interest; it does not get better with use.

Third, the majority responds to my hyperbole with some of its own. Rather than kicking down the door that bars jury speculation, the majority states that it has opened that door "to allow in some fresh air."[38] Setting aside the dueling metaphors, the fact remains that the majority's opinion states that the time during which defendant nurses continue to provide nursing care to Williams and Harris could reasonably serve as the measurement of damages with regard to lost profits, "along with any other evidence eventually presented at trial that might support a damage award covering the same or a longer period."[39] I assume that the majority intends that these words have some meaning. To me the meaning is clear: In the context of this case, *any* other evidence that *might* support a damage award—no matter how remote or conjectural—will be allowed to go before the jury. If there remains any bar to jury speculation in this case, I am at a loss to identify it.

Finally, the majority wonders whether I would "reverse case law that allows for more than nominal future damages for at-will employees whose employment is terminated for violation of various civil rights statutes or, for that matter, future damages for a wrongful death

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[37] *Ante* at ___ (emphasis in the original).

[38] *Ante* at ___.

[39] *Ante* at ___.

claim involving an at-will employee."[40] It was, and remains, my understanding that we were deciding *this* case, not some other case. I understand the issue here to be whether a plaintiff who brings a claim or claims for tortious interference with, or breach of, an at-will contract can recover more than nominal damages for future lost profits. This dissent goes to the boundaries of that issue, and no further.

E. Conclusion

I agree with the majority that damages are not speculative merely because they cannot be ascertained with mathematical precision,[41] and that it is sufficient if a reasonable basis for computation exists, although the result be only approximate.[42] I agree that the law does not require a higher degree of certainty than the nature of the case permits.[43] I agree that when the nature of the case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances that have a reasonable tendency to show their probable amount.[44]

But here there is no reasonable, or even approximate, basis for computation of Health Call's lost future profits as a result of the termination of the Williams Care Contract. Indeed, there is no certainty at all with respect to such lost future profits. Under such a circumstance, placing all the facts and circumstances surrounding the termination of the Williams Care Contract before the jury could have no tendency to show the probable amount of Health Call's lost future profits. Rather, it would leave the jury with no recourse but to pure speculation about a case that might have no end.

Therefore, I conclude that the reasoning in *Environair*, a case decided over ten years ago, remains sound, and I would decline to overrule that case. In my view, under Health Call's methodology, under the *Health Call* panel's methodology, or under the majority's methodology, there is no method by which Health Call's future lost profits for the termination of the Williams Care Contract can be reasonably computed or even estimated. I submit that the majority, despite its best efforts, has not refuted the logic of Atrium's syllogism: damages for the termination of the Williams Care Contract are not recoverable because such damages are inherently speculative.

Therefore, I would conclude that, as a matter of law, Health Call can recover no more than nominal damages for future lost profits resulting from (a) the alleged tortious interference

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[40] *Ante* at ___.

[41] See *ante* at ___, citing *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004), and *Hofmann, supra* at 108.

[42] See *ante* at ___, citing *Ensink*, *supra* at 525.

[43] See *ante* at ___, citing *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986).

[44] See *ante* at ___, citing *Body Rustproofing*, *supra* at 391.

by Atrium with the Nurse Independent Contractor Agreement with Damita Borner, (b) the alleged tortious interference by Atrium and Damita Borner with the Nurse Independent Contractor Agreements with Katrina Johnson and Dwight Robinson, and (c) the alleged tortious interference by Atrium and Damita Borner with the Williams Care Contract and with Health Call's "business relationships and expectancies" concerning Cierra Harris.

IV. Damages for Future Lost Profits Resulting from Breach of Contract

As I outlined in part III (B), there can be no future lost profits to Health Call as a result of the nurse defendants' alleged breach of the Nurse Independent Contractor Agreements because Health Call derived no profits from those agreements. Any damages for future lost profits that Health Call might suffer from the nurse defendants' breach of those agreements would be entirely derivative of the damages for future lost profits from the termination of the Williams Care Contract. I have argued in part III that such damages would be purely speculative. I do note, however, that Atrium concedes that a plaintiff might be able to recover any recruiting, hiring, or training costs or expenses incurred *before* an employee's breach of a noncompetition or nonsolicitation agreement.

For these reasons, I dissent.

Jansen, J., concurred with Whitbeck, C.J.

/s/ William C. Whitbeck
/s/ Kathleen Jansen