IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

TORTOLITA VETERINARY SERVICES, PC, DBA ADOBE VETERINARY CENTER, AN ARIZONA PROFESSIONAL CORPORATION,
Plaintiff/Appellant,

v.

AIMEE RODDEN AND THOMAS RODDEN, WIFE AND HUSBAND; SHELLY MARTIN AND JEREMY BOGARD, WIFE AND HUSBAND; AND DESERT PAWS MOBILE VETERINARY CARE, PC, AN ARIZONA PROFESSIONAL CORPORATION,
Defendants/Appellees.

No. 2 CA-CV 2020-0070
Filed August 27, 2021

Appeal from the Superior Court in Pima County
No. C20182211
The Honorable D. Douglas Metcalf, Judge

REVERSED IN PART; VACATED IN PART; REMANDED

COUNSEL

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OPINION

Vice Chief Judge Staring authored the opinion of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Tortolita Veterinary Services PC, dba Adobe Veterinary Center, appeals from the trial court's ruling that the liquidated damages provision in its employment contracts with Drs. Shelly Martin and Aimee Rodden constituted an unenforceable penalty, as well as the court's calculation of actual damages, its ruling that Desert Paws Mobile Veterinary Care PC was not liable for tortious interference with Martin's contract, and its award of attorney fees to Martin and Rodden and Desert Paws (collectively, "defendants"). For the following reasons, we reverse in part, vacate in part, and remand.

Factual and Procedural Background

¶2 Tortolita is a veterinary practice owned by Dr. Christine Staten. It is located on the east side of Tucson and provides care for both large and small animals. In June 2017, after working for ten years as a veterinarian in Tortolita's small animal practice, Martin resigned, and in July, she opened Desert Paws, a mobile veterinary practice providing services for small animals within and outside of the five-mile radius surrounding Tortolita's practice. After approximately six years of employment as a small animal veterinarian for Tortolita, Rodden left Tortolita to work for Desert Paws in November 2017. Between November and early December 2017, both Martin and Rodden, as employees of Desert Paws, began performing veterinary surgeries and dental procedures at Cimarron Animal Hospital, which is located within five miles of Tortolita.

¶3 In May 2018, after discovering Martin and Rodden were performing surgeries at Cimarron, Tortolita filed an action for breach of contract, alleging they had violated the covenants not to compete in their employment contracts by "performing veterinary surgical and dental

procedures in a leased space" within five miles of Tortolita's practice.[1] The relevant provisions of the contracts provided:

> Restriction. Employee agrees that during the period of his/her employment hereunder and for 12 months from termination of employment for any reason:
>
> (a) Employee will not hold an interest, directly or indirectly, as an investor in any other business or enterprise in the field of veterinary medicine, operating within five mile radius of the Company Location. The Company is located at 8300 E. Tanque Verde Road, Tucson Arizona.
>
> (b) Employee will not, directly or indirectly for his/her own account or as investor, employee, consultant, officer, director, partner, joint venture or otherwise operate within a five mile radius of the Company Location in any phase of the business in which the Company is engaged at the time of termination of employment or otherwise compete with the Company in such geographic area. The Company is located at 8300 E. Tanque Verde Road, Tucson Arizona.
>
> (c) The parties agree that liquidated damage to the Company for the breach of this Paragraph is the sum of $60,000.00. Employee may obtain the release from this paragraph by

[1]Because mobile small animal veterinary practices generally provide limited services such as physical examinations and vaccinations and do not have the ability to provide advanced diagnostics, dental procedures, or surgeries, and because Tortolita only offered mobile veterinary services for large animals, it did not claim Desert Paws's operation of a mobile clinic within the restricted area violated the non-compete provision.

> making a payment to the Company for the sum of $60,000.00.

¶4 Pursuant to these provisions, Tortolita sought separate awards of no less than $60,000 against Martin and Rodden. It also asserted Desert Paws had intentionally interfered with its contractual relationships with Martin and Rodden and sought a ruling that Desert Paws was jointly and severally liable for the liquidated damages resulting from such interference.

¶5 The parties filed cross-motions for summary judgment, and the trial court granted Tortolita's motion in part, concluding the non-compete provision was enforceable and Martin and Rodden had "breached it by performing surgeries at Cimarron during the one-year period after leaving [Tortolita]." The court also granted Martin's and Rodden's motion in part after considering the surgeries they had performed on former Tortolita patients within their respective twelve-month restricted periods, concluding that because the liquidated damages did not approximate the loss anticipated at the time of contract creation and were "grossly disproportionate" to the actual damages resulting from the breaches, and because "the difficulty of proof of loss [was] slight," the provision was unreasonable and constituted an unenforceable penalty.[2]

¶6 In November 2019, the trial court held a bench trial to determine actual damages resulting from Martin's and Rodden's breaches of their employment contracts and whether Desert Paws tortiously interfered with those contracts. The court found the total amount of gross revenue received by Desert Paws for surgeries performed at Cimarron on former Tortolita patients during the restricted period was $59,817.07. To calculate Tortolita's damages, the court subtracted from this amount the estimated costs Tortolita would have incurred if it had performed the surgeries. It concluded Tortolita was entitled to judgment against Martin in the amount of $19,592.96 and against Rodden in the amount of $10,195.94. In addition, the court concluded Desert Paws had intentionally

[2]In its ruling, the trial court noted Tortolita's failure to send a cease-and-desist letter, a practice "commonly done when an employer believes a former employee has violated a non-compete agreement." Additionally, it noted Tortolita had discovered Desert Paws was performing surgeries in December and ultimately sent an email in March 2018 demanding payment of the full amount of liquidated damages.

interfered with Rodden's, but not Martin's, contract, and held Desert Paws jointly and severally liable for the $10,195.94 in damages against Rodden.[3]

¶7 After trial, the parties filed cross-motions for attorney fees, and the trial court found that each party had been successful at different points in the litigation, noting Tortolita's success in enforcing its non-compete provision and defendants' January 8, 2019 settlement offer in excess of the damages Tortolita ultimately recovered. The court awarded Tortolita attorney fees in the amount of $9,978 against defendants and awarded defendants $40,445 in attorney fees against Tortolita. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶8 On appeal, Tortolita argues the trial court erred in concluding the liquidated damages provision in the veterinarians' employment contracts was an unenforceable penalty, failing to include lost future profits when calculating Tortolita's actual damages, finding Desert Paws was not liable for intentional interference with Martin's contract, and awarding defendants attorney fees based on its finding that they were the prevailing parties after January 8, 2019.

Liquidated Damages

¶9 Tortolita argues the trial court erred in concluding the liquidated damages provision was an unenforceable penalty because the "amount reasonably approximated the damages expected at the time of contract creation and the harm that would be caused by a breach was incapable of accurate estimation at the time of the contract creation." On appeal from a grant of summary judgment, "we review de novo whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, ¶ 4 (App. 2000). We view the record in the light most favorable to the party against whom judgment was entered. *See United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, ¶ 26 (App. 2006). And, in reviewing the court's decision, we consider only the evidence presented to the court when it addressed the motion. *See Phx. Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179

[3]The trial court originally stated Tortolita was entitled to separate judgments in the amount of $10,195.94 against Rodden and Desert Paws. However, the court later clarified its order to reflect that Rodden and Desert Paws were jointly and severally liable for the $10,195.94 judgment.

Ariz. 289, 292 (App. 1994); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990).

¶10 Generally, contracting parties may agree to liquidated damages in a contract, and such provisions are enforceable if they are intended "to compensate the non-breaching party rather than penalize the breaching party." *Dobson Bay Club II DD, LLC v. La Sonrisa de Siena, LLC*, 242 Ariz. 108, ¶¶ 1, 8 (2017). To decide whether a liquidated damages clause is unenforceable, courts "do not apply any bright-line rules but construe the clause 'according to the circumstances of the case, and in the light of all the facts surrounding it.'" *Id.* ¶¶ 1, 17 (quoting *Miller Cattle Co. v. Mattice*, 38 Ariz. 180, 190 (1931)).[4] The party seeking damages has the burden of persuasion to show that the clause is for liquidated damages and not a penalty. *Mech. Air Eng'g Co. v. Totem Constr. Co.*, 166 Ariz. 191, 194 (App. 1989).

¶11 A liquidated damages provision is reasonable if it "approximates either the loss anticipated at the time of contract creation (despite any actual loss) or the loss that actually resulted (despite what the parties might have anticipated in other circumstances)." *Dobson Bay*, 242 Ariz. 108, ¶¶ 14-15 & 14. Such a provision is unreasonable and therefore an unenforceable penalty when the "difficulty of proof of loss is slight and either no loss occurs" or the amount is grossly disproportionate to the actual loss. *Id.* But, "[i]f the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm." *Id.* ¶ 12 (quoting Restatement (Second) of Contracts § 356 cmt. b (1981)). "The difficulties of proof of loss are to be determined at the time the contract is made and not at the time of the breach." *Pima Sav. & Loan Ass'n v. Rampello*, 168 Ariz. 297, 300 (App. 1991).

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[4]In *Broadband Dynamics, LLC v. SatCom Marketing, Inc.*, 244 Ariz. 282, n.2 (App. 2018), another department of this court wrote: "The test for whether a contract fixes an unenforceable penalty or enforceable liquidated damages is whether the payment is for a fixed amount or varies with the nature and extent of the breach." There, however, the court declined to address the enforceability of the liquidated damages provision "because it was not addressed by the superior court and the facts [were] not sufficiently developed to permit a proper legal analysis." *Id.* ¶ 14. Therefore, and in light of *Dobson Bay*, we do not find *Broadband Dynamics* controlling on this point.

¶12 Here, the trial court concluded the liquidated damages provision "[did] not approximate the loss anticipated at the time of contract creation under *Dobson Bay* . . . and § 356(1) of the Restatement (Second) of Contracts" because it failed to "contemplate what actually happened with the large transfer of patient files that did not violate the non-compete." In reaching this conclusion, the court noted that before Martin began performing surgeries at Cimarron, Tortolita had transferred records for 420 patients to Desert Paws, and this transfer did not violate the non-compete provision. It also stated that when Desert Paws began doing surgeries, Tortolita transferred another 455 records to Desert Paws. The court reasoned that Desert Paws had "performed surgery on 124 pets during this latter period, so even during this time, most of the transferred files were not for surgery by Desert Paws."

¶13 The trial court also noted that the veterinarians' revenues from surgeries performed on former Tortolita patients during the one-year restricted time period—$39,343.29 and $20,473.78—were "far less than $60,000 per veterinarian." Thus, it concluded, the liquidated damages provision was "grossly disproportionate" to the losses Tortolita actually suffered as a result of the breaches. Moreover, the court concluded "the difficulty of proof of loss is slight" because Tortolita's "loss of business to Desert Paws can be calculated with precision as [Tortolita] can identify the patient files it sent to Desert Paws and then require Desert Paws to identify which of those patients it performed surgery on." The court thus ultimately ruled the $60,000 liquidated damage amount was unreasonable and unenforceable as a penalty.

¶14 On appeal, Tortolita argues the trial court "conflate[d] the alternative options for determining if liquidated damages are enforceable" and therefore erred in considering the loss that had actually resulted rather than solely the loss anticipated at the time of contract creation in its analysis under the first method identified in *Dobson Bay*. It contends the $60,000 liquidated damages amount did, in fact, approximate the loss anticipated at the time of contract creation, pointing to its "retention and referral trends, average number of visits by pet[s,] and average amounts of revenue anticipated from pets and owners over time." Additionally, Tortolita argues the possible harm caused by Martin's and Rodden's potential breaches could not have been accurately estimated at the time of contract creation, and the court erroneously concluded the damages could be calculated "with precision" based on its "improper hindsight analysis" focused on actual damages. Specifically, it asserts the court erred in analyzing the difficulty of proof of loss at the time of breach rather than at the time of contract creation, and therefore the court improperly considered

Tortolita's ability to identify patient files sent to Desert Paws and determine which patients Desert Paws performed surgery on during the restricted period.

¶15 Defendants counter that the liquidated damages provision failed to approximate the losses anticipated because it fixed an amount that "swept in all losses resulting from the resignation of an employee, and not just the losses resulting from a breach of the Non-Compete." They further argue the only basis for the $60,000 amount was "the number of years of employment and anticipated production, without regard to the nature of the breach, the time involved, the number of clients seen, or the type of services rendered" because "[t]he penalty was the same whether one pet was seen within the restricted area during the restricted time or 1,000 pets were treated, and whether the breach lasted one day or a full year." Moreover, they assert, Tortolita could have anticipated actual losses caused by the breach by estimating losses from surgeries performed by Desert Paws within the restricted area.[5] Finally, they appear to assert Staten's deposition testimony that the liquidated damages provision is a "huge burden" for employees and "[t]hat's why it's there," along with the statement by her husband, Tortolita's hospital director, that the "goal [of liquidated damages] would be that your associate vets don't go against the contract," supports their position.

¶16 Before the trial court's summary judgment ruling, the court was provided with deposition testimony in which Staten explained the liquidated damages provision was intended to protect Tortolita from losing a large number of clients in a short period of time "due to convenience of [another] veterinarian being geographically close to their home"—and providing a full range of veterinary services in direct competition with Tortolita—without giving it "an opportunity to form a relationship

[5]Defendants also argue the difficulty of proof of Tortolita's actual losses resulting from the surgeries they performed at Cimarron is slight because defendants "were able to quantify the exact number of former [Tortolita] clients who received services at Cimarron and the gross revenue derived from those services." Defendants further argue the actual damages are "grossly disproportionate" to the liquidated damages as they constitute "less than half of the amount sought from each doctor." However, Tortolita does not appear to challenge the trial court's findings and conclusions under the second method for determining the reasonableness of a liquidated damages provision identified in *Dobson Bay*, and we therefore need not address defendants' arguments.

between those clients and another [Tortolita] veterinarian." She further explained the liquidated damages amount increased based on the number of years a veterinarian had worked at Tortolita such that "first-year veterinarians would not have any restriction in their agreements," second-year veterinarians "would have the restriction with a liquidated damages provision of only $40,000," and "[t]he amount of the liquidated damages provision would then increase over the years but would be capped at $60,000." And, she stated that although "it would be difficult to approximate the precise loss to [Tortolita] in the event a veterinarian were to breach the restrictive covenants," she had determined that the $60,000 liquidated damages amount in Martin's and Rodden's contracts reflected a "conservative estimate of [its] potential actual damages."

¶17 Staten noted Tortolita sees an average pet at least one time per year "for an annual visit and vaccinations," but "[m]any pets are also seen for additional visits to address their individual medical needs." She stated the average cost of an annual visit for a small animal at Tortolita is $385.00. Further, she explained, Tortolita's client retention rate is high, and it "often treats each pet for its entire lifetime." Staten also provided that, on average, cats live between eleven and fifteen years and dogs live between ten and thirteen years, and when a client's pet dies, "many clients get new pets and bring those pets to [Tortolita] for annual visits and treatment." Finally, she stated that, in her experience, "a client is more likely to transfer to another veterinarian when that veterinarian can provide (or will soon be able to provide) the full range of services generally offered by a veterinary practice with a physical site as opposed to a veterinarian that can offer only limited mobile services."

¶18 Defendants did not present any evidence controverting Staten's statements. Thus, although the liquidated damages provision contemplated the damages Tortolita would incur if its former veterinarians practiced at another full-service facility within five miles of Tortolita's office, and, as the trial court acknowledged, "that is not exactly what happened" in this case, the $60,000 amount nevertheless reasonably approximated Tortolita's anticipated damages at the time of contract creation. *See Dobson Bay*, 242 Ariz. 108, ¶ 23 ("The probable injury that the parties had reason to foresee is a fact that largely determines the question whether they made a genuine pre-estimate of that injury . . . ." (omission in *Dobson Bay*) (quoting 11 Joseph M. Perillo, *Corbin on Contracts* § 58.11 at 457 (rev. ed. 2005))).

¶19 Further, contrary to the trial court's conclusion that "the difficulty of proof of loss is slight" and Tortolita's damages could be

calculated "with precision," it would have been difficult for Tortolita to accurately estimate, at the time of contract creation, the damages caused by Martin's and Rodden's breaches. In her deposition testimony, Staten explained she was unable to calculate lost profits resulting from Desert Paws's "direct competition" with Tortolita, which included "any future revenue . . . for the lifetime of that pet and any additional pets that that client may get, any referrals that we lost from those clients that may have stayed if we had the opportunity to see them another time." As Tortolita contends, in order to accurately determine its future losses at the time of contract creation, it would have needed to know "which clients would follow Drs. Martin and Rodden if they breached the Covenants, which clients would have continued seeing [Tortolita] but for Defendants' actions, what services those clients' pets would need over the course of their lives, how often they would need to be seen, and how many new pets those clients would have brought to [Tortolita] in the future." As noted, because, at the time of contract creation, the difficulty of proof of loss was great, Tortolita is allowed "considerable latitude" in the approximation of anticipated harm. *Id.* ¶¶ 12, 15 (quoting Restatement § 356 cmt. b); *see Rampello*, 168 Ariz. at 300.

¶20 As to defendants' argument that the liquidated damages provision is unenforceable because it does not take into account the nature and timing of the breach, the number of clients seen, or the type of services rendered, we disagree. The *Dobson Bay* court, in discussing anticipated damages, noted that "a principal rule used to decide whether a contract imposes a penalty or liquidated damages is whether the payment 'is a fixed and definite sum, regardless of the nature or extent of the breach of the contract, or whether it is based upon, and varies with, the nature and extent of the breach.'" 242 Ariz. at 108, ¶ 21 (quoting *Miller Cattle Co.*, 38 Ariz. at 190). Here, although the amount in the veterinarians' contracts did not account for situations in which veterinarians perform surgeries and dental procedures—but not other services—for less than the one-year restricted time period, the amount increased with the length of employment, "based upon the greater loss that it would be" to Tortolita if an experienced veterinarian left its practice and engaged in direct competition. In any event, the fact that the provision failed to predict the specific nature of the breach that occurred in this case is not determinative. *See id.* ¶ 17 (rejecting imposition of bright-line rule and requiring consideration of all circumstances). And, although the trial court does not appear to have relied on Staten's statement that the provision is a "huge burden" or her husband's statement that the "goal [of liquidated damages] would be that your associate vets don't go against the contract," we conclude these statements indicate Tortolita intended the provision to prevent former

employees from competing rather than to impose punishment in the event of a breach. *See id.*

¶21 Under the circumstances of this case, and in light of the difficulty of proof of loss, the liquidated damages amount was a reasonable approximation of the loss anticipated at the time of contract creation. *See id.* ¶¶ 12, 14, 15. Indeed, the proper purpose of a liquidated damages provision is to "provide certainty when actual damages would be difficult to calculate." *Id.* ¶ 8. Thus, we conclude the trial court erred in ruling the liquidated damages provision in Martin's and Rodden's contracts was unreasonable and unenforceable as a penalty. *See id.* ¶¶ 1, 8, 14.

Lost Future Profits

¶22 Next, Tortolita contends the trial court erred in failing to include lost future profits in its calculation of actual damages against defendants. And, it argues, if we affirm on appeal the court's ruling that the liquidated damages provision was unenforceable, we "should vacate the . . . award of damages and instruct the trial court to include future lost profits in its damages calculation." However, because we conclude the liquidated damages provision was enforceable, we do not further address this argument.

Intentional Interference with Contract

¶23 Tortolita also contends the trial court erred in concluding Desert Paws was not liable for intentional interference with Martin's employment contract. We review the court's factual findings for clear error and review any legal conclusions that flow from those factual findings de novo. *See Harrington v. Pulte Home Corp.*, 211 Ariz. 241, ¶ 16 (App. 2005).

¶24 To succeed on a claim of tortious interference with contract, a plaintiff must prove: "(1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interfer[e]r; (3) intentional interference inducing or causing a breach; (4) resultant damage to the party whose relationship has been disrupted; and (5) that the defendant acted improperly." *ABCDW LLC v. Banning*, 241 Ariz. 427, ¶ 37 (App. 2016) (quoting S*now v. W. Sav. & Loan Ass'n*, 152 Ariz. 27, 33 (1986)). To constitute intentional interference, the interferer "must have intended to interfere with the . . . contract or have known that this result was substantially certain to be produced by its conduct." S*now*, 152 Ariz. at 33; *see also* Restatement (Second) of Torts § 766 cmt. j (1979). And, the "interference must 'be *both* intentional and improper.'" *Neonatology Assocs., Ltd. v. Phx. Perinatal Assocs. Inc.*, 216 Ariz. 185, ¶ 8 (App. 2007) (quoting

Safeway Ins. Co. v. Guerrero, 210 Ariz. 5, ¶ 20 (2005)). We consider several factors in determining whether particular actions were improper, including the nature of the conduct, motive for the actions, "interests sought to be advanced by the actor," "relations between the parties," and "proximity or remoteness of the actor's conduct to the interference." *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 387 (1985) (quoting Restatement § 767).

¶25 At trial, Tortolita argued "Desert Paws knowingly employed Dr. Martin and Dr. Rodden, knowing that they had the restrictive covenant in place, and by employing them at Cimar[r]on, the hospital that's within the five mile radius, caused them to breach that covenant." Further, it argued Martin's testimony that she had obtained space at Cimarron because she had clients waiting for surgeries indicated "[D]esert Paws caused her to violate the covenant in order to keep those clients that had transferred from" Tortolita. Defendants countered that Martin and Rodden "each decided to leave [Tortolita] . . . without any interference by Desert Paws. In the case of Dr. Martin, Desert Paws didn't even exist."

¶26 The trial court ruled Desert Paws had not intentionally interfered with Martin's contract, reasoning:

> Desert Paws did not induce Dr. Martin to breach her Non-Compete with [Tortolita] by coming to work for Desert Paws, because the act of Dr. Martin working for Desert Paws did not violate the Non-Compete. The later act of Dr. Martin doing veterinary practice at a brick and mortar facility is an action that breaches the Non-Compete. That later act is too attenuated from Desert Paws['s] hiring of Dr. Martin to constitute improper interference.

¶27 Tortolita argues that, as established under the five elements set forth in *Banning*, 241 Ariz. 427, ¶ 37, Desert Paws intentionally interfered with Martin's contract, and the trial court erred in ruling Martin's conduct "was 'too attenuated' from Desert Paws' hiring of Dr. Martin to constitute intentional interference" with her contract. Tortolita appears to assert that, even though Martin opened Desert Paws approximately six months before the breach occurred, Desert Paws could still be found to have intentionally interfered with her contract because the breach—Martin's performance of veterinary surgeries at Cimarron—occurred in November 2017, well within the one-year restriction. Tortolita further contends the court's conclusion, "taken to its logical extension, would permit employers an easy loophole to unilaterally shorten the temporal restrictions in any restrictive covenant."

¶28 Defendants frame the issue as "whether an employer is responsible for an employee's breach of a covenant not to compete with a former employer." They argue the trial court correctly concluded Martin's breach of her contract with Tortolita was "too attenuated" or remote from Martin's first involvement with Desert Paws to constitute improper interference because at the time she was hired, there had been no breach of the non-compete provision.[6] Defendants characterize Tortolita's argument as implicitly asserting that "if later events lead to a breach of the Non-Compete, no matter how attenuated, then the employer is obligated to fire the employee" and argue this conclusion is not supported by public policy.

¶29 The trial court acknowledged that Martin's performance of surgeries at Cimarron constituted a breach of the non-compete provision, but it also appeared to consider as relevant the timing of Desert Paws's "hiring of Dr. Martin," which did not constitute a breach. Although the complaint could be construed as referring to Desert Paws's hiring of Martin as the act of tortious interference, given the arguments and evidence presented at trial, as well as the undisputed fact that Tortolita considered the breach to have occurred when the surgeries commenced rather than when Desert Paws hired Martin, we disagree with the court's apparent conclusion that Desert Paws did not induce or cause a breach merely because the breach took place after Martin began employment. We therefore cannot approve its finding of temporal remoteness.

¶30 The parties do not offer and we are unaware of any authority providing that Desert Paws is legally incapable of intentionally interfering with Martin's contract based on her role as its owner and president. And, the parties do not appear to dispute that Desert Paws is a properly formed corporate entity. Indeed, the trial court concluded Desert Paws had intentionally interfered with Rodden's contract. Thus, we conclude the court erred in ruling Desert Paws had not interfered with Martin's contract with Tortolita. We reverse that ruling, and because the pertinent facts are

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[6]Defendants further argue Tortolita's argument is moot because the damages for the interference claim are the same as those for the breach-of-contract claim and would be joint and several with the damages awarded against Martin. Thus, they assert, this issue need not be decided because it "will have no effect on the parties." However, because a ruling that Desert Paws is jointly and severally liable for the damages against Martin would allow Tortolita to attempt to recover damages from an additional defendant, we address this issue on its merits.

undisputed, we order the matter remanded for the entry of judgment in favor of Tortolita on this issue.

Attorney Fees

¶31 Tortolita contends that because the trial court erred in ruling the liquidated damages provision was unenforceable, failing to include lost future profits in its calculation of actual damages, and concluding Desert Paws was not liable for intentional interference with Martin's contract, the court also erred in concluding defendants were the successful parties as of January 8, 2019, and awarding them attorney fees from that date forward. "A trial court's determination of which party is successful and thus entitled to a fee award generally will be upheld absent an abuse of discretion." *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, ¶ 12 (2017). However, "[a]n error of law in reaching a discretionary ruling constitutes an abuse of discretion." *Id.*

¶32 Here, the trial court found that at the time of defendants' January 8, 2019 settlement offer, the amount of damages Tortolita had incurred, including attorney fees, was $41,075.90. Because this amount was less than defendants' $60,000 settlement offer, the court concluded defendants were the successful parties as of January 8, 2019, and awarded them $40,445 in attorney fees under the settlement offer provision of A.R.S. § 12-341.01(A).

¶33 Tortolita asserts that, based on the three alleged errors of law discussed above, it "was the successful party in the litigation and is thus entitled to its attorneys' fees for the entirety of the litigation." Because we conclude the court erred in ruling that the liquidated damages provision was unenforceable, we vacate the award of fees in favor of defendants and remand for the court to consider the issue of attorney fees in light of our disposition.

Attorney Fees on Appeal

¶34 Both parties request attorney fees on appeal pursuant to § 12-341.01. In the exercise of our discretion, we award Tortolita its attorney fees. As the successful party on appeal, it may also recover its costs upon compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶35 For the foregoing reasons, we reverse the trial court's grant of summary judgment in favor of defendants on the issue of enforceability of

the liquidated damages provision and its ruling on intentional interference with Martin's contract, vacate defendants' award of attorney fees, and remand for further proceedings consistent with this decision.