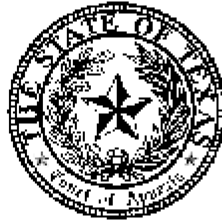
Affirmed, in Part; Reversed and Remanded, in Part; and Opinion filed October 26, 2000.



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

O P I N I O N

Appellants, Rick D. Baty ("Baty") and Baty & Associates Insurance Agency, Inc. ("BAI"), appeal the summary judgments entered in favor of appellees, ProTech Insurance Agency, Inc. ("ProTech"),

Connie Suzanne Malliaros ("Malliaros"), Treva C. Neill ("Neill"), Aetna Life & Casualty Co. ("Aetna"),[1] 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.

I. 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 a covenant 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 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 covenant 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, and (3) BAI, in turn, agreed that the covenant not to compete was no longer of any effect. As part of the settlement, BAI released claims against Malliaros, Neill, and ProTech. The scope of the release is the subject of dispute in this case.

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[1] Although Aetna was the original party to this suit, since the filing of this lawsuit, Travelers Casualty & Surety Co. acquired Aetna. For purposes of this appeal, we will refer to Aetna and Travelers as "Aetna."

After entering into the settlement agreement, Baty and BAI filed a second suit (this case) against Malliaros, Neill, and ProTech. Baty asserted claims alleging libel and slander; BAI asserted claims for business disparagement, breach of fiduciary duty, unjust enrichment, tortious interference with 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, owed to BAI. The trial court granted summary judgment in favor of the defendants/appellees on all the plaintiffs/appellants' claims.

II. 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. *See 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. *See 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. *See id.*[2]

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[2] 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.

III. ANALYSIS

A. The Release

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 had 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 bases 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 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.[3] Our task is determine whether the claims asserted in the second suit are barred by the release.

A release is a writing, which provides that a duty or obligation owed to one party to the release is discharged immediately or on the occurrence of a condition. *See National Union Fire Ins. Co. v. Insurance Co. of N. Am.*, 955 S.W.2d 120, 127 (Tex. App.—Houston [14th Dist.] 1997), *aff'd*, 20

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[3] 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.

S.W.3d 692 (Tex. 2000). A release, like any other agreement, is subject to the rules of construction governing contracts. *See 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. *See 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. *See 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. *See 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 relevant incidents bearing on the intent of the parties. *See Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 132 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'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. *See 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. *See 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. *See 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. *See 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. *See 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. *See 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.

(Emphasis added).

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.

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 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).[4] 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" 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

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[4] *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 ETO 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).

preserved from the effects of a release may be prudent practice to avoid the time and expense of litigating the issue, Texas law imposes no such requirement.[5]

The scope of coverage of a release is determined by the terms of the agreement between the parties. Here, the settlement agreement contained no language expressly releasing the tort claims BAI and Baty asserted against Neill, Malliaros, and ProTech in the first suit. The appellees, however, contend that 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's 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 breach of those duties were covered in the subject matter of the "Agreement Between Shareholders." The provision in the shareholders' agreement on which appellees rely, states:

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[5] *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. Pennziol 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 Pennziol"); *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," did not release claim for property damages).

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 shareholders' agreement (which gave rise to the released contract claims). Specifically, they contend the solicitation of business for personal advantage would not only limit Malliaros's 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 covenant 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[6] were also released in the settlement agreement because the facts underlying those claims relate to post-resignation conduct undermining BAI's business and attempting to solicit BAI's business in violation of the covenant not to compete. We reject appellees' arguments.

The settlement agreement released only the contractual claims covered by the non-competition and non-solicitation provisions contained in the "Agreement Between Shareholders." Those covenants protected BAI from competition *after* Malliaros and Neill left BAI. Malliaros and Neill, as employees and

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[6] 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 complains that they wrote letters to several BAI clients alleging that Baty and BAI were engaging in misleading and illegal practices.

officers of BAI, had a common law fiduciary duty not to compete *prior to* leaving BAI; 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 enjoinment 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). Likewise, tortious interference is a separate claim from any breach of the covenant not to compete. The former is a tort claim; the latter is a contract claim.

The fact that the common law duties Malliaros and Neill owed to BAI may be similar or even identical to the contractual duties imposed under the shareholders' agreement is not germane to the issue now before us, i.e., whether the parties intended to release claims sounding in tort as well as claims sounding in contract. The determination of this issue 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.

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.

We find that the settlement agreement did not 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 insurance companies, we now 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 justification to BAI's claims for tortious interference and inducing breach of fiduciary duty.

B. Tortious Interference

Aetna, Hartford, AMS, and Fidelity moved for summary judgment on BAI's tortious interference claims 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. *See 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. *See John Paul Mitchell Sys. v. Randalls Food Mkts., Inc.*, 17 S.W.3d 721, 731 (Tex. App.—Austin 2000, pet. filed). Moreover, inducing a contract obligor to do what it has a right to do is not actionable interference. *See 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. *See Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, No. 98-1053, 2000 WL 854273, at *2 (Tex. June 29, 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. *See id.* at *6. 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. *See Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996).

To recover on a cause of action for tortious interference with a prospective business relationship, the plaintiff must establish that: (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). Justification is also an affirmative defense to tortious interference with a prospective business relationship. *See Prudential Ins. Co. of Am.*, 2000 WL 854273, at *6.

Here, we need not decide whether the insurance companies took any action to interfere with BAI's contracts or prospective business relationships 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. *See 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).[7] 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. *See Prudential Ins. Co. of Am.*, 2000 WL 854273, at *6. 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 contracts and prospective business relationships.[8]

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[7] 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.

[8] BAI claims that Aetna did not move for summary judgment on its claim for tortious interference
(continued...)

C. Inducing Breach of Fiduciary Duty

Aetna, Hartford, AMS, and Fidelity also moved for summary judgment on BAI's claim 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. *See Texas Beef Cattle Co.*, 921 S.W.2d at 211. Aetna, Hartford, AMS, and Fidelity each had the legal right to enter into agency contracts with Malliaros, Neill, and ProTech. Their actions were lawful even though they might have furthered a breach of duty owed by another. "Improper motives cannot transform lawful actions into actionable torts. 'Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damage results to another, no cause of action arises against him because of a bad motive in exercising the right.'" *Texas Beef Cattle Co.*, 921 S.W.2d at 211 (quoting *Montgomery v. Phillips Petroleum Co.*, 49 S.W.2d 967, 972 (Tex. Civ. App.—Amarillo 1932, writ ref'd n.r.e.) (quoting 1 R.C.L. § 6 at 319)); *see also ACS Invs., Inc.*, 943 S.W.2d at 430 (merely inducing a contract obligor to do what it has a right to do is not actionable interference). The trial court did not err in granting summary judgment on BAI's claims alleging Aetna, Hartford, AMS, and Fidelity induced Malliaros and Neill to breach of a fiduciary duty because these insurance companies' actions cannot support such a claim as a matter of law.

D. Civil Conspiracy

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[8] (...continued)
with prospective business relationships. A review of the record, however, reflects that Aetna moved for summary judgment on this claim.

A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose by unlawful means. *See 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. *See 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. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). Therefore, to prevail on a civil conspiracy claim, the defendant must be liable for some underlying tort. *See 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 and inducing a breach of a fiduciary duty, there is no requisite underlying tort for which Aetna, Hartford, AMS, and Fidelity can be held liable and, therefore, they cannot be liable for civil conspiracy. We find that summary judgment was proper on BAI's conspiracy claims.

IV. 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 contracts and prospective business relationships, inducing the breach of a fiduciary duty, and civil conspiracy. Therefore, we affirm that portion of the judgment granting summary judgment in favor of Aetna, Hartford, AMS, and Fidelity. 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 October 26, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

Publish — TEX. R. APP. P. 47.3(b).