

COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO

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BARBARA A. VIGDENBEIN  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OH

**UTTER CONSTRUCTION, LTD.** :  
Plaintiff : **CASE NO. 2017 CVH 00869**  
vs. : **Judge McBride**  
**STEVEN D. TURNER, ET AL.** : **DECISION/ENTRY**  
Defendants :

Stites and Harbison, PLLC, William G. Geisen and Andrew J. Poltorak, counsel for the plaintiff Utter Construction, Inc., 100 East Rivercenter Boulevard, Suite 450, Covington, Kentucky, 41011.

Brennan, Manna, and Diamond LLC, Robert A. Hager, Daniel J. Rudary, and Justin M. Lovdahl, counsel for the defendants Steven D. Turner, American Environmental Group Ltd., and Tetra Tech Inc., 75 East Market Street, Akron, Ohio 44308.

This cause is before the court for consideration of 1) the motion for partial judgment on the pleadings filed by the defendants Steven D. Turner, American Environmental Group Ltd., and Tetra Tech, Inc. on December 5, 2017 and 2) the motion for leave to file a first amended answer to the plaintiff Utter Construction, Inc.'s complaint filed by the defendants on May 10, 2018. The parties waived oral argument on the motion for partial judgment on the pleadings when they did not appear for oral argument on January 19, 2018. The court took the motion under advisement on January 22nd. The parties did not request oral argument on the motion for leave to amend. The court took the motion under advisement on May 29th.

Upon consideration of the motions, the record of the case, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

Utter Construction Inc.'s complaint contains extensive allegations, and therefore the court only includes below those allegations that are relevant to the present motions.

### **THE PLAINTIFF'S ALLEGATIONS**

The plaintiff alleges the following:

The plaintiff is an Ohio company that specializes in providing construction services to the power and energy industry, including civil site development, ash pond installations, and landfill closures.<sup>1</sup> The defendant Steven D. Turner was an employee of the plaintiff from 2008 to 2016.<sup>2</sup> At the time Turner terminated his employment with the plaintiff, his position was Chief Operating Officer (hereinafter referred to as "COO").<sup>3</sup>

The defendant Turner left the plaintiff to work for the defendant American Environmental Group Ltd. (hereinafter referred to as "AEG") as the Vice President of its construction services division.<sup>4</sup> AEG is one of North America's largest suppliers and installers of geosynthetic materials for coal, ash, and landfill containment applications.<sup>5</sup> The defendant Tetra Tech, Inc. (hereinafter referred to as "Tetra Tech") owns AEG as its subsidiary.<sup>6</sup>

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<sup>1</sup> Compl., ¶ 6.

<sup>2</sup> Compl., ¶ 7.

<sup>3</sup> Compl., ¶ 7.

<sup>4</sup> Compl., ¶ 9.

<sup>5</sup> Compl., ¶ 10.

<sup>6</sup> Compl., ¶ 11.

AEG, in collaboration with Tetra Tech, orchestrated a scheme to steal and utilize the plaintiff's employees, confidential information, and/or trade secrets to create a new AEG Construction Services Division to compete directly with the plaintiff.<sup>7</sup>

Turner text messaged some of its key personnel for the purpose of recruiting and soliciting those individuals to leave the plaintiff and join AEG.<sup>8</sup> As a result, the plaintiff's employees left the plaintiff's employ to work for AEG.<sup>9</sup>

During Turner's employment with the plaintiff, he executed a non-competition agreement ("Turner Agreement") on January 30, 2012.<sup>10</sup> Prior to leaving the plaintiff, Turner, with AEG's knowledge, represented that AEG would not self-perform any of the plaintiff's civil construction work or upcoming projects, but would use the plaintiff as a subcontractor for any civil construction work.<sup>11</sup> These promises about having the plaintiff partner with AEG were materially false and were intended to make the plaintiff believe that its interests would be protected if Turner went to work for AEG.<sup>12</sup>

In reliance on Turner's representations, the plaintiff's president met with representatives from AEG, during which the parties agreed to create a Memorandum of Understanding ("MOU Agreement") in which the plaintiff and AEG would partner together.<sup>13</sup> On January 6, 2016, Turner presented a signed MOU Agreement to the plaintiff, drafted by AEG, which provided that neither AEG nor the plaintiff would actively pursue a client of the other without prior notification and discussions with the other

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<sup>7</sup> Compl., ¶ 1.

<sup>8</sup> Compl., ¶ 201.

<sup>9</sup> Compl., ¶ 203.

<sup>10</sup> Compl., ¶ 144.

<sup>11</sup> Compl., ¶¶ 77-78.

<sup>12</sup> Compl., ¶ 82.

<sup>13</sup> Compl., ¶¶ 84-85.

party.<sup>14</sup> On January 8, 2016, Turner terminated his employment with the plaintiff and immediately announced his employment with AEG.<sup>15</sup>

Turner acted with a conscious disregard for his fiduciary duties.<sup>16</sup> As its COO, the plaintiff had placed special trust and confidence in Turner.<sup>17</sup> Turner began working for AEG while still working for the plaintiff and holding himself out as its COO.<sup>18</sup> Turner, while employed by the plaintiff, acted on behalf of an entity with adverse interests to the plaintiff, acted in a manner to benefit himself and harm the plaintiff, directly competed with the plaintiff for business and retention of skilled employees, and usurped and deprived the plaintiff of business opportunities.<sup>19</sup>

In contravention of the terms of the Turner Agreement, Turner, in working for AEG, is directly competing with the plaintiff in Ohio, Kentucky, and Indiana for AEG and Tetra Tech's benefit.<sup>20</sup> Turner breached the Turner Agreement by soliciting the plaintiff's employees to work for AEG.<sup>21</sup> AEG and Tetra Tech knew of Turner's obligations under the agreement before the breaches because the plaintiff notified the defendants of those obligations.<sup>22</sup> AEG and Tetra Tech continued to allow Turner to utilize the plaintiff's confidential information, compete with it, and solicit its employees.<sup>23</sup>

AEG began to violate the MOU agreement immediately after hiring Turner when it pursued the plaintiff's clients with the intent of performing civil construction services

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<sup>14</sup> Compl., ¶¶ 88-90.

<sup>15</sup> Compl., ¶ 46.

<sup>16</sup> Compl., ¶ 2.

<sup>17</sup> Compl., ¶ 166.

<sup>18</sup> Compl., ¶ 92.

<sup>19</sup> Compl., ¶¶ 168-171.

<sup>20</sup> Compl., ¶ 148.

<sup>21</sup> Compl., ¶ 149.

<sup>22</sup> Compl., ¶¶ 150-151.

<sup>23</sup> Compl., ¶ 152.

and recruited the plaintiff's employees to perform civil construction work for projects that Turner learned of from his position with the plaintiff.<sup>24</sup>

Despite the plaintiff's requests that the defendants cease and desist, the defendants have continued to utilize its confidential information and/or trade secrets to steal business opportunities and employees from it with the knowledge that their actions would substantially harm the plaintiff's business relationships and reputation.<sup>25</sup>

### **PROCEDURAL BACKGROUND**

The plaintiff filed its complaint against the defendants on July 14, 2017, including ten causes of action. Only three counts are relevant to the present motion: Count 2 for breach of the non-compete agreement against Turner and AEG; Count 4 for breach of fiduciary duties against Turner; and Count 8 for tortious interference with employment relationships against all defendants.

On September 15, 2017, the defendants filed their answer along with a cross-claim against the plaintiff and a third party complaint against Terry D. Utter, the plaintiff's owner. The plaintiff filed its reply on November 13th.

On December 5th the defendants filed a motion for partial judgment on the pleadings under Civ.R. 12(C) on Counts 2, 4, and 8. The plaintiff filed a memorandum in opposition on December 18th. The defendants filed their reply in support on December 20th. None of the parties appeared for the oral hearing on this matter on January 19, 2018, and the court took it under advisement on January 22nd.

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<sup>24</sup> Compl., ¶¶ 131-132.

<sup>25</sup> Compl., ¶ 4.

On May 10, 2018, the defendants filed a motion for leave to file a first amended answer to the plaintiff's complaint. The plaintiff filed its response in opposition on May 22nd, and the defendants filed their reply in support on May 29th. Neither party requested an oral hearing on the motion, and the court took it under advisement on May 29th.

## **DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

### **I. LEGAL STANDARD**

Civ.R. 12(C) allows any party to move for judgment on the pleadings: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."<sup>26</sup> The Ohio Supreme Court has characterized a Civ.R. 12(C) motion as a " \* \* \* belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted."<sup>27</sup> Unlike a Civ.R. 12(B)(6) motion, however, parties use a motion under Civ.R. 12(C) specifically to resolve legal questions.<sup>28</sup>

Upon a motion for judgment on the pleadings, the trial court must " \* \* \* construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn in favor of the nonmoving party."<sup>29</sup> As such, in determining a motion for judgment

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<sup>26</sup> Civ.R. 12(C).

<sup>27</sup> *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 752 N.E.2d 267 (2001), citing *Nelson v. Pleasant*, 73 Ohio App.3d 479, 482, 597 N.E.2d 1137, 1139 (4th Dist. 1991).

<sup>28</sup> *Whaley*, 92 Ohio St.3d at 581, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569-570, 664 N.E.2d 931 (1996).

<sup>29</sup> *Whaley*, 92 Ohio St.3d at 581, citing *Peterson v. Toedosis*, 34 Ohio St.2d 161, 165-166, N.E.2d 113 (1973).

on the pleadings, the court is “\* \* \* restricted solely to the allegations in the pleadings.”<sup>30</sup> To grant dismissal under Civ.R. 12(C), “\* \* \* it must appear beyond doubt that [the plaintiff] can prove no set of facts warranting the requested relief, after construing all material factual allegations in the complaint and all reasonable inferences therefrom in the [nonmovant’s] favor.”<sup>31</sup>

## II. ANALYSIS

As stated previously, the defendants have moved for partial judgment on the pleadings on three of the plaintiff’s causes of action: Count 2 for breach of the non-compete agreement against AEG only; Count 4 for breach of fiduciary duties against Turner; and Count 8 for tortious interference with employment relationships against all defendants.

In its response, the plaintiff alleges that all of its claims are viable. However, the plaintiff requests that, should the court find otherwise, it have the opportunity to amend its complaint. The defendants’ reply does not address this request.

### A. COUNT 2 – BREACH OF NON-COMPETE AGAINST AEG

The defendants first argue that the plaintiff’s breach of contract claim against AEG for violating the Turner Agreement must be dismissed. They posit that, because AEG was not a party to the contract, it cannot be held liable. In response, the plaintiff

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<sup>30</sup> *Whaley*, 92 Ohio St.3d at 582, quoting *Peterson*, 34 Ohio St.2d at 166.

<sup>31</sup> *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 74, 765 N.E.2d 854 (2002).

argues that AEG is vicariously liable for Turner's breach of the Turner Agreement and that AEG also violated the MOU Agreement. In reply, the defendants highlight that Count 2 makes no mention of the MOU Agreement.

A contract is "generally defined as a promise, or set of promises, actionable upon breach."<sup>32</sup> To prevail on a breach of contract claim, a plaintiff must prove: "(1) the existence of a contract, (2) plaintiff fulfilled its contractual obligations, (3) defendant failed to fulfill its contractual obligations, and (4) plaintiff incurred damages as a result."<sup>33</sup> A plaintiff proves that a defendant has breached a contract by showing the defendant "did not perform one or more of the terms of the contract."<sup>34</sup>

Furthermore, "[a] valid contract must be specific as to its essential terms, such as the identity of the parties to be bound \* \* \*."<sup>35</sup> "Additionally, an enforceable agreement must be mutual and must bind all parties to the contract."<sup>36</sup> The " \* \* \* parties must have a distinct and common intention which is communicated by each party to the other."<sup>37</sup>

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<sup>32</sup> *Artisan Mechanical, Inc. v. Beiser*, 12th Dist. Butler No. CA2010-02-039, 2010-Ohio-5427, ¶ 25.

<sup>33</sup> *Frisby v. Solberg*, 12th Dist. Butler No. CA2015-11-204, 2016-Ohio-7644, ¶ 9, citing *Underwood v. Boeppler*, 12th Dist. Butler No. CA2014-02-055, 2015-Ohio-156, ¶ 13. See *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12 (holding same).

<sup>34</sup> *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 117 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 855, ¶ 24 (10th Dist.), quoting *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 771 N.E.2d 874 (10th Dist. 2002).

<sup>35</sup> *Turner v. Langenbrunner*, 12th Dist. Warren No. CA2003-10-099, 2004-Ohio-2814, ¶ 13, citing *Alligood v. Procter & Gamble Co.*, 72 Ohio App.3d 309, 311, 594 N.E.2d 668 (1991).

<sup>36</sup> *Turner*, 2004-Ohio-2814 at ¶ 13, citing *Fanning v. Insurance Co.*, 37 Ohio St. 339, 343-344 (1881).

<sup>37</sup> *McCarthy v. Lebit, Crystal & Haiman Co., L.P.A. v. First Union Management, Inc.*, 87 Ohio App.3d 613, 620, 622 N.E.2d 1093 (8th Dist. 1993), citing *Noroski v. Fallet*, 2 Ohio St.3d 77, 442 N.W.2d 1302 (1982).

As such, “[i]t is axiomatic that those not a party to a contract cannot be held liable for a breach of contract.”<sup>38</sup>

Moreover, the doctrine of vicarious liability applies in situations involving tortious conduct. In employment situations, an employer is liable for the tortious conduct of its employee through the doctrine of respondeat superior, which is a type of vicarious liability.<sup>39</sup>

In turning to the instant case, the plaintiff has not identified, nor has the court found, case law extending vicarious liability or respondeat superior to causes of action for breaches of contract, as opposed to tort actions. As such, the court finds that AEG cannot be held vicariously liable for Turner’s purported breach of the Turner Agreement.

As to direct liability, the law is clear that one who is not a party to a contract cannot be liable for its breach. AEG is not a party to the Turner Agreement. Therefore, the plaintiff’s Count 2, for breach of contract against AEG, is hereby dismissed.

The plaintiff argues that AEG is liable for breaching the MOU Agreement. However, Count 2 makes no mention of the MOU Agreement. The plaintiff has requested that it be able to amend its complaint to comport with the facts of the case. The defendants have not responded to this request in their reply. For the reasons set

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<sup>38</sup> *Ingle-Barr, Inc. v. E. Local School Dist. Bd.*, 4th Dist. Pike Nos. 10CA808, 10CA809, 2011-Ohio-584, ¶ 9, citing *Cremeans v. Robbins*, 4th Dist. Ross No. 99CA2520 (June 12, 2000).

<sup>39</sup> *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 20, quoting *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (1994). See *Jackson v. Hogeback*, 12th Dist. Butler No. CA2013-10-187, 2014-Ohio-2578, ¶ 24, quoting *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 20 and citing *Goob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 24 (Emphasis added.) (Internal citations omitted.) ([G]enerally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior. \* \* \* In order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of the employment.”).

forth in Section II, below, the plaintiff may amend its complaint to include a cause of action against AEG for its alleged breach of the MOU Agreement.

## **B. COUNT 4 – BREACH OF FIDUCIARY DUTIES AGAINST TURNER**

The defendants next argue that the plaintiff's fourth cause of action, for breach of fiduciary duties against Turner, should be dismissed. They posit that it must be dismissed because, as pled, it is premised on R.C. 1701.641, which went into effect only after Turner left his position with the plaintiff. R.C. 1701.641, which imposes certain fiduciary duties on corporate officers, did not come into effect until July 6, 2016, which is months after Turner left the plaintiff's employ.<sup>40</sup> Statutes are presumed to be “\* \* prospective in nature unless expressly made retrospective.”<sup>41</sup>

The plaintiff does not dispute these principles, nor does it deny that R.C. 1701.641 does not state that it should be applied retrospectively. Instead, it argues that Count 4 is based upon more than R.C. 1701.641 alone, but also upon common law duties placed upon corporate officers, and it cites case law supporting that proposition. It otherwise requests leave to amend its complaint on this count.

“It is well-established that a corporate officer occupies a position of trust in relation to his corporation.”<sup>42</sup> “That the relation between the officers and directors and

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<sup>40</sup> R.C. 1701.641.

<sup>41</sup> R.C. 1.48. See *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 889, ¶ 10, citing *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, paragraph one of the syllabus (“In order to overcome the presumption that a statute applies prospectively, a statute must ‘clearly proclaim’ its retroactive application.”).

<sup>42</sup> *Geygan v. Queen City Grain Co.*, 71 Ohio App. 3d 185, 191, 593 N.E.2d 328 (12th Dist. 1991), quoting *Wing Leasing, Inc. v. M & B Aviation*, 44 Ohio App.3d 178, 181, 542 N.E.2d 671 (10th Dist. 1988).

their corporation and its stockholders is one of trust as to all corporate matters is universally recognized. It is a fiduciary relation.”<sup>43</sup> The defendants do not respond to this argument in their reply.

Because Count 4 relies upon R.C. 1701.641, it is dismissed, as it went into effect after Turner ceased to be a corporate officer for the plaintiff. However, for the reasons set forth in Section II, the plaintiff may amend its complaint to add a common law and/or other statutory claim for breach of fiduciary duty against Turner.

### **C. COUNT 8 – TORTIOUS INTERFERENCE WITH EMPLOYMENT RELATIONSHIPS AGAINST ALL DEFENDANTS**

The defendants argue that the plaintiff’s claim for tortious interference with business relationships must be dismissed because such a cause of action is only viable when the plaintiff is not the employer. In other words, the plaintiff must be the aggrieved employee who had his employment relationship with his employer meddled with by another party.

The plaintiff counters that the plaintiff can be the employer. In its reply, the defendants argue that the plaintiff has conflated the cause of action for tortious interference with a business relationship with the distinct cause of action for tortious interference with an employment relationship.

There are various types of tortious interference causes of action, including tortious interference with a contract, with a business relationship, and with an employment relationship. “The basic principle of a ‘tortious interference’ action is that

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<sup>43</sup> *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 589, 641 N.E.2d 265 (8th Dist. 1994), quoting *Nienaber v. Katz*, 69 Ohio App. 153, 158, 43 N.E.2d 322 (1st Dist. 1942).

one, who is without privilege to do so, induces or purposely causes a third party to discontinue a business relationship with another is liable to the other for the harm caused thereby.”<sup>44</sup>

To begin with the first two varieties of tortious interference, “[t]he torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another.”<sup>45</sup>

The elements of tortious interference with a contract are: “(1) the existence of a contract, (2) the wrongdoer’s knowledge of the contract, (3) the wrongdoer’s intentional procurement of the contract’s breach, (4) lack of justification, and (5) resulting damages.”<sup>46</sup>

By contrast, the elements of tortious interference with a business relationship include: “(1) a business relationship, (2) the tortfeasor’s knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom.”<sup>47</sup>

“The main distinction between tort[i]ous interference with a contractual relationship and tort[i]ous interference with a business relationship is that the

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<sup>44</sup> *Wolf v. McCollough-Hyde Memorial Hosp.*, 67 Ohio Ap.3d 349, 355, 586 N.E.2d 1204 (12th Dist. 1990).

<sup>45</sup> *Ginn v. Stonecreek Dental Care*, 30 N.E.3d 1030, 2015-Ohio-1600, ¶ 11, quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14, 651 N.E.2d 1283 (12th Dist. 1995).

<sup>46</sup> *Fred Siegel Co., L.P.A. v. Arter v. Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999), at paragraph one of the syllabus, citing *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 650 N.E.2d 863 (1995), at paragraph two of the syllabus.

<sup>47</sup> *Knox Machinery, Inc. v. Doosan Machinery, USA, Inc.*, 12th Dist. Warren No. CA2002-03-033, 2002-Ohio-5147, ¶ 22, citing *Geo-Pro Serv., Inc. v. Solar Testing Laboratories, Inc.*, 145 Ohio App.3d 514, 525, 763 N.E.2d 664 (10th Dist. 2001).

interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract.”<sup>48</sup>

On the other hand, tortious interference with an employment relationship involves a separate set of elements, which are found in the case law cited by both parties: “(1) the existence of an employment relationship between plaintiff and the employer; (2) the defendant was aware of the relationship; (3) the defendant intentionally interfered with the relationship; and (4) the plaintiff was injured as a proximate result of the defendant’s acts.”<sup>49</sup>

The Twelfth District Court of Appeals has not yet reviewed a case on tortious interference with an employment relationship, although many other districts have. The plaintiff highlights case law stating that a claim for tortious interference with an employment relationship can be brought against an “outsider,” but although these cases state this principle, they do not actually list the elements for the tort, as the other cases have.<sup>50</sup> In all but one of the other appellate cases that have reviewed the elements for tortious interference with an employment relationship, courts have consistently listed the elements described above.<sup>51</sup> In all of those cases, from the Second, Third, Fifth, Eighth,

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<sup>48</sup> *Ginn*, 2015-Ohio-1600 at ¶ 12, quoting *Ireton v. JTD Realty Invests., L.L.C.*, 12th Dist. Clermont No. CA2010-04-023, 2011-Ohio-670, ¶ 70.

<sup>49</sup> (Emphasis added.) *Hetmanski v. Doe*, 11th Dist. Trumbull No. 2016-T-0123, 2017-Ohio-7220, ¶ 28, citing *Hester v. Case W. Res. Univ.*, 8th Dist. Cuyahoga No. 104415, 2017-Ohio-103, ¶ 37. See *Lanzer v. Louisville*, 2016-Ohio-8071, 75 N.E.3d 752, ¶ 44 (5th Dist.), citing *Costaras v. Dunnerstick*, 9th Dist. Lorain No. 04CA008453, 2004-Ohio-6266 (holding same); *McNett v. Worthington*, 3d Dist. Van Wert No. 15-11-05, 2011-Ohio-5225, ¶ 18, citing *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. No. 86651, 2006-Ohio-2587, ¶ 19 (holding same); *Slyman v. Shipman, Dixon, and Livingston Co., L.P.A.*, 2d Dist. Miami No. 2008-CA-35, ¶ 11, quoting *Lennon*, 2006-Ohio-2587 at ¶ 19 (holding same).

<sup>50</sup> *Definitive Solutions Co., Inc. v. Sliper*, 2016-Ohio-533, 60 N.E.3d 461, ¶ 2 (1st Dist.), citing *Wilson v. Proctor & Gamble*, 1st Dist. Hamilton No. C-970778, 1998 WL 769718, \*4 (Nov. 6, 1998).

<sup>51</sup> The outlier case is *Doyle v. Fairfield Machine Co., Inc.*, 120 Ohio App.3d 192, 697 N.E.2d 667 (11th Dist. 1997). In *Doyle*, the court listed the same elements for the tort of tortious interference

Ninth, and Eleventh District Courts of Appeal, the first element is that there exists an “employment relationship between plaintiff and the employer.” Thus, the first element naturally requires that the plaintiff is not also the employer. Instead, the plaintiff is the employee, the defendant is the tortious actor, and the third party is the employer. Indeed, “\* \* \* there are three players in a tortious interference claim: the plaintiff, the defendant, and a third-party employer.”<sup>52</sup>

In examining the case at bar, the facts the plaintiff has pled are actually more on point with other types of tortious interference causes of action. The plaintiff’s claim for tortious interference with an employment relationship cannot survive because the plaintiff is also the employer, not the aggrieved employee. Therefore, plaintiff’s Count 8, for tortious interference with an employment relationship, is hereby dismissed.

As with its other counts, the plaintiff has requested that it be given the opportunity to amend its complaint to conform Count 8 to the facts of the case. For the reasons stated in Section II, the court finds that the plaintiff may amend its complaint so as to set forth a claim for tortious interference with a business relationship and/or tortious interference with a contract.

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with an employment relationship as the elements for the tort of tortious interference with a contract. *Id.* at 216. In doing so, it quoted the elements from *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863, 866, which was actually a case that involved tortious interference with a contract, not an employment relationship. In quoting it, the Eleventh District Court of Appeals simply used brackets to replace the word “contract” with the words “employment relationship,” so that the elements read as follows: ““(1) the existence of a[n] employment relationship], (2) the wrongdoer’s knowledge of the [employment relationship], (3) the wrongdoer’s intentional procurement of the [termination of the employment relationship], (4) lack of justification, and (5) resulting damages.” *Id.* As a standalone case, and as one that actually quoted the elements for tortious interference with a contract, the court does not find *Doyle* persuasive, especially given the consistency of the holdings in other appellate districts. Furthermore, in a much more recent case from the Eleventh District Court of Appeals in 2017, *Hetmanski v. Doe*, cited above, the appellate court did not quote the elements as stated in *Doyle*, but instead applied the same elements for tortious interference with an employment relationship that all of the other districts apply.

<sup>52</sup> *Lanzer*, 2016-Ohio-8071 at ¶ 45.

**DEFENDANTS' MOTION TO FILE AN AMENDED ANSWER AND PLAINTIFF'S  
REQUEST TO AMEND ITS COMPLAINT**

**I. LEGAL STANDARD**

"Civ.R. 15(A) tells the litigant how and when to amend 'pleadings' \* \* \*."<sup>53</sup> Once 28 days have passed for responsive pleading, a party may request leave of court under Civ.R. 15(A) to amend the complaint.<sup>54</sup> In pertinent part, Civ.R. 15(A) provides:

"A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires. \* \* \*"<sup>55</sup>

The language of Civ.R. 15(A) " \* \* \* favors a liberal amendment policy."<sup>56</sup> Such a policy " \* \* \* provides the maximum opportunity for each claim to be decided on the merits rather than on procedural deficiencies."<sup>57</sup> The court may deny a motion to amend when "there is a showing of bad faith, undue delay, or undue prejudice to the opposing party."<sup>58</sup> However, absent bad faith, undue delay, or undue prejudice, a

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<sup>53</sup> *Hoover v. Sumlin*, 12 Ohio St.3d 1, 4, 465 N.E.2d 377 (1984).

<sup>54</sup> *Scovanner v. Ohio Valley Voices*, 12th Dist. Clermont No. CA2012-01-017, 2012-Ohio-3629, ¶ 27.

<sup>55</sup> Civ.R. 15(A).

<sup>56</sup> *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991).

<sup>57</sup> *Hoover*, 12 Ohio St.3d at 5, citing 6 Wright & Miller, Federal Practice and Procedure (1971) 359, Section 471.

<sup>58</sup> *Deutsche Bank Natl. Trust Co. v. Carter*, 12th Dist. Warren Nos. CA2014-01-001, CA2014-01-010, 2014-Ohio-5193, ¶ 28, quoting *Scovanner*, 2012-Ohio-3629 at ¶ 28.

motion to amend should be granted.<sup>59</sup> Moreover, of these three factors, prejudice to the opposing party is the “most critical factor.”<sup>60</sup>

## II. ANALYSIS

### A. PLAINTIFF’S REQUEST FOR LEAVE TO AMEND COMPLAINT

As discussed in Section I, the court grants the plaintiff leave to amend its complaint to add new causes of action to replace those that the court found unviable as a matter of law. The defendants have not offered an argument as to why the court should not grant the plaintiff leave to amend its complaint to include new causes of action to replace those that the court dismissed.

Significantly, this case is set to start trial on January 6, 2020, and discovery is still ongoing. Thus, the parties still have ample time and are not rapidly approaching the trial date. Moreover, the court cannot identify any bad faith by the plaintiff in requesting leave to amend the complaint to correct its defects at this stage in the litigation. Given the liberal amendment policy in favor of granting motions for leave, the early stage of the instant case, and the absence of bad faith, undue delay, or undue prejudice to the defendants, the court finds that the plaintiff may amend its complaint to add causes of action as discussed in Section I.

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<sup>59</sup> *Simmons v. Am. Pacific Ent., L.L.C.*, 164 Ohio App.3d 763, 2005-Ohio-6957, 843 N.E.2d 1271, ¶ 9 (10th Dist.), quoting *Hoover*, 12 Ohio St.3d at 6.

<sup>60</sup> *Simmons*, 2005-Ohio-6957 at ¶ 9, citing *Frayar Seed, Inc. v. Century 21 Fertilizer & Farm Chem., Inc.*, 51 Ohio App.3d 158, 165, 555 N.E.2d 654 (3d Dist. 1988).

## B. DEFENDANTS' REQUEST FOR LEAVE TO AMEND THEIR ANSWER

In their motion to amend their answer, the defendants have requested leave to assert three additional affirmative defenses: waiver, release, and estoppel. The defendants desire to add these additional affirmative defenses based upon new information they have gleaned in discovery. In response, the plaintiff argues that the motion should not be granted because these defenses are ultimately futile. In reply, the defendants posit that the futility of their affirmative defenses is not a factor for the court to consider and that the plaintiff's futility argument is an issue to be resolved on summary judgment.

Notably, the plaintiff has not claimed that it will suffer prejudice if the court grants the defendants' motion to amend their answer to add three new affirmative defenses. Nor has it argued or presented evidence that the defendants have requested leave based on bad faith or a desire to cause undue delay. As described, the plaintiff rests its opposition on its futility argument.<sup>61</sup>

As with the plaintiff's request to amend, it is likewise true that trial is still over one year away and discovery is ongoing. Moreover, the court cannot identify any bad faith by the defendants in asserting new affirmative defenses at this stage in the litigation. The reason that the defendants are now requesting leave to amend is the recent discovery of new information produced in discovery, and they submitted evidence to

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<sup>61</sup> When the court considers a request to amend a complaint to assert a new *claim*, the plaintiff must make a prima facie showing of support for the new claim. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117, ¶ 20, quoting *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 122. That requirement is meant simply to aid the court in determining whether the new claim is a mere delaying tactic. *Darby*, 2004-Ohio-3720 at ¶ 20, quoting *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 122.

substantiate their new findings. Lastly, the court has given the plaintiff the opportunity to amend its complaint, and as such the court believes it would be unfair not to allow the defendants to do the same with respect to their answer.

Given the liberal amendment policy in favor of granting motions for leave, the early stage of the instant case, and the absence of bad faith, undue delay, or undue prejudice to the plaintiff, the court finds that the defendants may amend their answer.


### **CONCLUSION**

For the foregoing reasons, the court finds:

- (1) The defendants Steven D. Turner, American Environmental Group Ltd., and Tetra Tech Inc.'s motion for partial judgment on the pleadings is well-taken and hereby granted. The plaintiff Utter Construction Inc. has the court's leave to amend its complaint to remedy the flaws discussed above and add new causes of action to replace the ones that have been dismissed. The plaintiff shall file an amended complaint within 14 days from the date of this decision.
- (2) The defendants Steven D. Turner, American Environmental Group Ltd., and Tetra Tech Inc.'s motion to amend their answer to add affirmative defenses is well-taken and hereby granted. The defendants shall file an amended answer within 14 days from the date that the plaintiff files its amended complaint.


IT IS SO ORDERED.

DATED: 8-31-18

  
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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were sent on this 31<sup>st</sup> day of January 2018 by e-mail to William G. Geisen, attorney for the plaintiff, at wgeisen@stites.com, and to Justin M. Lovdahl, at jmlovdahl@bmdllc.com, and Robert A. Hager, at rahager@bmdllc.com, attorneys for the defendants Steven D. Turner, American Environmental Group LTD, and Tetra Tech, Inc.

  
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Judicial Assistant to Judge McBride