SECTION 11

Business Law Torts

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Business Torts
CLE in Colorado, Inc.
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BUSINESS TORTS: AN OVERVIEW & UPDATE

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I. Introduction

A. What are Business Torts?

1. A tort is a wrongful injury to a person or property. A business tort is a wrongful injury to a business or its property; as one scholar described it, a business tort is "a private wrongdoing in the course of business." Business torts are based in common and statutory law.

2. A host of different business torts exist. Business torts include:

- tortious interference with a contract
- bad faith in business contracts
- interference with prospective advantage
- unfair competition/misappropriation of trade secrets
- breach of fiduciary duties
- fraudulent/negligent misrepresentation
- business defamation
- unfair competition
- antitrust
- misappropriation of trade secrets
- civil conspiracy/RICO
- breach of covenants not to compete
- internet and software piracy
- patent or trademark infringement

B. Damages and Other Remedies:

1. Business tort claims expose a defendant-business to liability for damages its conduct proximately caused. Although business torts frequently

originate with or involve a contract, tort damages are more expansive than contract damages.

2. Compensatory damages include lost profits, loss of good will, and loss of investments. Punitive damages may also be available.

3. Business torts oftentimes require injunctive or extraordinary relief (*e.g.*, a temporary or permanent restraining order to enforce a covenant not to compete).

II. The Boundary between Contract and Tort

Much business-to-business litigation involves a contract between two commercial entities. Courts have struggled to draw the line between contract and tort law.

A. Economic Loss Rule & Independent Duty of Care

1. The economic loss rule generally bars recovery in tort for injuries other than those sustained by a person or other property. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

2. The purpose of the economic loss rule is to maintain a line between tort and contract law. *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862, 865 (Colo. 2005).

3. The Colorado Supreme Court adopted the economic loss rule in *Town of Alma v. AZCO Construction*, 10 P.3d 1256, 1264 (Colo. 2000) ("[A] party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law").

4. Where a "duty of care is created by, and completely contained in, the contractual provisions," a tort claim cannot stand. *Grynbreg v. Agri Tech., Inc.*, 10 P.3d 1267, 1270 (Colo. 2000). *Grynberg* reversed a $600,000 negligence judgment because the jury found that a contract existed but was not breached.

B. "Exception" to the Economic Loss Rule

1. The economic loss rule does not apply where there is an independent duty in tort; in other words, if the tort claim arises from a duty extraneous to the contract, then a tort claim for economic loss may proceed. *See A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862 (Colo. 2005).

2. Generally, such duties arise from "duties imposed by law to protect citizens from risk of physical harm or damage to their personal property." *Id.* at 866 (noting that builders have an obligation to act without

negligence in the construction of a home independent of contractual obligations).

3. The Colorado Supreme Court has been reluctant to find a duty in tort between commercially sophisticated parties. *See BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 73 (Colo. 2004). A court will analyze the following factors to determine if a tort duty exists:

   a. The relief sought: is the relief sought in negligence the same as the contractual relief?

   b. The common law: is there a recognized common law duty of care?

   c. The duties involved: does the negligence duty differ in any way from the contractual duty? *BRW*, 99 P.3d at 74.

C. Examples of Exceptions to the Economic Loss Doctrine

1. Breach of the Implied Duty of Good Faith and Fair Dealing (sometimes called "Bad Faith in Business Contracts"):

   a. In general, this claim does not exist in tort. *See Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004) ("Every contract in Colorado contains an implied duty of good faith and fair dealing . . . . In most contractual relationships, a breach of this duty will only result in damages for breach of contract and will not give rise to tort liability.").

   b. For example, the Colorado Supreme Court has rejected implying this duty to at-will employment contracts. *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 947 P.2d 937 (Colo. 1997).

   c. The "exception to the exception": the implied duty of good faith and fair dealing gives rise to an independent tort duty in insurance contracts. *See Trans Am. Premier Ins. Co. v. Brighton School Dist. 27J*, 940 P.2d 348, 351 (Colo. 1997).

2. Construction Defect Litigation

   a. "[S]ubcontractors owe homeowners a duty of care, independent of any contractual obligations to act without negligence in the construction of a home." *A.C. Excavating v. Yacht Club II Home Owners Ass'n*, 114 P.3d 862, 864-65 (Colo. 2005).

D. **Update**:

1. *Bermel v. Blueradios, Inc.*, -- P.3d --, 2017 WL 710485 (Colo. App. Feb. 23, 2017) *cert. granted* 2017 WL 3016382 (July 3, 2017).

a. *Facts*: the plaintiff, an engineer, entered into an employment contract with the defendant-employer. The parties were unable to renew the contract. The plaintiff anticipated that he would have a contract and wage-loss claim against his employer and forwarded all of his work-related emails to his private email account. The emails contained proprietary information. The plaintiff sued the defendant-employer for breach of contract and wage loss claims. At plaintiff's deposition, he testified he indeed forwarded work-related emails to himself. The defendant-employer then filed a counterclaim for civil theft—a statutory remedy under Colorado law—against the plaintiff/counterclaim-defendant. Plaintiff/counterclaim-defendant moved for summary judgment and, after trial, for a directed verdict on the civil theft claim. The trial court denied both motions, concluding the economic loss rule did not apply to statutory causes of action. The court awarded the defendant-employer/counterclaim-plaintiff statutory damages for the plaintiff's civil theft of proprietary information.

b. *Issue:* whether the economic loss rule, a judge-made rule, applies in a case involving a statutory cause of action such as civil theft.

c. *Holding*: No. The Court of Appeals concluded that "[b]ecause the economic loss rule is a judicial construct, and because a civil theft claim is a statutory cause of action, . . . the economic loss rule does not preclude a cause of action under the civil theft statute."

d. *Reasoning:* The Court of Appeals reasoned that a judge-made rule could not preclude a statutory cause of action under a statute—here, the civil theft statute—because the legislature explicitly provided for that cause of action and for the remedy to the class (victims of theft) protected under the statute. The court's decision was rooted in separation of powers. It concluded that any tension between judge-made law and statutory law must be resolved in the legislature's right to enact laws.

III. <u>Intentional Interference with Contract or Contractual Relations</u>

A. "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." *Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.*, 690 P.2d 207, 210 (Colo. 1984) (emphasis added). This tort is meant to punish the conduct of a third person who is not a party to the contract. *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 89 (Colo. 2004).

B. Elements: the defendant must (1) be aware of a contract between the plaintiff and a third person, (2) intend that the third party breach the contract, and (3) induce the third party to breach or make it impossible for the party to perform the contract.

1. A party to a contract cannot be held liable for intentional interference with that contract. *Colorado Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 170 (Colo. 1993).

C. **Update**:

1. *Warne v. Hall*, 373 P.3d 588 (Colo. 2016).

a. *Facts:* the plaintiff, Bill Hall, sued Melinda Warne, the mayor of Gilcrest, for intentional interference with a contract. The plaintiff alleged that the defendant-mayor interfered with his agreement to sell land in Gilcrest to an oil drilling company, which wanted its headquarters in Gilcrest. The plaintiff alleged the defendant-mayor acted "arbitrarily," with "malice," and in "violation of law" in order to prevent him from selling land to the oil drilling company. The trial court dismissed the complaint for failure to state a claim; the Court of Appeals reversed; and the Supreme Court affirmed the trial court's dismissal decision.

b. *Issues:* whether the trial court correctly dismissed plaintiff's intentional interference with contract claim.

c. *Holding:* Yes. The trial court correctly dismissed the claim; however, it did not apply the court standard of review. The Supreme Court abandoned the *Conley v. Gibson* "no set of facts" standard for assessing the sufficiency of allegations under Colorado Rule of Civil Procedure 12(b). The Supreme Court adopted the *Bell Atlantic v. Twombly* "plausibility standard" for analyzing a complaint under Rule 12(b). Under the plausibility standard, the plaintiff did not plead facts sufficient to state a claim for intentional interference with a contract.

d. *Reasoning/Analysis*: The Supreme Court's procedural holding in this case is as important as its substantive holding under tort law. Under the plausibility standard, as the United States Supreme Court articulated it in *Twombly*, only a claim that states a plausible claim for relief survives a motion to dismiss. A trial court need not consider legal conclusion or conclusory allegations in a complaint. Applying this plausibility standard, the plaintiff's complaint failed to state a claim for relief because he did not allege facts that supported his conclusory allegations that the defendant-mayor

acted with malice or arbitrarily in refusing to allow his land-use sale to proceed.

2. *Warne* Rule re: Interference with Contract:

a. Plaintiff cannot be entitled to relief on a claim of intentional inference with a contract unless he alleges and proves that the defendant "intentionally" and "improperly" induced a party to breach the contract or improperly made it impossible to perform.

b. The Court explained that it has never attempted to rigidly define "improper" for purposes of interference with contract, but the finder of fact should consider:

i. The nature of the actor's conduct;

ii. The actor's motive;

iii. The interests of the plaintiff/other with whom the actor interferes;

iv. The interests the actor seeks to advance;

v. The social interests in protecting the freedom of action at issue;

vi. The proximity of the actor's conduct to the interference; and

vii. The relationship between the parties.

c. The Supreme Court affirmed the dismissal of the plaintiff's complaint because he failed to sufficiently allege that the defendant-mayor acted "improperly" in inducing a breach or made performance of the contract between the plaintiff and the oil company impossible.

IV. Interference with Prospective Business Advantage

A. This tort is similar to tortious interference with a contract, but focused on intentional interference with *formation* of a contract or quasi-contract.

B. "One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation, or (b) preventing the other from acquiring or continuing the prospective relation." *Amoco Oil Co. v. Erwin*, 908

P.2d 493, 500 (Colo. 1995) (citing Restatement (Second) Torts § 766B cmt. c (1979)).

C. Tortious interference with a prospective business relation requires a showing of intentional and improper interference preventing formation of a contract. *Dolton v. Capitol Federal Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo. App. 1981).

D. The Restatement explains that the "prospective contractual relation" is not used in a strict, technical sense. Restatement (Second) Torts § 766B cmt. c (1979).

1. It is not necessary that the prospective relation be reduced to a formal, binding contract; instead, the prospective relation may include a quasi-contractual or other restitutionary right. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995).

E. Factors to consider in determining if the defendant is intentionally interfering include: (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. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995).

F. **Update**:

1. *Zueger v. Goss*, 343 P.3d 1028 (Colo. App. 2014).

2. *Facts:* the plaintiff, an art dealer, sued the a widow of a famous artist. Plaintiff alleged that the defendant's disparaging statements about the plaintiff-art dealer and his company on the Internet interfered with his ability to sell art. Plaintiff alleged that these disparaging statements caused economic and non-economic damages. After trial, the jury returned an award of $86,601 on plaintiff's intentional interference with business relations claim.

3. *Issue:* whether the plaintiff presented sufficient evidence to support the jury's verdict.

4. *Holding:* Yes. The plaintiff, through expert witnesses, presented evidence that his art business declined after the defendant started making disparaging statements. This evidence was "more than sufficient" for the jury to return a verdict for the plaintiff.

V. <u>Civil Conspiracy</u>

A. Elements: "To establish a civil conspiracy in Colorado, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the

minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result." *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995).

B. A plaintiff must present evidence of an agreement to form a conspiracy because a court will not imply a conspiracy. *More v. Johnson*, 568 P.2d 437, 440 (Colo. 1977). The purpose of the conspiracy must involve an unlawful act or unlawful means. *Contract Maintenance Co. v. Local No. 105*, 415 P.2d 855, 857 (Colo. 1966).

C. **Update**:

1. *Rocky Mountain Exploration Inc. v. Davis Graham Stubbs LLP*, -- P.3d --, 2016 WL 908640 (Colo. App. March 10, 2016) *cert. granted* 2017 WL 825324 (Colo. Feb. 27, 2017).

2. *Facts:* The plaintiff, an oil and gas company, sued the defendant-law firm for, among other things, civil conspiracy. The plaintiff alleged that the law firm engaged in a scheme and conspiracy to unlawfully misappropriate the plaintiff's interest in a common area by setting up a company (Lario) as a straw-man purchaser at a price they knew would be lower than the plaintiff could receive at an auction.

3. *Issue:* whether the law firm engaged in unlawful or illegal conduct when it acted on behalf of an undisclosed or unidentified principal in acquiring plaintiff's oil and gas interests.

4. *Holding:* No. The general agency rule in Colorado is that an agent may act on behalf of an undisclosed or unidentified principal. There is no suggestion under Colorado law that acting on behalf of an undisclosed principal is fraudulent. Thus, the law firm did not engage in an illegal or fraudulent scheme. Absent an unlawful overt act, the plaintiff's conspiracy claim fails as a matter of law.

VI. <u>Negligent Misrepresentation and Fraud</u>

A. Negligent Misrepresentation:

1. Elements:

a. Defendant gave false information to plaintiff;

b. Defendant gave such information to plaintiff in the course of defendant's business;

c. Defendant gave information to plaintiff for his/her guidance or use in a business transaction;

d. Defendant was negligent in obtaining or communicating the information;

e. Defendant gave the information with the intent of knowing that plaintiff would act (or fail to act) in reliance on the information;

f. Plaintiff relied on the information supplied by defendant; and

g. Plaintiff suffered damages by relying on the information the defendant supplied. Reliance supplied by defendant caused damage to plaintiff.

Hildebrand v. New Vista Homes II, Inc., 252 P.3d 1159 (Colo. App. 2010).

2. A claim for negligent misrepresentation "cannot be based solely on the non-performance of a promise to do something at a future time." *High Country Movin', Inc. v. U.S. West Direct Co.*, 839 P.2d 469, 471 (Colo. App. 1992). In other words, no claim exists where a contract governs the parties' relationship.

a. Exception: the Colorado Supreme Court has held, however, that a negligent misrepresentation claim could lie against the manufacturer of a product for representations made during the course of sale of that product despite execution of a fully integrated sales agreement. *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 72 (Colo. 1991).

B. Fraud:

1. Elements: (a) Either a material misrepresentation OR a concealment OR a nondisclosure AND a duty to disclose; (b) intent; (c) reasonable reliance; and (d) damages. *Brody v. Bock*, 897 P.2d 769, 776 (Colo. 1995); *Kopeikin v. Merchants Mortg. & Trust Corp.*, 679 P.2d 599, 601 (Colo. 1984); *Wisehart v. Zions Bancorporation*, 49 P.3d 1200, 1204 (Colo. App. 2002).

2. Duty to Disclose. The key to proving a fraud claim is whether the defendant owed a duty to disclose. According to the Restatement, a duty to disclose will arise in the following circumstances:

a. Where fiduciary or other similar relation of trust exists;

b. If disclosure is necessary to prevent a partial or ambiguous statement of the facts from being misleading;

c. If defendant subsequently acquires information that he knows will make untrue or misleading a previous representation; or

d. Defendant knows that the other is about to enter into the transaction under a mistake as to the basic facts. Restatement (Second) Torts § 551 (1977).

3. A claim for fraud cannot be based on the nonperformance of a promise or contractual obligation or upon the failure to fulfill an agreement to do something at a future time. *H&H Distrib., Inc. v. BBC, Intern'l*, 812 P.2d 659, 662 (Colo. App. 1990).

C. **Update**:

1. Many cases but no change or significant discussion of the elements of negligent misrepresentation or fraud claims.

VII. Breach of Fiduciary Duty

A. Elements: (a) the existence of a fiduciary duty; (b) knowing participation in the breach; and (c) damages. *Graphic Directions, Inc. v. Busch*, 862 P.2d 1020, 1022 (Colo. App. 1993).

B. For example, Colorado courts have held the following relationships give rise to a fiduciary duty:

1. Attorney to client, *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000);

2. Brokerage firm and broker may owe fiduciary duty to customer, *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 515 (Colo. 1986);

3. Director of corporation to the corporation/shareholders, *Lacy v. Rotating Prod. Sys., Inc.*, 961 P.2d 1144 (Colo. App. 1998);

4. Members of a limited liability company to the company, *LaFond v. Sweeney*, 345 P.3d 932, 939 (Colo. App. 2012) *affirmed on other grounds* 343 P.3d 939 (Colo. 2015).

5. Director of an insolvent corporation to the corporation's creditors, *Alexander v. Anstine*, 152 P.3d 497, 502 (Colo. 2007) (limited fiduciary duty);

6. A general partner to a limited partner in a partnership, *Holmes v. Young*, 885 P.2d 305, 308 (Colo. App. 1994);

7. An episcopal diocese and bishop have a fiduciary duty to a parishioner, *Moses v. Diocese of Colorado*, 863 P.2d 310, 322 (Colo. 1993); and

8. A bank's loan customers/depositors and the bank, *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755 (Colo. App. 1988).

C. **Update**:

1. *Semler v. Hellerstein*, -- P.3d --, 2016 WL 6087893 (Colo. App. Oct. 6, 2016) *cert. granted* 2017 WL 1277497 (Colo. March 20, 2017).

a. *Facts:* the plaintiff, a member of condominium association, sued the treasurer of the condominium association and owner of several businesses that are part of the association. The plaintiff alleged, among other things, that the defendant and condominium association breached their fiduciary duty to him when they acquired title to parking spaces plaintiff believed he owned.

b. *Issue:* whether a condominium association owes a fiduciary duty to its members.

c. *Holding:* Yes. A homeowners' association generally owes a fiduciary duty to its members. Further, board members of an association owe a fiduciary duty to both the association and its members. An exception exists to this general rule, in that no fiduciary duty exits where the board member or association engaged in transactions that are not conducted on behalf of the association or and do not involve the association. In this case, the exception applied to defeat the plaintiff's claims because the treasurer-defendant did not act as treasurer or on behalf of the homeowner's association when he acquired the parking spaces. Thus, no fiduciary duty existed and plaintiff's breach of fiduciary duty claim failed as a matter of law.

VIII. Misappropriation of Trade Secrets/Unfair Competition

A. Elements of Trade Secret Misappropriation: to prove misappropriation of a trade secret, a plaintiff must show (a) that he or she possessed a valid trade secret; (b) that the trade secret was disclosed or used without consent; and (c) the defendant knew or should have known that the trade secret was acquired by improper means. *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1074 (D. Colo. 2012); *see also* C.R.S. § 7-74-102.

1. *See Port-a-Pour, Inc. v. Peak Innovations, Inc.*, No. 13-cv-01511, 2014 WL 2766775 (D. Colo. June 17, 2014) (applying elements and factors in classic trade secret misappropriation case).

B. Elements of Common Law Unfair Competition:

1. There are two elements of an unfair competition claim when a defendant uses an identical or similar trademark or trade name as the plaintiff:

a. a plaintiff must show that the trade name acquired a secondary meaning or significance that identifies the plaintiff; and

b. the defendant must have unfairly used the name or a simulation of it against the plaintiff.

Swart v. Mid-Continent Refrigerator Co., 360 P.2d 440, 442 (Colo. 1961).

2. The "universal test" for proof of unfair competition is whether the public is likely to be deceived. *Swart*, 360 P.2d at 442.

IX. Conclusion

A. Most business torts originate in contract. The practitioner has to be aware and on top of the ever-changing law on Colorado's economic loss rule.

B. Business tort cases are becoming increasingly prevalent as parties and lawyers look for ways to avoid contractual limitations on damages. A business tort case is oftentimes a search for extra-contractual damages.

C. If you have never done a business tort case, you should not be timid about transitioning into the field. The cases are naturally more document and discovery intensive because two entities are involved, but, in the end, it is just a complex tort case. The same types of trial themes that have made you successful in the personal injury arena will make you successful in the business arena.

D. Additional Resources:

1. *Litigating Business and Commercial Tort Cases* by Matthew A. Cartwright, Kirk Reasonover, and Joseph Peiffer (2013).

a. This is the best treatise on the market on business torts; it is comprehensive and geared toward the practicing lawyer; it has a lot of forms for discovery and trial preparation.

2. The "Business Torts Reporter" – short publication service dedicated solely to issues that arise in business torts.

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  - A business tort is a wrongful injury to a business or its property; as one scholar described it, a business tort is "a private wrongdoing in the course of business."
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The Boundary Between Contract and Tort

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Economic Loss Rule & Independent Duty of Care

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- The purpose of the economic loss rule is to maintain a line between tort and contract. *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862, 865 (Colo. 2005).
- The Colorado Supreme Court adopted the economic loss rule in *Town of Alma v. AZCO Construction*, 10 P.3d 1256, 1264 (Colo. 2000) ("[A] party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law").

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  - The duties involved: does the negligence duty differ in any way from the contractual duty? *BRW*, 99 P.3d at 74.

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Examples of Exceptions to the Economic Loss Doctrine

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  - For example, the Colorado Supreme Court has rejected implying this duty to at-will employment contracts. *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 947 P.2d 937 (Colo. 1997).
  - The "exception to the exception": the implied duty of good faith and fair dealing gives rise to an independent tort duty in insurance contracts. *See Trans Am. Premier Ins. Co. v. Brighton School Dist. 27J*, 940 P.2d 348, 351 (Colo. 1997).

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The Boundary Between Contract and Tort

Update

Bermel v. Blueradios, Inc., -- P.3d --, 2017 WL 710485 (Colo. App. Feb. 23, 2017) *cert. granted* 2017 WL 3016382 (July 3, 2017)

ISSUE: Whether the economic loss rule, a judge-made rule, applies in a case involving a statutory cause of action such as civil theft.

HOLDING: No. The Court of Appeals concluded that "[b]ecause the economic loss rule is a judicial construct, and because a civil theft claim is a statutory cause of action, . . . the economic loss rule does not preclude a cause of action under the civil theft statute."

The Boundary Between Contract and Tort

Update (continued)

Bermel v. Blueradios, Inc., -- P.3d --, 2017 WL 710485 (Colo. App. Feb. 23, 2017) *cert. granted* 2017 WL 3016382 (July 3, 2017)

REASONING:

The Court of Appeals reasoned that a judge-made rule could not preclude a statutory cause of action under a statute—here, the civil theft statute—because the legislature explicitly provided for that cause of action and for the remedy to the class (victims of theft) protected under the statute. The court's decision was rooted in separation of powers. It concluded that any tension between judge-made law and statutory law must be resolved in the legislature's right to enact laws.

Intentional Interference with Contractual Relations

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Intentional Interference with Contractual Relations

ELEMENTS

- **The defendant must:**
  - be aware of a contract between the plaintiff and a third person,
  - intend that the third party breach the contract, and
  - induce the third party to breach or make impossible for the party to perform the contract.
- A party to a contract cannot be held liable for intentional interference with that contract. *Colorado Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 170 (Colo. 1993).

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Intentional Interference with Contractual Relations

Update

Warne v. Hall, 373 P.3d 588 (Colo. 2016)

ISSUE: Whether the trial court correctly dismissed the plaintiff's intentional interference with contract claim.

HOLDING: Yes. The trial court correctly dismissed the claim; however, it did not apply the court standard of review. The Supreme Court abandoned the *Conley v. Gibson* "no set of facts" standard for assessing the sufficiency of allegations under Colorado Rule of Civil Procedure 12(b). The Supreme Court adopted the *Bell Atlantic v. Twombly* "plausibility standard" for analyzing a complaint under Rule 12(b). Under the plausibility standard, the plaintiff did not plead facts sufficient to state a claim for intentional interference with a contract.

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Intentional Interference with Contractual Relations

Update (continued)

Warne v. Hall, 373 P.3d 588 (Colo. 2016)

REASONING/ANALYSIS:

The Supreme Court's procedural holding in this case is as important as its substantive holding under tort law. Under the plausibility standard, as the United States Supreme Court articulated it in *Twombly*, only a claim that states a plausible claim for relief survives a motion to dismiss. A trial court need not consider legal conclusion or conclusory allegations in a complaint. Applying this plausibility standard, the plaintiff's complaint failed to state a claim for relief because he did not allege facts that supported his conclusory allegations that the defendant-mayor acted with malice or arbitrarily in refusing to allow his land-use sale to proceed.

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Intentional Interference with Contractual Relations

Update (continued)

***Warne* Rule re: Interference with Contract**

Plaintiff cannot be entitled to relief on a claim of intentional inference with a contract unless he alleges and proves that the defendant "intentionally" and "improperly" induced a party to breach the contract or improperly made it impossible to perform.

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Intentional Interference with Contractual Relations

Update (continued)

***Warne* Rule re: Interference with Contract**

The Court explained that it has never attempted to rigidly define "improper" for purposes of interference with contract, but the finder of fact should consider:

i. The nature of the actor's conduct;
ii. The actor's motive;
iii. The interests of the plaintiff/other with whom the actor interferes;
iv. The interests the actor seeks to advance;
v. The social interests in protecting the freedom of action at issue;
vi. The proximity of the actor's conduct to the interference; and
vii. The relationship between the parties.

Intentional Interference with Contractual Relations

Update (continued)

***Warne* Rule re: Interference with Contract**

The Supreme Court affirmed the dismissal of the plaintiff's complaint because he failed to sufficiently allege that the defendant-mayor acted "improperly" in inducing a breach or made performance of the contract between the plaintiff and the oil company impossible.

Interference with Prospective Business Advantage

- This tort is similar to tortious interference with a contract, but focused on intentional interference with *formation* of a contract or quasi-contract.
- "One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation, or (b) preventing the other from acquiring or continuing the prospective relation." *Amoco Oil Co. v. Erwin*, 908 P.2d 493, 500 (Colo. 1995) (citing Restatement (Second) Torts § 766B cmt. c (1979)).

Interference with Prospective Business Advantage

- Tortious interference with a prospective business relation requires a showing of intentional and improper interference preventing formation of a contract. *Dolton v. Capitol Federal Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo. App. 1981).
- The Restatement explains that the "prospective contractual relation" is not used in a strict, technical sense. Restatement (Second) Torts § 766B cmt. c (1979).
  - It is not necessary that the prospective relation be reduced to a formal, binding contract; instead, the prospective relation may include quasi-contractual or other restitutionary right. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995).

Interference with Prospective Business Advantage

- Factors to consider in determining if the defendant is intentionally interfering include:
  - the nature of the actor's conduct;
  - the actor's motive;
  - the interests of the other with which the actor's conduct interferes;
  - the interests sought to be advanced by the actor;
  - the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
  - the proximity or remoteness of the actor's conduct to the interference; and
  - the relations between the parties.

Amoco Oil Co. v. Ervin, 908 P.2d 493, 500 (Colo. 1995).

Interference with Prospective Business Advantage

Update

Zueger v. Goss, 343 P.3d 1028 (Colo. App. 2014)

ISSUE:

Whether the plaintiff presented sufficient evidence to support the jury's verdict.

HOLDING:

Yes. The plaintiff, through expert witnesses, presented evidence that his art business declined after the defendant started making disparaging statements. This evidence was "more than sufficient" for the jury to return a verdict for the plaintiff.

Civil Conspiracy

ELEMENTS

- **"To establish a civil conspiracy in Colorado, a plaintiff must show:**
  - two or more persons;
  - an object to be accomplished;
  - a meeting of the minds on the object or course of action;
  - an unlawful overt act; and
  - damages as to the proximate result."

Nelson v. Elway, 908 P.2d 102, 106 (Colo. 1995).

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Civil Conspiracy

ELEMENTS

- A plaintiff must present evidence of an agreement to form a conspiracy because a court will not imply a conspiracy. *More v. Johnson*, 568 P.2d 437, 440 (Colo. 1977). The purpose of the conspiracy must involve an unlawful act or unlawful means. *Contract Maintenance Co. v. Local No. 105*, 415 P.2d 855, 857 (Colo. 1966).

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Civil Conspiracy

Update

Rocky Mountain Exploration Inc. v. Davis Graham Stubbs LLP, -- P.3d --, 2016 WL 908640 (Colo. App. March 10, 2016) *cert. granted* 2017 WL 825324 (Colo. Feb. 27, 2017)

ISSUE: Whether the law firm engaged in unlawful or illegal conduct when it acted on behalf of an undisclosed or unidentified principal in acquiring plaintiff's oil and gas interests.

HOLDING: No. The general agency rule in Colorado is that an agent may act on behalf of an undisclosed or unidentified principal. There is no suggestion under Colorado law that acting on behalf of an undisclosed principal is fraudulent. Thus, the law firm did not engage in an illegal or fraudulent scheme. Absent an unlawful overt act, the plaintiff's conspiracy claim fails as a matter of law.

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Negligent Misrepresentation and Fraud

Negligent Misrepresentation - ELEMENTS

- Defendant gave false information to plaintiff;
- Defendant gave such information to plaintiff in the course of Defendant's business;
- Defendant gave information to plaintiff for his/her guidance or use in a business transaction;
- Defendant was negligent in obtaining or communicating the information;
- Defendant gave the information with the intent of knowing that plaintiff would act (or fail to act) in reliance on the information;
- Plaintiff relied on the information supplied by defendant; and
- Plaintiff suffered damages by relying on the information the defendant supplied. Reliance supplied by defendant caused damage to plaintiff.

Hildebrand v. New Vista Homes II, Inc., 252 P.3d 1159 (Colo. App. 2010).

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Negligent Misrepresentation and Fraud

- A claim for negligent misrepresentation "cannot be based solely on the non-performance of a promise to do something at a future time." *High Country Movin', Inc. v. U.S. West Direct Co.*, 839 P.2d 469, 471 (Colo. App. 1992). In other words, no claim exists where a contract governs the parties' relationship.
  - Exception: the Colorado Supreme Court has held, however, that a negligent misrepresentation claim could lie against the manufacturer of a product for representations made during the course of sale of that product despite execution of a fully integrated sales agreement. *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 72 (Colo. 1991).

Negligent Misrepresentation and Fraud

Fraud - ELEMENTS

- Either a material misrepresentation
  - OR a concealment
  - OR a nondisclosure
  - AND a duty to disclose
- intent
- reasonable reliance; and damages

Brody v. Bock, 897 P.2d 769, 776 (Colo. 1995);
Kopeikin v. Merchants Mortg. & Trust Corp., 679 P.2d 599, 601 (Colo. 1984);
Wisehart v. Zions Bancorporation, 49 P.3d 1200, 1204 (Colo. App. 2002).

Negligent Misrepresentation and Fraud

Fraud – DUTY TO DISCLOSE

- The key to proving a fraud claim is whether the defendant owed a duty to disclose. According to the Restatement, a duty to disclose will arise in the following circumstances:
  - Where fiduciary or other similar relation of trust exists;
  - If disclosure is necessary to prevent a partial or ambiguous statement of the facts from being misleading;
  - If defendant subsequently acquires information that he knows will make untrue or misleading a previous representation; or
  - Defendant knows that the other is about to enter into the transaction under a mistake as to the basic facts.

Restatement (Second) Torts § 551 (1977)

Negligent Misrepresentation and Fraud

- A claim for fraud cannot be based on the nonperformance of a promise or contractual obligation or upon the failure to fulfill an agreement to do something at a future time.

H&H Distrib., Inc. v. BBC, Intern'l, 812 P.2d 659, 662 (Colo. App. 1990).

Negligent Misrepresentation and Fraud

Update:

- Many cases but no new exposition of the elements of negligent misrepresentation or fraud claims.
- *DC-10 Entertainment LLC v. Manor Ins. Agency, Inc.*, 308 P.3d 1223 (Colo. Ct. App. 2013).
  - Case involving claims of negligent misrepresentation but the key holding in the case was, as a matter of first impression, that an insured's assignment of the proceeds from its negligence and negligent misrepresentation claims against an insurance broker to injured third party was enforceable.

Breach of Fiduciary Duty

ELEMENTS

- the existence of a fiduciary duty;
- knowing participation in the breach; and
- damages.

Graphic Directions, Inc. v. Busch, 862 P.2d 1020, 1022 (Colo. App. 1993).

Breach of Fiduciary Duty

For example, Colorado courts have held the following relationships give rise to a fiduciary duty:

- Attorney to client, *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000);
- Brokerage firm and broker may owe fiduciary duty to customer, *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 515 (Colo. 1986);
- Director of corporation to the corporation/shareholders, *Lacy v. Rotating Prod. Sys., Inc.*, 961 P.2d 1144 (Colo. App. 1998);
- Members of a limited liability company to the company, *LaFond v. Sweeney*, 345 P.3d 932, 939 (Colo. App. 2012) *affirmed on other grounds* 343 P.3d 939 (Colo. 2015).
- Director of an insolvent corporation to the corporation's creditors, *Alexander v. Anstine*, 152 P.3d 497, 502 (Colo. 2007) (limited fiduciary duty);
- A general partner to a limited partner in a partnership, *Holmes v. Young*, 885 P.2d 305, 308 (Colo. App. 1994);
- An episcopal diocese and bishop have a fiduciary duty to a parishioner, *Moses v. Diocese of Colorado*, 863 P.2d 310, 322 (Colo. 1993); and
- A bank's loan customers/depositors and the bank**,** *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755 (Colo. App. 1988).

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Breach of Fiduciary Duty

Update

Semler v. Hellerstein, -- P.3d --, 2016 WL 6087893 (Colo. App. Oct. 6, 2016)
cert. granted 2017 WL 1277497 (Colo. March 20, 2017)

ISSUE: Whether a condominium association owes a fiduciary duty to its members.

HOLDING: Yes. A homeowners' association generally owes a fiduciary duty to its members. Further, board members of an association owe a fiduciary duty to both the association and its members. An exception exists to this general rule, in that no fiduciary duty exits where the board member or association engaged in transactions that are not conducted on behalf of the association or and do not involve the association. In this case, the exception applied to defeat the plaintiff's claims because the treasurer-defendant did not act as treasurer or on behalf of the homeowner's association when he acquired the parking spaces. Thus, no fiduciary duty existed and plaintiff's breach of fiduciary duty claim failed as a matter of law.

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Misappropriation of Trade Secrets/ Unfair Competition

Elements of Trade Secret Misappropriation:

- **To prove misappropriation of a trade secret, a plaintiff must show:**
  (a) that he or she possessed a valid trade secret;
  (b) that the trade secret was disclosed or used without consent; and
  (c) the defendant knew, or should have known, that the trade secret was acquired by improper means.

Christou v. Beatport, LLC, 849 F. Supp. 2d 1055, 1074 (D. Colo. 2012); *see also* C.R.S. § 7-74-102.

- *See Port-a-Pour, Inc. v. Peak Innovations, Inc.*, No. 13-cv-01511, 2014 WL 2766775 (D. Colo. June 17, 2014) (applying elements and factors in classic trade secret misappropriation case).

Misappropriation of Trade Secrets/ Unfair Competition

Elements of Common Law Unfair Competition:

- There are two elements of an unfair competition claim when a defendant uses an identical or similar trademark or trade name as the plaintiff:
  - a plaintiff must show that the trade name acquired a secondary meaning or significance that identifies the plaintiff; and
  - the defendant must have unfairly used the name or a simulation of it against the plaintiff.

Swart v. Mid-Continent Refrigerator Co., 360 P.2d 440, 442 (Colo. 1961)

Misappropriation of Trade Secrets/ Unfair Competition

- The "universal test" for proof of unfair competition is whether the public is likely to be deceived. *Swart*, 360 P.2d at 442.

Conclusion

- Most business torts originate in contract. The practitioner has to be aware and on top of the ever-changing law on Colorado's economic loss rule.
- Business tort cases are becoming increasingly prevalent as parties and lawyers look for ways to avoid contractual limitations on damages. A business tort case is oftentimes a search for extracontractual damages.

Conclusion

- If you have never done a business tort case, you should not be timid about transitioning into the field. The cases are naturally more document and discovery intensive because two entities are involved, but, in the end, it is just a complex tort case. The same types of trial themes that have made you successful in the personal injury arena will make you successful in the business arena.
  - **And sometimes it is nice to try a case – on either plaintiff or defense side – that does not involve an injured human.**

Conclusion

Additional Resources:

- *Litigating Business and Commercial Tort Cases* by Matthew A. Cartwright, Kirk Reasonover, and Joseph Peiffer (2013).
  - This is the best treatise on the market on business torts; it is comprehensive and geared toward the practicing lawyer; it has a lot of forms for discovery and trial preparation.
- The "Business Torts Reporter" – short publication service dedicated solely to issues that arise in business torts.