

A. TORTIOUS INTERFERENCE WITH CONTRACT

Tortious interference with contractual rights requires Saber Greentown plead and prove the following:

- (1) the existence of a valid and enforceable contract;
- (2) defendant's knowledge of the existence of the contract;
- (3) defendant's intentional inducement of breach of the contract;
- (4) the absence of justification; and
- (5) resulting damages.

See *Indiana Health Centers, Inc., V. Cardinal Health Systems, Inc.*, 774 N.E.2d 992, 1000 (Ind. App 2002). Tortious interference with business relationship parallels tortious interference with contractual rights. See *Martin v. Platt*, 179 Ind. App. 688, 690, 386 N.E.2d 1026, 1027 (1979); *Kiyose v. Trustees of Indiana University*, 166 Ind. App. 34, 44, 333 N.E.2d 886, 891 (1975); *Daly v. Nau*, 167 Ind.App. 541, 339 N.E.2d 71 (1975); *Helvey v. O'Neill*, 153 Ind. App. 635, 288 N.E.2d 553, 561 (1972); and *Fort Wayne Cleaners & Dyers Assoc., Inc. v. Price* (1956), 127 Ind. App. 13, 137 N.E.2d 738. Two differences exist between the causes of action. First, no contract exists for a claim of a tortious interference with business relationships - only the existence of a valid business relationship. *Comfax Corp. v. North Am. Van Lines*, 587 N.E.2d 118, 124 (Ind.App. 1992). Secondly, for tortious interference with a business relationship requires the defendant acting illegally in causing the interference and the illegal acts include violence, fraud or intimidation. *Levee v. Beeching*, 729 N.E.2d 215, 222 (Ind. App. 2000).

For its Tortious Interference with Contract claim, Saber Greentown must prove five elements. “A claim for tortious interference with a contractual relationship is established by evidence of the following elements: (1) the existence of a valid and enforceable contract; (2) defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) resulting damages. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228 (Ind. 1994); *Levee v. Beeching*, 729 N.E.2d 215 (Ind. Ct. App. 2000).” *Indiana Health Centers, Inc., V. Cardinal Health Systems, Inc.*, 774 N.E.2d 992, 1000 (Ind. App 2002).

The Existence of a Valid and Enforceable Contract and Defendant's Knowledge of the Existence of the Contract

That C. Robert Hasler knew that Saber Greentown's business consisted of making pre-need and at-need funeral contracts as shown by the Consulting Agreement. Designated Documents, 1 Exhibit A to Plaintiff's Complaint. C. Robert Hasler had been in the same business as Saber Greentown. As shown by C. Robert Hasler's affidavit, he did not know of all contracts made by Saber Greentown nor does he know of all contracts which transferred. Designated Documents 3.

Saber Greentown needed to specify what contracts had C. Robert Hasler allegedly interfered with. “A defendant who has not been guilty of conduct otherwise actionable ought not to be held liable for having brought about, though wrongfully and without cause, the breach of a contract of which he had no knowledge.” *McGurk v. Cronenwett* (1908) 199 Mass. 457, 85 N.E. 576, 577.” *Tenta v. Guraly*, 140 Ind. App. 160, 166, 221 N.E.2d 577, 580 (1966). “The real issue of knowledge is what was known to appellants before the contract was breached.” *Tenta v. Guraly*, 140 Ind. App. at 166, 221 N.E.2d 577, 581. Saber Greentown failed alleging which of its contracts C. Robert Hasler interfered with. Further, Saber Greentown’s Interrogatory answers do not indicate any such contracts. Unless C. Robert Hasler knew of a particular contract’s existence before the contract’s breach then Saber Greentown’s claim fails. In Interrogatory 10, when asked regarding the facts supporting this Count of Saber Greentown’s Complaint, the answers provided evade the actual question by referring to the answers of Interrogatory 1. Designated Documents 4.

Zemco alleges that Navistar knew of the existence of the Liquidation Agreement, but the only evidence cited to support this claim is that at some point during litigation, attorneys for Navistar referred to the Agreement during depositions. This does not lead to the conclusion that Navistar knew of the Liquidation Agreement when the transfer of machines was made.

Zemco Mfg. v. Navistar Int’l Transp. Corp., 759 N.E.2d 239, 252 (Ind. App. 2001). Without showing that C. Robert Hasler knew that a particular person had contracted with Saber Greentown, Saber Greentown’s claim fails. See *McLinden v. Coco*, 765 N.E.2d 606, 618 (Ind. 2002) (“Coco knew of the existence of the first contract when he entered into the second contract.”)

Defendant's Intentional Inducement of Breach of the Contract

“Inducement in this context is analogous to causation. Restatement (Second) of Torts § 766 Comment h (1979).” *Neterer v. Slabaugh*, 548 N.E.2d 832, 834 (1990). See *Indiana Health Centers, Inc.*, 774 N.E.2d 992, 1000 -01. Inducing consists of more than mere negligence.

The specific charge in the complaint is that the defendants "intentionally and knowingly" acted; it requires no citations to understand that negligent interference is not charged in this case. We have found no case in which Indiana has had occasion to pass on negligent interference. However, most courts to whom the question has been presented have held that there is no liability for negligent invasion of another's contract rights. *Tenta v. Guraly*, *id.* (Citations omitted). “However, there are no allegations, and no evidence to support such allegations, that Navistar induced Pecoraro to sell the business in the first instance, nor that Pecoraro was required to abide by Navistar's advice once Pecoraro decided to sell.” *Zemco Mfg.*, 759 N.E.2d at 252.

Think about the party committing the inducement as a moving force. *McLinden v. Coco*, 765 N.E.2d 606, 618 citing to *Corinthian Corp. v. White & Bollard, Inc.*, 74 Wash. 2d 50, 442 P.2d 950, 957 (Wash. 1968).

Southwick does not claim, nor does it show, that the evidence favorable to Mutual Development leads to a conclusion opposite that reached by the trial court. Specifically, it does not show that Mutual Development through Coco approached Whiteco and acted as the moving force in forming the October 1997 Agreement. Rather, it is possible that Whiteco approached Coco to discuss the development and this discussion led to the October 1997 Agreement. For these reasons, we are unable to say that Coco intentionally induced breach of the September 1996 Agreement. Thus, Southwick Homes' claim of tortious interference with contract fails.

McLinden v. Coco, 765 N.E.2d at 618. Only if C. Robert Hasler motivated the customer in changing relations with Saber Greentown by breaching or cancelling the contract with Saber Greentown can Saber Greentown prove inducement. *Corinthian Corp. v. White & Bollard*,

Inc., 74 Wash. 2d 50, 62, 442 P.2d 950, 957-58. An unhappy customer leaving a contractual relationship because of the customer's unhappiness with the contractual does not prove an inducement supporting an intentional interference with contractual rights claim. See *Monarch Industrial Towel & Uniform Rental, Inc. v. Model Cov.*, 178 Ind. App. 235,237, 381 N.E.2d 1098, 1099 (1978).

The Absence of Justification - Tortious Interference with Contract

Justification acts not as an affirmative defense which the defendant must prove but as an element of Saber Greentown's prima facie case on its tortious interference with contractual rights claim. *Bradley v. Hall*, 720 N.E.2d 747, 751 at footnote 4. "[T]o properly state a cause of action for intentional interference with contractual rights, a plaintiff must state more than a mere assertion that the defendant's conduct was unjustified"; rather "the plaintiff must set forth factual allegations from which it can reasonably be inferred that the defendant's conduct was unjustified." See *HPI Health Care Services, Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 545 N.E.2d 672, 677, 137 Ill. Dec. 19 (Ill. 1989). For justification the courts will look at the following: (a) the nature of the defendant's conduct; (b) the defendant's motive; (c) the interests of the plaintiff with which the defendant's conduct interferes; (d) the interests sought to be advanced by the defendant; (e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff; (f) the proximity or remoteness of the defendant's conduct to the interference; and (g) the relations between the parties. See *Winkler v. V.G. Reed & Sons*, 638 N.E.2d 1228, 1235 (Ind. 1994).

"To satisfy [the element of lack of justification], the breach must be malicious and exclusively directed to the injury and damage of another." *Winkler v. V. G. Reed & Sons, Inc.*, 619 N.E.2d 597, 600-01 (Ind. Ct. App. 1993) (citations omitted), aff'd, 638 N.E.2d 1228 (1994); see also *Flintridge Station Ass'n v. American Fletcher Mortgage Co.*, 761 F.2d 434, 441 (7th Cir. 1985) (defining unjustified as "disinterested malevolence"; "a malicious [conduct] unmixed with any other and exclusively directed to injury and damage of another"); *Economation, Inc. v. Automated Conveyor Sys., Inc.*, 694 F. Supp. 553, 562 (S.D. Ind. 1988). Moreover, the existence of a legitimate reason for the defendant's actions provides the necessary justification avoiding liability. *Winkler*, 619 N.E.2d at 600-01." *Morgan Asset Holding Corp. v. CoBank*, 736 N.E.2d 1268, 1272 (2000).

The justification issue points out a logical problem for Saber Greentown's claim of tortious interference with contractual rights. If C. Robert Hasler entered competition with the plaintiffs then this present matter would greatly resemble *Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871 (Ind.App. 1998). "Harvest contends that Getche was not justified in competing with it for customers because Getche breached his Agent's Agreement with Harvest." *Harvest Life Ins. Co.*, 701 N.E.2d at 874. As with Getche in *Harvest Life Ins. Co.*, C. Robert Hasler would have had to forego the money under his consulting agreement. "Here, assuming that Getche breached the contract ..., he was entitled to do so knowing that the consequence of his actions under the agreement provided for forfeiture of his renewal commissions." *Harvest Life Ins.*, 701 N.E.2d at 877. The Court of Appeals examined the commentary to Restatement (Second) § 768 (1977) for this holding. *Id.* The Restatement's commentary set out the following for determining if the

interference resulted in proper or improper competition:

“§ 768 Competition as Proper or Improper Interference : (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint on trade and (d) his purpose is at least in part to advance his interest in competing with the other. (2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.”

Id..

B. TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE

Indiana recognizes the tort of intentional interference with a business relationship and interference with a prospective advantage. See *Helvey v. O'Neill*, 153 Ind. App. 635, 288 N.E.2d 553, 561 (1972) and *Kiyose v. Trustees of Indiana University*, 166 Ind. App. 34, 44, 333 N.E.2d 886, 891 (1975). “The development of the tort of interference with prospective advantage has been parallel to that of interference with contractual relations. For the most part, the expectancies protected by the former have been those of future contractual relations. Prosser, Torts § 130 (4th ed. 1971).” *Id.* Other than differing names there exists no apparent distinction between tortious interference with a prospective advantage, tortious interference with prospective business advantage, and intentional interference with a business relationship. See *Martin v. Platt*, 179 Ind. App. 688, 690, 386 N.E.2d 1026, 1027 (1979) citing *Daly v. Nau* (1975) 167 Ind.App. 541, 339 N.E.2d 71; *Kiyose v. Trustees of Indiana University* (1975), 166 Ind.App. 34, 333 N.E.2d 886; and *Fort Wayne Cleaners & Dyers Assoc., Inc. v. Price* (1956),

127 Ind. App. 13, 137 N.E.2d 738.

In Indiana, an action for tortious interference with business relationships has five elements: the existence of a valid business relationship; the defendant's knowledge of the existence of the relationship; the defendant's intentional interference in the relationship; the absence of any justification; and, damages resulting from the defendant's interference. *Flintridge Station Associates v. American Fletcher Mortgage Co.* (7th Cir. 1985), 761 F.2d 434, 440 (applying Indiana law).”

Comfax Corp. v. North Am. Van Lines, 587 N.E.2d 118, 124 (Ind.App. 1992). One finds these elements corresponding with those required for tortious interference with prospective business advantage.

...[T]he following elements have evolved into the tort of intentional or tortious interference with prospective business advantage: (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff; (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) a purposeful intent to interfere with the relationship, advantage, or expectancy; (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy; and (5) actual damages.

Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Haw. 224, 258-59, 982 P.2d 853, 88-88 (1999). These elements also follow closely with the Restatement (Second) of Torts § 766B as set out in *Robert's Haw. Sch. Bus, Inc.* *Robert's Haw. Sch. Bus, Inc.* 91 Haw. at 258, 982 P.2d 887. Much of what constitutes tortious interference with prospective business advantage parallels tortious interference with contractual rights. “Such actions lie where the breach is induced by a third party, not by one party to the contract.” *Comfax Corp.*, 587 N.E.2d at 124. See also *Levee v. Beeching*, 729 N.E.2d 215, 220 (Ind.App. 2000); and *Claise v. Bernardi*, Ind. App., 413 N.E.2d 609, 612 (1980).

Differences do exist between tortious interference with prospective business advantage and

tortious interference with contractual relations. Tortious interference with prospective business advantage lacks the contract requirement. Lacking a contract introduces another element. “In addition it has been recognized that an action may lie under Indiana law for tortious interference with a business relationship even though there was no valid contract. In such cases, however, it appears critical that the defendant acted illegally in achieving his end. *Spier v. Home Ins. Co.* (7th Cir. 1968), 404 F.2d 896; *Ft. Wayne Cleaners & Dyers Ass'n. v. Price* (1956), 127 Ind. App. 13, 137 N.E.2d 738.” *Biggs v. Marsh*, 446 N.E.2d 977, 983 (Ind.App. 1983). See *Comfax Corp.*, 587 N.E.2d at 124. See also *Levee v. Beeching*, 729 N.E.2d 215, 222 (Ind. App. 2000); *Bradley v. Hall*, 720 N.E.2d at 751; and *Harvest Life Ins. Co.*, 701 N.E.2d at 876. The illegal acts contemplated include “violence or intimidation, defamation, injurious falsehood or other fraud,****.” *Helvey v. O'Neill*, 153 Ind. App. 635, 288 N.E.2d 553, 561 (1972) quoting Prosser, Law of Torts 977 (3rd ed. 1964) (omissions in the original). *Helvey* accords with *Berry & Gould v. Berry*. See 360 Md. 142, 757 A.2d 108, 113-14 (2000). This Maryland case also seems to restore the omitted language from Prosser: “`and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.” *Id.* Clearly these cases describe tortious activities. Violating an ethical code lacks sufficient illegality for supporting a claim of tortious interference with prospective business advantage. *Biggs v. Marsh*, 446 N.E.2d 977, 984. Requiring the illegal act as an independent tort seems a growing trend. See *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 2001 ND 116, 628 N.W.2d 707, 719-21 (2001) and the cases cited there. *Levee* appears in *Trade 'N Post, L.L.C.* Maine requires a showing of intimidation or fraud. *McGeechan v. Sherwood*, 2000 ME 188, 760 A.2d 1068, 1081 (2000) citing to *Petit v. Key Bank of Me.*, 688 A.2d 427, 430 (Me. 1996).

The Existence of a Valid Business Relationship

The Defendant's Knowledge of the Existence of the Relationship

The reasoning behind *Tenta*'s requirement that one cannot be held liable for interfering with a contract unknown to the alleged tortfeasor applies in this type of action also. *Tenta v. Guraly*, 140 Ind. App. 160, 166, 221 N.E.2d 577, 580. Likewise, C. Robert Hasler must possess knowledge of the specific business relationship prior to the alleged interference just as he must have known of a contractual relationship under *Tenta*. See 140 Ind. App. at 166, 221 N.E.2d 577, 581; see also *Zemco Mfg.* 759 N.E.2d at 252. Without showing that C. Robert Hasler knew of a particular person having a business relationship with Saber Greentown, Saber Greentown's claim fails. See *McLinden v. Coco*, 765 N.E.2d 606, 618.

The Defendant's Intentional Interference in the Relationship

As noted earlier, see *Indiana Health Centers, Inc.*, 774 N.E.2d 992, 1000 -01; *Zemco Mfg.*, 759 N.E.2d at 252.; *McLinden v. Coco*, 765 N.E.2d 606, 618 (person committing the inducement likened to a "moving force"); and *Neterer v. Slabaugh*, 548 N.E.2d 832, 834. Inducing means more than mere negligence. *Tenta v. Guraly, id.*

Intentional fraud proof of the following elements: 1) a material misrepresentation of past or existing fact, 2) made with knowledge of or reckless disregard for the falsity of the statement, 3) and the misrepresentation relied upon to the detriment of the relying party." *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 676 (Ind. 1997) (Citations omitted). Maine has the same requirements for proving interference by "fraud": (1) making a false representation (2) of a

material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.” *Petit*, 688 A.2d at 430.

“Defamation is that which tends to injure reputation or to diminish esteem, respect, good will, or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff. *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), trans. pending.” *Davidson v. Perron*, 716 N.E.2d 29, 37 (Ind. App. 1999). Lastly, defamation cannot support a claim for tortious interference with prospective business advantage. “Despite the lack of a definition or test for a showing of the "illegal conduct" element of tortious interference with a business relationship, case law does not support a finding that defamation constitutes illegal conduct.” *Levee v. Beeching*, 729 N.E.2d 215, 222-23 (Ind. App. 2000).

Under *Levee*, the illegal means equates with an independent tort and civil conspiracy does not qualify as an independent tort. *Winkler v. V.G. Reed & Sons*, 638 N.E.2d 1228, 1234 citing to *Indianapolis Horse Patrol, Inc. v. Ward*, 247 Ind. 519, 522, 217 N.E.2d 626, 628 (1966).

a civil conspiracy “is a combination of two or more persons, by concerted action, to accomplish an unlawful purpose or to accomplish some purpose, not itself unlawful, by unlawful means.” *Indianapolis Horse Patrol, Inc.*, 247 Ind. at 522, 217 N.E.2d at 628 citing to *Holloway v. Thompson* (1942), 112 Ind. App. 229, 42 N. E. 2d 421; *Karges Furniture Co. v.*

Amalgamated, etc., Union (1905), 165 Ind. 421, 75 N. E. 877; and *Miller, etc. v. Ortman*,(1956), 235 Ind. 641, 136 N. E. 2d 17. Such a conspiracy implicates anti-competition concerns. As discussed above regarding tortious interference with contractual rights, concerns about competition expressed in *Harvest Life Ins. Co. v. Getche*. As the Indiana Court of Appeals held that one could compete with a former employer without liability for a tortious interference with contractual rights, the same reasoning applies to the tortious interference with prospective business advantage claim. Regarding interference as proper or improper competition, the commentary to Restatement (Second) § 768 (1977) must be looked to once again:

§ 768 Competition as Proper or Improper Interference : (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint on trade and (d) his purpose is at least in part to advance his interest in competing with the other. (2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

Harvest Life Ins, 701 N.E.2d at 877.

The case law indicates that for a conspiracy to support a claim of tortious interference with prospective business advantage, the combination must involve more than one business opportunity and for the conspirators deny Saber Greentown all business. See *William S. Deckelbaum Co. v. Equitable Life Assurance Soc.*, 419 N.E.2d 228, 231(Ind. App. 1981).

The Absence of Justification - Tortious Interference with Prospective Business Advantage

Saber Greentown must prove that C. Robert Hasler acted without justification. See *Bradley v. Hall*, 720 N.E.2d 747, 751 at footnote 4; *HPI Health Care Services, Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 545 N.E.2d 672, 677. For justification the courts should look to the same issues as under tortious interference with contractual relations: (a) the nature of the defendant's conduct; (b) the defendant's motive; (c) the interests of the plaintiff with which the defendant's conduct interferes; (d) the interests sought to be advanced by the defendant; (e) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff; (f) the proximity or remoteness of the defendant's conduct to the interference; and (g) the relations between the parties. See *Winkler v. V.G. Reed & Sons*, 638 N.E.2d 1228, 1235 (Ind. 1994). Again, the breach must be malicious, exclusively directed to the injury and damage of another, and C. Robert Hasler must have acted without a legitimate reason justifying his action. *Winkler v. V. G. Reed & Sons, Inc.*, 619 N.E.2d 597, 600-01; *Flintridge Station Ass'n v. American Fletcher Mortgage Co.*, 761 F.2d 434, 441 (defining unjustified as "disinterested malevolence"; "a malicious [conduct] unmixed with any other and exclusively directed to injury and damage of another"); *Economation, Inc. v. Automated Conveyor Sys., Inc.*, 694 F. Supp. 553, 562; *Morgan Asset Holding Corp. v. CoBank*, 736 N.E.2d at 1272.

Saber Greentown's anti-competition problems remain the same here as for Saber Greentown's claim of tortious interference contractual rights. Again, this matter resembles *Harvest Life Ins. Co.*. See *Harvest Life Ins. Co.*, 701 N.E.2d at 874. As argued in regards to tortious interference with contractual rights, C. Robert Hasler would have had to forego the money under his consulting agreement. *Harvest Life Ins*, 701 N.E.2d at 877.

Comfax and Kuker's allegations on this claim are groundless, and at most, amount to sheer speculation. The counterclaim fails to state any facts which would show that NAVL interfered with Comfax's business relationships with any third parties, beyond bald assertions of possible business opportunities. Comfax and Kuker have failed to show that Comfax had a valid business relationship with a third party with which NAVL interfered. They allege that NAVL interfered with and prevented sales to certain third parties, but cannot show that any viable business relationships existed between themselves and the third parties, and have not presented affidavits or other additional testimony from these third parties demonstrating such relationships.

Comfax Corp. v. North Am. Van Lines, 587 N.E.2d 118, 124. Saber Greentown's claim for tortious interference with prospective business advantage must be denied just as in *Comfax*.