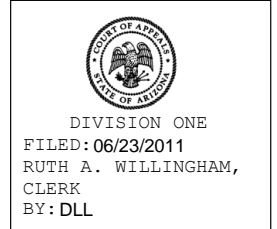


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



MICHAEL and KARI POLING, husband) 1 CA-CV 10-0472
and wife; ALLEN and KAREN)
ROBERTSON, husband and wife; CARL) DEPARTMENT D
GROVES, a single individual;)
LIGHTWAVE TECHNOLOGIES, LLC, an) **MEMORANDUM DECISION**
Arizona limited liability)
company; NEW SOURCES INVESTMENTS,) (Not for Publication -
LLC, an Arizona limited liability) Rule 28, Arizona Rules of
company,) Civil Appellate Procedure)
)
Plaintiffs/Counter-)
Defendants/Appellees,)
)
v.)
)
GREG and ANNA PATERNO, husband)
and wife; GARY PATERNO, JR.;)
HOLLY PATERNO; GARY PATERNO SR.;)
MICROGROUP MANUFACTURING, INC.,)
an Arizona corporation,)
)
Defendants/Counter-)
Claimants/Appellants.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-052861

The Honorable Stephen J.P. Kupiszewski, Judge Pro Tempore

AFFIRMED

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O R O Z C O, Judge

¶1 This is an appeal from a judgment and award of attorneys' fees in favor of Michael and Kari Poling, Allan and Karen Robertson, Carl Groves, Lightwave Technologies, LLC, and New Sources Investments, LLC (Plaintiffs). For the following reasons, we affirm the judgment and award of attorneys' fees.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Plaintiffs initially filed a complaint against Greg and Anna Paterno, Gary Paterno, Jr., Holly Paterno, Gary Paterno, Sr., and MicroGroup Manufacturing, Inc. (MicroGroup) arising out of an agreement between the parties. MicroGroup answered and filed a counter-claim against Plaintiffs. One of the claims in the counter-claim alleged intentional interference with a third-party contract by Plaintiffs and Plaintiffs' former attorney, Jeffrey Hernandez (Hernandez).

¶3 MicroGroup alleged that Hernandez misrepresented the "status of their contractual relationship" between Plaintiffs

and MicroGroup in an email to a potential buyer of MicroGroup. MicroGroup claimed that this interfered with the sales agreement between MicroGroup and the third-party. Hernandez filed a motion to dismiss the action against him. The trial court treated Hernandez' motion as a motion for summary judgment and dismissed all claims against Hernandez with prejudice.¹

¶14 Plaintiffs then filed a motion for partial summary judgment arguing that if Hernandez, as their agent, was not liable to MicroGroup, then Plaintiffs, as the principals, could not be liable for any claims that sought to impute liability based on Hernandez' actions. The trial court granted Plaintiff's motion for partial summary judgment without comment.

¹ The trial court did not state any reasons for its decision. The court also awarded attorneys' fees to Hernandez after finding no legal or factual basis for MicroGroup's claims against Hernandez and that the claims were pursued in bad faith. MicroGroup appealed from this judgment in a separate appeal, 1 CA-CV 10-0131. A different panel of this court affirmed the award of attorneys' fees. *Paterno v. Hernandez*, 1 CA-CV 10-0131 (Ariz. App. April 26, 2011).

After Hernandez was dismissed from the case, Plaintiffs filed a motion to assert a third-party complaint against Hernandez for any liability being asserted against them as a result of his conduct. The trial court denied this motion, finding a third-party complaint against Hernandez would not involve issues crucial to determining the liability between Plaintiffs and MicroGroup. The court expressed "no opinion as to whether Hernandez is currently or prospectively liable to [Plaintiffs]."

¶15 Plaintiffs filed a proposed form of judgment and an attorneys' fees application seeking fees pursuant to Arizona Revised Statutes (A.R.S.) sections 12-341.01.A., C. (2003) and 12-349 (2003). Plaintiffs' proposed form of judgment included a certification that there was no just reason for delay in entering the judgment pursuant to Rule 54(b), Arizona Rules of Civil Procedure (Rule 54(b)). MicroGroup objected to the proposed judgment including Rule 54(b) language, arguing that a claim for respondeat superior liability remained in the counter-claim.

¶16 The trial court entered judgment in favor of Plaintiffs on the intentional interference with third-party contract claim and "any other claims arising from Hernandez' alleged conduct." The judgment awarded attorneys' fees and costs to Plaintiffs based on MicroGroup pursuing these claims in bad faith. The judgment included language pursuant to Rule 54(b), stating that there was "no just reason for delay in the entry of judgment." MicroGroup filed a motion for new trial, which the trial court denied. MicroGroup filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-120.21.A.1. (2003).

DISCUSSION

Rule 54(b) Certification

¶7 On appeal, MicroGroup alleges the trial court: abused its discretion by including language pursuant to Rule 54(b), certifying that the judgment was final and appealable; erred in entering partial summary judgment in favor of Plaintiffs; and abused its discretion in awarding attorneys' fees to Plaintiffs.

¶8 MicroGroup contends that the trial court erred by including a Rule 54(b) certification in the judgment because there were still unresolved claims that would require the appellate court to decide the same issue more than once in a subsequent appeal. We review the trial court's decision that a judgment is final as to one of several claims under an abuse of discretion standard. See *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 191, 635 P.2d 174, 176 (1981).

¶9 In this case, the complaint and several of the counterclaims remain unresolved by the judgment now on appeal. Thus, the judgment is not final as to all claims. However, Rule 54(b) allows the trial court to render appealable an otherwise interlocutory judgment "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b).

Certification under Rule 54(b), however,
"does not give this court jurisdiction to

decide an appeal if the judgment in fact is not final, i.e., did not dispose of at least one separate claim of a multi-claim action." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). "[A] claim is separable from others remaining to be adjudicated when the nature of the claim already determined is 'such that no appellate court would have to decide the same issues more than once even if there are subsequent appeals.'" *Cont'l Cas. v. Superior Court*, 130 Ariz. 189, 191, 635 P.2d 174, 176 (1981), quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 . . . (1980).

Grand v. Nacchio, 214 Ariz. 9, 16, ¶ 17, 147 P.3d 763, 770 (App. 2006).

¶10 The counts in Plaintiffs' complaint do not raise any factual or legal issues similar to those resolved by the judgment on appeal. MicroGroup argues that count two in its counterclaim alleged that Plaintiffs were vicariously liable for Hernandez' actions under the theory of respondeat superior.

¶11 Plaintiffs sought partial summary judgment on all claims seeking to impute liability to Plaintiffs based on Hernandez' actions. This would include both intentional interference with third-party contracts and respondeat superior. The trial court granted the motion without limitation as to a specific claim; it dismissed *all* claims that sought to impute liability to Plaintiffs for Hernandez' acts. We agree with Plaintiffs that the prior grant of partial summary judgment was

for *all claims* seeking to impute liability to Plaintiffs based on Hernandez' actions, including respondeat superior.

¶12 Because the partial summary judgment resolved the respondeat superior and intentional interference with third-party contract claims, the remaining unresolved counterclaims will not require an appellate court to revisit these issues in any subsequent appeal.² Therefore, the trial court did not abuse its discretion in including Rule 54(b) language. The judgment was final and appealable pursuant to A.R.S. § 12-2101.B. (2003).³

Partial Summary Judgment for Plaintiffs

¶13 MicroGroup alleged that Plaintiffs were liable for respondeat superior and intentional interference with third-

² The remaining counterclaims are for joint venture among the original plaintiffs, breach of implied duty of good faith and fair dealing, breach of contract, declaratory relief, violation of A.R.S. § 47-9625.B. (2005), conversion, abuse of process, fraudulent conveyance, and punitive damages.

³ Although we are affirming certification under Rule 54(b), we do so because of the principles announced by our supreme court. We do not encourage the certification of a judgment as final in a partial summary judgment as was done in this case, because it resolves only a portion of the entire case; does not dismiss or eliminate any party from the litigation; and certification as final under Rule 54(b), as was done here, results in piecemeal litigation. Piecemeal litigation is not only costly to the parties as it requires them to litigate issues arising out of the same background transaction or events in two different courts but is disruptive to the orderly administration of justice as it requires these courts to repeatedly master these same matters. We affirm this trial court's Rule 54(b) ruling only because of our deferential standard of review.

party contract based on Hernandez' misrepresentations to a potential buyer of MicroGroup. These claims are not based on any independent acts of Plaintiffs themselves; only Hernandez' actions.

¶14 The law is clear that "where one defendant would be liable for committing the act and the other [liable] solely by operation of law, a finding that the first is not liable requires that the second be free from liability." *Wiper v. Downtown Dev. Corp. of Tucson*, 152 Ariz. 309, 311, 732 P.2d 200, 202 (1987) (citing *Rosenzweig & Son Jewelers, Inc. v. Jones*, 50 Ariz. 302, 310, 72 P.2d 417, 420 (1937)); see also *Ford v. Revlon, Inc.*, 153 Ariz. 38, 42, 734 P.2d 580, 584 (1987) (recognizing that "when the master's liability is based solely on the negligence of his servant, a judgment in favor of the servant is a judgment in favor of the master.") The fact that judgment was entered in favor of Hernandez on these claims compels the entry of judgment in favor of Plaintiffs as the principals of Hernandez.

¶15 We reject MicroGroup's argument that judgment was improper because Hernandez, as an attorney, had immunity which the Plaintiffs do not. Although the trial court did not state its reasons for granting judgment in favor of Hernandez, Hernandez did not raise the issue of immunity in his motion to

dismiss. Hernandez only argued that he was entitled judgment on the intentional interference with the third-party contract claim because he acted properly. Immunity was not an issue in his case.

¶16 Equally unavailing is MicroGroup's argument that the doctrine of issue preclusion is unavailable to Plaintiffs because the claims against Hernandez involved different circumstances. The judgment in favor of Plaintiffs was properly entered based on the legal principle that when a principal's liability is based solely on the acts of his agent, a judgment in favor of the agent compels a judgment in favor of the principal. See *Ford*, 153 Ariz. at 42, 734 P.2d at 584; see also *Wiper*, 152 Ariz. at 311, 732 P.2d at 202.

¶17 MicroGroup seems to argue that because Hernandez' actions allegedly fell outside the course and scope of his authority, Plaintiffs were somehow independently liable to them and could only seek indemnity from Hernandez. However, the complaint did not allege any independent bases under which Plaintiffs could be liable for intentional interference with a third-party contract. See Restatement (Third) of Agency § 7.03 (2006).⁴

⁴ A principal may be liable to a third-party under the following circumstances:

¶18 Therefore, we find that the trial court properly entered judgment in favor of Plaintiffs on all claims that sought to impute liability to Plaintiffs based on Hernandez' actions, which include the intentional interference with a third-party contract and the respondeat superior counts.

Attorneys' Fees Award

(1) A principal is subject to direct liability to a third party harmed by an agent's conduct when

(a) as stated in § 7.04, the agent acts with actual authority or the principal ratifies the agent's conduct and

(i) the agent's conduct is tortious, or

(ii) the agent's conduct, if that of the principal, would subject the principal to tort liability; or

(b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent; or

(c) as stated in § 7.06, the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.

(2) A principal is subject to vicarious liability to a third party harmed by an agent's conduct when

(a) as stated in § 7.07, the agent is an employee who commits a tort while acting within the scope of employment; or

(b) as stated in § 7.08, the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.

Restatement (Third) of Agency § 7.03.

¶19 The trial court awarded attorneys' fees to Plaintiffs based on A.R.S. §§ 12-341.01.A., C., and -349. We review a discretionary award of attorneys' fees under A.R.S. § 12-341.01.A., for an abuse of discretion. See *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007). However, an award of fees under A.R.S. §§ 12-341.01.C., and -349 is mandatory and we review such an award under a clearly erroneous standard. See *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 243, 934 P.2d 801, 807 (App. 1997).

¶20 On appeal, and in the trial court, MicroGroup objected to the award of attorneys' fees pursuant to A.R.S. § 12-341.01.A., which authorizes an award of fees to the successful party in a contract action. However, the judgment specifically found that MicroGroup pursued these claims in bad faith. This supports the award pursuant to A.R.S. § 12-341.01.C. MicroGroup does not allege that the court erred or abused its discretion in awarding fees pursuant to this section.⁵ The only argument MicroGroup raises regarding the award of attorneys' fees is that the intentional interference with a third-party contract is a

⁵ A party's failure to object to the lack of findings at the trial court precludes the party from raising the argument on appeal. *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 27, 5 P.3d 911, 917 (App. 2000).

tort, not a contract action, so fees were not appropriate under A.R.S. § 12-341.01.A. We conclude MicroGroup has waived any objection to the fee award under A.R.S. §§ 12-341.01.C. or -349.⁶

¶21 MicroGroup states that Plaintiffs' "ongoing tort liability . . . refutes" an award under A.R.S. § 12-349. To the extent this constitutes an objection to the award pursuant to A.R.S. § 12-349, we reject it. First, there is still no objection to the award under A.R.S. § 12-341.01.C. Second, the fact that MicroGroup thinks it raised a correct argument to dispute the award of attorneys' fees does not establish that the claims were not harassing, groundless, and brought in bad faith. We agree with the trial court's implicit conclusion that once the claims against Plaintiffs' attorney were dismissed, it constituted harassment and bad faith to continue to assert the same groundless claims against Plaintiffs. Accordingly, we affirm the award of attorneys' fees.

Attorneys' Fees on Appeal

⁶ Plaintiffs argue that this court should also find waiver based on MicroGroup's failure to respond to Plaintiffs' fee application. However, MicroGroup objected to the award of fees in its objection to Plaintiffs' form of judgment and again in their motion for new trial. As noted above, neither of these objections disputed the appropriateness of the award under A.R.S. §§ 12-341.01.C. or -349.

¶122 MicroGroup requests an award of their attorneys' fees on appeal pursuant to ARCAP 21. We find no basis upon which to award fees to MicroGroup on appeal and deny the request.

CONCLUSION

¶123 We affirm the Rule 54(b) judgment in favor of Plaintiffs on the intentional interference with a third-party contract and respondeat superior claims as well as the award of attorneys' fees. Each party shall pay its own attorneys' fees on appeal.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

JOHN C. GEMMILL, Judge