[Cite as *Ginn v. Stonecreek Dental Care,* 2015-Ohio-1600.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

DAVID R. GINN, DDS,	:	
Plaintiff-Appellant,	:	CASE NO. CA2014-06-015
	:	O P I N I O N
- vs -		4/27/2015
	:	
STONECREEK DENTAL CARE, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 12 CVH 00459

Russell A. Kelm, Joanne W. Detrick, 37 West Broad Street, Suite 860, Columbus, Ohio 43215, for plaintiff-appellant

Jeffrey Teeters, 600 Vine Street, Suite 2010, Cincinnati, Ohio 45202, for defendant-appellee, Stonecreek Dental Care

Mark D. Landes, James M. Young, Two Miranova Place, Suite 700, Columbus, Ohio 43215, for defendant-appellee, R. Douglas Martin, DDS

HENDRICKSON, J.

{¶ 1} Plaintiff-appellant, David R. Ginn, DDS, appeals from a decision of the Fayette County Court of Common Pleas granting a directed verdict in favor of defendant-appellee, Stonecreek Dental Care. For the reasons outlined below, we affirm in part and reverse in part the decision of the trial court and remand this cause for further proceedings.

{¶ 2} This appeal stems from the sale of a dental practice owned by R. Douglas Martin, DDS, located in Washington Court House. In 2010, Dr. Ginn was considering expanding his current dental practice, also located in Washington Court House, and Dr. Martin was interested in selling his practice. Following negotiations, Dr. Ginn and Dr. Martin entered into a contract for sale (contract) in which Dr. Ginn purchased "[a]ll right, title and interest in and to the name R. Douglas Martin, DDS, which name Seller warrants and represents to be the only trade name and trademark used by Seller in the course of its business" (goodwill provision). The contract provided that Dr. Martin was prohibited from engaging in business "within thirty (30) miles" of Dr. Ginn's practice for "five (5) years" from October 2010 (noncompete provision). Dr. Ginn and Dr. Martin also entered into a separate employment agreement whereby Dr. Martin was to work for Dr. Ginn one day per week. For various reasons, the relationship between Dr. Ginn and Dr. Martin deteriorated, and Dr. Martin's employment ended in April 2011.

{¶ 3} Shortly after Dr. Martin stopped working for Dr. Ginn, Dr. Martin began working for Stonecreek Dental one day per week in its Chillicothe office, which is located within 30 miles of Dr. Ginn's dental practice. Dr. Clark Sanders, DDS, an owner of Stonecreek Dental, communicated with Dr. Martin during his hiring process. A business consultant for Stonecreek Dental also communicated with Dr. Martin. In September 2011, Stonecreek Dental produced radio advertisements using Dr. Martin's voice to encourage people to see the dentists at Stonecreek Dental. These radio advertisements were broadcast in areas surrounding Stonecreek Dental, including Washington Court House.

{¶ 4} On November 15, 2012, Dr. Ginn filed a complaint against Dr. Martin and Stonecreek Dental. Relevant to this appeal, Dr. Ginn alleged that Stonecreek Dental tortiously interfered with his business relationships because it "induced and assisted Defendant Martin in his wrongful conduct to cause Plaintiff's patients to cease their business

relationship with Plaintiff." Additionally, Dr. Ginn alleged that Stonecreek Dental knew of the contractual relationship between Dr. Ginn and Dr. Martin, yet tortiously interfered with the contract. Specifically, Dr. Ginn claimed Stonecreek Dental tortiously interfered with the contract by employing Dr. Martin within the geographic area prohibited by the noncompete provision and by using Dr. Martin's voice in radio advertisements, which caused a loss of business goodwill.

{¶ 5} A jury trial began on May 20, 2014. At trial, Dr. Ginn elicited testimony from Dr. Sanders that Dr. Martin had provided Dr. Sanders with a copy of the contract and Dr. Martin assured Dr. Sanders working for Stonecreek Dental would not be in violation of the contract. Furthermore, Dr. Sanders testified that according to Mapquest, Dr. Ginn's office was more than 30 miles away from Stonecreek Dental's office. Dr. Sanders admitted that radio advertisements were produced for Stonecreek Dental using Dr. Martin's name and voice. An exhibit introduced at trial revealed that the advertisements using Dr. Martin's name and voice were broadcast in Washington Court House beginning in September 2011 and ending in January 2013.

{¶ 6} Dr. Ginn testified on his own behalf detailing his lost profits and stating that the only difference in the way he practiced dentistry was that Dr. Martin had left. Dr. Ginn did not specifically identify any of his patients who left to be treated by Stonecreek Dental. Dr. Ginn admitted people have a choice as to which dentist they choose to see and stated there are many reasons people stop seeing a specific dentist. Furthermore, Dr. Ginn opined that he does not keep a record of where patients transfer. However, Dr. Ginn also testified that he had always treated his patients well but that his business began declining around the time Stonecreek Dental's radio advertisements began.

{¶ 7} At the conclusion of Dr. Ginn's case, both Stonecreek Dental and Dr. Martin moved for a directed verdict. Dr. Martin argued that Dr. Ginn failed to show that damages

were proximately caused by the alleged breach of contract and further failed to establish damages to a reasonable degree of certainty. The trial court denied Dr. Martin's motion. However, the trial court granted a directed verdict in favor of Stonecreek Dental, finding that Dr. Ginn failed to show Stonecreek Dental possessed the requisite intent to interfere. Dr. Ginn now appeals, asserting one assignment of error for review:

{¶ 8} THE TRIAL COURT ERRED IN GRANTING DIRECTED VERDICT TO STONECREEK DENTAL ON [DR. GINN'S] TORTIOUS INTERFERENCE CLAIMS.

{¶ 9} On appeal, Dr. Ginn asserts that the trial court erred in granting a directed verdict on both his tortious interference with business relationships claim and his tortious interference with contract claim. Dr. Ginn argues that Stonecreek Dental, through the use of radio advertisements, tortiously interfered with his business relationships by encouraging and causing Dr. Ginn's patients to leave. Furthermore, Dr. Ginn asserts that Stonecreek Dental tortiously interfered with the contract because it knew its act of hiring Dr. Martin was substantially certain to violate the noncompete and goodwill provisions

Standard of Review

{¶ 10} The standard for granting a directed verdict is set forth in Civ.R. 50(A)(4), which provides:

> When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

To avoid a directed verdict, it is necessary for the plaintiff to produce some evidence upon every element of the claim. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). In turn, we have stated, "When the party opposing a motion for a directed verdict has failed to adduce any evidence on the essential elements of the claim, a directed verdict is

appropriate." *Nieman v. Bunnell Hill Development Co, Inc.*, 12th Dist. Butler No. CA2009-04-109, 2010-Ohio-1519, ¶ 25. In ruling on a motion for directed verdict, neither the weight of the evidence nor the credibility of the witnesses need be considered. *Downard v. Rumpke of Ohio, Inc.*, 12th Dist. Butler No. CA2012-11-218, 2013-Ohio-4760, ¶ 15. As a directed verdict involves a question of law, our standard in reviewing a grant of a motion for a directed verdict is de novo. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, ¶ 22. Consequently, we utilize the same standard the trial court should have used, without granting deference to the trial court's determination. *Downard* at ¶ 16.

Torts

{¶ 11} "The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14 (1995). "The elements essential to recovery for a tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom." *Wolf v. McCullough-Hyde Mem. Hosp.*, 67 Ohio App.3d 349, 355 (12th Dist.1990).

{¶ 12} In contrast, the elements of tortious interference with contract are "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176 (1999). "'The main distinction between tort[i]ous interference with a contractual relationship and tort[i]ous interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a

contract.'" *Ireton v. JTD Realty Invests., L.L.C.*, 12th Dist. Clermont No. CA2010-04-023, 2011-Ohio-670, ¶ 70, quoting *Marinelli v. Prete*, 6th Dist. Erie No. E-09-022, 2010-Ohio-2257, ¶ 40.

I. Tortious Interference with Business Relationships

{¶ 13} Dr. Ginn asserts that Stonecreek Dental tortiously interfered with his business relationships by encouraging and causing Dr. Ginn's patients to leave through the use of targeted radio advertisements. However, Dr. Ginn never identified anyone with whom he had a business relationship or prospective contractual relationship with which Stonecreek Dental intentionally interfered. Dr. Ginn testified that the staff would have handled any transfer of patients and that he does not keep a record of where patients transfer. Because Dr. Ginn could not identify anyone with whom he had a business relationship or prospective contractual relationship and with whom Stonecreek Dental interfered, a directed verdict was proper regarding Dr. Ginn's tortious interference with business relationships claim. *See Marinelli* at ¶ 41 (summary judgment proper in favor of defendants where plaintiff never identified anyone with whom she had a business relationship or prospective contractual relationship and terminated the relationship because of defendants' intentional interference).

II. Tortious Interference with Contract

{¶ 14} Regarding the tortious interference with contract claim concerning the relationship between Dr. Ginn and Dr. Martin, Stonecreek Dental argues several reasons why a directed verdict in its favor was proper. Stonecreek Dental asserts that its mere knowledge of a contract between Dr. Martin and Dr. Ginn was not enough to establish liability. Furthermore, Stonecreek Dental contends that the trial court was proper in its reasoning granting a directed verdict, because while Stonecreek Dental may have negligently interfered with the contract between Dr. Ginn and Dr. Martin, there was no evidence indicating that it intentionally did so. Stonecreek Dental additionally argues that a directed verdict was proper

in its favor because Dr. Ginn failed to establish damages. Finally, Stonecreek Dental contends that it is entitled to a competitor's privilege as a defense. Nevertheless, we find the above reasons fail because there is some evidence going to each element of tortious interference with contract and there is a question of fact as to whether Stonecreek Dental is entitled to a competitor's privilege.

A. Knowledge of the Contract

{¶ 15} We have previously stated, "Intentional interference may not be inferred solely from evidence that a third party entered into a contract with one of two contracting parties with knowledge of the previously existing contract." *Middletown Janitor Supply Co. v. Hayes*, 12th Dist. Butler No. CA86-03-035, 1986 WL 14536, *2 (Dec. 22, 1986). In so holding, we stated that it is insufficient to establish a cause of action for tortious interference with contract when a third party only had "mere knowledge" of a prior employment contact. *Id.*

{¶ 16} In this instance, Stonecreek Dental had more than mere knowledge that a contract existed as it had physical possession of a copy of the contract. The copy of the contract of sale, including the goodwill and noncompete provisions, was provided to Dr. Sanders. As such, knowledge of the contract is not at issue.

B. Wrongdoer's Intentional Procurement of the Contract's Breach

{¶ 17} To establish the intent element of a tortious interference with contract claim, a plaintiff must either (1) prove that the defendant acted with the purpose or desire to interfere with the performance of the contract or (2) prove that the defendant knew that interference was certain or substantially certain to occur as a result of its actions. *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. Franklin No. 03AP-735, 2004-Ohio-7046, ¶ 68. The Ohio Supreme Court has quoted with approval 4 Restatement of the Law 2d, Torts, Section 766 (1979), which provides:

> One who intentionally and improperly interferes with the

> performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Kenty v. Transamerica Premium Ins. Co., 72 Ohio St.3d 415, 418-419 (1995); *Fred Siegel*, 85 Ohio St.3d at 176. Comments within Section 766 provide guidance as to what constitutes intent. Comment j states: "The rule applies * * * to an interference that is incidental to the actor's independent purpose and desire but known to him as a necessary consequence of his action." Whether the interference was desired or merely incidental is but one factor to consider in determining whether interference is improper. *Id.* Additionally, Comment i states that if an actor knows of the contract, "he is subject to liability even though he is mistaken as to [the facts'] 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."

{¶ 18} The Ohio Supreme Court has adopted 4 Restatement of the Law 2d, Torts, Section 767 (1979), regarding whether an actor's interference with another's contract is improper, and has stated:

> [I]n determining whether an actor has acted improperly in intentionally interfering with a contract or prospective contract of another, consideration should be given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Fred Siegel at 178-179.

{¶ 19} In this instance, according to Dr. Sanders' testimony, Dr. Martin assured Dr. Sanders that his relationship with Stonecreek Dental would not violate his contract with Dr. Ginn. Furthermore, Dr. Sanders testified that according to Mapquest, Dr. Ginn's office was

more than 30 miles from Stonecreek Dental's office. Dr. Sanders recognized that Dr. Martin completed radio advertisements for Stonecreek Dental and transcripts of the radio advertisements broadcast in Washington Court House were admitted as exhibits. It is undisputed that Stonecreek Dental had a copy of the contract including both the goodwill and noncompete provisions within its possession. In regard to the goodwill provision, given its language assigning "[a]ll right, title and interest in and to the name R. Douglas Martin, DDS," when viewing the facts in favor of Dr. Ginn, one could easily conclude that by broadcasting radio advertisements using Dr. Martin's name and voice within the proximity of Dr. Ginn's practice in Washington Court House, Stonecreek Dental was substantially certain that interference with the goodwill provision of the contract would occur.

{¶ 20} Regarding the noncompete provision, even though Stonecreek Dental thought that the distance requirement included in the noncompete provision was driving distance rather than a straight line, legally, the proper measure of distance when utilizing the phrase "within 30 miles," is a straight line distance. *State v. Shepherd*, 61 Ohio St.2d 328, 331 (1980). As Stonecreek Dental was aware of the distance requirement given its knowledge of the noncompete provision, but failed to understand the legal significance, whether such ignorance was intentional or interference with the contract was merely incidental is a factor to be weighed by a jury in determining whether Stonecreek Dental's interference with the contract was improper.

{¶ 21} Considering factors to determine whether Stonecreek Dental's actions were improper, Stonecreek Dental's radio advertisements broadcast within the vicinity of Dr. Ginn's practice, by reasonable implication, were intended to procure additional patients for Stonecreek Dental. Stonecreek Dental employed Dr. Martin within 30 miles of Dr. Ginn's practice despite believing Stonecreek Dental's practice was outside the 30-mile radius. Nevertheless, Dr. Sanders testified that he did not think noncompete clauses were

enforceable because it is impossible to prohibit someone from working. Additionally, Stonecreek Dental employed Dr. Martin until the end of September 2013, which was ten months after Dr. Ginn filed his claims for tortious interference. In light of the goodwill provision, Dr. Ginn had an interest in establishing Dr. Martin's former patients as his own. Stonecreek Dental benefited from having an experienced dentist on staff with an established client base. As indicated, by broadcasting the radio advertisements, Stonecreek Dental was interested in seeking additional patients for financial gain. Society has an interest in free market competition and the ability of people to choose a dentist. Regarding proximity, the radio advertisements were broadcast in the geographic area where Dr. Ginn's practice is located and Stonecreek Dental hired Dr. Martin within 30 miles of Dr. Ginn's practice. The parties involved are competing dentists. All of these factors are to be weighed by a jury in determining whether Stonecreek Dental's actions were improper.

{¶ 22} In light of the language in the goodwill provision, when viewing the evidence in favor of Dr. Ginn, Stonecreek Dental possessed the requisite intent to violate the goodwill provision. Because Stonecreek Dental was mistaken as to the legal significance of the noncompete provision, whether Stonecreek Dental was substantially certain to violate the noncompete provision by hiring Dr. Martin and broadcasting the radio advertisements utilizing Dr. Martin's voice or whether interference was incidental, is to be determined by a jury in weighing whether such actions were improper. As such, a directed verdict based on the fact that Stonecreek Dental was merely negligent in procuring Dr. Martin's potential violation of the goodwill and noncompete provisions in the contract was in error.

C. Damages

{¶ 23} As stated above, in *Kenty*, 72 Ohio St.3d 415, the Ohio Supreme Court cited with approval 4 Restatement of the Law 2d, Torts, Section 766 (1979), regarding intentional interference with a contract. Section 766, Comment t, states that "[t]he cause of action is for

pecuniary loss resulting from the interference. Recovery may be had also for consequential harms for which the interference was a legal cause." By definition, "[c]onsequential damages in a tortious interference action include all damages proximately caused by the defendant's misconduct, including lost profits." *UZ Engineered Products Co. v. Midwest Motor Supply Co.*, 147 Ohio App.3d 382, 393 (10th Dist.2001). As such, the loss of profits must be the probable result of the defendant's misconduct. *See City of Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 68 (1988).

{¶ 24} Furthermore, in order to be recoverable, lost profits must be shown to a reasonable degree of certainty. *UZ Engineered Products* at 400. Damages for lost profits include the loss of profits minus expenditures saved by not having to produce that profit. *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.*, 112 Ohio App.3d 150, 158 (6th Dist.1996), citing *Gahanna*. A mere assertion that a party would have made a particular amount in profits is not sufficient. *Brookeside Ambulance* at 158. If a well-established business is affected, the loss of profits usually can be proven with sufficient certainty as evidence of past performance will form the basis for a reasonable prediction as to the future. Restatement of the Law 2d, Contracts, Section 352, Comment b (1981); *see AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177, 181 (1990). While mathematical certainty is not required, the trial court has the discretion to determine whether a calculation of lost profits is too speculative. *Pennant Moldings, Inc. v. C & J Trucking Co.*, 11 Ohio App.3d 248, 252 (12th Dist.1983); *Brookeside Ambulance* at 158. "Lost profit damages are measured by the loss, including lost profits the plaintiff business sustained as a result of the tortious interference, not by its effect upon the defendant's business." *UZ Engineered Products* at 400.

1. Damages - Proximate Cause

{¶ 25} Generally, a plaintiff bears the burden of proving the attribution of proximate cause and the extent of his damages to the defendant's conduct. *Roelle v. Orkin Exterminating Co.*, 10th Dist. Franklin No. 00AP-14, 2000 WL 1664865, *8 (Nov. 7, 2000); *see Minnich v. Ashland Oil Co.*, 15 Ohio St.3d 396, 397 (1984). The tests to show the legal cause of consequential damages in tortious interference with contract claims "have not been reduced to precise rules." 4 Restatement of the Law 2d, Torts, Section 774A, Comment d (1979). Nevertheless, the rules for negligent physical injury provide guidance in determining proximate cause. *Id.*

{¶ 26} The Ohio Supreme Court discussed when a directed verdict is proper regarding proximate cause in a general negligence claim in *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp.*, 42 Ohio St.2d 122 (1975). The court stated that a directed verdict is proper when there is an issue surrounding proximate cause "where the evidence is either defective because some crucial link in the evidence is missing, or is so imponderable that no one can reasonably say that the evidence tends to or fails to establish negligence." *Westinghouse* at 127. The court continued, "[W]here the facts from which an inference of probable proximate cause must be drawn are such that it is as reasonable to infer other causes, plaintiff has failed to supply proof of probable cause." *Id.* If that is the case and the "plaintiff has only presented proof that the actual cause was one of a number of possibilities, to enable an inference to be drawn that any particular cause is probable, the other causes must be eliminated." *Id.* However, to establish sufficient proximate cause for the issue to be presented to a jury, a plaintiff need not eliminate all *possible* causes, but only additional probable proximate causes that may be reasonably inferred from the facts and circumstances of each case. *Westinghouse*; *DiBlasi v. First Seventh-Day Adventist Community Church*, 11th Dist. Geauga No. 2013-G-3169, 2014-Ohio-2702, ¶ 41. "The application of this rule depends on the facts of each individual case." *Westinghouse* at 127.

{¶ 27} An analogous case to this situation is *Harris v. Univ. Hospitals of Cleveland*, 8th Dist. Cuyahoga Nos. 76724 and 76785, 2002 WL 363593 (Mar. 7, 2002). In *Harris*, a hospital was liable to a former employer of a doctor for tortious interference of contract when it employed the doctor within a five-mile radius of the former employer and advertised within the communities where the doctor's patients lived in violation of noncompete and nonsolicitation clauses. *Harris* at *7. Despite no evidence that any specific patient defected to the new employer because of advertising efforts, a jury could "easily have made a causal connection between the advertising efforts undertaken by [hospital]" and the patients leaving. *Id*. "Additionally, while a plaintiff can recover damages from a defendant's tortious interference with a contract, the measure of those damages is the actual loss sustained by the plaintiff, and not the benefits or profits that flowed to a defendant because of the tortious interference." *Id.* at *17. As such, while only 216 of plaintiff's patients submitted patient request forms to transfer to defendant, it was irrelevant as to whether an additional 346 patients who left plaintiff's practice actually transferred to defendant. *See id* at *2 and *17; *see also UZ Engineered*, 147 Ohio App.3d at 401 (proximate cause sufficient for damages established where director of plaintiff's operations testified that "the sales drop-off was dramatic in the territories of the employees who went to work for defendant but, in comparison, sales in territories for employees who left without violating the covenants in their contracts stayed active with little loss of sales"); *Shred-It USA, Inc. v. Mobile Data Shred, Inc.*, 238 F.Supp.2d 604 (S.D.N.Y.2002) (no direct testimony of former clients needed to establish proximate cause for damages of breach of noncompete).

{¶ 28} In this instance, Dr. Ginn testified that the only difference in his practice during the time a significant portion of his patients left was the departure of Dr. Martin and the radio advertisements broadcast by Stonecreek Dental. Dr. Ginn testified that there was no reason to believe people were leaving because of his skill as dentist, and Dr. Martin referred to Dr.

Ginn as an "exceptionally skillful dentist." While Dr. Ginn admitted that there are many reasons a person might discontinue seeing a particular dentist, such as leaving the geographic area, losing insurance, or not personally caring for the dentist, such other factors do not appear to be probable causes. When considering Dr. Ginn's substantial decline in revenue soon after Dr. Martin left, in conjunction with the timing of the radio-broadcast advertisements utilizing Dr. Martin's name and voice, it can reasonably be inferred that Stonecreek Dental's interference with the contract was the proximate cause of Dr. Ginn's loss of profits. As such, there is some evidence as to whether Stonecreek Dental's actions proximately caused the decline in Dr. Ginn's revenue, and whether Dr. Martin leaving the practice and working and advertising for Stonecreek Dental proximately caused damages to Dr. Ginn is a question for a jury.

2. Damages – Reasonable Degree of Certainty

{¶ 29} Additionally, Dr. Ginn testified to historical revenues prior to purchasing Dr. Martin's practice. Dr. Ginn then testified to the amount of revenue gained during the time Dr. Martin practiced with him, and compared these numbers to his revenue for five years, the length of the noncompete. Specifically, Dr. Ginn testified that in the past four to five years before Dr. Martin worked for Dr. Ginn, Dr. Ginn's practice generally grew. In 2009, the practice generated $618,000 in revenue. To determine the amount of revenue Dr. Martin would have generated in a year, Dr. Ginn testified that he took revenue generated by Dr. Martin for six months he worked and doubled it to determine how much revenue Dr. Martin generated for that year. Based on these calculations, the practice would have generated slightly over $1,100,000 the first year of Dr. Martin working for Dr. Ginn if Dr. Martin had stayed. Dr. Ginn then specifically testified to the actual revenues he received in years 2011 through 2014 and his projected revenues for 2015. In total, Dr. Ginn testified that he lost $1,109,933 in total revenue because of Dr. Martin's breach. Furthermore, Dr. Ginn testified

that these numbers represented lost profits because his overhead did not change.

{¶ 30} Because historical revenues are a proper basis to calculate damages when established practices are involved to predict future performance, and viewing the evidence in a light most favorable to Dr. Ginn when mathematical certainty is not required, it is possible to calculate damages to a reasonable degree of certainty. Additionally, it is within the trial court's discretion to determine whether a calculation of lost profits is too speculative. In this instance, the trial court found damages sufficiently established to survive a motion for a directed verdict as it denied a motion for a directed verdict made by Dr. Martin. As such, a directed verdict in favor of Stonecreek Dental based on the fact that Dr. Ginn failed to establish damages would have been improper.

D. Competitor's Privilege

{¶ 31} The Ohio Supreme Court has also adopted 4 Restatement of the Law 2d, Torts, Section 768 (1979), establishing a privilege of fair competition that will defeat a claim of tortious interference with contract when a contract is terminable at will. *Fred Siegel*, 85 Ohio St.3d at 179-180. Competition is proper by a defendant if (a) the relation between the actor and his competitor concerns a matter involved in the competition between the actor and the other, (b) the actor does not employ wrongful means, (c) his action does not create or continue an unlawful restraint of trade, and (d) his purpose is at least in part to advance his interest in competing with the other. *Id.* If a defendant establishes that his conduct falls within all the elements set forth in Section 768 when a contract is terminable at will, the fact-finder need not balance the factors set forth in Section 767 to determine whether a defendant's action was improper. *Id.* at 180.

{¶ 32} Generally, a contract with no express provision as to its duration is terminable at will. *Miller v. Wikel Mfg. Co.*, 46 Ohio St.3d 76, 78 (1989). Restrictive clauses utilized in a covenant not to compete are not terminable at will by definition as there is a specific time

period stated during which a party may not compete. *Harris*, 8th Dist. Cuyahoga Nos. 76724 and 76785, 2002 WL 363593 at *8. In the sale of a business, even when the sale carries with it goodwill and the name of a business, the seller may reengage in business only after reasonable time has passed that allows the buyer to establish the customers of the purchased business as his own. *Terminal Vegetable Co. v. Beck*, 8 Ohio App.2d 231, 234 (8th Dist.1964); *Suburban Ice Mfg. & Cold Storage Co. v. Mulvihill*, 21 Ohio App. 438, 443-444 (1st Dist.1926). Whether sufficient time has passed in order for the buyer to establish the customers of the purchased business as his own is a question of fact. *Id.* Three years has been held a sufficient time. *Soeder v. Soeder*, 82 Ohio App. 71, 78 (8th Dist.1947).

{¶ 33} In this instance, Dr. Ginn and Dr. Martin signed a contract for the sale of Dr. Martin's dental practice. The noncompete provision prohibited Dr. Martin from engaging in business within 30 miles of Dr. Ginn's practice for a period of five years. Because the noncompete was in effect for a specific period of time and was not terminable at will, the competitor's privilege is not available to Stonecreek Dental regarding any alleged violation of the noncompete provision.

{¶ 34} In regard to the goodwill provision, there is a question of fact as to whether Stonecreek Dental employed wrongful means in competing with Dr. Ginn by broadcasting advertisements within the geographic proximity of Dr. Ginn's office using Dr. Martin's name and voice approximately one year after the sale of the practice. Because no timeframe applied specifically to the sale of the goodwill of the business, including all right, title, and interest in the name R. Douglas Martin, DDS, it is a question for a jury to determine whether one year was a reasonable time to have passed to allow Dr. Ginn to establish Dr. Martin's patients as his own before Stonecreek Dental broadcast such radio advertisements.

{¶ 35} Because the noncompete provision was not terminable at will and the goodwill provision raises a question of fact for a jury to determine, a directed verdict in favor of

Stonecreek Dental could not be entered on the basis Stonecreek Dental had a competitor's privilege

Conclusion

{¶ 36} In light of the foregoing, we find that a directed verdict was proper in favor of Stonecreek Dental for the claim of tortious interference with business relationships regarding the relationship between Dr. Ginn and his clients. However, we find that a directed verdict was not proper in favor of Stonecreek Dental for the claim of tortious interference with contract involving the contract between Dr. Ginn and Dr. Martin. Dr. Ginn's single assignment of error is sustained in part and overruled in part.

{¶ 37} Judgment affirmed in part and reversed in part. Judgment affirmed as to the directed verdict granted in favor of Stonecreek Dental regarding Dr. Ginn's tortious interference with business relationships claim. Judgment reversed as to the directed verdict granted in favor of Stonecreek Dental regarding Dr. Ginn's tortious interference with contract claim. This cause is remanded for further proceedings.

PIPER, P.J., and M. POWELL, J., concur.