

Business Torts

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List of Classic Business Torts

- ◉ Breach of Fiduciary Duty
- ◉ Civil Conspiracy
- ◉ Civil RICO
- ◉ Civil Theft
- ◉ Constructive Trust
- ◉ Conversion
- ◉ Equitable Accounting
- ◉ Florida's Deceptive & Unfair Trade Practices Act
- ◉ Fraud
- ◉ Fraud in the Inducement
- ◉ Injurious Falsehood
- ◉ Theft and Loss of Business Opportunities
- ◉ Theft of Trade Secrets
- ◉ Tortious Interference

Related COA's not covered in this Presentation

- Defamation
- Slander
- Slander of Title
- Trade Libel/Disparagement
- Unfair Competition/Trade Practices

Casa Caribe – Fact Pattern

- Formed to invest in real estate in the Dominican Republic
- Macdonald - Chairman, President and CEO
- Opened accounts at Eagle Bank for Casa Caribe
- Made his wife signatory on the accounts

Casa Caribe – Fact Pattern

- Clients invested around \$450,000
- \$70,000 in legitimate expenses
- Board of Directors became concerned
- Meeting with Macdonald in NYC

Casa Caribe – Fact Pattern

- Macdonald gave the Board bogus documents
- When the other directors showed up in NYC, Macdonald wasn't there
- Board removed Macdonald from his position

Casa Caribe – Fact Pattern

- Further investigation revealed that Macdonald had stolen between \$450,000 and \$500,000
 - What are the causes of action?

Casa Caribe – Causes of Action Breach of Fiduciary Duty

ELEMENTS:

- Defendant has a fiduciary duty to Plaintiff;
- Defendant breaches its duties to Plaintiff; and
- Plaintiff suffers damages.

HERE:

- Classic fiduciary position;
- Stole from the company;
- Money is gone.

Doe v. Evans, 814 So.2d 370, 374 (Fla. 2002)

Casa Caribe – Causes of Action Conversion

ELEMENTS:

- Defendant engaged in an unauthorized act; which
- Deprived Plaintiff of its property, permanently or for an indefinite time
- Demand or showing of futility of demand, unless conversion can otherwise be shown

HERE:

- Unauthorized taking of \$
- Macdonald and his wife deprived CC of its money by spending it
- CC demanded return of funds

Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.,
450 So.2d 1157, 1160 (Fla. 3d DCA 1984)

Casa Caribe – Causes of Action Civil Theft (Fla. Stat. § 772.11)

ELEMENTS:

- Defendant knowingly obtains or uses, or endeavors to obtain or to use, with a felonious intent to steal (criminal intent);
- Property in which Plaintiff can successfully identify a legally cognizable right;
- With intent to, either temporarily or permanently:
 - Deprive Plaintiff of a right to the property or a benefit from the property; or
 - Appropriate the property to Defendant's own use or to the use of a person other than the Plaintiff.

HERE:

- Macdonald was fiduciary – knew what he was taking
- Casa Caribe's money
- Paid his and his wife's personal expenses

Casa Caribe – Causes of Action

Civil Theft (Fla. Stat. § 772.11)

- Pre-suit Demand Requirement
- Standard of Proof for Felonious Intent:
clear and convincing
- Treble damages

Westinghouse Elect. Corp., Inc. v. Bay County Energy System
Inc., 590 So.2d 986, 988 (Fla. 1st DCA 1991)

Casa Caribe – Causes of Action Fraud

ELEMENTS

- Defendant made a false representation;
- Regarding a material fact;
- Defendant knew or should have known the representation was false;
- Defendant intended that the representation induce Plaintiff to act on it; and
- Plaintiff suffered damages in justifiable reliance on the representation

HERE:

- Sent false documents
- Regarding the account balance
- Macdonald was in charge of the account
- Members sent money, which was lost
- Fiduciary relationship (reasonable reliance)

Johnson v. Davis, 480 So.2d 625 (Fla. 1985)

Casa Caribe – Causes of Action Civil Conspiracy

ELEMENTS:

- Defendant formed and operated a conspiracy (two or more parties);
- To do an unlawful act or lawful act by unlawful means;
- The execution of such act in pursuance of the conspiracy; and
- Plaintiff suffers damages as a result.

HERE:

- Macdonald + Boswell + Smith = two or more parties;
- To steal money from CC;
- For example:
 - Credit card for Smith;
 - Cash for Boswell;
 - Transfers to Macdonald's offshore accounts
- CC lost its money.

Churruca v. Miami Jai-alai, Inc., 353 So.2d 547, 550 (Fla. 1977)

Haven Home – Fact Pattern

- Haven Home solicited buyers of condos.
- Plaintiffs were potential purchasers.
- Numerous false statements, including:
 - Units at “friends and family” pricing;
 - Units not for sale to the public;
 - Long waiting list to purchase units
 - Quick flip = Big Profit\$\$\$

Haven Home – Fact Pattern

- Plaintiffs relied on misrepresentations
- Made deposits
- The promised flipping didn't happen
- Defendant changed floor plans; increased assessments without timely notice
- Plaintiffs sought to exercise their contractual rights to rescind
- Defendant refused to comply

Haven Home – Causes of Action

Fraud in the Inducement

○ Here:

- Misrepresentations made to induce deposits on the condominiums
- Misrepresentations undermined the negotiations
- Plaintiffs could not have known falsity

Haven Home – Causes of Action

- **Fraud in the Inducement**
- The **economic loss rule** limits the parties to their contractual remedies in the case of fraud relating to the performance of a contract. However, if the fraud occurs in connection with misrepresentations or omissions which induce the Plaintiff to enter into a contract or transaction, such fraud is **fraud in the inducement**, which is not so limited. D&M Jupiter, Inc. v. Friedopfer, 853 So.2d 485 (Fla. 4th DCA 2003).

Haven Home – Causes of Action

- “Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely – which normally would constitute grounds for invoking the economic loss doctrine – but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party’s fraudulent behavior.”
Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So.2d 74 (Fla. 3d DCA 1997).

Haven Home – Causes of Action

- **Florida's Deceptive & Unfair Trade Practices Act (Violation of § 501.204)**
- **Two approaches:**
 - **The Standards Approach: unfair, immoral, etc. business practices are illegal**
 - **The Per Se Approach: based on other statutes, ordinances, rules, etc.**
 - **E.g. FTC rules**

Haven Home – Causes of Action

- **Florida's Deceptive & Unfair Trade Practices Act**

- A practice is unfair “if it offends public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” Urling v. Helms Exterminators, 468 So.2d 451 (Fla. 1st DCA 1985).

- **Here: The Standards Approach**

- Misrepresentations in the conduct of trade as Condominium developer
- Untimely notice of amendment and withholding of Plaintiffs' deposits

Urling v. Helms Exterminators, 468 So.2d 451 (Fla. 1st DCA 1985)

Equilibrium Employment

- ◉ Temp agency
- ◉ Johanna Medium (JM) hired as manager
- ◉ Privy to confidential and proprietary information

Equilibrium Employment

- Non-compete clause
- Anti-interference clause
- Termination

Equilibrium Employment

- Competing business
- Misrepresentations to EE employees

EE – Causes of Action Breach of Contract

ELEMENTS:

- Valid contract
- Material breach
- Damages caused by breach

HERE:

- Employment contract
- Specific term
- Loss of business

Beck v. Lazard Freres & Co., LLC, 175 F.3d 913, 914
(11th Cir. 1999)

EE – Causes of Action

Theft of Trade Secrets

- **Uniform Trade Secrets Act (Fla. Stat. §§ 688.001 – 688.009)**
- **“Trade secret”** means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
 - Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
 - Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

EE – Causes of Action Theft of Trade Secrets

ELEMENTS:

- Trade secret owned and maintained by Plaintiff;
- Knowing misappropriation by Defendant;
- Damage to Plaintiff.

HERE:

- Customer lists, etc.
- Basis of new business
- Loss of business

Liberty American Ins. Group, Inc. v. WestPoint Underwriters, L.L.C., 199 F.Supp.2d 1271 (M.D.Fla. 2001)

EE – Causes of Action

Injurious Falsehood

- “The gist of [injurious falsehood] is the interference with the prospect of sale or some other advantageous relation; and it is equally possible to disparage the plaintiff’s business by reflecting upon its existence or character, [or] the manner in which it is conducted ... without affecting any property.” *W. Page Keeton, et al., Prosser and Keeton on The Law of Torts* § 128, at 966 (5th ed. 1984).

EE – Causes of Action Injurious Falsehood

ELEMENTS:

- False statement
- Communication to third party
- Likely harm known
- Falsehood played a material role in damaging Plaintiff

HERE:

- Job loss scare
- EE employees
- By virtue of position
- Loss of employees

Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,
742 So.2d 381 (Fla. 4th DCA 1999)

Nettles v. Klein

- ◉ Closely-knit religious community
- ◉ Honor, trust important
- ◉ Contracts often not written
- ◉ Both parties own various business entities

Nettles v. Klein

- ◉ Klein sought financing
- ◉ Nettles lent millions
- ◉ Many real estate deals

Nettles v. Klein

- Nettles became concerned
- Klein made excuses
- Nettles discovered diversion of funds

Nettles v. Klein

● Breach of Fiduciary Duty?

- Did Klein owe Nettles the duties of a fiduciary?
- Not a classic scenario
- Fiduciary duty is implied in law “when confidence is reposed by one party and a trust accepted by the other.” Capital Bank v. MVB, Inc., 644 So.2d 515, 518.
- The burden of proving such a relationship is on the party asserting it. Kislak v. Kreedian, 95 So.2d 510, 514-15 (Fla. 1957).

Nettles v. Klein – Causes of Action Equitable Accounting

ELEMENTS:

- Extensive/complicated accounts
- Inadequate remedy at law

HERE:

- Convoluted transactions, little documentation
- Forensic accounting necessary

Bankers Trust Realty, Inc. v. Kluger, 672 So.2d 897, 898
(Fla. 3d DCA 1996)

Nettles v. Klein – Causes of Action

Civil RICO

- Racketeer Influenced and Corrupt Organization Act (18 U.S.C.A §§ 1961 – 1968)
- **Basic Elements (simplified):**
 - Conduct of an enterprise
 - Through a pattern
 - Of racketeering activity

Nettles v. Klein – Causes of Action

Civil RICO

Conduct of an enterprise

- Requires proof of the existence of an enterprise which is:
 - A legal entity, an associated in fact entity, or a governmental entity;
 - Engaged in, or the activities of which affect, interstate or foreign commerce;
 - Pled as a separate and distinct element from the pattern of racketeering activity;
 - Distinct from Defendant.
- **Here:**
 - Klein operated numerous LLCs and sole-proprietorships
 - Engaged in real estate transactions in multiple states

Nettles v. Klein – Causes of Action

Civil RICO

Through a pattern

- Requires proof of a pattern of racketeering activity consisting of at least two acts of racketeering activity within ten years or the collection of an unlawful debt;
- **Here:** Klein engaged in two or more predicate acts – he fraudulently solicited funds from Nettles on multiple occasions using wire (email and telephone)

Nettles v. Klein – Causes of Action

Civil RICO

Of racketeering activity

- Requires proof of statutorily defined racketeering activity (see 18 U.S.C.A. § 1961(1))
- **Here:** Scheme perpetrated through wire fraud violations under 18 U.S.C. § 1343 and mail fraud violations under 18 U.S.C. § 1341.

Rogers v. Nacchio, 241 Fed.Appx. 602, 607-8 (11th Cir. 2007)

Nettles v. Klein – Causes of Action Unjust Enrichment

ELEMENTS:

- Conferral of benefit
- Acceptance
- Inequitable under the circumstances

HERE:

- Nettles lent millions
- Klein retained money
- Inequitable for Klein to keep money

Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., N.A., 667 So.2d 876 (Fla. 3d DCA 1996)

Nettles v. Klein – Causes of Action Constructive Trust

ELEMENTS:

- A promise, express or implied;
- Transfer of the property and reliance thereon;
- Confidential relationship;
- Unjust enrichment.

HERE:

- Klein fraudulently promised to repay
- Nettles relied and made the loan
- Fiduciary duty
- Inequitable to allow Klein to retain benefit

Standard of Proof: Clear and convincing evidence

**Hiestand v. Geier, 396 So.2d 744 (Fla. 3d DCA), *rev. denied*
407 So.2d 1103 (Fla. 1981)**

Nettles v. Klein – Causes of Action Promissory Estoppel

ELEMENTS:

- Defendant made a promise which Defendant reasonably expected Plaintiff to act upon;
- Plaintiff in fact acted upon it; and
- Injustice can only be avoided by enforcing the promise

HERE:

- Klein promised to repay Nettles with interest;
- Which induced Nettles to lend Klein the money;
- Injustice can only be avoided by enforcement of Klein's promise.

Argonaut Development Group, Inc. v. SWH Funding Corp.,
150 F.Supp.2d 1357 (S.D.Fla. 2001)

Other Causes of Action

Tortious Interference with a Business Relationship

- The existence of a business relationship
 - A protected business relationship need not be evidenced by an enforceable contract, but must afford Plaintiff existing or prospective legal or contractual rights. Register v. Pierce, 530 So.2d 990, 993 (Fla. 1st DCA 1988).
- Defendant's knowledge of the relationship
- Defendant's intentional and unjustified interference with the relationship;
- Damage to Plaintiff as a result of the breach of the relationship.

Gossard v. Adia Services, Inc., 723 So.2d 182 (Fla. 1998).

Other Causes of Action

Tortious Interference with a Contract Right

- The existence of a contract;
- Defendant's knowledge of the contract;
- Defendant's intentional procurement of the contract's breach;
- Absence of any justification or privilege;
- Damages resulting from the breach.

Smith v. Ocean State Bank, 335 So.2d 641 (Fla. 1st DCA 1976).

Other Causes of Action

Tortious Interference

- The torts of **Interference with a Contract Right** and **Interference with a Business Relationship** differ only slightly. See McDonald v. McGowan, 402 So.2d 1197 (Fla. 5th DCA 1981)

Conclusion

- Causes of Action
 - State or Federal Court
- Strategy
- Client Objectives

End of Presentation