

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF VENTURA  
VENTURA DIVISION**

**TENTATIVE RULINGS**

EVENT DATE: 12/08/2016

EVENT TIME: 08:20:00 AM

DEPT.: 43

JUDICIAL OFFICER: Kevin DeNoce

CASE NUM: 56-2014-00452255-CU-BC-VTA

CASE TITLE: TURNER VS. CLOUGHERTY

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Motion for Summary Judgment - or in the alternative, motion for summary adjudication of deft Kellee

CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment, 04/26/2016

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The morning calendar in courtroom 43 will begin at 9 a.m. Cases including *ex parte* matters will not be called prior to 9 a.m. Please check in with the courtroom clerk by no later than 8:45 a.m. If appearing by CourtCall, please call in between 8:35 and 8:45 a.m.

With respect to the below scheduled tentative ruling, no notice of intent to appear is required. If you wish to submit on the tentative decision, you can send an email to the court at: Courtroom43@ventura.courts.ca.gov or send a telefax to Judge DeNoce's secretary, Hellmi McIntyre at 805-477-5894, stating that you submit on the tentative. Do not call in lieu of sending an email or telefax. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence. This case has been assigned to Judge DeNoce for all purposes.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

For general information regarding Judge DeNoce and his courtroom rules and procedures, please visit: <http://www.denoce.com>

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**The court's tentative ruling is as follows:**

Grant motion for summary adjudication ("MSA") as to cause of action ("COA") 1, intentional interference with contractual economic relationship, and COA 5, interference with performance of a contract. Both causes of action require knowledge on the part of the defendant of the contracts. Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 55 and Little v. Amber Hotel Co. (2011) 202 Cal.App.4th 280, 291–92. Defendant declared that she had no knowledge of any contracts that Plaintiff had with patients or insurance carriers. Plaintiff offers no countervailing evidence.

Grant MSA as to COA 2, intentional interference with non-contractual economic relationship, COA 3, intentional interference with prospective economic relationship; and COA 4 negligent interference with economic relationship. These causes of action are related, and they share the requirement that the defendant's conduct at issue be independently wrongful. See Reeves v. Hanlon (2004) 33 Cal.4th 1140, 1152. Cancelling a phone contract shared by domestic partners does not violate any statute or law and is not actionable as an independently wrongful act. Plaintiff's claim of conversion is not compelling as she admits that Defendant put her on her account.

Grant MSA as to COA 6, breach of contract. The parties agreed to lease the office space together; there is no evidence of any sublease between the parties that was breached. The employment agreement was at-will; there is no evidence that the parties agreed that Plaintiff would only be fired for good cause. There is no evidence of any oral agreement to share patients. Rendering personal services in exchange for cell phone service is not a proper basis for a contract. Civil Code §3390.

Grant MSA as to COA 9 for trespass to land. Plaintiff and Defendant shared the office space and were on the lease together. Consequently, Plaintiff cannot establish that the land' (i.e. office space) belonged to her to the exclusion of Defendant. Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal.App.3d 1, 16. Grant MSA as to COA 10 for trespass to chattel. The parties shared office space and were both on the lease together. There is no evidence that any property taken from the premises belonged to Plaintiff. Jamgotchian v. Slender (2009) 170 Cal.App.4th 1384, 1401.

Deny MSA as to COA 11 for nuisance. There is a triable issue of fact as to whether Defendant interfered with Plaintiff's access to their joint residential property. (UMF 636, 642). Deny MSA as to COA 12 for slander. There is a triable issue of fact as to whether Defendant defamed Plaintiff when she verbally told realtor Lisa Clark that Plaintiff damaged the house. Plaintiff denies having damaged the house. (UMF 694). Deny MSA as to COA 13 for libel. There are triable issues of fact as to whether Defendant's emails to her father and the accountant were defamatory; whether Defendant's decision to email her father and the accountant reflected reasonable care on her part, and whether the father and the accountant were interested parties. (UMF 732.) These issues are more properly reserved for the ultimate trier of fact.

Deny the MSJ as it relates to COA 14 for medical negligence. Triable issues of fact exist as to the existence of a psychiatrist and patient relationship between the parties, and whether Defendant met the applicable standard of care in rendering therapy to her romantic partner. (UMF 771, 806, 808, 809, 814, 816). [While Defendant did not move for summary adjudication on this cause of action, she moved overall for summary judgment; thus, the Court refers to relevant UMFs to show that there is triable issue of fact as to medical negligence.]

Deny the MSA as to COA 15 for sexual contact with a patient. Triable issues of fact exist as to the existence of a psychiatrist and patient relationship between the parties during their romantic relationship. (UMF 771, 806, 808, 809, 814, 816.)

Deny MSA as to COA 7 for IIED. Defamation can support IIED. See Bikina v. Mahadevan (2015) 241 Cal.App.4th 70, 89. (UMF 694 and 732). Grant MSA as to COA 8 for NIED. The only identifiable duty here is that stemming from the alleged psychiatrist/client relationship. "There is no independent tort of negligent infliction of emotional distress. The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element." (Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal.4th 965, 984-985 [citations omitted].) To the extent that Defendant caused Plaintiff emotional distress, such damages are subsumed into the medical negligence cause of action. Grant the MSA as to punitive damages. There is no evidence of malicious, fraudulent or oppressive conduct in this case. CC §3294.

Defendant's Evidentiary Objections to Plaintiff's Dec. – Overrule as to each. Defendant attacks Plaintiff's declaration by objecting to entire paragraphs. In doing so, Defendant fails to comply with CRC 3.1354 which requires specificity in identifying the objectionable evidence and the evidentiary objection. Defendant's objections are overbroad. For example, Defendant objected to all of paragraph 9 based upon relevance, misstatement of facts, speculation and lack of foundation. Yet, clearly, the first sentence – "By 2009, after about 8 months as a licensed acupuncturist, I was growing my practice at Dr. Kavala's Chiropractic Office" - is not objectionable on any of these grounds. The statement is relevant to Plaintiff's business success which is arguably relevant to the first five causes of action; the statement is not based upon speculation; and Plaintiff would have personal knowledge of her economic situation. The Court will not wade through Plaintiff's declaration to figure out which overbroad objections *might* apply to which sentences.

Defendant's Evidentiary Objection to Pepper Dec. - Defendant seeks to strike the entire declaration of Dr. Pepper on the basis of Garibay v. Hemmat, (2008) 161 Cal. App. 4<sup>th</sup> 735 (requiring the submission of the medical records relied upon by the expert). Dr. Pepper's declaration is attached to a mountain of documents, including records from Anthem Blue Cross, Ventura County Medical Center, Community Centered Oriental Medicine, Sansum Clinic and various pharmacies. Defendant's blanket overbroad objection is overruled as the Court has no way of ascertaining portions of Dr. Pepper's declaration Defendant finds lack support under Garibay. Defendant also seeks to strike Dr. Pepper's declaration as being based upon conjecture and speculation. This objection is overruled. Dr. Pepper sufficiently explains the basis for his opinions.

Defendant's Evidentiary Objections to Laborde Dec. and Tillis Dec. - Overrule as to each. Plaintiff's failure to properly tab the evidence does not render the evidence objectionable. The Court can identify the evidence despite the tabbing errors. See Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson (2005) 131 Cal.App.4th 1466, 1478 (agreeing as a general matter that the trial court has discretion under Code of Civil Procedure section 437c to overlook procedural errors.) As discussed above, Dr. Pepper's declaration is supported by hundreds of pages of documents. Any errors made by moving party in identifying whether Dr. Pepper relied upon the documents identified in Mr. Tillis' declaration goes to the weight and not the evidentiary sufficiency of Dr. Pepper's declaration.

### **Discussion:**

**1<sup>st</sup> COA- Intentional interference with contractual economic relationship** - "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 55, as modified (Sept. 23, 1998)

**5<sup>th</sup> COA - Interference with performance of a contract** - This tort, though similar to cause of action 1 is slightly different and "broader in that it protects against intentional acts not necessarily resulting in a breach. [Citations.] It requires that a plaintiff prove: (1) he had a valid and existing contract with a third party; (2) defendant had knowledge of this contract; (3) defendant committed intentional and unjustified acts designed to interfere with or disrupt the contract; (4) actual interference with or disruption of the relationship; and (5) resulting damages."

Little v. Amber Hotel Co. (2011) 202 Cal.App.4th 280, 291–92, as modified (Jan. 17, 2012)

*P's Allegations* – P alleges that D committed the above two torts by intentionally cutting off P's business cell phone on 3/19/14, thereby interfering with the contracts that P had with insurance carriers, patients, doctors and other health care providers.

*D argues that these torts fails because:*

- P had no contracts with insurance carriers between 2012 and 2014. (*In the court's view, there is a triable issue of fact as to whether P was on insurance panels; she says her name was listed as a provided on insurance panels although no copies of contracts were provided.*) P Depo Vol 1 at 50:10.)

- P had no contracts with her patients. – (*P offers no evidence of any contracts with patients which is understandable given the kind of work that she did. A patient doesn't usually have a contract with a acupuncturist; chiropractor; massage therapist.*)

- Even if P had such contracts, D was unaware of them. (*This fact is established by D's Dec at ¶12; P offered no countervailing information to UMF 83.*)

- There was no disruption to P's business because P got a new cell phone number and was able to contact them (*not established- P declares that her clients got a "no longer in service" message from March to May 2014 and that this was very disruptive to her business. P Dec at ¶34.*)

- P's was seeing less than five patients a week anyway. (*Undisputed.*)

The court grants the MSA as to the above two causes of action. Both require knowledge on the part of the defendant of the contracts. Defendant declared that she had no knowledge of any contracts that Plaintiff had with patients or insurance carriers and there is a material fact in dispute as to whether P had knowledge of the contracts. (UMF 83, 291.)

**2<sup>nd</sup> COA - Intentional interference with non-contractual economic relationship**

**3<sup>rd</sup> COA - Intentional interference with prospective economic relationship**

**4<sup>th</sup> COA - Negligent interference with economic relationship**

The above three torts can be addressed collectively. The elements include: interfering with economic activity that has not been memorialized by contract. "To establish a prima facie case of intentional interference with prospective economic advantage, a plaintiff must demonstrate (1) an economic relationship between the plaintiff and a third party, with a probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of this relationship; (3) intentional and wrongful conduct on the part of the defendant, designed to interfere with or disrupt the relationship; (4) actual disruption or interference; and (5) economic harm to the plaintiff as a proximate result of the defendant's wrongful conduct." Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal.App.4th 688, 713. A plaintiff's burden includes

pleading and proving "that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, 45 Cal.Rptr.2d 436, 902 P.2d 740.) We consider an act independently wrongful "if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937. The 4<sup>th</sup> cause of action is the same as the 2<sup>nd</sup> and 3<sup>rd</sup>, but for intent.

*P's Allegations* – P alleges that P's business included clientele that were walk-ins who had yet to contract with P for services. By cutting off P's cell phone, P's clients were unable to contact here. By cutting off the cell phone, D committed a conversion and a violation of unfair business practice as set out at B&P §17204.

*D argues that these torts fail because:*

- Suspending the cell service was not wrongful by any legal measure
- The cell phone plan did not belong to plaintiff (*Established UMF 127; the court is not persuaded by P's attempt to dispute this by arguing that the account was transferred to D's name only for tax purposes. The reason that the transfer occurred is irrelevant. There does not appear to be any dispute that the phone was in D's name and not in P's name.*)
- D exclusively paid for the phone. (*P was supposed to pay for her part of the phone, but did not do so. UMF 127. P does not offer evidence that she paid for any part of the phone.*)
- The same facts in response to COA 1 and 5 above: no actual disruption to business; no knowledge on the part of D. (*These facts are the same as above, with the exception of D's knowledge. Clearly D knew about P and her acupuncture clients. She may not have known about any contracts with those clients, but she knew about the existence of the economic relationship that P had with her clients.*)

The critical issue here with the above three torts is the independent wrongfulness of the conduct. A "plaintiff seeking to recover for interference with prospective economic advantage must also plead and prove that the defendant engaged in an independently wrongful act in disrupting the relationship. (citation). In this regard, "an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152. Examples of independent wrongfulness include: *San Francisco Design Ctr. Assocs. v. Portman Cos.* (1995) 41 CA4th 29, 43, fn. 9. ("A used physical violence against B's employees to prevail. B could sue A for intentional interference with prospective economic advantage based on the battery committed against B's employees.") and *Roy Allan SlurrySeal, Inc. v. American Asphalt South, Inc.* (2015) 234 CA4th 748, 769-770 ("where losing bidder claimed its bid would have been lowest but for winning bidder's failure to pay its workers prevailing wage, as required for state contracts, such failure was independent wrong").

It is difficult to see how cancelling a joint phone contract – that P apparently didn't pay for – is independently wrongful. In her opposition, P argues that the conduct amounts to conversion and a violation of B&P §17204. Taking conversion first, if the phone contract was not in P's name – which P admits at ¶15 of her declaration – then D did not "convert" P's phone contract. "Conversion is the wrongful exercise of dominion over the property of another." *Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1404–05 (emphasis added) With respect to B&P §17204, there is no such statute. The court suspects that P meant to cite §17200 which makes actionable unfair competition which is defined to be "unlawful, unfair or fraudulent business act or practice." However, the court is not persuaded that cancelling a phone contract in this context of the relationship of these parties is anti-competitive behavior. Cancelling a phone contract shared by domestic partners is not actionable an independently wrongful act. *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152. The court grants the MSA as to these three causes of action.

**6<sup>th</sup> COA - Breach of contract** - In order to establish a breach of contract, the plaintiff must show: 1) a valid and enforceable contract; 2) plaintiff's performance or excuse for nonperformance; 3) defendant's breach; and 4) damage to plaintiff. *Reichert v General Ins. Co. of America* (1968) 68 Cal.2d 822.

*P's Allegations* – P and D entered into an oral contract by which P agreed to sublet an office space from D for \$350 per month. P and D had an oral employment contract by which P was first administrative assistant and then office manager. The parties had an oral agreement to share patients. D agreed to pay for P's cell phone as an inducement to maintain a business and professional relationship with D.

*D argues that this tort fails because none of the four alleged contracts are actionable:*

- There was no sub-lease between P and D because P was on the lease to the office. (*This is established – the lease was entered into jointly by P and D (UMF 339); P offers no evidence of a sub-lease.*)
- P contributed various amounts (\$500, \$525) at various times which shows that there was no definite contractual relationship. (*P argues that D voluntarily waived rent when P was ill.*)

- There was no consideration; P gave up nothing of value for the lease.
- There was no discussion that the employment relationship was terminable only based upon good cause. (*D declared that she and P never discussed that P's employment could only be terminated for good cause. (D Dec at ¶15). P's evidence in opposition to this statement is not compelling. According to P, she and D agreed that P would keep her job even if P and D broke up. (See P Dec at ¶19). But, that isn't responsive. An employment agreement is either terminable at-will or for good cause. The basis for the employment agreement was money for work, not money for personal relationship. Such an agreement is not allowed by law: Civil Code §3390 does not allow a contract to render personal service. So, P hasn't properly responded to D's evidence that there was never any discussion as to "good cause." By referring to their personal relationship, P has not created a triable issue of fact.*)
- If the employment relationship was for good cause, D had good cause because P failed to perform her duties (including failing to return sensitive and private documents). (*This issue is moot since the court finds that the employee relationship was at will.*)
- There was no oral agreement to share patients. (*D Dec at ¶13; there was no countervailing evidence of any agreement offered by P. According to P, she and D referred patients to each other. (P Dec at ¶11). But, that is not evidence of an oral agreement to do so.*)
- P "rendering personal service" in exchange for access to D's cell phone would be in violation of public policy. (CC §3390: there can be no contract for personal service.; "Generally, an obligation to render personal service, and an obligation to employ another in personal service, cannot be specifically enforced<sup>1</sup> regardless of which party seeks enforcement" 58 Cal. Jur. 3d Specific Performance § 57)
- Assuming there was an agreement, P breached the contract' when she broke up with D. (*D can't have the argument both ways. "Breaking up" with someone can't be considered an anticipatory breach on the part of P. D's argument assumes a valid contract that can be breached by "breaking up" with someone; but that can't be the case by law.*)

The court grants the MSA as to breach of contract. The parties agreed to the lease the premises together; there is no evidence of a sublease that was breached. The employment agreement was at-will; there is no evidence that the parties agreed that Plaintiff would only be fired for good cause. There is no evidence of any oral agreement to share patients. Rendering personal services in exchange for cell phone service is not an actionable contract. Civil Code §3390.

**9<sup>th</sup> COA - Trespass to land** The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal.App.3d 1, 16.

*P's Allegations* – D entered P's office space and occupied the office, opened drawers, took office supplies, and other items.

*D argues that this tort fails because:*

- There can be no trespass to joint office space; P and D were tenants in common.
- Entry was consensual as there was office supplies located in that side of the office.

D's argument is persuasive. Even though P alleged that she had exclusive possession of the office space (TAC at ¶121), P admitted in her declaration that the lease was joint. (See P's declaration at ¶11). The lease reflects that both P and D were the tenants. (Ex AA D's declaration). P also admitted in an email (Ex BB to D's declaration) that the space was "one office." The court grants the MSA as to Trespass to Land. The undisputed fact is that both Plaintiff and Defendant shared the office space. Consequently, Plaintiff cannot establish that the land, (i.e.) office space, belonged to her to the exclusion of Defendant.

**10<sup>th</sup> COA - Trespass to chattel** - An action for trespass to personal property lies where defendant has intentionally interfered with plaintiff's right to or use of personal property, resulting in injury to the property or to plaintiff's rights in the property. Jamgotchian v. Slender (2009) 170 Cal.App.4th 1384, 1401.

*P's Allegations-* D accessed P's closed client files, causing P to review the files to determine what HIPPA violations had occurred. D took supplies belonging to P.

*D argues that this tort fails because:*

- P did not have ownership in the office supplies that D accessed
- D paid for those office supplies. (*D has not established this fact. D argues that the office supplies were paid for on her credit card, but her evidence (UMF 13 and her Dec. at ¶11) isn't compelling as she simply states that they shared the office which does not shift the burden on who owned the office supplies to P.*)
- D's alleged access of closed patient files is not actionable because P admitted that she still had access to those files. (*D says at UMF 39 (her Dec at ¶33) that she did not access P's files. P does not dispute this, but instead refutes any claim that she had access to D's files which is not relevant to this cause of action.*)

The court grants the MSA with respect to this COA. It appears that the office space was joint and P offers insufficient

evidence of any theft on the part of D of office supplies.

**11<sup>th</sup> COA - Nuisance** "Plaintiffs attempt to state a cause of action for private nuisance, i.e., a nontrespassory interference with the private use and enjoyment of land. (See Civ.Code, §§ 3479–3481.) In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient" San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal.4th 893, 937.

*P's Allegations* – D locked the gates to the Tico Property, thereby denying P access to it.

*D argues that the tort fails because:*

- P's actions after 3/16/14 reflect that she had no intention of returning home; she no longer had any intent to access the Tico Property. (*D's alleged fact is not established. P declares that she had to break locks to get access to the property and D would then change the locks to deny P access. P Dec at ¶42*)

- P was still able to get into the property despite D changing the locks, but P chose not to do so. (*D's alleged fact is not established. P declares that she had to break the locks to get into the property. P Dec at ¶42*).

The court denies the MSA with respect to the nuisance COA. There is a triable issue of fact as to P's ability to access the property and whether there was interference with the use or enjoyment of property.

**12<sup>th</sup> COA - Slander per se** - "Civil Code section 46 provides, "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: [¶] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [¶] 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease; [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; [¶] 4. Imputes to him impotence or a want of chastity; or [¶] 5. Which, by natural consequence, causes actual damage." Regalia v. Nethercutt Collection (2009) 172 Cal.App.4th 361, 367.

**13<sup>th</sup> COA - Libel per se** "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. Civil Code section 45 provides, "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Wong v. Tai Jing (2010) 189 Cal.App.4th 1354, 1369.

*P's Allegations re Slander-* D told police officer, Derek Donswyk and D's mother that P had stolen D's prescription pads, her car titles, social security card, and tax returns. D also accused P of refusing to return D's office documents and for violating HIPPA regulations. [D made these statements twice to these individuals: on 3/19/14 and 3/20/14]. On 4/15/14, D also said that P was untrustworthy as an employee, in business, and as a fellow resident of the Tico Property. D said that P had stolen D's computer, her patients social security numbers, her own social security number, had moved D's files without authority to do so; and had changed D's passwords without authority to do so. Vincent Roberti and Teri Deth heard these statements. On 5/9/14, D spoke to Nita Blevins, a client of P's after Blevin's acupuncture treatment with P. She told Blevins that P engaged in "more lies." On 6/18/14, D told Dianne Epstein (Chadwell Financial) who issued insurance policies for P and D that she wanted to remove P from the beneficiary status on the policy. In doing so, D "intimated" that D was in fear for her life and that it had to do with beneficiary status on the life insurance policy. On 7/7/14, D spoke to realtor, Lisa Clark, and said that P was not trustworthy to be on the Tico Property, and that P was stealing items off that property and that P and Lisa were in a scheme of wrongdoing against D.

*P's Allegations re Libel* - D cc'd her father and her accountant on an email in which she said that P's actions had compromised D's personal and business materials. In the same email (3/22/14) D accused P of taking D's social security card, past and current tax documents, and D's personal and business files.

D argues that the slander and libel torts fail for the following reasons:

- Statements to the police and humane society were privileged. (*The issue here is whether statements made to a police officer or humane society officer that are overheard by a third party are actionable as defamation. The court is not persuaded. D's position would undermine the principle that the public is to have no fear of retribution in speaking to police officers. Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 364.

- Statements to realtor, Lisa Clark, were true. (*D essentially admits that she told the realtor that P had damaged the Tico House. (UMF 51). Yet, P denies that she did so, claiming that she had to enter through a window because D had locked P out of the house. P states that she disconnected surveillance cameras, but did not destroy them. (P Dec at ¶41 and 42).*

- D's cancellation of her life insurance policy and her interaction with Nita Blevins cannot be reasonably construed as defamatory. (*D cancelled the insurance policy that included P, but that this act cannot be construed as defamatory. P's evidence in response is objectionable and not compelling. All P states is that D "defamed her to an employee of (the insurance company) again listing all of her allegations."* (P Dec at ¶37). There is no foundation for this statement, nor does it appear to be based upon any personal knowledge.

- D's use of her own email to contact her father and her accountant were privileged. (*D argues that she acted reasonably in including her father and her accountant on the emails because she was trying to preserve evidence. UMF 37. She adds that P won't be able to prove malice. While that might be true, it isn't necessarily true. D didn't foreclose the possibility that the statements disseminated to her father and the accountant were false and damaging against P. The court denies the MSA as to slander and libel. There is a triable issue of fact as to whether the Defendant defamed Plaintiff when she verbally told realtor Lisa Clark that Plaintiff damaged the house; Plaintiff denies having damaged the house. There is a triable issue of fact as to whether the Defendant's emails to her father and the accountant were defamatory; whether Defendant's decision to email her father and the accountant reflected reasonable care on her part and whether the father and the accountant were interested parties.*

**14<sup>th</sup> COA - Medical malpractice – professional negligence**; "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." *Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968, review denied (Nov. 10, 2015)

*P's Allegations-* D took on P's psychiatric care in late 2006 and agreed to treat her. But in doing so, she failed to gather complete information regarding P; she did not properly treat her but followed her own agenda; she failed to refer her out to a proper psychiatrist; misdiagnosed her; prescribed her medications without proper monitoring, etc.

*D argues that:*

- D denied having diagnosed P or memorializing their talks with charts, but D did say that P had anxiety and that she had given her Wellbutron for her depression. (D Depo at 32 and 52).

- D declares that during her time with P they had mutual conversations typical of a couple's relationship, regarding familial issues. (Dec at ¶44). "We each gave the other feedback and relationship advice, but I do not feel we were in a therapeutic relationship." (¶47).

- D says that she suggested to P that therapy with a third party might be beneficial. (Dec at ¶44.)

- D denies ever consenting to treat P, and says that no appointments were ever made. (¶44.)

P's evidence in response to the above:

- P testified that she believed that there was a patient/psychiatrist relationship (p. 26.2)

- D asked P about P's symptoms. (p. 263)

- D would ask P about her childhood, her mom, her dad, her sisters. (p. 263.)

- P said "we would sit down and talk outside of just having a casual conversation." (p. 264.)

- These talks would occur weekly; sometimes every couple of weeks. (Id.)

- They would last under an hour

- The talks were very different than talking over dinner. (p. 268.)

- P "I relied on Kellee solely for like my therapy. She was my sole confidante as far as what I was going through with my family, with friends. I trusted her with symptoms I was having with my medication." (p. 265.)

- P said that D was adamant about P not seeing any other psychiatrist at all. (p. 276.)

- D prescribed P with Zoloft, Xanax, Ambien, Wellbutron (D Depo at 19, 24.)

The court is persuaded that there is a triable issue of fact regarding whether D treated P or not which is a prerequisite to a professional negligence cause of action. P's expert, Dr. Pepper, declares that based on his review of the records, there was a physician-patient relationship between P and D (Dec at ¶18) and that D breached her duty of care to as her therapist. (Dec at ¶80). D objects to much of Pepper's declaration, but his two overall conclusions stated above cannot survive objection and preclude MSA on this COA. Pepper's declaration is sufficient to counter D's moving evidence on this issue, i.e., the declaration of Dr. Paster who opines that there was no doctor/patient relationship and D's conduct was appropriate, and met the standard of care. (Paster Dec at ¶25 and 26.) The court denies the MSA as to the professional negligence COA. There is a triable issue of fact as to the existence of a psychiatrist/patient relationship and whether Defendant met her standard of care in treating Plaintiff.

**15<sup>th</sup> COA - Sexual contact by psychiatrist with a patient** Civ. Code, § 43.93 provides that a "A cause of action against a psychotherapist for sexual contact exists for a patient or former patient for injury caused by sexual contact with the psychotherapist, if the sexual contact occurred under any of the following conditions: (1) During the period the

patient was receiving psychotherapy from the psychotherapist. (2) Within two years following termination of therapy. (3) By means of therapeutic deception.

*P's Allegations* - P and D engaged in a sexual relationship while D was treating P as a patient.

D argues that this cause of action fails because:

- She and P were not in a therapeutic relationship; she was not a patient of D. (*For the reasons previously stated, the court finds this issue to be a material fact in dispute.*)

- Also, though not legally married, they lived as though they were and there is a statutory exception for spouses within a marriage. (*Under §43.93(c), there is an exception for sexual contact between spouses. Specifically, the statute says that "No cause of action shall exist between spouses within a marriage." D is essentially asking the court to treat P and D as spouses even though they were not legally married at the time. Since same sex marriage was not legal until June 2013, D argues, there was no possibility for them to be married for most of their relationship. D does not cite any authority by which a court has determined that same sex partners should be considered "spouses" under the statute. While the spirit of the law might have been intended to protect the type of situation we have here – long term committed relationships involving same-sex couples – the statute seems clear that it is to protect spouses only. The Legislature could have included "long term same sex couples" in (c). Such language would have been amorphous and perhaps not very workable, but still the Legislature did not see fit to carve out from the statute relationships other than 'spousal' relationships.*)

The court denies the MSA as to the 15<sup>th</sup> COA. The court finds that there is a triable issue of fact as to whether there was a psychiatrist/patient relationship during the time that the parties were involved in a sexual relationship.

**7<sup>th</sup> COA - Intentional infliction of emotional distress** - '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " ' " (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001, 25 Cal.Rptr.2d 550, 863 P.2d 795; see *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903, 2 Cal.Rptr.2d 79, 820 P.2d 181.) A defendant's conduct is "outrageous" when it is so " ' "extreme as to exceed all bounds of that usually tolerated in a civilized community." ' " (*Potter*, at p. 1001, 25 Cal.Rptr.2d 550, 863 P.2d 795.) And the defendant's conduct must be " ' "intended to inflict injury or engaged in with the realization that injury will result." ' " (*Ibid.*) *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–51.

**8<sup>th</sup> COA - Negligent infliction of emotional distress**

There is no independent tort of negligent infliction of emotional distress. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 818, citing *Potter v. Firestone Tire & Rubber Co.*, (1993) 6 Cal.4th 965, 984. It is a form of negligence. *Id.* The issue is whether D owed any duty to P.

The court will address the causes of action for intentional and negligent infliction of emotional distress collectively:

*P's Allegations* – D locked P out of their home; fired P; cut off her cell phone; demanded that P take P's name off title; blocked entry to P's home by chain; changed the locks; calling the police to make absurd allegations about her; destroying chickens jointly owned by the parties; refusing to pay office rent leading P to fear eviction; and denying P access to her personal property and animals.

*D argues that these torts fail because:*

- D did not engage in any outrageous conduct; all of her conduct was lawful
- There was no physician patient relationship between D and P.
- Locking P out of the Tico Road property, firing her, suspending her cell phone line, and making a police report on missing property were all lawful actions
- The law cannot allow recovery of damages for such mundane actions related to an interpersonal dispute between romantic partners.
- P has not suffered severe or serious emotional distress
- There is nothing in P's medical records to indicate that she suffered severe or serious emotional distress
- P moved her practice in May 2014 and began a new relationship in September 2014.

In UMF 433, D states that she never intended to cause P any harm; she had spent 10 years with P and her actions were to protect herself against further harm at the hands of someone she trusted. (Dec at ¶43). P simply alleges that D's actions reflect her intent to hurt P. P offers no witnesses who say that D told them that she wanted to harm P, nor any text messages or emails that reflect such intent. P sets out a litany of conduct that she says is indicative of this intent.

See P dec at ¶25. "Intent to harm" is by nature an inferential fact that does not lend itself to objective proof. In this case, the slander and libel causes of action *could* be the outrageous intentional conduct that would support this cause of action. Allegedly, D accused P of being dishonest and of being a thief. See Bikkina v. Mahadevan (2015) 241 Cal.App.4th 70, 89 ("As outlined above, Bikkina has presented a prima case showing of facts sufficient to support his allegations of defamation and intentional infliction of emotional distress.") The court finds that there is a triable issue of fact as to whether D intended harm within the meaning of a IIED cause of action. Therefore, the court denies the MSA as to IIED.

As to P's NIED cause of action, "[t]here is no independent tort of negligent infliction of emotional distress. The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984-985 [citations omitted].) Any potential emotional distress damages suffered by D are subsumed and covered by the professional negligence cause of action. Burgess v. Superior Court (1992) 2 Cal.4th 1064, 1077 ("A plaintiff in a case of medical malpractice may recover damages for emotional distress.") The court grants the MSA as to the NIED cause of action. The only arguable duty here is that stemming from the alleged psychiatrist/client relationship. To the extent that Defendant caused Plaintiff emotional distress, such damages are subsumed into the medical negligence cause of action.

**Punitive Damages** - D argues that there are no facts which support punitive damages. It is unclear which cause of action punitive damages are connected to by P. Regardless, P's evidence in support of punitive damages for any cause of action is wholly lacking. The court grants the MSA on the issue of punitive damages.