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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

J. Christopher Carey,
Plaintiff,

vs.

Maricopa County, et al.,
Defendant.

No. cv-05-2500-PHX-ROS

ORDER

Pending before the Court is Defendant Chavira’s Motion for Summary Judgment (Doc. 324). For the reasons discussed herein, Defendant’s Motion shall be granted in part and denied in part.

I. BACKGROUND

Beginning in 2001, Plaintiff Dr. J. Christopher Carey, a physician, served as Chair of Obstetrics and Gynecology with Defendant Maricopa Medical Center (“MMC”) (an entity within the Maricopa Integrated Health System (“MIHS”)). He also served Residency Program Director for the Phoenix Integrated Residency in Obstetrics and Gynecology (“PIROG”), a residency program at MMC. His employment was pursuant to an employment contract with MedPro, which in turn contracted with MMC.

The topic of abortion appears – to put it mildly – to have been a hotly contested one in Plaintiff’s workplace during his tenure. As part of the residency program that Defendant supervised, PIROG allowed residents who were not opposed to obtain training in performing

1 abortions through a rotation at Planned Parenthood. In the summer of 2003, Dr. William
2 Chavira and Dr. Marcela Moffitt, both employed by MedPro, contacted Cathi Herrod at the
3 Center for Arizona Policy, a group with an anti-abortion focus, to discuss their opposition
4 to the Planned Parenthood rotation. Plaintiff alleges that this event sparked a variety of
5 actions against Plaintiff by Chavira, Moffitt, and others, designed to undermine his position
6 as PIROG director and OB/GYN Chair, including thinly veiled investigations against him.
7 On September 22, 2004, the Maricopa County Board of Supervisors removed Plaintiff from
8 his leadership positions at MMC; soon after, he negotiated a formal severance agreement
9 with MedPro.

10 Plaintiff now brings suit against a number of persons and organizations associated
11 with the end of his employment with MedPro, including Defendant Chavira. He alleges that
12 Chavira acted under color of state law in violating his First Amendment rights, defamed him,
13 and intentionally interfered with his contract with MedPro.

14 Defendant Chavira argues that each claim should be dismissed as a matter of law.

15 II. STANDARD OF REVIEW

16 A court must grant summary judgment if the pleadings and supporting documents,
17 viewed in the light most favorable to the non-moving party, "show that there is no genuine
18 issue as to any material fact and that the moving party is entitled to a judgment as a matter
19 of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).
20 Substantive law determines which facts are material, and "[o]nly disputes over facts that
21 might affect the outcome of the suit under the governing law will properly preclude the entry
22 of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In
23 addition, the dispute must be genuine; that is, "the evidence is such that a reasonable jury
24 could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

25 The party opposing summary judgment "may not rest upon the mere allegations or
26 denials of [the party's] pleading, but . . . must set forth specific facts showing that there is a
27 genuine issue for trial." Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co., Ltd. v. Zenith
28 Radio Corp., 475 U.S. 574, 586-87 (1986). There is no issue for trial unless there is

1 sufficient evidence favoring the non-moving party; "[i]f the evidence is merely colorable, or
2 is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at
3 249-50 (citations omitted). However, "[c]redibility determinations, the weighing of the
4 evidence, and the drawing of legitimate inferences from the facts are jury functions, not those
5 of a judge." Id. at 255. Therefore, "[t]he evidence of the non-movant is to be believed, and
6 all justifiable inferences are to be drawn in his favor" at the summary judgment stage. Id.

7 III. CHOICE OF LAW

8 A federal court exercising supplemental jurisdiction over a state law claim is bound
9 to apply state law in the same manner it would were it sitting in diversity. United Mine
10 Workers v. Gibbs, 383 U.S. 715, 726 (1966). A federal court sitting in diversity applies the
11 forum state's choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496
12 (1941); Orr v. Bank of Am., 285 F.3d 764, 772 n.4 (9th Cir. 2002). Arizona courts apply the
13 rules set forth in the Restatement (Second) of Conflicts (1972) ("Restatement"). Bryant v.
14 Silverman, 703 P.2d 1190, 1191 (Ariz. 1985). Here, Plaintiff has non-federal claims against
15 Defendant Chavira for defamation and for intentional interference with Contract. As per the
16 former claim, section 149 of the Restatement states:

17 In an action for defamation, the local law of the state where the publication
18 occurs determines the rights and liabilities of the parties . . . unless, with
19 respect to the particular issue, some other state has a more significant
relationship . . . to the occurrence and the parties, in which event the local law
of the other state will be applied.

20 As to Plaintiff's intentional interference with contract claim, section 145(a) of the
21 Restatement states:

22 The rights an liabilities of the parties with respect to an issue in tort are
23 determined by the local law of the state which, with respect to that issue, has
the most significant relationship to the occurrence and the parties

24 It is undisputed that Arizona is the site of publication of the allegedly defamatory statements.
25 Further, this case involves an employment relationship between Arizona citizens. All of the
26 alleged actions that form the basis for Plaintiff's claim took place in Arizona. Neither party
27 has argued that another forum's law would be more appropriate. Accordingly, Arizona law
28 shall be applied.

1 IV. ANALYSIS

2 A. Release of Claims

3 The separation agreement between Plaintiff and MedPro contains a clause entitled
4 “Waiver, Release, and Discharge of Claims,” that reads, in part:

5 a. Except as set forth in paragraph 2(e) below, Dr. Carey waives, releases, and
6 discharges all of his existing rights to any relief of any kind (known and
7 unknown) from MedPro, and its insurers, affiliates, divisions, directors,
8 officers, shareholders, members, employees, agents, attorneys, successors, and
9 assigns (collectively the ‘Released Parties’). Dr. Carey specifically
acknowledges and agrees that Marcela Moffit is an employee of MedPro, and
that as such, she is a Released Party, but only to the extent of her acts and/or
omissions as an employee of MedPro which either would give rise to vicarious
liability on the part of MedPro, or are claimed by Dr. Carey to give rise to
vicarious liability on the part of Med Pro. . . .

10 Defendant Chavira argues that – as he was an employee of MedPro at the time of the alleged
11 behavior that is the basis of this suit – any claims Plaintiff had against Chavira are released.
12 Plaintiff, in turn, argues that because Chavira was not an employee of MedPro at the time the
13 Settlement agreement was negotiated and executed, he is not covered under the Separation
14 Agreement.

15 “A general principle of contract law is that when parties bind themselves by a lawful
16 contract the terms of which are clear and unambiguous, a court must give effect to the
17 contract as written.” Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C., 138 P.3d
18 1210, 1213 (citing Estes Co. v. Aztec Constr., Inc., 677 P.2d 939, 941 (Ariz. Ct. App. 1983)).

19 The court may not “pervert or do violence to the language used or expand it beyond its plain
20 and ordinary meaning or add something to the contract which the contracting parties did not
21 put there.” Bender v. Bender, 597 P.2d 993, 996 (Ariz. Ct. App. 1979) (citing Estrada v.
22 Planet Insurance Company, 546 P.2d 372 (1976)). “It is not within the province or power
23 of the court to alter, revise, modify, extend, rewrite or remake an agreement.” Goodman v.
24 Newzona Investment Co., Inc., 421 P.2d 318, 321 (Ariz. 1966). The existence of ambiguity
25 in a contract is a matter of law. Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1428 (9th Cir.
26 1986); see also Mercy Healthcare Ariz. v. Glen Curtis, Inc., No. CV-93-1358, 1995 U.S.
27 Dist. Lexis 11476 at *15-16 (D. Ariz. 1995).

1 Private persons act “under color of law” when they are “jointly engaged with state
2 officials in the prohibited action.” United States v. Price, 383 U.S. 787, 794 (1996). The
3 accused must be “a willful participant in joint activity with the State or its agents.” Dennis
4 v. Sparks, 449 U.S. 24, 29 n. 4 (1980) (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144,
5 152 (1970)). Individuals can be liable for such a conspiracy under section 1983 even if they
6 do “not know the exact details of the plan,” however “each participant must at least share the
7 common objective of the conspiracy.” United Steelworkers of America v. Phelps Dodge
8 Corp., 865 F.2d 1539, 1541 (9th Cir. 1989). “A defendant’s knowledge of and participation
9 in a conspiracy may be inferred from circumstantial evidence and from evidence of the
10 defendant’s actions.” Gilbrook v. City of Westminster, 177 F.3d 839, 856-57 (9th Cir. 1999)
11 (citing United States v. Calabrese, 825 F.2d 1342, 1348 (9th Cir. 1987) (involving a criminal
12 conspiracy)).

13 Plaintiff supplies several pieces of evidence in support of such a conspiracy:

14 1) Defendant Moffitt states that she Defendant Chavira contacted Cathi Herrod,
15 executive director of the Arizona Center for Policy, regarding the Planned Parenthood
16 Affiliation Agreement. Moffitt states that she contacted Herrod because she was concerned
17 the agreement was illegal and “needed another set of eyes” on it. Moffit Dep, Carey SOF
18 Ex. 9.

19 2) Ronald Max Johnson of Arizona Right to Life testified in his deposition that either
20 Moffitt or Chavira (he does not recall precisely whom) described to him pressure on residents
21 to rotate to Planned Parenthood. Johnson Dep., Carey SOF Ex. 33.

22 3) Herrod states that Chavira and Moffitt “expressed to [her] that they believed that
23 the Planned Parenthood agreement violated county policy, violated state law because it was
24 facilitating . . . the training of residents in performing abortions using taxpayer dollars.”
25 Herrod Dep., Carey SOF Ex. 31.

26 4) Plaintiff publicly and repeatedly objected to what he viewed as attempts by
27 Defendants to limit availability of abortions and training. See, e.g., Carey Dep., Carey SOF
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1 Ex. 5, Ex. 10; Kearney Dep., Carey SOF Ex. 11; Ellert Dep., Carey SOF Ex. 57; Kunasek
2 e-mail, Carey SOF Ex. 59.

3 5) Chavira attended a meeting in December, 2003 – to which Plaintiff was not invited.
4 Also in attendance were Moffit, Stapley, Kunasek, John Jakubczyk of Arizona Right to Life,
5 Ronald Johnson, Dr. James Mouer and Dr. William Farnsworth. It was held at the law
6 offices of Herrod’s husband. Moffit Dep., Carey SOF Ex. 9; Chvira Dep., Carey SOF Ex.
7 23; Kunasek Dep., Carey SOF Ex. 13. Moffit testified that the meeting involved “strategic
8 planning for the department of OB/GYN,” clarifying that “if there was a change in the
9 leadership,” it was “basically, planning for that change in leadership potentially.” Moffit
10 Dep., Carey SOF Ex. 9.

11 6) Soon after that meeting Plaintiff was asked if he would resign by MMC CEO Mark
12 Hillard. Carey Aff. ¶ 46.

13 6) Kunasek testified that an allegation that Carey performed an abortion without the
14 patient’s informed consent was brought to his attention, and stated that it was likely that it
15 was done so by either Moffitt or Chavira. Kunasek Dep., Carey SOF Ex. 13, Ex. 34.
16 Moffitt stated that Chavira had reported a violation of the county’s abortion policy to
17 Kunasek. Moffit Dep., Carey SOF Ex. 16.

18 7) Chavira and Kunasek spoke on a number of occasions during the summer and fall
19 of 2004 regarding abortion training and the Planned Parenthood agreement. Kunasek Dep.,
20 Carey SOF Ex. 34. Chavira did not inform Plaintiff of these conversations. Chavira Dep.,
21 Carey SOF Ex. 24.

22 8) After Chavira resigned from MedPro, he met with Tim Casey, counsel for County
23 Defendants, and stated that he had received complaints relating to Plaintiff’s wife’s business
24 solicitation of residents. Chavira Def., Carey SOF Ex. 24. They also discussed alleged
25 sexually inappropriate comments made by Plaintiff. Id.

26 9) Chavira allegedly copied two patient charts – in violation of hospital confidentiality
27 policy – to demonstrate that improper abortions were done. He gave these charts to Moffitt,
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1 who stated that she “honestly felt like he was on a fishing expedition.” Moffitt Dep., Carey
2 SOF Ex. 16; Carey Dep., Carey SOF Ex. 10.

3 10) Meanwhile, Chavira was participating in anti-abortion prayer vigils outside the
4 Planned Parenthood facility where PIROG residents rotated. On at least one occasion, he
5 met Casey, counsel for the County Defendants, at such a vigil. Chavira Dep, Carey SOF Ex.
6 24.

7 Taken together, and particularly given the fact that Chavira attended a meeting in the
8 midst of the other event at issue, with MedPro employees and pro-life activists to discuss a
9 change in leadership at MedPro, there is a genuine issue of material fact such that a jury
10 could infer Chavira’s ”knowledge of and participation in a conspiracy.” Gilbrook, 177 F.3d
11 at 857.

12 Defendant Chavira notes that Plaintiff did not name him as a state actor in his original
13 notice of claim, filed pursuant to Arizona law. He does not, however, allege that this means
14 the claim against Chavira is invalid, and that initial failing does not weigh probatively on the
15 fact of Chavira’s involvement. Nor is the fact that Chavira “was a junior faculty member Dr.
16 Carey’s subordinate” dispositive. Subordinates may take actions in furtherance of a
17 conspiracy against their senior, particularly where more senior employees are also involved
18 in the conspiracy, as is alleged here.

19 Defendant Chavira relies on Collins v. Womancare, in which the Ninth Circuit held
20 that Defendants who made a citizens arrest against protestors were not acting under color of
21 state law as:

22 [t]he circumstances of this case simply do not establish that the state has so far
23 insinuated itself into a position of interdependence with Womancare
24 employees that it must be recognized as a joint participant in the challenged
25 activity. . . . First, it is undisputed that the impetus for the arrests came from
26 Womancare employees and not San Diego police officers. Indeed, the police
27 officer attempted to *discourage* Womancare employees from making the
28 arrests by warning them of the danger of civil liability for false arrest. Second,
the police officer refused after conducting an independent investigation, to
arrest the protestors on his own authority. Third, the Collins group has not
disputed nor are there alleged any facts in opposition to Womancare’s
contention that the police maintained a policy of neutrality in the dispute.

1 878 F.2d 1145, 1155 (9th Cir. 1989) (internal citations and quotations omitted). He writes:
2 “Dr. Chavira’s interaction with the state was far less than even the protestors in Collins,”
3 Defendant argues.

4 However, unlike the protestors in Collins, Chavira was a public employee who is
5 alleged to have actually conspired to remove Plaintiff from his position and to have taken
6 affirmative steps in furtherance of that conspiracy. Plaintiff has provided enough evidence
7 to create a genuine issue of material fact as to the validity of these allegations. Conversely,
8 in Collins, it was uncontested that the state actors in questions deliberately distanced
9 themselves from and discouraged the actions of the non-state actors.

10 Accordingly, given that a jury may infer the existence of a conspiracy from
11 circumstantial evidence, it cannot be concluded as a matter of law that Chavira did not act
12 under color of state law. Defendant’s Motion for Summary Judgment fails on this point.

13 C. Plaintiff’s Defamation Claim

14 Arizona law specifies a one year statute of limitation for defamation actions. A.R.S.
15 § 12-541(1). “An action for defamation accrues and the Statute of Limitations begins to run
16 upon publication,” i.e., when the statement was communicated to third person (someone
17 other than the one defamed). Lim v. Superior Court In and For Pima City, 616 P.2d 941, 942
18 (Ariz. Ct. App. 1980); 50 Am. Jur. 2d Libel and Slander § 220 (2008). None of the eleven
19 allegedly defamatory statements made by Chavira was made after November 30, 2003;
20 barring any tolling, then, the last day that Plaintiff could maintain an action for defamation
21 against Chavira was November 30, 2004. Plaintiff’s action was filed August 18, 2005.

22 Plaintiff cites the “discovery rule” which holds that when defamatory statements are
23 “published in a manner in which [they were] peculiarly likely to be concealed from the
24 plaintiff,” the cause of action accrues when the plaintiff discovers the statements or
25 reasonably should have discovered them. Wietecha v. Ameritas Life Ins. Corp., NO-CV-05-
26 0324, 2006 U.S. Dist. Lexis 70320 at * 14-15 (citing Clark v. AiResearch Co. of Arizona,
27 673 P.2d 984, 986-87 (Ariz. Ct. App. 1983)). Plaintiff argues that Chavira communicated
28 his defamatory statements to Kunasek, Moffitt and others in a “clandestine and insidious”

1 way, thus falling under the discovery rule. Accordingly, while Plaintiff “suspected that
2 Defendant Chavira may have defamed him (and sued based on those good-faith suspicions),
3 it was not until the commencement of discovery that many of his suspicions were confirmed.”

4 However, Arizona cases have applied the discovery rule exceedingly sparingly.² In
5 Clark, the court cites Illinois and Texas cases involving defamatory reporting to a credit
6 agency, a Washington case involving confidential business memoranda, and a California case
7 in which a defamatory letter was placed in a school teacher’s confidential personnel file. 673
8 P.2d at 986. In the case at hand, the Clark court found that the rule of discovery did not
9 extend to cases where remarks were not made in an “*inherently* secret or confidential matter.”
10 Id. at 987 (emphasis added). Accordingly, because “Clark admitted in his deposition that
11 even before he resigned from AiResearch and continually in the years following, he was led
12 to believe that negative things were being said about him by personnel at AiResearch,” the
13 rule of discovery did not apply. Id. at 987.

14 The facts here are indistinguishable from Clark. Chavira’s alleged remarks were not
15 published in an *inherently* confidential matter. They may, indeed, have been clandestine, as
16 Plaintiff alleges, however remarks made among co-workers and their associates are simply
17 not the sort of defamation that comes under the scope of the discovery rule. That rule is
18 limited to things which are, by actual rule of confidentiality or privacy, inaccessible to the
19 wronged party.

20 Accordingly, Plaintiff’s defamation claim is time barred.

21 D. Interference with Contract

22 Plaintiff alleges Defendants – including Chavira – intentionally interfered with
23 Plaintiff’s contractual relationship with MedPro, causing Plaintiff’s employment to terminate.

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25 ² As Chavira points out, the discovery rule has been found to apply in only one case,
26 a case decided under A.R.S. § 12-821.01 rather than A.R.S. 12.541, which authorizes claims
27 against public entities and public employees and specifically states that “[f]or purposes of
28 this section, a cause of action accrues when the damaged party realizes he or she has been
damaged and knows or reasonably should know the case, source, act, event, instrumentality
or condition which caused or contributed to the damage.” A.R.S. § 12-821.01(B).

1 To prove the tort of intentional interference with contractual relations in Arizona, a Plaintiff
2 must show:

3 the existence of a valid contractual relationship or business expectancy; the
4 interferer's knowledge of the relationship of expectancy; intentional
5 interference inducing or causing a breach or termination of the relationship or
6 expectancy; and resultant damage to the party whose relationship or
7 expectancy has been disrupted. . . . In addition, the interference must be
8 improper as to motive or means before liability will attach.

9 Neonatology Assocs. v. Phoenix Perinatal Assocs., 164 P.3d 691, 693 (Ariz. Ct. App. 2007)
10 (quoting Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors, 909 P.2d
11 486, 494 (Ariz. Ct. App. 1995)). To be actionable, interference must “be both intentional and
12 improper If the interferer is to be held liable for committing a wrong, his liability must
13 be based on more than the act of interference alone. Thus, there is ordinarily no liability
14 absent a showing that defendant's actions were improper as to motive or means.” Safeway
15 Ins. Co. v. Guerrero, 106 P.3d 1020, 1026 (2005).

16 Chavira argues first that the existence of a conditional privilege for his alleged
17 statements defeats this claim. This conditional privilege is “based on the social utility of
18 protecting statements required to be made in response to a legal, moral or social duty.” Green
19 Acres Trust v. London, 688 P.2d 617, 624 (1984). However, Arizona courts have “rejected
20 the ‘formalistic privilege concept in favor of a requirement that an interference be ‘improper’
21 for liability to attach.” Safeway Ins. Co. v. Guerrero, 106 P.3d 1020, 1025 (Ariz. 2005)
22 (quoting Wagenseller v. Scottsdale Mem’l Hosp., 710 P.2d 1025, 1043 (Ariz. 1985)).
23 Instead, the focus must be on whether the defendant “‘acted improperly’ and not on whether
24 the lawyers were ‘privileged’ to interfere in the contractual relationship between Safeway and
25 Botma.” Id. Accordingly, Defendant's claim of privilege fails.³

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³ Chavira's Motion for Summary Judgment does, indeed, quote Arizona's
jurisprudence on the topic of determining whether the interference is “improper.” However,
Plaintiff does not make an argument based on this standard, instead focusing entirely on its
claim of conditional privilege and stating that “[b]ecause the conditional privilege is ‘based
on the social utility of protecting statements required to be made in response to a legal, moral
or social duty,’ . . . privileged statements cannot be improper.” It will not, therefore, be
considered on summary judgment.

1 Second, Chavira argues that Plaintiff cannot establish that Chavira caused him any
2 harm. Chavira notes that the last allegedly tortious comment from Chavira was made in
3 October, 2003. In May of 2004, Plaintiff was investigated by MedPro a second time and
4 cleared of any wrongdoing alleged by Chavira's allegations. Later that year, Plaintiff's
5 contract with MedPro was renewed. Plaintiff's voluntary severance commenced in March,
6 2005. Accordingly, Chavira states, "his resignation from MedPro has all the indicia of a
7 voluntary severance from the company," and "there is no evidence that any allegedly tortious
8 comments made by Dr. Chavira caused MedPro to end its relationship with Dr. Carey."
9 Plaintiff responds that "Dr. Carey's final departure from MedPro was merely the *coup de*
10 *grâce* in a long, drawn out, and far from voluntary termination."

11 Further, Plaintiff points to governing law which states that

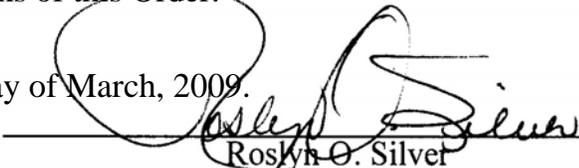
12 [o]ne who intentionally and improperly interferes with the performance of a
13 contract . . . between another and a third person, by preventing the other from
14 performing the contract or causing his performance to be more expensive or
burdensome, is subject to liability to the other for the pecuniary loss resulting
to him.

15 Restatement (Second) of Torts § 766A (1979); Plattner v. State Farm Mut. Auto Ins. Co., 812
16 P.2d 1129, 1134 (Ariz. Ct. App. 1991). This section does not require that the alleged
17 interfering act actually have the effect of terminating the contract in and of itself. Given the
18 conspiracy Chavira is alleged to have participated in to remove Plaintiff, and given the
19 evidence Plaintiff has provided in furtherance of that conspiracy (see section on "Color of
20 Law," *supra*), Plaintiff has demonstrated that there is a genuine issue of material fact as to
21 whether Chavira's actions constitute intentional interference with Plaintiff's contract.

22 Accordingly,

23 **IT IS ORDERED** Defendant's Motion shall be **GRANTED IN PART** and **DENIED**
24 **IN PART**, consistent with the terms of this Order.

25 DATED this 10th day of March, 2009.

26 
27 Roslyn O. Silver
28 United States District Judge