

**Motions for Rehearing Overruled; Opinion filed October 26, 2000, Withdrawn; Affirmed, in Part, Reversed and Remanded, in Part; and Opinion on Rehearing filed April 5, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-00201-CV**  
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**RICK D. BATY and  
BATY & ASSOCIATES INSURANCE AGENCY, INC., Appellants**

**V.**

**PROTECH INSURANCE AGENCY, CONNIE SUZANNE MALLIAROS, TREVA C.  
NEILL, AETNA LIFE & CASUALTY CO., ITT HARTFORD FIRE INSURANCE CO.,  
AMERICAN MEDICAL SECURITY, INC., and FIDELITY & DEPOSIT COMPANY  
OF MARYLAND, Appellees**

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**On Appeal from the 334th District Court  
Harris County, Texas  
Trial Court Cause No. 94-62720A**

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**OPINION ON REHEARING**

The motions for rehearing filed by appellees, ProTech Insurance Agency ("ProTech"), Connie Suzanne Malliaros, and Treva C. Neill and the motions for rehearing filed by appellants, Rick D. Baty and Baty & Associates Insurance Agency, Inc. ("BAI") are overruled. On the

court's own motion, in light of the Texas Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Sturges*, No. 98-1107, 44 Tex. Sup. Ct. J. 486, 2001 WL 228139 (Tex. Mar. 8, 2001), we reverse summary judgment on BAI's claims for tortious interference with prospective business relationships. In addition, to the extent that tortious interference with prospective business relationships serves as the requisite underlying tort for BAI's civil conspiracy claims, we reverse summary judgment on the conspiracy claims. The disposition of all other issues presented in this appeal remains the same. The court's opinion issued on October 26, 2000, is withdrawn, and this opinion is substituted in its place.

## I. INTRODUCTION

Appellants, Baty and BAI, appeal the summary judgments entered in favor of appellees, ProTech, Malliaros, Neill, Aetna Life & Casualty Co.,<sup>1</sup> ITT Hartford Fire Insurance Co. ("Hartford"), American Medical Security, Inc. ("AMS"), and Fidelity & Deposit Company of Maryland ("Fidelity"). We affirm, in part, and reverse and remand, in part.

## II. FACTUAL AND PROCEDURAL BACKGROUND

BAI is an independent insurance agency authorized to sell property, casualty, life, and health insurance. Baty is the president and part owner of BAI. In 1992, BAI employed Malliaros and Neill as sales representatives. Shortly thereafter, they became officers of the company. In April 1993, Malliaros and Neill each purchased ten percent of BAI stock, becoming shareholders of the company along with Baty. In connection with this purchase of BAI stock, Malliaros, Neill, and Baty entered into an "Agreement Between Shareholders." This agreement contained covenants not to compete.

In 1994, Malliaros and Neill began making plans to start their own insurance agency, ProTech. On August 31, 1994, Malliaros and Neill resigned from BAI. The next day, ProTech

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<sup>1</sup> Although Aetna was the original party to this suit, after the filing of this lawsuit, Travelers Casualty & Surety Co. acquired Aetna. In this opinion, we refer to Aetna and Travelers as "Aetna."

commenced business in competition with BAI. ProTech, in furtherance of its business, entered into agency agreements with various insurance companies, including Aetna, Hartford, AMS, and Fidelity.

About a week after Malliaros and Neill resigned, BAI brought suit against them, seeking to enforce the covenants not to compete. BAI asserted claims of breach of contract, breach of fiduciary duty, and unjust enrichment against Malliaros and Neill. BAI also joined ProTech as a defendant in the suit. In November 1994, BAI, Baty, Malliaros, and Neill entered into a “Settlement and Recission Agreement” pursuant to which (1) Malliaros, Neill, and Baty agreed to rescind the “Agreement Between Shareholders,” (2) Malliaros and Neill agreed to return their stock to BAI, (3) BAI, in turn, agreed that the covenants not to compete were no longer of any effect; and (4) all parties agreed to dismiss their claims without prejudice. As part of the settlement, Baty and BAI released claims against Malliaros, Neill, and ProTech. The scope of the release is the subject of dispute in this case.

After entering into the settlement agreement, Baty and BAI filed a second suit (this case) against Malliaros, Neill, and ProTech. Baty asserted libel and slander claims; BAI asserted claims for business disparagement, breach of fiduciary duty, unjust enrichment, tortious interference with existing contracts and prospective business relationships, and civil conspiracy. In this second lawsuit, BAI also brought claims against Aetna, Hartford, AMS, and Fidelity, alleging these insurance companies tortiously interfered with its contracts and prospective business relationships and induced Malliaros and Neill to breach the fiduciary duties they, as officers and employees, owed to BAI. Baty and BAI bring this appeal from the summary judgment in favor of the defendants/appellees on all the plaintiffs/appellants’ claims.

### **III. SUMMARY JUDGMENT STANDARD OF REVIEW**

To prevail on a motion for summary judgment, a defendant must establish that no

material fact issue exists and that it is entitled to judgment as a matter of law. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999). If a defendant moves for summary judgment on the basis of an affirmative defense, it has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). In conducting our review of the summary judgment, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor. *Id.*<sup>2</sup>

#### IV. ANALYSIS

##### A. Scope of Settlement Agreement's Release and Recission Provisions

Malliaros, Neill, and ProTech moved for summary judgment on all of the claims Baty and BAI asserted against them on the stated ground that Baty and BAI had released those claims in the settlement agreement. Similarly, Aetna, Hartford, AMS, and Fidelity each moved for summary judgment on the claims BAI asserted against them, alleging that because those claims are derivative of BAI's tort claims against Malliaros, Neill, and ProTech, the settlement agreement also released the claims against the insurance companies.

BAI based its breach of fiduciary duty claims on Malliaros and Neill's actions as agents and officers of BAI prior to leaving their employment. BAI claims these actions included unauthorized use of time and effort to set up a competing business, misappropriation of BAI's confidential information for the benefit of their new competing business, solicitation of BAI's employees, failure to disclose their improper activities to BAI's principal officer and shareholder (Baty), and diversion of BAI's clients to ProTech. BAI's factual allegations with

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<sup>2</sup> AMS and Fidelity filed no-evidence motions for summary judgment on BAI's claims for inducing the breach of a fiduciary duty, while Aetna filed a no-evidence motion for summary judgment on BAI's tortious interference claims. Based on our disposition of the issues relative to the traditional motions for summary judgment, we need not reach the grounds raised in the no-evidence motions for summary judgment.

respect to Malliaros and Neill’s alleged breaches of their fiduciary duties in the first lawsuit are essentially the same as the factual allegations set forth in the current litigation.<sup>3</sup> Our task is determine whether the claims asserted in the second suit are barred by the release and/or rescission provisions of the “Settlement and Rescission Agreement.”

## 1. Release

A release is a writing which provides that a duty or obligation owed to one party to the release is discharged immediately on the occurrence of a condition. *National Union Fire Ins. Co. v. Insurance Co. of N. Am.*, 955 S.W.2d 120, 127 (Tex. App.—Houston[14thDist.] 1997), *aff’d*, 20 S.W.3d 692 (Tex. 2000). Like any other agreement, a release is subject to the rules of construction governing contracts. *Grimes v. Andrews*, 997 S.W.2d 877, 881 (Tex. App.—Waco 1999, no pet.). When construing a contract, courts must give effect to the true intentions of the parties as expressed in the written instrument. *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996). The contract must be read as a whole, rather than by isolating a certain phrase, sentence, or section of the agreement. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). The language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties’ intent. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999).

Although oral statements regarding the parties’ intentions are inadmissible to vary or contradict the terms of the agreement, the court may examine prior negotiations and all other

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<sup>3</sup> BAI alleged, in relevant part, in the first lawsuit:

[I]t appears that Neill, and Malliaros had taken substantial advance preparations to go into competition with Baty and Associates prior to the time of their resignation and while they were employees and corporate officers owing a fiduciary obligation toward Baty and Associates. The efforts taken by Neill, and Malliaros, prior to their resignation, which on information and belief included contacts and negotiations with insurers and solicitation of existing and potential customers of Baty and Associates, were in breach of their fiduciary obligations to Baty and Associates.

relevant incidents bearing on the intent of the parties. *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 132 (Tex. App.—Houston [14th Dist.] 2000, pet. dismiss’d). Such an examination assists the court in ascertaining the object and purpose of the contractual language the parties chose to include in the written instrument. *Id.* The court should construe a contract by considering how a reasonable person would have used and understood such language, considering the circumstances surrounding its negotiation and keeping in mind the purposes which the parties intended to accomplish by entering into the contract. *National Union Fire Ins. Co.*, 955 S.W.2d at 127.

To effectively release a claim, the releasing instrument must “mention” the claim to be released. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991). Any claims not “clearly within the subject matter” of the release are not discharged, even if those claims exist when the release is executed. *Id.* It is not necessary, however, for the parties to anticipate and identify every potential cause of action relating to the subject matter of the release. *Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 20 S.W.3d 692, 698 (Tex. 2000). Although releases generally contemplate claims existing at the time of execution, a valid release may also encompass unknown claims and damages that develop in the future. *Id.*

The settlement agreement at issue here states, in relevant part:

The Agreement Between Shareholders (the “Agreement”) dated April 27, 1993, between and among Neill, Baty, Malliaros, and [BAI] (Exhibit 1) is hereby rescinded and declared to be of no further force and effect to the same extent as if the Agreement were never executed. . . . Likewise, Baty and [BAI] specifically agree that *the non-compete and non-solicitation provisions in Article 9.6 of the Agreement Between Shareholders or any similar provision or covenant, whether written or otherwise*, at law or in equity, are of no force and effect. Baty and [BAI] *waive and release any claim against Neill [and Malliaros] and/or ProTech based upon any alleged non-compete and/or non-solicitation agreement, covenant, or provision*, known or unknown, whether now existing or which may arise in the future. The parties specifically

agree that after the effective date of this Settlement and Rescission Agreement, no party shall have any obligations to any other *under the provisions of the Agreement Between Shareholders*, and each party releases each of the other parties from *any claims under the Agreement Between Shareholders* existing as of the date of this Settlement and Rescission Agreement.<sup>4</sup>

The covenant not to compete in the “Agreement Between Shareholders,” to which the settlement agreement specifically refers, states, in relevant part:

9.6 Covenant Not to Compete. In consideration for the agreements of [BAI] herein contained, Employee agrees that for a period of two (2) years *following the termination of her employment*, whether such termination is voluntary, or involuntary, with or without cause, Employee will not, directly or indirectly, for herself or by or on behalf of any other person, firm, corporation, partnership or other entity, solicit insurance business from any customers of [BAI], or from any other prospective customers whom she may have solicited in the one (1) year period preceding the date of termination of employment.<sup>5</sup>

Baty and BAI maintain that their tort claims are not “clearly within the subject matter” of the settlement agreement because the release language is expressly limited to claims arising under the “Agreement Between Shareholders” and does not specifically state that tort claims are being released. We agree.

When a release contains language which evinces a specific intent to cover tort claims as well as contract claims, courts will not hesitate to find the claims were released. *See, e.g., Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180-81 (Tex. 1997) (holding that a release, which released all “causes of action of whatsoever nature, or any other legal theory arising out of the circumstances described above, and from any and all liability damages of any kind known or unknown, whether in *contract or tort*,” released fraudulent inducement claims) (emphasis added). Likewise, courts will construe broadly drafted releases to encompass a

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<sup>4</sup> Emphasis added.

<sup>5</sup> Emphasis added.

wide variety of claims. *See, e.g., Anheuser-Busch Cos. v. Summit Coffee Co.*, 858 S.W.2d 928, 934 (Tex. App.—Dallas 1993), *vacated on other grounds*, 514 U.S. 1001 (1995) (finding that a release, which released “any and all causes of action of *any nature whatsoever, at common law, statutory or otherwise*,” included fraud and securities law claims because the release, by reference to the stock purchase agreement, mentioned all claims involving undisclosed liabilities, a specific class of claims which included the claims at issue) (emphasis added).<sup>6</sup> However, the settlement agreement at issue here is not a broad form general release. It does not purport to release claims of “any nature whatsoever;” it does not even mention tort claims. Rather, it is expressly restricted to claims relating to “any alleged non-compete and/or non-solicitation agreement, *covenant or provision*”<sup>7</sup> and “claims under the Agreement Between Shareholders,” i.e., contract claims.

Appellees do not dispute the settlement agreement lacks specific language releasing the tort claims; rather, they argue that because the settlement agreement does not expressly reserve or otherwise except the tort claims from its coverage, the court should read the settlement agreement as encompassing these claims. While including contractual language that expressly reserves or excepts claims intended to be preserved from the effects of a release

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<sup>6</sup> *See also Memorial Med. Ctr. of E. Tex. v. Keszler*, 943 S.W.2d 433, 434-35 (Tex. 1997) (finding that a release, which stated that the parties agreed to release all claims related to corrective action by Memorial against Keszler “and *any other matter relating to [Keszler’s] relationship with [Memorial]*” was not limited to claims regarding corrective action, but released all claims relating to Keszler’s relationship with Memorial, including the ethylene dioxide exposure claim) (emphasis added); *Vera v. North Star Dodge Sales, Inc.*, 989 S.W.2d 13, 18 (Tex. App.—San Antonio 1998, no pet.) (finding that a release, which operated to “release[] North Star Dodge from any and all liability regarding the purchase of a 1993 Mazda Protg [sic],” was not limited to claims concerning the purchase of the vehicle, but also included unlawful debt collection, conversion, and wrongful repossession claims because the terms of the purchase were not satisfied).

<sup>7</sup> Emphasis added. The words “covenant” and “provision” are terms generally associated with contracts and written instruments, not torts. A “covenant” is a “formal agreement or promise, usu[ally] in a contract.” BLACK’S LAW DICTIONARY 369 (7th ed. 1999). A “provision” is a “clause in a statute, contract or other legal instrument.” *Id.* at 1240.



may be prudent practice to avoid the time and expense of litigating the issue, Texas law imposes no such requirement.<sup>8</sup>

The scope of coverage of a release is determined by the terms of the agreement between the parties. Here, the settlement agreement contains no language expressly releasing the tort claims BAI and Baty asserted against Malliaros, Neill, and ProTech in the first suit. Appellees, however, contend the language in the settlement agreement is nevertheless broad enough to encompass the tort claims. In support of this contention, appellees argue that the claims based on Malliaros and Neill’s alleged pre-resignation activities, which are the subject of the second lawsuit, fall within the scope of the release because the duties involved and the conduct alleged to constitute the breaches of those duties were covered in the subject matter

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<sup>8</sup> See, e.g., *Keck, Mahin & Cate*, 20 S.W.3d at 698 (holding that a release, which released claims “directly or indirectly attributable to the rendition or [sic] professional legal services by KMC to Granada between June 1, 1998 and April 1, 1992,” did not release legal malpractice claims arising after April 1, 1992); *Brady*, 811 S.W.2d at 939 (finding that although the release agreement released all claims attributable to a specific loan transaction between a bank and its customer, it did not cover a new loan transaction between the bank and the same customer, which was the subject of subsequent litigation); *Grimes*, 997 S.W.2d at 884 (finding that the appellant’s claims for wrongful termination and discrimination, which were filed in federal court, were not released in a settlement agreement referring only to the state court cause number under which the appellant’s workers’ compensation claim was filed); *Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 204 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.) (finding that where a release agreement referred only to the “dispute as to the validity of said lease” and the appellants’ desire to ratify the lease as part of the settlement of that dispute, it did not cover the claims of improper pooling and unitization of the appellants’ land in violation of the lease asserted in the second lawsuit, in spite of broad language stating “all damages, claims or causes of action claimed or asserted against Pennzoil”); *Johnson v. J.M. Huber Corp.*, 699 S.W.2d 879, 883 (Tex. App.—Amarillo 1985, writ ref’d n.r.e.) (holding that a release, which released claims for damages from underground water pollution for two specific tracts of land, did not release claims related to a third tract which was not expressly mentioned in the release); *Houston Oilers, Inc. v. Floyd*, 518 S.W.2d 836, 838 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.) (holding that a release executed in workman’s compensation action, which released “any and all claims . . . of whatever nature arising out of and resulting from the alleged injury accident of August 23, 1968 and of and from any and all claims . . . for liability for medical aid, hospital services, nursing, chiropractic services and medical expenses, past, present and future,” did not bar cause of action to recover balance of salary); *Loy v. Kuykendall*, 347 S.W.2d 726, 728 (Tex. Civ. App.—San Antonio 1961, writ ref’d n.r.e.) (finding that where a preprinted general release for all damages contained a more specific clause stating “[t]his release is only for bodily injury,” it did not release claim for property damages).

of the “Agreement Between Shareholders.” The provision in the shareholders’ agreement on which appellees rely, states:

9.2 Duties. The duties to be performed by Employee shall be those of an account executive, including those duties associated with servicing existing clients and developing, producing and closing new business clients. Employee shall perform such other incidental work as may be assigned to her which is commensurate with Employee’s position and compensation level in accordance with the instructions, directions and under the control of Employer, [sic] Employee shall devote her full time efforts to the business of Corporation, and shall not undertake any other business activities during the term of this Agreement which would limit her abilities to perform services for the Corporation.

Appellees argue that the common law duties of loyalty BAI claims Malliaros and Neill breached as employees and officers of BAI (which give rise to the tort claims) were the same contractual duties set forth in the “Agreement Between Shareholders” (which gave rise to the released contract claims). Specifically, they contend the solicitation of business for personal advantage would not only limit Malliaros and Neill’s ability to perform their contractual duties as employees of BAI, but it would also interfere with the “servicing of existing clients and developing, producing and closing new business clients.” Therefore, according to appellees, these were clearly “claims under the Agreement Between Shareholders” and, thus, were the subject matter of the settlement agreement. Malliaros, Neill, and ProTech make a similar argument with respect to BAI’s tortious interference claims, i.e., that such alleged interference was necessarily related to their efforts to solicit customers away from BAI in breach of the covenants not to compete and, for this reason, the tortious interference claims must be deemed to fall within the subject matter of the release, too. Finally, Malliaros, Neill, and ProTech argue that the defamation and business disparagement claims<sup>9</sup> were also released in the

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<sup>9</sup> These claims are based on allegations by Baty and BAI that Malliaros and Neill sent a letter to the Texas Department of Insurance asserting that Baty and BAI were engaged in illegal or unethical practices. BAI also complains that Malliaros and Neill wrote letters to several BAI clients alleging that Baty (continued...)

settlement agreement because the facts underlying those claims relate to post-resignation conduct undermining BAI's business and attempting to solicit BAI's customers in violation of the covenants not to compete.

To support their argument that the "Agreement Between Shareholders" subsumes the common law duties they owed as officers and employees of BAI, Malliaros and Neill rely on *DeWitt County Elec. Co-op, Inc. v. Parks*, 1 S.W.2d 96 (Tex. 1999) and *R.C. Bowen Estate v. Continental Trailways, Inc.*, 152 Tex. 260, 256 S.W.2d 71 (Tex. 1953), two Texas Supreme Court cases which address the effects of releasing claims where there are concomitant contractual and common law duties.

In *DeWitt*, rural property owners entered into an easement agreement with an electric cooperative. The easement agreement, which detailed the specific actions the cooperative could take to maintain the right-of-way, stated:

The Cooperative shall have the right to clear the right-of-way of all obstructions, to cut and trim trees within the right-of-way or chemically treat trees or shrubbery with herbicides and to cut down from time to time all dead, weak, leaning, or dangerous trees that are tall enough to strike the wires in falling.

*DeWitt*, 1 S.W.2d at 100. When the cooperative cut down several trees in the right of way, the landowners brought suit, asserting both breach of contract and negligence claims. The Texas Supreme Court, reversing the intermediate appellate court, determined that the landowners could not maintain a negligence claim independently of their contract claim. Explaining its rationale, the *DeWitt* court stated:

We held in *Southwestern Bell Telephone Co. v. DeLanney* that "[i]f the defendant's conduct ... would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct ... would give rise to liability only

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<sup>9</sup> (...continued)  
and BAI were engaging in misleading and illegal practices.

because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract.”

The court of appeals carried this statement to an illogical conclusion. A person who enters a neighbor's property and cuts down trees *with no contractual right* to do so can be held liable in tort. But when, as here, *a contract spells out the parties' respective rights about whether trees may be cut*, the contract and not common-law negligence governs any dispute about whether trees could be cut or how trees were cut.

*Id.* at 105 (emphasis added) (quoting *Southwestern Bell Tele. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991)). Relying on *DeWitt*, Malliaros and Neill insist that the contractual duties set forth in the “Agreement Between Shareholders” overlap the common law duties and, thus, when BAI released them from claims under the contract, it also released them from tort claims. These appellees’ reliance on *DeWitt* is misplaced.

Unlike the easement agreement in *DeWitt*, the “Agreement Between Shareholders” does not expressly or specifically address the duties in question, nor does it “spell out” the obligations Malliaros and Neill had with respect to fulfillment of those duties. Unlike the contracting parties in *DeWitt*, the signatories to the “Agreement Between Shareholders” did not undertake to replace common law duties with an agreement of their own making; rather, they merely stated in very general terms the job descriptions and responsibilities of Malliaros and Neill.

“Certain duties, apart from any written contract, arise upon the formation of an employment relationship.” *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 21-22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism’d). Malliaros and Neill each had a common law duty not to compete with BAI *during* their employment; this duty was separate from and independent of any contractual duties they undertook in the “Agreement Between Shareholders.” *See Gaal v. BASF Wyandotte Corp.*, 533 S.W.2d 152, 154-55 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (affirming the enjoinder of a former

employee from contacting customers solicited prior to leaving employment, but observing that employer lost its right to prevent that employee from competing for customers upon the termination of employment in the absence of a post-termination covenant not to compete). As officers and employees of BAI, they also had a duty not to disclose or use BAI's confidential and proprietary information for their own benefit. See *T-N-T Motorsports*, 965 S.W.2d at 22. Likewise, the common law imposes on all persons a general duty not to defame others. *Atlantic Lloyd's Ins. Co. of Tex. v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472, 475 (Tex. App.—Dallas 1998, pet. denied). The “Agreement Between Shareholders,” however, contains no express prohibition against pre-termination competition, unauthorized use of BAI's confidential and proprietary information, or disparagement of BAI, nor does it identify any of these specific common law duties as contractual obligations.

Texas case law has consistently held that “courts cannot make contracts for the parties.” *Holman v. Meridian Oil, Inc.*, 988 S.W.2d 802, 807 (Tex. App.—San Antonio 1999, pet. denied) (refusing to find liquidated damages clause imposed duty to release “any lease” where the only express provision governing expired leases was contained in separate paragraph of lease addendum). When parties have entered into a valid contract, an appellate court does not have the power to place an interpretation upon the contract and its terms which the parties did not express. *Id.* at 806. We find that because the “Agreement Between Shareholders” does not contain provisions expressly prohibiting or restricting the conduct which forms the basis of BAI's tort claims, this case does not present a *DeWitt* scenario.

Malliaros, Neill, and ProTech's reliance on *Bowen* is similarly misplaced. In *Bowen*, a landlord sued its tenant for negligent waste. *Bowen*, 256 S.W.2d at 71. The court rejected the landlord's argument that the landlord had a cause of action in tort for negligent waste, independent of the lease, and that liability for the tort was not covered by the release. *Id.* at 72-73. The negligent waste claim was based on the implied duty of the tenant to use ordinary care to protect the leased premises from injury other than ordinary wear and tear. In rejecting the

landlord's contention, the *Bowen* court noted the parties had by "express covenant incorporated that implied covenant against waste into the lease contract." *Id.* at 73. Therefore, the *Bowen* court found "[u]nder the language of the lease contract covenants are treated as conditions and the parties have not indicated that any distinction is to be made between the two." *Id.* at 73. *Bowen* is clearly distinguishable. Here, the contracting parties did not make the common law prohibitions against pre-termination competition and post-termination business disparagement express covenants in the "Agreement Between Shareholders." Moreover, in *Bowen*, the contractual duty was identical to the common law duty, making it logical to conclude that a release covered violations of both. *Id.* That is not the case here. While the contractual and common law duties overlap in a very broad sense, the common law imposes specific duties on current and former employees that clearly do not appear in the "Agreement Between Shareholders."

We do not read *DeWitt* and *Bowen* to hold that *any* overlap in contractual and common law duties precludes a claimant from maintaining a tort claim independently of a contract claim. Where, as here, the contract does not address the specific duties at issue (i.e., the duty not to engage in pre-termination competition with one's employer, the duty not to use or disclose an employer's confidential information, and the duty not to make defamatory or disparaging statements), then it is reasonable to conclude that the parties did not intend to supplant the common law duties or to look solely to the contract to define the obligations of the parties. Because the parties to the "Agreement Between Shareholders" included a contractual provision which expressly prohibited post-termination competition with BAI but did not include such a prohibition against pre-termination competition,<sup>10</sup> there is no contractual

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<sup>10</sup> Notably, in the first lawsuit, the only actions BAI specifically identified as constituting a breach of contract were Malliaros and Neill's *post-termination* activities, i.e., violations of the non-compete covenant. Malliaros and Neill's *pre-termination* conduct was the subject of the breach of fiduciary duty claims arising out of their common law duties as officers and employees of BAI. The defamation and business disparagement claims, relating to post-termination conduct, were not asserted in the first suit.

provision that subsumes that common law duty. The same holds true for the common law duties not to make unauthorized use of an employer’s confidential information or defame or disparage others. For these reasons, there is no basis for concluding that only the “Agreement Between Shareholders” governs the obligations of the parties, and no reason for precluding BAI and Baty from maintaining tort claims independently of their contract claims. Therefore, we reject appellees’ contention that when the parties to the settlement agreement released all claims under the “Agreement Between Shareholders,” the tort claims for breach of fiduciary duty and tortious interference (based on pre-termination conduct) and for defamation and business disparagement (based on post-termination conduct) were extinguished.

The determination of whether the parties released claims sounding in tort as well as claims sounding in contract turns on the intent of the parties as expressed in the plain language of the settlement agreement. That agreement does not mention any tort claims. It does, however, recite that the parties desire “to avoid the expense and uncertainty of *litigation concerning the two Agreements Between Shareholders.*”<sup>11</sup> Significantly, at the time the parties entered into the “Settlement and Rescission Agreement,” the breach of fiduciary duty claims BAI and Baty had asserted against Malliaros and Neill were pending, yet the parties did not refer to these claims in the settlement agreement. Nor did the parties make any recitals concerning their desire to avoid further litigation on these claims or any other tort claims, as they did with the contract claims. This silence raises an inference that the parties did not intend to include tort claims in the settlement agreement. *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987) (noting that “[t]he maxim *expressio unius est exclusio alterius*, meaning that the naming of one thing excludes another,” though not conclusive, was applicable to the construction of a settlement agreement). Moreover, while “parties [need not] anticipate and identify each potential cause of action

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<sup>11</sup> Emphasis added.

relating to the release's subject matter,"<sup>12</sup> when specific claims have been filed and are the subject of pending litigation, a failure to identify them by name strongly suggests that the parties did not intend to include them in the release.

Finally, we note the "Settlement and Rescission Agreement" does not contain the sort of provisions which would tend to support the notion that the parties intended for the disputed claims to be released. For example, the settlement agreement does not provide for the dismissal of claims with prejudice, but instead expressly states that all parties agree to dismiss their claims without prejudice. "A dismissal without prejudice means the claimant has the right to sue again on the same cause of action." *McConnell v. Attorney Gen. of Tex.*, 878 S.W.2d 281, 283 (Tex. App.—Corpus Christi 1994, no writ). Additionally, the settlement agreement does not contain any covenants or agreements not to pursue the claims asserted in the original litigation or file future claims arising out of the employment relationship. Reading the contract as a whole, we do not find that a reasonable person would have used and understood the release language to release anything other than claims specifically identified, i.e., claims based on the non-compete and/or non-solicitation provisions and other claims under the "Agreement Between Shareholders."

The role of the court is to construe the release to follow the expressions of the written instrument. We will not expand the language of the release to cover claims not specifically mentioned, nor will we infer or presume an intent of the parties to release claims that are not clearly within the scope of the agreement. Had the parties intended to release claims sounding in tort as well as claims sounding in contract, they easily could have included language to that effect in the settlement agreement or entered into a broad form general release encompassing "claims of any nature whatsoever." They did not. We will not rewrite their settlement agreement to release claims not mentioned.

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<sup>12</sup> *Keck*, 20 S.W.3d at 698.



## 2. Rescission

Malliaros, Neill, and ProTech argue that because the settlement agreement also rescinded the “Agreement Between Shareholders,” its interpretation should not be limited to the release provision. Instead, they argue, this court should find that the intended and actual effect of the rescission language was “the eradication of all the contractual, employment and corporate relationships out of which any claim for breach of fiduciary duty could be based.”

As a general rule, rescission puts an end to a contract. *Taylor v. Gill*, 211 S.W.2d 363, 366-67 (Tex. Civ. App.—Eastland 1948, no writ). Under Texas law, the parties may mutually agree to rescind a contract, thereby restoring the *status quo ante*. *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 754 (5th Cir. 1996). Upon rescission of a contract, “[t]he rights and liabilities of the parties are extinguished and they are restored to the relative positions which they would have occupied if no such contract had ever been made.” *Taylor*, 211 S.W.2d at 367; *see also Allen v. Allen*, 751 S.W.2d 567, 573 (Tex. App.—Houston [14th Dist.] 1988, writ denied), *overruled on other grounds by Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998); *Manges v. Guerra*, 621 S.W.2d 652, 658 (Tex. Civ. App.—Waco 1981), *aff’d in part and rev’d in part on other grounds*, 673 S.W.2d 180 (Tex. 1984).

By the rescission language in the settlement agreement, the parties intended to restore each of the signatories to their former positions, i.e., Malliaros and Neill agreed to return their stock to BAI, and BAI, in turn, agreed that the non-compete and non-solicitation covenants were no longer of any effect. While the rescission provision in the settlement agreement restores the parties to their former positions, it does not, as appellees urge, accomplish a comprehensive conclusion of their legal relationship and all claims between and among them. Indeed, one can only undo by rescission what one has done by agreement. In other words, contractual rescission is an agreement by contracting parties to discharge contractual duties;

it does not operate to discharge tort claims. *See Tuttlebee v. Tuttlebee*, 702 S.W.2d 253, 257 (Tex. App.—Corpus Christi 1985, no writ) (observing that in the event any cause of action exists in favor of either party against the other, it is necessarily independent of the contract and separate and apart from any of the terms of the contract); *Taylor*, 211 S.W.2d at 367 (same); *Stinson v. Sneed*, 163 S.W. 989, 911 (Tex. Civ. App.—Amarillo 1914, no writ) (same).

Malliaros and Neill were agents and employees of BAI before they signed the “Agreement Between Shareholders.” As agents and employees, Malliaros and Neill owed common law duties of loyalty to BAI, which precluded them from soliciting customers and business away from BAI prior to leaving their employment. *See Gaal*, 533 S.W.2d at 154-55. Therefore, notwithstanding the rescission of the “Agreement Between Shareholders,” Malliaros and Neill would still owe fiduciary duties to their employer and any claims for breach of those duties would survive the rescission. *See Tuttlebee*, 702 S.W.2d at 257; *Taylor*, 211 S.W.2d at 367; *Stinson*, 163 S.W. at 911.<sup>13</sup>

We find that neither the release nor rescission language in the settlement agreement operates to release any of the tort claims Baty and BAI have asserted against Malliaros, Neill, and ProTech. Additionally, because BAI’s tort claims against the insurance companies (Aetna, Hartford, AMS, and Fidelity) are derivative of its claims against Malliaros, Neill, and ProTech, we find the settlement agreement did not release those claims either.

Having determined that the settlement agreement did not release the claims against the

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<sup>13</sup> ProTech, Malliaros, and Neill rely on *Bowen* to support their argument that the rescission language eradicated any tort claims. *See R.C. Bowen Estate v. Continental Trailways, Inc.*, 152 Tex. 260, 256 S.W.2d 71 (1953). *Bowen*, however, is distinguishable. First, in *Bowen*, the entire landlord/tenant relationship was based on the contract; that is, there had been no landlord/tenant relationship before the parties entered into the lease. Here, an employer/employee relationship existed between BAI and Malliaros and Neill separate and apart from, and prior to, the “Agreement Between Shareholders.” Second, in *Bowen*, the parties entered into an agreement “unequivocally releasing the [tenant] from responsibility for waste.” *Id.* at 73. As previously noted, there is no comparable release language in the “Settlement and Rescission Agreement.”

insurance companies, we must consider whether the insurance companies were entitled to summary judgment on their other affirmative defenses. Accordingly, we now address the insurance companies' affirmative defense of legal justification or privilege to BAI's claims for tortious interference and inducing breach of fiduciary duty.

### **B. Tortious Interference with Existing Contracts**

Aetna, Hartford, AMS, and Fidelity moved for summary judgment on BAI's claim for tortious interference with existing contracts based on the defense of justification. The elements of tortious interference with a contract are: (1) the existence of a contract subject to interference; (2) the occurrence of an act of interference that was willful and intentional; (3) the act was a proximate cause of the claimant's damage; and (4) actual damage or loss occurred. *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456 (Tex. 1998). Merely entering into a contract with a party with the knowledge of that party's contractual obligations to someone else is not the same as inducing a breach. *John Paul Mitchell Sys. v. Randalls Food Mkts., Inc.*, 17 S.W.3d 721, 731 (Tex. App.—Austin 2000, pet. denied). Moreover, inducing a contract obligor to do what it has a right to do is not actionable interference. *ACS Invs., Inc. v. McLaughlin*, 943 S.W.2d 426, 431 (Tex. 1997).

Even if the plaintiff establishes all the elements of a claim for tortious interference with a contract, the defendant may avoid liability if it establishes the elements of the defense of justification. *Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 77-78 (Tex. 2000). A party is privileged to interfere with the contractual relations of another if: (1) it is done in the bona fide exercise of its own rights, or (2) the interfering party has an equal or superior right in the subject matter to that of the party to the contract. *Id.* at 80. Justification is established as a matter of law when the defendant's acts, which the plaintiff claims constitute tortious interference, are merely done in the defendant's exercise of its own contractual rights, regardless of motive. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996).

Here, we need not decide whether the insurance companies took any action to interfere with BAI's contracts with its clients. Instead, we find that the insurance companies' actions were taken merely in the exercise of their own contractual rights and, therefore, are not actionable in any event. As insurers with third party contracts, these companies each had the legal right to appoint their own insurance agents and, thereby, had the right to contract with Malliaros, Neill, and ProTech. More importantly, the insurance companies were contractually obligated to honor any change in agency appointments submitted by their insureds. *Crockett v. Great-West Life Assur. Co.*, 578 So.2d 1290, 1295-96 (Ala. 1991) (finding that where the contract between the insurer and the insured provided the insured with the right to change the designation of agent of record at any time, there was no tortious interference with a contractual relationship); *Hoffman v. Hagedorn & Co.*, 420 N.Y.S.2d 75, 76 (1979) (finding that it was the insurer's duty to comply with the insured's desire to change the designation of writing agent, and it was not in the province of the insurer to inquire into the reasons for the desired change).<sup>14</sup> Thus, in entering into agency agreements with Malliaros, Neill, and ProTech, the insurance companies were not only exercising contractual rights but were endeavoring to discharge their own contractual obligations to third parties. Consequently, their actions in giving agency appointments to Malliaros, Neill, and ProTech were legally justified. *Prudential Ins. Co. of Am.*, 29 S.W.3d at 80. We find the trial court properly granted summary judgment in favor of Aetna, Hartford, AMS, and Fidelity on BAI's claims for tortious interference with existing contracts.

### **C. Tortious Interference with Prospective Business Relationships**

Aetna, Hartford, AMS, and Fidelity also moved for summary judgment on BAI's claims for tortious interference with prospective business relationships on the defense of

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<sup>14</sup> BAI has cited no authority to support the notion that Aetna, Hartford, AMS, and Fidelity have no right to appoint their own agents or no obligation to honor the wishes of their insureds in changing agents.

justification.<sup>15</sup> In our original opinion, we analyzed these claims in much the same fashion as BAI's tortious interference with contract claims, and affirmed summary judgment in favor of the insurance companies on the ground that the insurance companies were legally justified in their actions. We based our original opinion on the Texas Supreme Court's holding in *Prudential* that justification is an affirmative defense to a claim for tortious interference with a prospective business relationship. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 80. However, since we issued our original opinion, the Texas Supreme Court has reevaluated the tort cause of action for interference with a prospective business relationship and has placed restrictions on when a defendant may assert the affirmative defense of justification or privilege to that cause of action. *See Wal-Mart Stores, Inc. v. Sturges*, No. 98-1107, 44 Tex. Sup. Ct. J. 486, 2001 WL 228139 (Tex. Mar. 8, 2001).

Now, to recover on a claim for tortious interference with a prospective business relationship, the plaintiff must establish the defendant's conduct is independently tortious. *Id.* at \*12. In *Sturges*, the Texas Supreme Court emphasized that it is not necessary for the plaintiff to prove an independent tort, only that the plaintiff establish the defendant's conduct would be actionable under a recognized tort. *Id.* In so defining this cause of action, the *Sturges* court concluded that the concepts of justification and privilege are subsumed in the plaintiff's proof and, thus, restricts the availability of the affirmative defense of justification or privilege to a claim for tortious interference with a prospective business relationship to those cases in which justification or privilege is a defense to the independent tortiousness of the defendant's conduct. *Id.* By way of example, the *Sturges* court pointed out that "a statement made against the plaintiff, though defamatory, may be protected by a complete or qualified privilege." *Id.* "Otherwise, the plaintiff need not prove that the defendant's conduct was not justified or privileged, nor can a defendant assert such defenses." *Id.* In explaining its

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<sup>15</sup> BAI claims that Aetna did not move for summary judgment on its claim for tortious interference with prospective business relationships. A review of the record, however, reveals that Aetna moved for summary judgment on this claim.

rationale for this rule, the Texas Supreme Court stated:

In reaching this conclusion we treat interference with prospective business relations differently than tortious interference with contract. It makes sense to require a defendant who induces a breach of contract to show some justification or privilege for depriving another of benefits to which the agreement entitled him. But when two parties are competing for interests to which neither is entitled, then neither can be said to be more justified or privileged in this pursuit. If the conduct of each is lawful, neither should be heard to complain that mere unfairness is actionable. *Justification and privilege are not useful concepts in assessing interference with prospective relations, as they are in assessing interference with an existing contract.*

*Id.* (emphasis added).

Each of the insurance companies moved for summary judgment on BAI's tortious interference with prospective business relationships on the affirmative defense of justification. Aetna, AMS, and Fidelity also filed no-evidence summary judgment motions under 166a(i) of the Texas Rules of Civil Procedure on the elements of BAI's claims for tortious interference with prospective business relationships.<sup>16</sup> Neither the parties nor the trial court had the benefit of *Sturges* at the time of summary judgment. In light of the Texas Supreme Court's recent pronouncements in that case, we must reverse the summary judgments in favor of Aetna, Hartford, AMS, and Fidelity on BAI's claims for tortious interference with prospective business relationships and remand those claims to the trial court.

#### **D. Inducing Breach of Fiduciary Duty**

Aetna, Hartford, AMS, and Fidelity also moved for summary judgment on BAI's claim

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<sup>16</sup> Prior to *Sturges*, to recover on a cause of action for tortious interference with a prospective business relationship, a plaintiff was required to establish: (1) there was a reasonable probability that the plaintiff would have entered into a business relationship; (2) the defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming the plaintiff; (3) the defendant was not privileged or justified in its actions; and (4) the plaintiff suffered actual harm or damage. See *Robles v. Consolidated Graphics, Inc.*, 965 S.W.2d 552, 561 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

that they induced Malliaros and Neill to breach their fiduciary duties to BAI. The insurance companies maintain they are not liable for any action they might have taken to induce or further any breach by Malliaros and Neill because they had a legal right to enter into agency contracts with Malliaros, Neill, and ProTech.

“It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such.” *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942); *Kline v. O’Quinn*, 874 S.W.2d 776, 786 (Tex. App.—Houston [14th Dist.] 1994, writ denied). This rule, however, does not apply where the third party is doing that which he has a legal right to do. *Texas Beef Cattle Co.*, 921 S.W.2d at 211.

BAI maintains that the affirmative defense of legal justification or privilege is not applicable as a defense to a claim for third party breach of fiduciary duty because “a third party is never privileged to assist in the breach of fiduciary duty.” To the contrary, the very definition of inducing the breach of a fiduciary duty set forth in the Restatement of Agency provides for the defense of justification or privilege: “A person, *without being privileged to do so*, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal.” RESTATEMENT (SECOND) OF AGENCY § 312 (1958) (emphasis added). Aetna, Hartford, AMS, and Fidelity each had the legal right to enter into agency contracts with Malliaros, Neill, and ProTech. Moreover, as previously noted, Aetna, Hartford, AMS, and Fidelity were *contractually obligated* to honor any change in agency appointments submitted by their insureds, subjecting them to potential liability to their insureds for failing to honor such changes. *See Crockett*, 578 So.2d at 1295-96; *Hoffman*, 420 N.Y.S.2d. at 76.<sup>17</sup> Under these circumstances, the trial court did not err in granting summary judgment on BAI’s

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<sup>17</sup> The comment to the Restatement further provides: “Privileges to this are rare; business competition does not give rise to one.” RESTATEMENT (SECOND) OF AGENCY § 312 cmt. a. The actions in this case are not based on business competition, but, as noted above, on a contractual obligation to honor an insured’s request for change in the agency appointment.

claims alleging Aetna, Hartford, AMS, and Fidelity induced Malliaros and Neill to breach a fiduciary duty because these insurance companies' actions cannot support such a claim as a matter of law.

### **E. Civil Conspiracy**

BAI brought claims against the insurance companies for civil conspiracy to commit tortious interference with existing contracts and prospective business relationships and to induce Malliaros and Neill to breach the fiduciary duties they owed BAI. A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose by unlawful means. *Operation Rescue-Nat'l v. Planned Parenthood of Houston & S.E. Tex., Inc.*, 975 S.W.2d 546, 553 (Tex. 1998). The elements of civil conspiracy are: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages. *Id.* Because the defendant's liability depends on its participation in some underlying tort for which the plaintiff seeks to hold the defendant liable, conspiracy is considered a derivative tort. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). Therefore, to prevail on a civil conspiracy claim, the plaintiff must show that the defendant was liable for some underlying tort. *Trammell Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 635 (Tex. 1997).

Because the trial court properly granted summary judgment on BAI's claims for tortious interference with existing contracts and inducing a breach of a fiduciary duty, Aetna, Hartford, AMS, and Fidelity cannot be held liable on those claims and, therefore, they cannot be liable for civil conspiracy with respect to those claims. Therefore, summary judgment was proper on BAI's civil conspiracy claims to the extent that BAI relies on tortious interference with existing contracts and inducing a breach of a fiduciary duty as the requisite underlying torts. However, because we must reverse summary judgment on BAI's claim for tortious interference with prospective business relationships in light of *Sturges*, we must also reverse summary judgment on BAI's civil conspiracy claims to the extent that tortious interference



with prospective business relationships serves as the requisite underlying tort for those claims.

## V. CONCLUSION

The trial court erred in granting summary judgment on the tort claims Baty and BAI asserted against Malliaros, Neill, and ProTech and, therefore, we reverse that portion of the summary judgment and remand those claims for further proceedings. The trial court properly granted summary judgment in favor of Aetna, Hartford, AMS, and Fidelity on BAI's claims for tortious interference with existing contracts, inducing the breach of a fiduciary duty, and civil conspiracy with respect to those two claims. Therefore, we affirm that portion of the judgment granting summary judgment in favor of Aetna, Hartford, AMS, and Fidelity on those claims. However, in view of the Texas Supreme Court's recent decision in *Sturges*, we reverse summary judgment in favor of Aetna, Hartford, AMS, and Fidelity on BAI's claims for tortious interference with prospective business relationships, and civil conspiracy with respect to tortious interference with prospective business relationships and remand those claims for further proceedings. Accordingly, the judgment of the trial court is affirmed, in part, and reversed and remanded, in part.

/s/      Kem Thompson Frost  
                 Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Anderson, Frost and Amidei.<sup>18</sup>

Publish — TEX. R. APP. P. 47.3(b).

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<sup>18</sup> Former Justice Maurice Amidei sitting by assignment.