IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANESTHESIA SERVICES, P.A.	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. N11C-03-005 MJB**
	)	
ANESTHESIA ADVANTAGE, P.C. and ANESTHESIA ADVANATAGE OF DELAWARE, P.A.,	)	
	)	
Defendants/Third Party Plaintiffs	)	
	)	
v.	)	
	)	
TRACY WINTERS, M.D. and EGNM, LLC d/b/a LEWES SURGERY CENTER,	)	
	)	
Third Party Defendants	)	

Submitted: March 6, 2013
Decided: June 27, 2013

Upon Bench Trial, Post Trial Briefing and Oral Argument Judgment Awarded in Favor of Defendants Anesthesia Advantage, P.C. and Anesthesia Advantage of Delaware, P.A.

MEMORANDUM OPINION

Charles T. Armbruster, III, Esquire, Law Offices of Raymond Tomasetti, Newport, Delaware, Attorney for Plaintiffs.

Thomas E. Hanson, Jr., Esquire, Wilmington, Delaware, Attorney for Defendants.

BRADY, J.

I. INTRODUCTION AND FACTS

This is the Court's decision following a bench trial relating to a dispute arising from contractual relationships between Anesthesia Services, P.A. ("ASPA"),[1] Lewes Surgery Center ("LSC),[2] and Tracy Winters, M.D. ("Dr. Winters").[3] After the Court dismissed the third party complaint filed by Defendants Anesthesia Advantage, P.C. and Anesthesia Advantage of Delaware, P.A. (collectively "AAPC") against Dr. Winters and LSC,[4] the bench was trial held on October 4, 2012 between ASPA and AAPC. The parties submitted post-trial briefs and oral argument was held on March 6, 2013. The Court finds the following facts from the record.

On January 4, 2006, ASPA and LSC formed a contract, "which permitted [ASPA] to provide anesthesia services pursuant to the Anesthesia Service Agreement ("Agreement").[5] The Agreement included a non-solicitation provision:

> NON-SOLICITATION. During the period commencing with the execution of this Agreement and ending two (2) years after termination of this Agreement LSC agrees that neither LSC, nor any affiliated or successor entities, nor any physician with an investment interest in LSC or any such entities, or any physician employed by Orthopaedic Associates of Southern Delaware shall directly or indirectly employ, solicit for employment, or otherwise retain or contract for the professional services of any physician or CRNA who at the time of such termination is then, or within the twelve months immediately preceding was, providing professional services

[1] "Anesthesia Services, P.A., is an anesthesiology service provider that operates at various hospitals and outpatient surgery centers throughout the State of Delaware." Def.'s Post Trial Answering Br., at 1 (December 6, 2012).
[2] "Lewes Surgery Center. . .is an outpatient surgery center. . .located at 17015 Old Orchard Road, Lewes, Delaware." *Id.*
[3] *See* Pl.'s Opening Post-Trial Br., at 1 (Nov. 9, 2012) ("Anesthesia Services, P.A. ("ASPA") entered into an Anesthesia Services Agreement with ENGM, LLC, d/b/a Lewis Surgery Center ("LSC") on January 4, 2006 (the "LSC Agreement"); *Id.* at 2 ("On December 12, 2007, ASPA hired Dr. Tracey Winters to become an employee physician.").
[4] Oct. 31, 2011 Court Opinion and Order, Transaction ID 40644106 (Oct. 31, 2011).
[5] Def.'s Post Trial Answering Br., at 1 (Dec. 6, 2012).

> to LSC under the terms of this Agreement, without prior consent of ASPA. This provision shall apply to solicitations for employment or professional services by LSC, or any affiliated or successor entities, any physician with an investment interest in LSC or any such entities, or any physician employed by Orthopaedic Associates of Southern Delaware.[6]

Furthermore, the Agreement asserted that if LSC or any physician breached this agreement, ASPA would receive liquidated damages equal to one year of the physician's salary.[7]

ASPA hired Dr. Winters on December 12, 2007, to begin providing anesthesiology services at LSC beginning on February 4, 2008.[8] "Pursuant to Paragraph 24[9] of the Employment Agreement, Dr. Winters agreed that ASPA invested a substantial amount of time and expense to establish him within ASPA's Service Area. . .[which was] defined as a 25 mile radius around each of the [ASPA] facilities."[10] Specifically, the agreement entailed the understanding that ASPA would "suffer significant financial hardship" if, while working for ASPA or for a two year period thereafter, he were to provide anesthesia-related medical services elsewhere, and within the defined Service Area.[11] Dr. Winters agreed that he had read carefully the provisions of the service agreement, and that the terms of this non-compete agreement would survive expiration or termination of the agreement.[12]

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[6] *Id.*
[7] Pl.'s Opening Post-Trial Br., at 1 (Nov. 9, 2012).
[8] *See id.* at 2, 4.
[9] Hereinafter "the Financial Damages Provision."
[10] Pl.'s Opening Post-Trial Br., at 2-3 (Nov. 9, 2012).
[11] *Id.* at 3.
[12] *Id.*

By December of 2008, it had become clear that the relationship between ASPA and LSC was not a profitable one.[13] Accordingly, APSA met with LSC in December of 2008, and provided the company with notice of intent to terminate the agreement.[14] LSC subsequently accepted the termination of the agreement via email sent on January 8, 2009.[15] "As a result, the LSC Agreement was set to terminate and did terminate on June 30, 2009."[16] Although ASPA offered Dr. Winters a similar position at Nanticoke Hospital,[17] Dr. Winters tendered his resignation to ASPA on March 8, 2009, effective "at the close of business on June 30, 2009."[18]

On January 14, 2009, AAPC presented a sales pitch to LSC, which Dr. Winters attended.[19] Pursuant to this presentation, Dr. Winters expressed an interest in working for AAPC.[20] Ultimately, AAPC and LSC formed a contract whereupon AAPC would replace ASPA as the anesthesia service provider at LSC's surgery center, beginning on July 1, 2009.[21] Furthermore, on April 29, 2009, AAPC formally executed an employment agreement with Dr. Winters, and Dr. Winters began work at the LSC surgery center on July 1, 2009.[22] ASPA, noting that only 24.989[23] miles separate LSC's

[13] *See* Def.'s Post Trial Answering Br., at 2 (Dec. 6, 2012) ("While providing service under the LSC Agreement, Plaintiff failed to establish a profitable relationship with the Surgery Center and 'continu[ed] to lose money at the facility.'") (quoting Tr. 32:3-4).
[14] *See id.*
[15] *Id.*
[16] Pl.'s Opening Post-Trial Br., at 4 (Nov. 9, 2012).
[17] *E.g.*, "Based on ASPA's desire to maintain its relationship with Dr. Winters, ASPA offered Dr. Winters two positions at Nanticoke Memorial Hospital." *Id.* at 4.
[18] *Id.* at 5.
[19] *See* Def.'s Post Trial Answering Br., at 2 (Dec. 6, 2012). This was not the first time members of the two organizations had met – the first time occurred in December of 2008, when Kurt Hausner, Anesthesia Advantage's head of business development, "[a]s part of his routine canvassing." Pl.'s Opening Post-Trial Br., at 4 (Nov. 9, 2012).
[20] *See* Def.'s Post Trial Answering Br., at 5 (Dec. 6, 2012).
[21] This agreement was unanimously approved by the LSC board of directors on March 11, 2009. *See* Pl.'s Opening Post-Trial Br., at 7 (Nov. 9, 2012).
[22] *Id.* at 8.
[23] Trial Ex. 2.

surgery center, and ASPA's operations at Nanticoke Memorial Hospital, filed several suits.[24]

Prior to the instant dispute, "Plaintiff brought separate litigation against both LSC and [Dr.] Winters arising from their alleged breach of their contracts with Plaintiff.[25] These suits reached a settlement resolution on March 1, 2011, and ASPA subsequently sued AAPC, pursuant to the alleged breach.[26]

A. Parties' Contentions

"ASPA maintains four claims against Defendants: (i) tortuous interference with existing contractual relations; (ii) tortuous interference with prospective contractual relations; (iii) civil conspiracy; and (iv) aiding and abetting."[27] Pursuant to these claims, ASPA asserts that it is entitled to recover $833,243.00 in lost value, or $656,466.35 in actual expenses.[28] Beyond dispute is that Dr. Winters and LSC breached their respective agreements with ASPA.[29] AAPC disputes each of these claims, asserting that "Plaintiff's [lack of] ability to prove that Anesthesia Advantage knew of the contractual restrictions in Plaintiff's respective agreements shall determine each of the four (4) causes of action."[30]

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[24] *See* Def.'s Post Trial Answering Br., at 7 (Dec. 6, 2012).
[25] *Id.* (citing *Anesthesia Services, P.A. v. EGNM, LLC*, C.A. No. 10C-05-118-MJB and *Anesthesia Services, P.A. v. Winters*, C.A. No. 10C-06-037 RRC).
[26] *See id.*
[27] Pl.'s Opening Post-Trial Br., at 11 (Nov. 9, 2012).
[28] *Id.* at 17.
[29] *See id.* at 11 ("It has already been established that Dr. Winters and LSC breached their respective agreements with ASPA."). *See also id.* at 9 ("When confronted with the full weight of the factual evidence and legal arguments, Dr. Winters and LSC expressly admitted that they had breached the LSC agreement and Employment Agreement.").
[30] Def.'s Post Trial Answering Br., at 9 (Dec. 6, 2012).

1. Tortious Interference with existing contractual relations.

ASPA asserts that "[b]efore [AAPC] entered into these agreements, they knew or should have known about the restrictions in the ASPA agreements."[31] In asserting that AAPC had actual knowledge of the non-compete restriction, ASPA cites to a letter in which Dr. Winters stated "I assured you Lewes Surgery Center was beyond the 25 mile restriction set forth in my agreement with Anesthesia Services, P.A. . ."[32] In the alternative, ASPA argues that AAPC had constructive knowledge of the covenant, because, *inter alia*, LSC's agreements have similar agreements, and such agreements are so commonplace in the medical industry as to infer that AAPC had constructive knowledge of it.[33]

AAPC argues that ASPA failed to establish in the factual record that AAPC had actual knowledge of the specific contractual restrictions.[34] AAPC states that "[p]laintiff's theory of actual knowledge of the contractual restrictions rests solely upon receipt of an undated letter, and knowledge of the twenty five mile restriction, after the Plaintiff initiated litigation."[35] Furthermore, AAPC argues that because no industry standard regarding these contracts and restrictive covenants exists, it is inappropriate to impute constructive knowledge upon them.[36] Accordingly, AAPC argues, ASPA has

[31] Pl.'s Opening Post-Trial Br., at 11 (Nov. 9, 2012).
[32] *Id.* at 12-13 (quoting Tr. 139:17-20).
[33] *Id.* at 13-14 ("Defendants consistently engage in contractual relations containing nearly identical restrictive covenants in order to protect their business interests. It should therefore be assumed that Defendants are in a unique position to understand what sort of conduct is wrongful.").
[34] Def.'s Post Trial Answering Br., at 10 (Dec. 6, 2012) ("The record merely establishes that Anesthesia Advantage knew that the Plaintiff previously provided anesthesia service at the Surgery Center and likewise employed Winters.") (citing Tr. 136:8).
[35] *Id.* at 11 (citing Tr. 179:15-18).
[36] *Id.* at 12 ("While other jurisdictions recognize that constructive knowledge may satisfy the requirement for tortuous interference; these jurisdictions declined creating an affirmative duty of inquiry. . .[l]ikewise, Delaware Courts traditionally tend to narrowly circumscribe the scope of tortuous interference with contractual relations.") (internal punctuation omitted) (citations omitted).

failed to demonstrate that they had either actual or constructive knowledge of the agreements.[37]

2. Tortious interference with prospective contractual relations.

ASPA argues that AAPC tortiously interfered with the prospective contractual relations, stating that "[a]s a result of Defendants' intentional solicitation of Dr. Winters' services and intentional interference with ASPA's negotiations with Dr. Winters, ASPA suffered substantial pecuniary harm. That is, ASPA never realized the potentially profitable arrangement of Dr. Winters' assignment at Nanticoke Memorial Hospital."[38]

As with ASPA's claim of tortious interference with existing contractual relations, AAPC argues that because they were unaware of the contractual restriction, there could have been no intentional interference.[39] In the alternative, AAPC notes that, "[a]ssuming that the Winters un-dated letter provided to Anesthesia Advantage with knowledge of the twenty-five mile restriction, Anesthesia Advantage's subsequent hiring of Winters is at best a negligent act that resulted in the underlying breached contract."[40] "Without demonstrating that Anesthesia Advantage intentionally interfered with the business opportunity," AAPC goes on to assert, "Plaintiff's theory of tortious interference fails."[41]

3. Civil conspiracy to interfere with contractual relations.

[37] *Id.* at 13.
[38] Pl.'s Opening Post-Trial Br., at 15 (Nov. 9, 2012).
[39] Def.'s Post Trial Answering Br., at 14 (Dec. 6, 2012).
[40] *Id.*
[41] *Id.* at 15.

ASPA contends that, with Dr. Winters and LSC, AAPC "tortioulsy interfered with ASPA's existing and prospective contractual relations with Dr. Winters by inducing and participating in Dr. Winters' wrongful practice of anesthesiology" in violation of the ASPA agreements' restrictive covenants.[42] ASPA's contends that having "established an underlying cause of action: tortious interference with existing and prospective contractual relations," this amounts to a civil conspiracy.[43] ASPA, in part, bases this contention on the fact that both Dr. Winters and LSC settled the claims brought by ASPA against them. Because Dr. Winters and LSC admit to breaching the Employment Agreement and Anesthesia Services Agreement respectively, these admissions show a civil conspiracy.[44]

AAPC responds, as discussed *supra*, that ASPA has failed to establish the underlying claims of tortious interference, and therefore, a civil conspiracy cannot exist.[45]

4. Aiding and abetting tortious interference with contract.

Finally, ASPA asserts that "[d]efendants, with actual or constructive knowledge of the restrictive covenants in the Employment Agreement and LSC Agreement, substantially assisted Dr. Winters and LSC in breaching their contracts."[46] Although ASPA notes that Delaware does not recognize a claim for aiding and abetting a breach of contract, it asserts that "where the underlying breach amounts to a willful or wanton breach of contract, Delaware Courts will recognize that such conduct amounts to a business tort."[47] As with the claim of civil conspiracy, AAPC asserts that "Anesthesia Advantage did not aid and abet the breach of Plaintiff's contracts because the Plaintiff

[42] Pl.'s Opening Post-Trial Br., at 15 (Nov. 9, 2012).
[43] *Id*. at 16.
[44] Tr. 8:6-20; 56:5-12; 162:20-22; 163.
[45] Def.'s Post Trial Answering Br., at 15 (Dec. 6, 2012).
[46] Pl.'s Opening Post-Trial Br., at 16 (Nov. 9, 2012).
[47] *Id.*

failed to demonstrate the required underlying tortious conduct. . .aiding and abetting is not an independent cause of action."[48]

II. DISCUSSION

A. There was no tortious interference with existing contractual relations, because the knowledge element was not conclusively established.

To succeed on a claim of tortious interference with contractual relations, a a plaintiff must demonstrate: 1) the existence of a valid contract; 2) about which the defendant knew; 3) an intentional act that is a significant factor in the breach of the contract; 4) done without justification; and 5) that causes injury to the plaintiff.[49] The requirement of knowledge of the contract may be satisfied by the defendant possessing either actual or imputed knowledge.[50] The record must clearly demonstrate that the defendant possessed actual or imputed knowledge to satisfy this element of the tort.[51] A defendant will not be found liable under a theory of tortious interference if the record fails to demonstrate such knowledge.[52]

Other Jurisdictions

Courts in other jurisdictions have allowed plaintiffs to succeed on a claim for tortious interference by establishing constructive knowledge through industry standards or finding an inquiry duty.[53] While those courts have found constructive knowledge to

[48] Def.'s Post Trial Answering Br., at 15 (Dec. 6, 2012).
[49] *See Colbert v. Goodville Mut. Cas. Co.*, 2011 WL 441363, at *1 (Del. Super. 2011); *Irwin & Leighton, Inc. v. W. M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987).
[50] *Irwin*, 532 A.2d, at 993.
[51] *See Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *12 (Del. Ch. Apr. 14, 2004).
[52] *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 2011 WL 5314507, at *14 (Del. Super. Oct. 31, 2011) (finding no evidence of knowledge, prior to the breach of contract, on the record), *aff'd*, 49 A.3d 1168 (Del. 2012).
[53] *See Gruen Indus. Inc. V. Biller*, 608 F.2d274, 283 (7th Cir. 1979)(constructive knowledge is appropriate, but no inquiry duty); *APCO Oil Co. v. Knight Enter.*, 2005 WL 2679776, *2 (Mich. Ct. App. Oct. 20, 2005)(industry practice regarding exclusive contracts may establish constructive knowledge); *Pampered*

be sufficient, Delaware courts have not adopted such a rule.[54] This Court is reluctant to impose a duty of inquiry on AAPC or find constructive knowledge of the restriction to be sufficient to establish actual or imputed knowledge.

The Restatement

In assessing a tortious interference claim, Delaware courts follow Section 766 of the Restatement (Second) of Torts.[55] The Comments to the Restatement discuss the issue of knowledge of the underlying contract:

> *i. Actor's knowledge of other's contract.* To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering *and of the fact that he is interfering with the performance of the contract*. Although the actor's conduct is in fact the cause of another's failure to perform a contract, the actor does not induce or otherwise intentionally cause that failure if he has no knowledge of the contract. But it is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty, at least in the case of an express contract. If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have.[56]

The language of Comment (i) demonstrates that knowledge of the contract itself is insufficient to establish a tortious interference claim. The comment explicitly requires both "knowledge of the contract" and knowledge "*of the fact that he is interfering with the performance of the contract.*"[57]

Chef v. Alexanian, 804 F.Supp.2d 765, 800-02 (N.D. Ill. 2011)(constructive knowledge established through showing restrictive covenants were typical in the industry)

[54] Delaware courts have not held constructive knowledge of a contract, or of a particular restriction, to be sufficient to establish actual or imputed knowledge, nor have they imposed a duty to inquire upon a defendant.

[55] *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012).

[56] Restatement (Second) of Torts § 766, cmt. i(*emphasis added*).

[57] *Id*.

The fact that these requirements are separately stated supports AAPC's contention that it must have acted with both knowledge of Dr. Winters's contract with ASPA and knowledge of the 25 mile restriction itself. Accordingly, the Court holds that to establish the knowledge element in the tortious interference with contract cause of action, ASPA must establish that AAPC knew of the contract generally and knew of the particular restriction.

The WaveDivision Decisions

ASPA contends that, based on the Delaware Supreme Court's holding in *WaveDivision* and the comment to the Restatement, "[t]he knowledge necessary to establish a cause of action . . . should apply only to knowledge of the contract itself."[58] In *this* Court's decision in *WaveDivision*,[59] it held there to be "nothing in the record" that could support the claim that the defendants "acted with *actual* knowledge," and the matter was dismissed.[60]

On appeal of *WaveDivision*, the Supreme Court held that "[t]o prevail on a claim for tortious interference . . . [plaintiff] must establish that [defendant] had actual or imputed knowledge of the underlying contract that was breached."[61] In its analysis, the Supreme Court focused mainly on the issues of justification and whether or not an agency relationship existed between two defendants, in order establish imputed knowledge.[62] The Court affirmed the Superior Court, finding the defendant had no actual knowledge of the contract. While ASPA contends the *WaveDivision* decisions establish that only knowledge of the contract itself is required, neither this Court nor the Supreme Court

[58] Pl.'s Opening Post-Trial Br., at 12.
[59] *WaveDivision Holdings*, 2011 WL 5314507 at*14.
[60] *Id*.(*emphasis added*).
[61] *WaveDivision Holdings*, 49 A.3d at 1176.
[62] *Id*., at 1175-77.

addressed the issue of knowledge of particular provisions in that case, as the agreements themselves were unknown to the defendants. The analysis, however, can be applicable. Just as the courts in *WaveDivision* found there was nothing the record to support a claim the defendants were aware of the contract, here, there is nothing in the record to support a claim that this Defendant was aware of the actual provision at issue.

The Berryman Decision

The Court of Chancery has discussed in more detail the actual knowledge requirement.[63] In *Berryman*, the Court found that the defendants were *aware* of the contractual obligations, specifically, the restrictions upon solicitation.[64] In *Berryman*, plaintiff's president, Mr. McGivney, was subject to a covenant not to compete during his employment and subject to another one upon his termination and sale of his stock in the company.[65] The second covenant, in addition to restricting McGivney from competing with plaintiffs, restricted McGivney from soliciting any of plaintiff's customers or employees.[66] In *Berryman*, the court found that the defendants, including Mr. McGivney's partners in a new venture, had "intimate knowledge" of the restrictive covenant and actively pursued Mr. McGivney, who was subject to the restriction.[67] The facts in *Berryman* clearly supported such a finding. The defendants had numerous meetings with McGivney where they discussed establishing a business to compete with plaintiff and discussed possible ways to get around McGivney's restrictive covenant.[68] Specifically, the defendants discussed using one of McGivney's relatives as the head of

[63] *See Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886 (Del. Ch. Apr. 14, 2004).
[64] *Berryman*, 2004 WL 835886 at *14.
[65] *Id*., at *1-*2.
[66] *Id*.
[67] *Id*.
[68] *Id*., at *2-*6.

the competing company or forming an alliance with companies that had offices beyond the territorial scope of the restrictive covenant.[69] Further, the defendants and McGivney had 129 telephone conversations in a twenty-two day period. The Court properly reached a conclusion that McGivney "had a significant role and provided substantial assistance" in establishing the competing business and that the other defendants sought out McGivney's assistance to establish the business as well.[70] McGivney and the defendants also had several lunches with plaintiff's customers, and the Court concluded that the purpose of these lunches was solicitation.[71] In reaching its decision in favor of plaintiffs, the Court held that the defendants "had full knowledge of the *restrictions* imposed on McGivney by the Covenant, yet they actively sought (and took advantage of) McGivney's assistance in starting a company to compete with [plaintiff] and to solicit [plaintiff's] customers. These actions can neither be justified nor countenanced."[72]

Whether or not AAPC had the requisite knowledge may be determined from the facts presented to the Court at trial, in particular Dr. Carestia's testimony and the undated letter from Dr. Winters to Dr. Carestia. The undated letter discussing the 25 mile restriction "c[a]me after Dr. Winters was sued by ASPA,"[73] and accordingly does not establish the existence of actual knowledge prior to the breach of contract. Dr. Carestia testified that at the time Dr. Winters executed his employment agreement with AAPC, Dr. Winters told him that he possessed no restrictions that prevented him from staying at the Surgery Center.[74] The record reflects that at the time Dr. Winters executed the

[69] *Id*.
[70] *Id*., at *6, *12.
[71] *Id*., at
[72] *Id*., at *12(*emphasis added*).
[73] Tr. 138:17-18.
[74] Tr. 143:8-10; 172:5-7.

employment agreement with AAPC, AAPC had no actual knowledge of any restrictions against Dr. Winters. Furthermore, from the record, AAPC and Dr. Carestia were not aware of the specific 25-mile restriction until after litigation commenced.[75]

The record before the Court does not indicate that AAPC acted with knowledge similar to the defendants in *Berryman*. This is not a case where the record reflects that AAPC had knowledge of the territorial restriction and actively sought ways around it, as the defendants did in *Berryman*. Instead, the facts before the Court are that Dr. Winters told AAPC that there was nothing that would restrict his ability to work for them.

ASPA contends that there exists an industry-wide standard in the medical community incorporating non-compete agreements into employment contracts for doctors, particularly anesthesiologists. Even assuming ASPA had demonstrated such conclusively, which they did not, the Court would be required to impose a duty to inquire as to the specific provision regarding Dr. Winters in order to find AAPC liable. The Court has already, for the reasons stated, rejected that approach.

Because ASPA had the burden of proving by a preponderance of the evidence that AAPC acted with actual or imputed knowledge of the particular restriction, and the record does not so establish, ASPA's claim for tortious interference with existing contractual relations must fail, and I find for AAPC.

B. Tortious interference with prospective contractual relations cannot exist without knowledge to support intent.

To succeed on a claim for tortious interference with prospective contractual relations, a plaintiff must demonstrate: 1) the existence of a reasonable probability of a business opportunity; 2) intentional interference with the opportunity by the defendant; 3)

[75] *Id*.

proximate causation; and 4) damages.[76] Although there is no dispute that ASPA offered Dr. Winters opportunities prior to the breach,[77] the Court does not find that AAPC acted with the requisite knowledge, as is discussed *supra*. Without knowledge, the element of intent cannot be demonstrated, and accordingly, ASPA's claim for tortious interference with prospective contractual relations must fail.

C. Civil conspiracy to interfere with contractual relations cannot exist in the absence of an underlying tort.

To establish a valid claim of civil conspiracy to interfere with contractual relations, a plaintiff must demonstrate: 1) the existence of a confederation of two or more individuals; 2) an unlawful act completed in furtherance of the conspiracy; and 3) that the conspirators caused actual damage.[78] Accordingly, "[a]n actionable tort must accompany any conspiracy in order for there to be recovery."[79] ASPA has argued that the fact that Dr. Winters and LSC admitted liability through executing settlements, this wrongdoing is sufficient to show a conspiracy. However, it has not been shown that AAPC was aware of these settlements or saw the terms thereof. Even so, the terms of the settlement only state that LSC and Dr. Winters had breached their respective agreements with ASPA in general term.[80]

Because, as discussed *supra*, ASPA failed to establish an underlying tort due to the insufficiency of evidence in the record supporting ASPA's claim that AAPC had knowledge of the restrictive covenant, the claim of civil conspiracy must also fail.

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[76] *See Malpiede v. Towson*, 780 A.2d 1075, 1099 (Del. 2001).
[77] *See* Def.'s Post Trial Answering Br., at 14 (Dec. 6, 2012).
[78] *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *3 (Del. Super. 2004).
[79] *Id.*
[80] See Trial Ex. 15. Settlement Agreement and Release. "WHEREAS, LSC admits that it breached its Anesthesia Services Agreement (the "ASA") with ASPA; and WHEREAS, Winters admits that he breached his Physician's Employment Agreement (the "Employment Agreement") with ASPA."

D. Aiding and abetting tortious interference with contract requires knowledge.

For a plaintiff to succeed in demonstrating that a defendant aided and abetted in tortious interference with a contract, it must demonstrate the existence of: 1) underlying tortious conduct; 2) knowledge; and 3) substantial assistance in the interference.[81] As was the case with ASPA's claim for civil conspiracy, the record's lack of demonstration of actual or constructive knowledge of the restrictive covenant vanquishes both the elements of underlying tortious conduct, and knowledge. Accordingly, Plaintiff's claim of aiding and abetting must fail.

III. CONCLUSION

For the reasons set forth above, each of Plaintiff's claims is unsuccessful. Verdict is entered in favor of the Defendants as to all claims. Because each of ASPA's claims is unsuccessful, the Court does not have to reach the issue of damages.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[81] *Patton v. Simone*, 1992 Del. Super LEXIS 316, at *23.