IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 10/11/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

DONNA M. TAVILLA, Plaintiff/Appellee, v. CITY OF PHOENIX, a municipal corporation; TIM J. NORTON, a Phoenix police officer, Defendant/Appellants.	No. 1 CA-CV 10-0429 DEPARTMENT A **MEMORANDUM DECISION**
NICK TAVILLA and DONNA TAVILLA, Plaintiffs/Appellants, v. CITY OF PHOENIX, a municipal corporation; TIM J. NORTON, a Phoenix police officer, Defendants/Appellees.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2002-018960
Cause No. CV 2007-011914
(Consolidated)

The Honorable John Christian Rea, Judge

AFFIRMED IN PART, REVERSED IN PART, REMANDED

Treon Aguirre Newman & Norris PA Phoenix
By Richard T. Treon
Meghann L. St. Thomas
Attorneys for Plaintiffs/Appellees/Appellants Tavilla

Sanders & Parks PC Phoenix
By James Arthur Eaves
Robin E. Burgess
Attorneys for Defendants/Appellants/Appellees
City of Phoenix and Norton

T I M M E R, Presiding Judge

¶1 Appellants/cross-appellees Tim J. Norton and the City of Phoenix ("City") appeal a judgment entered after a jury awarded appellee Donna M. Tavilla ("Donna") damages on her complaint for intentional infliction of emotional distress ("IIED"). Donna and her husband, Nick Tavilla ("Nick"), cross-appeal the trial court's dismissal of other claims set forth in their complaint. For the reasons that follow, we affirm the judgment adjudicating Donna's IIED claim and the court's dismissal of Nick's separately asserted claims except loss of consortium. We reverse the court's dismissal of Nick's loss of consortium claim to the extent it is derivative of Donna's successful IIED claim. We remand to the trial court for additional proceedings on that claim.

BACKGROUND

¶2 During the time frame relevant to this lawsuit, the Tavillas owned and operated a car repair business in Phoenix. Nick performed repairs, and Donna handled all administrative tasks. For years prior to 2001, the Tavillas repaired and serviced undercover vehicles for the Phoenix Police Department

("Department") and Norton, then an officer, served as their contact/supervisor. From time to time, Norton also showed Department-seized vehicles to the Tavillas and other prospective buyers interested in bidding on the vehicles at auction.

¶3 The Tavillas contend that during the course of their business relationship with the Department, Norton sexually harassed Donna, thereby damaging the couple and their business. The Tavillas served notices of claim on the City and Norton making these allegations on March 29, 2002. After the parties failed to settle the claims, the Tavillas initiated this lawsuit on September 27, 2002, alleging several causes of action. Thereafter, the court dismissed or summarily adjudicated various claims asserted by the Tavillas in their original and amended complaints and in a consolidated case. The court also precluded as time-barred any claims based on events that occurred prior to October 1, 2001. The parties proceeded to a jury trial on November 30, 2009 on the sole remaining claim for intentional infliction of emotional distress, which emanated from Donna's allegation that Norton sexually harassed her in a telephone call that occurred on November 1, 2001. The jury returned a verdict in favor of Donna in the amount of $600,000, and the trial court entered judgment on the verdict on December 10. After the trial

court ruled on post-judgment motions, this timely appeal and cross-appeal followed.[1]

DISCUSSION

I. Appeal

¶4 The City and Mr. Norton (collectively, "Defendants") argue the trial court committed reversible error by: (1) denying their motion for mistrial and later a motion for a new trial on grounds of misconduct, (2) permitting the Tavillas to introduce evidence of Norton's other bad acts, and (3) denying Defendants' motion for judgment as a matter of law ("JMOL"). We address each contention in turn.

A. Misconduct

¶5 Defendants argue the trial court erred in denying their motions for mistrial and new trial because Donna engaged in misconduct by violating the court's pre-trial in limine order, which precluded evidence of Norton's alleged prior sexual harassment of Donna.[2] We review the court's rulings for an abuse

[1] Donna conditionally cross-appeals, asking us to reverse various interim trial court rulings only in the event we reverse the judgment and remand for a new trial. Because we reject the arguments made by the City and Norton in their appeal, we do not address Donna's contentions of error.

[2] The court reasoned that, although relevant to the extreme and outrageous nature of the November 1 telephone call, the other acts' relevance was outweighed by the "substantial danger that the jury would rely on [the other acts, now time-barred] rather than the November 1, 2001 telephone call in assessing liability or damages."

of discretion. *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 398, 949 P.2d 56, 58 (App. 1997) (mistrial); *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009) (new trial). We will reverse if Donna engaged in misconduct, the misconduct materially affected Defendants' rights, and it is probable the misconduct "actually influenced the verdict." *Leavy v. Parsell*, 188 Ariz. 69, 72, 932 P.2d 1340, 1343 (1997) (quoting *Sanchez v. Stremel*, 95 Ariz. 392, 395, 391 P.2d 557, 559 (1964)).

¶6 Defendants assert Donna engaged in misconduct by willfully violating the trial court's in limine order when she elicited the following testimony, which purportedly implied Norton had sexually harassed Donna prior to the November 1, 2001 telephone call:[3]

> 1. Donna stated that during a party held in honor of the Phoenix Police chief in May 2000, Norton "kept coming and sitting really close to me so I would move."
> 2. Donna and witness Angela Lee each related Norton had visited the Tavillas' home, which doubled as Donna's office, at least once a week when Nick was out in order to help with invoices. When repeatedly questioned on the same subject, Norton denied he was ever in the home when Nick was out.

[3] In their reply brief, Defendants point to two other instances in which Donna allegedly violated the court's order. Because these arguments were raised for the first time in the reply brief, we do not address them. *See Romero v. Sw. Ambulance,* 211 Ariz. 200, 204 n.3, ¶ 7, 119 P.3d 467, 471 n.3 (App. 2005) (holding issue raised for first time in reply brief waived on appeal).

> 3. Donna testified that Norton had called her "many times at night" while drinking beer and described the conversations as "harassing" and "always just badgering me about the invoices."
>
> 4. Donna described a meeting she and Nick had with police chiefs on October 3, 2001, where she "tried to explain to them that he [Norton] was harassing me so bad, it wasn't even normal. I mean it wasn't even like, Hey, could you get those invoices in? I mean I was being harassed, literally harassed."
>
> 5. While recounting the November 1 telephone call, Donna related she had asked Norton after he made sexually explicit remarks, "You know, Tim, we've gone over this, and when is this ever going to end? When is this ever going to end?"

¶7 Defendants additionally point to two unanswered questions posed by Donna's attorney as further evidence of a wrongful campaign to imply a long course of sexual harassment by Norton against Donna:

> 6. Donna's attorney asked Norton why he was "reluctant to admit" he was often at the Tavillas' home. The attorney withdrew the question after Defendants objected that the question misstated evidence.
>
> 7. Donna's attorney asked Phoenix Police Chief Jack Harris whether he had learned of "a telephone call from Norton to Donna," which purportedly referred to information gleaned at the October 3, 2001 meeting. After objection and a bench conference, Donna's attorney asked specifically about the November 1 telephone call.

¶8 The trial court held that while Donna's attorney may have "buck[ed] against the corral" of the pretrial order, "the questions were not a direct violation of any of the . . . motions in limine." Defendants assert the court erred in this ruling because the attorney's line of questioning was akin to counsel's wrongful acts in *Leavy*, which governs this case.

¶9 In *Leavy*, the defendant in a personal injury lawsuit arising from a two-vehicle accident directly violated pretrial rulings by describing in opening statement that, according to hospital records, the plaintiff was probably not wearing a seatbelt and that an expert witness would testify to the high credibility of an eyewitness to the automobile accident. 188 Ariz. at 71, 932 P.2d at 1342. The defendant again violated the court's order by asking a witness whether the plaintiff was wearing a seatbelt immediately after the accident. *Id.* Finally, although the plaintiff's possible alcohol usage before the accident was "not an issue to be tried," the defendant repeatedly referred to plaintiff's use of alcohol during trial. *Id.* The evidence was evenly balanced — described by one juror as "[e]xactly even" — and the jury unanimously found for the defense. *Id.*

¶10 The supreme court held that a new trial was needed because the defendant's misconduct had deprived the plaintiff of a fair trial. *Id.* at 73, 932 P.2d at 1344. Acknowledging the

difficulty of showing that the misconduct influenced the verdict in a close case, the court held "that prejudice will be found when there has been significant misconduct affecting the essential rights of a litigant and when the very nature of the misconduct makes it impossible to determine the extent of prejudice." *Id.* Thus, prejudice should be found when, as in *Leavy*, (1) the misconduct was significant, especially if involving deliberate violations of court orders, (2) the misconduct is prejudicial because it related to essential issues in a close case, and (3) the misconduct is apparently successful. *Id.*; *see also Styles v. Ceranski,* 185 Ariz. 448, 453, 916 P.2d 1164, 1169 (App. 1996) (concluding a new trial on liability and damages warranted as plaintiff's argument "unfairly exploited trial court rulings on admission of evidence and boldly disregarded pretrial orders limiting each party to one standard of care witness.").

¶11 We are not persuaded the trial court abused its discretion by refusing to grant a mistrial or new trial. Unlike the defendant in *Leavy* and the plaintiff in *Styles*, Donna did not engage in misconduct by violating the court's in limine order. Although the trial court precluded evidence of sexual harassment prior to October 1, 2001, the court also denied the Defendants' motions to preclude "evidence of the economic and business relationship" between the parties and to preclude "Any

Suggestion Office[r] Norton Had Power Over Donna Tavilla." The court reasoned that because "the history of the contractual and economic relationship between [the parties], and Norton's role in that relationship, is relevant to the issue of the extreme or outrageous nature of [Norton's] alleged conduct," even evidence relating to acts outside the claim period were relevant and admissible.

¶12 Much of the questioning to which the Defendants object was explicitly tied to the backlog of invoices due the City rather than to any sexual impropriety by Norton. *See supra* ¶¶ 6-7, items 2-4, and 6. As such, the questions constituted a permissible area of inquiry regarding the parties' business and economic relationship and Norton's position of power over the Tavillas' economic interests. Although Defendants complain that Donna's repeated use of the term "harassment" implied sexual harassment, the context of the questions and answers reveals that "harassment" referred to Norton's attempts to compel Donna to send the aging invoices.

¶13 While the questioning of Chief Harris, *see supra* ¶ 7, item 7, was initially muddled as to the date he learned of a telephone call between Donna and Norton, counsel eventually clarified the timing by asking specifically about the Chief's knowledge of the November 1 call. This clarification ensured

the Chief was not questioned about any calls prior to November 1, 2001, which would have violated the in limine order.

¶14 We also agree with the trial court that the inquiry that resulted in Donna's comment that Norton had sat closely to her at a party, *see supra* ¶ 6, item 1, did not violate the in limine order. The context of the line of questioning was geared to determining how Donna knew the number of beers Norton had consumed that evening. Additionally, because Donna had just testified that Norton had "hounded" and "embarrassed" her that evening about completing the invoices, it is more likely the jury concluded she moved from him to avoid discussing that issue rather than as a means to avoid sexual harassment.

¶15 Whether the remaining disputed area of inquiry violated the in limine order is a closer question. *See supra* ¶ 6, item 5. Donna's statements in the November 1 call, "[W]e've gone over this, and when is this ever going to end? When is this ever going to end?" made immediately after Norton's sexually explicit remarks and before Donna cried and hung up the telephone gave rise to a reasonable inference he had made similar remarks in the past. Had an objection been made, the trial court would have been justified in sustaining it for the

same reasons it entered the in limine order.[4] *See supra* ¶ 5, n.2. But the questioning focused on what was related during the November 1 telephone call, which formed the core of the lawsuit, and did not directly ask about events prior to that call. Additionally, as defense counsel pointed out during closing argument, no other evidence of prior sexual harassment was introduced at trial. Thus, although the jury may have wondered whether Donna's comments concerned prior sexual harassment,[5] it could have reasonably concluded she referred to Norton's previously described prior harassment about invoice processing. On this record, we cannot say the court erred by concluding Donna's counsel did not violate the in limine order by his questions concerning the November 1 call.

¶16 In summary, the trial court did not abuse its discretion by denying the motions for mistrial and new trial based on allegations of misconduct.

---

[4] The preferred course of action would have been to raise the issue to the court and opposing counsel before asking the question.

[5] As Defendants note, a juror asked during trial when Norton first made sexual advances toward Donna, whether anyone was informed, and whether November 1 was the first instance. We do not address whether the question is indicative of prejudice as we conclude no misconduct occurred, and we therefore do not reach the issue of prejudice. *See Leavy*, 188 Ariz. at 72, 932 P.2d at 1343. We note, however, that the juror's question may have arisen as a result of hearing that despite the parties' lengthy business relationship, the only evidence presented of sexual harassment occurred during the November 1 call, which may have struck the juror as odd and impacted Donna's credibility.

B. Other act evidence

¶17 Defendants next argue the trial court erred by permitting Donna to introduce evidence of Norton's other bad acts in violation of Arizona Rules of Evidence 403 and 404(b) and in limine orders. According to Defendants, the cumulative impropriety of this evidence deprived them of a fair trial. We review the trial court's evidentiary rulings for an abuse of discretion and reverse only if unfair prejudice resulted. *Gemstar Ltd. v. Ernst & Young,* 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996).

(1) Sergeant's examination

¶18 Defendants argue the trial court erred by permitting Donna to ask Norton whether he took the police sergeant's examination because the court had precluded this line of questioning in an in limine order. We reject this argument because the court did not "permit" the question; Defendants never raised an objection. Also, Norton opened the door for the question by volunteering to the jury it was his choice not to be promoted. Despite the in limine order, Donna was entitled to impeach that statement by asking whether he sought promotion by taking the sergeant's examination.

(2) Beer and profanity

¶19 Without elaboration, Defendants also contend the court erred by permitting evidence that Norton "had a kind of liking

for the beer" and used profanity toward his stepson. Because Defendants failed to object to these questions or testimony and the subjects were not governed by any in limine orders, however, Defendants have waived any claim of error. *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975).

(3) Theft

¶20 Defendants contend the trial court erred by allowing Donna's attorney to ask Nick about allegations Norton had stolen property. But Defendants sat silent through this line of questioning until finally raising a relevancy objection, which the court sustained, and the questions were not the subject of an in limine order. The court did not err.

(4) Ex-Wife

¶21 Defendants primarily focus their argument on testimony elicited regarding one of Norton's ex-wives. A pretrial ruling precluded "evidence or comment upon Officer Norton's prior marriages." At trial, Donna's counsel referred to Norton's "then-wife" when questioning Norton, and asked Donna about profanity and threats made by Norton about his "former spouse." Defendants contend these knowing violations of the in limine order are akin to those in *Leavy* and require reversal and a new trial.[6]

[6] Defendants present this argument in the sections of its opening and reply briefs addressing the trial court's alleged errors in

¶22 Assuming the references to Norton's ex-wife violated the in limine order and constituted significant misconduct, we nevertheless decline to reverse as no prejudice resulted. Here, unlike the situation in *Leavy*, the misconduct did not relate to essential issues in the case. 188 Ariz. at 72, 932 P.2d at 1343. Specifically, whether and how many times Norton had married did not relate to the allegation he intentionally inflicted emotional distress on Donna via the November 1 telephone call. Additionally, we fail to understand how references to the fact of Norton's prior marriages unduly prejudiced him. In today's society, divorce is not generally regarded as a stigma. Moreover, Norton himself mentioned his "ex-wife" when testifying, so the jury was already aware of this fact. Although references to profanity and threats were prejudicial, the in limine order did not prevent Donna from pursuing this line of questioning; she was only precluded from associating these subjects with references to Norton's prior marriages. For these reasons, even assuming misconduct, we

---

admitting evidence. Regarding references to Norton's prior marriages, however, the trial court sustained all objections to the contested questions based on the in limine order. Defendants do not cite any instance the court permitted questions on this topic over their objection. Consequently, we confine our analysis to Defendants' contention that reversal is warranted for Donna's significant misconduct in knowingly violating the in limine order.

conclude Norton was not prejudiced by references to his prior marriage, and we decline to reverse on this basis.

C. Motion JMOL

¶23 Defendants next argue the trial court erred by denying their motion JMOL. The court should grant a motion JMOL when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Ariz. R. Civ. P. 50(a)(1); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) ("[The] motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.") We review the denial of a motion JMOL de novo, viewing the evidence in the light most favorable to the non-moving party. *Saucedo ex rel. Sinaloa v. Salvation Army,* 200 Ariz. 179, 181–82, ¶ 9, 24 P.3d 1274, 1276–77 (App. 2001).

¶24 To prove the IIED claim, Donna was required to show: (1) Norton's conduct was "extreme" and "outrageous," (2) Norton either intended to cause Donna emotional distress or recklessly disregarded the near certainty of such distress, and (3) Donna suffered severe emotional distress as a result of Norton's actions. *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987) (citations omitted). Defendants argue JMOL was

required because Donna failed to present sufficient evidence to satisfy the first and third elements. We address each element in turn.

(1) Extreme and outrageous conduct

¶25 Conduct is "extreme and outrageous" when "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community . . . in which . . . an average member of the community would . . . exclaim, 'Outrageous!'" *Id.* (quoting Restatement (Second) of Torts ("Restatement") § 46, cmt. d (1965)). When assessing the character of the defendant's conduct, the jury may consider, among other things, "the position occupied by the defendant . . . [and] defendant's knowledge that the plaintiff is peculiarly susceptible to emotional distress by reason of some physical or mental condition." *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 149 Ariz. 76, 79, 716 P.2d 1013, 1016 (1986) (citations omitted).

¶26 The jury in this case heard evidence that Norton and the Tavillas had a lengthy business relationship and that Norton served as the Tavillas' contact with the Department. Thus, it was reasonable to conclude that the Tavillas' ongoing business relationship with the Department depended in part on good relations with Norton. At the time of the November 1 call,

Norton had been "hounding" and "harassing" Donna to process invoices the Department needed to stay abreast of what was owed to the Tavillas. The Department had sent the Tavillas a letter in October stating "effective immediately" they would no longer receive work from the Department, which had been the Tavillas' largest source of income. In addition, the jury heard evidence Norton was aware of other stressors affecting Donna – for example, the aftermath of a flood in her home that had displaced her family and Nick's serious physical ailments – making her more susceptible to harassment.

¶27 Against this backdrop, Norton called Donna on November 1 and, in the midst of discussing an idea about solving the invoice problem, suggested she lay the invoices on her bed, remove her clothes and then "rub all over them and get [her] scent, [her] smell, [her] [pussy] juices" on them. He then proceeded to tell her he would like to take his false teeth out and "gum" or "numb" her and if Nick did not "fuck [her]" Norton would "fuck [her]" thereby "christening" the invoices. As the court noted when denying Defendants' motion JMOL, the single phone call "is made in the context of significant economic authority [and] the jury can infer that it was, in essence, have sex with me, or lose your business." Although Defendants argue that a single telephone call cannot give rise to an IIED claim, they cite no authority and we are not aware of any. Indeed,

illustrations of extreme and outrageous conduct set forth in the Restatement describe single acts as sufficient to support such claims. Restatement § 46 cmt. d, illus. 1 – 3.

¶28 Viewing the evidence in the light most favorable to Donna, as we must, we conclude the evidence adduced at trial was sufficient to raise a jury question whether the November 1 call was "extreme and outrageous."

(2) Severe emotional distress

¶29 Liability for IIED requires a showing of "severe" emotional distress resulting from the defendant's extreme and outrageous conduct. To prevail on the claim, "the distress inflicted [must be] so severe that no reasonable man could be expected to endure it." Restatement § 46, cmt. j; *see also Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 199, 650 P.2d 496, 501 (App. 1982) ("[A] line of demarcation should be drawn between conduct likely to cause mere 'emotional distress' and that causing 'severe emotional distress.'") (citation omitted). Neither physical injury nor disabling response is required to constitute "severe emotional distress." *Skousen v.* Nidy, 90 Ariz. 215, 219, 367 P.2d 248, 250 (1961). While the court must determine whether evidence of severe emotional distress can be found, it is the jury's task to determine whether such distress actually exists and whether the extreme and outrageous conduct

caused it. *Midas*, 133 Ariz. at 197, 650 P.2d at 499; *Savage v. Boies*, 77 Ariz. 355, 358, 272 P.2d 349, 351 (1954).

¶30 Donna's psychologist, Dr. Christine Grubb, testified that Donna suffered from post-traumatic stress disorder ("PTSD"), primarily as a result of Norton's harassment. Dr. Grubb described Donna as extremely depressed, very nervous, and anxious when they initially met and noted Donna was unable to drive herself to appointments. Defendants' psychologist-expert witness agreed that Donna suffered from "major depression," although he disagreed with the PTSD diagnosis. Defendants argue that other stressors in Donna's life contributed to her emotional distress; Donna and her psychologist, however, both described Donna's successful handling of other stressors and squarely attributed the distress to sexual harassment at the hands of Norton. The jury was free to agree with Donna and Dr. Grubb.

¶31 Viewing the evidence in the light most favorable to Donna, the jury had sufficient evidence before it to find that she suffered from severe emotional distress as a result of Norton's extreme and outrageous conduct. *See Monaco v. Healthpartners of S. Arizona*, 196 Ariz. 299, 304, ¶¶ 11-12, 995 P.2d 735, 739 (App. 1999) (finding that PTSD was sufficient to support a claim for negligent infliction of emotional distress); *see also Taylor v. Metzger*, 706 A.2d 685, 697 (N.J. 1998)

("Severe emotional distress means any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so, including . . . posttraumatic stress disorder.") (citation omitted); *accord Schnabel v. Tyler*, 630 A.2d 1361, 1368-69 (Conn. App. 1993), *aff'd*, 646 A.2d 152 (Conn. 1994); *Curtis v. Firth*, 850 P.2d 749, 756-57 (Idaho 1993); *Kraszewski v. Baptist Medical Ctr. Of Okla., Inc.,* 916 P.2d 241, 249 (Okla. 1996).

¶32 Because sufficient evidence raised a jury question on both the extreme and outrageous nature of Norton's conduct and the severity of Donna's distress as a result of that conduct, the trial court did not err in denying Defendants' motion JMOL.

II. Cross-Appeal

¶33 Nick cross-appeals the trial court's Rule 12(b)(6) dismissal of his claims for IIED, loss of consortium, and interference with contract, as well as the court's denial of his motions to amend his complaint to assert claims for equitable estoppel, a violation of 42 U.S.C. § 1983, and a breach of contract claim. We review the court's rulings for an abuse of discretion. *Dressler v. Morrison,* 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006) (dismissal); *Owen v. Superior Court (Moroney)*, 133 Ariz. 75, 80, 649 P.2d 278, 283 (1982) (motion to amend).

A. IIED

¶34 Nick alleged in the first amended complaint that Norton intentionally or recklessly inflicted emotional distress on him by making sexual advances toward Donna with the knowledge that Nick's health impaired his ability to have sexual relations with his wife. The City moved to dismiss this claim asserting (1) Nick was time-barred from basing an IIED claim on events that occurred prior to October 1, 2001, (2) Norton engaged in no extreme and outrageous acts toward Nick, and (3) Nick's claim is derivative of Donna's IIED claim, which is legally infirm. The trial court granted the motion without explanation, although it simultaneously denied the City's motion to dismiss Donna's IIED claim.

¶35 Nick argues the trial court erred in dismissing his claim for IIED because the City admitted his claim was derivative of Donna's IIED claim. Nick does not cite any authority to support his apparent position that the trial court is bound by a party's erroneous legal argument, and we are not aware of any. As we alluded previously, *see supra* ¶ 25, Arizona follows Restatement § 46 in assessing IIED claims. Section 46 explicitly addresses circumstances under which a third person can assert an IIED claim based on actions directed at another:

> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

See also id. cmt. l. Here, Nick did not assert in his first amended complaint that he was present at the time Norton called Donna on November 1, 2001. To the contrary, the complaint alleged that some time after November 1 Donna told Nick about the call and Norton's past inappropriate acts. Because Nick did not allege he was present when Norton directed extreme and outrageous conduct toward Donna, Nick failed to state a cognizable claim and the trial court correctly dismissed the claim.

B. Loss of consortium

¶36 Nick alleged in the first amended complaint that he lost consortium with his wife as a result of Norton's November 1, 2001 conduct. Defendants moved to dismiss, contending Nick could not state a claim for loss of consortium, a derivative claim, because Donna could not state a claim for IIED, the underlying claim. The court, somewhat vaguely, "grant[ed] the

Motion to Dismiss as to the claims made by Nick Tavilla" while ruling that Donna's IIED claim survived.

¶37 Loss of consortium is a derivative claim, so it cannot exist unless "all elements of the underlying cause [are] proven." *Barnes v. Outlaw*, 192 Ariz. 283, 285-86, ¶ 8, 964 P.2d 484, 486-87 (1998) (citation omitted). Here, the underlying tort claim – IIED as alleged by Donna – survived, so Nick's derivative claim for loss of consortium is not barred on this ground.

¶38 Nor is the loss of consortium claim time-barred, as the City contends. The Tavillas' notice of claim – timely filed as to claims arising on November 1, 2001 – explicitly included Nick's allegation of loss of consortium. The Tavillas agreed, however, that, per the court's earlier rulings, "Donna Tavilla's claims for injuries resulting from Norton's improper conduct prior to October 1, 2001 (and therefore Nick Tavilla's claims for loss of consortium derivative of Donna's claims) are time barred." This admission, properly construed, admits only that Nick's claims are time barred if derivative to one of Donna's untimely claims. Because the court ruled that Donna's November 1-based IIED claim was timely and proper, Nick's loss of consortium claim derivative to the November 1-based IIED claim should have survived as well.

¶39 We reverse the court's dismissal of Nick's loss of consortium claim derivative of Donna's surviving IIED claim and remand for further proceedings.

C. Interference with contract/breach of contract

¶40 In their original complaint, the Tavillas alleged an intentional interference with contract claim based on Norton's conduct but affirmatively alleged Norton was "acting within the scope and course of his employment" with the City. Defendants moved to dismiss because an intentional interference with contract claim is available only "when a *third party* improperly and intentionally interferes" with performance of a contract, and an employee acting within the scope of employment is not a third party. *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 555, 905 P.2d 559, 564 (App. 1995) (emphasis added) (citation omitted). The Tavillas "consent[ed] to dismissal of [this claim] without prejudice and with leave to file an amended complaint," and the court granted the motion to dismiss. Thereafter, the Tavillas filed a first amended complaint but did not allege claims for interference with contract or breach of contract. One year later, in September 2005, the Tavillas moved to file a second amended complaint that asserted, among other new claims, a claim for breach of contract. The court denied the motion as untimely, finding "[t]he amendment would add new issues and claims to this matter. The claims sought to be added

are not newly discovered, simply, newly pled." In June 2006, the Tavillas again sought leave to amend the complaint to add a breach of contract claim, and the court again denied the request.

¶41 Rule 15, Arizona Rules of Civil Procedure, authorizes amendment of pleadings by leave of court, with "[l]eave to amend [to] be freely given when justice requires." Ariz. R. Civ. P. 15(a). While leave to amend is entrusted to the trial court's discretion, policy favoring trial on the merits dictates "amendment will be permitted unless there has been undue delay, dilatory action or undue prejudice." *Owen*, 133 Ariz. at 79, 649 P.2d at 282 (1982) (citations omitted). Here, in light of the Tavillas' lengthy delay in seeking leave to amend their complaint to assert a known claim, we cannot say the trial court erred by denying the motions to amend.

D. Equitable estoppel and civil rights

¶42 Nick finally asserts the trial court erred in denying his September 2005 and June 2006 motions to amend the first amended complaint to assert claims that (1) the City is equitably estopped to assert a statute of limitations defense as it failed to investigate the Tavillas' complaints against Norton, and (2) the City and various police officials violated Nick's civil rights. The court denied both motions as untimely. *See supra* ¶ 40.

¶43 In October 2007, the Tavillas filed a separate lawsuit arising out of the same conduct and asserting a § 1983 claim against the City and police officials. After the court consolidated the cases, it granted summary judgment for Defendants on the § 1983 claim. The court rejected the Tavillas' argument that "the statute of limitations . . . should be deemed not to have run until [the Tavillas] became aware that the City was required by policy to conduct an investigation" of complaints against Norton. The court reasoned that the limitations period for the civil rights claims began to run in 2002 when the Tavillas expected an investigation but "knew or should have known that the investigation was not conducted." The court also found no merit to the Tavillas' equitable tolling argument as it was clear by 2002 that no investigation had been or would be conducted. The tolling argument was also the crux of the Tavillas' motions for leave to amend. Consequently, the court did not abuse its discretion in denying the motion as granting it would have constituted a futile act.

CONCLUSION

¶44 For the foregoing reasons, we affirm the judgment adjudicating Donna's IIED claim. We also affirm the court's dismissal of Nick's separately asserted claims except the claim for loss of consortium. We reverse the court's dismissal of Nick's loss of consortium claim to the extent it is derivative

of Donna's successful IIED claim, and we remand to the trial court for additional proceedings on that claim.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patrick Irvine, Judge

/s/
Daniel A. Barker, Judge