

IN THE SUPREME COURT  
STATE OF ARIZONA

SAFEWAY INSURANCE COMPANY, INC., a )  
foreign corporation, )

Plaintiff-Appellant, )

v. )

PETER A. GUERRERO, individually, PETER )  
A. GUERRERO, P.C., an Arizona professional )  
corporation; CHARLES D. ROUSH, individually, )  
CHARLES D. ROUSH, P.C., an Arizona )  
professional corporation; and ROUSH, )  
McCRACKEN, GUERRERO & MILLER, )  
ATTORNEYS AT LAW, a partnership of )  
professional corporations., )

Defendants-Appellees. )

No. **CV-04-0146-PR**

Court of Appeals  
No. 1-CA-CV 02-0661

MARICOPA County  
Superior Court  
No. CV2002-004495

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**RESPONSE TO  
PETITION FOR  
REVIEW**  
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**ISSUES PRESENTED TO, BUT NOT DECIDED BY,**  
**THE COURT OF APPEALS**

1. Did Guerrero's Statement of Facts Establish That There Was No Genuine Issue of Material Fact?
2. Did the Trial Court Error in the Evidentiary and Procedural Rulings That Led to the Grant of Summary Judgment?
3. Should Safeway Have Been Given Leave to Amend the Complaint to Cure Any Defects in the Pleadings?
4. Is Guerrero Sufficiently in Privity with Botma and Himes, Such That Guerrero Should be Bound in This Case By the Federal District Court's Judgment and Opinion in the Matter of Safeway v. Botma and Himes, CIV-00-553-PHX-RCB?

## ARGUMENT

### I. THE PETITION DISTORTS THE FACTS AND MISREPRESENTS THE COURT OF APPEALS' DECISION.

The facts of this case are set forth in paragraphs 4 through 10, and 47 through 51 of the Opinion of the Court of Appeals, so they will not be restated here. Safeway v. Guerrero, --- Ariz. ---, at ¶¶ 4-10 and 47-51, 83 P.3d 560 (App. 2004). In their Petition for Review, the Petitioners, Guerrero, Roush and Roush, McCracken, Guerrero & Miller (collectively referred to as "Guerrero"), have ignored nearly all of the facts relied upon by the Court of Appeals. Consequently, the arguments advanced by Guerrero in the Petition are either factually unsupported or are supported by inaccurate "facts."

For instance, Guerrero states that the Court of Appeals' Opinion allows, "an insurer to seek damages against an adverse lawyer upon alleging *nothing more* than that the lawyer erroneously advised the client to pursue the opportunity of instituting litigation against the insurer." (Petition for Review "PR" at Page 7.) (Emphasis added.) In another passage, Guerrero argues that the Opinion allows, "a jury to award damages against a lawyer *simply for being wrong*." (PR at Page 6.) (Emphasis added.) Yet, any reading of the facts relied upon by the Court of

Appeals makes it clear that Safeway not only alleged, but should be allowed to prove, that Guerrero was guilty of actionable conduct.

The Petition also makes it appear as though Safeway's insured, Steven Botma ("Botma"), through his attorney, made the initial and only overture that led to the eventual *Morris* agreement. (PR at Page 3.) It does so by ignoring that, "other facts show that Roush initially proposed the *Damron/Morris* agreement, but prior counsel for Botma advised that it be rejected." Safeway v. Guerrero, at ¶ 53. The Petition repeatedly portrays Guerrero as complete innocents who made an honest mistake. But, those are not the facts of this case.

Regrettably, the Petition also unfairly manipulates the Opinion of the Court of Appeals. Guerrero claims, "As the court below warned: lawyers will hereafter negotiate *Damron/Morris* agreements 'at their peril.'" (PR at Page 5.) The Court of Appeals made no such warning. The actual quote from the Opinion is, "Counsel who negotiate *Damron/Morris* agreements *outside the permitted parameters* do so at their peril." Safeway v. Guerrero, at ¶ 39. (Emphasis added.) The Court of Appeals did not warn all lawyers. Rather, the Opinion warns only those few who cannot resist the temptation to exceed the proper bounds of permissible conduct.

Additionally, Guerrero claims that, “the Court of Appeals has held that, if the insurer had not, in fact, breached a duty to its insured, Guerrero and Roush ‘acted improperly,’ so as to permit an action against them for interference with contract.” (PR at Page 8.) The implication is that Guerrero innocently misinterpreted whether Safeway had actually breached a duty to Botma. This misrepresentation of the Court of Appeals’ Opinion and the actual facts underlying the Opinion is clearly rebutted by the following quote from the Opinion:

The thrust of this lawsuit is an insurer’s claim that lawyers representing a third-party plaintiff stepped outside the legal boundaries for *Damron/Morris* agreements and purposefully implemented a scheme to ‘manufacture’ a bad faith claim in order to generate a multi-million dollar recovery instead of collecting on a \$15,000 motor vehicle policy.

Safeway v. Guerrero, at ¶ 2.

The distortion of the Court of Appeals Opinion is so pervasive in the Petition, that an objective reader of both could fairly conclude that two entirely different cases were being discussed. Make no mistake. There is nothing innocent or mistaken about the acts committed by Guerrero in the underlying case, and the effort undertaken in the Petition to rewrite those facts is disingenuous.

## II. SUITS AGAINST OPPOSING COUNSEL DO NOT REQUIRE PROOF OF MALICE.

Guerrero has misstated the law in arguing that all suits allowed in Arizona against opposing counsel require proof of malice. On the contrary, improper conduct is the hallmark of every cause of action that has been permitted against opposing counsel. A cause of action for intentional interference with contract against opposing counsel requires the very same type of improper conduct that is common to wrongful institution of civil proceedings and abuse of process cases, and both of those types of suits are already allowed against opposing counsel in Arizona.

The relevant elements of an abuse of process claim in Arizona require proof of (1) a willful use of judicial process; (2) for a purpose that is improper in regular proceedings. Nienstedt v. Wetzel, 133 Ariz. 348, 651 P.2d 876 (App. 1982). The relevant elements of a wrongful institution of civil proceedings claim in Arizona require proof of (1) institution of a civil proceeding; (2) that is *motivated* by malice. Bradshaw v. State Farm, 157 Ariz. 411, 758 P.2d 1313 (1988). (Emphasis added.) However, the malice component does not require proof of an intent to injure; rather, it requires proof that the civil action was primarily *used for a purpose other than the proper adjudication of the case.* Id. (Emphasis added.)

Phrased differently, the relevant element is proof of an improper purpose.

Likewise, the relevant element of an intentional interference with contract case requires proof of conduct that is improper as to either motive or means.

Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985).

Consequently, all three types of suits incorporate improper conduct as the harbinger of liability. None of the three require proof of actual malice. Guerrero's claim that malice is the touchstone for abuse of process and wrongful institution of civil proceedings claims is incorrect.

The shared theme of improper conduct is the reason that intentional interference with contract claims against opposing counsel should be allowed in Arizona, just as have claims of abuse of process and wrongful institution of civil proceedings. The relevant element of each cause of action is nearly identical. Improper conduct is the thread that weaves all three into one cloth.

### III. THE PETITIONERS' PROCEDURAL ARGUMENT IS UNAVAILING

Guerrero has waived any argument that allowing this intentional interference with contract claim to proceed will create procedural problems. They made no such argument in the Trial Court, and never mentioned any procedural

concerns in their filings with the Appellate Court, until they filed their Motion for Reconsideration. “The failure to raise an issue either at the trial level or in briefs on appeal constitutes a waiver of the issue.” Van Loan v. Van Loan, 116 Ariz. 272, 274, 569 P.2d 214 (1977). Guerrero’s failure to raise the issue of alleged procedural problems prior to the filing of their Motion for Reconsideration is likely the reason that the Court of Appeals did not address the issue in its Order denying the Motion for Reconsideration.

However, even had Guerrero properly preserved this issue for consideration on appeal, their use of the argument seems hypocritical. They had no compunction about procedural chaos during the underlying case, when they attempted to garnish the stipulated judgment they improperly obtained from the Trial Court, before the Trial Judge had even held a hearing to determine whether the amount of the judgment was reasonable. Himes v. Safeway, 205 Ariz. 31 at ¶¶ 38-42, 66 P.3d 74 (App. 2003). Even though that procedurally chaotic attempt was eventually thwarted, Guerrero willingly and intentionally created that chaos. Yet, they now claim that procedural chaos should be avoided. Their past conduct does not provide them with the moral standing to make such a plea to this Court.

Clearly, Safeway does not concede that an interference with contract action can create “chaos.” However, even if one were to assume, *arguendo*, that allowing

a bad faith action and an interference with contract action to proceed simultaneously in separate courts might create problems, the courts can regulate the progression of such cases. For instance, a court presiding over an interference with contract case could stay the proceedings in that case until the related bad faith case was resolved. Such a step would prevent duplication of litigation on identical issues and promote judicial economy. *See: Waddell v. Titan Insurance*, 424 Ariz.Adv.Rep. 13 at Note 3 (App. 2004) (Recommending that judges and parties consider staying proceedings to determine the reasonableness of *Morris* agreements until after the coverage determination has been made in a declaratory judgment action.)

In this case, the timing of the suit for intentional interference with contract could not be avoided. Botma entered into the *Morris* agreement with the third-party claimant, Patricia Himes (“Himes”) on March 17, 2000, so that is the date upon which Botma breached his contract with Safeway. (Exhibit 1 to the Appendix to the Response to Petition for Review, “ARPR.”) The interference with contract action was filed against Guerrero on March 8, 2002, just nine days before the statute of limitations would have run on the claim. (Petition for Review Appendix “PRA” at 1.) Safeway waited as long as possible before pursuing this case, because the related proceedings had yet to be resolved, and the full measure

of the damages caused to Safeway by Guerrero's intentional interference with contract was not then known. Consequently, the interference with contract action had to be brought when it was, despite the fact that the declaratory judgment action was still pending. Nevertheless, the Trial Court had the power and ability to stay proceedings in this case until after the resolution of the declaratory judgment action, but none of the parties to this case sought such relief from the Trial Court.

#### IV. THE STIPULATION FROM THE REASONABLENESS HEARING IS IRRELEVANT.

The Petition rehashes the same argument made to the Court of Appeals by asserting that a reasonableness hearing held to scrutinize a *Morris* agreement should effectively immunize Guerrero for any actionable conduct they committed. Guerrero then argues that Safeway's stipulation that fraud or collusion would not be argued *in that case* as to the actions of *Himes* or *Botma* should preclude Safeway from recovery against *Guerrero in this case*. The Court of Appeals' Opinion directly addressed this same argument and found that it "failed."  
Guerrero v. Safeway, at ¶ 54.

This case is not about whether Botma colluded with Himes to defraud the insurance company. That issue was resolved at the reasonableness hearing. Safeway has always taken the position that Botma was a pawn in the scheme hatched by Guerrero and has never alleged that the *insured agreed* to collude with *the claimant* to commit fraudulent acts.

In fact, Guerrero urges this Court to preclude all causes of action for intentional interference with contract against opposing counsel who were involved in an underlying case. In their view, there is nothing that an attorney could do in an underlying case that should ever give rise to an intentional interference with contract claim. Safeway respectfully disagrees. Such a blanket immunity would constitute bad public policy, allowing attorneys to interfere with contracts with impunity.

### **CONCLUSION**

The Court of Appeals' Opinion, although the first reported decision in Arizona where an insurance company has brought an action for intentional interference with contract against the attorneys who represented a third-party claimant, is not a seminal decision. The Opinion merely retraces the steps taken by the Court thirteen years ago when it decided Plattner v. State Farm Mutual

Automobile Insurance Company, 168 Ariz. 311, 812 P.2d 1129 (App. 1991). This case is the “flip side” of Plattner, with the only difference being “the identity of the tortfeasor.” Safeway v. Guerrero, at ¶ 18. Therefore, an existing Arizona decision already controls the point of law in question, and there is no need for this Court to grant the Petition for Review.

RESPECTFULLY submitted this 7th day of June, 2004.



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Ronald E. Huser  
Attorney for Respondent  
State Bar No. 011540

Original and 6 copies of the foregoing hand-delivered this 7th day of June, 2004, to:

Clerk of the Court of Appeals  
Division One  
State Courts Building  
1501 West Washington Street  
Phoenix, Arizona 85007

Two copies of the foregoing mailed this  
7th day of June, 2004 to the following:

Kent A. Turley  
TURLEY, SWAN & CHILDERS, P.C.  
3101 N. Central Avenue, Suite 1300  
Phoenix, Arizona 85012

I certify that the above were delivered and/or mailed to the above addresses on this  
7th day of June, 2004.



Ronald E. Huser

### CERTIFICATE OF COMPLIANCE

Pursuant to the Arizona Rules of Civil Appellate Procedure, Rule 23(e), the undersigned certifies that this response to the Petition for Review is double spaced, uses 14 point proportionally spaced Times New Roman typeface and does not exceed 12 pages in length.

6/7/04  
Date



Ronald E. Huser  
Attorney for Respondent

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<sup>1</sup> The Complaint is attached as No. 1 of the Appendix to the Petition for Review, but the Exhibits attached to the Complaint were not included in the Appendix, so the Exhibits are submitted here for the purpose of completion.

<sup>2</sup> Guerrero's Motion to Dismiss and the Statement of Facts are attached as No. 2 of the Appendix to the Petition for Review, but the Exhibits attached to the Statement of Facts were not included in the Appendix, so the Exhibits are submitted here for the purpose of completion.