

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

QUALITY CARE AMBULANCE  
SERVICE, INC.; QUALITY  
CARE TRANSPORTATION  
SERVICE, INC.; and  
QUALITY CARE OF EAST  
TENNESSEE, INC.,

Debtors.

Nos. 00-22579 through 00-22581  
Chapter 11  
Jointly Administered

QUALITY CARE AMBULANCE  
SERVICE, INC. and  
QUALITY CARE OF EAST  
TENNESSEE, INC.,

Plaintiffs,

vs.

BLUE CROSS/BLUE SHIELD  
OF TENNESSEE, INC.;  
SHARRON FOX; and  
KENT HAMPTON,

Defendants.

Adv. Pro. No. 01-2052

M E M O R A N D U M

APPEARANCES :

G. CHRISTOPHER KELLY, Esq.  
1795 Peachtree Road, N.E., Suite 350  
Atlanta, Georgia 30309  
*Attorney for Plaintiffs*

JOHN H. SINCLAIR, JR., Esq.,  
ARTHUR CROWNOVER, II, Esq.  
OFFICE OF THE ATTORNEY GENERAL  
Post Office Box 20207  
Nashville, Tennessee 37243  
*Attorneys for Sharon Fox and Kent Hampton*

MARK S. DESSAUER, ESQ.  
HUNTER, SMITH & DAVIS, LLP  
Post Office Box 3740  
Kingsport, Tennessee 37664  
*Attorneys for Blue Cross/Blue Shield  
of Tennessee, Inc.*

**MARCIA PHILLIPS PARSONS**  
**UNITED STATES BANKRUPTCY JUDGE**

In this adversary proceeding, the plaintiffs<sup>1</sup> seek damages for "actual breach of contract, tortious interference with a contract and/or tortious interference with business relations," arising out of their contractual agreement to provide non-emergency ambulance transportation services to participants in

---

<sup>1</sup>Although the caption of the complaint lists all three debtors in the jointly administered chapter 11 cases as plaintiffs, the body of the complaint does not. In paragraph 1 of the complaint and in the adversary proceeding cover sheet, only Quality Care Ambulance Service, Inc. and Quality Care of East Tennessee, Inc. are identified as plaintiffs. Similarly, paragraphs 3-10 of the complaint, which discuss the parties in detail, reference only Quality Care Ambulance Service, Inc. and Quality Care of East Tennessee, Inc. No specific mention of Quality Transportation Services, Inc. is made anywhere in the complaint other than in the caption itself. Because of the foregoing, it is not clear to the court that Quality Transportation Services, Inc. is in fact a plaintiff. See, e.g., *Townsend v. Okla. ex rel. Okla. Military Dept.*, 760 F. Supp. 884, 888 (W.D. Okla. 1991) ("In general, the allegations in the body of a complaint, not the names in a caption, determine the parties to a lawsuit."). Nonetheless, because the parties in their various memoranda refer to Quality Transportation Services, Inc. as a plaintiff, the court will also for purposes of this memorandum opinion.

the TennCare program as administered by Blue Cross/Blue Shield of Tennessee, Inc. ("BCBS"). Presently pending before the court are motions for summary judgment filed by the individual defendants and BCBS. For the reasons discussed below, the motions will be granted. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A) and (O).

#### I.

In 1993 the state of Tennessee instituted the TennCare program in place of Medicaid whereby indigent health care was provided through contracts with various insurance companies, including BCBS. In connection with its contractual obligations under the TennCare program, BCBS contracted with the predecessors to plaintiffs Quality Care Ambulance Service, Inc. ("QCAS") and Quality Transportation Services Inc. ("QTS") for non-emergency ambulance transportation services for TennCare participants in certain counties in east Tennessee ("Transporter Agreements"). These transportation services were coordinated by the state of Tennessee's community service agencies ("CSAs"), specifically Northeast Community Service Agency ("NCSA") and East Tennessee Community Service Agency ("ETCSA"). At the time relevant to this lawsuit, defendant Fox was a transportation director of ETCSA and defendant Hampton was a transportation

director of NCSA.<sup>2</sup>

The plaintiffs allege in the complaint filed in this case that the "CSAs ... were to intake calls from or regarding ... patients seeking transportation services and the CSA was to call out a participating ambulance company to provide the needed service," based on which ambulance company had the lowest bid. The plaintiffs allege that even though they had the lowest bid, defendants Fox and Hampton "intentionally rout[ed] calls to companies who did not have the lowest bid and leaving Plaintiff ... out of the loop without just cause." According to the plaintiffs, the individual defendants' actions constitute tortious interference with contract and/or tortious interference with business relations. As to the defendant BCBS, the plaintiffs contend that "the acts, omissions and/or knowledge" of defendants Hampton and Fox are imputed to BCBS "by the doctrine of respondeat superior, agency, and/or Tennessee State common law." Additionally, the plaintiffs allege that "[i]t was understood and agreed that in consideration for submitting the

---

<sup>2</sup>Originally, the named defendants in the action were BCBS, ETCSA, NCSA, Ms. Fox, individually and as transportation director of ETCSA, Wilmetta Williams, individually and as director of NCSA, and Mr. Hampton, individually and as transportation director of NCSA. By order entered April 22, 2002, the court dismissed on the basis of sovereign immunity all claims against ETCSA, NCSA, Wilmetta Williams, both individually and in her official capacity, and Ms. Fox and Mr. Hampton in their official capacities.

lowest bid, the lowest bidding company would get first priority for transportation calls." The plaintiffs allege that BCBS, either itself or through its agents Hampton and Fox, breached this agreement, "which resulted in not giving the appropriate number of transportation calls to Plaintiffs in several counties where Plaintiffs were in fact the lowest bidder."

The motions for summary judgment which are presently before the court were filed by defendants Hampton and Fox on June 25, 2003, and defendant BCBS on August 14, 2003. The plaintiffs have now filed responses to each of the motions. The various issues raised by the parties will be addressed by the court in seriatim.

## II.

Summary judgment is appropriate when there is no genuine issue of material fact, thereby entitling the movant to a judgment as a matter of law....

The "mere possibility" of a factual dispute does not suffice to create a triable case. *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986). To defeat summary judgment, the plaintiff "must come forward with more persuasive evidence to support his claim than would otherwise be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If the defendant successfully demonstrates, after a reasonable period of discovery, that the plaintiff cannot produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his or her case, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When

determining whether to reach this conclusion, [the court must] view the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Williams v. Int'l Paper Co.*, 227 F.3d 706, 710 (6th Cir. 2000); *Smith v. Thornburg*, 136 F.3d 1070, 1074 (6th Cir. 1998).

*Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 566 (6th Cir. 2003).

### III.

BCBS's first contention is that there neither were nor are any written contracts in place between plaintiff Quality Care of East Tennessee, Inc. ("QCET") and BCBS and therefore the complaint fails to state a claim upon which relief can be granted as to that plaintiff. In their response, the plaintiffs concede this point, admitting that the contracts were between BCBS and QCAS and QTS only. Accordingly, BCBS is entitled to summary judgment as to any claim by QCET.

The second issue raised by the parties is whether there is a breach of the contracts that QCAS and QTS had with BCBS. BCBS contends that it is entitled to summary judgment as to these plaintiffs' claim against it for breach of contract because the evidence does not establish that BCBS breached the parties' agreements and because the plaintiffs have failed to submit any

evidence of damages, an essential element of a breach of contract cause of action. BCBS questions plaintiffs' ability to establish such damages since the parties' agreements do not convey any exclusive rights to the plaintiffs. Lastly with respect to the breach of contract issue, BCBS notes that plaintiffs' claims for breach of contract arise out of an alleged oral statement by an employee of BCBS. BCBS contends that this alleged statement may not constitute an independent basis for breach of contract because any verbal representations were merged into the subsequent written agreements between the parties.

The issue of whether there was a breach of contract between BCBS and the plaintiffs is also relevant to defendants Fox and Hampton's summary judgment motion. According to the individual defendants, the existence of a breach of contract is one of the required elements of a tortious interference with a contract cause of action under Tennessee law. Ms. Fox and Mr. Hampton assert that there was no breach of the contracts between BCBS and the plaintiffs in that the contracts neither guaranteed the plaintiffs a certain number of trips nor did they convey any exclusive rights with respect to non-emergency ambulance service. They maintain that absent a breach of contract, they may not be held liable for tortious interference with a contract

and are therefore entitled to summary judgment on this claim.

As noted, it is plaintiffs' position that their contracts with BCBS required the CSAs to "callup" the transportation company with the lowest bid and therefore the contracts were breached when the plaintiffs were not called up since they had the lowest bid. It appears that the lowest-bid requirement is not derived from any provision in the written contracts, but is instead based on a telephone conversation between Randy Roark, a representative of BCBS, and Joe Cerone, president and ambulance service director of QCAS and QTS. According to the deposition testimony of Mr. Cerone tendered in connection with these summary judgment motions, Mr. Cerone, when asked what he recalled about the conversation, stated the following:

Originally we had contracted at one price and we were trying to get a competitive advantage, trying to understand that managed care was supposed to work the way it was supposed to work. I called Mr. Roark and being concerned about competition in our marketplaces we asked him the question, if we have the lowest rate, can we expect to get a lion share of the business, and his response was, yes, we will give you all the business you can handle, or the lowest price service, all they can handle and we will go to the next highest price service.

Well, immediately after that time we amended our rate structure or put our rate structure from \$125 down to \$75 for physician office visits.

It is not clear from Mr. Cerone's deposition testimony when this conversation took place. There are two written agreements

between BCBS and the plaintiffs. The Transporter Agreement between BCBS and QTS's predecessor (Quality Care of Sullivan County)(the "QTS Transporter Agreement") was signed by Mr. Cerone on February 8, 1994, and provides that it is effective as of January 1, 1994. The Transporter Agreement between BCBS and the QCAS's predecessor (Quality Care of Unicoi County)(the "QCAS Transporter Agreement") similarly was effective January 1, 1994, although it was not signed by Mr. Cerone on behalf of Quality Care until March 2, 1994. At his deposition after being questioned about the QTS Transporter Agreement, Mr. Cerone was asked if his conversation with Mr. Roark was before or after January 1, 1994. Mr. Cerone responded, "It was immediately after." Later in his deposition, Mr. Cerone was asked, "Do you recall if your conversation with Mr. Roark occurred before or after you signed the [the QTS Transporter Agreement]? Mr. Cerone responded, "It occurred before because I wouldn't have lowered the prices unless I felt like that we weren't going to get the business. If he hadn't indicated that to me, I wouldn't have done it." It is this latter testimony, that the conversation occurred before Mr. Cerone signed the Transporter Agreements, which BCBS cites as its evidentiary basis for the merger argument, that the phone conversation did not constitute a contract because any representations therein merged in the

subsequently executed written document.

In response to BCBS's summary judgment motion, the plaintiffs filed the affidavit of Joe Cerone, apparently in an attempt to clarify the timing of the conversation with Mr. Roark. Mr. Cerone states in the affidavit the following with regard to this question:

At the beginning of the TennCare program, our companies had to sign Transportation Agreements. We signed this agreement and submitted it with our rate sheets.

Shortly thereafter, I spoke with Randy Roark at Blue Cross about the TennCare program calls and was advised by him that the lowest available bidder for the type of transport needed (ambulance or wheelchair) would get the call, and if the lowest was not available the call would go to the next lowest.

Based on my conversation with Mr. Roark, my companies resubmitted lower bids. We did not re-execute another Transportation Agreement, we just sent in new forms with our new rates. This is what I indicated at my deposition was done after my conversation with Mr. Roark.

It is the plaintiffs' contention that Mr. Cerone's affidavit and deposition testimony establish that the conversation in question occurred after the original execution of the Transporter Agreements and therefore the subsequent verbal agreement stands alone and is not merged into the writings. In this regard, the plaintiffs observe that the written agreements do not require that any changes or additions be made in writing. Alternatively, the plaintiffs argue that even if the alleged

verbal agreement does not stand on its own as a contract, "BCBS should still be held liable for the statements of its employee Roark (and the damages resulting there from) under the theory of fraud in the inducement of contracting."

In its reply to the plaintiffs' response, BCBS states that "[e]ven if one disregards the inconsistency in Mr. Cerone's sworn testimony, the outcome, as advocated by [BCBS], is still the same" based on the terms of the Transporter Agreements themselves. BCBS observes that the rate schedule for each transportation provider is set forth in the "TennCare Schedule of Payments" which is part and parcel of the Transporter Agreements. As set forth in the Transporter Agreements:

1.7 "TennCare Schedule of Payments" means the document(s) attached to and made part of this Agreement which defines the mechanisms on which payments for Transportation Services rendered to TennCare Enrollees are based.

....

6.1 This Agreement, and the TennCare Schedule of Payments, as amended from time to time contain the entire agreement between the parties relating to the rights granted and the obligations assumed by the parties for TennCare Enrollees. Any prior agreements, promises, negotiations or representations, either oral or written, relating to the subject matter of this Agreement not expressly set forth in this Agreement are of no force or effect.

Thus, according to BCBS, because the Transporter Agreements, even if already signed, were not complete until the rate

schedules were attached, the alleged oral statements merged into the written agreements and are therefore unenforceable as an independent agreement. BCBS also responds that the plaintiffs may not now assert a fraud argument if their breach of contract claim fails since fraud was not pled in the complaint.

With respect to the merger question, it appears from Mr. Cerone's deposition and affidavit testimony that after execution of at least one of the Transporter Agreements, Mr. Cerone had the alleged conversation with Mr. Roark and then submitted a new fee schedule in place of the old schedule. From the language of the Transporter Agreements quoted above, the fee schedule is part of the written agreement such that any new schedule created a new, written agreement.<sup>3</sup> Any oral representations by the parties which led to the creation of the new contract were merged into the written agreement.

As stated by the Tennessee Court of Appeals:

The doctrine of merger provides that "the last agreement concerning the same subject matter that has been signed by all parties supersedes all former

---

<sup>3</sup>It appears that the Transporter Agreements tendered in this case in connection with the summary judgment motions are the agreements which went into effect after Mr. Cerone's alleged conversation with Mr. Roark. As noted, according to Mr. Cerone, after the conversation with Mr. Roark, the plaintiffs lowered their rate structure from \$125 to \$75 for one-way physician office visits. The QTS Transporter Agreement provides on page 14 that the Non-ALS Base Rate is \$75, while the QCAS Transporter Agreement lists an \$85 Non-ALS Base Rate.

agreements, and the last contract is the one that embodies the true agreement." *Magnolia Group v. Metro. Dev. & Housing Agency*, 783 S.W.2d 563, 566 (Tenn. Ct. App. 1989). A conclusive presumption that the writing represents the parties' final agreement arises after the parties have reduced their agreement to a clear and unambiguous written contract. *Faithful v. Gardner*, 799 S.W.2d 232, 235 (Tenn. Ct. App. 1990). Consequently, all parol agreements on the same subject matter are deemed merged with the contract as written. *Id.*

*Tipton v. Quinn*, 2001 WL 329530, \*4 (Tenn. App. Sept. 17, 2001). See also *Young v. Cooper*, 203 S.W.2d 376, 383 (Tenn. App. 1947) ("In the absence of mistake or fraud, a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and the whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing.... All verbal agreements made at or before the time of the execution of a contract are to be considered as merged in the written instrument.").

As the plaintiffs concede, the written Transporter Agreements provide no basis for the plaintiffs' assertion that BCBS contractually agreed to give the plaintiffs the first call for non-emergency ambulance services if they had the lowest bid. The Transporter Agreements, which provide for termination by either party upon 60 days' notice, grant plaintiffs neither an exclusive right to calls nor a guaranteed number of calls. The criteria for calling out a transporter is set forth in the

Community Service Agency Transportation Guidelines (the "Guidelines"), which are incorporated and made a part of the Transporter Agreements pursuant to paragraph 3.28. Paragraph 4.3 of the Guidelines states:

[T]he CSA shall assign and authorize each trip ... to a Transporter based on the following criteria:

- a. That the Transporter's service offering is appropriate to the client's need;
- b. That the Transporter is the most cost effective alternative with available capacity to meet the client's needs.

Similarly, paragraph 1.2(c) of the Guidelines provides that the CSAs are to "[a]uthorize and assign approved client trips to the most appropriate and cost efficient contract Transporter." Thus, while the cost is one criterion upon which transporters were to be chosen, it was not the only one.

This reading of the Transporter Agreements is confirmed by the deposition testimony of Christopher Ramsey, senior pharmacy benefit manager for BCBS. When asked what factors determine which ambulance service is called to transport a TennCare enrollee, Mr. Ramsey stated:

There are several factors. One of course meaning if your rates are competitive or is it within the reasonable range. The other factor is do you have the capacity to take the trips. Then also making sure that they can assure that the quality of the service can be rendered as well and the availability. I guess capacity and availability is the same. Not every member requires to be transported by ambulance, so that's something that is a determining factor as well

because not every member who calls and needs to go to the doctor has to be taken via ambulance.

At another point in his deposition, Mr. Ramsey testified that rather than the lowest bid being the determinative factor, the company that was "the most cost effective" would normally be called, which included whether "they [can] perform the trips, are their rates within acceptable ranges ...."

Because any oral statement by a representative of BCBS merged in the written contracts, the Transporter Agreements provide no basis for the assertion that callouts would be based on the lowest bid. And because the lowest bid allegation is the sole basis for plaintiffs' breach of contract claim against BCBS,<sup>4</sup> the plaintiffs have failed to establish a breach of

---

<sup>4</sup>Mr. Cerone did state in his deposition that BCBS had not timely paid some of plaintiffs' claims for transportation services, but observed that this lawsuit does not concern any such claims. It must be noted that although the complaint only asserts a breach of contract based on the alleged lowest-bidder requirement and Mr. Cerone only referenced the failure to comply with the lowest bid requirement when questioned in his deposition as to the basis of its claim against BCBS, the plaintiffs now assert in response to Ms. Fox and Mr. Hampton's summary judgment motion that the individual defendants failed to comply with the Guidelines for calling out transporters as incorporated in the Transporter Agreements. As discussed above, paragraphs 4.3 and 1.2(c) require the CSA to assign a transporter based on which transporter's service offering is most appropriate to the client's needs and most cost effective. As proof that the individual defendants have not complied with these Guidelines, the plaintiffs submitted the affidavit of Janet Morris, who worked as a team leader under Ms. Fox at ETCSA. Ms. Morris states in her affidavit, "At one time Sharron  
(continued...)"

contract by BCBS. Accordingly, BCBS is entitled to summary judgment as to plaintiffs' claims for breach of contract.

This court's conclusion as to the absence of a breach of contract is also determinative of defendants Fox and Hampton's summary judgment motion with respect to plaintiffs' tortious interference with contract claim. As the individual defendants have observed, a breach of contract is an essential element for a tortious interference action. Both common and Tennessee statutory law require a plaintiff to establish the following criteria for a procurement of breach of contract claim:

1. There must be a legal contract.
2. The wrongdoer must have knowledge of the existence of the contract.
3. There must be an intention to induce its breach.
4. The wrongdoer must have acted maliciously.

---

<sup>4</sup>(...continued)

Fox advised ETCSA employees that she did not care if they gave another call to [QCAS]"; "that QCAS was to be called last, only after no other provider could provide the service"; and "I was advised to use Medic One, even though they charged more than what QCAS had been charging."

Because these statements involve only defendant Fox and plaintiff QCAS, they provide no support for any claim by any other plaintiff or against defendant Hampton. More importantly, even if the statements are accepted as true, they do not establish that Ms. Fox failed to call out transporters based on a consideration of the criteria set forth in the Guidelines, which require not only a consideration of cost but also of the client's needs. Accordingly, Ms. Morris' affidavit is insufficient to create an issue of fact as to the breach of contract issue.

5. There must be a breach of the contract.

6. The act complained of must be the proximate cause of the breach of the contract.

7. There must have been damages resulting from the breach of the contract.

*See Buddy Lee Attractions, Inc. v. William Morris Agency, Inc.*, 13 S.W.3d 343, 354-55 (Tenn. App. 1999) (citing 45 AM. JUR. 2D *Interference* §§ 3, 4, 5, 6, 7 & 11); *Dynamic Motel Mgmt., Inc. v. Erwin*, 528 S.W.2d 819, 822 (Tenn. App. 1975); TENN. CODE ANN. § 47-50-109. Absent a breach of contract, there can be no action for procurement or inducement of breach of contract. *Black v. Stulberg*, 1991 WL 83334, \*6 (Tenn. App. May 22, 1991). *See also Winfree v. Educators Credit Union*, 900 S.W.2d 285, 290 (Tenn. 1995) ("A fundamental requirement in sustaining an action for procurement of the breach of a contract is an actual breach."). The court having concluded as a matter of law that there was no breach of contract, plaintiffs' tortious interference with contract claims against the individual defendants must be dismissed.

The last claim asserted by the plaintiffs in this action is against defendants Fox and Hampton for tortious interference with business relations, which the complaint lists as an alternative ground to plaintiffs' tortious interference with contract claim. According to the complaint, Ms. Fox and Mr.

Hampton knew of the contractual obligation that the lowest bidders were to be called out first and knew that plaintiffs had the lowest bid, yet "intentionally and maliciously called out other ambulance companies who had higher bid rates. The failure to call the Plaintiffs constitutes breach of contract and/or tortious interference with contract and/or tortious interference with business relations." The complaint also references defendants Fox and Hampton in connection with its allegations involving the CSAs. As set forth in the complaint, "ETCSA, by its transportation director Sharron Fox, and NECSA, by its transportation director Kent Hampton, had been intentionally routing calls to companies who did not have the lowest bid and leaving Plaintiff QCAS out of the loop without any just cause."<sup>5</sup>

The Tennessee Supreme Court has held that liability should be imposed for tortious interference with a business relationship when the plaintiff can demonstrate the following:

- (1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons;
- (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings

---

<sup>5</sup>Rather than a claim against defendants Fox and Hampton in their individual capacities, this statement appears to be in reference to the claims against ETCSA and NECSA or possibly Ms. Fox and Mr. Hampton in their official capacities. Nonetheless, to the extent that the allegation is a claim against Ms. Fox and Mr. Hampton, individually, the court will consider it for purposes of ruling on the defendants' summary judgment motions.

with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means,... and finally, (5) damages resulting from the tortious interference.

*Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002).

With respect to the fourth requirement, an improper motive or means, the Tennessee Supreme Court has explained:

It is clear that a determination of whether a defendant acted "improperly" or possessed an "improper" motive is dependent on the particular facts and circumstances of a given case, and as a result, a precise, all-encompassing definition of the term "improper" is neither possible nor helpful. However, with regard to improper motive, we require that the plaintiff demonstrate that the defendant's predominant purpose was to injure the plaintiff. See *Leigh Furniture & Carpet Co.*, 657 P.2d at 307-08.

Moreover, in the attempt to provide further guidance, we cite the following methods as some examples of improper interference: those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules, see *id.* at 308; violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship, see *Duggin*, 360 S.E.2d at 836 (citing *Top Serv. Body Shop, Inc.*, 582 P.2d at 1371 n.11); and those methods that violate an established standard of a trade or profession, or otherwise involve unethical conduct, such as sharp dealing, overreaching, or unfair competition, see *id.* at 837.

*Id.* at n.5.

Regarding plaintiffs' tortious interference with a business

relationship claim against them, defendants Fox and Hampton assert that there is no "credible, competent proof that [they] engaged in tortious conduct in order to injure plaintiffs' business." The individual defendants also contend that the plaintiffs have failed to establish that they utilized improper means or motives, as defined by the Tennessee Supreme Court in *Trau-Med*.

Before considering the evidence to ascertain whether a genuine issue of material fact exists as to these matters, a more preliminary matter must be addressed: whether the defendants have stated a claim for tortious interference with business relations. From the court's review of the case law considering this tort, a claim of tortious interference with a business relationship by definition only arises in the absence of a contractual relationship. If the parties' entire relationship is a contractual one and there has been an interference with that contractual relationship, the injured party's claim is for tortious interference with contract, rather than tortious interference with a business relationship. In the *Trau-Med* decision, wherein the Tennessee Supreme Court expressly adopted the tort of intentional interference with business relationships, the court noted:

The relations protected against intentional

interference by the rule stated in this Section include any prospective contractual relations, ... and any other relations leading to potentially profitable contracts.... Also included is interference with a continuing business or other customary relationship not amounting to a formal contract.

*Id.* at n.4 (adopting discussion in comment c of RESTATEMENT (SECOND) OF TORTS § 766B (1979))(emphasis in original).

In *Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC*, 102 S.W.3d 603 (Tenn. App. 2002), the chancery court had dismissed the plaintiffs' inducement of breach of contract action based on the conclusion that no breach of contract had occurred. Upon appeal, after the Tennessee Supreme Court rendered its decision in *Trau-Med*, the plaintiffs argued that notwithstanding the absence of a breach, the defendants may be liable for intentional interference with a business relationship. *Id.* at 609 n.2. The Tennessee Court of Appeals rejected this assertion, remarking that "[t]here does not appear to be anything in the record to indicate a business relationship between the parties outside of the contracts we have been called upon to construe." *Id.*

Similarly, in the instant case, the only business relationship between the plaintiffs and BCBS is the contractual ones which arose out of the Transporter Agreements. If defendants Fox and Hampton improperly interfered with those

relationships, the plaintiffs' cause of action is tortious interference with contract, not tortious interference with a business relationship. There is simply no indication that the Tennessee courts intended the tort of interference with a business relationship to be used as a mere backup or secondary position if the tort of interference with a contract failed due to the absence of one of the required elements of the tort.

Furthermore, even if the two torts were not mutually exclusive in the context of one relationship, the court's conclusion that the absence of a breach of contract precludes a tortious interference with contract claim would similarly be determinative of an interference with business relationship cause of action. If the individual defendants' actions did not result in a breach of the contracts between BCBS and the plaintiffs with resulting damages to the plaintiffs, then likewise there has been no improper interference with the relationship between BCBS and the plaintiffs. In other words, if the relationship between BCBS and the plaintiffs has not been damaged by Ms. Fox and Mr. Hampton, then there is no cause of action against the individuals. Accordingly, defendants Fox and Hampton are entitled to summary judgment as to the plaintiffs' claims for tortious interference with business relationships.

#### IV.

In summary of all of the foregoing, defendant BCBS is entitled to summary judgment as to the allegations in the complaint that it breached its contracts with plaintiffs, and defendants Fox and Hampton will be granted summary judgment as to the torts of interference with contract and business relationships. While this ruling is dispositive of the causes of action set forth in the complaint, it is necessary for the court to address the plaintiffs' contention raised in response to BCBS's summary judgment motion that even if the breach of contract claims fail, the alleged conversation between Messrs. Roark and Cerone provides a basis for a fraud in the inducement claim against BCBS. BCBS's reply to this contention is that the plaintiffs have not pled fraud or in any respect complied with the requirement set forth in Fed. R. Civ. P. 9(b), made applicable to this proceeding by Fed. R. Bankr. P. 7009, that "the circumstances constituting fraud or mistake [are to] be stated with particularity." As stated by BCBS:

There is nothing in the Complaint to place [BCBS] on notice that fraud was ever a theory of recovery being advanced by the plaintiffs. Further, the plaintiffs have not requested to amend their Complaint so as to claim fraud. Thus, the plaintiffs should, therefore, not be allowed to circumvent the pleading requirements of Rule 9[b] and the requirements of Rule 15(a), Fed. R. Civ. P., to defeat [BCBS]'s Motion for Summary Judgment."

In their sur-reply brief, the plaintiffs respond that their failure to plead fraud in the complaint is not fatal because at trial the complaint may be conformed to the evidence where the defendants have been placed on actual notice of the allegations. The plaintiffs also state that a motion to dismiss under Fed. R. Civ. P. 9(b) is the proper vehicle for BCBS to raise this issue rather than a motion for summary judgment and that even then, the plaintiffs would be given an opportunity to cure any deficiencies in the complaint before dismissal would be appropriate.

Fed. R. Civ. P. 15(b) provides in pertinent part:

Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

As noted by one court:

Typically, a litigant seeks to amend under Rule 15(b) after successfully arguing at trial some legal or factual matter that was not officially pled. In the usual case, then, amendment fosters the spirit of the rule: "to bring the pleadings in line with the actual issues upon which the case was tried."

*DRR, L.L.C. v. Sears, Roebuck and Co.*, 171 F.R.D. 162, 165 (D. Del. 1997)(quoting 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶

15.13[2] (2d ed. 1996)).

It is highly questionable whether Rule 15(b) may be utilized in the fashion sought by plaintiffs. The issues in this case have not yet been tried. See, e.g., *Crawford v. Gould*, 56 F.3d 1162, 1168-69 (9th Cir. 1995)(finding Rule 15 did not apply in summary judgment context because it applies only to amendments to conform pleadings to issues actually litigated at trial); *Albanese v. Bergen County, New Jersey*, 991 F. Supp. 410, 421 (D.N.J. 1998) ("Rule 15(b)... is limited to situations where the issue has been tried. [Where] no trial has occurred, ... [the movant] can find no solace in Rule 15(b)."); *United States v. 2001 Honda Accord EX VIN No. 1HGCG22561A035829*, 245 F. Supp.2d 602, 612 (M.D. Penn. 2003)(accord); *Vosgerichian v. Commodore Int'l Ltd.*, 1998 WL 966026, \*3 (E.D. Pa. 1998), *aff'd*, 191 F.3d 446 (3d Cir. 1999)(accord). But see *Breeden v. Bennett (In re Bennett Funding Group, Inc.)*, 220 B.R. 743, 752 (Bankr. N.D.N.Y. 1997)("Rule 15(b) also applies at the summary judgment stage of proceedings."); *Moreno v. Schwartz (In re Schwartz)*, 36 B.R. 355, 357 (Bankr. E.D.N.Y. 1984)("When deciding a motion for summary judgment the court may evaluate not just the issues presently tendered by the pleadings but those which can reasonably be raised in an amended pleading.").

Additionally, even if the court were to find that the issues

raised in this case are being "tried" at this point of the lawsuit because they are being considered in the context of a dispositive motion, there is no indication that the fraud issue asserted by the plaintiffs in response to BCBS's summary judgment motion has been tried by the consent of the parties, either express or implied consent. Clearly, there has been no express consent since BCBS objected to this court's consideration of the fraud issue immediately after it was raised by the plaintiffs. As to implied consent, the Sixth Circuit Court of Appeals has cautioned:

a trial court may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue. Also, evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case.

*Richie v. Short*, 1992 WL 44869, \*3 (6th Cir. 1992)(citing *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992); *MBI Motor Co., Inc. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974)). "The rule does not exist simply 'to allow parties the change theories mid-stream.'" *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 831 (6th Cir. 2000) (quoting *Donald v. Wilson*, 847 F.2d 1191, 1198 (6th Cir. 1988)).

There has been no litigation of the fraud issue in this case and no notice to BCBS, much less notice stated with particularity as required, that a fraud claim is being asserted against it by the plaintiffs. Furthermore, no request has been made by the plaintiffs that the complaint be amended to conform to the evidence and the court is loath to consider the plaintiffs' discussion of Rule 15(b) in their sur-reply brief as such a request. See *Zurich Ins. Co. v. Barnes (In re Barnes)*, 1995 WL 1943274, \*3 (Bankr. M.D. Ga. Jan. 23, 1995) (Because party had not filed a motion to amend its pleadings in conformity with Rule 15, the court refused to construe party's opposition to the motion for partial judgment on the pleadings as a substitute for compliance with Rule 15.). Accordingly, an order will be entered in accordance with this memorandum opinion granting the defendants' motions for summary judgment.

FILED: October 2, 2003

BY THE COURT

---

MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE