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## Driving through the Dense Fog: Analysis of and Proposed Changes to Ohio Tortious Interference Law

Eric P. Voigt

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DRIVING THROUGH THE DENSE FOG:  
ANALYSIS OF AND PROPOSED CHANGES TO OHIO  
TORTIOUS INTERFERENCE LAW

ERIC P. VOIGT\*

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#### I. INTRODUCTION

This Article analyzes and summarizes each element of a claim for tortious interference with a contract or a business relationship under Ohio law, and it argues what conduct should constitute tortious interference. The purpose of the Article is two-fold: (1) to guide practitioners in proving and defending against claims of tortious interference with a contract or a business relationship; and (2) to provide a detailed roadmap for the legal community to define the law of tortious interference in a manner that promotes good public policy.

Ohio courts<sup>1</sup> recognize two distinct claims for tortious interference: (1) interference with a contract; and (2) interference with a business relationship.<sup>2</sup>

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The main distinction between these two claims is that a claim for interference with a contract applies only to contracts that are *not* terminable at will, but a claim for interference with a business relationship applies to both “prospective contractual relations[] not yet reduced to a contract” and contracts or agreements terminable at will.<sup>3</sup> In this Article (unless otherwise noted), tortious interference with a contract refers solely to contracts not terminable at will, and tortious interference with a business relationship refers to contracts terminable at will, business relationships, and prospective business relationships.<sup>4</sup> The Supreme Court of Ohio has adopted section 766 of Restatement (Second) of Torts and has set forth five elements to establish tortious interference with a contract or business relationship: (1) the existence of a valid contract or business relationship between a plaintiff and a third party; (2) the defendant’s knowledge of the contract or business relationship; (3) the defendant’s intentional inducement of the breach or termination of the contract or business relationship; (4) the defendant’s engagement in improper and unprivileged conduct (e.g., the commission of a fraud or breach of a fiduciary duty); and (5) damages resulting from the defendant’s actions.<sup>5</sup>

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<sup>1</sup>Ohio courts include decisions by the Supreme Court of Ohio, Ohio Court of Appeals, District Courts for the Northern and Southern Districts of Ohio, and the Sixth Circuit Court of Appeals (when construing Ohio law).

Moreover, because this Article aids practitioners in the State of Ohio, full case citations retain the name of the county in which the opinion was issued.

<sup>2</sup>*Extracorporeal Alliance, L.L.C. v. Rosteck*, 285 F. Supp. 2d 1028, 1040-41, 1043-44 (N.D. Ohio 2003) (“Ohio law recognizes both the tort of intentional interference with a contract and the tort of intentional interference with a prospective contractual relationship.”); *Chandler & Assocs. v. America’s Healthcare Alliance*, 709 N.E.2d 190, 198 (Ohio Ct. App. Cuyahoga County 1997) (“[T]ortious interference with a contractual relationship which, although similar in form, is distinguishable from the substantive law of tortious interference with a business relationship.”).

<sup>3</sup>*Diamond Wine & Spirits v. Dayton Heidelberg Distrib. Co.*, 774 N.E.2d 775, 780-81 (Ohio Ct. App. Allen County 2002); *Lapping v. HM Health Servs.*, No. 2000-T-0061, 2001 Ohio App. LEXIS 5634, at \*23 (Ohio Ct. App. Trumbull County Dec. 14, 2001) (citing *Reagan v. Ranger Transp., Inc.*, No. 97-P-0102, 1998 Ohio App. LEXIS 5824, at \*16 (Ohio Ct. App. Portage County Dec. 4, 1998)).

<sup>4</sup>For a detailed discussion on the difference between a contract not terminable at will and an at-will contract, see *infra* notes 92-101 and accompanying text.

<sup>5</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 858 (Ohio 1999); *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, syllabus ¶ 2 (Ohio 1995) (setting forth same elements); see *RESTATEMENT (SECOND) OF TORTS* § 766 (1979) (“One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the

Parts II, IV, and VI discuss the first (existence of a contract or relationship), third (intent), and fifth (damages) elements, respectively. Ohio courts have adequately defined these elements, and this Article does not set forth new modifications to them.

Although the Ohio common law has acknowledged a claim for tortious interference for at least sixty-five years,<sup>6</sup> large gaps in Ohio interference law still exist.<sup>7</sup> Ohio courts have not: (1) addressed what type of knowledge (e.g., actual or constructive) is necessary for liability to attach (second element); (2) provided adequate guidance as to what actions are improper and unprivileged (which commonly determines whether a defendant is liable) (fourth element); and (3) addressed the situation where a defendant induces a breach of a contract and then, while the contract remains in effect, induces a termination of the contract. This Article builds bridges over these gaps and proposes clarifications and modifications to Ohio law. The foundation of these bridges is based on the law of tortious interference in Ohio and jurisdictions outside of Ohio, the law of Ohio outside of the interference context, and public policies that encourage competition and protect the expectancy interests of parties to contracts and business relationships.

Part III argues that Ohio law should not require a defendant to have actual knowledge of a contractual or business relationship, but rather that a defendant's constructive knowledge of such a relationship should be sufficient for a plaintiff to prove the requisite knowledge. Under this proposed clarification to Ohio law, a defendant must reasonably inquire whether a contract or business relationship exists when the defendant has knowledge of facts that a third party may have an existing, conflicting contract or business relationship. Constructive knowledge (in contrast to actual knowledge) discourages would-be interferers from engaging in deliberate ignorance as to the existence of a third party's contract or business relationship.

Part V.A.2-3 argues that courts should determine whether conduct is improper, not based only on competition, but also on whether the defendant induced the breach or termination of a contract not terminable at will or a business relationship. Parties to binding contracts have a legal right to future performance during the term of the contract, but parties to business relationships and at-will contracts have only an expectancy of continued relations. Thus, contracts not terminable at will should receive greater protection than business relationships against outside interference, and more actions by a defendant should be improper when the breached or terminated interest is a non-at-will contract than when the interest is an at-will contract or a business relationship. Part V.B.1 proposes a new standard for at-will contracts and business relationships: Ohio law should require an interferer to engage in independently actionable conduct (e.g., a fraud or false and defamatory statement made with malice) to be liable for tortious interference. Part V.B.2 argues that, for contracts not terminable at will, Ohio courts should conclude that a defendant acts improperly and without a privilege when it: (1) intentionally induces a breach or

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contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.”).

<sup>6</sup>Horth v. Am. Aggregates Corp., 35 N.E.2d 592 (Ohio Ct. App. Darke County 1940).

<sup>7</sup>See Dougherty v. Parsec, Inc., 872 F.2d 766, 770 (6th Cir. 1989) (stating that “tortious interference with contract is not clear” in Ohio); see also Petrovski v. Fed. Express Corp., 240 F. Supp. 2d 685, 689 n.1 (N.D. Ohio 2003) (“[T]he fourth element of the tort of intentional interference with contract is not well-defined in Ohio.”).

termination of a non-at-will contract with actual or constructive knowledge of the contract; or (2) makes a false statement with at least negligence as to its falsity.

Finally, Part VII discusses what constitutes the relevant period of interference—the time period in which a defendant’s knowledge and actions may be used to support a claim for tortious interference with a contract. This issue arises when the date on which a contract is breached is different than the date on which the contract is terminated. This Part argues that the interference period should extend until the termination date of the contract.

To illustrate each element, this Article discusses a hypothetical situation where a client seeks legal advice from his lawyer regarding the viability of potential tortious interference claims against the client’s competitor and former salesperson. Imagine the following scenario. The President of Sleepy, Inc. (“Sleepy”), a manufacturer of alarm clocks, enters the office of his lawyer who is a partner with Great Lawyers & Associates. The President (a rather eccentric character) proceeds to tell his lawyer about his company’s most recent legal problems. Sleepy’s top sales representative, aptly named Traitor Tom, has left Sleepy to start selling alarm clocks for Sleepy’s largest competitor, Wake-Up Later, Inc. (“Wake-Up”). Traitor Tom’s employment with Wake-Up violates his agreement not to compete with Sleepy within a twenty mile radius of Sleepy for two years upon the termination of his employment and not to solicit the customers of Sleepy (the “non-competition agreement”).

The attorney interjects, “How did Traitor Tom begin working for Wake-Up?” The President explains that Wake-Up contacted Traitor Tom for an interview while Sleepy employed him. During the interview, Wake-Up told Traitor Tom that Sleepy was having severe financial problems and many executives at Sleepy intended to resign. The President assures his lawyer that those statements were false. The President concedes that Wake-Up had no actual knowledge that the statements were false but that Wake-Up likely lacked a reasonable belief that the statements were true.

The President of Sleepy further explains that Traitor Tom has highly agitated Sleepy by soliciting Sleepy’s largest customers and convincing three customers to terminate their business relationships with Sleepy (Sleepy had no contracts with these customers) and instead to purchase alarm clocks from Wake-Up. The President informs his lawyer that Traitor Tom sent letters to all customers he served during his employment with Sleepy and that Traitor Tom offered the customers heavily reduced prices if they immediately stopped purchasing alarm clocks from Sleepy. The three customers who switched to Wake-Up informed Sleepy that they were satisfied with Sleepy’s product but were enticed by the lower prices.

The President’s excitement rises another notch. The President explains that he recently informed Wake-Up about Traitor Tom’s non-competition agreement and demanded that Wake-Up immediately terminate Traitor Tom’s employment. Wake-Up refused to discharge Traitor Tom, even though it conceded that the non-competition agreement was enforceable (a surprising admission to both the President and his lawyer). Wake-Up told the President that Traitor Tom never disclosed the existence of the non-competition agreement to Wake-Up prior to his employment with Wake-Up and that Wake-Up never asked whether such an agreement existed. Wake-Up admitted that it learned about the non-competition agreement soon after Wake-Up hired Traitor Tom.

The President believes that Sleepy has claims against Wake-Up for: (1) tortious interference with a contract because Wake-Up induced Traitor Tom to violate his

non-competition agreement; and (2) tortious interference with a business relationship because Wake-Up made false statements about Sleepy to induce Traitor Tom to work for Wake-Up. The President also thinks that Sleepy has a claim for tortious interference with a business relationship against Traitor Tom for his intentional and successful solicitation of three of Sleepy's former customers.

The President fires numerous questions at the attorney. Is Traitor Tom liable for persuading three of Sleepy's customers to terminate their business relationships with Sleepy? Before hiring Traitor Tom, should Wake-Up have asked the simple question to Traitor Tom, "Are you bound by any contract that would be violated if Wake-Up employs you?" If Wake-Up did so, may it rely upon the answer provided by Traitor Tom? Does liability for Wake-Up hinge upon whether the non-competition agreement is enforceable or whether Wake-Up made the false statements about Sleepy's financial troubles with malice (i.e., with knowledge that the statements were false or in reckless disregard as to their falsity)? Once Wake-Up specifically knows about the non-competition agreement, must Wake-Up terminate Traitor Tom's employment or place him in a new position to avoid liability for tortiously interfering with this agreement? This Article answers all the President's questions.

## II. ELEMENT (1): EXISTENCE OF A VALID CONTRACT OR BUSINESS RELATIONSHIP BETWEEN A PLAINTIFF AND THIRD PARTY

Ohio courts have adequately discussed the contours of the first element. To assert a viable claim for interference with a contract, a plaintiff must have an "enforceable contract" that is not terminable at will.<sup>8</sup> The existence of a contract is a question of law.<sup>9</sup> A valid contract exists when there are "an offer and acceptance, supported by valid consideration,"<sup>10</sup> and a "meeting of the minds" of the parties.<sup>11</sup> The contract must comply with public policy.<sup>12</sup> Without a valid contract, a claim of interference with a contract will often fail, and courts generally will not *sua sponte* address the validity of a claim for interference with a business relationship.<sup>13</sup> Thus, attorneys should plead both claims to avoid a dismissal.

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<sup>8</sup>Bell v. Horton, 680 N.E.2d 1272, 1274 (Ohio Ct. App. Ross County 1996); *see infra* notes 92-101 and accompanying text (discussing when a contract is not terminable at will).

<sup>9</sup>De Boer Structures (U.S.A.), Inc. v. Shaffer Tent & Awning Co., 233 F. Supp. 2d 934, 949 (S.D. Ohio 2002).

<sup>10</sup>Sashti, Inc. v. Glunt Indus., 140 F. Supp. 2d 813, 816 (N.D. Ohio 2001).

<sup>11</sup>Nilavar v. Osborn, 711 N.E.2d 726, 733 (Ohio 1998).

<sup>12</sup>Diamond Wine & Spirits v. Dayton Heidelberg Distrib. Co., 774 N.E.2d 775, 780-81 (Ohio Ct. App. Allen County 2002) (ruling that agreement violated public policy and was unenforceable).

<sup>13</sup>Griffin v. Griffin, Nos. CA2003-03-076, CA2003-04-081, 2004 Ohio App. LEXIS 671, at \*6-7 (Ohio Ct. App. Butler County Feb. 17, 2004) (explaining that where a "valid and enforceable contract d[id] not exist" dismissal of claim for interference with a contract was proper); Bell, 680 N.E.2d at 1274 & n.2 (ruling that plaintiff's interference with a contract claim must fail "as a matter of law" because contract was unenforceable under the Statute of Frauds; noting that an interference with a business relationship claim was "not before us"); Hardie v. Shady Hollow Country Club, No. 1995CA00298, 1996 Ohio App. LEXIS 2956, at \*8-11 (Ohio Ct. App. Stark County June 17, 1996) (upholding the grant of "summary



To prove a claim of interference with a business relationship, a plaintiff need not have a binding, executed contract.<sup>14</sup> The existence of a current business relationship or a potential business relationship is sufficient.<sup>15</sup> For example, a business relationship exists when a plaintiff has an “understanding” with a third party that the plaintiff would perform certain work for the third party.<sup>16</sup> Prospective relationships include relationships with potential customers.<sup>17</sup>

A defendant cannot tortiously interfere with *its* contracts or business relationships. For a viable tortious interference claim, a defendant must interfere with a contract or a business relationship between a plaintiff and third party, not a relationship between a plaintiff and defendant.<sup>18</sup> There is no third party with whom to interfere when a plaintiff-employee files a tortious interference claim against the plaintiff’s former supervisors<sup>19</sup> or a subsidiary of plaintiff’s former employer.<sup>20</sup> An

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judgment on [plaintiffs’] claim for tortious interference with a contract” because employee was terminable at will).

<sup>14</sup>Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 858, 861 (Ohio 1999) (ruling that the trial court erred in awarding summary judgment to interferers on plaintiff-law firm’s tortious interference claim, even though plaintiff had only business relationships with its clients).

<sup>15</sup>A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1294 (Ohio 1995); Gray-Jones v. Jones, 738 N.E.2d 64, 69-70 (Ohio Ct. App. Franklin County 2000).

<sup>16</sup>Cooper v. Jones, No. 05CA7, 2006 Ohio App. LEXIS 1606, at \*15-17 (Ohio Ct. App. Jackson County Mar. 29, 2006) (reversing the award of summary judgment in favor of defendant; understanding between plaintiff and railroad company “established a business relationship,” although any binding contract needed the approval of the city).

<sup>17</sup>Elwert v. Pilot Life Ins. Co., 602 N.E.2d 1219, 1223-24 (Ohio Ct. App. Hamilton County 1992).

<sup>18</sup>Kenty v. Transamerica Premium Ins. Co., 650 N.E.2d 863, 866 (Ohio 1995); Tiger, Inc. v. Time Warner Entm’t Co., 26 F. Supp. 2d 1011, 1019 (N.D. Ohio 1998) (“An essential element of the tort is interference by someone who is not a party or agent of the party to the contract or relationship at issue.”); Garg v. Venkataraman, 561 N.E.2d 1005, 1010 (Ohio Ct. App. Wayne County 1988) (“[N]o cause of action lies for interference with one’s own contract.”).

<sup>19</sup>Mulvin v. City of Sandusky, 320 F. Supp. 2d 627, 641 (N.D. Ohio 2004) (awarding summary judgment to defendants-employees; “[a] person in a supervisory capacity or other position of authority over the employee cannot be sued for interfering with the employment relationship that it is his duty to monitor, supervise, or enforce” (quoting Smiddy v. Kinko’s, Inc., No. C-020222, 2003 Ohio App. LEXIS 460, at \*3 (Ohio Ct. App. Hamilton County Jan. 31, 2003) (internal quotation marks omitted)); Fitzgerald v. Roadway Express, Inc., 262 F. Supp. 2d 849, 860 (N.D. Ohio 2003) (granting motion to dismiss interference claim against agent who acted on behalf of his employer); Condon v. Body, 649 N.E.2d 1259, 1265 (Ohio Ct. App. Cuyahoga County 1994) (finding that summary judgment in favor of defendant-agent was appropriate; manager of firm “was not a third party subject to liability for tortiously interfering with a contract to which the Firm was a party”); Contadino v. Tilow, 589 N.E.2d 48, 51 (Ohio Ct. App. Hamilton County 1990) (finding that summary judgment to defendant-manager was proper; manager was a party to the contract between plaintiff and his former employer).

agent, however, may be considered a third party to a contract between a plaintiff-employee and the plaintiff's employer when the agent does not supervise the plaintiff<sup>21</sup> or the agent acts "solely in his or her individual capacity."<sup>22</sup> If a defendant is a party to the contract or business relationship that is breached or terminated, then the defendant is entitled to summary judgment.<sup>23</sup>

In the Sleepy/Wake-Up Hypothetical,<sup>24</sup> Sleepy can prove the existence of a valid contract and a business relationship for its claims of tortious interference with a contract and a business relationship against Wake-Up and Traitor Tom. As to Wake-Up, Sleepy (plaintiff) and its former employee, Traitor Tom (third party), have a contract not terminable at will (the non-competition agreement), and Wake-Up (defendant) is not a party to that agreement. Even if a court voided the non-competition agreement, Sleepy could establish the first element as to Wake-Up because Sleepy and Traitor Tom had an employment relationship, which constitutes a valid business relationship. As to Traitor Tom, Sleepy had existing business relationships with the three customers (third parties) who Traitor Tom (defendant) successfully solicited. Of course, Sleepy cannot assert an *interference* claim against Traitor Tom for *his* breach of the non-competition agreement.

### III. ELEMENT (2): A DEFENDANT MUST KNOW ABOUT THE CONTRACT OR THE BUSINESS RELATIONSHIP THAT IS BREACHED OR TERMINATED

Unlike the first element (a valid contract or business relationship), Ohio courts need to define the extent of knowledge necessary for a plaintiff to establish the knowledge (second) element. Ohio courts should allow both actual and constructive knowledge to be sufficient for an interference claim. The lower standard of constructive knowledge requires a potential interferer to engage in a reasonable inquiry to determine whether a third party has an existing contract or a business relationship when the interferer has knowledge of sufficient facts to indicate that the

<sup>20</sup>Canderm Pharmacal, Ltd. v. Elder Pharm., Inc., 862 F.2d 597, 601-02 (6th Cir. 1988) (construing Ohio law and affirming district court's grant of summary judgment to defendant; defendant-parent could not tortiously interfere with plaintiff's contract with defendant's wholly-owned subsidiary).

<sup>21</sup>Floyd v. Thomas, No. CA99-07-016, 2000 Ohio App. LEXIS 2760, at \*17-18 (Ohio Ct. App. Preble County June 26, 2000) (holding that defendant was not entitled to summary judgment where there were "genuine issues of material fact regarding whether [defendant] was acting within the scope of her authority").

<sup>22</sup>Tessmer v. Nationwide Life Ins. Co., No. 98AP-1278, 1999 Ohio App. LEXIS 4633, at \*21 (Ohio Ct. App. Franklin County Sept. 30, 1999) (citing Miller v. Wikel Mfg. Co., 545 N.E.2d 76, 78-79 (Ohio 1989)).

<sup>23</sup>Melott v. ACC Operations, Inc., No. 05-CV-063, 2006 U.S. Dist. LEXIS 46328, at \*23-24 (S.D. Ohio July 10, 2006) (granting defendant's motion for summary judgment since there was "no 'third party' with which to interfere"); Sanabria v. Germain Motor Co., No. C2:04-cv-508, 2005 U.S. Dist. LEXIS 20683, at \*12-13 (S.D. Ohio Sept. 21, 2005) (granting summary judgment in favor of defendant-employer because defendant "induced no third party to interfere with the prospective contract" and because "a defendant's mere refusal to deal with a party cannot support a claim for tortious interference with contractual relations") (internal quotation marks and citation omitted).

<sup>24</sup>See *supra* Part I.

third party may have a contract or a business relationship that could conflict with the proposed contract or business relationship. The constructive knowledge standard has been adopted by most jurisdictions outside of Ohio that have addressed this standard (jurisdictions that, like Ohio, follow Restatement (Second) of Torts section[CRD1] 766), and it encourages would-be interferers to learn about and respect the sanctity of others' contracts and business relationships.

The constructive knowledge standard does not transform an intentional interference claim (which Ohio recognizes) into a claim of negligent interference (which Ohio does not recognize)<sup>25</sup> because this proposed standard requires intentional conduct. Under the constructive knowledge standard, a defendant's duty to reasonably inquire as to the existence of a third party's contract or business relationship is triggered *only if* the defendant has knowledge of sufficient facts to alert the defendant that the third party may have a contract or business relationship that could be breached or terminated if the defendant and third party enter into the proposed relationship. When a defendant has knowledge of sufficient facts and fails to engage in a reasonable inquiry, the defendant has intentionally and willfully remained ignorant of the third party's contract or business relationship. Such willful ignorance constitutes intentional, not negligent, conduct. Indeed, at least one court (without explanation) has specifically rejected the contention that allowing constructive knowledge would impose liability for negligent interference.<sup>26</sup>

Further, a defendant acts with the requisite intent if it acts with knowledge that "interference was certain or substantially certain to occur as a result of its actions."<sup>27</sup> When an interferer fails to inquire in the face of knowledge of sufficient facts and enters into a contract or a business relationship with a third party that conflicts with the third party's existing relationship, the interferer has engaged in conduct that makes interference with the existing relationship "certain or substantially certain to occur."

#### A. What Constitutes Sufficient Knowledge Is Unclear Under Ohio Law

Only one Ohio court has expressly addressed whether constructive knowledge of the existence of a contract or business relationship (or the terms of such a contract or relationship) is sufficient to satisfy the knowledge (second) element. In that case, the Sixth Circuit agreed with the interferer that allowing constructive knowledge would "wrongly import[] a negligence standard" into Ohio interference law.<sup>28</sup> The Sixth Circuit's ruling is not persuasive. The court offered no rationale and cited no cases

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<sup>25</sup>Dorricott v. Fairhill Ctr. for Aging, 2 F. Supp. 2d 982, 990 (N.D. Ohio 1998) (explaining that "Ohio does not recognize *negligent* interference" with a contract or "business relationship") (emphasis added), *aff'd*, 187 F.3d 635 (6th Cir. 1999).

<sup>26</sup>Indy Lube Inves., L.L.C. v. Wal-Mart Stores, 199 F. Supp. 2d 1114, 1124 (D. Kan. 2002) (rejecting argument that plaintiff pled "a claim for negligent rather than intentional interference with contract" by alleging that defendant "knew or should have known . . . of the contract"; the "knowledge element may consist of actual or constructive knowledge").

<sup>27</sup>RFC Capital Corp. v. Earthlink, Inc., No. 03AP-735, 2004 Ohio App. LEXIS 6507, at \*48 (Ohio Ct. App. Franklin County, Dec. 23, 2004) (citing RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1979)).

<sup>28</sup>Crown Equip. Corp. v. Toyota Material Handling, U.S.A., Inc., No. 05-4476, 2006 U.S. App. LEXIS 26896, at \*11 (6th Cir. Oct. 27, 2006).

to support its conclusion other than noting that “negligent interference” is not actionable in Ohio.<sup>29</sup> The Sixth Circuit also summarily dismissed other jurisdictions’ rulings that constructive knowledge is sufficient, stating that those rulings “are not binding on this court.”<sup>30</sup>

The other few Ohio rulings that have addressed the knowledge element appear inconsistent. The Supreme Court of Ohio, in stating that the knowledge element requires “knowledge of the contract,” implied that actual knowledge of a contract or a business relationship is necessary.<sup>31</sup> One Ohio court appeared to require actual knowledge where it was customary in the industry for the plaintiff not to have contracts with the third party.<sup>32</sup> Another court has implied that specific knowledge of the terms of a contract is necessary.<sup>33</sup> Finally, one court has implied that constructive knowledge is sufficient.<sup>34</sup>

*B. Jurisdictions Outside of Ohio Have Adopted the Constructive Knowledge Standard*

The majority of courts that have specifically addressed the knowledge element (e.g., Iowa, Illinois, Kansas, Minnesota, Tennessee, Texas, and Wisconsin) have ruled that constructive knowledge of the existence of a contract or a business relationship satisfies this element.<sup>35</sup> Each court adopting this standard has applied

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<sup>29</sup>*Id.* at \*11 n.2.

<sup>30</sup>*Id.* at \*11 n.3 (citing several courts that adopted the constructive knowledge standard).

<sup>31</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 858 (Ohio 1999).

<sup>32</sup>*Akron Group Servs., Inc. v. Patron Plastics, Inc.*, No. 22507, 2005 Ohio App. LEXIS 4616, at \*11-12, \*14-16 (Ohio Ct. App. Summit County Sept. 28, 2005) (upholding the grant of summary judgment in favor of defendants; there was no evidence that defendants “were aware of any contract” between plaintiff (a temporary service provider) and the third-party employer for the hiring of temporary employees where defendants testified that employers who hire temporary employees from temporary service providers “typically decline to sign contractual agreements with temporary service providers”).

<sup>33</sup>*Danberry Co. v. Benderson Dev. Co.*, No. L-90-288, 1992 Ohio App. LEXIS 2479, at \*10-11 (Ohio Ct. App. Lucas County May 15, 1992) (affirming jury finding of tortious interference; “there is competent, credible evidence to show that . . . defendants knew of the single party listing agreement” between plaintiff and a third party). Whether general knowledge of the agreement would have satisfied the knowledge element was not at issue in *Danberry*.

<sup>34</sup>*Schiavoni v. Steel City Corp.*, 727 N.E.2d 967, 970 (Ohio Ct. App. Mahoning County 1999) (reversing the trial court’s OHIO R. CIV. P. 12(b)(6) dismissal of the claim of tortious interference with a contract; allegation that the defendant had “*actual or constructive knowledge* that the Client was represented by counsel and that Plaintiff had a contract with Client” was sufficient) (emphasis added).

<sup>35</sup>*Burns v. Hy-Vee, Inc.*, No. 02-254, 2003 U.S. Dist. LEXIS 9518, at \*23-24 (D. Minn. May 23, 2003) (“[A]ctual knowledge of a contract between the plaintiff and a third party” is unnecessary, as long as a defendant has “knowledge of sufficient facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and the rights of the parties.”) (internal quotation marks and citation omitted); *Indy Lube Inves., L.L.C. v. Wal-Mart Stores*, 199 F. Supp. 2d 1114, 1124 (D. Kan. 2002) (“[T]his knowledge element may consist of actual or constructive knowledge.” (citing *Petroleum Energy, Inc. v.*

the law of a state that, like Ohio, has adopted section 766 of Restatement (Second) of Torts, or is guided by it.<sup>36</sup> Additionally, like Ohio, none of the jurisdictions that have adopted the constructive knowledge standard recognize a claim of negligent

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Mid-America Petroleum, Inc., 775 F. Supp. 1420, 1429 (D. Kan. 1991)); *Tele-Port v. Ameritech Mobile Commc'ns, Inc.*, 49 F. Supp. 2d 1089, 1092 (E.D. Wis. 1999) (setting forth constructive knowledge standard); *D 56, Inc. v. Berry's Inc.*, 955 F. Supp. 908, 916 (N.D. Ill. 1997) (setting forth "'constructive' knowledge" standard); *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 764 (Iowa 1999) (upholding jury instructions on knowledge element that stated: "It is not necessary that the Defendant had actual knowledge of the specific contract. It is sufficient that the Defendant had knowledge of facts which, if followed by reasonable inquiry, would have lead to the disclosure of the contractual relationship."); *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 656 (Tex. App. 1991) (Knowledge is sufficient when a "party ha[s] knowledge of such facts and circumstances that would lead a reasonable person to believe in the existence of the contract and the plaintiff's interest in it."); *Crye-Leike Realtors v. WDM, Inc.*, No. 02A01-9711-CH-00287, 1998 Tenn. App. LEXIS 641, at \*16 (Tenn. Ct. App. Sept. 23, 1998) (adopting standard in *Exxon Corp.*).

New Jersey law, however, has rejected the constructive knowledge standard. *Digiorgio Corp. v. Mendez & Co.*, 230 F. Supp. 2d 552, 564 (D.N.J. 2002) ("General knowledge . . . is not sufficient"; an interferer must "have specific knowledge of the contract right upon which his actions infringe.").

<sup>36</sup>*Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671, 676 (2d Cir. 1983) (noting that New York courts have adopted Sections 766 and 767), *cert. denied*, 466 U.S. 938 (1984); *JamSports & Entm't, LLC v. Paradama Prods.*, 360 F. Supp. 2d 905, 906-07 (N.D. Ill. 2005) ("Illinois courts have frequently relied on the Restatement (Second) of Torts in assessing tortious interference claims"); *V.C. Video, Inc. v. Nat'l Video, Inc.*, 755 F. Supp. 962, 970-71 (D. Kan. 1990) ("Kansas generally follows the test set forth in" sections 766 and 767); *Yeager's Fuel v. Pa. Power & Light Co.*, 953 F. Supp. 617, 667 (E.D. Pa. 1997) ("The Supreme Court of Pennsylvania has adopted both §§ 766 and 767."); *AmeriGas Propane v. Crook*, 844 F. Supp. 379, 389 (M.D. Tenn. 1993) (applying Section 766 to define an intent to interfere); *Nesler v. Fisher & Co.*, 452 N.W.2d 191, 194, 197-98 (Iowa 1995) (agreeing with the standard in Sections 766 and 767); *Macklin v. Robert Logan Assocs.*, 639 A.2d 112, 117 (Md. App. 1994) (following Sections 766, 767, and 768); *Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 499-500 (Minn. Ct. App. 2002) (citing Section 766 with approval); *Eloise Bauer & Assocs. v. Elec. Realty Assocs.*, 621 S.W.2d 200, 203 (Tex. App. 1981) (guided by Sections 766 and 767); *Sampson Invs. v. Jondex Corp.*, 499 N.W.2d 177, 184 (Wis. 1993) (adopting Section 766).

interference.<sup>37</sup> Leading commentators agree with the adoption of the constructive knowledge standard.<sup>38</sup>

*C. Public Policy Favors the Constructive Knowledge Standard*

If adopted in Ohio, the constructive knowledge standard would require defendants to take reasonable affirmative steps to learn about the existence of a contract or a business relationship (and the relevant details) between a plaintiff and third party. The actual knowledge standard would have the opposite effect. Requiring an interferer to have actual knowledge of a contract or a business relationship would allow the interferer to escape liability by engaging in deliberate ignorance and not asking the third party the simple question, “Do you have an existing contract or a business relationship that would conflict with or be violated by the terms of our proposed relationship?” To discourage “deliberate ignorance” in other contexts, courts have rejected an actual knowledge standard.<sup>39</sup> As the Fourth Circuit noted, tortious interference law should not reward interferers for taking no

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<sup>37</sup>*Storage Tech. Corp. v. Cisco Sys.*, 395 F.3d 921, 924 (8th Cir. 2005) (applying Minnesota law; requiring the “tortfeasor’s intentional causation of a breach of the contract”); *Cody v. Harris*, 409 F.3d 853, 859 (7th Cir. 2005) (applying Illinois law; there must be an “intentional inducement of a contract breach”); *Duct-O-Wire Co. v. United States Crane*, 31 F.3d 506, 509 (7th Cir. 1994) (applying Wisconsin law; plaintiff must prove that “the interference was intentional”); *Rodriguez v. ECRI Shared Servs.*, 984 F. Supp. 1363, 1366-67 (D. Kan. 1997) (stating that plaintiff must show an “intentional procurement of [a] breach” or “intentional misconduct by defendant”); *Reihmann v. Foerstner*, 375 N.W.2d 677, 683 (Iowa 1985) (explaining that to be liable for tortious interference, a defendant must “intentionally and improperly interfere[]”); *Givens v. Mullikin*, 75 S.W.3d 383, 405 (Tenn. 2002) (for statutory or common law claim of interference, defendant must act with an intent to interfere); *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996) (requiring “a willful and intentional act of interference”).

<sup>38</sup>PROSSER AND KEETON ON THE LAW OF TORTS 982 (W. Page Keeton et al. eds., 5th ed. 1984) (“Intentional interference of course presupposes knowledge of the plaintiff’s contract or interest, or at least of facts which would lead a reasonable person to believe that such interest exists.”) (emphasis added); Steven W. Feldman, *Tortious Interference with Contract in Tennessee: A Practitioner’s Guide*, 31 U. MEM. L. REV. 281, 300 (2001) (“The prevailing view is that the defendant need only know of the existence of the contract being obstructed or that he has knowledge of facts which would lead a reasonable person to believe that a contract exists.”); 45 AM. JUR. 2d *Interference* § 9 (2007) (“It is not necessary to prove actual knowledge; it is enough to show that defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to complete disclosure of the contractual relations and rights of the parties.”).

<sup>39</sup>In determining what constitutes willful non-compliance with the Fair Credit Reporting Act (“FCRA”), courts have ruled that a defendant may act willfully, even though the defendant lacks knowledge that its conduct is unlawful. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006) (stating that not requiring knowledge that the act is unlawful avoids the “perverse incentives for companies covered by FCRA to avoid learning the law’s dictates”); *Apodaca v. Discover Fin. Servs.*, 417 F. Supp. 2d 1220, 1229 (D.N.M. 2006) (“[R]equiring FCRA plaintiffs to prove the defendant actually knew that it was violating the law would create perverse incentives for credit reporting agencies to pursue a policy of deliberate ignorance of the law in order to avoid liability for punitive damages.”) (internal quotation marks and citation omitted).

action or for taking actions that keep interferers ignorant of others' contracts and business relationships.<sup>40</sup>

*D. Proposed Clarification to Ohio Law: Constructive Knowledge Is Sufficient*

Based on other jurisdictions and sound public policy, Ohio courts should specifically adopt the constructive knowledge standard for a claim of interference with a contract or a business relationship. Under this proposed clarification to Ohio law, once a defendant has actual knowledge of sufficient facts, it must engage in a "reasonable inquiry" to determine whether the third party has a contract or a business relationship that could conflict with the defendant and third party's proposed contract or business relationship.<sup>41</sup> Constructive knowledge exists when a defendant has "knowledge of facts which, if followed by inquiry ordinarily made by a reasonable and prudent person, would have led to a disclosure of the contractual [or business] relationship."<sup>42</sup> Evidence that a defendant should have known about a third party's existing contract or business relationship and failed to undertake a reasonable effort to learn about such a relationship should be sufficient for a plaintiff to prove the knowledge element. A defendant is not subject to liability, however, when the defendant lacked knowledge of sufficient facts to warrant an inquiry or when a reasonable inquiry could *not* have revealed the contract or business relationship.<sup>43</sup>

At a minimum, a defendant should have a duty to ask the third party whether the third party is bound by any conflicting contract (or business relationship) when the defendant has *actual knowledge* that: (1[CRD2]) the third party has at least a business

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<sup>40</sup>Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc., No. 99-1357, 2000 U.S. App. LEXIS 3394, at \*12-14 (4th Cir. Mar. 6, 2000) (finding that the district court erred by granting summary judgment to interferer; defendant is not "insulated from liability because it did not know about the franchise agreement's restrictions" where defendant never asked for a copy of the agreement, despite its knowledge that an agreement existed, and where defendant "had ample opportunity to educate itself as to its terms").

<sup>41</sup>Revere Transducers, Inc. v. Deere & Co., 595 N.W.2d 751, 764 (Iowa 1999).

<sup>42</sup>Tele-Port v. Ameritech Mobile Commc'ns. Inc., 49 F. Supp. 2d 1089, 1092 (E.D. Wis. 1999); *see* cases cited *supra* note 36.

Other non-Ohio courts (*e.g.*, Maryland, New York, and Pennsylvania) have expressly rejected a standard that would require an interferer to possess specific knowledge of the terms of a contract or business relationship. *CompuSpa, Inc. v. Int'l Bus. Machs. Corp.*, No. DKC 2002-0507, 2004 U.S. Dist. LEXIS 11922, at \*20-22 (D. Md. June 29, 2004) (finding that defendant's lack of knowledge of the "30-day notice provision in the contracts is of no moment"; "knowledge of the existence of the contract" is sufficient) (internal quotation marks and citations omitted); *Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp. 2d 246, 279 (S.D.N.Y. 2002) (denying summary judgment to defendant; knowledge of the "legal particulars of the contract" was unnecessary); *Posner v. Lankenau Hosp.*, 645 F. Supp. 1102, 1112 (E.D. Pa. 1986) (explaining that RESTATEMENT (SECOND) OF TORTS § 766 (1979) "does not require knowledge of the specific terms of the contract").

<sup>43</sup>ACT, Inc. v. Sylvan Learning Sys., 296 F.3d 657, 662-63 (8th Cir. 2002) (applying Iowa law; summary judgment to defendant was proper because a "reasonable inquiry" by defendant would not have revealed the previous contracts between plaintiff and third party; defendant knew only that plaintiff was "in discussions" over a new contract).

relationship with the plaintiff;<sup>44</sup> (2) in the business market in which the defendant interfered, it is standard for persons or entities similarly situated like the third party to have contracts (or business relationships); and (3) although not common in the industry, the plaintiff or defendant generally has contracts (or business relationships) with persons or entities similarly situated to the third party.<sup>45</sup> In these circumstances, a defendant knows sufficient facts to alert the defendant that it must ask the simple question to the third party, “Do you have any contract or a business relationship that *may* be breached or terminated as a result of our proposed relationship?” The constructive knowledge standard, however, does not impose a duty on a defendant to *always* ask whether a contract or a business relationship exists. If a defendant has no actual knowledge of any contractual or business relationship and the circumstances do not indicate otherwise, then the defendant is not required to inquire about such a relationship.<sup>46</sup>

To satisfy its duty to reasonably inquire, a defendant may rely solely on the answer given by the third party. Where the inquiring potential interferer receives and relies upon false information and has reasonable grounds to do so, the interferer should not be held liable. First, it is impractical to require businesses in all situations to seek further evidence to corroborate a third party’s response that no contract or business relationship exists that would be breached or terminated. Second, a defendant should have no obligation to contact a plaintiff (the injured party) about any conflicting agreements or relationships the plaintiff has with the third party. In the employment context, for instance, such a requirement would hinder the mobility of employees, as many employees interview with other companies without the knowledge of their current employer. Third, the constructive knowledge standard imposes the difficult task upon an interferer to discover a negative[CRD3] (i.e., the

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<sup>44</sup>Courts have ruled that a plaintiff proves constructive knowledge if the defendant knows some type of agreement or relationship exists and does not further investigate. *D 56, Inc. v. Berry’s Inc.*, 955 F. Supp. 908, 916, 918 (N.D. Ill. 1997) (denying defendant’s motion for summary judgment on plaintiff’s interference with contract claim; “regardless of whether defendants received a copy of the agreement,” a reasonable jury could determine that the letter by plaintiff put defendant on notice of plaintiff’s agreements with the third parties from which defendant purchases products); *Enesco Corp. v. K’s Merch. Mart, Inc.*, No. 99 C 1070, 2000 U.S. Dist. LEXIS 17326, at \*22-24 (N.D. Ill. Aug. 29, 2000) (denying summary judgment for defendant because plaintiff need not prove that defendant “s[aw] and read the contract”); *Revere*, 595 N.W.2d at 759, 764 (affirming jury verdict in favor of plaintiff; defendant’s knowledge that employees (third parties) had “employment agreements” with plaintiff-employer was sufficient “to put [defendant] on notice” of the “nondisclosure-confidentiality agreement,” even though defendant argued that it had no specific knowledge of that binding agreement).

<sup>45</sup>*Crye-Leike Realtors v. WDM, Inc.*, No. 02A01-9711-CH-00287, 1998 Tenn. App. LEXIS 641, at \*16 (Tenn. Ct. App. Sept. 23, 1998) (holding that the trial court erred in granting summary judgment in favor of defendant because “actual knowledge of the existence of a contract” was unnecessary; defendant “knew that brokers [of plaintiff] usually attempted to get their clients to sign agreements with them” but did not inquire further into the relationship between plaintiff’s brokers and their clients).

<sup>46</sup>What type of inquiry is reasonable cannot be completely addressed in a vacuum. This Article provides only *some* examples of what type of inquiry should relieve a defendant of liability.



absence of an existing contract or a business relationship). Consequently, even if the law required evidence to corroborate a third party's answer, a further inquiry by a defendant may be futile. An employer seeking to hire from its competitor an employee who is bound by a non-competition agreement could ask the employee for his or her employment agreement, but the employee could produce his or her employment handbook rather than the agreement containing the non-competition provision.

As an evidentiary matter, though, businesses are well advised to obtain corroborating evidence. An interloper could communicate with the third party through writings or could review a copy of the third party's contract with the plaintiff. Such actions will assist a defendant in establishing that it reasonably inquired and in prevailing on a motion to dismiss or a motion for summary judgment. A defendant should not escape liability by relying on a third party's answer that no conflicting contract exists when the answer is inconsistent with a defendant's actual knowledge that such a contract is common in the industry, or the answer directly conflicts with other reliable information, such as a communication from the third party's employer that he or she is bound by a non-competition agreement. Under those circumstances, a defendant knows sufficient facts that require a *further* inquiry.

*E. Application of the Sleepy/Wake-Up Hypothetical to the Knowledge Element*

Recall that the President of Sleepy believes he has: (1) a claim for tortious interference with a contract against Sleepy's competitor, Wake-Up, for its interference with the non-competition agreement; and (2) a claim for tortious interference with a business relationship against Wake-Up (assuming the non-competition agreement is unenforceable) and against Sleepy's former employee, Traitor Tom. As to the latter claims, Sleepy could prove the requisite knowledge because Wake-Up had actual knowledge of Traitor Tom's employment relationship with Sleepy before it interviewed him and because Traitor Tom had actual knowledge of Sleepy's business relationships with its customers before he solicited them.

For Sleepy to satisfy the knowledge element for its claim of interference with the non-competition agreement, Ohio law would have to adopt the constructive knowledge standard (note that Wake-Up did not ask Traitor Tom whether he was bound by any contract at the time Wake-Up interviewed him). Assume that non-competition agreements are common in the alarm clock industry. Given this industry standard, because Wake-Up failed to inquire whether Traitor Tom had a restrictive employment agreement with Sleepy, Wake-Up failed to undertake a reasonable inquiry. Now assume that Wake-Up did ask Traitor Tom during the interview whether he was bound by a non-competition agreement and Traitor Tom responded, "no." Wake-Up still would be obligated to inquire because such agreements are standard in the industry. Immediately after Traitor Tom accepted an offer of employment, Wake-Up should have informed Sleepy of its employment of Traitor Tom, which would have provided Sleepy an opportunity to inform Wake-Up about the non-competition agreement.

Now suppose non-competition agreements are rare in this industry, but Wake-Up knew that Sleepy required most of Sleepy's employees to sign such agreements. Wake-Up's knowledge of such facts would trigger its duty to reasonably inquire about Traitor Tom's relationship with Sleepy for two independent reasons: Wake-Up

knew that some type of employment relationship existed and knew that many other employees of Sleepy signed non-competition agreements.

IV. ELEMENT (3): A DEFENDANT MUST INTEND TO INDUCE A BREACH OR TERMINATION OF A CONTRACT OR BUSINESS A RELATIONSHIP

In addition to the knowledge element, a plaintiff must prove that a defendant acted with an intent to interfere. The intent (third) element requires proof that: (1) a contract or a business relationship was breached or terminated; (2) an interferer intended to induce the breach or termination or knew that the breach or termination was certain or substantially certain to occur; and (3) the interferer's actions caused the breach or termination. A plaintiff must establish all three sub-elements to prevail on a claim for tortious interference with a contract or a business relationship. This Article discusses each sub-element in turn.

*A. A Breach or Termination of a Contract or a Business Relationship Must Occur*

A claim for tortious interference with a contract requires a third party to breach or terminate a contract that is not terminable at the will of the parties.<sup>47</sup> “A breach . . . occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the [breaching] party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach.”<sup>48</sup> An invalid contract cannot be breached.<sup>49</sup> In the absence of a breach or termination, a defendant is not liable for interference with a contract.<sup>50</sup>

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<sup>47</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 858 (Ohio 1999) (stating that the intent element is satisfied by “[t]he wrongdoer’s intentional procurement of the contract’s breach” (quoting *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, syllabus ¶ 2 (Ohio 1995))); *Cannon Group, Inc. v. Better Bags, Inc.*, 250 F. Supp. 2d 893, 903 (S.D. Ohio 2003) (stating that the intent element requires a defendant to induce “a contractual breach” (citing *Brookside Ambulance, Inc. v. Walker Ambulance Serv.*, 678 N.E.2d 248, 252 (Ohio Ct. App. Lucas County 1996))); *Weinfeld v. Welling*, No. 2003CA00247, 2004 Ohio App. LEXIS 4432, at \*5-6 (Ohio Ct. App. Stark County Sept. 13, 2004) (explaining that a breach or termination satisfies the intent element (citing *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co.*, 774 N.E.2d 775, 780 (Ohio Ct. App. Allen County 2002))).

<sup>48</sup>*Laurent v. Flood Data Servs.*, 766 N.E.2d 221, 225 (Ohio Ct. App. Lorain County 2001) (quoting *Garafalo v. Chicago Title Ins. Co.*, 661 N.E.2d 218, 226 (Ohio Ct. App. Cuyahoga County 1995)).

<sup>49</sup>*Fitness Experience, Inc. v. TFC Fitness Equip., Inc.*, 355 F. Supp. 2d 877, 892-93 (N.D. Ohio 2004) (granting summary judgment to defendant on plaintiff’s breach of contract claim because plaintiff could not enforce the non-competition agreements against defendant); *Res. Title Agency, Inc. v. Morreale Real Estate Servs.*, 314 F. Supp. 2d 763, 769 (N.D. Ohio 2004) (“[A]n enforceable contract is one of the basic prerequisites of a breach of contract claim.” (citing *Garafalo v. Chicago Title Ins., Co.*, 661 N.E.2d 218, 266 (Ohio Ct. App. Cuyahoga County 1995))).

<sup>50</sup>*Hubbard v. Dillingham*, No. CA2002-02-045, 2003 Ohio App. LEXIS 1386, at \*2-3, \*13 (Ohio Ct. App. Butler County Mar. 24, 2003) (ruling that summary judgment to defendant was appropriate because “there was no breach of the lease contract”); *Willis Refrigeration v. Maynard*, No. CA99-05-047, 2000 Ohio App. LEXIS 102, at \*20, \*24-25, \*27-28 (Ohio Ct. App. Clermont County Jan. 18, 2000) (affirming the lower court’s denial of plaintiff’s motion for a preliminary injunction where plaintiff’s former employee “did not breach” his non-

To establish the intent element for interference with a business relationship claim, the third party must terminate a business relationship or at-will contract of the parties,<sup>51</sup> or cause the parties to refrain from entering into a business relationship.<sup>52</sup> Without a termination or failure to enter into a business relationship, a defendant will prevail.<sup>53</sup>

*B. A Defendant Must Intend to Induce a Breach or Termination of a Contract or a Business Relationship*

In addition to a breach or termination, a defendant must act with an *intent* to induce the breach or termination of a contract or a business relationship.<sup>54</sup> Intent is established by proving that the defendant either: (1) “acted with the purpose or desire to interfere with the performance of the contract”; or (2) “knew that interference was certain or substantially certain to occur as a result of its actions.”<sup>55</sup> Proof of a defendant’s “personal ill will, spite or hatred” toward a plaintiff is unnecessary to

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competition agreement); *Bell v. Horton*, 680 N.E.2d 1272, 1274 (Ohio Ct. App. Ross County 1996) (holding that claim for interference with a contract failed because the contract was void).

<sup>51</sup>*Cannon Group*, 250 F. Supp. 2d at 903; *Zacks v. Beck*, No. 04AP-1364, 2005 Ohio App. LEXIS 4130, at \*9 (Ohio Ct. App. Franklin County Sept. 1, 2005) (“[T]ortious interference with a business relationship” requires a “termination of the relationship.”)(citing *Geo-Pro Servs. v. Solar Testing Labs.*, 763 N.E.2d 664, 672 (Ohio Ct. App. Franklin County 2001)).

<sup>52</sup>*A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294 (Ohio 1995) (stating that intent requires “induc[ing] or otherwise purposely caus[ing] a third person not to enter into or continue a business relation with another, or not to perform a contract with another” (citing *Juhasz v. Quick Shops, Inc.*, 379 N.E.2d 235, 238 (Ohio Ct. App. Summit County 1977))).

<sup>53</sup>*Shah v. Cardiology S., Inc.*, No. 20440, 2005 Ohio App. LEXIS 195, at \*1-2, \*27-28 (Ohio Ct. App. Montgomery County Jan. 21, 2005) (affirming the award of summary judgment to defendant, which was the former practice group of plaintiff-physician; explaining that plaintiff failed “to identify any former patient whose care was lost to [plaintiff]”).

<sup>54</sup>*Kand Med., Inc. v. Freund Med. Prods., Inc.*, 963 F.2d 125, 127, 129 (6th Cir. 1992) (affirming the grant of summary judgment; the plaintiff lacked “evidence that [defendant] intended Freund to breach the original contracts” with plaintiff).

<sup>55</sup>*RFC Capital Corp. v. Earthlink, Inc.*, No. 03AP-735, 2004 Ohio App. LEXIS 6507, at \*48 (Ohio Ct. App. Franklin County Dec. 23, 2004) (citing RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1979)); *see McDonnell v. Cardiothoracic & Vascular Surgical Assocs.*, No. C2-03-0079, 2004 U.S. Dist. LEXIS 29437, at \*25 (S.D. Ohio July 30, 2004) (adopting same standard as *RFC Capital*); *Kenneth J. Majcen & Assocs. v. Phoenix Assocs.*, No. 76454, 2001 Ohio App. LEXIS 140, at \*17 (Ohio Ct. App. Cuyahoga County Jan. 18, 2001) (setting forth substantially the same standard as *RFC Capital*); *Miller v. Pennitech Indus. Tools*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*13 (Ohio Ct. App. Medina County Apr. 19, 1995) (setting forth similar standard as *RFC Capital*).

Some jurisdictions require a defendant to have “specifically intended to interfere with [the] plaintiff.” *E.g.*, *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1170 (3d Cir. 1993) law (citing *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 2d 225, 250-51 (D.N.J. 1991)) (applying New Jersey tortious interference). No Ohio court has adopted that heightened standard.

prove intent.<sup>56</sup> “Not every act of interference is intentional.”<sup>57</sup> Ohio law, for instance, “does not recognize negligent interference.”<sup>58</sup>

The knowledge and intent elements are intertwined. A defendant’s knowledge (constructive or actual) of a contract or a business relationship is a prerequisite to a finding of an intent to cause a breach or termination of the contract or the business relationship. A defendant cannot intentionally interfere with a contract or a relationship that is unknown to the defendant<sup>59</sup> or that could not be discovered through a reasonable inquiry. Nonetheless, a defendant’s “mere knowledge of the plaintiff’s contract with the third-party and [the defendant’s] decision to contract with the third-party in the face of that knowledge[,]” alone, does not establish an intent to interfere.<sup>60</sup> A computer software company, for instance, may know about a potential customer’s agreements with other software companies and contract with that customer for the sale of new and different software with no intent to induce a termination of the customer’s existing agreements. Under those circumstances, Ohio courts do not infer an intent to induce a breach or termination,<sup>61</sup> and a defendant is entitled to summary judgment.<sup>62</sup>

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<sup>56</sup>*Canderm Pharm., Ltd. v. Elder Pharms., Inc.*, 862 F.2d 597, 601 (6th Cir. 1988) (quoting *Reichman v. Drake*, 100 N.E.2d 533 (Ohio Ct. App. Hamilton County 1951)) (applying Ohio law).

<sup>57</sup>*Zacks v. Beck*, No. 04AP-1364, 2005 Ohio App. LEXIS 4130, at \*13 (Ohio Ct. App. Franklin County Sept. 1, 2005) (citing *Barno v. Empire Gen. Life Ins. Co.*, No. 46499, 1983 Ohio App. LEXIS 12766 (Ohio Ct. App. Cuyahoga County Nov. 10, 1983)).

<sup>58</sup>*Dorricott v. Fairhill Ctr. for Aging*, 2 F. Supp. 2d 982, 990 (N.D. Ohio 1998) (citing *Smith v. Ameriflora 1992, Inc.*, 644 N.E.2d 1038, 1042-43 (Ohio Ct. App. Franklin County 1979)); *Bauer v. Commercial Aluminum Cookware Co.*, 746 N.E.2d 1173, 1177 (Ohio Ct. App. Wood County 2000) (citing *Smith*, 644 N.E.2d at 1042-43).

<sup>59</sup>*RFC Capital*, 2004 Ohio App. LEXIS 6507, at \*48-50 (holding that the trial court erred in not granting defendant judgment as a matter of law because “[defendant] could not know, much less intend, that its actions would interfere with [third party’s] obligations under the Loan and Security Agreement”).

<sup>60</sup>*Midland Am. Sales - Weintraub, Inc. v. Osram Sylvania, Inc.*, 874 F. Supp. 164, 167 (N.D. Ohio 1995) (citing *Horth v. Am. Aggregates Corp.*, 35 N.E.2d 592 (Ohio Ct. App. Darke County 1940)).

<sup>61</sup>*Province v. Cleveland Press Publ’g Co.*, 787 F.2d 1047, 1056 (6th Cir. 1986) (applying Ohio law; intent not “‘inferred from the mere fact that a [defendant] enters into a contract with one of two existing contracting parties with knowledge’ of the existing contract” (quoting *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1125 (6th Cir. 1981))).

<sup>62</sup>*Kand Med., Inc. v. Freund Med. Prods., Inc.*, 963 F.2d 125, 127-28 (6th Cir. 1992) (interpreting Ohio law; noting that defendant knew of business relationship and agreeing with district court that “[defendant] did not have the requisite intent to induce a contractual breach”); *Heheman*, 661 F.2d at 1126, 1127-28 (applying Ohio law and upholding summary judgment to defendant on interference claim; although defendant admitted “it was aware of [plaintiffs’] contractual obligations[,]” defendant’s “purpose” was not the “deprivation of plaintiffs’ rights”).

Because direct evidence of intent is rare, intent to induce a breach or termination may be “inferred from the totality of the circumstances.”<sup>63</sup> Courts draw reasonable inferences of intent from evidence that an interferer: (1) had ill-will toward a plaintiff;<sup>64</sup> (2) made derogatory statements about the plaintiff *after* the third party terminated its relationship with plaintiff;<sup>65</sup> or (3) provided financial incentives to the third party.<sup>66</sup> Intent, however, may not be inferred when a defendant did not initially solicit the third party<sup>67</sup> or when a defendant directs its actions toward parties other than the plaintiff.<sup>68</sup>

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<sup>63</sup>*McDonnell v. Cardiothoracic & Vascular Surgical Assocs.*, No. C2-03-0079, 2004 U.S. Dist. LEXIS 29437, at \*25 (S.D. Ohio July 30, 2004), *aff'd*, 165 F. App'x 423 (6th Cir. 2006) (citing *Davis v. Sun Ref. & Mktg. Co.*, 671 N.E.2d 1049, 1059 (Ohio Ct. App. Montgomery County 1996)). Circumstantial evidence is often used to establish the intent element of other intentional torts. *E.g.*, *Doyle v. Fairfield Mach. Co.*, 697 N.E.2d 667, 677 (Ohio Ct. App. Trumbull Cty. 1997) (finding that circumstantial evidence of intent to defraud plaintiff was sufficient to create an issue of fact); *Davis*, 671 N.E.2d at 1059 (Ohio Ct. App. Montgomery County 1996) (finding that the trial court properly inferred an intent to mislead “from the ‘totality of the circumstances’” (citing *Klapchar v. Dunbarton Props. Ltd.*, No. CA-8521, 1991 WL 249432, at \*3 (Ohio Ct. App. Stark County Nov. 4, 1991))); *see State v. Bergsmark*, No. L-03-1137, 2004 Ohio App. LEXIS 5175, at \*14 (Ohio Ct. App. Lucas County Oct. 29, 2004) (“Purpose or intent can be established by circumstantial evidence from the surrounding facts and circumstances.” (citing *State v. Tiger*, 772 N.E.2d 144, 149 (Ohio Ct. App. Medina County 2002))).

<sup>64</sup>*Hicks v. Bryan Med. Group, Inc.*, 287 F. Supp. 2d 795, 801-02, 811 (N.D. Ohio 2003) (holding that plaintiff-doctor presented sufficient evidence that the defendant-hospital encouraged patients and other physicians to complain about plaintiff’s treatment procedures, which eventually led to his termination from his practice group); *Ahmed v. Univ. Hosps. Health Care Sys., Inc.*, No. 79016, 2002 Ohio App. LEXIS 1843, at \*7-8, \*26 (Ohio Ct. App. Cuyahoga County Apr. 18, 2002) (reversing the award of summary judgment for defendant-hospital on claim that hospital tortiously interfered with plaintiff-physician’s prospective relationships with his patients; jury could have found that hospital removed physician’s staff privileges with the intent to “deny him the ability to treat patients in the area” because hospital revoked physician’s privileges (and breached the hospital’s bylaws) at the same time it granted privileges to other physicians).

<sup>65</sup>*Petrovski v. Fed. Express Corp.*, 240 F. Supp. 2d 685, 686, 689, 691 (N.D. Ohio 2002) (denying summary judgment for defendant where Fed Ex (the third party) terminated plaintiff’s employment after defendant complained to Fed Ex because a jury could find that defendant’s statement “that plaintiff ‘had got what he deserved’ . . . evidenced intent on [defendant’s] part to have plaintiff fired”).

<sup>66</sup>*Premix, Inc. v. Zappitelli*, 561 F. Supp. 269, 277 (N.D. Ohio 1983) (concluding, after a bench trial, that “the evidence [wa]s clear that defendant BMC intentionally induced [third party] to breach the . . . employment agreement” where defendant-employer “promised [third party] a substantial increase in salary” and indemnification prior to the breach; finding of intent was a factual determination); *see Midland Am. Sales - Weintraub, Inc. v. Osram Sylvania, Inc.*, 874 F. Supp. 164, 166, 168 (N.D. Ohio 1995) (granting summary judgment in favor of defendant; there was no evidence that defendant gave the third party “some improper financial or other incentive to convince [third party] to breach his employment agreement with [plaintiff]”).

<sup>67</sup>*Charles Gruenspan Co. v. Thompson*, No. 80748, 2003 Ohio App. LEXIS 3287, at \*10-11 (Ohio Ct. App. Cuyahoga County July 10, 2003) (affirming summary judgment in favor of defendant because intent was lacking; defendant-attorney presented undisputed testimony that

*C. A Defendant Must Cause the Breach or Termination of a Contract or a Business Relationship*

The third requirement under the intent element is that a defendant must *cause* the breach or termination of a contract or a business relationship.<sup>69</sup> The causation requirement may be established by “circumstantial evidence.”<sup>70</sup> Without evidence of causation, summary judgment for a defendant will be granted.<sup>71</sup> Although only a few Ohio courts have addressed the distinction between an intent to interfere and causation, these sub-elements are independent requirements. To illustrate, a defendant may act with a purpose to induce a third party to breach a contract, but the act may fail to effectuate such a breach. Alternatively, a third party may breach its contract for reasons unrelated to a defendant’s intentional act.

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he did not solicit plaintiff’s former client and that the client was dissatisfied with plaintiff’s legal representation); *Knox Mach., Inc. v. Doosan Mach., USA, Inc.*, No. CA2002-03-033, 2002 Ohio App. LEXIS 5226, at \*12-13 (Ohio Ct. App. Warren County Sept. 30, 2002) (affirming the grant of summary judgment to defendant because there was no intent when the defendant answered an *unsolicited* question from the plaintiff’s customer, which resulted in the customer severing its relationship with the plaintiff).

<sup>68</sup>*Zacks v. Beck*, No. 04AP-1364, 2005 Ohio App. LEXIS 4130, at \*13-15 (Ohio Ct. App. Franklin County Sept. 1, 2005) (affirming the grant of summary judgment to defendant).

<sup>69</sup>*A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294 (Ohio 1995) (stating that intent requires “induc[ing] or otherwise purposely caus[ing]” a termination of a business relationship) (citations omitted); *Universal Windows & Doors, Inc. v. Eagle Window & Door, Inc.*, 689 N.E.2d 56, 61, 62 (Ohio Ct. App. Hamilton County 1996) (entering “judgment as a matter of law” for defendant on interference with contract claim because defendant did not “caus[e] a third person not to perform the contract” between plaintiff and third party (citing *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995))); *Vitrano v. CWP Ltd. P’ship*, No. 19516, 1999 Ohio App. LEXIS 6179, at \*16 (Ohio Ct. App. Summit County Dec. 22, 1999) (requiring “a causal connection . . . between the breach . . . and the actions of the defendant” (citing *Metro. Life Ins. Co. v. Triskett Ill., Inc.*, 646 N.E.2d 528, 533 (Ohio Ct. App. Hamilton County 1994))).

<sup>70</sup>*Jaro Transp. Servs. v. Grandy*, No. 4:03-CV-01227, 2006 U.S. Dist. LEXIS 62932, at \*47 (N.D. Ohio Sept. 5, 2006) (citing *Wauseon Plaza, Ltd. P’ship v. Wauseon Hardware Co.*, 807 N.E.2d 953, 964 (Ohio Ct. App. Fulton County 2004)); *Hoover v. Curtis*, No. 18580, 2001 Ohio App. LEXIS 2653, at \*1-2, \*6 (Ohio Ct. App. Montgomery County June 15, 2001) (reversing the grant of summary judgment for interferer; “a jury could infer” that defendant’s false statements “caused” the termination of plaintiff’s employment).

<sup>71</sup>*Aetna Cas. & Surety Co. v. Leahey Constr. Co.*, 22 F. Supp. 2d 695, 706 (N.D. Ohio 1998) (granting defendant’s motion for summary judgment where there was “no evidence that the defendants here caused a breach of contract or business relationship”); *Koukious v. Total Access Techs., Inc.*, No. C-970700, 1998 Ohio App. LEXIS 2217, at \*6-8 (Ohio Ct. App. Hamilton County May 22, 1998) (affirming summary judgment to defendant because uncontradicted evidence demonstrated that plaintiff’s customer terminated its contract with the plaintiff *before* the customer communicated with defendant); *see Weinfeld v. Welling*, No. 2003CA00247, 2004 Ohio App. LEXIS 4432, at \*6 (Ohio Ct. App. Stark County Sept. 13, 2004) (upholding jury verdict for defendant; plaintiff failed to prove that the “intentional interference caused a breach or termination”).

Causation “requires something more than a showing that a particular course of conduct *may* have” influenced a third party.<sup>72</sup> In *Chrvala*, the court granted summary judgment to the defendant because evidence of causation was lacking.<sup>73</sup> Plaintiff-employee contended that the disparaging statements made by his former employer (the defendant) to plaintiff’s prospective employer (the third party) caused the prospective employer not to hire the plaintiff. *Chrvala* concluded that the uncontradicted evidence that the third party decided not to employ plaintiff for reasons other than the defendant’s statements was sufficient to prove there was no causation.<sup>74</sup> Other courts are consistent with *Chrvala*, determining that causation was lacking where third parties chose to terminate the relationships for reasons independent of defendants’ actions.<sup>75</sup>

*D. Application of the Sleepy/Wake-Up Hypothetical to the Intent Element*

Based on the facts of the above hypothetical,<sup>76</sup> Sleepy has sufficient evidence to survive a dispositive motion on the intent element for Sleepy’s claims of tortious interference with a business relationship against Traitor Tom and Wake-Up. Regarding the claim against Traitor Tom, three of Sleepy’s customers terminated their business relationships with Sleepy (a fact the President hates to admit); Traitor Tom intentionally solicited the customers to terminate their relationships with Sleepy by offering them substantially reduced prices; and Traitor Tom’s actions caused the terminations (the customers admitted switching to Wake-Up because of the lower prices). As to the claim against Wake-Up, Traitor Tom terminated his employment with Sleepy; Wake-Up intentionally induced his termination (Wake-Up solicited Traitor Tom with knowledge that Traitor Tom could not work for both Wake-Up and Sleepy); and Wake-Up caused the termination, in substantial part, through its false statements about the financial condition of Sleepy.

Proving the intent element on Sleepy’s claim against Wake-Up for its interference with Traitor Tom’s non-competition agreement hinges upon what knowledge standard Ohio law adopts. Assume that Wake-Up’s intent as of Traitor Tom’s hiring date is the only relevant date.<sup>77</sup> Under the actual knowledge standard,

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<sup>72</sup>*Chrvala v. Borden, Inc.*, 14 F. Supp. 2d 1013, 1023 (S.D. Ohio 1998) (citing *Leibovitz v. Central Nat’l Bank*, 60 N.E.2d 727, 728-29 (Ohio Ct. App. Cuyahoga County 1944)).

<sup>73</sup>*Id.* at 1023-24.

<sup>74</sup>*Id.*

<sup>75</sup>*E.g.*, *Stilson & Assocs. v. Stilson Consulting Group*, Nos. 03-4458, 03-4542, 2005 U.S. App. LEXIS 7971, at \*18-19 (6th Cir. May 6, 2005) (construing Ohio law and affirming the district court’s factual findings; explaining that “[d]efendants cannot be said to have caused the termination of the relationship” because the third party was dissatisfied with plaintiffs’ work and the third party would have contracted with a new company regardless of defendants’ actions); *Rigby v. Falls Equip. Co.*, 779 N.E.2d 1056, 1063-64 (Ohio Ct. App. Summit Cty. 2002) (stating that causation was lacking where the third parties testified in affidavits that they were not influenced by defendant’s communications).

<sup>76</sup>*See supra* Part I.

<sup>77</sup>For the purpose of proving a claim of interference with a contract, the relevancy of a defendant’s knowledge and actions after a contract is breached, but before the contract is terminated, is discussed *infra* Part VII.

Wake-Up would prevail because it cannot intend to induce a breach or termination of the non-competition agreement if it lacked actual knowledge of its existence. If Ohio courts adopt the constructive knowledge standard, however, then whether Wake-Up intentionally caused the breach of the non-competition agreement should be decided by the trier of fact. Wake-Up knew Sleepy employed Traitor Tom, yet Wake-Up failed to ask whether Traitor Tom had any employment agreement with Sleepy that may be breached. Under this circumstance, a reasonable fact finder could conclude that Wake-Up's deliberate ignorance as to the existence of the non-competition agreement constitutes knowledge that "interference was certain or substantially certain to occur."

V. ELEMENT (4): A DEFENDANT MUST ENGAGE IN IMPROPER AND UNPRIVILEGED CONDUCT

The fourth element requires proof that an interferer engaged in improper and unprivileged conduct.<sup>78</sup> Whether a defendant is found liable for tortious interference with a contract or a business relationship or prevails on a dispositive motion generally hinges upon whether the interference was improper and unprivileged.<sup>79</sup> The Supreme Court of Ohio has adopted the approach of Restatement (Second) of Torts sections 767 and 768, which set forth two separate tests to determine whether a defendant acted improperly and without a privilege. Under both sections, a plaintiff has the burden to prove improper conduct,<sup>80</sup> which includes (but is not limited to) making false, defamatory statements with malice; disclosing confidential information; abusing judicial process; and committing physical violence or fraud.<sup>81</sup> Despite the adoption of the Restatement, the Ohio Supreme Court and other Ohio courts have not defined adequately the contours of what conduct is improper.<sup>82</sup> The

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<sup>78</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 858 (Ohio 1999) ("Only improper interference with a contract is actionable, as reflected in the fourth element of the tort. . . ." (citing *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 865-66 (Ohio 1996))). This Article, like Ohio courts, uses the "terms improper and without privilege interchangeably." *Wauseon Plaza, Ltd. P'ship v. Wauseon Hardware Co.*, 807 N.E.2d 953, 963 (Ohio Ct. App. Fulton County 2004) (internal quotation marks and citations omitted).

<sup>79</sup>See *infra* notes 131-159 and accompanying text.

<sup>80</sup>After two decisions by the Ohio Supreme Court (*Fred Siegel*, 707 N.E.2d at 858, and *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, syllabus ¶ 2 (Ohio 1995)), which set forth improper and unprivileged conduct as an element of an interference claim, courts have consistently required a plaintiff to establish this element. *E.g.*, *Licul v. Swagelok Co.*, No. 86322, 2006 Ohio App. LEXIS 619, at \*11 (Ohio Ct. App. Cuyahoga County Feb. 16, 2006) (citing *Andrews v. Carmody*, 761 N.E.2d 1076, 1081 (Ohio Ct. App. Lake County 2001)); *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 742 (6th Cir. 1999) (citing *Kenty*, 650 N.E.2d at 866) (applying Ohio law); *Andrews*, 761 N.E.2d at 1080 (citing *Fred Siegel*, 650 N.E.2d at para. 1 of syllabus). Prior to *Fred Siegel* and *Kenty*, some courts placed the burden of proof on the interferer. *E.g.*, *Carman v. Entner*, No. 13978, 1994 Ohio App. LEXIS 387, at \*23 (Ohio Ct. App. Montgomery County Feb. 2, 1994) ("[T]he burden of proving the defense of a privilege to interfere clearly rests with the defendant.").

<sup>81</sup>See *infra* notes 124-130 and accompanying text.

<sup>82</sup>*Petrovski v. Fed. Express Corp.*, 240 F. Supp. 2d 685, 690 n.1 (N.D. Ohio 2003) (noting that the improper element "is not well-defined by Ohio courts").



Court has explained that the impropriety of a defendant's actions is fact specific and determined "'under the circumstances.'"<sup>83</sup> That standard fails to notify defendants whether their conduct is improper, resulting in unnecessary litigation. How the law should provide clearer guidelines to would-be interferers is discussed below.

The seven-factor balancing test of section 767 of Restatement (Second) of Torts applies: (1) to all contracts *not* terminable at the will of the parties; and (2) to business relationships and contracts that are terminable at will when the plaintiff and defendant do not compete.

The seven factors of section 767 are:

1. the nature of the actor's conduct;
2. the actor's motive;
3. the interests of the other with which the actor's conduct interferes;
4. the interests sought to be advanced by the actor;
5. the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
6. the proximity or remoteness of the actor's conduct to the interference; and
7. the relations between the parties.<sup>84</sup>

Of the seven factors, "[t]he nature of the [defendant's] conduct" is the "chief factor."<sup>85</sup>

The application of the competitor's privilege of section 768 of Restatement (Second) of Torts is limited to a "contract that is terminable at will" or a business relationship where the plaintiff and interferer *compete*.<sup>86</sup> Competition exists when "two or more commercial interests [seek] to obtain the same business from third parties."<sup>87</sup> Under section 768, a defendant has a privilege to compete if:

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<sup>83</sup>*Fred Siegel*, 707 N.E.2d at 858 (quoting RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1979)).

<sup>84</sup>*Id.* at 860 (adopting RESTATEMENT (SECOND) OF TORTS § 767 (1979)). Prior to *Fred Siegel*, many Ohio courts determined the existence of a privilege by applying the five-factor test set forth in *Juhasz v. Quik Shops, Inc.*, 379 N.E.2d 235, 238-39 (Ohio Ct. App. Summit County 1977): "(a) the nature of the actor's conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between the parties, (d) the interest sought to be advanced by the actor[,] and (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand." (internal quotation marks omitted). This five-factor test is almost identical to Section 767; thus, the cases where courts analyzed the existence of a privilege pursuant to the *Juhasz* factors are applicable to a Section 767 analysis.

<sup>85</sup>*Super Sulky*, 174 F.3d at 742 (citing RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1977)); *Hicks v. Bryan Med. Group, Inc.*, 287 F. Supp. 2d 795, 812 (N.D. Ohio 2003) (citing *Super Sulky*, 174 F.3d at 742).

<sup>86</sup>*Fred Siegel*, 707 N.E.2d at 860 (citing RESTATEMENT (SECOND) OF TORTS § 768 (1979)); *Cannon Group, Inc. v. Better Bags, Inc.*, 250 F. Supp. 2d 893, 903 (S.D. Ohio 2003) (citing RESTATEMENT (SECOND) OF TORTS § 768 (1979)).

<sup>87</sup>BLACK'S LAW DICTIONARY 278 (7th ed. 1999).

1. the relation concerns a matter involved in the competition between the actor and the other[;] and
2. the actor does not employ *wrongful means*[;] and
3. his action does not create or continue an unlawful restraint of trade[;] and
4. his purpose is at least in part to advance his interest in competing with the other.<sup>88</sup>

Unlike section 767 (which sets forth a balancing test), the fair competition privilege of section 768 *purports* to provide a defendant-competitor with a safe harbor when its four prongs are satisfied.<sup>89</sup> If the fair competition privilege is inapplicable, then the balancing test of section 767 applies (and vice-versa).<sup>90</sup>

To determine what conduct is improper and unprivileged, Ohio courts should consider whether the breached or terminated interest is a contract not terminable at will, a contract terminable at will, or a business relationship. Ohio law should afford greater protection to non-at-will contracts against outside interference than it does to less binding business relationships and at-will contracts.<sup>91</sup> Before addressing how courts construe the improper element and before setting forth proposed standards to Ohio interference law, this Article discusses when a contract is not terminable at will or is terminable at will.

#### A. *Contracts and Business Relationships That Are Terminable At Will and Contracts That Are Not Terminable At Will*

Classifying a contract or business relationship as terminable at will or not terminable at will should determine whether a defendant acts improperly and without a privilege.

##### 1. When Is a Contract Terminable At Will?

Contracts without a specific duration of time are generally terminable at will.<sup>92</sup> Either party to an at-will contract may be terminate it “at any time and for any reason” (i.e., without good or just cause),<sup>93</sup> as long as the reason “is not contrary to

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<sup>88</sup>*Fred Siegel*, 707 N.E.2d at 861 n.1 (adopting RESTATEMENT (SECOND) OF TORTS § 768(1) (1979)) (emphasis added); *Cannon Group*, 250 F. Supp. 2d at 903-04 (same). Roughly only fifteen Ohio courts have cited to the competitor’s privilege of Section 768 or its comments, and fewer courts have construed this section.

<sup>89</sup>In practice, the competitor’s privilege does not, and should not, provide defendants with broad protections on the sole basis that the plaintiff and defendant compete. *See infra* Part V.A.3. The law should protect a competitor with a non-at-will agreement from tortious interference from its competitors who have economic incentives to interfere.

<sup>90</sup>*Fred Siegel*, 707 N.E.2d at 860-61 (“The specific applications in [Section 768] supplant the generalization expressed in [Section 767].” (quoting RESTATEMENT (SECOND) OF TORTS § 767 cmt. a (1979) (internal quotation marks omitted).

<sup>91</sup>*See infra* notes 102-11 and accompanying text.

<sup>92</sup>*Miller v. Wikel Mfg. Co.*, 545 N.E.2d 76, 79 (Ohio 1989) (“[A] distributorship agreement with no express provision as to duration is generally terminable at will.”).

<sup>93</sup>*Lake Land Employment Group of Akron v. Columer*, 804 N.E.2d 27, 32 (Ohio 2004).

law.”<sup>94</sup> Ohio courts presume that employment relationships are terminable at the will of either the employer or employee, unless the “parties have specifically agreed otherwise.”<sup>95</sup> Contracts, though, containing a specific duration of time or a time frame for performance, are not terminable at will, but terminable only for good cause.<sup>96</sup>

Whether a contract is considered terminable at will for purposes of a claim of tortious interference is not always an easy issue. At a minimum, an at-will contract is one that is terminable at the will of both parties. At-will contracts include contracts that permit both parties to terminate them for any reason with thirty days advance notice.<sup>97</sup> Only one Ohio court, in *Wagoner v. Leach Co.*,<sup>98</sup> has analyzed a contract terminable at the will of only one party in the context of a tortious interference claim. In *Wagoner*, the plaintiff-dealer could terminate its distributorship agreement with the third-party manufacturer for any reason with thirty days notice, but the manufacturer needed good cause to terminate the agreement.<sup>99</sup> The manufacturer breached the agreement, and the dealer asserted an interference claim against the interferer. *Wagoner* ruled that the dealer agreement was *not* terminable at will because the agreement required the breaching manufacturer to have good cause to terminate it; thus, the competitor’s privilege of section 768 of Restatement (Second) of Torts (which applies only to at-will agreements) was “inapplicable.”<sup>100</sup> *Wagoner* is consistent with other courts that have

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<sup>94</sup>Haynes v. Zoological Soc’y, 652 N.E.2d 948, 951 (Ohio 1995).

<sup>95</sup>Dorricott v. Fairhill Ctr. for Aging, 2 F. Supp. 2d 982, 991 (N.D. Ohio 1998) (citation omitted); *accord* Hawley v. Dresser Indus., Inc., 737 F. Supp. 445, 459 (S.D. Ohio 1990) (same standard).

<sup>96</sup>Energy Mktg. Servs. v. Homer Laughlin China Co., 186 F.R.D. 369, 371, 374 (S.D. Ohio 1999) (ruling that agreement “constitute[d] an enforceable contract” where the agreement provided, in part, that it would be renewed annually, unless “a party gave the other sixty days written termination notice”); *Absolute Mach. Tools v. Southwest Indus. Sales*, No. 04CA008611, 2005 Ohio App. LEXIS 3625, at \*6-7 (Ohio Ct. App. Lorain County Aug. 3, 2005) (finding that the trial court properly awarded summary judgment to plaintiff; plaintiff “established the existence of a binding contract” where plaintiff agreed to sell, and defendant agreed to buy, machinery for a set price).

<sup>97</sup>*Doe v. Lodi Cmty. Hosp.*, No. 2955-M, 2000 Ohio App. LEXIS 5802, at \*23-24 (Ohio Ct. App. Medina County Dec. 13, 2000) (finding that the plaintiff’s contract was “an at-will contract”); *Hoyt, Inc. v. Gordon & Assocs.*, 662 N.E.2d 1088, 1095 (Ohio Ct. App. Cuyahoga County 1995) (applying the competitor’s privilege of Section 767 and concluding that the “agreement . . . was terminable at-will with thirty days’ notice”).

<sup>98</sup>No. 17580, 1999 Ohio App. LEXIS 3152 (Ohio Ct. App. Montgomery County July 2, 1999).

<sup>99</sup>*Id.* at \*4, \*43 (manufacturer “was only able to terminate the contract after it found deficiencies and gave [dealer] the opportunity to cure them”).

<sup>100</sup>*Id.* at \*43. Outside of the interference context, at least one non-Ohio court has ruled that a contract terminable at the will of only one party was a non-at-will contract. *Bugglin v. CPC Int’l Inc.*, No. 91-2735, 1992 U.S. Dist. LEXIS 12103, at \*2, \*6 (E.D. Pa. Aug. 11, 1992) (“[T]he distributor’s agreement is not terminable at will” since the contract could be terminated by wholesaler only for “just cause” but by the distributor for any reason.).

concluded that employment contracts are not terminable at will when the employer, but not employee, must have good cause to terminate the contract.<sup>101</sup>

Although not directly stated by *Wagoner*, the proper focus for whether a contract is terminable at will is the contractual expectancy of the plaintiff, the injured party. Under such an analysis, a contract may be at will for one party but not the other party. In *Wagoner*, the contract was *not* terminable at will because the plaintiff-dealer had the expectation that the third-party manufacturer (which could terminate the agreement only for good cause) would abide by the terms of the distributorship agreement. The binding nature of the agreement on the manufacturer provided the dealer with a legal right to future relations and not only an expectancy. Had the situation been reversed—the manufacturer could terminate the agreement for any reason but not the dealer—then the dealer would have had no legal expectation that the manufacturer would continue with the relationship. Under that situation, a court applying *Wagoner* should conclude that the agreement was terminable at will as to the dealer.

## 2. Protection Afforded to Contracts and Business Relationships That Are Terminable At to Will and Contracts That Are Not Terminable At Will

Under Ohio tortious interference law, at-will agreements and business relationships should receive (and deserve) less protection against outside interference than non-at-will contracts.<sup>102</sup> The binding nature of a contract and the objective expectation of a future relationship between parties should determine when actions are improper under the seven-factor test of section 767 and the competitor's privilege of section 768. Ohio courts agree that parties to at-will contracts and business relationships have "no legal interest . . . but only an expectancy of continued relations": "[A]ny interference with [an at-will contract] that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes, [a plaintiff] has *no legal right* but only an *expectancy*."<sup>103</sup> Parties to contracts that are not terminable at

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<sup>101</sup>*Golem v. Village of Put-In-Bay*, 222 F. Supp. 2d 924, 929-30 (N.D. Ohio 2002) (granting employee's motion for summary judgment on his breach of contract claim; employment handbook containing "very specific requirements for employment and discipline" "alter[ed] the at-will nature of the employment"); *Sowards v. Norbar, Inc.*, 605 N.E.2d 468, 472 (Ohio Ct. App. Franklin County 1992) (upholding jury finding that employer violated the employment handbook; handbook set forth "specific and mandatory" discipline procedures that applied only to the employer, which rendered the employment not at will).

<sup>102</sup>*Tata Consultancy Servs. v. Sys. Int'l, Inc.*, 31 F.3d 416, 427 (6th Cir. 1994) (applying Michigan law; explaining that at-will contracts are "deserving of less protection . . . than enforceable bilateral contracts" (citing *Kand Med., Inc. v. Freund Med. Prods., Inc.*, 963 F.2d 125 (6th Cir. 1992))).

<sup>103</sup>*Hoyt, Inc. v. Gordon & Assos.*, 662 N.E.2d 1088, 1097 (Ohio Ct. App. Cuyahoga County 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 768 cmt. i (1979)) (ruling that summary judgment for interferer was proper) (first and third alternation added; second alternation in original; emphasis added); *accord Thomson v. Deaconess Hosp. of Cincinnati*, No. C-980257, 1999 Ohio App. LEXIS 541, at \*8-9 (Ohio Ct. App. Hamilton County Feb. 19, 1999) (applying standard set forth in *Hoyt* to a contract terminable at will and affirming the grant of a directed verdict for defendant).

will, however, have a “legal right” to future performance from the other party.<sup>104</sup> Under a non-at-will contract, in contrast to an at-will contract or business relationship, a plaintiff has a “greater definiteness of the other’s expectancy” and a “stronger claim to security.”<sup>105</sup> Ohio has a strong interest in preserving the “sanctity of contractual relations”<sup>106</sup> and enforcing contracts not terminable at will.<sup>107</sup> “The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint.”<sup>108</sup>

Although not addressed directly by Ohio courts, a plaintiff’s expectation that the other party to a non-at-will contract will abide by its terms should entitle that contract to more protection against a defendant’s interference than a business relationship or at-will contract. Providing broader protection to contracts not terminable at will is logically consistent with Ohio law—that parties to at-will agreements and business relationships have no “legal assurance” of an ongoing relationship, but parties to non-at-will contracts do have such an assurance. The seven factors of section 767 of Restatement (Second) of Torts, which the Supreme Court of Ohio has adopted, affords heightened protection to non-at-will contracts. Section 767 explains that an act that induces a termination of a business relationship may be privileged, but the same act may be improper if it induces the “breach of an existing contract.”<sup>109</sup> Other jurisdictions that have addressed this issue have concluded that the range of conduct that is improper is more narrow for the termination of an at-will contract or business relationship than for the breach or termination of a non-at-will contract.<sup>110</sup> Requiring more culpable conduct for the

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<sup>104</sup>Miller v. Pennitech Indus. Tools, Inc., No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*14 (Ohio Ct. App. Medina County Apr. 19, 1995) (explaining that if the employment agreement was not terminable at will the plaintiff would have had a “legal right” to enforce it against the third party).

<sup>105</sup>RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1979).

<sup>106</sup>Blakeman’s Valley Office Equip., Inc. v. Bierdeman, 786 N.E.2d 914, 920 (Ohio Ct. App. Mahoning County 2003) (weighing the public interest factor and ruling that the trial court should have issued a preliminary injunction); Mike McGarry & Sons, Inc. v. Gross, No. 86603, 2006 Ohio App. LEXIS 1620, at \*14-16 (Ohio Ct. App. Cuyahoga County Apr. 6, 2006) (setting forth same proposition as *Blakeman’s* and upholding issuance of a preliminary injunction).

<sup>107</sup>Escape Enters., Ltd. v. Gosh Enters., Inc., Nos. 04AP-834, 04AP-857, 2005 Ohio App. LEXIS 2466, at \*12-13, \*31-32 (Ohio Ct. App. Franklin County May 26, 2005) (explaining that the interest of the public favored the enforcement of the contract and upholding the issuance of a preliminary injunction to plaintiff on its claim that defendant tortiously interfered with its non-at-will contract).

<sup>108</sup>Wallace v. Balint, 761 N.E.2d 598, 604 (Ohio 2002) (quoting *Blount v. Smith*, 231 N.E.2d 301, 305 (Ohio 1967)).

<sup>109</sup>RESTATEMENT (SECOND) OF TORTS § 767 cmts. e & j (1979) (providing that “permissible interference is given a broader scope” for a business relationship than an “existing contract”).

<sup>110</sup>NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group, 664 N.E.2d 492, 496 (N.Y. 1996) (“Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of

interference with an at-will contract or business relationship than a non-at-will contract appropriately balances “‘society’s interest in respect for the integrity of contractual [and business] relationships, [with] . . . the right to freedom of action on the part of the party interfering and society’s concern that competition not be unduly hampered.’”<sup>111</sup>

To illustrate the rule that contracts terminable at will deserve less protection from outside interference than non-at-will contracts, recall the Sleepy/Wake-Up Hypothetical. Traitor Tom (Sleepy’s former employee) caused three of Sleepy’s customers to terminate their at-will business relationships with Sleepy, and Wake-Up (Sleepy’s competitor) induced Traitor Tom to breach his non-competition agreement (a contract not terminable at will). Because Sleepy had no legal assurance of a future relationship with its customers but had a legal right to bind Traitor Tom to his two-year agreement, Traitor Tom’s actions should have to be more culpable than Wake-Up’s actions to be improper.

### 3. At-Will Contracts and Business Relationships: The Effect of Competition on Whether Conduct Is Improper

The mere fact that the parties compete should not transform unprivileged actions into privileged actions.<sup>112</sup> Rather, the key inquiries should be whether the breached or terminated interest is an at-will contract or business relationship and whether improper means were used to induce the breach or termination.<sup>113</sup> The competitor’s privilege of section 768 of Restatement (Second) of Torts applies to at-will contracts and business relationships where a plaintiff and defendant are in competition. On its face, the fair competition privilege *purports* to provide a safe harbor to competitors, providing that a competitor “does not interfere improperly with the other’s relation if” its four prongs are met.<sup>114</sup> Some courts have construed that provision to be an absolute safe harbor for an interferer who induces the termination of an at-will contract or business relationship, as long as the interferer acts, in part, to compete with the plaintiff.<sup>115</sup>

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the defendant.”); *Duggin v. Adams*, 360 S.E.2d 832, 836 (Va. 1987) (“[T]he extent of permissible third-party interference increases as the degree of enforceability of a business relationship decreases.”).

<sup>111</sup>*NBT Bancorp*, 664 N.E.2d at 496 (quoting *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 448 (N.Y. 1980)).

<sup>112</sup>*Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1104 (N.Y. 2004) (explaining that it was irrelevant whether the court classifies plaintiffs and defendant as “‘competitors’”; “the question . . . is whether the ‘means’ employed . . . were ‘wrongful’ or ‘culpable’”).

<sup>113</sup>*See supra* notes 102-11 and accompanying text.

<sup>114</sup>*See supra* notes 86-90 and accompanying text (discussing the four prongs of the competitor’s privilege).

<sup>115</sup>*E.g.*, *Chem-A-Co., Inc. v. Earth Science Labs., Inc.*, No. 4:04CV0015, 2006 U.S. Dist. LEXIS 66798, at \*10-11, \*11 n.1, \*13 (N.D. Ind. Sept. 18, 2006) (granting interferer’s motion for summary judgment where interferer “was acting, at least in part, to compete with [counterclaimant] and promote its own legitimate business interests”; explaining that between competitors “the mere existence of a legitimate business interest will provide justification” for interference); *Economation, Inc. v. Automated Conveyor Sys., Inc.*, 694 F. Supp. 553, 562 (S.D. Ind. 1988) (“[J]ustification for the defendant’s conduct was competition.”).

The express language of the competitor's privilege and Ohio courts' interpretation of that privilege, however, support the rule that whether conduct is privileged should not hinge solely on whether a plaintiff and defendant compete but on whether the relationship is at will. First, to fall within the fair competition privilege of section 768, a defendant must compete with a plaintiff *and* must "not employ wrongful means."<sup>116</sup> Under Ohio law, even if competition exists, a competitor-interferer does not escape liability when it uses "wrongful means."<sup>117</sup> Second, no Ohio court has expressly ruled that a defendant may avail itself of more extensive privileges on the sole basis that the defendant is a competitor, and one court has implicitly rejected such a contention.<sup>118</sup> Third, prior to Ohio's adoption of the competitor's privilege of section 768 in April 1999,<sup>119</sup> some courts analyzed a defendant's right to compete by weighing the factors set forth in *Juhasz v. Quik Shops, Inc.*<sup>120</sup>—the same factors used to determine whether conduct between non-competitors is improper.<sup>121</sup> Even after the adoption of the fair competition privilege, Ohio courts have not applied the *Juhasz* factors or section 767 to at-will contracts and business relationships involving competition.<sup>122</sup>

Competition, however, does play a role in tortious interference law. Whether a plaintiff and interferer compete is relevant to the *strength* of the interferer's evidence that its conduct was privileged. Because competitors seek revenues from the same or similar customers, competition provides an economic basis and motive for a defendant's interference with its competitors' business relationships. In contrast, when parties are not competitors, it is more likely that an interferer was motivated by

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<sup>116</sup>RESTATEMENT (SECOND) OF TORTS § 768(1)(a)-(1)(b) (1979).

<sup>117</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 861 (Ohio 1999) (construing the fair competition privilege and ruling that the interferer would be liable if it "used information acquired through *improper means* in their competitive efforts, e.g., information protected as trade secrets" (emphasis added)); *Prof'l Balance Co. v. Fulton & Assocs. Balance*, No. 97-L-238, 1999 Ohio App. LEXIS 1692, at \*16-17 (Ohio Ct. App. Lake County Apr. 16, 1999) (noting that where plaintiff and defendant competed, defendant's conduct would have been improper had he breached a fiduciary duty); see *Soderlud Bros. v. Carrier Corp.*, 663 N.E.2d 1, 8 (Ill. App. Ct. 1996) ("Acts of competition which are never privileged include fraud, deceit, intimidation or deliberate disparagement.").

<sup>118</sup>*Reed Elsevier, Inc. v. TheLaw.net Corp.*, 269 F. Supp. 2d 942, 949 (S.D. Ohio 2003) (rejecting defendant-competitor's argument that "any act of interference that it did commit was privileged" under section 768).

<sup>119</sup>*Fred Siegel*, 707 N.E.2d at 861.

<sup>120</sup>*Juhasz v. Quik Shops, Inc.*, 379 N.E.2d 235 (Ohio Ct. App. Summit County 1977); see *supra* note 84 (setting forth the five *Juhasz* factors).

<sup>121</sup>See, e.g., *Dineen Enters. v. Patrick*, No. 12732, 1987 Ohio App. LEXIS 6707, at \*7-8 (Ohio Ct. App. Summit County May 6, 1987) (construing the five factors in *Juhasz*).

<sup>122</sup>*M.J. McPherson Servs., L.L.P. v. Sports Images, Inc.*, No. 5:06 CV 465, 2006 U.S. Dist. LEXIS 60879, at \*11-12 (N.D. Ohio Aug. 28, 2006) (setting forth the seven factors of Section 767); *Kenneth J. Majcen & Assocs. v. Phoenix Assocs.*, No. 76454, 2001 Ohio App. LEXIS 140, at \*17 (Ohio Ct. App. Cuyahoga County Jan. 18, 2001) (not citing Section 768); *Bailey v. Lake Erie Educ. Computer Ass'n*, Nos. 99CA007323, 99CA007471, 2000 Ohio App. LEXIS 5160, at \*9-10 (Ohio Ct. App. Lorain County Nov. 8, 2000) (applying *Juhasz* factors).

something other than economic competition, such as ill will toward a plaintiff.<sup>123</sup> Suppose a plaintiff's interference claim against a non-competitor is based on the non-competitor's false statements. A jury is more likely to find that the non-competitor acted with an intent to harm the plaintiff and made the statements with knowledge of their falsity if the non-competitor cannot claim competition as a basis for the interference.

*B. Application of Restatement (Second) of Torts Section 767 (Seven-Factor Balancing Test) and Section 768 (Competitor's Privilege)*

Under the seven-factor test of section 767 and the competitor's privilege of section 768 of Restatement (Second) of Torts, courts determine what constitutes improper conduct by placing claims for tortious interference into three categories: (1) at-will contracts or business relationships involving no competition between the plaintiff and defendant (section 767 applies); (2) at-will contracts and business relationships involving a matter of competition between the plaintiff and defendant (section 768 applies); and (3) non-at-will contracts, regardless of whether the plaintiff and defendant are competitors (section 767 applies). Part V.B.1 discusses what actions are improper or privileged under current Ohio law. Part V.B.1.b argues that Ohio law should be modified with a bright-line rule for determining improper conduct for the termination of at-will contracts and business relationships. Part V.B.2 argues that Ohio courts should clarify what is improper for the inducement of a breach or termination of a contract not terminable at will.

1. At-Will Contracts and Business Relationships: What Is Improper Conduct Under Ohio Law

Ohio courts have failed to define a sufficient range of conduct that is improper and unprivileged in the context of contracts terminable at will and business relationships, and even fewer courts have ruled as a matter of law on what constitutes improper conduct. For the interference with an at-will contract or a business relationship, the following actions are improper under Ohio law: (1) using or disclosing confidential information or trade secrets;<sup>124</sup> (2) making false or misleading statements with malice;<sup>125</sup> (3) breaching a fiduciary duty;<sup>126</sup> (4) committing fraud or

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<sup>123</sup>Carvel Corp. v. Noonan, 818 N.E.2d 1100, 1104 (N.Y. 2004) (stating that in the absence of competition, "there may be a stronger case that the defendant's interference with the plaintiff's relationships was motivated by spite").

<sup>124</sup>*M.J. McPherson Servs.*, 2006 U.S. Dist. LEXIS 60879, at \*12-13 (concluding that the complaint failed to alleged improper conduct because there were no trade secrets disclosed, the only basis of plaintiff's interference claim); see *infra* notes 140-43 and accompanying text.

<sup>125</sup>See *infra* notes 131-37 and accompanying text; see also Bearing Distributs., Inc. v. Rockwell Automation, Inc., No. 06-cv-831, 2006 U.S. Dist. LEXIS 67327, at \*1, \*29-30 (N.D. Ohio Sept. 20, 2006) (denying motion to dismiss claim for interference with a business relationship; plaintiff pled improper conduct by alleging that interferer "falsely informed [plaintiff's] customers that [plaintiff] is substituting parts manufactured in China for other products specified by customers, without the customers knowledge or consent") (citation omitted); *Days Inn Worldwide, Inc. v. Sai Baba, Inc.*, 300 F. Supp. 2d 583, 594-95 (N.D. Ohio 2004) (franchisees' claim that franchisor engaged in a "misrepresentation" was a sufficient allegation of "improper" conduct); *Cooper v. Jones*, No. 05CA7, 2006 Ohio App. LEXIS 1606, at \*16-17 (Ohio Ct. App. Jackson County Mar. 29, 2006) (finding that defendant's



physical violence;<sup>127</sup> (5) instituting a civil or criminal action in bad faith (i.e., for purposes other than litigating the claim on the merits);<sup>128</sup> (6) abusing process of the judicial system;<sup>129</sup> and (7) acting with an intent to harm a plaintiff.<sup>130</sup>

When a plaintiff's claim for tortious interference with a business relationship is based on false or misleading statements and the statements are defamatory, a plaintiff must prove by clear and convincing evidence that the defendant made the statements "with actual malice, i.e., with knowledge that the statements are false or with

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statements that plaintiff was a "liar" and "cheat" were sufficient to create a material issue of fact as to the propriety of defendant's conduct).

<sup>126</sup>Prof'l Balance Co. v. Fulton & Assocs. Balance, No. 97-L-238, 1999 Ohio App. LEXIS 1692, at \*16-17 (Ohio Ct. App. Lake County Apr. 16, 1999) (applying the competitor's privilege of Section 768; had the jury determined that defendant-employee breached a fiduciary duty in soliciting plaintiff's employees (who were defendant's former coworkers) then such conduct would have fallen outside of Section 768 and been improper).

<sup>127</sup>RESTATEMENT (SECOND) OF TORTS §§ 767 cmt. c, 768 cmts. e & g (1979). The Supreme Court of Ohio has cited comment c to Section 767 with approval. Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 860 (Ohio 1999).

The elements for a claim of fraud are "(1) a representation or, where there is a duty to disclose, concealment, (2) which is material, (3) made falsely, with knowledge of its falsity or with reckless disregard for the truth, (4) with the intent to mislead, (5) justifiable reliance upon the representation or concealment, and (6) resulting injury proximately caused by the justifiable reliance." Padgett v. Sanders, 719 N.E.2d 636, 641 (Ohio Ct. App. Clermont County 1998).

<sup>128</sup>RESTATEMENT (SECOND) OF TORTS §§ 767 cmt. c, 768 cmt. e (1979).

To prove a malicious prosecution claim, a plaintiff must establish four elements: "(1) malicious institution of prior proceedings against the plaintiff by defendant, . . . (2) lack of probable cause for the filing of the prior lawsuit, . . . (3) termination of the prior proceedings in plaintiff's favor, . . . and (4) seizure of plaintiff's person or property during the course of the prior proceedings." Robb v. Chagrin Lagoons Yacht Club, 662 N.E.2d 9, 13 (Ohio 1996) (quoting Crawford v. Euclid Nat'l Bank, 483 N.E.2d 1168 (Ohio 1985)).

<sup>129</sup>Gray-Jones v. Jones, 738 N.E.2d 64, 71 (Ohio Ct. App. Franklin County 2000) (explaining that committing the tort of abuse of process to interfere with another's business relations is improper).

A claim for the tort of abuse of process requires a showing of three elements: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an *ulterior purpose* for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A., 626 N.E.2d 115, syllabus ¶ 1 (Ohio 1994) (emphasis added).

<sup>130</sup>See *infra* notes 144-45 and accompanying text; see also RESTATEMENT (SECOND) OF TORTS § 768 cmt. g (1979); Coal Processing Equip., Inc. v. Campbell, 578 F. Supp. 445, 464-67 (N.D. Ohio 1981) (finding, after a bench trial, that defendant lacked a privilege to act by sending letters to plaintiff's clients claiming that plaintiff was infringing defendant's patent; the letters, which lacked any basis, were "intended to injure [plaintiff's] business" and sent with "ill will and vindictiveness" toward plaintiff); Madorsky v. Bernstein, 626 N.E.2d 694, 696-97 (Ohio Ct. App. Cuyahoga Cty. 1993) (applying *Juhasz* factors; affirming summary judgment in favor of defendant because plaintiff produced no evidence that defendant "acted in bad faith").

reckless disregard as to their truth or falsity.”<sup>131</sup> A reckless disregard means the defendant “had a high degree of awareness of the probable falsity of the published statements . . .”;<sup>132</sup> it is more than mere negligence.<sup>133</sup> A showing of malice creates an issue of fact on whether an interferer’s statement was privileged.<sup>134</sup> Indeed, a plaintiff is entitled to summary judgment when the plaintiff establishes that an interferer made a false statement recklessly. *In the Matter of Gettys*,<sup>135</sup> the defendant-attorney persuaded a competitor’s client to terminate her relationship with plaintiff-attorney. Defendant did so by falsely telling the client that she would not be responsible for plaintiff’s attorneys’ fees if she hired defendant while the bankruptcy proceeding was pending.<sup>136</sup> *Gettys* granted plaintiff’s motion for summary judgment, ruling that defendant “employed ‘wrongful means’ when he [made] misrepresent[at]ions [regarding client’s fee] obligation” to the plaintiff.<sup>137</sup> Without evidence of actual malice, however, a claim for tortious interference with a business relationship will fail.<sup>138</sup>

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<sup>131</sup>A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1295 (Ohio 1995); *accord* Licul v. Swagelok Co., No. 86322, 2006 Ohio App. LEXIS 619, at \*12-13 (Ohio Ct. App. Cuyahoga County Feb. 16, 2006) (construing Section 767 and upholding jury verdict for defendant because jury found no malice); Doyle v. Fairfield Mach. Co., 697 N.E.2d 667, 683-84 (Ohio Ct. App. Trumbull County 1997) (finding that the jury instruction requiring the statements to be made with actual malice was proper for claim that defendant interfered with plaintiff’s employment). Malice “does not require the showing of ill-will or hatred for the plaintiff . . .” *Andrews v. Carmody*, 761 N.E.2d 1076, 1081 (Ohio Ct. App. Lake County 2001).

<sup>132</sup>*Jacobs v. Frank*, 573 N.E.2d 609, 613 (Ohio 1991) (citing *Duplere v. Mansfield Journal*, 413 N.E.2d 1187 (Ohio 1985)).

<sup>133</sup>*Kremer v. Cox*, 682 N.E.2d 1006, 1021 (Ohio Ct. App. Summit County 1996).

<sup>134</sup>*Barilla v. Patella*, 760 N.E.2d 898, 904-05 (Ohio Ct. App. Cuyahoga County 2001) (finding an issue of fact as to actual malice where defendant testified that his defamatory statements were true and then later testified that those statements “were not true”).

<sup>135</sup>205 B.R. 515 (S.D. Ohio 1997). Surprisingly, *Gettys* is the only Ohio court that has granted a plaintiff’s motion for summary judgment on a claim for tortious interference.

<sup>136</sup>*Id.* at 517-18, 519, 522-23.

<sup>137</sup>*Id.* at 522 & n.4, 525 (construing the fair competition privilege under Section 768). *Gettys* did not specifically address whether defendant made the misrepresentations with at least a reckless disregard as to the falsity of his statements. The court, though, implicitly found that defendant acted recklessly; it emphasized that attorneys like defendant are “presumed to know the law.” *Id.* at 524.

<sup>138</sup>*A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294-95 (Ohio 1995) (affirming the grant of a directed verdict for defendant because no evidence of malice for claim of interference with prospective business relationship); *Rizvi v. St. Elizabeth Hosp. Med. Ctr.*, 765 N.E.2d 395, 400 (Ohio Ct. App. Mahoning County 2001) (affirming the award of summary judgment in favor of defendant-physician; statements in report that plaintiff-doctor was “unsatisfactory in terms of ethics and honesty” were privileged because “a report supported by a finding of an administrative board does not reach the point of actual malice”); *Smith v. Ameriflora 1992, Inc.*, 644 N.E.2d 1038, 1040-41, 1044 (Ohio Ct. App. Franklin County 1994) (finding that without evidence of

A plaintiff may defeat an interferer's motion for summary judgment by setting forth evidence of any conduct falling within categories (1) through (7) discussed above.<sup>139</sup> For instance, the Supreme Court of Ohio in *Fred Siegel Co., v. Arter & Hadden*<sup>140</sup> construed the competitor's privilege and reversed the trial court's grant of summary judgment in favor of defendant-attorney.<sup>141</sup> Plaintiff-firm contended that its former attorney used confidential information to solicit plaintiff's clients.<sup>142</sup> *Fred Siegel* explained: "The evidence is ambiguous as to whether [defendant] used information acquired through *improper means* in [her] competitive efforts, e.g., information protected as trade secrets, or information as to [plaintiff's] fee arrangements with clients that may have been wrongfully disclosed."<sup>143</sup> Additionally, Ohio courts have denied summary judgment to an interferer where the sole evidence of unprivileged conduct was that the interferer had an intent to harm the plaintiff.<sup>144</sup> Evidence of a third party's legitimate reason for terminating a business relationship does not negate a defendant's ill-will toward a plaintiff.<sup>145</sup>

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malice, summary judgment for defendant was appropriate). None of these courts cited either section 767 or 768.

<sup>139</sup>See *supra* notes 124-30 and accompanying text.

<sup>140</sup>707 N.E.2d 853 (Ohio 1999).

<sup>141</sup>*Id.* at 861 (citing RESTATEMENT (SECOND) OF TORTS § 768 (1979)).

<sup>142</sup>*Id.* at 853-54.

<sup>143</sup>*Id.* at 861 (emphasis added).

<sup>144</sup>*Hicks v. Bryan Med. Group, Inc.*, 287 F. Supp. 2d 795, 801, 812-13 (N.D. Ohio 2003) (denying defendant-hospital's motion for summary judgment because evidence of ill-will toward plaintiff was sufficient under Section 767; defendant's actions, which resulted in the termination of plaintiff-physician's at-will agreement with his practice group, may have been motivated by ill-will toward plaintiff and not to ensure quality medical care); *Petrovski v. Fed. Express Corp.*, 240 F. Supp. 2d 685, 689, 691 (N.D. Ohio 2003) (applying Section 767; defendant was not entitled to summary judgment where there was a factual dispute regarding whether defendant's statement, "plaintiff 'had got what he deserved'" (in referring to the termination of plaintiff's at-will employment relationship), evidenced an intent to harm plaintiff); *Edified Developers, Inc. v. Gillombardo's Broadview, Inc.*, No. 59674, 1992 Ohio App. LEXIS 9, at \*2-5, \*11-13 (Ohio Ct. App. Cuyahoga County Jan. 2, 1992) (applying *Juhasz* factors; trial court erred in granting summary judgment to interferer because the jury could have found that the interferer acted not to "enhance its own economic well-being," but to harm the other party).

<sup>145</sup>*Miller v. Pennitech Indus. Tools, Inc.*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*19-21 (Ohio Ct. App. Medina County Apr. 19, 1995) (finding that the trial court erred in granting summary judgment in favor of interferer because evidence that third party acted to advance *its* economic interests does not negate defendant's conduct).

Acting with an intent to harm, without more, should be privileged conduct. Ohio courts' rulings to the contrary were wrongly decided. Assume that two interferers commit the same act to induce a termination of a business relationship, and one of the interferers has an intent to harm the plaintiff. The fact that one interferer acted with ill-will does not make it more or less likely that the act will induce the third party to terminate the business relationship. Thus, this type of conduct does not further the purpose of tortious interference -- to protect parties from outside interference.

In the majority of cases involving claims of tortious interference with a business relationship, the defendant prevails.<sup>146</sup> Certain actions under Ohio law that cause the termination of an at-will contract or a business relationship are *per se* privileged: (1) soliciting and hiring the at-will employees of another employer;<sup>147</sup> (2) acting in good faith to protect a defendant's economic interest;<sup>148</sup> (3) making true statements of fact or statements of opinion, even if defamatory;<sup>149</sup> and (4) acting in accordance with an express provision in the plaintiff's contract with defendant.<sup>150</sup> When a defendant's actions fall within those *per se* categories, an interference claim fails.

Defendants are privileged to solicit and hire the employees of another employer, as long as the employees have employment agreements terminable at will and the defendant does not commit an act falling in the improper categories (1) to (7) above. Under such circumstances, Ohio courts grant (or uphold) summary judgment in favor of defendants.<sup>151</sup> For instance, offering an at-will employee a higher wage rate or more benefits than the employee's former employer "to induce . . . the employee . . . to terminate an at-will employment relationship" is privileged conduct.<sup>152</sup> Like at-will employees, a defendant may solicit and lure away a plaintiff's customers, so long as the customers and plaintiff have no non-at-will contract and the defendant

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<sup>146</sup>See *infra* notes 147-59 and accompanying text.

<sup>147</sup>See *infra* notes 151-52 and accompanying text.

<sup>148</sup>See *infra* notes 153-54 and accompanying text.

<sup>149</sup>See *infra* note 155 and accompanying text.

<sup>150</sup>See *infra* notes 156-59 and accompanying text.

<sup>151</sup>R.G. Eng'g & Mfg. v. Rance, No. 01-CO-12, 2002 Ohio App. LEXIS 5264, at \*1, \*19-20 (Ohio Ct. App. Columbiana County Sept. 25, 2002) ("[N]o genuine issue of material fact remains as to [plaintiffs'] claims for tortious interference with contract and business relations"; plaintiff's former employees who started working for defendant "were [not] bound by non-competition agreements."); Tool Steel Prods. Sales Corp. v. XTEK, Inc., No. C-910533, 1993 Ohio App. LEXIS 333, at \*1-2, \*10 & n.3 (Ohio Ct. App. Hamilton County Jan. 29, 1993) (affirming the issuance of summary judgment in favor of defendant; defendant hired two employees who worked for plaintiff in "a strictly at-will relationship, with no fixed term of employment" and such conduct was privileged); see Willis Refrigeration, Air Conditioning & Heating, Inc. v. Maynard, No. CA99-05-047, 2000 Ohio App. LEXIS 102, at \*2-3, \*26 (Ohio Ct. App. Clermont County Jan. 18, 2000) (finding that the trial court properly denied motion for a preliminary injunction; by soliciting at-will employees of plaintiff, defendant "was privileged by the advancement of a bona fide business interest" by employing lawful means).

<sup>152</sup>Propper Demonstration Sales of Ohio, Inc. v. F.W. Woolworth Co., No. 1:88CV4149, 1990 U.S. Dist. LEXIS 20896, at \*5-6, \*17-18 (N.D. Ohio Nov. 29, 1999) (granting summary judgment to defendant-employer where defendant solicited plaintiff's employee and paid the former employee \$4.00 per hour more than plaintiff; "it is not improper interference" to induce the termination of an at-will relationship); Reagan v. Ranger Transp., Inc., No. 97-P-0102, 1998 Ohio App. LEXIS 5824, at \*2, \*3-4, \*15-19 (Ohio Ct. App. Portage County Dec. 4, 1998) (finding that summary judgment in favor of defendants was proper; defendants acted within their privilege under section 767 where they set up a meeting with plaintiff's employees, used "public information" about plaintiff, and hired seven of plaintiff's employees; evidence showed that the seven employees "left [plaintiff] for Ranger in pursuit of a better compensation package, not as the result of any improper conduct" by defendants).

does not use trade secrets or confidential information contained in a customer list.<sup>153</sup> Under those circumstances, Ohio courts award (or uphold) summary judgment for a defendant when the defendant acts to promote its economic interest, even if the defendant has actual knowledge of the third party's business relationship.<sup>154</sup>

Further, true statements and statements of opinion entitle a defendant to summary judgment on a claim for interference with a business relationship.<sup>155</sup> Another example of *per se* privileged conduct is an act that is expressly permitted by a contract between a plaintiff and defendant. In *Franklin Tractor Sales v. New Holland North America, Inc.*,<sup>156</sup> plaintiff sold equipment manufactured by defendant.<sup>157</sup> Defendant implemented a new program where it began selling equipment directly to customers, including plaintiff's customers.<sup>158</sup> The Sixth

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<sup>153</sup>M.J. McPherson Servs., L.L.P. v. Sports Images, Inc., No. 5:06 CV 465, 2006 U.S. Dist. LEXIS 60879, at \*1-3, \*11-13 (N.D. Ohio Aug. 28, 2006) (applying OHIO R. Civ. P. 12(b)(6) and dismissing a claim of tortious interference with a business relationship where defendant successfully solicited at least one of plaintiff's customer by using plaintiff's customer list; ruling that complaint failed to allege that defendant "acted improperly" because defendant did not disclose a trade secret or use the customer list unlawfully).

<sup>154</sup>*Cannon Group, Inc. v. Better Bags, Inc.*, 250 F. Supp. 2d 893, 903-04 (S.D. Ohio 2003) (construing section 768 and granting summary judgment for defendant; defendant "did not employ any wrongful means" by negotiating with third parties with knowledge of their at-will contracts with plaintiff and offering them a "better deal" than plaintiff); *Busch v. Premier Integrated Med. Assocs.*, No. 19364, 2003 Ohio App. LEXIS 4255, at \*1-2, \*19-23 (Ohio Ct. App. Montgomery County Sept. 5, 2003) (interpreting section 768; summary judgment for defendant appropriate where defendant-medical group "pursue[d] [its] economic opportunities to [its] maximum benefit" in competing with plaintiff); *Northeast Ohio College of Massotherapy v. Burek*, 759 N.E.2d 869, 872, 879-80 (Ohio Ct. App. Mahoning County 2001) (applying section 768 and affirming award of summary judgment in favor of defendants; defendants' solicitation of students from plaintiff-school (its competitor) was done "to advance their competitive interest in the massotherapy education services" and was not prohibited by any prior arrangement between the parties); *Hoyt, Inc. v. Gordon & Assocs.*, 662 N.E.2d 1088, 1095-97 (Ohio Ct. App. Cuyahoga County 1995) (affirming summary judgment under Section 768; defendants were privileged to compete with plaintiff because they employed no "wrongful means" by . . . exert[ing] economic pressure" on the plaintiff's former business partner; defendants acted to advance their business interests).

<sup>155</sup>*Rizvi v. St. Elizabeth Hosp. Med. Ctr.*, 765 N.E.2d 395, 400 (Ohio Ct. App. Mahoning County 2001) (affirming the grant of summary judgment to one of the defendant-physicians because his statement was "an expression of opinion and not subject to liability"); *El-Shiekh v. Nw. State Cardiology Consultants*, No. L-99-1380, 2000 Ohio App. LEXIS 4143, at \*14-16 (Ohio Ct. App. Lucas County Sept. 15, 2000) (affirming summary judgment for defendant because its statement was "privileged and true"; explaining that truthful statements are "a complete defense to tortious interference where the underlying claim is based upon allegations of defamatory statements"); *Dryden v. Cincinnati Bell Tel.*, 734 N.E.2d 409, 414-15 (Ohio Ct. App. Hamilton County 1999) (ruling that summary judgment in favor of defendant was appropriate because co-workers were privileged to convey "truthful information" to plaintiff's supervisor) (citing RESTATEMENT (SECOND) OF TORTS § 772 (1979)).

<sup>156</sup>106 F.App'x 342 (6th Cir. 2004) (construing Section 767 under Ohio law).

<sup>157</sup>*Id.* at 343.

<sup>158</sup>*Id.*

Circuit affirmed the grant of summary judgment to defendant, explaining: “The dealership agreements unquestionably allowed [defendant] to bypass [plaintiff] and sell directly to customers . . . .”<sup>159</sup>

*a. At-Will Contracts and Business Relationships: The Outer Limits of What Constitutes Improper Conduct Is Unclear Under Ohio Law*

Ohio courts have not expressly addressed how culpable an interferer’s actions must be to defeat the privilege in the context of contracts terminable at will and business relationships. They have implied that a defendant’s act may be unprivileged without rising to the level of a crime or tort. Several courts have concluded that conduct may be improper when an interferer acts with an intent to harm a plaintiff, conduct that is not independently actionable.<sup>160</sup> The Supreme Court of Ohio has stated that “whether the interference is improper or not” under the seven-factor balancing test is determined “under the circumstances.”<sup>161</sup> On the other hand, all actions that Ohio courts have considered to be improper (except acting with an intent to harm) were either illegal or independently tortious.<sup>162</sup>

*b. Proposed Modification to Ohio Law for At-Will Contracts and Business Relationships: Conduct Must Be Independently Actionable to Be Improper and Unprivileged*

For inducing the termination of at-will agreements and business relationships, Ohio should adopt the standard that a defendant’s conduct is privileged, unless the defendant engages in independently actionable conduct (which is conduct that, by itself, may form the basis of a criminal or civil action). Under this modification to Ohio law, a defendant could cause the termination of an at-will contract or business relationship without liability, as long as the defendant commits no act that would subject the defendant to civil or criminal liability. This proposed standard furthers the principle that courts should require an interferer’s conduct to be more culpable for the interference with at-will contracts and business relationships (where parties have only an expectancy of a future relationship) than non-at-will contracts (where parties have a legal right to continued relations). As established below, the independently actionable standard is consistent with many other jurisdictions (jurisdictions that, like Ohio, have adopted the competitor’s privilege and the seven-factor test), and it appropriately balances Ohio’s interest in protecting competition and the freedom to act with the low future expectancy of parties to at-will agreements and business relationships.

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<sup>159</sup>*Id.* at 346 (explaining that under the agreement, defendant “reserve[d] the right to sell directly to eligible customers”); accord *Bill Call Ford, Inc. v. Ford Motor Co.*, 830 F. Supp. 1053, 1062-63 (N.D. Ohio 1993) (ruling that the *Juhasz* factor, the relation between the parties, was of “paramount consideration” and granting summary judgment in favor of defendant Ford; because the franchise agreement between plaintiff-dealer and defendant Ford gave Ford the “right to pick and choose its successor franchisee” and to “counsel the prospective successor [of plaintiff] on the price paid for [plaintiff’s] assets[,]” Ford acted properly in doing so).

<sup>160</sup>See cases cited *supra* note 144.

<sup>161</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 858 (Ohio 1999).

<sup>162</sup>See *supra* notes 124-30 and accompanying text.

To determine the impropriety of an interferer's conduct, the independently actionable standard requires the weighing of only one factor—whether civil or criminal liability may attach to a defendant's act; if so, then the interferer acted without privilege. The determinative factor under the independently actionable requirement is the third factor of section 767 of Restatement (Second) of Torts, “the interests of the other with which the actor's conduct interferes” (i.e., whether the breached or terminated interest was a non-at-will contract or an at-will contract or business relationship), and is the second factor of section 768, “the actor does not employ wrongful means.”<sup>163</sup> Determining improper conduct on the basis of one factor is consistent with Ohio courts, which have concluded that one factor of the seven-factor test (section 767) and the competitor's privilege (section 768) may be dispositive on the issue of privilege.<sup>164</sup>

In the Sleepy–Wake-Up hypothetical, under current Ohio law and the independently actionable standard, Sleepy's interference claim against Traitor Tom for soliciting Sleepy's former customers would fail. Assuming that the lower price offered by Traitor Tom to the former customers complied with the antitrust laws and that Traitor Tom disclosed no confidential information, then his conduct is lawful and privileged. On the other hand, if Sleepy establishes that Wake-Up's false and defamatory statements were made to Traitor Tom with malice, such statements would form the basis of a defamation claim against Wake-Up. Thus, those statements would constitute improper conduct under current Ohio law and the proposed independently actionable standard.

The independently actionable requirement does not make a claim for tortious interference with a business relationship duplicative of the underlying cause of action. Under the proposed standard, tortious interference with a business relationship may provide a plaintiff with a cause of action against a defendant who would otherwise not be subject to liability to the plaintiff.<sup>165</sup> Suppose before Traitor Tom leaves Sleepy he is physically beaten by Bully Bill (a former employee whom

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<sup>163</sup>DP-TEK, Inc. v. AT&T Global Info. Solutions Co., 100 F.3d 828, 835 (10th Cir. 1996) (ruling that “the wrongful means test of section 768 requires independently actionable conduct”).

<sup>164</sup>See *supra* notes 156-59 and accompanying text (discussing Franklin Tractor Sales v. New Holland N. Am., Inc., 106 F.App'x 342 (6th Cir. 2004), and *Bill Call Ford, Inc.*, 830 F. Supp. 1053, and explaining that these courts determined that the relations between the parties was a dispositive factor).

<sup>165</sup>The Tenth Circuit has explicitly rejected an argument that the independently actionable requirement would render this tort redundant. It explained:

[I]f Companies A and B are competing for a piece of lucrative business and A uses violence against the employees of B to prevail, these employees could presumably sue for battery. B's damages for intentional interference with prospective advantage, which depend in part on proof of the torts committed against its employees, would be far larger, however.

DP-TEK, Inc. v. AT&T Global Info. Solutions Co., 100 F.3d 828, 835 (10th Cir. 1996) (quoting *San Francisco Design Ctr. of Cal. v. Portman Cos.*, 41 Cal. App. 4th 29, 42 n.9 (1995)); accord PROSSER AND KEETON ON THE LAW OF TORTS 992 (W. Page Keeton et al. eds., 5th ed. 1984) (“Thus in many cases interference with contract is not so much a theory of liability in itself as it is an element of damage resulting from the commission of some other tort. . .”).

Sleepy recently terminated), resulting in Traitor Tom being unable to work for Sleepy for five months. Further assume that Bully Bill had an intent to interfere and that the non-competition agreement is invalid. Sleepy could prevail on a claim against Bully Bill for tortious interference with a business relationship because Bully Bill's battery subjects him to civil liability to Traitor Tom. Without an interference claim, Sleepy would have no tort cause of action against Bully Bill (only Traitor Tom would have a claim against him).

i. Jurisdictions Outside of Ohio Have Adopted the Independently Actionable Requirement

Many courts outside of Ohio have ruled that independently actionable conduct is necessary for a finding of improper conduct.<sup>166</sup> Each court adopting this standard applied the law of a state that, like Ohio, has adopted the Restatement (Second) of Torts or is guided by it for interference claims.<sup>167</sup> Although those jurisdictions adopted the independently actionable requirement in the context of competition, as demonstrated above, competition itself does not justify a standard that transforms otherwise unprivileged conduct into privileged conduct.<sup>168</sup> Notably, the courts adopting this standard did not limit their rulings to competitors. The independently actionable standard, therefore, should apply to *all* at-will relationships, regardless of whether there is direct competition.

ii. Public Policy Favors the Independently Actionable Standard

Modifying Ohio law to require conduct to be independently actionable for liability to attach would promote good public policy. First, Ohio law must provide

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<sup>166</sup>These jurisdictions are California, Connecticut, Indiana, Kansas, Massachusetts, Minnesota, Missouri, New York, and Pennsylvania. *CGB Occupational Therapy, Inc. v. RHA Health Servs. Inc.*, 357 F.3d 375, 388-89 (3d Cir. 2004) (construing section 768 under Pennsylvania law and requiring conduct to be "independently actionable"); *DP-TEK*, 100 F.3d at 835 (construing Kansas law; "the wrongful means test of section 768 requires independently actionable conduct"); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1507 (8th Cir. 1992) (applying Minnesota law; "wrongful" conduct under Section 768 means conduct that is "itself capable of forming the basis for liability of the actor" (quoting *Conoco, Inc. v. Inman Oil Co.*, 774 F.2d 895, 907 (8th Cir. 1985))); *Arochem Int'l, Inc. v. Buirkle*, 968 F.2d 266, 272 (2d Cir. 1992) (applying California and Connecticut law and concluding that conduct must be independently actionable); *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 542 (7th Cir. 1986) (explaining that Indiana law requires that the "defendant act[s] illegally" (quoting *Biggs v. Marsh*, 446 N.E.2d 977, 983 (Ind. Ct. App. 1983))); *San Francisco Design*, 41 Cal. App. 4th at 42-43 (stating that to defeat the privilege of competition, the defendant's conduct "must be unlawful or illegitimate" or "independently actionable"); *Fordham v. Cole*, Nos. 90-6563, 91-6861, 1993 Mass. Super. LEXIS 278, at \*18-19 (Mass. Dist. Ct. Aug. 5, 1993) (requiring actions to be unlawful under section 768); *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737, 741 (Mo. Ct. App. 1984) ("[C]ompetitive conduct which is neither illegal nor independently actionable does not become actionable because it interferes with another's prospective contractual relations."); *Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1102-03 (N.Y. 2004) (stating that the general rule is that improper actions must "constitute a crime or an independent tort").

<sup>167</sup>*See supra* note 166 (citing cases where courts adopted the independently actionable requirement by construing the competitor's privilege of section 768).

<sup>168</sup>*See supra* notes 112-22 and accompanying text.



greater clarity to businesses located in Ohio as to what actions are privileged or unprivileged, and the independently actionable standard provides the necessary clarity. To their credit, Ohio courts have offered some guidance. They have expressly determined that certain acts are per se not privileged (e.g., making defamatory, false statements with malice, disclosing confidential information, and committing fraud)<sup>169</sup> and that some conduct is per se privileged (e.g., acting in accordance with a specific provision in the third party's contract).<sup>170</sup> Nonetheless, because improper conduct is not limited to unlawful conduct and because the Supreme Court of Ohio applies the "under the circumstances" test,<sup>171</sup> there are numerous acts that could subject an Ohio business to liability for tortious interference with a business relationship.<sup>172</sup>

Without clear guidelines, competition in Ohio is, and will continue to be, hindered. A business, for instance, is likely not to commit a certain act to solicit the customers of its competitors if the business is unsure whether the act is improper. Suppose a business has an opportunity to obtain a customer list of its competitor, and, if obtained, the business would send direct marketing information to those customers about a new, low-priced product the business offers. If the business cannot be reasonably certain that it may obtain that list and solicit the customers on that list without being subject to a tortious interference claim, then the business likely will refrain from doing so. Thus, the customers will not have complete information about that product, and the customers will continue to purchase products from the competitor, although the business's new product may be better suited for the customers. As Judge Easterbrook explained, when perfect information in the marketplace is lacking, the economy is working inefficiently.<sup>173</sup> Under the independently actionable standard, the business likely would solicit the customers because it could be reasonably certain that its actions are privileged.

Second, the independently actionable requirement protects the objective expectations of parties. Parties to an at-will agreement or business relationships have no legal expectation that the other will continue the relationship for a definite length of time; however, at a minimum, they have a justified expectation that their relationship would not be terminated based on the *unlawful* acts of a party or non-party to the relationship. Although employees with at-will agreements have no objective expectation of future employment, for example, they do have a legitimate expectation not to be terminated for unlawful reasons,<sup>174</sup> such as sexual or religious

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<sup>169</sup>See *supra* notes 124-29 and accompanying text.

<sup>170</sup>See *supra* notes 147-50 and accompanying text.

<sup>171</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 858 (Ohio 1999).

<sup>172</sup>The RESTATEMENT (SECOND) OF TORTS (1979) offers little guidance. Section 767 sets forth seven vague factors, and section 768 (the competitor's privilege) shields an interferer from liability only when "the actor does not employ wrongful means," which section 768 fails to define.

<sup>173</sup>*Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 732 (7th Cir. 2004) ("When markets are informationally efficient, it is impossible to segment information [in the relevant market][:] . . . only if the market is inefficient is partial [information] transmission likely . . .").

<sup>174</sup>*Pytlinski v. Brocar Prods.*, 760 N.E.2d 385, 387 (Ohio 2002) (explaining that the discharge of an at-will employee in violation of a statute "contravenes public policy").

discrimination.<sup>175</sup> The independently actionable standard protects such employees' expectations from the illegal acts of outsiders.

Third, the independently actionable requirement promotes competition (e.g., lower prices). When a defendant attempts to interfere with a plaintiff and third party's relationship by offering the third party a better "deal" than the plaintiff, in contrast to interfering through unlawful acts, the third party is more likely to provide the plaintiff with a reasonable opportunity to counter the offer made by the defendant *before* the third party accepts defendant's offer and terminates its relationship with the plaintiff. Suppose that an automobile manufacturer has at-will agreements with Dealer A and Dealer B and that a competing manufacturer approaches both dealers in hopes that the Dealers will terminate their current agreements. The competitor solicits Dealer A and B by offering them cheaper wholesale price, but the competitor also makes false, defamatory statements to Dealer B that Dealer B's current manufacturer intends to replace Dealer B with a new dealer. Dealer A likely would inform the automobile manufacturer about the competitor's proposal to use as a bargaining tool, and the manufacturer will have a reasonable opportunity to negotiate a new price with Dealer A to maintain their relationship (where the competitor's actions were lawful). Dealer B, however, is likely to execute an agreement with the competitor without first providing the manufacturer with an opportunity to refute the competitor's statements (where the competitor's actions were unlawful).

Any contention that the independently actionable standard does not adequately protect business relationships from outside interference should fail. Presumably, parties in a business relationship do not have a contract terminable only for good cause because of their deliberate decision not to enter into such a contract. Under this proposed standard, parties in at-will relationships will receive exactly what they bargained for—the ability to terminate the relationship for any lawful reason. If parties want their relationship to receive more protection, then they can (and should) execute a contract terminable only for cause. The Ohio Constitution explicitly "protects the freedom" of parties to contract.<sup>176</sup>

## 2. Contracts Terminable Only for Good Cause: What Is Improper Conduct Under Ohio Law

As with at-will contracts and business relationships when competition is lacking, section 767's seven factors apply to contracts not terminable at will. Few courts have analyzed whether a defendant's actions are improper when a non-at-will contract was breached or terminated. Ohio law recognizes that non-at-will contracts are entitled to more protection than at-will contracts and business relationships from outside interference; thus, more actions fall within the improper category for contracts not terminable at will than for at-will contracts and business relationships.<sup>177</sup> Accordingly, any act that causes the termination of an at-will contract or business relationship and is improper (regardless of competition) also

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<sup>175</sup>OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2006) (prohibiting employers from discriminating against their employees on the basis of "race, color, religion, sex, national origin, disability, age, or ancestry").

<sup>176</sup>Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1261 (Ohio 2003) (citing OHIO CONST. art. II, § 28).

<sup>177</sup>See *supra* notes 102-11 and accompanying text.

must be improper if the act causes the breach or termination of a non-at-will contract.<sup>178</sup>

Nonetheless, conduct that is privileged for business relationships is not necessarily privileged for contracts terminable only for good cause. More extensive privileges are available to a defendant when the terminated interest is a business relationship and not a non-at-will contract. Thus, the independently actionable requirement, under which the range of privileged acts is broad, should not apply to non-at-will contracts. Rather, Ohio courts should adopt standards that allow plaintiffs to prove improper conduct more readily when interferers induce the breach or termination of plaintiffs' contracts not terminable at will. The following two sections propose two such standards.

*a. Proposed Clarification to Ohio Law for Contracts Not Terminable At Will: Knowledge Plus an Intent to Cause a Breach or Termination Should Equal Improper Conduct*

For contracts terminable only for good cause, Ohio courts should specifically adopt the standard that a defendant acts improperly when the defendant: (1) has actual or constructive knowledge of a non-at-will contract between a plaintiff and third party; *and* (2) has an intent to induce a breach or termination of the contract.

The proposed knowledge-plus-intent standard should include not only actual knowledge of a non-at-will contract, but also constructive knowledge.<sup>179</sup> When an interferer has constructive knowledge of a third party's contract, the interferer has intentionally ignored known facts that, if followed by a reasonable inquiry, would have led to actual knowledge of the third party's contract that conflicted with the interferer's proposed contract.<sup>180</sup> Under those circumstances, a defendant's willful ignorance rises to the level of improper conduct. If actual knowledge of a non-at-will contract were required, then defendants could fail to reasonably inquire (thus violate the knowledge element), yet avoid liability on the basis that they had no actual knowledge of the contract and were privileged to act. Requiring a defendant to have actual knowledge would undermine the purpose of the constructive knowledge standard—to discourage interferers from deliberately not learning about another's contract.

Ohio courts have not expressly addressed whether knowledge and an intent to interfere is improper conduct, but they have implicitly done so. The Supreme Court of Ohio has adopted Restatement (Second) of Torts section 768(2), which provides: “[C]ausing a breach of an existing contract [is] improper interference if the contract is not terminable at will.”<sup>181</sup> Additionally, a comment to the competitor's privilege

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<sup>178</sup>To illustrate, the improper actions falling within categories (1) to (7) above for the interference with an at-will agreement or business relationship (*e.g.*, committing a fraud) also are improper when they interfere with a non-at-will contract.

<sup>179</sup>Ohio and non-Ohio courts have not addressed whether constructive knowledge is sufficient under the knowledge-plus-intent requirement.

<sup>180</sup>*See supra* notes 41-43 and accompanying text.

<sup>181</sup>*Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 861 (Ohio 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 768(2) (1979)).

of section 768 states that inducing an employee to breach a “contract not to compete” is not “justified.”<sup>182</sup>

Further, at least six Ohio courts appear to agree that knowledge, coupled with an intent to induce a breach or termination of a contract not terminable at will, is improper interference. In *Escape Enterprises v. Gosh Enterprise*,<sup>183</sup> the court affirmed the issuance of a preliminary injunction on plaintiff’s claim for interference with a contract.<sup>184</sup> Plaintiff-franchisor informed defendant-competitors that plaintiff’s agreements with its franchisees required each franchisee to obtain plaintiff’s consent prior to selling the franchise. Despite defendants’ knowledge of the prohibitions, they induced many of plaintiff’s franchisees to sell their franchise to defendants without consent from plaintiff.<sup>185</sup> Based on defendants’ knowledge of the franchise agreements and their intent to interfere, *Escape Enterprises* affirmed the lower court’s finding that plaintiff “made a substantial showing of likelihood of success on the merits” of its interference claim.<sup>186</sup> The appellate court explained: “[E]vidence that [defendants] induced [plaintiff’s] franchisees to breach an agreement requiring [plaintiff’s] consent . . . would give rise to liability under a theory of tortious interference.”<sup>187</sup>

Other Ohio decisions support the adoption of the knowledge-plus-intent standard. In *Credit Consultants v. Gallagher*,<sup>188</sup> the court reversed the trial court’s dismissal of plaintiff-employer’s claim that defendant-competitor tortiously interfered with its enforceable non-competition and non-solicitation agreement. While employed with plaintiff, Mr. Gallagher agreed not to “engage in any business which competes with the [plaintiff’s] business” and not to “[s]olicit, divert, or take away, any of the [plaintiff’s] clients.”<sup>189</sup> Upon resigning from plaintiff and while working for defendant, both defendant and Mr. Gallagher started to solicit plaintiff’s customers.<sup>190</sup> *Credit Consultants* ruled that because “[defendant] apparently concede[d] that [it] attempted to solicit business from [plaintiff’s] customers while aware of the covenant not to compete . . . a prima facie case [was] made for proof of this tort.”<sup>191</sup> Four additional Ohio cases are consistent with *Escape Enterprises* and

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<sup>182</sup>RESTATEMENT (SECOND) OF TORTS § 768 cmt. i (1979).

<sup>183</sup>Nos. 04AP-834, 04AP-857, 2005 Ohio App. LEXIS 2466 (Ohio Ct. App. Franklin County May 26, 2005).

<sup>184</sup>*Id.* at \*1, \*2, \*7, \*32.

<sup>185</sup>*Id.* at \*3, \*8-9.

<sup>186</sup>*Id.* at \*19.

<sup>187</sup>*Id.* at \*20.

<sup>188</sup>No. 91AP-26, 1991 Ohio App. LEXIS 3063, at \*7, \*13, \*16-17 (Ohio Ct. App. Franklin County June 25, 1991).

<sup>189</sup>*Id.* at \*5.

<sup>190</sup>*Id.* at \*6, \*16.

<sup>191</sup>*Id.* at \*16-17.

*Credit Consultants* that a defendant acts improperly when it causes the breach or termination of a known contract that is terminable only for good cause.<sup>192</sup>

Rulings appearing to the contrary actually support Ohio's implicit adoption of the proposition that knowledge plus intent equals improper conduct. Three courts (*Kand Medical, Inc. v. Freund Medical Products, Inc.*,<sup>193</sup> *Heheman v. E.W. Scripps Co.*,<sup>194</sup> and *Midland American Sales - Weintraub, Inc. v. Osram Sylvania, Inc.*<sup>195</sup>) construed Ohio law and concluded that a defendant's conduct is proper when the defendant, without more, "merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person."<sup>196</sup> In *Kand*, *Heheman*, and *Midland*, the courts found no improper conduct and granted (or upheld) summary judgment in favor of defendants, even though the defendants knew about the breached and terminated contracts.<sup>197</sup> In each case, although the defendants had actual knowledge of the contracts at issue, the defendants lacked an

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<sup>192</sup>*MPW Indus. Servs., Inc. v. Pollution Control Sys., Inc.*, No. 2:02-CV-955, 2006 U.S. Dist. LEXIS 9360, at \*20-25 (S.D. Ohio Mar. 9, 2006) (denying summary judgment to interferer; reasonable jury could find that interferer's "conduct was improper" where interferer knew about the non-competition agreement and "nevertheless solicited [third party's] business," although there was no other evidence of unprivileged conduct); *Bridge v. Park Nat'l Bank*, No. 03AP-380, 2003 Ohio App. LEXIS 6182, at \*2, \*6 (Ohio Ct. App. Franklin County Dec. 18, 2003) (reversing the grant of interferer's motion to dismiss plaintiff's claim for tortious interference with a contract; plaintiff's allegation that interferer acted improperly by intentionally inducing the third party "to repudiate and cancel the contract" it had with plaintiff with "full knowledge" of the binding contract was sufficient); see *A Way of Life, Inc. v. Schulda*, No. 2004-P-0032, 2005 Ohio App. LEXIS 5634, at \*5-6, \*17 (Ohio Ct. App. Portage County Nov. 25, 2005) (affirming the denial of plaintiff's motion for a preliminary injunction; implying that had defendant known about the "specific terms" of the non-competition clause improper conduct would have been shown); *Wagoner v. Leach Co.*, No. 17580, 1999 Ohio App. LEXIS 3152, at \*38-39, \*43-44, \*47 (Ohio Ct. App. Montgomery County July 2, 1999) (reversing the award of summary judgment in favor of defendant on plaintiff's interference claim; "[b]ecause . . . the contract was not terminable at will" and defendant had actual knowledge of the contract, defendant would be liable if "it intentionally procured a breach").

<sup>193</sup>963 F.2d 125 (6th Cir. 1992).

<sup>194</sup>661 F.2d 1115 (6th Cir. 1981).

<sup>195</sup>874 F. Supp. 164, 167 (N.D. Ohio 1995).

<sup>196</sup>RESTATEMENT (SECOND) OF TORTS § 766 illus. n (1979). See also *Kand Med.*, 963 F.2d at 129 (citing *Horth v. Am. Aggregates Corp.*, 35 N.E.2d 592 (Ohio Ct. App. Darke County 1940)); see *Heheman*, 661 F.2d at 1127 ("[M]alicious inducement (is not to) be inferred from the mere fact that a third party enters into a contract with one of two contracting parties with knowledge of the existing contract.") (internal quotation marks and citation omitted); *Midland*, 874 F. Supp. at 167 ("[M]ere knowledge of the plaintiffs contract with the third-party and a decision to contract with the third-party in the face of that knowledge is insufficient to establish the tort of business interference." (citing *Horth*, 35 N.E.2d 592)).

<sup>197</sup>*Kand Med.*, 963 F.2d at 129-30; *Heheman*, 661 F.2d at 1115; *Midland*, 874 F. Supp. at 166-67.

intent to interfere with them,<sup>198</sup> or the contract was “exitable” at the will of the third party.<sup>199</sup>

In short, Ohio courts should expressly rule that an interferer acts improperly when the interferer: (1) has actual or constructive knowledge of a contract between a plaintiff and third party that is terminable only for good cause; and (2) has an intent to induce a breach or termination of the contract. Once Ohio courts formally recognize this proposed standard, an interferer will know that it is liable for tortiously interfering with a contract not terminable at will, even though the interferer commits no act other than the act that induces the breach or termination of the non-at-will contract and even if that act is lawful.<sup>200</sup> As shown below, many non-Ohio courts have adopted the knowledge-plus-intent standard (courts that, like Ohio courts, follow Restatement (Second) of Torts for analyzing interference claims<sup>201</sup>). In addition, this standard protects the expectancy of parties to non-at-will contracts that such contracts will remain in effect until the date of termination specified in the contract or the date of performance.

i. Jurisdictions Outside of Ohio Have Adopted the Standard That Knowledge Plus Intent Equals Improper Conduct

Many non-Ohio courts have concluded that acting with an intent to induce a breach or termination of a contract not terminable at will in the face of knowledge of such a contract, by itself, is improper conduct.<sup>202</sup> Judge Posner of the Seventh Circuit and other federal judges have construed the competitor’s privilege of section 768 (which Ohio courts follow) and ruled: “[C]ompetition is not a defense to a charge of interfering with an *existing contract* (for a firm should have no right to compete by inducing its competitors’ customers to *break valid contracts*).”<sup>203</sup> Deliberate

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<sup>198</sup>*Midland*, 874 F. Supp. at 166 (“[Plaintiff] nowhere contends that [defendant] actively induced [third party] to leave [plaintiff’s] employ or gave [third party] some improper financial or other incentive to convince [third party] to breach his employment agreement with [plaintiff].”) (emphasis added); see *Heheman*, 661 F.2d at 1126-28.

<sup>199</sup>*Kand Med.*, 963 F.2d at 128, 129 (finding defendant’s conduct to be privileged where defendant induced the third party to terminate a contract that the third party told the defendant was terminable at will; explaining that “[t]here is a significant *distinction* between intentionally inducing a *breach* of contract and intending to induce the *lawful* termination of a contract”) (emphasis added).

<sup>200</sup>See *supra* notes 183-92; *infra* note 205 and accompanying text (discussing cases where conduct was lawful but improper).

<sup>201</sup>See *supra* note 36; *infra* note 203; *United States v. Mansion House Ctr.*, 767 F. Supp. 995, 1007 (E.D. Mo. 1991) (adopting section 766); *Mason v. Wal-Mart Stores*, 969 S.W.2d 160, 162-65 (Ark. 1998) (adopting section 766); *Hennum v. City of Medina*, 402 N.W.2d 327, 337-38 (N.D. 1987) (citing Sections 766 and 767 with approval); *Uptown Heights Assocs. v. Seafirst Corp.*, 891 P.2d 639, 648 (Or. 1995) (adopting sections 766).

<sup>202</sup>See *infra* notes 203-05 and accompanying text (discussing cases supporting this proposition).

<sup>203</sup>*Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 947 (7th Cir. 1986) (emphasis added); see *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, No. 99-1357, 2000 U.S. App. LEXIS 3394, at \*10 (4th Cir. Mar. 6, 2000) (construing section 768(2) of RESTATEMENT (SECOND) OF TORTS (1979) and applying Maryland law;

interference, coupled with knowledge of a non-at-will contract, is actionable, “even if the defendant was engaged in lawful behavior.”<sup>204</sup> Indeed, jurisdictions outside of Ohio have determined as a matter of law that causing the breach or termination of a known non-competition or exclusivity agreement—non-at-will contracts—is improper and unprivileged.<sup>205</sup>

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“[w]here there is an existing contract, not terminable at will, between a plaintiff and a third party, acts by a defendant to induce the third party to breach that contract are, themselves, improper and wrongful”) (internal quotation marks and citation omitted); *see* *Pure Distrib. v. Baker*, 285 F.3d 150, 158 (1st Cir. 2002) (construing Massachusetts law; stating that it is improper “to abet the repudiation of solemn contractual obligations of which the party interfering is well aware”) (internal quotation marks and citation omitted).

<sup>204</sup>*Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 404 (E.D.N.Y. 2004) (internal quotation marks and citation omitted); *see* *Mathis v. Liu*, 276 F.3d 1027, 1029-30 (8th Cir. 2002) (construing Arkansas law and upholding jury verdict for plaintiff; where defendant persuaded third party to breach his binding contract with plaintiff, through lawful means, such actions were “improper, especially since inducing a breach of contract absent compelling justification is, in and of itself, improper”); *NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group Inc.*, 664 N.E.2d 492, 496 (N.Y. 1996) (“Where there is an existing, enforceable contract and a defendant’s deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior.”) (citations omitted).

<sup>205</sup>Courts addressing the interference with non-competition agreements are: *ANR W. Coal Dev. Co. v. Basin Elec. Power Coop.*, 276 F.3d 957, 971-73 (8th Cir. 2002) (construing North Dakota law and reversing judgment in favor of interferers; evidence that defendant knew its actions would interfere with plaintiff’s non-competition agreement was “enough . . . to establish tortious interference as a matter of law”); *Sulzer Carbomedics, Inc. v. Or. Cardio-Devices, Inc.*, 257 F.3d 449, 452, 454 (5th Cir. 2001) (affirming the district court’s denial of interferer’s motion for a judgment notwithstanding the verdict; “[c]onduct was sufficient to satisfy the improper motive or means element” under Oregon law where interferer and third party’s contract “explicitly required [third party] to violate [its] covenants not to compete with [plaintiff]”); *Prison Health Servs., v. Umar & Corr. Med. Care*, No. 02-2642, 2002 U.S. Dist. LEXIS 12288, at \*10, \*59-61 (E.D. Pa. July 2, 2002) (“Plaintiff is also likely to succeed on the merits of its claim for interference with the Noncompetition Agreement”; despite defendant’s knowledge of the “Noncompetition Agreements,” defendant “actively solicited [p]laintiff’s current and prospective customers.”); *Quality Carriers, Inc. v. MJK Distrib., Inc.*, No. 02-CV-0148-MJR, 2002 U.S. Dist. LEXIS 5700, at \*28-30 (S.D. Ill. Apr. 2, 2002) (ruling that plaintiff was likely to “succeed on the merits of its claim for tortious interference”; “evidence show[ed] no justification for any of” defendants’ actions where defendants “were clearly aware of the non-compete clause” and “conspir[ed] to tortiously interfere . . . with the . . . contract”); *Ecolab, Inc. v. K.P. Laundry Mach., Inc.*, 656 F. Supp. 894, 897-900 (S.D.N.Y. 1987) (concluding that plaintiff showed a “likelihood of success on the merits” on its tortious interference claim; defendant-employer knew of plaintiff’s restrictive covenants with its employees, yet defendant “intentionally induced several employees to breach the contract” by offering “indemnification agreements, as well as . . . large salaries” to the employees).

Courts discussing the interference of exclusivity contracts (under which a plaintiff and third party have an agreement that requires the third party to exclusively use the plaintiff’s services or goods) include: *Marcus, Stowell & Beye Gov’t Secs., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 229-30, 235-36, 237 (5th Cir. 1986) (affirming the jury verdict in favor of plaintiff on its tortious interference with a contract claim and rejecting defendant’s contention that it “was justified as a matter of law”; once the jury found that defendant knew of the “exclusive loan broker” agreement between plaintiff and third party and that defendant

ii. Public Policy Favors the Standard That Knowledge Plus Intent Equals Improper Conduct

The knowledge-plus-intent standard furthers the public policy of Ohio (and other jurisdictions) that provides greater protection to contracts terminable only for good cause than contracts terminable at will. This proposed standard also promotes the Supreme Court of Ohio's policy to protect the "fundamental" right of parties to "contract freely with the expectation that the contract shall endure according to its terms."<sup>206</sup> Recall that parties to non-at-will contracts have a legal expectation that the contract will remain in existence and be performed for the period of time specified in the contract.<sup>207</sup> Holding interferers liable for inducing the breach or termination of a known non-at-will contract will protect the contracting parties' expectations by discouraging interferers from attempting to cause a breach or termination of the contract, thus making it more likely that the terms of the contract will be fulfilled.

*b. Proposed Modification to Ohio Law for Contracts Not Terminable At Will: Making False or Misleading Statements with Negligence Should Be Improper Conduct*

For contracts terminable only for good cause, Ohio courts should not require an interferer to make a false statement with actual malice (i.e., with knowledge that the statement is false or with a reckless disregard to its falsity) for the statement to rise to the level of improper conduct. The Supreme Court of Ohio and all other Ohio courts, except one, have adopted the malice standard in the context of at-will agreements and business relationships.<sup>208</sup> No court, however, has specifically addressed whether a showing of actual malice is necessary for non-at-will contracts.

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executed a similar agreement with the third party before the plaintiff's agreement expired, then the jury had to conclude that defendant's agreement with the third party "could not justify interfering with [plaintiff's] preexisting exclusive contract"); *Air Terminal Servs., Inc. v. Lehigh-Northampton Airport Auth.*, No. 96-2314, 1996 U.S. Dist. LEXIS 11501, at \*10-11 (E.D. Pa. Aug. 1, 1996) (denying summary judgment to defendant; plaintiff's allegations that "[d]efendant's actions were intentional, unprivileged, and malicious," were supported by evidence that defendant contracted with the third party after learning about "[p]laintiff's rights under the exclusivity provision of its contract with [third party]"); *Cramer Prods, Inc. v. Int'l Comfort Prods., Ltd.*, No. 89-2488-0, 1989 U.S. Dist. LEXIS 15996, at \*19, \*22 (D. Kan. Jan. 27, 1989) (issuing a preliminary injunction and ruling that plaintiff "[wa]s likely to succeed" on its interference claim; despite defendant's knowledge of plaintiff and third party's exclusive agreement, defendant continued to interfere in plaintiff's exclusive market, which "suggests that [defendant] unjustifiably and intentionally interfered with the distributor agreement"); *Maison Lazard et Compagnie v. Manfra, Tordella & Brooks, Inc.*, 585 F. Supp. 1286, 1291 (S.D.N.Y. 1984) (denying defendant's motion to dismiss; where defendant "knew that [plaintiff] had the exclusive rights to sell" and interfered with that known right, such action "constitute[d] an interference with contractual relations").

<sup>206</sup>*Wallace v. Balint*, 761 N.E.2d 598, 604 (Ohio 2002) (internal quotation marks omitted); see *Core Funding Group v. McDonald*, No. L-05-1291, 2006 Ohio App. LEXIS 1523, at \*30 (Ohio Ct. App. Lucas County Mar. 31, 2006) (explaining that agreements "should not be lightly disregarded" because the "freedom to contract is fundamental" in Ohio).

<sup>207</sup>See *supra* notes 103-08 and accompanying text.

<sup>208</sup>See *supra* notes 131-38 and accompanying text.



The only Ohio case to adopt the malice standard for a contract not terminable at will is *Andrews v. Carmody*.<sup>209</sup>

Ohio law should reject the malice standard when an interferer causes the breach or termination of a contract not terminable at will and should adopt a negligence standard. Under this modification to Ohio law, an interferer engages in unprivileged conduct when it interferes with a non-at-will contract by making a false or misleading statement and the interferer should have known that the statement was false or misleading (i.e., was negligent as to its falsity).<sup>210</sup> To avoid liability for tortious interference, a defendant must act “reasonably in attempting to discover the truth or falsity” of the interfering statement.<sup>211</sup> Although *Andrews* required malice where the plaintiff had a non-at-will contract, *Andrews* does not undermine the adoption of a negligence standard in Ohio. In *Andrews*, the plaintiff failed to argue for a standard other than malice, and *Andrews* did not consider (but should have considered) that the defendant caused the breach of a non-at-will contract. *Andrews*, therefore, failed to recognize the difference between the binding nature of non-at-will contracts and at-will agreements and business relationships.

In addition, allowing a showing of negligence (and not requiring malice) to prove improper conduct promotes Ohio’s policy that contracts not terminable at will receive more protection against outside interference than at-will agreements and business relationships. Heightened protection to non-at-will contracts means that more false and misleading statements should be unprivileged for such contracts than for business relationships. The application of the less stringent negligence standard would provide such heightened protection to non-at-will contracts. The negligence standard, in contrast to a no-fault level, balances Ohio’s interest in enforcing non-at-will contracts with a defendant’s free speech rights under the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.<sup>212</sup>

Recall that Wake-Up made false statements about Sleepy’s financial condition to cause Traitor Tom to breach his non-competition agreement. Wake-Up failed to

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<sup>209</sup>761 N.E.2d 1076, 1078, 1081-82 (Ohio Ct. App. Lake County 2001) (affirming the grant of summary judgment to defendants because they did not make the false statements with malice when they interfered with plaintiff’s purchase agreement for real property; “there does not exist any evidence of malice, let alone clear and convincing evidence of malice, to overcome the privilege”).

<sup>210</sup>Of course, if Ohio expressly adopts the knowledge-plus-intent standard, then this proposed negligence standard would be unnecessary. Any statement made with an intent to cause a breach or termination of a known non-at-will contract would be improper conduct.

<sup>211</sup>*Embers Supper Club, Inc. v. Scripps-Howard Broad. Co.*, 457 N.E.2d 1164, 1167 (Ohio 1984) (applying the negligence standard to a defamation claim).

<sup>212</sup>*Lansdowne v. Beacon Journal Publ’g Co.*, 512 N.E.2d 979, 983 (Ohio 1987) (indicating that a no-fault level for a defamation claim raises federal and state constitutional concerns); OHIO CONST. art. I, § 11 (“Every citizen may freely speak, write, and publish his sentiments on all subjects.”). Under Ohio defamation law and the First Amendment, if a plaintiff is a public figure or limited public figure, then a plaintiff must prove that the defendant made the false statement with actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Daubenmire v. Sommers*, 805 N.E.2d 571, 586-89 (Ohio Ct. App. Madison County 2004). This Article does not address whether the malice standard in *Gertz* applies to false statements that are made for the purpose of inducing a breach or termination of a non-at-will contract of a public figure plaintiff.

investigate whether the statements were true and, thus, had an unreasonable belief that the statements were true. Because the non-competition agreement is not terminable at will, if Ohio courts reject the knowledge-plus-intent standard but adopt the negligence standard, then Sleepy could establish that Wake-Up acted improperly by inducing the breach of the non-competition agreement through the false statements.

#### VI. ELEMENT (5): A DEFENDANT MUST CAUSE DAMAGES

The last element of a claim for tortious interference with a contract or a business relationship requires proof that a defendant's interference damaged the plaintiff.<sup>213</sup> The "goal of tort damages is to place the injured party in the same financial position" it would have attained in the absence of the tort.<sup>214</sup> A plaintiff may recover "all damages proximately caused by an actor's misconduct in . . . [its] tortious interference action."<sup>215</sup> These damages constitute "compensatory damages," which account for the actual loss to a plaintiff.<sup>216</sup> Consequential, pecuniary, and profit losses are recoverable as compensatory damages.<sup>217</sup> Compensatory damages also include attorneys' fees (if any) expended by a plaintiff in a previous action with the third party for its breach or termination of the plaintiff's contract<sup>218</sup> and the plaintiff's expenses incurred in mitigating damages.<sup>219</sup> Under limited circumstances, punitive damages are available.<sup>220</sup>

Ohio does not, and should not, limit the amount of damages to the amount that is recoverable for a breach of contract claim against the third party for its breach of the contract.<sup>221</sup> To illustrate, Ohio interference law allows a plaintiff to obtain punitive

<sup>213</sup>Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 858 (Ohio 1999).

<sup>214</sup>Bemmes v. Pub. Employees Ret. Sys. of Ohio, 658 N.E.2d 31, 35 (Ohio Ct. App. Warren County 1995); *see* Columbus Fin., Inc. v. Howard, 327 N.E.2d 654, 658 (Ohio 1975) ("[M]easure of [tort] damages is normally that amount of money which will compensate and make whole the injured party.").

<sup>215</sup>Gray-Jones v. Jones, 738 N.E.2d 64, 70 (Ohio Ct. App. Franklin County 2000); UZ Engineered Prods. Co. v. Midwest Motor Supply Co., 770 N.E.2d 1068, 1077 (Ohio Ct. App. Franklin County 2001).

<sup>216</sup>Fantozzi v. Sandusky Cement Prods. Co., 597 N.E.2d 474, 482 (Ohio 1992); RESTATEMENT (SECOND) OF TORTS § 903 (1979).

<sup>217</sup>Brookeside Ambulance, Inc. v. Walker Ambulance Serv., 678 N.E.2d 248, 253 (Ohio Ct. App. Lucas County. 1996); Developers Three v. Nationwide Ins. Co., 582 N.E.2d 1130, 1133 (Ohio Ct. App. Franklin County 1990).

<sup>218</sup>*See infra* notes 239-42 and accompanying text.

<sup>219</sup>*See infra* notes 233-38 and accompanying text.

<sup>220</sup>*See infra* notes 243-50 and accompanying text.

<sup>221</sup>Video Towne, Inc. v. RB-3 Assocs., 125 F.R.D. 457, 459 (S.D. Ohio 1988) ("[I]n an action based upon tortious interference with contractual relations, a plaintiff may recover 'any and all damages proximately caused by the tortfeasor's misconduct . . . includ[ing] but . . . not limited to those items of damage otherwise recoverable in an action for breach of contract brought against the defaulting party to the contract.'" (quoting Davison Fuel & Dock Co. v. Pickands Mather & Co., 376 N.E.2d 965, 968 (Ohio Ct. App. Hamilton County 1977))) (alternation and omission in original; emphasis added).

damages, even though such damages are not recoverable from the third party for its breach.<sup>222</sup> In addition, any clause in the contract between a plaintiff and third party that limits the amount of damages for a breach of the contract (i.e., a damage limitation provision) should not limit the amount of damages a plaintiff may recover from an interferer. Many non-Ohio courts have expressly ruled that a damage limitation provision is not enforceable against an interferer.<sup>223</sup>

#### A. Lost Profits Are Recoverable

Lost profits of an established business must be proved to a “reasonable certainty” and may not be “too speculative.”<sup>224</sup> “[M]athematical certainty” is not required.<sup>225</sup> Demonstrating lost profits of a *new* business, however, is subject to “greater scrutiny because there is no track record upon which to base an estimate.”<sup>226</sup> Although the reasonable certainty standard applies to both contract and tort damages, it is less demanding in the tort context.<sup>227</sup> Profits are limited to “the loss sustained by the

<sup>222</sup>OHIO REV. CODE ANN. § 2315.21(A)(1) (LexisNexis 2006) (providing that punitive damages are not recoverable “for a breach of contract”); *see infra* note 243 and accompanying text.

<sup>223</sup>*See* Sulzer Carbomedics, Inc. v. Or. Cardio-Devices, Inc., 257 F.3d 449, 454-55 (5th Cir. 2001) (rejecting defendant’s claim that the limitation of liability clause contained in the agreement between plaintiff and third party, which provided that “[i]n no event will either party be liable to the other for incidental, special or consequential damages,” precluded plaintiff from recovering damages on its tortious interference claim; “[t]o allow [defendant] to enforce the limitation would undermine the ‘aim of awarding damages for tortious interference’”) (citation omitted); LDCircuit, LLC v. Sprint Commc’ns Co., 364 F. Supp. 2d 1246, 1259 (Kan. 2005) (“[A] valid tort claim may be able to overcome a contractual limitation of liability provision in the appropriate circumstances.”); Richland State Bank v. Household Credit Servs. Inc., 340 F. Supp. 2d 1051, 1056, 1058 (D.S.D. 2004) (denying summary judgment in favor of defendant on plaintiff’s interference claim; determining that limitation of liability provision, which stated that third party was not “liable for any penalties or damages including . . . anticipated and unanticipated damages, attorney’s fees, and costs of collection,” was inapplicable to interference claim); CompuSpa, Inc. v. Int’l Bus. Machs. Corp., 228 F. Supp. 2d 613, 627-28 (D. Md. 2002) (denying defendant’s FED. R. CIV. P. 12(b)(6) motion; “the limit[ation] [of] liability clause will not be enforced with respect to Plaintiff’s tortious interference claim”); Medline Indus. Inc. v. Maersk Med. Ltd., 230 F. Supp. 2d 857, 871 (N.D. Ill. 2002) (“[L]iability provision d[id] not preclude [plaintiff] from recovering for intentional torts.”).

<sup>224</sup>*Brookeside Ambulance, Inc. v. Walker Ambulance Serv.*, 678 N.E.2d 248, 253 (Ohio Ct. App. Lucas County 1996) (citing *City of Gahanna v. Eastgate Props., Inc.*, 521 N.E.2d 814, 817-18 (Ohio 1988)); *see* *Gunsorek v. Addison*, No. 90AP-303, 1991 Ohio App. LEXIS 256, at \*11-12 (Ohio Ct. App. Franklin County Jan. 24, 1991) (finding that plaintiff-accountant’s testimony as to the profits of five other car wash businesses over a one-year period was insufficient to prove future profits of new business).

<sup>225</sup>*Advanced Mktg. Servs., Inc. v. Dayton Data Processing, Inc.*, No. 12607, 1992 Ohio App. LEXIS 994, at \*15 (Ohio Ct. App. Montgomery County Mar. 6, 1992).

<sup>226</sup>*McNulty v. PLS Acquisition Corp.*, Nos. 79025, 79125, 79195, 2002 Ohio App. LEXIS 7038, at \*38 (Ohio Ct. App. Cuyahoga County Dec. 26, 2002).

<sup>227</sup>*Ahmed v. Univ. Hosps. Health Care Sys., Inc.*, No. 79016, 2002 Ohio App. LEXIS 1843, at \*31 (Ohio Ct. App. Cuyahoga County Apr. 18, 2002) (stating that tort damages are “held to a less stringent standard of certainty” than contract damages); *Brookeside Ambulance*,

plaintiff's business" and exclude any gains flowing to a defendant because of the tortious interference.<sup>228</sup> An established or new business may prove lost profits with "reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, [and] business records of similar enterprises."<sup>229</sup> The use of historical sales data also is appropriate to calculate anticipated profits.<sup>230</sup> Although expert testimony and market surveys are unnecessary to prove lost profits to a "reasonable certainty,"<sup>231</sup> when used, the surveys must not be based on "hypothetical" data.<sup>232</sup>

### B. Mitigation Expenses Are Recoverable

Another type of compensatory damages is mitigation expenses. A plaintiff must mitigate any damages resulting from an interferer's tort.<sup>233</sup> The mitigation of damages means actions that tend to reduce the amount of damages resulting from a tort.<sup>234</sup> Mitigation of damages may result in out-of-pocket expenses for a plaintiff. Such costs are mitigation expenses and are recoverable as damages: "It is a

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678 N.E.2d at 254 ("[C]ourts have generally required greater certainty in proof of damages for breach of contract than for tort.").

<sup>228</sup>*Brookeside Ambulance*, 678 N.E.2d at 253 (citing *Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130, 1136 (Ohio Ct. App. Franklin County 1990)).

<sup>229</sup>*AGF, Inc. v. Great Lakes Heat Treating Co.*, 555 N.E.2d 634, 640 (Ohio 1990) (internal quotation marks omitted).

<sup>230</sup>*Parker v. Priorway Farms Homeowners' Ass'n*, No. 99-G-2257, 2000 Ohio App. LEXIS 5356, at \*2, \*5, \*13-14 (Ohio Ct. App. Geauga County Nov. 17, 2000) (reversing the grant of summary judgment to interferer; evidence of lost profits was sufficient where plaintiff's estate liquidator, based on her previous sales experience, testified that sales would have exceeded \$10,000 in the absence of the interference).

<sup>231</sup>*McConnell v. Cosco, Inc.*, 238 F. Supp. 2d 970, 983 (S.D. Ohio 2003) (denying defendant's summary judgment motion; expert opinion was not necessary to prove lost future wages because "a reasonable jury could conclude that [plaintiff] would earn some money in his lifetime"); *Brookeside Ambulance*, 678 N.E.2d at 253-55 (concluding that the trial court abused its discretion in excluding damage expert's testimony; where expert relied upon statistical data and plaintiff's and defendant's financial statements and tax returns to calculate lost profits, no market survey was needed).

<sup>232</sup>*McNulty v. PLS Acquisition Corp.*, Nos. 79025, 79125, 79195, 2002 Ohio App. LEXIS 7038, at \*38 (Ohio Ct. App. Cuyahoga County Dec. 26, 2002) (finding that expert testimony as to "lost sales commissions" should have been excluded; such testimony was "largely hypothetical since there was no historic record of operations from which lost profits could be projected").

<sup>233</sup>*Johnson v. Univ. Hosp. of Cleveland*, 540 N.E.2d 1370, 1377 (Ohio 1989) ("One injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure *after* the commission of the tort." (citing RESTATEMENT (SECOND) OF TORTS § 918 (1979))) (internal quotation marks omitted) (emphasis added). Mitigation, though, is not *required* when the "tortfeasor *intended* the harm or was aware of it and was recklessly disregarding of it[.]" RESTATEMENT (SECOND) OF TORTS § 918(2) (1979) (emphasis added).

<sup>234</sup>*Schafer v. RMS Realty*, 741 N.E.2d 155, 193 (Ohio Ct. App. Montgomery County 2000).

fundamental Hornbook law that [a plaintiff] is entitled to recover its expenses incurred in mitigating damages.”<sup>235</sup> Mitigation expenses are recoverable even when the “efforts turn out to be unsuccessful and actually increase the loss.”<sup>236</sup> Only “expenditures reasonably made . . . in a reasonable effort to avert [further] harm” are recoverable against an interferer.<sup>237</sup> Although not addressed by Ohio law, if mitigation efforts prove to be successful, the resulting benefits to a plaintiff should not reduce the amount of recoverable mitigation expenses. Any windfall should be awarded to a plaintiff and not the interferer, the party who caused the harm to the plaintiff.<sup>238</sup> Otherwise, the interferer would be rewarded for its tortious conduct.

### C. Attorneys’ Fees Are Recoverable

A plaintiff also may recover any attorneys’ fees it incurred in litigation with a third party to prove that its breach or termination of the contract or business relationship was unlawful. Such attorneys’ fees constitute compensatory damages:

[W]here the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur . . . attorneys’ fees, [such fees] should be treated as the legal consequences of the original wrongful act and may be recovered as damages.<sup>239</sup>

Section 914(2) of Restatement (Second) of Torts expressly provides that attorneys’ fees expended as a result of a tort of a defendant are recoverable.<sup>240</sup> Only

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<sup>235</sup>Shenandoah Energy Corp. v. Blue Creek Coal, Inc., No. CA-1369, 1979 Ohio App. LEXIS 9574, at \*2 (Ohio Ct. App. Tuscarawas Cty. Dec. 28, 1979) (involving a tort claim).

<sup>236</sup>W.D.I.A. Corp. v. McGraw-Hill, Inc., 34 F. Supp. 2d 612, 625, (S.D. Ohio 1998), *aff’d*, 202 F.3d 271 (6th Cir. 2000).

<sup>237</sup>RESTATEMENT (SECOND) OF TORTS § 919(2) (1979); *W.D.I.A. Corp.*, 34 F. Supp. 2d at 625; (setting forth similar proposition).

<sup>238</sup>Hamlin v. Charter Twp. of Flint, 165 F.3d 426, 441 (6th Cir. 1999) (holding that when allocating a “windfall” between the “victim and the tortfeasor it is always preferable to favor the victim”); *Robinson v. Bates*, 828 N.E.2d 657, 664 (Ohio Ct. App. Hamilton County 2005) (“[S]hould a windfall arise, . . . the party to profit . . . is the person who has been injured, not the one whose wrongful acts caused the injury.”).

<sup>239</sup>Hollon v. Abner, No. C960182, 1997 Ohio App. LEXIS 3814, at \*11, (Ohio Ct. App. Hamilton County Aug. 29, 1997) (affirming the award of attorneys’ fees to plaintiff, fees incurred as a result of defendant’s breach of its contract) (quoting *S & D Mech. Contractors, Inc. v. Enting Water Conditioning Sys., Inc.*, 593 N.E.2d 354, 363 (Ohio Ct. App. Montgomery County 1991) (concluding that because plaintiff incurred \$4,000 in fees in legal negotiations with a third party, such fees were recoverable as the “legal consequence of [defendant’s] wrongful breach”) (alteration added)); *see Shanker v. Columbus Warehouse Ltd. P’ship*, No. 99AP-772, 2000 Ohio App. LEXIS 2391, at \*14 (Ohio Ct. App. Franklin County June 6, 2000) (noting that attorneys’ fees may be awarded as either costs of the litigation or as compensatory damages).

<sup>240</sup>RESTATEMENT (SECOND) OF TORTS § 914(2) (1979). Ohio courts have cited this provision with approval. *Good Samaritan Hosp. & Health Ctr. v. Wright State Univ.*, 610 N.E.2d 1183, 1184 (Ohio Ct. App. Franklin County 1992); *Reiner v. Kelley*, 457 N.E.2d 946, 952-53 (Ohio Ct. App. Franklin County 1983).

reasonable attorneys' fees are recoverable as damages.<sup>241</sup> Attorneys' fees incurred in litigating a plaintiff's interference claim against an interferer, however, are costs of the litigation and are not recoverable.<sup>242</sup>

#### *D. Punitive Damages Are Recoverable*

In addition to compensatory damages, the trier of fact *may* award punitive damages.<sup>243</sup> Ohio Rev. Code section 2315.21 authorizes an award of punitive damages for any "tort action,"<sup>244</sup> including claims of tortious interference.<sup>245</sup> Under section 2315.21(B) and (C), a plaintiff must prove "by clear and convincing evidence" that a defendant acted with "malice."<sup>246</sup> The Supreme Court of Ohio defines malice as: "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge[;] or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."<sup>247</sup> Punitive damages are intended "not to compensate a plaintiff, but to punish and deter" a defendant's conduct.<sup>248</sup> A "conscious disregard" requires an interferer to have "subjective knowledge" that its actions will harm others.<sup>249</sup> An employer may act with a conscious disregard toward a plaintiff when the employer encourages its employees to solicit the customers of the plaintiff with knowledge that the employees' restrictive covenants prohibit such solicitations.<sup>250</sup>

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<sup>241</sup>*Reiner*, 457 N.E.2d at 953 (stating that appellee was entitled to "the reasonable value of attorney fees" expended in the collateral litigation action).

<sup>242</sup>*Hollon*, 1997 Ohio App. LEXIS 3814, at \*10 ("[P]arties to an action are responsible for their own attorney fees.").

<sup>243</sup>OHIO REV. CODE ANN. § 2315.21 (LexisNexis 2006).

<sup>244</sup>*Id.* § 2315.21(A)(1) (defining "tort action" as "a civil action for damages for injury or loss to person or property") (internal quotation marks omitted).

<sup>245</sup>*De Boer Structures (U.S.A.), Inc. v. Shaffer Tent & Awning Co.*, 233 F. Supp. 2d 934, 950 (S.D. Ohio 2002) ("[A] Plaintiff may recover punitive damages on a tort claim."); *Ohio Cellular Prods. Corp. v. Adams USA Inc.*, No. 3:94 CV 7251, 2000 U.S. Dist. LEXIS 19657, at \*24 (N.D. Ohio Nov. 9, 2000) ("Ohio permits recovery for punitive damages based on intentional interference with a business relationship." (citing *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Servs., Inc.*, 611 N.E.2d 955, 966 (Ohio Ct. App. Summit County 1992))), *aff'd*, 50 F.App'x. 422 (6th Cir. 2002).

<sup>246</sup>*Apel v. Katz*, 697 N.E.2d 600, 608 (Ohio 1998) (quoting OHIO REV. CODE § 2315.21(LexisNexis 2006)).

<sup>247</sup>*Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994).

<sup>248</sup>*Id.*

<sup>249</sup>*Malone v. Courtyard by Marriott Ltd. P'ship*, 659 N.E.2d 1242, 1247-48 (Ohio 1996).

<sup>250</sup>*UZ Engineered Prods. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068, 1084-85 (Ohio Ct. App. Franklin County 2001) (affirming jury award of punitive damages against interferer-employer because it acted with a "conscious disregard for plaintiff's rights"; explaining that interferer assigned plaintiff's former employees to their former sales territory and had the employees solicit the customers they serviced while employed with plaintiff, all in violation of the employees' non-solicitation and non-competition agreements).

*E. Application of the Sleepy/Wake-Up Hypothetical to the Damage Element*

Assuming that Sleepy could establish the other four elements of its interference claims, Sleepy may recover its compensatory damages resulting from Wake-Up's hiring of Traitor Tom and Traitor Tom's successful solicitation of three customers of Sleepy. Sleepy has incurred the following damages: (1) \$500,000 of lost annual profits from each of the three customers who switched to Wake-Up (based on historical data over a ten-year period); (2) \$10,000 in mitigation expenses in Sleepy's failed attempts to find a suitable replacement for Traitor Tom; and (3) attorneys' fees that Sleepy will incur as a result of litigating its tortious interference claims against Traitor Tom and Wake-Up. Based on current Ohio law, Sleepy could recover its lost annual profits of \$1.5 million and its \$10,000 in mitigation expenses. It is irrelevant that Sleepy's efforts to replace Traitor Tom have been unsuccessful, as long as the mitigation expenses were reasonable. Any attorneys' fees incurred to litigate Sleepy's interference claims against Traitor Tom and Wake-Up, however, are costs of pending litigation and are not recoverable as compensatory damages. If Sleepy incurs attorneys' fees in a lawsuit against Traitor Tom for his breach of the non-competition agreement, then those fees could be recovered from Wake-Up as compensatory damages.

As to punitive damages, Wake-Up has acted, and is acting, with a conscious disregard to Sleepy's right to enforce the non-competition agreement. Despite actual knowledge of that agreement, Wake-Up continues to encourage Traitor Tom to solicit Sleepy's customers (e.g., by providing him with financial resources). Such actions are sufficient for a reasonable jury to find that Wake-Up acted with malice.

VII. PROPOSED CLARIFICATION TO OHIO LAW FOR CONTRACTS NOT TERMINABLE AT WILL: THE RELEVANT PERIOD OF INTERFERENCE SHOULD EXTEND TO THE TERMINATION DATE OF THE CONTRACT

Another aspect of a claim for tortious interference with a contract that Ohio courts (and most other courts) have failed to address is what constitutes the relevant period of interference for the purpose of establishing an interference claim. Of course, the relevant period of interference includes a defendant's intentional and improper acts committed *prior* to the date of breach of a non-at-will contract.<sup>251</sup> Ohio law is unclear, however, whether the relevant period also includes an interferer's actions (or knowledge of the contract) that occur *after* the non-at-will contract is breached but before the contract is terminated. Many contracts terminable only for good cause are not terminated on the same date that the contract is breached. For example, contracts between manufacturers and their dealers often provide the breaching party with an opportunity to cure the breach within a set number of days before the non-breaching party may terminate the contract.

Ohio courts should clarify interference law and expressly rule that the relevant period of interference includes an interferer's knowledge and actions until the date on which a non-at-will contract is terminated (designated "post-breach, pre-

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<sup>251</sup>Escape Enters., Ltd. v. Gosh Enters., Inc., Nos. 04AP-834, 04AP-857, 2005 Ohio App. LEXIS 2466, at \*2-3, \*7, \*8-9, \*32 (Ohio Ct. App. Franklin County May 26, 2005) (holding that plaintiff had a likelihood of success on the merits where defendants contacted and solicited plaintiff's franchisees and subsequently the franchisees breached and terminated their franchise agreements with plaintiff).

termination knowledge and conduct”), regardless of the date of breach. This proposed clarification to Ohio law would require courts to consider a defendant’s knowledge and conduct through a contract’s termination date in analyzing a plaintiff’s proof of its claim for tortious interference with a contract. A defendant could be held liable, therefore, even if the defendant either learns about the non-at-will contract or acts improperly *after* the contract is breached, as long as the contract remains in effect and the defendant continues to interfere (e.g., it causes the termination of the contract). This proposed period promotes sound public policy and is consistent with both Ohio law and the majority of jurisdictions outside of Ohio that have adopted section 766 of Restatement (Second) of Torts.<sup>252</sup>

*A. Current Ohio Law Supports the Inclusion of Post-Breach, Pre-Termination Knowledge and Conduct as Part of the Relevant Period*

Ohio courts have not directly discussed what constitutes the relevant period of interference, but they have implied that this period extends until the date of termination of the contract. In determining what damages resulted from the defendant’s tortious interference, one Ohio court concluded that “post-contract breach events and circumstances which bear directly on the contract which was breached” must be considered.<sup>253</sup> In addition, the Sixth Circuit has explained that parties to a contract must fulfill their contractual duties until the contract is no longer in effect. When a contract has a notice period, for example, “the contract remains in force and must continue to be performed according to its terms during the specified period after receipt of the notice of termination.”<sup>254</sup>

The accrual date for a claim of tortious interference provides further support for defining the interference period as including post-breach, pre-termination knowledge and conduct. The accrual date for a claim of tortious interference is not when a contract is *breached*, but is the date on which the contract is *terminated*. The accrual date for a tortious interference claim is determined under Ohio Rev. Code section 2305.09(D).<sup>255</sup> The Supreme Court of Ohio has ruled that a tort claim subject to section 2305.09(D) does not accrue until the time a plaintiff sustains actual injury

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<sup>252</sup>Yeager’s Fuel, Inc. v. Pa. Power & Light Co., 953 F. Supp. 617, 667 (E.D. Pa. 1997) (“Supreme Court of Pennsylvania has adopted both §§ 766 and 767 . . . .”); Shafir v. Steele, 727 N.E.2d 1140, 1143 (Mass. 2000) (“[Sections] 766 and 766B reflect the law of Massachusetts.”); Reihmann v. Foerster, 375 N.W.2d 677, 683 (Iowa 1985) (adopting Section 766).

<sup>253</sup>Scanlon v. Gordon F. Stofer & Bros., Nos. 55467, 55472, 1989 Ohio App. LEXIS 2528, at \*53 (Ohio Ct. App. Cuyahoga County June 22, 1989).

<sup>254</sup>Digital Storage, Inc. v. ePlus Group, Inc., 65 F.App’x. 37, 38 (6th Cir. 2003) (construing Ohio law and upholding the grant of summary judgment to plaintiff on its breach of contract claim; ruling that defendant was obligated to perform the lease until the date of termination, even though plaintiff had notified defendant that plaintiff was terminating the lease in ninety (90) days) (citation omitted).

<sup>255</sup>See Sommer v. City of Dayton, 556 F. Supp. 427, 434 (S.D. Ohio 1982) (applying four-year limitation period of Section 2305.09(D) to plaintiff’s tortious interference claim); *see also* Tri-State Computer Exchange, Inc. v. Burt, No. C-020345, 2003 Ohio App. LEXIS 2869, at \*15-16 (Ohio Ct. App. Hamilton County June 20, 2003).



because the injury is the “invasion of a legally protected interest.”<sup>256</sup> Before the termination date, a plaintiff has suffered no legal damages (element five).<sup>257</sup> Without an injury, a plaintiff has no valid cause of action for tortious interference. Thus, when the dates of breach and termination of a contract are different, a plaintiff must wait until the contract is terminated (assuming it is) to assert a viable interference claim because actual injury occurs on the date of termination. If post-breach, pre-termination knowledge and conduct are excluded from the relevant period of interference, then a defendant could act improperly during the waiting period and not be liable for such an act, even though the improper act occurred *prior to* the accrual date of the interference claim.

*B. The Majority of Jurisdictions That Have Addressed the Relevant Period of Interference Agree That It Extends Until the Date on Which the Contract Is Terminated*

Including post-breach, pre-termination knowledge and conduct as part of the relevant period of interference is supported by most non-Ohio courts that have addressed this issue. Three cases that have expressly considered a defendant’s knowledge and actions until the termination date of a contract and concluded that such knowledge and actions may support a claim for tortious interference are *Peterson v. First National Bank of Iowa*,<sup>258</sup> *Melo-Tone Vending, Inc. v. Sherry, Inc.*,<sup>259</sup> and *ID Security System Canada, Inc. v. Checkpoint System, Inc.*<sup>260</sup> In *Peterson*, plaintiffs leased farmland from Mr. Staskal. Plaintiffs defaulted on the rent, thus breaching their lease agreement with Mr. Staskal.<sup>261</sup> Over one month after the breach (but before termination of the contract), on December 6, 1982, defendant-bank refused to loan plaintiffs promised funds to cover plaintiffs’ rent.<sup>262</sup> The jury found in favor of plaintiffs on their tortious interference claim against defendant-bank.<sup>263</sup> In reversing the trial court’s grant of a new trial to defendant, *Peterson* ruled

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<sup>256</sup>*Kunz v. Buckeye Union Ins. Co.*, 437 N.E.2d 1194, 1196-97 (Ohio 1982) (reversing the appellate court and holding that the negligence claim accrued when the insured equipment was damaged); *Velotta v. Leo Petronzio Landscaping, Inc.*, 433 N.E.2d 147, 150 (Ohio 1982) (“[W]here the wrongful conduct complained of is not presently harmful, the cause of action does not accrue until actual damage occurs.”); *see Carter v. Am. Aggregates Corp.*, 611 N.E.2d 512, 516 (Ohio Ct. App. Franklin County 1992) (stating the general proposition that accrual date begins “when the plaintiff has suffered an injury as a result of the alleged tortious conduct”).

<sup>257</sup>*CGB Occupational Therapy, Inc. v. RHA Health Servs. Inc.*, 357 F.3d 375, 384 (3d Cir. 2004) (stating that “[e]ven though the allegedly interfering acts were launched before” the termination date of the contract, “the tort was not consummated until the contract was terminated”; plaintiff had no “actual legal damages” before the termination of the contact).

<sup>258</sup>392 N.W.2d 158 (Iowa Ct. App. 1986).

<sup>259</sup>656 N.E.2d 312 (Mass App. Ct. 1995).

<sup>260</sup>249 F. Supp. 2d 622 (E.D. Pa. 2003).

<sup>261</sup>392 N.W.2d at 159, 166.

<sup>262</sup>*Id.* at 160.

<sup>263</sup>*Id.* at 161.

that “the bank’s alleged interference which occurred on December 6, 1982 . . . was properly submitted to the jury” because “the *contract existed until it was terminated*” roughly four months after the date of breach.<sup>264</sup>

Based on a defendant’s post-breach actions, *Melo-Tone Vending* affirmed the jury verdict in favor of plaintiff on its tortious interference claim. Plaintiff and the third party, Sherry, had a contract where plaintiff retained “the sole and exclusive right” to place vending machines at Sherry’s business for eight years.<sup>265</sup> After Sherry breached the contract by allowing defendant to place its vending machines at Sherry’s business, plaintiff informed defendant about Sherry’s exclusive-dealing contract with plaintiff.<sup>266</sup> Subsequently, defendant agreed to pay for the removal of plaintiff’s machines and to fund Sherry’s litigation expenses against plaintiff.<sup>267</sup> *Melo-Tone Vending* relied upon those post-breach actions and concluded that defendant acted improperly, emphasizing that defendant knew plaintiff’s contract “had five years to run” when it paid for Sherry’s legal expenses.<sup>268</sup>

*ID Security Systems* also supports this proposed clarification to Ohio law that the relevant period of interference includes post-breach, pre-termination knowledge and conduct. The court affirmed the jury verdict against the defendant where defendant induced the third party, Tokai, to terminate its contract with plaintiff *after* plaintiff breached the contract.<sup>269</sup> Plaintiff and Tokai had a contract where plaintiff was the exclusive dealer of Tokai’s product.<sup>270</sup> On February 13, 1997, after plaintiff breached the contract but before Tokai terminated the contract, defendant executed an agreement with Tokai to sell Tokai’s product, even though their agreement violated plaintiff’s contract with Tokai.<sup>271</sup> Upon signing an agreement with defendant, Tokai terminated its contract with plaintiff. *ID Security Systems* rejected defendant’s contention that plaintiff’s contract with Tokai was not in existence as of February 13 (the date on which defendant committed the interfering acts).<sup>272</sup> The court explained that evidence that defendant’s actions induced Tokai to terminate its contract with plaintiff—actions that occurred after the breach—was “legally sufficient evidence for a jury” to find defendant liable.<sup>273</sup>

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<sup>264</sup>*Id.* at 166 (emphasis added).

<sup>265</sup>*Melo-Tone Vending, Inc. v. Sherry, Inc.*, 656 N.E.2d 312, 313 (Mass. App. Ct. 1995).

<sup>266</sup>*Id.* at 314.

<sup>267</sup>*Id.*

<sup>268</sup>*Id.* at 315 (explaining that a party may not “abet the repudiation of solemn contractual obligations of which the party interfering is well aware”).

<sup>269</sup>*ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 666, 668-69 (E.D. Pa. 2003).

<sup>270</sup>*Id.* at 634.

<sup>271</sup>*Id.* at 636, 666.

<sup>272</sup>*Id.* at 669.

<sup>273</sup>*Id.* (denying defendant’s “motion for post-trial relief”). The fact that plaintiff and Tokai attempted to resolve their dispute after the initial breach indicated that the contract was in effect on February 13. *Id.* at 667; *accord Groseth Int’l, Inc. v. Tenneco, Inc.*, 410 N.W.2d 159, 163, 172 (S.D. 1987) (denying interferer’s motion for summary judgment; issues of fact

*C. Public Policy Supports the Standard That the Interference Period Extends Until the Date the Contract Is Terminated*

Holding an interferer liable for its post-breach, pre-termination knowledge and conduct ensures that the purpose of this tort—preventing and discouraging interferers from meddling with the contracts of others—is satisfied.<sup>274</sup> The Supreme Court of Ohio recognizes that enforcing parties’ “right to contract,” even if the exercise of that right is imprudent, is “one of the roots of its preservation.”<sup>275</sup> If Ohio law extends the relevant period of interference until the date a contract is terminated, then with the law would help preserve parties’ contracts by discouraging would-be interferers from attempting to terminate breached contracts still in effect.

To illustrate, consider the situation where a manufacturer has a non-at-will agreement with Dealer A where both parties must provide sixty days notice to the breaching party to allow the breaching party the opportunity to cure the breach. After the manufacturer breaches the agreement, but before the expiration of the cure period, a competing dealer, Dealer B, makes false statements with malice to the manufacturer to induce it not to cure its breach of the contract with Dealer A and instead to execute a new contract with Dealer B. If the relevant period of interference excludes post-breach, pre-termination conduct, then Dealer B would escape liability because its false statements were made *after* the date of breach, thus undermining the purpose of an interference claim. On the other hand, if the law subjects Dealer B to liability for its false statements made after the breach but before the agreement was terminated, then the law would have discouraged Dealer B from meddling with the agreement during the sixty-day cure period. Thus, Dealer A and the manufacturer would have had an opportunity to resolve their dispute without outside interference.

*D. Application of the Sleepy/Wake-Up Hypothetical to the Relevant Period of Interference*

As previously discussed, Sleepy informed Wake-Up that its employment of Traitor Tom violates his non-competition agreement, which remains in effect. Assume that Sleepy’s interference claim against Wake-Up for interfering with Sleepy and Traitor Tom’s non-competition agreement is based solely on Wake-Up’s express refusal to comply with the non-competition agreement once Wake-Up had actual knowledge of that agreement. Under the standard that the relevant period of interference extends until a contract is terminated, Wake-Up may be liable because the non-competition agreement has not expired by its terms and because knowledge plus an intent to interfere with a contract not terminable at will is improper.<sup>276</sup> To

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existed where evidence showed that defendant’s tortious conduct occurred after the breach but prior to the expiration of the six-month notice period).

<sup>274</sup>David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 775 (1992) (asserting that the interference tort serves the purposes of the preservation and maintenance of “cooperative relationships”).

<sup>275</sup>Lake Ridge Acad. v. Carney, 613 N.E.2d 183, 187 (Ohio 1993); see *Blakeman’s Valley Office Equip., Inc. v. Bierdeman*, 786 N.E.2d 914, 920 (Ohio Ct. App. Mahoning County 2003) (“Preserving the sanctity of contractual relations . . . [is] in the public interest.”).

<sup>276</sup>See *supra* Part V.B.2.a.

avoid liability, Wake-Up must act to prevent any further violation of the non-competition agreement, such as terminating Traitor Tom's employment or moving him to a new position.

This result is fair to Traitor Tom because he intentionally placed himself in this situation. Traitor Tom voluntarily signed the non-competition agreement and knowingly violated it by working for Wake-Up. He took a calculated risk either that the agreement would be unenforceable or that Sleepy would not enforce the agreement. Further, including post-breach, pre-termination knowledge and conduct as part of the relevant period of interference will encourage third parties such as Traitor Tom to disclose the existence of their non-at-will contracts to potential interferers before any interference occurs.

#### VIII. CONCLUSION

Ohio courts have not adequately defined what actions constitute tortious interference with a contract or a business relationship. This Article summarized the current law of tortious interference in Ohio and argued for the adoption of new or clearer standards in Ohio based on current Ohio law, tortious interference law of other jurisdictions, and sound public policy.

First, Ohio courts should allow a plaintiff to establish the knowledge element through evidence that an interferer had knowledge of sufficient facts and failed to reasonably inquire whether the third party had a contract or a business relationship with the plaintiff. This constructive knowledge standard would prevent interferers from avoiding liability by remaining deliberately ignorant of others' contracts and business relationships. Second, Ohio courts should determine whether conduct is improper and unprivileged based on whether a defendant induced a breach or termination of a contract not terminable at will or a business relationship. This standard furthers Ohio's express public policy that non-at-will contracts deserve more protection against outside interference than at-will contracts or business relationships. Pursuant to such heightened protection, Ohio courts should adopt standards where the universe of conduct that is considered improper is broader for the breach or termination of a contract not terminable at will than for an at-will contract or business relationship. Third, Ohio courts should specifically rule that the relevant period of interference includes an interferer's knowledge and actions until the date on which a contract is terminated.