19.03 INTENTIONAL INTERFERENCE WITH CONTRACT OR PROSPECTIVE ECONOMIC ADVANTAGE – JUSTIFICATION AND PRIVILEGE

The plaintiff claims that the defendant’s conduct was not privileged or justified.

In order for the plaintiff to prevail, you must decide that one of the following statements is more likely true than not true:

1. the defendant’s conduct was primarily motivated by something other than [protection of [his][her][its] economic interests] [safety concerns]; or

(2) the defendant used improper means to achieve [his][her][its] objective.

# Use Note

As part of a prima facie case, the plaintiff is required to prove that the defendant’s conduct was not privileged or justified. Therefore, this instruction must be given in all cases involving intentional interference with contract or prospective economic advantage.

This instruction refers to two interests recognized in Alaska case law as justifying such interference. The instruction may be modified to refer to other interests, as discussed in the Comment below.

# Comment

The torts of intentional interference with contract and with prospective economic advantage are closely related. *E.g.*, *Oaksmith v. Brusich*, 774 P.2d 191, 198 (Alaska 1989). The privilege or justification element is the same in both torts. *E.g.*, *RAN Corp. v. Hudesman*, 823 P.2d 646, 648 (Alaska 1991). Instruction 19.03 sets out the elements of privilege and justification for the interference.

The Alaska court has recognized two interests that may justify interference: economic interest and public safety. *E.g.,* *RAN Corp.*, 823 P.2d at 648 (economics); *Hatten v. Union Oil Co. of California, Inc*., 778 P.2d 1150 (Alaska 1989) (safety). The Restatement (Second) of Torts discusses a number of interests that may qualify: (1) competition (§ 768); (2) personal financial interest (§ 769); (3) responsibility for personal welfare of another (§ 770); (4) interest in influencing others' business policies (§ 771); (4) right to give advice or truthful information (§ 772); (6) assertion of a bona fide claim protecting legally protected interests (§ 773); and (7) the contract was illegal or contrary to public policy (§ 774).

Alaska decisions hold “that where an actor has a direct financial interest, he is privileged to interfere with a contract for economic reasons, but not where he is motivated by spite, malice, or some other improper objective.” *RAN Corp.*, 823 P.2d at 648. The court has recognized a direct financial interest in a number of situations. *See* *Kinzel v. Discovery Drilling Inc.*, 93 P.3d 427, 444 (Alaska 2004) (prime contractor’s interest in contract between subcontractor and subcontractor’s employee); *RAN Corp.*, 823 P.2d at 649 (lessor’s interest in assignment of lease); *Bendix Corp. v. Adams*, 610 P.2d 24, 31-32 (Alaska 1980) (parent corporation’s interest in contract of subsidiary)*; Alyeska Pipeline Service Co. v. Aurora Air Service, Inc.,* 604 P.2d 1090, 1093-95 (Alaska 1979*)* (right of owner to discontinue transportation services component of communications contract).

Protection of the qualifying interest must be the primary reason for the interference: “the essential question in determining if interference is justified is whether the person's conduct is motivated by a desire to protect his economic interest, or whether it is motivated by spite, malice, or some other improper objective.” *See* *Kinzel*, 93 P.3d at 444 (footnote omitted). Where there is evidence of an improper motive, the plaintiff is entitled to put the question to the jury notwithstanding the defendant’s undisputed economic interest. *Kinzel* reversed summary judgment for a defendant, notwithstanding the defendant’s direct financial interest, where there was evidence that the defendant’s primary motivation was retaliation for an employee’s safety complaints. 93 P.3d at 444. *Alyeska* affirmed judgment for the plaintiff notwithstanding the defendant’s economic interest where there was evidence that the defendant was motivated by a prior dispute over an unrelated contract. 604 P.2d at 1094.

The means used to protect the interest must be "appropriate." *E.g., Bendix Corp.*, 610 P.2d at 30 (“Where the means used are improper, such as where a defendant tears down his competitor's sign, or converts a carload of his goods and causes the post office to misdeliver his mail, the results are obvious”); *Alyeska Pipeline Service Co.*, 604 P.2d at 1094 (“In order to negate liability, the justification must be as broad as the act and must cover not only the motive and purpose, but also the means used”).

The Alaska Supreme Court has considered the seven factors set out in the Restatement (Second) of Torts § 767 that are to be balanced to determine when interference is improper: (1) the means employed; (2) the nature of the rights interfered with; (3) the relation between the defendant and the parties to the contract; (4) the interests which the defendant sought to protect; (5) the social interests involved; (6) the proximity of the conduct to the interference; and (7) the motive involved. *RAN Corp*., 823 P.2d at 648 n.2; *Bendix Corp*., 610 P.2d at 30 n.10. But while acknowledging that these factors may be appropriate considerations, the Alaska court has twice declined to adopt the section 767 factors on grounds that they are not an effective mechanism for resolving the issue of privilege or justification. *RAN Corp.*, 823 P.2d at 648; *Bendix Corp*., 610 P.2d at 30.

Instruction 19.03 is consistent with Alaska case law that provides that the plaintiff bears the burden of proof to show that the defendant’s conduct was not justified or privileged. *E.g*., *Kinzel*, 93 P.3d at 443 (contract); *Sisters of Providence in Washington v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 997 (Alaska 2003) (prospective economic relationship). Before 1986, Alaska decisions held that the defendant bore the burden of proof to show the conduct that caused the breach was justified or privileged. *E.g.*, *Bendix Corp.*, 610 P.2d at 29. But in *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 793 (Alaska 1986), the court shifted the burden of proof to the plaintiff. That remains the rule in Alaska. *E.g.*, *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 717 (Alaska 2003) (contract); *J & S Services, Inc. v. Tomter*, 139 P.3d 544, 551 (Alaska 2006) (prospective economic relationship).