STATE OF MICHIGAN

COURT OF APPEALS

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

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

MURPHY, J.

Pursuant to MCR 7.215(J)(3), this special panel was convened to resolve a conflict between this Court's opinion in *Environair, Inc v Steelcase, Inc*, 190 Mich App 289; 475 NW2d 366 (1991), and the recently issued opinion in *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) (vacating part III of the opinion pursuant to MCR 7.215[J][5]). In accordance with MCR 7.215(J)(1), the prior *Health Call* panel indicated that it was required to follow the precedent of *Environair* in regard to that panel's holding limiting recovery to nominal damages for tortious interference claims arising from the termination of an at-will contract unrelated to employment. *Health Call, supra* at 84-85. Were it not for MCR 7.215(J)(1) and the holding in *Environair*, the *Health Call* panel would not have limited damages on remand; thus, the panel invoked MCR 7.215(J)(2). *Health Call, supra* at 80, 86-87. We conclude 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, because there may exist factual scenarios in which there is a tangible basis on which future damages[1] may be assessed that are not overly speculative despite the at-will nature of the underlying contract. The case before us today presents such a

[1] For purposes of this opinion, reference to "future" damages pertains to alleged losses or damages accruing after the date on which the at-will contract was terminated.

situation when viewing the evidence in a light most favorable to plaintiff for purposes of summary disposition. Therefore, we resolve the conflict in favor of the analysis and reasoning in *Health Call*, and, to the extent that *Environair* 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 such as those involved here and in *Environair*, it is overruled. Accordingly, we reverse and remand to the trial court without limiting, as a matter of law, plaintiff's recovery to nominal damages.

Because the special order vacated only part III of the opinion in *Health Call*, parts I and II, which address the facts and principles of summary disposition, remain intact. For ease of reference and continuity, we shall incorporate parts I and II into this opinion by way of quotation and then proceed with our own independent analysis in part III.

I

> Plaintiff is a Michigan corporation that provides nursing and medical services for home care. Individual defendants, Katrina Johnson, Dwight Robinson, and Damita Borner, who are licensed practical nurses, entered at-will independent contractor agreements with plaintiff in which they agreed to provide home nursing services to plaintiff's clients. The defendant nurses' respective contracts contained a noncompetition clause, effective for two years following the termination of the independent contractor agreements. As relevant to the instant case, Wendy Williams, the mother of Cierra Harris, an infant, entered into an at-will contract with plaintiff for the provision of twenty-four hour home nursing services to Harris. The defendant nurses provided the contracted services to Harris under the independent contractor agreements between the defendant nurses and plaintiff.
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> Plaintiff alleges that defendant Atrium Home & Health Care Services, Inc. (Atrium), which was also in the business of providing home nursing care services, contacted defendant Borner and urged her to terminate her contract with plaintiff and persuade defendants Johnson and Robinson to also terminate their contracts with plaintiff, in order that Atrium could thereafter provide home nursing care services to Harris. Plaintiff further alleges that the defendant nurses terminated their respective independent contractor agreements with plaintiff, subsequently contracted with Atrium, and continued to provide home nursing care services to Harris after leaving plaintiff's employ and contracting with Atrium.
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> In its complaint, plaintiff alleged in count I that Atrium tortiously interfered with plaintiff's contract with Borner, that Borner and Atrium tortiously interfered with plaintiff's contracts with Johnson and Robinson, and that Borner and Atrium tortiously interfered with plaintiff's contract, business relationship, and expectancies with Williams concerning Harris. Count II alleged that the defendant nurses breached paragraph 12 of their respective contracts, which paragraph precluded solicitation of, or competition with, plaintiff's clients for two years after the expiration of their respective at-will agreements. Defendants moved for partial summary disposition pursuant to MCR 2.116(C)(10), asserting

that plaintiff as a matter of law was limited to a recovery of nominal damages on its claims.

On count I, the trial court granted summary disposition in favor of Borner with regard to plaintiff's claim of tortious interference with the Harris contract, but permitted the tortious interference claim to proceed against Atrium. Regarding count II, the trial court granted summary disposition in favor of the defendant nurses "to the extent" that "the damages [claimed by plaintiff] are measured by the loss of the [Harris] contract." The trial court determined that such damages were speculative because they were based on plaintiff's loss of an at-will contract to provide services to Harris. The parties stipulated the dismissal of all remaining claims without prejudice, and this appeal ensued. [*Health Call, supra* at 80-82.]

II

On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *First Pub Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). "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." *Id.* [*Id.* at 82-83.]

III

Before delving into the conflict issue, we shall address some preliminary or housekeeping matters. First, as noted in *Health Call, supra* at 80 n 1, plaintiff's complaint included a third count alleging breach of fiduciary duty that was dismissed in its entirety, but the dismissal is not challenged on appeal. Next, we wish to clarify and expand on the trial court's summary disposition ruling in this case. With respect to the tortious interference count of the complaint, the court dismissed the claim involving Atrium and Borner as it related directly to the at-will contract between Williams and plaintiff concerning the in-home nursing care of infant Harris (the home nursing contract). The trial court would not permit possible recovery of even nominal damages. Additionally, on the tortious interference claim relative to the independent contractor agreements between plaintiff and defendant nurses, the trial court dismissed any prayer for damages in regard to Atrium and Borner that related to the loss of the home nursing contract. Once again, the court rejected a claim for even nominal damages because "nominal damages were never explained in [plaintiff's] answer or brief in opposition to the motion for summary disposition." The breach of contract claim against defendant nurses arising from the independent contractor agreements was limited by the court in that damages would not be permitted to be measured by plaintiff's loss of the home nursing contract. In sum, the trial court

denied any claim for losses or damages associated with the home nursing contract because it was "a contract terminable at-will and the damages are speculative."

In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy. *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-367; 695 NW2d 521 (2005); *Feaheny v Caldwell*, 175 Mich App 291, 301-303; 437 NW2d 358 (1989); M Civ JI 125.01 and 126.01.[2] The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. *Badiee, supra* at 366-367; *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989); see also M Civ JI 125.01 (adding the necessary damage element to the cause of action). The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Badiee, supra* at 365-366; *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003); *Feaheny, supra* at 301; see also M Civ JI 126.01.

Here, plaintiff's tortious interference count, although entitled "Tortious Interference with Existing Contractual Relations," entails and blends both theories of tortious interference. Part of plaintiff's claim alleges that Atrium enticed nurse Borner into breaching her contract with plaintiff and that Atrium and Borner coerced the remaining defendants into breaching their contracts with plaintiff. Plaintiff also alleges that Atrium and Borner interfered with plaintiff's contract, business relationship, and expectancy with regard to Williams and Harris, but without any assertion that Williams breached the at-will home nursing contract when she terminated plaintiff's services. Further, with respect to defendant nurses and their contractual relationships with plaintiff, the complaint alleges interference with the parties' business relationships and expectancies of continued employment. The tortious interference count of the complaint speaks generally of interference with contracts, business relationships, and expectancies. The second count of the complaint is a straightforward breach of contract claim and pertains only to defendant nurses. The issue of damages presented to us ultimately ties directly into the at-will

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[2] In *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 496 n 4; 421 NW2d 213 (1988), this Court acknowledged the distinction between the two torts:

> The parties in this case at times seem to treat the torts of interference with an advantageous business relationship and interference with an existing contract as synonymous. These torts, however, are distinct. . . . Regarding the tort of interference with an advantageous relationship or expectancy, "an advantageous *contractual* relationship is sufficient, but not necessary, to state a cause of action." [Citation omitted; emphasis in original.]

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.[3] Accordingly, the question is whether damages for future lost profits, beyond those deemed nominal, can flow from the termination of plaintiff 's business relationship with Williams, which relationship was necessarily premised on the home nursing contract.

In *Feaheny, supra* at 302-304, this Court discussed at-will employment contracts in the context of tortious interference claims:

> The next question we must resolve is whether there can be interference with an employment contract that is terminable at will. We answer this question in the affirmative.
>
> At-will employment contracts have posed some analytical difficulties in tortious interference cases, particularly where an employee seeks damages caused by his discharge. When viewed under the tortious interference cause of action requiring a breach of contract, the courts have held that a discharge from employment is an insufficient basis upon which to establish the claim since no breach arises from the termination. On the other hand, when viewed as a subsisting relationship that is of value to the employee and will presumably continue in effect absent wrongful interference by a third party, the majority opinion in *Tash v Houston*, 74 Mich App 566, 569-570; 254 NW2d 579 (1977), . . . held that an at-will contract is the proper subject of an actionable tortious interference claim. Under this view, the employee has a manifest interest in the freedom of the employer to exercise his or her judgment without illegal interference or compulsion and it is the unjustified interference by third persons that is actionable. . . .
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> 4 Restatement Torts, 2d, § 766, comment (g), pp 10-11, similarly takes the position that an at-will contract can be improperly interfered with, but that the fact that the contract is terminable at will makes it closely analogous to interference with prospective contractual relations claims and is a factor to be taken into account in determining damages. . . .
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> We agree with the rationale of the Restatement and *Tash* and, therefore, hold that an at-will employment contract is actionable under a tortious interference theory of liability. . . . Since we are here faced only with a question of defendants' liability, we express no view on what damages, if any, plaintiff

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[3] To the extent that plaintiff claims tortious interference with a contract, as opposed to interference with a business relationship or expectancy, against Atrium and Borner as it relates solely and directly to the home nursing contract, the claim cannot survive because there is no assertion that Williams *breached* the home nursing contract.

> could recover for tortious interference with the contract. We hold only that tortious interference with an at-will contract is actionable. The basis of our holding is that an at-will employee who enjoys the confidence of his or her employer has the right to expect that a third party will not wrongfully undermine the existing favorable relationship. [Citations omitted.]

Likewise, plaintiff here 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 the care of her infant without plaintiff and the relationship being undermined by defendants' wrongful interference. Of course, questions of wrongful interference and liability, which are not issues in this appeal, must be established. There is no dispute that tortious interference with an at-will contract is actionable and, if established, provides a basis to award damages in some form. This brings us to *Environair*.

In *Environair,* the plaintiff, Environair, represented manufacturers of various products and components for commercial buildings, and Greenheck Fan Corporation appointed the plaintiff as its exclusive sales agent pursuant to a written sales agreement. The agreement was terminable at will by either party following 30 days' notice. Subsequently, a dispute arose between Environair and the defendant, Steelcase, regarding the amount owing to Environair on a Steelcase construction project in which Environair was a subcontractor. Environair alleged that when it and Steelcase could not amicably resolve the dispute, Steelcase contacted Greenheck and successfully induced it to terminate the Greenheck-Environair sales agreement. Environair proceeded to file suit against Steelcase, alleging tortious interference with a business relationship, tortious interference with a contract, and an independent claim for exemplary damages. The trial court ruled that Environair could only recover nominal damages for any claim of damages accruing after the date the contract was terminated. *Environair, supra* at 290-291.

This Court affirmed, relying on *Sepanske v Bendix Corp,* 147 Mich App 819; 384 NW2d 54 (1985).

> In [*Sepanske*], the plaintiff was awarded damages for future lost earnings in an action for breach of a promise that he would be restored to either his former or a similar position. While this Court agreed that a breach of contract claim had been established, it vacated the award of damages. The Court found that the plaintiff 's expectation was that he would be restored to the same or similar at-will position, one which the employer was free to alter or terminate without consequence. The Court held that the jury's damage assessment in such a situation was purely speculative:
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> "There is no tangible basis upon which damages may be assessed where plaintiff 's expectation was for an at-will position which could have been changed or from which he could have been terminated without consequence."
>
> The case was remanded to the trial court for entry of judgment in favor of the plaintiff for nominal damages only. [*Environair, supra* at 293-294 (citations omitted).]

The *Environair* panel concluded that *Sepanske*'s holding should apply equally to the loss of an at-will contract outside the context of an employment action:

> While *Sepanske* involved an employment relationship, its holding regarding the speculative nature of damages is just as applicable to a nonemployment situation also involving an at-will contractual relationship. Just as the employment relationship in *Sepanske* could have been terminated at any time without consequence, thereby providing "no tangible basis upon which damages may be assessed," so could the exclusive sales contract between Environair and Greenheck. Thus, in the present case, we agree with the trial court that there could be "no tangible basis upon which damages may be assessed" that would be any less speculative. [*Environair*, *supra* at 294.]

This ruling was directed at Environair's tortious interference with a contract claim. *Id.* The Court noted that Environair had not specifically challenged the trial court's ruling with respect to this claim, but Environair had argued that *Sepanske* did not affect its claim for tortious interference with a business relationship or expectancy because the claim was not dependent on the existence of a contract. *Id.* This Court, citing *Feaheny*, rejected the argument and held:

> [B]ecause the nature of the relationship between Environair and Greenheck was one founded upon a contract that was terminable at will, we conclude that there was no cognizable tortious interference cause of action independent of that contract, because Environair's mere subjective expectation of the continuation of the contract could not justify an expectation any greater.
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> Therefore, we conclude that the trial court did not err in granting defendant's motion to limit damages. [*Environair*, *supra* at 295.]

As 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. The original *Health Call* panel opined that "*Environair* requires this Court to find that plaintiff could not recover more than nominal damages on its breach of contract and tortious interference claims, insofar as they pertain to the termination of the at-will contract to provide home nursing services to Harris." *Health Call*, *supra* at 84-85.[4]

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[4] In its supplemental brief, plaintiff raises various points and arguments concerning *Environair* that demand only cursory consideration. Plaintiff argues that the ruling at issue in *Environair* is dictum because, as indicated above, Environair had not specifically challenged the trial court's ruling with respect to its tortious interference with a contract claim; therefore, there was no true conflict, and the *Health Call* panel was free to hold as it believed appropriate. Plaintiff also maintains that *Environair* is no longer good law following our Supreme Court's ruling in *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239; 531 NW2d 144 (1995), which addressed an at-will employment contract, retaliatory discharge, future damages, *Sepanske*, and *Environair*. Plaintiff further contends that the *Environair* decision relative to
(continued…)

The general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action. *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966); *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 524; 687 NW2d 143 (2004). A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). Damages, however, are not speculative simply because they cannot be ascertained with mathematical precision. *Ensink, supra* at 525; *Hofmann, supra* at 108. Although the result may only be an approximation, it is sufficient if a reasonable basis for computation exists. *Ensink, supra* at 525. Moreover, the law will not demand that a plaintiff show a higher degree of certainty than the nature of the case permits. *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986) (stating that lost profits are recoverable as damages on proper proof), citing *Allison v Chandler*, 11 Mich 542, 555 (1863). Thus, "when the nature of a 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 which have a tendency to show their probable amount." *Body Rustproofing, supra* at 391. Furthermore, the certainty requirement is relaxed where damages have been established but the amount of damages remains an open question. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). Questions regarding what damages may be reasonably anticipated are issues better left to the trier of fact. *Wendt v Auto-Owners Ins Co*, 156 Mich App 19, 26; 401 NW2d 375 (1986).

After reciting similar principles concerning damages, the *Health Call* panel explained its disagreement in applying the *Environair* ruling regarding nominal damages:

> Here, plaintiff has alleged in count I that Atrium persuaded Borner to terminate her agreement with plaintiff and to begin working with Atrium, that Atrium and Borner together persuaded Johnson and Robinson to leave plaintiff's employ for Atrium, and that Atrium thereafter persuaded Williams to end her contract with plaintiff and to instead contract with Atrium for the provision of home nursing services to Harris. If the finder of fact were to conclude that Williams discontinued the contract with plaintiff and entered into the contract with Atrium only because she wanted the care provided by the defendant nurses to continue unabated, such a finding would support the conclusion that the termination of the home nursing services contract had no relation to the fact that the contract was at will. Under these circumstances, damages for the tortious interference by Atrium and Borner with the independent nursing contracts between plaintiff and the defendant nurses, and for interference by all defendants

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(…continued)

nominal damages was fact-specific and not applicable as a matter of law to the facts presented in this case. Although arguably there may be merit to one or more of plaintiff's stances, this Court has already determined that a conflict exists that is outcome determinative and that requires resolution by this special panel. 265 Mich App 801. To accept any one of plaintiff's arguments as valid would be to rule that there was no actual outcome-determinative conflict, and the law of the case precludes us from ruling contrary to the special order previously issued by this Court. See generally *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

> with the nursing services contract between plaintiff and Williams, 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. Similarly, should the fact-finder conclude regarding count II that the defendant nurses had breached the noncompetition clause of their respective contracts by going to work for Atrium and that Williams terminated her contract with plaintiff 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 defendant nurses. Therefore, were we not constrained by the holding in *Environair,* we would find that plaintiff is not limited merely to the recovery of nominal damages for tortious interference with its independent [contractor] agreements with the defendant nurses or for breach by the defendant nurses of the noncompetition clause of the independent [contractor] agreements. [*Health Call, supra* at 85-86.]

Indeed, this case presents a unique factual situation in which the home nursing services provided to Williams and Harris by defendant nurses continued to be provided by those same nurses despite the change in the corporate entities servicing Williams and Harris. Within the four corners of the *Environair* opinion, there is no indication of such ongoing relationships or links. This, along with the fact that the Greenheck-Environair contract was subject to at-will termination, lent support to the Court's conclusion that there was no tangible basis on which damages could be assessed and thus any damage award would be unacceptably speculative. However, the *Health Call* panel chose not to distinguish the case from *Environair* on the basis of the facts. This raises a subject worthy of further inquiry bearing on the analytical framework of this opinion.

We must construe *Environair* as standing for the proposition that damages arising out of or related to the termination of an at-will contract are speculative as a matter of law in all cases because there is no tangible basis on which damages can be assessed. This interpretation is mandated as a result of the ruling in *Health Call* and the special order calling for conflict resolution. The *Health Call* panel found that factual circumstances exist that could reasonably support an award by the trier of fact of future damages that are not overly speculative or uncertain; therefore, plaintiff should not be limited to a recovery of nominal damages pursuant to the summary disposition ruling. *Health Call, supra* at 85-86. But this Court found itself constrained by *Environair* to hold that only nominal damages are recoverable, essentially as a matter of law. *Id.* at 86. This holding necessarily reflected that the Court did not believe that it was at liberty to factually distinguish the case from *Environair* with respect to facts outside those establishing that an at-will contract was terminated upon which damages are sought. In other words, termination of an at-will contract allows, at best, only nominal damages. Future lost profits under the contract are not recoverable regardless of all the other surrounding circumstances. Therefore, the conflict that existed in the minds of the *Health Call* panel was that *Environair* permitted no more than nominal damages any time a party sought damages arising from or related to the termination of an at-will contract, while it, the *Health Call* panel, would allow more than nominal damages under the right factual conditions, present here according to the panel, despite the at-will nature of the underlying contract.

When this Court was polled under MCR 7.215(J) and voted that there was an outcome-determinative issue in conflict that required resolution by a special panel, the Court necessarily adopted the *Health Call* panel's assessment, implicit in part, that *Environair* controlled the outcome, that *Environair* set forth a blanket rule of only nominal damages, and that factual distinctions were irrelevant. If this were not the case, there would be no outcome-determinative conflict issue to resolve.[5] For example, if the facts present in our particular case do not warrant more than an award of nominal damages, it does not matter whether there is a blanket rule of nominal damages as opposed to a rule that requires the issue of damages to be ascertained on a case-by-case basis; plaintiff loses. For this reason, and pursuant to principles regarding the law of the case doctrine, we are hesitant to explore whether the facts support a conclusion that future lost profits are speculative and uncertain. If we were to find that future damages were uncertain and speculative under the given facts, we would in fact be deciding that there did not actually exist an *outcome-determinative* conflict issue. Our directive is to resolve a legal conflict, not to reassess the facts. It appears to us that the conflict issue more properly and precisely stated is whether it is appropriate to limit recovery to nominal damages as a matter of law in all cases in which the damages sought arose out of or are related to the termination of an at-will contract. But, because we agree with the *Health Call* panel's assessment that the facts are sufficient to survive summary disposition and that more than nominal damages may be recoverable,[6] and because this case presents a sound basis for rejecting any rule of nominal damages only, we shall discuss the facts as they relate to the law of damages without fear of treading on the sanctity of the special order that convened this panel.

The evidence established a continuum of care by defendant nurses before, during, and after the termination of the home nursing contract; the only significant change as far as nursing care was the corporate entity supplying defendant nurses to Williams and Harris. Williams testified that she asked Atrium to keep the same nurses on the case. The question thus posed is whether this evidence is sufficient under principles governing summary disposition and MCR 2.116(C)(10) to create an issue of fact on damages for future lost profits such that they are not overly speculative or uncertain. Viewing the evidence in a light most favorable to plaintiff, *Shepherd Montessori*, *supra* at 324, we find the evidence sufficient to survive summary disposition. Considering the continuum of care and Williams's apparent satisfaction with and reliance on defendant nurses, a reasonable trier of fact could find that, but for the alleged tortious interference 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.

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[5] "Special panels may be convened to consider outcome-determinative questions *only*." MCR 7.215(J)(3)(a) (emphasis added).

[6] By agreeing with the *Health Call* panel that more than nominal damages might be recoverable under the facts, we are reinforcing the position that an outcome-determinative conflict issue exists.

Indeed, in their brief on appeal, defendants acknowledged the close relationship between defendant nurses and Cierra Harris and Williams:

> Cierra's mother also requested that the nurses continue providing Cierra with medical care, only through Atrium instead of Health Call.
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> The reason for this request was that from the time Cierra was discharged from the hospital and [placed] into her foster home until the time Health Call was terminated from her case, the Nurses provided Cierra with the necessary twenty-four (24) hour nursing care. As a result of providing such care to Cierra, the Nurses developed a deep understanding of her special needs and the skills required to respond to these special needs. Cierra responded very well to the care the Nurses provided to her. Although Cierra's mother was dissatisfied with Health Call, she and the foster mother were very happy with the care the three (3) Nurses provided to Cierra. [Citations to record deleted.]

Plaintiff 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. The period 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 covering the same or a longer period. Recall that in *Environair*, the panel would not allow recovery of more than nominal damages accruing beyond the date of termination of the Greenheck-Environair contract. Although Williams testified in her deposition that she was unhappy with one of plaintiff's owners and that she would have made the change in service providers regardless of whether defendant nurses continued providing the care, evidence showing that Williams made a specific request that care be continued by defendant nurses and the fact that there was a continuum of care thereafter minimally created a factual issue on the subject, leaving resolution for trial. In light of the evidence, and considering the nature of this case and the need to estimate damages somewhat, "it is proper to place before the jury all the facts and circumstances which have a tendency to show" the amount of damages. *Body Rustproofing*, *supra* at 391. This case presents a clear example against a rule that only nominal damages are recoverable.

The dissent takes us to task, maintaining that we have established a rule "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." *Post* at ___ (emphasis in original). We first note that our opinion specifically indicates that this case presents a *unique* factual situation, and we foresee that in other cases involving tortious interference with at-will contracts, the plaintiffs may struggle to present evidence sufficient to proceed to trial on the issue of future damages, with nominal damages being the limit of any recovery. We do think it would suffice if a plaintiff presents documentary evidence in which the party who terminated an at-will contract specifically indicates that it was completely satisfied with the plaintiff's services under the contract and would have continued the contract indefinitely but for the wrongful interference. It will likely be

the rare case that parallels the factual situation here. The dissent's position effectively permits a party to tortiously interfere with at-will contracts whenever the party pleases and in whatever manner chosen without fear of financial repercussions.

The main thrust of the dissent is that our ruling will require a jury to engage in speculation and baseless conjecture because Williams could have terminated the home nursing contract at any time for any reason, or she may have continued the contract indefinitely; therefore, it is impossible to ascertain the amount of future lost profits with any certainty. We believe that the dissent demands absolute or too much certainty and seeks exactness; the law permits some level of uncertainty to be resolved by the trier of fact in the context of damage awards.

In *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116; 680 NW2d 485 (2004), the plaintiff tenant leased property adjacent to the city's airport and sued the city under a claim of inverse condemnation after it was unable to expand its operations on the property because of the city's actions relative to expanding airport operations. The plaintiff pointed to lost profits from the inability to expand its business as part of valuing the leasehold, and this Court stated, "Because we are dealing with a business that has not come to fruition, some degree of guesswork is necessary and the amount of damages cannot be established for certain." *Id.* at 136-137. In *Bonelli, supra* at 511, this Court noted that even if lost profits are difficult to calculate and speculative to some degree, they are still allowed as an item of loss. As early as 1863, our Supreme Court stated that "when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." *Allison*, *supra* at 555-556.

In the context of damages in personal injury and wrongful death actions, there is inherent uncertainty regarding what the future may hold. In *Vink v House*, 336 Mich 292, 296-297; 57 NW2d 887 (1953), a personal injury case, the Michigan Supreme Court indicated that the measure of damages attributable to the loss of future earnings is left to the sound judgment of the jury despite the time element being uncertain, and the jury's award will not be disturbed if reasonable and within the range of the testimony and proofs presented. This principle was adopted and incorporated in *Henry v Detroit*, 234 Mich App 405; 594 NW2d 107 (1999), an action under the Whistleblowers' Protection Act, MCL 15.361 *et seq.* The *Henry* panel stated:

> In regard to the economic damage award, the only specific argument defendants make is that there were no guarantees plaintiff would have been employed until the age of seventy. Our Supreme Court has stated that the measure of damages for the loss of future earnings where the time element is uncertain is based on the sound judgment of the trier of fact and, if reasonable, will not be disturbed. *Vink v House*, 336 Mich 292, 297; 57 NW2d 887 (1953). In the case at bar, plaintiff testified that he wanted to work until the age of seventy, and there was other testimony indicating that other members of the police department worked in excess of thirty-five years and attained the age of seventy.

> As a result, the trial testimony supports the economic damage award, which appears to be reasonable. [*Henry, supra* at 415-416.][7]

In *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 542; 470 NW2d 678 (1991), a case involving, in part, a claim under the Civil Rights Act, MCL 37.2101 *et seq.*, this Court stated that "[i]t is well established that, where the fact of liability is proven, difficulty in determining damages will not bar recovery." In *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 253-254; 531 NW2d 144 (1995), our Supreme Court found that in employment tort cases involving at-will employment, a plaintiff can recover lost wages and is not limited to nominal damages despite the inherent speculation in assessing the amount of lost wages.

Here, the evidence of a continuum of care and Williams's desire to maintain the status quo with respect to the nurses providing care to her daughter constituted evidence that could support a jury finding that the home nursing contract with plaintiff would have remained intact beyond the date of termination and would not have been terminated on that date. Although there might be a need to speculate somewhat as to how long the 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 retain the services of defendant nurses. This finding could be coupled with facts regarding the periods in which defendant nurses continued to care for Harris after the switch in corporate entities, i.e., the date of termination of the home nursing contract, in order to ascertain the extent of lost profits.

The dissenting opinion utilizes hyperbole in its misinterpretation of our holding. We have simply held 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 dissent concludes that we have not only "opened the door to jury speculation," we have "kick[ed] that door down entirely." *Post* at ___. With all due respect, it is the dissent that would have us bolt the door shut and, if we have opened the door, we have done so to allow in some fresh air. If one subscribes to the dissent's view regarding future damages as always being speculative when they relate to at-will employment contracts, one wonders whether the dissent would reverse case law that allows for more than nominal future damages for at-will employees whose employment is terminated in violation of various civil rights statutes or, for that matter, future damages for a wrongful death claim involving an at-will employee. Future damages for lost wages have traditionally been allowed in situations in which there is no dispute of fact that the injured party was an at-will employee. Simply because damages cannot be ascertained with

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[7] In *Goins v Ford Motor Co*, 131 Mich App 185, 199; 347 NW2d 184 (1983), a wrongful discharge case in which the jury calculated damages using salary differences for the 40 years of the plaintiff's life expectancy, this Court found that "[t]o so calculate based upon relevant evidence was not improper or overly speculative."

mathematical certainty does not make them unacceptably speculative. It is for this reason that what damages may reasonably be anticipated is an issue better left for the trier of fact.

We conclude 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. There may exist factual scenarios in which there is a tangible basis on which future damages may be assessed that is not overly speculative despite the at-will nature of the underlying contract. Indeed, this case presents such a situation when viewing the evidence in a light most favorable to plaintiff for purposes of summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Neff, Fitzgerald, and Markey, JJ., concurred with Murphy, J.

/s/ William B. Murphy
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey