CHAPTER 24

INTENTIONAL INTERFERENCE WITH CONTRACTUAL OBLIGATIONS

24:1 ELEMENTS OF LIABILITY

For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on** *(insert applicable pronoun)* **claim of intentional interference with contract, you must find that all of the following have been proved by a preponderance of the evidence:**

1. The plaintiff had a contract with *(name of third person)* **in which** *(name of third person)* **agreed to** *(describe the substance of the promise the defendant allegedly interfered with)***;**

2. The defendant knew or reasonably should have known of the contract;

3. The defendant by words or conduct, or both, intentionally (caused *[name of third person]* **[not to perform] [to terminate]** *[insert applicable pronoun]* **contract with the plaintiff) (or) (interfered with** *[name of third person]***'s performance of the contract, thereby causing** *[name of third person]* **[not to perform] [to terminate] the contract with the plaintiff);**

4. The defendant's interference with the contract was improper; and

5. The defendant's interference with the contract caused the plaintiff (damages) (losses).

If you find any one or more of these *(number)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to the plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

(In determining whether the affirmative defense of privilege *[describe privilege]* **has been proved, you must also determine whether the plaintiff proved by a preponderance of the evidence that the defendant abused that privilege as explained in Instruction No.** *[insert instruction number that corresponds to 24:6]***.)**

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Use whichever parenthesized or bracketed portions are appropriate.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. Omit any numbered paragraph, the facts of which are not disputed.

4. Other appropriate instructions defining the terms used in this instruction, for example, "contract," "intentional conduct" (Instruction 24:2), "improper" (Instruction 24:3), must also be given with this instruction, in particular an appropriate instruction or instructions relating to causation (Instructions 9:18-9:21). An instruction relating to constructive notice of the contract may also be used in connection with paragraph 2 of the instruction. *See* Instruction 3:7.

5. Where there is evidence that the third person has partially performed, the phrase in numbered paragraph 3, "not to perform," if used, should be changed to read "not to perform fully."

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

Source and Authority

1. This instruction is supported by **Warne v. Hall**, 2016 CO 50, ¶ 25, 373 P.3d 588 (referencing with approval the RESTATEMENT (SECOND) OF TORTS § 767 (1965)); **Radiology Professional Corp. v. Trinidad Area Health Ass'n,** 195 Colo. 253, 577 P.2d 748 (1978) (no liability where third party did not in fact breach the contract); **Watson v. Settlemeyer**, 150 Colo. 326, 372 P.2d 453 (1962); **Credit Investment & Loan Co. v. Guaranty Bank & Trust Co.**, 143 Colo. 393, 353 P.2d 1098 (1960); **Comtrol, Inc. v. Mountain States Telephone & Telegraph Co.**, 32 Colo. App. 384, 513 P.2d 1082 (1973) (citing RESTATEMENT OF TORTS § 766 (1938)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129 (5th ed. 1984); and 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 6.5-6.10 (3d ed. 2006). *See also* **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207 (Colo. 1984) (supports numbered paragraph 4); **Pierce v. St. Vrain Valley Sch. Dist. RE-1J**, 944 P.2d 646 (Colo. App. 1997) (supports numbered paragraph 1 of instruction), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999); **Fasing v. LaFond**, 944 P.2d 608 (Colo. App. 1997) (supports numbered paragraph 1 of instruction); **Galleria Towers, Inc. v. Crump Warren & Sommer, Inc.**, 831 P.2d 908 (Colo. App. 1991); **Boettcher DTC Bldg. Joint Venture v. Falcon Ventures**, 762 P.2d 788 (Colo. App. 1988); **Bithell v. W. Care Corp.**, 762 P.2d 708 (Colo. App. 1988) (supports numbered paragraph 2 in particular); **Hein Enters., Ltd. v. San Francisco Real Estate Investors**, 720 P.2d 975 (Colo. App. 1985) (supports numbered paragraph 3 in particular); **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). *But see* **Baker v. Carpenter**, 33 Colo. App. 139, 143, 516 P.2d 459, 461 (1973) (The court stated in dictum: "[O]ne does not induce a seller to breach a contract with a third person when he merely enters into an agreement with the seller with knowledge that the seller cannot perform both it and his contract with the third person.").

2. A claim for interference with contract is based on contracts that existed at the time of the allegedly tortious conduct, including both contracts terminable at will and contracts not terminable at will. *See, e.g.*, **Mem'l Gardens, Inc.**, 690 P.2d at 211-12 (involving contracts not terminable at will); **Harris Grp., Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (at-will contract); **Electrolux Corp. v. Lawson**, 654 P.2d 340 (Colo. App. 1982) (at-will contract).

3. The companion tort of intentional interference with a prospective business advantage has also been recognized. **Amoco Oil Co. v. Ervin**, 908 P.2d 493 (Colo. 1995) (tortious interference with prospective business relationship requires showing that interference with formation of contract was both intentional and improper); **Carter Holdings Inc. v. Carter**, 2023 COA 26, ¶ 34, 531 P.3d 437, 444 (proper recording of lis pendens notices "did not interfere with any contractual relations"); **Emp't Television Enters., LLC v. Barocas**, 100 P.3d 37 (Colo. App. 2004) (threat of legal action that the defendant believed was without merit and that induced plaintiff to abandon plans to enter into business relationship with third party could be basis of claim); **Montgomery Ward & Co. v. Andrews**, 736 P.2d 40 (Colo. App. 1987); **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (no underlying contract necessary for claim of interference with prospective business relation); *see also* **Clancy Sys. Int'l, Inc. v. Salazar**, 177 P.3d 1235 (Colo. 2008) (availability of UCC claim based on same facts precluded common-law tortious interference with prospective business advantage claim); **BA Mortg., LLC v. Quail Creek Condo. Ass'n**, 192 P.3d 447 (Colo. App. 2008) (no improper interference where homeowners association had right under homeowners declarations and statute to file lien assessment, even though association's conduct had the effect of clouding title of foreclosing lender, and there was no contract between lender and association); **Wasalco, Inc. v. El Paso County**, 689 P.2d 730 (Colo. App. 1984) (tort of interference with a prospective business advantage does not require proof of an underlying contract, while tort of intentional interference with a contractual obligation does).

4. The contract involved must be a valid contract. **Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1**, 2018 COA 92, ¶ 54, 474 P.3d 1231, 1244 ("So if for any reason a contract is entirely void, there is no liability for causing its breach." (quoting RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (1979))); **Condo v. Conners**, 271 P.3d 524 (Colo. App. 2010) (operating agreement of limited liability company rendered assignment of limited liability company interest without member consents void and precluded claim based on interference with the assignment), *aff'd*, 266 P.2d 1110 (Colo. 2011).

5. The proper defendant in an action alleging the tort of interference with the formation of a contract is the interfering third party, not the party with whom the plaintiff sought to contract. **L & M Enters., Inc. v. City of Golden**, 852 P.2d 1337 (Colo. App. 1993).

6. Where there is no dispute that the defendant was privileged to interfere with the contract and would not be liable in absence of the plaintiff's proving the privilege was abused, *see* Instruction 24:6, this instruction may be modified to include the elements of abuse the plaintiff would need to prove, rather than giving Instruction 24:6 as a separate instruction. **Boettcher DTC Bldg. Joint Venture**, 762 P.2d at 791; *see also* **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112 (Colo. 1990). In **Westfield Dev. Co.**, 786 P.2d at 1117, the court, relying on the language of RESTATEMENT (SECOND) OF TORTS §§ 766A and 767 (1979), stated that the interference had to be both intentional and improper. However, again relying on

RESTATEMENT § 773, the court makes clear that once the plaintiff proves that the defendant intentionally interfered with the contract and caused damage, the burden of proving that the occasion was a privileged one, i.e., that the conduct was prima facie proper, is on the defendant as an affirmative defense, unless the plaintiff's own evidence establishes that fact or the fact is not in dispute. The plaintiff has the burden of proving that the defendant's conduct was both improper and intentional. If the defendant has raised privilege as an affirmative defense, the defendant has the burden of proving that the privilege exists, and the plaintiff has the burden of proving that the defendant abused any privilege. *See* Instruction 24:6; *see also* **Lutfi v. Brighton Cmty. Hosp. Ass'n**, 40 P.3d 51 (Colo. App. 2001) (trial court properly entered summary judgment in favor of defendant on plaintiff's claim for intentional interference with contract where plaintiff presented no evidence to establish that defendant's conduct was improper); **Swartz v. Bianco Family Trust**, 874 P.2d 430 (Colo. App. 1993) (indicating that improper motive is element of claim).

7. For a discussion as to whether a statute or administrative regulation can provide an absolute right to intentionally interfere with contract relations or prospective economic advantage, see **Omedelena v. Denver Options, Inc.**, 60 P.3d 717 (Colo. App. 2002).

8. A plaintiff whose own performance of a contract was prevented by the wrongful interference of the defendant, thereby causing the plaintiff to breach his or her contract with a third person, may also have a cause of action. HARPER, JAMES, AND GRAY ON TORTS, *supra*, § 6.9, at 379-82. This instruction, however, is not intended to cover such cases.

9. For cases concerning additional civil liability for inducing a breach of an agricultural cooperative marketing association agreement, see section 7-56-504, C.R.S. *See also* **Rinnander v. Denver Milk Producers**, 114 Colo. 506, 166 P.2d 984 (1946).

10. There is some authority to the effect that, where the interference is with a master-servant relationship, the defendant may be liable on a theory of negligence; that is, the defendant's conduct need not be intentional. In such a case, this instruction would not be appropriate. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 998.

11. An agent may be liable to a third person for intentionally interfering "improperly" with a contract between that person and the agent's principal. The existence of the agency relationship is relevant in determining whether the agent acted properly. An agent or corporate officer abuses his or her qualified privilege if the interference is not done for bona fide organizational purposes, but is motivated by a desire to do one of the contracting parties harm. **Trimble v. City & Cty. of Denver**, 697 P.2d 716 (Colo. 1985); *see also* **Krystowiak v. W.O. Brisben Cos.**, 90 P.3d 859 (Colo. 2004); **Corporon v. Safeway Stores, Inc.**, 708 P.2d 1385 (Colo. App. 1985). Similarly, except where a subsidiary corporation is an alter ego of its parent corporation, it may be held liable for intentionally interfering with a contract between its parent and another. **Friedman & Son, Inc. v. Safeway Stores, Inc.**, 712 P.2d 1128 (Colo. App. 1985). As to the factors for determining whether a subsidiary was only an alter ego of the parent, see **Friedman & Son, Inc.**, 712 P.2d at 1131.

12. A personal representative of a decedent's estate may not be held personally liable for tortiously interfering with a contract between the decedent and a third party. **Colo. Nat'l Bank of Denver v. Friedman**, 846 P.2d 159 (Colo. 1993).

13. A claim for tortious interference with contract cannot be maintained among parties to the same contract. **MDM Grp. Assocs., Inc. v. CX Reinsurance Co.**, 165 P.3d 882 (Colo. App. 2007).

14. Under the Colorado Governmental Immunity Act, a municipality is immune from liability for the tort of intentional interference with a contractual obligation. **Grimm Constr. Co. v. Denver Bd. of Water Comm'rs**, 835 P.2d 599 (Colo. App. 1992).

24:2 INTENTIONAL CONDUCT — DEFINED

Conduct is intentional if a person acts or speaks for the purpose, in whole or in part, of bringing about a particular result, or if a person knows *(insert applicable pronoun)* **acts or words are likely to bring about that result. It is not necessary that a person act or speak with malice or ill will, but the presence or absence of malice or ill will may be considered by you in determining if the conduct is intentional.**

Notes on Use

This instruction should be given whenever Instruction 24:1 is given.

Source and Authority

This instruction is supported by **Watson v. Settlemeyer**, 150 Colo. 326, 372 P.2d 453 (1962) (by implication); RESTATEMENT (SECOND) OF TORTS § 766 (1979) cmts. j, r, s; and 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.8 (3d ed. 2006). *See also* **Rinnander v. Denver Milk Producers**, 114 Colo. 506, 166 P.2d 984 (1946).

24:3 IMPROPER — DEFINED

The defendant's interference with the contract was improper if you find that *(insert those facts that the plaintiff claims constitute improper conduct and that, if established, would constitute improper conduct as a matter of law)***.**

Notes on Use

1. The court should define in this instruction the alleged conduct which, if proven, would be improper interference. **Harris Grp., Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (holding that interfering with employment contracts through tortious conduct (conversion and breach of fiduciary duty) amounted to "improper" interference with contractual relations).

2. It is error to instruct the jury on improper conduct that is not supported by the evidence. **Harris Grp.**, 209 P.3d at 1200 (correct jury instructions should have "(1) excluded the wrongful means unsupported by the evidence – physical violence, threats of criminal prosecution, or threats of civil suit; (2) excluded the tort — intentional interference with contract — to which the business competition privilege applied; and (3) added the torts — conversion and breach of fiduciary duty — that qualified as wrongful means."

3. Where there is no dispute that the defendant was privileged to interfere with the contract, this instruction should be modified to instruct the jury on alleged conduct which, if proven, would constitute abuse of the privilege. In such event, Instruction 24:6 should not be given as a separate instruction. *See also* **Amoco Oil Co. v. Ervin**, 908 P.2d 493 (Colo. 1995) (holding the claim should not have been submitted to the jury where evidence was undisputed that defendant was privileged competitor and did not use wrongful means to interfere with plaintiffs' prospective business relations).

Source and Authority

1. This instruction is supported by **Westfield Development Co. v. Rifle Investment Associates**, 786 P.2d 1112, 1118 (Colo. 1990) ("Even if the interference is intentional, therefore, liability does not attached unless the court concludes that the actor's conduct is also improper."). *See also* **Trimble v. City and Cty. of Denver**, 697 P.2d 716 (Colo. 1985); **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc**., 690 P.2d 207 (Colo. 1984).

2. Whether conduct is "improper" must be made by the court in the specific facts and circumstances in the case, and include weighing public policy interest in protecting the freedom to compete in the marketplace. **Warne v. Hall**, 2016 CO 50, ¶ 25, 373 P.3d 588, 596 ("Because it is so clearly dependent upon context and circumstances, we have never attempted to rigidly define 'improper' for all purposes of interference with contract, but we have favorably referenced the Restatement (Second) of Torts § 767 (Am. Law Inst. 1965), in this regard and its enumeration of potentially relevant factors, which includes the nature of the actor's conduct, the actor's motive, the interests of the other with which the actor's conduct interferes, the interests

sought to be advanced by the actor, the social interests in protecting the freedom of action of the actor and the contractual interests of the other, the proximity or remoteness of the actor's conduct to the interference, and the relation between the parties."). *See also* **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112 (Colo. 1990) (applying the RESTATEMENT (SECOND) OF TORTS § 767 to determine whether conduct interfering with a contract or prospective business relation is improper).

24:4 INTERFERENCE — DEFINED

Interference means intentional conduct (that causes another to terminate or not to perform a contract) (or) (that makes another's performance of a contract impossible or more difficult).

Notes on Use

This instruction should be given with Instruction 24:1 whenever that instruction is given using the word "interfered" in numbered paragraph 3.

Source and Authority

This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 991 (5th ed. 1984); and 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.9 (3d ed. 2006).

24:5 CONTRACTS TERMINABLE AT WILL OR VOIDABLE

It is not a defense to the plaintiff's claim of intentional interference with contract that the contract between the plaintiff *(name)* **and** *(name of third person)* **could have been (canceled [for no reason] [because of** *(describe the reason, e.g., the legal disability of the third person)*]**) (terminated at will).**

Notes on Use

1. This cautionary instruction should not be given unless some reference concerning terminability or voidability has been made before to the jury.

2. Use whichever parenthesized words are appropriate.

3. This instruction does not apply where the contract is illegal or otherwise void as being against public policy. **Colo. Accounting Machs., Inc. v. Mergenthaler**, 44 Colo. App. 155, 609 P.2d 1125 (1980); *see also* **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (no liability for inducing a breach of a contract made void by statute because even if oral contract existed, specific language of applicable statute of frauds rendered contract void).

Source and Authority

1. This instruction is supported by **Harris Group, Inc. v. Robinson**, 209 P.3d 1188 (Colo. App. 2009) (contract at will entitled to less protection in business competition than contract not terminable at will); **Electrolux Corp. v. Lawson,** 654 P.2d 340 (Colo. App. 1982) (where privilege of competition exists, causing a third person to terminate a contract terminable at will not improper unless wrongful means, such as physical violence, fraud, etc., are used); and **Mulei v. Jet Courier Serv., Inc.**, 739 P.2d 889 (Colo. App. 1987), *rev'd in part on other grounds*, 771 P.2d 486 (Colo. 1989). *See also* Instruction 24:6. "A contract terminable at will is one that may be terminated at any time without legal consequence; that is, there is no breach if the contract is terminated." **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207, 212 (Colo. 1984) (supporting the instruction by implication, but holding the contract was not terminable at will). Thus, even though the fact that a contract is terminable at will is not a defense, the affirmative defense of justifiable business competition has been recognized as being particularly applicable in such cases.

2. The fact that the contract may have been terminable at the will of the third person does not deprive the plaintiff of his or her claim for relief. **Watson v. Settlemeyer**, 150 Colo. 326, 372 P.2d 453 (1962); **Bithell v. W. Care Corp.**, 762 P.2d 708 (Colo. App. 1988); **Zappa v. Seiver**, 706 P.2d 440 (Colo. App. 1985); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 995-96 (5th ed. 1984). However, such fact may be relevant on the issues of damages and privilege. *See* **Harris Grp., Inc.**, 209 P.3d at 1202-03; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 996.

3. Although the contract with the third person must be "valid" in the sense of not being illegal or against public policy, the fact that the third person may be in a position to resist

enforcement of the contract because of some defense making the contract voidable (statute of frauds, minority, etc.) does not generally deprive the plaintiff of his or her claim for relief. *See* RESTATEMENT (SECOND) OF TORTS § 766 cmts. f & g (1979); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 994-95; 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.7, at 368-72 (3d ed. 2006); *see also* **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979).

24:6 AFFIRMATIVE DEFENSE — PRIVILEGE — WHEN EXISTENT — WHEN LOST

For the defendant to establish *(insert applicable pronoun)* **affirmative defense of privilege** *(insert applicable pronoun)* **has the burden of proving (all of the following):**

(Insert those facts that the defendant claims gives him or her a privilege and that, if true, would give the defendant a privilege as a matter of law.)

(Even though the defendant proves *[insert applicable pronoun]* **affirmative defense of privilege, that defense is lost if the plaintiff proves that the defendant abused** *[insert applicable pronoun]* **privilege. The defendant abused** *[insert applicable pronoun]* **privilege if** *[describe those facts that the plaintiff claims constitute and that would constitute an abuse of privilege as a matter of law.]***).**

Notes on Use

This instruction should be given only if there is sufficient evidence in the case for a reasonable jury to reasonably conclude the truth of facts which, as a matter of law, would give the defendant a privilege. *See* **Westfield Dev. Co. v. Rifle Inv. Assocs.**, 786 P.2d 1112 (Colo. 1990) (privilege to initiate litigation and filing of *lis pendens* that interferes with a third person's performance of contract is a qualified, not an absolute, privilege).

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 768 (1979), which was specifically applied in Colorado in **Harris Group, Inc. v. Robinson**, 209 P.3d 1188 (Colo. 2009), for cases involving intentional interference with contracts terminable at will. *See also* **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207 (Colo. 1984) (by implication, but holding the contract was not terminable at will); **Begley v. Ireson**, 2020 COA 157, ¶ 26, 490 P.3d 963, 970 ("[W]e conclude that the litigation privilege may protect an attorney from liability for his nondefamatory statements."); **McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body**, 799 P.2d 394 (Colo. App. 1989) (privilege is lost if the competitor employs "wrongful means"); **Electrolux Corp. v. Lawson**, 654 P.2d 340 (Colo. App. 1982) (where privilege of business competition exists, causing third person to terminate a contract terminable at will not improper unless wrongful means, such as physical violence, fraud, etc., are used); **Dolton v. Capitol Fed. Sav. & Loan Ass'n**, 642 P.2d 21 (Colo. App. 1981) (privilege expressly adopted in case of companion tort of intentional interference with a prospective business advantage). "Wrongful means" includes the commission of independent torts, such as conversion and breach of fiduciary duty. **Harris Grp., Inc.**, 209 P.3d at 1200.

2. For factors to consider in determining whether there is abuse of the business competition privilege when the claim involves interference with at-will contracts or prospective contractual relations, see RESTATEMENT § 768:

> (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 of 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.

See **Harris Grp., Inc.**, 209 P.3d at 1200 (wrongful means include using breach of fiduciary duty and conversion as a means to induce plaintiff's customers and employees to terminate at-will contracts); **Mulei v. Jet Courier Serv., Inc.**, 739 P.2d 889 (Colo. App. 1987), *rev'd in part on other grounds*, 771 P.2d 486 (Colo. 1989); *see also* **Mem'l Gardens, Inc.**, 690 P.2d at 210-11; **Electrolux Corp. v. Lawson**, 654 P.2d at 341-42.

3. Once the plaintiff has established a prima facie case of liability, the burden of establishing that the defendant's conduct was justified, i.e., privileged, shifts to the defendant. 2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 6.12 (3d ed. 2006); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 983-84 (5th ed. 1984). Regardless of what other circumstances might have given the defendant a privilege, the defendant may not be privileged if the conduct was engaged in solely to cause harm to the plaintiff, 2 HARPER, JAMES AND GRAY ON TORTS, *supra*, at 418-19, or if the conduct was otherwise tortious or in some other way illegal. *See* RESTATEMENT § 767 cmt. c; *see also* **Bithell v. W. Care Corp.**, 762 P.2d 708, 712 (Colo. App. 1988) ("A public official performing discretionary acts within the scope of his office enjoys [a] qualified immunity . . . but only insofar as his conduct is not willful, malicious, or intended to cause harm.").

4. The defendant may have been privileged to act as the defendant did for the purpose of protecting some interest of his or her own or some third person or that of the public, including the interest of business competition. For illustrations of other such interests and circumstances, see HARPER, JAMES AND GRAY ON TORTS, *supra*, §§ 6.12 and 6.13; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 985-89; and RESTATEMENT §§ 767-774.

5. Where there is no dispute that the defendant was privileged to interfere with the contract and would not be liable in absence of the plaintiff's proving the privilege was abused, Instruction 24:1 (elements of liability) may be modified to include the elements of abuse the plaintiff would need to prove, rather than giving this instruction as a separate instruction. **Boettcher DTC Bldg. Joint Venture v. Falcon Ventures**, 762 P.2d 788 (Colo. App. 1988).

6. Though an agent or corporate officer may be privileged to interfere with a contract between the principal and another, such privilege is only a qualified privilege that may be lost if the agent abuses the privilege by acting improperly. **Trimble v. City & Cty. of Denver**, 697 P.2d 716 (Colo. 1985) (agent abused privilege when the interference was not done for bona fide organizational purposes but was motivated solely by a desire to do harm to one of the contracting parties); **Bithell**, 762 P.2d at 713 (corporate directors have qualified privilege to communicate with each other about corporate affairs, but such privilege is lost if communications are not made in good faith, or are made with malice or with reckless disregard for their truth); **Zappa v. Seiver**, 706 P.2d 440 (Colo. App. 1985) (officer or director of corporation is not privileged if his or her sole motivation is to cause the corporation to breach its contract with the plaintiff or to interfere with the contractual relations between the corporation and the plaintiff); *see also* **Cronk v. Intermountain Rural Elec. Ass'n**, 765 P.2d 619 (Colo. App. 1988).

7. In **Martin v. Montezuma-Cortez School District RE-1**, 841 P.2d 237 (Colo. 1992), the court ruled that striking public school teachers could not be held liable to school district for tortious interference with contracts of other teachers where strike was legal.

8. The absolute privilege that shields attorneys from defamation claims arising out of statements made during preparation for litigation or in the course of judicial proceedings also bars other non-defamation claims that stem from the same conduct, including claims for intentional interference with a contractual relationship. **Buckhannon v. U.S. W. Commc'ns, Inc.**, 928 P.2d 1331 (Colo. App. 1996).

24:7 ACTUAL OR NOMINAL DAMAGES

Plaintiff, *(name)***, has the burden of proving, by a preponderance of the evidence, the nature and extent of** *(insert applicable pronoun)* **damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the interference by the defendant(s),** *(name[s])* **with plaintiff's contract, (and the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries that plaintiff has had or probably will have in the future, including: *[insert any recoverable noneconomic losses for which there is sufficient evidence]***; and**

2. Any economic losses that plaintiff has had or probably will have in the future, including: *[insert any recoverable economic losses for which there is sufficient evidence]***.**

If you find in favor of the plaintiff but do not find any actual damages, you shall award *(insert applicable pronoun)* **nominal damages of one dollar.**

Notes on Use

Because the fact situations to which this instruction would be applicable are so varied, no attempt has been made to itemize the elements of damage that the plaintiff may legally be entitled to recover, or to specify the relevant factors a jury may or should take into account in determining the amount of any particular element of damage.

Source and Authority

1. This instruction is supported by **Westfield Development Co. v. Rifle Investment Associates**, 786 P.2d 1112 (Colo. 1990), the court articulated several rules of damages. Because intentional interference with contract is a tort, the measure of damages may depart from contractual damages when necessary to make the innocent party whole. Such damages may be for emotional distress only. However, to award any damages for emotional distress, such distress must have been a reasonably expectable result of the interference. Finally, under ordinary circumstances, only parties to a contract may recover damages for intentional interference with the contract. *See also* **Ervin v. Amoco Oil Co.**, 885 P.2d 246 (Colo. App. 1994) (emotional distress is compensable injury in action for intentional interference with prospective business relationship if emotional distress damages could be reasonably expected to result from defendant's tortious conduct), *aff'd in part, rev'd in part on other grounds*, 908 P.2d 493 (Colo. 1995); **Batterman v. Wells Fargo Ag Credit Corp.**, 802 P.2d 1112 (Colo. App. 1990) (court quoted and approved RESTATEMENT (SECOND) OF TORTS § 774A(1) (1979) regarding compensable damages). For a discussion of damages, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 1002-04 (5th ed. 1984) (indicating basically three different views concerning allowable damages). *See also* **Hein Enters., Ltd. v. San Francisco**

Real Estate Inv'rs, 720 P.2d 975 (Colo. App. 1985) (loss of business advantage or opportunity recoverable, which "may include loss of profits and chances for gain"); RESTATEMENT § 774A.

2. Unlike other nominal damage torts, e.g., trespass to land, the law does not presume the existence of actual damages. Proof of actual damages is a necessary element of the plaintiff's claim for relief. **Rywalt v. Writer Corp.**, 34 Colo. App. 334, 526 P.2d 316 (1974). On the other hand, if the plaintiff proves he or she sustained some damages, but produces insufficient evidence from which the amount of such damages can be determined, the plaintiff is nonetheless entitled to nominal damages. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 129, at 1002-03.

3. Under appropriate circumstances, *see* Instruction 5:4, plaintiff may also recover punitive damages. *See* S. Johnson, Annotation, *Punitive Damages for Interference With Contract or Business Relationship*, 44 A.L.R. 4th 1078 (1986).

4. In order to avoid double recovery of actual damages, where a plaintiff has received compensation from the person with whom the plaintiff contracted for that person's breach of contract caused by interference of the defendant, the amount of that compensation must be credited against any actual damages the plaintiff may recover from the defendant for having caused the breach. Also, where the contract with which the defendant interfered provided for liquidated damages that have been paid to, and accepted by, the plaintiff, generally no additional actual damages may be recovered by the plaintiff. **Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.**, 690 P.2d 207 (Colo. 1984).

5. Where, as a result of the defendants' tortious interference with the plaintiff's contract, the plaintiff incurs attorney fees in litigating other claims against the defendants and a third-party, plaintiff is entitled to recover those attorney fees as damages; however, the plaintiff is not entitled to recover those fees incurred in litigating the tortious interference with contract claim itself. **Swartz v. Bianco Family Tr.**, 874 P.2d 430 (Colo. App. 1993). Litigation costs incurred by a party in separate litigation may sometimes be an appropriate measure of compensatory damages against another party. **Rocky Mtn. Festivals, Inc. v. Parsons Corp.**, 242 P.3d 1067 (Colo. 2010).