THE HANDLING OF A CLAIM FOR TORTIOUS INTERFERENCE WITH AN AT-WILL EMPLOYMENT CONTRACT IN THE DELAWARE STATE COURTS VERSUS THE DELAWARE DISTRICT COURT

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The sudden end of an employee-employer relationship always has the potential to engender feelings of resentment, hostility, frustration, and perhaps even retribution among one or both of the parties. When the parties turn to litigation to resolve any remaining differences, the attorneys (and the courts) often face a litany of issues arising out of the former employment. Distinct issues arise when the former employee or employer believes that the employment relationship was cut short by the actions of a third party — often when an employee begins working for a competitor. The law generally protects against interference with contract, but when the contract is one for at-will employment, relief is typically more restricted.

Overall, the Delaware state and federal courts have been consistent in their approach to dismissing claims brought by former employees against third parties (such as co-workers or supervisors) for tortious interference with their at-will employment contract. This does not appear true, however, when tortious interference with an at-will contract claims are brought by employers against third-party interferers. Two recent Court of Chancery decisions illustrate this distinction and suggest that only the latter scenario may present a viable cause of action. As discussed in this article, the latter situation should be the only one where a tortious interference with an at-will contract claim could be capable of surviving a motion to dismiss.

In *Triton Construction Company, Inc. v. Eastern Shore Electrical Services, Inc.*,[1] the Court of Chancery rejected a former employer's claim for tortious interference with a former employee's at-will employment contract by the employee's new employer. To support this analysis, the Court of Chancery relied on two Delaware Superior Court decisions that held that an employee cannot bring a tortious interference claim against a third party for interference with an at-will employment contract. The court held that because there was no cause of action for tortious interference with an at-will employment relationship, the claim against defendants had to be dismissed.

Subsequently, in *Great American Opportunities v. Cherrydale Fundraising, LLC*,[2] the same member of the Court of Chancery took advantage of an opportunity to clarify and readdress the *Triton* issue when a similar tortious interference with contract claim was brought by a former employer against its former employee's new employer. When addressing the issue in this context, the court rejected the argument that the tortious interference claims against it should be dismissed pursuant to *Triton*. Instead, the court distinguished *Triton* and held that "claims for tortious interference with contract apply just as readily to an 'at-will' employee who has executed a valid employment contract as they do to an employee contractually obligated to remain with a company for a specified period of time."[3]

The Delaware District Court cases that have addressed this issue have taken a different approach. In particular, the District Court appears not to have adopted a blanket rejection of a claim for tortious interference with an at-will

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1. C.A. No. 3290-VCP, 2009 WL 7387115 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010).

2. C.A. No. 3718-VCP, 2010 WL 338219 (Del. Ch. Jan. 29, 2010).

3. *Id.* at *10.

employment contract as suggested in *Triton*. Rather, as analyzed in *Nelson v. Fleet National Bank*,[4] the District Court's position is that the tort should be recognized because "[t]he gravamen of the tort is interference with the employment contract irrespective of the term of that contract," and predicted that the Delaware Supreme Court would reach the same conclusion based on the commentary to the *Restatement*.[5]

A review of the relevant, yet few, cases that have analyzed the issues surrounding this particular tort reveals that *Triton*'s reasoning was incomplete. The conclusion reached in *Great American*, however, seems to resolve the issue of whether this particular claim can be brought in Delaware, although the analysis of why the claim should survive remains unsettled. While ultimate resolution as to the viability of this claim rests with the Delaware Supreme Court, the conclusion should be the same as that implied in *Great American* and based on the applicable commentary in the *Restatement (Second) of Torts* § 766: Delaware law should recognize a claim for tortious interference with an at-will employment contract as a viable cause of action only when it is brought by a former employer against the former employee's new employer.

I. TORTIOUS INTERFERENCE WITH CONTRACT

Delaware follows the *Restatement (Second) of Torts* § 766 with regard to claims for tortious interference with contract.[6] Section 766 defines tortious interference with 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.[7]

The *sine qua non* of a tortious interference with contract claim is a breach of a contract.[8] Similarly, plaintiffs must be parties to the contract in order to have standing to pursue a claim for tortious interference,[9] and the defendants cannot be parties to the contract with which they have allegedly interfered.[10] After finding that these threshold requirements are

4. 949 F. Supp. 254 (D. Del. 1996).

5. *Id.* at 262.

6. *See, e.g.*, Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983, 992 (Del. Ch. 1987).

7. Restatement (Second) of Torts § 766 (1979).

8. *See* Aspen Advisors LLC v. United Artists Theatre Co., 861 A.2d 1251, 1265-66 (Del. 2004) (affirming the dismissal of a tortious interference claim as a matter of law where the complaint failed to state a claim for breach of contract); *see also* Allied Capital Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1036 (Del. Ch. 2006) (holding that a plaintiff must allege an underlying breach of contract to state a tortious interference claim); Am. Homepatient, Inc. v. Collier, C.A. No. 274-N, 2006 WL 1134170, at *4 (Del. Ch. Apr. 19, 2006) (same); Griffin Corporate Servs., LLC v. Jacobs, C.A. No. 396-N, 2005 WL 2000775, at *4 (Del. Ch. Aug. 11, 2005) (same).

9. Bishop v. Murphy, C.A. No. 05A-05-002-MMJ, 2006 WL 1067274, at *3 (Del. Super. Ct. Apr. 10, 2006) (granting summary judgment where plaintiffs were not parties to the contract at issue and therefore had "no standing to assert claims for breach of contract or tortious interference with contractual relations").

10. Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578, 590 (Del. Ch. 1994) ("It is rudimentary that a party to a contract cannot be liable both for breach of that contract and for inducing that breach."); CPM Indus., Inc. v. ICI Americas, Inc., 1990 WL 28574, at *1 (Del. Super. Ct. Feb. 27, 1990) (ORDER) (the "principle that a party to the contract cannot be sued thereunder for [tortious interference with contract] is well settled in Delaware").

met or are not in dispute such that a claim for tortious interference may be stated, the courts will address the elements to the tort. To establish tortious interference with contract, a plaintiff must show: (1) a valid contract (2) about which defendants knew, and (3) an intentional and (4) unjustified act that is the proximate cause of the breach of such contract, and (5) damages.[11]

II. AT-WILL EMPLOYMENT DOCTRINE

Delaware has long adhered to the doctrine of at-will employment.[12] Under this doctrine and unless otherwise expressly stated, a contract for employment is "at-will in nature, with an indefinite duration"[13] and permits employers to dismiss employees "without cause and regardless of motive."[14] An employer (and employee) has the freedom to "terminate an at-will employment contract for its own legitimate business, or even highly subjective, reasons."[15] Delaware also recognizes that an employment contract includes an implied covenant of good faith and fair dealing.[16] Thus, the at-will employment doctrine helps to protect the expectations of both parties: first, the employer in its hiring decision as it pertains to the management of its business; and second, the employee in accepting and undertaking the offer of indefinite, at-will employment.[17]

III. THE INTERSECTION OF THE TORT AND THE LAW

A. The Delaware State Cases

Given that Delaware recognizes both the tort of interference with contract and the doctrine of at-will employment, employees have occasionally brought causes of action that purport to intersect the two ideas. Typically, plaintiffs in these cases are ex-employees and the defendants are their former employers and/or supervisors.

11. Aspen Advisors LLC v. United Artists Theatre Co., 861 A.2d 1251, 1266 (Del. 2004); Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983, 992 (Del. Ch. 1987); DeBonaventura v. Nationwide Mut. Ins. Co., 419 A.2d 942, 947 (Del. Ch. 1980), *aff'd*, 428 A.2d 1151 (Del. 1981).

12. *E.g.*, Lord v. Souder, 748 A.2d 393, 398 (Del. 2000); E.I. du Pont de Nemours & Co. v. Pressman, 679 A.2d 436, 437 (Del. 1996); Merrill v. Crothall-Am., Inc., 606 A.2d 96, 102 (Del. 1992); Greer v. Arlington Mills Mfg. Co., 43 A. 609, 612 (Del. Super. 1899). This paper uses "at-will employment doctrine," "employment at-will doctrine" and "the doctrine of at-will employment" interchangeably.

13. *Merrill*, 606 A.2d at 102.

14. *Pressman*, 679 A.2d at 437; *accord Lord*, 748 A.2d at 400. Delaware does recognize certain limited exceptions for employees to obtain relief for wrongful termination. *See Lord*, 748 A.2d at 400-01.

15. *Merrill*, 606 A.2d at 103; *see also* Nye v. Univ. of Del., No. 315, 2005, 2006 WL 250003, at *3 (Del. 2006) ("Delaware adheres to the employment at-will doctrine, and has set a high threshold for an actionable breach of that covenant."); Lazard Debt Recovery GP, LLC v. Weinstock, 864 A.2d 955, 970 n.24 (Del. Ch. 2004) ("[T]he common law of many states, including this one, emphasizes that, absent an employment contract, employees serve at-will and may, with extremely narrow exceptions, be terminated at any time for any reason not forbidden by statutory laws.") (citation omitted).

16. *Merrill*, 606 A.2d at 101.

17. *See id.* at 101-02; *see also Pressman*, 679 A.2d at 449 (explaining that the covenant of good faith and fair dealing present in an at-will employment contract limits the parties in their exercise of the freedom to terminate in that it creates a cause of action if the dismissal is caused by "fraud, deceit and misrepresentation, either in the inducement or in intentionally fictionalizing in a material way the employee's performance to cause dismissal").

The first case addressing whether Delaware would recognize a former employee's claim for tortious interference with an at-will employment contract was *Rizzo v. E.I. du Pont de Nemours & Co.*[18] *Rizzo* stands for the proposition that the Delaware at-will employment doctrine does not give rise to a claim of tortious interference.[19] In that case, an ex-employee sued his former employer and supervisors, alleging that "their mistreatment of him forced him to retire early, resulting in reduced retirement benefits."[20] The Superior Court analyzed the issues through the lens of the doctrine of at-will employment, noting that there were few exceptions that permitted an at-will employee a cause of action for his or her termination. Accordingly, the court granted summary judgment in favor of defendants, holding that the underlying issue involved plaintiff's accusations that defendants violated their company policies in connection with his termination, which was not actionable as tortious interference for an at-will employee.[21]

The next case to address this issue came over a decade later in *Leblanc v. Redrow*.[22] In *Leblanc*, the plaintiff-employee had been terminated a short time after one of her former employer's customers had complained about an incident between plaintiff and one of the customer's employees, which led to the customer requesting that he not have to deal with plaintiff anymore.[23] After plaintiff was terminated, she sued the customer for tortious interference with contract, claiming her allegedly wrongful termination was caused by the customer's complaint. The Superior Court, applying the holding in *Rizzo*, held that "where the employment is 'at will', meaning that it is terminable at the option of either party without justification and/or cause, no cause of action for tortious interference with contractual relations is recognized in this state."[24] The court went on to conclude that plaintiff's at-will employment by itself was sufficient to entitle defendants to summary judgment as a matter of law.[25] However, the court noted in dicta that even if there was a cause of action, the actions of "voicing a grievance" by a customer against an employee as had been alleged could not be "tortious" or wrongful.[26]

Nearly a decade passed after *Leblanc* before a Delaware state court again addressed the issue of tortious interference with an at-will employment contract. In *Triton Construction Company v. Eastern Shore Electrical Services, Inc.*,[27] the Court of Chancery addressed this issue in the context of a lawsuit by a former employer against the former employee and his current employer and its principals. The court explained that the complaint alleged that the new employer tortiously interfered with plaintiff's contractual relationship with its former employee.[28] Applying *Leblanc* and *Rizzo*, the court held

18. C.A. No. 86C-JL-88, 1989 WL 135651 (Del. Super. Ct. Oct. 31, 1989).

19. *Id.* at *1-2.

20. *Id.* at *1.

21. *Id.* at *2.

22. C.A. No. 99C-02-170-CHT, 2001 WL 428686 (Del. Super. Ct. Apr. 19, 2001).

23. *Id.* at *1.

24. *Id.* at *2. The Superior Court also cited Park v. Georgia Gulf Corp., C.A. No. 91-569-RRM, 1992 WL 714968 (D. Del. Sept. 14, 1992) for support.

25. *Leblanc*, 2001 WL 428686, at *2.

26. *Id.*

27. C.A. No. 3290-VCP, 2009 WL 1387115 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010).

28. *Id.* at *17. Plaintiff also brought claims for various breaches of fiduciary duty, tortious interference with prospective economic advantage, fraud, and misappropriation of trade secrets. *See id.* at *1, 5.

that because there was no cause of action for tortious interference with an at-will employment relationship, the claim against defendants had to be dismissed.[29] *Triton* was affirmed by the Delaware Supreme Court on the basis of the reasoning in the Court of Chancery's decision.[30] This particular aspect of the *Triton* decision, however, was not appealed.[31]

A few months later, in *Great American Opportunities v. Cherrydale Fundraising, LLC*,[32] the Court of Chancery again addressed the issue of tortious interference with an at-will employment contract in the context of a suit by a former employer. The employees at issue had worked for one company, Kathryn Beich, Inc. ("KB"), before being recruited to work for a second company, Cherrydale Fundraising, LLC ("Cherrydale"). Contemporaneously with these actions, a third company, Great American Opportunities, Inc. ("Great American"), purchased most of KB's assets, including the right to pursue any causes of action KB may have had against Cherrydale.[33] Great American sued Cherrydale for tortious interference with contract and willful and malicious misappropriation of trade secrets. Cherrydale argued that under *Triton*, the tortious interference claim should have failed as a matter of law because the employees were at-will employees at KB.[34] The court acknowledged *Triton*'s holding, but rejected Cherrydale's proposition. Instead, the Court distinguished *Triton* and recognized that "claims for tortious interference with contract apply just as readily to an 'at-will' employee who has executed a valid employment contract as they do to an employee contractually obligated to remain with a company for a specified period of time."[35] The court went on to address the merits of the tortious interference claim and found that Cherrydale tortiously interfered with the contractual relationships with three former KB employees by "enticing or encouraging them to breach several provisions in their employment contracts."[36] Thus, while both *Triton* and *Great American* involved

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29. *Id.* at *17.

30. 988 A.2d 938 (Del. 2010) (Table).

31. Opening Brief for the Plaintiff-Below, Appellant at ii, 2-3 Triton Constr. Co. v. E. Shore Elec. Servs., Inc. (Del. Aug. 31, 2009) (No. 383, 2009) (Filing ID 26849275); Answering and Opening Brief for Defendants-Below, Appellees/Cross Appellants at i-ii, 3-4 Triton Constr. Co. v. E. Shore Elec. Servs., Inc. (Del. Sept. 30, 2009) (No. 383, 2009) (Filing ID 27335241); Reply and Answering Brief for the Plaintiff-Below, Appellant/Cross-Appellee at 2-3 Triton Constr. Co. v. E. Shore Elec. Servs., Inc. (Del. Oct. 30, 2009) (No. 383, 2009) (Filing ID 27821633); Reply Brief for Defendants-Below, Cross Appellants at 1 Triton Constr. Co. v. E. Shore Elec. Servs., Inc. (Del. Nov. 9, 2009) (No. 383, 2009) (Filing ID 27952893). The issues raised on appeal and cross-appeal involved whether the Court of Chancery erred as a matter of law in its application of the rule mandating disgorgement of profits, the award of lost gross profits and damages, and the Court of Chancery's application of *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949).

32. C.A. No. 3718-VCP, 2010 WL 338219 (Del. Ch. Jan. 29, 2010).

33. *Id.* at *2. In so doing, the court analyzed the first impression issue of "whether restrictive covenants contained in an employment agreement lacking an assignability clause are enforceable by a successor company that has purchased substantially all of the original employer's assets." *Id.* at *10-12. The conclusion and analysis reached by the court is beyond the scope of this article. The court held that absent specific language prohibiting assignment, reasonable restrictive covenants in employment contracts (such as noncompete covenants) are assignable and remain enforceable by the assignee under Delaware law so long as the assignee "engages in the same business as the assignor" and "regardless of whether the employment contract contains a clause expressly authorizing such assignability." *Id.* at *12.

34. *Id.* at *10.

35. *Id.*

36. *Id.* at *1; *id.* at *12-15.

at-will employment contracts, the tortious interference claim was sustained in the latter apparently on the basis that the at-will employment contract was contained in an executed writing.[37]

B. The District Of Delaware Cases

Interestingly, three federal cases in the District of Delaware have also touched on this tort in the at-will context, although each in a different scenario. The first, referenced in *Leblanc*, was *Park v. Georgia Gulf Corp*.[38] The plaintiff in *Park* had been fired from defendant's employ and then sued his former employer and two of his co-workers for, among other things, his co-workers' tortious interference with his employment contract.[39] The District Court first found that his employment was at-will and consistent with Delaware law, could be terminated without cause.[40] Turning to the tortious interference claim, the court simply applied the holding in *Rizzo*, holding that "[w]here the contract ostensibly interfered with is an at-will employment contract, . . . the cause of action for tortious interference with contract does not lie."[41] Accordingly, the court granted summary judgment in favor of defendants.

Following *Park*, the District Court next addressed the issue of tortious interference with an at-will contract in *Nelson v. Fleet National Bank*.[42] In *Nelson*, the plaintiff brought an action for, among other things, tortious interference with contract against her former employer and supervisors related to the circumstances leading to her resignation. The court found that plaintiff had actually brought an action for intentional interference with another's performance of her own contract under *Restatement (Second) of Torts* § 766A, rather than tortious interference with contract under Section 766, in part because she had not alleged a breach of contract,[43] although the court recognized that such claims were typically analyzed under Section 766.[44]

Relevant to this article, *Nelson* took up the issue of whether there could be a cause of action for tortious interference with an at-will employment contract brought by an employee, in light of the holdings from the Delaware Superior Court in *Rizzo* and the Delaware District Court in *Park*. The District Court acknowledged "Delaware's historical adherence to the at-will employment doctrine …,"[45] but predicted that "the Supreme Court of Delaware would hold an action for tortious interference with contract may be maintained in conjunction with an at-will employment contract."[46] To reach this

37. The written contract contained non-solicitation and non-competition provisions. *See id.* at *13-15.

38. C.A. No. 91-569-RRM, 1992 WL 714968 (D. Del. Sept. 14, 1992).

39. *Id.* at *1.

40. *Id.* at *7-8.

41. *Id.* at *9.

42. 949 F. Supp. 254 (D. Del. 1996).

43. *Id.* at 257 n.3. This distinction may be important given that there are no Delaware state cases that have adopted or have addressed this tort or this section of the *Restatement*. *See infra*.

44. *See id.*; *id.* at 261-62.

45. *Id.* at 262.

46. *Id.* at 261.

conclusion, it relied on commentary from Section 766 of the *Restatement*, which supported a cause of action for tortious interference with an at-will contract,[47] and a passage from *Prosser and Keeton on the Law of Torts*, which also opined that "the overwhelming majority of the cases have held that interference with employment or other contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relation, of value to the plaintiff, and presumably to continue in effect."[48] After distinguishing *Rizzo* based on its interpretation that the plaintiff in that case was attempting to "evade the at-will doctrine," the District Court in *Nelson* concluded that:

> [O]ne can reasonably predict the Delaware Supreme Court would not distinguish between an at-will employment contract and an employment contract for a term of years where the defendant is a supervisor who tortiously interferes with the employee's contract. The gravamen of the tort is interference with the employment contract irrespective of the term of that contract.[49]

The District Court therefore rejected the defendant's argument (and the holding in *Park*) that at-will status by itself would preclude a claim for tortious interference with contract.

Turning to whether a supervisor could be liable to a former employee for his tortious interference, the District Court in *Nelson* concluded that the question in this scenario would have to turn on whether that employee had acted beyond the scope of his employment in order to state a claim for tortious interference of his own contract under Section 766A.[50] The court found that there was a material question of fact on this point which precluded summary judgment for that claim.[51]

Accordingly, the District Court's analysis of this issue and its ultimate recognition of a tortious interference with an at-will contract claim suggest that the success of bringing such a claim may depend on the circumstances under which it is brought, making the analysis more nuanced than any of the aforementioned state court cases have concluded.

IV RECONCILING THE CASES: TORTIOUS INTERFERENCE WITH AN AT-WILL EMPLOYMENT CONTRACT

One could argue that, prior to *Great American*, there was a distinct split between the Delaware state courts and the Delaware District Court as to when a cause of action for tortious interference with an at-will employee's contract may be brought under Delaware law. *Great American*, however, attempts to resolve any confusion over the issue. The cases summarized above demonstrate that such claims have been brought by both former employees and former employers.

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47. *Id.* (quoting Restatement (Second) Torts § 766 cmt. g). This comment is quoted and discussed *infra*.

48. *Id.* (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at 994-96 (5th ed. 1984)). This passage is quoted and discussed *infra*.

49. *Id.* at 262.

50. *Id.* at 263.

51. The District Court revisited the issue in *Anderson v. Wachovia Mortgage Corp.*, 497 F. Supp. 2d 572 (D. Del. 2007). To the extent it was applicable, the court in *Anderson* disagreed with *Nelson*'s analysis of Section 766A, noting that the Third Circuit Court of Appeals in *Gemini Physical Therapy & Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance Co.*, 40 F.3d 63 (3d Cir. 1994), had addressed this very issue in distinguishing Sections 766 and 766A and predicting that the Pennsylvania Supreme Court would not recognize Section 766A as a valid cause of action. Adopting that analysis, the court in *Anderson* speculated that the Delaware Supreme Court would also not recognize Section 766A. *Anderson*, 497 F. Supp. 2d at 583-84.

Only the latter appears to fall within the purview of Section 766 of the Restatement and should be recognized as a viable cause of action. *Great American* appears to confirm this conclusion.

The distinction can best be understood by comparing Sections 766 and 766A of the *Restatement*, which "focus on different targets of interfering conduct."[52] Section 766 "states the rule for the actor's intentional interference with a third person's performance of his existing contract with the plaintiff."[53] Under this section, "the plaintiff's interest in obtaining performance of the contract is interfered with directly."[54] Section 766A, however, "is concerned only with the actor's intentional interference with the plaintiff's performance of his own contract, either by preventing that performance or making it more expensive or burdensome."[55] "[T]he interference is indirect, in that the plaintiff is unable to obtain performance of the contract by the third person because he has been prevented from performing his part of the contract and thus from assuring himself of receiving the performance by the third person."[56] As summarized by the Third Circuit Court of Appeals in *Windsor Securities Inc. v. Hartford Life Insurance Co.*:[57]

> Section 766 addresses disruptions caused by an act directed not at the plaintiff, but at a third person: the defendant causes the promisor to breach its contract with the plaintiff. Section 766A addresses disruptions caused by an act directed at the plaintiff: the defendant prevents or impedes the plaintiff's own performance.[58]

Put another way, the appropriate section that applies depends on the plaintiff. In both cases, there is a contract between A (promisor) and B (promissee). Where a third party defendant C has induced A to breach the contract or otherwise prevented B from performing his part of the contract with A, Section 766A provides B with a cause of action against that third party ("Scenario 1"). Where a third party defendant C has induced B to breach the contract thereby directly interfering with the contract between A and B, Section 766 provides A with a cause of action against that third party ("Scenario 2"). Thus, if B is the plaintiff, Section 766A sets forth the appropriate tort. If A is the plaintiff, Section 766 does.

The commentary to Section 766 supports this distinction and explains why the cause of action fails when brought by an employee against his former supervisors or even a third party interferer fails to state a claim, but may succeed when brought by the former employer against that employee's new employer. Comment g expressly provides that a cause of action for tortious interference with an at-will contract is subsumed within the tort of interference with contract:

> g. Contracts terminable at will. A similar situation exists with a contract that, by its terms or otherwise, permits the third person to terminate the agreement at will. Until he has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it. The fact that the contract is terminable at will, however, is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach. (See § 774A).

52. *Windsor Sec.*, 986 F.2d at 660.

53. RESTATEMENT (SECOND) TORTS § 766A cmt. a.

54. *Id.* at § 766A cmt. c.

55. *Id.* at § 766A cmt. a.

56. *Id.* at § 766A cmt. c.

57. 986 F.2d 655 (3d Cir. 1993).

58. *Id.* at 660.

> One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations. (See § 766B). If the defendant was a competitor regarding the business involved in this contract, his interference with this contract may not be improper. (See § 768, especially Comment *i*).[59]

The Delaware District Court's application of this passage from *Prosser and Keeton on the Law of Torts* in *Nelson* reinforces this point:

> Virtually any type of contract is sufficient as the foundation of an action for procuring its breach … There is some authority to the contrary effect as to contracts which the promissor may terminate at will, on the theory that there is really nothing involved but an option on his part to perform or not. However, eminent legal writers to the contrary notwithstanding, the overwhelming majority of the cases have held that interference with employment or other contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relation, of value to the plaintiff, and presumably to continue in effect.[60]

When viewed through this lens, it becomes clear that *Rizzo*, *LeBlanc*, *Park*, and *Nelson* all fall within Scenario 1 because the plaintiffs (B) were former employees suing defendants (C) who had allegedly induced their former employers (A) to end their employment. As the causes of action for tortious interference with contract (and particularly tortious interference with an at-will contract) were brought under Section 766 in those cases (save *Nelson*), those courts correctly held that the plaintiffs had failed to state a claim under that section as a matter of law. On the other hand, the plaintiff in *Triton* was the former employer (A) and not the employee (B), so it would seem that Scenario 2 — not Scenario 1 — was applicable. *Great American* provides a far more obvious Scenario 2 case.

A. Scenario 1: Where The Cause Of Action For The Tort Should Fail To State A Claim: When Brought By A Former Employee

As the above Scenario 1 cases indicate, claims for tortious interference with an at-will employment contract are sometimes brought by a discharged employee against a third party (not his employer) for alleged interference with his or her former employment. It is unlikely that a former employee plaintiff would ever be able to state a claim for tortious interference with an at-will employment contract, and a court confronting this issue should hold that the claim fails as a matter of law.

At the threshold of this analysis, the plaintiff-employee would have to be a discharged employee (*i.e.*, fired) because if he resigned, there would be no breach (or the resignation would be a complete defense) and the claim would fail as a matter of law.[61] Under this reasoning, the plaintiff's resignation in *Rizzo* would have provided an independent basis

59. Restatement (Second) of Torts § 766 cmt. g. *See also generally* Empire Fin. Servs., Inc. v. Bank of N.Y., 900 A.2d 92, 98 (Del. 2006) (suggesting that such conduct involving an at-will contract may be more properly analyzed as tortious interference with a prospective contractual relationship).

60. *Nelson*, 949 F. Supp. at 261 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at 994-96 (5th ed. 1984)).

61. *See supra* note 8 and accompanying text; *see also* Haney v. Laub, 312 A.2d 330, 332 (Del. Super. Ct. 1973) ("A hiring for an indeterminate period is a hiring at will and, consequently, is terminable at the will of either party with or without cause."). A discussion of other causes of action a plaintiff in this situation may have is beyond the scope of this article.

for the court's dismissal of the tortious interference with contract claim without having to address the at-will employment doctrine issue. Indeed, the plaintiff's resignation in *Nelson* (that is, the failure of pleading a breach of contract) precluded a claim under Section 766 and led to the court to instead analyze the case under Section 766A. Second, the claim would fail as a matter of law against the former employer regardless of whether he or she was fired or resigned because the defendant employer would be a party to the contract, and ordinarily a tortious interference claim will not lie against a party to a contract (the appropriate claim, if any, being one for breach of the contract).[62]

Because the employer would be a party to the contract, a tortious interference claim against the former employee's supervisor would also fail under agency doctrine, unless the agent was acting beyond the scope of his employment. Arguably, this idea was explored and the premise implicitly accepted by the District Court in *Nelson*, albeit in the context of Section 766A.[63] Likewise, this "beyond the scope of employment" argument probably would have been the only basis upon which the plaintiff would have been able to seek relief against his supervisors in *Park*, although that avenue was not raised in that case.[64]

The question remains whether a cause of action for tortious interference with an at-will contract could be brought by an employee against his former supervisor who allegedly acted beyond the scope of his employment or against a third party, as in *Leblanc*. The commentary to Sections 766 and 766A of the *Restatement* suggest that the answer is no, at least under Section 766. Rather, the employee would probably only have a cause of action under Section 766A.[65] This conclusion is consistent with Scenario 1, as the plaintiff (B) would still be the former employee seeking damages against the third party (C) based on his at-will contract with his former employer (A). In sum, a plaintiff bringing a Scenario 1 action and raising a claim for tortious interference with his at-will employment contract under Section 766 would fail to state a claim as a matter of law.

B. Scenario 2: Where The Cause Of Action For The Tort May State A Claim: When Brought By The Former Employer Against The Former Employee's New Employer

Scenario 2 represents the only possible situation where tortious interference with an at-will employment contract may be brought — by the employee's former employer against the new employer. The fact pattern in *Triton* illustrates the circumstances where this claim could be brought, despite *Triton*'s application of the aforementioned state Scenario 1 cases in dismissing the claim. As previously explained, the plaintiff in *Triton* was the former employer who brought claims related to fiduciary duty, fraud, tortious interference and trade secrets against the former employee and his new employer. With regard to the plaintiff employer's claim that the current employer had tortiously interfered with its former employee's at-will contract, the Court of Chancery, citing *Leblanc* and *Rizzo*, noted that because the employee was an at-will employee, the plaintiff employer could not prove tortious interference with that employment relationship.[66]

62. *See supra* note 10 and accompanying text.

63. *Nelson*, 949 F. Supp. at 263. Although not in the 766A context, the Court of Chancery has relied on the factual allegations in *Nelson* in determining whether a complaint had alleged sufficient facts to support an inference that defendants had acted outside the scope of their employment for purposes of a tortious interference with contract claim. *See* Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 885-86 (Del. Ch. 2009).

64. *See Park*, 1992 WL 714968, at *1-2. Although encompassed within a workers' compensation claim, the Delaware Supreme Court has recently explored a "course of employment" test with regard to a claim involving horseplay by co-worker defendants. *See* Grabowski v. Mangler, 956 A.2d 1217 (Del. 2008); *see also supra* note 55.

65. *See supra* note 51.

66. *Triton*, 2009 WL 1387115, at *17.

The distinction between Scenarios 1 and 2 demonstrates the difference between the plaintiff employees in those cases compared to the plaintiff employer in *Triton*. Thus, the applicability of *Leblanc* and its progeny in *Triton* may have been misplaced. The relationship in *Triton* is a Scenario 2 relationship: The third party defendant C induced former employee B to breach the contract thereby directly interfering with the contract between the plaintiff employer (A) and the former employee (B). Through this lens, Section 766 should have provided the plaintiff former employer with a cause of action against the defendant new employer. Thus, the Court of Chancery's juxtaposition of the Scenario 1 cases to the situation in *Triton* may have incorrectly short-circuited the claim.

In *Great American*, the new employer argued that the former employer could not bring a claim for tortious interference with an at-will contract pursuant to *Triton*. The court in Great American rejected this argument by focusing on the fact that the employee in *Triton* lacked a valid employment contract.[67] In doing so, the court effectively recasts *Triton* as a Scenario 1 case, allowing it to recognize implicitly that a tortious interference claim in a Scenario 2 case is cognizable. Put another way, by changing the focus to the employee's contract rather than on who brought the claim, the court in *Great American* was able to reach a conclusion entirely consistent with the reasoning in the *Restatement*: "[C]laims for tortious interference with contract apply just as readily to an 'at-will' employee who has executed a valid employment contract as they do to an employee contractually obligated to remain with a company for a specified period of time."[68]

The first reported tortious interference decision in the history of common law, *Lumley v. Gye*,[69] also supports reaching this conclusion. *Lumley* involved "a singer under contract to sing at the plaintiff's theatre," who "was induced by the defendant, who operated a rival theatre, to break her contract with the plaintiff in order to sign for the defendant."[70] Although that former employee was under contract, the situation facing an employer prematurely losing a former employee is directly on-point. As the commentary to Section 766 provides, until the employer or employee has terminated the at-will employment contract, "the contract is valid and subsisting, and the defendant may not improperly interfere with it."[71] In other words, until the contract is terminated, it "is a subsisting relation, of value to the plaintiff, and presumably [would] continue in effect."[72] Thus, because the employer has an expectation that the employment will continue indefinitely, the sudden departure of an employee may be actionable under a tortious interference (Section 766) theory. Indeed, "[t]he gravamen of the tort [of interference with contract] is interference with the employment contract irrespective of the term of that contract."[73]

The circumstances, however, should dictate whether bringing this specific cause of action would be viable and worth involving the courts. As the commentary indicates, "[t]he fact that the contract is terminable at will … is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach."[74] Thus, if the court

67. *Great American*, 2010 WL 338219, at *10.

68. *Id.*

69. Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).

70. Restatement (Second) Torts § 766A cmt. c (citing Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853)).

71. *Id* at § 766 cmt. g.

72. *Nelson*, 949 F. Supp. at 261 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at 994-96 (5th ed. 1984)).

73. *Nelson*, 949 F. Supp. at 262.

74. Restatement (Second) of Torts § 766 cmt. g.

were to recognize this cause of action as brought by a plaintiff-employer against the former employee's new employer, damages probably must be alleged in order to state the claim and proven in order to survive a motion for summary judgment. For example, an employer who has entrusted an employee with specific tasks or trade secrets may, over time, become increasingly valuable to that employer. The risk of a new employer (and likely a competitor) surreptitiously courting that employee will probably increase. If the new employer is successful in causing the employee to terminate the current at-will relationship, the former employer may likely wish to pursue a tortious interference with contract claim. As discussed herein, the courts should recognize this cause of action as a Scenario 2 situation, leaving the former employer to confront and overcome the issue of damages.

The case law suggests that one way an employer may want to protect itself prospectively from these issues is by putting the employment contract in writing, even if the employment remains at-will, although the case law never explains why an oral contract should not be enforceable in this situation in the same manner as other situations. Regardless, the success of the "written agreement" argument is likely to be highly factual, and will hinge legally on distinguishing a Scenario 2 case from a Scenario 1 case. Applying the applicable commentary to the *Restatement* as discussed in this article may be another way of strengthening the legal arguments for such a claim.

V. CONCLUSION

Particularly when a former employer faces a situation where its employee has been lost to a competitor, claims for tortious interference with an at-will employment contract present nuanced analyses of the employer-employee relationship. Section 766 of the *Restatement* recognizes a cause of action for tortious interference with an at-will employment contract. The adoption of this commentary by the Delaware District Court suggests that the lines drawn by the Delaware state courts are not as distinct as the analysis in these cases makes them. *Great American* implies that a claim for tortious inference with an at-will employment contract may be viable under appropriate circumstances paralleling a Scenario 2 fact pattern. That is, the only circumstance where the courts should recognize a cause of action for tortious interference with an at-will contract is when it is brought by a former employer against the former employee's new employer. Such an outcome would be consistent with the *Restatement*. Accordingly, Delaware law should recognize a claim for tortious interference with an at-will employment contract as a viable cause of action only when it is brought by a former employer against the former employee's new employer.[75]

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75. After this article went to press, the Delaware Supreme Court issued *ASDI, Inc. v. Beard Research, Inc.*, Nos. 296, 301, 308, 2010, ___A.3d ___, 2010 WL 4751770 (Del. Nov. 23, 2010). In affirming the Court of Chancery's underlying decisions, the Supreme Court appears to endorse the proposition posed by this article, that tortious interference with an at-will contract may create an actionable claim. *See id.* at *1 ("Conduct amounting to tortious interference has been found actionable even where the third party is lawfully entitled to terminate a contract 'at will.'") (citing cases); *see also id.* at *2 ("[T]the focus of the claim is on the defendant's wrongful conduct that induces the termination of the contract, irrespective of whether the termination is lawful.") (citations omitted).