Chapter 5

Business Torts

5-1 INTRODUCTION

It is not uncommon for business entities to find themselves in business disputes or in positions of having to protect their rights from competitors or others in the marketplace. Often times, this ultimately leads to litigation. This chapter explores various causes of action under Connecticut common law that typically arise in actions involving commercial entities and disputes.

5-2 TORTIOUS INTERFERENCE

Connecticut common law has long recognized a cause of action for tortious interference with another’s business relations, opportunities, and expectancies. It is well settled that one cannot unjustifiably interfere with another’s lawful business pursuits or occupation and the right to secure to himself the earnings of his industry. Full, fair and free competition is necessary to the economic life of a community, but under its guise, no man can by unlawful means prevent another from obtaining the fruits of his labor.¹

There are essentially two closely related causes of action recognized under the penumbra of tortious interference: tortious interference with contractual or business relations and tortious interference with business expectancies. While the two are

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separate causes of action in tort, many courts have treated them interchangeably. As the Connecticut Appellate Court has noted,

[i]t has long been considered tortious either to induce a breach of contract or to interfere with financial expectancies. Unfortunately, courts have tended to confuse these two types of actions, and there is no clear enumeration of their requisite elements.2

Originally, the law recognized a cause of action where a defendant was alleged to have unjustifiably interfered with the plaintiff’s contractual relations with another. Over time, in recognition of increasing competition,

the principles of liability for interference with contract extended beyond existing contractual relations, and [recognized] that a similar action would lie for interference with relations which were merely prospective or potential.3

The resulting closely related causes of action share similar elements and have been characterized in the following manner:
The tort of interference with contractual relations is merely a species of the broader tort of interference with prospective advantage[,] and the tort of interference with business advantage is merely interference with ongoing and existing rather than prospective business advantage.4

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2. Wellington Sys., Inc. v. Redding Grp., Inc., 49 Conn. App. 152, 168 (1998) (internal quotation marks omitted); see also Amatulli Imps., Inc. v. Nargezian, No. 30 90 84, 1993 WL 11937, at *3 (Conn. Super. Ct. Jan. 19, 1993) (discussing that the claim of tortious interference with contractual relations is closely related to tortious interference with business expectancies and that “our courts have tended to confuse the two separate causes of action and, consequently, there is no clear separation of their requisite elements”).


5-2.1 Tortious Interference with Business Expectancies

A cause of action for tortious interference with business expectancies, also referred to at times as tortious interference with prospective advantage, requires proof of three elements:

1. a business relationship between the plaintiff and another party;
2. the defendant’s intentional interference with the business relationship while knowing of the relationship; and
3. as a result of the interference, the plaintiff suffers actual loss.5

To prevail on a claim, a plaintiff need not prove a breach of contract. Rather, a plaintiff must establish that “he suffered loss as a result of tortious conduct by the defendants that interfered with a business relationship.”6 There must, however, exist a sufficiently identifiable business expectancy or opportunity with which the defendant purportedly interfered, i.e., that there existed a reasonable probability of entering into a contract or making a profit.7 Further, there must have been a business expectancy with a specific third party.8 In other words, “interference with a potential contractual relationship may constitute sufficient proof to establish the existence of a contractual or business relationship … [provided

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the contractual relationships were identifiable individuals and identifiable potential contracts.”

5-2:2 Tortious Interference with Contractual Relations

A cause of action for tortious interference with contractual relations requires proof of the following elements:

1. the existence of a contractual or beneficial relationship,
2. the defendants’ knowledge of that relationship,
3. the defendants’ intent to interfere with the relationship,
4. the interference was tortious, and
5. a loss suffered by the plaintiff that was caused by the defendants’ tortious conduct.

A formal breach of contract is not required to prevail on a claim. The Connecticut Supreme Court has held that “[a] plaintiff may recover damages for tortious interference with a contract not only where the contract is thereby not performed but also where the interference causes the performance to be more expensive and burdensome.”

Additionally, it is well settled that a claim for tortious interference with contractual relations arises only “when a third party adversely affects the contractual relations of two other parties.” Thus, one who is either directly or indirectly a party to the contract at issue cannot be held liable for tortiously interfering with it. Accordingly, an agent who acts legitimately within the scope of his authority generally cannot be held liable for interfering with a contract.

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11 Herman v. Endriss, 187 Conn. 374, 376-77 (1982) (internal quotation marks omitted) (internal citation omitted).


13 Haiyan v. Hamden Pub. Schs., 875 F. Supp. 2d 109, 134 (D. Conn. 2012) (“[T]here can be no intentional interference with contractual relations by someone who is directly or indirectly a party to the contract. [T]he general rule is that the agent may not be charged with having interfered with a contract of the agent’s principal.”) (quoting Appleton v. Board of Educ. of the Town of Stonington, 53 Conn. App. 252, 267 (1999), rev’d in part on other grounds, 254 Conn. 205 (2000)).
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made by the agent’s principal and a third party, or for inducing the principal to breach that contract, “because to hold him liable would be, in effect, to hold the corporation liable in tort for breaching its own contract.” However, an exception to this general rule applies where the agent improperly acted outside the scope of his authority, using the corporate power for personal gain.

5-2.3 Common Elements

5-2.3.1 Knowledge of Beneficial Relationship

To impose liability for tortious interference, it is axiomatic that the defendant have known of the beneficial relationship with which it is alleged to have improperly interfered. Without knowledge of a beneficial relationship, a defendant cannot be found to have intent and, therefore, there can be no liability.

5-2.3.2 Improper Interference

While tortious interference with business expectancies encompasses a broad range of behavior, not every act of interference is tortious. To be actionable, the defendant’s interference must be “wrongful” beyond the mere fact of the interference itself.

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16. Tassmer v. McManus, No. CV085018961, 2009 WL 1218591, at *3 (Conn. Super. Ct. Apr. 9, 2009) (“To be subject to liability the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract”) (internal quotation marks omitted).


19. Blake v. Levy, 191 Conn. 257, 262 (1983); see also American Diamond Exch., Inc. v. Alpert, 101 Conn. App. 83, 90 (2007) (providing that not every act is actionable as tortious interference, but only when the “interference resulting in injury to another is wrongful
A plaintiff must prove some improper motive or use of improper means by demonstrating that the defendant was guilty of fraud, misrepresentation, intimidation, or molestation, or that he acted maliciously. The term “malice” in a tortious interference claim means “without justification,” as opposed to the ordinary sense of ill will. The plaintiff bears the burden of proving a defendant’s “lack of justification.”

In determining whether the defendant’s conduct is improper for purposes of a tortious interference claim, Connecticut courts consider the following factors set forth in the Restatement (Second) of Torts: (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, (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.

A plaintiff bears the burden of proof to establish a tortious interference claim by a preponderance of the evidence.
**Actual Loss**

An essential element of a cause of action for tortious interference is that the plaintiff must have suffered actual loss as a result of the interference. As the Connecticut Supreme Court has explained, “unlike other torts in which liability gives rise to nominal damages even in the absence of proof of actual loss[,] it is an essential element of the tort of unlawful interference with business relations that the plaintiff suffers actual loss.” When damages are an essential element to establishing the plaintiff’s claim, they must be proved with reasonable certainty.

Actual loss may be established by demonstrating that “except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit.” A plaintiff may not recover for an interference with “a mere possibility” of its making a profit in business.

The issue that often arises with this type of loss, however, is the difficulty in determining the amount of loss, i.e., the resulting damage, with a reasonable degree of certainty. For this reason, courts will give appropriate weight to the fact that the ability to calculate the amount of actual loss with reasonable certainty was made hypothetical by the defendant’s own wrongful conduct.

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29 American Diamond Exch., Inc. v. Alpert, 101 Conn. App. 83, 97 (2007) (“If the question is whether the plaintiff would have succeeded in attaining a prospective business transaction in the absence of the defendant’s interference, the court may, in determining whether the proof meets the requirement of reasonable certainty, give due weight to the fact that the question was made hypothetical by the very wrong of the defendant.”) (quoting Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 34 (2000)).
Courts have recognized the distinction between “damage” (i.e., the loss or injury caused by the negligence or misconduct of another) and “damages” (i.e., the money used to compensate one for the loss or injury occasioned by the negligence or misconduct of another), holding that the actual loss requirement of a tortious interference claim means “damage.” Accordingly, if actual loss is established, “the fact that [plaintiff] did not prove by a preponderance of the evidence the specific amount of the loss should not bar recovery … .”

5-2:4 Defenses

As discussed, not every act of interference is tortious for purposes of imposing liability under a theory of tortious interference. Rather, to be actionable, the defendant’s interference must be improper, and a plaintiff must demonstrate malice, not in the sense of ill will but intentional interference without justification. “Therefore, justification is a defense to a claim of tortious interference.”

Additionally, Connecticut courts have allowed the application of the Noerr-Pennington immunity doctrine to common law claims of tortious interference. Essentially, the Noerr-Pennington doctrine

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30. DiNapoli v. Cooke, 43 Conn. App. 419, 427-28 (1996) (“[D]amage is the loss, hurt, or harm which results from the injury[] and damages are the recompense or compensation awarded for the damage suffered.”) (emphasis added) (internal quotation marks omitted).

31. Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 37 (2000) (allowing award of punitive damages despite that the specific amount of damages was not established because the jury found that there was actual loss); see also American Diamond Exch., Inc. v. Alpert, 101 Conn. App. 83, 98 (2007) (“[A]n award of compensatory damages is not necessary to establish a cause of action for tortious interference as long as there is a finding of actual loss”) (quotation omitted); DiNapoli v. Cooke, 43 Conn. App. 419, 428 (1996) (affirming determination that plaintiff proved actual loss for tortious interference claim despite that “the court could not mathematically compute the precise or approximate pecuniary compensation, or damages, for that loss”).

32. Improper interference is discussed in § 5-2:3.2.


serves to immunize a party from liability for activities that attempt to influence governmental or judicial action despite having an anti-competitive purpose to eliminate competition. While the doctrine has its origins in antitrust law, the Noerr-Pennington defense applies to Connecticut common law claims as well, in particular claims of tortious interference.

However, the Noerr-Pennington doctrine does not provide immunity from suit if the conduct at issue constitutes a mere “sham” to disguise an attempt to directly interfere with a competitor’s business relationships. This “sham litigation” exception “applies where the litigation is (1) ‘objectively baseless’ and (2) intended to cause harm to defendant ‘through the use of governmental process—as opposed to the outcome of that process.’” Essentially, then, a sham involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action in any form” but, rather, one who has used governmental or judicial processes as an “anticompetitive weapon” to unjustifiably interfere with another’s business. Under these circumstances, the Noerr-Pennington doctrine will not immunize a defendant from suit for tortious interference.


37. *T.F.T.F. Capital Corp. v. Marcus Dairy, Inc.*, 33 F. Supp. 2d 122, 125-26 (D. Conn. 1998), aff’d on other grounds, 312 F.3d 90 (2d Cir. 2002) (holding that the Noerr-Pennington doctrine barred claim of tortious interference); *Zeller v. Consolini*, 59 Conn. App. 545, 554 n.5 (2000) (“We note that the Noerr-Pennington doctrine is similar to existing law in Connecticut governing the tort[] of interference with business relations….”).

38. *Zeller v. Consolini*, 59 Conn. App. 545, 552 (2000) (“[P]etitioning activity is not protected if such activity is a mere sham or pretense to interfere with no reasonable expectation of obtaining a favorable ruling.”) (citing *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983)).


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5-2.5 Damages

The proper measure of damages for a claim of tortious interference with business expectancies is “the pecuniary loss to the plaintiff of the benefits of the prospective business relation.”\(^{41}\) Stated another way, damages resulting from tortious interference are to be based upon the plaintiff’s lost profits, not upon any improper gains realized by the defendant.\(^{42}\) In addition, it is well established that nominal damages are “appropriate where there is insufficient evidence produced at trial to prove actual damages.”\(^{43}\) In essence, nominal damages are “a mere peg to hang costs on.”\(^{44}\)

As succinctly stated by the Connecticut Supreme Court, with respect to tortious interference cases, “[w]e . . . note that there are circumstances in which proof of damages may be difficult and that such difficulty is, in itself, an insufficient reason for refusing an award once the right to damages has been established.”\(^{45}\) Nonetheless, a plaintiff is not relieved of its burden of producing at least some nonspeculative evidence to permit the objective calculation of damages with some reasonable certainty.\(^{46}\) While mathematical exactitude is not required for an ultimate award of damages, it remains “the unvarying rule that evidence of such certainty as the nature of the case permits should be produced.”\(^{47}\)

\(^{41}\) American Diamond Exch., Inc. v. Alpert, 101 Conn. App. 83, 103 (2007) (citing Conrad v. Erickson, 41 Conn. App. 243, 247-48 (1996)); see also 4 Restatement (Second) Torts § 774A(1) (1979) (“One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for (a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.”).


\(^{43}\) DiNapoli v. Cooke, 43 Conn. App. 419, 424 (1996) (“Nominal damages mean no damages. They exist only in name and not in amount.”) (quoting Larsen Chelsey Realty Co. v. Larsen, 232 Conn. 480, 504 (1995)).


\(^{45}\) American Diamond Exch., Inc. v. Alpert, 302 Conn. 494, 510 (2011) (internal quotation marks omitted).

\(^{46}\) American Diamond Exch., Inc. v. Alpert, 302 Conn. 494, 510 (2011) (“Nevertheless, the court must have evidence by which it can calculate the damages, which is not merely subjective or speculative but which allows for some objective ascertainment of the amount.”) (internal quotation marks omitted).

\(^{47}\) American Diamond Exch., Inc. v. Alpert, 302 Conn. 494, 512 (2011) (internal quotation marks omitted).
5-3 COMMERCIAL DISPARAGEMENT AND DEFAMATION

5-3:1 Generally

Connecticut recognizes a cause of action for commercial disparagement, also known as trade libel, as a “species of defamation.”

In the seminal case of *QSP, Inc. v. Aetna Casualty & Surety Company*, the Connecticut Supreme Court recognized that the differing terminology used in this area of law is “somewhat confusing.” As the Court explained, “[f]alse communications which damage or tend to damage the reputation as to quality of goods or services are variously described as ‘disparagement,’ ‘product disparagement,’ ‘trade libel,’ or ‘slander of goods.’” Also, while “slander” connotes an oral communication, and “libel” connotes a written communication in the law of defamation, the terms “trade libel” and “slander of goods” in the context of commercial disparagement “are used without regard to the manner of publication.” In sum, the Court described the subtleties of commercial disparagement and defamation as follows:

Defamation and disparagement in the commercial context are allied in that the gravamen of both are falsehoods published to third parties. More specifically, however, where a statement *impugns the basic integrity or creditworthiness of a business*, an action for defamation lies and injury is conclusively presumed. But where, however, the statement is confined to *denigrating the quality of*
the business, goods or services, it could support an action for disparagement.53

Subsequent courts addressing claims of commercial disparagement or trade libel have evaluated those claims under the tenets of defamation law.54

5-3:2 Liability

To prevail on a claim for commercial disparagement, the plaintiff must prove that the defendant made a false and damaging statement concerning the plaintiff.55 This requirement is consistent with the treatment of a claim for commercial disparagement by Connecticut courts as one for defamation.56 A defamatory statement is one that “tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”57 In the context of trade libel, the appropriate inquiry is whether the plaintiff has been disparaged “in such a way as to interfere with its business relationships?”58


"[T]rade defamation is the knowing publication of a false matter derogatory to the plaintiff’s business calculated to prevent or interfere with relationships between the plaintiff and others to its detriment." A plaintiff must prove the following elements to establish a claim of defamation:

1. the defendant published a defamatory statement;
2. the defamatory statement identified the plaintiff to a third person;
3. the defamatory statement was published to a third person; and
4. the plaintiff’s reputation suffered injury as a result of the statement.

Additionally, a plaintiff is required to plead claims of defamation with specificity. To sufficiently state a claim, a plaintiff must specifically identify the alleged defamatory statement, when it was made, by whom, and to whom it was made.

5-3:3 Defenses

5-3:3.1 Generally

Given the treatment by Connecticut courts of a claim for commercial disparagement or trade libel as one for defamation, it follows that the various common law defenses available under the law of defamation may be asserted in actions for trade libel.

‘gravamen of disparagement in the commercial context’ is ‘falsehoods published to third parties.’” (quoting QSP, Inc. v. Aetna Cas. & Sur. Co., 256 Conn. 343, 359 n.15 (2001)).


61 RAB Assocs., LLC v. Bertch Cabinet Mfg., Inc., No. NHNCV106015934, 2012 WL 1434963, at *9 (Conn. Super. Ct. Mar. 29, 2012) (“Certainty is required in the allegations as to the defamation and as to the person defamed.”) (internal quotation marks omitted); American Int’l Specialty Lines Co. v. HMT Inspections, No. MMXCV095007419, 2011 WL 1759098, at *7-8 (Conn. Super. Apr. 13, 2011) (granting motion to strike trade libel claim for failure to identify to whom the statements were made).

As discussed, to be liable for defamation, it must be established that “the defendants published false statements that harmed the [plaintiff], and that the defendants were not privileged to do so.”63 Thus, common defenses typically asserted include those which attack the prima facie elements of the claim, such as maintaining that the statements at issue were actually true, that there was no publication of the statement, or that the statement was privileged.64 In the corporate context, intracorporate communications constitute “publication” of a defamatory statement.65 With respect to a privilege defense, there are two aspects to the defense: “[t]he occasion must be one of privilege, and the privilege must not be abused.”66

5-3:3.2 Absolute Privilege

It is well established that an absolute privilege exists for statements that are made in the course of judicial proceedings. Connecticut courts “have consistently held that absolute immunity bars defamation claims that arise from statements made in the course of judicial or quasi-judicial proceedings.”67 In such circumstances, the public policy of affording people the opportunity to speak freely and encouraging participation and candor outweighs the risk that one may abuse the privilege to impugn another by a false and defamatory statement.68 Accordingly, so long as the

communications or statements are pertinent to the subject matter of the controversy, the absolute privilege serves to bar the recovery of any damages for defamatory statements made.69 The privilege is not limited to formal testimony but also “extends to any statement made in the course of the judicial proceeding, whether or not given under oath, as long as it is pertinent to the controversy.”70

5-3:4 Damages
In actions for trade libel, Connecticut courts are also guided by the settled principles of the law of defamation on the issue of damages.71 When statements are defamatory per se, i.e., they impugn the integrity of one’s business or profession,72 then injury to one’s reputation is conclusively presumed.73 In these circumstances, a plaintiff is entitled to recover general damages without proof of special damages, or specific pecuniary harm.74

69 McKinney v. Chapman, 103 Conn. App. 446, 452 (2007) (“[C]ommunications uttered or published in the course of the judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. The effect of an absolute privilege is that damages cannot be recovered for a defamatory statement even if it is published falsely or maliciously.”) (internal quotation marks omitted); Wilcox v. Schmidt, Nos. WWMCV044001126, WWMCV054001851, 2010 WL 2817490, at *13 (Conn. Super. Ct. June 3, 2010) (same) (quoting Gallo v. Bartle, 284 Conn. 459, 465-66 (2007)).


72 Miles v. Perry, 11 Conn. App. 584, 601-02 (1987) (providing that defamation “is actionable per se if it charges improper conduct or lack of skill or integrity in one’s profession or business and is of such a nature that is calculated to cause injury to one in his profession or business”) (internal quotation marks omitted); Wilcox v. Schmidt, Nos. WWMVC044001126, WWMVC054001851, 2010 WL 2817490, at *12 (Conn. Super. Ct. June 3, 2010) (same).


74 Genworth Fin. Wealth Mgmt., Inc. v. McMullan, No. 3:09-CV-1521, 2012 WL 1078011, at *17 (D. Conn. Mar. 30, 2012) (holding that statements that are defamatory per se obviate
If, however, defamation is established but is not actionable per se, general damages may still be recoverable but “only upon proof of special damages for actual pecuniary loss suffered.”

5-4 FRAUD

In the context of business litigation, fraud generally involves obtaining an unfair advantage by an affirmative act or omission that violates good faith and conscientious conduct. Given the various types of fraud that exist, there are a variety of remedies available, some of which turn on whether the fraud was intentional or negligent.

5-4:1 Fraudulent Misrepresentation

The essential elements required to establish a cause of action for common law fraud are:

(1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury.

Fraudulent misrepresentation is an intentional tort. The plaintiff bears the burden of establishing fraud “by a standard higher than the usual fair preponderance of the evidence, which we have described as clear and satisfactory or clear, precise and

the need to prove specific pecuniary harm); Miles v. Perry, 11 Conn. App. 584, 602 (1987) (“Once the plaintiff has established that the words are false and actionable per se ... she is entitled under Connecticut law to recover general damages without proof of special damages.”) (citation omitted).


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unequivocal." Additionally, fraud claims asserted in federal court actions are subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

A false representation for purposes of a fraud claim “is one that is knowingly untrue, or made without belief in its truth, or recklessly made and for the purpose of inducing action upon it.” The false representation must be one of fact, and not a mere statement of opinion. Also, the false representation must relate to an existing or past fact. “[A] promise to do an act in the future is a false representation only when coupled with a present intent not to fulfill the promise.” Additionally, it is axiomatic that the party to whom the false representation was made must have reasonably relied on the representation and suffered harm as a result of that reliance.

5-4:1.1 Fraudulent Nondisclosure

The intentional nondisclosure of a known fact may also form the basis of a fraudulent misrepresentation claim. Fraud may be

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79 Fed. R. Civ. P. 9(b); see also Sovereign Bank v. ACG II, LLC, No. 08cv1600, 2010 WL 363336, at *4 (D. Conn. Jan. 25, 2010) (providing that to satisfy Rule 9(b) a complaint must specify the purportedly fraudulent statements, identify the speaker, when and where the statements were made, and why the statements are fraudulent).


perpetrated in a variety of different ways calculated to deceive another, and “there may be as much fraud in a person’s silence as in a false statement.”84 Nondisclosure of a known fact can amount to fraud only if there is a duty to speak.85 Once a vendor undertakes to speak with respect to some matter, it must then make “full and fair disclosure” as to that matter and avoid any deliberate nondisclosure concerning the matter.86 Accordingly, to establish fraudulent nondisclosure, there must be a failure to disclose known facts, a duty to disclose, and an intent or expectation by the declarant that the nondisclosure will ‘cause mistake by another to exist or to continue, in order to induce the latter to enter into or refrain from entering into a transaction.’87

5-4:1.2 Defenses

Comparative negligence is not a defense to a claim of fraudulent or intentional misrepresentation.88 The defense of comparative negligence, which replaced the former rule of contributory negligence that acted as a complete bar to liability, operates to diminish the amount of damages recoverable based upon the degree of the plaintiff’s own negligence.89 A defendant charged with fraud cannot use the defrauded party’s negligence as a defense to liability


86 Dockter v. Slowik, 91 Conn. App. 448, 458 (2005); see also Wedig v. Brinster, 1 Conn. App. 123, 131 (1983) ("[O]nce a vendor assumed to speak, ‘he must make a full and fair disclosure as to the matters about which he assumes to speak.’ He must then avoid a deliberate nondisclosure."). (quoting Franchey v. Hannes, 152 Conn. 372, 379 (1965)).


for its own intentional conduct.\textsuperscript{90} Thus, in fraud claims, “fault should not be apportioned between an intentional tortfeasor and a merely negligent victim.”\textsuperscript{91}

\textbf{5-4.1.3 Damages}

In an action for fraud, a plaintiff may be entitled to recover general and special damages, as well as punitive damages.\textsuperscript{92} Proof of damages on a fraud claim need be established by only a preponderance of the evidence.\textsuperscript{93}

Punitive or exemplary damages may be awarded not as punishment but when the evidence demonstrates “a reckless indifference to the rights of others or an intentional and wanton violation of those rights.”\textsuperscript{94} An award of punitive damages is discretionary.\textsuperscript{95} Additionally, punitive damages in a fraud case may include an award of attorney’s fees.\textsuperscript{96} The amount of punitive damages awarded is limited to a party’s litigation expenses less taxable costs.\textsuperscript{97} “Litigation expenses may include not only attorney’s fees, but also any other nontaxable disbursements reasonably necessary to prosecuting the action.”\textsuperscript{98}

\textsuperscript{90} Kramer v. Petisi, 285 Conn. 674, 685 (2008) (“One who has perpetrated a fraud should not be permitted to say to the party defrauded when relief is demanded that he or she not ought to have believed or trusted the perpetrator and was negligent in doing so.”) (quoting 37 Am. Jur. 2d 330 § 319 (2001)).

\textsuperscript{91} Kramer v. Petisi, 285 Conn. 674, 685 (2008) (internal quotation marks omitted).


\textsuperscript{93} Whitaker v. Taylor, 99 Conn. App. 719, 735 (2007); see also Dockter v. Slowik, 91 Conn. App. 448, 453-54 (2005) (“[A]lthough the elements of fraud must be proved by clear and convincing evidence, damages may be proved by the preponderance of the evidence.”) (quoting Kilduff v. Adams, Inc., 219 Conn. 314, 329 (1991)).


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5-4:2  Negligent Misrepresentation

5-4:2.1  Generally
The tort of negligent misrepresentation is separate and distinct from the tort of fraudulent or intentional misrepresentation.99 The requisite elements for a claim of negligent misrepresentation vary slightly from those of fraudulent or intentional misrepresentation. For negligent misrepresentation, a plaintiff must establish

(1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result.100

A plaintiff must prove negligent misrepresentation by a fair preponderance of the evidence.101

Connecticut has long recognized and imposed liability for negligent misrepresentation. The principles underlying such a claim are well settled in Connecticut common law:

One who, in the course of his business, profession or employment supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.102

In such circumstances, “even an innocent misrepresentation may be actionable if the declarant has the means of knowing,

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ought to know, or has the duty of knowing the truth.”103 Given that the claim is premised upon negligence, the defendant must have “failed to exercise the reasonable care and competence of a reasonable man in obtaining or communicating the information.”104 Regardless of whether the statement of fact was made negligently or innocently, to be actionable it must have been false and made for purposes of inducing action upon it.105 Finally, a plaintiff’s reliance on the misrepresentation must have been reasonable.106

A claim of negligent misrepresentation may arise even as between two sophisticated commercial entities having full access to information concerning a business transaction. In Williams Ford, Inc. v. Hartford Courant Company,107 the Connecticut Supreme Court rejected the argument that the tort of negligent misrepresentation cannot be recognized in circumstances involving business adversaries in the commercial context.108 To the contrary, the Court expressly adopted the reasoning that “there would seem to be very little justification for not extending liability to all parties and agents to a bargaining transaction for making misrepresentations negligently.”109


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5-4:2.2  Defenses

Comparative negligence under § 52-572h(b) of the Connecticut General Statutes is available as a defense to a claim of negligent misrepresentation resulting in commercial loss. As previously discussed, comparative negligence replaced the former rule of contributory negligence, which had served as a complete defense to the imposition of liability. Thus, in defense of a negligent misrepresentation claim, a defendant may assert the plaintiff’s comparative negligence “to diminish recovery of damages based upon the degree of the plaintiff’s own negligence.”

5-4:3  Innocent Misrepresentation

Connecticut common law recognizes the tort of innocent misrepresentation, which is a separate and distinct cause of action from that of negligent misrepresentation and is based on principles of warranty. The requisite elements of a cause of action for innocent misrepresentation are:

1. a representation of material fact
2. made for the purpose of inducing the purchase,
3. the representation is untrue, and
4. there is justifiable reliance by the plaintiff on the representation by the defendant and
5. damages.


111. The defense of comparative negligence is also discussed in § 5-4:1.2.


114. Gibson v. Campano, 241 Conn. 725, 730 (1997); Kramer v. Petisi, 285 Conn. 674, 686 n.10 (2008) (discussing “the separate and distinct tort of innocent misrepresentation, which, in contrast to the tort of negligent misrepresentation, is predicated on principles of warranty”) (citing Johnson v. Healy, 176 Conn. 97, 100-02 (1978)).

The tort extends to any sale, rental, or exchange transaction, and is not limited to the sale of goods.\textsuperscript{116} Negligence on the part of the defendant is not required.\textsuperscript{117} An innocent misrepresentation is actionable if it is false and misleading, even in the absence of fraud or bad faith. Thus, the plaintiff need establish only that the defendant made a false representation of fact that induced it to act and that the plaintiff suffered damages as a result of the incorrect statement.\textsuperscript{118} In this regard, innocent misrepresentation is considered a strict liability tort.\textsuperscript{119} The tort may also be analogized to the doctrine of mistake under contract law.\textsuperscript{120}

\textbf{5-5 \hspace{1em} STATUTE OF LIMITATIONS}

\textbf{5-5:1 \hspace{1em} Generally}

Section 52-577 of the Connecticut General Statutes provides for a three-year statute of limitations for causes of action sounding in tort.\textsuperscript{121} Given that § 52-577 is an occurrence statute, the time period to commence an action “begins to run at the moment the act or omission complained of occurs.”\textsuperscript{122} The limitations period

\begin{itemize}
\item \textsuperscript{116} \textit{Gibson v. Campano}, 241 Conn. 725, 730 (1997).
\item \textsuperscript{117} \textit{Little Mountains Enters., Inc. v. Groom}, No. FSTCV075004977, 2011 WL 6934572, at *5 (Conn. Super. Ct., Dec. 6, 2011) (“Consequently, it can be seen that the difference between a claim for negligent misrepresentation and innocent misrepresentation is that under an innocent misrepresentation theory, the plaintiff does not have to demonstrate that the defendants acted negligently.”).
\item \textsuperscript{119} \textit{Petrucelli v. Palmer}, 596 F. Supp. 2d 347, 373 (D. Conn. 2009) (describing innocent misrepresentation claim asserted by plaintiff as “the closest to a ‘strict liability’ tort”) (citing \textit{Johnson v. Healy}, 176 Conn. 97, 101-02 (1978) (extending this “strict liability” from the sale of goods to transactions for the sale of land); \textit{Matyas v. Minck}, 37 Conn. App. 321, 334 n.7 (1995) (discussing that strict liability has been imposed for innocent misrepresentation with respect to construction contracts) (citing \textit{E & F Constr. Co. v. Stamford}, 114 Conn. 250 (1932)).
\item \textsuperscript{120} See generally \textit{Gibson v. Campano}, 241 Conn. 725, 730-31 (1997) (applying general principles of contract law to resolve innocent misrepresentation claim); \textit{cf. Duska v. City of Middletown}, 173 Conn. 124, 128 (1977) (holding that the innocent and unintentional nondisclosure of facts where there existed a duty to disclose justifies the remedy of rescission).
\item \textsuperscript{121} Conn. Gen. Stat. § 52-577.
\end{itemize}
begins to run regardless of when the plaintiff first discovers the purported injury. The three-year statute of limitations governs claims of tortious interference with contractual relations, tortious interference with business expectancies, fraudulent or intentional misrepresentation, negligent misrepresentation, and innocent misrepresentation.

While Connecticut courts have not expressly addressed the applicable statute of limitations governing claims of commercial disparagement, the tort, as previously discussed, is recognized under Connecticut law as a species of defamation. Thus, these claims are governed by the two-year statute of limitations under

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127. Viejas Band of Kumeyaay Indians v. Lorinsky, 116 Conn. App. 114, 158 n.15 (2009) (holding that plaintiff’s negligent misrepresentation claim was governed by the three-year statute of limitations under § 52-577). While Connecticut law also provides for a two-year statute of limitations for claims of negligence under § 52-584, that statute governs the limitations period for recovery for injury to person or personal property. Conn. Gen. Stat. § 52-584. As such, § 52-584 generally does not apply to litigation among commercial entities. Guerrera v. Signore’s Place, LLC, No. CV1811371, 2010 WL 5188630, at *2 n.1 (Conn. Super Ct. Dec. 2, 2010) (holding that § 52-577 applies “to claims of negligent misrepresentation which, as here, do not include allegations of damages to person or property”); Lee v. Brenner, Saltzman & Wallman, LLP, No. CV065000728, 2010 WL 398916, at *3 (Conn. Super Ct. Jan. 12, 2010) (“Because the plaintiff in this action does not seek to recover damages for injury to his person or to his real or personal property, his negligent misrepresentation claims do not fall in within § 52-584 and are governed by § 52-577.”); but see Gonzalves v. Superior Plating Co., No. CV085015711, 2010 WL 3964659, at *11 (Conn. Super Ct. Sept. 9, 2010) (applying two-year statute of limitations under § 52-584 because negligent misrepresentation claim is an action for negligence).


129. Commercial disparagement is discussed in § 5-3.

§ 52-597, which applies to defamation claims. Similar to § 52-577, the two-year limitations period under § 52-597 begins to run “from the act complained of,” meaning “the publication of the alleged defamatory statement, not the plaintiff’s discovery of that defamatory statement.”

5-5:2 Fraudulent Concealment

The running of the three-year statute of limitations may be suspended, however, where a party fraudulently conceals the existence of the cause of action. Specifically, § 52-595 of the Connecticut General Statutes provides that, if any person who is liable to another fraudulently conceals the existence of the cause of action, that cause of action will begin to accrue only when the person entitled to sue thereon first discovers its existence. Section 52-595 does not create an independent cause of action. The statute merely serves to toll the relevant statute of limitations until such time as the potential plaintiff discovers the existence of the cause of action.

To demonstrate fraudulent concealment under § 52-595, a plaintiff has the burden of proving that the defendant

(1) had actual awareness, rather than imputed knowledge, of the facts necessary to establish plaintiff’s cause of action; (2) intentionally concealed these facts from the plaintiff; and

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131. Conn. Gen. Stat. § 52-597; Byte Interactive, LLC v. Schlechter, No. FSTCV044002070, 2006 WL 2556307, at *2 (Conn. Super. Ct. Aug. 10, 2006) (applying § 52-597 to trade defamation claim but denying summary judgment on issue of whether the claim was barred because there existed a genuine issue of material fact as to when the statement was made).


(3) concealed the facts for the purpose of delaying plaintiff’s filing of a lawsuit.\textsuperscript{135}

In sum, for the statute of limitations to be tolled for fraudulent concealment under § 52-595, the plaintiff must establish that the defendant had actual knowledge of the facts giving rise to the plaintiff’s claim and intentionally concealed those facts to delay the commencement of a lawsuit.\textsuperscript{136}
