DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARMORWORKS ENTERPRISES, LLC., an Arizona limited liability company; ARMORWORKS, INC., an Arizona corporation, Plaintiffs/Appellants, v. THE CAVANAGH LAW FIRM, P.A., an Arizona corporation; CHRISTINA S. HAMILTON and JOHN DOE HAMILTON, a married couple; PETER C. GUILD and JANE DOE GUILD, a married couple, Defendants/Appellees.	No. 1 CA-CV 11-0201 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-014160 and CV 2008-014305 (Consolidated)

The Honorable Sam J. Myers, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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T I M M E R, Judge

¶1 ArmorWorks, Inc. ("AWI") and ArmorWorks Enterprises, LLC ("AWE") (collectively "AW") appeal (1) the trial court's entry of summary judgment in favor of the Cavanagh Law Firm, P.A. ("Cavanagh") and attorney Christina Hamilton (collectively "Cavanagh defendants"), and (2) the denial of requests to amend the complaints to add an abuse-of-process claim. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND[1]

¶2 AWE researches, develops, engineers, and produces "high-tech armor protection for United States military use around the world." Substantially all AWE's revenues are the product of defense contracts with the United States Government.

¶3 Bill Perciballi is the sole shareholder of AWI, which in turn owns a sixty percent membership interest in AWE. The remaining forty percent interest in AWE is held by C Squared

[1] We view the evidence and all legitimate inferences in the light most favorable to AW as the parties against which summary judgment was entered. *Walk v. Ring*, 202 Ariz. 310, 312, ¶ 3, 44 P.3d 990, 992 (2002).

Capital Partners, L.L.C. ("C Squared"), which is an investment vehicle for Tim and Eric Crown. Bill is the manager of AWE and under an oral operating agreement, he controls all day-to-day operations of the company while C Squared serves as a passive investment owner. AWE is careful to maintain Bill's majority control via AWI and its management structure to preserve the integrity of security clearances and licenses issued to Bill and used for AWE and to maintain AWE's veteran-owned and small business statuses, which favor AWE under the federal procurement code.

¶4 In October 2004, on the Crowns' recommendation, AWE retained Goldman, Sachs & Co. ("Goldman") to serve as AWE's exclusive financial advisor in any sale of all or part of AWE. Under the terms of the arrangement (the "Goldman Agreement"), Goldman, among other things, would search for an acceptable purchaser, coordinate visits with potential purchasers, and assist in negotiating the terms of any sale. AWE and Goldman worked together to draft an offering memorandum for AWE, which was completed by October 2005. But because of business setbacks commencing around that time, which resulted in litigation with a third party, AWE and Goldman postponed the sales process until resolution of these matters. By October 2007, AWE was again ready for sale, and AWE and Goldman re-commenced the sales process.

¶5 In April 2006, Amy Perciballi filed for dissolution of her marriage to Bill. On December 17, 2007, pursuant to Arizona Rule of Family Law Procedure ("Rule") 69, Bill and Amy entered in a binding agreement to resolve division of the stock in AWI, which was the community's largest asset. At the time of the agreement, according to renewed planning discussions between AWE and Goldman, AWE was poised for a May or June 2008 sales process launch. Under the terms of the Rule 69 Agreement, among other things, Amy would be granted a fifty percent inchoate interest in AWI secured by a promissory note, while the AWI stock would remain in Bill's name to maintain the company's contractual relationships, marketability, and federal procurement preferences. Bill had two years within which to sell or recapitalize AWE.[2] At the end of that period, either party had the option to buy out the other after an appraisal. In the meantime, Amy was entitled to have a representative receive and review information concerning the operation, revenue, and sale of AWE to monitor her interest. The parties agreed to reduce this agreement to a written document after negotiating finer details.

[2] This period was subsequently extended because of market conditions in 2008. For ease of reference, we refer to the sales period granted in the Rule 69 Agreement as the "two-year period."

¶6 Matters quickly deteriorated. Documentation efforts stalled and Bill did not provide Amy information relating to the marketing and sale of AWE. Amy and her attorney, Christina Hamilton, became increasingly concerned Bill was not actively marketing AWE and was trying to renege on the Rule 69 Agreement. While continuing to urge Bill to comply with the agreement, they also explored alternative ways for Amy to liquidate her interest in AWI.

¶7 In April 2008, Hamilton engaged in discussions with Tim Crown, a member of C Squared, about the possibility of banding together to sell their respective interests in AWI and AWE. During these discussions, Tim told Hamilton that Goldman was interested in obtaining majority control of AW through a joint purchase of Amy's shares of AWI and the Crowns' membership interest in AWE. Tim recommended that Amy attempt to convert her inchoate community property interest in AWI into transferable title ownership in order to facilitate such a transaction. Hamilton responded that if Bill was willing to buy Amy's AWI shares at an amount equivalent to a sales price, a new proposal made by Bill, Hamilton was "not sure [she could] get Amy out of it." She further stated she would proceed with her plan to seek a receiver to monitor sales efforts to keep Bill in compliance with the obligation to market AWE and noted this may

"be a way to push Bill into the Goldman sales camp." Finally, she expressed doubt about the ability to separate Amy's shares.

¶8 On April 29, Hamilton filed a motion with the family court asking it to appoint either a special master or a receiver to monitor the marketing process through Goldman and report to the court to ensure Bill was actively trying to sell AWE. Alternatively, if Bill indicated an inability to fulfill the terms of the Rule 69 Agreement, Hamilton asked the court to set aside the relevant part of the Rule 69 Agreement, award Amy her shares of AWI, and order a special master or receiver to sell AWI and then divide the proceeds equally between Bill and Amy. Hamilton subsequently withdrew the motion after learning an AWI receivership could hamper efforts to sell AWE and after receiving Bill's promises to perform the Rule 69 Agreement.

¶9 On May 27, Bill's attorney, Charles Hallam, provided Hamilton with a proposed written agreement embodying the Rule 69 Agreement and simultaneously asked her to stop contacting the Crowns and Goldman. Hamilton did not comply with the request, and the parties were unable to resolve matters.

¶10 On June 17, AWE initiated this lawsuit against Hamilton and her law firm alleging Hamilton tortiously interfered with AWE contracts and business expectancies and

seeking injunctive relief.[3] The Cavanagh defendants subsequently moved for summary judgment, which the trial court eventually granted after a protracted briefing period. While the motion was pending, AWI successfully intervened with a similar complaint but also sought monetary damages. Both AWE and AWI then moved for leave to amend their complaints to add claims for abuse of process. The court never explicitly ruled on the motions to amend, and they were denied by operation of law upon entry of final judgment. *Atchison, Topeka & Santa Fe Ry. Co. v. Parr*, 96 Ariz. 13, 15, 391 P.2d 575, 577 (1964). This timely appeal followed.

DISCUSSION

I. Summary judgment

¶11 The trial court properly granted summary judgment if "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing the court's ruling, we determine de novo whether any disputed issues of material fact exist and whether the trial court properly applied the law. *Best Choice Fund, LLC v. Low & Childers, P.C.*, 624 Ariz. Adv. Rep. 24, ¶ 10 (App. Jan. 6, 2012) (as amended). We view the

[3] On June 12, Bill filed a similar complaint against the Cavanagh defendants and Amy, but the court later dismissed the complaint on the defendants' motion. The propriety of that ruling is not before us.

facts and inferences arising from them in the light most favorable to AW as the parties against which judgment was entered. *Id*. We will affirm if the court was correct for any reason. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

¶12 To establish a prima facie case for tortious interference with contract or business expectancies, the plaintiff must establish:

> (1) Existence of a valid contractual relationship, (2) knowledge of the relationship on the part of the interferor, (3) intentional interference inducing or causing a breach, (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly.

Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund, 201 Ariz. 474, 493, ¶ 74, 38 P.3d 12, 31 (2002) (citing Restatement (Second) of Torts ("Restatement") § 766 (1979)). The Cavanagh defendants argued AW could not prove the third and fifth elements, and they were therefore entitled to summary judgment. The trial court granted the motion without explaining the basis for its ruling. We address the bases urged for the motion in turn.

A. Actual interference

¶13 To prevail on its claim, AW is required to show Hamilton actually interfered with an AW contract or business

expectancy. *Stingley v. Arizona*, 796 F. Supp. 424, 430 (D. Ariz. 1992) (granting summary judgment for defendant on interference claim because plaintiff "fail[ed] to point to any evidence that [defendant] succeeded in interfering"); *see also Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 386, 710 P.2d 1025, 1041 (1985) (superseded by statute not relevant to this case). AW does not have to prove termination of a contract but is required to demonstrate how the interference caused AW to lose a right under the contract. *Snow v. W. Sav. & Loan Ass'n*, 152 Ariz. 27, 34, 730 P.2d 204, 212 (1986) (citing Restatement § 766); *Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 316, 812 P.2d 1129, 1134 (App. 1991) (citing Restatement § 766A) (recognizing interference occurs when defendant prevents party to contract from performing or causing performance to be more expensive or burdensome); *Bar J Bar Cattle Co. v. Pace*, 158 Ariz. 481, 483, 763 P.2d 545, 547 (App. 1988) (holding no requirement to show breach of contract to prove interference as long as actions otherwise caused harm).

¶14 AW argues that disputed issues of material fact exist whether Hamilton actually interfered with (1) AWE's oral operating agreement, (2) various procurement contracts with the United States Government, and (3) the Goldman Agreement.[4]

[4] The Cavanagh defendants also moved for summary judgment on AW's claim that Hamilton tortiously interfered with a Chase Bank loan

1. Oral operating agreement

¶15 AW contends Hamilton interfered with the oral operating agreement by attempting to make Tim a "de facto manager for AWE" when she worked with him to sell AWE and convert Goldman from a broker to a buyer. According to AW, Tim's assumption of an active role violated the operating agreement. But the terms of the operating agreement concerned the day-to-day management of AWE. AW fails to provide any evidence that Tim's discussions with either Hamilton or Goldman affected AWE's operations or deprived AW of any rights under the operating agreement. Also, Tim's discussions with Hamilton and Goldman centered on the sale of *C Squared's* interest in AWE and Amy's interest in AWI – not the sale of AWE or its assets. The operating agreement does not prohibit Tim or C Squared from negotiating for sale of C Squared's interest in AWE even if the sale would have negatively impacted AWE. In sum, AW failed to provide evidence that Bill's right to manage the day-to-day operations of AWE was adversely affected by Hamilton's actions, and the trial court properly entered summary judgment on AW's

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agreement. Although AW contested the propriety of summary judgment concerning that agreement before the trial court, they do not do so on appeal. Consequently, AW has waived any challenge to the entry of summary judgment on the tortious interference claim to the extent it concerns the Chase Bank loan agreement. *See Skousen v. Nidy*, 90 Ariz. 215, 217, 367 P.2d 248, 249 (1961) (a party who fails to present argument or authority to support a claim of error waives that claim).

claim Hamilton tortiously interfered with the oral operating agreement. *See Stingley*, 796 F. Supp. at 430.

2. Government contracts

¶16 AW argues Hamilton's actions interfered with AWE's government contracts by "threaten[ing] to divest [Bill] of a controlling interest in AWE . . . [which] would defeat AWE's veteran-owned business status, jeopardizing the contracts awarded to AWE pursuant to set-asides for veteran-owned businesses." But, as explained previously, *see supra* ¶ 13, AW is required to show deprivation of some right under these contracts. *Snow*, 152 Ariz. at 34, 730 P.2d at 212. In their briefs, AW does not point to a single contract or potential contract in which AWE's rights have been adversely affected as a result of Hamilton's actions. The *potential* for deprivation of a right is insufficient to sustain a tortious interference claim.[5] *Id*. The trial court properly entered summary judgment

[5] At his deposition, Bill testified he believed AWE lost a bid for a government body armor contract due to increased scrutiny of AWE caused by his divorce and doubts about future management of AWE in light of the motion for special master/receiver. He admitted, however, that the contract was sought by multiple bidders and the government stated AWE's bid was insufficient due to performance standards and "some ballistic problem." No indication is given AWE lost the bidding due to any action taken by Hamilton. AW's speculation about events is insufficient to prove actual interference. *See United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990) (noting mere speculation as to facts will not suffice to defeat summary judgment).

on AW's claim that Hamilton tortiously interfered with AWE's government contracts.

3. Goldman Agreement

¶17 AW asserts Hamilton's actions interfered with the Goldman Agreement by causing Goldman to neglect its obligations under that Agreement in order to explore purchasing or investing in AWE. The Cavanagh defendants respond that insufficient evidence of interference exists because Hamilton never communicated with Goldman and Goldman continued to operate under the Agreement. We agree with AW.

¶18 At the time Bill and Amy entered in the Rule 69 Agreement, AWE and Goldman were gearing up to sell AWE. Both Bill and Tim believed that AWE's financial performance leading up to the first quarter of 2008 had made the company very marketable. Indeed, by the first financial quarter of 2008, AWE had recovered from any financial losses and "had substantially exceeded AWE's and Goldman Sachs' projections." A time table prepared by Goldman projected AWE would be positioned for a May or June 2008 sales process launch.

¶19 In April 2008, just four months after creation of the Rule 69 Agreement, Hamilton entered discussions with Tim about the possibility of selling Amy's and C Squared's respective interests in AWI and AWE to Goldman. Hamilton denies ever communicating directly with Goldman. But according to Bill, she

admitted doing so during a May 8 meeting with Bill, Hallam, and Hamilton's law partner. Specifically, Bill avows Hamilton said she had personally discussed with a Goldman representative, whom she refused to identify, Goldman's interest in purchasing Amy's and C Squared's interests and other matters related to the prospective sale of AWE.[6]

¶20 Days after the May 8 meeting, Goldman surprised AWE by expressing interest in directly purchasing or investing in AWE rather than continuing to market AWE, and asked whether AWE would release it from the Goldman Agreement. AWE refused the request. During the subsequent two-month period, Goldman "was non-responsive to [Bill's] requests for meetings and for the launch of the AWE sales process."[7] By Fall 2008, the market had experienced a downturn, which caused AWE to lose significant value. In August 2009, AWE notified Goldman of its position that Goldman had constructively terminated the Goldman Agreement by failing to perform.

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[6] An affidavit submitted by Hallam is more opaque, stating Hamilton "represented and stated that Goldman Sachs had expressed an interest in acquiring [Amy's] and/or the Crowns' interest in ArmorWorks" and then refused to disclose her source of information. Hallam never directly avowed that Hamilton said she had spoken with a Goldman representative.

[7] The Cavanagh defendants point to a May 14, 2008 email written by Bill and reflecting Goldman's enthusiasm for its relationship with AWE as evidence no disruption occurred in their relationship. In light of other evidence reflecting a rift, however, this email merely creates an issue for resolution by a fact-finder.

¶21 The above-described evidence would allow a reasonable fact-finder to find that Hamilton's pursuit of a plan to sell Amy's interest in conjunction with C Squared's interest to Goldman induced Goldman to abandon its responsibilities to market AWE during a favorable sales period and, instead, explore furthering its own interests by purchasing or investing in AWE. Because it would have been more advantageous for Goldman to drive down the price of AWE or its membership interests if Goldman was the purchaser, a fact-finder could conclude Goldman acted, at least for a short time, at odds with AWE's interests. Alternatively, a fact-finder could conclude Goldman took no action in furtherance of the Goldman Agreement during a beneficial sales period because it chose to pursue its own interests. Consequently, because a fact-finder could find that AWE was deprived of its interests in the Goldman Agreement by Hamilton's actions, sufficient evidence exists that Hamilton actually interfered with that Agreement. *Snow*, 152 Ariz. at 34, 730 P.2d at 212.

¶22 In summary, insufficient evidence exists that Hamilton actually interfered with the operating agreement and government contracts, and the trial court correctly entered summary judgment in favor of the Cavanagh defendants on those claims. Because sufficient evidence exists that Hamilton actually interfered with the Goldman Agreement, the propriety of summary

judgment concerning that Agreement turns on whether sufficient evidence exists for a reasonable fact-finder to conclude Hamilton intended to interfere and that she did so improperly.

B. Intent to interfere

¶23 To prevail on their claim, AW must demonstrate Hamilton intended to interfere with the Goldman Agreement or knew her conduct would be substantially certain to interfere with that Agreement. *Snow*, 152 Ariz. at 33, 730 P.2d at 211; Restatement § 766 cmt. j. "Intent" focuses on the mental state of the actor, *Neonatology Assocs. v. Phoenix Perinatal Assocs.*, 216 Ariz. 185, 188, ¶ 8, 164 P.3d 691, 694 (App. 2007), and is ordinarily a factual question. *Snow*, 152 Ariz. at 33, 730 P.2d at 211.

¶24 AW argues it demonstrated Hamilton knew her actions were "substantially certain" to result in interference by providing evidence from which a reasonable fact-finder could find interference was a "necessary consequence" of her actions. *Id*. at 34, 730 P.2d at 212 (holding liability attached for interferences "'incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action.'") (citing Restatement § 766 cmt. j). The Cavanagh defendants counter that Hamilton's sole intent in speaking with Tim and filing the motion for appointment of a special master/receiver was to protect and promote Amy's interest. And

because she had no intent to harm AWE, which also would have harmed Amy's interest, and she engaged in only limited conduct, a reasonable fact-finder could not find she knew her actions were substantially certain to result in interference. Viewing the evidence in the light most favorable to AW, we agree with AW.

¶25 A reasonable fact-finder could find that although Hamilton was motivated by a desire to represent, promote, and preserve Amy's interest in AWI, she knew discussions with Goldman to purchase her interest would create a conflict with Goldman's contractual obligation to serve AWE's interests to secure a purchaser for AWE for the highest price possible. Hamilton does not dispute she knew about the Goldman Agreement; Tim's initial email to her stated Goldman was "retained to sell Armorworks and [has] been for . . . several years." A fact-finder could conclude an educated attorney would know Goldman could not secure the highest price for the sale of AWE while simultaneously seeking to purchase for itself less than all membership interests in AWE, presumably for the lowest price possible, making Goldman's withdrawal from the Goldman Agreement "substantially certain" in order to avoid the conflict of interest. For this reason, we decide AW proffered sufficient evidence that Hamilton intended to interfere with the Goldman Agreement.

C. Improper acts

¶26 The final hurdle AW must clear to avoid entry of summary judgment is the most problematic – producing sufficient evidence that Hamilton acted improperly. *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 11, ¶ 20, 106 P.3d 1020, 1026 (2005) (citation omitted). The "improper" element focuses on the importance of the interest the defendant sought to advance as weighed against the interest invaded. *Id*. at 11, ¶ 21, 106 P.3d at 1026 (citation omitted). In weighing these considerations, Arizona courts examine factors set forth in Restatement § 767,[8] with the most weight afforded the actor's motive and conduct. *Wells Fargo Bank*, 201 Ariz. at 494, ¶ 81, 38 P.3d at 32. Generally, the propriety of action is an issue of fact. *Neonatology Assocs.*, 216 Ariz. at 188, ¶ 9, 164 P.3d at 694.

¶27 AW argues sufficient evidence exists Hamilton possessed an improper motive and used improper means to

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[8] A court should consider the following seven factors when deciding whether a particular action is improper:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Restatement § 767.

interfere with the Goldman Agreement. To support both contentions, AW relies on the purported wrongful nature of Hamilton's actions rather than ascribing a motive to her that is unrelated to advancement of Amy's best interests. We therefore consider evidence relating to motive and means together. *See* Restatement § 767 cmt. d (noting motive is often closely interwoven with other factors "so that they cannot be easily separated").

¶28 Our review of the record reveals sufficient evidence to create a disputed issue of material fact whether Hamilton acted improperly to interfere with the Goldman Agreement.

¶29 First, although Bill and Amy entered in the Rule 69 Agreement in December 2007, which gave Bill a two-year period to sell AWE, a fact-finder could conclude Hamilton sought to frustrate or negate that agreement by directly seeking a more expedient liquidation of Amy's interest. Had Hamilton been successful in selling Amy's interest to Goldman, the Rule 69 Agreement would have become a nullity. Pursuing a course of conduct that conflicts with a contractual obligation can be wrongful. *See Wells Fargo Bank*, 201 Ariz. at 490, ¶ 59, 38 P.3d at 28 (noting covenant of good faith and fair dealing implied in every agreement "prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement").

¶30 Second, although Hamilton may have had a legitimate reason to seek a special master or receiver in light of Bill's alleged foot-dragging in complying with the Rule 69 Agreement, in light of the timing of the motion in the midst of discussions with Goldman and Tim, a reasonable fact-finder could also conclude Hamilton used the motion as a means to "push Bill into the Goldman sales camp" to force a quick sale to Goldman and deprive Bill of the benefit of the agreed-upon two-year sales period. *See Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257, ¶ 11, 92 P.3d 882, 887 (App. 2004) (stating party abuses process by using the court "to accomplish a purpose for which the process was not designed").

¶31 The Cavanagh defendants vigorously argue that Hamilton's actions cannot be considered improper because they were taken solely to promote her client's best interests and did not involve any personal malice or motive for financial gain. But the supreme court in *Safeway Insurance* explicitly rejected the contention that "lawyers acting on behalf of their clients hold a qualified privilege from liability for tortious interference with contractual relations." 210 Ariz. at 10, ¶ 15, 106 P.3d at 1025. Phrased succinctly, lawyers and non-lawyers are judged in the same light when considering the propriety of their actions and motives. But in assessing whether Hamilton acted improperly as guided by the Restatement

factors, *see supra* n.8, the fact-finder can consider Hamilton's lack of personal motive and society's interest in ensuring that attorneys are not dissuaded from fully representing their clients' interests for fear of personal reprisal.

¶32 At oral argument before this court, the Cavanagh defendants also argued that the decision in *Safeway Insurance* mandates a conclusion that Hamilton's actions allegedly aimed at releasing Amy from the Rule 69 Agreement were not improper for purposes of a tortious interference claim. In *Safeway Insurance*, an insurance company sued a plaintiff's personal injury attorney for allegedly inducing the insured/defendant to breach the cooperation clause of the insurance contract by entering in a *Morris*[9] agreement with the plaintiff while knowing the insurer had not acted in bad faith in failing to settle the case. 210 Ariz. at 8, ¶ 6, 106 P.3d at 1023. But that attorney did not breach or frustrate the terms of any settlement agreement, as the Cavanagh defendants suggest. *Id*. at 12, ¶ 24, 106 P.3d at 1027 (rejecting insurer's argument that attorney acted improperly by withdrawing settlement offer to manufacture bad faith claim because the insurer never accepted the offer and attorney was free to withdraw it). Thus, *Safeway Insurance* does

[9] *United Servs. Auto. Ass'n v. Morris*, 154 Ariz. 113, 117, 741 P.2d 246, 250 (1987).

not persuade us to decide as a matter of law that Hamilton's actions were not improper.[10]

¶33 In sum, the above-recited evidence is sufficient to raise a disputed issue of material fact regarding the propriety of Hamilton's conduct to allegedly interfere with the Goldman Agreement.[11] Although, as the Cavanagh defendants point out, other evidence weighs against finding that Hamilton acted improperly, including her lack of personal motive for gain and her role as a lawyer, a fact-finder must resolve this issue. For this reason, and because fact issues exist concerning

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[10] Likewise, the federal district court cases cited by the Cavanagh defendants are distinguishable and do not persuade us to reach a different result. *See Emp'rs Reinsurance Corp. v. GMAC Ins.*, 308 F. Supp. 2d 1010, 1016 (D. Ariz. 2004) (holding attorney did not act improperly because he did not violate an ethical rule as alleged by plaintiff); *Am. Family Mut. Ins. Co. v. Zavala*, 302 F. Supp. 2d 1108, 1118-20 (D. Ariz. 2003) (reviewing Restatement factors and concluding attorney did not act improperly by failing to deliver a *Morris* agreement for his client's signature after insurer withdrew reservation of rights; attorney had no obligation to fulfill adversaries' contractual objectives); *Mann v. GTCR Golder Rauner, L.L.C.*, 351 B.R. 685, 701 (D. Ariz. 2006) (holding law firm did not act improperly by recommending attorney of counsel to firm to client even though firm had a conflict representing the client in the matter).

[11] Nothing in the record supports a finding Hamilton acted improperly by fraudulently misrepresenting the court's ability to convert Amy's community property interest in AWI shares into a thirty percent interest in AWE, fraudulently failing to explain the nature of a receivership to Tim, or fraudulently failing to inform him about the two-year sales period granted by the Rule 69 Agreement. *See* Restatement § 767, cmt. c (explaining fraudulent misrepresentation is ordinarily a wrongful means of interference and stating representation is fraudulent when utterer knows recipient will glean a false understanding of situation).

whether Hamilton actually interfered with the Goldman Agreement and whether she intended to do so, the trial court erred by entering summary judgment on this aspect of AW's tortious interference claim.

II. Motion for leave to amend complaints

¶34 Lastly, AW argues the trial court erred by denying AWE and AWI leave to amend their complaints to assert abuse-of-process claims. Rule 15(a), Arizona Rules of Civil Procedure, authorizes amendments of pleadings by leave of court, with "[l]eave to amend [to] be freely given when justice requires." While leave to amend is entrusted to the trial court's discretion, policy favoring trial on the merits dictates the "amendment will be permitted unless there has been undue delay, dilatory action or undue prejudice," *Owen v. Superior Court*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982), or if permitting the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

¶35 The trial court did not explicitly rule on the motions to amend, and the motions were denied by operation of law. Consequently, the trial court apparently did not exercise its discretion in the first instance, as is preferable in our system of justice. And because we are remanding the case, considerations of futility, delay, and undue prejudice may have changed. For these reasons, we reverse the judgment to the

extent it denies the motions to amend the complaints and remand for the trial court to explicitly address and rule on the motions in the first instance.

CONCLUSION

¶36 For the foregoing reasons, we affirm the entry of summary judgment to the extent it dismisses AW's claims that the Cavanagh defendants are liable for tortious interference with the oral operating agreement, government contracts, and the Chase Bank loan agreement. We reverse the entry of summary judgment to the extent it dismisses AW's claims that the Cavanagh defendants are liable for tortious interference with the Goldman Agreement and remand for further proceedings on that claim. Finally, we reverse the judgment to the extent it denies AW's motions to amend their complaints and remand for the trial court to rule on these motions.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Andrew W. Gould, Judge