STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: October 9, 2014)

OCEAN STATE PHYSICAL THERAPY, INC. and FRANK L. FRAUSTO, JR.	:	
V.	:	**C.A. No. KC-2010-0508**
CHERYL D. PICARD, Alias	:	

DECISION

K. RODGERS, J. A soured business relationship between Plaintiff Frank L. Frausto, Jr. (Frausto or Plaintiff) and Defendant Cheryl D. Picard (Picard or Defendant) is the impetus for the instant action. Plaintiff's Complaint seeks a declaration that Defendant's interest in Ocean State Physical Therapy, Inc. is null and void and/or her interest is limited to the net physical assets of the corporation as of its incorporation date. Defendant's Counterclaim seeks to have this Court enforce an oral agreement for Plaintiff to buy out Defendant's shares in the corporation and alleges various instances of fraud, misrepresentation, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and estoppel, among others.

Following a non-jury trial, this Court requested the parties to submit post-trial briefs. Having reviewed said briefs, this Court will now render its Decision.

Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 9-30-1.

I

Findings of Fact

Upon assessing the credibility of the witnesses, weighing all the evidence presented, and considering the undisputed facts as submitted by the parties, the Court makes the following findings of fact.

Frausto, a licensed physical therapist, and Picard, an administrative assistant, first met while working for Harvard-Pilgrim Health Care (Harvard-Pilgrim) in Warwick, Rhode Island. While there, Picard obtained her license to practice as a physical therapy assistant. At or about the time Harvard-Pilgrim shut its doors in Rhode Island, both parties took jobs with a business known as Atlantic Physical Therapy (Atlantic).

After three or four months at Atlantic, the parties began to discuss the possibility of starting a physical therapy business together. These discussions proved fruitful and, on June 1, 2000, the parties entered into a written partnership agreement under the partnership name Ocean State Physical Therapy. See Joint Ex. 1 at 2. A partnership was formed rather than a corporation following then-counsel's communication with the Rhode Island Department of Health (DOH) Professional Regulations Unit. See id. at 1. The purpose of the partnership was to engage in the business of providing physical therapy services. Under the agreement, each partner was required to contribute $10,000 in cash within ten days of the agreement and then contribute capital to the partnership annually in an amount equal to five percent of that partner's share of the profits from the prior fiscal year. Id. at 2-3. According to the partnership agreement, the partnership was to continue until June 30, 2010. Id. at 2. The parties opened up their business in mid-summer of 2000 in the same building in which Harvard-Pilgrim previously operated and

in what then became known as the Warwick Medical Building. Joint Stmt. of Undisputed Facts ¶ 1.

Shortly after forming the partnership, in September of 2000, Frausto himself contacted Donna Dickerman (Dickerman) of DOH's Professional Regulations Unit to inquire whether a physical therapist and a physical therapist assistant were permitted to form a professional services corporation. Joint Ex. 2; Joint Stmt. of Undisputed Facts ¶ 2. Dickerman's written response to Frausto expressly stated that such a professional services corporation would be precluded under G.L. 1956 § 7-5.1-3[1] because the second individual is not a licensed physical therapist. Joint Ex. 3. In December 2000, Ocean State Physical Therapy, Inc. was incorporated, with Frausto alone assuming all corporate officer positions of President, Vice President, Secretary and Treasurer, and being the sole shareholder. See generally Joint Ex. 4; Joint Stmt. of Undisputed Facts ¶ 3.

In early 2003, as the parties carried on their business as Ocean State Physical Therapy, Inc., they together consulted with an attorney and an accountant to explore the formation of an "S" corporation, notwithstanding DOH's previous position that such an arrangement would be impermissible. Attorney Stephen Brusini (Brusini) advised the parties that his opinion differed from DOH's, inasmuch as he believed that an "S" corporation could be formed with both Frausto and Picard as officers and shareholders because both were licensed by DOH in the practice of physical therapy. Additionally,

[1] Section 7-5.1-3 provides that, "any corporation organized under this chapter may engage in rendering professional services of not more than one of the professions enumerated in § 7-5.1-2, provided that every officer, director, and shareholder of the corporation is an individual authorized to practice the profession and is employed by the corporation in that practice." Sec. 7-5.1-3(a). "Physical therapists" are included among the professions listed in § 7-5.1-2, but physical therapist assistants are not. See § 7-5.1-2(1)(xiii).

according to Frausto, Brusini suggested that, because the Secretary of State's office doesn't look closely at applications and otherwise makes mistakes, an "S" corporation application identifying both Frausto and Picard as officers and shareholders could "slip by." The parties thereafter engaged Brusini to prepare the necessary paperwork, and, on March 7, 2003, Ocean State Physical Therapy, Inc.[2] (OSPT) was incorporated as an "S" corporation. See generally Joint Ex. 6 (closing binder). Picard was named President and Treasurer, Frausto was named Vice President and Secretary, and each party held 100 shares of $1 par value common stock. Id. at 2, 4, 6, 8, 14-16.

Frausto and Picard practiced together amicably for the next seven years, complementing each other's capabilities and talents. Frausto focused on patient treatment, including initial consultations and patient reevaluations every thirty days. Picard obtained, cultivated, and maintained relationships with referring healthcare providers, participated in marketing seminars and/or courses, crafted the budgets, and maintained the books for OSPT. The parties' relationship, however, began to deteriorate in the spring of 2009 when Picard observed that the number of referred patients had decreased. Specifically, Picard noted that referrals from Dr. Steven Rogers were not coming in with the usual frequency. Picard learned that Dr. Rogers would no longer refer patients to OSPT because Frausto had made disparaging remarks to one of Dr. Rogers' patients. Despite Picard's urging, Frausto never reached out to Dr. Rogers to repair the rift. As a result, Dr. Rogers' referrals from 2008 to 2009 dwindled from sixty-three

[2] The name of the original corporation formed in December 2000, with Frausto alone serving in all officer capacities and as sole shareholder, was changed to CDPFLF, Inc., on the date of incorporation of the "S" corporation in order that the new "S" corporation could be named Ocean State Physical Therapy, Inc. See generally Joint Ex. 5; Joint Stmt. of Undisputed Facts ¶ 4.

patients to just nine. See Def.'s Exs. O and P. Picard also became aware in the fall of 2009 that a major healthcare organization, StatCare, had complained that Frausto had disparaged patients referred to OSPT. Like his failing relationship with Dr. Rogers, Frausto did not mend fences with StatCare.

As a result of these complaints regarding Frausto's behavior and comments directed at patients, Picard became concerned for the future of their business. On January 11, 2010, Picard hand-delivered to Frausto a document in which she presented Frausto with three choices: (1) Frausto could buy Picard's half of the business for $250,000; (2) the parties could sell the business to a third party for $250,000; or (3) the parties could sell the assets and dissolve the corporation before the end of the year. Joint Ex. 8. In that letter, Picard also voiced her frustrations with Frausto, noting:

> "I cannot stay in business with you any longer. We obviously have a different mindset as to how a successful physical therapy practice is run. You have done nothing but see patients, and sit in the back and play solitaire. You have ruined key referral providers, alienated patients, and are systematically destroying our company. I have seen patients, done most if not all of the marketing, follow through with billing, do all of payroll, all accounts payable and receivables, all ordering, put-out fires, and do 95% of the cleaning and general keep-up of Ocean State Physical Therapy." Id.

According to Picard, Frausto's response to her written demands was that he could not presently deal with these issues as he was going through a divorce, of which Picard had been aware.

In late January and early February of 2010, the parties engaged in buyout negotiations, including three face-to-face meetings on January 28, February 5, and February 11, 2010. The parties also agreed to utilize the services of the corporation's

counsel, Brusini, to draft necessary documents and its corporate accountant to evaluate the value of the business for the purpose of a buyout. OSPT's corporate accountant determined the buyout value to be $250,000.[3] Frausto, however, believed that, based upon his own internet research, the sale of similar physical therapy practices ranged between just $40,000 and $60,000.

At the final face-to-face meeting on February 11, 2010, the parties authorized Brusini to prepare a Letter of Intent (LOI) for Frausto to purchase Picard's stock in the corporation. Although the buyout amount was set at $125,750, the manner in which that amount would be paid was still to be determined, including partial cash payment and partial financing over four years with an as-yet-determined interest rate; also unresolved were certain adjustments that would be made to the purchase price. The following day, on February 12, 2010, Picard sent an email to her then-counsel and to Brusini, with a copy to Frausto, identifying three areas which she apparently wished to be included in the LOI: that half the purchase price, or $62,875, be paid up front; that she sought reciprocal protection against disparagement by Plaintiff; and that there be a definitive timeline for a closing. Pl.'s Ex. 1.

The LOI was forwarded in draft form from Brusini to each of the parties and their respective counsel on February 25, 2010 and sought comments, questions and changes from the parties. See Pl.'s Ex. 3; Joint Ex. 10. Importantly, the LOI noted:

> "21. Binding and Non-binding Provisions. Except for the binding provisions described below, the parties agree that

[3] No testimony or evidence was presented describing or supporting the manner in which this value was calculated. Additionally, although Picard relied upon such evidence, see Def.'s Post-Trial Mem. at 9, there was no credible evidence or testimony to substantiate that an unidentified, experienced broker of professional corporations had determined that the fair buyout value was between $250,000 and $260,000.

> this Letter of Intent does not create a binding and enforceable contract between the parties and may not be relied on by any party as the basis for a contract by estoppel or otherwise. Rather, this Letter of Intent evidences a non-binding expression of the mutual intent of the parties with respect to the proposed transactions contemplated hereunder. Other than with respect to the binding provisions described in this section, any binding terms and conditions regarding the transactions proposed hereunder shall be set forth in the P&S, which shall be a definitive, written purchase agreement, in form and substance mutually agreeable to Buyer and Seller." Joint Ex. 10 at 7.

The LOI further stated:

> "23. Termination. The parties shall endeavor to enter into the P&S no later than March 5, 2010. If the P&S has not been executed by all parties on or before such date, then the proposal set forth in this Letter of Intent shall at either party's option terminate." Id. at 8.

Picard's last day of work at OSPT was on February 26, 2010. She had been offered other employment which she ultimately accepted.

On March 4, 2010, Picard's then-counsel responded to Brusini by email and attached a red-lined version of the LOI, offering changes, comments and questions throughout the text of the document. See Joint Ex. 10. Picard's position as of March 4, 2010, as documented in her red-lined changes to the LOI, was that she would sell her shares in the corporation to Plaintiff for a lump-sum payment of $125,750 at the time of closing; that she would forego any adjustments based upon accounts receivable; that the closing would take place on or before March 31, 2010; that, regardless of the date of closing, she would be permitted to terminate her employment with OSPT and accept new employment any time after March 5, 2010; and that she sought that the entire LOI be binding upon the parties. Id. at 1-2, 7. On that same day and in response to Picard's red-lined comments, Brusini requested that Frausto and/or his counsel provide comments.

See Pl.'s Ex. 4. Frausto and/or his counsel never responded to the draft LOI dated February 25, 2010 or to Picard's red-lined comments dated March 4, 2010. Additionally, no conversation between Frausto and Picard took place on March 4, 2010.

On Thursday, March 11, 2010, Picard appeared at OSPT with her husband. Although Frausto did not consider it a discussion that they had, he did learn on that date that Picard was seeking to be paid for the previous two weeks by treating such time as vacation pay. On that same day, Picard notified her then-counsel that she had just met with Frausto and requested vacation pay for the previous two weeks that she had not worked at OSPT. Pl.'s Ex. 2. In an email sent to her then-counsel, with a copy to Brusini and Frausto on that same day, Picard stated that she informed Frausto that because they did not have an agreement she would be returning to work on the following Monday. Id. Additionally, Defendant directed her then-counsel that if Frausto failed to respond, then she would seek to call a shareholders' meeting and potentially pursue receivership. Id.

On Tuesday, March 23, 2010, Picard again appeared at OSPT holding a document that purported to seek a shareholder meeting for March 26, 2010. Frausto and Picard did not have any further conversation at that time.

On March 24, 2010, Frausto's counsel sent a letter by facsimile to Brusini.[4] It appears that, for the first time since the buyout negotiations began in January 2010, Frausto questioned whether Picard, as a physical therapy assistant, was eligible to be a shareholder of OSPT and/or employed by OSPT. Id. at 1-2. Additionally, Frausto had

[4] This letter was not introduced as evidence, and therefore it is unknown whether it was also distributed to Defendant and/or her counsel, what it said, and what was attached. No testimony was presented by any witness concerning the contents or attachments of the March 24, 2010 letter from Plaintiff's counsel. The content of that letter can only be gleaned from Brusini's written response dated March 25, 2010. See Joint Ex. 12.

referenced a "grossly exorbitant purchase price," to which Brusini responded that Frausto and/or his counsel must have engaged a qualified valuation expert who made that determination.[5] Id. at 3. Frausto's letter clearly threatened legal action. Id. at 2 (urging Plaintiff's counsel "to hold off on filing any documents with the court" until DOH responded to another request for an opinion on a physical therapy assistant's eligibility to be shareholder in a professional services corporation).

The LOI was never signed, nor was any purchase and sales agreement signed or closing scheduled to take place. Rather, on March 26, 2010, Frausto filed the instant suit requesting that this Court declare (1) that any and all interest of Picard in the corporation be declared null and void based upon her ineligibility to be an officer, director or shareholder in a professional corporation pursuant to § 7-5.1-3; (2) that Picard's interest in the corporation be limited to her portion of the net physical assets as of its incorporation date, March 7, 2003; and (3) that Picard be permanently enjoined from entering the premises of OSPT and interfering with its patients and business operations. Frausto's Complaint was accompanied by an Application for Injunctive Relief and supporting Affidavit executed on March 25, 2010.

Defendant denied all of Plaintiff's claims in her Answer and asserted eleven counterclaims against Plaintiff. Additionally, she filed a Counter-Affidavit in response to Plaintiff's Application for Injunctive Relief. Count One of Picard's Counterclaim seeks to have the Court declare that there was a binding contract between the parties for Frausto to buy out Picard's shares in the corporation for $125,750. Counts Two through Five allege various acts of fraud and misrepresentation through which, Picard alleges, Frausto

[5] No such expert was presented to this Court.

knowingly and negligently misrepresented facts relating to the buyout and the formation of the professional corporation. Counts Six and Seven further allege that such misrepresentations by Frausto constitute a breach of fiduciary duty as well as a breach of the covenant of good faith and fair dealing. Count Eight alleges that Frausto should be estopped from denying that he had a valid buyout contract with Picard. Count Nine requests that if OSPT was invalidly formed, then it should revert back to partnership status and the Court should enforce the buyout contract as it relates to the partnership. Count Ten alleges intentional infliction of emotional distress, and Count Eleven seeks disgorgement of OSPT's assets.

Within days of the filing of this lawsuit, the State of Rhode Island experienced unprecedented rainfall and flooding. The Warwick Medical Building and the surrounding areas suffered significant flooding. OSPT's office space, located in the basement of the Warwick Medical Building, was buried under approximately three feet of water. Patient charts and equipment were damaged or destroyed. Frausto was not able to reopen OSPT for over two months. OSPT had neither flood insurance nor income loss coverage to compensate for such losses. The business ultimately ceased operating in January 2011.

II

Presentation of Witnesses

Plaintiff relied upon his own testimony in his case-in-chief. Defendant presented her own testimony as well as that of Brusini.

This Court notes at the outset that the animosity between the parties was palpable. The testimony and interaction between the parties demonstrated that these former

colleagues have grown to dislike and indeed disrespect what perhaps was originally attractive about the other as a business associate. For instance, Frausto testified that he did not believe that Picard's marketing seminars were useful to the corporation. Picard, on the other hand, built up her marketing efforts and downplayed Frausto's role in the corporation. Notwithstanding the present sentiments toward one another, this Court recognizes that each party brought particular strengths to the business which allowed the business to flourish over several years, at least through 2008. Additionally, this Court notes that the reasons underlying Picard's decision to cease working with Frausto are not germane to the causes of action before this Court, and therefore this Court will not engage in placing blame on either party for the downfall of their business relationship.

This Court further notes that the trial testimony of each party and the evidence before the Court differs from some assertions made in their respective Affidavits that were submitted in the very early stages of this litigation. For instance, Plaintiff attested in his Affidavit executed on March 25, 2010, that when Defendant recently sought to leave OSPT and sell her shares to Plaintiff, he sought counsel, and "[i]t was then that [he] was advised that the Defendant may never have been eligible to be a member of a Professional Corporation, nor eligible to be a shareholder therein." Frausto Aff. ¶ 7 (emphasis added). By stark contrast, Frausto testified at trial that both he and Defendant were aware in 2000 of DOH's position that such a corporation was prohibited as well as Brusini's subsequent legal opinion in 2003, and that the parties agreed to "go for it" by incorporating as an "S" corporation with the hope that it would "slip by" the Office of Secretary of State. Certainly, such a change in the timeline of when Plaintiff became aware of any restrictions imposed on a physical therapy assistant's role in a professional

service corporation—from 2010 to 2000 and 2003—better serves Frausto's defense of the various Counterclaims raised by Picard since his Affidavit was prepared, particularly where Plaintiff's Proposed Findings of Fact and Conclusions of Law now appears to abandon his three-count Complaint.[6] It appears, then, that Frausto will attest under oath as necessary to support the claims he is pressing at the moment.

Picard's trial testimony also conflicts with her own Counter-Affidavit, as well as with the documentary evidence with respect to the date on which she contends the parties reached an oral agreement which she seeks to enforce. In her Counter-Affidavit, executed on March 25, 2010,[7] Picard states that in early March 2010 the parties had reached a tentative agreement, reflected in what was presented before this Court as Joint Ex. 10; that based upon "this agreement," she made arrangements to start a new job as early as March 8, 2010, but that she told Frausto that she would not start in that position unless the parties had an agreement, to which Frausto responded they did have an agreement; and that she understood that "the agreement" would be signed the next day, on March 5, 2010. Picard Aff. ¶¶ 30-32. In her trial testimony, however, she acknowledged that her Counter-Affidavit was erroneous; she now contends that the

[6] Plaintiff urges this Court to defer ruling on Plaintiff's Complaint until after all eleven Counts in Defendant's Counterclaim have been considered. See Pl.'s Proposed Findings of Fact and Conclusions of Law at 7. He thereafter urges this Court to conclude: "Since no real affirmative relief was requested by the Plaintiff, this Court will deny his Complaint without any factual findings" and "enter Judgment for Defendant on all Counts [in Plaintiff's Complaint]." Id. at 13. Short of a dismissal stipulation on these three claims, this Court will decline Plaintiff's invitation and instead will rule upon the Counts that remain pending before this Court.

[7] The Counter-Affidavit contains two dates: March 27, 2010, handwritten in under Picard's signature, and March 25, 2010 as the date it was executed before a notary public. Additionally, the Court file reflects the Counter-Affidavit was filed in open court on March 26, 2010. This Court accepts that the Counter-Affidavit was executed on March 25, 2010 and filed, in executed form, on March 26, 2010.

alleged agreement was reached between the parties in February 2010 at the last face-to-face meeting that was conducted with the parties and Brusini, inter alia, which occurred on February 11, 2010. This Court concludes that neither date is accurate, and therefore no oral agreement, representation or promise can be found to have been made by Frausto. The documentary evidence conclusively demonstrated that, after the last meeting on February 11, 2010, Picard presented several additional terms to Brusini in advance of his preparation and circulation of the LOI, including half the purchase price up front, or $62,875, reciprocal protection against disparagement by Plaintiff, and a definitive timeline for a closing by way of a February 12, 2010 email. Pl.'s Ex. 1. Clearly, these were additional terms Picard proposed, beyond what had been agreed to in person on February 11, 2010. It was not until February 25, 2010, that a draft LOI was circulated by Brusini with a request for comments, questions and changes. Pl.'s Ex. 3. On March 4, 2010, Defendant's then-counsel emailed a red-lined version of the LOI to Brusini, see Pl.'s Ex. 4, which is the draft LOI marked as Joint Ex. 10. That document, too, reveals that Picard offered yet more terms; namely, that the entire purchase price be paid up front in full, that certain adjustments would not be made, that the closing would take place by March 25, 2010, and that the entire LOI would be binding on the parties. Joint Ex. 10 at 1-2, 7.

Neither Plaintiff nor his counsel ever responded to Picard's additional terms in her February 12, 2010 email, on which they were copied, nor did they ever submit comments, questions or changes to the draft LOI. Thus, after February 11, 2010, the last face-to-face meeting of the parties, the terms of the so-called "agreement" were still being introduced by Picard; as of March 4, 2010, Frausto had not responded to the terms set forth on that

same day in Picard's red-lined document; and the parties did not engage in any discussions at all on March 4, 2010. Thus, this Court gives no credence to Picard's trial testimony that the parties had reached their "agreement" at the last meeting on February 11, 2010 or even on March 4, 2010.[8]

In addition to contradictions in the date of the alleged oral agreement set forth in her Counter-Affidavit as compared with her trial testimony, Picard acknowledged on cross-examination that her Counter-Affidavit was also erroneous as it related to her knowledge of the corporate structure. In her Counter-Affidavit, Picard stated that on March 7, 2003, the parties agreed to change their business relationship from a partnership to an "S" corporation for tax purposes. Picard Aff. ¶ 12. When confronted with written communication directed to her attention dated December 18, 2002, and various corporate documents that had been filed in December 2000, see Joint Ex. 4, Picard acknowledged that she had been aware that the business had long ceased being a partnership, that it had been incorporated in late 2000, and that her Counter-Affidavit was incorrect.

On balance, Frausto, while lacking credibility based upon the inconsistencies between his trial testimony and his Affidavit, more accurately identified dates upon which certain discussions took place, which dates were confirmed in one way or another by the documentary evidence before the Court. Picard's recollection of dates, particularly the date upon which the alleged oral agreement was reached with Frausto, lacks all credibility based on the inconsistencies between her testimony, her Counter-

[8] In derivation of Picard's trial testimony that the parties had reached an agreement on February 11, 2010, her counsel continues to argue in her Post-Trial Memorandum Along With Defendant's Request for Findings of Fact and Conclusions of Law—and asks this Court to conclude—that the parties reached an oral agreement on March 4, 2010. See Def.'s Post-Trial Mem. at 19.

Affidavit and the documentary evidence. Based upon the additional terms she demanded in her February 12, 2010 email and the LOI not being circulated until February 25, 2010, it is implausible that she and Frausto had reached an oral agreement on February 11, 2010. Additionally, inasmuch as her own red-lined comments to the LOI were not circulated until March 4, 2010 and no conversation between Frausto and Picard took place on that date, it is equally implausible that they reached an oral agreement on March 4, 2010.

Finally, this Court finds that Brusini was an impartial and credible witness. He testified that Frausto was originally not in agreement with the $250,000 valuation of OSPT in the first couple meetings during the buyout negotiations and that Frausto presented his own number for valuation purposes. He also recalled that Picard had indicated at the February 11, 2010 meeting that she had a job offer, and that she sought assurance that she could accept the position without prejudicing her rights in OSPT. Brusini also testified that he circulated the LOI without red-lined comments on February 25, 2010, and that he received Defendant's red-lined comments from her then-counsel on March 4, 2010. According to Brusini, it was always the intention that the LOI would serve as a prelude to a more specific purchase and sales agreement to be executed by the parties.

This Court concludes that Brusini's recollection of the discussion concerning Picard's new employment opportunity is more credible than Picard's version. While Picard would have this Court believe that Frausto specifically responded that they did indeed have an agreement and that she was free to start her new position, the more credible testimony reveals that the discussion merely centered on her new position not

prejudicing her rights in OSPT.[9] Brusini did not testify that Picard demanded a commitment from Frausto that the buyout terms were agreed upon before she would accept the new employment. This Court gives no credence to Picard's assertion that she only took a new job because Frausto expressly stated that they had a buyout agreement.

III

Standard of Review

In a non-jury trial, the standard of review is governed by Rule 52(a) of the Superior Court Rules of Civil Procedure, which provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, "'the trial justice sits as a trier of fact as well as of law.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" Id. (quoting Hood, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court." McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

[9] At no point did Frausto assert that Picard somehow relinquished her interest in OSPT by taking this alternate job opportunity.

"When rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis and discussion of all the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not "'categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings.'" Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

Although not specifically referenced in his Complaint nor in his Proposed Findings of Fact and Conclusions of Law, Counts I and II of Plaintiff's Complaint appear to seek declaratory relief.[10] The Uniform Declaratory Judgments Act vests this Court with the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. In so doing, the Court strives "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Sec. 9-30-12; see also Capital Props., Inc. v. State, 749 A.2d 1069, 1080 (R.I. 1999) (citations omitted).

[10] Count I seeks a declaration that Defendant's interest in OSPT is null and void based upon her ineligibility to be an officer or shareholder as a physical therapist assistant. Compl., Count I and ¶ 10. Count II seeks a declaration that Defendant's interest is limited to the net physical assets of OSPT as of its incorporation date in March 2003. Compl., Count II and ¶ 15. Count III sought injunctive relief to enjoin Defendant from entering OSPT while this litigation is pending. Compl., Count III and ¶ 18. Count III is moot as the business has ceased operating.

IV

Analysis

A

Whether Picard's Participation as an Officer and Shareholder of OSPT was Illegal and Entitles Frausto to the Relief Sought

Plaintiff's Complaint essentially seeks to freeze Picard out of any ownership interest in OSPT under the auspices that her participation as a shareholder and officer in the corporation was illegal at its inception. Accordingly, this Court must determine whether Rhode Island's Professional Service Corporations statute allows a physical therapist and a physical therapist assistant to engage in a professional service corporation. In doing so, this Court is aware that its ultimate goal is to give effect to the purpose of the act as intended by the legislature. Webster v. Perrotta, 774 A.2d 68, 75 (R.I. 2001); Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987).

Professional corporations of physical therapists are governed by Rhode Island's Professional Service Corporations statute, codified at § 7-5.1-1, et seq. Section 7-5.1-3, entitled "Authority to practice," states that

> "(a) . . . any corporation organized under this chapter may engage in rendering professional services of not more than one of the professions enumerated in § 7-5.1-2, provided that every officer, director, and shareholder of the corporation is an individual authorized to practice the profession and is employed by the corporation in that practice.
>
> "(b) Nothing in these provisions is to be construed to prohibit a corporation organized under this chapter from engaging in the practice of the following combination of professions:
>
> "(1) Physicians, dentists, registered nurses, podiatrists, optometrists, physician assistants, chiropractic physicians,

> physical therapists, psychologists, midwives or nurse-midwives." Sec. 7-5.1-3 (emphasis added).

"Professional services" as used in title 7, chapter 5.1 is defined as "the rendering of personal services by a person authorized to practice as one of the following professions as defined: . . . (xiii) Physical therapists[.]" Sec. 7-5.1-2(1)(xiii). Physical therapist assistant is not included in the list of professions enumerated in § 7-5.1-2(1). Notably, "professional services" is defined to include the professions of both physicians and physician assistants. Sec. 7-5.1-2(1)(i) and (xvii). That same section later defines "authorized to practice" to mean "duly licensed, certified, or registered by the proper regulatory agency." Sec. 7-5.1-2(3).

The Board of Physical Therapy within DOH has promulgated rules for the licensure of physical therapists as well as physical therapist assistants. See generally R5-40-PT/PTA. A physical therapist is defined as "an individual who is licensed by [DOH] to practice physical therapy" while a "physical therapist assistant" is "an individual who is licensed by [DOH] to assist in the practice of physical therapy under the supervision of a physical therapist." R5-40-PT/PTA §§ 1.8-1.9.

In light of the language of § 7-5.1-3, the definitions set forth in § 7-5.1-2, and the rules regulating the licensure of physical therapists and physical therapist assistants, this Court concludes that, in enacting the Professional Service Corporations statute, the legislature did not intend to allow for a physical therapist assistant to serve as an officer, director or shareholder of a professional service corporation with a physical therapist. First, physical therapist assistants are not included within the list of professions set forth in § 7-5.1-2(1). By comparison, the General Assembly expressly included physician assistants in the list of professions which could form a professional services corporation,

and also included physician assistants as among the professions that could be combined with physicians, dentists, registered nurses, podiatrists, optometrists, chiropractors, physical therapists, psychologists, and midwives or nurse-midwives to form a single professional corporation. Secs. 7-5.1-2(1)(xvii) and 7-5.1-3(b)(1). Clearly, then, assistants to physicians have been expressly included within chapter 5.1, but assistants to physical therapists have not.

Second, § 7-5.1-3(a), refers to the rendering of professional services "enumerated in § 7-5.1-2" and requires that every "officer, director, and shareholder of the corporation is an individual authorized to practice the profession[.]" It follows then, that the legislature did not intend to include those who are not authorized to practice a profession listed in § 7-5.1-2 as eligible to serve as an officer, director or shareholder. As the profession of physical therapist assistants is not included within § 7-5.1-2, they cannot be included within the meaning of § 7-5.1-3(a), regardless of whether they are regulated by the same professional licensing board as physical therapists. Additionally, DOH's regulations do not allow physical therapist assistants to engage in the practice of physical therapy without limitation as they must practice under the supervision of a physical therapist. R5-40-PT/PTA § 1.9. Giving a plain reading to the language in § 7-5.1-3, physical therapist assistants, while licensed to practice as physical therapist assistants, are not authorized "to practice the profession" of physical therapy within the meaning of § 7-5.1-3. Accordingly, the incorporation of OSPT with Picard serving as an officer and shareholder violates § 7-5.1-3.

Such a decision does not, however, end this Court's analysis. Picard has raised numerous affirmative defenses, including Frausto's unclean hands and the doctrine of estoppel.

1

Unclean Hands

It is axiomatic that he who comes into equity must come with clean hands. Rodriques v. Santos, 466 A.2d 306, 311 (R.I. 1983). "The equitable doctrine of clean hands expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue." 27Am. Jur. 2d Equity, § 98. In other words,

> "[e]quity will not aid one who consciously invites the wrong complained of. A person cannot aid, encourage, or solicit the commission of a wrong and then complain to equity that he or she has been injured by the same act. Thus, a party may be denied relief where the result induced by his or her conduct will be unconscionable either in the benefit to him- or herself or the injury to others." Id. at § 101.

Frausto's participation in forming the corporation warrants a finding of unclean hands. Frausto himself sought, and was fully aware in September 2000, that DOH's position was that a physical therapist and a physical therapist assistant cannot form a professional corporation with a physical therapist assistant serving as an officer, director and/or shareholder. In response to that information, he initially incorporated with only himself serving as officer and sole shareholder. However, in order to obtain favorable tax advantages and other protections, Frausto later opted to try to "slip by" OSPT's paperwork past the Office of Secretary of State and "go for it" by forming the "S" corporation. Frausto not only consciously invited the wrong complained of, but also

solicited assistance from Brusini and elected to form the "S" corporation with Picard as an officer and shareholder. To now contend that Picard cannot serve as an officer or shareholder, positions that Frausto expressly agreed upon notwithstanding discussions concerning its legality, and deprive Picard of her ownership interest in OSPT is unfair, inequitable and unconscionable on Frausto's part. This Court sitting in equity will not countenance such conduct.

Based upon Frausto's unclean hands, he is not entitled to a finding that Picard's interest in OSPT is null and void. Accordingly, it is Defendant and not Plaintiff who is entitled to judgment on Count I of Plaintiff's Complaint.

2

Estoppel

The Rhode Island Supreme Court has held that "[e]quitable estoppel is 'extraordinary' relief, which 'will not be applied unless the equities clearly [are] balanced in favor of the part[y] seeking relief.'" Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 67 (R.I. 2005) (quoting Southex Exhibitions, Inc. v. R.I. Builders Ass'n, 279 F.3d 94, 104 (1st Cir. 2002)). In order to apply the doctrine of equitable estoppel, this Court must find:

> "'an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and . . . , that such representation or conduct in fact did induce the other to act or fail to act to his injury.'" Id. (quoting Southex Exhibitions, Inc., 279 F.3d at 104).

"The key element of an estoppel is intentionally induced prejudicial reliance." E. Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118 R.I. 559, 568, 376 A.2d 682,

686 (1977) (citing Raymond v. B.I.F. Indus., Inc., 112 R.I. 192, 198-99, 308 A.2d 820, 823 (1973)).

By ignoring all opinions to the contrary and forming OSPT with Picard as an officer and shareholder, Frausto's actions were intended for Picard (and the Office of the Secretary of State) to rely upon the valid formation of the "S" corporation. Picard clearly relied upon such actions by practicing side-by-side with Frausto for approximately seven years and dividing the profits evenly between them. To now seek to deprive Picard of her interest in OSPT is prejudicial. Accordingly, the evidence of record leads this Court to conclude that, in addition to not being entitled to relief due to his unclean hands, Plaintiff is also not entitled to relief on Count I based upon the doctrine of equitable estoppel, and judgment shall enter for Defendant on Count I.

B

Whether Defendant's Interest in OSPT is Limited to Net Physical Assets as of Date of Incorporation

Count II of Plaintiff's Complaint requests this Court to declare that Picard's interest in OSPT be limited to her portion of the net physical assets as of its March 7, 2003 incorporation. In support thereof, Plaintiff alleges that Picard "operated under [Frausto's] guidance as a licensed Physical Therapist throughout her tenure in the employ of [OSPT]" and, "[a]s a result, any goodwill of [OSPT] is the separate property of [Frausto]." Compl. ¶¶ 14-15.

Plaintiff offered no factual or legal support for such relief at trial or in his pre-trial or post-trial submissions to this Court.[11] Thus, he has wholly failed to sustain his burden of proving by a preponderance of the evidence that he is entitled to such relief, and judgment shall enter for Defendant on Count II of Plaintiff's Complaint.

C

Defendant's Counterclaims

Defendant's Counterclaims are largely premised upon two theories: (1) that Frausto agreed or promised to buy out Picard's interest in OSPT for $125,750;[12] and (2) that Frausto induced or misled Picard into incorporating OSPT with Picard serving as officer and shareholder. In evaluating each of the specific counts asserted in her Counterclaim, this Court applies the following conclusions it has reached. First, there was no agreement, promise or representation by Frausto to Picard that their negotiations had concluded and that he would buy out her interest for $125,750. As discussed at length in Section II, supra, this Court wholly rejects Picard's assertion that the parties had reached any sort of agreement on February 11, 2010 or on March 4, 2010, as the terms of the buyout offered by Picard continued to evolve and were never responded to by Frausto. Similarly, this Court rejects Picard's recitation of what was agreed to when she disclosed that she had another job opportunity and instead gives credence to Brusini's

[11] Indeed, in his Proposed Findings of Fact and Conclusions of Law, Plaintiff urges this Court to deny his Complaint without any factual findings and enter judgment for Defendant thereon. See Pl.'s Proposed Findings of Fact and Conclusions of Law at 7.

[12] Contrary to the express allegations throughout her Counterclaim that Frausto had agreed to this buyout amount, Picard's Post-Trial Memorandum fluctuates in referring to the buyout amount as being $125,675, see, e.g., Def.'s Post-Trial Mem. at 12-13, 15, and as $125,750, see, e.g., id. at 3, 10, 19, 20.

testimony that the parties merely agreed that she could accept the position without prejudicing her rights in OSPT.

Second, the change in corporate structure in March 2003 was accomplished with Picard's knowledge and acceptance after the parties had conferred with Brusini. Not only was Picard aware from an earlier written communication in 2002 that the partnership had changed in December 2000 to a corporation with Frausto serving in all offices and as sole shareholder, see Joint Ex. 4, but also Picard had met with Brusini and Frausto in early 2003 to explore the formation of an "S" corporation with Picard serving as an officer and shareholder. At that meeting, the parties discussed with Brusini his opinion as to whether Picard's stake as an officer and shareholder violated § 7-5.1-3 and DOH's previous position conveyed to Frausto in 2000. The parties were fully cognizant of the competing opinions and opted to "go for it" by forming the "S" corporation. Thus, at the time of OSPT's March 2003 incorporation, Picard was aware that an argument existed that she may be ineligible to serve as an officer and/or shareholder in a professional service corporation because she was a physical therapist assistant.

This Court now turns to each of the claims set forth in Defendant's Counterclaim.

1

Counts I and VIII: Breach of Contract and Promissory Estoppel

Picard alleges that she and Frausto had a valid buyout agreement wherein Frausto would buy out Picard's interest in OSPT for $125,750. In the alternative, Picard alleges that she detrimentally relied on the representations and actions of Frausto which led Picard to believe they had a valid buyout agreement.

"'A contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" Lamoureux v. Burrillville Racing Ass'n, 91 R.I. 94, 98, 161 A.2d 213, 215 (1960) (quoting 17 C.J.S. Contracts § 1, p. 310). The Rhode Island Supreme Court has defined promissory estoppel as: "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance[, and therefore] is binding if injustice can be avoided only by enforcement of the promise. Alix v. Alix, 497 A.2d 18, 21 (R.I. 1985). The Court has adopted the following three-element approach to promissory estoppel claims: (1) a clear and unambiguous promise; (2) reasonable and justifiable reliance upon the promise; and (3) detriment to the promisee, caused by his or her reliance on the promise. See Filippi v. Filippi, 818 A.2d 608, 626 (R.I. 2003).

As discussed at length in Section II, supra, this Court wholly rejects Picard's contention that the parties ever reached an oral agreement that Frausto would buy out Picard's interest in OSPT for $125,750, or that Frausto made a clear and unambiguous promise to do the same. There was no agreement reached on February 11, 2010, as Picard testified at trial, nor was there an oral agreement reached or even a conversation between the parties on March 4, 2010, as Picard attested in her March 2010 Counter-Affidavit and as her counsel argued in Defendant's Post-Trial Memorandum. Indeed, the terms of the deal were continuing to evolve, as evidenced by Picard's own February 12, 2010 email to Brusini and her red-lined comments on the draft LOI on March 4, 2010. See Pl.'s Ex. 1; Joint Ex. 10. Picard's efforts to alter the terms of the LOI in her March 4, 2010 red-lined comments, and particularly her request that the "Binding and Non-binding

Provisions" in the draft LOI be made to render the entire LOI binding upon the parties, clearly demonstrate that there had been no meeting of the minds as of March 4, 2010. Joint Ex. 1, ¶ 21.

Also, as evidenced by the draft LOI and Brusini's credible testimony, it was anticipated that the LOI would not create a binding and enforceable contract between the parties nor was it to serve as a basis for a contract by estoppel or otherwise. See Joint Ex. 10, ¶ 21. Instead, the LOI would lead to a more formal written purchase and sale agreement. The LOI was never executed nor was a purchase and sale agreement. Picard cannot now seek enforcement of an oral agreement or promise that not only was not made but also was anticipated by the parties to be non-binding and unenforceable under contract and estoppel principles. Any reliance upon such an agreement or promise was unreasonable and unjustified in light of the non-binding nature of the LOI.

In sum, Picard is not entitled to judgment for breach of contract or promissory estoppel. Judgment shall enter for Plaintiff on Counts I and V of Defendant's Counterclaim.

2

Counts II, III, IV: The Fraud Counts

Picard alleges numerous species of fraud against Frausto. First, Picard alleges that Frausto's representations that he would buy out her interest for $125,750 was made with the false representation to induce her to leave the business. Countercl. ¶ 28. Second, Picard alleges that Frausto fraudulently induced her to change the business from their partnership into a professional corporation. Countercl. ¶ 30. Last, Picard contends

generally in Count IV that Frausto's actions show an intent to deceive and that Picard has relied upon such deception and fraud. Countercl. ¶¶ 32-33.

"To establish a prima facie damages claim in a fraud case, the plaintiff must prove that the defendant 'made a false representation intending thereby to induce plaintiff to rely thereon' and that the plaintiff justifiably relied thereon to his or her damage." Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996) (quoting Cliftex Clothing Co. v. DiSanto, 88 R.I. 338, 344, 148 A.2d 273, 275 (1959)).

In light of the contradictory testimony Picard offered and the documentary evidence, Picard has failed to prove by a preponderance of the evidence that Frausto represented that he would buy her interest for $125,750. Moreover, the non-binding nature of the LOI and the intent to conclude the negotiations with a written purchase and sales agreement renders Picard's reliance upon any such ongoing discussions and negotiations unjustified. Therefore, Picard is not entitled to relief on Count II of her Counterclaim and judgment shall enter for Plaintiff thereon.

With regard to the alleged fraud in inducing Picard to change the business from a partnership to a professional corporation, the evidence does not support such a finding. Indeed, OSPT was changed from a corporation for which Frausto served in all officers' capacities and as sole shareholder to an "S" corporation with Picard serving as officer and shareholder alongside Frausto. The corporate structure with Picard serving as officer and shareholder was not changed from the partnership between Picard and Frausto. Thus, there was not any "inducement" for Picard to change from a partnership to the "S" corporation. Moreover, in light of this Court's findings on Count I of Plaintiff's Complaint denying Frausto's request that Picard's interest in OSPT be declared null and

void, Picard has not been damaged by this change in corporate structure. Thus, Picard has failed to prove the elements of fraud in the inducement and Frausto is entitled to judgment on Count III of Defendant's Counterclaim.

Finally, Picard's general contentions that Frausto's actions show an intent to deceive and that Picard has relied upon such deception and fraud also fall short. Countercl. ¶¶ 32-33. Indeed, Count IV of Defendant's Counterclaim fails to comply with Rule 9(b) of the Superior Court Rules of Civil Procedure requiring that the circumstances constituting fraud be stated with particularity. In any event, to the extent Picard contends that Frausto "created a ruse so that [Picard] would leave the business and accept outside employment" as a basis for this general fraudulent misrepresentation, see Def.'s Post-Trial Mem. at 20, ¶ 31, this Court continues to be unpersuaded in light of Picard's less than credible testimony offered to establish a conversation between the parties, wherein she allegedly stated to Frausto that she would not start her new job unless they had an agreement, and Brusini's credible testimony that the parties merely agreed that she could accept new employment without prejudicing her rights in OSPT. Accordingly, this Court concludes that Picard is not entitled to relief on Count IV of her Counterclaim.

3

Count V: Negligent Misrepresentation

Picard next alleges that Frausto negligently misrepresented material facts as to both buying out Picard's interest in OSPT and in changing the corporate structure. See Countercl. ¶ 36. To succeed on a claim for negligent misrepresentation, Picard must establish the following elements:

> "'(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation,

> must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.'" Zarrella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1257 (R.I. 2003) (quoting Mallette v. Children's Friend and Service, 661 A.2d 67, 69 (R.I. 1995)).

Again, this Court rejects the premise that Frausto made any representations or misrepresentations that he would buy Picard's interest in OSPT for $125,750, as the negotiations from February 11 through March 4, 2010 were ongoing and such negotiations were not intended to be binding upon the parties. Second, as her claim relates to the corporate structure, Picard herself was aware of the same material facts that she claims were misrepresented to her, to wit, that an argument could be made that, pursuant to § 7-5.1-3, she was ineligible to serve as an officer and/or shareholder in a professional service corporation with Frausto. As she was aware of such facts, this Court cannot conclude that Frausto negligently misrepresented those same facts to her. Moreover, in light of this Court's decision on Count I of Plaintiff's Complaint denying him the relief sought, Picard has not been injured by relying on the same facts of which she was originally aware and forming the "S" corporation with Frausto.

For these reasons, then, judgment shall enter for Frausto on Count V of Defendant's Counterclaim.

4

Count VI: Breach of Fiduciary Duty

Next, Picard alleges that Frausto's misrepresentations concerning both buying out Picard's interest in OSPT and in changing the corporate structure constitute a breach of fiduciary duty. Countercl. ¶ 40.

"Under Rhode Island law, to prevail on a breach of fiduciary claim, a plaintiff must establish that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the defendant's breach harmed the plaintiff." Burt v. R.I. Hosp. Trust Nat. Bank, No. PC-2002-2243, 2006 WL 2089254 (R.I. Super. July 26, 2006) (citing A. Teixeira & Co. v. Teixeira, 699 A.2d 1383, 1387 (R.I. 1997)). The Rhode Island Supreme Court has recognized that a "'fiduciary obligation, similar to that imposed upon partners in a partnership, does exist among the shareholders in a small family type of or close corporation.'" Notarantonio, 941 A.2d at 145 (quoting A. Teixeira, 699 A.2d at 1387, 1388 (concluding that a fiduciary duty existed on the "basis of the small number of shareholders in plaintiff corporation, the active participation by these shareholders in management decisions, and their close and intimate working relations")). "If a fiduciary duty is found, such duty 'is one of trust and confidence and imposes the duty on the fiduciary to act with the utmost good faith.'" Id. (quoting Hendrick v. Hendrick, 755 A.2d 784, 789 (R.I. 2000)). Not all close corporations give rise to a fiduciary duty, however, and such a finding can occur only after a fact-intensive inquiry. Id.

Here, the testimony revealed that the parties were the only individuals responsible for the operation of OSPT. They were the sole officers and sole shareholders, and they

had previously served as partners in the same business environment prior to incorporating. This Court concludes that the parties each owed a fiduciary duty to the other to act with the utmost good faith.

The next inquiry is whether Frausto breached the fiduciary duty owed to Picard. Picard contends that Frausto breached his fiduciary duty by "stringing the defendant along to believe that he was going to buy her interest out for $125,750." Def.'s Post-Trial Mem. at 21, ¶ 5. Picard further suggests that had the parties not reached agreement on the value of the corporation, then a petition for dissolution would have been filed by Picard with the court. See Def.'s Post-Trial Mem. at 11-13. Neither of these actions is sufficient in this Court's view to constitute a breach of Frausto's fiduciary duties to Picard. The parties had clearly intended that the negotiations culminate in a signed LOI and, ultimately, in a signed purchase and sales agreement. Indeed, Picard offered a change in the terms of payment through her February 12, 2010 email seeking $62,875 to be paid up front, reciprocal anti-disparagement clauses, and a timeline for the closing, terms which were not previously conveyed to Frausto. See Pl.'s Ex. 1. The negotiations continued up through March 4, 2010 when Picard presented her red-lined comments to the draft LOI, including a lump-sum payment of $125,750 and a request that the "Binding and Non-binding Provisions" section be changed to make the entire LOI binding upon the parties. See Joint Ex. 10 at 1, 7.

Under the facts presented, this Court cannot conclude that Frausto was "stringing the defendant along." While Picard dislikes the end result that the parties could not ultimately reach agreement on the terms of a buyout of her interest in OSPT, the fact remains that her own actions demonstrated that the negotiations were ongoing at least

through March 4, 2010. It would be wholly unfair to conclude that Picard could continue to seek changes to the terms of the buyout while Frausto could not. In any event, Frausto's eventual rejection of Picard's terms is not a breach of his fiduciary duty any more than Picard's efforts in modifying the terms of the buyout were a breach of her fiduciary duty to Frausto.

Defendant's assertion that, but for Picard's reliance on Frausto's alleged agreement to buy her out, she would have filed a petition for dissolution is also unavailing. Picard was bound by OSPT's By-Laws and Articles of Incorporation to offer her shares to the corporation and/or other shareholders, see Joint Ex. 6 at 32, 39,[13] but the corporation and/or its shareholders are not bound to purchase such shares offered. Thus, any petition for dissolution filed with the court would, of necessity, have to follow an offer to the corporation and/or shareholders. Frausto's decision not to purchase Picard's shares in this context cannot be a breach of fiduciary duty where that right was reserved to the corporation and each of its shareholders in the corporate By-Laws and Articles of Incorporation.

Finally, Frausto's involvement in changing the corporate structure was done with Picard's full knowledge and participation. Picard was equally aware of the competing opinions as to whether her role as an officer or shareholder violated § 7-5.1-3, yet agreed to "go for it." While this Court has denied Plaintiff relief on Count I of his Complaint based upon his unclean hands and equitable estoppel, such a finding does not dictate that

[13] Defendant erroneously cites to Joint Ex. 5 as the Addendum to the Articles of Incorporation. See Def.'s Post-Trial Mem. at 12. It is Joint Ex. 6, the OSPT closing binder, that includes both the Addendum to the Articles of Incorporation and the By-Laws. The documents contained therein, however, as reflected on the cover page of the closing binder, do not accurately reflect the arrangement of said documents. See generally Joint Ex. 6.

he is liable to Defendant for breaching his fiduciary duties. Indeed, because this Court denied Plaintiff any relief, Picard has not been harmed by the change in corporate structure.

Accordingly, Plaintiff is entitled to judgment on Count VI of Defendant's Counterclaim.

5

Count VII: Breach of Covenant of Good Faith and Fair Dealing

Picard alleges that Frausto's actions regarding the buyout and transforming the partnership into a corporation breached the covenant of good faith and fair dealing. Countercl. ¶42. "'[V]irtually every contract contains an implied covenant of good faith and fair dealing between the parties.'" Dovenmuehle Mortg., Inc. v. Antonelli, 790 A.2d 1113, 1115 (R.I. 2002) (quoting Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1342 (R.I. 1996)).

Here, as discussed supra, no contract existed between the parties through which Frausto agreed to purchase Picard's interest in OSPT or to change the organization from a partnership to a corporation with Picard serving as an officer and shareholder. Therefore, Picard is not entitled to relief on Count VII of her Counterclaim.

6

Count IV: Reversion to Partnership

Defendant's count seeking to revert the organization to a partnership if it is deemed invalid as a corporation must be denied. First, the "S" corporation was created well after the partnership had been subsumed by a corporation in which Frausto alone served as officer and shareholder. Second, while this Court has concluded that a

professional service corporation in physical therapy bars a physical therapy assistant from serving as an officer, director or shareholder, it has also declined to grant Plaintiff the relief requested based upon the doctrines of unclean hands and equitable estoppel. Accordingly, there is no basis upon which this Court can or will order OSPT to be treated as a partnership.

7

Count X: Intentional Infliction of Emotional Distress

Similarly, there is no basis upon which this Court could find that Defendant is entitled to damages for intentional infliction of emotional distress. It is well-settled that to prevail on her claim for intentional infliction of emotional distress, Picard was required to show: (1) the conduct was intentional or in reckless disregard of the probability of causing emotional distress; (2) the conduct was extreme and outrageous; (3) there is a causal connection between the wrongful conduct and the emotional distress; (4) the emotional distress was severe; and (5) at least some proof of medically established physical symptomology resulting from the alleged improper conduct. Swerdlick v. Koch, 721 A.2d 849, 862-63 (R.I. 1998) (citing Vallinoto v. DiSandro, 688 A.2d 830, 838-40 (R.I. 1997); Clift v. Narragansett Television L.P., 688 A.2d 805, 813 (R.I. 1996); Reilly v. United States, 547 A.2d 894, 898 (R.I. 1988)). Furthermore, "[a party] may not be held liable [for intentional infliction of emotional distress] 'when he has done no more than insist on his legal rights in a permissible way, even though such insistence is likely or even certain to annoy, disturb, or inconvenience [the other] or even cause [the other] to suffer some emotional distress.'" Swerdlick, 721 A.2d at 863 (quoting Champlin v. Washington Trust Co. of Westerly, 478 A.2d 985, 989 (R.I. 1984)).

Here, Picard offered no evidence of any emotional distress that was severe or was supported by any physical symptomology. Additionally, Frausto's conduct was neither extreme nor outrageous. Rather, his decision not to agree to the terms of the buyout was his legal right under the corporation's By-Laws and Articles of Incorporation, which did not mandate that he, as remaining shareholder, was required to purchase Picard's shares when offered to him. Accordingly, Plaintiff is entitled to judgment on Count X of Defendant's Counterclaim.

8

Count XI: Disgorgement

Finally, Picard contends that Frausto wrongfully took over the assets and funds of the corporation and continued to write checks out of corporate funds in violation of the By-Laws and his fiduciary duties. Beyond her contention that Frausto breached his fiduciary duties, which this Court has rejected, see Section IV.C.4, Picard offers no legal or factual support for the relief requested. Indeed, Picard's Post-Trial Memorandum seeks only monetary damages in the amount of $125,750.[14] See Def.'s Post-Trial Mem. at 21-22. Picard is not entitled to such monetary damages, and she appears to have abandoned her claim for disgorgement. Accordingly, judgment shall enter for Plaintiff on Count XI of Defendant's Counterclaim.

[14] Notably, Picard never sought the dissolution of OSPT after Frausto elected not to buy her out, nor did she seek other relief in the event this Court determined that the formation of OSPT was not null and void. While Picard sought certain injunctive relief on her claim of disgorgement, including an order to replace funds that Frausto had transferred from OSPT and an accounting, see Countercl. at 10, such relief clearly was not pressed at trial or in any post-trial submission.

V

Conclusion

For all the reasons set forth herein, judgment shall enter for Defendant on Counts I and II of Plaintiff's Complaint, and Count III seeking injunctive relief is deemed moot as the corporation has ceased operating. Judgment shall enter for Plaintiff on each of the eleven counts in Defendant's Counterclaim.

Counsel for the parties shall confer and submit an appropriate judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Ocean State Physical Therapy, Inc. v. Cheryl D, Picard**
CASE NO:	**C.A. No. KC-2010-0508**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**October 9, 2014**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Dennis J. Tente, Esq.**
For Defendant:	**Edward John Mulligan, Esq.**