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## Tortious Interference with a Contract in Ohio

Thomas H. Ferguson  
*University of Dayton*

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# TORTIOUS INTERFERENCE WITH A CONTRACT IN OHIO:

*Kenty v. Transamerica Premium Insurance Co.,*  
650 N.E.2d 863 (Ohio 1995)

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## I. INTRODUCTION

In *Kenty v. Transamerica Premium Insurance Co.*,<sup>1</sup> a case of first impression,<sup>2</sup> the Ohio Supreme Court adopted the analysis of the *Restatement (Second) of Torts*' definition of tortious interference with a contract.<sup>3</sup> In *Kenty*, the Ohio Supreme Court affirmed what had become the trend among lower Ohio courts<sup>4</sup> by formally recognizing the claim for tortious interference with a contract.<sup>5</sup> The Ohio Supreme Court made a conscious decision to adopt the analytical format found in section 766 of the *Restatement (Second) of Torts* which requires the interference be *improper*, as opposed to the scheme found in the *Restatement* which requires the interference to be *unprivileged*. Lower courts applying section 766 must be alert to the fact that the *Restatement*

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1. 650 N.E.2d 863 (Ohio 1995).

2. Ohio appellate courts have recognized the cause of action of tortious interference with a contract, but the Ohio Supreme Court had never formally done so. See *infra* note 14 and accompanying text. The Ohio Supreme Court, however, had previously recognized a cause of action for tortious interference with business relationships and contract rights. See *Haller v. Borror Corp.*, 552 N.E.2d 207, 212-13 (Ohio 1990) (citing *Juhasz v. Quik Shops, Inc.*, 379 N.E.2d 235 (Ohio Ct. App. 1977) and *Reichman v. Drake*, 100 N.E.2d 533 (Ohio Ct. App. 1951)).

3. *Kenty*, 650 N.E.2d at 866. The *Restatement (Second) of Torts* defines tortious interference with a contract as follows:

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 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.

RESTATEMENT (SECOND) OF TORTS § 766 (1979).

4. See *infra* notes 16 & 22.

5. *Kenty*, 650 N.E.2d at 866.

(*Second*)’s definition and elements for tortious interference with a contract differ from the definition and elements for that claim found in the original *Restatement*. If these differences are not recognized and addressed, the result will be confusion and uncertainty in the law regarding the elements necessary to sustain a claim for tortious interference with a contract.

This Note applauds the Ohio Supreme Court’s decision to formally recognize a cause of action for tortious interference with a contract and discusses the drawbacks of the court’s opinion. Section II of this Note examines how Ohio appellate courts used the claim of tortious interference with a contract prior to the *Kenty* decision.<sup>6</sup> Section II then discusses policy considerations surrounding the claim of tortious interference with a contract.<sup>7</sup> Section III discusses the facts of *Kenty* and explains the Ohio Supreme Court’s holding.<sup>8</sup> Section IV analyzes the *Kenty* decision.<sup>9</sup> Section IV illustrates that the Ohio Supreme Court correctly decided to recognize a claim for tortious interference with a contract, but could have rested its decision upon existing state case law that better analyzes the claim.<sup>10</sup> Section IV further illustrates that the Ohio Supreme Court failed to set forth a clear test in *Kenty* for lower courts to follow<sup>11</sup> and further confused the state of tortious interference law in its subsequent decision of *A & B-Abell Elevator Co. v. Columbus/Central Ohio Building & Construction Trades Council*.<sup>12</sup> Finally, Section IV reasons that the *Kenty* court failed to adequately support its recognition of tortious interference with a contract as a cause of action.<sup>13</sup> Section V concludes that the Ohio Supreme Court correctly decided to recognize tortious interference with a contract; however, due to the inconsistency in defining the tort, the court gives little or no direction to lower courts to follow.

## II. BACKGROUND

### A. *The Claim of Tortious Interference With a Contract*

In 1940, Ohio courts first began recognizing a claim for tortious interference with a contract.<sup>14</sup> Section 766 of the *Restatement of Torts* defines the elements of tortious interference with a contract as “one who, without

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6. See *infra* notes 14-33 and accompanying text.

7. See *infra* notes 34-44 and accompanying text.

8. See *infra* notes 45-68 and accompanying text.

9. See *infra* notes 69-149 and accompanying text.

10. See *infra* notes 74-88 and accompanying text.

11. See *infra* notes 89-125 and accompanying text.

12. 651 N.E.2d 1283 (Ohio 1995); see *infra* notes 126-40 and accompanying text for a discussion of *A & B-Abell Elevator Co.*

13. See *infra* notes 140-48 and accompanying text.

14. *Horth v. American Aggregates Corp.*, 35 N.E.2d 592, 597-98 (Ohio Ct. App. 1940) (citing RESTATEMENT OF TORTS § 766 (1939)).



privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.”<sup>15</sup> Ohio courts applying this definition required the following four elements: a contract, breach of the contract, inducement by a third party, and the third party’s unprivileged inducement.<sup>16</sup> In 1979, section 766 of the *Restatement (Second) of Torts* modified the *Restatement’s* definition of tortious interference with a contract.<sup>17</sup>

Section 766 of the *Restatement of Torts* differs from its counterpart in the *Restatement (Second) of Torts* in one significant way. The *Restatement of Torts* focuses on whether the interference is “privileged,”<sup>18</sup> while the *Restatement (Second) of Torts* focuses on whether the interference is “improper.”<sup>19</sup> The difference between whether interference is privileged or improper can be dramatic and even determinative in some cases. For instance, a court’s use of either the privileged or improper standard may determine which party bears the burden of proof in a tortious interference action. Under the privilege standard in tort cases, the defendant generally has the burden of proving the existence of privilege.<sup>20</sup> Under the improper standard, in contrast, the plaintiff often bears the burden of proving that the conduct was improper.<sup>21</sup>

15. RESTATEMENT OF TORTS § 766.

16. See *Juhasz v. Quik Shops, Inc.*, 379 N.E.2d 235, 237-38 (Ohio Ct. App. 1977); *Pearse v. McDonald’s Systems of Ohio, Inc.*, 351 N.E.2d 788, 790 (Ohio Ct. App. 1975); *Reichman v. Drake*, 100 N.E.2d 533, 536 (Ohio Ct. App. 1951). In *Juhasz*, the court stated:

[t]he basic principle of such an action is that one who, without a privilege to do so, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship with another, or perform a contract with another is liable to the other for the harm caused thereby.

*Juhasz*, 379 N.E.2d at 238 (citing RESTATEMENT OF TORTS § 766).

17. See *supra* notes 3 & 15 and accompanying text.

18. RESTATEMENT OF TORTS § 766.

19. RESTATEMENT (SECOND) OF TORTS § 766 (1979). The change from the privilege approach to an improper standard is primarily attributable to the lack of definitive rules regarding the existence of a privilege in tortious interference actions, as opposed to other areas of tort law such as defamation and intentional injury to a person. *Id.* § 767 cmt. b. Therefore:

[t]he issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation.

*Id.*

20. See *Carman v. Entner*, No. 13978, 1994 Ohio App. LEXIS 387, at \*23 (Ohio Ct. App. Sept. 23, 1994) (“[t]he burden of proving the defense of a privilege to interfere clearly rests with the defendant.”); *Worrell v. Multipress Corp.*, No. 88-535, 1988 Ohio App. LEXIS 188, at \*25-26 (Ohio Ct. App. Jan. 21, 1988) (“The burden of proving the presence of the circumstances necessary for the existence of a privilege to publish a defamatory communication is upon the defendant.”); *Smith v. Klein*, 492 N.E.2d 852, 856 (Ohio Ct. App. 1985) (finding that if the defendant makes a showing of privilege, plaintiff then has the burden of showing the defendant exceeded the privilege); *Hersh v. Scripps*, 445 N.E.2d 670, 678-79 (Ohio Ct. App. 1981) (finding defendant may establish a privilege by pleading and proving its existence); *but see Sharp v. Clark*, No. 1285, 1992 Ohio App. LEXIS 2624, at \*5 (Ohio Ct. App. May 20, 1992) (stating that the plaintiff has the burden of proving an “intentional, unprivileged interference by the defendant”).

21. *Walter v. Murphy*, 573 N.E.2d 678, 679-80 (Ohio Ct. App. 1988) (finding plaintiff cannot prove facts that would entitle him to relief and none of the allegations made by plaintiff would meet the level of



Once the *Restatement (Second) of Torts* was published, many Ohio courts opted for the improper standard rather than the privilege standard.<sup>22</sup> In *Miller v. Pennitech Industrial Tools*,<sup>23</sup> the Ohio Court of Appeals for Medina County found no tortious interference with a contract where the party interfering did not do so improperly.<sup>24</sup> Before coming to its decision, the *Miller* court reviewed the conflicting definitions given by the *Restatements* and chose to follow the *Restatement (Second)*.<sup>25</sup> Other appellate courts, however, remained faithful to the original definition in the *Restatement of Torts* and applied the privilege approach.<sup>26</sup>

For the courts that use the privilege standard in determining tortious interference with a contract, section 767 of the *Restatement of Torts* lists the factors to consider in determining the existence of a privilege.<sup>27</sup> Courts utilizing the "improper" standard may use the *Restatement (Second) of Torts*, section 767, for guidance.<sup>28</sup> Under either standard, the issue of whether there

improper interference); *RESTATEMENT (SECOND) OF TORTS* § 767 cmt. b (stating that it is sometimes the plaintiff's case to prove an improper interference or lack of justification).

22. See *Miller v. Pennitech Indus. Tools, Inc.*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*7 (Ohio Ct. App. Apr. 19, 1995); *Logsdon v. Fifth Third Bank*, 654 N.E.2d 115, 121 (Ohio Ct. App. 1994); *Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130, 1133 (Ohio Ct. App. 1990); *Walter*, 573 N.E.2d at 679.

23. *Miller*, No. 2356-M 1995 Ohio App. LEXIS 1622.

24. *Id.* at \*10.

25. *Id.* at \*8. The *Miller* court chose to follow the improper standard because of the absence of definite rules that outline the existence or non-existence of a privilege in this area of law. *Id.*; see *supra* note 19 and accompanying text.

26. See *Carman v. Entner*, No. 13978, 1994 Ohio App. LEXIS 387, at \*2 (Ohio Ct. App. Sept. 23, 1994); *Smith v. Ameriflora 1992, Inc.*, 644 N.E.2d 1038, 1043 (Ohio Ct. App. 1994); *Madorsky v. Bernstein*, 626 N.E.2d 694, 696 (Ohio Ct. App. 1993); *Stiles v. Chrysler Motors Corp.*, 624 N.E.2d 238, 243 (Ohio Ct. App. 1993); *Sharp v. Clark*, No. 1285, 1992 Ohio App. LEXIS 2624, at \*14 (Ohio Ct. App. May 20, 1992); *Elwert v. Pilot Life Ins. Co.*, 602 N.E.2d 1219, 1223 (Ohio Ct. App. 1991); *Hart v. Sheffield-Sheffield Lake Board of Educ.*, No. 89CA004708, 1990 Ohio App. LEXIS 4943, at \*7 (Ohio Ct. App. Nov. 7, 1990). In *Smith*, the majority of the court chose to use the *Restatement of Torts* definition because the Ohio Supreme Court had not yet adopted the *Restatement (Second) of Torts* § 766. *Smith*, 644 N.E.2d at 1043 n.1. The *Smith* court went on to state that the Ohio Supreme Court had cited *Juhasz*, utilizing the *Restatement of Torts* privilege standard, as the leading case for tortious interference in business relationships. *Id.* The dissent in *Smith*, however, believed the correct measure of tortious interference with a contract was found in the *Restatement (Second) of Torts* § 766. *Id.* at 1047.

27. *RESTATEMENT OF TORTS* § 767 (1939). Section 767 states:

In determining whether there is a privilege . . . the following are important factors:

- (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.

*Id.*

28. *RESTATEMENT (SECOND) OF TORTS* § 767 (1979). Section 767 states:

In determining whether an actor's conduct of intentionally interfering with a contract . . . relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,

was tortious interference with a contract, including whether the interference was improper or privileged, is generally a question of fact for the jury to decide.<sup>29</sup> The conflict among Ohio's lower courts as to the correct standard mandated the Ohio Supreme Court's resolution of the issue.

Although the *Restatement* and *Restatement (Second) of Torts* are in conflict regarding the proper standard, both the privilege and improper definitions have the same malice requirement.<sup>30</sup> Courts in Ohio require malice in its legal sense rather than ill will or spite.<sup>31</sup> The *Miller* court defined malice to include "'interference in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action.'"<sup>32</sup> Actual malice, however, may be necessary to determine the issue of punitive damages.<sup>33</sup>

### B. Policy Considerations

Policy arguments exist both for and against the claim of tortious interference with a contract. One commentator notes that "in a society founded upon and operating under free enterprise principles, it is the law of contracts,

- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

*Id.*

29. *Miller v. Pennitech Indus. Tools, Inc.*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*10; *Juhasz v. Quik Shops, Inc.*, 379 N.E.2d 235, 239 (Ohio Ct. App. 1977).

30. *Reichman v. Drake*, 100 N.E.2d 533, 537 (Ohio Ct. App. 1951); *Miller*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*12.

31. *Reichman*, 100 N.E.2d at 537; *Sharp v. Clark*, No. 1285, 1992 Ohio App. LEXIS 2624, at \*14 (Ohio Ct. App. May 20, 1992); *Miller*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*12. In *Reichman*, the court quoted 30 AM. JUR. §§ 75-76, which stated:

The malice, however, which makes one liable for procuring a breach of contract is malice in its legal sense, and whether a wrongdoer's motive in interfering is to benefit himself or to gratify his spite by working mischief to another is immaterial; malice in the sense of ill will or spite is not essential.

*Reichman*, 100 N.E.2d at 537.

32. *Miller*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*12 (quoting from RESTATEMENT (SECOND) OF TORTS § 766 cmt. j).

33. *Id.* (defining actual malice in the sense of ill will, spite, or hatred). *Reichman* concerned a claim of tortious interference with a contract between two lessees. 100 N.E.2d at 535. The defendant, a holdover tenant, did not vacate the premises when her lease expired. *Id.* The defendant knew of the lease between the plaintiff and lessor, but did not give possession of the premises to the plaintiff. *Id.* The Hamilton County Court Of Appeals concluded that the defendant had violated the plaintiff's property rights and therefore held the defendant liable for damages. *Id.* at 537. Ordinarily, the damages that can be recovered for tortious interference with a contract are actual damages. *Id.* at 538. The *Reichman* court, however, did find in dicta that actual malice, in the sense of ill will, spite, or hatred, may be important if the plaintiff seeks punitive damages. *Id.* at 537. Punitive damages may be warranted where the interferer "consciously disregard[s] the rights of others with the great probability of causing substantial harm." *Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130, 1135 (Ohio Ct. App. 1990); see also *Preston v. Murty*, 512 N.E.2d 1174, 1175 (Ohio 1987).



not the law of torts, that should constitute the overriding influence in commercial relationships.”<sup>34</sup> In contrast, other commentators have reasoned that “society’s . . . strong interest in the formal integrity of contract,” commercial stability, commercial expectations of individuals, and ethical behavior are strong policies in favor of recognizing tortious interference with a contract.<sup>35</sup> Judge Richard Posner, in his study of the economics of law, found “the fundamental function of contract law . . . is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and make costly self-protective measures unnecessary.”<sup>36</sup> The Ohio Supreme Court has found that the right to contract and the expectational interests in the contract are fundamental to society.<sup>37</sup>

The *Restatement* and *Restatement (Second) of Torts* provide guidance for tortious interference with contract claims by listing factors to consider when determining whether the interference was privileged or improper.<sup>38</sup> When tortious interference with a contract is alleged, a court will balance policy considerations to determine if the claim will succeed.<sup>39</sup> Freedom of action and competition can often be important factors that weigh heavily against a finding of tortious interference with a contract, while the right of contract expectations of the injured party can be a strong factor for a finding of tortious interference with a contract.<sup>40</sup>

In *Reichman v. Drake*,<sup>41</sup> one of Ohio’s earliest cases addressing tortious interference with a contract, the Court of Appeals for Hamilton County found

34. James B. Sales, Comment, *The Tort of Interference With Contract: An Argument for Requiring A "Valid Existing Contract" to Restrain the Use of Tort Law in Circumventing Contract Law Remedies*, 22 TEX. TECH. L. REV. 123, 129 (1991).

35. John Danforth, Comment, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1508-14 (1981).

36. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 81 (3d ed. 1986) (citation omitted). This principle can apply equally to tortious interference claims, where the intentional interferer behaves opportunistically for his own benefit by inducing a contracting party to breach a contract. In the case of a tortious interferer, the injured party is left unable to protect himself from third party interference due to his expectation of contract performance.

37. *Blount v. Smith*, 231 N.E.2d 301, 305 (Ohio 1967). Since Ohio law views expectational interests in contracts as fundamental to society, it is a logical extension to recognize a claim for tortious interference with a contract to protect those interests. A plaintiff in a tortious interference action is seeking from the interfering party damages that the plaintiff would not have incurred had the contract been performed as expected.

38. See *supra* notes 27-28 and accompanying text. Section 767 “indicates the factors to be taken into consideration in determining whether the interference is improper or not, through an appraisal of the several factors and an evaluation of their comparative weight.” RESTATEMENT (SECOND) OF TORTS § 767 cmt. a (1979).

39. *Miller v. Pennitech Indus. Tools*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*12 (Ohio Ct. App. Apr. 19, 1995).

40. *Id.* (finding that the freedom of action weighed too heavily to find tortious interference with a contract). The court found that “[n]ew business increases competition, which should lead to more efficiency, better quality of service and lower costs” and any interference that occurred was not improper, but desirable. *Id.*

41. 100 N.E.2d 533 (Ohio Ct. App. 1951).



that the theory behind tortious interference with a contract is "the right to perform a contract and to reap the profits resulting from such performance, and also the right to performance by the other party."<sup>42</sup> The court also noted that these expectations are "property rights which entitle each party to protection, and to seek compensation by action in tort for any injuries to such contract."<sup>43</sup> Thus, the facts of each individual case will determine the weight a court affords the varying factors from freedom to contract to contractual expectations.<sup>44</sup>

### III. FACTS AND HOLDING

On November 11, 1986, Barbara Kenty bought an automobile by securing a loan from Bank One, Columbus (Bank One).<sup>45</sup> The loan agreement granted Bank One a security interest in the automobile as collateral for the loan.<sup>46</sup> The agreement also required Kenty to provide insurance on the automobile and to provide Bank One evidence of such insurance.<sup>47</sup> Along with the loan agreement, Kenty executed a "Notice of Requirement to Provide Insurance."<sup>48</sup> Kenty subsequently failed to obtain the required insurance.<sup>49</sup> Upon Kenty's failure to provide insurance, Bank One obtained "collateral

42. *Id.* at 536.

43. *Id.*

44. The *Restatement (Second) of Torts* § 766 states:

The plaintiff's interest in his contractual rights and expectancies must be weighed, however, against the defendant's interest in freedom of action. If the defendant's conduct is predatory the scale on his side may weigh very lightly, but if his conduct is not predatory it may weigh heavily. The issue is whether in the given circumstances [the defendant's] interest and the social interest in allowing the freedom claimed by [the defendant] are sufficient to outweigh the harm that [the defendant's] conduct was designed to produce.

RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (1979).

45. *Kenty v. Transamerica Premier Ins. Co.*, 650 N.E.2d 863, 864 (Ohio 1995).

46. *Id.*

47. *Kenty v. Transamerica Premier Ins. Co.*, No. 93AP-478, 1993 Ohio App. LEXIS 5596, at \*1 (Ohio Ct. App. Nov. 18, 1993).

48. *Kenty*, 650 N.E.2d at 864. The Notice of Requirement to Provide Insurance read: I understand the terms of my loan require that: (a) I provide property insurance against loss or damage . . . on the collateral securing my loan, in an amount sufficient to cover the outstanding balance on my loan, plus any existing liens on the collateral. This coverage is commonly referred to as collision and comprehensive insurance, if the collateral is personal property . . . I understand that I may obtain the insurance from any agent or company of my choice; if I fail to obtain the required insurance BANK ONE, at its option, but without any obligation to do so, may apply in my name and at my expense to purchase limited insurance for the protection of only BANK ONE for the amount of my loan. I authorize BANK ONE to add such insurance premiums, and finance charges thereon, to my loan balance. I understand that BANK ONE will retain a security interest in the collateral securing my loan until the entire balance, including any premiums and finance charges, is paid. ANY INSURANCE OBTAINED BY BANK ONE WILL NOT PROVIDE ME WITH LIABILITY COVERAGE FOR BODILY INJURY OR PROPERTY DAMAGE AND WILL NOT FULFILL THE REQUIREMENTS OF ANY FINANCIAL RESPONSIBILITY LAW.

*Id.* at 864-65.

49. *Id.* at 865.

protection insurance" from Transamerica Premier Insurance Company (Transamerica).<sup>50</sup>

On July 21, 1992, Kenty filed a class action complaint in the Franklin County Court of Common Pleas which alleged three counts of wrongdoing by Bank One and Transamerica.<sup>51</sup> Count one of the complaint alleged that Transamerica tortiously interfered with the contract between Kenty and Bank One by providing insurance coverage to Bank One which Kenty did not agree to purchase.<sup>52</sup> Kenty claimed the insurance premiums that Bank One added to Kenty's loan balance exceeded the premiums she would be responsible to pay under the insurance notice in the loan.<sup>53</sup> Kenty claimed that the insurance notice in the loan required her to obtain only property insurance, but that appellees had bought additional coverage and added those premiums to Kenty's loan balance.<sup>54</sup> Kenty complained that Bank One and Transamerica designed a scheme whereby Transamerica provided insurance coverage for Kenty at artificially inflated prices.<sup>55</sup> Kenty also claimed that commissions paid by Transamerica to Bank One Wisconsin Insurance for the purchase of the insurance coverage were not deducted from the premiums added to Kenty's loan.<sup>56</sup>

Count two of Kenty's complaint alleged that the appellees engaged in unlawful civil conspiracy by adding premiums from the six coverages without deducting commissions received by Bank One Wisconsin Insurance.<sup>57</sup> The third count of Kenty's complaint alleged a breach of duty of good faith and fair dealing by Transamerica.<sup>58</sup>

On October 19, 1992, and October 20, 1992, Bank One and Transamerica moved to dismiss Kenty's complaint under Ohio Rule of Civil Procedure 12(b)(6).<sup>59</sup> The trial court granted the motions, finding that Kenty had not

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50. *Id.* Bank One obtained the collateral insurance from 1986 through 1990, adding the premiums to Kenty's loan balance. *Id.* The collateral insurance obtained by Bank One included six coverages: "conversion, embezzlement and secretion coverage, mechanics lien coverage, premium deficiency coverage, repossession expense coverage, repossessed vehicle coverage, and repossession storage expense coverage." *Id.*

51. *Kenty*, No. 93AP-478, 1993 Ohio App. LEXIS 5596, at \*1 (Ohio Ct. App. Nov. 18, 1993). Defendants/Appellees in the case consisted of Banc One Corporation, Banc One Ohio Corporation, Bank One Wisconsin Services Corporation, Transamerica Premier Insurance Company, and Transamerica Premier Insurance Services, Inc. *Id.* Appellee Banc One Corporation owns Banc One Ohio Corporation and Bank One Wisconsin Insurance Services Corporation. *Kenty*, 650 N.E.2d at 865. Banc One Ohio Corporation is a holding company for Bank One Columbus. *Id.* Appellee Transamerica Premier Insurance Services, Inc. is owned by Transamerica Premier Insurance Company. *Id.*

52. *Kenty*, 650 N.E.2d at 865.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* Ohio Rule of Civil Procedure 12(b)(6) provides the defense that no claim has been stated upon



stated a claim upon which relief could be granted.<sup>60</sup> The Court of Appeals affirmed the trial court's judgment, and Kenty appealed to the Ohio Supreme Court.<sup>61</sup>

In *Kenty v. Transamerica Premier Insurance Co.*,<sup>62</sup> the Ohio Supreme Court formally recognized tortious interference with a contract as a cause of action.<sup>63</sup> In doing so, the court followed the reasoning of the *Restatement (Second) of Torts*,<sup>64</sup> identifying five elements that make up the claim of tortious interference with a contract.<sup>65</sup> These elements are: "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages."<sup>66</sup> The Ohio Supreme Court reversed and remanded the judgment made by the Court of Appeals for Franklin County regarding Kenty's claims for tortious interference with a contract and unlawful civil conspiracy.<sup>67</sup> The court found that Kenty stated a claim for tortious interference with a contract and for unlawful civil conspiracy.<sup>68</sup>

#### IV. ANALYSIS

In *Kenty*, the Ohio Supreme Court correctly recognized the claim of tortious interference with a contract. In deciding to recognize this cause of action, the Ohio Supreme Court cited one Ohio appellate case,<sup>69</sup> three out-of-state cases<sup>70</sup> and the *Restatement (Second) of Torts* section 766.<sup>71</sup> The *Kenty* court followed the direction of some lower courts in Ohio<sup>72</sup> by adopting the analysis of the *Restatement (Second)* as a basis for tortious interference with a contract.<sup>73</sup>

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which relief may be granted. OHIO R. CIV. P. 12(b)(6).

60. *Kenty*, 650 N.E.2d at 865.

61. *Id.*

62. *Id.* at 863.

63. *Id.* at 866.

64. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

65. *Kenty*, 650 N.E.2d at 866.

66. *Id.*

67. *Id.* at 867.

68. *Id.* at 866-67. The Ohio Supreme Court did not render a decision on the claim of breach of duty of good faith and fair dealing because that issue was not appealed.

69. The court cited the Franklin County Court of Appeals decision in *Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130 (Ohio Ct. App. 1990). *Kenty*, 650 N.E.2d at 866.

70. *Trimble v. City & County of Denver*, 697 P.2d 716 (Colo. 1985); *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398 (Iowa 1982); *Hanger One, Inc. v. Davis Assocs., Inc.*, 431 A.2d 792 (N.H. 1981).

71. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

72. See *supra* note 22 and accompanying text.

73. *Kenty*, 650 N.E.2d at 866.



### A. Ohio Authority Used by the Court

In *Kenty*, the Ohio Supreme Court cited to *Developers Three v. Nationwide Insurance Co.*<sup>74</sup> for support of its recognition of the tortious interference with a contract claim. In *Developers Three*, the Court of Appeals for Franklin County held that damages for tortious interference with a contract cannot be based on a theory of unjust enrichment.<sup>75</sup> The law concerning tortious interference with a contract is defined in *Developers Three*,<sup>76</sup> but the application of the cause of action is not discussed.<sup>77</sup> The Supreme Court of Ohio, in citing *Developers Three*, chose a case that offered little guidance for future courts attempting to analyze the claim.

The Ohio Supreme Court could have chosen from a myriad of Ohio cases that better explain and analyze the claim of tortious interference with a contract than *Developers Three*. For example, in *Miller v. Pennitech Industrial Tools, Inc.*,<sup>78</sup> the Court of Appeals for Medina County analyzed tortious interference with a contract in great detail. The *Miller* court not only looked at both standards<sup>79</sup> that have been articulated for tortious interference with a contract, but also listed factors that “may be considered and balanced” in deciding if the interference is improper.<sup>80</sup> In fact, the *Miller* court explicitly rejected analyzing the claim on the “basis of ‘privilege.’”<sup>81</sup> The facts of each particular case determine whether there has been improper intentional interference.<sup>82</sup> The *Miller* court then discussed the particular facts of the case in light of the definition and factors to consider and concluded the interference was not improper.<sup>83</sup> By going through similar steps, the Ohio Supreme Court would

74. 582 N.E.2d 1130 (Ohio Ct. App. 1990).

75. *Id.* at 1136.

76. *Id.* at 1133 (quoting RESTATEMENT (SECOND) OF TORTS § 766 (1979)).

77. *Id.* The court merely defines tortious interference with a contract and discusses why the cause of action cannot be based on a theory of unjust enrichment. *Id.* at 1133-34. The court gives no elements, and it does not direct lower courts in their analysis of tortious interference claims.

78. No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*3-13 (Ohio Ct. App. Apr. 19, 1995).

79. See *supra* notes 3 & 15 and accompanying text. The *Miller* court chose to use the “improper” standard of the *Restatement (Second) of Torts* § 766. *Miller*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*8.

80. *Miller*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*9 (quoting RESTATEMENT (SECOND) OF TORTS § 767); see also *supra* note 28 and accompanying text.

81. *Miller*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*10.

82. *Id.* at \*9 (finding that a decision towards improper interference cannot be made by generalizations or rules of law). “[D]etermination of whether an interference is improper is under the particular circumstances” of each case. RESTATEMENT (SECOND) OF TORTS § 767 cmt. b.

83. *Miller*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*7-17. Improper interference was not proven even if the plaintiff, Pennitech, could show the third party induced Miller to terminate employment with Pennitech by promising Miller an exclusive sales representation. *Id.* at \*12-13. Miller’s contract was terminable at will, and the third party’s conduct was not illegal. *Id.* The *Miller* court found “[n]ew business increases competition, which should lead to more efficiency, better quality of service and lower costs; thus, the] conduct favors a finding that the interference, if any, was not only proper, but desirable.” *Id.* at \*13. The decision in *Miller* demonstrates that the court was looking for conduct that was improper, not whether the

have given lower courts in Ohio a basis on where and how to begin analyzing the claim of tortious interference with a contract.

In *Logsdon v. Fifth Third Bank*,<sup>84</sup> a case factually similar to *Kenty*,<sup>85</sup> the Court of Appeals for Lucas County held that an insurance company did not tortiously interfere with the contract between Logsdon and the bank.<sup>86</sup> The *Logsdon* court found that the insurance company merely sold the insurance coverage to the bank and that there was no evidence the bank was induced to pass on the additional insurance coverage charges above the contract requirements.<sup>87</sup> The decision not only defined tortious interference with a contract, but also gave direction in analyzing such claims.<sup>88</sup> The Ohio Supreme Court in *Kenty*, instead of being so abstract, should have given more direction for analyzing a tortious interference with a contract claim so that lower courts could better understand this area of the law in Ohio.

In choosing *Developers Three* to analyze the tortious interference claim, the *Kenty* court provided no guidance to lower Ohio courts in their future analysis of such claims. Both *Miller* and *Logsdon* are cases which would have better served the Ohio Supreme Court in its recognition of the tortious interference with a contract claim. *Miller* and *Logsdon* provide more direction on the proper evaluation of a tortious interference with a contract claim. Citation to cases such as these would have given lower courts a better basis for analyzing the claim of tortious interference with a contract.

### B. An Unclear Decision

In *Kenty*, the Ohio Supreme Court relied upon *Restatement (Second) of Torts* section 766 to reach its decision. The *Kenty* court derived five elements

conduct by the interfering party was privileged or justified. Although *Miller* states that the question of impropriety is generally a question of fact, the court found, after weighing all the factors, that the action by the third party "weighs so heavily in favor of freedom of action that we decide the question as a matter of law." *Id.* at \*11.

84. 654 N.E.2d 115 (Ohio Ct. App. 1994).

85. Logsdon purchased an automobile through a loan from Fifth Third Bank. *Id.* at 116. The loan agreement contained a clause that Logsdon would obtain insurance on the automobile. *Id.* If Logsdon did not obtain insurance, the loan agreement allowed the bank to obtain the insurance itself, with reimbursement from Logsdon. *Id.* Logsdon failed to obtain the required insurance, and the bank purchased collision and comprehensive coverage. *Id.* at 117. In addition, the bank purchased mechanic's lien expenses, repossession expenses, storage and towing costs, conversion, and embezzlement insurance. *Id.* Subsequently, Logsdon filed suit against the bank for charging her more than basic comprehensive and collision insurance called for under the loan. *Id.*

86. *Id.* at 122.

87. *Id.* at 121. In *Kenty*, however, the Ohio Supreme Court found that possible overcharging for insurance premiums by Bank One Columbus could have been a breach of the contract between Kenty and Bank One Columbus induced by Transamerica. *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995).

88. *Logsdon*, 654 N.E.2d at 121. "The conduct focused upon [in section 766] is what a defendant does to prevent a third person from performing his contract with plaintiff" . . . [and] "[i]nducement may be by threat, persuasion or intimidation and must be the legal cause of plaintiff's loss." *Id.* (quoting Norton v. Popper, No. 89AP-906, 1990 Ohio App. LEXIS 2563 (Ohio Ct. App. June 19, 1990)).



from the *Restatement (Second)* section 766 that constitute the claim of tortious interference with a contract.<sup>89</sup> A comparison of the elements in *Kenty* to those of the definition of the *Restatement (Second)* leads to an interesting and confusing conclusion. The first element, the existence of a contract,<sup>90</sup> is incorporated in the *Restatement (Second) of Torts* definition.<sup>91</sup> Element two, the wrongdoer's knowledge of the contract,<sup>92</sup> is very similar to that in the *Restatement (Second) of Torts*.<sup>93</sup> Element three, the wrongdoer's intentional procurement of the contract's breach,<sup>94</sup> is also similar to that found in the *Restatement (Second) of Torts*.<sup>95</sup> Element five, resulting damages,<sup>96</sup> is clearly found in the *Restatement (Second) of Torts*.<sup>97</sup> The fourth element, lack of justification,<sup>98</sup> however, is not explicitly stated in the *Restatement (Second) of Torts*<sup>99</sup> and creates a problem for the *Kenty* court.

The Ohio Supreme Court expressly adopted the analysis of the *Restatement (Second) of Torts* section 766,<sup>100</sup> yet ignored a crucial part of the *Restatement (Second)* definition. The *Restatement (Second) of Torts* looks to determine whether the interference was *improper*,<sup>101</sup> not whether there is a *lack of justification* for the interference, as the *Kenty* court<sup>102</sup> established. This language used by the Ohio Supreme Court produces a confusing result by failing to define *lack of justification*.

The confusion is compounded by the fact that Ohio courts have frequently used the terms *justification* and *privilege* interchangeably in tortious interference with contract claims.<sup>103</sup> For example, in *Reichman v. Drake*,<sup>104</sup> the

89. *Kenty*, 650 N.E.2d at 866.

90. *Id.*

91. See *supra* note 3 and accompanying text.

92. *Kenty*, 650 N.E.2d at 866.

93. See *supra* note 3 and accompanying text. The *Restatement (Second) of Torts* calls for intentional interference with a contract; thus, the wrongdoer needs knowledge of the contract to intentionally interfere.

94. *Kenty*, 650 N.E.2d at 866.

95. See *supra* note 3 and accompanying text. While the *Restatement (Second) of Torts* uses the terms "inducing or otherwise causing" and *Kenty* uses "procurement," these terms have essentially the same meaning. Procurement is defined as "the act of obtaining, attainment, acquisition, bringing about, [or] effecting." *Ford v. City of Caldwell*, 321 P.2d 589, 593 (Idaho 1958) (citation omitted). "Inducement means to cause a party to choose one course of conduct rather than another." *Stoltz v. Delaware Real Estate Comm'n.*, 473 A.2d 1258, 1264 (Del. Super. Ct. 1984).

96. *Kenty*, 650 N.E.2d at 866.

97. See *supra* note 3 and accompanying text.

98. *Kenty*, 650 N.E.2d at 866.

99. See *supra* note 3 and accompanying text. The *Restatement (Second) of Torts* looks to whether the conduct of another is improper rather than whether the conduct is justified. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

100. *Kenty*, 650 N.E.2d at 866.

101. RESTATEMENT (SECOND) OF TORTS § 766. Under the malice requirement for this claim, the comments in the *Restatement (Second) of Torts* defines malice as "intentional interference without justification." *Id.* § 766 cmt. s.

102. *Kenty*, 650 N.E.2d at 866.

103. See *Smith v. Ameriflora 1992, Inc.*, 644 N.E.2d 1038, 1043 (Ohio Ct. App. 1994); *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 629 N.E.2d 28, 33 (Ohio Ct. App. 1993); *Hart v. Sheffield-*



Court of Appeals for Hamilton County utilized the privilege standard, but chose to define malice in tortious interference with a contract as "unjustified interference."<sup>105</sup> In *Juhasz v. Quik Shops, Inc.*,<sup>106</sup> the defendant raised an affirmative defense of justification, and the Court of Appeals of Summit County treated it as an issue of privilege.<sup>107</sup> In *Universal Coach, Inc. v. New York City Transit Authority, Inc.*,<sup>108</sup> the plaintiff stated a claim for tortious interference with a contract, establishing the fourth element by showing "the defendant's conduct was malicious and without legal justification."<sup>109</sup> The *Universal Coach* court, however, cited *Juhasz*<sup>110</sup> as authority for tortious interference with a contract.<sup>111</sup> The foregoing cases demonstrate how Ohio courts have in the past treated *justification* and *privilege* interchangeably.

A comparison of the definitions of justification, improper, and privilege lead to a strong assumption that justification is closely related, if not analogous, to privilege.<sup>112</sup> If the *Kenty* court meant to adopt tortious interference with a contract as stated in section 766 of the *Restatement (Second) of Torts*, the fourth element should be in terms of impropriety, not justification.<sup>113</sup> It is possible that the Ohio Supreme Court intended *lack of justification* to be synonymous with *improper interference*. This conclusion, however, is merely speculative, especially in light of the lower courts' treatment of the term "justification."<sup>114</sup> Since the *Kenty* court adopted the analysis of the *Restatement (Second)*, the court should have explicitly stated that lack of justification should be interpreted as improper interference. Otherwise, lower courts in Ohio may treat lack of justification as a privilege standard.<sup>115</sup> The Ohio Supreme Court, to provide better guidance, should have used improper interference as the fourth element.

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Sheffield Lake Bd. of Educ., No. 89CA004708, 1990 Ohio App. LEXIS 4943, at \*7 (Ohio Ct. App. Nov. 7, 1990); *Juhasz v. Quik Shops, Inc.*, 379 N.E.2d 235, 238 (Ohio Ct. App. 1977); *Reichman v. Drake*, 100 N.E.2d 533, 537 (Ohio Ct. App. 1951).

104. 100 N.E.2d 533.

105. *Reichman*, 100 N.E.2d at 537; see also *Hart*, No. 89CA004708, 1990 Ohio App. LEXIS 4943, at \*8.

106. 379 N.E.2d 235.

107. *Id.* at 238.

108. 629 N.E.2d 28 (Ohio Ct. App. 1993).

109. *Id.* at 33.

110. *Juhasz*, 379 N.E.2d at 238 (utilizing the *Restatement of Torts* § 766 and the privilege standard).

111. *Universal Coach*, 629 N.E.2d at 34.

112. The definition of these words shows "justification" and "privilege" are more closely analogous than "justification" and "improper." Justification is defined as a "[j]ust, lawful excuse or reason for act or failing to act." BLACK'S LAW DICTIONARY 865 (6th ed. 1990). Privilege, in connection with torts, is "a general term applied to certain rules of law by which particular circumstances *justify* conduct which otherwise would be tortious." *Id.* at 1198 (emphasis added). Improper means "[n]ot suitable; unfit; not suited to the character, time, and place." *Id.* at 757. *Black's Law Dictionary* also notes that the "[t]erm [justification] is not widely used in torts where, instead, defenses and privileges are common." *Id.* at 866.

113. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

114. See *supra* notes 103-11 and accompanying text.

115. See *supra* notes 103-11 and accompanying text.

What is required in order for *lack of justification* to exist under *Kenty*? The Ohio Supreme Court failed to define, in any way, when interference would or would not be justified. The court may have considered this element extremely fact sensitive<sup>116</sup> and intended it to be judged on a case by case basis, or that the lower courts should fashion a definition. In *Trimble v. City & County of Denver*,<sup>117</sup> the Colorado Supreme Court adopted the *Restatement (Second) of Torts* standard and, consequently, the improper standard.<sup>118</sup> In determining whether interference was improper, the *Trimble* court referred to section 767 of the *Restatement (Second) of Torts*,<sup>119</sup> which lists factors to consider in determining the issue of improper interference.<sup>120</sup> By referring to these factors, the Colorado Supreme Court gave some direction to the Colorado lower courts in their determination of whether interference is improper.

The Ohio Supreme Court also may have intended for the factors listed in section 767 of the *Restatement (Second) of Torts*,<sup>121</sup> referring to improper interference, to be used in determining lack of justification,<sup>122</sup> but this also amounts to speculation.<sup>123</sup> The *Kenty* court could have given lower courts a sense of direction by stating factors to consider in determining the court's *lack of justification*,<sup>124</sup> or by referring to section 767 of the *Restatement (Second) of Torts*.<sup>125</sup> By using *improper* language and giving factors to consider, the court could have made the *Kenty* decision clearer and given lower courts a sense of direction in their analysis of tortious interference with a contract claims.

### C. Confusing Subsequent Decision

Less than one month after the *Kenty* decision, the Ohio Supreme Court decided *A & B-Abell Elevator Co. v. Columbus/Central Ohio Building &*

116. See, e.g., *Miller v. Pennitech Indus. Tools, Inc.*, No. 2356-M, 1995 Ohio App. LEXIS 1622, at \*7 (Ohio Ct. App. Apr. 19, 1995).

117. 697 P.2d 716 (Colo. 1985).

118. *Id.* at 726. In *Trimble*, the court looked to see if the conduct of the defendant was improper; however, after fully analyzing the issue, the court found the actions of the defendant were "unjustified and improper." *Id.* at 726. The court clearly focused on whether the interference was improper, and did not mention the language concerning justification until a final decision was made on the issue. *Id.* Thus, *Trimble* does not settle the issue of whether unjustified and improper are one and the same, or whether different conclusions could be reached for them individually. In fact, the conjunction "and" would lead one to conclude that the two (unjustified and improper) are distinct from one another.

119. See *supra* note 28 and accompanying text.

120. *Trimble*, 697 P.2d at 726.

121. See *supra* note 28 and accompanying text.

122. One could come to this conclusion because *Kenty* cited *Trimble*, a case which analyzed the factors of whether interference was improper or not. *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995).

123. Because lower courts in Ohio have treated justification and privilege in much the same manner, they may continue to do so in claims of tortious interference with a contract until specifically told otherwise. See *supra* notes 103-11 and accompanying text.

124. *Kenty*, 650 N.E.2d at 866.

125. RESTATEMENT (SECOND) OF TORTS § 767 (1979).



*Construction Trades Council*,<sup>126</sup> which also dealt with tortious interference with a contract. *A & B-Abell*,<sup>127</sup> although factually different from *Kenty*,<sup>128</sup> confuses the state of the law for tortious interference with a contract in Ohio. In *A & B-Abell*, the Ohio Supreme Court stated that “[t]he torts of interference with business relation[ships] and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another, or not to perform a contract with another.”<sup>129</sup> This definition is in direct conflict with the definition given in *Kenty*,<sup>130</sup> and more in concert with section 766 of the *Restatement of Torts* and the privilege standard.<sup>131</sup> The lower courts in Ohio now theoretically have two definitions to apply in tortious interference with a contract actions.

In *A & B-Abell*, the Ohio Supreme Court did qualify its opinion, but did not provide adequate guidance to lower state courts regarding which definition to use. The *A & B-Abell* court found that where tortious interference with a contract is a derivative claim to defamation, the heightened standard of malice<sup>132</sup> found in defamation should be used in both claims.<sup>133</sup> The privilege standard of tortious interference with a contract in *A & B-Abell* could be limited to those times where tortious interference with a contract is a derivative of the plaintiff's theory, as in defamation claims. But the court failed to make this qualification and chose to define tortious interference with a contract through a privilege standard. In fact, the Ohio Supreme Court did not address or cite to *Kenty* in its *A & B-Abell* decision.

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126. 651 N.E.2d 1283 (Ohio 1995).

127. *Id.* *A & B-Abell* is a contractor which submitted a bid to the city of Columbus for repair contracts on the city's airport. *Id.* at 1286. *A & B-Abell* was the lowest bidder, but was initially not awarded the bid because information about past practices at *A & B-Abell* was given to the city by the secretary-treasurer of Columbus. *Id.* The secretary-treasurer provided the city with information that *A & B-Abell* had not performed previous contracts in Indiana. *Id.* at 1287. Less than one month later, however, the contracts were awarded to *A & B-Abell*. *Id.* at 1286.

128. *Kenty*, 650 N.E.2d 863. The *A & B-Abell* decision dealt mainly with the issue of defamation. *A & B-Abell*, 651 N.E.2d at 1293-95.

129. *A & B-Abell*, 651 N.E.2d at 1294.

130. *Kenty*, 650 N.E.2d at 866. The *Kenty* decision uses an improper standard, while the *A & B-Abell* decision employs a privilege standard. See *supra* notes 3 & 15 and accompanying text.

131. See *supra* note 15 and accompanying text.

132. *A & B-Abell*, 651 N.E.2d at 1294. The court discusses why the heightened standard of malice is required where tortious interference with a contract is a derivative claim to defamation. *Id.* at 1294-95. This Note, however, does not discuss the appropriateness of that conclusion, but merely notes the fact that the general level of malice needed for a claim of tortious interference with a contract is legal malice. See *supra* notes 30-33 and accompanying text.

133. *A & B-Abell*, 651 N.E.2d at 1295. In *A & B-Abell*, the Ohio Supreme Court found that the defendant had published information on a privileged occasion. *Id.* at 1291-92. Therefore, in order to defeat the privilege of an otherwise defamatory statement, a showing of actual malice is necessary. *Id.* at 1292. The court concluded that there was insufficient evidence to establish actual malice. *Id.* at 1294. In discussing the tortious interference claim, the court found that “when defamation and tortious interference actions are based on the same statements, the protection afforded by virtue of the heightened standard of malice must apply to both claims.” *Id.* at 1295.



In both *Kenty* and *A & B-Abell*, the Ohio Supreme Court defined tortious interference with a contract in two distinct ways. The different factual settings of the cases may explain why the court in *A & B-Abell* analyzed the defendant's conduct in terms of a privilege rather than an improper standard, since *A & B-Abell* dealt with statements that were part of both defamation and tortious interference actions, and privilege is a defense in defamation cases.<sup>134</sup> The *A & B-Abell* decision is confusing, however, because the privilege standard found in *A & B-Abell* was the definition many Ohio appellate courts were using prior to the *Kenty* decision.<sup>135</sup>

Now, instead of a split among the lower courts as to the correct standard of law in tortious interference claims, the split is at Ohio's highest court. The *A & B-Abell* decision could signify that *Kenty*, which adopted the *Restatement (Second) of Torts* improper standard,<sup>136</sup> intended *lack of justification* to mean *lack of privilege*. *Kenty*, however, required the plaintiff to prove *lack of justification*.<sup>137</sup> Lower Ohio courts may be confused regarding the correct definition for tortious interference with a contract and regarding the burden of proof as to impropriety or privilege.

The Ohio Supreme Court could have easily avoided this confusion by clarifying its decision in *A & B-Abell*. The court should have noted that the correct definition of tortious interference with a contract is that put forth in *Kenty*,<sup>138</sup> however, since the tortious interference claim in the *A & B-Abell* case is a derivative claim to defamation, the definition should be refined. The refined definition, if an act is privileged or not, is more appropriate to the underlying claim of defamation where the two claims are based on the same statements.<sup>139</sup> A clear explanation of the apparent abandonment of the *Kenty* definition would have at least confined the confusion to the issue of the meaning of *lack of justification*.<sup>140</sup> Furthermore, the fact that the Ohio Supreme Court chose to redefine tortious interference with a contract without qualifying it fully lends support to the proposition that the court did not attach a sufficient meaning to *lack of justification*. Lack of justification, thus, may mean a lack of privilege to interfere.

#### *D. Lack of Justification Given by the Court*

In its official recognition of tortious interference with a contract as a claim, the Ohio Supreme Court failed to give any reasons for the allowance of

134. See *supra* note 133 and accompanying text.

135. See *supra* note 16 and accompanying text.

136. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

137. *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995) (implying the plaintiff must prove lack of justification); see *supra* notes 20-21 and accompanying text.

138. *Kenty*, 650 N.E.2d at 866 (adopting the *Restatement (Second) of Torts* § 766). In fact, the Ohio Supreme Court did not address or cite to *Kenty* in the *A & B-Abell* decision.

139. See *supra* note 130 and accompanying text.

140. *Kenty*, 650 N.E.2d at 866.

this tort in Ohio. The court made a cursory statement that Ohio recognizes this tort. The court should have given some rationale regarding this recognition rather than merely “conform[ing] to the trend of other Ohio courts.”<sup>141</sup>

The *Kenty* court does not cite any cases that give policy considerations for allowing the claim of tortious interference with a contract.<sup>142</sup> It seems odd that the highest court in Ohio would simply recognize tortious interference with a contract because lower courts have done so previously. The Ohio Supreme Court should have explained its basis for recognizing this claim.

The Ohio Supreme Court could have rested its recognition of the claim on the grounds of protecting the integrity of contracts<sup>143</sup> or a desire to punish wrongdoers.<sup>144</sup> The court could have also reasoned that contracting parties’ expectational interests are important and that those who intentionally interfere with those interests should be held liable for the resulting damages.<sup>145</sup> Another reason for recognizing this claim is as a deterrent measure. The recognition of tortious interference with a contract may deter third parties from interfering with others’ contracts. Recognizing this action also makes sense from a commercial cost perspective.<sup>146</sup> Under a commercial cost argument, contracts, in theory, are interfered with when an overall net gain results. This net gain could take many forms, such as cost benefits or efficiency.<sup>147</sup> The Ohio Supreme Court, however, may not have asserted a rationale for recognizing tortious interference with a contract because the court wanted to allow lower courts to develop this claim further.

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141. *Id.*

142. *Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130 (Ohio Ct. App. 1990); *Trimble v. City & County of Denver*, 697 P.2d 716 (Colo. 1985); *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398 (Iowa 1982); *Hanger One, Inc. v. Davis Assocs., Inc.*, 431 A.2d 792 (N.H. 1981). In *Trimble*, however, the court used the *Restatement (Second) of Torts*, § 767, which does give factors to consider in making a decision on the issue of improper conduct. *Trimble*, 697 P.2d at 726. Section 767 does take into account policy considerations. See *supra* note 28 and accompanying text.

143. *Danforth*, *supra* note 35 at 1508-14.

144. See, e.g., *Reichman v. Drake*, 100 N.E.2d 533 (Ohio Ct. App. 1951). Consider, for example, a case in which “C,” a third party, improperly interferes with a contract between “A” and “B,” A being the injured party. If tortious interference with a contract is not recognized, A’s only chance for compensation is to sue B for breach of contract. But if B is unable to pay damages, A would not secure compensation for his losses unless A had insurance. But one of the reasons a party contracts with another party is for insurance of the performance. If tortious interference with a contract were recognized, A could still obtain compensation from C, a party who helped bring about the injury. Of course, if both B and C are unable to pay damages, A will be unable to receive compensation from them and will be left to his own resources. The point is, however, that C should not be able to escape potential liability where C helped bring about the injury by inducing B.

145. See *supra* note 37 and accompanying text.

146. For instance, a party will likely only interfere where, after taking all costs into account, an overall benefit would flow to the interfering party. Thus, any damages the interfering party has to pay to the aggrieved party will be less than the amount the interfering party expects to gain from the transaction. The aggrieved party obtains compensation for his loss due to the improper interference, while the interfering party derives a net gain. This type of approach takes into account two rival viewpoints that are expressed in the *Restatement (Second) of Torts* § 767, contract performance/expectations and freedom of action. See *RESTATEMENT (SECOND) OF TORTS* § 767 (1979).

147. See *supra* note 40 and accompanying text.



The Court, however, should have explicitly recognized section 767 of the *Restatement (Second) of Torts*.<sup>148</sup> These factors, although there is no *per se* rule among them, basically represent a balancing act of policy considerations.<sup>149</sup> The use of these factors would give lower courts in Ohio a firm basis for analyzing tortious interference claims.

## V. CONCLUSION

The Ohio Supreme Court was correct in formally recognizing tortious interference with a contract because injured parties now will be able to seek compensation for their injuries against all parties who brought about the injury rather than just the breaching party. Section 767 of the *Restatement (Second) of Torts* is a solid building block; however, the *Kenty* decision failed to completely follow its direction. The *Kenty* court did not give an explanation of its choice of the *lack of justification* terminology instead of *impropriety*. Also, the court gave no indication of the necessary components to prove lack of justification. In its subsequent decision of *A & B-Abell*, the Ohio Supreme Court deferred to the definition of tortious interference of a contract as given in section 766 of the *Restatement of Torts* and the privilege standard. In less than one month, the Ohio Supreme Court recognized two conflicting definitions for tortious interference with a contract. The decision in *A & B-Abell* will likely further confuse lower courts regarding the correct standard of tortious interference to use, especially in light of the fact that courts in Ohio have used the terms “justification” and “privilege” interchangeably. Are the lower courts in Ohio now able to choose between the privilege standard and an improper standard? And are they free to devise their own factors in determining when interference is improper or privileged? The Ohio Supreme Court should have taken these questions into consideration in *Kenty*. The Ohio Supreme Court’s explanation of its recognition of this claim and specification of the proper standard in analyzing tortious interference claims would have provided lower courts in Ohio with a roadmap to follow through the law of tortious interference with a contract.

Thomas H. Ferguson

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148. See *supra* note 28 and accompanying text.

149. For example, the freedom of an actor is balanced against the contractual interests of the alleged victim. RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1979); see *supra* note 28 and accompanying text.