FLORIDA CAUSES OF ACTION

BY MARC A. WITES

HIGHLIGHTS

The 2022 edition of **Florida Causes of Action** includes ***7* new sample complaints**, plus **new and updated case law in support of dozens of causes of action**, spanning a broad range of legal practice areas. Topics covered include:

NEGLIGENCE CLAIMS

CONTRACT CASES

BUSINESS/COMMERCIAL CASES

- Account stated – defenses to
- Breach of fiduciary duty
- Civil conspiracy
- Conversion
- Constructive trust

FRAUD

DEFAMATION AND PRIVACY

CONSUMER PROTECTION/DEBT COLLECTION

- FL Deceptive and Unfair Trade Practices Act (FDUTPA)
  - Unlawful acts and practices by social media platforms
  - Elements and exclusions
  - "Deception" must be probable, not merely possible
  - Actual reliance not required
  - Long-arm jurisdiction
- FL Consumer Collection Practices Act (FCCPA)
  - Applies to transactions/obligations that meet the statutory definition of "debt"
  - Weight of federal court decisions interpreting FCCPA

TRUSTS AND ESTATES

NEW SAMPLE COMPLAINTS

- Complaint: Negligence_Slip and Fall in a Hotel
- Complaint: Negligence_MVA_Driver and Owner of Motor Vehicle
- Complaint: Negligence_MVA_ Driver and Driver's Employer
- Complaint: Negligence_MVA_Failure to Yield
- Complaint: Negligence, Negligent Misrepresentation_ Horseback Riding Accident
- Complaint: Negligence, Negligent Misrepresentation, Fraudulent Transfer
- Complaint: Assault, Battery, False Imprisonment, Negligent Retention

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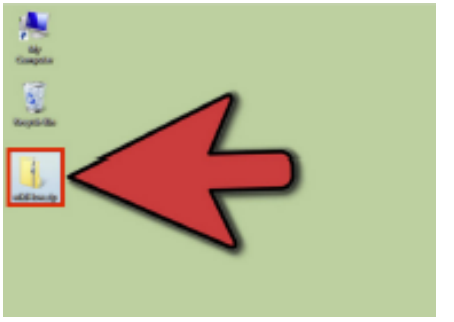

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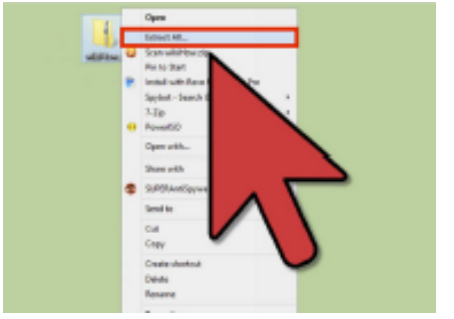

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Marc is the author of The Florida Litigation Guide (www.flalitguide.com), a well-known practice guide used by thousands of lawyers throughout Florida since 2001. The Guide contains a listing of the elements of popular common law causes of action, citations for the most recent state and federal court cases listing the elements of the actions and various defenses to the actions. Tens of thousands of lawyers, from virtually every major Florida law firm, as well as countless practitioners from medium and small firms, solo practitioners and government attorneys, as well as members of the judiciary, have relied on Marc's publication in Florida litigation matters.

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TABLE OF CONTENTS

CHAPTER 1: PLEADING IN FLORIDA

CHAPTER 2: NEGLIGENCE CASES

CHAPTER 3: CONTRACT CASES

CHAPTER 4: BUSINESS & COMMERCIAL CASES

CHAPTER 5: WARRANTY CASES

CHAPTER 6: INDEMNITY ACTIONS

CHAPTER 7: EMPLOYMENT CASES

CHAPTER 8: FRAUD

CHAPTER 9: DEFAMATION & PRIVACY

CHAPTER 10: INTENTIONAL TORTS

CHAPTER 11: PROCEDURAL TORTS

CHAPTER 12: PHYSICAL TORTS

CHAPTER 13: REAL PROPERTY ACTIONS

CHAPTER 14: CONSTRUCTION CASES

CHAPTER 15: LIEN CASES

CHAPTER 16: CONSUMER PROTECTION, DEBT COLLECTION CASES

CHAPTER 17: PROCEDURAL REMEDIES

CHAPTER 18: LEGAL THEORIES & DEFENSES

CHAPTER 19: TRUSTS & ESTATES

INDEX

EXPANDED TABLE OF CONTENTS

CHAPTER 1: PLEADING IN FLORIDA

§1:10 FLORIDA RULES OF CIVIL PROCEDURE
- §1:10.1 Rule 1.100 Pleadings and Motions
- §1:10.2 Rule 1.110 General Rules of Pleading
- §1:10.3 Rule 1.120 Pleading Special Matters
- §1:10.4 Rule 1.130 Attaching Copy of Cause of Action and Exhibits

§1:20 FLORIDA RULES OF JUDICIAL ADMINISTRATION
- §1:20.1 Rule 2.515 Signature of Attorneys and Parties
- §1:20.2 Rule 2.520 Paper

§1:30 FLORIDA STATUTES

§1:40 RELATED MATTERS

§1:50 SAMPLE COMPLAINT

CHAPTER 2: NEGLIGENCE CASES

§2:10 EMOTIONAL DISTRESS, NEGLIGENT INFLICTION OF
- §2:10.1 Elements of Cause of Action — Florida Supreme Court
  - §2:10.1.1 Elements of Cause of Action — 1st DCA
  - §2:10.1.2 Elements of Cause of Action — 2nd DCA
  - §2:10.1.3 Elements of Cause of Action — 3rd DCA
  - §2:10.1.4 Elements of Cause of Action — 4th DCA
  - §2:10.1.5 Elements of Cause of Action — 5th DCA
- §2:10.2 Statute of Limitations
- §2:10.3 References
- §2:10.4 Defenses
- §2:10.5 Related Matters
- §2:10.6 Sample Complaint

§2:20 MALPRACTICE, LEGAL
- §2:20.1 Elements of Cause of Action — Florida Supreme Court
  - §2:20.1.1 Elements of Cause of Action — 1st DCA
  - §2:20.1.2 Elements of Cause of Action — 2nd DCA
  - §2:20.1.3 Elements of Cause of Action — 3rd DCA
  - §2:20.1.4 Elements of Cause of Action — 4th DCA
  - §2:20.1.5 Elements of Cause of Action — 5th DCA
- §2:20.2 Statute of Limitations
- §2:20.3 References
- §2:20.4 Defenses
- §2:20.5 Related Matters
- §2:20.6 Sample Cause of Action

§2:30 MALPRACTICE, MEDICAL
§2:30.1 Elements of Cause of Action — Florida Supreme Court
§2:30.1.1 Elements of Cause of Action — 1st DCA
§2:30.1.2 Elements of Cause of Action — 2nd DCA
§2:30.1.3 Elements of Cause of Action — 3rd DCA
§2:30.1.4 Elements of Cause of Action — 4th DCA
§2:30.1.5 Elements of Cause of Action — 5th DCA
§2:30.2 Statute of Limitations
§2:30.3 References
§2:30.4 Defenses
§2:30.5 Related Matters

§2:40 NEGLIGENCE
§2:40.1 Elements of Cause of Action — Florida Supreme Court
§2:40.1.1 Elements of Cause of Action — 1st DCA
§2:40.1.2 Elements of Cause of Action — 2nd DCA
§2:40.1.3 Elements of Cause of Action — 3rd DCA
§2:40.1.4 Elements of Cause of Action — 4th DCA
§2:40.1.5 Elements of Cause of Action — 5th DCA
§2:40.2 Statute of Limitations
§2:40.3 References
§2:40.4 Defenses
§2:40.5 Related Matters
§2:40.6 Sample Complaints

§2:50 NEGLIGENCE, FALL-DOWN
§2:50.1 Elements of Cause of Action — Florida Supreme Court
§2:50.1.1 Elements of Cause of Action — 1st DCA
§2:50.1.2 Elements of Cause of Action — 2nd DCA
§2:50.1.3 Elements of Cause of Action — 3rd DCA
§2:50.1.4 Elements of Cause of Action — 4th DCA
§2:50.1.5 Elements of Cause of Action — 5th DCA
§2:50.2 Statute of Limitations
§2:50.3 References
§2:50.4 Defenses
§2:50.5 Related Matters
§2:50.6 Complaint (Fla.R.Civ.P. Form 1.951)

§2:60 NEGLIGENCE, HIRING OR RETENTION
§2:60.1 Elements of Cause of Action — Florida Supreme Court
§2:60.1.1 Elements of Cause of Action — 1st DCA
§2:60.1.2 Elements of Cause of Action — 2nd DCA
§2:60.1.3 Elements of Cause of Action — 3rd DCA
§2:60.1.4 Elements of Cause of Action — 4th DCA
§2:60.1.5 Elements of Cause of Action — 5th DCA
§2:60.2 Statute of Limitations
§2:60.3 References
§2:60.4 Defenses
§2:60.5 Related Matters
§2:60.6 Sample Complaints

§2:70 NEGLIGENCE, MISREPRESENTATION
§2:70.1 Elements of Cause of Action — Florida Supreme Court
§2:70.1.1 Elements of Cause of Action — 1st DCA

§2:70.1.2 Elements of Cause of Action — 2nd DCA
§2:70.1.3 Elements of Cause of Action — 3rd DCA
§2:70.1.4 Elements of Cause of Action — 4th DCA
§2:70.1.5 Elements of Cause of Action — 5th DCA
§2:70.2 Statute of Limitations
§2:70.3 References
§2:70.4 Defenses
§2:70.5 Related Matters

§2:80 NEGLIGENCE, MOTOR VEHICLE
§2:80.1 Elements of Cause of Action — Florida Supreme Court
§2:80.1.1 Elements of Cause of Action — 1st DCA
§2:80.1.2 Elements of Cause of Action — 2nd DCA
§2:80.1.3 Elements of Cause of Action — 3rd DCA
§2:80.1.4 Elements of Cause of Action — 4th DCA
§2:80.1.5 Elements of Cause of Action — 5th DCA
§2:80.2 Statute of Limitations
§2:80.3 References
§2:80.4 Defenses
§2:80.5 Related Matters
§2:80.6 Complaint (Fla.R.Civ.P. Form 1.945)

§2:90 NEGLIGENCE, MOTOR VEHICLE WHEN PLAINTIFF IS UNABLE TO DETERMINE WHO IS RESPONSIBLE
§2:90.1 Fla.R.Civ.P. Form 1.946
§2:90.2 Statute of Limitations
§2:90.3 References
§2:90.4 Defenses
§2:90.5 Related Matters

§2:91 UNINSURED/UNDERINSURED MOTORIST COVERAGE
§2:91.1 Fla. Stat. §627.727
§2:91.2 Statute of Limitations
§2:91.3 References
§2:91.4 Defenses
§2:91.5 Related Matters
§2.91.6 Sample Complaint

§2:100 NEGLIGENCE, STILLBIRTH
§2:100.1 Elements of Cause of Action — Florida Supreme Court
§2:100.1.1 Elements of Cause of Action — 1st DCA
§2:100.1.2 Elements of Cause of Action — 2nd DCA
§2:100.1.3 Elements of Cause of Action — 3rd DCA
§2:100.1.4 Elements of Cause of Action — 4th DCA
§2:100.1.5 Elements of Cause of Action — 5th DCA
§2:100.2 Statute of Limitations
§2:100.3 References
§2:100.4 Defenses
§2:100.5 Related Matters

§2:110 PARENTAL LIABILITY FOR TORT OF MINOR
§2:110.1 Elements of Cause of Action — Florida Supreme Court
§2:110.1.1 Elements of Cause of Action — 1st DCA
§2:110.1.2 Elements of Cause of Action — 2nd DCA

§2:110.1.3 Elements of Cause of Action — 3rd DCA
§2:110.1.4 Elements of Cause of Action — 4th DCA
§2:110.1.5 Elements of Cause of Action — 5th DCA
§2:110.2 References
§2:110.3 Defenses
§2:110.4 Related Matters

§2:120 SPOLIATION OF EVIDENCE (NEGLIGENT DESTRUCTION OF EVIDENCE)
§2:120.1 Elements of Cause of Action — Florida Supreme Court
§2:120.1.1 Elements of Cause of Action — 1st DCA
§2:120.1.2 Elements of Cause of Action — 2nd DCA
§2:120.1.3 Elements of Cause of Action — 3rd DCA
§2:120.1.4 Elements of Cause of Action — 4th DCA
§2:120.1.5 Elements of Cause of Action — 5th DCA
§2:120.2 Statute of Limitations
§2:120.3 References
§2:120.4 Defenses
§2:120.5 Related Matters

§2:130 STRICT LIABILITY
§2:130.1 Elements of Cause of Action — Florida Supreme Court
§2:130.1.1 Elements of Cause of Action — 1st DCA
§2:130.1.2 Elements of Cause of Action — 2nd DCA
§2:130.1.3 Elements of Cause of Action — 3rd DCA
§2:130.1.4 Elements of Cause of Action — 4th DCA
§2:130.1.5 Elements of Cause of Action — 5th DCA
§2:130.2 Statute of Limitations
§2:130.3 References
§2:130.4 Defenses
§2:130.5 Related Matters
§2:130.6 Sample Complaint

§2:140 WRONGFUL DEATH
§2:140.1 Elements of Cause of Action — Florida Supreme Court
§2:140.1.1 Elements of Cause of Action — 1st DCA
§2:140.1.2 Elements of Cause of Action — 2nd DCA
§2:140.1.3 Elements of Cause of Action — 3rd DCA
§2:140.1.4 Elements of Cause of Action — 4th DCA
§2:140.1.5 Elements of Cause of Action — 5th DCA
§2:140.2 Statute of Limitations
§2:140.3 References
§2:140.4 Defenses
§2:140.5 Related Matters

§2:150 DOG BITE—STATUTORY CLAIM
§2:150.1 Elements of Cause of Action
§2:150.1.1 Florida Statutes
§2:150.1.2 Florida Supreme Court
§2:150.2 Statute of Limitations
§2:150.3 References
§2:150.4 Defenses
§2:150.5 Related Matters
§2:150.6 Related Causes of Action
§2:150.7 Sample Complaint

§2:160 DOG BITE—COMMON LAW CLAIM
§2:160.1 Elements of Cause of Action — Florida Supreme Court
§2:160.1.1 Elements of Cause of Action — 1st DCA
§2:160.1.2 Elements of Cause of Action — 2nd DCA
§2:160.1.3 Elements of Cause of Action — 3rd DCA
§2:160.1.4 Elements of Cause of Action — 4th DCA
§2:160.1.5 Elements of Cause of Action — 5th DCA
§2:160.2 Statute of Limitations
§2:160.3 References
§2:160.4 Defenses
§2:160.5 Related Matters
§2:160.6 Related Causes of Action
§2:160.7 Sample Complaint

§2:170 NEGLIGENT SECURITY
§2:170.1 Elements of Cause of Action — Florida Supreme Court
§2:170.1.1 Elements of Cause of Action — 1st DCA
§2:170.1.2 Elements of Cause of Action — 2nd DCA
§2:170.1.3 Elements of Cause of Action — 3rd DCA
§2:170.1.4 Elements of Cause of Action — 4th DCA
§2:170.1.5 Elements of Cause of Action — 5th DCA
§2:170.2 Statute of Limitations
§2:170.3 Defenses
§2:170.4 Related Matters
§2:170.5 Additional References

CHAPTER 3: CONTRACT CASES

§3:10 BREACH OF CONTRACT
§3:10.1 Elements of Cause of Action — Florida Supreme Court
§3:10.1.1 Elements of Cause of Action — 1st DCA
§3:10.1.2 Elements of Cause of Action — 2nd DCA
§3:10.1.3 Elements of Cause of Action — 3rd DCA
§3:10.1.4 Elements of Cause of Action — 4th DCA
§3:10.1.5 Elements of Cause of Action — 5th DCA
§3:10.2 Statute of Limitations
§3:10.3 References
§3:10.4 Defenses
§3:10.5 Related Matters
§3:10.6 Sample Complaints

§3:20 BREACH OF IMPLIED-IN-FACT CONTRACT
§3:20.1 Elements of Cause of Action — Florida Supreme Court
§3:20.1.1 Elements of Cause of Action — 1st DCA
§3:20.1.2 Elements of Cause of Action — 2nd DCA
§3:20.1.3 Elements of Cause of Action — 3rd DCA
§3:20.1.4 Elements of Cause of Action — 4th DCA
§3:20.1.5 Elements of Cause of Action — 5th DCA
§3:20.2 Statute of Limitations
§3:20.3 References
§3:20.4 Defenses
§3:20.5 Related Matters

§3:30 BREACH OF IMPLIED-IN-LAW CONTRACT
§3:30.1 Elements of Cause of Action — Florida Supreme Court
§3:30.1.1 Elements of Cause of Action — 1st DCA
§3:30.1.2 Elements of Cause of Action — 2nd DCA
§3:30.1.3 Elements of Cause of Action — 3rd DCA
§3:30.1.4 Elements of Cause of Action — 4th DCA
§3:30.1.5 Elements of Cause of Action — 5th DCA
§3:30.2 Statute of Limitations
§3:30.3 References
§3:30.4 Defenses
§3:30.5 Related Matters

§3:40 BREACH OF THIRD PARTY BENEFICIARY CONTRACT
§3:40.1 Elements of Cause of Action — Florida Supreme Court
§3:40.1.1 Elements of Cause of Action — 1st DCA
§3:40.1.2 Elements of Cause of Action — 2nd DCA
§3:40.1.3 Elements of Cause of Action — 3rd DCA
§3:40.1.4 Elements of Cause of Action — 4th DCA
§3:40.1.5 Elements of Cause of Action — 5th DCA
§3:40.2 Statute of Limitations
§3:40.3 References
§3:40.4 Defenses

§3:50 ESTOPPEL, PROMISSORY
§3:50.1 Elements of Cause of Action — Florida Supreme Court
§3:50.1.1 Elements of Cause of Action — 1st DCA
§3:50.1.2 Elements of Cause of Action — 2nd DCA
§3:50.1.3 Elements of Cause of Action — 3rd DCA
§3:50.1.4 Elements of Cause of Action — 4th DCA
§3:50.1.5 Elements of Cause of Action — 5th DCA
§3:50.2 Statute of Limitations
§3:50.3 References
§3:50.4 Defenses
§3:50.5 Related Matters
§3:50.6 Sample Complaint

§3:60 RESCISSION
§3:60.1 Elements of Cause of Action — Florida Supreme Court
§3:60.1.1 Elements of Cause of Action — 1st DCA
§3:60.1.2 Elements of Cause of Action — 2nd DCA
§3:60.1.3 Elements of Cause of Action — 3rd DCA
§3:60.1.4 Elements of Cause of Action — 4th DCA
§3:60.1.5 Elements of Cause of Action — 5th DCA
§3:60.2 Statute of Limitations
§3:60.3 References
§3:60.4 Defenses
§3:60.5 Related Matters

§3:70 SPECIFIC PERFORMANCE
§3:70.1 Elements of Cause of Action — Florida Supreme Court
§3:70.1.1 Elements of Cause of Action — 1st DCA
§3:70.1.2 Elements of Cause of Action — 2nd DCA
§3:70.1.3 Elements of Cause of Action — 3rd DCA
§3:70.1.4 Elements of Cause of Action — 4th DCA
§3:70.1.5 Elements of Cause of Action — 5th DCA

§3:70.2 Statute of Limitations
§3:70.3 Defenses
§3:70.4 Related Matters
§3:70.5 Sample Complaint
§3:70.6 Complaint (Fla.R.Civ.P. Form 1.941)

§3:80 TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP
§3:80.1 Elements of Cause of Action — Florida Supreme Court
§3:80.1.1 Elements of Cause of Action — 1st DCA
§3:80.1.2 Elements of Cause of Action — 2nd DCA
§3:80.1.3 Elements of Cause of Action — 3rd DCA
§3:80.1.4 Elements of Cause of Action — 4th DCA
§3:80.1.5 Elements of Cause of Action — 5th DCA
§3:80.2 Statute of Limitations
§3:80.3 References
§3:80.4 Defenses
§3:80.5 Related Matters

§3:90 UNJUST ENRICHMENT
§3:90.1 Elements of Cause of Action — Florida Supreme Court
§3:90.1.1 Elements of Cause of Action — 1st DCA
§3:90.1.2 Elements of Cause of Action — 2nd DCA
§3:90.1.3 Elements of Cause of Action — 3rd DCA
§3:90.1.4 Elements of Cause of Action — 4th DCA
§3:90.1.5 Elements of Cause of Action — 5th DCA
§3:90.2 Statute of Limitations
§3:90.3 References
§3:90.4 Defenses
§3:90.5 Related Matters
§3:90.6 Sample Cause of Action

§3:100 USURIOUS TRANSACTION
§3:100.1 Elements of Cause of Action — Florida Supreme Court
§3:100.1.1 Elements of Cause of Action — 1st DCA
§3:100.1.2 Elements of Cause of Action — 2nd DCA
§3:100.1.3 Elements of Cause of Action — 3rd DCA
§3:100.1.4 Elements of Cause of Action — 4th DCA
§3:100.1.5 Elements of Cause of Action — 5th DCA
§3:100.2 Statute of Limitations
§3:100.3 References
§3:100.4 Defenses
§3:100.5 Related Matters

§3:110 BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
§3:110.1 Elements of Cause of Action — Florida Supreme Court
§3:110.1.1 Elements of Cause of Action — 1st DCA
§3:110.1.2 Elements of Cause of Action — 2nd DCA
§3:110.1.3 Elements of Cause of Action — 3rd DCA
§3:110.1.4 Elements of Cause of Action — 4th DCA
§3:110.1.5 Elements of Cause of Action — 5th DCA
§3:110.2 Statute of Limitations
§3:110.3 References
§3:110.4 Defenses
§3:110.5 Related Matters

CHAPTER 4: BUSINESS & COMMERCIAL CASES

§4:10 ACCOUNT STATED
§4:10.1 Elements of Cause of Action — Florida Supreme Court
§4:10.1.1 Elements of Cause of Action — 1st DCA
§4:10.1.2 Elements of Cause of Action — 2nd DCA
§4:10.1.3 Elements of Cause of Action — 3rd DCA
§4:10.1.4 Elements of Cause of Action — 4th DCA
§4:10.1.5 Elements of Cause of Action — 5th DCA
§4:10.2 Statute of Limitations
§4:10.3 References
§4:10.4 Defenses
§4:10.5 Related Matters
§4:10.6 Fla.R.Civ.P. Form 1.933
§4:10.7 Sample Complaint

§4:20 ACCOUNTING, EQUITABLE
§4:20.1 Elements of Cause of Action — Florida Supreme Court
§4:20.1.1 Elements of Cause of Action — 1st DCA
§4:20.1.2 Elements of Cause of Action — 2nd DCA
§4:20.1.3 Elements of Cause of Action — 3rd DCA
§4:20.1.4 Elements of Cause of Action — 4th DCA
§4:20.1.5 Elements of Cause of Action — 5th DCA
§4:20.2 Statute of Limitations
§4:20.3 References
§4:20.4 Defenses
§4:20.5 Related Matters
§4:20.6 Sample Cause of Action

§4:30 ANTITRUST ACT, VIOLATION OF FLORIDA
§4:30.1 Florida Statutes
§4:30.2 Elements of Cause of Action — Florida Supreme Court
§4:30.2.1 Elements of Cause of Action — 1st DCA
§4:30.2.2 Elements of Cause of Action — 2nd DCA
§4:30.2.3 Elements of Cause of Action — 3rd DCA
§4:30.2.4 Elements of Cause of Action — 4th DCA
§4:30.2.5 Elements of Cause of Action — 5th DCA
§4:30.3 Statute of Limitations
§4:30.4 References
§4:30.5 Defenses
§4:30.6 Related Matters

§4:40 APPROPRIATION (COMMERCIAL EXPLOITATION OF THE PROPERTY VALUE OF ONE'S NAME)
§4:40.1 Florida Statutes
§4:40.2 Statute of Limitations
§4:40.3 References
§4:40.4 Defenses

§4:50 BREACH OF FIDUCIARY DUTY
§4:50.1 Elements of Cause of Action — Florida Supreme Court
§4:50.1.1 Elements of Cause of Action — 1st DCA
§4:50.1.2 Elements of Cause of Action — 2nd DCA
§4:50.1.3 Elements of Cause of Action — 3rd DCA
§4:50.1.4 Elements of Cause of Action — 4th DCA
§4:50.1.5 Elements of Cause of Action — 5th DCA

§4:50.2 Statute of Limitations
§4:50.3 References
§4:50.4 Defenses
§4:50.5 Related Matters
§4:50.6 Sample Cause of Action

§4:60 CANCELLATION OF DEED
§4:60.1 Elements of Cause of Action — Florida Supreme Court
§4:60.1.1 Elements of Cause of Action — 1st DCA
§4:60.1.2 Elements of Cause of Action — 2nd DCA
§4:60.1.3 Elements of Cause of Action — 3rd DCA
§4:60.1.4 Elements of Cause of Action — 4th DCA
§4:60.1.5 Elements of Cause of Action — 5th DCA
§4:60.2 Statute of Limitations
§4:60.3 References
§4:60.4 Related Matters

§4:70 CONSPIRACY, CIVIL
§4:70.1 Elements of Cause of Action — Florida Supreme Court
§4:70.1.1 Elements of Cause of Action — 1st DCA
§4:70.1.2 Elements of Cause of Action — 2nd DCA
§4:70.1.3 Elements of Cause of Action — 3rd DCA
§4:70.1.4 Elements of Cause of Action — 4th DCA
§4:70.1.5 Elements of Cause of Action — 5th DCA
§4:70.2 Statute of Limitations
§4:70.3 References
§4:70.4 Related Matters
§4:70.5 Sample Cause of Action

§4:80 CONVERSION
§4:80.1 Elements of Cause of Action — Florida Supreme Court
§4:80.1.1 Elements of Cause of Action — 1st DCA
§4:80.1.2 Elements of Cause of Action — 2nd DCA
§4:80.1.3 Elements of Cause of Action — 3rd DCA
§4:80.1.4 Elements of Cause of Action — 4th DCA
§4:80.1.5 Elements of Cause of Action — 5th DCA
§4:80.2 Statute of Limitations
§4:80.3 References
§4:80.4 Defenses
§4:80.5 Related Matters
§4:80.6 Fla.R.Civ.P. Form 1.939
§4:80.7 Sample Complaints

§4:90 EVICTION, TENANT
§4:90.1 Fla.R.Civ.P. Form 1.947
§4:90.2 Statute of Limitations
§4:90.3 References
§4:90.4 Defenses
§4:90.5 Related Matters

§4:100 FORECLOSURE, MORTGAGE
§4:100.1 Elements of Cause of Action — Florida Supreme Court
§4:100.1.1 Elements of Cause of Action — 1st DCA
§4:100.1.2 Elements of Cause of Action — 2nd DCA

§4:100.1.3 Elements of Cause of Action — 3rd DCA
§4:100.1.4 Elements of Cause of Action — 4th DCA
§4:100.1.5 Elements of Cause of Action — 5th DCA
§4:100.2 Statute of Limitations
§4:100.3 References
§4:100.4 Defenses
§4:100.5 Related Matters
§4:100.6 Fla.R.Civ.P. Form 1.944

§4:110 GOODS SOLD
§4:110.1 Fla.R.Civ.P. Form 1.935

§4:120 MISLEADING ADVERTISEMENT
§4:120.1 Elements of Cause of Action — Florida Supreme Court
§4:120.1.1 Elements of Cause of Action — 1st DCA
§4:120.1.2 Elements of Cause of Action — 2nd DCA
§4:120.1.3 Elements of Cause of Action — 3rd DCA
§4:120.1.4 Elements of Cause of Action — 4th DCA
§4:120.1.5 Elements of Cause of Action — 5th DCA
§4:120.2 Florida Statutes
§4:120.3 Statutes of Limitations
§4:120.4 Related Matters

§4:130 MONEY LENT
§4:130.1 Fla.R.Civ.P. Form 1.936

§4:140 OPEN ACCOUNT
§4:140.1 Elements of Cause of Action — Florida Supreme Court
§4:140.1.1 Elements of Cause of Action — 1st DCA
§4:140.1.2 Elements of Cause of Action — 2nd DCA
§4:140.1.3 Elements of Cause of Action — 3rd DCA
§4:140.1.4 Elements of Cause of Action — 4th DCA
§4:140.1.5 Elements of Cause of Action — 5th DCA
§4:140.2 Statute of Limitations
§4:140.3 References
§4:140.4 Related Matters
§4:140.5 Fla.R.Civ.P. Form 1.932

§4:150 PROMISSORY NOTE
§4:150.1 Fla.R.Civ.P. Form 1.934
§4:150.2 Statute of Limitations
§4:150.3 Defenses
§4:150.4 Related Matters
§4:150.5 Sample Complaint

§4:160 REPLEVIN
§4:160.1 Elements of Cause of Action Pursuant to Fla. Stat. §78.055 (2005)
§4:160.1.1 Elements of Cause of Action — Florida Supreme Court
§4:160.1.2 Elements of Cause of Action — 1st DCA
§4:160.1.3 Elements of Cause of Action — 2nd DCA
§4:160.1.4 Elements of Cause of Action — 3rd DCA
§4:160.1.5 Elements of Cause of Action — 4th DCA
§4:160.1.6 Elements of Cause of Action — 5th DCA
§4:160.2 Statute of Limitations

§4:160.3 References
§4:160.4 Defenses
§4:160.5 Related Matters
§4:160.6 Fla.R.Civ.P. Form 1.937

§4:170 RICO, CIVIL (CIVIL REMEDIES FOR CRIMINAL PRACTICES ACT)
§4:170.1 Florida Statutes
§4:170.2 Elements of Cause of Action — Florida Supreme Court
§4:170.2.1 Elements of Cause of Action — 1st DCA
§4:170.2.2 Elements of Cause of Action — 2nd DCA
§4:170.2.3 Elements of Cause of Action — 3rd DCA
§4:170.2.4 Elements of Cause of Action — 4th DCA
§4:170.2.5 Elements of Cause of Action — 5th DCA
§4:170.3 Statute of Limitations
§4:170.4 References
§4:170.5 Defenses
§4:170.6 Related Matters
§4:170.7 Florida Standard Jury Instructions in Criminal Cases

§4:180 TORTIOUS INTERFERENCE WITH ADVANTAGEOUS BUSINESS RELATIONSHIP
§4:180.1 Elements of Cause of Action — Florida Supreme Court
§4:180.1.1 Elements of Cause of Action — 1st DCA
§4:180.1.2 Elements of Cause of Action — 2nd DCA
§4:180.1.3 Elements of Cause of Action — 3rd DCA
§4:180.1.4 Elements of Cause of Action — 4th DCA
§4:180.1.5 Elements of Cause of Action — 5th DCA
§4:180.2 Statute of Limitations
§4:180.3 References
§4:180.4 Defenses
§4:180.5 Related Matters
§4:180.6 Sample Complaint

§4:190 TRUST, CONSTRUCTIVE
§4:190.1 Required Elements — Florida Supreme Court
§4:190.1.1 Elements of Cause of Action — 1st DCA
§4:190.1.2 Elements of Cause of Action — 2nd DCA
§4:190.1.3 Elements of Cause of Action — 3rd DCA
§4:190.1.4 Elements of Cause of Action — 4th DCA
§4:190.1.5 Elements of Cause of Action — 5th DCA
§4:190.2 Statute of Limitations
§4:190.3 References
§4:190.4 Defenses
§4:190.5 Related Matters
§4:190.6 Related Remedies

§4:200 TRUST, RESULTING
§4:200.1 Required Elements — Florida Supreme Court
§4:200.1.1 Elements of Cause of Action — 1st DCA
§4:200.1.2 Elements of Cause of Action — 2nd DCA
§4:200.1.3 Elements of Cause of Action — 3rd DCA
§4:200.1.4 Elements of Cause of Action — 4th DCA
§4:200.1.5 Elements of Cause of Action — 5th DCA
§4:200.2 Statute of Limitations
§4:200.3 References

§4:200.4 Defenses
§4:200.5 Related Matters
§4:200.6 Related Remedies

§4:210 BREACH OF JOINT VENTURE AGREEMENT
§4:210.1 Elements of Cause of Action — Florida Supreme Court
§4:210.1.1 Elements of Cause of Action — 1st DCA
§4:210.1.2 Elements of Cause of Action — 2nd DCA
§4:210.1.3 Elements of Cause of Action — 3rd DCA
§4:210.1.4 Elements of Cause of Action — 4th DCA
§4:210.1.5 Elements of Cause of Action — 5th DCA
§4:210.2 Statute of Limitations
§4:210.3 References
§4:210.4 Defenses
§4:210.5 Related Matters

CHAPTER 5: WARRANTY CASES

§5:10 WARRANTY, BREACH OF UCC
§5:10.1 Elements of Cause of Action — Florida Supreme Court
§5:10.1.1 Elements of Cause of Action — 1st DCA
§5:10.1.2 Elements of Cause of Action — 2nd DCA
§5:10.1.3 Elements of Cause of Action — 3rd DCA
§5:10.1.4 Elements of Cause of Action — 4th DCA
§5:10.1.5 Elements of Cause of Action — 5th DCA
§5:10.2 Statute of Limitations
§5:10.3 References
§5:10.4 Defenses
§5:10.5 Related Matters
§5:10.6 Standard Jury Instructions — Product Liability

§5:20 WARRANTY, COMMON LAW
§5:20.1 Elements of Cause of Action — Florida Supreme Court
§5:20.1.1 Elements of Cause of Action — 1st DCA
§5:20.1.2 Elements of Cause of Action — 2nd DCA
§5:20.1.3 Elements of Cause of Action — 3rd DCA
§5:20.1.4 Elements of Cause of Action — 4th DCA
§5:20.1.5 Elements of Cause of Action — 5th DCA
§5:20.2 Statute of Limitations
§5:20.3 References
§5:20.4 Defenses
§5:20.5 Related Matters

§5:30 WARRANTY, CONDOMINIUM STATUTORY
§5:30.1 Florida Statutes
§5:30.2 Statute of Limitations
§5:30.3 References
§5:30.4 Related Matters

§5:40 WARRANTY, IMPLIED
§5:40.1 Fla.R.Civ.P. Form 1.949
§5:40.2 Statute of Limitations
§5:40.3 References

§5:40.4 Defenses
§5:40.5 Related Matters
§5:40.6 Standard Jury Instructions — Product Liability

§5:50 WARRANTY, PET DEALER'S STATUTORY
§5:50.1 Florida Statutes
§5:50.2 Statute of Limitations
§5:50.3 References

CHAPTER 6: INDEMNITY ACTIONS

§6:10 INDEMNITY, COMMON LAW
§6:10.1 Elements of Cause of Action — Florida Supreme Court
§6:10.1.1 Elements of Cause of Action — 1st DCA
§6:10.1.2 Elements of Cause of Action — 2nd DCA
§6:10.1.3 Elements of Cause of Action — 3rd DCA
§6:10.1.4 Elements of Cause of Action — 4th DCA
§6:10.1.5 Elements of Cause of Action — 5th DCA
§6:10.2 Statute of Limitations
§6:10.3 References
§6:10.4 Defenses
§6:10.5 Related Matters

§6:20 INDEMNITY, CONTRACTUAL
§6:20.1 Elements of Cause of Action — Florida Supreme Court
§6:20.1.1 Elements of Cause of Action — 1st DCA
§6:20.1.2 Elements of Cause of Action — 2nd DCA
§6:20.1.3 Elements of Cause of Action — 3rd DCA
§6:20.1.4 Elements of Cause of Action — 4th DCA
§6:20.1.5 Elements of Cause of Action — 5th DCA
§6:20.2 Statute of Limitations
§6:20.3 References
§6:20.4 Defenses
§6:20.5 Related Matters

§6:30 INDEMNITY, IMPLIED
§6:30.1 Elements of Cause of Action — Florida Supreme Court
§6:30.1.1 Elements of Cause of Action — 1st DCA
§6:30.1.2 Elements of Cause of Action — 2nd DCA
§6:30.1.3 Elements of Cause of Action — 3rd DCA
§6:30.1.4 Elements of Cause of Action — 4th DCA
§6:30.1.5 Elements of Cause of Action — 5th DCA
§6:30.2 Statute of Limitations
§6:30.3 References
§6:30.4 Defenses
§6:30.5 Related Matters

CHAPTER 7: EMPLOYMENT CASES

§7:10 DISCRIMINATION, EMPLOYMENT—DISABILITY UNDER FLORIDA CIVIL RIGHTS ACT
§7:10.1 Elements of Cause of Action — Florida Supreme Court
§7:10.1.1 Elements of Cause of Action — 1st DCA
§7:10.1.2 Elements of Cause of Action — 2nd DCA
§7:10.1.3 Elements of Cause of Action — 3rd DCA
§7:10.1.4 Elements of Cause of Action — 4th DCA
§7:10.1.5 Elements of Cause of Action — 5th DCA
§7:10.2 Statute of Limitations
§7:10.3 References
§7:10.4 Defenses
§7:10.5 Related Matters

§7:20 RETALIATORY DISCHARGE—MEMBERSHIP IN LABOR ORGANIZATION
§7:20.1 Florida Statutes
§7:20.2 Elements of Cause of Action — Florida Supreme Court
§7:20.3 Statute of Limitations
§7:20.4 References
§7:20.5 Defenses
§7:20.6 Related Causes of Action
§7:20.7 Sample Cause of Action

§7:30 RETALIATORY DISCHARGE—PUBLIC SECTOR WHISTLE-BLOWER'S ACT
§7:30.1 Florida Statutes
§7:30.2 Elements of Cause of Action — Florida Supreme Court
§7:30.3 Statute of Limitations
§7:30.4 References
§7:30.5 Defenses
§7:30.6 Related Matters
§7:30.7 Related Causes of Action
§7:30.8 Sample Cause of Action

§7:40 RETALIATORY DISCHARGE—PRIVATE SECTOR WHISTLE-BLOWER'S ACT
§7:40.1 Florida Statutes
§7:40.2 Elements of Cause of Action — Florida Supreme Court
§7:40.2.1 Elements of Cause of Action — 1st DCA
§7:40.2.2 Elements of Cause of Action — 2nd DCA
§7:40.2.3 Elements of Cause of Action — 3rd DCA
§7:40.2.4 Elements of Cause of Action — 4th DCA
§7:40.2.5 Elements of Cause of Action — 5th DCA
§7:40.3 Statute of Limitations
§7:40.4 References
§7:40.5 Defenses
§7:40.6 Related Matters
§7:40.7 Sample Cause of Action

§7:50 RETALIATORY DISCHARGE—WORKERS' COMPENSATION
§7:50.1 Florida Statutes—F.S. §440.205
§7:50.2 Elements of Cause of Action — Florida Supreme Court
§7:50.2.1 Elements of Cause of Action — 1st DCA
§7:50.2.2 Elements of Cause of Action — 2nd DCA
§7:50.2.3 Elements of Cause of Action — 3rd DCA
§7:50.2.4 Elements of Cause of Action — 4th DCA
§7:50.2.5 Elements of Cause of Action — 5th DCA

§7:50.3 Statute of Limitations
§7:50.4 References
§7:50.5 Defenses
§7:50.6 Related Matters
§7:50.7 Related Causes of Action
§7:50.8 Sample Cause of Action

§7:60 WRONGFUL GARNISHMENT
§7:60.1 Elements of Cause of Action — Florida Supreme Court
§7:60.1.1 Elements of Cause of Action — 1st DCA
§7:60.1.2 Elements of Cause of Action — 2nd DCA
§7:60.1.3 Elements of Cause of Action — 3rd DCA
§7:60.1.4 Elements of Cause of Action — 4th DCA
§7:60.1.5 Elements of Cause of Action — 5th DCA
§7:60.2 Statute of Limitations
§7:60.3 References
§7:60.4 Related Matters

CHAPTER 8: FRAUD

§8:10 FRAUD
§8:10.1 Elements of Cause of Action — Florida Supreme Court
§8:10.1.1 Elements of Cause of Action — 1st DCA
§8:10.1.2 Elements of Cause of Action — 2nd DCA
§8:10.1.3 Elements of Cause of Action — 3rd DCA
§8:10.1.4 Elements of Cause of Action — 4th DCA
§8:10.1.5 Elements of Cause of Action — 5th DCA
§8:10.2 Statute of Limitations
§8:10.3 References
§8:10.4 Defenses
§8:10.5 Related Matters

§8:20 FRAUD, CONSTRUCTIVE
§8:20.1 Elements of Cause of Action — Florida Supreme Court
§8:20.1.1 Elements of Cause of Action — 1st DCA
§8:20.1.2 Elements of Cause of Action — 2nd DCA
§8:20.1.3 Elements of Cause of Action — 3rd DCA
§8:20.1.4 Elements of Cause of Action — 4th DCA
§8:20.1.5 Elements of Cause of Action — 5th DCA
§8:20.2 Statute of Limitations
§8:20.3 References
§8:20.4 Defenses
§8:20.5 Related Matters

§8:30 FRAUD IN THE INDUCEMENT
§8:30.1 Elements of Cause of Action — Florida Supreme Court
§8:30.1.1 Elements of Cause of Action — 1st DCA
§8:30.1.2 Elements of Cause of Action — 2nd DCA
§8:30.1.3 Elements of Cause of Action — 3rd DCA
§8:30.1.4 Elements of Cause of Action — 4th DCA
§8:30.1.5 Elements of Cause of Action — 5th DCA
§8:30.2 Statute of Limitations
§8:30.3 References

§8:30.4 Defenses
§8:30.5 Related Matters

§8:40 FRAUDULENT MISREPRESENTATION
§8:40.1 Elements of Cause of Action — Florida Supreme Court
§8:40.1.1 Elements of Cause of Action — 1st DCA
§8:40.1.2 Elements of Cause of Action — 2nd DCA
§8:40.1.3 Elements of Cause of Action — 3rd DCA
§8:40.1.4 Elements of Cause of Action — 4th DCA
§8:40.1.5 Elements of Cause of Action — 5th DCA
§8:40.2 Statute of Limitations
§8:40.3 References
§8:40.4 Defenses
§8:40.5 Related Matters

CHAPTER 9: DEFAMATION & PRIVACY

§9:10 DEFAMATION
§9:10.1 Elements of Cause of Action — Florida Supreme Court
§9:10.1.1 Elements of Cause of Action — 1st DCA
§9:10.1.2 Elements of Cause of Action — 2nd DCA
§9:10.1.3 Elements of Cause of Action — 3rd DCA
§9:10.1.4 Elements of Cause of Action — 4th DCA
§9:10.1.5 Elements of Cause of Action — 5th DCA
§9:10.2 Statute of Limitations
§9:10.3 References
§9:10.4 Defenses
§9:10.5 Related Matters
§9:10.6 Florida Standard Jury Instructions—Civil

§9:20 GOVERNMENTAL INTRUSION
§9:20.1 Florida Constitution
§9:20.2 Elements of Cause of Action — Florida Supreme Court
§9:20.2.1 Elements of Cause of Action — 1st DCA
§9:20.2.2 Elements of Cause of Action — 2nd DCA
§9:20.2.3 Elements of Cause of Action — 3rd DCA
§9:20.2.4 Elements of Cause of Action — 4th DCA
§9:20.2.5 Elements of Cause of Action — 5th DCA
§9:20.3 Statute of Limitation
§9:20.4 Related Matters

§9:30 SECURITY OF COMMUNICATIONS ACT, VIOLATION OF
§9:30.1 Florida Statutes
§9:30.2 Statute of Limitations
§9:30.3 References
§9:30.4 Defenses
§9:30.5 Related Matters

§9:40 INVASION OF PRIVACY, GENERALLY
§9:40.1 Elements of Cause of Action — Florida Supreme Court
§9:40.1.1 Elements of Cause of Action — 1st DCA
§9:40.1.2 Elements of Cause of Action — 2nd DCA
§9:40.1.3 Elements of Cause of Action — 3rd DCA

§9:40.1.4 Elements of Cause of Action — 4th DCA
§9:40.1.5 Elements of Cause of Action — 5th DCA
§9:40.2 Statute of Limitations
§9:40.3 References
§9:40.4 Defenses
§9:40.5 Related Matters

§9:50 INVASION OF PRIVACY — PUBLIC DISCLOSURE OF PRIVATE FACTS
§9:50.1 Elements of Cause of Action — Florida Supreme Court
§9:50.1.1 Elements of Cause of Action — 1st DCA
§9:50.1.2 Elements of Cause of Action — 2nd DCA
§9:50.1.3 Elements of Cause of Action — 3rd DCA
§9:50.1.4 Elements of Cause of Action — 4th DCA
§9:50.1.5 Elements of Cause of Action — 5th DCA
§9:50.2 Statute of Limitations
§9:50.3 Defenses
§9:50.4 Related Matters

§9:60 INVASION OF PRIVACY — INTRUSION
§9:60.1 Elements of Cause of Action — Florida Supreme Court
§9:60.1.1 Elements of Cause of Action — 1st DCA
§9:60.1.2 Elements of Cause of Action — 2nd DCA
§9:60.1.3 Elements of Cause of Action — 3rd DCA
§9:60.1.4 Elements of Cause of Action — 4th DCA
§9:60.1.5 Elements of Cause of Action — 5th DCA
§9:60.2 Statute of Limitations
§9:60.3 Defenses
§9:60.4 Related Matters

§9:70 INVASION OF PRIVACY — APPROPRIATION
§9:70.1 Florida Statutes
§9:70.2 Statute of Limitations
§9:70.3 Related Matters

CHAPTER 10: INTENTIONAL TORTS

§10:10 INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS
§10:10.1 Elements of Cause of Action — Florida Supreme Court
§10:10.1.1 Elements of Cause of Action — 1st DCA
§10:10.1.2 Elements of Cause of Action — 2nd DCA
§10:10.1.3 Elements of Cause of Action — 3rd DCA
§10:10.1.4 Elements of Cause of Action — 4th DCA
§10:10.1.5 Elements of Cause of Action — 5th DCA
§10:10.2 Statute of Limitations
§10:10.3 References
§10:10.4 Defenses
§10:10.5 Related Matters

§10:20 INTERFERENCE WITH CHILD CUSTODY
§10:20.1 Elements of Cause of Action — Florida Supreme Court
§10:20.1.1 Elements of Cause of Action — 1st DCA
§10:20.1.2 Elements of Cause of Action — 2nd DCA
§10:20.1.3 Elements of Cause of Action — 3rd DCA

§10:20.1.4 Elements of Cause of Action — 4th DCA
§10:20.1.5 Elements of Cause of Action — 5th DCA
§10:20.2 Statute of Limitations
§10:20.3 References
§10:20.4 Defenses
§10:20.5 Related Matters

§10:30 THEFT, CIVIL
§10:30.1 Elements of Cause of Action — Florida Supreme Court
§10:30.1.1 Elements of Cause of Action — 1st DCA
§10:30.1.2 Elements of Cause of Action — 2nd DCA
§10:30.1.3 Elements of Cause of Action — 3rd DCA
§10:30.1.4 Elements of Cause of Action — 4th DCA
§10:30.1.5 Elements of Cause of Action — 5th DCA
§10:30.2 Florida Statutes
§10:30.3 Statute of Limitations
§10:30.4 References
§10:30.5 Defenses
§10:30.6 Related Matters

§10:40 INTERFERENCE WITH TESTAMENTARY EXPECTATION
§10:40.1 Elements of Cause of Action — Florida Supreme Court
§10:40.1.1 Elements of Cause of Action — 1st DCA
§10:40.1.2 Elements of Cause of Action — 2nd DCA
§10:40.1.3 Elements of Cause of Action — 3rd DCA
§10:40.1.4 Elements of Cause of Action — 4th DCA
§10:40.1.5 Elements of Cause of Action — 5th DCA
§10:40.2 Statute of Limitations
§10:40.3 References
§10:40.4 Defenses
§10:40.5 Related Matters

CHAPTER 11: PROCEDURAL TORTS

§11:10 ABUSE OF PROCESS
§11:10.1 Elements of Cause of Action — Florida Supreme Court
§11:10.1.1 Elements of Cause of Action — 1st DCA
§11:10.1.2 Elements of Cause of Action — 2nd DCA
§11:10.1.3 Elements of Cause of Action — 3rd DCA
§11:10.1.4 Elements of Cause of Action — 4th DCA
§11:10.1.5 Elements of Cause of Action — 5th DCA
§11:10.2 Statute of Limitations
§11:10.3 References
§11:10.4 Defenses
§11:10.5 Related Matters

§11:20 MALICIOUS PROSECUTION
§11:20.1 Elements of Cause of Action — Florida Supreme Court
§11:20.1.1 Elements of Cause of Action — 1st DCA
§11:20.1.2 Elements of Cause of Action — 2nd DCA
§11:20.1.3 Elements of Cause of Action — 3rd DCA
§11:20.1.4 Elements of Cause of Action — 4th DCA
§11:20.1.5 Elements of Cause of Action — 5th DCA

§11:20.2 Statute of Limitations
§11:20.3 References
§11:20.4 Defenses
§11:20.5 Related Matters

CHAPTER 12: PHYSICAL TORTS

§12:10 ASSAULT
§12:10.1 Elements of Cause of Action — Florida Supreme Court
§12:10.1.1 Elements of Cause of Action — 1st DCA
§12:10.1.2 Elements of Cause of Action — 2nd DCA
§12:10.1.3 Elements of Cause of Action — 3rd DCA
§12:10.1.4 Elements of Cause of Action — 4th DCA
§12:10.1.5 Elements of Cause of Action — 5th DCA
§12:10.2 Statute of Limitations
§12:10.3 References
§12:10.4 Defenses
§12:10.5 Related Matters
§12:10.6 Sample Complaint

§12:20 BATTERY
§12:20.1 Elements of Cause of Action — Florida Supreme Court
§12:20.1.1 Elements of Cause of Action — 1st DCA
§12:20.1.2 Elements of Cause of Action — 2nd DCA
§12:20.1.3 Elements of Cause of Action — 3rd DCA
§12:20.1.4 Elements of Cause of Action — 4th DCA
§12:20.1.5 Elements of Cause of Action — 5th DCA
§12:20.2 Statute of Limitations
§12:20.3 References
§12:20.4 Defenses
§12:20.5 Related Matters
§12:20.6 Sample Complaint

§12:30 FALSE IMPRISONMENT
§12:30.1 Elements of Cause of Action — Florida Supreme Court
§12:30.1.1 Elements of Cause of Action — 1st DCA
§12:30.1.2 Elements of Cause of Action — 2nd DCA
§12:30.1.3 Elements of Cause of Action — 3rd DCA
§12:30.1.4 Elements of Cause of Action — 4th DCA
§12:30.1.5 Elements of Cause of Action — 5th DCA
§12:30.2 Statute of Limitations
§12:30.3 References
§12:30.4 Defenses
§12:30.5 Related Matters
§12:30.6 Sample Cause of Action

§12:40 FORCIBLE ENTRY AND DETENTION
§12:40.1 Fla.R.Civ.P. Form 1.938
§12:40.2 Statute of Limitations
§12:40.3 References
§12:40.4 Related Matters

CHAPTER 13: REAL PROPERTY ACTIONS

§13:10 EASEMENT, PRESCRIPTIVE
§13:10.1 Elements of Cause of Action — Florida Supreme Court
§13:10.1.1 Elements of Cause of Action — 1st DCA
§13:10.1.2 Elements of Cause of Action — 2nd DCA
§13:10.1.3 Elements of Cause of Action — 3rd DCA
§13:10.1.4 Elements of Cause of Action — 4th DCA
§13:10.1.5 Elements of Cause of Action — 5th DCA
§13:10.2 Statute of Limitations
§13:10.3 References
§13:10.4 Defenses
§13:10.5 Related Matters

§13:20 EJECTMENT
§13:20.1 Fla.R.Civ.P. Form 1.940
§13:20.2 Statute of Limitations
§13:20.3 References
§13:20.4 Related Matters

§13:30 INVERSE CONDEMNATION
§13:30.1 Elements of Cause of Action — Florida Supreme Court
§13:30.1.1 Elements of Cause of Action — 1st DCA
§13:30.1.2 Elements of Cause of Action — 2nd DCA
§13:30.1.3 Elements of Cause of Action — 3rd DCA
§13:30.1.4 Elements of Cause of Action — 4th DCA
§13:30.1.5 Elements of Cause of Action — 5th DCA
§13:30.2 Statute of Limitations
§13:30.3 References
§13:30.4 Defenses
§13:30.5 Related Matters

§13:40 SLANDER OF TITLE (DISPARAGEMENT OF PROPERTY)
§13:40.1 Elements of Cause of Action — Florida Supreme Court
§13:40.1.1 Elements of Cause of Action — 1st DCA
§13:40.1.2 Elements of Cause of Action — 2nd DCA
§13:40.1.3 Elements of Cause of Action — 3rd DCA
§13:40.1.4 Elements of Cause of Action — 4th DCA
§13:40.1.5 Elements of Cause of Action — 5th DCA
§13:40.2 Statute of Limitations
§13:40.3 References
§13:40.4 Defenses
§13:40.5 Related Matters
§13:40.6 Sample Cause of Action

§13:50 TRESPASS ON THE CASE
§13:50.1 Elements of Cause of Action — Florida Supreme Court
§13:50.1.1 Elements of Cause of Action — 1st DCA
§13:50.1.2 Elements of Cause of Action — 2nd DCA
§13:50.1.3 Elements of Cause of Action — 3rd DCA
§13:50.1.4 Elements of Cause of Action — 4th DCA
§13:50.1.5 Elements of Cause of Action — 5th DCA
§13:50.2 Statute of Limitations
§13:50.3 References

§13:50.4 Defenses
§13:50.5 Related Matters

§13:60 IMPLIED WAY OF NECESSITY
§13:60.1 Florida Statutes
§13:60.2 Elements of Cause of Action — Florida Supreme Court
§13:60.2.1 Elements of Cause of Action — 1st DCA
§13:60.2.2 Elements of Cause of Action — 2nd DCA
§13:60.2.3 Elements of Cause of Action — 3rd DCA
§13:60.2.4 Elements of Cause of Action — 4th DCA
§13:60.2.5 Elements of Cause of Action — 5th DCA
§13:60.3 Statute of Limitations
§13:60.4 References
§13:60.5 Defenses
§13:60.6 Related Matters

§13:70 STATUTORY WAY OF NECESSITY
§13:70.1 Florida Statutes
§13:70.2 Elements of Cause of Action — Florida Supreme Court
§13:70.2.1 Elements of Cause of Action — 1st DCA
§13:70.2.2 Elements of Cause of Action — 2nd DCA
§13:70.2.3 Elements of Cause of Action — 3rd DCA
§13:70.2.4 Elements of Cause of Action — 4th DCA
§13:70.2.5 Elements of Cause of Action — 5th DCA
§13:70.3 Statute of Limitations
§13:70.4 References
§13:70.5 Defenses
§13:70.6 Related Matters

§13:80 QUIET TITLE
§13:80.1 Florida Statutes
§13:80.2 Elements of Cause of Action — Florida Supreme Court
§13:80.2.1 Elements of Cause of Action — 1st DCA
§13:80.2.2 Elements of Cause of Action — 2nd DCA
§13:80.2.3 Elements of Cause of Action — 3rd DCA
§13:80.2.4 Elements of Cause of Action — 4th DCA
§13:80.2.5 Elements of Cause of Action — 5th DCA
§13:80.3 Statute of Limitations
§13:80.4 References
§13:80.5 Defenses
§13:80.6 Related Matters

CHAPTER 14: CONSTRUCTION CASES

§14:10 BUILDING CODE, VIOLATION OF
§14:10.1 Florida Statutes
§14:10.2 Statute of Limitations
§14:10.3 References
§14:10.4 Related Matters

CHAPTER 15: LIEN CASES

§15:10 LIEN, CHARGING
§15:10.1 Elements of Cause of Action — Florida Supreme Court
§15:10.1.1 Elements of Cause of Action — 1st DCA
§15:10.1.2 Elements of Cause of Action — 2nd DCA
§15:10.1.3 Elements of Cause of Action — 3rd DCA
§15:10.1.4 Elements of Cause of Action — 4th DCA
§15:10.1.5 Elements of Cause of Action — 5th DCA
§15:10.2 Statute of Limitations
§15:10.3 References
§15:10.4 Defenses
§15:10.5 Related Matters

§15:20 LIEN, EQUITABLE
§15:20.1 Elements of Cause of Action — Florida Supreme Court
§15:20.1.1 Elements of Cause of Action — 1st DCA
§15:20.1.2 Elements of Cause of Action — 2nd DCA
§15:20.1.3 Elements of Cause of Action — 3rd DCA
§15:20.1.4 Elements of Cause of Action — 4th DCA
§15:20.1.5 Elements of Cause of Action — 5th DCA
§15:20.2 Statute of Limitations
§15:20.3 References
§15:20.4 Defenses
§15:20.5 Related Matters

§15:30 LIEN, RETAINING
§15:30.1 Elements of Cause of Action — Florida Supreme Court
§15:30.1.1 Elements of Cause of Action — 1st DCA
§15:30.1.2 Elements of Cause of Action — 2nd DCA
§15:30.1.3 Elements of Cause of Action — 3rd DCA
§15:30.1.4 Elements of Cause of Action — 4th DCA
§15:30.1.5 Elements of Cause of Action — 5th DCA
§15:30.2 References
§15:30.3 Defenses
§15:30.4 Related Matters

CHAPTER 16: CONSUMER PROTECTION, DEBT COLLECTION CASES

§16:10 FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT
§16:10.1 Florida Statutes
§16:10.2 Elements of Cause of Action — Florida Supreme Court
§16:10.2.1 Elements of Cause of Action — 1st DCA
§16:10.2.2 Elements of Cause of Action — 2nd DCA
§16:10.2.3 Elements of Cause of Action — 3rd DCA
§16:10.2.4 Elements of Cause of Action — 4th DCA
§16:10.2.5 Elements of Cause of Action — 5th DCA
§16:10.3 Statute of Limitations
§16:10.4 References
§16:10.5 Defenses
§16:10.6 Related Matters
§16:10.7 Related Causes of Action
§16:10.8 Sample Cause of Action

§16:20 COLLECTIONS, WORTHLESS CHECKS, DRAFTS, ORDERS OF PAYMENT
§16:20.1 Fla.R.Civ.P. Form 1.942
§16:20.2 Florida Statutes
§16:20.3 Statute of Limitations
§16:20.4 References
§16:20.5 Related Matters

§16:30 FLORIDA CONSUMER COLLECTION PRACTICES ACT
§16:30.1 Florida Statutes
§16:30.2 Elements of Cause of Action — Florida Statutes
§16:30.2.1 Elements of Cause of Action — Fla. Stat. §559.72, et seq.
§16:30.2.2 Elements of Cause of Action — Fla. Stat. §559.72(5)
§16:30.2.3 Elements of Cause of Action — Fla. Stat. §559.72(7)
§16:30.2.4 Elements of Cause of Action — Fla. Stat. §559.72(9)
§16:30.3 Statute of Limitations
§16:30.4 References
§16:30.5 Defense
§16:30.6 Related Matters
§16:30.7 Related Causes of Action
§16:30.8 Sample Cause of Action

CHAPTER 17: PROCEDURAL REMEDIES

§17:10 INJUNCTION, PERMANENT
§17:10.1 Annotation
§17:10.2 Elements of Cause of Action — Florida Supreme Court
§17:10.2.1 Elements of Cause of Action — 1st DCA
§17:10.2.2 Elements of Cause of Action — 2nd DCA
§17:10.2.3 Elements of Cause of Action — 3rd DCA
§17:10.2.4 Elements of Cause of Action — 4th DCA
§17:10.2.5 Elements of Cause of Action — 5th DCA
§17:10.3 Statute of Limitations
§17:10.4 References
§17:10.5 Defenses
§17:10.6 Related Matters
§17:10.7 Sample Complaint

§17:20 INJUNCTION, TEMPORARY
§17:20.1 Elements of Cause of Action — Florida Supreme Court
§17:20.1.1 Elements of Cause of Action — 1st DCA
§17:20.1.2 Elements of Cause of Action — 2nd DCA
§17:20.1.3 Elements of Cause of Action — 3rd DCA
§17:20.1.4 Elements of Cause of Action — 4th DCA
§17:20.1.5 Elements of Cause of Action — 5th DCA
§17:20.2 Statute of Limitations
§17:20.3 References
§17:20.4 Defenses
§17:20.5 Related Matters
§17:20.6 Sample Cause of Action

§17:30 DECLARATORY JUDGMENT
§17:30.1 Elements of Cause of Action — Florida Supreme Court
§17:30.1.1 Elements of Cause of Action — 1st DCA

§17:30.1.2 Elements of Cause of Action — 2nd DCA
§17:30.1.3 Elements of Cause of Action — 3rd DCA
§17:30.1.4 Elements of Cause of Action — 4th DCA
§17:30.1.5 Elements of Cause of Action — 5th DCA
§17:30.2 Statute of Limitations
§17:30.3 References
§17:30.4 Defenses
§17:30.5 Related Matters

CHAPTER 18: LEGAL THEORIES & DEFENSES

§18:10 FLA. R. CIV. P. 1.110(D) AND OTHER STANDARD DEFENSES

§18:20 ACCORD AND SATISFACTION—COMMON LAW
§18:20.1 Elements — Florida Supreme Court
§18:20.1.1 Elements — 1st DCA
§18:20.1.2 Elements — 2nd DCA
§18:20.1.3 Elements — 3rd DCA
§18:20.1.4 Elements — 4th DCA
§18:20.1.5 Elements — 5th DCA
§18:20.2 Florida Statutes
§18:20.3 Fla.R.Civ.P. Form 1.967. Defense. Accord and Satisfaction
§18:20.4 References
§18:20.5 Related Matters

§18:30 ACCORD AND SATISFACTION—ARTICLE 3 OF THE UCC
§18:30.1 Florida Statutes
§18:30.2 Fla.R.Civ.P. Form 1.967. Defense. Accord and Satisfaction
§18:30.3 Elements — 5th DCA
§18:30.4 References
§18:30.5 Related Matters

§18:40 AGENCY, ACTUAL
§18:40.1 Elements — Florida Supreme Court
§18:40.1.1 Elements — 1st DCA
§18:40.1.2 Elements — 2nd DCA
§18:40.1.3 Elements — 3rd DCA
§18:40.1.4 Elements — 4th DCA
§18:40.1.5 Elements — 5th DCA
§18:40.2 References
§18:40.3 Related Matters

§18:50 AGENCY, APPARENT (A.K.A. AGENCY BY ESTOPPEL)
§18:50.1 Elements — Florida Supreme Court
§18:50.1.1 Elements — 1st DCA
§18:50.1.2 Elements — 2nd DCA
§18:50.1.3 Elements — 3rd DCA
§18:50.1.4 Elements — 4th DCA
§18:50.1.5 Elements — 5th DCA
§18:50.2 References
§18:50.3 Related Matters

§18:60 PIERCING THE CORPORATE VEIL
§18:60.1 Elements — Florida Supreme Court
§18:60.1.1 Elements — 1st DCA
§18:60.1.2 Elements — 2nd DCA
§18:60.1.3 Elements — 3rd DCA
§18:60.1.4 Elements — 4th DCA
§18:60.1.5 Elements — 5th DCA
§18:60.2 References

§18:70 COMMERCIAL BRIBERY
§18:70.1 Elements — Florida Supreme Court
§18:70.1.1 Elements — 1st DCA
§18:70.1.2 Elements — 2nd DCA
§18:70.1.3 Elements — 3rd DCA
§18:70.1.4 Elements — 4th DCA
§18:70.1.5 Elements — 5th DCA
§18:70.2 References
§18:70.3 Related Matters

§18:80 CONTRACTORS, UNLICENSED CIVIL REMEDY
§18:80.1 Florida Statutes
§18:80.2 References
§18:80.3 Defenses
§18:80.4 Related Matters

§18:90 DURESS
§18:90.1 Elements — Florida Supreme Court
§18:90.1.1 Elements — 1st DCA
§18:90.1.2 Elements — 2nd DCA
§18:90.1.3 Elements — 3rd DCA
§18:90.1.4 Elements — 4th DCA
§18:90.1.5 Elements — 5th DCA
§18:90.2 References
§18:90.3 Defenses
§18:90.4 Related Matters

§18:100 EQUITABLE SUBROGATION
§18:100.1 Elements — Florida Supreme Court
§18:100.1.1 Elements — 1st DCA
§18:100.1.2 Elements — 2nd DCA
§18:100.1.3 Elements — 3rd DCA
§18:100.1.4 Elements — 4th DCA
§18:100.1.5 Elements — 5th DCA
§18:100.2 References
§18:100.3 Defenses
§18:100.4 Related Matters

§18:110 COLLATERAL ESTOPPEL (ESTOPPEL BY JUDGMENT)
§18:110.1 Elements — Florida Supreme Court
§18:110.1.1 Elements — 1st DCA
§18:110.1.2 Elements — 2nd DCA
§18:110.1.3 Elements — 3rd DCA
§18:110.1.4 Elements — 4th DCA
§18:110.1.5 Elements — 5th DCA
§18:110.2 References

§18:110.3 Defenses
§18:110.4 Related Matters

§18:120 ESTOPPEL, EQUITABLE
§18:120.1 Elements — Florida Supreme Court
§18:120.1.1 Elements — 1st DCA
§18:120.1.2 Elements — 2nd DCA
§18:120.1.3 Elements — 3rd DCA
§18:120.1.4 Elements — 4th DCA
§18:120.1.5 Elements — 5th DCA
§18:120.2 References
§18:120.3 Defenses
§18:120.4 Related Matters

§18:130 ESTOPPEL, JUDICIAL
§18:130.1 Elements — Florida Supreme Court
§18:130.1.1 Elements — 1st DCA
§18:130.1.2 Elements — 2nd DCA
§18:130.1.3 Elements — 3rd DCA
§18:130.1.4 Elements — 4th DCA
§18:130.1.5 Elements — 5th DCA
§18:130.2 References
§18:130.3 Defenses
§18:130.4 Related Matters

§18:140 GRATUITOUS ASSUMPTION OF DUTY
§18:140.1 Elements — Florida Supreme Court
§18:140.1.1 Elements — 1st DCA
§18:140.1.2 Elements — 2nd DCA
§18:140.1.3 Elements — 3rd DCA
§18:140.1.4 Elements — 4th DCA
§18:140.1.5 Elements — 5th DCA
§18:140.2 References
§18:140.3 Defenses

§18:150 LACHES, DEFENSE OF
§18:150.1 Elements — Florida Supreme Court
§18:150.1.1 Elements — 1st DCA
§18:150.1.2 Elements — 2nd DCA
§18:150.1.3 Elements — 3rd DCA
§18:150.1.4 Elements — 4th DCA
§18:150.1.5 Elements — 5th DCA
§18:150.2 References
§18:150.3 Defenses
§18:150.4 Related Matters

§18:160 NOVATION
§18:160.1 Elements — Florida Supreme Court
§18:160.1.1 Elements — 1st DCA
§18:160.1.2 Elements — 2nd DCA
§18:160.1.3 Elements — 3rd DCA
§18:160.1.4 Elements — 4th DCA
§18:160.1.5 Elements — 5th DCA
§18:160.2 References
§18:160.3 Defenses

§18:170 REFORMATION
§18:170.1 Elements — Florida Supreme Court
§18:170.1.1 Elements — 1st DCA
§18:170.1.2 Elements — 2nd DCA
§18:170.1.3 Elements — 3rd DCA
§18:170.1.4 Elements — 4th DCA
§18:170.1.5 Elements — 5th DCA
§18:170.2 References
§18:170.3 Defenses
§18:170.4 Related Matters

§18:180 RES JUDICATA (DOCTRINE OF CLAIM PRECLUSION)
§18:180.1 Elements — Florida Supreme Court
§18:180.1.1 Elements — 1st DCA
§18:180.1.2 Elements — 2nd DCA
§18:180.1.3 Elements — 3rd DCA
§18:180.1.4 Elements — 4th DCA
§18:180.1.5 Elements — 5th DCA
§18:180.2 References
§18:180.3 Defenses
§18:180.4 Related Matters

§18:190 RESTITUTION
§18:190.1 Elements — Florida Supreme Court
§18:190.1.1 Elements — 1st DCA
§18:190.1.2 Elements — 2nd DCA
§18:190.1.3 Elements — 3rd DCA
§18:190.1.4 Elements — 4th DCA
§18:190.1.5 Elements — 5th DCA
§18:190.2 References
§18:190.3 Related Matters

§18:200 UNCONSCIONABILITY, COMMON LAW
§18:200.1 Elements — Florida Supreme Court
§18:200.1.1 Elements — 1st DCA
§18:200.1.2 Elements — 2nd DCA
§18:200.1.3 Elements — 3rd DCA
§18:200.1.4 Elements — 4th DCA
§18:200.1.5 Elements — 5th DCA
§18:200.2 References
§18:200.3 Related Matters

§18:210 VEXATIOUS LITIGANT
§18:210.1 Florida Statutes
§18:210.2 References
§18:210.3 Related Matters

§18:220 WAIVER
§18:220.1 Elements — Florida Supreme Court
§18:220.1.1 Elements — 1st DCA
§18:220.1.2 Elements — 2nd DCA
§18:220.1.3 Elements — 3rd DCA
§18:220.1.4 Elements — 4th DCA
§18:220.1.5 Elements — 5th DCA

§18:220.2 Definitions
§18:220.3 References
§18:220.4 Defenses
§18:220.5 Related Matters

§18:230 COBLENTZ AGREEMENTS
§18:230.1 Elements — Florida Supreme Court
§18:230.1.1 Elements — 1st DCA
§18:230.1.2 Elements — 2nd DCA
§18:230.1.3 Elements — 3rd DCA
§18:230.1.4 Elements — 4th DCA
§18:230.1.5 Elements — 5th DCA
§18:220.2 Definitions
§18:230.3 Statute of Limitations
§18:230.4 Related Matters

§18:240 IN PARI DELICTO
§18:240.1 Elements — Florida Supreme Court
§18:240.1.1 Elements — 1st DCA
§18:240.1.2 Elements — 2nd DCA
§18:240.1.3 Elements — 3rd DCA
§18:240.1.4 Elements — 4th DCA
§18:240.1.5 Elements — 5th DCA
§18:240.2 Defenses to the Usage of the Defense
§18:240.3 Related Matters

§18:250 SPLITTING CAUSES OF ACTION
§18:250.1 Elements — Florida Supreme Court
§18:250.1.1 Elements — 1st DCA
§18:250.1.2 Elements — 2nd DCA
§18:250.1.3 Elements — 3rd DCA
§18:250.1.4 Elements — 4th DCA
§18:250.1.5 Elements — 5th DCA
§18:250.2 Related Matters

CHAPTER 19: TRUSTS & ESTATES

§19:10 REVOCATION OF PROBATE BASED ON LACK OF TESTAMENTARY CAPACITY
§19:10.1 Florida Statutes
§19:10.2 Elements of Cause of Action — Florida Supreme Court
§19:10.2.1 Elements of Cause of Action — 1st DCA
§19:10.2.2 Elements of Cause of Action — 2nd DCA
§19:10.2.3 Elements of Cause of Action — 3rd DCA
§19:10.2.4 Elements of Cause of Action — 4th DCA
§19:10.2.5 Elements of Cause of Action — 5th DCA
§19:10.3 Statute of Limitations
§19:10.4 References
§19:10.5 Defenses
§19:01.6 Related Matters

§19:20 REVOCATION OF PROBATE BASED ON UNDUE INFLUENCE
§19:20.01 Florida Statutes
§19:20.1 Elements of Cause of Action — Florida Supreme Court

§19:20.1.1 Elements of Cause of Action — 1st DCA
§19:20.1.2 Elements of Cause of Action — 2nd DCA
§19:20.1.3 Elements of Cause of Action — 3rd DCA
§19:20.1.4 Elements of Cause of Action — 4th DCA
§19:20.1.5 Elements of Revision 10, 9/2016 Cause of Action — 5th DCA
§19:20.2 Statute of Limitations
§19:20.3 References
§19:20.4 Defenses
§19:20.5 Related Matters
§19:20.5.1 Burden of Proof and Presumption of Undue Influence
§19:20.6 Related Causes of Action

§19:30 REMOVAL OF PERSONAL REPRESENTATIVE: SURCHARGE
§19:30.1 Florida Statutes and Florida Probate Rules
§19:30.2 Elements of Cause of Action — Florida Supreme Court
§19:30.2.1 Elements of Cause of Action — 1st DCA
§19:30.2.2 Elements of Cause of Action — 2nd DCA
§19:30.2.3 Elements of Cause of Action — 3rd DCA
§19:30.2.4 Elements of Cause of Action — 4th DCA
§19:30.2.5 Elements of Cause of Action — 5th DCA
§19:30.3 Statute of Limitations
§19:30.4 References
§19:30.5 Related Matters
§19:30.6 Sample Petition

INDEX

CHAPTER 1

PLEADING IN FLORIDA

§1:10 FLORIDA RULES OF CIVIL PROCEDURE
§1:10.1 Rule 1.100 Pleadings and Motions
§1:10.2 Rule 1.110 General Rules of Pleading
§1:10.3 Rule 1.120 Pleading Special Matters
§1:10.4 Rule 1.130 Attaching Copy of Cause of Action and Exhibits

§1:20 FLORIDA RULES OF JUDICIAL ADMINISTRATION
§1:20.1 Rule 2.515 Signature of Attorneys and Parties
§1:20.2 Rule 2.520 Paper

§1:30 FLORIDA STATUTES

§1:40 RELATED MATTERS

§1:50 SAMPLE COMPLAINT

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§1:10 FLORIDA RULES OF CIVIL PROCEDURE

§1:10.1 Rule 1.100 Pleadings and Motions

(c) Caption.

(1) Every pleading, motion, order, judgment, or other paper shall have a caption containing the name of the court, the file number, the name of the first party on each side with an appropriate indication of other parties, and a designation identifying the party filing it and its nature or the nature of the order, as the case may be. All papers filed in the action shall be styled in such a manner as to indicate clearly the subject matter of the paper and the party requesting or obtaining relief.[1]

§1:10.2 Rule 1.110 General Rules of Pleading

(a) Forms of Pleadings. Forms of action and technical forms for seeking relief and of pleas, pleadings, or motions are abolished.

(b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to demand general relief.

(c) The Answer. In the answer a pleader shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge, the defendant shall so state and such statement shall operate as a denial. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, the pleader shall specify so much of it as is true and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or may generally deny all of the averments except such designated averments as the pleader expressly admits, but when the pleader does so intend to controvert all of its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial.

(d) Affirmative Defenses. In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if justice so requires, shall treat the pleading as if there had been a proper designation. Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b); provided this shall not limit amendments under rule 1.190 even if such ground is sustained.

(e) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(f) Separate Statements. All averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all subsequent pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense when a separation facilitates the clear presentation of the matter set forth.

(g) Joinder of Causes of Action; Consistency. A pleader may set up in the same action as many claims or causes of action or defenses in the same right as the pleader has, and claims for relief may be stated in

[1] E.g., "Order Denying Plaintiff's Motion for Summary Judgment," "Defendant's Motion to Compel," "Order Denying Defendant's Motion to Dismiss," "Final Judgment for Plaintiff," etc.

the alternative if separate items make up the cause of action, or if 2 or more causes of action are joined. A party may also set forth 2 or more statements of a claim or defense alternatively, either in 1 count or defense or in separate counts or defenses. When 2 or more statements are made in the alternative and 1 of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of 1 or more of the alternative statements. A party may also state as many separate claims or defenses as that party has, regardless of consistency and whether based on legal or equitable grounds or both. All pleadings shall be construed so as to do substantial justice.

(h) Subsequent Pleadings. When the nature of an action permits pleadings subsequent to final judgment and the jurisdiction of the court over the parties has not terminated, the initial pleading subsequent to final judgment shall be designated a supplemental complaint or petition. The action shall then proceed in the same manner and time as though the supplemental complaint or petition were the initial pleading in the action, including the issuance of any needed process. This subdivision shall not apply to proceedings that may be initiated by motion under these rules.

§1:10.3 Rule 1.120 Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit. Malice, intent, knowledge, mental attitude, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment or Decree. In pleading a judgment or decree of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to aver the judgment or decree without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

§1:10.4 Rule 1.130 Attaching Copy of Cause of Action and Exhibits

(a) Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

(b) Part for All Purposes. Any exhibit attached to a pleading shall be considered a part thereof for all purposes. Statements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion.

§1:20 FLORIDA RULES OF JUDICIAL ADMINISTRATION

§1:20.1 Rule 2.515 Signature of Attorneys and Parties

(a) Attorney Signature. Every pleading and other paper of a party represented by an attorney shall be signed by at least 1 attorney of record in that attorney's individual name whose address, telephone number, including area code, and Florida Bar number shall be stated, and who shall be duly licensed to practice law in Florida or who shall have received permission to appear in the particular case as provided in rule 2.510. The attorney may be required by the court to give the address of, and to vouch for the attorney's authority to represent, the party. Except when otherwise specifically provided by an applicable rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other paper had not been served.

(b) Pro Se Litigant Signature. A party who is not represented by an attorney shall sign any pleading or other paper and state the party's address and telephone number, including area code.

(c) Form of Signature.

(1) The signatures required on pleadings and papers by subdivisions (a) and (b) of this rule may be:
   (A) original signatures;
   (B) original signatures that have been reproduced by electronic means, such as on electronically transmitted documents or photocopied documents; or
   (C) any other signature format authorized by general law, so long as the clerk where the proceeding is pending has the capability of receiving and has obtained approval from the Supreme Court of Florida to accept pleadings and papers with that signature format.

(2) An attorney, party, or other person who files a pleading or paper by electronic transmission that does not contain the original signature of that attorney, party, or other person shall file that identical pleading or paper in paper form containing an original signature of that attorney, party, or other person (hereinafter called the follow-up filing) immediately thereafter. The follow-up filing is not required if the Supreme Court of Florida has entered an order directing the clerk of court to discontinue accepting the follow-up filing.

§1:20.2 Rule 2.520 Paper

(a) Type and Size. All pleadings, motions, petitions, briefs, notices, orders, judgments, decrees, opinions, and other papers and official documents filed in any court shall be filed on recycled paper measuring 8 1/2 by 11 inches. For purposes of this rule, paper is recycled if it contains a minimum content of 50 percent waste paper. Xerographic reduction of legal-size (8 1/2 by 14 inches) documents to letter size (8 1/2 by 11 inches) is prohibited.

(b) Exhibits. Any exhibit or attachment filed with pleadings or papers may be filed in its original size.

(c) Recording Space. On all papers and documents prepared and filed by the court or by any party to a proceeding which are to be recorded in the public records of any county, including but not limited to final money judgments and notices of lis pendens, a 3-inch by 3-inch space at the top right-hand corner on the first page and a 1-inch by 3-inch space at the top right-hand corner on each subsequent page shall be left blank and reserved for use by the clerk of court.

(d) Exceptions to Recording Space. Any papers or documents created by persons or entities over which the filing party has no control, including but not limited to wills, codicils, trusts, or other testamentary documents; documents prepared or executed by any public officer; documents prepared, executed, acknowledged, or proved outside of the State of Florida; or documents created by State or Federal government agencies, may be filed without the space required by this rule.

(e) Noncompliance. No clerk of court shall refuse for filing any document or paper because of noncompliance with this rule. However, upon request of the clerk of court, noncomplying documents shall be resubmitted in accordance with this rule.

§1:30 FLORIDA STATUTES

[Reserved]

§1:40 RELATED MATTERS

1. **Jurisdiction:** "A pleading which sets forth a claim for relief must contain allegations of fact sufficient to show the jurisdiction of the court." *E.g., Gannett v. King*, 108 So.2d 299, 301 (Fla. 2d DCA 1959).
2. **Fact Pleading:** "Florida is a fact-pleading jurisdiction. *Continental Baking Co. v. Vincent*, 634 So.2d 242, 244 (Fla. 5th DCA 1994); see also *Goldschmidt v. Holman*, 571 So .2d 422, 423-24 (Fla.1990) ("Florida Rule of Civil Procedure 1.110(b)(2) requires that '[a] pleading which sets forth a claim for relief ... must state a cause of action and shall contain ... a short and plain statement of the ultimate facts showing that the pleader is entitled to relief' "). Florida's pleading rule forces counsel to *173 recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort. *Continental Baking Co.*, 634 So.2d at 244. Furthermore, at the outset of a suit, litigants must state their pleadings with sufficient particularity for a defense to be prepared. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561 (Fla. 1988)." *E.g., Horowitz v. Lasky*, 855 So.2d 169, 172 (Fla. 5th DCA 2003).
3. **Pleading Ultimate Facts:** "In addition to the jurisdictional statement and the relief sought, the complaint must contain a plain statement of ultimate facts establishing entitlement to relief." *E.g., Pratus v. City of Naples*, 807 So.2d 795, 796 (Fla. 2d DCA 2002).
4. **Inconsistent Pleading:** "The Florida Rules of Civil Procedure permit inconsistency in pleadings as to either statements of facts or legal theories adopted." *E.g., Booker v. Sarasota, Inc.,* 707 So.2d 886, 888 (Fla. 1st DCA 1998) (citation omitted).
5. **Allegations of Time and Place:** "In essence, allegations of time and place are necessary only if without them the statement of the claim is so vague and ambiguous that the other party cannot adequately frame an answer." *E.g., Sarasota Cloth Fabric & Foam, Inc. v. Benes*, 482 So.2d 574, 576 (Fla. 5th DCA 1986).
6. **Legal Conclusions Insufficient:** "Clearly mere legal conclusions inserted in a complaint are insufficient to state a cause of action unless substantiated by allegations of ultimate fact. A complaint must sufficiently allege ultimate facts which, if established by competent evidence, would support a decree granting the relief sought." *E.g., Doyle v. Flex*, 210 So.2d 493, 494-95 (Fla. 4th DCA 1968).
7. **Pleading for Attorney's Fees:** "[A] a claim for attorney's fees, whether based on statute or contract, must be pled. Failure to do so constitutes a waiver of the claim." *Stockman v. Downs*, 573 So.2d 835, 837-88 (Fla. 1991); *see also Green v. Sun Harbor Homeonwers' Ass'n, Inc.*, 730 So.2d 1261, 1263 (Fla. 1998)("*Stockman* is to be read to hold that the failure to set forth a claim for attorney fees in a complaint, answer, or counterclaim, if filed, constitutes a waiver. However, the failure to set forth a claim for attorney fees in a motion does not constitute a waiver. Until a rule is approved for cases that are dismissed before the filing of an answer, we require that a defendant's claim for attorney fees is to be made either in the defendant's motion to dismiss or by a separate motion which must be filed within thirty days following a dismissal of the action. If the claim is not made within this time period, the claim is waived.").
8. **Pleading for Interest:** "A specific demand for prejudgment interest is procedurally unnecessary." *E.g., Getelman v. Levey*, 481 So.2d 1236, 1240-41 (Fla. 3rd DCA 1985) (citations omitted).
9. **Pleading for Punitive Damages:** A plaintiff cannot plead for punitive damages without leave of court. See 768.72, Fla. Stat. Section 768.72(1), Fla. Stat., details the threshold Plaintiffs must meet to obtain leave to amend to add a claim for punitive damages as follows:

   In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.

   To properly assert a punitive damages claim, a plaintiff need only make "a reasonable showing by evidence in the record or proffered by the claimant." *Strasser v. Yalamanchi*, 677 So.2d 22, 23 (Fla. 4th DCA 1996); *Solis v. Calvo*, 689 So.2d 366, 369, n. 2 (Fla. 3rd DCA 1997). "If there is any evidence tending to show that punitive damages could be properly inflicted, even if the Court be of the

opinion that the preponderance of evidence is the other way, the Court should leave the question to the jury." *Jonat Properties, Inc. v. Gateman*, 226 So.2d 703 (Fla. 3rd DCA 1969) (emphasis added). In deciding whether or not to allow a motion to amend for punitive damages, a court should not prejudge the evidence prior to trial. As explained by the Second District Court of Appeals, "We hold that the trial judge abused his discretion in denying the motion on the basis of his perception of the proffered evidence which might be available at trial. Prejudging the evidence is not a proper vehicle for the court's denial of the motion to amend." *Dolphin Cove Ass'n v. Square D. Co.*, 616 So.2d 553 (Fla. 2d DCA 1993). Furthermore, Section 768.72 does not allow a defendant to proffer evidence to oppose Plaintiffs' Motion. *Strasser*, 677 So.2d at 23. While a defendant may argue over the sufficiency of evidence presented, and the inferences to be drawn from the proffered evidence, a defendant cannot inject new evidence to counter a request to amend to assert a punitive damages claim. This conclusion is consistent with the plain language of Section 768.72, which requires the trial court to decide whether the plaintiffs have a reasonable basis to recover punitive damages but leaves to the trier of fact the determination of whether punitive damages will be awarded.

§1:50 SAMPLE COMPLAINT

USE NOTE:
Use the following model complaint as a template for building your own case-specific complaints. Sample language for pleading specific counts (paragraph 7, below) is included throughout this book as part of the coverage of each individual cause of action. The "sample complaints" contained in each individual cause of action illustrate all of the elements of each claim that must be pled in order to survive a motion to dismiss. You must plead the necessary ultimate facts to support each count in order to satisfy Florida's pleading standard, as described above, and allow the Defendant to properly frame a responsive pleading.

[INSERT CAPTION]

COMPLAINT

[INSERT NAME OF PLAINTIFF(S)],("Plaintiff") hereby makes the following allegations against [INSERT NAME OF DEFENDANT] ("Defendant"), and alleges as follows:

INTRODUCTION

1. This is an action to recover damages resulting from [INSERT SHORT SUMMARY OF COMPLAINT HERE].

JURISDICTION AND VENUE

2. This Court has jurisdiction over this dispute because this complaint seeks damages in excess of $_____ [OR INSERT APPLICABLE JURISDICTIONAL LIMITS], exclusive of interest and attorneys' fees.
3. Venue is proper in [INSERT NAME OF COUNTY] County, Florida because [THE DEFENDANT RESIDES HERE, THE CAUSE OF ACTION ACRUED HERE OR THE PROPERTY AT ISSUE IN THE LITIGATION IS LOCATED HERE].

PARTIES

4. Plaintiff is a resident of [INSERT NAME OF COUNTY], Florida, is over the age of eighteen, and is otherwise sui juris.
5. Defendant is a [insert state of domicile of Defendant and type of entity or individual Defendant's name] which maintains offices [OR RESIDES] in [INSERT NAME OF COUNTY] County, Florida.

SUBSTANTIVE ALLEGATIONS

6. [INSERT SUMMARY OF RELEVANT FACTS IN CONSECUTIVELY NUMBERED PARAGRAPHS.]

COUNT I—INSERT TITLE OF CAUSE OF ACTION

7. Plaintiff realleges and incorporates the allegations set forth above in paragraphs 1-__ above as if set forth herein in full.
8. [INSERT ALLEGATIONS FOR CAUSE OF ACTION HERE IN CONSECUTIVELY NUMBERED PARAGRAPHS.]

WHEREFORE, Plaintiff demands damages against Defendant for [INSERT NAME OF CAUSE OF ACTION].

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable.
Respectfully Submitted:
[INSERT PLEADING SIGNATURE BLOCK]

CHAPTER 2

NEGLIGENCE CASES

§2:10 EMOTIONAL DISTRESS, NEGLIGENT INFLICTION OF
§2:10.1 Elements of Cause of Action — Florida Supreme Court
§2:10.1.1 Elements of Cause of Action — 1st DCA
§2:10.1.2 Elements of Cause of Action — 2nd DCA
§2:10.1.3 Elements of Cause of Action — 3rd DCA
§2:10.1.4 Elements of Cause of Action — 4th DCA
§2:10.1.5 Elements of Cause of Action — 5th DCA
§2:10.2 Statute of Limitations
§2:10.3 References
§2:10.4 Defenses
§2:10.5 Related Matters
§2:10.6 Sample Complaint

§2:20 MALPRACTICE, LEGAL
§2:20.1 Elements of Cause of Action — Florida Supreme Court
§2:20.1.1 Elements of Cause of Action — 1st DCA
§2:20.1.2 Elements of Cause of Action — 2nd DCA
§2:20.1.3 Elements of Cause of Action — 3rd DCA
§2:20.1.4 Elements of Cause of Action — 4th DCA
§2:20.1.5 Elements of Cause of Action — 5th DCA
§2:20.2 Statute of Limitations
§2:20.3 References
§2:20.4 Defenses
§2:20.5 Related Matters
§2:20.6 Sample Cause of Action

§2:30 MALPRACTICE, MEDICAL
§2:30.1 Elements of Cause of Action — Florida Supreme Court
§2:30.1.1 Elements of Cause of Action — 1st DCA
§2:30.1.2 Elements of Cause of Action — 2nd DCA
§2:30.1.3 Elements of Cause of Action — 3rd DCA
§2:30.1.4 Elements of Cause of Action — 4th DCA
§2:30.1.5 Elements of Cause of Action — 5th DCA
§2:30.2 Statute of Limitations
§2:30.3 References
§2:30.4 Defenses
§2:30.5 Related Matters

§2:40 NEGLIGENCE
§2:40.1 Elements of Cause of Action — Florida Supreme Court
§2:40.1.1 Elements of Cause of Action — 1st DCA
§2:40.1.2 Elements of Cause of Action — 2nd DCA
§2:40.1.3 Elements of Cause of Action — 3rd DCA
§2:40.1.4 Elements of Cause of Action — 4th DCA
§2:40.1.5 Elements of Cause of Action — 5th DCA
§2:40.2 Statute of Limitations
§2:40.3 References
§2:40.4 Defenses
§2:40.5 Related Matters
§2:40.6 Sample Complaints

§2:50 NEGLIGENCE, FALL-DOWN
§2:50.1 Elements of Cause of Action — Florida Supreme Court
§2:50.1.1 Elements of Cause of Action — 1st DCA
§2:50.1.2 Elements of Cause of Action — 2nd DCA
§2:50.1.3 Elements of Cause of Action — 3rd DCA
§2:50.1.4 Elements of Cause of Action — 4th DCA
§2:50.1.5 Elements of Cause of Action — 5th DCA
§2:50.2 Statute of Limitations
§2:50.3 References
§2:50.4 Defenses
§2:50.5 Related Matters
§2:50.6 Complaint (Fla.R.Civ.P. Form 1.951)

§2:60 NEGLIGENCE, HIRING OR RETENTION
§2:60.1 Elements of Cause of Action — Florida Supreme Court
§2:60.1.1 Elements of Cause of Action — 1st DCA
§2:60.1.2 Elements of Cause of Action — 2nd DCA
§2:60.1.3 Elements of Cause of Action — 3rd DCA
§2:60.1.4 Elements of Cause of Action — 4th DCA
§2:60.1.5 Elements of Cause of Action — 5th DCA
§2:60.2 Statute of Limitations
§2:60.3 References
§2:60.4 Defenses
§2:60.5 Related Matters
§2:60.6 Sample Complaints

§2:70 NEGLIGENCE, MISREPRESENTATION
§2:70.1 Elements of Cause of Action — Florida Supreme Court
§2:70.1.1 Elements of Cause of Action — 1st DCA
§2:70.1.2 Elements of Cause of Action — 2nd DCA
§2:70.1.3 Elements of Cause of Action — 3rd DCA
§2:70.1.4 Elements of Cause of Action — 4th DCA
§2:70.1.5 Elements of Cause of Action — 5th DCA
§2:70.2 Statute of Limitations
§2:70.3 References
§2:70.4 Defenses
§2:70.5 Related Matters

§2:80 NEGLIGENCE, MOTOR VEHICLE
§2:80.1 Elements of Cause of Action — Florida Supreme Court
§2:80.1.1 Elements of Cause of Action — 1st DCA
§2:80.1.2 Elements of Cause of Action — 2nd DCA

§2:80.1.3 Elements of Cause of Action — 3rd DCA
§2:80.1.4 Elements of Cause of Action — 4th DCA
§2:80.1.5 Elements of Cause of Action — 5th DCA
§2:80.2 Statute of Limitations
§2:80.3 References
§2:80.4 Defenses
§2:80.5 Related Matters
§2:80.6 Complaint (Fla.R.Civ.P. Form 1.945)

§2:90 NEGLIGENCE, MOTOR VEHICLE WHEN PLAINTIFF IS UNABLE TO DETERMINE WHO IS RESPONSIBLE
§2:90.1 Fla.R.Civ.P. Form 1.946
§2:90.2 Statute of Limitations
§2:90.3 References
§2:90.4 Defenses
§2:90.5 Related Matters

§2:91 UNINSURED/UNDERINSURED MOTORIST COVERAGE
§2:91.1 Fla. Stat. §627.727
§2:91.2 Statute of Limitations
§2:91.3 References
§2:91.4 Defenses
§2:91.5 Related Matters
§2:91.6 Sample Complaint

§2:100 NEGLIGENCE, STILLBIRTH
§2:100.1 Elements of Cause of Action — Florida Supreme Court
§2:100.1.1 Elements of Cause of Action — 1st DCA
§2:100.1.2 Elements of Cause of Action — 2nd DCA
§2:100.1.3 Elements of Cause of Action — 3rd DCA
§2:100.1.4 Elements of Cause of Action — 4th DCA
§2:100.1.5 Elements of Cause of Action — 5th DCA
§2:100.2 Statute of Limitations
§2:100.3 References
§2:100.4 Defenses
§2:100.5 Related Matters

§2:110 PARENTAL LIABILITY FOR TORT OF MINOR
§2:110.1 Elements of Cause of Action — Florida Supreme Court
§2:110.1.1 Elements of Cause of Action — 1st DCA
§2:110.1.2 Elements of Cause of Action — 2nd DCA
§2:110.1.3 Elements of Cause of Action — 3rd DCA
§2:110.1.4 Elements of Cause of Action — 4th DCA
§2:110.1.5 Elements of Cause of Action — 5th DCA
§2:110.2 References
§2:110.3 Defenses
§2:110.4 Related Matters

§2:120 SPOLIATION OF EVIDENCE (NEGLIGENT DESTRUCTION OF EVIDENCE)
§2:120.1 Elements of Cause of Action — Florida Supreme Court
§2:120.1.1 Elements of Cause of Action — 1st DCA
§2:120.1.2 Elements of Cause of Action — 2nd DCA
§2:120.1.3 Elements of Cause of Action — 3rd DCA
§2:120.1.4 Elements of Cause of Action — 4th DCA
§2:120.1.5 Elements of Cause of Action — 5th DCA

§2:120.2 Statute of Limitations
§2:120.3 References
§2:120.4 Defenses
§2:120.5 Related Matters

NEGLIGENCE CASES

§2:130 STRICT LIABILITY
§2:130.1 Elements of Cause of Action — Florida Supreme Court
§2:130.1.1 Elements of Cause of Action — 1st DCA
§2:130.1.2 Elements of Cause of Action — 2nd DCA
§2:130.1.3 Elements of Cause of Action — 3rd DCA
§2:130.1.4 Elements of Cause of Action — 4th DCA
§2:130.1.5 Elements of Cause of Action — 5th DCA
§2:130.2 Statute of Limitations
§2:130.3 References
§2:130.4 Defenses
§2:130.5 Related Matters
§2:130.6 Sample Complaint

§2:140 WRONGFUL DEATH
§2:140.1 Elements of Cause of Action — Florida Supreme Court
§2:140.1.1 Elements of Cause of Action — 1st DCA
§2:140.1.2 Elements of Cause of Action — 2nd DCA
§2:140.1.3 Elements of Cause of Action — 3rd DCA
§2:140.1.4 Elements of Cause of Action — 4th DCA
§2:140.1.5 Elements of Cause of Action — 5th DCA
§2:140.2 Statute of Limitations
§2:140.3 References
§2:140.4 Defenses
§2:140.5 Related Matters

§2:150 DOG BITE—STATUTORY CLAIM
§2:150.1 Elements of Cause of Action
§2:150.1.1 Florida Statutes
§2:150.1.2 Florida Supreme Court
§2:150.2 Statute of Limitations
§2:150.3 References
§2:150.4 Defenses
§2:150.5 Related Matters
§2:150.6 Related Causes of Action
§2:150.7 Sample Complaint

§2:160 DOG BITE—COMMON LAW CLAIM
§2:160.1 Elements of Cause of Action — Florida Supreme Court
§2:160.1.1 Elements of Cause of Action — 1st DCA
§2:160.1.2 Elements of Cause of Action — 2nd DCA
§2:160.1.3 Elements of Cause of Action — 3rd DCA
§2:160.1.4 Elements of Cause of Action — 4th DCA
§2:160.1.5 Elements of Cause of Action — 5th DCA
§2:160.2 Statute of Limitations
§2:160.3 References
§2:160.4 Defenses
§2:160.5 Related Matters
§2:160.6 Related Causes of Action
§2:160.7 Sample Complaint

§2:170 NEGLIGENT SECURITY

§2:170.1 Elements of Cause of Action — Florida Supreme Court
§2:170.1.1 Elements of Cause of Action — 1st DCA
§2:170.1.2 Elements of Cause of Action — 2nd DCA
§2:170.1.3 Elements of Cause of Action — 3rd DCA
§2:170.1.4 Elements of Cause of Action — 4th DCA
§2:170.1.5 Elements of Cause of Action — 5th DCA
§2:170.2 Statute of Limitations
§2:170.3 Defenses
§2:170.4 Related Matters
§2:170.5 Additional References

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§2:10 EMOTIONAL DISTRESS, NEGLIGENT INFLICTION OF

§2:10.1 Elements of Cause of Action — Florida Supreme Court

Under Florida law's "impact rule," with a few exceptions discussed below, there are two ways for a plaintiff to recover for negligent infliction of emotional distress:

A. If the plaintiff has "suffered a physical impact from an external force," then "Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself."

B. If the plaintiff has *not* "suffered a physical impact from an external force," then "[1] the complained-of mental distress must be 'manifested by physical injury,' [2] the plaintiff must be 'involved' in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and [3] the plaintiff must suffer the complained-of mental distress and accompanying physical impairment 'within a short time' of the incident."

Willis v. Gami Golden Glades, LLC, 967 So.2d 846, 850 (Fla. 2007), *citing Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 526 (Fla. 3d DCA 1985).

The elements of a claim for negligent infliction of emotional distress are as follows:

1. the plaintiff must suffer a physical injury;
2. the plaintiff's physical injury must be caused by the psychological trauma;
3. the plaintiff must be involved in some way in the event causing the negligent injury to another; and
4. the plaintiff must have a close personal relationship to the directly injured person.

Source

Zell v. Meek, 665 So.2d 1048, 1054 (Fla. 1995).

Exceptions

The Florida Supreme Court has crafted several exceptions to the "impact rule" and the requirements set out above where "the foreseeability and gravity of the emotional injury involved, and lack of countervailing policy concerns, have surmounted the policy rationale undergirding application of the impact rule." *Rowell v. Holt*, 850 So.2d 474, 478 (Fla. 2003) (citation omitted):

1. *Florida Dep't of Corrections v. Abril*, 969 So.2d 201, 206 (Fla. 2007) (observing that the court "has recognized exceptions where a plaintiff may recover for emotional damages even though he or she suffered no impact or physical manifestation of the injuries," and agreeing with 2d DCA that the impact rule did not bar recovery for emotional distress resulting from breach of the duty to keep HIV testing results confidential because "the emotional damages resulting from the dissemination of confidential HIV test results are foreseeable and grave").
2. *Rowell*, 850 So.2d at 478 (approving lower court's conclusion that the impact rule did not preclude non-economic damages in a case where an attorney failed to file papers which would have resulted in his client's release from jail because of the "clear foreseeability of emotional harm resulting from a protracted period of wrongful pretrial incarceration").
3. *Gracey v. Eaker*, 837 So.2d 348, 356-57 (Fla. 2002) (holding that claims for emotional distress resulting from therapist's breach of duty of confidentiality were not barred by the impact rule because "we can envision few occurrences more likely to result in emotional distress than having one's psychotherapist reveal without authorization or justification the most confidential details of one's life").
4. *Tanner v. Hartog*, 696 So.2d 705, 708 (Fla. 1997) (impact rule does not bar claim for damages for negligence resulting in stillborn child, noting that its holding was a "natural evolution of the common law").
5. *Kush v. Lloyd*, 616 So.2d 415, 422 (Fla. 1992) (allowing claim for damages by parents of child born with serious birth defects when hospital negligently informed them that she did not carry a genetic impairment, and holding that the impact rule is not applicable to wrongful birth claims).

See Also

1. *Florida Dep't of Corr. v. Abril*, 969 So. 2d 201, 206 (Fla. 2007).
2. *Southern Baptist Hospital of Florida, Inc. v. Welker*, 908 So.2d 317, 320 (Fla. 2002) ("the issue of whether the impact rule applies is inextricably intertwined with the type of cause of action that is asserted").

3. *Hagan v. Coca-Cola Bottling Co.*, 804 So.2d 1234, 1238 (Fla. 2001) (recognizing "a cause of action for emotional distress caused by the ingestion of a contaminated food or beverage should be recognized despite the lack of an accompanying physical injury" based on the foreseeability of resulting emotional distress); *see also Doyle v. Pillsbury Co.*, 476 So.2d 1271, 1272 (Fla. 1985) (noting that "the foreign object cases all involve some ingestion of a portion of the food or drink product," which is considered as an "impact"; "[w]hen a claim is based on an inert foreign object in a food product, we continue to require ingestion of a portion of the food before liability arises").

§2:10.1.1 Elements of Cause of Action — 1st DCA

"Generally, in order to recover damages for emotional distress caused by the negligence of another in Florida, the plaintiff must show that the emotional distress flows from physical injuries sustained in an impact."

The elements of a claim of negligent infliction of emotional distress when the event injured another person are: "(1) the plaintiff must *suffer a physical injury*; (2) the plaintiff's physical injury must be caused by the psychological trauma; (3) the plaintiff must be *involved in some way in the event causing the negligent injury to another*; and (4) the plaintiff must have close personal relationship to the directly injured person."

However, "[t]he impact rule in Florida has evolved into a dichotomy: If the plaintiff suffers an impact, he or she is permitted recovery for the emotional distress flowing from the incident in which the impact occurred; if the plaintiff has not suffered an impact, the mental distress must be manifested by a discernable physical injury, the plaintiff must have been involved in the incident which involved a closely-related person, and the plaintiff must suffer the physical injury within a short time after the incident."

Source

Elliott v. Elliott, 58 So.3d 878, 880-81 (Fla. 1st DCA 2011) (emphasis added by *Elliott* court), *citing Abril*, *supra*; *Zell v. Meek*, 665 So.2d 1048, 1053-54 (Fla. 1995); and *Willis*, *supra*.

See also

1. *Testa v. Southern Escrow and Title, LLC*, 36 So.3d 713, 714 (Fla. 1st DCA 2010) ("[I]n essence, the impact rule requires that 'before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact.'").

§2:10.1.2 Elements of Cause of Action — 2nd DCA

"Generally, 'before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact.' *R.J. v. Humana of Fla., Inc.*, 652 So.2d 360, 362 (Fla. 1995). Some of [the plaintiff's] distress—for example, his anxiety—was attributable to the impact of the spider bite. Bust as we have observed, he failed to prove that the hospital was negligent in regard to the bite. In the absence of negligence, he could not recover damages for any distress flowing from the bite, either physical or emotional."

Source

St. Joseph's Hosp. v. Cowart, 891 So.2d 1039, 1043 (Fla. 2d DCA 2004).

§2:10.1.3 Elements of Cause of Action — 3rd DCA

"The elements required for this cause of action are:

1. the plaintiff must suffer a discernable physical injury;
2. the physical injury must be caused by the psychological trauma;
3. the plaintiff must be involved in the event causing the negligent injury to another; and
4. the plaintiff must have a close personal relationship to the directly injured person."

Source

LeGrande v. Emmanuel, 889 So.2d 991, 995 (Fla. 3d DCA 2004), *citing Zell*, *supra*.

See Also

1. *Gonzalez v. Metropolitan Dade County Public Health Trust*, 626 So.2d 1030, 1033 (Fla. 3d DCA 1993), *rev. granted*, 639 So.2d 978 (Fla. 1994), *affirmed*, 651 So.2d 673 (Fla. 1995) (because there is generally no cause of action for negligent infliction of emotional distress without a physical impact, "there can be no recovery for emotional distress caused by tortious interference with a dead body because there was no allegation or proof of physical impact or malicious conduct") (citation omitted).
2. *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 526 (Fla. 3d DCA 1985), *rev. denied*, 492 So.2d 1331 (Fla. 1986).
3. *American Fed'n of Gov't Employees v. DeGrio*, 454 So.2d 632, 637 (Fla. 3d DCA 1984), *affirmed*, 484 So.2d 1 (Fla. 1986), *abrogated on other grounds by Nordqvist v. Nordqvist*, 586 So.2d 1282 (Fla. 3d DCA 1991) (noting that "[a]n exception to the impact rule has long existed, however, where the defendant's conduct goes beyond simple negligence and amounts to willful, wanton, malicious conduct, the type of conduct which would justify an award of punitive damages") (citation omitted). This is not a true "exception" to the "impact rule," as emotional distress damages are recoverable for intentional conduct. *See, e.g., Williams v. City of Minneola*, 575 So.2d 683, 693 (Fla. 3d DCA 1991) ("the 'impact' rule is unrelated to emotional distress cases where intentional conduct or its equivalent is involved").

§2:10.1.4 Elements of Cause of Action — 4th DCA

The elements of a negligent infliction of emotional distress claim are: (1) the plaintiff must suffer a discernable physical injury; (2) the physical injury must be caused by the psychological trauma; (3) the plaintiff must be involved in the event causing the negligent injury to another; and (4) the plaintiff must have a close personal relationship to the directly injured person.

Source

Fernander v. Bonis, 947 So.2d 584, 590 (Fla. 4th DCA 2007), *citing LeGrande v. Emmanuel*, 889 So.2d 991, 995 (Fla. 3d DCA 2004).

§2:10.1.5 Elements of Cause of Action — 5th DCA

The elements of negligent infliction of emotional distress are: (1) the plaintiff must suffer a discernable physical injury; (2) the physical injury must be caused by the psychological trauma; (3) the plaintiff must be involved in the event causing the negligent injury to another; and (4) the plaintiff must have a close personal relationship to the directly injured person.

Source

Kendron v. SCI Funeral Services of Florida, LLC, 230 So.3d 636, 637 (Fla. 5th DCA 2017).

See Also

Reiser v. Wachovia Corp., 935 So.2d 1236 (Fla. 5th DCA 2006) (Florida does not recognize a cause of action for negligent infliction of emotional distress, at least in the absence of a physical impact or injury).

§2:10.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:10.3 References

1. 17 Fla. Jur. 2d *Damages* §§95–100 (2004).
2. 22 Am. Jur. 2d *Damages* §§211–218, 716 (2003).
3. 25 C.J.S. *Damages* §§94–104, 242, 311 (2002).
4. Restatement (Second) of Torts §§685 Comment (g), 703 Comment (h) (1977).
5. Jay M. Zitter, Annotation, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R.5th 545 (2001).

6. Mary Donovan, Comment, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?,* 41 UCLA L. Rev. 1337 (1994) (the history of the impact rule and the differing treatment of the rule among the states).
7. Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?,* 67 Wash. L. Rev. 1 (1992).

§2:10.4 Defenses

1. **Impact Rule:** While many states have abolished the "impact rule," Florida still adheres to the rule. *See Willis v. Gami Golden Glades*, LLC, 967 So.2d 846, 850 (Fla. 2007). The rule requires that the plaintiff has "suffered a physical impact from an external force" or "if the plaintiff has not suffered an impact, the mental distress must be manifested by a discernable physical injury, the plaintiff must have been involved in the incident which involved a closely-related person, and the plaintiff must suffer the physical injury within a short time after the incident." *Id*.; *see also Elliott v. Elliott*, 58 So.3d 878, 880-81 (Fla. 1st DCA 2011) (emphasis added by *Elliott* court), *citing Abril*, *supra*; *Zell v. Meek*, 665 So.2d 1048, 1053-54 (Fla. 1995); *but see Hagan v. Coca-Cola Bottling Co.,* 804 So. 2d 1234 (Fla. 2001) (allowing claim for emotional distress based on ingestion of contaminated food or beverage absent physical impact). Courts have adopted several exceptions to the rule. *See* §2:10.1, Elements of Cause of Action - Florida Supreme Court.

2. **Economic Loss Rule:** The economic loss doctrine is limited to products liability cases and bars causes of action in tort unless the defective product injures a person or damages property other than the defective product itself. *Tiara Condominium Assoc., Inc. v. March & McClennan Cos. Inc.*, 110 So.3d 399, 401 (Fla. 2013).

3. **Intervening Cause:** An intervening cause relieves a tortfeasor from liability only if it is completely independent of, and not in any way set in motion by, the tortfeasor's negligence. The intervening cause must be unforeseeable. Another way of stating the question whether the intervening cause was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct. *Townsend v. Westside Dodge, Inc.*, 642 So.2d 49, 50 (Fla. 1st DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995). Where reasonable people cannot differ, the issue may be one of law for the court to decide, not simply a question of factual causation. *Scott v. Florida Dept. of Transportation*, 752 So.2d 30, 33 (Fla. 1st DCA 2000).

4. **Assertion of Legal Rights:** The assertion of legal rights in a legally permissible manner constitutes a privilege that precludes an action based on reckless or even outrageous conduct. *Canto v. J.B. Ivey & Co.*, 595 So.2d 1025, 1028 (Fla. 1st DCA 1992).

§2:10.5 Related Matters

1. **Asbestos, Inhalation of:** Embedding of asbestos fibers in the lungs satisfies the impact rule. *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 526 (Fla. 3d DCA 1985), *rev. denied*, 492 So.2d 1331 (Fla. 1986).

2. **Ingestion of Contaminated Substance:** The ingestion of a contaminated food or beverage is a "contact" sufficient to state a claim. *See, e.g., Hagan v. Coca-Cola Bottling Co.*, 804 So.2d 1234, 1241 (Fla. 2001); *Doyle v. Pillsbury Co.*, 476 So. 2d 1271, 1272 (Fla. 1985).

3. **Pets:** Florida courts have refused to extend an exception to the "impact rule" to allow recovery for emotional distress damages for veterinary malpractice. *See, e.g., Kennedy v. Byas*, 867 So.2d 1195, 1198 (Fla. 1st DCA 2004), *rev. dismissed*, 879 So.2d 622 (Fla. 2004) (recognizing that "pet owners may consider pets as part of their family," but concluding that an exception would "place an unnecessary burden on the ever burgeoning caseload of courts in resolving serious tort claims for individuals"); *see also Arendes v. Lee County*, 899 So.2d 493, 494 (Fla. 2d DCA 2005).

4. **Mishandling of Dead Body:** "Florida law currently does not require physical impact to bring a claim for mental distress based upon the negligent mishandling of a dead body," but "[a]n action for mental anguish based on negligent handling of a dead body requires proof of either physical injury or willful or wanton misconduct." *Gonzalez v. Metro Dade County*, 651 So.2d 673, 675 (Fla. 1995); *see also Brady v.*

SCI Funeral Services of Florida, Inc., 948 So.2d 976, 979 (Fla. 1st DCA 2007) (concluding that "if a jury finds [the mortuary's] acts met the heightened standard of willful and wanton misconduct, the negligence action would fall outside of the impact rule, for purposes of non-economic damages").

5. **Negligent Defamation:** Actual damages resulting from negligent defamation may include damages for "mental suffering." *Miami Herald Publishing Co. v. Brown*, 66 So.2d 679, 680-81 (Fla. 1953).

6. **Mass shootings:** Mass shootings and similar criminal acts with multiple victims are single "incidents or occurrences" for purposes of the State of Florida's limited waiver of sovereign immunity in tort actions, pursuant to §768.28(5), Florida Statutes; thus, total recovery in tort against the State of Florida based on such events is limited to an individual cap of $200,000 and an aggregate cap of $300,000, no matter how many tort claimants there are. *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 517 (Fla. 2020).

§2:10.6 Sample Complaint

See Complaint Library, Form 2:40-3 (Violation of Chapter 497 (Funeral and Cemetery Services), Florida Statutes; Negligence; Negligent Infliction of Emotional Distress; Breach of Contract; Conversion; Gross Negligence) on Digital Access.

§2:20 MALPRACTICE, LEGAL

§2:20.1 Elements of Cause of Action — Florida Supreme Court

We find that, in a claim for legal malpractice, a plaintiff must plead and prove the following elements:
1. the attorney's employment;
2. the attorney's neglect of a reasonable duty; and
3. the attorney's negligence was the proximate cause of the client's loss.

With respect to a legal malpractice suit brought by one convicted of a crime, a majority of jurisdictions have held that appellate or postconviction relief is a prerequisite to maintaining the action.

Source

Larson & Larson, P.A. v. TSE Indus., Inc., 22 So.3d 36, 39 (Fla. 2009).

See also

1. *Steele v. Kehoe*, 747 So.2d 931, 933 (Fla. 1999), *rehearing denied*, 780 So.2d 915 (Fla. 1999).
2. *Weekley v. Knight*, 156 So. 625, 626 (Fla. 1934) ("We think there can be no question that one has a cause of action ex contractu against an attorney who neglects to perform the services which he agrees to perform for a client or which by implication he agrees to perform when he accepts employment by a client.").
3. *Law Office of David J. Stern, P.A. v. Security National Servicing Corp.*, 969 So.2d 962, 966 (Fla. 2007).

§2:20.1.1 Elements of Cause of Action — 1st DCA

To recover in a legal malpractice action, the plaintiff must show:
1. the attorney's employment;
2. the attorney's neglect of a reasonable duty; and
3. such negligence was the proximate cause of loss to the plaintiff.

Source

Lane v. Cold, 882 So.2d 436, 438 (Fla. 1st DCA 2004).

See also

1. *Olmsted v. Emmanuel*, 783 So.2d 1122, 1125 (Fla. 1st DCA 2001).
2. *Anderson v. Steven R. Andrews, P.A.*, 692 So.2d 237, 240 (Fla. 1st DCA 1997).

3. *Fernandes v. Barrs*, 641 So.2d 1371, 1374 (Fla. 1st DCA 1994), *overruled on other grounds, Chandris, S.A. v. Yanakakis*, 668 So.2d 180, 185 (Fla. 1995).
4. *Arnold v. Carmichael*, 524 So.2d 464, 465 (Fla. 1st DCA 1988), *rev. denied*, 531 So.2d 1352 (Fla. 1988).
5. *Hatcher v. Roberts*, 478 So.2d 1083, 1087 (Fla. 1st DCA 1985), *rev. denied*, 488 So.2d 68 (Fla. 1986).
6. *Dykema v. Godfrey*, 467 So.2d 824, 825 (Fla. 1st DCA 1985).
7. *Drawdy v. Sapp*, 365 So.2d 461, 462 (Fla. 1st DCA 1978).

§2:20.1.2 Elements of Cause of Action — 2nd DCA

A cause of action for legal malpractice has three elements:
1. the attorney's employment and
2. his neglect of a reasonable duty; which
3. is the proximate cause of loss to the client.

Source

Rocco v. Glenn, Rasmussen, Fogarty & Hooker, P.A., 32 So.3d 111, 116 (Fla. 2d DCA 2009).

See Also

1. *Savannah Cap., LLC v. Pitisci, Dowell & Markowitz*, 313 So. 3d 953, 957 (Fla. 2d DCA 2021).
2. *Watts v. Goetz*, 311 So. 3d 253, 260 (Fla. 2d DCA 2020).
3. *Herendeen v. Mandelbaum,* 232 So.3d 487, 491 (Fla. 2d DCA 2017).
4. *Cira v. Dillinger*, 903 So.2d 367, 370 (Fla. 2d DCA 2005).
5. *Nickolauson v. Rhyne*, 529 So.2d 365 (Fla. 2d DCA 1988).
6. *Stake v. Harlan*, 529 So.2d 1183, 1186 (Fla. 2d DCA 1988) (See concurring opinion).
7. *Thompson v. Martin*, 530 So.2d 495, 496 (Fla. 2d DCA 1988).

§2:20.1.3 Elements of Cause of Action — 3rd DCA

It is well settled that a cause of action for legal malpractice has three elements:
1. the attorney's employment;
2. the attorney's neglect of a reasonable duty; and
3. the attorney's negligence as the proximate cause of loss to the client.

Source

FBK Associates v. TEW Cardenas, LLP, 280 So.3d 493 (Fla. 3d DCA 2019), *reh'g denied* (Oct. 8, 2019).

See Also

1. *Weisser v. Dolan*, 253 So.3d 49, 51 (Fla. 3d DCA 2017).
2. *Marine Res. Dev. Found., Inc. v. Moore*, 121 So.3d 1072, 1075 (Fla. 3d DCA 2013).
3. *Hold v. Manzini*, 736 So.2d 138, 142 (Fla. 3d DCA 1999).
4. *Atkin v. Tittle & Tittle*, 730 So.2d 376, 377 (Fla. 3d DCA 1999).
5. *Sure Snap Corp. v. Baena*, 705 So.2d 46, 48 (Fla. 3d DCA 1998), *rev. denied*, 719 So.2d 288 (Fla. 1998).
6. *Riccio v. Stein*, 559 So.2d 1207, 1208 (Fla. 3d DCA 1990), *rev. dismissed*, 567 So.2d 436 (Fla. 1990).
7. *Davenport v. Stone*, 528 So.2d 45, 46 (Fla. 3d DCA 1988).
8. *Maillard v. Dowdell*, 528 So.2d 512, 514 (Fla. 3d DCA 1988), *rev. denied*, 539 So.2d 475 (Fla. 1988).
9. *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So.2d 315, 317 (Fla. 3d DCA 1985).
10. *Adams, George & Wood v. Travelers Insurance Co.*, 359 So.2d 457, 458 (Fla. 3d DCA 1978).

§2:20.1.4 Elements of Cause of Action — 4th DCA

For a party to recover for legal malpractice, three elements must be proven:
1. the attorney was employed by or in privity with the plaintiff(s);
2. the attorney neglected a reasonable duty to the client(s); and
3. the negligence proximately caused any loss to the plaintiff(s).

Source

R.S.B. Ventures, Inc. v. Berlowitz, 211 So.3d 259, 263 3 (Fla. 4th DCA 2017).

See Also

1. *Washington v. Yates*, 2022 WL 1397663, *1 (Fla. 4th DCA May, 4, 2022).
2. *J.B.J. Inv. Of S. Fla., Inc. v. S. Title Grp., Inc.*, 251 So.3d 173, 177 (Fla. 4th DCA 2018).
3. *Miller v. Finizio & Finizio, P.A.,* 226 So.3d 979, 982 (Fla. 4th DCA 2017).
4. *Arrowood Indem. Co. v. Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A.*, 134 So.3d 1079, 1081 (Fla. 4th DCA 2014).
5. *Elkind v. Bennett*, 958 So.2d 1088, 1090 (Fla. 4th DCA 2007).
6. *Gresham v. Strickland*, 784 So.2d 578, 580 (Fla. 4th DCA 2001).
7. *Kates v. Robinson*, 786 So.2d 61 (Fla. 4th DCA 2001).
8. *Home Furniture Depot, Inc. v. Entevor AB*, 753 So.2d 653, 655 (Fla. 4th DCA 2000) ("was a legal cause" used in place of "was the proximate cause").
9. *Rowe v. Schreiber*, 725 So.2d 1245, 1249 (Fla. 4th DCA 1999), *approved*, 814 So.2d 396 (Fla. 2002).
10. *Dadic v. Schneider*, 722 So.2d 921, 923 (Fla. 4th DCA 1999).
11. *Tarleton v. Arnstein & Lehr*, 719 So.2d 325, 328 (Fla. 4th DCA 1998), *rev. denied*, 732 So.2d 325 (Fla. 1999).
12. *Brennan v. Ruffner*, 640 So.2d 143, 145 (Fla. 4th DCA 1994).

§2:20.1.5 Elements of Cause of Action — 5th DCA

To state a cause of action for legal malpractice, a plaintiff must show:

1. the attorney's employment;
2. the attorney's neglect of a reasonable duty; and
3. the attorney's negligence resulted in and was the proximate cause of loss to the client.

Source

Dingle v. Dellinger, 134 So.3d 484, 487 (FLA. 5th DCA 2014).

See Also

1. *E.P. v. Hogreve*, 259 So.3d 1007, 1010 (Fla. 5th DCA 2018).
2. *Dingle v. Dellinger*, 134 So.3d 484, 487 (Fla. 5th DCA 2014).
3. *Horowitz v. Laske*, 855 So.2d 169, 173 (Fla. 5th DCA 2003).
4. *Proto v. Graham*, 788 So.2d 393, 395 (Fla. 5th DCA 2001).
5. *Florida Fruit and Vegetable Assoc. v. Wells*, 755 So.2d 828, 830 (Fla. 5th DCA 2000).
6. *Bolves v. Hullinger*, 629 So.2d 198, 200 (Fla. 5th DCA 1993).

§2:20.2 Statute of Limitations

Two Years. Fla. Stat. §95.11(4)(a); *McLeod v. Bankier*, 63 So.3d 858 (Fla. 4th 2011). *Integrated Broadcast Services, Inc. v. Mitchel*, 931 So.2d 1073 (Fla. 4th DCA 2006).

§2:20.3 References

1. 4 Fla. Jur. 2d *Attorneys at Law* §§449–483 (2002).
2. 7 Am. Jur. 2d *Attorneys at Law* §§212–253 (1997).
3. 7A C.J.S. *Attorney and Client* §§283–343 (2004).
4. Robert J. Hoffman, *Legal Malpractice in the Criminal Context: Is Postconviction Relief Required?,* 74 Fla. Bar J. 66 (Jan. 2000).

§2:20.4 Defenses

1. **Abandonment of Claim:** Settlement of the underlying lawsuit, while the appeal was pending, constituted abandonment of the malpractice claim. *KJB Vill. Prop., LLC v. Craig Dorne, P.A.*, 2012 Fla. App. LEXIS

18655 (Fla. 3d DCA Feb. 2, 2012); *Pennsylvania Insurance Guaranty Association v. Sikes*, 590 So.2d 1051, 1053 (Fla. 3d DCA 1991).

2. **Appeal Most Probably Would Have Been Unsuccessful:** "In order to recover damages for legal malpractice, a party who has been denied his right to appeal due to an attorney's failure to timely file a petition for review to the appropriate court must show that but for the attorney's negligence, the appeal most probably would have been successful." *Oteiza v. Braxton*, 547 So.2d 948, 949 (Fla. 3d DCA 1989), *rev. denied*, 560 So.2d 232 (Fla. 1990).

3. **Appeal, Obligation to Pursue:** A client is not precluded from establishing redressable harm in a subsequent legal malpractice claim based upon the dismissal or settlement of a related case, or the failure to appeal the underlying lawsuit. *Hunzinger Constr. Corp. v. Quarles & Brady*, 735 So.2d 589, 594-95 (Fla. 4th DCA 1999). To determine when a cause of action for legal malpractice arises, the existence of redressable harm must be established. *Id.* at 595. Redressable harm may be established upon the completion or termination of the appellate process or without having first sought appellate review. *Id.* In either instance, an action for legal malpractice is not precluded. *Id.* However, there are circumstances in which a client's subsequent actions constitute an abandonment of a legal malpractice claim. *Id.* For example, where a judicial error occasioned by the attorney's curable, nonprejudicial mistake effectuates the client's loss, and the judicial error would in all likelihood be corrected on appeal, the client's failure to pursue the appeal constitutes an abandonment of a legal malpractice claim. *Id.* "With respect to a legal malpractice suit brought by one convicted of a crime, a majority of jurisdictions have held that appellate or postconviction relief is a prerequisite to maintaining the action." *Steele v. Kehoe*, 747 So.2d 931, 933 (Fla. 1999).

4. **Assignment:** The vast majority of legal malpractice claims are not assignable. *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755, 757-58 (Fla. 2005). However, claims against accountants arising from independent audits and other claims that do not involve personal services or implicate confidentiality concerns, are assignable. *Id.* at 756, 61.

5. **Attorney-Client Relationship:** "[I]t is not sufficient merely to assert an attorney-client relationship existed between the parties; it is essential to allege the relationship existed with respect to the acts or omissions upon which the malpractice claim is based." *Maillard v. Dowdell*, 528 So.2d 512, 514 (Fla. 3d DCA 1988), *rev. denied*, 539 So.2d 475 (Fla. 1988). "To bring a legal malpractice action, the plaintiff must either be in privity with the attorney, wherein one party has a direct obligation to another, or, alternatively, the plaintiff must be an intended third-party beneficiary. In the area of will drafting, a limited exception to the strict privity requirement has been allowed where it can be demonstrated that the apparent intent of the client in engaging the services of the lawyer was to benefit a third party." *Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner*, 612 So.2d 1378, 1380 (Fla. 1993). *See also Hare v. Miller, Canfield, Paddock and Stone*, 743 So.2d 551, 553 (Fla. 4th DCA 1999); *Noyes v. Universal Underwriters Ins. Co.,* 3 F. Supp. 3d 1356, 1362 (M.D. Fla. 2014).

6. **Judgmental Immunity:** "*Crosby v. Jones*, 705 So.2d 1356 (Fla. 1998), teaches that the lawyer who seeks the protection of judgmental immunity must have acted in good faith and made a diligent inquiry into that area of the law." *DeBiasi v. Snaith*, 732 So.2d 14, 16 (Fla. 4th DCA 1999). Too many plaintiffs and their new attorneys, however, fail to recognize that an error of judgment by an attorney is an issue different from, and irrelevant to, the determination of whether the attorney was negligent. The perfect vision and wisdom of hindsight are unreliable criteria for determining the existence of legal malpractice.

7. **Proximate Cause:** "Where the attorney-client relationship ends before its conclusion, the question is whether the attorney proximately caused the client's damages." *Dadic v. Schneider*, 722 So.2d 921, 923 (Fla. 4th DCA 1999). "The third element regarding the loss to the client is not satisfied unless the plaintiff demonstrates that there is an amount of damages which the client would have recovered but for the attorney's negligence." *Tarleton v. Arnstein & Lehr*, 719 So.2d 325, 328 (Fla. 4th DCA 1998).

8. **Tactical Decisions:** "Good faith tactical decisions are not actionable in Florida." *Crosby v. Jones*, 705 So.2d 1356 (Fla. 1998). As stated by the Court Florida has long held that an attorney may be held liable for damages incurred by a client based on the attorney's failure to act with a reasonable degree of care, skill and dispatch. *Weekley v. Knight*, 156 So. 625 (Fla. 1934); *Riccio v. Stein*, 559 So.2d 1207 (Fla. 3d DCA 1990), *rev. dismissed*, 567 So.2d 436 (Fla. 1990). "This does not mean, however, that an attorney acts as an insurer of the outcome of a case. Good faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity." *Proto v. Graham*, 788 So.2d 393, 395 (Fla. 5th DCA 2001).

9. **Remittitur:** *Young v. Becker & Poliakoff, P.A,* 88 So.3d 1002, 1007 (Fla. 4th DCA 2012) (a punitive damages award on a legal malpractice claim should be painful enough to provide some retribution and deterrence; it should not financially destroy a defendant).

10. **Arbitration Clauses:** *Johnson, Pope, Bokor, Ruppel & Burns, LLP and Roger Larson v. Forier*, 67 So.3d 315 (Fla. 2d DCA 2011) (arbitration clauses in attorney-client agreements were not per se against public policy).

11. **Statute of Frauds:** Generally, statute of frauds is a bar to claims arising out of an oral contract to convey real property; however, a legal malpractice claim and/or a breach of fiduciary duty are independent torts not barred by the statute of frauds. *B & C Investors, Inc. v. Vojak,* 79 So. 3d 42, 48 (Fla. Dist. Ct. App. 2d Dist. 2011).

§2:20.5 Related Matters

1. **Malpractice in the Defense of a Criminal Case:** Generally speaking, a claim for legal malpractice has three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) the attorney's negligence was the proximate cause of the client's loss. *Steele,* 747 So.2d at 933 (citing *Weekley v. Knight*, 156 So. 625 (Fla. 1934)). However, the Supreme Court of Florida has adopted two additional elements applicable to a claim for legal malpractice in the defense of a criminal case. First, "a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action." *Id.; Johnson,* 837 So.2d 481. This precondition is sometimes referred to as the "exoneration rule." *See generally Canaan v. Bartee*, 72 P.3d 911, 915 (2003) (discussing the exoneration rule at length and collecting cases); Robert J. Hoffman, *Legal Malpractice in the Criminal Context: Is Postconviction Relief Required?,* 74 Fla. Bar J. 66 (Jan. 2000). "Second, the plaintiff must prove his or her actual innocence of the crimes charged in the underlying criminal proceeding by a preponderance of the evidence." *Cira v. Dillinger*, 903 So.2d 367, 370 (Fla. 2d DCA 2005).

2. **Transactional Work / Litigation:** "Florida courts have consistently drawn a distinction between those malpractice actions arising from transactional work and those arising from errors or mistakes committed during the course of litigation." *Robbat v. Gordon*, 771 So.2d 631, 634 (Fla. 4th DCA 2000).

3. **Violation of Rules of Professional Conduct:** "A violation of the Rules of Professional Conduct, 494 So.2d 977, 1021 (Fla.1986), does not create a legal duty on the part of the lawyer nor constitute negligence per se, although it may be used as some evidence of negligence." *Pressley v. Farley*, 579 So.2d 160, 161 (Fla. 1st DCA 1991), *cause dismissed*, 583 So.2d 1036 (Fla. 1991). *See also Lane v. Sarfati,* 676 So.2d 475 (Fla. 3d DCA 1996); *Beach Higher Power Corp. v. Rekant*, 832 So.2d 831, 833 (Fla. 3d DCA 2002); *Pitcher v. Zappitell*, 160 So.3d 145, 148 (Fla. 4th DCA 2015).

4. **Breach of Fiduciary Duty:** A plaintiff may assert both a count for negligence and a count for breach of fiduciary duty in a legal malpractice action. *FDIC v. Martin*, 801 F. Supp. 617, 620 (M.D. Fla. 1992); *RTC v. Holland & Knight*, 832 F. Supp. 1528, 1532 (S.D. Fla. 1993) (permitting plaintiffs to plead its malpractice action in two alternative counts because they "represent two distinct theories of malpractice"); *Singleton v. Foreman*, 435 F.2d 962 (5th Cir. 1970) (permitting breach of fiduciary claim in legal malpractice action); *see also Palafrugell Holdings, Inc. v. Cassel*, 825 So.2d 937, 939 n.2 (Fla. 3d DCA 2002) (permitting both claims to be pleaded in legal malpractice case). In order to assert a claim for breach of fiduciary duty, the

plaintiff must demonstrate an existence of a fiduciary duty and that the defendant committed a "breach of the duties of honesty, forthrightness, loyalty and fidelity" (*citing Smyrna Developers, Inc. v. Bornstein*, 177 So.2d 16 (Fla.2d DCA 1965)).; *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1259-60 (11th Cir. 2004) (in negotiating an employment discrimination claim, firm representing plaintiffs entered into a four-year "consulting agreement" by which it was directly paid $120,000 of the settlement fund, and in essence negotiated a conflict of interest which would prevent it from representing future plaintiffs, and "effectively buying the loyalty of the plaintiffs' attorneys from the plaintiffs"). A breach of fiduciary duty claim is not duplicative of legal malpractice claims in instances of material misrepresentations and omissions, *Pukke v. Hyman Lippitt*, 2006 WL 1540781 (Mich. App. June 6, 2006), and a failure to disclose material facts to a client, *Kelly v. Nelson, Mullins, Riley & Scarborough*, 2004 WL 4054841 (M.D. Fla. Nov. 17, 2004); *Young v. Becker & Poliakoff, P.A.,* 88 So.3d 1002, 1007 (Fla. 4th DCA 2012) (attorney withheld information from client that her case had been dismissed, so that firm could settle another case and secure attorneys' fees and cost reimbursement).

5. **Malicious Prosecution:** A plaintiff may assert a claim for malicious prosecution in a legal malpractice action. *Rushing v. Bosse*, 652 So.2d 869, 875 (Fla. 4th DCA 1995). However, in order to be a viable cause of action, the evidence must show the lawyer instituted a claim which a reasonable lawyer would regard as untenable or unreasonably neglected to investigate the facts and law in making a determination to proceed, provided that as long as the other elements of a malicious prosecution are proven. *Id.*

6. **Civil Conspiracy:** A plaintiff may assert both a claim for negligence and a claim for civil conspiracy in a legal malpractice action provided an underlying independent wrong or tort exists. *Rushing*, 652 So.2d at 875.

7. **Insurers:** Insurers have standing to maintain a legal malpractice action against counsel hired to represent its insured where the insurer is contractually subrogated to the insured's rights under the insurance policy. *Arch Ins. Co. v. Kubicki Draper, LLP*, 318 So.3d 1249, 1253 (Fla. 2021).

§2:20.6 Sample Cause of Action

COUNT FOR LEGAL
MALPRACTICE

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Defendant attorney was employed by Plaintiff as Plaintiff's legal counsel.
Defendant neglected a reasonable duty owed to Plaintiff.
Defendant's negligence was the proximate cause of Plaintiff's damages, which is the amount Plaintiff would have recovered but for the Defendant's negligence.
Plaintiff suffered damages

WHEREFORE, Plaintiff demands damages against Defendant for legal malpractice and such other relief this Court deems just and proper.

§2:30 MALPRACTICE, MEDICAL

§2:30.1 Elements of Cause of Action — Florida Supreme Court

To prevail in a medical malpractice case, a plaintiff must establish the following:
1. the standard of care owed by the defendant,
2. the defendant's breach of the standard of care, and
3. that said breach proximately caused the damages claimed.

Source

Gooding v. University Hospital Building, Inc., 445 So.2d 1015, 1018 (Fla. 1984).

See Also

1. *Paddock v. Chacko*, 553 So.2d 168, 169 (Fla. 1989) (See dissent).
2. *Wale v. Barnes*, 278 So.2d 601, 603 (Fla. 1973).
3. *Balbontin v. Porias*, 215 So.2d 732 (Fla. 1968).
4. *Saunders v. Dickens*, 151 So.3d 434, 441 (Fla. 2014).
5. *Hernandez v. Crespo*, 211 So. 3d 19, 27 (Fla. 2016), reh'g denied, No. SC 15-67, 2017 WL 786846 (Fla. Feb. 27, 2017) (holding that "arbitration agreements which change the cost, award, and fairness incentives of the MMA statutory provisions contravene the Legislature's intent and are therefore void as against public policy.").
6. *North Broward Hospital District v. Kalitan*, 219 So.3d 49 (Fla. 2017) (holding "that statutory caps on personal injury noneconomic damages in medical negligence actions violated Florida Constitution's equal protection clause").
7. *National Deaf Academy, LLC v. Townes,* 242 So.3d 303 (Fla. 2018) (distinguishing ordinary negligence claims from medical malpractice claims).
8. *Cantore v. West Boca Medical Center, Inc.*, 254 So.3d 256, 260 (Fla. 2018).

§2:30.1.1 Elements of Cause of Action — 1st DCA

To prevail in a medical malpractice case, a plaintiff must establish:

1. the standard of care owed by the defendant;
2. the defendant's breach of the standard of care; and
3. that such breach proximately caused the alleged damages.

Source

Jackson County Hosp. Corp. v. Aldrich, 835 So.2d 318, 327 (Fla. 1st DCA 2002).

See Also

1. *Pohl v. Witcher*, 477 So.2d 1015, 1017 (Fla. 1st DCA 1985).

§2:30.1.2 Elements of Cause of Action — 2nd DCA

To prevail in a medical malpractice action, a plaintiff must:

1. identify the standard of care owed by the physician;
2. produce evidence that the physician breached the duty to render medical care in accordance with the requisite standard of care; and
3. establish that the breach proximately caused the injury alleged.

Source

Santa Lucia v. LeVine, 198 So.3d 803, 809 (Fla. 2d DCA 2016).

See Also

1. *Shartz v. Miulli*, 127 So.3d 613, 618 (Fla. 2d DCA 2013).
2. *Torres v. Sarasota County Public Hospital Board*, 961 So.2d 340, 344 (Fla. 2d DCA 2007) ("[T]he existence of a relationship between a physician or other healthcare provider and a patient is an essential element of a cause of action for medical malpractice because it is that relationship that gives rise to the physician's duty of care.").
3. *Moisan v. Frank K. Kriz, Jr., M.D., P.A.*, 531 So.2d 398, 399 (Fla. 2d DCA 1988).

§2:30.1.3 Elements of Cause of Action — 3rd DCA

To prevail in a medical malpractice case, a plaintiff must establish:

1. the standard of care owed by the defendant;

2. the defendant's breach of the standard of care; and
3. that such breach proximately caused the alleged damages.

Source

Chaskes v. Gutierrez, 116 So.3d 479, 485 (Fla. 3d DCA 2013).

See Also

1. *Hunt v. Gerber*, 166 So.2d 720, 722 (Fla. 3d DCA 1964).

§2:30.1.4 Elements of Cause of Action — 4th DCA

To prevail in a medical malpractice case, a plaintiff must establish the following:.

1. the standard of care owed by the defendant;
2. the defendant's breach of the standard of care; and
3. that said breach proximately caused the damages claimed.

Source

Hollywood Medical Center, Inc. v. Alfred, 82 So.3d 122, 125 (Fla. 4th DCA 2012).

See Also

1. *Anesthesiology Critical Care & Pain Management Consultants, P.A. v. Kretzer*, 802 So.2d 346, 351 (Fla. 4th DCA 2001).

§2:30.1.5 Elements of Cause of Action — 5th DCA

Plaintiffs in negligence actions are required to prove each of the following four elements: duty, breach, causation and damages. *Jefferies v. Amery Leasing, Inc.*, 698 So.2d 368, 371 (Fla. 5th DCA 1997). These elements are applicable in medical malpractice actions.

Source

Kaplan v. Morse, 870 So.2d 934, 937 (Fla. 5th DCA 2004).

§2:30.2 Statute of Limitations

Two Years. Fla. Stat. §95.11(4)(b); *but see* Fla. Stat. §766.104(2) (an automatic 90-day extension will be granted upon petition to the court to allow for reasonable investigation based on good faith).

§2:30.3 References

1. Florida Statutes §768.042 (2005) (Damages).
2. Florida Statutes §§766.101–766.316 (2005).
3. Florida Statutes ch. 400 (2001) (Nursing Homes).
4. 36 Fla. Jur. 2d *Medical Malpractice* §§9–41, 79–81 (2004).
5. 40A Am. Jur. 2d *Hospitals and Asylums* §§44–58 (1999).
6. 61 Am. Jur. 2d *Physicians and Surgeons* §§286–294, 304–313 (2002).
7. 70 C.J.S. *Physicians and Surgeons* §§81–149 (2005).

§2:30.4 Defenses

1. **Comparative Negligence:** To establish the defense of comparative negligence, the medical defendant must prove each of the following elements of negligence: (1) the plaintiff owed himself a duty of care; (2) the patient breached that duty; and (3) the breach was the proximate cause of the damages the patient sustained. *Riegel v. Beilan*, 788 So.2d 990 (Fla. 2d DCA 2000).

2. **Duty Limited:** Doctors do not have a duty to treat each of their patients for every conceivable medical condition that they might have. Generally, a doctor is not liable for the suicide of a patient. An exception to this general rule exists when the patient is confined to a hospital. Where a patient has surrendered himself to the custody, care and treatment of a psychiatric hospital and its staff, liability may be predicated upon the hospital's failure to take protective measures to prevent the patient from injuring himself. *Garcia v. Lifemark Hospitals of Florida, Inc.*, 754 So.2d 48, 49 (Fla. 3d DCA 1999), *rev. denied*, 779 So.2d 270 (Fla. 2000).

3. **Pre-Suit Notice:** The notice requirement under the Act is inextricably intertwined into the fabric of an overall statutory scheme designed to weed out meritless medical malpractice claims and promote the prompt resolution of valid claims. The Legislature expressed its intent to provide a plan for prompt resolution of medical negligence claims, which plan consists of two separate components, presuit investigation and arbitration. *Pavolini v. Bird*, 769 So.2d 410, 412 (Fla. 5th DCA 2000), *rev. denied*, 790 So.2d 1102 (Fla. 2001). After the claimant completes the presuit investigation, she or he must then notify each "prospective defendant" of the intent to initiate litigation prior to filing a claim for medical malpractice. *See* §766.106, Fla. Stat. (2005). *Integrated Health Care Services, Inc. v. Lang-Redway*, 840 So.2d 974, 977 (Fla. 2002). Failure to follow pre-suit procedures requires a dismissal of the cause of action. *Palms West Hosp. Ltd. P'ship v. Burns*, 83 So. 3d 785, 788 (Fla. Dist. Ct. App. 4th Dist. 2011) (the medical negligence umbrella is wide enough to include allegations of business decisions, such as staffing choices, leading to medical injury, and, therefore, must comply with all pre-suit notice requirements before filing a malpractice claim).

§2:30.5 Related Matters

1. **More Likely Than Not Standard of Causation:** In negligence actions, Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury. *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So.3d 828 (Fla. 2011) (affirming administrative law judge's factual findings as to infant's injuries "more likely than not" being caused well after birth, disqualifying infant from NICA (Neurological Injury Compensation Act) coverage); *Hollywood Med. Ctr., Inc. v. Alfred*, 82 So. 3d 122, 125 (Fla. Dist. Ct. App. 4th Dist. 2012) (evidence showed that had physician undertaken appropriate treatment, more likely than not the wife would have survived; but evidence failed to establish causation because it did not show the breach of standard of care by nursing staff, hence requiring directed verdict for hospital). In *Gooding v. University Hospital Building, Inc.*, 445 So.2d 1015 (Fla. 1984), the Supreme Court quoted Prosser on this standard of proof: [The plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. *Id.* (quoting William Prosser, *Law of Torts* §41 (4th ed. 1971) (footnotes omitted)). The "more likely than not" standard is satisfied in a wrongful death case if a plaintiff presents evidence that establishes that the decedent had a fifty-one percent or better chance that death would not have occurred but for the actions or lack thereof of the medical care provider. *See Rivet v. Perez*, 655 So.2d 1169, 1171 (Fla. 3d DCA 1995); *Jackson County Hosp. Corp. v. Aldrich*, 835 So.2d 318, 327 (Fla. 1st DCA 2002), *case dismissed*, 863 So.2d 310 (Fla. 2003).

2. **Res Ipsa Loquitur:** To state a claim under the *res ipsa loquitur* doctrine an injured plaintiff must establish two things: (1) that the cause of his or her injury was under the exclusive control of the defendant; *and* (2) that the injury would not, in the ordinary course of events, have occurred without negligence on the part of the defendant, who was in control. *See Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So.2d 1339, 1341 (Fla. 1978). Moreover, this court has previously recognized: Given the restrictive nature of the doctrine [of *res ipsa loquitur*], a court should never lightly provide this inference of negligence. Rather it is incumbent on the plaintiff to present his or her case in a manner which demonstrates and satisfies each of the doctrine's requisite elements and only after the plaintiff carries this burden of proof may a court supply the inference. *Kenyon v. Miller*, 756 So.2d 133, 136 (Fla. 3d DCA 2000).

3. **Valcin Doctrine:** The Valcin doctrine, as it is now called, is applied when, through the defendant's negligence, essential records are missing or inadequate, and such absence or inadequacy hinders the plaintiff's

ability to establish a prima facie case. In those instances, a rebuttable presumption of negligence is placed on the defendant. Once the defendant introduces evidence tending to disprove the presumed fact, the jury then decides whether the evidence introduced is sufficient to meet the burden of proving that the presumed fact did not exist. The doctrine is applicable to those cases in which either primary or secondary evidence is lost, destroyed, or not maintained. *Anesthesiology Critical Care & Pain Management Consultants, P.A. v. Kretzer*, 802 So.2d 346, 349 (Fla. 4th DCA 2001).

4. **Wrongful Death Act:** *See* Florida Statutes §§768.16–768.26 (2005).

5. **Damages:** Caps on noneconomic damages in medical malpractice wrongful death suits are unconstitutional under Florida law. *Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014).

§2:40 NEGLIGENCE

§2:40.1 Elements of Cause of Action — Florida Supreme Court

Four elements are necessary to sustain a negligence claim:
1. a duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
2. a failure on the defendant's part to conform to the standard required: a breach of the duty;
3. a reasonably close causal connection between the conduct and the resulting injury, which is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact; and
4. actual loss or damage.

Source

Curd v. Mosaic Fertilizer, LLC, 39 So.3d 1216 (Fla. 2010).

See Also

1. *Peoples Gas Sys. v. Posen Constr., Inc.*, 322 So.3d 604, 612-13 (Fla. 2021).
2. *National Deaf Academy, LLC v. Townes,* 242 So.3d 303 (Fla. 2018) (distinguishing ordinary negligence claims from medical malpractice claims).
3. *Limones v. Sch. Dist. of Lee Cty.*, 161 So. 3d 384, 389 (Fla. 2015).
4. *Florida Dep't of Corrections v. Abril*, 969 So.2d 201, 204–05 (Fla. 2007).
5. *Turlington v. Tampa Electric Co.*, 56 So. 696, 698 (Fla. 1911).
6. *Woodbury v. Tampa Waterworks Co.*, 49 So. 556, 566 (Fla. 1909).

§2:40.1.1 Elements of Cause of Action — 1st DCA

Traditionally, a cause of action for negligence has been divided into four elements: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) an injury to the plaintiff that was legally caused by the defendant's breach; and (4) damages as a result of the injury.

Source

Sorel v. Koonce, 53 So.3d 1225, 1227 (Fla. 1st DCA 2011).

See Also

1. *Lee v. Harper*, 328 So.3d 384, 386-87 (Fla.1st DCA 2021).
2. *Denson v. SM-Planters Walk Apartments*, 183 So.3d 1048, 1050 (Fla. 1st DCA 2015).
3. *Meyers v. City of Jacksonville*, 754 So.2d 198, 202 (Fla. 1st DCA 2000).
4. *O'Keefe v. Orea*, 731 So.2d 680, 684 (Fla. 1st DCA 1998), *rev. denied*, 725 So.2d 1109 (Fla. 1998).
5. *Paterson v. Deeb*, 472 So.2d 1210, 1214 (Fla. 1st DCA 1985), *rev. denied*, 484 So.2d 8 (Fla. 1986), *rev. denied*, 484 So.2d 9 (Fla. 1986).
6. *Coker v. Wal-Mart Stores, Inc.*, 642 So.2d 774, 776 (Fla. 1st DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995).
7. *Cato v. West Florida Hospital, Inc.*, 471 So.2d 598, 600 (Fla. 1st DCA 1985).

8. *Harris v. Lewis State Bank*, 482 So.2d 1378, 1384 (Fla. 1st DCA 1986).
9. *Jackson v. Sweat*, 783 So.2d 1207 (Fla. 1st DCA 2001), *appeal after remand*, 855 So.2d 1151 (Fla. 1st DCA 2003).
10. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060, 1068 (Fla. 1st DCA 2010), *rev. denied*, 67 So.3d 1050 (Fla. 2011).

§2:40.1.2 Elements of Cause of Action — 2nd DCA

In order to sufficiently allege a cause of action for negligence, the plaintiff must allege:
1. a duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others, against unreasonable risks;
2. a failure on the defendant's part to conform to the standard required: a breach of the duty;
3. a reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as legal cause, or proximate cause, and which includes the notion of cause in fact; and
4. actual loss or damages

Source

Whritenour v. Thompson, *145 So.3d 870 (Fla. 2d DCA 2014)*.

See Also

1. *Greeley v. Wal-Mart Stores East, LP*, 2022 WL 1019619, *4 (Fla. 2d DCA Apr. 6, 2022).
2. *Norman v. DCI Biologicals Dunedin, LLC*, 301 So.3d 425, 428 (Fla. 2d DCA 2020).
3. *Clerk of Cir. Ct. & Comptroller of Collier Cty. v. Doe*, 292 So. 3d 1254, 1257 (Fla. 2d DCA 2020).
4. *Tank Tech, Inc. v. Valley Tank Testing, LLC*, 244 So.3d 383, 392 (Fla. 2d DCA 2018).
5. *Lisanti v. City of Port Richey*, 787 So.2d 36, 37 (Fla. 2d DCA 2001).
6. *Davis v. Bell*, 705 So.2d 108, 109 (Fla. 2d DCA 1998).
7. *Cooper Hotel Services, Inc. v. MacFarland*, 662 So.2d 710, 712 (Fla. 2d DCA 1995), *rev. denied*, 670 So.2d 939 (Fla. 1996).
8. *Vincent v. C.R. Bard, Inc.*, 944 So.2d 1083, 1085 (Fla. 2d DCA 2006).
9. *Florida Power Corporation v. McCain*, 555 So.2d 1269, 1270 (Fla. 2d DCA 1989), *accepting jurisdiction*, 564 So.2d 487 (Fla. 1990), *opinion quashed on other grounds and jury's verdict reinstated*, 593 So.2d 500 (Fla. 1992).

§2:40.1.3 Elements of Cause of Action — 3rd DCA

The elements of negligence are:
1. existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff;
2. failure on the part of the defendant to perform this duty; and
3. an injury or damage to the plaintiff proximately caused by such failure.

Source

Encarnacion v. Lifemark Hosp. of Fl., 211 So.3d 275, 277 (Fla. 3d DCA 2017)

See Also

1. *Pozanco v. FJB 6501, Inc.*, 2022 WL 1758350, *2 (Fla. 3d DCA June 1, 2022).
2. *Mejia v. Egleston*, 319 So.3d 159, 160 n.5 (Fla. 3d DCA 2021).
3. *Lago v. Costco Wholesale Corp.,* 233 So.3d 1248, 1250 (Fla. 3d DCA 2017).
4. *Kenz v. Miami-Dade County & Unicco Serv. Co.*, 116 So.3d 461, 464 (Fla. 3d DCA 2013).
5. *Kayfetz v. A.M. Best Roofing, Inc.*, 832 So.2d 784, 786 (Fla. 3d DCA 2002), rev. denied, 851 So.2d 728 (Fla. 2003).
6. *Superior Garlic International v. E&A Produce Corp.,* 913 So.2d 645, 648 (Fla. 3d DCA 2005).
7. *Florida Power and Light Co. v. Lively*, 465 So.2d 1270, 1273 (Fla. 3d DCA 1985), *rev. denied*, 476 So.2d 674 (Fla. 1985).
8. *Stahl v. Metropolitan Dade County*, 438 So.2d 14, 17 (Fla. 3d DCA 1983).
9. *Brown v. Sims*, 538 So.2d 901, 907 (Fla. 3d DCA 1989), *accepting jurisdiction*, 547 So.2d 635 (Fla. 1989), *quashed in part on other grounds,* 574 So.2d 131 (Fla. 1991), *on remand to,* 579 So.2d 276 (Fla. 3d DCA 1991).

§2:40.1.4 Elements of Cause of Action — 4th DCA

A negligence claim has four elements:
1. a duty by defendant to conform to a certain standard of conduct;
2. a breach by defendant of that duty;
3. a causal connection between the breach and injury to plaintiff; and
4. loss or damage to plaintiff.

Source

Abad v. G4S Secure Solutions (USA), Inc., 293 So.3d 26, 29 (Fla. 4th DCA 2020).

See Also

1. *Scheible v. Brown*, 333 So.3d 726, *729 (Fla. 4th DCA 2022).
2. *Bryan v. Galley Maid Marine Prod., Inc.*, 287 So. 3d 1281, 1285 (Fla. 4th DCA 2020).
3. *Las Olas Holding Company v. Demella*, 228 So.3d 97, 103 (Fla. 4th DCA 2017).
4. *Bartsch v. Costello*, 170 So.3d 83, 86 (Fla. 4th DCA 2015).
5. *Horton v. Freeman*, 917 So.2d 1064, 1066 (Fla. 4th DCA 2006).
6. *Gibbs v. Hernandez*, 810 So.2d 1034, 1036 (Fla. 4th DCA 2002).
7. *Strasser v. Yalamanchi*, 783 So.2d 1087 (Fla. 4th DCA 2001), *rev. denied*, 805 So.2d 810 (Fla. 2001).
8. *Miller by and through Miller v. Foster*, 686 So.2d 783 (Fla. 4th DCA 1997).
9. *Steck v. Henderson Mental Health Center, Inc.*, 539 So.2d 1173, 1174 (Fla. 4th DCA 1989).
10. *Smiley v. Court*, 243 So.2d 643, 646 (Fla. 4th DCA 1971) (the duty on the part of the defendant is to protect the plaintiff from the injury or damage from which he complains).

§2:40.1.5 Elements of Cause of Action — 5th DCA

A plaintiff ordinarily bears the burden of proof of all four elements of negligence-duty of care, breach of that duty, causation, and damages.

Source

Charron v. Birge, 37 So.3d 292, 296 (Fla. 5th DCA 2010).

See Also

1. *Jefferies v. Amery Leasing, Inc.*, 698 So.2d 368, 371 (Fla. 5th DCA 1997).
2. *Kaplan v. Morse*, 870 So.2d 934, 937 (Fla. 5th DCA 2004).
3. *Schwartz v. Wal-Mart Stores, Inc.*, 155 So.3d 471, 473 (Fla. 5th DCA 2015).
4. *Townes v. National Deaf Academy, LLC,* 197 So.3d 1130 (Fla. 5th DCA 2016) (distinguishing ordinary negligence claims from medical malpractice claims), aff'd 242 So.3d 303 (Fla. 2018).
5. *Graulau Maldonado v. Orange Cty. Pub. Libr. Sys.*, 273 So. 3d 278, 279 (Fla. 5th DCA 2019).

§2:40.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a); *Elmore v. Florida Power & Light Co.*, 895 So.2d 475, 478 (Fla. 4th DCA 2005).

§2:40.3 References

1. 38 Fla. Jur. 2d *Negligence* §§15–33, 149–160 (2005).
2. 57A Am. Jur. 2d *Negligence* §§71–131 (2004).
3. 65, 65A C.J.S. *Negligence* §§21–58, 107–110, 649–694 (2000).
4. Florida Statutes §768.13 (2001) (Good Samaritan Act; immunity from civil liability). *See also* Florida Statutes §§768.1345 (professional malpractice, immunity); 768.135 (volunteer team physicians, immunity); 768.1355 (Florida Volunteer Protection Act).
5. Florida Statutes §856.015 (2001) (open house parties).
6. Restatement (Second) of Torts §281 (1965).

7. Gerald T. Wetherington & Donald I. Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 U. Fla. L. Rev. 1 (1992).

§2:40.4 Defenses

1. **Burden of Proof:** Florida Statute §768.0755, which is effective July 1, 2010, deals with the burden of proof in slip and fall cases. Section 768.0755 requires that the injured person "prove that the business establishment had actual or constructive knowledge of the dangerous condition" (i.e., the transitory foreign substance alleged to have caused injury) and that the business establishment "should have taken action to remedy it." *Id.* In addition, §768.0755 states that constructive knowledge may be established by circumstantial evidence that "(1) [t]he dangerous condition existed for such a length of time that in the exercise of ordinary care the business owner should have known of the condition; or, (2) the condition occurred with regularity and was therefore foreseeable." *Id.* Florida Statute §768.0755 replaces Florida Statute §768.0710, which provided that actual or constructive notice to the owner of the transitory foreign object or substance was not a required element of proof of the claim, thus lessening a slip and fall plaintiff's burden of proof. See Fla. Stat. Ann. §768.0710 (West 2005). §768.0755 re-establishes certain slip and fall standards in effect prior to the Florida Supreme Court's decision in *Owens v. Publix Supermarkets, Inc.,* 802 So.2d 315 (Fla. 2001). In *Owens*, the Florida Supreme Court held that a transitory foreign substance on the floor of a business premises is not a safe condition, and the mere existence of such a condition created a rebuttable presumption that the business owner failed to maintain the premises in a reasonably safe condition. *Id.* at 331. Consequently, once a plaintiff established that a transitory foreign substance caused him to fall, the burden shifted to the business owner to prove that it exercised reasonable care in maintaining the premises. *Id.* However, with the 2010 changes to Fla. Stat. §768.0710, the new statute being Fla. Stat. §768.0755 (2010), the defendant business owner "d[oes] not have to provide such proof." *Delgado v. Laundromax, Inc.*, 65 So.3d 1087, 1089 (Fla. 3d DCA 2011) (summary judgment affirmed for premises owner when invitee of laundromat who fell on clear liquid on floor failed to produce any evidence that owner had actual or constructive notice of water, nor did record contain additional facts to create an inference of liability, nor was negligent mode of operation advanced as a theory for liability). "The mere presence of water on the floor is not enough to establish constructive notice." *Delgado*, at 1090.

   768.0755 is procedural in nature, and applies retroactively, requiring that [in a slip-and-fall action] the plaintiff prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. *Kenz v. Miami-Dade County & Unicco Serv. Co.*, 116 So.3d 461 (Fla. 3d DCA 2013).

2. **Comparative Negligence:** In *Hoffman v. Jones*, 280 So.2d 431, 438 (Fla. 1973), Florida adopted the comparative negligence rule. Under the comparative negligence rule, a plaintiff is prevented from recovering only that proportion of his damages for which he is responsible.

3. **Damages:** Despite dicta in *Moransais v. Heathman*, 744 So.2d 973, 979 (Fla. 1999), that suggests a cause of action in negligence can be alleged without allegations of bodily injury or property damage, we continue to hold, as a general rule, that bodily injury or property damage is an essential element of a cause of action in negligence. *Monroe v. Sarasota County School Bd*., 746 So.2d 530, 531 (Fla. 2d DCA 1999).

4. **Economic Loss Doctrine:** The economic loss doctrine is limited to product liability cases and bars causes of action in tort unless the defective product injures a person or damages property other than the defective product itself. *Tiara Condominium Assoc., Inc. v. March & McClennan Cos. Inc.*, 110 So.3d 399, 401 (Fla. 2013); *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 1999).

5. **Exculpatory Clause:** The public interest factor will invalidate an exculpatory clause when: (1) it concerns a business of a type generally suitable for public regulations; (2) the party seeking exculpation is engaged in performing a service of great public importance, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform this service for any member of the public who seeks it; (4) as a result of the essential nature of the service and the economic setting of

the transaction, the party seeking exculpation possesses a decisive advantage in bargaining strength; (5) in exercising superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation; and (6) as a result of the transaction, the person or property of the purchaser is placed under control of the party to be exculpated. *Goeden v. CM III, Inc.*, 756 So.2d 1105, 1106 (Fla. 3d DCA 2000).

6. **Express Assumption of Risk:** In *Blackburn v. Dorta*, 348 So.2d 287 (Fla. 1977), the supreme court rejected the doctrine of implied assumption of risk as a complete bar to a plaintiff's recovery against a negligent defendant. *Blackburn*, had no effect, however, on the doctrine of *express* assumption of risk, which includes express covenants not to sue and situations of actual consent, such as occurs with voluntary participation in a contact sport. In cases where a plaintiff expressly assumes a risk, he "waives his right to be free from those bodily contacts inherent in the chances taken," and is barred from recovery. *Kuehner v. Green*, 436 So.2d 78 (Fla. 1983). The court in *Kuehner* held that in order for a jury to find express assumption of risk, it is necessary for it to determine that the plaintiff "*subjectively* appreciated the risk giving rise to the injury" (i.e., had actual knowledge of the risk), but proceeded nonetheless to participate in the face of such danger. *Potter v. Green Meadows, Par 3*, 510 So.2d 1225, 1226 (Fla. 1st DCA 1987).

7. **Foreseeability:** It is incumbent upon the courts to place limits on foreseeability, lest all remote possibilities be interpreted as foreseeable in the legal sense. *Scott v. Florida Dept. of Transportation*, 752 So.2d 30, 33 (Fla. 1st DCA 2000).

8. **Florida's Alcohol and Drug Defense:** Section 768.36(2), Fla. Stat., provides in pertinent part that "In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured: (a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and (b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm." *See Kempton v. McComb*, 264 So.3d 1180, 1181 (Fla. 5th DCA 2019).

9. **Implied Assumption of Risk:** Implied assumption of risk has been subsumed into the comparative negligence doctrine. *Fleming v. Albertson's Inc.*, 535 So.2d 682, 683 (Fla. 1st DCA 1988), *petition for rev. denied*, 542 So.2d 1333 (Fla. 1989); *Blackburn v. Dorta*, 348 So.2d 287 (Fla. 1977), *on remand*, 350 So.2d 25 (Fla. 3d DCA 1977).

10. **Independent Contractor:** Florida follows the general rule that the employer of an independent contractor is not liable for the contractor's negligence because the employer has no control over the manner in which the work is done, but it also recognizes exceptions to the general rule which may generally be divided into three categories: (1) negligence in selecting, instructing, or supervising the contractor; (2) non-delegable duties arising out of some relation toward the public or the particular plaintiff; and (3) work which is specially, peculiarly, or "inherently" dangerous. *Hirschenson v. Westway Incorporated*, 728 So.2d 1216, 1217 (Fla. 3d DCA 1999). *See also Lake Parker Mall, Inc. v. Carson*, 327 So.2d 121, 123 (Fla. 2d DCA 1976), *cert. denied*, 344 So.2d 323 (Fla. 1977).

11. **Intervening Cause:** An intervening cause relieves a tortfeasor from liability only if it is completely independent of, and not in any way set in motion by, the tortfeasor's negligence. The intervening cause must be unforeseeable. Another way of stating the question whether the intervening cause was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct. *Townsend v. Westside Dodge, Inc.*, 642 So.2d 49, 50 (Fla. 1st DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995); *see also Golden Gate Homes, LC v. Levey*, 59 So.3d 275, 281 (Fla. 3d DCA 2011). Where reasonable people cannot differ, the issue may be one of law for the court to decide, not simply a question of factual causation. *Scott v. Florida Dept. of Transportation*, 752 So.2d 30, 33 (Fla. 1st DCA 2000).

12. **Misuse of Product:** We conclude that product misuse is not an absolute bar to a products liability claim sounding in negligence. Rather, much like the earlier demise of the absolute defense of contributory

negligence, product misuse merges into the defense of comparative negligence. Consequently, product misuse reduces a plaintiff's recovery in proportion to his or her own comparative fault. *Standard Havens Products, Inc. v. Benitez*, 648 So.2d 1192, 1197 (Fla. 1995).

13. **Open and Obvious:** Since the advent of comparative negligence, the "open and obvious" hazard doctrine no longer bars recovery. Instead, the doctrine serves as an affirmative (comparative negligence) defense for landowners confronted by a plaintiff who knew of the danger. *CSX Transportation, Inc. v. Whittler*, 584 So.2d 579, 583 (Fla. 4th DCA 1991), *rev. denied*, 595 So.2d 556 (Fla. 1992). *See also Stewart v. Boho, Inc.*, 493 So.2d 95, 96 (Fla. 4th DCA 1986).

14. **Sovereign Immunity:** Generally, within the realm of sovereign immunity, the discretionary, judgmental, planning-level decisions of a governmental entity are immune from suit, while operational decisions are not. *City of Coral Springs v. Rippe*, 743 So.2d 61, 63 (Fla. 4th DCA 1999), *rev. dismissed*, 751 So.2d 1250 (Fla. 2000). Section 768.28(6)(a) precludes any action from being instituted on a claim against the state or one of its agencies or subdivisions unless the claimant has presented a written claim both to the appropriate agency and the DOI within 3 years after the claim accrues and the DOI or the appropriate agency denies the claim in writing. *Morhaim v. Department of Transportation*, 737 So.2d 1234, 1236 (Fla. 3d DCA 1999), *rev. denied*, 751 So.2d 1252 (Fla. 2000).

15. **Sovereign Immunity—Agents of the State:** The immunity in section 768.28(9)(a) extends to certain private parties who are involved in contractual relationships with the state, provided that such parties are "agents" of the state. *See Stoll v. Noel*, 694 So.2d 701 (Fla. 1997). Whether the party being contracted with is an agent of the state turns on the degree of control retained or exercised by the state agency. Agency status is a question of fact, except in those cases where the party opposing summary judgment is unable to point to any conflicting facts or inferences to be drawn from the facts. *McFeely v. Prudential Healthcare Plan, Inc.*, 843 So.2d 1023 (Fla. 1st DCA 2003); *M.S. v. Nova Southeastern University Inc*., 881 So.2d 614, 617 (Fla. 4th DCA 2004), *rev. denied*, 900 So.2d 554 (Fla. 2005).

16. **Standing Train Doctrine:** This doctrine has been abolished in Florida. *Florida Power Corporation v. Webster*, 760 So.2d 120, 126 (Fla. 2000).

17. **Release** is the waiver or relinquishment of the right to bring a claim against a person or entity. See generally Blacks Law Dictionary, pg. 1289 (6th Ed. 1990); *see also Bruce v. Heiman*, 392 So.2d 1026, 1028 (Fla. 5th DCA 1981); Fla. Civ. P. 1.110(d). Releases are disfavored in Florida as a matter of public policy. For a release to legally bar a plaintiff's claim, the clause must be unambiguous and clearly demonstrate a clear and understandable intention of the defendant to be relieved of liability for its negligence so that an ordinary and knowledgeable person will know what he or she is contracting away. *Sanislo v. Give Kids the World, Inc.*, 157 So.3d 256 (Fla. 2015). The Florida legislature enacted an amendment to Florida Statute §744.301 which became effective on April 27, 2010. Fla. Stat. Ann. §744.301 (West 2010). This new legislation resulted from the Florida Supreme Court's decision in *Kirton v. Fields*, 997 So.2d 349 (Fla. 2008). In *Kirton*, the Supreme Court held that when a pre-injury release is executed by a parent on behalf of a minor child to allow the minor child's participation in a commercial activity, the pre-injury release is unenforceable against the minor or the minor's estate in a tort action for injuries resulting from participation. *Id.* at 359. The new law amends Florida Statute 744.301 by creating a new subsection (3) which authorizes natural guardians "on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a commercial activity provider, which would accrue to the minor child for personal injury, including death, resulting from an inherent risk in the activity." §744.301(3). Thus, Florida Statute §744.301 renders enforceable a pre-injury release executed by parents and natural guardians on behalf of their minor children, but only for those dangers inherent in the activity. *Id.* In addition, when a pre-injury release is executed by a parent on behalf of a minor child to allow the minor child's participation in a community-supported or school-based activity, the pre-injury release is enforceable against the minor or the minor's estate in a tort action for injuries resulting from participation. *Krathen v. School Bd. of Monroe Cty.*, 972 So.2d 887, 888 (Fla. 3d DCA 2007); *Gonzalez v. City of Coral Gables*, 871 So.2d 1067, 1067-68 (Fla. 3d DCA 2004).

§2:40.5 Related Matters

1. **Alternative Liability:** The theory of alternative liability applies where the conduct of two or more actors is tortious, and it is proved that the injury to the plaintiff was caused by only one of them, but there is uncertainty as to which one actually caused it. Under these circumstances, the burden is placed upon each of the negligent actors to prove that he did not cause the plaintiff's injury. Defendants unable to meet the burden are held jointly and severally liable. Restatement (Second) of Torts §433B(3). This theory of liability is based on a policy determination that an innocent plaintiff should not be without a remedy because he is unable to prove which of the negligent defendants caused his injuries. *Conley v. Boyle Drug Co*., 570 So.2d 275, 281 (Fla. 1990).

2. **Derivative Liability:** Cases of derivative liability "involve wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another." *Underwood & Morrison*, *supra,* at 619. "Although the liability is not vicarious (because the derivatively liable person has engaged in tortious conduct), the liability is derivative because it depends upon a subsequent wrongful act or omission by another." *Id.* at 642. Derivative liability is similar to vicarious liability in that: (1) there is no cause of action unless the directly liable tortfeasor commits a tort; and (2) the derivatively liable party is liable for *all* of the harm that such a tortfeasor has caused. *Grobman v. Posey*, 863 So.2d 1230, 1235 (Fla. 4th DCA 2003).

3. **Duty:** The Restatement (Second) of Torts for example, recognizes four sources of duty: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case. *Restatement (Second) of Torts* §285 (1965). *See also McCain v. Florida Power Corporation*, 593 So.2d 500, 503 (Fla. 1992); *National Title Insurance Co. v. Lakeshore 1 Condominium Association, Inc.*, 691 So.2d 1104, 1106 (Fla. 3d DCA 1997); *Gross v. Sand and Sea Homeowners Assoc., Inc.*, 756 So.2d 1073, 1075 (Fla. 4th DCA 2000); *Clay Elec. Co-op., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla. 2003), *Aguila v. Hilton, Inc*., 878 So.2d 392, 395 (Fla. 1st DCA 2004), *rev. denied*, 891 So.2d 549 (Fla. 2004). Whether a duty exists is a question of law for the court. *Florida Power Corporation v. McCain*, 555 So.2d 1269, 1270 (Fla. 2d DCA 1989), *accepting jurisdiction*, 564 So.2d 487 (Fla. 1990), *opinion quashed on other grounds and jury's verdict reinstated*, 593 So.2d 500 (Fla. 1992); *McKesson Medication Management, LLC v. Slavin*, 75 So.3d 308 (Fla. 3d DCA 2011) (duty claimed to be owed by a pharmacy toward hospital patient to train hospital staff with respect to obtaining information, i.e., contraindications, regarding drugs, was nonexistent); *Gyongyosi v. Miller*, 80 So. 3d 1070, 1078 (Fla. Dist. Ct. App. 4th Dist. 2012) (homeowner had no duty to anticipate home explosion from floor tile removal). Florida law recognizes that a legal duty arises whenever a human endeavor creates a generalized and foreseeable risk of harming others. *National Title Insurance Company v. Lakeshore 1 Condominium Association, Inc.*, 691 So.2d 1104, 1106 (Fla. 3d DCA 1997). The law generally will recognize a duty upon the defendant to either lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk imposes. *Gross v. Sand and Sea Homeowners Assoc., Inc.*, 756 So.2d 1073, 1075 (Fla. 4th DCA 2000).

   The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred. In other words, the former is a minimal threshold *legal* requirement for opening the courthouse doors, whereas the latter is part of the much more specific *factual* requirement that must be proved to win the case once the courthouse doors are open. As is obvious, a defendant might be under a legal duty of care to a specific plaintiff, but still not be liable for negligence because proximate causation cannot be proven. *McCain,* 593 So.2d at 502.

   On the question of duty, we explained: Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. As we have stated: Where a defendant's conduct creates a *foreseeable zone of*

risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses. *Id.* at 503 (quoting *Kaisner v. Kolb*, 543 So.2d 732, 735 (Fla. 1989)). The Court also noted that every risk need not be set out in a statute or by case law in order to give rise to a duty of care: Each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. For these same reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant. *Id.* Finally, as to the element of proximate cause, we explained: Foreseeability is concerned with the specific, narrow factual details of the case, not with the broader zone of risk the defendant created. Unlike in the "duty" context, the question of foreseeability as it relates to proximate causation generally must be left to the fact-finder to resolve. Thus, where reasonable persons could differ as to whether the facts establish proximate causation, i.e., whether the *specific* injury was genuinely foreseeable or merely an improbable freak, then the resolution of the issue must be left to the fact-finder. *Whitt v. Silverman*, 788 So.2d 210, 216 (Fla. 2001). *See also Gibbs v. Hernandez*, 810 So.2d 1034, 1036 (Fla. 4th DCA 2002).

4. **Duty to Protect Strangers:** Currently, the duty to protect strangers against the tortious conduct of another can arise if, at the time of the injury, the defendant is in actual or constructive control of: (1) the instrumentality; (2) the premises on which the tort was committed; or (3) the tortfeasor. *See Daly v. Denny's, Inc.*, 694 So.2d 775, 777 (Fla. 4th DCA 1997); *T.W. v. Regal Trace, Ltd.*, 908 So.2d 499 (Fla. 4th DCA 2005); *Michael & Philip, Inc. v. Sierra*, 776 So.2d 294, 297 (Fla. 4th DCA 2000), *rev. denied*, 792 So.2d 1215 (Fla. 2001).

5. **Governmental Entity as Defendant:** In order to maintain a cause of action sounding in negligence against a government entity, such as a municipality or county, it is essential that the plaintiff plead and prove that the governmental entity breached a special duty of due care which it owed to the plaintiff in particular rather than to the public in general. Although no simple talismanic test exists in determining what constitutes a special duty as opposed to a general duty, the cases appear to turn on certain policy considerations. Among such policy considerations is the public importance of the duty in question when balanced against the probable economic exposure to the governmental entity in question which recognition of a special duty would entail. *Welsh v. Metropolitan Dade County*, 366 So.2d 518, 521 (Fla. 3d DCA 1979), *cert. denied*, 378 So.2d 347 (Fla. 1979). In *Trianon Park Condominium Association v. City of Hialeah*, 468 So.2d 912 (Fla. 1985), the Florida Supreme Court held that in order to hold a governmental entity liable for its negligence, a plaintiff must allege and prove two elements: (1) That the governmental entity owed the specific claimant (as opposed to the public generally) either a "statutory" or "common law" duty of care that was breached; and (2) That the challenged conduct of the government involved an "operational" rather than a "planning" level of decision making. *Holodak v. Lockwood*, 726 So.2d 815, 816 (Fla. 4th DCA 1999). Unlike private tortfeasors, government tortfeasors are not liable for punitive damages or prejudgment interest. *City of Pompano Beach v. Stefanko*, 791 So.2d 1120 (Fla. 4th DCA 2000). *See also Hinckley v. Palm Beach County Bd. of County Comm'rs*, 801 So.2d 193, 194 (Fla. 4th DCA 2001).

   In *Wallace v. Dean*, 3 So.3d 1035, 1040 (Fla. 2009), the Florida Supreme Court held that a duty of care may arise against the police pursuant to the traditional common law tort principle referred to as "the undertaker's doctrine." In this case, two officers responded to a safety check of an unresponsive woman and reassured concerned neighbors and a relative that the woman was sleeping and not in need of medical attention, when, in fact, she was in a diabetic coma, which ultimately resulted in her death. Thus, even without a special relationship, the common law of undertaking to act, the officers "in a position of authority, increased the risk of harm that the decedent faced by inducing third parties—who would have otherwise rendered further aid … to forebear from doing so … [T]here is at least a duty to avoid any affirmative acts which make [her] situation worse." *Wallace*, 3 So.3d at 1052. *But see also Milanese v. City of Boca Raton*, 84 So. 3d 339, 350 (Fla. Dist. Ct. App. 4th Dist. 2012) (dissenting opinion) ("having made the decision to take responsibility for the transportation needs of the 'impaired, drunk and inebriated' Milanese, the police were required to act with reasonable care").

6. **Foreseeability:** A duty exists if the defendant's conduct creates a foreseeable "zone of risk" that poses a general threat of harm to others. This aspect of negligence is an issue of law for resolution by the court. In contrast, the issue of proximate cause turns on the question whether it was foreseeable that the defendant's conduct would cause the specific injury that actually occurred. *Porter v. Department of Agriculture and Consumer Services*, 689 So.2d 1152, 1155 (Fla. 1st DCA 1997). In applying the "foreseeable zone of risk" test to determine the existence of a legal duty, the supreme court has focused on the likelihood that a defendant's conduct will result in the type of injury suffered by the plaintiff. This aspect of foreseeability requires a court to evaluate whether the type of negligent act involved in a particular case has so frequently previously resulted in the same type of injury or harm that "in the field of human experience" the same type of result may be expected again. The extent of the duty or standard of care is measured in terms of foreseeability of injury from the situation created. There is no duty to safeguard against occurrences that cannot be reasonably expected or contemplated. A failure to anticipate and guard against a happening which would not have arisen but for exceptional or unusual circumstances is not negligence. *Michael & Philip, Inc. v. Sierra*, 776 So.2d 294, 297 (Fla. 4th DCA 2000), *rev. denied*, 792 So.2d 1215 (Fla. 2001).

7. **Gross Negligence:** Gross negligence must be established by facts evincing a reckless disregard of human life or rights which is equivalent to an intentional act or a conscious indifference to the consequences of an act. *Rupp v. Bryant*, 417 So.2d 658, 670 (Fla. 1982).

8. **Industry Standards:** A breach of industry standards is evidence of negligence. *Hilliard v. Speedway Superamerica LLC*, 766 So.2d 1153 (Fla. 4th DCA 2000).

9. **Landlords, Action Against:** In order to state a cause of action in negligence against a landlord, the injured tenant need only allege that the landlord had either actual or constructive knowledge of a dangerous code violation for a sufficient time to make a correction of the condition. *Grant v. Thornton*, 749 So.2d 529, 532 (Fla. 2d DCA 1999).

10. **Maritime Negligence:** The elements of a maritime negligence cause of action are essentially the same as the elements of common law negligence. *Burklow & Associates, Inc. v. Belcher*, 719 So.2d 31, 35 (Fla. 1st DCA 1998).

11. **Mass Shootings:** Mass shootings and similar criminal acts with multiple victims are single "incidents or occurrences" for purposes of the State of Florida's limited waiver of sovereign immunity in tort actions, pursuant to §768.28(5), Florida Statutes; thus, total recovery in tort against the State of Florida based on such events is limited to an individual cap of $200,000 and an aggregate cap of $300,000, no matter how many tort claimants there are. *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 517 (Fla. 2020).

12. **Professional as Defendant:** Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party. *Stone's Throw Condominium Assoc., Inc. v. Sand Cove Apartments, Inc.*, 749 So.2d 520, 522 (Fla. 2d DCA 1999); *see also Tiara Condominium Assoc., Inc. v. March & McClennan Cos. Inc.*, 110 So.3d 399, 401 (Fla. 2013) (explaining that the economic loss doctrine is limited to product liability cases and bars causes of action in tort unless the defective product injures a person or damages property other than the defective product itself).

13. **Proximate Causation:** Proximate causation essentially consists of two elements: cause in fact and foreseeability. *Coker v. Wal-Mart Stores, Inc.*, 642 So.2d 774, 776 (Fla. 1st DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995).

14. **Recovery of Economic Damages:** The following comments are found in *Monroe v. Sarasota County School Board*, 746 So.2d 530 (Fla. 2d DCA 1999). This is only a portion of the complete text.

    A careful review of the broad body of law addressing negligence claims for economic injuries suggests at least five separate, but somewhat interrelated, general theoretical approaches.

1. **The Traditional Negligence Approach.**
Negligence law evolved from the intentional tort of trespass on the case. Because trespass on the case tended to protect a plaintiff only for property damage or injury to person, that is the nature of the protection carried over to negligence law. Thus, the general standards of care traditionally created by negligence law are standards designed to protect person and property from physical injury. From an emotional standpoint, people did not sense a need to punish or seek vengeance for such losses from the people who unintentionally caused the nonphysical, economic loss. In a free market economy, judges wished to encourage people to exercise their freedom of contract to bargain for private rights and remedies concerning economic issues. The law of negligence effectively creates a social contract of safety. From an economic perspective traditional common law judges decided that these purely intangible economic risks were matters that should be left as externalities borne by the party that experienced them rather than as costs internalized into the social contract of safety. This theory suggests that the judiciary should be adverse to expanding the "social contract" created by negligence law to protect economic losses unless the court can safely conclude that, had the public been free to bargain and pay for the standards of care arising from these duties in negligence, it is virtually certain that objective buyers of safety and sellers of care would have created contractual obligations comparable to the duties imposed by the court.

2. **The Professional Malpractice Quasi-Contract Approach.**
Professional malpractice has it origins in contract law. Initially, the professional was viewed as breaching his or her professional duties under a contractual relationship of privity with the client. When contract theories failed to provide a good justification to permit an award for bodily injury damages, particularly in medical malpractice, the cause of action evolved into a negligence theory. As a result, professional malpractice incorporated negligence theories, not only for medical malpractice resulting in physical injury, but also for other types of professional malpractice where the damages were primarily or purely intangible economic losses. In essence, we use negligence law to insert obligations of reasonable care protecting some economic interests into the professionals' contracts with their clients. Because purely economic risks are normally left to private bargaining in our legal tradition, common law judges need a strong justification to add such obligations of reasonable care to protect against losses unconnected to bodily injury or property damage.

3. **The Products Liability Approach.**
During the twentieth century, the law of products liability rapidly changed from warranty law to a separate field dominated by a strict liability theory. The implied warranty theory of products liability never satisfactorily explained how pain and suffering damages could be recoverable under warranty law, especially from a manufacturer with no privity to the victim. As a result, products liability theory evolved into strict liability. When this happened, the economic remedies of warranty law were generally left behind in the Uniform Commercial Code where they belonged. The "economic loss doctrine" invoked by *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), was created to assure that warranty claims remained in warranty law and did not evolve into a type of strict liability. Thus, there is a strong tendency to prohibit products liability claims for purely intangible economic damages and to require those economic risks associated with products to be resolved through warranty law and private contracts.

4. **The Separation of Contract and Negligence Approach.**
This approach normally is utilized when the parties have a contractual agreement and the court focuses upon the existence of the contract to decide what, if any, negligence theory should exist. This approach is often utilized in opinions in which the judiciary fears that an expanded negligence theory would allow contract law to drown in a "sea of tort." At one level, this approach is only a clarification of the traditional negligence approach. It emphasizes that the existence of a contractual relationship is a good reason not to create a negligence cause of action shifting economic risks that the parties could have shifted through bargaining.

5. **The Negligent Misrepresentation Theory.**

In limited circumstances, a party may recover purely economic losses arising from a misrepresentation that is made in a negligent manner. Although the tort of negligence historically evolved from the intentional tort of trespass on the case, this modern commercial tort is evolving from the intentional tort of fraud. Thus, this negligence theory has a heritage that never required bodily injury or property damage. It has been limited by some courts when competing principles indicate that recovery should not be allowed for purely intangible economic loss.
Contra *Tiara Condominium Assoc., Inc. v. March & McClennan Cos. Inc.*, 110 So.3d 399, 401 (Fla. 2013) (explaining that the Economic Loss Doctrine is limited to product liability cases and bars causes of action in tort unless the defective product injures a person or damages property other than the defective product itself).

15. **Res Ipsa Loquitur:** Res ipsa loquitur—"the thing speaks for itself"—is a doctrine of extremely limited applicability. Essentially, the injured plaintiff must establish that the instrumentality causing his or her injury was under the exclusive control of the defendant, and that the accident is one that would not, in the ordinary course of events, have occurred without negligence on the part of the one in control. The doctrine of res ipsa loquitur simply recognizes that in rare instances an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause. *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So.2d 1339, 1341 (Fla. 1978). The plaintiff is not required to eliminate with certainty all other possible causes or inferences. All that is required is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. *McDougald v. Perry*, 716 So.2d 783, 786 (Fla. 1998). Given the restrictive nature of the doctrine, a court should never lightly provide this inference of negligence. Rather it is incumbent on the plaintiff to present his or her case in a manner which demonstrates and satisfies each of the doctrine's requisite elements and only after the plaintiff caries this burden of proof may a court supply the inference. *Kenyon v. Miller*, 756 So.2d 133, 136 (Fla. 3d DCA 2000). *See also* Florida Standard Jury Instruction (Civil) 4.6.

16. **Sexual Harassment:** Florida does not recognize a cause of action for sexual harassment under a common law negligence theory. *City of Miami Beach v. Guerra*, 746 So.2d 1159 (Fla. 3d DCA 1999), *dismissed*, 782 So.2d 868 (Fla. 2001).

17. **Social Host Liability:** In *Newsome v. Haffner*, 710 So.2d 184 (Fla. 1st DCA 1998), *rev. denied*, 722 So.2d 193 (Fla. 1998), the First District recognized a civil cause of action for social host liability under a theory of negligence per se based on an alleged violation of Florida Statutes §856.015. *See also Trainor v. Estate of Hansen*, 740 So.2d 1201 (Fla. 2d DCA 1999), *rev. denied*, 753 So.2d 564 (Fla. 2000).

18. **Good Samaritan:** Good Samaritans are immune from civil liability. §768.13, Fla. Stat. "The immunity given under [§768.13] to a person who gratuitously renders aid to an injured person is conditioned upon that person rendering aid 'as an ordinary reasonably prudent person.'" *L.A. Fitness Int'l, LLC v. Mayer*, 980 So.2d 550, 561n.2 (Fla. 4th DCA 2008).

19. **Statutes and Ordinances:** Statutes and ordinances are categorized in three groups to determine the standards to apply when there is a violation of the statute. These categories come under the general headings of strict liability, negligence per se, and evidence of negligence. Violations of statutes and ordinances that are neither strict liability nor negligence per se require the plaintiff to prove all elements of actionable negligence. Strict liability statutes are designed to protect a particular class of persons from their inability to protect themselves. The strict liability classification is a narrow one, and this is a group of unusual and exceptional statutes. A cause of action in negligence per se is created when a penal statute is designed to protect a class of persons, of which the plaintiff is a member, against a particular type of harm. A statute or ordinance in the evidence of negligence category applies to the general public. *Eckelbarger v. Frank*, 732 So.2d 433, 435 (Fla. 2d DCA 1999). *See also Trainor v. Estate of Hansen*, 740 So.2d 1201 (Fla. 2d DCA 1999), *rev. denied*, 753 So.2d 564 (Fla. 2000). The Third District Court of Appeal summarized the three categories of statutory violations as follows: (1) violation of a strict liability statute designed to protect a particular class of persons who are unable to protect themselves, constituting negligence per se; (2) violation of a statute establishing a duty to take precautions to protect a particular class of persons

from a particular type of injury, also constituting negligence per se; (3) violation of any other kind of statute, constituting mere prima facie evidence of negligence. *Chevron U.S.A., Inc. v. Forbes*, 783 So.2d 1215, 1219 (Fla. 4th DCA 2001).

20. **Wrongful Death Action:** Under Florida law, to state a cause of action for negligence in a wrongful death action, Appellant is required to allege: (1) that Appellee owed a legal duty to the decedent; (2) that Appellee breached that duty; (3) that the breach was a legal or proximate cause of the decedent's death; and (4) that Appellant suffered damages as a result of the breach. *Fritsch v. Rocky Bayou Country Club, Inc*., 799 So.2d 433, 435 (Fla. 1st DCA 2001). *See also McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992); *Coker v. Wal-Mart Stores, Inc.*, 642 So.2d 774 (Fla. 1st DCA 1994); *Paterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985).

21. **Injuries Caused by Tortfeasors in Separate Accidents Occurring Close in Time:** An injured party should be able to recover for his or her injuries and the recovery should not be diminished because of a jury's inability to apportion injury between wrongdoers. *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000). Tortfeasors who contribute to cause an indivisible injury, incapable of apportionment, are both responsible for the entire injury. *Lawrence v. Hethcox*, 283 So.2d 41 (Fla.1973). Where evidence reveals two successive accidents, and the defendant is responsible only for one of the accidents, the burden is on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each of the two accidents. *Gross* at 279; *see also Washewich v. LeFave*, 248 So.2d 670, 672 (Fla. 4th DCA 1971). Where the plaintiff sues the first of two successive tortfeasors and establishes liability, but the jury cannot apportion the injury between the two after both parties have had the opportunity to present evidence on the issue, the first tortfeasor will be liable for the entire injury. *Gross*, 763 So.2d at 279. Prior tortfeasors will be liable for whole injuries just as subsequent tortfeasors have been liable for entire unapportionable injuries, thereby providing full relief for proven injuries suffered by victims of negligence. *Gross* at 279. The policy issue is the same whether it is the first or second accident: a tortfeasor should not escape responsibility when two independent causes both proximately contribute to cause an ultimate injury and the plaintiff has done everything that could reasonably have been expected of the plaintiff to segregate the damages as between the two accidents. *Washewich*, 248 So.2d at 673. The joinder of two tortfeasors in one lawsuit for injuries sustained in two motor vehicle accidents was proper where the injuries were overlapping and not apportionable. *Lawrence*, 283 So.2d at 44.

    A party injured by both an initial tortfeasor and a subsequent tortfeasor may elect to recover all of his damages from the initial tortfeasor or may pursue separate claims against each wrongdoer. In Florida, when a person is injured by the wrongful act of one tortfeasor and that injury is subsequently aggravated by the wrongful act of another tortfeasor, the law considers the negligence of the initial torfeasor to be the proximate cause of the negligence of the subsequent tortfeasor. The rationale is to prevent: (1) the victim from receiving a double recovery; and (2) the subsequent tortfeasor from being exposed to double liability to both the victim for damages and the initial tortfeasor under the doctrine of equitable subrogation.

    As the injured party cannot seek double recovery for his damages, the injured party can also settle with one tortfeasor (initial or subsequent) and pursue a claim against the remaining tortfeasor. When the injured party settles with the subsequent tortfeasor first, there is ordinarily no issue with regard to how the language of the release or settlement may impact a cause of action against the initial tortfeasor. However, where the injured party settles with the initial tortfeasor, intending that the settlement be limited to damages for injuries suffered as a result of the initial tort only, the settlement agreement and release of the initial tortfeasor should be carefully accomplished so that it is clear that the victim is not receiving compensation from the initial tortfeasor for injuries resulting from the subsequent negligence of health care providers that the victim is reserving the victim's cause of action against the subsequent tortfeasor. *Univ. of Miami v. Francois*, 76 So.3d 360 (Fla. 3d DCA 2011).

§2:40.6 Sample Complaints

See Sample Complaints and Forms, Chapter 2, available in Digital Access.

§2:50 NEGLIGENCE, FALL-DOWN

§2:50.1 Elements of Cause of Action — Florida Supreme Court

Four elements are necessary to sustain a negligence claim:
1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty.
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
4. Actual loss or damage.

Source

Curd v. Mosaic Fertilizer, LLC, 39 So.3d 1216, 1227-28 (Fla. 2010).

§2:50.1.1 Elements of Cause of Action — 1st DCA

The elements of negligence are:
1. Defendant owed a duty to plaintiff to protect the plaintiff from a particular injury or damage;
2. Defendant breached this duty;
3. Defendant's breach was the proximate cause of injury or damage to plaintiff; and
4. Plaintiff suffered damages caused by the breach.

See Also

1. *Walker v. Winn-Dixie Stores, Inc.*, 160 So.3d 909, 912 (Fla. 1st DCA 2014).
2. *Jenkins v. W.L. Roberts, Inc.*, 851 So.2d 781, 783 (Fla. 1st DCA 2003).

§2:50.1.2 Elements of Cause of Action — 2nd DCA

The elements of a negligence cause of action consist of (1) a legal duty "requiring the defendant to conform to a certain standard of conduct for the protection of others," (2) a failure to meet that duty, and (3) damages proximately caused by that failure.

Source

Norman v. DCI Biologicals Dunedin, LLC, 301 So.3d 425, 428 (Fla. 2d DCA 2020).

See Also

1. *Greeley v. Wal-Mart Stores East, LP*, 2022 WL 1019619, *4 (Fla. 2d DCA Apr. 6, 2022).
2. *Lisanti v. City of Port Richey*, 787 So.2d 36, 37 (Fla. 2d DCA 2001).

§2:50.1.3 Elements of Cause of Action — 3rd DCA

The three elements a plaintiff must plead and prove in a cause of action sounding in negligence are: (1) the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff; (2) a failure on the part of the defendant to perform that duty; and (3) an injury or damage to the plaintiff proximately caused by such failure.

Source

Kenz v. Miami-Dade Cty. & Unicco Serv. Co., 116 So.3d 461, 464 (Fla. 3d DCA 2013).

See Also

1. *Lago v. Costco Wholesale Corp.*, 233 So. 3d 1248, 1250 (Fla. 3d DCA 2017).
2. *Wilson-Greene v. City of Miami*, 208 So. 3d 1271, 1274 (Fla. 3d DCA 2017).

§2:50.1.4 Elements of Cause of Action — 4th DCA

In any civil action for negligence involving loss, injury, or damage to a business invitee as a result of a transitory foreign object or substance on business premises, the claimant shall have the burden of proving that:

(a) The person or entity in possession or control of the business premises owed a duty to the claimant;
(b) The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises.
(c) The failure to exercise reasonable care was a legal cause of the loss, injury, or damage.

Source

Pembroke Lakes Mall Ltd. v. McGruder, 137 So.3d 418, 423–24 (Fla. 4th DCA 2014).

See Also

1. *Oliver v. Winn-Dixie Stores, Inc.*, 291 So. 3d 126, 128 (Fla. 4th DCA 2020).

§2:50.1.5 Elements of Cause of Action — 5th DCA

To state a cause of action for negligence, a complaint must allege: "(1) a duty to the plaintiff; (2) the defendant's breach of that duty; (3) injury to the plaintiff arising from the defendant's breach; and (4) damage caused by the injury to the plaintiff as a result of the defendant's breach of duty."

Source

Maldonado v. Orange Cty. Pub. Libr. Sys., 273 So.3d 278, 279-280 (Fla. 5th DCA 2019).

See Also

1. *Bongiorno v. Americorp, Inc.*, 159 So.3d 1027, 1029 (Fla. 5th DCA 2015).

§2:50.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:50.3 References

1. 41 Fla. Jur. 2d *Premises Liability* §§100–127 (2001).
2. 62 Am. Jur. 2d *Premises Liability* §§30–39, 60–67 (2005).
3. 65A C.J.S. *Negligence* §§381–694 (2000).

§2:50.4 Defenses

See §2:40.4, Defenses – Negligence

§2:50.5 Related Matters

1. **Amusement, Places of:** In *Wells v. Palm Beach Kennel Club*, 35 So.2d 720 (Fla. 1948), the Florida Supreme Court announced a special rule for slip and fall cases involving places of amusement where large crowds are invited to congregate. Imposing a higher duty of care upon the owners and operators of those establishments, the court indicated that such places of amusement have a continuous duty to look after the safety of their patrons, so that liability may be predicated on a negligent method of operation even without notice or knowledge of a dangerous condition. But the supreme court has declined to extend the special rule announced in *Wells* to slip and fall cases involving other business establishments, such as supermarkets. *Food Fair Stores, Inc. v. Trusell,* 131 So.2d 730 (Fla. 1961).

2. **Burden of Proof:** In a premises liability case, the plaintiff bears the burden of proving that the defendant was negligent. To that end, the plaintiff must generally prove that the owner of the premises had actual or constructive notice of the dangerous condition. The landowner's constructive notice of a dangerous condition may be inferred from either (1) the amount of time a substance has been on the floor, or (2) the fact that the condition occurred with such frequency that the owner should have known of its existence. *Thompson v. Poinciana Place Condominium Association, Inc.*, 729 So.2d 457, 458 (Fla. 4th DCA 1999). Florida Statute §768.0755, which is effective July 1, 2010, deals with the burden of proof in slip and fall cases. §768.0755 requires that the injured person "prove that the business establishment had actual or constructive knowledge of the dangerous condition" (i.e. the transitory foreign substance alleged to have caused injury) and that the business establishment "should have taken action to remedy it." *Id.* In addition, §768.0755 states that constructive knowledge may be established by circumstantial evidence that "(1) [t]he dangerous condition existed for such a length of time that in the exercise of ordinary care the business owner should have known of the condition; or, (2) the condition occurred with regularity and was therefore foreseeable." *Id.* Florida Statute §768.0755 replaces Florida Statute §768.0710, which provided that actual or constructive notice to the owner of the transitory foreign object or substance was not a required element of proof of the claim, thus lessening a slip and fall plaintiff's burden of proof. *See* Fla. Stat. Ann. §768.0710 (West 2005). §768.0755 re-establishes certain slip and fall standards in effect prior to the Florida Supreme Court's decision in *Owens v. Publix Supermarkets, Inc.,* 802 So.2d 315 (Fla. 2001). In *Owens*, the Florida Supreme Court held that a transitory foreign substance on the floor of a business premises is not a safe condition, and the mere existence of such a condition created a rebuttable presumption that the business owner failed to maintain the premises in a reasonably safe condition. *Id.* at 331. Consequently, once a plaintiff established that a transitory foreign substance caused him to fall, the burden shifted to the business owner to prove that it exercised reasonable care in maintaining the premises. *Id.*

   768.0755 is procedural in nature, and applies retroactively, requiring that [in a slip-and-fall action] the plaintiff prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. *Kenz v. Miami-Dade County & Unicco Serv. Co.*, 116 So.3d 461 (Fla. 3d DCA 2013).

3. **Constructive Knowledge:** Circumstantial evidence can be sufficient to show that a dangerous condition existed for such a length of time so as to charge the store owner with constructive knowledge. *See Camina v. Parliament Ins. Co.*, 417 So.2d 1093 (Fla. 3d DCA 1982); *Mashni v. Lasalle Partners Management Ltd*., 842 So.2d 1035, 1037 (Fla. 4th DCA 2003). Constructive notice may be established by showing that the condition occurred with regularity and, consequently, was foreseeable. *Costco Wholesale Corp. v. Marsan*, 823 So.2d 301, 302 (Fla. 3d DCA 2002). However, for a transitory foreign substance, *see Owens v. Publix Supermarkets, Inc*., 802 So.2d 315, 331 (Fla. 2001). However, for transitory foreign objects or substances, *see* Florida Statutes §768.0710 (2005) (Burden of proof in claims of negligence involving transitory foreign objects or substances against persons or entities in possession or control of business premises.).

4. **Florida's Alcohol and Drug Defense:** Section 768.36(2), Fla. Stat., provides in pertinent part that "In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured: (a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and (b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm." *See Kempton v. McComb*, 264 So.3d 1180, 1181 (Fla. 5th DCA 2019).

5. **Governmental Entity:** A governmental entity operating a public swimming area will have the same operational-level duty to invitees as a private landowner—the duty to keep the premises in a reasonably safe condition and to warn the public of any dangerous conditions of which it knew or should have known. *Florida Dept. of Natural Resources v. Garcia*, 753 So.2d 72, 75 (Fla. 2000).

6. **Legal Duties Owed by Possessor:** An entity in the actual possession and control of a premises, such as a supermarket, to which members of the public are invited, is not an insurer of the safety of such persons, nor is the possessor strictly liable, or liable per se without fault, for injuries resulting to invitees from dangerous conditions on the premises; nevertheless, such a possessor basically has two legal duties to protect invitees from the harmful effects of dangerous premises conditions. First, such a premises possessor has a legal duty to ascertain that the premises are reasonably safe for invitees. This duty equates into a legal duty to use reasonable care to learn of (i.e., to acquire actual knowledge as to) the existence of any dangerous conditions on the premises. *Westervelt v. Thyssenkrupp Elevator Corp.*, 76 So.3d 10 (Fla. 4th DCA 2011). Secondly, the premises possessor has a second, entirely different, legal duty to use reasonable care to protect invitees from dangerous conditions of which the possessor has actual knowledge. *Winn-Dixie Stores, Inc. v. Mazzie*, 707 So.2d 927, 928 (Fla. 5th DCA 1998), *rev. denied*, 725 So.2d 1109 (Fla. 1998). *See also Knight v. Waltman*, 774 So.2d 731, 733 (Fla. 2d DCA 2000). *See also Fredrick v. Dolgencorp, LLC*, 304 So.3d 36, 38-39 (Fla. 2d DCA 2020).

7. **Transitory Foreign Substances:** All premises owners owe a duty to their invitees to exercise reasonable care to maintain their premises in a safe condition. *See, e.g., Everett v. Restaurant & Catering Corp.*, 738 So.2d 1015, 1016 (Fla. 2d DCA 1999). Despite this general proposition, when a person slips and falls on a transitory foreign substance, the rule has developed that the injured person must prove that the premises owner had actual knowledge or constructive knowledge of the dangerous condition "in that the condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of it and taken action to remedy it." *Colon v. Outback Steakhouse of Florida, Inc.*, 721 So.2d 769, 771 (Fla. 3d DCA 1998). Constructive knowledge may be established by circumstantial evidence showing that: (1) "the dangerous condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of the condition;" or (2) "the condition occurred with regularity and was therefore foreseeable." *Brooks v. Phillip Watts Enter., Inc.*, 560 So.2d 339, 341 (Fla. 1st DCA 1990). In the latter category, evidence of recurring or ongoing problems that could have resulted from operational negligence or negligent maintenance becomes relevant to the issue of foreseeability of a dangerous condition.

   All of these factors lead us to conclude that premises liability cases involving transitory foreign substances are appropriate cases for shifting the burden to the premises owner or operator to establish that it exercised reasonable care under the circumstances, eliminating the specific requirement that the customer establish that the store had constructive knowledge of its existence in order for the case to be presented to the jury. Presumptions, which are created either judicially or legislatively and arise from considerations of fairness, public policy, and probability, are used to allocate the burden of proof. *See generally* Charles W. Ehrhardt, *Florida Evidence* §301.1 (2000 ed.) Accordingly, we adopt the following holding to be applied to slip-and-fall cases in business premises involving transitory foreign substances. We hold that the existence of a foreign substance on the floor of a business premises that causes a customer to fall and be injured is not a safe condition and the existence of that unsafe condition creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition. Thus, once the plaintiff establishes that he or she fell as a result of a transitory foreign substance, a rebuttable presumption of negligence arises. At that point, the burden shifts to the defendant to show by the greater weight of evidence that it exercised reasonable care in the maintenance of the premises under the circumstances. The circumstances could include the nature of the specific hazard and the nature of the defendant's business. *Owens v. Publix Supermarkets, Inc*., 802 So.2d 315, 331 (Fla. 2001). *See also Melkonian v. Broward County Bd. of County Com'rs*., 844 So.2d 785, 787 (Fla. 4th DCA 2003). However, *see* Florida Statutes §768.0710 (2005) (Burden of proof in claims of negligence involving transitory foreign objects or substances against persons or entities in possession or control of business premises.).

8. **Transitory Foreign Substances, Defined:** By "transitory foreign substance," we refer generally to any liquid or solid substance, item or object located where it does not belong. *See Black's Law Dictionary* 660 (7th ed. 1999) (A foreign substance is "[a] substance found … where it is not supposed to be found"). *Owens v. Publix Supermarkets, Inc*., 802 So.2d 315, 317 (Fla. 2001).

9. **Landscaping Areas:** Premises owner does not have a duty to make the landscaping areas safe for walking when it has already provided walkways for invitees to cross the landscaping areas. *Wolf v. Sam's East, Inc*., 132 So.3d 305 (Fla. 4th DCA 2014) (no duty on premises owner where plaintiff tripped and fell over exposed tree-roots while cutting across landscaping area instead of using the concrete walkway provided to invitees for crossing).

§2:50.6 Complaint (Fla.R.Civ.P. Form 1.951)

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. On _____(date)_____, defendant was the owner and in possession of a building at _____ in _____, Florida, that was used as a (describe use).
3. At that time and place, plaintiff went on the property to (state purpose).
4. Defendant negligently maintained (describe item) on the property by (describe negligence or dangerous condition) so that plaintiff fell on the property.
5. The negligent condition was known to defendant or had existed for a sufficient length of time so that defendant should have known of it.
6. As a result, plaintiff was injured in and about his/her body and extremities, suffered pain therefrom, incurred medical expense in the treatment of the injuries, suffered physical handicap, and his/her working ability was impaired; the injuries are either permanent or continuing in nature, and plaintiff will suffer the losses and impairment in the future.

WHEREFORE plaintiff demands judgment for damages against defendant.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

See also Sample Complaints and Forms, Chapter 2, available through Digital Access. Form.

§2:60 NEGLIGENCE, HIRING OR RETENTION

§2:60.1 Elements of Cause of Action — Florida Supreme Court

Most jurisdictions, including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others. Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.

Source

Island City Flying Service v. General Electric Credit Corp., 585 So.2d 274, 276 (Fla. 1991) (citing *Williams v. Feather Sound, Inc.,* 386 So.2d 1238 (Fla. 2d DCA 1980), *rev. denied,* 392 So.2d 1374 (Fla. 1981)).

See Also

1. *Mallory v. O'Neil,* 69 So.2d 313, 315 (Fla. 1954) ("We are of the view that the second count or cause of action is sufficient to state a cause of action. It is grounded on negligence of the defendant in knowingly keeping a dangerous servant on the premises which defendant knew or should have known was dangerous and incompetent and liable to do harm to the tenants." … "Other jurisdictions have considered the negligence of the master in knowingly keeping a dangerous servant on the premises and have held the

master liable for the acts of his servant outside the scope of his authority if trespassing on the rights of those legally on the master's premises whether the servant acted willfully, maliciously or negligently.").

2. *In re Standard Jury Instructions In Civil Cases-Report No. 09-01*, 35 So.3d 666, 682 (Fla. 2010) ("In [hiring] [or] [retaining] another to perform services, the employer must exercise due care to assure that the person is competent to perform the services. A person is responsible for the negligence of [his][her] independent contractor if, in [hiring] [or] [retaining] the independent contractor, the employer failed to exercise due care.").

§2:60.1.1 Elements of Cause of Action — 1st DCA

Most jurisdictions, including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others.

Negligent retention of an employee occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness, but the employer fails to take further action, such as investigation, discharge or reassignment.

Source

Tallahassee Furniture Company, Inc. v. Harrison, 583 So.2d 744, 750 (Fla. 1st DCA 1991), *rev. denied*, 595 So.2d 558 (Fla. 1992).

See Also

Herndon v. Shands Teaching Hosp. and Clinics, Inc., 23 So.3d 802, 803-04 (Fla. 1st DCA 2009) ("A common law duty is recognized, regardless of intervening criminal conduct, when a person's actions "create 'a foreseeable zone of risk' posing a general threat of harm to others … to ensure that the underlying threatening conduct is carried out reasonably." Moreover, this Court has explained these legal parameters by pointing out that the essence of the zone of risk is not the foreseeability of the specific injury that occurred, but whether the zone of risk poses a general threat of harm to others. Finally, foreseeability, as it relates to proximate cause, is generally left to the trier of fact, and if reasonable persons could differ as to whether the facts establish proximate cause, then the resolution of the issue must be left to the fact finder.").

§2:60.1.2 Elements of Cause of Action — 2nd DCA

The principal difference between negligent hiring and negligent retention as bases for employer liability is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. … Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment.

In order to allege facts sufficient to show breach of a duty to exercise reasonable care in *hiring*, the plaintiff generally must allege facts sufficient to show that:

1. the employer was required to make an appropriate investigation of the employee and failed to do so;
2. an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and
3. it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.

Source

Garcia v. Duffy, 492 So.2d 435, 438 (Fla. 2d DCA 1986).

See Also

1. *Williams v. Feather Sound, Inc.,* 386 So.2d 1238, 1239 (Fla. 2d DCA 1980), *petition for rev. denied*, 392 So.2d 1374 (Fla. 1981).
2. *Texas Skaggs, Inc. v. Joannides,* 372 So.2d 985, 987 (Fla. 2d DCA 1979), *cert. denied*, 381 So.2d 767 (Fla. 1980).

§2:60.1.3 Elements of Cause of Action — 3rd DCA

"Negligent retention … occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment." … The employer, however, should be liable for the acts committed by his employee "[o]nly when an employer has somehow been responsible for bringing a third person into contact with an employee, whom the employer knows or should have known is predisposed to committing a wrong. …" Besides pleading sufficient facts to establish that the employer owes a duty to the injured person, the plaintiff must also plead sufficient facts to establish that the employer breached that duty.

Source

Bennett v. Godfather's Pizza, Inc., 570 So.2d 1351, 1353 (Fla. 3d DCA 1990).

See Also

1. *Watson v. City of Hialeah,* 552 So.2d 1146, 1148 (Fla. 3d DCA 1989).
2. *Willis v. Dade County School Board,* 411 So.2d 245, 246 (Fla. 3d DCA 1982), *petition for rev. denied*, 418 So.2d 1278 (Fla. 1982).
3. *Manrique v. Bob's Plumbing Company,* 573 So.2d 422 (Fla. 3d DCA 1991) ("Second, on the facts alleged there was no claim for negligent retention of the employee, as plaintiff was not within the zone of foreseeable risk created by the employment.").
4. *DeJesus v. Jefferson Stores, Inc.,* 383 So.2d 274 (Fla. 3d DCA 1980) ("Jefferson had no notice of any violent propensities of the employee and therefore could not be held liable under the alternative 'negligent hiring' doctrine.").
5. *Friedman v. Mutual Broadcasting System,* 380 So.2d 1313, 1314 (Fla. 3d DCA 1980), *cert. denied*, 388 So.2d 1112 (Fla. 1980).
6. *Int'l Sec. Mgmt. Grp., Inc. v. Rolland*, 271 So.3d 33, 49 (Fla. 3d DCA 2018).

§2:60.1.4 Elements of Cause of Action — 4th DCA

We glean from Grand Union that to impose liability it is necessary to show that:

1. the employee is engaging in or shows a propensity to engage in conduct that is in its nature dangerous to members of the general public;
2. the employer has notice that the employee is acting or in all probability will act in a manner dangerous to other persons;
3. the employer has the ability to control the employee such as to substantially reduce the probability of harm to other persons; and
4. the other person must in fact have been injured by an act of the employee which could reasonably have been anticipated by the employer and which by exercising due diligence and authority over the employee that employer might reasonably have prevented.

Source

McArthur Jersey Farm Dairy, Inc. v. Burke, 240 So.2d 198, 201 (Fla. 4th DCA 1970).

See Also

1. *Ahern v. Odyssey Re (London) Ltd*., 788 So.2d 369, 372 (Fla. 4th DCA 2001), *rev. dismissed*, 819 So.2d 138 (Fla. 2002).
2. *Abbott v. Payne,* 457 So.2d 1156, 1157 (Fla. 4th DCA 1984) ("We agree with the holding in *Williams v. Feather Sound, supra,* and hold that an employer who knows that an employee will have free and independent access to the homes of its customers has an obligation to make reasonable efforts to inquire into such employee's past employment and past records.").

§2:60.1.5 Elements of Cause of Action — 5th DCA

Under theories of negligent hiring and negligent retention, an employer can be held responsible for an employee's willful torts if the employer knew or should have known that the employee was a threat to others.

The principal difference between negligent hiring and negligent retention, as a basis for employer liability, is the time at which the employer is charged with knowledge of the employee's unfitness. "Negligent hiring" occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness. In negligent hiring cases, a primary focus is whether the employer conducted an adequate pre-employment investigation into the prospective employee's background. "Negligent retention" occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action, such as investigation, discharge, or reassignment.

To find an employer liable for negligent hiring or negligent retention, a plaintiff must first establish that an employer owed a legal duty to that particular plaintiff to exercise reasonable care in hiring and retaining safe and competent employees; in order for an employer to owe a particular plaintiff such a duty, that plaintiff must be within a zone of risk that was reasonably foreseeable to the employer. Whether a duty exists on the part of an employer to exercise reasonable care to a third party in hiring and retaining safe and competent employees is a question of law.

Source

Magill v. Bartlett Towing, Inc., 35 So.3d 1017 (Fla. 5th DCA 2010); *Goss v. Human Servs. Assocs.,* 79 So. 3d 127, 131 (Fla. 5th DCA 2012).

See Also

1. *Nazareth v. Herndon Ambulance Service, Inc.,* 467 So.2d 1076, 1077 (Fla. 4th DCA 1985), *petition for rev. denied*, 478 So.2d 53 (Fla. 1985).
2. *Storm v. Town of Ponce Inlet*, 866 So.2d 713, 716 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 624 (Fla. 2004).
3. *Dep't of Envtl. Prot. v. Hardy*, 907 So.2d 655, 660 (Fla. 5th DCA 2005).

§2:60.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:60.3 References

1. 2A Fla. Jur. 2d *Agency and Employment,* §§266–274 (2005).
2. 27 Am. Jur. 2d *Employment Relationship* §§389–408 (2004).
3. 30 C.J.S. *Employer-Employee Relationship* §§183–224 (1992).
4. Restatement (Second) of Torts §317 (1965).
5. Restatement (Second) of Torts §411 (1965).
6. Restatement (Second) of Agency §§213, 219 (1958).
7. E.L. Kellett, Annotation, *Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 A.L.R.3d 619 (1966).

§2:60.4 Defenses

1. **Comparative Negligence:** In suits for negligence, the defendant is entitled to raise the defense of comparative negligence. *Island City Flying Service v. General Electric Credit Corp.,* 585 So.2d 274, 278 (Fla. 1991).

2. **Lack of Knowledge:** It is a valid defense to negligent supervision that the defendant lacked actual or constructive knowledge that its employee was unfit. *M.V. v. Gulf Ridge Council Boy Scouts of Am., Inc.*, 529 So.2d 1248 (Fla. 2d DCA 1988).

3. **Rational Basis:** However, an employer's liability for negligent retention is not unlimited. There must be some rational basis for limiting the boundaries of that liability; otherwise, an employer would be an absolute guarantor and strictly liable for any acts committed by his employee against any person under any circumstances. *Watson v. City of Hialeah,* 552 So.2d 1146, 1148 (Fla. 3d DCA 1989).

4. **Special Relationship Test:** Florida has adopted the "special relationship" test set forth in the Restatement (Second) of Torts, Section 315, which states: §315 General Principle - There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct; or (b) a special relation exists between the actor and the other which gives to the other a right to protection. *K.M. ex rel. D.M. v. Publix Super Markets, Inc*., 895 So.2d 1114, 1117 (Fla. 4th DCA 2005).

§2:60.5 Related Matters

1. **Church Defendant:** We hold that allowing Doe to bring a breach of fiduciary duty claim against the Church Defendants does not run afoul of the Establishment Clause. The imposition of liability based on a breach of fiduciary duty has a secular purpose and the primary effect of imposing liability under the circumstances of this case neither advances nor inhibits religion. As noted above, the court in this case is not being called upon to interpret ecclesiastical doctrine. Rather, the focus is on whether the Church Defendants had a fiduciary relationship with Doe giving rise to a duty and whether they breached this duty by failing to protect Doe from Evans. Moreover, the resolution of this dispute does not depend on extensive inquiry by civil courts into religious law and polity. *Doe v. Evans*, 814 So.2d 370, 376 (Fla. 2002).

2. **Government Defendant:** Florida courts have also recognized this tort in cases involving the state or one of its agencies, as a defendant. In *Metropolitan Dade County v. Martino*, 710 So.2d 20 (Fla. 3d DCA 1998) and *Watson v. City of Hialeah*, 552 So.2d 1146 (Fla. 3d DCA 1989), both decisions recognize that negligent retention or supervision of police officers or deputies is a viable tort which could be brought against the state or a municipality in a proper case. *Storm v. Town of Ponce Inlet*, 866 So.2d 713, 717 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 624 (Fla. 2004). However, the decision of the governmental executive (Mayor, Town Council, Governor) or the legislative branch, to hire or fire a top head of an agency is necessarily fundamental, and involves the exercise of governmental discretion at the highest level. This is precisely the area into which, under the separation of powers doctrine, courts must not intervene. Only the voters, using the ballot box, are appropriate to second-guess the decisions of a Town Council at this level. *Storm v. Town of Ponce Inlet*, 866 So.2d 713, 719 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 624 (Fla. 2004). There is no sovereign immunity barrier to making a claim against a governmental agency for negligent retention or supervision. *Slonin v. City Of West Palm Beach, Fla*., 896 So.2d 882, 884 (Fla. 4th DCA 2005). *Compare Storm v. Town of Ponce Inlet*, 866 So.2d 713, 718 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 624 (Fla. 2004).

3. **Homeowner Defendant:** For run-of-the-mill activities not involving highly dangerous or specialized work, an employer is required to make only minimal inquiry into the qualifications of an independent contractor. For the typical homeowner, there is no duty to make a specific, detailed inquiry into the qualifications of a contractor hired to perform a non-dangerous activity. *Suarez v. Gonzalez*, 820 So.2d 342, 346 (Fla. 4th DCA 2002), *rev. denied*, 832 So.2d 105 (Fla. 2002). *See also* Restatement (Second) of Torts §411 (1965).

4. **Landlord-Tenant Relationship:** In Florida, the landlord-tenant relationship imposes a nondelegable duty of care upon a landlord who undertakes to make repairs or improvements for the benefit of a tenant. *Suarez v. Gonzalez*, 820 So.2d 342, 346 (Fla. 4th DCA 2002), *rev. denied*, 832 So.2d 105 (Fla. 2002). The amount of care which should be exercised in selecting an independent contractor is that which a reasonable man would exercise under the circumstances, and therefore varies as the circumstances vary. Restatement §411, cmt. c. The Restatement identifies three factors which are important in fixing the amount of care required: (1) the danger to which others will be exposed if the contractor's work is not properly done; (2) the character of the work to be done-whether the work lies within the competence of the average man or is work which can be properly done only by persons possessing special skill and training; and (3) the existence of a relation between the parties which imposes upon the one a peculiar duty of protecting the other. *Suarez v. Gonzalez*, 820 So.2d 342, 345 (Fla. 4th DCA 2002), *rev. denied*, 832 So.2d 105 (Fla. 2002).

5. **Outside Scope of Employment:** Negligent retention claims must be based on acts committed by an employee outside the scope of his or her employment. *Watson v. City of Hialeah*, 552 So.2d 1146, 1148 (Fla. 3d DCA 1989); *Acts Retirement-Life Comtys. Inc. v. Estate of Zimmer*, 206 So.3d 112, 116 (Fla. 4th DCA 2016).

6. **Respondeat Superior Compared:** Unlike a suit based on the doctrine of respondeat superior, this cause of action is grounded upon the negligence of the employer. Most jurisdictions, including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the willful tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others. The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment. *Anderson Trucking Service, Inc. v. Gibson*, 884 So.2d 1046, 1052 (Fla. 5th DCA 2004). Cases of derivative liability, such as Prudential's negligent credentialing of a health care provider, "involve wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another." Underwood & Morrison, *supra,* at 619. "Although the liability is not vicarious (because the derivatively liable person has engaged in tortious conduct), the liability is derivative because it depends upon a subsequent wrongful act or omission by another." *Id.* at 642. Derivative liability is similar to vicarious liability in that: (1) there is no cause of action unless the directly liable tortfeasor commits a tort; and (2) the derivatively liable party is liable for *all* of the harm that such a tortfeasor has caused. *Grobman v. Posey*, 863 So.2d 1230, 1235 (Fla. 4th DCA 2003).

7. **School Board Defendant:** This common law duty has also been recognized in the context of school boards and injury to students caused by school board employees. In *School Board of Orange County v. Coffey*, 524 So.2d 1052 (Fla. 5th DCA), *rev. denied*, 534 So.2d 401 (Fla. 1988), this court said: The retention and supervision of a teacher by a school board are not acts covered with sovereign immunity. The school board has a common law duty to protect others from the result of negligent hiring, supervision, or retention, which duty is identical to the duty upon private employers who hire, retain or supervise employees whose negligent or intentional acts in positions of employment can foreseeably cause injuries to third parties. *Storm v. Town of Ponce Inlet*, 866 So.2d 713, 717 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 624 (Fla. 2004).

8. **Motor Vehicle Accidents:** A claim for negligent hiring, employment or entrustment cannot be brought against an employer that is named as a defendant in a motor vehicle accident case as a result of the negligence of its employee in causing the accident as the at-fault driver because such claims do not impose any additional liability on the defendant employer. *Clooney v. Getting*, 352 So.2d 1216, 1220 (Fla. 2d DCA 1977). However, such claims may be plead against an employer's official or employee as they impose more liability than those plead against the employer and are thus proper causes of action. *Petrik v. New Hampshire Ins. Co.*, 379 So.2d 1287, 1291 (Fla. 1st DCA 1979), *cert. denied*, 400 So.2d 8 (Fla. 1981), *abrogation recognized on other grounds by State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So.2d 1160 (Fla. 2006). Where a tort has been committed, individual officers and agents of a corporation are personally liable to any third person even if such acts are performed within the scope of their employment or as corporate officers or agents. *Adams v. Brickell Townhouse, Inc.*, 388 So.2d 1279, 1280 (Fla. 3d DCA 1980). The concept of piercing the corporate veil does not apply in the case of a tort, even where an intentional tort has not been alleged. *Florida Specialty, Inc. v. H 2 Ology*, 742 So.2d 523, 527 (Fla. 1st DCA 1999).

§2:60.6 Sample Complaints

See Sample Complaints and Forms, Chapter 2 (Forms 2.60.6.1, 2.60.6.2), and Chapter 12 (Form 12.20.6), available through Digital Access.

§2:70 NEGLIGENCE, MISREPRESENTATION

§2:70.1 Elements of Cause of Action — Florida Supreme Court

On (claimant's) claim for negligent misrepresentation, the issues for your determination are:

1. whether (defendant) made a statement concerning a material fact that [he][she][it] believed to be true but which was in fact false;
2. whether (defendant) was negligent in making the statement because [he][she][it] should have known the statement was false;
3. whether in making the statement, (defendant) intended [or expected] that another would rely on the statement;
4. whether (claimant) justifiably relied on the false statement; and
5. whether (claimant) suffered [loss] [injury] [or] [damage] as a result.

A material fact is one that is of such importance that (claimant) would not have [entered into the transaction] [acted], but for the false statement.

Source

Standard Jury Instructions—Civil Cases (No. 99-2), 777 So.2d 378, 381 (Fla. 2000).

Note: This jury instruction departs from the following language found in some earlier cases: "the representer either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false." Also, the comment at 777 So.2d 378, 384 suggests that there may be two distinct causes of action for negligent misrepresentation under the *Restatement* and under the common law. Compare this instruction with the jury instruction for fraudulent misrepresentation which is an *intentional* tort.

See Also

1. *Standard Jury Instructions—Civil Cases (1.0, 6.1d, MI8),* 613 So.2d 1316, 1318 (Fla. 1993).
2. *Gilchrist Timber Co. v. ITT Rayonier, Inc*., 696 So.2d 334, 339 (Fla. 1997) ("By this opinion, we adopt the Restatement (Second) of Torts' position on negligent misrepresentation contained in section 552. Further, we find that the comparative fault provisions contained in section 768.81 apply to actions involving negligent misrepresentation. We disapprove *Lynch* to the extent it could be construed to hold to the contrary.").

§2:70.1.1 Elements of Cause of Action — 1st DCA

To prevail on an action for fraudulent misrepresentation, a plaintiff must establish: "(1) a false statement concerning a material fact; (2) the representer's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation."

To state a cause of action for negligent misrepresentation, a plaintiff must show: "(1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false; (2) the defendant was negligent in making the statement because he should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely … on the misrepresentation; and (4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation."

Source

Howard v. Murray, 184 So.3d 1155, n.22 (Fla. 1st DCA 2015) (citing *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So.3d 306, 310 (Fla. 1st DCA 2011).

See Also

1. *Arlington Pebble Creek, LLC v. Campus Edge Condo. Assoc'n, Inc.*, 232 So.3d 502, 505 (Fla. 1st DCA 2017).

§2:70.1.2 Elements of Cause of Action — 2nd DCA

To state a claim for negligent misrepresentation, the plaintiff must allege—and ultimately be able to prove—that "(1) there was a misrepresentation of material fact; (2) the representer either knew of the misrepresentation,

made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false; (3) the representer intended to induce another to act on the misrepresentation; and (4) injury resulted to a party acting in justifiable reliance upon the misrepresentation."

Source

Pirate's Treasure, Inc. v. City of Dunedin, 277 So.3d 1124, 1129 (Fla. 2d DCA 2019).

See Also

1. *Gallon v. Geico Ins. Co.*, 150 So.3d 252, 254 (Fla. 2d DCA 2014).
2. *Grimes v. Lottes,* 241 So.3d 892, 896 (Fla. 2d DCA 2018).
3. *C & J Sapp Publishing Co. v. Tandy Corp.,* 585 So.2d 290, 292 (Fla. 2d DCA 1991).
4. *Atlantic National Bank of Florida v. Vest,* 480 So.2d 1328, 1331 (Fla. 2d DCA 1985), *rev. denied,* 491 So.2d 281 (Fla. 1986), *and rev. denied,* 508 So.2d 16 (Fla. 1987).
5. *Baggett v. Electricians Local 915 Credit Union,* 620 So.2d 784, 786 (Fla. 2d DCA 1993).
6. *Gandy v. Trans World Computer Tech. Group*, 787 So.2d 116, 118 (Fla. 2d DCA 2001).
7. *Rocky Creek Ret. Prop., Inc. v. Estate of Fox ex rel.*, 19 So.3d 1105, 1110 (Fla. 2d DCA 2009).

§2:70.1.3 Elements of Cause of Action — 3rd DCA

To prove negligent misrepresentation, it must be shown that (1) there was a misrepresentation of material fact; (2) the representer either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false; (3) the representer intended to induce another to act on the misrepresentation; and (4) injury resulted to a party acting in justifiable reliance upon the misrepresentation.

Source

Coral Gables Distrib., Inc. v. Milich, 992 So.2d 302, 303 (Fla. 3d DCA 2008).

See Also

1. *Romo v. Amedex Insurance Co.*, 930 So.2d 643, 653 (Fla. 3rd DCA 2006).
2. *Woodson Elec. So., Inc. v. Port Royal Prop., LLC*, 271 So.3d 111, 114 (Fla. 3d DCA 2019).

§2:70.1.4 Elements of Cause of Action — 4th DCA

In order to allege a viable cause of action for negligent misrepresentation, four elements must be presented. A plaintiff must allege that:

1. there was a misrepresentation of material fact;
2. the representer either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false;
3. the representer intended to induce another to act on the misrepresentation; and
4. injury resulted to a party acting in justifiable reliance upon the misrepresentation.

Source

Florida Women's Medical Clinic, Inc. v. Sultan, 656 So.2d 931, 933 (Fla. 4th DCA 1995).

See Also

1. *Lorber v. Passick as Tr of Sylvia Passick Revocable Trust*, 327 So.3d 297, 307 (Fla. 4th DCA 2021).
2. *Hoon v. Pate Construction Company, Inc.,* 607 So.2d 423, 427 (Fla. 4th DCA 1992), *rev. denied*, 618 So.2d 210 (Fla. 1993), *subsequent appeal*, 638 So.2d 998 (Fla. 4th DCA 1994).
3. *Wallerstein v. Hospital Corporation of America,* 573 So.2d 9, 10 (Fla. 4th DCA 1990).
4. *Federal Deposit Insurance Corp. v. High Tech Medical Systems,* 574 So.2d 1121 (Fla. 4th DCA 1991), *rev. dismissed*, 582 So.2d 622 (Fla. 1991).
5. *Bankers Mut. Capital Corp. v. U.S. Fid. & Guar. Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001).
6. *Blumstein v. Sports Immortals, Inc.*, 67 So.3d 437 (Fla. 4th DCA 2011).

§2:70.1.5 Elements of Cause of Action — 5th DCA

In order to allege a viable cause of action for negligent misrepresentation a plaintiff must allege in his complaint that:
1. the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false;
2. the defendant was negligent in making the statement because he should have known the representation was false;
3. the defendant intended to induce the plaintiff to rely and [act] on the misrepresentation; and
4. injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation.

Source

Simon v. Celebration Co., 883 So.2d 826, 832 (Fla. 5th DCA 2004).

See Also

Townsend v. Morton, 36 So.3d 865 (Fla. 5th DCA 2010).

§2:70.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:70.3 References

1. 27 Fla. Jur. 2d *Fraud and Deceit* §§10–44 (2000).
2. 27 Fla. Jur. 2d *Fraud and Deceit* §§17, 18, 47 (1981).
3. 37 Am. Jur. 2d *Fraud and Deceit* §§128–131 (2001).
4. 37 C.J.S. *Fraud* §§59–61 (1997).
5. Restatement (Second) of Torts §552 (1977).
6. Sonja Larsen, Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Negligent Misrepresentation,* 22 A.L.R.5th 464, 471 (1994) ("The prevailing view is that comparative negligence principles are applicable to negligent misrepresentations."). *See also Gilchrist Timber Co. v. ITT Rayonier, Inc*., 696 So.2d 334, 337 (Fla. 1997).

§2:70.4 Defenses

1. **False Information Negligently Supplied:** Restatement (Second) of Torts §552 has been interpreted as limiting liability for the supply of false information to those entities that are in the business of supplying a particular type of information or those who have a pecuniary interest in the transaction to which the information pertains. *See Blumstein v. Sports Immortals, Inc.*, 67 So.3d 437 (Fla. 4th DCA 2011); *Geosearch, Inc. v. Howell Petroleum Corp.,* 819 F.2d 521, 524 (5th Cir.1987); *Cont'l Leavitt Communications, Ltd. v. PaineWebber, Inc.*, 857 F.Supp. 1266, 1270 (N.D.Ill. 1994), *overruling recognized on other grounds by Cordiant MN, Inc. v. David Cravit & Assoc., Ltd.*, 1997 WL 534308 (N.D.Ill. 1997) (finding brokerage house that maintained research department with sole function of providing brokers with information to pass on to clients was in business of supplying information). However, when the information supplied is "gratuitous," no liability attaches because "the user of the information is not justified in expecting the supplier to have used due care in given [sic] the information." *Cont'l Leavitt,* 857 F.Supp. at 1270 (citing Restatement (Second) of Torts §552, comment d. (1977)). The supplier is only charged with the obligation to "speak in good faith and without consciousness of a lack of any basis for belief in the truth or accuracy of what he says." Section 552, cmt. a. In other words, the standard is one of honesty. Section 552, cmt. d. *See Reimsnyder v. Southtrust Bank, N.A.*, 846 So.2d 1264, 1267 (Fla. 4th DCA 2003). An action for false information negligently supplied for the guidance of others requires allegations that the defendant "supplie[d] false information for the guidance of others in their business transactions" and that the plaintiff suffered "pecuniary loss" caused by justifiable reliance upon the false information. In pursuing such a claim, however, the plaintiff must plead and establish that she is one of a limited group of persons for whose benefit and guidance the defendant intended to supply this type of information and that the defendant intended the information to influence her transaction or a substantially similar transaction**.** *Morgan v. W.R. Grace & Co.—Conn*., 779 So.2d 503, 506 (Fla. 2d DCA 2000).

2. **Justifiable Reliance:** In *Gilchrist Timber Co. v. ITT Rayonier, Inc.,* 696 So.2d 334 (Fla. 1997), the Supreme Court held that the doctrine of comparative negligence, as codified in §768.81, Fla. Stat., applied to an action for negligent misrepresentation as set forth in the *Restatement (Second) of Torts* §552 (1977), which requires proof of justifiable reliance. Accordingly, the committee has replaced its earlier reference to "reasonable reliance" in these [jury] instructions with "justifiable reliance." *Standard Jury Instructions-Civil Cases (No. 99-2)*, 777 So.2d 378, 383 (Fla. 2000). The reason a narrower scope of liability is fixed for negligent misrepresentation than for deceit is to be found in the difference between the obligations of honesty and of care, and in the significance of this difference to the reasonable expectations of the users of information that is supplied in connection with commercial transactions.

3. **Mere opinion:** Mere opinions or misrepresentations of law are not actionable. *MDVIP, Inc. v. Beber*, 222 So.3d 555, 561 (Fla. 4th DCA 2017).

4. **Pleading with Specificity:** We conclude that the requirement that fraud be pleaded with specificity also applies to claims for negligent misrepresentation. *Morgan v. W.R. Grace & Co.—Conn*. 779 So.2d 503, 506 (Fla. 2d DCA 2000); *Zikofsky v. Robby Vapor Systems, Inc.*, 846 So.2d 684, 685 (Fla. 4th DCA 2003).

5. **Comparative Negligence:** Principles of comparative fault apply to negligent misrepresentation actions. *See Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 339 (Fla. 1997).

§2:70.5 Related Matters

1. **Jury Instruction - Negligent Misrepresentation:** On (claimant's) claim for negligent misrepresentation, the issues for your determination are:
   - First, whether (defendant) made a statement concerning a material fact that [he][she][it] believed to be true but which was in fact false;
   - Second, whether (defendant) was negligent in making the statement because [he][she][it] should have known the statement was false;
   - Third, whether in making the statement, (defendant) intended [or expected] that another would rely on the statement;
   - Fourth, whether (claimant) justifiably relied on the false statement; and
   - Fifth, whether (claimant) suffered [loss] [injury] [or] [damage] as a result.

   A material fact is one that is of such importance that (claimant) would not have [entered into the transaction] [acted], but for the false statement. *See Standard Jury Instructions-Civil Cases (No. 99-2)*, 777 So.2d 378, 381 (Fla. 2000).

2. **Negligent Misrepresentation & Fraudulent Misrepresentation Compared:** In fraudulent misrepresentation, a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had the recipient made an investigation, unless the recipient knows the representation to be false or its falsity is obvious. A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two—fraud and negligence—negligence is less objectionable than fraud. *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So.2d 334, 336 (Fla. 1997). *See also Newbern v. Mansbach*, 777 So.2d 1044, 1045 (Fla. 1st DCA 2001).

§2:80 NEGLIGENCE, MOTOR VEHICLE

§2:80.1 Elements of Cause of Action — Florida Supreme Court

The elements of negligence are:
1. Defendant owed a duty to plaintiff to protect the plaintiff from a particular injury or damage;
2. Defendant breached this duty;
3. Defendant's breach was the proximate cause of injury or damage to plaintiff; and
4. Plaintiff suffered damages caused by the breach.

See Also
1. *Birge v. Charron*, 107 So.3d 350, 362 n19 (Fla. 2012).

§2:80.1.1 Elements of Cause of Action — 1st DCA

Traditionally, a cause of action for negligence has been divided into four elements: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) an injury to the plaintiff that was legally caused by the defendant's breach; and (4) damages as a result of the injury.

Source
Sorel v. Koonce, 53 So.3d 1225, 1227 (Fla. 1st DCA 2011).

See Also
1. *Jenkins v. W.L. Roberts, Inc.*, 851 So.2d 781, 783 (Fla. 1st DCA 2003).

§2:80.1.2 Elements of Cause of Action — 2nd DCA

The elements of a negligence action are the existence of a duty, a breach of the duty, a causal connection between the conduct and the resulting injury, and actual damages.

Source
Whritenour v. Thompson, 145 So.3d 870, 873 (Fla. 2d DCA 2014).

See Also
1. *Meyers v. Shontz*, 251 So. 3d 992, 1002 (Fla. 2d DCA 2018).

§2:80.1.3 Elements of Cause of Action — 3rd DCA

The tort of negligence requires the establishment of duty, breach, proximate cause, and damages.

Source
Sewell v. Racetrac Petroleum, Inc., 245 So.3d 822, 825 (Fla. 3d DCA 2017).

§2:80.1.4 Elements of Cause of Action — 4th DCA

A plaintiff ordinarily bears the burden of proof of all four elements of negligence: duty of care, breach of that duty, causation and damages.

Source
Padilla v. Schwartz, 199 So.3d 516, 518 (Fla. 4th DCA 2016).

§2:80.1.5 Elements of Cause of Action — 5th DCA

A plaintiff ordinarily bears the burden of proof of all four elements of negligence: duty of care, breach of that duty, causation and damages.

Source

Charron v. Birge, 37 So.3d 292, 296 (Fla. 5th DCA 2010).

§2:80.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:80.3 References

1. Sarah E. Williams, Comment, *Florida's Dangerous Instrumentality Doctrine*, 25 Stetson L. Rev. 177 (1995).
2. Thomas D. Sawaya, Personal Injury & Wrongful Death Actions §5:14 (2008-2009 ed.).
3. Walter G. Latimer, Liability of the Commercial Driver, Florida Bar Journal (February 2001).
4. Mary Therese K. Fitzgerald, et. al., Automobiles and Other Vehicles, Florida Jurisprudence, Second Edition (May 2009).
5. Sarah E. Williams, Florida's Dangerous Instrumentality Doctrine, 25 Stetson L.Rev. 177, 179 (1995).

§2:80.4 Defenses

1. **Seat Belt Defense:** The "seat belt defense" poses a question of comparative negligence; that is, whether the plaintiff's failure to use a seat belt contributed to her injuries. To present a jury question on this issue, the defendant must prove that: (1) the plaintiff failed to use an available and fully operational seatbelt; (2) the nonuse was unreasonable under the circumstances; and (3) this failure caused or contributed substantially to the plaintiff's damages. *Smith v. Butterick*, 769 So.2d 1056, 1057 (Fla. 2d DCA 2000). *See also Ridley v. Safety Kleen Corp.*, 693 So.2d 934 (Fla. 1996); *but see Jones v. Alayon*, 162 So.3d 360, 368 (Fla. 4th DCA 2015) (holding that defendants need not prove seatbelt was available and fully operational, but such information may be used as a factor in establishing comparative negligence).

2. **Sudden Emergency Doctrine:** The requisite factual requirements in considering the application of the sudden emergency doctrine are: (1) that the claimed emergency actually or apparently existed; (2) that the perilous situation was not created or contributed to by the person confronted; (3) that alternative courses of action in meeting the emergency were open to such person; and (4) that the action or course taken was such as would or might have been taken by a person of reasonable prudence in the same or similar situation. The presence or absence of a sudden emergency situation is a question of fact ordinarily to be decided by the jury. *Wallace v. National Fisheries, Inc.*, 768 So.2d 17, 18 (Fla. 3d DCA 2000); *Vantran Industries, Inc. v. Ryder Truck Rental, Inc.*, 955 So.2d 1118, 1220 (Fla. 1st DCA 2006).

3. **Sudden Stop:** Florida law has long recognized a rebuttable presumption of negligence on the part of the rear driver in a rear-end collision accident. *See Bellere v. Madsen*, 114 So.2d 619 (Fla. 1959). The rebuttable presumption of negligence that attaches to the rear driver in a rear-end collision in Florida arises out of necessity in cases where the lead driver sues the rear driver. The presumption bears only upon the causal negligence of the rear driver. The usefulness of the rule is obvious. A plaintiff ordinarily bears the burden of proof of all four elements of negligence-duty of care, breach of that duty, causation and damages. Yet, obtaining proof of two of those elements, breach and causation, is difficult when a plaintiff driver who has been rear-ended knows that the defendant driver rear-ended him but usually does not know why. *Clampitt v. D.J. Spencer Sales*, 786 So.2d 570, 572 (Fla. 2001). Where it is claimed that the rear-end collision was precipitated by a sudden stop by the preceding driver, most districts have found that the presumption cannot be rebutted if the stop happened at a place and time where it was reasonably expected. *Tacher v. Asmus*, 743 So.2d 157, 158 (Fla. 3d DCA 1999), *cause dismissed*, 767 So.2d 461 (Fla. 2000). However, if the stop by the lead driver is "arbitrary" (i.e., unexpected and sudden), then the presumption is rebutted and the plaintiff is not entitled to a directed verdict. *Ferguson v. Disalvo*, 775 So.2d 414, 415 (Fla. 4th DCA 2001). *See also Eppler v. Tarmac America, Inc.*, 752 So.2d 592, 594 (Fla. 2000); *Hunter v. Ward*, 812 So.2d 601, 605 (Fla. 1st DCA 2002); *Padilla v. Schwartz*, 199 So.3d 516, 518 (Fla. 4th DCA 2016).

4. **Sudden Loss of Consciousness:** It is well settled that negligence is not chargeable against the operator of a motor vehicle who, while driving, suffers a sudden loss of consciousness or attack from an unforeseen cause.

Bridges v. Speer, 79 So.2d 679 (Fla. 1955). It is not even simple negligence if one has a sudden attack, loses control of the car and causes an accident if the driver had no premonition or warning of the condition that caused the attack. *Bridges*, 79 So.2d 679. The courts reason that if the person did not or should not have known of the condition which caused the loss of consciousness, the essential element of foreseeability is absent and, therefore, negligence may not be established. *Id.* at 681. However, where one has notice or knowledge of the existence of a physical impairment which may come on suddenly and destroy their power to control an automobile, it is "gross negligence" for such person to operate the automobile. *Id.* Sudden Loss of Consciousness is not an affirmative defense that must be asserted. *Tropical Exterminators, Inc. v. Murray*, 171 So.2d 432, (Fla. 2d DCA 1965). A general denial of negligence is sufficient to put this defense in issue. *Id.* at 433.

5. **Sudden Brake Failure:** The defense of Sudden Brake Failure can be utilized by the alleged negligent party in a motor vehicle accident to show that a sudden mechanical failure caused the accident. *Ironman v. Rhoades*, 493 So.2d 1097 (Fla. 4th DCA 1986). This defense is an avoidance or affirmative defense that should be specially plead. *Ironman*, 493 So.2d 1097.

§2:80.5 Related Matters

1. **Dangerous Instrumentality Doctrine:** Under the dangerous instrumentality doctrine, one who permits an automobile to be used by someone else on the public highways is liable for injuries to third parties caused by the authorized user's negligence. *Medina v. Yoder Auto Sales, Inc.*, 743 So.2d 621, 622 (Fla. 2d DCA 1999). *See also Ryder TRS, Inc. v. Hirsch*, 900 So.2d 608, 610 (Fla. 4th DCA 2005), *rev. dismissed*, 908 So.2d 1058 (Fla. 2005); *Ady v. Am. Honda Fin. Corp.*, 675 So.2d 577, 581 (Fla. 1996); *Kraemer v. General Motors Acceptance Corp.*, 572 So.2d 1363 (Fla. 1990); *Newton v. Caterpillar Fin. Servs. Corp.*, 253 So.3d 1054, 1056 (Fla. 2018). The supreme court first extended the common law dangerous instrumentality doctrine to automobiles in 1920. *See Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920); *See also Enterprise Leasing Co. South Central, Inc. v. Hughes*, 833 So.2d 832, 837 (Fla. 1st DCA 2002), *rev. denied*, 848 So.2d 1154 (Fla. 2003). There are exceptions to that doctrine: the owner's liability should be determined on the basis of whether there has, in fact, been a conversion or theft of the vehicle prior to the negligence at issue. However, procurement of a vehicle through fraud is but one factor to be considered in determining whether a vehicle has been the subject of theft or conversion. *Leal v. Nunez*, 775 So.2d 974, 975 (Fla. 3d DCA 2000). A co-owner of a car is subject to vicarious liability for the negligent operation of the vehicle under the Dangerous Instrumentality Doctrine. *Christensen v. Bowen*, 39 Fla. L. Weekly S214 (Fla. April 10, 2014) (joint title holder cannot avoid vicarious liability by claiming he never intended to be the owner of the vehicle and relinquished control to the co-owner).

   The dangerous instrumentality doctrine has also been extended to include golf carts, trucks, buses, airplanes, tow-motors, other motorized vehicles, and even farm tractors. *Rippy v. Shepard*, 80 So. 3d 305, 308 (Fla. 2012) (finding that a tractor of sufficient size, character, weight, and broad operational use to be considered dangerous instrumentality); *Meister v. Fisher*, 462 So.2d 1071 (Fla. 1984) (golf carts).

   The dangerous instrumentality doctrine seeks to provide greater financial responsibility to pay for the carnage on our roads. It is premised upon the theory that the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation. *Rippy*, slip op. at 5, citing *Kraemer*, 572 So.2d. at 1365.

2. **Strict Vicarious Liability:** Under the dangerous instrumentality doctrine, an automobile owner is vicariously liable for damages caused by the operation of his vehicle by a permissive user. *Hertz Corp. v. Jackson*, 617 So.2d 1051, 1053 (Fla. 1993). Florida is apparently the only state that imposes strict vicarious liability on the owner of an automobile who entrusts it to another, and the doctrine has drawn its fair share of criticism. *Rippy v. Shepard*, 80 So. 3d 305, 310 (Fla. 2012) (see dissent); *Aurbach v. Gallina*, 753 So.2d 60, 62 (Fla. 2000) (doctrine is unique to Florida). The real and perceived inequities created by the doctrine prompted the legislature to amend section 324.021 to add subsection (9)(b)(1), which eliminated the doctrine's application to long-term automobile lessors provided that the lessee maintained insurance in an amount specified by the statute. *See Kraemer v. Gen. Motors Acceptance Corp.*, 572 So.2d 1363 (Fla. 1990). In 1999, the legislature added subsections (9)(b)(2) and (3), which limit the liability of lessors who rent or lease a motor vehicle for less than a year and owners who are natural persons who lend their car to any permissive user. *See Lynn v.*

Feldmeth, 849 So.2d 481 (Fla. 2d DCA 2003*). See also Fischer v. Alessandrini*, 907 So.2d 569, 570 (Fla. 2d DCA 2005). The 1999 changes by the Florida legislature to section 324.021(9)(b)(3) limited noneconomic damages awardable against a vehicle owner for damages caused by the negligence of a permissive user and capped same at $100,000. While that section limits an owner's exposure to vicarious liability, it does not apply to limit the owner's direct liability for his or her own negligence in a negligent entrustment claim, which would still be subject to comparative negligence principles. *Trevino v. Mobley*, 63 So.3d 865 (Fla. 5th DCA 2011).

3. **Injuries Caused by Tortfeasors in Separate Accidents Occurring Close in Time:** An injured party should be able to recover for his or her injuries and the recovery should not be diminished because of a jury's inability to apportion injury between wrongdoers. *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000). Tortfeasors who contribute to cause an indivisible injury, incapable of apportionment, are both responsible for the entire injury. *Lawrence v. Hethcox*, 283 So.2d 41 (Fla.1973). Where evidence reveals two successive accidents, and the defendant is responsible only for one of the accidents, the burden is on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each of the two accidents. *Gross* at 279; *see also Washewich v. LeFave*, 248 So.2d 670, 672 (Fla. 4th DCA 1971). Where the plaintiff sues the first of two successive tortfeasors and establishes liability, but the jury cannot apportion the injury between the two after both parties have had the opportunity to present evidence on the issue, the first tortfeasor will be liable for the entire injury. *Gross*, 763 So.2d at 279. Prior tortfeasors will be liable for whole injuries just as subsequent tortfeasors have been liable for entire unapportionable injuries, thereby providing full relief for proven injuries suffered by victims of negligence. *Gross* at 279. The policy issue is the same whether it is the first or second accident: a tortfeasor should not escape responsibility when two independent causes both proximately contribute to cause an ultimate injury and the plaintiff has done everything that could reasonably have been expected of the plaintiff to segregate the damages as between the two accidents. *Washewich*, 248 So.2d at 673. The joinder of two tortfeasors in one lawsuit for injuries sustained in two motor vehicle accidents was proper where the injuries were overlapping and not apportionable. *Lawrence*, 283 So.2d at 44.

4. **Unlicensed Tortfeasor**: Evidence that the driver of a vehicle was unlicensed at the time of the accident is admissible. The evidence is relevant to show that the driver's inexperience in handling the automobile bore a causal connection to the accident. *Lopez v. Wink Stucco, Inc.*, 124 So.3d 281 (Fla. 2d DCA 2013).

§2:80.6 Complaint (Fla.R.Civ.P. Form 1.945)

COMPLAINT

Plaintiff, A.B., sues defendants, C.D., and E.F., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. (Use a or b)
   a. On or about _____(date)_____, defendant, C.D., owned a motor vehicle that was operated with his/her consent by defendant, E.F., at _____ in _____, Florida.
   b. On or about _____(date)_____, defendant owned and operated a motor vehicle at _____ in _____, Florida.
3. At that time and place defendants negligently operated or maintained the motor vehicle so that it collided with plaintiff's motor vehicle.
4. As a result, plaintiff suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss of earnings, loss of ability to earn money, and aggravation of a previously existing condition. The losses are either permanent or continuing and plaintiff will suffer the losses in the future. Plaintiff's automobile was damaged, and he/she lost the use of it during the period required for its repair or replacement.

WHEREFORE plaintiff demands judgment for damages against defendants.

NOTE: This form, except for paragraph 2b, is for use when owner and driver are different persons. Use paragraph 2b when they are the same. If paragraph 2b is used, "defendants" must be changed to "defendant" wherever it appears.

Committee Notes: 1980 Amendment. This form was changed to show that one of the alternatives in paragraph 2 is used, but not both, and paragraph 4 has been changed to paraphrase Standard Jury Instruction 6.2.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§2:90 NEGLIGENCE, MOTOR VEHICLE WHEN PLAINTIFF IS UNABLE TO DETERMINE WHO IS RESPONSIBLE

§2:90.1 Fla.R.Civ.P. Form 1.946

COMPLAINT

Plaintiff, A.B., sues defendants, C.D., and E.F., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. On or about _____(date)_____, defendant, C.D., or defendant, E.F., or both defendants, owned and operated motor vehicles at _____ in _____, Florida.
3. At that time and place defendants, or one of them, negligently operated or maintained their motor vehicles so that one or both of them collided with plaintiff's motor vehicle.
4. As a result plaintiff suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss of earnings, loss of ability to earn money, and aggravation of a previously existing condition. The losses are either permanent or continuing and plaintiff will suffer the losses in the future. Plaintiff's automobile was damaged and he/she lost the use of it during the period required for its repair or replacement.

WHEREFORE, plaintiff demands judgment for damages against defendants.

NOTE: Allegations when owner and driver are different persons are omitted from this form and must be added when proper.

Committee Notes: 1980 Amendment. Paragraph 4 is changed to paraphrase Standard Jury Instruction 6.2. See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§2:90.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:90.3 References

1. Sarah E. Williams, Comment, Florida's Dangerous Instrumentality Doctrine, 25 Stetson L. Rev. 177 (1995).

§2:90.4 Defenses

1. **Seat Belt Defense:** The "seat belt defense" poses a question of comparative negligence; that is, whether the plaintiff's failure to use a seat belt contributed to her injuries. To present a jury question on this issue, the defendant must prove that: (1) the plaintiff failed to use an available and fully operational seatbelt; (2) the nonuse was unreasonable under the circumstances; and (3) this failure caused or contributed substantially to the plaintiff's damages. *Smith v. Butterick*, 769 So.2d 1056, 1057 (Fla. 2d DCA 2000). *See also Ridley v. Safety Kleen Corp.*, 693 So.2d 934 (Fla. 1996); *but see Jones v. Alayon*, 162 So.3d 360, 368 (Fla. 4th DCA 2015) (holding that defendants need not prove seatbelt was available and fully operational, but such information may be used as a factor in establishing comparative negligence).

2. **Sudden Emergency Doctrine:** The requisite factual requirements in considering the application of the sudden emergency doctrine are: (1) that the claimed emergency actually or apparently existed; (2) that the perilous situation was not created or contributed to by the person confronted; (3) that alternative courses of action in meeting the emergency were open to such person; and (4) that the action or course taken was such as would or might have been taken by a person of reasonable prudence in the same or similar situation. The presence or absence of a sudden emergency situation is a question of fact ordinarily to be decided by the jury. *Wallace v. National Fisheries, Inc.*, 768 So.2d 17, 18 (Fla. 3d DCA 2000).

3. **Sudden Stop:** Florida law has long recognized a rebuttable presumption of negligence on the part of the rear driver in a rear-end collision accident. *See Bellere v. Madsen*, 114 So.2d 619 (Fla. 1959). Where it is claimed that the rear-end collision was precipitated by a sudden stop by the preceding driver, most districts have found that the presumption cannot be rebutted if the stop happened at a place and time where it was reasonably expected. *Tacher v. Asmus*, 743 So.2d 157, 158 (Fla. 3d DCA 1999), *cause dismissed*, 767 So.2d 461 (Fla. 2000). However, if the stop by the lead driver is "arbitrary" (i.e., unexpected and sudden), then the presumption is rebutted and the plaintiff is not entitled to a directed verdict. *Ferguson v. Disalvo*, 775 So.2d 414, 415 (Fla. 4th DCA 2001); *Padilla v. Schwartz*, 199 So.3d 516, 518 (Fla. 4th DCA 2016).

§2:90.5 Related Matters

1. **Dangerous Instrumentality Doctrine:** Under the dangerous instrumentality doctrine, one who permits an automobile to be used by someone else on the public highways is liable for injuries to third parties caused by the authorized user's negligence. *Medina v. Yoder Auto Sales, Inc.*, 743 So.2d 621, 622 (Fla. 2d DCA 1999). *See also Kraemer v. General Motors Acceptance Corp.*, 572 So.2d 1363 (Fla. 1990); *Newton v. Caterpillar Fin. Servs. Corp.*, 253 So.3d 1054, 1056 (Fla. 2018). There are exceptions to that doctrine: the owner's liability should be determined on the basis of whether there has, in fact, been a conversion or theft of the vehicle prior to the negligence at issue. However, procurement of a vehicle through fraud is but one factor to be considered in determining whether a vehicle has been the subject of theft or conversion. *Leal v. Nunez*, 775 So.2d 974, 975 (Fla. 3d DCA 2000).

2. **Injuries Caused by Tortfeasors in Separate Accidents Occurring Close in Time:** An injured party should be able to recover for his or her injuries and the recovery should not be diminished because of a jury's inability to apportion injury between wrongdoers. *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000). Tortfeasors who contribute to cause an indivisible injury, incapable of apportionment, are both responsible for the entire injury. *Lawrence v. Hethcox*, 283 So.2d 41 (Fla.1973). Where evidence reveals two successive accidents, and the defendant is responsible only for one of the accidents, the burden is on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each of the two accidents. *Gross* at 279; *see also Washewich v. LeFave*, 248 So.2d 670, 672 (Fla. 4th DCA 1971). Where the plaintiff sues the first of two successive tortfeasors and establishes liability, but the jury cannot apportion the injury between the two after both parties have had the opportunity to present evidence on the issue, the first tortfeasor will be liable for the entire injury. *Gross*, 763 So.2d at 279. Prior tortfeasors will be liable for whole injuries just as subsequent tortfeasors have been liable for entire unapportionable injuries, thereby providing full relief for proven injuries suffered by victims of negligence. *Gross* at 279. The policy issue is the same whether it is the first or second accident: a tortfeasor should not escape responsibility when two independent causes both proximately contribute to cause an ultimate injury and the plaintiff has done everything that could reasonably have been expected of the plaintiff to segregate the damages as between the two accidents. *Washewich*, 248 So.2d at 673. The joinder of two tortfeasors in one lawsuit for injuries sustained in two motor vehicle accidents was proper where the injuries were overlapping and not apportionable. *Lawrence*, 283 So.2d at 44.

§2:91 UNINSURED/UNDERINSURED MOTORIST COVERAGE

§2:91.1 Fla. Stat. §627.727

Florida's Uninsured/Underinsured Motorist Coverage statute (Section 627.727, Fla. Stat.) provides, in pertinent part, that "[n]o motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section is not applicable when, or to the extent that, an insured named in the policy makes a written rejection of the coverage on behalf of all insureds under the policy." Fla. Stat. §627.727(1) (2015). (Current through the 2018 Second Regular Session of the 25th Legislature.)

§2:91.2 Statute of Limitations

Five Years. Fla. Stat. §95.11(2)(b).

§2:91.3 References

1. Florida Jurisprudence, 30B Fla Jur Insurance §1925.
2. Florida Jurisprudence, 30B Fla Jur Insurance §1927.
3. Florida Jurisprudence, 30B Fla Jur Insurance §1928.
4. Florida Jurisprudence, 30B Fla Jur Insurance §1929.
5. Florida Jurisprudence, 30B Fla Jur Insurance §1932.
6. Florida Jurisprudence, 30B Fla Jur Insurance §2935.
7. Florida Jurisprudence, 30B Fla Jur Insurance §2937.
8. 4-121 Florida Forms of Jury Instruction §121.61

§2:91.4 Defenses

1. **Insolvency of tortfeasor's insurer.** Uninsured motorist coverage carrier was relieved of its obligation to indemnify its insured where the other driver's vehicle was not deemed uninsured because his insurer became insolvent more than a year after the accident; the one-year statute of limitation, whereby a motor vehicle is considered uninsured when its insurer is unable to respond because of insolvency, could only apply to accidents occurring during a policy period in which the insured's uninsured motorist coverage was in effect and where the tortfeasor's liability insurer became insolvent within one year after such an accident. *Sires v. State Fire & Casualty Co.*, 226 So. 2d 875 (Fla. 3rd DCA 1969).

2. **Must be a primary household resident to be a UM insured.** Plaintiff, who had moved into her grandfather's residence while waiting for her water-damaged house to be repaired, was not a resident of her grandfather's household for purposes of his **uninsured motorist** coverage. The policy extends coverage to relatives who ''reside primarily'' with the insured. *State Farm Mut. Auto. Ins. Co. v. Colon*, 880 So. 2d 782 (Fla. 2d DCA 2004).

§2:91.5 Related Matters

1. **Attorney's fees** are only awarded during the time period when coverage is at issue when an insurer denies coverage and liability under uninsured motorist provisions of a policy, but after being sued, concedes coverage. *See Moore v. Allstate Insurance Co.,* 570 So.2d 291 (Fla.1990).

2. An insured is entitled to a determination of liability and the full extent of his or her damages in the uninsured motorist action **before first filing a first party bad faith action**. *See Fridman v. Safeco Ins. Co. of Illinois,* 185 So.3d 1214 (2016) (finding it obvious that the UM verdict to which the insured is entitled was binding in the bad faith action).

3. **An employee is covered under an employer's uninsured motorist coverage as a Class II insured.** If the employee is not a named insured under the employer's policy, the employee is considered to be a "Class II insured." Further, a Class II insured has standing to challenge the lack of a written rejection of UM because the written-rejection requirement is part-and-parcel of the challenge to a knowing rejection of uninsured motorist coverage. *Travelers Ins. Co. v. Quirk*, 583 So. 2d 1026 (Fla. 1991).

4. **The insurance carrier providing uninsured motorist coverage should be a named Defendant.** The trial court erred in granting a motion that was filed by an insurer for severance from a suit by one motorist against another, for whom the plaintiff had underinsured motorist coverage and defendant had liability coverage; the insurer was a necessary party under Fla. Stat. §627.727, and the jury should have been aware of the parties to the action. *Government Emples. Ins. Co. v. Krawzak*, 675 So. 2d 115 (Fla. 1996).

5. **An insurer is required to offer uninsured motorist coverage benefits where the insured had moved to Florida and insurer knew of the move.** The Florida Supreme Court found that while the insurance policy was originally issued in another state, appellee insurer knew that appellant insured had moved to Florida, that the subject insured vehicle was registered and garaged there, the policy contained Florida policy terms, and, consequently, the policy was governed by Florida law. The statute required appellee to offer appellant uninsured motorist coverage irrespective of the fact that when originally issued in another state, such coverage was waived in writing, because the Florida policy was, in effect, a new policy for which such coverage had to be re-offered. *Strochak v. Fed. Ins. Co.*, 717 So. 2d 453 (Fla. 1998).

6. **Self-insured leases for less than one year are not required to offer uninsured motorist coverage.** Fla. Stat. §627.727 did not impose a duty on a self-insured automobile-leasing company to offer uninsured motorist coverage on leases that lasted less than one year. *Diversified Services, Inc. v. Avila*, 606 So. 2d 364 366 (Fla. 1992).

7. **Statute of Limitations for Uninsured Motorist Coverage is not affected by Statute of Limitations for the negligent tortfeasor.** Pursuant to Fla. Stat. §627.727(1), insureds were entitled to recover underinsured motorist benefits, even though the applicable statute of limitations, Fla. Stat. §95.11(3)(a), barred their negligence action, because they had the legal right to recover damages from the tortfeasors at the time of the accident, and the expiration of the limitations period as to the tortfeasors did not bar insureds' right to recover underinsured motorist benefits. *Lewis v. Allstate Ins. Co.*, 667 So. 2d 261 (Fla. 1st DCA 1995).

8. **Ambiguous insurance policy language is to be construed against insurer and in favor of coverage.** Due to the ambiguous language of an insurance policy issued to the insureds, it could have been reasonably read to provide coverage. The trial court did not err in construing these provisions as providing uninsured motorist coverage for the insureds. The ambiguity was properly construed against the insurer and in favor of coverage. *State Farm Mut. Auto. Ins. Co. v. Reis*, 926 So. 2d 415 (Fla. 1st DCA 2006).

9. **Summary judgment was improper where issue of material fact remained as to whether insured provided proper notice to uninsured motorist carrier of settlement with underlying tortfeasor.** Summary judgment entered in favor of insurer was not appropriate because there was a material issue of fact as to whether claimant and insured failed to provide written notice to insurer of their proposed settlement and failed to obtain its prior written consent to the settlement as required by the policy and Fla. Stat. §627.727(6)(a); parties' affidavits stated that insurer was present at the mediation and had actual notice of the settlement. *Gray v. State Farm Mut. Auto. Ins. Co.*, 734 So. 2d 1102 1103 (Fla. 2d DCA 1999).

10. **Specialty insurance policy for antique automobile is not required to offer uninsured motorist coverage.** The Court affirmed the trial court's grant of summary judgment in favor of appellee, holding that Fla. Stat. §627.727 did not require a specialty insurance policy covering only an antique automobile with restricted highway usage to provide uninsured motorist coverage for accidents not involving the antique. *Martin v. St. Paul Fire & Marine Ins. Co.*, 670 So. 2d 997 (Fla. 2d DCA 1996).

11. **A written rejection of uninsured motorist coverage is required by law.** Fla. Stat. §627.727 requires a written rejection of uninsured motorist coverage. However, insureds may waive this requirement through an oral rejection. *See Union Am. Ins. Co. v. Cabrera*, 721 So. 2d 313, 314 (Fla. 3rd DCA 1998); *but see Jervis v. Castaneda*, 243 So.3d 996, 998 (Fla. 4th DCA 2018) (holding that §627.727 requires written notice to the insured of the limitations imposed by the statute); *Berman v. Liberty Mutual Ins. Co.*, 359 F.Supp.3d 1158, 1160-61 (M.D. Fla. 2019) (holding case law allowing oral waiver was based on outdated version of statute, and that current statute unambiguously requires a written rejection).

12. **An insured must submit a settlement offer from the tortfeasor to the uninsured motorist carrier for approval.** "Fla. Stat. 627.727(6) is applicable in situations where the liability insurer offers the injured person its liability limits. If the settlement would create an underinsured motorist claim, the injured person is required to submit the settlement offer to the underinsured motorist insurer for approval. Once the settlement offer is submitted, the underinsured motorist insurer has 30 days in which to agree to arbitrate the

underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not approve the settlement agreement the injured person may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve their respective liabilities for any damages to be awarded. Fla. Stat. 627.727(6) further requires the injured person to join both the liability insurer's insured and the underinsured motorist insurer if he chooses to file suit against the underinsured motorist insurer as a result of it rejecting the settlement offer by the liability insurer. Fla. Stat. 627.727 does require the joinder of the tortfeasor where the underinsured motorist insurer does not agree within 30 days to arbitrate the uninsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release." *Wardrop v. Government Employment Ins. Co.*, 567 So. 2d 1012 (Fla. 3d DCA 1990).

13. **Insurance carrier is required to offer uninsured motorist coverage on a rental car.** Where a motorist, who later was injured in an accident with an uninsured motorist, rented a car from a self-insured rental car company and, as part of an "extra protection" package offered by the rental car company, bought an excess liability policy from an insurance company, but no uninsured motorist coverage was made available to her and the written policy specifically excluded uninsured motorist coverage, the fact that the rental car company was not required, under Fla. Stat. §627.727(1), to offer or provide primary uninsured motorist coverage on a short-term rental did not negate the insurance company's obligation under Fla. Stat. §627.727(2) to offer that coverage. *Ferreiro v. Philadelphia Indem. Ins. Co.*, 816 So. 2d 140 (Fla. 3rd DCA 2002).

14. **Husband can reject uninsured motorist coverage on behalf of wife.** As a husband acted on behalf of his wife, the named insured, as an applicant in securing an auto insurance policy, his rejection of stacked uninsured motorist (UM) coverage was a valid rejection of coverage under Fla. Stat. §627.727(9)(e). Therefore, the insurer properly denied the husband-and-wife stacked UM benefits. *Mercury Ins. Co. v. Sherwin*, 982 So. 2d 1266 (Fla. 4th DCA 2008).

15. **Insurer was on notice of exposure in Florida and therefore statute applies.** Fla. Stat. §627.727 applied to an insurance contract made in New Jersey, where the State of Florida had a significant relationship to the insurance contract at issue and where the insurer was on notice of exposure to a Florida risk. *Safeco Ins. Co. v. Ware*, 424 So. 2d (Fla. 4th DCA 1982).

16. **Uninsured motorist carrier's true identity as an insurance company must be disclosed to the jury.** Trial court's order denying insureds a new trial in their personal injury action against appellee county was reversed where the trial court erred in failing to disclose to the jury the true status of appellees as underinsured automobile insurers; the failure to reveal appellees' true identities was inherently unfair to insureds, deceptive to the jury, contrary to the insurance contract entered into between the insured and its insurers, and contrary to Fla. Stat. §627.727(6), which provided for the joinder of the underinsured motorist carrier as a party defendant along with the underinsured tortfeasor. *Brush v. Palm Beach County*, 679 So. 2d 814 (Fla. 4th DCA 1996).

17. **Automobile insurance application should not automatically reject uninsured motorist coverage for insureds.** The court disapproved of an underwriting practice under which uninsured motorist coverage was shown as "rejected" on an application form before there was any discussion of coverage as this violated the spirit, if not the letter, of Fla. Stat. §627.727(1); when there was substantial evidence to support the finding that the rejection of uninsured motorist coverage was knowingly made, however, the court would not disturb this finding. *Daly v. Industrial Fire & Casualty Ins. Co.*, 422 So. 2d 1093, 422 So. 2d 1093 (Fla. 4th DCA 1982).

18. **A new written rejection is not required for renewal of same insurance policy.** Under Fla. Stat. §627.727(2), the insurer is required to inform the insured under a non-primary policy of the availability of uninsured motorist coverage. However, there was no such requirement upon the renewal of the same policy. *Weesner v. United Servs. Auto. Ass'n*, 711 So. 2d 1192 (Fla. 5th DCA 1998).

19. **Plaintiff was aware that employer had right to reject coverage for Plaintiff.** Plaintiff could not allege that insurer failed to inform him of his right to uninsured motorist coverage when Plaintiff's vehicle agreement with his employer authorized the employer to procure motor vehicle insurance for plaintiff and the agreement expressly authorized employer to reject uninsured motorist coverage on Plaintiff's behalf. *Duane v. Travelers Ins. Co.*, 496 So. 2d 859 (Fla. 5th DCA 1986).

20. Existence of $100,000 of UM coverage did not establish **amount-in-controversy requirement for diversity jurisdiction**, even where the plaintiff's pre-suit demand exceeded $75,000. *Campbell v. State Farm Mut. Auto. Ins. Co*., 2014 U.S. Dist. LEXIS 103398 (M.D. Fla. 2014).

21. "[T]he **forfeiture of benefits** under [a UM] policy will not automatically result upon an insured's **breach of a CME provision unless** the insurer pleads and proves actual prejudice as an element of its affirmative defense." *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1076 (Fla. 2014)(emphasis added).

§2:91.6 Sample Complaint

COMPLAINT

Plaintiff hereby sues Defendant Insurance Company, and alleges as follows:

INTRODUCTION

1. This is an action for uninsured motorist coverage.
2. On January 1, 2013, Plaintiff was stopped westbound on ABC Road in the left-turn lane waiting at the red light at the intersection of Smith Road. At that time, Jane Doe, an underinsured motorist, was traveling eastbound on ABC Road approaching Smith Road. Jane Doe lost control of her vehicle, crossed over the median and crashed into the right side of Plaintiff's vehicle.
3. The collision caused significant damage to Plaintiff's vehicle, and caused Plaintiff to suffer severe and permanent injuries.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this dispute because this complaint seeks damages in excess of $15,000.00 dollars, exclusive of interest and attorneys' fees.
5. Defendant is amenable to jurisdiction in Florida as it is a Florida corporation authorized to do business in _____ County, Florida.
6. Venue is proper in _____ County, Florida, because the motor vehicle accident from which this cause of action arises occurred in _____ County, Florida.

PARTIES

7. Plaintiff was, at all times material hereto, a resident of _____ County, Florida, was 18 years of age or over, and is otherwise *sui juris*.
8. Defendant is amenable to jurisdiction in Florida as it is authorized to do business in _____ County, Florida.

GENERAL ALLEGATIONS

9. On January 1, 2013, Plaintiff was stopped westbound on ABC Road in the left-turn lane waiting at the red light at the intersection of Smith Road. At that time, Jane Doe, an underinsured motorist, was traveling eastbound on ABC Road approaching Smith Road. Jane Doe lost control of her vehicle, crossed over the median and crashed into the right side of Plaintiff's vehicle.
10. As a direct result of the automobile accident, Plaintiff sustained permanent injuries.

COUNT I—FOR UNINSURED MOTORIST COVERAGE

11. Plaintiff repeats the allegations set forth above in paragraphs 1 through 10 as if set forth herein in full.
12. At all times material hereto, Jane Doe was an underinsured driver, in that she did not maintain sufficient insurance to compensate Plaintiff for damages to which Plaintiff is legally entitled as a result of the injuries caused by the above-described motor vehicle accident.

13. At all material times, Plaintiff had uninsured motorist coverage pursuant to a policy of insurance, policy number _____ issued by Defendant. See Contract of Insurance attached hereto as Exhibit A.
14. By virtue of the automobile insurance policy issued by Defendant and the uninsured/underinsured motorist coverage contained therein, Defendant agreed to be responsible for, and reimburse Plaintiff for, all damages for which Plaintiff is legally entitled to recover from Jane Doe as a result of the injuries Plaintiff sustained in the above-described motor vehicle accident.
15. As a result of the negligence of Jane Doe, Plaintiff suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, loss of earnings, loss of ability to earn money, and aggravation of a previously existing condition. The losses are either permanent or continuing and Plaintiff will suffer such losses in the future.
16. Timely notice has been provided to Defendant of the subject accident.
17. Plaintiff has met all conditions precedent to the filing of this action.
18. As a direct and proximate result of the aforementioned uninsured motorist coverage loss, Plaintiff has suffered monetary damages.

WHEREFORE, Plaintiff demands judgment for damages against Defendant _____ in excess of the minimum jurisdictional limits of this Court, as well as post-judgment interest and the costs of bringing this action as allowed by law, and any other relief this Honorable Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of all issues so triable.

DATED _____.

§2:100 NEGLIGENCE, STILLBIRTH

§2:100.1 Elements of Cause of Action — Florida Supreme Court

Yet, it is difficult to justify the outright denial of a claim for the mental pain and anguish which is so likely to be experienced by parents as a result of the birth of a stillborn child caused by the negligence of another. As a natural evolution of the common law, we conclude, as in *Kush* [*v. Lloyd,* 616 So.2d 415 (Fla. 1992)], that public policy dictates that an action by the parents for negligent stillbirth should be recognized in Florida.

We hold only that the impact rule is inapplicable to this narrow class of cases.

A suit for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action. The former is directed toward the death of a fetus while the latter is applicable to the death of a living person. As contrasted to the damages recoverable by parents under the wrongful death statute, the damages recoverable in an action for negligent stillbirth would be limited to mental pain and anguish and medical expenses incurred incident to the pregnancy.

Source

Tanner v. Hartog, 696 So.2d 705, 708 (Fla. 1997).

See Also

1. *Tanner v. Hartog*, 618 So.2d 177, 182 (Fla. 1993).

§2:100.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§2:100.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

See Also

1. *Tanner v. Hartog*, 678 So.2d 1317, 1320 (Fla. 2d DCA 1996), *rev. granted*, 687 So.2d 1306 (Fla. 1996), *quashed on other grounds*, 696 So.2d 705 (Fla. 1997).

§2:100.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§2:100.1.4 Elements of Cause of Action — 4th DCA

In *Tanner v. Hartog*, 696 So.2d 705, 708 (Fla. 1997), the Florida Supreme Court held that parents of a stillborn child could recover damages for mental pain and anguish caused by the negligence of another, even in the absence of evidence that the stillbirth caused any physical impact or injury to the mother.

Yet, it is difficult to justify the outright denial of a claim for the mental pain and anguish which is so likely to be experienced by parents as a result of the birth of a stillborn child caused by the negligence of another. As a natural evolution of the common law, we conclude, as in *Kush* [*v. Lloyd,* 616 So.2d 415 (Fla. 1992)], that public policy dictates that an action by the parents for negligent stillbirth should be recognized in Florida.

We hold only that the impact rule is inapplicable to this narrow class of cases.

Source

Kammer v. Hurley, 765 So.2d 975, 977 (Fla. 4th DCA 2000).

§2:100.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§2:100.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:100.3 References

1. 62A Am. Jur. 2d *Prenatal Injuries* §§49–119 (2005).
2. 25A C.J.S. *Death* §36 (2002).
3. 43 C.J.S. *Infants* §318 (2004).
4. 67A C.J.S. *Parent and Child* §§327–328 (2002).

§2:100.4 Defenses

1. **Statute of Limitations:** Mere knowledge of a stillbirth, without more, would not suggest the possibility of medical negligence. *Tanner v. Hartog*, 618 So.2d 177, 182 (Fla. 1993).

§2:100.5 Related Matters

1. **Medical Malpractice:** An unborn fetus is either a new and separate human being or "person," temporarily residing within the womb of the host mother, *OR* it is a part of the mother's body, *OR* both. The Florida Supreme Court has held that, in legal contemplation, an unborn fetus is not a person for the wrongful death of whom a tortfeasor is liable to its survivors for damages under the Wrongful Death Act (§768.19, Fla. Stat.); therefore, it is living tissue of the body of the mother for the negligent or intentional tortious injury to which the mother has a legal cause of action the same as she has for a wrongful injury to any other part of her body. *Singleton v. Ranz*, 534 So.2d 847 (Fla. 5th DCA 1988), *rev. denied*, 542 So.2d 1332 (Fla. 1989); *rev. denied*, 542 So.2d 1334 (Fla. 1989).

2. **Presence:** "Because we hold the impact rule inapplicable, James's presence at the birth of the stillborn child would not be a prerequisite to recovery." *Tanner v. Hartog*, 696 So.2d 705, 709 (Fla. 1997).

3. **Right to Remain Unborn:** There is no right to remain unborn. *Kush v. Lloyd*, 616 So.2d 415, 423 (Fla. 1992).

4. **Wrongful Death Act:** At the outset, we note that this Court has repeatedly held that there is no cause of action under Florida's Wrongful Death Act for the death of a stillborn fetus. *Tanner v. Hartog*, 696 So.2d 705, 706 (Fla. 1997).

5. **Wrongful Birth:** "Wrongful birth" is that species of medical malpractice in which parents give birth to an impaired or deformed child and allege that negligent treatment or advice deprived them of the opportunity or knowledge to avoid conception or to terminate the pregnancy. *See Black's Law Dictionary* 1612 (6th ed. 1990). The primary object of a wrongful birth claim is to recover damages for the extraordinary expense of caring for the impaired or deformed child, over and above routine rearing expenses. *Fassoulas v. Ramey*, 450 So.2d 822 (Fla. 1984). Other jurisdictions have distinguished "wrongful birth" from two other somewhat similar torts, "wrongful conception" and "wrongful pregnancy." Under these out-of-state theories, wrongful conception is a claim brought by parents against a physician, a manufacturer of contraceptives, or other related professionals for injuries caused when a negligently performed sterilization or contraception procedure results in pregnancy. "Wrongful pregnancy" is a similar claim for a birth resulting despite a negligently performed abortion procedure. James Bopp, Jr., et al., *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duquesne L.Rev. 461, 464-65 (1989). *Kush v. Lloyd*, 616 So.2d 415, 417 (Fla. 1992).

6. **Wrongful Life:** "Wrongful life" is that species of medical malpractice in which a cause of action is brought on behalf of a child born with birth defects, where the birth allegedly would not have occurred but for negligent medical advice to or treatment of the parents. *Black's Law Dictionary* 1613 (6th ed. 1990). For reasons expressed below, the tort does not exist in Florida. *Kush v. Lloyd*, 616 So.2d 415, 417 (Fla. 1992).

7. **Short Gestation:** Negligent stillbirth and its exception to the impact rule do not apply to the deaths of very young fetuses. Though no bright-line rule has been established, the cut-off is somewhere between fifteen weeks and forty-one weeks. *Compare Thomas v. OB/GYN Specialists of Palm Beaches, Inc.*, 889 So.2d 971, 971-72 (Fla. 4th DCA 2004) (holding that impact rule exception for negligent stillbirth did not apply to the loss of a fifteen- to eighteen-week-old fetus), *with Tanner v. Hartog*, 696 So.2d 705, 706 (Fla. 1997) (allowing suit for negligent stillbirth over the loss of forty-one week-old fetus).

§2:110 PARENTAL LIABILITY FOR TORT OF MINOR

§2:110.1 Elements of Cause of Action — Florida Supreme Court

We first recognized the "basic and established law that a parent is not liable for the tort of a minor child because of the mere fact of paternity." *Gissen* at 703. Nevertheless, we also recognized four broadly defined exceptions wherein a parent may incur liability:

1. where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others;
2. where the child committing the tort is acting as the servant or agent of its parents;
3. where the parent consents, directs, or sanctions the wrongdoing; and
4. where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible.

Source

Snow v. Nelson, 475 So.2d 225, 226 (Fla. 1985).

See Also

1. *Gissen v. Goodwill*, 80 So.2d 701, 703 (Fla. 1955).

§2:110.1.1 Elements of Cause of Action — 1st DCA

A parent is not liable for the torts committed by his or her children unless:
1. the parent entrusts the child with a dangerous instrumentality;
2. the child is acting as the parent's agent in committing the tortious act;
3. the parent knows of and consents to the child's tortious act; or
4. the parent fails to exercise control over the child when injury to another is a possible consequence.

Source

Thompson v. Baniqued, 741 So.2d 629, 632 (Fla. 1st DCA 1999).

See Also

1. Compare the elements set forth in *Thompson*, above, with those set forth in *Snow v. Nelson*, 475 So.2d 225, 226 (Fla. 1985).

§2:110.1.2 Elements of Cause of Action — 2nd DCA

It is well settled that a parent is not liable for the torts of his minor child simply because of his paternity. There are, however, certain broadly defined exceptions wherein a parent may incur liability:
1. Where he entrusts his child with an instrumentality which, because of the lack of age, judgment, or experience of the child, may become a source of danger to others.
2. Where a child, in the commission of a tortious act, is occupying the relationship of a servant or agent of its parents.
3. Where the parent knows of his child's wrongdoing and consents to it, directs or sanctions it.
4. Where he fails to exercise parental control over his minor child, although he knows or in the exercise of due care should have known that injury to another is a probable consequence.

Source

Bullock v. Armstrong, 180 So.2d 479, 480 (Fla. 2d DCA 1965).

§2:110.1.3 Elements of Cause of Action — 3rd DCA

A parent is not liable for the tort of his minor child because of the mere fact of his paternity. *Gissen v. Goodwill*, 80 So.2d 701, 703 (Fla. 1955). There are, however, four exceptions:
1. where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others;
2. where the child committing the tort is acting as the servant or agent of its parents;
3. where the parent consents, directs, or sanctions the wrongdoing; and
4. where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible.

Source

K.C. v. A.P., 577 So.2d 669, 671 (Fla. 3d DCA 1991), *rev. denied*, 589 So.2d 289 (Fla. 1991).

See Also

1. *Spector v. Neer*, 262 So.2d 689, 690 (Fla. 3d DCA 1972).

§2:110.1.4 Elements of Cause of Action — 4th DCA

In Florida, the long-standing rule is that "a parent is not liable for the tort of his minor child because of the mere fact of paternity." *Seabrook v. Taylor*, 199 So.2d 315, 317 (Fla. 4th DCA 1967) (citing *Gissen v. Goodwill*, 80 So.2d 701 (Fla. 1955)). There are four recognized exceptions to this rule.

Source

Perez v. Rodriguez, 204 So.3d 92, 95 (Fla. 4th DCA 2016).

See Also

Fina v. Hennarichs, 19 So.3d 1081, 1084 (Fla. 4th DCA 2009) ("A parent may incur liability … [w]here he entrusts his child with an instrumentality which, because of the lack of age, judgment, or experience of the child, may become a source of danger to others; *Gilbert v. Merritt*, 901 So.2d 334, 336 (Fla. 4th DCA 2005); *Gissen v. Goodwill,* 80 So.2d 701, 703 (Fla. 1955).").

§2:110.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§2:110.2 References

1. Florida Statutes §741.24 (2005).
2. 25A Fla. Jur. 2d *Family Law* §§458–463 (2002).
3. 59 Am. Jur. 2d *Parent and Child* §§96–105 (2002).
4. 67A C.J.S. *Parent and Child* §§309–315 (2002).
5. Restatement (Second) of Torts §§315, 316 (1965).
6. Kimberly C. Simmons, Annotation, *Liability of Adult Assailant's Family to Third Party for Physical Assault*, 25 A.L.R. 5th 1 (1994).
7. Karen L. Ellmore, Annotation, *Negligent Entrustment of Motor Vehicle to Unlicensed Driver*, 55 A.L.R. 4th 1100 (1987).
8. Donald P. Duffala, Annotation, *Modern Trends as to Tort Liability of Child of Tender Years*, 27 A.L.R. 4th 15 (1984).
9. Wanda E. Wakefield, Annotation, *Liability of Donor of Motor Vehicle for Injuries Resulting from Owner's Operation*, 22 A.L.R. 4th 738 (1983).
10. George Priest, Annotation, *Liability of Parent for Injury Caused by Child Riding a Bicycle*, 70 A.L.R. 3d 611 (1976).
11. Wade R. Habeeb, Annotation, *Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child*, 54 A.L.R. 3d 974 (1974).
12. B. C. Ricketts, Annotation, *Validity and Construction of Statutes Making Parents Liable for Torts Committed by their Minor Children*, 8 A.L.R. 3d 612 (1966).
13. L. S. Rogers, Annotation, *Liability of Person Permitting Child to Have Gun, or Leaving Gun Accessible to Child, for Injury Inflicted by the Latter*, 68 A.L.R. 2d 782 (1959).
14. Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 Santa Clara L. Rev. 621 (1997).
15. Renée Cordes, *California Supreme Court Asked to Overturn Parental Liability Decision*, 30 Trial 2:81 (1994).
16. Abraham Abramovsky, *Bias Crime: Is Parental Liability the Answer?*, 1992 / 1993 Ann. Surv. Am. L. 533 (1994).

§2:110.3 Defenses

1. **Adult Children:** No Florida decision has imposed liability upon the parents of an adult child for intentional acts simply because the child may be financially dependent on, or needs to reside with, his or her parents. *Knight v. Merhige*, 133 So.3d 1140 (Fla. 4th DCA 2014). *Carney v. Gambel*, 751 So.2d 653, 654 (Fla. 4th DCA 1999). *Cf. Thorne v. Ramirez*, 346 So.2d 121, 122 (Fla. 3d DCA 1977).

2. **No Duty to Protect Others:** The law does not require persons to protect others from danger, unless such persons themselves created the danger. Exceptions exist when the actor creates the danger or there is a special relation between the actor and a third person. Sections 314A and B provide that the following special relations give rise to a duty to aid or protect: common carriers to passengers, innkeepers to guests, possessors of land to invitees, custodians to those in custody, and employers to employees. We decline, however, to conclude that a neighbor is responsible for another neighbor's child, who is injured in the street, simply because the child had wandered into and played in the neighbor's yard. *Thompson v. Baniqued*, 741 So.2d 629, 631 (Fla. 1st DCA 1999). *See also Carney v. Gambel*, 751 So.2d 653, 654 (Fla. 4th DCA 1999).

3. **No Habit of Engaging in the Conduct:** In *Snow v. Nelson*, 475 So.2d 225, 226 (Fla. 1985), however, the court, following *Gissen v. Goodwill*, 80 So.2d 701, 703 (Fla. 1955), stated that to prevail on a cause of action for parental negligent supervision of a child under exception (4), the plaintiff must plead and prove that the child had a habit of engaging in a particular act or course of conduct which led to the plaintiff's injury. *Thompson v. Baniqued*, 741 So.2d 629, 632 (Fla. 1st DCA 1999*). See also K.C. v. A.P.*, 577 So.2d 669, 671 (Fla. 3d DCA 1991), *rev. denied*, 589 So.2d 289 (Fla. 1991).

§2:110.4 Related Matters

1. **Mere Fact of Paternity:** Florida recognizes the "basic and established law that a parent is not liable for the tort of a minor child because of the mere fact of paternity." *Snow v. Nelson*, 475 So.2d 225,226 (Fla. 1985), *citing Gissen v. Goodwill*, 80 So.2d 701, 703 (Fla. 1955).

2. **Restatement (Second) of Torts:** A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk or bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control. Restatement (Second) of Torts §316 (1965).

3. **Loco Parentis:** Whether the parental relationship has been assumed is normally a question of fact suitable for resolution at trial. *Nova Univ., Inc. v. Wagner,* 491 So.2d 1116, 1118 n. 2 (Fla. 1986) (citing 59 Am. Jur. 2d, *Parent and Child* §88 (1971)). Additionally, there is no difference, so far as common-law tort liability is concerned, between one in loco parentis and a natural parent. *Wyatt v. McMullen,* 350 So.2d 1115, 1116 (Fla. 1st DCA 1977). *Gilbert v. Merritt*, 901 So.2d 334, 335 (Fla. 4th DCA 2005).

§2:120 SPOLIATION OF EVIDENCE (NEGLIGENT DESTRUCTION OF EVIDENCE)

§2:120.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

See Also

1. *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342, 347 (Fla. 2005) (not recognizing a cause of action for spoliation of evidence where the defendant and the spoiler are one and the same, but recognizing such a cause of action for third-party spoliation).

§2:120.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§2:120.1.2 Elements of Cause of Action — 2nd DCA

In order to establish a cause of action for spoliation, a party must show:
1. the existence of a potential civil action;
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action;
3. destruction of that evidence;
4. significant impairment in the ability to prove the lawsuit;
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. damages.

Source

Jost v. Lakeland Reg'l Med. Ctr., 844 So.2d 656, 657 (Fla. 2d DCA 2003), *rev. dismissed*, 888 So.2d 622 (Fla. 2004).

§2:120.1.3 Elements of Cause of Action — 3rd DCA

We hold now that the elements of a cause of action for negligent destruction of evidence are:
1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action;
3. destruction of that evidence;
4. significant impairment in the ability to prove the lawsuit;
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. damages.

Source

Continental Insurance Company v. Herman, 576 So.2d 313, 315 (Fla. 3d DCA 1990), *rev. denied,* 598 So.2d 76 (Fla. 1991).

See Also

1. *Lincoln Insurance Co. v. Home Emergency Services, Inc.*, 812 So.2d 433 (Fla. 3d DCA 2001), *rev. denied*, 833 So.2d 773 (Fla. 2002).
2. *Miller v. Allstate Insurance Co.,* 650 So.2d 671, 673 (Fla. 3d DCA 1995), *rev. denied*, 659 So.2d 1087 (Fla. 1995) (citing *Continental Insurance Company v. Herman*, 576 So.2d 313, 315 (Fla. 3d DCA 1990), *rev. denied,* 598 So.2d 76 (Fla. 1991)).

§2:120.1.4 Elements of Cause of Action — 4th DCA

To prevail in a cause of action for spoliation of evidence, the plaintiff must prove the following:
1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action;
3. destruction of that evidence;
4. significant impairment in the ability to prove the lawsuit;
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. damages.

Source

Gayer v. Fine Line Construction & Electric, Inc., 970 So.2d 424, 426 (Fla. 4th DCA 2007).

See Also

1. *Toole v. State*, 270 So.3d 371, 388 n.123 (Fla. 4th DCA 2019) (Ciklin, J., concurring).
2. *Flagstar Companies, Inc. v. Cole-Ehlinger*, 909 So.2d 320 (Fla. 4th DCA 2005).
3. *Sullivan v. Dry Lake Dairy, Inc*., 898 So.2d 174, 175 (Fla. 4th DCA 2005).
4. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So.2d 843, 845 (Fla. 4th DCA 2004).
5. *Hagopian v. Publix Supermarkets, Inc*., 788 So.2d 1088, 1091 (Fla. 4th DCA 2001), *rev. denied*, 817 So.2d 849 (Fla. 2002).
6. *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33, 35 (Fla. 4th DCA 1996), *rev. dismissed*, 709 So.2d 105 (Fla. 1998) ("Accordingly, we now expressly recognize a cause of action for the spoliation of evidence and adopt the Third District's characterization of this tort's necessary elements. *See Herman*, 576 So.2d at 315").
7. *Brown v. City of Delray Beach*, 652 So.2d 1150, 1153 (Fla. 4th DCA 1995).

§2:120.1.5 Elements of Cause of Action — 5th DCA

To establish a spoliation cause of action, the plaintiff must prove each of the following:
1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence which is relevant to the potential civil action;
3. destruction of that evidence;
4. significant impairment in the ability to prove the lawsuit;
5. a causal relationship between the evidence destruction and the inability to prove the lawsuit; and
6. damages.

Source

Shamrock-Shamrock, Inc. v. Remark, 271 So.3d 1200, 1203 (Fla. 5th DCA 2019), *review denied*, No. SC19-1106, 2019 WL 5290225 (Fla. Oct. 17, 2019).

§2:120.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(a).

§2:120.3 References

1. 23 Fla. Jur. 2d *Evidence and Witnesses* §139 (2003).
2. 32 Fla. Jur. 2d *Interference* §22 (2003).
3. 41A Fla. Jur. 2d *Products Liability* §§143–145 (2004).
4. 3B C.J.S. *Alteration of Instruments* §§135–148 (2003).
5. 32 C.J.S. *Evidence* §§163–168, 389 (1996).
6. 86 C.J.S. *Torts* §85 (1997).
7. Robert D. Peltz, *The Necessity of Redefining Spoliation of Evidence Remedies in Florida,* 29 Fla. St. U. L. Rev. 1289 (2002).
8. Martin H. Redish, *Electronic Discovery and the Litigation Matrix,* 51 Duke L.J. 561 (2001).
9. Philip A. Lionberger, Comment, *Interference with Prospective Civil Litigation By Spoliation of Evidence: Should Texas Adopt A New Tort?,* 21 St. Mary's L.J. 209 (1989).
10. Andrea H. Rowse, Comment, *Spoliation: Civil Liability for Destruction of Evidence,* 20 U. Rich. L. Rev. 191 (1985).
11. Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 Tex. L. Rev. 1185 (1983).

§2:120.4 Defenses

1. **Concealment of Evidence:** "Concealment of evidence does not form a basis for a claim of spoliation." *Jost v. Lakeland Regional Medical Center, Inc*., 844 So.2d 656, 658 (Fla. 2d DCA 2003), *rev. dismissed*, 888 So.2d 622 (Fla. 2004).

2. **Duty to Maintain or Preserve the Property:** "It is fundamental to the entire legal basis for spoliation of evidence that the owner or possessor of property have a legally defined duty to maintain or preserve the property." *Martino v. Wal-Mart Stores, Inc*., 908 So.2d 342 (Fla. 2005) (concurring opinion).

3. **First-Party v. Third-Party Spoilers:** There is no cause of action against a first-party defendant for negligent destruction/ spoliation of evidence. *Ferere v. Shure*, 65 So.3d 1141, 1145 (Fla. 4th DCA 2011), *citing Martino v. Wal-Mart Stores, Inc*., 908 So.2d 342, 347 (Fla. 2005) (distinguishing between first party-defendant sponsored and third-party spoliation claims).

§2:120.5 Related Matters

1. **Insurance Coverage:** "[A] spoliation claim is not covered as "bodily injury" or "property damage" in a general liability contract." *Lincoln Insurance Co. v. Home Emergency Services, Inc.*, 812 So.2d 433 (Fla. 3d DCA 2001), *rev. denied*, 833 So.2d 773 (Fla. 2002).

2. **Products Liability:** "[U]nder section 768.041, the spoliator is properly deemed a joint tortfeasor with the defendant in the products liability claim." *Builder's Square, Inc. v. Shaw*, 755 So.2d 721, 725 (Fla. 4th DCA 1999), *rev. denied*, 751 So.2d 1250 (Fla. 2000).

3. **Remedy against First-Party Defendant:** Under a claim of spoliation of evidence, the remedy against a first-party defendant is not an independent cause of action for spoliation of evidence. *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342, 347 (Fla. 2005). Where the evidence is intentionally lost, misplaced, or destroyed by one party, the remedy against a first-party defendant is based upon the discovery sanctions found in Fla. R. Civ. P. 1.380(b)(2), and allows the jury to determine whether the records contained

indications of negligence. *Id.* at 346. Where the loss of the evidence is negligent, and the absence of such evidence affects the plaintiff's ability to establish a prima facie case, a rebuttable presumption of negligence arises. *Id.* at 347. The presumption shifts the burden under section 90.302(2), Florida Statutes, and exists until the jury believes the burden required to overcome the presumed negligence has been met. *Id.*

4. **Sanctions:** "The propriety of a sanction imposed for failing to preserve evidence depends on: (1) the willfulness or bad faith of the responsible party; (2) the extent of prejudice suffered by the requesting party; and (3) the remedy imposed to cure the prejudice." *See Nationwide Lift Trucks v. Smith*, 832 So.2d 824, 826 (Fla. 4th DCA 2002); *Johnson Const. Management, Inc. v. Lopez*, 902 So.2d 206, 208 (Fla. 3d DCA 2005).

5. **Sovereign Immunity:** "[A] special relationship between an individual and a governmental agency may give rise to a duty of care owed to that individual, thereby creating an exception to the governmental entity's sovereign immunity from suit even for functions that are otherwise considered discretionary." "Such a special relationship and corresponding duty to an individual is created when a law enforcement officer promises or agrees to take some special action at the individual's request." *Brown v. City of Delray Beach*, 652 So.2d 1150, 1153 (Fla. 4th DCA 1995).

6. **Underlying Case Completed:** "Because of the nature of the claim, liability for spoliation does not arise until the underlying action is completed." *Lincoln Insurance Co. v. Home Emergency Services, Inc.*, 812 So.2d 433 (Fla. 3d DCA 2001), *rev. denied*, 833 So.2d 773 (Fla. 2002); *Steinberg v. Kearns*, 907 So.2d 691 (Fla. 4th DCA 2005).

7. **Rebuttable Presumption, *Valcin* Doctrine:** When essential records are either missing or inadequate as a result of the defendant's negligence, a rebuttable presumption is raised, recognized in section 90.302(2), Florida Statutes. *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596, 599 (Fla. 1987). When evidence rebutting such a presumption is introduced, the burden of proof shifts to the party against whom the presumption operates to prove the non-existence of the fact presumed, ensuring the issue of negligence will be for the jury. *Id.* at 600. The presumption is not overcome until the jury believes, based on the degree of persuasion required, under the substantive law of the case, that the burden has been met. *Id.* at 601.

§2:130 STRICT LIABILITY

§2:130.1 Elements of Cause of Action — Florida Supreme Court

In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.

Source

West v. Caterpillar Tractor Co., 336 So.2d 80, 87 (Fla. 1976).

See Also

1. *Aubin v. Union Carbide Corp.*, 177 So.3d 489, 502-03 (Fla. 2015).
2. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067, 1068 (Fla. 1994).
3. *Edward M. Chadbourne, Inc. v. Vaugh*, 491 So.2d 551, 553 (Fla. 1986).
4. *Ford Motor Company v. Hill*, 404 So.2d 1049, 1051 (Fla. 1981).

§2:130.1.1 Elements of Cause of Action — 1st DCA

To recover on a strict liability theory, the user must establish:

1. the manufacturer's relationship to the product;
2. the defect and unreasonably dangerous condition of the product; and
3. the existence of the proximate causal connection between the condition of the product and the user's injuries or damages.

Source

Lesnik v. Duval Ford, LLC, 185 So.3d 577, 581 (Fla. 1st DCA 2016).

See Also

1. *Diversified Products Corp. v. Faxon*, 514 So.2d 1161, 1162 (Fla. 1st DCA 1987).
2. *Hardin v. Montgomery Elevator Co.*, 435 So.2d 331, 334 (Fla. 1st DCA 1983).
3. *Hartman v. Opelika Machine and Welding Co.*, 414 So.2d 1105 (Fla. 1st DCA 1982), *petition for rev. denied*, 426 So.2d 27 (Fla. 1983).
4. *Cunningham v. General Motors Corp.*, 561 So.2d 656, 659 (Fla. 1st DCA 1990).
5. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060, 1067-68 (Fla. 1st DCA 2010).

§2:130.1.2 Elements of Cause of Action — 2nd DCA

A manufacturer is strictly liable in tort when a product the manufacturer places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

Source

Cataldo v. Lazy Days R.V. Ctr., Inc., 920 So.2d 174, 177 (Fla. 2d DCA 2006).

See Also

1. *Savage v. Jacobsen Mfg.*, 396 So.2d 731, 732 (Fla. 2d DCA 1981).

§2:130.1.3 Elements of Cause of Action — 3rd DCA

In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of a proximate causal connection between such condition and the user's injuries or damage.

Source

Siemens Energy & Automation, Inc. v. Medina, 719 So.2d 312, 315 (Fla. 3d DCA 1998), *rev. denied*, 733 So.2d 516 (Fla. 1999).

See Also

1. *Clark v. Boeing Company*, 395 So.2d 1226, 1229 (Fla. 3d DCA 1981).
2. *Martinez v. Clark Equipment Co.*, 382 So.2d 878, 880 (Fla. 3d DCA 1980).
3. *Plaza v. Fisher Dev., Inc.*, 971 So.2d 918, 920 (Fla. 3d DCA 2007).

§2:130.1.4 Elements of Cause of Action — 4th DCA

In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.

Source

Zyferman v. Taylor, 444 So.2d 1088, 1091 (Fla. 4th DCA 1984), *petition for rev. denied*, 453 So.2d 44 (Fla. 1984).

See Also

1. *Mattes v. Coca Cola Bottling Co. of Miami*, 311 So.2d 417, 423 (Fla. 4th DCA 1974), *cert. dismissed*, 328 So.2d 843 (Fla. 1975).
2. *Rivera v. Baby Trend, Inc.*, 914 So.2d 1102, 1103-04 (Fla. 4th DCA 2005).
3. *R.J. Reynolds Tobacco Co. v. Brown*, 70 So.3d 707, 717 (Fla. 4th DCA 2011).

§2:130.1.5 Elements of Cause of Action — 5th DCA

[A] cause of action on the theory of strict liability may be properly pled by alleging:
1. the manufacturer's relationship to the product in question;
2. the unreasonably dangerous condition of the product; and
3. the existence of a proximate causal connection between the condition of the product and the plaintiff's injury.

Source

Cintron v. Osmose Wood Preserving, Inc., 681 So.2d 859, 861 (Fla. 5th DCA 1996).

See Also

1. *Builders Shoring and Scaffolding Equipment Co., Inc. v. Schmidt*, 411 So.2d 1004, 1006 (Fla. 5th DCA 1982), *petition for rev. denied*, 419 So.2d 1200 (Fla. 1982).

§2:130.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(e).

§2:130.3 References

1. 41A Fla. Jur. 2d *Products Liability* §§17–38, 210 (2004).
2. 63 Am. Jur. 2d *Products Liability* §§556–560 (1997).
3. 72A C.J.S. *Products Liability* §§6–8 (2004).
4. Restatement (Second) of Torts §388 (1965).
5. Restatement (Second) of Torts §§402A–402B (1965).
6. Restatement Third Torts: Products Liability §1 et seq. (1998).
7. Richard S. Markovits, *The Allocative Efficiency of Shifting from a 'Negligence' System to a 'Strict-Liability' Regime in our Highly-Pareto-Imperfect Economy: A Partial and Preliminary Third-Best-Allocative-Efficiency Analysis*, 73 Chi. Kent L. Rev. 11 (1998).
8. E. Wertheimer, *Calabresi's Razor: A Short Cut To Responsibility*, 28 Stetson L. Rev. 105, 113 (1998).
9. Martin A. Kotler, *Reconceptualizing Strict Liability in Tort: An Overview*, 50 Vand. L. Rev. 555 (1997).
10. Alan Schwartz, *The Case Against Strict Liability*, 60 Fordham L. Rev. 819 (1992).
11. John Cirace, *A Theory of Negligence and Products Liability*, 66 St. John's L. Rev. 1 (1992).
12. Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. Cin. L. Rev. 1183 (1992).
13. Kim D. Larsen, Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 Colu. L. Rev. 2045 (1984).

§2:130.4 Defenses

1. **Contributory or Comparative Negligence:** Contributory or comparative negligence is a defense in a strict liability action if based upon grounds other than the failure of the user to discover the defect in the product or the failure of the user to guard against the possibility of its existence. The consumer or user is entitled to believe that the product will do the job for which is was built. On the other hand, the consumer, user or bystander is required to exercise ordinary due care. *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 92 (Fla. 1976); *Standard Havens Prods., Inc. v. Benitez*, 648 So.2d 1192, 1197 (Fla. 1994).

2. **Defect's Existence:** In order to prevail in a products liability action brought under a theory of either strict liability or negligence, a plaintiff must demonstrate that the injuries complained of were caused by a defective product whose defect existed at the time of injury and at the time in which the product left the manufacturer's control. *Rodriguez v. National Detroit, Inc.*, 857 So.2d 199, 201 (Fla. 3d DCA 2003), *rev. denied*, 868 So.2d 524 (Fla. 2004).

3. **Failure to Warn:** A prima facie case of strict liability failure to warn does not require a showing of negligence. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately

warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Manufacturers are to be held to a higher standard than that imposed under negligence jurisprudence, but are not reduced to insurers. *Griffin v. Kia Motors Corp.*, 843 So.2d 336, 339 (Fla. 1st DCA 2003) (citing *Ferayorni v. Hyundai Motor Co.*, 711 So.2d 1167, 1172 (Fla. 4th DCA 1998), quoting *Anderson v. Owens-Corning Fiberglas Corp.,* 53 Cal.3d 987, 281 Cal.Rptr. 528, 810 P.2d 549, 558 (1991)).

4. **Firearms:** Florida does not recognize a cause of action for negligent distribution of a non-defective firearm, i.e., there can be no liability on behalf of Valor in this instance. As of yet, no Florida court has recognized a duty for a gun distributor to reasonably and prudently distribute a non-defective gun. *Grunow v. Valor Corp. of Florida*, 904 So.2d 551, 554 (Fla. 4th DCA 2005).

5. **Patent Defect:** It would be contrary to public policy as well as good common sense to hold a person, whether characterized as a manufacturer or a contractor, strictly liable when the defect is patent or known to the owner. *Edward M. Chadbourne, Inc. v. Vaugh*, 491 So.2d 551, 554 (Fla. 1986).

6. **Statute of Repose:** The statute of repose bars product liability actions based on harm "allegedly caused by a product with an expected useful life of 10 years or less, if the harm was caused by exposure to or use of the product more than 12 years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product," unless the product is specifically exempted as having a useful life greater than 10 years. §95.031(2)(b), Fla. Stat; *Dominguez v. Hayward Indus., Inc.*, 201 So.3d 100, 101 (Fla. 3d DCA 2015).

7. **Structural Improvements in Real Estate:** It has long been recognized that the doctrine of strict products liability does not apply to structural improvements to real estate. *Easterday v. Masiello*, 518 So.2d 260, 261 (Fla. 1988); *Edward M. Chadbourne, Inc. v. Vaugh*, 491 So.2d 551 (Fla. 1986).

§2:130.5 Related Matters

1. **Commercial Leases:** Thus, we hold that the doctrine of strict liability is applicable to commercial lease transactions in Florida. However, we limit our holding to those lessors who are engaged in the business of leasing the allegedly defective product. The strict liability cause of action is not applicable to those leases which are isolated or infrequent transactions not related to the principal business of the lessor. *Samuel Friedland Family Enterprises v. Amoroso*, 630 So.2d 1067, 1071 (Fla. 1994).

2. **Defective Product:** Under the theory of strict products liability adopted in *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976), a product may be defective by virtue of a design defect, a manufacturing defect, or an inadequate warning. *Cooper v. Old Williamsburg Candle Corp.*, 653 F.Supp.2d 1220, 1224 (M.D. Fla. 2009). [The Restatement Third, Torts: Products Liability (1998)] states that a product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design" and its omission "renders the product not reasonably safe." *Id.* at §2(b). Additionally, a product is considered defective "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings" and their omission "renders the product not reasonably safe." *Scheman-Gonzalez v. Saber Mfg. Co*., 816 So.2d 1133, 1139 (Fla. 4th DCA 2002).

3. **Distributive Chain:** Florida courts have expanded the doctrine of strict liability to others in the distributive chain including retailers, wholesalers, and distributors. *Samuel Friedland Family Enterprises v. Amoroso,* 630 So.2d 1067, 1068 (Fla. 1994*). See also Siemens Energy & Automation, Inc. v. Medina*, 719 So.2d 312, 315 (Fla. 3d DCA 1998), *rev. denied*, 733 So.2d 516 (Fla. 1999). Factors to be taken into consideration when determining whether a supplier has discharged its duty to warn the ultimate user of its product include: (1) the dangerous nature of the product; (2) the form in which the product is used; (3) the intensity and form of the warnings given; (4) the burdens to be imposed by requiring warnings; and (5) the likelihood that the warnings will be adequately communicated to the foreseeable users of the product. *Union Carbide Corp. v. Kavanaugh*, 879 So.2d 42, 45 (Fla. 4th DCA 2004).

4. **No-Privity, Breach of Implied Warranty Cases:** The doctrine of strict liability in tort supplants all no-privity, breach of implied warranty cases, because it was, in effect, created out of these cases. *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 (Fla. 1988).

§2:130.6 Sample Complaint

See Sample Complaints and Forms, Chapter 2, available through Digital Access.

§2:140 WRONGFUL DEATH

§2:140.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§2:140.1.1 Elements of Cause of Action — 1st DCA

To establish a cause of action for negligence in a wrongful death action, a plaintiff must allege and prove:
1. the existence of a legal duty owed to the decedent;
2. breach of that duty;
3. legal or proximate cause of death was that breach; and
4. consequential damages.

Source

Jenkins v. W.L. Roberts, Inc., 851 So.2d 781, 783 (Fla. 1st DCA 2003).

See Also

1. *Fritsch v. Rocky Bayou Country Club, Inc*., 799 So.2d 433, 435 (Fla. 1st DCA 2001).
2. *Coker v. Wal-Mart Stores, Inc*., 642 So.2d 774, 776 (Fla. 1st DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995).
3. *Griffis v. Wheeler*, 18 So.3d 2, 5 (Fla. 1st DCA 2009).

§2:140.1.2 Elements of Cause of Action — 2nd DCA

The elements of a cause of action in tort are: (1) a legal duty owed by defendant to plaintiff, (2) breach of that duty by defendant, (3) injury to plaintiff legally caused by defendant's breach, and (4) damages as a result of that injury." *O'Keefe v. Orea,* 731 So.2d 680, 684 (Fla. 1st DCA 1998); *See also Jenkins v. W.L. Roberts, Inc.,* 851 So.2d 781, 783 (Fla. 1st DCA 2003) (setting forth the elements of a cause of action for negligence in a wrongful death claim).

Source

Estate of Rotell v. Kuehnle, 38 So.3d 783 (Fla. 2d DCA 2010).

§2:140.1.3 Elements of Cause of Action — 3rd DCA

It is settled law that to maintain a cause of action sounding in negligence, such as the wrongful death action herein, the plaintiff must plead and prove three elements:
1. the existence of a duty recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others including the plaintiff;
2. A failure on the part of the defendant to perform that duty; and
3. An injury or damage to the plaintiff proximately caused by such failure.

Source

Tieder v. Little, 502 So.2d 923, 925 (Fla. 3d DCA 1987).

§2:140.1.4 Elements of Cause of Action — 4th DCA

The gravamen of the statute is the wrongful act, et cetera, of the person liable for damages. So it is in the instant case, where it is recited in the appellant's brief that the gravamen of the complaint is that the defendants were negligent. By description it is a tort, personal and transitory in nature. It has been well stated that such an action should be tried in the same manner and be governed by the same general principles of practice as it would have been had the injured person not died and was suing to recover damages for the wrongful act.

Source

Gaboury v. Flagler Hospital, Inc., 316 So.2d 642, 644 (Fla. 4th DCA 1975).

See Also

1. *Healthcare Underwriters Grp., Inc. v. Sanford, 2022 WL 945529, *2-3 (Fla. 4th DCA Mar. 30, 2022).*
2. *Daniels v. Greenfield*, 15 So.3d 908, 910 (Fla. 4th DCA 2009) ("Florida's Wrongful Death Act is codified in sections 768.16-768.26, Florida Statutes. The purpose of the Wrongful Death Act is to 'shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer.' §768.17, Fla. Stat. *See also Fla. Convalescent Ctrs. v. Somberg,* 840 So.2d 998, 1008 (Fla.2003) (stating that purpose of the Act is "to provide recovery to those who need it, specifically the surviving spouse, children, and dependents of the decedent"). The Act is remedial in nature and must be liberally construed. §768.17, Fla. Stat.").

§2:140.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

See Also

1. *Domino's Pizza, LLC v. Wiederhold*, 248 So. 3d 212, 219-20 (Fla. 5th DCA 2018) (concluding that plaintiff's right of action under wrongful death statute must be determined by facts existing at time of decedent's death, not time of decedent's injury).

§2:140.2 Statute of Limitations

Two Years. Fla. Stat. §95.11(4)(d); *Fulton County Adm'r v. Sullivan*, 753 So.2d 549, 552 (Fla. 1999) ("[A] cause of action for wrongful death accrues on the date of death"); *but see Thomas v. City of Jacksonville,* No. 3:13-cv-737-J-32MCR, 2017 WL 3316478, at *8 (M.D. Fla. Aug. 3 2017) (stating "Claims for wrongful death brought against a natural person for an intentional tort resulting in death from acts described in s. 782.04 (murder) or s. 782.07 (manslaughter) may be commenced at any time.").

§2:140.3 References

1. 17 Fla. Jur. 2d *Death* §§1–17 (2004).
2. 22A Am. Jur. 2d *Death* §§1, 2, 31–77, 329–393 (2003).
3. 25A C.J.S. *Death* §§17, 18, 117–140 (2002).
4. Florida Statutes §§768.16–768.26 (2005) (Florida Wrongful Death Act).
5. Wade R. Habeeb, Annotation, *Right to Amend Pending Personal Injury Action by Including Action for Wrongful Death after Statute of Limitations has run against Independent Death Action*, 71 A.L.R.3d 933 (1976).
6. Alien Tort Claim Act (ATCA) 28 U.S.C.A. §1350.
7. Marcia MacConnell, *Florida Negligence Law* (1997) (D&S Publications; ISBN 0-40926-454-7).

§2:140.4 Defenses

1. **Contributory Negligence:** The trial court additionally erred in failing to set off the economic damage award by the amount of comparative negligence of the plaintiffs. *See Cody v. Kernaghan*, 682 So.2d 1147 (Fla. 4th DCA 1996); *Horton v. Channing*, 698 So.2d 865, 867 (Fla. 1st DCA 1997).

2. **Felony, Death during Commission of:** Section 776.085, Florida Statutes (1993), creates a defense to the wrongful death action because plaintiff's decedent died during the attempted commission of a forcible felony. *Gonzalez v. Liberty Mut. Ins. Co*., 634 So.2d 178, 179 (Fla. 3d DCA 1994).

3. **Governmental Immunity:** There is a distinction between operational activities for which the state does not enjoy sovereign immunity and planning or judgmental government functions for which the state does enjoy sovereign immunity. An operational act has been described as one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented. In contrast, a planning or judgmental act involves an exercise of executive of legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning. *State of Florida, DOT v. City of Pembroke Pines*, 67 So.3d 1162 (Fla. 4th DCA 2011) (in a wrongful death suit by police officer who crashed a car, hitting a median, rolling over, and striking a palm tree, the allegations of negligence were the type of planning-level functions afforded sovereign immunity). When a governmental entity creates a known dangerous condition that is not readily observable to those who may be injured by such condition, then a duty arises at the operational level to warn of or protect the public from the known danger, and the failure to fulfill this duty will give rise to a cause of action.

4. **Duty:** The duty element of negligence is a threshold legal question; if no legal duty exists, then no action for negligence may lie. *See Jenkins v. W.L. Roberts, Inc.*, 851 So. 2d 781, 783 (Fla. 1st DCA 2003).

§2:140.5 Related Matters

1. **Action Brought by Personal Representative:** A wrongful death action may be brought only by the personal representative for the benefit of the decedent's survivors and estate. *Williams v. Infinity Ins. Co.*, 745 So.2d 573, 576 (Fla. 5th DCA 1999). *See* §768.20, Fla. Stat. (1999); *Hess v. Hess*, 758 So.2d 1203 (Fla. 4th DCA 2000); *Pearson v. DeLamerens*, 656 So.2d 217 (Fla. 3d DCA 1995); *Cont'l Nat'l Bank v. Brill*, 636 So.2d 782, 784 (Fla. 3d DCA 1994). The personal representative is a nominal party to the action while the estate and the survivors are the real parties in interest on whose behalf recovery is sought. *Morgan v. Am. Bankers Life Assurance Co. of Fla.*, 605 So.2d 104 (Fla. 3d DCA 1992); *Florida Emergency Physicians-Kang and Associates, M.D., P.A. v. Parker*, 800 So.2d 631, 633 (Fla. 5th DCA 2001). A personal representative may pursue both a survival action and an alternative wrongful death claim where the cause of the decedent's death may be disputed. *Capone v. Phillip Morris USA, Inc.*, 116 So.3d 363 (Fla. 2013); *see also Domino's Pizza, LLC v. Wiederhold*, 248 So.3d 212, 219-220 (Fla. 5th DCA 2018) (concluding that plaintiff's right of action under wrongful death statute must be determined by facts existing at time of decedent's death not time of decedent's injury).

2. **Common Law:** At common law there was no right of action for wrongful death. *Cinghina v. Racik*, 647 So.2d 289 (Fla. 4th DCA 1994); *White v. Clayton*, 323 So.2d 573 (Fla. 1975); *Eppes v. Covey*, 141 So.2d 747 (Fla. 1st DCA 1962), *rev'd on other grounds*, 153 So.2d 3 (Fla. 1963); *Chamberlain v. Florida Power Corporation*, 198 So. 486 (Fla. 1940); *Nolan v. Moore*, 88 So. 601 (Fla. 1921).

3. **Liberally Construed:** As the district court accurately observed, our analysis is guided by the Legislature's general intent that the remedial provisions of the wrongful death statute should be liberally, rather than strictly or narrowly, construed. While the general rule is that statutes in derogation of the common law are strictly construed, the general rule of strict construction does not, in Florida, apply to a remedial statute in derogation of the common law. *BellSouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 290 (Fla. 2003); *Cunningham v. Florida Dept. of Children and Families*, 782 So.2d 913, 915 (Fla. 1st DCA 2001), *rev. denied*, 797 So.2d 585 (Fla. 2001).

4. **Personal Injury Action Compared:** The personal injury cause of action for negligence is based on the common law; the cause of action for wrongful death is provided by statute (§768.19, Fla. Stat.). The negligence action requires a personal injury but not a death; the wrongful death action requires a death but not necessarily a death caused by negligence. The negligence action accrues at the time of the negligent act; the wrongful death action accrues at the time of the death. The negligence action is in favor of the person injured; the wrongful death action is in favor of the decedent's estate and statutorily designated survivors. The measure of damages in a personal injury negligence action is different from the damages provided by §768.21, Fla. Stat., for a wrongful death. In effect, both causes of action cannot exist at the same time because the cause of action for wrongful death does not accrue until the death which is the very event that extinguishes the personal injury cause of action that theretofore existed in favor of the negligently injured person. *Randall v. Walt Disney World Co.*, 140 So.3d 1118 (Fla. 5th DCA 2014).

5. **Presumption of Death:** At common law, upon the expiration of seven years' unexplained absence, a presumption of death arose. *Groover v. Simonhoff*, 157 So.2d 541 (Fla. 3d DCA 1963). Section 731.103(3) provides for that presumption to arise after only five years' unexplained absence. The statute is merely a procedure by which the Legislature has provided a method to judicially establish the presumption of death which has already arisen by the passage of time. *Id.* at 543 (considering former §734.34). However, just as the common law presumption did not preclude an inference that death is deemed to have occurred before the expiration of such period where the circumstances justify a conviction that death occurred at an earlier date, *see Johns v. Burns*, 67 So.2d 765, 767 (Fla. 1953), so too we hold that the statute does not preclude the establishment of death by circumstantial evidence prior to the expiration of the statutory period. *Woods v. Estate of Woods*, 681 So.2d 903, 905 (Fla. 4th DCA 1996).

6. **Unborn Viable Fetus:** An unborn viable fetus is not a "person" within the meaning of Florida's Wrongful Death Act. *Duncan v. Flynn*, 358 So.2d 178 (Fla. 1978). *See also Tanner v. Hartog*, 696 So.2d 705 (Fla. 1997).

7. **Injuries Caused by Tortfeasors in Separate Accidents Occurring Close in Time:** An injured party should be able to recover for his or her injuries and the recovery should not be diminished because of a jury's inability to apportion injury between wrongdoers. *Gross v. Lyons*, 763 So.2d 276 (Fla. 2000). Tortfeasors who contribute to cause an indivisible injury, incapable of apportionment, are both responsible for the entire injury. *Lawrence v. Hethcox*, 283 So.2d 41 (Fla.1973). Where evidence reveals two successive accidents, and the defendant is responsible only for one of the accidents, the burden is on the plaintiff to prove to the extent reasonably possible what injuries were proximately caused by each of the two accidents. *Gross* at 279; *see also Washewich v. LeFave*, 248 So.2d 670, 672 (Fla. 4th DCA 1971). Where the plaintiff sues the first of two successive tortfeasors and establishes liability, but the jury cannot apportion the injury between the two after both parties have had the opportunity to present evidence on the issue, the first tortfeasor will be liable for the entire injury. *Gross*, 763 So.2d at 279. Prior tortfeasors will be liable for whole injuries just as subsequent tortfeasors have been liable for entire unapportionable injuries, thereby providing full relief for proven injuries suffered by victims of negligence. *Gross* at 279. The policy issue is the same whether it is the first or second accident: a tortfeasor should not escape responsibility when two independent causes both proximately contribute to cause an ultimate injury and the plaintiff has done everything that could reasonably have been expected of the plaintiff to segregate the damages as between the two accidents. *Washewich*, 248 So.2d at 673. The joinder of two tortfeasors in one lawsuit for injuries sustained in two motor vehicle accidents was proper where the injuries were overlapping and not apportionable. *Lawrence*, 283 So.2d at 44.

8. **Worker's Compensation Law:** Employers in compliance with the Worker's Compensation Law are immune from claims for wrongful death, unless an intentional tort exception applies. §440.11, Fla. Stat.; *Ramsey v. Dewitt Excavating, Inc.*, 248 So.3d 1270, 1272 (Fla. 5th DCA 2018).

9. **Damages:** A statutory cap on wrongful death noneconomic damages recoverable in medical malpractice actions violates the right to equal protection under the Florida Constitution. *Estate of McCall v. U.S.*, 134 So.3d 894 (Fla. 2014).

10. **Mass Shootings:** Mass shootings and similar criminal acts with multiple victims are single "incidents or occurrences" for purposes of the State of Florida's limited waiver of sovereign immunity in tort actions, pursuant to §768.28(5), Florida Statutes; thus, total recovery in tort against the State of Florida based on such events is limited to an individual cap of $200,000 and an aggregate cap of $300,000, no matter how many tort claimants there are. *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 517 (Fla. 2020).

§2:150 DOG BITE—STATUTORY CLAIM

Florida's dog bite statute **supersedes the common law** as to claims against dog owners, but "only in those situations covered by the statute." *Belcher Yacht, Inc. v. Stickney,* 450 So.2d 1111, 1113 (Fla.1984).

§2:150.1 Elements of Cause of Action

§2:150.1.1 Florida Statutes

1. **Florida Statute §767.01: Dog owner's liability for damages to persons, domestic animals, or livestock:** Owners of dogs shall be liable for any damage done by their dogs to a person or to any animal included in the definitions of "domestic animal" and "livestock" as provided by §585.01. Fla. Stat. §767.01. (Current through the 2018 Second Regular Session of the 25th Legislature.)

2. **Florida Statutes §767.04: Dog owner's liability for damages to persons bitten:** The owner of any dog that bites any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, is liable for damages suffered by persons bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness. However, any negligence on the part of the person bitten that is a proximate cause of the biting incident reduces the liability of the owner of the dog by the percentage that the bitten person's negligence contributed to the biting incident. A person is lawfully upon private property of such owner within the meaning of this act when the person is on such property in the performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States, or when the person is on such property upon invitation, expressed or implied, of the owner. However, the owner is not liable, except as to a person under the age of 6, or unless the damages are proximately caused by a negligent act or omission of the owner, if at the time of any such injury the owner had displayed in a prominent place on his or her premises a sign easily readable including the words "Bad Dog." **The remedy provided by this section is in addition to and cumulative with any other remedy provided by statute or common law.** (Emphasis added.) Fla. Stat. §767.04. (Current through the 2018 Second Regular Session of the 25th Legislature.)

3. **Florida Statute §767.11(7):** "Owner" means any person, firm, corporation, or organization possessing, harboring, keeping, or having control or custody of an animal or, if the animal is owned by a person under the age of 18, that person's parent or guardian. Fla. Stat. §767.11(7). (Current through the 2018 Second Regular Session of the 25th Legislature.)

§2:150.1.2 Florida Supreme Court

Section 767.04 imposes absolute liability upon the owner of a dog for any injury caused by the dog regardless of scienter and provides absolute defenses by which a dog owner may escape liability from a dog bite injury inflicted by his dog.

SOURCE

Noble v. Yorke, 490 So.2d 29, 30 (Fla.1986)

See also

1. *Belcher Yacht, Inc. v. Stickney,* 450 So.2d 1111, 1113 (Fla.1984) ("[T]he statute cuts two ways: it imposes absolute liability upon the dog owner when the dog-bite victim is in a public place or lawfully on or in a private place except when the dog is carelessly or mischievously provoked or when the owner had displayed in a prominent place on the premises a sign easily readable including the words "Bad Dog.")
2. *Sweet v. Josephson*, 173 So.2d 444, 445 (Fla.1965) ("The Act contains many provisions with references to the premises where such injuries might be inflicted and the circumstances under which a dog-bite might occur but the gist of the section is the actual wounding by biting and the significant language is present that the liability attaches 'regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.'")

§2:150.2 Statute of Limitations

The statute of limitations for a dog bite cause of action is four (4) years from the time of the injury. Fla. Stat. §95.11(3)(f); *Sellers v. Miami-Dade County School Bd.*, 788 So.2d 1086, 1087 (Fla. 3rd DCA 2001) ("[A] cause of action accrues when the injury occurs and the damage is sustained") *quoting Department of Transp. v. Soldovere*, 519 So.2d 616, 617 (Fla.1988).

§2:150.3 References

1. 85 Am. Jur. Proof of Facts 3d 1, Proof of Landlord's Liability for Injury Inflicted by Tenant's Dog (2006).
2. Florida Pleading and Practice Forms §30:26, Complaint—By homeowner—Against neighbor—Attack by dog (2006).
3. Florida Pleading and Practice Forms §30:26.5, Complaint—Dog bite (2006).
4. La Coe's Forms for Pleading Under Fla. Rules of Civ. Pro. R 1.110(233.2), Rule 1.110(233.2). Dangerous animals (2006).
5. 2A Fla. Jur. 2d *Animals* §§75-78, 84-86 (2006).
6. 14 Causes of Action 685, Cause of Action Against Owner or Keeper of Domestic Animal to Recover for Personal Injuries Caused by Animal (2006).
7. Intentional Provocation, Contributory or Comparative Negligence, or Assumption of Risk as Defense to Action for Injury by Dog, 11 A.L.R.5th 127.
8. Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant, 87 A.L.R.4th 1004 (1991).
9. Liability of owner or occupant of premises for injury to person thereon by dog not owned or harbored by former, 92 A.L.R. 732, (1934).

§2:150.4 Defenses

1. **Provocation:** *Reed v. Bowen*, 512 So.2d 198, 199 (Fla.1987) ("[S]ince the statute plainly states that the owner shall not be liable to 'any person' who maliciously or carelessly provokes the dog, the court found that whether a particular child is capable of such an act is a question for the jury."); *Freire v. Leon*, 584 So.2d 98, 99 (Fla. 3rd DCA 1991) ("Provocation is an affirmative defense that must be proved by the defendant.")

2. **Warning Sign**: *Noble v. Yorke*, 490 So.2d 29, 30 (Fla.1986) ("One of [Section 767.04's] absolute defenses … is that a dog owner may escape liability if an easily readable sign with the words "Bad Dog" is displayed in a prominent place on the premises."); *Carroll v. Moxley*, 241 So.2d 681, 683 (Fla. 1970) ("In every case, the factual determination must be made whether the 'Bad Dog' sign as posted is in a prominent place and easily readable, so as to give actual notice of the risk of bite to the victim. The sufficiency of this notice should be determined by the circumstances of each case."); *Kaiser v. Baley*, 474 So.2d 906, 907 (Fla. 5th DCA 1985) ("adequacy of the warning [sign] is a jury question").

3. **Proximate Cause:** *Wendland v. Akers*, 356 So.2d 368, 370 (Fla. 4th DCA 1978), *overruled on other grounds by Wipperfurth v. Huie*, 654 So.2d 116 (Fla. 1995) ("We find nothing in this statute which indicates any intention to hold a dog owner strictly liable in a dog bite case where the proximate cause of the

injury was the intervening negligence of another person.") *overruled on other grounds*, *Wipperfurth v. Huie*, 654 So.2d 116 (Fla. 1995).

4. **No Common Law Defenses to Statutory Claim:** *Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 358 So.2d 21, 26 (Fla. 1978) ("[A] dog owner who is brought to trial pursuant to Section 767.04, Florida Statutes (1975), has available to him only the defenses expressed in the statute. To the extent that earlier decisions of the District Courts of Appeal express or imply the existence of a separate defense predicated upon assumption of risk, they are hereby overruled."); *Kilpatrick v. Sklar*, 497 So.2d 1289, 1290-1291 (Fla. 3rd DCA 1986) ("Chapter 767 renders dog owners strictly liable for damages or injuries to persons caused by their dogs… The Florida supreme court has consistently ruled that section 767.04 supersedes the common law and, therefore, abrogates common-law defenses in situations covered by the statute.") *approved by* 548 So.2d 215, 217 (Fla.1989); *Rattet v. Dual Sec. Systems, Inc.*, 373 So.2d 948, 951 (Fla. 3rd DCA 1979) ("Since the statutory liability of a dog owner is not based upon negligence, contributory negligence is not a defense available to an owner.")

5. **Trespassing:** The statute requires an injured person to be "lawfully" in the place where the bite occurred in order to recover damages; a person who is trespassing on private property without permission is not "lawfully" on the private property and, thus, cannot collect damages. See *Paskel v. Higgins*, 337 So. 2d 416 (Fla. 4th DCA 1976) (reversing summary judgment in favor of the plaintiffs because they failed to meet their burden of showing that when the bite occurred the minor victim was on defendants' property "'upon invitation, expressed or implied, of the owner.'").

§2:150.5 Related Matters

1. **Equitable Estoppel:** *Noble v. Yorke*, 490 So.2d 29, 31 (Fla.1986) ("[A]bsent specific statutory provision, there is no rule of law which in general exempts statutory rights and defenses from the operation of the doctrine of equitable estoppel. Significantly, the statute [section 767.04] neither expressly disallows application of the doctrine nor contains language suggesting such a result."); *Godbey v. Dresner*, 492 So.2d 800, 801 (Fla. 2nd DCA 1986); *But see Belcher Yacht, Inc. v. Stickney*, 450 So.2d 1111 (Fla.1984) (that plaintiff is invitee does not equitably estop defendant from relying on section 767.04 defenses); *Regueira v. Rafart*, 499 So.2d 937 (Fla. 3rd DCA 1986) (same).

2. **When Plaintiff Cannot Read:** *Registe v. Porter*, 557 So.2d 214, 215 (Fla. 2nd DCA 1990) ("[A] sign is effective to protect the property owner from liability regardless of the victim's failure to understand the warning solely because of an inability to read or write English."); *But see Flick v. Malino*, 374 So.2d 89, 90 (Fla. 5th DCA 1979) ("'[E]asily readable' means the plaintiff must have had ability and opportunity to read the warning sign, and in this case there was no dispute as to the fact that [a three-year-old girl] was incapable of reading the warning sign.").

3. **Chapter 767** of the Florida Statutes provides additional standards and penalties for dog bites and dangerous dogs that apply to actions brought by government agencies, but which may be used to establish the standard of care or a defense in a civil action.

§2:150.6 Related Causes of Action

1. Dog Bite Common Law Claim (§2:160)
2. Intentional Infliction of Emotional Distress (§10.10)
3. Assault (§12:10)
4. Battery (§12:20)
5. Negligence (§2:40)
6. Negligent Infliction of Emotional Distress (§2:10)
7. Agency, Actual
8. Negligent Hiring or Retention (§2:60)

§2:150.7 Sample Complaint

See Sample Complaints and Forms, Chapter 2, available through Digital Access.

§2:160 DOG BITE—COMMON LAW CLAIM

Common law claims for dog bites may be brought against (a) dog owners, only to the extent not covered by the Dog Bite Statute (Florida Statute §767.04, as amended in 1993) and (b) property owners and other non-owners. In practice, in most cases, plaintiff's counsel should allege both common law and statutory claims against the dog owner.

§2:160.1 Elements of Cause of Action – Florida Supreme Court

[A] dog-bite victim may sue the non-owner of the dog upon a theory of common law liability.

Source

Noble v. Yorke, 490 So.2d 29, 31-32 (Fla.1986).

See also

Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111, 1112 (Fla.1984) ("[S]ection 767.04 pertains only to the owner. It is silent as to the custodian or keeper of a dog who is not the owner. It neither creates liability on the part of [defendant] nor exonerates him because of the posted sign.")

§2:160.1.1 Elements of Cause of Action – 1st DCA

It is well established that unless a landlord has actual knowledge of the vicious nature of a tenant's dog, or such knowledge can be imputed to the landlord… there is no liability to third persons for injuries caused by the tenant's dog. [citations omitted]

Source

Bessent By and Through Bessent v. Matthews, 543 So.2d 438, 439 (Fla. 1st DCA 1989).

See also

1. *Anderson v. Walthal*, 468 So.2d 291, 294 (Fla. 1st DCA 1985) ("Should a jury conclude that [manager] had actual knowledge of the dog's presence and of her vicious propensities, and that [manager's] authority as manager included keeping the premises safe for business invitees, then that knowledge may be imputed to [defendant landlord]").

§2:160.1.2 Elements of Cause of Action – 2nd DCA

[L]andlord may be liable for tenant's dog if landlord knows dog is vicious and has sufficient control of premises to protect plaintiff.

Source

Sutherlund ex rel. Sutherland v. Pell, 738 So.2d 1016, 1017 (Fla. 2nd DCA1999) *citing Vasques v. Lopez,* 509 So.2d 1241 (Fla. 4th DCA 1987).

See also

1. *Ward v. Young*, 504 So.2d 528 (Fla. 2nd DCA1987) (restating common-law liability of landlord in dog bite cases).

§2:160.1.3 Elements of Cause of Action – 3rd DCA

[A] landlord may be liable for injuries resulting from an attack by a tenant's dog, if the landlord knew, or should have known that the tenant kept a vicious dog on the premises, and the landlord had the ability to control its presence.

Source

Rosseau v. Fintz, 711 So.2d 1352, 1353 (Fla. 3rd DCA1998) *citing Noble v. Yorke*, 490 So.2d 29 (Fla.1986); *Vasques By and Through Rocha v. Lopez,* 509 So.2d 1241 (Fla. 4th DCA 1987); *Ward v. Young,* 504 So.2d 528 (Fla. 2d DCA 1987); *Anderson v. Walthal,* 468 So.2d 291 (Fla. 1st DCA 1985).

See also

1. *Olave v. Howard*, 547 So.2d 349, 350 (Fla. 3rd DCA 1989) ("It is well established that unless a landlord has actual knowledge of the vicious nature of a tenant's dog, or such knowledge can be imputed to the landlord… there is no liability to third persons for injuries caused by the tenant's dog.").

§2:160.1.4 Elements of Cause of Action – 4th DCA

[A] landowner may be liable for injuries resulting from an attack by a bad dog owned by a tenant, if the landowner knows of the presence of the animal and its vicious propensity, and has the ability to control its presence.

Source

Sanzare v. Varesi, 681 So.2d 785, 786 (Fla. 4th DCA 1996).

See also

1. *Martin v. Gulfstream Metal Plating, Inc.*, 877 So.2d 688, 689-90 (Fla.4th DCA 2008).
2. *Ramirez v. M.L. Management Co., Inc.*, 920 So.2d 36, 39 (Fla. 4th DCA 2005) ("[A] landlord has a duty to protect its tenants in connection with a vicious dog of which the landlord has knowledge.").
3. *Barrwood Homeowners Ass'n, Inc. v. Maser*, 675 So.2d 983, 984 (Fla. 4th DCA 1996).("[A] landowner could be held liable for damages caused by a dog on its property where there was sufficient evidence from which a jury could determine that the landlord had knowledge of the vicious dog's presence and had the ability to control the premises.").
4. *Vasques v. Lopez,* 509 So.2d 1241, 1242 (Fla. 4th DCA 1987) ("[T]he owner of premises may be liable for injuries resulting from an attack by a bad dog owned by a tenant if the landlord knows of the presence of the animal and its vicious propensity, and has the ability to control its presence.").
5. *White v. Whitworth,* 509 So.2d 378, 380 (Fla. 4th DCA 1987) ("A landlord who recognizes and assumes the duty to protect co-tenants from dangerous propensities of a tenant's pet is required to undertake reasonable precautions to protect co-tenants from reasonably foreseeable injury occasioned thereby.").

§2:160.1.5 Elements of Cause of Action – 5th DCA

[T]he owner of the premises may be liable for injuries resulting from an attack by a bad dog owned by a tenant if the landlord has actual knowledge of the vicious nature of the tenant's dog or such knowledge can be imputed to the landlord and the landlord has the ability to control the dog's presence.

Source

Giaculli v. Bright, 584 So.2d 187, 189 (Fla. 5th DCA 1991).

See also

1. *Maher v. Best Western Inn*, 717 So.2d 97, 99 (Fla. 5th DCA 1998) ("By inviting dogs on its premises [defendant] thus created a foreseeable zone of risk, 'which placed upon it a duty to either lessen the risk or see that sufficient precautions are taken to protect others from the harm the risk poses.'") *quoting McCain v. Florida Power Corp.,* 593 So.2d 500, 503 (Fla. 1992).

§2:160.2 Statute of Limitations

The statute of limitations for a dog bite cause of action is four years from the time of the injury. Fla. Stat. §§95.11(3)(a) (for negligence); Fla. Stat. §§95.11(3)(o) (for assault, battery and all other intentional torts); *Sellers v. Miami-Dade County School Bd.*, 788 So.2d 1086, 1087 (Fla. 3rd DCA 2001) ("[A] cause of action accrues when the injury occurs and the damage is sustained") *quoting Department of Transp. v. Soldovere*, 519 So.2d 616, 617 (Fla. 1988).

§2:160.3 References

1. 85 Am. Jur. Proof of Facts 3d 1, Proof of Landlord's Liability for Injury Inflicted by Tenant's Dog (2006).
2. Florida Pleading and Practice Forms §30:26, Complaint—By homeowner—Against neighbor—Attack by dog (2006).
3. Florida Pleading and Practice Forms §30:26.5, Complaint—Dog bite (2006).
4. La Coe's Forms for Pleading Under Fla. Rules of Civ. Pro. R 1.110(233.2), Rule 1.110(233.2). Dangerous animals (2006).
5. 2A Fla. Jur. 2d *Animals* §§75-78, 84-86 (2006).
6. 14 Causes of Action 685, Cause of Action Against Owner or Keeper of Domestic Animal to Recover for Personal Injuries Caused by Animal (2006).
7. Intentional Provocation, Contributory or Comparative Negligence, or Assumption of Risk as Defense to Action for Injury by Dog, 11 A.L.R.5th 127.
8. Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant, 87 A.L.R.4th 1004 (1991).
9. Liability of owner or occupant of premises for injury to person thereon by dog not owned or harbored by former, 92 A.L.R. 732, (1934).

§2:160.4 Defenses

All Common Law Defenses: *Kilpatrick v. Sklar*, 548 So.2d 215, 218 (Fla. 1989) ("[Defendant] who had no ownership interest in the dogs, is entitled to [common law] defense"). *See also* "Negligence" *infra*.

§2:160.5 Related Matters

1. **Liability of Landlord When Dog-Bites Occur Outside Leased Premises.** *Tran v. Bancroft*, 648 So.2d 314, 315 (Fla. 4th DCA 1995) (landlord is not liable for damages that occur outside of landlord's property) *citing Allen v. Enslow,* 423 So.2d 616 (Fla. 1st DCA 1982); *Ward v. Young,* 504 So.2d 528, 529 (Fla. 2d DCA 1987); *O'Steen v. Kemmerer,* 344 So.2d 313 (Fla. 1st DCA 1977) (absent some special interest or relationship between the landowner and an animal kept on the premises by an occupant, the landowner will not be liable for injuries that the animal causes away from the property). *But see Ramirez v. M.L. Management Co., Inc.*, 920 So.2d 36, 38 (Fla. 4th DCA 2005) ("Where a special relationship exists, such as that of a business and its invitee or a landlord and tenant, the duty will be measured in terms of that special relationship and not based on the mere physical location of the injury.").

2. **Liability of employer for dog of employee:** *Roberts v. 219 South Atlantic Blvd., Inc.*, 914 So.2d 1108, 1109 (Fla. 4th DCA 2005) ("[A]n employer is not liable for injury caused to a third party by his employee's dog if the bringing of the dog to the work site: 1) "is not consented to or encouraged by the employer," 2) is "of no benefit to the employer," 3) is "not within the scope of the employee's duties," and 4) "the employer has no knowledge of the vicious propensities of the animal."), *citing Poling v. Peter R. Rylance, Inc.,* 388 So.2d 353 (Fla. 4th DCA 1980).

§2:160.6 Related Causes of Action

1. Dog Bite Statutory Claim (§2:150)
2. Intentional Infliction of Emotional Distress (§10.10)
3. Assault (§12:10)
4. Battery (§12:20)
5. Negligence (§2:40)
6. Negligent Infliction of Emotional Distress (§2:10)
7. Agency, Actual
8. Negligent Hiring or Retention (§2:60)

§2:160.7 Sample Complaint

See Complaint Library, Forms 2:150 and 2:150.1 on Digital Access.

§2:170 NEGLIGENT SECURITY

Florida recognizes the legal theory that one person or party may be liable for failing to protect another person from the results of reasonably foreseeable criminal conduct. A property owner owes business visitors a duty of reasonable care for their safety. To maintain an action for negligent security, which the law also refers to as a species of a premises liability claim, a plaintiff must establish the same elements required for a negligence claim, including:

1. the defendant owed some legal duty to the plaintiff;
2. the defendant breached that duty;
3. the plaintiff was injured as a result of the defendant's breach of duty; and
4. the injury caused damage.

E.g., Mulhearn v. K-Mart Corp., No. 6:01-cv-523-Orl-31KRS, 2006 U.S. Dist. LEXIS 59433, at *4-5 (M.D. Fla. 2006) (in a negligent security action, setting forth the elements of a negligence claim, and explaining that "[t]he owner or occupier of property has a duty to protect an invitee on his premises from a criminal attack that is reasonably foreseeable").

§2:170.1 Elements of Cause of Action — Florida Supreme Court

"If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes an actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby. Thus, it would be irrational to allow a party who negligently fails to provide reasonable security measures to reduce its liability because there is an intervening intentional tort, where the intervening intentional tort is exactly what the security measures are supposed to protect against." *Merrill Crossings Assocs. v. McDonald*, 705 So.2d 560 (Fla. 1997).

The property owner is not required to protect an invitee from every conceivable risk; the property owner owes only a duty to protect against risks which are reasonably foreseeable. The question of foreseeability is for the trier of fact. *Hall v. Billy Jack's, Inc.*, 458 So.2d 760 (Fla. 1984).

"The proprietor of a place of public entertainment owes his invitee a duty to use due care to maintain his premises in a reasonably safe condition commensurate with the activities conducted thereon. The proprietor of a liquor saloon, although not an insurer of his patrons' safety, is bound to use every reasonable effort to maintain order among his patrons, employees, or those who come upon the premises and are likely to produce disorder to the injury or inconvenience of patrons lawfully in his place of business. A determination as to whether this duty has been violated will depend upon a review of the facts of each individual case. Additionally, the risk of harm must be foreseeable. Specific knowledge of a dangerous individual is not the exclusive method of proving foreseeability. It can be shown by proving that a proprietor knew or should have known of a dangerous condition on his premises that was likely to cause harm to a patron." *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983).

§2:170.1.1 Elements of Cause of Action — 1st DCA

Knowledge of an individual's history of violence is considered competent evidence of foreseeability. However, proof of foreseeability is not limited by law to evidence of actual or constructive knowledge of an individual's propensity for violence. "A tavern owner's actual or constructive knowledge, based upon past experience, that there is a likelihood of disorderly conduct by third persons in general, which may endanger the safety of his patrons, is sufficient to establish foreseeability. This rationale applies with equal force to the owner of a hotel." *Hardy v. Pier 99 Motor Inn*, 664 So.2d 1095 (Fla. 1st DCA 1995).

"As a motel operator, appellee was under a continuing legal duty to its business invitees to use ordinary care to keep the premises in a reasonably safe condition and protect them from harm due to reasonably foreseeable risks of injury. While foreseeability of such risks requires reasonable precautionary measures that will deter crime generally, such measures cannot reasonably be expected to *prevent* all crime or any one specific criminal act. Factors to be considered in proving foreseeability include: (1) industry standards, (2) community crime rate, (3) extent of assaults or criminal

activity in the area or in similar business enterprises, and (4) the presence of suspicious persons and the peculiar security problems posed by the premises design." *Satchwell v. La Quinta Motor Inns, Inc.*, 532 So.2d 1348 (Fla. 1st DCA 1988).

"The four elements of negligence are (1) a legal duty owed by defendant to plaintiff, (2) breach of that duty by defendant, (3) an injury to plaintiff legally caused by defendant's breach, and (4) damages as a result of the injury. In general, the landlord's duty is to exercise reasonable care to maintain the premises in a reasonably safe condition." *Paterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985).

"Whether a criminal attack on a tenant is an intervening act that relieves landlords of liability depends on whether it was reasonably foreseeable. A landowner has no duty to protect an invitee on his premises from criminal attack by a person over whom the landowner has no control unless the criminal attack is reasonably foreseeable. To impose such a duty upon the landowner, the invitee must allege and prove that the landowner had actual or constructive knowledge of prior similar acts committed upon invitees on the premises because a landowner should not be required to take precautions against a sudden attack which the landowner has no reason to anticipate." *Paterson v. Deeb*, 472 So. 2d 1210 (Fla. 1st DCA 1985).

"In some circumstances, the landlord's duty to reasonably provide protection from a criminal attack does not have to be implied from prior similar occurrences on the leased premises. For instance, a landlord's breach of an implied duty to provide locks and maintain common areas in a safe condition may serve as the legal basis for liability to the tenant for injuries resulting from unauthorized entry and criminal acts within the premises." *Paterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985).

§2:170.1.2 Elements of Cause of Action — 2nd DCA

"Ordinarily, a property owner has no duty to protect a person on his premises from the criminal attack of a third party. However, there are some circumstances where the courts have imposed liability because of the owner's prior knowledge of the danger or because of a special relationship between the parties … There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under such ordinary circumstances, it is not reasonably to be expected that anyone will intentionally tamper with a railway track, blow up a powder magazine, forge a check, push another man into an excavation, assault a railway passenger, or hold up a bowling alley and shoot a patron. There are, however, other situations, in which either a special responsibility resting upon the defendant for the protection of the plaintiff, or an especial temptation and opportunity for criminal misconduct, brought about by the defendant, will call upon him to take precautions against it. Liability will exist only where the likelihood of the misconduct and the unreasonable risk of it outweighs the burden of protecting against it."

Source

Drake v. Sun Bank & Trust Co., 377 So.2d 1013 (Fla. 2d DCA 1979).

§2:170.1.3 Elements of Cause of Action — 3rd DCA

It is well-settled that the question of duty in a negligent security case is one for the jury to determine what precautions are reasonably required in the exercise of a particular duty of due care. If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused thereby. *L.K. v. Water's Edge Assoc.*, 532 So.2d 1097 (Fla. 3d DCA 1988); *Holly v. Mt. Zion Terrace Apts.*, 382 So.2d 98 (Fla. 3d DCA 1980).

"The question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it. Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of risk, and the public interest in the proposed solution. A proprietor of the premises is not the insurer of the safety of persons on the premises. His duty to control the acts of third persons is a duty of reasonable care to protect against known or reasonably foreseeable risk. He is not required to take precaution against attacks by third persons which he has no reason to anticipate. Once a duty exists, however, the question of whether a landlord breached his duty to protect tenants against reasonably foreseeable criminal activity is properly a question for the jury. It is peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty." *Ten Associates v. McCutchen*, 398 So.2d 860 (Fla. 3d DCA 1981).

§2:170.1.4 Elements of Cause of Action — 4th DCA

"A landlord has no duty to third parties for injuries caused by a tenant's dog where those injuries occur off the leased premises." *Tran v. Bancroft*, 648 So.2d 314 (Fla. 4th DCA 1995). However, the landlord's duty to the tenants can extend beyond the boundaries of an apartment complex where a special relationship exists, such as that of a business and its invitee or a landlord and tenant; the duty will be measured in terms of that special relationship, and not based on the mere physical location of the injury. A tenant may have a cause of action against her apartment complex when she is injured after being bitten by the dog of another tenant while in a park that is adjacent to the apartment complex when that park is advertised by the apartment complex as an amenity of living in the apartment complex. *Ramirez v. M.L. Mgt. Co., Inc.*, 920 So.2d 36 (Fla. 4th DCA 2005).

§2:170.1.5 Elements of Cause of Action — 5th DCA

In a negligence action where the plaintiff is assaulted in a parking lot by an intentional tortfeasor, the intentional tortfeasor should not be listed on the verdict form. Liability should not be apportioned between a negligent party and a criminal. *Hennis v. City Tropics Bistro, Inc.*, 1 So.3d 1152 (Fla. 5th DCA 2009).

"Foreseeability of criminal attacks upon invitees while on a property owner's or occupier's property is determined in light of all the circumstances of the case rather than by a rigid application of the mechanical rule requiring evidence of prior similar criminal acts against invitees on the property." *Foster v. Po Folks, Inc.*, 674 So.2d 843 (Fla. 4th DCA 1996).

§2:170.2 Statute of Limitations

Four years. Fla. Stat. §95.11(3)(a).

§2:170.3 Defenses

1. **Foreseeability:** A property owner only owes a duty to protect against risks which are reasonably foreseeable. *Hall v. Billy Jack's, Inc.*, 458 So. 2d 760 (Fla. 1984). A proprietor of the premises is not the insurer of the safety of persons on the premises. His duty to control the acts of third persons is a duty of reasonable care to protect against known or reasonably foreseeable risk. He is not required to take precaution against attacks by third persons that he has no reason to anticipate. *Ten Associates v. McCutchen*, 398 So.2d 860 (Fla. 3d DCA 1981).

2. **Comparative Negligence:** In suits for negligence, the defendant is entitled to raise the defense of comparative negligence. *Island City Flying Service v. General Electric Credit Corp.*, 585 So.2d 274 (Fla. 1991).

3. **Express Assumption of Risk:** In *Blackburn v. Dorta*, 348 So.2d 287 (Fla. 1977), the Florida Supreme Court rejected the doctrine of implied assumption of risk as a complete bar to a plaintiff's recovery against a negligent defendant. *Blackburn* had no effect, however, on the doctrine of *express* assumption of risk, which includes express covenants not to sue and situations of actual consent. In cases where a plaintiff expressly assumes a risk, he "waives his right to be free from those bodily contacts inherent in the changes taken," and is barred from recovery. *Kuehner v. Green*, 436 So.2d 78 (Fla. 1983). The court in *Kuehner* held that in order for a jury to find express assumption of risk, it is necessary for it to determine that the plaintiff "subjectively appreciated the risk giving rise to the injury" (i.e. had actual knowledge of the risk), but proceeded nonetheless to participate in the face of such danger. *Potter v. Green Meadows*, 510 So.2d 1225, 1226 (Fla. 1st DCA 1987).

4. **Implied Assumption of Risk:** Implied assumption of risk has been subsumed into the comparative negligence doctrine. *Fleming v. Albertson's Inc.*, 535 So.2d 682, 683 (Fla. 1st DCA 1988), *petition for rev. denied*, 542 So.2d 1333 (Fla. 1989); *Blackburn v. Dorta*, 348 So.2d 287 (Fla. 1987), *on remand*, 350 So.2d 25 (Fla. 3d DCA 1977).

5. **Open and Obvious:** Since the advent of comparative negligence, the "open and obvious" hazard doctrine no longer bars recovery. Instead, the doctrine serves as an affirmative (comparative negligence) defense

for landowners confronted by a plaintiff who knew of the danger. *CSX Transportation, Inc. v. Whittler*, 584 So.2d 579, 583 (Fla. 4th DCA 1991), *rev. denied*, 595 So.2d 556 (Fla. 1992). *See also Stewart v. Boho, Inc.*, 493 So.2d 95, 96 (Fla. 4th DCA 1986); *but see Brookie v. Winn-Dixie Stores, Inc.*, 213 So.3d 1129, 1133 (Fla. 1st DCA 2017) (holding open and obvious doctrine to completely bar recovery when either (1) the condition is "open and obvious and not inherently dangerous," or (2) the condition may be dangerous, but is "so open and obvious that an invitee may be reasonably expected to discover them to protect himself.").

6. **Intervening Cause:** An intervening cause relieves a tortfeasor from liability only if it is completely independent of, and not in any way set in motion by, the tortfeasor's negligence. The intervening cause must be unforeseeable. Another way of stating the question whether the intervening cause was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the defendant's negligent conduct. *Townsend v. Westside Dodge, Inc.*, 642 So.2d 49, 50 (Fla. 1st DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995). Where reasonable people cannot differ, the issue may be one of law for the court to decide, not simply a question of factual causation. *Scott v. Florida Dept. of Transportation*, 752 So.2d 30, 33 (Fla. 1st DCA 2000).

7. **Sovereign Immunity:** Generally, within the realm of sovereign immunity, the discretionary, judgmental, planning-level decisions of a governmental entity are immune from suit, while operational decisions are not. *City of Coral Springs v, Rippe*, 743 So.2d 61, 63 (Fla. 4th DCA 1999), *rev. dismissed*, 751 So.2d 1250 (Fla. 2000). Section 768.28(6)(a) precludes any action from being instituted on a claim against the state or one of its agencies or subdivisions unless the claimant has presented a written claim both to the appropriate agency and the DOI within three years after the claim accrues, and the DOI or the appropriate agency denies the claim in writing. *Morhaim v. Department of Transportation*, 737 So.2d 1234, 1236 (Fla. 3d DCA 1999), *rev. denied*, 751 So.2d 1252 (Fla. 2000).

8. **Sovereign Immunity - Agents of the State:** The immunity in section 768.28(9)(a) extends to certain private parties who are involved in contractual relationships with the state, provided that such parties are "agents" of the state. *See Stoll v. Noel*, 694 So.2d 701 (Fla. 1997). Whether the party being contracted with is an agent of the state turns on the degree of control retained or exercised by the state agency. Agency status is a question of fact, except in those cases where the party opposing summary judgment is unable to point to any conflicting facts or inferences to be drawn from the facts. *McFeely v. Prudential Healthcare Plan, Inc.*, 843 So.2d 1023 (Fla. 1st DCA 2003); *M.S. v. Nova Southeastern University Inc.*, 881 So.2d 614, 617 (Fla. 4th DCA 2004), *rev. denied*, 900 So.2d 443 (Fla. 2005).

§2:170.4 Related Matters

1. **Tavern Owner:** "A tavern owner is not required to protect the patron from every conceivable risk; he owes only a duty to protect against those risks which are reasonably foreseeable. A dangerous condition may be indicated if, according to past experience, there is a likelihood of disorderly conduct by third persons in general which might endanger the safety of patrons or if security staffing is inadequate." *Hall v. Billy Jack's, Inc.*, 458 So.2d 760 (Fla. 1984); *Borda v. East Coast Entertainment, Inc.,* 950 So.2d 488, 491 (Fla. 4th DCA 2007); *Bellevue v. Frenchy's South Beach Café, Inc.*, 136 So.3d 640, 643 (Fla. 2d DCA 2013).

2. **Bank Owner:** Banks are not required to go to unreasonable lengths to prevent bank robberies. They are merely obliged to exercise reasonable care to protect those who are upon their premises to transact business. They cannot be held accountable for the criminal acts of third persons under any and all circumstances. *Drake v. Sun Bank & Trust Co.*, 377 So.2d 1013 (Fla. 2nd DCA 1979).

3. **Bus Station:** In a case where a rider of a Greyhound bus was assaulted after arriving at a Greyhound bus station that was darkened, closed, and locked, the court determined that it was a question for the jury to determine: (a) whether Greyhound owed a duty to the rider to let her know in advance of her trip that the station would be closed; and (b) whether the Greyhound station was located in a "high crime area." As such, the evidence was sufficient to create an issue for a jury to decide as to whether a criminal attack

on appellant was reasonably foreseeable by Greyhound under the circumstances. *Werndli v. Greyhound Lines, Inc.*, 412 So.2d 384 (Fla. 2d DCA 1982).

4. **Premises Liability:** "[W]e take this opportunity to clarify that negligent security cases fall under the auspices of premises liability as opposed to ordinary negligence. In addition to the fact that there is case law supporting this conclusion, it also makes logical sense. Ordinary negligence involves active negligence—meaning the tort-feaser actually does something to harm the injured party, whereas premises liability involves passive negligence—meaning the tort-feaser's failure to do something to its property resulted in harm to the injured party. … As negligent security actions concern the landowner's *failure* to keep the premises safe and secure from foreseeable criminal activity, it follows that they fall under the umbrella of premises liability as opposed to ordinary negligence." *Nicholson v. Stonybrook Apartments*, LLC, 154 So.3d 490, 493-94 (Fla. 4th DCA 2015).

5. **Alternative Liability:** The theory of alternative liability applies where the conduct of two or more actors is tortious, and it is proved that the injury to the plaintiff was caused by only one of them, but there is uncertainty as to which ones actually caused it. Under these circumstances, the burden is placed upon each of the negligent actors to prove that he did not cause the plaintiff's injury. Defendants unable to meet the burden are jointly and severally liable. Restatement (Second) of Torts §433B(3). This theory of liability is based on a policy determination that an innocent plaintiff should not be without a remedy because he is unable to prove which of the negligent defendants caused his injuries. *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 281 (Fla. 1990).

6. **Victim-Targeted Crime:** While an employer-business premises owner can make out the defense that the crime against an employee was victim-targeted, which no measure of preventative security measures could guard against, the premises owner cannot use expert testimony to comment on the motive of the assailant. *L.B. v. The Naked Truth III, Inc.*, 117 So.3d 1114, 1117 (Fla. 3d DCA 2012).

7. **Security Companies:** Security companies voluntarily assume the duty to guard against crime by contractually agreeing to do so; thus, proof of prior criminal offenses in the area is not necessary to establish the element of duty in cases against such defendants. *See Vazquez v. Lago Grande Homeowners Ass'n*, 900 So. 2d 587, 593 (Fla. 3d DCA 2004); *Burns Int'l Sec. Servs. Inc. of Fla. v. Philadelphia Indem. Ins. Co.*, 899 So. 2d 361, 364-65 (Fla. 4th DCA 2005).

8. **Mass Shootings:** Mass shootings and similar criminal acts with multiple victims are single "incidents or occurrences" for purposes of the State of Florida's limited waiver of sovereign immunity in tort actions, pursuant to §768.28(5), Florida Statutes; thus, total recovery in tort against the State of Florida based on such events is limited to an individual cap of $200,000 and an aggregate cap of $300,000, no matter how many tort claimants there are. *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 517 (Fla. 2020).

§2:170.5 Additional References

1. Jill Grim, *Peer Harassment In Our Schools: Should Teachers and Administrators Join The Fight?*, 10 Barry L. Rev. 155 (2008) (this article provides useful information that may apply to the duty element of a negligent security claim).
2. Peter Lopez, *Foreseeable Zone of Risk: An Analysis of Florida's Off-Premises Liability Standard*, 55 U. Miami L. Rev. 397 (2001).
3. Jonathan M. Matzner, *When Category II Meets Category III: Sovereign Immunity or Liability for the Criminal Acts of Third Parties on Municipally Owned Property*, 30 Stetson L. Rev. 1019 (2001).
4. Theresa L. Fiset, *Comparative Fault As A Tool To Nullify The Duty To Protect: Apportioning Liability To A Non-Party Intentional Tortfeasor In Stellas v. Alamo Rent-A-Car, Inc.*, 27 Stetson L. Rev. 699 (1997) (the question of whether the "the jury verdict form should include an intentional tortfeasor for purposes of apportioning fault in causes of action based on negligent failure to protect from a criminal attack may arise in negligent security cases").

CHAPTER 3

CONTRACT CASES

§3:10 BREACH OF CONTRACT
§3:10.1 Elements of Cause of Action — Florida Supreme Court
§3:10.1.1 Elements of Cause of Action — 1st DCA
§3:10.1.2 Elements of Cause of Action — 2nd DCA
§3:10.1.3 Elements of Cause of Action — 3rd DCA
§3:10.1.4 Elements of Cause of Action — 4th DCA
§3:10.1.5 Elements of Cause of Action — 5th DCA
§3:10.2 Statute of Limitations
§3:10.3 References
§3:10.4 Defenses
§3:10.5 Related Matters
§3:10.6 Sample Complaints

§3:20 BREACH OF IMPLIED-IN-FACT CONTRACT
§3:20.1 Elements of Cause of Action — Florida Supreme Court
§3:20.1.1 Elements of Cause of Action — 1st DCA
§3:20.1.2 Elements of Cause of Action — 2nd DCA
§3:20.1.3 Elements of Cause of Action — 3rd DCA
§3:20.1.4 Elements of Cause of Action — 4th DCA
§3:20.1.5 Elements of Cause of Action — 5th DCA
§3:20.2 Statute of Limitations
§3:20.3 References
§3:20.4 Defenses
§3:20.5 Related Matters

§3:30 BREACH OF IMPLIED-IN-LAW CONTRACT
§3:30.1 Elements of Cause of Action — Florida Supreme Court
§3:30.1.1 Elements of Cause of Action — 1st DCA
§3:30.1.2 Elements of Cause of Action — 2nd DCA
§3:30.1.3 Elements of Cause of Action — 3rd DCA
§3:30.1.4 Elements of Cause of Action — 4th DCA
§3:30.1.5 Elements of Cause of Action — 5th DCA
§3:30.2 Statute of Limitations
§3:30.3 References
§3:30.4 Defenses
§3:30.5 Related Matters

§3:40 BREACH OF THIRD PARTY BENEFICIARY CONTRACT
§3:40.1 Elements of Cause of Action — Florida Supreme Court
§3:40.1.1 Elements of Cause of Action — 1st DCA
§3:40.1.2 Elements of Cause of Action — 2nd DCA
§3:40.1.3 Elements of Cause of Action — 3rd DCA
§3:40.1.4 Elements of Cause of Action — 4th DCA
§3:40.1.5 Elements of Cause of Action — 5th DCA
§3:40.2 Statute of Limitations
§3:40.3 References
§3:40.4 Defenses

§3:50 ESTOPPEL, PROMISSORY
§3:50.1 Elements of Cause of Action — Florida Supreme Court
§3:50.1.1 Elements of Cause of Action — 1st DCA
§3:50.1.2 Elements of Cause of Action — 2nd DCA
§3:50.1.3 Elements of Cause of Action — 3rd DCA
§3:50.1.4 Elements of Cause of Action — 4th DCA
§3:50.1.5 Elements of Cause of Action — 5th DCA
§3:50.2 Statute of Limitations
§3:50.3 References
§3:50.4 Defenses
§3:50.5 Related Matters
§3:50.6 Sample Complaint

§3:60 RESCISSION
§3:60.1 Elements of Cause of Action — Florida Supreme Court
§3:60.1.1 Elements of Cause of Action — 1st DCA
§3:60.1.2 Elements of Cause of Action — 2nd DCA
§3:60.1.3 Elements of Cause of Action — 3rd DCA
§3:60.1.4 Elements of Cause of Action — 4th DCA
§3:60.1.5 Elements of Cause of Action — 5th DCA
§3:60.2 Statute of Limitations
§3:60.3 References
§3:60.4 Defenses
§3:60.5 Related Matters

§3:70 SPECIFIC PERFORMANCE
§3:70.1 Elements of Cause of Action — Florida Supreme Court
§3:70.1.1 Elements of Cause of Action — 1st DCA
§3:70.1.2 Elements of Cause of Action — 2nd DCA
§3:70.1.3 Elements of Cause of Action — 3rd DCA
§3:70.1.4 Elements of Cause of Action — 4th DCA
§3:70.1.5 Elements of Cause of Action — 5th DCA
§3:70.2 Statute of Limitations
§3:70.3 Defenses
§3:70.4 Related Matters
§3:70.5 Sample Complaint
§3:70.6 Complaint (Fla.R.Civ.P. Form 1.941)

§3:80 TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP
§3:80.1 Elements of Cause of Action — Florida Supreme Court
§3:80.1.1 Elements of Cause of Action — 1st DCA
§3:80.1.2 Elements of Cause of Action — 2nd DCA
§3:80.1.3 Elements of Cause of Action — 3rd DCA
§3:80.1.4 Elements of Cause of Action — 4th DCA
§3:80.1.5 Elements of Cause of Action — 5th DCA
§3:80.2 Statute of Limitations
§3:80.3 References
§3:80.4 Defenses
§3:80.5 Related Matters

§3:90 UNJUST ENRICHMENT
§3:90.1 Elements of Cause of Action — Florida Supreme Court
§3:90.1.1 Elements of Cause of Action — 1st DCA
§3:90.1.2 Elements of Cause of Action — 2nd DCA
§3:90.1.3 Elements of Cause of Action — 3rd DCA
§3:90.1.4 Elements of Cause of Action — 4th DCA
§3:90.1.5 Elements of Cause of Action — 5th DCA
§3:90.2 Statute of Limitations
§3:90.3 References
§3:90.4 Defenses
§3:90.5 Related Matters
§3:90.6 Sample Cause of Action

§3:100 USURIOUS TRANSACTION
§3:100.1 Elements of Cause of Action — Florida Supreme Court
§3:100.1.1 Elements of Cause of Action — 1st DCA
§3:100.1.2 Elements of Cause of Action — 2nd DCA
§3:100.1.3 Elements of Cause of Action — 3rd DCA
§3:100.1.4 Elements of Cause of Action — 4th DCA
§3:100.1.5 Elements of Cause of Action — 5th DCA
§3:100.2 Statute of Limitations
§3:100.3 References
§3:100.4 Defenses
§3:100.5 Related Matters

§3:110 BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
§3:110.1 Elements of Cause of Action — Florida Supreme Court
§3:110.1.1 Elements of Cause of Action — 1st DCA
§3:110.1.2 Elements of Cause of Action — 2nd DCA
§3:110.1.3 Elements of Cause of Action — 3rd DCA
§3:110.1.4 Elements of Cause of Action — 4th DCA
§3:110.1.5 Elements of Cause of Action — 5th DCA
§3:110.2 Statute of Limitations
§3:110.3 References
§3:110.4 Defenses
§3:110.5 Related Matters

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§3:10 BREACH OF CONTRACT

§3:10.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

See Also

1. *Hazen v. Cobb*, 117 So. 853, 859 (Fla. 1928) ("[w]e have held that a cause of action for an entire breach of the contract immediately arises upon the wrongful discharge of an employee under a contract for a definite time, and it is not necessary to await the termination of that period before asking the courts for redress.").
2. *Fontainebleau Hotel Corp. v. Walters*, 246 So.2d 563, 565 (Fla. 1971).

§3:10.1.1 Elements of Cause of Action — 1st DCA

To establish breach of contract, it is plaintiff's burden to prove: (1) a contract existed; (2) the contract was breached; and (3) damages flowed from that breach.

Source

A.R. Holland, Inc. v. Wendco Corp., 884 So.2d 1006, 1006 (Fla. 1st DCA 2004).

See Also

1. *Ford Motor Credit Co. LLC v. Parks*, 2022 WL 1482387, *2 (Fla. 1st DCA May 11, 2022).
2. *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So.2d 297, 301 (Fla. 1st DCA 1999) (Note: Omits the element of damages).
3. *Marshall Construction, Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So.2d 845, 848 (Fla. 1st DCA 1990) ("[I]n order to maintain an action for breach of contract, a claimant must first establish performance on its part of the contractual obligations imposed in the contract.").
4. *Knowles v. C.I.T. Corp.*, 346 So.2d 1042, 1043 (Fla. 1st DCA 1977) ("It is elementary that in order to recover on a claim for breach of contract the burden is upon the claimant to prove by a preponderance of the evidence the existence of a contract, a breach thereof and damages flowing from the breach.").

§3:10.1.2 Elements of Cause of Action — 2nd DCA

The elements of an action for breach of contract are:

1. the existence of a contract;
2. a breach of the contract; and
3. damages resulting from the breach.

Source

Ferguson Enters. v. Astro Air Conditioning & Heating, Inc., 137 So. 3d 613, 615 (Fla. 2d DCA 2014); *Rollins, Inc. v. Butland*, 951 So.2d 860, 876 (Fla. 2d DCA 2006) ("In addition, in order to maintain an action for breach of contract, a claimant must also prove performance of its obligations under the contract or a legal excuse for its nonperformance.").

See Also

1. Synergy Cont. Grp., Inc. v. Fednat Ins. Co., 332 So.3d 62, 65 (Fla. 2d DCA 2021).
2. *Farman v. Deutsche Bank Nat'l Tr. Co. as Tr. for Long Beach Mortg. Loan Tr. 2006-05*, 311 So. 3d 191, 195 (Fla. 2d DCA 2020).
3. *JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.*, 292 So.3d 500, 508 (Fla. 3d DCA 2020).
4. *Nat'l Collegiate Student Loan Tr. 2006-4 v. Meyer*, 265 So. 3d 715, 718 (Fla. 2d DCA 2019).
5. *Asset Mgmt. Holdings, LLC v. Assets Recovery Ctr. Inv., LLC,* 238 So.3d 908, 912 (Fla. 2d DCA 2018).
6. *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So.2d 253, 255 (Fla. 2d DCA 1994) (stating that the plaintiff properly pled a breach of contract by alleging an offer, acceptance, consideration, a contract, breach of the contract and damages).

7. *Perry v. Cosgrove*, 464 So.2d 664, 667 (Fla. 2d DCA 1985) ("The complaint alleged the execution of an oral contract, the obligation thereby assumed, and a breach. It therefore set forth sufficient facts which, taken as true, would state a cause of action for breach of contract.").
8. *Cerniglia v. Davison Chemical Co.*, 145 So.2d 254, 255 (Fla. 2d DCA 1962).

§3:10.1.3 Elements of Cause of Action — 3rd DCA

The elements of an action for breach of contract are: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach.

Source

People's Tr. Ins. Co. v. Valentin, 305 So.3d 324, 326 (Fla. 3d DCA 2020).

See Also

1. *IMC Group, L.L.C. v. Outar Inv. Co., L.L.C.*, 2022 WL 163835, *2 (Fla. 3d DCA Jan. 19, 2022).
2. *People's Tr. Ins. Co. v. Alonzo-Pombo*, 307 So. 3d 840, 843 (Fla. 3d DCA 2020).
3. *R. Plants, Inc. v. Dome Enters., Inc.*, 221 So.3d 752, 754 (Fla. 3d DCA 2017).
4. *Grove Isle Ass'n v. Grove Isle Assocs*., *LLLP*, 137 So. 3d 1081, 1094 (Fla. 3d DCA 2014).
5. *Progressive Am. Ins. Co. v. Gregory, Inc.*, 16 So.3d 979, 981 (Fla. 3d DCA 2009).
6. *Murciano v. Garcia*, 958 So.2d 423, 423 (Fla. 3rd DCA 2007).
7. *Collections, USA, Inc. v. City of Homestead*, 816 So.2d 1225, 1227 (Fla. 3d DCA 2002).
8. *AIB Mortgage Co. v. Sweeney*, 687 So.2d 68, 69 (Fla. 3d DCA 1997) ("To establish a breach of contract, a party must show the existence of a contract, a breach thereof, and damages.").
9. *Industrial Medicine Publishing Co. Inc. v. Colonial Press of Miami, Inc.*, 181 So.2d 19, 20 (Fla. 3d DCA 1965).

§3:10.1.4 Elements of Cause of Action — 4th DCA

An adequately pled breach of contract action requires three elements: (1) a valid contract; (2) a material breach; and (3) damages.

Source

Friedman v. New York Life Ins. Co., 985 So.2d 56, 58 (Fla. 4th DCA 2008).

See Also

1. *Rauch, Weaver, Norfleet, Kurtz & Co. v. AJP Pine Island Warehouses, Inc.*, 313 So. 3d 625, 630 (Fla. 4th DCA 2021).
2. *Chetu, Inc. v. KO Gaming, Inc.*, 261 So. 3d 605, 606 (Fla. 4th DCA 2019).
3. *Sulkin v. All Florida Pain Management, Inc.*, 932 So.2d 485, 486 (Fla. 4th DCA 2006).
4. *J.J. Gumberg Co. v. Janis Services, Inc*., 847 So.2d 1048, 1049 (Fla. 4th DCA 2003).
5. *Miller v. Nifakos*, 655 So.2d 192, 193 (Fla. 4th DCA 1995) ("To establish a breach of contract, a party must show the existence of a contract, a breach thereof, and damages.").
6. *Plowden & Roberts, Inc. v. Conway*, 192 So.2d 528, 531 (Fla. 4th DCA 1966).
7. *Handi-Van, Inc. v. Broward County*, 116 So.3d 530, 541 (Fla. 4th DCA 2013).
8. *Business Specialists, Inc. v. Land & Sea Petroleum, Inc.*, 25 So.3d 693, 695 (Fla. 4th DCA 2010) ("Before an action for breach of contract can be sustained, there must be an enforceable contract.").

§3:10.1.5 Elements of Cause of Action — 5th DCA

To state a cause of action for breach of contract, a complaint need only allege facts that establish:
1. the existence of a contract;
2. a material breach; and
3. resulting damages.

Source

Baron v. Osman, 39 So.3d 449, 450 (Fla. 5th DCA 2010).

See Also

1. *Burlington & Rockenbach, P.A. v. L. Offs. of E. Clay Parker*, 160 So. 3d 955, 960 (Fla. 5th DCA 2015).
2. *Abbott Laboratories, Inc. v. General Electric Capital*, 765 So.2d 737, 740 (Fla. 5th DCA 2000).

§3:10.2 Statute of Limitations

Fla. Stat. §95.11(2)(b)(five years for written contract); §95.11(3)(k)(four years for oral contract); *see also Gonzalez-Guzman v. Metropolitan Life Ins. Co.,* No. 17-20107-CIV-GAYLES, 2017 WL 4882512, at *3 (S.D. Fla. Oct. 30, 2017) (discussing the statute of limitations for written contracts).

§3:10.3 References

1. 11 Fla. Jur. 2d *Contracts* §§262–273 (2003).
2. 17A Am. Jur. 2d *Contracts* §§699–712 (2004).
3. 17B C.J.S. *Contracts* §§640–649 (1999).
4. Florida Standard Jury Instruction (Civ.) MI 12.1.

§3:10.4 Defenses

1. **Abandonment of Contract:** Abandonment of contract is an affirmative defense that the defendant must raise in its answer or otherwise is waived. *American Enviro-Port, Inc. v. Williams*, 489 So.2d 839 (Fla. 1st DCA 1986).

2. **Act of God:** If the losses or injuries are caused by an act of God that could not have been foreseen and from which the carrier could not by the exercise of due care protect the goods, the carrier is not liable. *Seaboard Air Line Ry. Co. v. Mullin*, 70 So. 467, 469 (Fla. 1915).

3. **Breach by Other Party:** When one party to a contract unjustifiably refuses to perform his agreement in whole, or in any substantial part, the other party has the option to rescind the entire contract, provided he offers to do so within a reasonable time, and will restore what he has received, and provided that the situation of the parties remains so far unchanged that they can be restored to their original position. *Savage v. Horne*, 31 So.2d 477, 482 (Fla. 1947). *See Also Bryan and Sons Corp. v. Klefstad*, 237 So.2d 236, 238 (Fla. 4th DCA 1970), *appeal after remand*, 265 So.2d 382 (Fla. 4th DCA 1972). However, neither the failure to timely report a claim, nor the breach of the duty to cooperate, gives rise to the automatic forfeiture of insurance benefits in an insurance contract, absent prejudice to the insurer. *State Farm Mut. Auto. Ins. Co. v. Curran*, 83 So. 3d 793, 809 (Fla. Dist. Ct. App. 5th Dist. 2011) (insurer still liable for policy limits, where neither insurer could show that insured's failure to submit to a compulsory medical examination prejudiced insurer, nor that insurer contractually provided for a forfeiture of all benefits as a result of breach by insured's failure to submit to exam).

4. **Contractors:** Generally, the liability of a contractor is cut off after the owner has accepted the work performed if the alleged defect is a patent defect which the owner could have discovered and remedied. However, the test for patency is not whether or not the condition was obvious to the owner, but whether or not the dangerousness of the condition was obvious had the owner exercised reasonable care. *Florida Dept. of Transportation v. Capeletti Bros., Inc.*, 743 So.2d 150, 152 (Fla. 3d DCA 1999), *rev. denied*, 760 So.2d 945 (Fla. 2000).

5. **Consequential damages:** Extra-contractual, consequential damages are not available in a first-party breach of insurance contract action; they are, however, available in a separate bad faith action pursuant to §624.155, Fla. Stat. *Citizens Prop. Ins. Corp. v. Manor House, LLC*, 313 So. 3d 579, 582 (Fla. 2021).

6. **Damages Required:** Not all breaches of contract result in damages and the law furnishes a remedy only for such wrongful acts as result in injury or damage. *Scott-Steven Development Corp. v. Gables by the Sea, Inc.*, 167 So.2d 763, 764 (Fla. 3d DCA 1964), *cert. denied*, 174 So.2d 32 (Fla. 1965).

7. **Liquidated Damages:** Where damages are unascertainable, a liquidated damages clause is given effect; but where damages are ascertainable by some known rule or pecuniary standard and the stipulated sum is disproportionate thereto, a liquidated damages clause will be regarded as a penalty and not given effect. *Goldblatt v. C.P. Motion, Inc.*, 77 So. 3d 798, 810 (Fla. Dist. Ct. App. 3d Dist. 2011) (where a court finds that the provision is a penalty, the plaintiff may only recover the actual damages pled and proven at trial).

8. **Discharge:** A material breach by one party may be considered a discharge of the other party's obligations thereunder. *Nacoochee Corp. v. Pickett*, 948 So.2d 26, 30 (Fla. 1st DCA 2006).

9. **Duress:** Assuming duress was present in the execution of the instrument, which position we do not favor, the agreement would not have been void, but only voidable. *Davis v. Hefty Press, Inc.*, 11 So.2d 884, 886 (Fla. 1943). *ManorCare Health Servs., Inc. v. Stiehl*, 22 So.3d 96, 99 (Fla. 2d DCA 2009) (defenses such as fraud, duress, or unconscionability are applicable when emotionally fragile family members are checking in loved ones into the care of a nursing home and signing contracts).

10. **Failure of Consideration:** A failure of consideration is a defense to a contract. *Vichaikul v. S.C.A.C. Enterprises, Inc.*, 616 So.2d 100 (Fla. 2d DCA 1993). The slightest detriment to the promisee is sufficient consideration to bind the promisor. *Maryland Casualty Company v. Krasnek*, 174 So.2d 541, 543 (Fla. 1965).

11. **Fraud, Contract Induced by:** It is a fundamental proposition that a contract induced by fraud is voidable. *Lance Holding Co. v. Ashe*, 533 So.2d 929, 930 (Fla. 5th DCA 1988). Generally, the remedy for fraud in the inducement is recission of the contract. *Lower Fees, Inc. v. Bankrate, Inc.*, 74 So.3d 517 (Fla. 4th DCA 2011) (a "no-reliance" clause in a purchase contract does not preclude a claim of fraud in the inducement as grounds for rescinding the contract, unless the contract explicitly states that fraud was not a ground for recission).

12. **Frustration of Purpose:** Frustration of purpose refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which it bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party. Even under theories which permit a broader application of the doctrine of commercial frustration, the defense is not available concerning difficulties which could reasonably have been foreseen by the promisor at the creation of the contract. *Home Design Center–Joint Venture v. County Appliances of Naples*, 563 So.2d 767, 770 (Fla. 2d DCA 1990).

13. **Hindering the Performance of the Other:** One who prevents or makes impossible the performance or happening of a condition precedent upon which his liability by the terms of a contract is made to depend cannot avail himself of its nonperformance. *Hanover Realty Corp. v. Codomo*, 95 So.2d 420, 423 (Fla. 1957).

14. **Illegality:** An agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. When a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice. Where the parties to such an agreement are in pari delicto the law will leave them where it finds them, relief will be refused in the courts because of the public interest. *Local No. 234 of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada v. Henley & Beckwith, Inc.*, 66 So.2d 818, 821 (Fla. 1953). *See Also McIntyre v. Norman*, 429 So.2d 1296, 1297 (Fla. 3d DCA 1983), *rev. denied*, 438 So.2d 833 (Fla. 1983). A court will not vacate an arbitration award based on an illegal contract since doing so would "evince resistance to arbitration and deprive the parties of perhaps arbitration's ultimate benefit of finality." *Visiting Nurse Ass'n of Florida, Inc. v Jupiter Medical Center, Inc.,* 154 So.3d 1115, 1136 (Fla. 2014) (court enforced arbitration award in favor of home health care agency on its breach of contract claim against hospital despite hospital's assertion that panel's interpretation of the contract violated state and federal health care law).

15. **Impossibility of Performance:** Impossibility of performance refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform. As a general rule, a contract is not invalid, nor is the obligor discharged from its binding effect, because the contract turns out to be difficult or burdensome to perform. *Home Design Center—Joint Venture v. County Appliances of Naples*, 563 So.2d 767, 769 (Fla. 2d DCA 1990). *See Also McIntyre v. Norman*, 429 So.2d 1296, 1297 (Fla. 3d DCA 1983), *rev. denied*, 438 So.2d 833 (Fla. 1983). The doctrine of "impossibility" must be applied with caution and is not available concerning intervening difficulties which could reasonably have been foreseen and could have been controlled by an express provision of the agreement. *See Am. Aviation, Inc. v. Aero-Flight Serv., Inc.,* 712 So.2d 809 (Fla. 4th DCA 1998); *Home Design Ctr.—Joint Venture v. County Appliances of Naples, Inc.,* 563 So.2d 767 (Fla. 2d DCA 1990); *Walter T. Embry, Inc. v. LaSalle Nat. Bank*, 792 So.2d 567, 570 (Fla. 4th DCA 2001), *subsequent appeal*, 868 So.2d 661 (Fla. 4th DCA 2004); *Hillsborough County v. Star Ins. Co.,* 847 F.3d 1296, 1305 (11th Cir. 2017).

16. **Mistake:** Florida law permits a party to rescind a contact based on unilateral mistake unless the mistake results from an inexcusable lack of due care or unless the other party has so detrimentally relied on the contact that it would be inequitable to order rescission. *Florida Insurance Guaranty Association, Inc. v. Love*, 732 So.2d 456, 457 (Fla. 2d DCA 1999). A mistake, whether unilateral or mutual, must go to a material, substantial element of a contract in order to justify rescission. *Williams, Salomon, Kanner, Damian, Weissler & Brooks v. Harbour Club Villas Condominium Association, Inc.*, 436 So.2d 233, 235 (Fla. 3d DCA 1983); *DePrince v. Starboard Cruises, Inc.*, 271 So.3d 11, 20 (Fla. 3d DCA 2018). A mutual mistake also allows a court to reform the contract. *Fed. Ins. Co. v. Donovan Indus.*, 75 So.3d 812 (Fla. 2d DCA 2011).

17. **Rescission:** While we have found no Florida cases expressly stating that rescission is an affirmative defense, it appears that rescission falls within the general definition of that which is included within the nature of an affirmative defense. *Joseph Buckeck Construction Corp. v. Music*, 420 So.2d 410, 414 (Fla. 1st DCA 1982). Florida law permits a party to rescind a contract based on unilateral mistake unless the mistake results from an inexcusable lack of due care or unless the other party has so detrimentally relied on the contract that it would be inequitable to order rescission. *Florida Insurance Guaranty Assoc., Inc. v. Love*, 732 So.2d 456, 457 (Fla. 2d DCA 1999).

18. **Sovereign Immunity:** In *County of Brevard v. Miorelli Engineering, Inc.,* 703 So.2d 1049 (Fla. 1997), the court ruled that under section 768.28, the legislature authorized state entities to enter into contracts and waived sovereign immunity as to express contracts. It concluded that if disputed work is not expressly part of the original contract or a change order, and it is not an implied part of the contract, sovereign immunity bars recovery for the disputed work because it is "outside" the contract. *W&J Construction Corp. v. Fanning/Howey Associates,* 741 So.2d 582, 584 (Fla. 5th DCA 1999).

19. **Failure to Satisfy Conditions Precedent:** A defending party's assertion that a plaintiff has failed to satisfy conditions precedent necessary to trigger contractual duties under an existing agreement is generally viewed as an affirmative defense for which the defensive pleader has the burden of pleading and persuasion. *See Diaz v. Wells Fargo Bank, N.A.*, 189 So. 3d 279, 284 (Fla. 5th DCA 2016); *Harris v. U.S. Bank Nat'l Ass'n,* 223 So.3d 1030, 1033 (Fla. 1st DCA 2017).

20. **Unconscionability:** Unconscionability is an affirmative defense which must be raised by proper pleading. *Barakat v. Broward County Housing Authority*, 771 So.2d 1193, 1194 (Fla. 4th DCA 2000); *Hobby Lobby Stores, Inc. v. Cole*, 287 So.3d 1272, 1275-76 (Fla. 4th DCA 2020).

§3:10.5 Related Matters

1. **Anticipatory Repudiation:** Anticipatory repudiation relieves the non-breaching party of its duty to further perform and creates in it an immediate cause of action for breach of contract. *Twenty-Four Collection, Inc. v. M. Weinbaum Construction, Inc.*, 427 So.2d 1110, 1111 (Fla. 3d DCA 1983). This alone, however,

does not entitle the non-breaching party to damages. Anticipatory repudiation obviates the requirement that the conditions be performed, but not that they be performable. *Craigside, LLC v. GDC View, LLC*, 74 So.3d 1087 (Fla. 1st DCA 2011). Moreover, a party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise. The holder of the duty based upon a condition precedent cannot profit from an anticipatory repudiation of a contract that he would have breached himself. It follows that if performance of the conditions precedent is excused, the ability to perform them must still be shown. *Id*.

2. **Lost Chance or Opportunity:** It is now an accepted principle of contract law, nonetheless, that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain. *Miller v. Allstate Insurance Co.*, 573 So.2d 24, 29 (Fla. 3d DCA 1990), *rev. denied*, 581 So.2d 1307 (Fla. 1991).

3. **Lost Profits:** To recover damages for lost profits in a breach of contract action, a party must prove a breach of contract, that the party actually sustained a loss as a proximate result of that breach, that the loss was or should have been within the reasonable contemplation of the parties, and that the loss alleged was not remote, contingent, or conjectural and the damages were reasonably certain. *Frenz Enterprises, Inc. v. Port Everglades*, 746 So.2d 498, 504 (Fla. 4th DCA 1999). Florida law requires proof of lost profits (income less expense) rather than merely lost gross revenue. *Del Monte Fresh Produce Co. v. Net Results, Inc.*, 77 So.3d 667 (Fla. 3d DCA 2011). "It is as inappropriate to use purely speculative forecasts of future revenue to determine the market value of a business as it is to use such speculative forecasts in determining lost future profits." *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 921 So.2d 43, 46 (Fla. 3d DCA 2006).

4. **Oral Contract:** To state a cause of action for breach of an oral contract, a plaintiff is required to allege facts that, if taken as true, demonstrate that the parties mutually assented to "a certain and definite proposition" and left no essential terms open. *Jacksonville Port Authority v. W.R. Johnson Enterprises, Inc.,* 624 So.2d 313 (Fla. 1st DCA 1993), *rev. denied*, 634 So.2d 629 (Fla. 1994); *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc*. 728 So.2d 297, 300 (Fla. 1st DCA 1999). *See* Complaint Library, Form 3:10-2 (oral contract) on Digital Access.

5. **Prejudgment Interest:** Prejudgment interest is an element of damages for a breach of contract. *Pelaez v. Persons*, 664 So.2d 1022, 1023 (Fla. 2d DCA 1995).

6. **Rescission:** A mere breaching of a contract is not necessarily a rescinding of the contract. When a contract is rescinded it is done away with and ceases to be a contract. When a contract is breached the contract continues to live and the parties have their rights to damages for the breach instead of on the theory of the contract being rescinded. If one party to a contract renders performance impossible, the opposite party may at his election rescind it. *Givens v. Vaughn-Griffin Packing Co.*, 1 So.2d 714, 719 (Fla. 1941).

7. **Settlement Agreements:** Settlements are construed in accordance with the rules for interpretation of contracts. *Treasure Coast, Inc. v. Ludlum Construction, Inc.*, 760 So.2d 232, 234 (Fla. 4th DCA 2000).

8. **Attorney's Fees:** "If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988." Fla. Stat. §57.105(7).

§3:10.6 Sample Complaints

See Complaint Library, Form 3:10-2 (Oral Contract) on Digital Access. *See also*:

- Form 2:40-3 (Violation of Chapter 497 (Funeral and Cemetery Services), Florida Statutes; Negligence; Negligent Infliction of Emotional Distress; Breach of Contract; Conversion; Gross Negligence);

- Form 3:10-3 (Construction Contract);
- Form 3:10-6 (Breach of Contract; Conversion; Promissory Estoppel; Specific Performance);
- Form 3:10-7 (Breach of Contract; Unjust Enrichment; Conversion)
- Form 17:10-7 (Emergency Injunctive Relief and Damages; Misappropriation of Trade Secrets; Breach of Contract; Tortious Interference With Business Relationship).

§3:20 BREACH OF IMPLIED-IN-FACT CONTRACT

§3:20.1 Elements of Cause of Action — Florida Supreme Court

[A]n implied contract is one in which some or all of the terms are inferred from the conduct of the parties and the circumstances of the case, though not expressed in words. In a contract implied in fact the assent of the parties is derived from other circumstances, including their course of dealing or usage of trade or course of performance.

Source

McMillan v. Shively, 23 So.3d 830, 831 (Fla. 1st DCA 2009).w1

See Also

1. *Tipper v. Great Lakes Chemical Co.*, 281 So.2d 10, 13 (Fla. 1973) (Contracts implied in fact rest upon the assent of the parties).
2. *Rodriguez v. Powell*, 172 So. 849 (Fla. 1937) (holding that promise of company's agent to cover a plaintiff's medical expenses in exchange for a release created a contract and plaintiff could sue company for breaching it).
3. *Bromer v. Florida Power & Light Co.,* 45 So.2d 658, 660 (Fla.1950).
4. *Waite Dev., Inc. v. City of Milton*, 866 So.2d 153 (Fla. 1st DCA 2004) ("A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words.").

§3:20.1.1 Elements of Cause of Action — 1st DCA

A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words.

Source

Sheppard v. M & R Plumbing, Inc., 82 So. 3d 950, 952 (Fla. 1st DCA 2011); *Waite Dev., Inc. v. City of Milton*, 866 So.2d 153 (Fla. 1st DCA 2004).

See Also

1. *Rabon v. Inn of Lake City, Inc.*, 693 So.2d 1126, 1131-32 (Fla. 1st DCA 1997) (In a contract implied in fact, the assent of the parties is derived from other circumstances, including their course of dealing or usage of trade or course of performance. In inferring a contract implied in fact, a court should give to the implied contract the effect which the parties, as fair and reasonable men, presumably would have agreed upon if, having in mind the possibility of the situation which has arisen, they had contracted expressly in reference thereto).
2. *Mecier v. Broadfoot*, 584 So.2d 159, 161 (Fla. 1st DCA 1991) (Contracts implied in fact are inferred from facts and circumstances of case).

§3:20.1.2 Elements of Cause of Action — 2nd DCA

While contracts implied in fact require the assent of the parties, contracts implied in law do not.

Source

Rite-Way Painting & Plastering, Inc. v. Tetor, 582 So.2d 15, 17 (Fla. 2d DCA 1991).

See Also

1. *Kenf, LLC v. Jabez Restorations, Inc.*, 303 So.3d 229, 231 (Fla. 2d DCA 2019).

§3:20.1.3 Elements of Cause of Action — 3rd DCA

Parties can create a contract implied in fact through inferences drawn from their conduct and assent to the contractual relationship.

Source

Biscayne Inv. Group, Ltd. v. Guar. Mgmt. Servs., 903 So. 2d 251, 254 (Fla. 3d DCA 2005).

See Also

1. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 693 (Fla. 3d DCA 2018).
2. *Tabraue v. Doctors Hospital, Inc.*, 272 So.3d 468, 473 (Fla. 3d DCA 2019).
3. *Health Options, Inc. v. Palmetto Pathology, P.A.*, 983 So.2d 608, 615 (Fla. 3d DCA 2008)
4. *Aldebot v. Story*, 534 So.2d 1216, 1217 (Fla. 3d DCA 1988) (as opposed to express contracts and contracts implied in fact, where assent of parties is required, contracts implied in law are obligations imposed by law on grounds of justice and equity and do not rest upon assent of contracting parties).
5. *Variety Children's Hospital, Inc. v. Vigliotti*, 385 So.2d 1052, 1053 (Fla. 3d DCA 1980).

§3:20.1.4 Elements of Cause of Action — 4th DCA

A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words. A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. Common examples of contracts implied in fact are where a person performs services at another's request or where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances fairly raising the presumption that the parties understood and intended that compensation was to be paid. In these circumstances, the law implies the promise to pay a reasonable amount for the services.

Source

Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., 695 So.2d 383, 385 (Fla. 4th DCA 1997).

See Also

1. *F.H. Paschen, S.N. Nielsen & Assocs. LLC v. B&B Site Dev., Inc.*, 311 So. 3d 39, 48 (Fla. 4th DCA 2021).
2. *GEM Broadcasting v. Minker*, 763 So.2d 1149, 1150 (Fla. 4th DCA 2000) (the enforceability of a contract implied in fact is based on an implied promise, not on whether the defendant has received something of value).
3. *CDS & Assoc. of Palm Beaches, Inc. v. 1711 Donna Rd. Assoc.,* 743 So.2d 1223 (Fla. 4th DCA 1999) (a contract implied in fact is an enforceable contract that is inferred in whole or part from the parties' conduct, not solely from their words).
4. *Policastro v. Myers,* 420 So.2d 324, 326 (Fla. 4th DCA 1982) (contracts implied in fact rest upon the assent of the parties).

§3:20.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition]

§3:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(k).

§3:20.3 References

1. Restatement (Second) of Contracts §4, cmt. a (1982).

2. 1 Arthur Linton Corbin, Corbin on Contracts, §§1.18-1.20 (Joseph M. Perillo ed. 1993).
3. 3 Corbin on Contracts §562 (1960).
4. 17 Am.Jur.2d "Contracts" §3 (1964).

§3:20.4 Defenses

1. **Burden:** It is our view that a greater burden should be placed upon a plaintiff who relies upon an implied contract than one who uses reasonable care and foresight in protecting himself by means of an express contract. To hold otherwise would be to encourage loose dealings and place a premium upon carelessness. *Bromer v. Florida Power & Light Co.*, 45 So.2d 658, 660 (Fla. 1949).

2. **Lack of Assent:** While contracts implied in fact, such as an action in quantum meruit, require the assent of the parties, contracts implied in law do not require such assent. *Rite-Way Painting & Plastering, Inc. v. Tetor*, 582 So.2d 15, 17 (Fla. 2d DCA 1991).

3. **Familial Relationship:** When a person provides services to another without a written agreement regarding compensation, a promise to pay for those services will generally be implied. However, this general rule is not applicable if the services are rendered by and for members of the same family or relatives who live together. In such cases, no presumption arises that one is to be paid for the services rendered. In the absence of an express contract or promise to pay, no right of action accrues for the services, especially where the relationship evinces the mutuality or reciprocity of services, benefits and duties, which characterize normal family life. *McLane v. Musick*, 792 So.2d 702, 705 (Fla. 5th DCA 2001).

4. **Failure to Comply With Statutory Requirements:** This consumer protection statute [Fla. Stat. §559.905] must necessarily be construed to be a limitation on the common law principle of quantum meruit because the recognition of a quasi-contractual obligation by the law in this situation would necessarily circumvent the very dictates of the statute by enabling a motor vehicle repair shop to ignore the statutory requirements of providing a written estimate or obtaining a written waiver. *Osteen v. Morris*, 481 So.2d 1287, 1290 (Fla. 5th DCA 1986).

5. **Express Contract:** Where an express contract exists, the court will not infer an implied-in-fact contract, except where the express contract cannot be proven. *See Quayside Assocs., Ltd. v. Triefler*, 506 So. 2d 6, 7 (Fla. 3d DCA 1987); *see also Farrey's Wholesale Hardware Co., Inc. v. Coltin Elec. Servs., LLC*, 263 So.3d 168, 181 (Fla. 2d DCA 2018).

§3:20.5 Related Matters

1. **Contract Implied in Fact and Contract Implied in Law:** A contract implied in fact is an enforceable contract that is inferred in whole or in part from the parties' conduct, not solely from their words. A contract implied in law is an obligation created by the law without regard to the parties' expression of assent by their words or conduct. In short, a contract implied in law does not require an agreement, however, a contract implied in fact does. A quasi-contract is a contract implied in law since it does not require an agreement. *CDS and Associates of the Palm Beaches, Inc. v. 1711 Donna Road Associates*, 743 So.2d 1223, 1224 (Fla. 4th DCA 1999).

A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words. A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact rest upon the assent of the parties.

A contract implied in law, or quasi-contract, is not based upon the finding, by a process of implication from the facts, of an agreement between the parties. A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances

that made it unjust to retain it without giving compensation. This is unlike a contract implied in fact which must arise from the interaction of the parties or their agents.

To describe the cause of action encompassed by a contract implied in law, Florida courts have synonymously used a number of different terms—"quasi-contract," "unjust enrichment," "restitution," "constructive contract," and "quantum meruit." This profusion of terminology has its roots in legal history. Concerned about the confusion between contracts implied in law and fact, two legal scholars sought to extirpate the term "contract implied in law" from legal usage and to substitute for it the term "quasi-contract." As Corbin explains, although the term "quasi-contract" took hold, the older term successfully resisted extirpation to the further confusion of law students and lawyers.

The term "quantum meruit" derives from common law forms of pleading. The action of assumpsit was available for the recovery of damages for the breach or non-performance of a simple contract or upon a contract implied by law from the acts or conduct of the parties. There were two divisions of assumpsit, general, upon the common counts, and special. In general assumpsit, on the common counts, only an implied contract could be the basis of the action. The common counts were abbreviated and stereotyped statements that the defendant was indebted to the plaintiff for a variety of commonly recurring reasons, such as goods sold and delivered or work and labor done. The count asking judgment for work done was quantum meruit; for goods sold the count was quantum valebant. The common counts were used to enforce contracts implied both in law and in fact. Because so many quasi-contract actions were brought in the common counts, and because courts and lawyers were not careful to draw the distinction, the term "quantum meruit" is often used synonymously with the term "quasi-contract."

In Florida, all implied contract actions were part of the action of assumpsit, which was an action at law under the common law. *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Company, Inc.,* 695 So.2d 383 (Fla. 4th DCA 1997).

§3:30 BREACH OF IMPLIED-IN-LAW CONTRACT

§3:30.1 Elements of Cause of Action — Florida Supreme Court

Contracts implied in law, commonly called "quasi-contracts," are obligations imposed by law on grounds of justice and equity, and do not rest upon the assent of the contracting parties.

Source

Tipper v. Great Lakes Chemical Co., 281 So.2d 10, 13 (Fla. 1973).

§3:30.1.1 Elements of Cause of Action — 1st DCA

A contract implied in law (or quasi-contract), unlike a true contract based upon the express or apparent intention of the parties, is not based on a promissory agreement or the apparent intention of the parties to undertake the performance in question. Quasi-contracts or contracts implied in law are obligations imposed by law to prevent unjust enrichment. The essential elements for an action under this theory are a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof. Quasi-contracts, therefore, are obligations created by the law for reasons of justice, not by the express or apparent intent of the parties. Thus, it may be said that obligations of this type should not properly be considered contracts at all, but a form of the remedy of restitution.

Source

Rabon v. Inn of Lake City, Inc., 693 So.2d 1126, 1131-32 (Fla. 1st DCA 1997).

§3:30.1.2 Elements of Cause of Action — 2nd DCA

Contracts implied in law are obligations imposed by law to prevent unjust enrichment. The essential elements for an action under this theory are a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it

inequitable for him to retain it without paying the value thereof. While contracts implied in fact, such as an action in quantum meruit, require the assent of the parties, contracts implied in law do not require such assent.

Source

Rite-Way Painting & Plastering, Inc. v. Tetor, 582 So.2d 15, 17 (Fla. 2d DCA 1991).

See Also

1. *Craig W. Sharp, P.A. v. Adalia Bayfront Condo., Ltd.,* 547 So.2d 674 (Fla. 2d DCA 1989).
2. *Henry M. Butler, Inc. v. Trizec Properties, Inc.,* 524 So.2d 710, 711-12 (Fla. 2d DCA 1988).

§3:30.1.3 Elements of Cause of Action — 3rd DCA

Unlike express contracts or contracts implied in fact, quasi-contracts do not rest upon the assent of the contracting parties. Quasi-contracts are based primarily upon a benefit flowing to the person sought to be charged. The person unjustly enriched is required to compensate the person furnishing the benefit. Thus, the preliminary question in determining whether the law should imply a contract in this case turns upon whether the mother has been unjustly enriched, and that determination turns upon whether the mother has an obligation or legal duty that has been satisfied by the efforts of another.

Source

Variety Children's Hospital, Inc. v. Vigliotti, 385 So.2d 1052, 1053 (Fla. 3d DCA 1980).

See Also

1. *Crawley-Kitzman v. Hernandez*, 324 So.3d 968, 975-76 (Fla. 3d DCA 2021).
2. *Perez v. Salmeron*, 307 So. 3d 927 (Fla. 3d DCA 2020).
3. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 693 (Fla. 3d DCA 2018).
4. *Porsche Cars North America, Inc. v. Diamond*, 140 So. 3d 1090, 1100 (Fla. 3d DCA 2014).
5. *Aldebot v. Story*, 534 So.2d 1216, 1217 (Fla. 3d DCA 1988) (As opposed to express contracts and contracts implied in fact, where assent of parties is required, contracts implied in law are obligations imposed by law on grounds of justice and equity and do not rest upon assent of contracting parties).

§3:30.1.4 Elements of Cause of Action — 4th DCA

The elements of a cause of action for a quasi-contract are that: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it. Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other. This is unlike a contract implied in fact which must arise from the interaction of the parties or their agents.

Source

Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., 695 So.2d 383, 385 (Fla. 4th DCA 1997).

See Also

1. *F.H. Paschen, S.N. Nielsen & Assocs. LLC v. B&B Site Dev., Inc.*, 311 So. 3d 39, 48 (Fla. 4th DCA 2021).
2. *Fulton v. Brancato*, 189 So.3d 967, 969 (Fla. 4th DCA 2016).
3. *J.P. Morgan Chase Bank Nat'l Ass'n v. Colletti Investments, LLC*, 199 So. 3d 395, 397-98 (Fla. 4th DCA 2016).
4. *GEM Broadcasting v. Minker*, 763 So.2d 1149, 1150-51 (Fla. 4th DCA 2000) (a necessary element of a cause of action for a contract implied in law is that the plaintiff has conferred a benefit on the defendant — it is not based upon the finding of an agreement between the parties).
5. *CDS & Assoc. of Palm Beaches, Inc. v. 1711 Donna Rd. Assoc.,* 743 So.2d 1223 (Fla. 4th DCA 1999).
6. *Nursing Care Services, Inc. v. Dobos,* 380 So.2d 516 (Fla. 4th DCA 1980).
7. *Hillman Const. Corp. v. Wainer,* 636 So.2d 576, 577 (Fla. 4th DCA 1994).

§3:30.1.5 Elements of Cause of Action — 5th DCA

A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation. The elements of a cause of action for a quasi-contract are that: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

Source

American Safety Ins. Service, Inc. v. Griggs, 959 So.2d 322, 331 (Fla. 5th DCA 2007).

§3:30.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(k); *Swafford v. Schweitzer,* 906 So.2d 1194, 1195 (Fla. 4th DCA 2005).

§3:30.3 References

1. Restatement (Second) of Contracts §4, cmt. b (1982).
2. 11 Fla. Jur. 2d Contracts §282 (2003).
3. 66 Am. Jur. 2d Restitution and Implied Contracts §§8, 9, 12 (2001).
4. 7 C.J.S. Assumpsit, Action on §§1–3 (2004).
5. Restatement of the Law of Restitution §1 (1937).
6. George B. Klippert, Unjust Enrichment (1983). ISBN 0-409-84293-1 (discussing Canadian law).
7. H. Hugh McConnell, Distinguishing Quantum Merit and Unjust Enrichment in the Construction Setting, 71 Fla. Bar J. 88 (March 1997).
8. David M. Holliday, Annotation, Equipment Leasing Expenses as Element of Construction Contractor's Damages, 52 A.L.R.4th 712 (1987).
9. J. R. Kemper, Annotation, Building and Construction Contracts: Right of Subcontractor Who Has Dealt Only With Primary Contractor to Recover Against Property Owner in Quasi-Contract, 62 A.L.R.3d 288 (1975).

§3:30.4 Defenses

1. **Burden:** *Bromer v. Florida Power & Light Co.*, 45 So.2d 658, 660 (Fla. 1949) ("It is our view that a greater burden should be placed upon a plaintiff who relies upon an implied contract than one who uses reasonable care and foresight in protecting himself by means of an express contract. To hold otherwise would be to encourage loose dealings and place a premium upon carelessness.").

2. **Express Contract:** An action for unjust enrichment fails upon a showing that an express contract exists. *Williams v. Bear Stearns & Co.*, 725 So.2d 397, 400 (Fla. 5th DCA 1998), rev. denied, 737 So.2d 550 (Fla. 1999).

3. **Payment Made:** Unjust enrichment cannot exist where payment has been made for the benefit conferred. *N.G.L. Travel Associates v. Celebrity Cruises, Inc.*, 764 So.2d 672, 675 (Fla. 3d DCA 2000).

4. **Received in Good Faith:** The law seems to be settled that money paid under a mistake of facts cannot be reclaimed where the plaintiff has derived a substantial benefit from the payment, nor where the defendant received it in good faith in satisfaction of an equitable claim, nor where it was due in honor and conscience. *Pensacola & A. R. Co. v. Braxton*, 16 So. 317, 321 (Fla. 1894).

§3:30.5 Related Matters

1. **Contract Implied in Fact and Contract Implied in Law:** A contract implied in fact is an enforceable contract that is inferred in whole or in part from the parties' conduct, not solely from their words. A contract

implied in law is an obligation created by the law without regard to the parties' expression of assent by their words or conduct. In short, a contract implied in law does not require an agreement, however, a contract implied in fact does. A quasi-contract is a contract implied in law since it does not require an agreement. *CDS and Associates of the Palm Beaches, Inc. v. 1711 Donna Road Associates*, 743 So.2d 1223, 1224 (Fla. 4th DCA 1999); *Sheppard v. M & R Plumbing, Inc.*, 82 So. 3d 950, 952 (Fla. Dist. Ct. App. 1st Dist. 2011) (no implied in fact contract as no meeting of the minds, but claim for quantum meruit for work and labor done treated as an unjust enrichment claim). A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words.

A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact rest upon the assent of the parties.

A contract implied in law, or quasi-contract, is not based upon the finding, by a process of implication from the facts, of an agreement between the parties. A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation. This is unlike a contract implied in fact which must arise from the interaction of the parties or their agents.

To describe the cause of action encompassed by a contract implied in law, Florida courts have synonymously used a number of different terms—"quasi-contract," "unjust enrichment," "restitution," "constructive contract," and "quantum meruit." This profusion of terminology has its roots in legal history. Concerned about the confusion between contracts implied in law and fact, two legal scholars sought to extirpate the term "contract implied in law" from legal usage and to substitute for it the term "quasi-contract." As Corbin explains, although the term "quasi-contract" took hold, the older term successfully resisted extirpation to the further confusion of law students and lawyers.

The term "quantum meruit" derives from common law forms of pleading. The action of assumpsit was available for the recovery of damages for the breach or non-performance of a simple contract or upon a contract implied by law from the acts or conduct of the parties. There were two divisions of general assumpsit upon the common counts, and special. In general assumpsit, on the common counts, only an implied contract could be the basis of the action. The common counts were abbreviated and stereotyped statements that the defendant was indebted to the plaintiff for a variety of commonly recurring reasons, such as goods sold and delivered or work and labor done. The count asking judgment for work done was quantum meruit; for goods sold the count was quantum valebant. The common counts were used to enforce contracts implied both in law and in fact. Because so many quasi-contract actions were brought in the common counts, and because courts and lawyers were not careful to draw the distinction, the term "quantum meruit" is often used synonymously with the term "quasi-contract."

In Florida, all implied contract actions were part of the action of assumpsit, which was an action at law under the common law. *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Company, Inc.*, 695 So.2d 383 (Fla. 4th DCA 1997).

2. **Second Real Estate Broker:** The elements of a cause of action against a second real estate broker to recover the commission from the sale of property on the theory of unjust enrichment require the first real estate broker to show either the existence of an implied contract to pay him for his services in finding and negotiating with the ultimate purchasers or that he was the procuring factor in the sale. *Framer Realty, Inc. v. Ross*, 768 So.2d 5 (Fla. 3d DCA 2000), *rev. denied*, 789 So.2d 348 (Fla. 2001).

§3:40 BREACH OF THIRD PARTY BENEFICIARY CONTRACT

§3:40.1 Elements of Cause of Action — Florida Supreme Court

To establish an action for breach of a third-party beneficiary contract, [the noncontracting third party] must allege and prove the following four elements: "(1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach."

Source

Foundation Health v. Westside EKG Assocs., 944 So.2d 188, 194-95 (Fla. 2006) (*citing Networkip, LLC v. Spread Enters., Inc.*, 922 So.2d 355, 358 (Fla. 3d DCA 2006)).

See Also

1. *Mendez v. Hampton Court Nursing Ctr., LLC*, 203 So.3d 146, 148 (Fla. 2016).
2. *Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259, 262 (Fla. 1971).
3. *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969).
4. *Auto Mut. Indem., Co. v. Shaw,* 184 So. 852, 856 (Fla. 1938).
5. *Marianna Lime Products Co. v. McKay,* 147 So. 264 (Fla. 1933).
6. *East Coast Stores, Inc. v. Cuthbert,* 133 So. 863 (Fla. 1931).
7. *Woodbury v. Tampa Waterworks Co.,* 49 So. 556 (Fla. 1909).

§3:40.1.1 Elements of Cause of Action — 1st DCA

To prevail under a third-party beneficiary theory, Clark must prove that the provisions of the reinsurance treaties "clearly show an *intention primarily and directly* to benefit" Clark. Additionally, it must be shown that *both* parties to the reinsurance treaties intended that Clark be directly benefited therefrom—it is not sufficient to show that only one party, in this case Eastern, unilaterally intended that result.

Source

Clark and Co., Inc. v. Dept. of Insurance, 436 So.2d 1013, 1016 (Fla. 1st DCA 1983).

See Also

1. *McKinney-Green, Inc. v. Davis,* 606 So.2d 393, 396 (Fla. 1st DCA 1992).
2. *Crabtree v. Aetna Casualty and Surety Co.,* 438 So.2d 102, 105 (Fla. 1st DCA 1983) ("If a contract shows its clear intent and purpose to be a direct and substantial benefit to third parties, such third parties may maintain an action for its breach, and where a contact creates a right or imposes a duty in favor of a third person, the law presumes that the parties intended to confer a benefit upon him and furnish him a remedy.").
3. *Health Application Systems, Inc. v. Hartford Life & Accident Insurance Co.,* 381 So.2d 294, 298 (Fla. 1st DCA 1980).

§3:40.1.2 Elements of Cause of Action — 2nd DCA

A party is an intended beneficiary only if the parties clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong. To find the requisite intent, it must be shown that both contracting parties intended to benefit the third party; it is insufficient to show that only one party unilaterally intended to benefit the third party.

Source

Williams v. CVT, LLC, 295 So.3d 883, 887-88 (Fla. 2d DCA 2020).

See Also

1. *OTI Fiber, LLC v. CenterState Bank, N.A.*, 326 So.3d 743, 746-747 (Fla. 2d DCA 2021).
2. *Pezeshkan v. Manhattan Constr. Fla., Inc.*, 313 So. 3d 948, 951-52 (Fla. 2d DCA 2021).

3. *Green Emerald Homes, LLC v. 21st Mortg. Corp.*, 300 So.3d 698, 706 (Fla. 2d DCA 2019).
4. *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So.2d 399, 400 (Fla. 2d DCA 2000).
5. *Greenacre Properties, Inc. v. Rao*, 933 So.2d 19, 23 (Fla. 2d DCA 2006).
6. *Deanna Const. Co., Inc. v. Sarasota Entertainment Corp*., 563 So.2d 150, 151 (Fla. 2d DCA 1990).
7. *Sachse v. Tampa Music, Co.,* 262 So.2d 17, 19 (Fla. 2d DCA 1972), *reversed and remanded following remand*, 289 So.2d 785 (Fla. 2d DCA 1974) (citing *Gallichio v. Corporate Group Service, Inc.,* 227 So.2d 519 (Fla. 3d DCA 1969)).
8. *Highland Insurance Co. v. Walker Memorial Sanitarium and Benevolent Assoc.,* 225 So.2d 572, 574 (Fla. 2d DCA 1969), *cert. denied*, 232 So.2d 181 (Fla. 1969).

§3:40.1.3 Elements of Cause of Action — 3rd DCA

A cause of action for breach of contract brought by a third-party beneficiary must include the following allegations:
1. the existence of a contract;
2. the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party;
3. breach of the contract by a contracting party; and
4. damages to the third party resulting from the breach.

Source

Inspirato LLC v. Ciafone, 274 So.3d 487, 487 (Fla. 3d DCA 2019).

See Also

1. *Health Options, Inc. v. Palmetto Pathology Servs., P.A.*, 983 So.2d 608, 615 (Fla. 3d DCA 2008).
2. *Networkip, LLC v. Spread Enters., Inc.*, 922 So.2d 355, 358 (Fla. 3d DCA 2006).
3. *Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc*., 903 So.2d 251 (Fla. 3d DCA 2005).
4. *Technicable Video Systems, Inc. v. Americable of Greater Miami, Ltd.,* 479 So.2d 810, 811 (Fla. 3d DCA 1985).
5. *Hialeah Hospital, Inc. v. Raventos,* 425 So.2d 1205, 1206 (Fla. 3d DCA 1983).
6. *Security Mutual Casualty Co. v. Pacura,* 402 So.2d 1266, 1267 (Fla. 3d DCA 1981).
7. *Gallichio v. Corporate Group Service, Inc.,* 227 So.2d 519 (Fla. 3d DCA 1969).

§3:40.1.4 Elements of Cause of Action — 4th DCA

Thus, in order to plead a cause of action for breach of a third-party beneficiary contract, the following elements must be set forth:
1. a contract between A and B;
2. an intent, either expressed by the parties, or in the provisions of the contract, that the contract primarily and directly benefit C, the third party (or a class of persons to which that party belongs);
3. breach of that contract by either A or B (or both); and
4. damages to C resulting from the breach.

Source

Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd., 647 So.2d 1028, 1031 (Fla. 4th DCA 1994).

See Also

1. *Reconco v. Integon Nat'l Ins. Co.*, 312 So. 3d 914, 917 (Fla. 4th DCA 2021).
2. *Saadeh v. Connors*, 166 So. 3d 959, 962 (Fla. 4th DCA 2015).
3. *Morgan Stanley DW Inc. v. Halliday*, 873 So.2d 400, 403 (Fla. 4th DCA 2004).
4. *Decarlo v. Griffin*, 827 So.2d 348, 351 (Fla. 4th DCA 2002).
5. *Jenne v. Church & Tower, Inc*., 814 So.2d 522, 524 (Fla. 4th DCA 2002).
6. *Hollywood Lakes Country Club, Inc. v. Community Association Services, Inc.,* 770 So.2d 716, 719 (Fla. 4th DCA 2000).
7. *Horizon Images, Inc. v. Delta Color Graphics, Inc.,* 639 So.2d 186 (Fla. 4th DCA 1994), *appeal after remand*, 693 So.2d 988 (Fla. 4th DCA 1997).
8. *Cigna Fire Underwriters Ins. Co., Inc. v. Leonard*, 645 So.2d 28, 30 (Fla. 4th DCA 1994).

9. *Jacobson v. Heritage Quality Const. Co., Inc.,* 604 So.2d 17, 18 (Fla. 4th DCA 1992), *cause dismissed*, 613 So.2d 5 (Fla. 1993).
10. *Aetna Casualty & Surety, Co. v. Jelac Corp.,* 505 So.2d 37, 38 (Fla. 4th DCA 1987).
11. *Weimar v. Yacht Club Point Estates, Inc.,* 223 So.2d 100, 102 (Fla. 4th DCA 1969).

§3:40.1.5 Elements of Cause of Action — 5th DCA

A person who is not a party to a contract may not sue for breach of that contract where that person receives only an incidental or consequential benefit from the contract. The exception to this rule is where the entity that is not a party to the contract is an intended third-party beneficiary of the contract. A third party may sue under a contract as an intended third-party beneficiary only if the parties express, or the contract clearly expresses, the intention to primarily and directly benefit the third party. The right of an intended, third party beneficiary to sue under a contract is recognized only if the parties clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party.

Source

Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp., 850 So.2d 536, 543 (Fla. 5th DCA 2003), *rev. denied*, 860 So.2d 977 (Fla. 2003).

See Also

1. *Goins v. Praetorian Ins. Co.*, 302 So. 3d 478, 479 (Fla. 5th DCA 2020).
2. *E.P. v. Hogreve*, 259 So. 3d 1007, 1011 (Fla. 5th DCA 2018).
3. *Dingle v. Dellinger*, 134 So. 3d 484, 488 (Fla. 5th DCA 2014).
4. *Patel v. Boers*, 68 So.3d 380 (Fla. 5th DCA 2011).
5. *Qubty v. Nagda*, 817 So.2d 952, 957 (Fla. 5th DCA 2002).
6. *Hirshenson v. Spaccio*, 800 So.2d 670, 673 (Fla. 5th DCA 2001).
7. *Jim Macon Bldg. Contractors, Inc. v. Lake County*, 763 So.2d 1223, 1226 (Fla. 5th DCA 2000).

§3:40.2 Statute of Limitations

Five Years. Fla. Stat. §95.11(2)(b).

§3:40.3 References

1. 11 Fla. Jur. 2d *Contracts* §§197–205 (2003).
2. 17A Am. Jur. 2d *Contracts* §§425–453 (2004).
3. 17A C.J.S. *Contracts* §§612–632 (1999).
4. Annotation, *What Constitutes Reservation of Right to Terminate, Rescind, or Modify Contract, as against Third-Party Beneficiary*, 44 A.L.R.2d 1270 (1955).
5. Restatement (Second) of Contracts §302 (1979).

§3:40.4 Defenses

1. **Only one contracting party intended to benefit the third party:** It is insufficient to show that only one party unilaterally intended to benefit the third party. *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.,* 647 So.2d 1028, 1031 (Fla. 4th DCA 1994) (citing to *Clark and Co. v. Department of Insurance,* 436 So.2d 1013, 1016 (Fla. 1st DCA 1983); *Suarez v. Integon Nat'l Ins. Co.*, No 19-22006-CIV-MORENO, 2019 WL 8014371, at *2 (S.D. Fla. October 15, 2019) (quoting *Clark & Co. v. Dep't of Ins. as Receiver of E. Ins. Co.*, 436 So. 2d 1013, 1016 (Fla. 1st DCA 1983)). *See Also Health Application Systems, Inc. v. Hartford Life and Accident Insurance Co.,* 381 So.2d 294, 298 (Fla. 1st DCA 1980).

2. **The contract does not evidence any intent to benefit a third party.** *See Hollywood Lakes Country Club, Inc. v. Community Ass'n Serv., Inc.,* 770 So. 2d 716, 719 (Fla. 4th DCA 2000); *Dingle v. Dellinger,* 134 So. 3d 484, 488 (Fla. 5th DCA 2014); *Driessen v. Univ. of Miami School of Law Children and Youth Clinic*,

260 So. 3d 1080, 1081 (Fla. 3d DCA 2018); *but see Pharma Supply, Inc. v. Stein,* No. 14-80374-CIV-COHN/SELTZER, 2015 WL 11422321, at *15 (S.D. Fla. April 27, 2015) (recognizing that "[I]t is not an absolute requirement that the plaintiff allege explicit contractual language designating it as an intended beneficiary. Instead, a plaintiff may allege that the parties in some other manner expressed an intent to benefit it through their contract.").

3. **Impossibility of performance** is a defense to breach of contract when the factual situation renders one party's performance under the contract impossible. *See Home Design Center Joint Venture v. County Appliances of Naples, Inc.,* 563 So. 2d 767, 770 (Fla. 2d DCA 1990); *Hillsborough County v. Star Ins. Co., 847 F.3d 1296, 1305 (11th Cir. 2017).*

4. **Test:** In such cases the test is, not that the promisee is liable to the third person, or that there is some privity between them, or that some consideration moved from the third person, but that the parties to the contract intended that a third person should be benefited by the contract. It is the undertaking on the part of the promisor, as a consideration to the promisee, to benefit the third person, that gives rise to a cause of action by the beneficiary against the promisor, resting upon the contract itself. *Jenne v. Church & Tower, Inc.*, 814 So.2d 522, 524 (Fla. 4th DCA 2002).

§3:50 ESTOPPEL, PROMISSORY

§3:50.1 Elements of Cause of Action — Florida Supreme Court

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Source

DK Arena, Inc. v. EB Acquisitions, I, LLC, 112 So.3d 85, 96 (Fla. 2013).

See Also

1. *Crown Life Insurance Company v. McBride*, 517 So.2d 660, 662 (Fla. 1987).
2. *Mount Sinai Hospital of Greater Miami, Inc. v. Jordan*, 290 So.2d 484, 486 (Fla. 1974).
3. *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.*, 190 So.2d 777, 779 (Fla. 1966).
4. *South Inv. Corp. v. Norton*, 57 So.2d 1, 3 (Fla. 1952).
5. *Hygema v. Markley*, 187 So. 373, 380 (Fla. 1939).
6. *W. R. Grace and Company v. Geodata Services, Inc.*, 547 So.2d 919, 924 (Fla. 1989).

§3:50.1.1 Elements of Cause of Action — 1st DCA

To state a cause of action for promissory estoppel, a plaintiff must allege facts that, if taken as true, would show:

1. that the plaintiff detrimentally relied on a promise made by the defendant,
2. that the defendant reasonably should have expected the promise to induce reliance in the form of action or forbearance on the part of the plaintiff or a third person, and
3. that injustice can be avoided only by enforcement of the promise against the defendant.

Source

Harris v. School Bd. of Duval County, 921 So.2d 725, 734 (Fla. 1st DCA 2006).

See Also

1. *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So.2d 297, 302 (Fla. 1st DCA 1999).
2 *Atlantic Masonry v. Miller Construction*, 558 So.2d 433, 434 (Fla. 1st DCA 1990).
3. *Criterion Leasing Group v. Gulf Coast Plastering & Drywall*, 582 So.2d 799, 800 (Fla. 1st DCA 1991).

4. *American States Insurance Company v. McGuire*, 510 So.2d 1227, 1229 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1273 (Fla. 1987).
5. *Dorsey v. Bacon*, 436 So.2d 1017, 1021 (Fla. 1st DCA 1983).
6. *Baxter's Asphalt & Concrete, Inc. v. Liberty County*, 406 So.2d 461, 466 (Fla. 1st DCA 1981), *reversed on other grounds*, 421 So.2d 505 (Fla. 1982).
7. *Centimark Corp. v. Gonzalez*, 10 So.3d 644, 645 (Fla. 1st DCA 2009) ("Under the doctrine of "promissory estoppel," a party is estopped from denying liability where that party makes a promise which it should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance and injustice can be avoided only by enforcement of the promise.").
8. *Harris v. School Bd. of Duval County*, 921 So.2d 725, 734 (Fla. 1st DCA 2006).
9. *Bishop v. Progressive Express Ins. Co.*, 154 So.3d 467, 468 (Fla. 1st DCA 2015).
10. *Scott v. James A. Jones Constr. Co.*, 315 So. 3d 767, 769 (Fla. 1st DCA 2021).

§3:50.1.2 Elements of Cause of Action — 2nd DCA

To state a cause of action for promissory estoppel, a plaintiff must establish the following three elements: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) a reasonable reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon.

Source

FCCI Ins. Co. v. Cayce's Excavation, Inc., 901 So.2d 248, 251 (Fla. 2d DCA 2005).

See Also

1. *City of Cape Coral v. Water Services of America, Inc.*, 567 So.2d 510 (Fla. 2d DCA 1990), *rev. denied*, 577 So.2d 1330 (Fla. 1991) ("Our supreme court discussed at length the elements of promissory estoppel and the circumstances under which that doctrine should be applied in *W.R. Grace and Co. v. Geodata Services*, 547 So.2d 919 (Fla. 1989).").
2. *In re Estate of Ingram v. Ingram*, 302 So.2d 204 (Fla. 2d DCA 1974).
3. *Southeastern Sales and Service Co. v. T. T. Watson, Inc.*, 172 So.2d 239 (Fla. 2d DCA 1965).

§3:50.1.3 Elements of Cause of Action — 3rd DCA

To state a cause of action for promissory estoppel, the plaintiff is required to allege three elements:
1. a representation as to a material fact that is contrary to a later-asserted position;
2. a reasonable reliance on that representation; and
3. a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon.

Source

JN Auto Collection, Corp. v. U.S. Security Ins. Co., 59 So.3d 256, 258 (Fla. 3d 2011) *(citing Romo v. Amedex Ins. Co.*, 930 So.2d 643, 650 (Fla. 3d DCA 2006).

See Also

1. *Friends of Lubavitch/Landow Yeshivah v. Northern Trust Bank of Florida*, 685 So.2d 951, 952 (Fla. 3d DCA 1996) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").
2. *Coral Way Properties, Ltd. v. Roses*, 565 So.2d 372, 374 (Fla. 3d DCA 1990).
3. *Jordan v. Mount Sinai Hospital of Greater Miami, Inc.*, 276 So.2d 102 (Fla. 3d DCA 1973), *affirmed*, 290 So.2d 484, 486 (Fla. 1974).
4. *Elgin National Industries, Inc. v. Howard Industries, Inc.*, 264 So.2d 440 (Fla. 3d DCA 1972).
5. *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.*, 173 So.2d 492 (Fla. 3d DCA 1965), *affirmed*, 190 So.2d 777 (Fla. 1966).

6. *Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship*, 45 So. 3d 897 (Fla. 3d DCA 2010).

§3:50.1.4 Elements of Cause of Action — 4th DCA

Promissory estoppel "applies when there is (1) a promise which the promisor should reasonably expect to induce action or forbearance, (2) action or forbearance in reliance on the promise, and (3) injustice resulting if the promise is not enforced." *DK Arena, Inc*., 112 So.3d at 96. The Florida Supreme Court has expressly stated that the Statute of Frauds cannot be circumvented by application of the doctrine of promissory estoppel. *Id.* at 97 ("[A]pplication of the Statute of Frauds is a matter of legislative prerogative; the judicial doctrine of promissory estoppel may not be used to circumvent its requirements.").

Source

Ocwen Loan Servicing, LLC v. Delvar, 180 So.3d 1190, 1194 (Fla. 4th DCA 2015).

See Also

1. *Walker v. State*, 193 So. 3d 946, 953 (Fla. 4th DCA 2016).
2. *Leonardi v. City of Hollywood*, 715 So.2d 1007, 1008 (Fla. 4th DCA 1998) (The quote in *Leonardi* has omitted the following sentence included in *W.R. Grace and Co. v. Geodata Services, Inc.*, 547 So.2d 919, 924 (Fla. 1989): "The remedy granted for breach may be limited as justice requires.").
3. *Waterfront Properties, Inc. v. Coast to Coast Real Estate, Inc.*, 679 So.2d 48, 49 (Fla. 4th DCA 1996).
4. *Revlon Group Incorporated v. LJS Realty, Inc.*, 579 So.2d 365, 367 (Fla. 4th DCA 1991) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. … The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice.").
5. *Perry Publications, Inc. v. Bankers Life and Casualty Company*, 246 So.2d 604, 605 (Fla. 4th DCA 1971).

§3:50.1.5 Elements of Cause of Action — 5th DCA

To prove estoppel the following elements must be established:

1. A representation as to a material fact that is contrary to a later-asserted position;
2. A reasonable reliance on that representation; and
3. A change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon.

Source

Warren v. Dep't of Admin., 554 So.2d 568, 570 (Fla. 5th DCA 1989).

See Also

1. *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So.2d 1098, 1103 (Fla. 5th DCA 2006).
2. *Homrich v. American Chambers Life Insurance Company*, 594 So.2d 348 (Fla. 5th DCA 1992).
3. *Ubersee Handels Gesellschaft, Inc. v. Semenjuk*, 540 So.2d 136, 138 (Fla. 5th DCA 1989).

§3:50.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p).

§3:50.3 References

1. 22 Fla. Jur. 2d *Estoppel and Waiver* §§46–49 (2005).
2. 28 Am. Jur. 2d *Estoppel and Waiver* §§55–59 (2000).
3. 31 C.J.S. *Estoppel and Waiver* §§92, 93 (1996).
4. Restatement (Second) of Contracts §90 (1979).
5. Annotation, *Promissory Estoppel of Lending Institution Based on Promise to Lend Money*, 18 A.L.R.5th 307 (1994).

6. Annotation, *Promissory Estoppel as Basis For Avoidance of UCC Statute of Frauds (UCC §2-201)*, 29 A.L.R.4th 1006 (1984).
7. Annotation, *Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R.3d 1037 (1974).
8. Annotation, *Promissory Estoppel*, 48 A.L.R.2d 1069 (1956).
9. Eric M. Holmes, *The Four Phases of Promissory Estoppel*, 20 Seattle U. L. Rev. 45 (1996).
10. Michael I. Swygert & Donald W. Smucker, *Promissory Estoppel in Florida: Growing Recognition of Promissory Obligation*, 16 Stetson L. Rev. 1 (1986).
11. Jay M. Feinman, *Promissory Estoppel and Judicial Methods*, 97 Harv. L. Rev. 678 (1984).
12. Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L. Rev. 472 (1983).
13. Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 Vill. L. Rev. 63 (1980).

§3:50.4 Defenses

1. **Definite Promise:** The promise must be definite as to terms and time. *W. R. Grace and Company v. Geodata Services, Inc.*, 547 So.2d 919, 924 (Fla. 1989).

2. **Evidence Required:** For promissory estoppel to be applied, the evidence must be clear and convincing. *W. R. Grace and Company v. Geodata Services, Inc.*, 547 So.2d 919, 925 (Fla. 1989).

3. **Express Contract:** An action for promissory estoppel fails upon a showing that an express contract exists. *Williams v. Bear Stearns & Co.*, 725 So.2d 397, 400 (Fla. 5th DCA 1998), *rev. denied*, 737 So.2d 550 (Fla. 1999).

4. **Illegal Result:** Estoppel cannot be applied against a governmental entity to accomplish an illegal result. *Branca v. City of Miramar*, 634 So.2d 604 (Fla. 1994); *Morgran Co., Inc. v. Orange County*, 818 So.2d 640, 644 (Fla. 5th DCA 2002), *rev. denied*, 839 So.2d 699 (Fla. 2003).

5. **Limited Application:** The doctrine, however, only applies where to refuse to enforce a promise, even though not supported by consideration, "would be virtually to sanction the perpetration of fraud or would result in other injustice." *Crown Life Insurance Company v. McBride*, 517 So.2d 660, 662 (Fla. 1987). In any event, the doctrine of promissory estoppel should not be applied if injustice can otherwise be avoided. *Brine v. Fertitta*, 537 So.2d 113, 115 (Fla. 2d DCA 1988).

6. **Lost Profits / Bidding Statute:** We consider that it would be unjust to allow a recovery for loss of profits based on the theory of promissory estoppel due to a violation of a public bidding statute. *Baxter's Asphalt & Concrete, Inc. v. Liberty County*, 406 So.2d 461, 468 (Fla. 1st DCA 1981), *reversed on other grounds*, 421 So.2d 505 (Fla. 1982).

7. **Oral Employment Contracts:** Promissory estoppel is not controlling on oral employment contracts. *Keller v. Penovich*, 262 So.2d 243, 244 (Fla. 4th DCA 1972).

8. **Sovereign, The:** The law of this state recognizes that the theory of promissory estoppel applies to the sovereign only under exceptional circumstances. *State of Florida, Department of Health and Rehabilitative Services v. Law Offices of Donald W. Belveal*, 663 So.2d 650, 652 (Fla. 2d DCA 1995). Courts usually shrink from finding an estoppel against a governmental entity where the actions of the official are unauthorized or unlawful. *Martin County v. Indiantown Enterprises, Inc.*, 658 So.2d 1144, 1146 (Fla. 4th DCA 1995).

9. **Statute of Frauds:** "The question that emerges for resolution by us is whether or not we will adopt by judicial action the doctrine of promissory estoppel as a sort of counter action to the legislatively created Statute of Frauds. This we decline to do." *W. R. Grace and Company v. Geodata Services, Inc.*, 547 So.2d

919, 924 (Fla. 1989); *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.*, 190 So.2d 777, 779 (Fla. 1966); *Coral Way Properties, Ltd. v. Roses*, 565 So.2d 372, 374 (Fla. 3d DCA 1990).

10. **Truthful Statements:** Ordinarily, a truthful statement as to the present intention of a party with regard to his future act is not the foundation upon which an estoppel may be built. *W. R. Grace and Company v. Geodata Services, Inc.*, 547 So.2d 919, 924 (Fla. 1989).

§3:50.5 Related Matters

1. **Insurance Coverage:** The form of equitable estoppel known as promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice. *Crown Life Insurance Company v. McBride*, 517 So.2d 660, 662 (Fla. 1987); *Doe v. Allstate Insurance Company*, 653 So.2d 371 (Fla. 1995); *Tradewinds Construction v. Newsbaum*, 606 So.2d 708, 709 (Fla. 1st DCA 1992), *rev. denied*, 618 So.2d 210 (Fla. 1993); *Emanuel v. United States Fidelity and Guaranty Company*, 583 So.2d 1092, 1093 (Fla. 3d DCA 1991); *State Farm Mutual Automobile Insurance Company v. Hinestrosa*, 614 So.2d 633, 636 (Fla. 4th DCA 1993).

2. **Pledge, Breach of:** Therefore, in order for a pledge to survive the death of the donor and be considered a valid claim against the estate, two elements must coincidentally exist. First, the document stating the conditions of the pledge must recite with particularity the specific purpose for which the funds are to be used. … Secondly, the donee must affirmatively show actual reliance of a substantial character in furtherance of the specified purpose set forth in the pledge instrument before the claim may be honored by the estate. *Mount Sinai Hospital of Greater Miami, Inc. v. Jordan*, 290 So.2d 484, 486 (Fla. 1974). The view most commonly held is that such a subscription is an offer to contract which becomes binding as soon as the work towards which the subscription was promised has been done or begun, or liability incurred in regard to such work on the faith of the subscription. Using that reasoning then it becomes simple to understand that once the element of promissory estoppel is found, a cause of action for the breach of a pledge accrues where the pledge was agreed to be performed. *Friends of Lubavitch/Landow Yeshivah v. Northern Trust Bank of Florida*, 685 So.2d 951, 952 (Fla. 3d DCA 1996).

3. **Second Bite at the Apple:** Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract. *Gen. Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1042 (6th Cir. 1990), (quoting *Walker v. KFC Corp.,* 728 F.2d 1215, 1220 (9th Cir. 1984)). *Advanced Marketing Systems Corp. v. ZK Yacht Sales*, 830 So.2d 924, 928 (Fla. 4th DCA 2002).

4. **Third Parties:** Promissory estoppel may be asserted by third parties. *Atlantic Masonry v. Miller Construction*, 558 So.2d 433, 434 (Fla. 1st DCA 1990).

§3:50.6 Sample Complaint

See Complaint Library, Form 3:10-6 (Breach of Contract; Conversion; Promissory Estoppel; Specific Performance) on Digital Access.

§3:60 RESCISSION

§3:60.1 Elements of Cause of Action — Florida Supreme Court

The elements of rescission, in a nutshell, are "misrepresentation" of a "material" "fact" on which the buyer justifiably "relied." The buyer need not show any causal connection between the misrepresentation and his damage, indeed, he need not even show that he has been damaged.

Source

E.F. Hutton & Co. v. Rousseff, 537 So.2d 978, 980 (Fla. 1989).

§3:60.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§3:60.1.2 Elements of Cause of Action — 2nd DCA

The fundamental requirements necessary to state a cause of action for rescission or cancellation of a contract are:

1. The character or relationship of the parties;
2. The making of the contract;
3. The existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground for rescission or cancellation;
4. That the party seeking rescission has rescinded the contract and notified the other party to the contract of such rescission;
5. If the moving party has received benefits from the contract, he should further allege an offer to restore these benefits to the party furnishing them, if restoration is possible;
6. Lastly, that the moving party has no adequate remedy at law.

Source

Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc., 174 So.2d 614, 617 (Fla. 2d DCA 1965), *cert. denied*, 180 So.2d 656 (Fla. 1965).

§3:60.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

See Also

1. *Rachid v. Perez*, 26 So.3d 70, 71 (Fla. 3d DCA 2010) ("Under Florida law, the party seeking rescission based on unilateral mistake must establish that: (1) the mistake was induced by the party seeking to benefit from the mistake; (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo; (3) denial of release from the agreement would be inequitable; and (4) the position of the opposing party has not so changed that granting the relief would be unjust.").
2. *AVVA-BC, LLC v. Amiel*, 25 So.3d 7, *11 (Fla. 3d DCA 2009) ("In order to grant rescission, both parties must be restored to their pre-contract *status quo.* Courts of equity will rescind an instrument upon fraud, accident or mistake. Cancellation or rescission will not be granted for breach of contract, in the absence of fraud, mistake, undue influence, multiplicity of suits, cloud on title, trust, or some other independent ground for equitable interference. While an agreement may be rescinded for fraud relating to an existing fact, as a general rule, rescission will not be granted for failure to perform a covenant or promise to do an act in the future, unless the covenant breached is a dependent one….. [In addition,] where a party seeking rescission has discovered grounds for rescinding an agreement and either remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof, he will be held to have waived his right to rescind.").

§3:60.1.4 Elements of Cause of Action — 4th DCA

The second district has identified those factors that must appear in a complaint to state a cause of action for rescission of a contract:

1. The character or relationship of the parties;
2. The making of the contract;
3. The existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground for rescission or cancellation;

4. That the party seeking rescission has rescinded the contract and notified the other party to the contract of such rescission;
5. If the moving party has received benefits from the contract, he should further allege an offer to restore these benefits to the party furnishing them, if restoration is possible;
6. Lastly, that the moving party has no adequate remedy at law.

Source

Billian v. Mobile Corporation, 710 So.2d 984, 991 (Fla. 4th DCA 1998), *rev. denied*, 725 So.2d 1109 (Fla. 1998).

§3:60.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

See Also

Townsend v. Morton, 36 So.3d 865, 866 (Fla. 5th DCA 2010) ("Rescission is a proper remedy to relieve a party from obligations and provisions of an instrument procured by fraud, deceit, trickery, or artifice… The courts also have established that in order to grant rescission of an instrument, the other party must be restored to the position it occupied prior to its execution.").

§3:60.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(l).

§3:60.3 References

1. 9 Fla. Jur. 2d *Cancellation, Rescission, and Reformation of Instruments* §§1–51 (2004).
2. 11 Fla. Jur. 2d *Contracts* §288 (2003).
3. 13 Am. Jur. 2d *Cancellation of Instruments* §§50–53 (2000).
4. 12A C.J.S. *Cancellation of Instruments; Rescission* §§19–70, 122–143 (2004).

§3:60.4 Defenses

1. **Adequate Remedy At Law:** Rescission should not be granted if damages for breach of contract or warranty are available. *Central Florida Antenna Service, Inc. v. Crabtree*, 503 So.2d 1351, 1353 (Fla. 5th DCA 1987). *See Also Collier v. Boney*, 525 So.2d 971, 972 (Fla. 1st DCA 1988).

2. **Harsh Remedy:** Rescission and cancellation are harsh remedies and therefore not favored by the court. *Rood Company v. Board of Public Instruction of Dade County*, 102 So.2d 139, 142 (Fla. 1958).

3. **Indispensable Party:** In an action for rescission of a transaction, the parties to the transaction are indispensable. *Allman v. Wolfe*, 592 So.2d 1261, 1263 (Fla. 2d DCA 1992).

4. **Modification of Contract:** An action to cancel or rescind an agreement based on fraudulent inducement cannot be maintained where the agreement has been modified by the parties after the original fraud has been discovered. *Sunrise Farms, Inc. v. Wright*, 376 So.2d 457, 458 (Fla. 1st DCA 1979).

5. **Waiver:** *See Rood Company v. Board of Public Instruction of Dade County*, 102 So.2d 139, 142 (Fla. 1958).

§3:60.5 Related Matters

1. **Consideration Inadequate:** Inadequacy of consideration when coupled with other inequitable circumstances may afford a basis for rescission. *Harrell v. Branson*, 344 So.2d 604, 606 (Fla. 1st DCA 1977), *cert. denied*, 353 So.2d 675 (Fla. 1977).

2. **Election of Remedies:** Florida law provides for an election of remedies in fraudulent inducement cases: rescission, whereby the party repudiates the transaction, or damages, whereby the party ratifies the contract. *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co*., 761 So.2d 306, 313 (Fla. 2000).

3. **Equitable Lien:** As part of the relief granted in rescission, a court may impose an equitable lien. *Billian v. Mobile Corporation*, 710 So.2d 984, 991 (Fla. 4th DCA 1998), *rev. denied*, 725 So.2d 1109 (Fla. 1998).

4. **Jury Trial Improper:** It is error to submit equitable issues to a jury. *Chabad House-Lubavitch of Palm Beach County, Inc. v. Banks*, 602 So.2d 670, 672 (Fla. 4th DCA 1992).

5. **Promise to Perform Act in the Future:** *See Steak House, Inc. v. Barnett*, 65 So.2d 736, 738 (Fla. 1953).

6. **Status Quo:** In granting rescission, the court should attempt to restore the parties to the status quo. Where restoration to the status quo is impossible, however, a court may still grant rescission, provided the equities between the parties can be balanced. *Braman Dodge, Inc. v. Smith*, 515 So.2d 1053, 1054 (Fla. 3d DCA 1987); *Bass v. Farish*, 616 So.2d 1146, 1147 (Fla. 4th DCA 1993) (noting an exception to the general rule when the inability of one party to restore to the status quo is caused by the fraud of the other party).

7. **Stranger Bringing Action:** A stranger may bring an action for rescission of a contract if his legal or equitable rights are affected thereby. *ADCA Corp. v. Blumberg*, 403 So.2d 547 (Fla. 2d DCA 1981).

8. **No-Reliance Clauses:** Such contractual clauses must explicitly state that fraud is not a ground for rescission in order to deny rescission as a remedy. *Lower Fees, Inc. v. Bankrate, Inc.*, 74 So.3d 517 (Fla. 4th DCA 2011).

§3:70 SPECIFIC PERFORMANCE

§3:70.1 Elements of Cause of Action — Florida Supreme Court

The Florida Supreme Court long ago held that specific performance is an equitable remedy that, under Florida law, is effectively the same as and synonymous with injunctive relief.

SOURCE

Seaboard Oil Co. v. Donovon, 99 Fla. 1296, 1306 (Fla. 1930) ("an injunction against the breach of a contract is a negative decree of specific performance of the agreement, and the general rule is that the power and the duty of a court of equity to grant the former is measured by the same rules and practice as its power and duty to grant the latter relief.").

SEE ALSO

Thompson v. Shell Petroleum Corp., 130 Fla. 652 (Fla. 1938) ("An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules.").

§3:70.1.1 Elements of Cause of Action — 1st DCA

The elements for specific performance are:
1. Plaintiff and Defendant are parties to a contract;
2. Plaintiff performed its obligation under the contract or is ready, willing and able to perform;
3. Defendant refused to perform its obligation under the contract; and
4. No adequate remedy at law exists.

SEE ALSO

Celano v. Dlabal, 591 So.2d 653, 655 (Fla. 1st DCA 1991).

§3:70.1.2 Elements of Cause of Action — 2nd DCA

See Also

Matousek v. Cooper, 111 So.2d 65, 67 (Fla. 2d DCA 1959).

§3:70.1.3 Elements of Cause of Action — 3rd DCA

Specific performance is an equitable remedy that can only be granted when 1) the plaintiff is clearly entitled to it, 2) there is no adequate remedy at law, and 3) the judge believes that justice requires it.

Source

All Seasons Condo. Ass'n, Inc. v. Patrician Hotel, LLC, 274 So.3d 438, 445-46 (Fla. 3d DCA 2019).

See Also

1. *IMC Grp., LLC. v. Outar Inv. Co. LLC.*, 2022 WL 163835, *2 (Fla. 3d DCA Jan. 19, 2022).
2. *DePrince v. Starboard Cruise Services, Inc.*, 163 So.3d 586, 597 (Fla. 3d DCA 2015) (explaining that in a breach of contract for the sale of real property, the seller can elect the remedy of specific performance).

§3:70.1.4 Elements of Cause of Action — 4th DCA

See Also

Taylor v. Richards, 971 So.2d 127, 129 (Fla. 4th DCA 2007).

§3:70.1.5 Elements of Cause of Action — 5th DCA

A decree of specific performance can be granted only when 1) the plaintiff is clearly entitled to it, 2) there is no adequate remedy at law, and 3) the judge believes that justice requires it.

Source

Boardwalk at Daytona Dev., LLC v. Paspalakis, 220 So.3d 457, 460 (Fla. 5th DCA 2016).

See Also

1. *Lusignan v. Lusignan*, 972 So. 2d 1076, 1077 (Fla. 5th DCA 2008).

§3:70.2 Statute of Limitations

One Year. Fla. Stat. §95.11(5)(a).

§3:70.3 Defenses

1. **Ambiguity:** Specific performance may be denied when a contract is unenforceable because, based on an ambiguity in the contract, the parties never reached a meeting of the minds regarding an essential term of the agreement. *King v. Bray*, 867 So.2d 1224, 1226 (Fla. 5th DCA 2004); *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 220 So.3d 457, 461 (Fla. 5th DCA 2016).

2. **Compliance with Contractual Obligations:** Specific performance was properly denied where the buyer had not complied with its contractual obligations. *JNC Enterprises, Ltd. v. ICP 1, Inc.*, 777 So.2d 1182, 1185 (Fla. 5th DCA 2001), *rev. denied*, 792 So.2d 1214 (Fla. 2001); *Muniz v. Crystal Lake Project, LLC*, 947 So.2d 464, 470 (Fla. 3d DCA 2006).

3. **Contract Terms:** The complaint was insufficient in that it did not have attached a copy of the entire contract sued upon nor did it set forth the terms of the contract adequately. *Pletts v. Pletts*, 258 So.2d 297 (Fla. 3d DCA 1972).

4. **Equitable Remedy:** A decree of specific performance is an equitable remedy "not granted as a matter of right or grace but as a matter of sound judicial discretion" governed by legal and equitable principles.

Humphrys v. Jarrell, 104 So.2d 404, 410 (Fla. 2d DCA 1958). Specific performance shall only be granted when: (1) the plaintiff is clearly entitled to it; (2) there is no adequate remedy at law; and (3) the judge believes that justice requires it. *Mrahunec v. Fausti,* 121 A.2d 878, 880 (1956). *Castigliano v. O'Connor*, 911 So.2d 145 (Fla. 3d DCA 2005). *See Also L'Engle v. Overstreet*, 55 So. 381, 384 (Fla. 1911); *Pariz v. Colon*, 77 So.3d 721 (Fla. 3d DCA 2011) (a court sitting in equity has the discretion to award specific performance, which includes allowing title to be transferred from one party into another party's name).

5. **Tenants:** Tenants cannot seek specific performance of a lease against a landlord. *Cardinal Inv. Grp., Inc. v. Giles*, 813 So.2d 262, 263 (Fla. 4th DCA 2002); *Craven v. TRG-Boynton Beach, Ltd.*, 925 So.2d 476, 481 (Fla. 4th DCA 2006).

6. **Unable to Comply:** A court of equity will not demand that a contract be specifically enforced against a party who, due to future circumstances, is unable to comply with the agreement. *Camp v. Parks*, 314 So.2d 611, 615 (Fla. 4th DCA 1975).

§3:70.4 Related Matters

1. **Purpose:** The purpose of specific performance is to compel a party to do what it agreed to do pursuant to a contract. *Anthony James Development, Inc. v. Balboa Street Beach Club, Inc*., 875 So.2d 696, 698 (Fla. 4th DCA 2004).

§3:70.5 Sample Complaint

See Complaint Library, Form 3:10-6 (Breach of Contract; Conversion; Promissory Estoppel; Specific Performance) on Digital Access.

§3:70.6 Complaint (Fla.R.Civ.P. Form 1.941)

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for specific performance of a contract to convey real property in _____ County, Florida.
2. On _____(date)_____, plaintiff and defendant entered into a written contract, a copy being attached.
3. Plaintiff tendered the purchase price to defendant and requested a conveyance of the real property described in the contract.
4. Defendant refused to accept the tender or to make the conveyance.
5. Plaintiff offers to pay the purchase price.

WHEREFORE plaintiff demands judgment that defendant be required to perform the contract for damages.

NOTE: A copy of the sales contract must be attached.

Committee Notes: 1980 Amendment. Paragraph 3 is divided into 2 paragraphs to properly accord with rule 1.110(f). See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

Author's Note: The "WHEREFORE" clause may need the word "and" between the words, "contract" and "for." Also, the word "sued" has been changed to "sues."

§3:80 TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

§3:80.1 Elements of Cause of Action — Florida Supreme Court

If one maliciously interferes with a contract between two persons, and induces one of them to breach the contract to the injury of the other, the injured party may maintain an action against the wrongdoer, and where the act was intentional, malice will be inferred. To do intentionally that which is calculated in the ordinary course of events to damage, and which in fact does damage, another person in his property or trade, is malicious in the law, and is actionable if it is done without just cause or excuse.

Source

Dade Enterprises, Inc. v. Wometco Theatres, Inc., 160 So. 209, 210 (Fla. 1935).

See Also

1. *Bankers Multiple Line Insurance Co. v. Farish*, 464 So.2d 530, 532 (Fla. 1985) ("In order to prevail in his suit Farish had to prove, among other things, that Bankers intentionally and unjustifiedly interfered with the Farish-Smith contract.").
2. *Gossard v. Adia Servs., Inc.*, 723 So.2d 182, 184 (Fla. 1998).
3. *In re Standard Jury Instructions In Civil Cases-Report No. 09-01*, 35 So.3d 666, 698 (Fla. 2010).

§3:80.1.1 Elements of Cause of Action — 1st DCA

Four elements are required to establish tortious interference with a contractual or business relationship: (1) the existence of a business relationship or contract; (2) knowledge of the business relationship or contract on the part of the defendant; (3) an intentional and unjustified interference with the business relationship or procurement of the contract's breach; and (4) damage to the plaintiff as a result of the interference.

Source

McKinney-Green, Inc. v. Davis, 606 So.2d 393, 397 (Fla. 1st DCA 1992).

See Also

1. *Howard v. Murray*, 184 So.3d 1155, 1166 (Fla. 1st DCA 2015).
2. *University of West Florida Bd. of Trustees v. Habegger*, 125 So.3d 323, 326 (Fla. 1st DCA 2013).
3. *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 899 So.2d 1222, 1228 (Fla. 1st DCA 2005).
4. *McCurdy v. Collis*, 508 So.2d 380 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987).
5. *Smith v. Ocean State Bank*, 335 So.2d 641, 643 (Fla. 1st DCA 1976).

§3:80.1.2 Elements of Cause of Action — 2nd DCA

To be actionable, tortious interference requires:

1. the existence of an advantageous business relationship under which the plaintiff has legal rights;
2. an intentional and unjustified interference with that relationship by the defendant; and
3. damage to the plaintiff as a result of the breach of the business relationship.

Source

Amedas, Inc. v. Brown, 505 So.2d 1091, 1093 (Fla. 2d DCA 1987), *rev. denied*, 639 So.2d 975 (Fla. 1994).

See Also

Fiberglass Coatings, Inc. v. Interstate Chem., Inc., 16 So.3d 836, 838 (Fla. 2d DCA 2009).

§3:80.1.3 Elements of Cause of Action — 3rd DCA

To establish the tort of interference with a contractual or business relationship, it is well-settled in Florida that one must allege and prove:

1. the existence of a business relationship under which the plaintiff has legal rights,
2. an intentional and unjustified interference with that relationship by the defendant, and
3. damage to the plaintiff as a result of the breach of the business relationship.

Source

DNA Sports Performance Lab, Inc. v. Club Atlantis Condo. Assoc., 219 So.3d 107, 110 (Fla. 3d DCA 2017).

See Also

1. *Peninsula Federal Savings and Loan Association v. DKH Properties, Ltd*., 616 So.2d 1070, 1073 (Fla. 3d DCA 1993), *rev. denied*, 626 So.2d 204 (Fla. 1993).
2. *Ethyl Corporation v. Balter*, 386 So.2d 1220, 1223 (Fla. 3d DCA 1980), *petition for rev. denied*, 392 So.2d 1371 (Fla. 1981), *cert. denied*, 101 S.Ct. 3099 (1981).
3. *Fernandez v. Haber & Ganguzza, LLP*, 30 So.3d 644, 646 (Fla. 3d DCA 2010).

§3:80.1.4 Elements of Cause of Action — 4th DCA

The elements of tortious interference with a contract or business relationship are:

1. the existence of a business relationship between the plaintiff and a third person, not necessarily evidenced by an enforceable contract, under which the plaintiff has legal rights;
2. the defendant's knowledge of the relationship;
3. an intentional and unjustified interference with the relationship by the defendant which induces or otherwise causes the third person not to perform; and
4. damage to the plaintiff resulting from the third person's failure to perform.

Source

Seminole Tribe of Florida v. Times Pub. Co., Inc., 780 So.2d 310, 315 (Fla. 4th DCA 2001).

See Also

1. *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 385 (Fla. 4th DCA 1999).
2. *Wackenhut Corporation v. Maimone*, 389 So.2d 656, 657 (Fla. 4th DCA 1980), *petition for rev. denied*, 411 So.2d 383 (Fla. 1981).
3. *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 76 (Fla. Dist. Ct. App. 4th Dist. 2010).
4. *Palm Beach County Health Care Dist. v. Prof'l Med. Educ.*, 13 So.3d 1090, 1094 (Fla. 4th DCA 2009).

§3:80.1.5 Elements of Cause of Action — 5th DCA

The elements of a cause of action for tortious interference with a contractual relationship are:

1. The existence of a contract,
2. The defendant's knowledge of the contract,
3. The defendant's intentional procurement of the contract's breach,
4. Absence of any justification or privilege, [and]
5. Damages resulting from the breach.

Source

Florida Telephone Corporation v. Essig, 468 So.2d 543, 544 (Fla. 5th DCA 1985).

See Also

1. *Farah v. Canada*, 740 So.2d 560, 561 (Fla. 5th DCA 1999), *rev. denied*, 744 So.2d 452 (Fla. 1999).
2. *Sullivan v. Economic Research Properties*, 455 So.2d 630, 631 (Fla. 5th DCA 1984).
3. *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1076 (Fla. 5th DCA 1982).
4. *McDonald v. McGowan*, 402 So.2d 1197, 1201 (Fla. 5th DCA 1981), *petition for rev. dismissed*, 411 So.2d 380 (Fla. 1981).
5. *Kenniasty v. Bionetics Corp.*, 10 So.3d 1183, 1187 (Fla. 5th DCA 2009), *quashed on other grounds*, 69 So.3d 943 (Fla. 2011), *after remand*, *Kenniasty v. Bionetics Corp.*, 82 So. 3d 1071 (Fla. Dist. Ct. App. 5th Dist. 2011).

§3:80.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p).

§3:80.3 References

1. 32 Fla. Jur. 2d *Interference* §§1–4, 11–13 (2003).
2. 45 Am. Jur. 2d *Interference* §§3–35 (1999).
3. 86 C.J.S. *Torts* §§59–65, 98 (1997).
4. Restatement (Second) of Torts §§762–774A (1979).

§3:80.4 Defenses

1. **Absolute Immunity:** In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as tortious interference with a business relationship so long as the act has some relation to the proceeding. *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.*, 639 So.2d 606, 608 (Fla. 1994); *Fernandez v. Haber & Ganguzza, LLP*, 30 So.3d 644, 646 (Fla. 3d DCA 2010); *Davis v. Bailynson*, 268 So.3d 762, 770 (Fla. 4th DCA 2019); *but see DelMonico v. Traynor*, 116 So.3d 1205, 1220 (Fla. 2013) (holding that statements made during ex-parte, out-of-court questioning of potential witnesses are subject only to qualified privilege).

2. **Act Legal in Itself:** Where one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice, or other bad motive toward another, does not give the latter a right of action against the former. *Ethyl Corporation v. Balter*, 386 So.2d 1220, 1225 (Fla. 3d DCA 1980), *petition for rev. denied*, 392 So.2d 1371 (Fla. 1981), *cert. denied*, 101 S.Ct. 3099 (1981).

3. **Contract Required:** An essential element for the establishment of a tortious interference with a contractual relationship is the existence of a contract. *McKinney-Green, Inc. v. Davis*, 606 So.2d 393, 397 (Fla. 1st DCA 1992); *Realauction.com, LLC v. Grant St. Group, Inc.*, 82 So. 3d 1056, 1060 (Fla. Dist. Ct. App. 4th Dist. 2011) (the tortious interference claim failed because the company did not make the requisite prima facie showing of tortious interference with a business relationship, as a relationship did not exist when the alleged interference occurred).

4. **Contract Terminable At Will:** The general rule is that an action for tortious interference will not lie where a party tortiously interferes with a contract terminable at will. This is so because when a contract is terminable at will there is only an expectancy that the relationship will continue. In such a situation, a competitor has a privilege of interference in order to acquire the business for himself. *Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.,* 629 So.2d 252, 255 (Fla. 3d DCA 1993). *See Also Perez v. Rivero,* 534 So.2d 914, 916 (Fla. 3d DCA 1988); *Wackenhut Corp. v. Maimone,* 389 So.2d 656, 658 (Fla. 4th DCA 1980), *petition for rev. denied,* 411 So.2d 383 (Fla. 1981); *Fid. Warranty Servs. v. Firstate Ins. Holdings, Inc.*, 74 So.3d 506 (Fla. 4th DCA 2011) (where agreement with insurer was terminable at will with 90-day notice; there was no proof presented at trial on the correct measure of damages, and as such, the trial court should have granted JMA's motion for directed verdict on the tortious interference counterclaim). However, even if the contract is terminable at will, the interferer's actions are tortious and actionable if the motive is purely malicious and not coupled with any legitimate competitive economic interest. *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1076 (Fla. 5th DCA 1982).

5. **First Amendment:** Although the trial court had subject matter jurisdiction over the rabbi's breach of contract claim, the court lacked jurisdiction over his complaint for defamation and tortious interference because resolving these disputes would require the court to become excessively entangled with religious beliefs. *Goodman v. Temple Shir Ami, Inc.*, 712 So.2d 775 (Fla. 3d DCA 1998), *appeal dismissed*, 737 So.2d 1077 (Fla. 1999), *cert. denied*, 120 S.Ct. 789 (2000).

6. **Honest Advice:** An agent that gives, on request by his or her principal, honest advice in his or her principal's best interest to breach an existing relationship is not liable for tortious interference. Restatement (Second) of Torts §772 (1965); *Scussel v. Balter*, 386 So.2d 1227, 1228 (Fla. 3d DCA 1980).

7. **Interference:** In order to maintain an action for tortious interference with contractual rights, a plaintiff must prove that a third party interfered with a contract by influencing, inducing or coercing one of the parties to breach the contract, thereby causing injury to the other party. The defendant may not be held liable where it is found that the breach by the party to the contract rather than the persuasion by the defendant was the proximate cause of the plaintiff's damage. *Farah v. Canada*, 740 So.2d 560, 561 (Fla. 5th DCA 1999), *rev. denied*, 744 So.2d 452 (Fla. 1999).

8. **Knowledge of the Contract:** The intent element of the cause of action encompasses the requirement that the defendant know about the contract he is interfering with. *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1076 (Fla. 5th DCA 1982).

9. **Negligent Interference:** There is no such thing as a cause of action for interference which is only negligently or consequently effected. *Peninsula Federal Savings and Loan Association v. DKH Properties, Ltd*., 616 So.2d 1070, 1073 (Fla. 3d DCA 1993), *rev. denied*, 626 So.2d 204 (Fla. 1993). *See Also Ethyl Corporation v. Balter*, 386 So.2d 1220, 1224 (Fla. 3d DCA 1980), *petition for rev. denied*, 392 So.2d 1371 (Fla. 1981), *cert. denied*, 101 S.Ct. 3099 (1981).

10. **Own Business Interest:** Absent proof of a duty owed by defendant to plaintiff, defendant was entitled to conduct its business and legal affairs in the manner it determined to be in its own best interests without regard to the effects on plaintiff. *Paparone v. Bankers Life & Casualty Company*, 496 So.2d 865, 868 (Fla. 2d DCA 1986); *Bruce v. American Development Corp.*, 408 So.2d 857, 858 (Fla. 3d DCA 1982). Under Florida law, a party is privileged to act, and his actions are non-actionable, if the actions are taken to safeguard or promote the party's own financial interests. *Horizons Rehabilitation, Inc. v. Health Care And Retirement Corp*., 810 So.2d 958, 964 (Fla. 5th DCA 2002), *rev. denied*, 832 So.2d 104 (Fla. 2002). *See Also Perez v. Rivero*, 534 So.2d 914, 916 (Fla. 3d DCA 1988); *Knight Enterprises, Inc. v. Green*, 509 So.2d 398 (Fla. 4th DCA 1987); *Genet Co. v. Annheuser-Busch, Inc*., 498 So.2d 683, 684 (Fla. 3d DCA 1986).

11. **Party to the Contract:** A cause of action for interference does not exist against one who is himself a party to the contract allegedly interfered with. *Ethyl Corporation v. Balter*, 386 So.2d 1220, 1224 (Fla. 3d DCA 1980), *petition for rev. denied*, 392 So.2d 1371 (Fla. 1981), *cert. denied*, 101 S.Ct. 3099 (1981); *Palm Beach County Health Care Dist. v. Professional Medical Educ., Inc.,* 13 So.3d 1090, 1094 (Fla. 4th DCA 2009). The rule generally applied to interconnected contracts, is that a party may not be charged with interference with its own contract. *Peninsula Federal Savings and Loan Association v. DKH Properties, Ltd*., 616 So.2d 1070, 1073 (Fla. 3d DCA 1993), *rev. denied*, 626 So.2d 204 (Fla. 1993).

12. **Right of Interference:** Tortious interference claims are barred when a contractual provision expressly reserves the right of interference. *McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987), rev. denied, 518 So.2d 1274 (Fla. 1987).

13. **Tortious Interference with Advantageous Business Relationship:** See the defenses under Tortious Interference with Advantageous Business Relationship.

14. **Voidable Contracts:** It usually is held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, or harsh and unconscionable provisions, or conditions precedent to the existence of the obligation, can still afford a basis for a tort action when the defendant interferes with their performance. *United Yacht Brokers, Inc. v. Gillespie*, 377 So.2d 668, 672 (Fla. 1979).

§3:80.5 Related Matters

1. **Factors to Consider:** The factors to consider in evaluating the propriety of interference with contractual relations are stated in Restatement (Second) of Torts §767 (1977), as: In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
   (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. See *McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987). *See Also Seminole Tribe of Florida v. Times Pub. Co., Inc*., 780 So.2d 310, 315 (Fla. 4th DCA 2001).

2. **Freedom from Unreasonable Interference:** This cause of action recognizes that economic relations are entitled to freedom from unreasonable interference. *United Yacht Brokers, Inc. v. Gillespie*, 377 So.2d 668, 672 (Fla. 1979).

3. **Historical Background:** This remedy made its first appearance in modern times in *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng.Rep. 749 (1853). *Wackenhut Corporation v. Maimone*, 389 So.2d 656, 657 (Fla. 4th DCA 1980), *petition for rev. denied*, 411 So.2d 382, 383 (Fla. 1981).

4. **Single Contractual Provision:** The tort of interference with a contractual relationship can include attempts to alter or change only a single contractual provision, whether the attempt is to extinguish the provision entirely or instead simply to alter it, so long as the effect is to interfere with benefits otherwise due the plaintiff. *See Ingalsbe v. Stewart Agency, Inc.,* 869 So.2d 30, 33 (Fla. 4th DCA 2004), *rev. dismissed*, 889 So.2d 779 (Fla. 2004); *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp*., 899 So.2d 1222, 1228 (Fla. 1st DCA 2005).

5. **Temporary Injunction:** Temporary injunctions have been recognized as a viable form of relief in a suit for tortious interference with a contract. *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1075 (Fla. 5th DCA 1982).

§3:90 UNJUST ENRICHMENT

§3:90.1 Elements of Cause of Action — Florida Supreme Court

The elements of an unjust enrichment claim are a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.

Source

Florida Power Corp. v. City of Winter Park, 887 So.2d 1237, 1242 (Fla. 2004).

See Also

1. *Yeats v. Moody,* 175 So. 719 (Fla. 1937).

§3:90.1.1 Elements of Cause of Action — 1st DCA

To establish unjust enrichment, a party must show that:
1. a benefit was conferred upon the party allegedly enriched;

2. the enriched party either requested the benefit or knowingly and voluntarily accepted it;
3. a benefit flowed to the enriched party; and
4. under the circumstances, it would be inequitable for the enriched party to retain the benefit without paying the value thereof.

Source

CMH Homes, Inc. v. LSFC Co., LLC, 118 So.3d 964, 965 (Fla. 1st DCA 2013).

See Also

1. *14th & Heinberg, LLC v. Terhaar & Cronley Gen. Contractors, Inc.*, 43 So.3d 877, 881 (Fla. 1st DCA 2010).
2. *Golden v. Woodward*, 15 So.3d 664, 670 (Fla. 1st DCA 2009).
3. *Cole Taylor Bank v. Shannon*, 772 So.2d 546, 551 (Fla. 1st DCA 2000).
4. *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So.2d 297, 303 (Fla. 1st DCA 1999).
5. *Rabon v. Inn of Lake City, Inc.,* 693 So.2d. 1126, 1131 (Fla. 1st DCA 1997).
6. *Turner v. Fitzsimmons,* 673 So.2d 532, 536 (Fla. 1st DCA 1996).
7. *Circle Finance Co. v. Peacock,* 399 So.2d 81, 84 (Fla. 1st DCA 1981), *petition for rev. denied*, 411 So.2d 380 (Fla. 1981).
8. *Interior Design Concepts, Inc. v. Curtin,* 473 So.2d 1374, 1376 (Fla. 1st DCA 1985).
9. *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp*., 899 So.2d 1222, 1227 (Fla. 1st DCA 2005).

§3:90.1.2 Elements of Cause of Action — 2nd DCA

The essential elements of a claim for unjust enrichment are:

1. a benefit conferred upon a defendant by the plaintiff;
2. the defendant's appreciation of the benefit; and
3. the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof.

Source

Malamud v. Syprett, 117 So.3d 434, 437 (Fla. 2d DCA 2013).

See Also

1. *Rite-Way Painting & Plastering, Inc. v. Tetor,* 582 So.2d 15, 17 (Fla. 2d DCA 1991), *rev. dismissed*, 587 So.2d 1329 (Fla. 1991).
2. *Swindell v. Crowson*, 712 So.2d 1162, 1163 (Fla. 2d DCA 1998).
3. *Ruck Brothers Brick, Inc. v. Kellogg & Kimsey, Inc.,* 668 So.2d 205, 207 (Fla. 2d DCA 1995), *rev. denied*, 676 So.2d 1368 (Fla. 1996).
4. *Gomes v. Stevens,* 548 So.2d 1163, 1164 (Fla. 2d DCA 1989).
5. *Craig W. Sharp, P.A. v. Adalia Bayfront Condominium, Ltd.,* 547 So.2d 674, 677 (Fla. 2d DCA 1989).
6. *Coffee Pot Plaza Partnership v. Arrow Air Conditioning and Refrigeration, Inc.,* 412 So.2d 883 (Fla. 2d DCA 1982).
7. *Kenf, LLC v. Jabez Restorations, Inc.*, 303 So.3d 229, 231 (Fla. 2d DCA Feb. 27, 2019).
8. *Rost Invs., LLC v. Cameron*, 302 So. 3d 445, 451 (Fla. 2d DCA 2020).

§3:90.1.3 Elements of Cause of Action — 3rd DCA

The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the conferred benefit; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff.

Source

Grove Isle Ass'n v. Grove Isle Assocs., LLLP, 137 So. 3d 1081, 1094 (Fla. 3d DCA 2014).

See Also

1. *Gutierrez v. Sullivan,* 2022 WL 220949, *3 (Fla. 3d DCA Jan. 26, 2022).
2. *Crawley-Kitzman v. Hernandez*, 324 So. 3d 968, 975 (Fla. 3d DCA 2021).

3. *Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So.3d 689, 693 (Fla. 3d DCA, 2018).
4. *Flatirons Bank v. Alan W. Steinberg LP,* 233 So.3d 1207, 1219 (Fla. 3d DCA 2017).
5. *Peoples National Bank of Commerce v. First Union National Bank of Florida, N.A.*, 667 So.2d 876, 879 (Fla. 3d DCA 1996) (citing to *Hillman Construction Corporation v. Wainer*, 636 So.2d 576, 577 (Fla. 4th DCA 1994)).
6. *Challenge Air Transport, Inc., v. Transportes Aereos Nacionales, S.A.,* 520 So.2d 323, 324 (Fla. 3d DCA 1988).
7. *Edd Helms Electrical Contracting, Inc. v. Barnett Bank of South Fla., N.A.,* 531 So.2d 238, 239 (Fla. 3d DCA 1988).
8. *N.G.L. Travel Associates v. Celebrity Cruises, Inc.*, 764 So.2d 672, 675 (Fla. 3d DCA 2000).

§3:90.1.4 Elements of Cause of Action — 4th DCA

To state a claim for unjust enrichment, a plaintiff must plead the following elements:
1. the plaintiff has conferred a benefit on the defendant;
2. the defendant has knowledge of the benefit;
3. the defendant has accepted or retained the benefit conferred; and
4. the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

Source

Willson v. Big Lake Partners, LLC, 211 So.3d 360, 365 (Fla. 4th DCA 2017); *AMP Servs., Ltd. v. Walanpatrias Found*., 73 So.3d 346 (Fla. 4th DCA 2011).

See Also

1. *Point Conversions, LLC v. WPB Hotel Partners, LLC*, 324 So. 3d 947, 956. (Fla. 4th DCA 2021).
2. *F.H. Paschen, S.N. Nielsen & Assocs. LLC v. B&B Site Dev., Inc.*, 311 So. 3d 39, 48 (Fla. 4th DCA 2021).
3. *Cleveland Clinic Fla. v. Child. Cancer Caring Ctr., Inc.*, 274 So. 3d 1102, 1104 (Fla. 4th DCA 2019).
4. *Swafford v. Schweitzer*, 906 So.2d 1194, 1195 (Fla. 4th DCA 2005).
5. *Cohen v. Kravit Estate Buyers, Inc*., 843 So.2d 989, 992 (Fla. 4th DCA 2003).
6. *Magwood v. Tate*, 835 So.2d 1241, 1243 (Fla. 4th DCA 2003).
7. *Hull & Company, Inc. v. Thomas*, 834 So.2d 904, 907 (Fla. 4th DCA 2003).
8. *Greenfield v. Manor Care, Inc.*, 705 So.2d 926, 930 (Fla. 4th DCA 1997), *appeal dismissed*, 717 So.2d 534 (Fla. 1998), *overruled on other grounds by Beverly Enters.-Florida, Inc. v. Knowles*, 766 So.2d 335 (Fla. 4th DCA 2000).
9. *Alevizos v. John D. and Catherine T. MacArthur Foundation*, 764 So.2d 8, 13 (Fla. 4th DCA 1999).
10. *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Company, Inc.,* 695 So.2d 383, 386 (Fla. 4th DCA 1997).
11. *CDS and Associates of the Palm Beaches, Inc. v. 1711 Donna Road Associates*, 743 So.2d 1223, 1224 (Fla. 4th DCA 1999).
12. *Hillman Construction Corporation v. Wainer*, 636 So.2d 576, 577 (Fla. 4th DCA 1994) (citing to *Henry M. Butler Inc. v. Trizec Properties Inc.,* 524 So.2d 710 (Fla. 2d DCA 1988)).
13. *Moore Handley, Inc. v. Major Realty Corp.,* 340 So.2d 1238, 1239 (Fla. 4th DCA 1976) ("There can be no strict rule as to what constitutes unjust enrichment, nor can an exhaustive list be given of elements which must be alleged in a pleading in order to state a cause of action for restitution. Everything depends on the circumstances of the individual case and whether or not the pleader has alleged facts which show that an injustice would occur if money were not refunded.").
14. *JP Morgan Chase Bank v. Colletti Investments, LLC*, 199 So.3d 395, 397-98 (Fla. 4th DCA 2016).

§3:90.1.5 Elements of Cause of Action — 5th DCA

The elements of a cause of action for a unjust enrichment are that: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.

Source

American Safety Ins. Co. v. Griggs, 959 So.2d 322, 331 (Fla. 5th DCA 2007).

See Also

1. *Baron v. Osman*, 39 So. 3d 449, 451 (Fla. 5th DCA 2010).
2. *Duncan v. Kasim, Inc*. 810 So.2d 968, 971 (Fla. 5th DCA 2002), *rev. denied*, 832 So.2d 104 (Fla. 2002).
3. *Timberland Consolidated Partnership v. Andrews Land and Timber, Inc*., 818 So.2d 609, 611 (Fla. 5th DCA 2002).

§3:90.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(k); *Beltran v. Vincent P. Miraglia, M.D., P.A.*, 125 So.3d 855, 859 (Fla. 4th DCA 2013).

§3:90.3 References

1. 11 Fla. Jur. 2d *Contracts* §282 (2003).
2. 66 Am. Jur. 2d *Restitution and Implied Contracts* §§8, 9, 12 (2001).
3. 7 C.J.S. *Assumpsit, Action on* §§1–3 (2004).
4. Restatement of the Law of Restitution §1 (1937).
5. George B. Klippert, *Unjust Enrichment* (1983). ISBN 0-409-84293-1 (discussing Canadian law).
6. H. Hugh McConnell, *Distinguishing Quantum Merit and Unjust Enrichment in the Construction Setting*, 71 Fla. Bar J. 88 (March 1997).
7. David M. Holliday, Annotation, *Equipment Leasing Expenses as Element of Construction Contractor's Damages*, 52 A.L.R.4th 712 (1987).
8. J. R. Kemper, Annotation, *Building and Construction Contracts: Right of Subcontractor who has dealt only with Primary Contractor to Recover against Property Owner in Quasi Contract*, 62 A.L.R.3d 288 (1975).

§3:90.4 Defenses

1. **Burden:** *Bromer v. Florida Power & Light Co.,* 45 So.2d 658, 660 (Fla. 1949) ("It is our view that a greater burden should be placed upon a plaintiff who relies upon an implied contract than one who uses reasonable care and foresight in protecting himself by means of an express contract. To hold otherwise would be to encourage loose dealings and place a premium upon carelessness.").

2. **Plaintiff Must Confer Benefit:** It is insufficient to show that defendant received an unjust benefit. At the core of the law of restitution and unjust enrichment is the principle that a party who has been unjustly enriched at the expense of another is required to make restitution to the other. Plaintiff must show that it was the party in interest from whose expense or effort came the benefit. *Fito v. Attorneys' Title Ins. Fund, Inc.*, 83 So. 3d 755, 758 (Fla. Dist. Ct. App. 3d Dist. 2011) (while the evidence did show that defendant received a benefit, there was no evidence to establish that plaintiff was the party that conferred such a benefit).

3. **Express Contract:** An action for unjust enrichment fails upon a showing that an express contract exists. *Williams v. Bear Stearns & Co.*, 725 So.2d 397, 400 (Fla. 5th DCA 1998), *rev. denied*, 737 So.2d 550 (Fla. 1999); *Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 85 So. 3d 1112, 1114 (Fla. Dist. Ct. App. 4th Dist. 2012) (unjust enrichment claim was not barred by express contract where there was no express contract how the proceeds of a secret, global undifferentiated settlement of both the underlying PIP and bad faith claims were to be allocated in the settlement of litigation over auto insurance claims); *Leader Global Solutions, LLC v. Tradeco Infraestructura, S.A. DE C.V.*, 155 F.Supp.3d 1310, 1320 (S.D. Fla. Jan 12, 2016).

4. **Payment Made:** Unjust enrichment cannot exist where payment has been made for the benefit conferred. *N.G.L. Travel Associates v. Celebrity Cruises, Inc.*, 764 So.2d 672, 675 (Fla. 3d DCA 2000).

5. **Received in Good Faith:** The law seems to be settled that money paid under a mistake of facts cannot be reclaimed where the plaintiff has derived a substantial benefit from the payment, nor where the defendant received it in good faith in satisfaction of an equitable claim, nor where it was due in honor and conscience. *Pensacola & A. R. Co. v. Braxton*, 16 So. 317, 321 (Fla. 1894).

§3:90.5 Related Matters

1. **Contract Implied in Fact and Contract Implied in Law:** A contract implied in fact is an enforceable contract that is inferred in whole or in part from the parties' conduct, not solely from their words. A contract implied in law is an obligation created by the law without regard to the parties' expression of assent by their words or conduct. In short, a contract implied in law does not require an agreement, however, a contract implied in fact does. A quasi contract is a contract implied in law since it does not require an agreement. *CDS and Associates of the Palm Beaches, Inc. v. 1711 Donna Road Associates*, 743 So.2d 1223, 1224 (Fla. 4th DCA 1999).

   A contract implied in fact is one form of an enforceable contract; it is based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from their words. A contract implied in fact is not put into promissory words with sufficient clarity, so a fact finder must examine and interpret the parties' conduct to give definition to their unspoken agreement. It is to this process of defining an enforceable agreement that Florida courts have referred when they have indicated that contracts implied in fact rest upon the assent of the parties.

   A contract implied in law, or quasi contract, is not based upon the finding, by a process of implication from the facts, of an agreement between the parties. A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation. This is unlike a contract implied in fact which must arise from the interaction of the parties or their agents.

   To describe the cause of action encompassed by a contract implied in law, Florida courts have synonymously used a number of different terms—"quasi contract," "unjust enrichment," "restitution," "constructive contract," and "quantum meruit." This profusion of terminology has its roots in legal history. Concerned about the confusion between contracts implied in law and fact, two legal scholars sought to extirpate the term "contract implied in law" from legal usage and to substitute for it the term "quasi contract." As Corbin explains, although the term "quasi contract" took hold, the older term successfully resisted extirpation to the further confusion of law students and lawyers.

   The term "quantum meruit" derives from common law forms of pleading. The action of assumpsit was available for the recovery of damages for the breach or non-performance of a simple contract or upon a contract implied by law from the acts or conduct of the parties. There were two divisions of assumpsit, general, upon the common counts, and special. In general assumpsit, on the common counts, only an implied contract could be the basis of the action. The common counts were abbreviated and stereotyped statements that the defendant was indebted to the plaintiff for a variety of commonly recurring reasons, such as goods sold and delivered or work and labor done. The count asking judgment for work done was quantum meruit; for goods sold the count was quantum valebant. The common counts were used to enforce contracts implied both in law and in fact. Because so many quasi contract actions were brought in the common counts, and because courts and lawyers were not careful to draw the distinction, the term "quantum meruit" is often used synonymously with the term "quasi contract."

   In Florida, all implied contract actions were part of the action of assumpsit, which was an action at law under the common law. *Commerce Partnership 8098 Limited Partnership v. Equity Contracting Company, Inc.,* 695 So.2d 383 (Fla. 4th DCA 1997).

2. **Second Real Estate Broker:** The elements of a cause of action against a second real estate broker to recover the commission from the sale of property on the theory of unjust enrichment require the first real estate broker to show either the existence of an implied contract to pay him for his services in finding and negotiating with the ultimate purchasers or that he was the procuring factor in the sale. *Framer Realty, Inc. v. Ross*, 768 So.2d 5 (Fla. 3d DCA 2000), *rev. denied*, 789 So.2d 348 (Fla. 2001).

3. **Legal Malpractice:** Where an unjust enrichment claim arises out of an oral contract to convey real estate, the statute of frauds will not bar an independent equitable claim based on the allegation that the defendant-lawyer appreciated and retained a special benefit at the expense of the plaintiff-client's efforts. *B & C Investors, Inc. v. Vojak*, 79 So. 3d 42, 48 (Fla. Dist. Ct. App. 2d Dist. 2011); *See Also Kane v. Stewart Tilghman Fox & Bianchi*, P.A., 85 So. 3d 1112, 1114 (Fla. Dist. Ct. App. 4th Dist. 2012) (plaintiff bad

faith claim lawyers sued PIP lawyers sued on theory of unjust enrichment arising out of fees awarded in the settlement of litigation over auto insurance claims).

§3:90.6 Sample Cause of Action

COUNT FOR UNJUST
ENRICHMENT

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Plaintiff has conferred a benefit on the defendant, who has knowledge thereof.
Defendant voluntarily accepted and retained the benefit conferred.
The circumstances render Defendant's retention of the benefit inequitable unless the Defendant pays to Plaintiff the value of the benefit.
Defendant has been unjustly enriched at the expense of Plaintiff
Plaintiff is entitled to damages as a result of Defendant's unjust enrichment, including the disgorgement of all monies unlawfully accepted by Defendant from Plaintiff.

WHEREFORE, Plaintiff demands monetary damages against Defendant for unjust enrichment and such other relief this Court deems just and proper.

WHEREFORE, Plaintiff demands monetary damages against Defendant for slander of title and such other relief this Court deems just and proper.

See also Form 3:10-7 (Breach of Contract; Unjust Enrichment; Conversion), in the Complaint Library on Digital Access.

§3:100 USURIOUS TRANSACTION

§3:100.1 Elements of Cause of Action — Florida Supreme Court

The Four requisites of a usurious transaction are:
1. there must be a loan express or implied;
2. an understanding between the parties that the money lent shall be returned;
3. that for such a loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and
4. there must exist a Corrupt intent to take more than the legal rate for the use of the money loaned.

Source
Dixon v. Sharp, 276 So.2d 817, 819 (Fla. 1973).

See Also
1. *Clark v. Grey,* 132 So. 832 (Fla. 1931).

§3:100.1.1 Elements of Cause of Action — 1st DCA

The four elements of a usurious transaction are:
1. an express or implied loan;
2. an understanding between the parties that the money loaned shall be returned;
3. an agreement that a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and
4. the existence of a corrupt intent to take more than the legal rate for the use of the money loaned.

Source

Rollins v. Odom, 519 So.2d 652 (Fla. 1st DCA 1988), *rev. denied*, 529 So.2d 695 (Fla. 1988).

§3:100.1.2 Elements of Cause of Action — 2nd DCA

The four requirements necessary to establish a usurious transaction are:

1. A loan, either express or implied;
2. An understanding between the lender and the borrower that the money must be repaid;
3. For such loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and
4. There must be a corrupt intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned.

Source

Rebman v. Flagship First Nat'l Bank, 472 So.2d 1360, 1362 (Fla. 2d DCA 1985).

See Also

1. *Florida Trading and Inv. Co., Inc. v. River Const. Services, Inc*., 537 So.2d 600, 603 (Fla. 2d DCA 1988), *rev. denied*, 544 So.2d 200 (Fla. 1989).
2. *River Hills, Inc. v. Edwards*, 190 So.2d 415, 423 (Fla. 2d DCA 1966).
3. *Diversified Enterprises, Inc. v. West*, 141 So.2d 27 (Fla. 2d DCA 1962).
4. *Stewart v. Nangle*, 103 So.2d 649 (Fla. 2d DCA 1958).

§3:100.1.3 Elements of Cause of Action — 3rd DCA

In order to establish a usurious transaction, certain elements must first be present. Firstly, there must be a loan, either expressed or implied, and an understanding between the parties that the money lent shall be returned. Secondly, it must appear that a greater rate of interest than is allowed by law has been or is about to be paid, or was agreed to be paid. Thirdly, there must exist an intent to willfully and knowingly take more than the legal rate of interest for the use of the money loaned.

Source

Bermil Corp. v. Sawyer, 353 So.2d 579, 583 (Fla. 3d DCA 1977).

See Also

1. *Antonelli v. Neumann*, 537 So.2d 1027, 1028 (Fla. 3d DCA 1988).
2. *Gergora v. Goldstein Professional Association Defined Benefits Pension Plan and Trust*, 500 So.2d 695, 697 (Fla. 3d DCA 1987).
3. *Saralegui v. Sacher, Zelman, Van Sant Paul, Beily, Hartman & Waldman, P.A.*, 19 So.3d 1048, 1051 (Fla. 3d DCA 2009) ("The element of corrupt intent for a usury defense does not require knowledge of the usury statutes themselves by the lender and a specific intention to violate them; rather, it requires proof that the lender intended to collect payments for the loan which, when expressed as a simple rate of interest per annum, exceeded the maximum allowable rate.").
4. *World O World Corp. v. Patino*, 306 So. 3d 1044, 1045-46 (Fla. 3d DCA 2020).

§3:100.1.4 Elements of Cause of Action — 4th DCA

The four requisites of a usurious transaction are:

1. a loan, express or implied;
2. an understanding between the parties that the money lent shall be returned;
3. payment or agreement to pay a greater rate of interest than is allowed by law; and
4. a corrupt intent to take more than the legal rate for the use of the money loaned.

Source

Northwood SG, LLC v. Builder Fin Corp., 76 So.3d 3 (Fla. 4th DCA 2011); *Valliappan v. Cruz*, 917 So.2d 257, 260 (Fla. 4th DCA 2005).

See Also

1. *Nolden v. Summit Fin. Corp.*, 244 So.3d 322, 325 (Fla. 4th DCA 2018).
2. *Valliappan v. Cruz,* 917 So.2d 257, 260 (Fla. 4th DCA 2005).
3. *Kraft v. Mason,* 668 So.2d 679, 683 (Fla. 4th DCA 1996), *rev. dismissed*, 679 So.2d 773 (Fla. 1996).
4. *Jersey Palm-Gross, Inc. v. Paper*, 639 So.2d 664, 666 (Fla. 4th DCA 1994), *approved*, 658 So.2d 531 (Fla. 1995).
5. *Sharp v. Dixon*, 252 So.2d 805 (Fla. 4th DCA 1971).

§3:100.1.5 Elements of Cause of Action — 5th DCA

There are four essential elements of a usurious transaction:

1. an express or implied loan;
2. a repayment requirement;
3. an agreement to pay interest in excess of the legal rate; and
4. a corrupt *intent* to take more than the legal rate for the money loaned.

Source

Oregrund Ltd. Partnership v. Sheive, 873 So.2d 451, 456 (Fla. 5th DCA 2004).

See Also

1. *Party Yards, Inc. v. Templeton*, 751 So.2d 121, 123 (Fla. 5th DCA 2000).

§3:100.2 Statute of Limitations

Four Years. Fla. Stat. §§95.11 (3)(f); 687.147.

§3:100.3 References

1. 32 Fla. Jur. 2d *Interest and Usury* §§47–79 (2003).
2. 45 Am. Jur. 2d *Interest and Usury* §§84–381 (1999).
3. 42 C.J.S. *Interest and Usury; Consumer Credit* §§143–164, 184–253 (2005).
4. Florida Statutes §687.03 (2005) (Unlawful rates of interest defined; proviso).
5. Florida Statutes §687.071 (2005) (Criminal usury, loan sharking; shylocking).
6. Chapter 687, Florida Statutes (2005) (Interest and usury; lending practices).

§3:100.4 Defenses

1. **Burden of Proof:** The burden to establish these elements of usury is on the borrower. *Rebman v. Flagship First Nat'l Bank of Highlands County*, 472 So.2d 1360, 1362 (Fla. 2d DCA 1985).

2. **Defenses, Generally:** Neither ignorance of the law of usury, nor the fact that the suggestion of the usurious rate emanated from the borrower, nor that it was the opinion of counsel that the loan was not violative of the statute, nor the fact that a plan or scheme to circumvent usury was embraced by both parties, where the amount of interest is in fact usurious and known to the lender to be, will absolve him from the penalties involved because of usury. *See Lee Construction Corp. v. Newman*, 143 So.2d 222 (Fla. 3d DCA 1962), *cert. denied*, 148 So.2d 280 (Fla. 1962); *Ross v. Whitman*, 181 So.2d 701 (Fla. 3d DCA (1966), *cert. denied*, 194 So.2d 624 (Fla. 1966); *Carr v. Cole*, 161 So. 392 (Fla. 1935); *Beach v. Kirk*, 189 So. 263 (Fla. 1938); *Hormuth v. Dickson*, 156 So. 127 (Fla. 1934); *River Hills, Inc. v. Edwards*, 190 So.2d 415, 424 (Fla. 2d DCA 1966).

3. **Speculative Risk:** Excluded from the usury statutes are transactions in which a portion of the investment is at speculative risk. *Hurley v. Slingerland*, 461 So.2d 282, 283 (Fla. 4th DCA 1985); *Diversified Enterprises, Inc. v. West*, 141 So.2d 27 (Fla. 2d DCA 1962). This principle has been statutorily validated when the venture exceeds $500,000. *See Bailey v. Harrington*, 462 So.2d 861 (Fla. 3d DCA 1985), *pet. rev. denied*, 472 So.2d 1180 (Fla. 1985), *pet. rev. denied*, 472 So.2d 1181 (Fla. 1985); *Oregrund Ltd. Partnership v. Sheive*, 873 So.2d 451, 456 (Fla. 5th DCA 2004).

4. **Usury Savings Clause:** A usury savings clause cannot, by itself, absolutely insulate a lender from a finding of usury. Rather, we approve and adopt the Fourth District's holding, that a usury savings clause is one factor to be considered in the overall determination of whether the lender intended to exact a usurious interest rate. Such a standard strikes a balance between the legislative policy of protecting borrowers from overreaching creditors and the need to preserve otherwise good faith, albeit complex, transactions which may inadvertently exact an unlawful interest rate. … [W]e also believe that savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances. For instance, we agree with Judge Pariente's illustration, in the majority opinion below, of the proper utilization of a savings clause: Where the actual interest charged is close to the legal rate, or where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent. *Jersey Palm-Gross, Inc. v. Paper*, 658 So.2d 531, 535 (Fla. 1995).

§3:100.5 Related Matters

1. **Common Law:** The defense of usury was unknown at the common law. *Yaffee v. International Co*., 80 So.2d 910, 912 (Fla. 1955).

2. **Substance over Form:** It is the substance of a transaction, rather than its form, that must be scrutinized in ascertaining whether a transaction, not appearing in the form of a loan, is in fact a usurious loan. *Growth Leasing, Ltd. v. Gulfview Advertiser, Inc.*, 448 So.2d 1224 (Fla. 2d DCA 1984); *Florida Trading and Inv. Co., Inc. v. River Const. Services, Inc*., 537 So.2d 600, 602 (Fla. 2d DCA 1988), *rev. denied*, 544 So.2d 200 (Fla. 1989).

3. **Usurious Nature of Transaction:** The burden of proving usury is on the party who alleges it. *See Phillips v. Lindsay*, 136 So. 666 (Fla. 1931); *Tucker v. Fouts*, 76 So. 130 (Fla. 1917); *Swanson v. Gulf West Intern. Corp.*, 429 So.2d 817 (Fla. 2d DCA 1983). The Legislature enacted usury laws to remedy an existing evil, and it has wide discretion in dealing with usury. *Cesary v. Second National Bank of North Miami*, 369 So.2d 917 (Fla. 1979). The determination of the maximum amount of interest which may be charged for the use of money loaned is within the police power of the state. *Cesary v. Second National Bank of North Miami*, 369 So.2d 917 (Fla. 1979). Excluded from the usury statutes are transactions in which a portion of the investment is at speculative risk. *Hurley v. Slingerland*, 461 So.2d 282, 283 (Fla. 4th DCA 1985); *Diversified Enterprises, Inc. v. West*, 141 So.2d 27 (Fla. 2d DCA 1962). This principle has been statutorily validated when the venture exceeds $500,000. *See Bailey v. Harrington*, 462 So.2d 861 (Fla. 3d DCA 1985). Courts look to the *substance* of the transaction to determine whether a transaction is usurious. *Party Yards; Kay v. Amendola*, 129 So.2d 170 (Fla. 2d DCA 1961). That is, a finding of usury depends on the intent and understanding of the parties. *Indian Lake Estates, Inc. v. Special Investments, Inc.*, 154 So.2d 883 (Fla. 2d DCA 1963). A key issue is the *liability* of the borrower under the contract's terms, or what *may be demanded* of a borrower, rather than what *is* demanded of him. *First Mortgage.* A transaction that is either entirely or partially in the form of a sale, may be usurious *when the intent is to make a loan of money* for a greater profit than allowed by statute. *See, e.g., Griffin v. Kelly*, 92 So.2d 515 (Fla. 1957). The usurious nature of a transaction is established at the *inception* of the transaction. *See Home Credit Co. v. Brown*, 148 So.2d 257 (Fla. 1963); *Shorr v. Skafte*, 90 So.2d 604 (Fla. 1956); *Carter v. Leon Loan & Finance Co.*, 146 So. 664 (Fla. 1933); *Maxwell v. Jacksonville Loan & Improvement Co.*, 34 So. 255 (Fla. 1903); *First Mortgage; Kay v. Amendola*, 129 So.2d 170 (Fla. 2d DCA 1961); *Coral Gables First National Bank v. Constructors of Florida, Inc.*, 119 So.2d 741 (Fla. 3d DCA 1960). The exception to this rule is where an old contract is abandoned and a new one, which has been entered into free from the vice of the old, occurs. *Oregrund Ltd. Partnership v. Sheive*, 873 So.2d 451, 455 (Fla. 5th DCA 2004).

4. **Usury as a Defense:** When usury is raised as a defense, the borrower must affirmatively plead and establish the four elements of a usurious transaction by clear and satisfactory evidence. *Dixon v. Sharp*, 276 So.2d at 820; *Sumner v. Investment Mortgage Company of Florida*, 332 So.2d 103, 105 (Fla. 1st DCA 1976), *cert. denied*, 344 So.2d 327 (Fla. 1977); *Gergora v. Goldstein Professional Assoc.*, 500 So.2d at 697; *Rebman v. St. Petersburg Bank*, 472 So.2d at 1362. In other words, that the lender willfully and with corrupt intent charged or accepted more than the prohibited interest must be specifically and affirmatively pleaded and established by clear and satisfactory evidence. *River Hills, Inc. v. Edwards*, 190 So.2d 415, 424 (Fla. 2d

DCA 1966). *See Also American National Growers Corporation v. Harris*, 120 So.2d 212, 213 (Fla. 2d DCA 1960); *Rollins v. Odom*, 519 So.2d 652, 657 (Fla. 1st DCA 1988), *rev. denied*, 529 So.2d 695 (Fla. 1988).

§3:110 BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

§3:110.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

See Also

County of Brevard v. Miorelli Eng'g, Inc., 703 So.2d 1049, 1050 (Fla. 1997) ("Under Florida law, the implied covenant of good faith and fair dealing is a part of every contract.")

§3:110.1.1 Elements of Cause of Action — 1st DCA

To maintain an action for breach of the implied covenant of good faith and fair dealing, the plaintiff must allege the following:

1. the plaintiff and the defendant are parties to a written contract;
2. the contract is ambiguous about the permissibility or scope of the conduct in question;
3. the defendant, through a conscious and deliberate act, fails or refuses to discharge contractual responsibilities, which unfairly frustrates the contract's purpose and disappoints the plaintiff's expectations;
4. the defendant's breach deprives the plaintiff of the contract's benefits; and
5. the plaintiff suffers damages.

Source

Cox v. CSX Intermodal, Inc., 732 So.2d 1092, 1097 (Fla. 1st DCA 1999).

See Also

1. *Holmes v. Florida A&M Univ. by and through Board of Trustees*, 260 So.3d 400, 407 (Fla. 1st DCA 2018).
2. *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 170 (Fla. 1st DCA 2015).
3 *Sobi v. First South Bank, Inc.,* 946 So.2d 615, 617 (Fla. 1st DCA 2007) ("An implied covenant of good faith, fair dealing, and commercial reasonableness must relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements.")

§3:110.1.2 Elements of Cause of Action — 2nd DCA

Source

JF &LN, LLC v. Royal Oldsmobile-GMC Trucks Co., 292 So.3d 500, 507-08 (Fla. 2d DCA 2020).

See Also

1. *Speedway SuperAmerica, LLC v. Tropic Enters., Inc.*, 966 So.2d 1, 3 (Fla. 2d DCA 2007).
2. *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 896 So.2d 787, 791 (Fla. 2d DCA 2005).

§3:110.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

See Also

1. *Diageo Dominicana, S.R.L. v. United Brands, S.A.*, 314 So. 3d 295, 299 (Fla. 3d DCA 2020).
2. *Flagship Resort Dev. Corp. v. Interval Intern., Inc.*, 28 So.3d 915, 924 (Fla. 3d DCA 2010) ("The doctrine of implied covenant of good faith cannot be used to vary the terms of an express contract; a duty of good

faith must relate to performance of an express term of the contract and is not an abstract and independent term of a contract, and it must be anchored to the performance of an express contractual obligation.")

3. *Green Co., Inc., of FL v. Kendall Racquetball Inv., LTD*, 560 So.2d 1208, 1210 (Fla. 3d DCA 1990) ("[I]t is fundamental that '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.'")
4. *Bowers v. Medina*, 418 So.2d 1068, 1069 (Fla. 3d DCA 1982) ("An established contract principle is that a party's good-faith cooperation is an implied condition precedent to performance of the contract; where that cooperation is withheld, the recalcitrant party is estopped from availing himself of his own wrong doing.")

§3:110.1.4 Elements of Cause of Action — 4th DCA

To maintain an action for breach of the implied covenant of good faith and fair dealing, the plaintiff must allege the following:

1. the plaintiff and the defendant are parties to a written contract;
2. the contract is ambiguous about the permissibility or scope of the conduct in question;
3. the defendant, through a conscious and deliberate act, fails or refuses to discharge contractual responsibilities, which unfairly frustrates the contract's purpose and disappoints the plaintiff's expectations;
4. the defendant's breach deprives the plaintiff of the contract's benefits; and
5. the plaintiff suffers damages.

Source

Meruelo v. Mark Andrew of Palm Beaches, Ltd., 12 So.3d 247, 250-51 (Fla. 4th DCA 2009).

See Also

1. *Share v. Broken Sound Club, Inc.*, 312 So. 3d 962, 969 (Fla. 4th DCA 2021).
2. *Overseas Inv. Group v. Wall Street Electronica, Inc.*, 181 So.3d 1288, 1291 (Fla. 4th DCA 2016).
3. *Gassman v. State Farm Ins. Co.*, 77 So.3d 210 (Fla. 4th DCA 2011).
4. *Hosp. Corp. of Am. v. FL Med. Ctr., Inc.*, 710 So.2d 573, 574 (Fla. 4th DCA 1998).
5. *Harrison Land Dev., Inc. v. R & H Holding Co.*, 518 So.2d 353, 355 (Fla. 4th DCA 1988).

§3:110.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

See Also

Progressive Am. Ins. Co. v. Rural/Metro Corp. of Fla., 994 So.2d 1202, 1207 (Fla. 5th DCA 2008) ("Because the implied covenant of good faith and fair dealing is not a stated contractual term, to operate it attaches to the performance of a specific or express contractual provision; there can be no cause of action for a breach of the implied covenant absent an allegation that an express term of the contract has been breached.")

§3:110.2 Statute of Limitations

Four years. Fla. Stat. §95.11(3)(o)(2009).

§3:110.3 References

1. Fla. R. Civ. P. 1.110(d)(pleading affirmative defenses), and other standard defenses. *See* §60.
2. Restatement (Second) of Contracts, §205 (1981).
3. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810 (1982).

§3:110.4 Defenses

1. **Derogation of Express Terms:** An action for breach of the implied covenant of good faith and fair dealing cannot be maintained in derogation of the express terms of the underlying contract. *Burger King*, 169 F. 3d at 1318; *QBE Ins. Corp. v. Chalfonte Condo. Apart. Assoc.*, 94 So.3d 541, 547 (Fla. 2012).

2. **Variance of Express Terms:** An action for breach of the implied covenant of good faith and fair dealing cannot be maintained where the implied duty of good faith alleged to have been breached would vary the express terms of the contract. *Cox*, 732 So.2d at 1098; *Riviera Beach*, 691 So.2d at 521; *Flagship Nat'l Bank v. Gray Distrib. Sys., Inc.*, 485 So.2d 1336, 1340 (Fla. 3d DCA 1986), *rev. denied*, 497 So.2d 1217 (Fla. 1986).

3. **Absence of Breach of Express Terms:** An action for breach of the implied covenant of good faith and fair dealing cannot be maintained in the absence of breach of an express term of the underlying contract. *Burger King*, 169 F. 3d at 1318. The duty of good faith performance does not exist until the plaintiff can establish a breach of an express term the other party was obligated to perform. *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So.2d 787, 791 (Fla. 2d DCA 2005).

4. **Performance of Express Terms:** An action for breach of implied covenant of good faith and fair dealing cannot be maintained where the party alleged to have breached the implied covenant has in good faith performed all of the express contractual provisions. *Burger King*, 169 F. 3d at 1316; *Hosp. Corp. of Am.,* 710 So.2d at 575; *Bernstein v. True*, 636 So.2d 1364, 1366 (Fla. 4th DCA 1994).

5. **Expired Contract:** A cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained where the contract itself has expired. *Bernstein*, 636 So.2d 1364.

6. **Disclaimer/Waiver:** Under Section 671.102(3), Florida Statutes (2009), "[T]he obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which performance of such obligations is to be measured if such standards are not manifestly unreasonable." Fla. Stat. §671.102(3) (2009). Additionally, the Uniform Commercial Code duty of good faith may not be imposed to override the express terms of a contract. *Riedel v. NCNB Nat'l Bank of FL, Inc.*, 591 So.2d 1038, 1040 (Fla. 1st DCA 1992); *Flagship Nat'l Bank*, 485 So.2d at 1340.

§3:110.5 Related Matters

1. **Construction Contract:** An owner has (a) an implied obligation not to do anything to hinder or obstruct performance by the other person, (b) an implied obligation not to knowingly delay unreasonably the performance of duties assumed under the contract, and (c) an implied obligation to furnish information which would not mislead prospective bidders. *County of Brevard*, 703 So.2d at 1050-51.

2. **Franchise Agreement:** The rights and duties of the parties to a franchise agreement are created by the agreement. *Burger King v. Weaver*, 169 F. 3d 1310, 1317 (11th Cir. 1999). In the absence of an agreement, neither party has a duty to perform nor does neither party have any right against the other. *Id.* Thus, there is no independent cause of action under Florida law for breach of the implied covenant of good faith and fair dealing. *Id.*

3. **At-Will Employment Contract:** An action for breach of the implied covenant of good faith and fair dealing is not recognized in Florida as a viable cause of action in the at-will employment context. *Burger King*, 169 F. 3d at 1316; *Kelly v. Gill*, 544 So.2d 1162 (Fla. 5th DCA 1989).

CHAPTER 4

BUSINESS & COMMERCIAL CASES

§4:10 ACCOUNT STATED

§4:10.1 Elements of Cause of Action — Florida Supreme Court
- §4:10.1.1 Elements of Cause of Action — 1st DCA
- §4:10.1.2 Elements of Cause of Action — 2nd DCA
- §4:10.1.3 Elements of Cause of Action — 3rd DCA
- §4:10.1.4 Elements of Cause of Action — 4th DCA
- §4:10.1.5 Elements of Cause of Action — 5th DCA

§4:10.2 Statute of Limitations
§4:10.3 References
§4:10.4 Defenses
§4:10.5 Related Matters
§4:10.6 Fla.R.Civ.P. Form 1.933
§4:10.7 Sample Complaint

§4:20 ACCOUNTING, EQUITABLE

§4:20.1 Elements of Cause of Action — Florida Supreme Court
- §4:20.1.1 Elements of Cause of Action — 1st DCA
- §4:20.1.2 Elements of Cause of Action — 2nd DCA
- §4:20.1.3 Elements of Cause of Action — 3rd DCA
- §4:20.1.4 Elements of Cause of Action — 4th DCA
- §4:20.1.5 Elements of Cause of Action — 5th DCA

§4:20.2 Statute of Limitations
§4:20.3 References
§4:20.4 Defenses
§4:20.5 Related Matters
§4:20.6 Sample Cause of Action

§4:30 ANTITRUST ACT, VIOLATION OF FLORIDA

§4:30.1 Florida Statutes
§4:30.2 Elements of Cause of Action — Florida Supreme Court
- §4:30.2.1 Elements of Cause of Action — 1st DCA
- §4:30.2.2 Elements of Cause of Action — 2nd DCA
- §4:30.2.3 Elements of Cause of Action — 3rd DCA
- §4:30.2.4 Elements of Cause of Action — 4th DCA
- §4:30.2.5 Elements of Cause of Action — 5th DCA

§4:30.3 Statute of Limitations
§4:30.4 References
§4:30.5 Defenses
§4:30.6 Related Matters

§4:40 APPROPRIATION (COMMERCIAL EXPLOITATION OF THE PROPERTY VALUE OF ONE'S NAME)
§4:40.1 Florida Statutes
§4:40.2 Statute of Limitations
§4:40.3 References
§4:40.4 Defenses

§4:50 BREACH OF FIDUCIARY DUTY
§4:50.1 Elements of Cause of Action — Florida Supreme Court
§4:50.1.1 Elements of Cause of Action — 1st DCA
§4:50.1.2 Elements of Cause of Action — 2nd DCA
§4:50.1.3 Elements of Cause of Action — 3rd DCA
§4:50.1.4 Elements of Cause of Action — 4th DCA
§4:50.1.5 Elements of Cause of Action — 5th DCA
§4:50.2 Statute of Limitations
§4:50.3 References
§4:50.4 Defenses
§4:50.5 Related Matters
§4:50.6 Sample Cause of Action

§4:60 CANCELLATION OF DEED
§4:60.1 Elements of Cause of Action — Florida Supreme Court
§4:60.1.1 Elements of Cause of Action — 1st DCA
§4:60.1.2 Elements of Cause of Action — 2nd DCA
§4:60.1.3 Elements of Cause of Action — 3rd DCA
§4:60.1.4 Elements of Cause of Action — 4th DCA
§4:60.1.5 Elements of Cause of Action — 5th DCA
§4:60.2 Statute of Limitations
§4:60.3 References
§4:60.4 Related Matters

§4:70 CONSPIRACY, CIVIL
§4:70.1 Elements of Cause of Action — Florida Supreme Court
§4:70.1.1 Elements of Cause of Action — 1st DCA
§4:70.1.2 Elements of Cause of Action — 2nd DCA
§4:70.1.3 Elements of Cause of Action — 3rd DCA
§4:70.1.4 Elements of Cause of Action — 4th DCA
§4:70.1.5 Elements of Cause of Action — 5th DCA
§4:70.2 Statute of Limitations
§4:70.3 References
§4:70.4 Related Matters
§4:70.5 Sample Cause of Action

§4:80 CONVERSION
§4:80.1 Elements of Cause of Action — Florida Supreme Court
§4:80.1.1 Elements of Cause of Action — 1st DCA
§4:80.1.2 Elements of Cause of Action — 2nd DCA
§4:80.1.3 Elements of Cause of Action — 3rd DCA
§4:80.1.4 Elements of Cause of Action — 4th DCA
§4:80.1.5 Elements of Cause of Action — 5th DCA
§4:80.2 Statute of Limitations
§4:80.3 References
§4:80.4 Defenses
§4:80.5 Related Matters
§4:80.6 Fla.R.Civ.P. Form 1.939
§4:80.7 Sample Complaints

§4:90 EVICTION, TENANT
§4:90.1 Fla.R.Civ.P. Form 1.947
§4:90.2 Statute of Limitations
§4:90.3 References
§4:90.4 Defenses
§4:90.5 Related Matters

§4:100 FORECLOSURE, MORTGAGE
§4:100.1 Elements of Cause of Action — Florida Supreme Court
§4:100.1.1 Elements of Cause of Action — 1st DCA
§4:100.1.2 Elements of Cause of Action — 2nd DCA
§4:100.1.3 Elements of Cause of Action — 3rd DCA
§4:100.1.4 Elements of Cause of Action — 4th DCA
§4:100.1.5 Elements of Cause of Action — 5th DCA
§4:100.2 Statute of Limitations
§4:100.3 References
§4:100.4 Defenses
§4:100.5 Related Matters
§4:100.6 Fla.R.Civ.P. Form 1.944

§4:110 GOODS SOLD
§4:110.1 Fla.R.Civ.P. Form 1.935

§4:120 MISLEADING ADVERTISEMENT
§4:120.1 Elements of Cause of Action — Florida Supreme Court
§4:120.1.1 Elements of Cause of Action — 1st DCA
§4:120.1.2 Elements of Cause of Action — 2nd DCA
§4:120.1.3 Elements of Cause of Action — 3rd DCA
§4:120.1.4 Elements of Cause of Action — 4th DCA
§4:120.1.5 Elements of Cause of Action — 5th DCA
§4:120.2 Florida Statutes
§4:120.3 Statutes of Limitations
§4:120.4 Related Matters

§4:130 MONEY LENT
§4:130.1 Fla.R.Civ.P. Form 1.936

§4:140 OPEN ACCOUNT
§4:140.1 Elements of Cause of Action — Florida Supreme Court
§4:140.1.1 Elements of Cause of Action — 1st DCA
§4:140.1.2 Elements of Cause of Action — 2nd DCA
§4:140.1.3 Elements of Cause of Action — 3rd DCA
§4:140.1.4 Elements of Cause of Action — 4th DCA
§4:140.1.5 Elements of Cause of Action — 5th DCA
§4:140.2 Statute of Limitations
§4:140.3 References
§4:140.4 Related Matters
§4:140.5 Fla.R.Civ.P. Form 1.932

§4:150 PROMISSORY NOTE
§4:150.1 Fla.R.Civ.P. Form 1.934
§4:150.2 Statute of Limitations
§4:150.3 Defenses
§4:150.4 Related Matters
§4:150.5 Sample Complaint

§4:160 REPLEVIN
§4:160.1 Elements of Cause of Action Pursuant to Fla. Stat. §78.055 (2005)
§4:160.1.1 Elements of Cause of Action — Florida Supreme Court
§4:160.1.2 Elements of Cause of Action — 1st DCA
§4:160.1.3 Elements of Cause of Action — 2nd DCA
§4:160.1.4 Elements of Cause of Action — 3rd DCA
§4:160.1.5 Elements of Cause of Action — 4th DCA
§4:160.1.6 Elements of Cause of Action — 5th DCA
§4:160.2 Statute of Limitations
§4:160.3 References
§4:160.4 Defenses
§4:160.5 Related Matters
§4:160.6 Fla.R.Civ.P. Form 1.937

§4:170 RICO, CIVIL (CIVIL REMEDIES FOR CRIMINAL PRACTICES ACT)
§4:170.1 Florida Statutes
§4:170.2 Elements of Cause of Action — Florida Supreme Court
§4:170.2.1 Elements of Cause of Action — 1st DCA
§4:170.2.2 Elements of Cause of Action — 2nd DCA
§4:170.2.3 Elements of Cause of Action — 3rd DCA
§4:170.2.4 Elements of Cause of Action — 4th DCA
§4:170.2.5 Elements of Cause of Action — 5th DCA
§4:170.3 Statute of Limitations
§4:170.4 References
§4:170.5 Defenses
§4:170.6 Related Matters
§4:170.7 Florida Standard Jury Instructions in Criminal Cases

§4:180 TORTIOUS INTERFERENCE WITH ADVANTAGEOUS BUSINESS RELATIONSHIP
§4:180.1 Elements of Cause of Action — Florida Supreme Court
§4:180.1.1 Elements of Cause of Action — 1st DCA
§4:180.1.2 Elements of Cause of Action — 2nd DCA
§4:180.1.3 Elements of Cause of Action — 3rd DCA
§4:180.1.4 Elements of Cause of Action — 4th DCA
§4:180.1.5 Elements of Cause of Action — 5th DCA
§4:180.2 Statute of Limitations
§4:180.3 References
§4:180.4 Defenses
§4:180.5 Related Matters
§4:180.6 Sample Complaint

§4:190 TRUST, CONSTRUCTIVE
§4:190.1 Elements of Cause of Action — Florida Supreme Court
§4:190.1.1 Elements of Cause of Action — 1st DCA
§4:190.1.2 Elements of Cause of Action — 2nd DCA
§4:190.1.3 Elements of Cause of Action — 3rd DCA
§4:190.1.4 Elements of Cause of Action — 4th DCA
§4:190.1.5 Elements of Cause of Action — 5th DCA
§4:190.2 Statute of Limitations
§4:190.3 References
§4:190.4 Defenses
§4:190.5 Related Matters
§4:190.6 Related Causes of Action

§4:200 TRUST, RESULTING

§4:200.1 Elements of Cause of Action — Florida Supreme Court
§4:200.1.1 Elements of Cause of Action — 1st DCA
§4:200.1.2 Elements of Cause of Action — 2nd DCA
§4:200.1.3 Elements of Cause of Action — 3rd DCA
§4:200.1.4 Elements of Cause of Action — 4th DCA
§4:200.1.5 Elements of Cause of Action — 5th DCA
§4:200.2 Statute of Limitations
§4:200.3 References
§4:200.4 Defenses
§4:200.5 Related Matters
§4:200.6 Related Causes of Action

§4:210 BREACH OF JOINT VENTURE AGREEMENT

§4:210.1 Elements of Cause of Action — Florida Supreme Court
§4:210.1.1 Elements of Cause of Action — 1st DCA
§4:210.1.2 Elements of Cause of Action — 2nd DCA
§4:210.1.3 Elements of Cause of Action — 3rd DCA
§4:210.1.4 Elements of Cause of Action — 4th DCA
§4:210.1.5 Elements of Cause of Action — 5th DCA
§4:210.2 Statute of Limitations
§4:210.3 References
§4:210.4 Defenses
§4:210.5 Related Matters

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§4:10 ACCOUNT STATED

§4:10.1 Elements of Cause of Action — Florida Supreme Court

A stated account never gives to a party claiming under it the benefit of an absolute estoppel. It establishes prima facie the correctness of the items, and, unless this presumption is overcome by proof of fraud, mistake, or error, it becomes conclusive; but that an account stated may be impeached for fraud, mistake, or error is well settled. The party impeaching it, however, has the affirmative of the issue and the burden of proof.

A party cannot, by verbally agreeing to the correctness of an account stated to him, and verbally promising to pay the same, legally bind himself to pay any items of indebtedness included therein that are due by another, and for which he is in no way responsible except through such verbal promise. But when sued upon such account as upon an account stated he can show that items therein are the indebtedness of another, for which he is not responsible; and as to such items the plaintiff cannot recover unless he can show a promise in writing, signed by the defendant, to pay the same.

Where an account is made up and rendered by one person to another, he who receives it is bound to examine it, and state his objections thereto, and, if he does not object within a reasonable time, it will be treated, under ordinary circumstances, as being presumptively, by acquiescence, a stated account; the presumption of the party's acquiescence from his silence depending in large measure for its force upon the circumstances of the case, whether the party is a man of business, considering the nature of his business and education, their local situation, customary dealings with each other, and other circumstances. What is a reasonable time within which the person to whom an account is rendered must object or become bound depends upon the relations of the parties and the usual course of business between them. The question of what is a reasonable time within which the party must object in such cases, is one of law for the court to determine in every case, dependent, however, upon the facts proved, the latter to be passed upon by the jury. In such cases, therefore, it is proper always for the court to instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties in the premises.

Source

Martyn v. Amold, 18 So. 791 (Fla. 1895).

See Also

Ham v. Portfolio Recovery Assocs., LLC, 308 So. 3d 942, 949 (Fla. 2020).

§4:10.1.1 Elements of Cause of Action — 1st DCA

(1) Plaintiff and defendant made a previous transaction;
(2) The parties' agreement that the balance is correct and due; and
(3) Defendant made an express or implicit promise to pay balance.

Source

Myrick v. St. Catherine Laboure Manor, Inc., 529 So.2d 369, 371 (Fla. 1st DCA 1988).

See Also

Ham v. Portfolio Recovery Assocs., LLC, 260 So. 3d 450, 454 (Fla. 1st DCA 2018).

§4:10.1.2 Elements of Cause of Action — 2nd DCA

A claim for account stated requires proof that there was an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions, and promising payment. There does not need to be an explicit agreement. Instead, a claim for account stated can be based on a debtor's failure to object to an account statement.

Source

Bushnell v. Portfolio Recovery Assocs., LLC, 255 So.3d 473, 477 (Fla. 2d DCA 2018).

§4:10.1.3 Elements of Cause of Action — 3rd DCA

To state a claim for recovery in account stated, the plaintiff must demonstrate that the parties had agreed that a certain balance is correct and due, and that there was an express or implicit promise to pay this balance. In the absence of such an agreement, no recovery upon an account stated theory is permitted.

Source

F.D.I.C. v. Brodie, 602 So.2d 1358, 1361 (Fla. 3d DCA 1992).

See Also

1. *Merrill-Stevens Dry Dock Co. v. Corniche Express*, 400 So.2d 1286 (Fla. 3d DCA 1981).

§4:10.1.4 Elements of Cause of Action — 4th DCA

For an account stated to exist there must be an agreement between the parties that a certain balance is correct and due, and an express or implied promise to pay this balance, and, where there is no such agreement between the parties, there can be no recovery on this theory. The action is premised on a sum certain and after it is proven, the account stated may be attacked only by proof of fraud, duress, mistake or other grounds cognizable in equity for the avoidance of an instrument.

Source

Farley v. Chase Bank, U.S.A., N.A., 37 So.3d 936 (Fla. 4th DCA 2010).

See Also

1. For an account stated to exist, there must be agreement between the parties that a certain balance is correct and due and an express or implicit promise to pay this balance. *Merkle v. Health Options, Inc*., 940 So.2d 1190, 1199 (Fla. 4th DCA 2006).
2. *Merin Hunter Codman, Inc. v. Wackenhut Corrections Corp.*, 941 So.2d 396, 398 (4th DCA 2006), *quoting J.J. Gumberg Co. v. Janis Services, Inc.*, 847 So.2d 1048, 1049 (Fla. 4th DCA 2003).

§4:10.1.5 Elements of Cause of Action — 5th DCA

To establish a claim for account stated, a plaintiff must establish an agreement between parties, who have engaged in previous transactions, which fixes the amount due in such transactions, and a promise of payment.

Source

Burt v. Hudson & Keyse, LLC, 138 So. 3d 1193, 1195-96 (Fla. 5th DCA 2014).

§4:10.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(k).

§4:10.3 References

1. 1 Fla. Jur. 2d *Accounts and Accounting* §§8–18 (2004).
2. 1 Am. Jur. 2d *Accounts and Accounting* §§26–51 (2005).
3. 1A C.J.S. *Account Stated* §§55–60 (2005).
4. Restatement (Second) of Contracts §282 (1981).

§4:10.4 Defenses

1. **Presumption of Correctness:** An account stated is prima facie evidence of the correctness of the items and the liability of a party therefor. This presumed correctness may be overcome by proof of fraud, mistake or error. However, the burden of establishing fraud, mistake or error is upon the party asserting it and

unless he disposes of this burden, the presumptive correctness of the stated account becomes conclusive. *Gendzier v. Bielecki*, 97 So.2d 604, 608 (Fla. 1957). *See also Home Health Services of Sarasota, Inc. v. McQuay-Garrett, Sullivan & Co*., 462 So.2d 605, 606 (Fla. 2d DCA 1985); *Robert C. Malt & Co. v. Kelly Tractor Co*., 518 So.2d 991, 992 (Fla. 4th DCA 1988); *Derius v. Allstate Indem. Co*., 723 So.2d 271, 274 (Fla. 4th DCA 1998), *rev. denied*, 719 So.2d 892 (Fla. 1998).

2. **Rendition of the Account to the Defendant:** To give an account rendered the force of an account stated because of silence on the part of the party sought to be charged, the evidence must show the rendition of the account to the defendant. The plaintiff's usual custom of sending out statements to different parties, including the defendant, the first of every month, showing the goods bought during the preceding month and the balance remaining over, is not sufficient to establish the fact that certain bills in question were rendered to defendant. *United Hardware-Furniture Co. v. Blue*, 52 So. 364 (Fla. 1910). It was clear from the record that Cargil did not dispute the invoices upon which the claim was based. In fact, Cargil's responses to Coleman's request for admissions reflect that the invoices in question were never challenged by Cargil. Further, Cargil not only accepted the goods, but later sold them. On these facts, Coleman was entitled to recovery for account stated. *Coleman Co., Inc. v. Cargil Intern. Corp*., 731 So.2d 2, 3 (Fla. 3rd DCA 1998), *rev. dismissed*, 732 So.2d 325 (Fla. 1999). Additionally, "An account stated comes into being when a creditor periodically bills a debtor for a certain amount, which amount is not objected to within a reasonable time." *Dudas v. Dade County*, 385 So.2d 1144 (Fla. 3d DCA 1980).

§4:10.5 Related Matters

1. **Account Stated and Open Account Compared:** Actions for an account stated and an open account are two distinct causes of actions requiring different burdens of proof. An account stated claim is "an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions and promising payment." … Thus, for an account stated to exist, there must be an agreement that a certain balance is correct and due, and an express or implicit promise to pay that balance. … An account opened is an unsettled debt arising from items of work and labor, with the expectation of further transactions subject to future settlement and adjustment. *South Motor Company of Dade County v. Accountable Construction Co.*, 707 So.2d 909, 912 (Fla. 3d DCA 1998). *See also Rauzin v. Kupper*, 139 So.2d 432 (Fla. 3rd DCA 1962); *Dudas v. Dade County*, 385 So.2d 1144 (Fla. 3rd DCA 1980); *Robert C. Malt & Co. v. Kelly Tractor Co*., 518 So.2d 991, 992 (Fla. 4th DCA 1988); *Mercado v. Lion's Enterprises, Inc*., 800 So.2d 753, 756 (Fla. 5th DCA 2001).

2. **Failure to Respond to Demand Letter:** Under some circumstances, a failure to respond to a demand letter may support a finding of liability in an action for an account stated; such an action is appropriate when parties engage in regular periodic billing. *Page Avjet Corp. v. Cosgrove Aircraft Service, Inc.*, 546 So.2d 16, 18 (Fla. 3d DCA 1989). *See also Martyn v. Arnold*, 18 So. 791 (1895); *Dudas v. Dade County*, 385 So.2d 1144 (Fla. 3d DCA 1980); *Rauzin v. Kupper,* 139 So.2d 432 (Fla. 3d DCA 1962).

§4:10.6 Fla.R.Civ.P. Form 1.933

COMPLAINT

Plaintiff, A. B., sue defendant, C. D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. Before the institution of this action plaintiff and defendant had business transactions between them and on ____(date)____, they agreed to the resulting balance.
3. Plaintiff rendered a statement of it to defendant, a copy being attached, and defendant did not object to the statement.
4. Defendant owes plaintiff $_____ that is due with interest since ____(date)____, on the account.

WHEREFORE plaintiff demands judgment for damages against defendant.

NOTE: A copy of the account showing items, time of accrual of each, and amount of each must be attached.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§4:10.7 Sample Complaint

See Complaint Library, Form 4:150-5 (Breach of Promissory Note; Breach of Credit Agreement; Account Stated) on Digital Access.

§4:20 ACCOUNTING, EQUITABLE

§4:20.1 Elements of Cause of Action — Florida Supreme Court

Matters of account are one of the ordinary sources of equity jurisdiction, because of the greater facility and more improved methods of taking the account.

Courts of equity take cognizance of cases in which contract demands between litigants involve extensive, mutual, or complicated accounts when it is not clear from the facts alleged in the particular case that the remedy at law is as full, adequate, and expeditious as it is in equity.

Source

R. O. Holton & Co. v. Hull, 192 So. 229, 231 (Fla. 1939).

See Also

1. *Royal Indemnity Co. v. Knott*, 136 So. 474, 478 (Fla. 1931) ("And it may be said generally that whenever there is a fiduciary relation such as that of trustee, agent, executor, etc., the right to an accounting in equity is undoubted. The right in such cases is based upon the substantive equity of trusts which jurisdiction equity always had.").
2. *Campbell v. Knight*, 109 So. 577, 579 (Fla. 1926) ("Courts of equity take cognizance of cases in which contract demands between litigants involve extensive, mutual, or complicated accounts when it is not clear from the facts alleged in the particular case that the remedy at law is as full, adequate, and expeditious as it is in equity.").

§4:20.1.1 Elements of Cause of Action — 1st DCA

An action for accounting is an equitable procedure which normally calls for a two-stage proceeding: "First for the establishment of the right or basis for the accounting with the actual accounting following in accordance with the earlier determination" (citation omitted). It is only after the accounting is actually held that the court must "balance the equities, adjust the accounts of the parties, and render complete justice between them" (citation omitted). Given this unique procedure, it is clear that at the conclusion of the first stage—that is, the determination of entitlement to an accounting—no determination of liability is as yet made.

Source

Heritage Paper Co. v. Farah, 440 So.2d 389, 391 n.2 (Fla. 1st DCA 1983).

See Also

1. *Riggs v. Saltmarsh, Cleaveland and Gund*, 341 So.2d 818, 819 (Fla. 1st DCA 1977) ("[A]lthough courts of law have jurisdiction to enforce contract demands which involve an accounting, equity will take cognizance of cases where the alleged contract demands extensive accounting.").

§4:20.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

See Also

1. *Cushman v. Schubert*, 110 So.2d 703, 705 (Fla. 2d DCA 1959) ("[E]quity has jurisdiction to entertain an action for an accounting where a confidential or fiduciary relationship is shown to exist.").

§4:20.1.3 Elements of Cause of Action — 3rd DCA

To state a claim for an equitable accounting, the plaintiff must allege that the contract demands between litigants involve extensive or complicated accounts and it is not clear that the remedy at law is as full, adequate and expeditious as it is in equity.

Source

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

See Also

1. *Dahlawi v. Ramlawi*, 644 So.2d 523, 524 (Fla. 3d DCA 1994), *rev. denied*, 652 So.2d 817 (Fla. 1995).
2. *Sodikoff v. Allen Parker Company*, 202 So.2d 4, 6 (Fla. 3d DCA 1967), *cert. denied*, 210 So.2d 226 (Fla. 1968).
3. *F. A. Chastain Construction, Inc. v. Pratt*, 146 So.2d 910, 913 (Fla. 3d DCA 1962), *following mandate*, *Pratt v. F. A. Chastain Construction, Inc.*, 157 So.2d 101 (Fla. 3d DCA 1963).

§4:20.1.4 Elements of Cause of Action — 4th DCA

[No citation for this edition.]

See Also

1. *Daddono v. Miele*, 69 So.3d 320 (Fla. 4th DCA 2011).
2. *Kesl, Inc. v. Racquet Club of Deer Creek II Condominium, Inc.*, 574 So.2d 251, 255 (Fla. 4th DCA 1991) (This is an appropriate remedy at law [accounting] notwithstanding that the parties do not otherwise stand in a fiduciary relationship to each other and are even adverse.).

§4:20.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§4:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(k).

§4:20.3 References

1. 1 Fla. Jur. 2d *Accounts and Accounting* §§23–33 (2004).
2. 1 Am. Jur. 2d *Accounts and Accounting* §§54–68 (2005).
3. 1 Am. Jur. 2d *Actions* §§12–31 (2005).
4. 1A C.J.S. *Accounting* §§6–10, 34–46 (2005).
5. Fla.R.Civ.P. 1.490(f) (2005).
6. Florida Statutes §620.8405 (2005). Actions by Partnership and Partners.
7. Charles W. Merritt, Note, *Jurisdictional Prerequisites for an Equitable Accounting*, 6 U. Fla. L. Rev. 232 (1953).
8. H. D. Warren, Annotation, *Availability of Equitable Remedy of Accounting between Principal and Agent*, 3 A.L.R.2d 1310 (1949).

§4:20.4 Defenses

1. **Uncomplicated Agreement:** An uncomplicated oral agreement for short term employment does not warrant an action for an accounting. *Bankers Trust Realty, Inc. v. Kluger*, 672 So.2d 897, 898 (Fla. 3d DCA 1996).

2. **Simple Transactions:** Simple transactions concerning small amounts of money do not give rise to claim for accounting. *See Bankers Trust Realty, Inc. v. Kluger*, 672 So. 2d 897, 898 (Fla. 3d DCA 1996).

§4:20.5 Related Matters

1. **Discretion Allowed:** The case before us was in equity for an accounting. In such cases, in balancing the equities between the parties, the chancellor is of necessity allowed some discretion. *City of Miami v. Carter*, 105 So.2d 5, 15 (Fla. 1958).

2. **Jury Trial Impracticable:** An action for accounting was formerly cognizable, both at law and in equity. The basis for the equity jurisdiction in accounting matters was the complexity of the issues and the fact that there were often numerous issues which made the use of a common law jury impracticable. *Sodikoff v. Allen Parker Company*, 202 So.2d 4, 6 (Fla. 3d DCA 1967), *cert. denied*, 210 So.2d 226 (Fla. 1968). While a jury may be permitted to conduct a simple accounting in a breach of contract dispute involving a fixed and certain amount, complicated partnership accountings are to be conducted in equity by the trial court, and not by the jury. *Dahlawi v. Ramlawi*, 644 So.2d 523, 524 (Fla. 3d DCA 1994), *rev. denied*, 652 So.2d 817 (Fla. 1995). However, it is not sufficient to deny to the parties the constitutional right to a trial by jury merely because a case is complicated or because questions of addition, subtraction, and other mathematical problems arise which require elementary accounting on the part of the jury to arrive at a verdict. *Martell & Sons, Inc. v. Friedman*, 461 So.2d 1023, 1024 (Fla. 3d DCA 1985), *pet. for rev. denied*, 469 So.2d 748 (Fla. 1985).

3. **Partnership:** In a partnership dispute, the appropriate remedy is a formal accounting of the partnership affairs, and an action at law may generally not be maintained. *Dahlawi v. Ramlawi*, 644 So.2d 523, 524 (Fla. 3d DCA 1994), *rev. denied*, 652 So.2d 817 (Fla. 1995).

4. **Procedure for Accounting:** In suits for an accounting, where the answer does not admit the allegations of the complaint and where there is no consent to entry of a decree, the proper practice is for the court to determine the initial question of plaintiff's right to an accounting, and an accounting may then be decreed if the finding is in favor of plaintiff upon the preliminary issue. *Daddono v. Miele*, 69 So.3d 320, 323 (Fla. 4th DCA 2011), *citing Heritage Paper Co. v. Farah*, 440 So.2d 389, 391 n.2 (Fla. 1st DCA 1983); *Riggs v. Saltmarsh, Cleaveland and Gund*, 341 So.2d 818, 819 (Fla. 1st DCA 1977). *See also A-1 Truck Rentals, Inc. v. Vilberg*, 222 So.2d 442, 444 (Fla. 3d DCA 1969), *superseded by statute*, Fla. R. App. P. 9.130 (a)(3)(C)(iv), *as recognized in Heritage Paper Co. v. Farah*, 440 So.2d 389 (Fla. 1st DCA 1983). Once the right to an accounting is decided, the court can then enter orders requiring the production of documents related to the accounting itself. *Wood v. Brackett*, 266 So.2d 398, 399 (Fla. 1st DCA 1972). *See also Cooper v. Fulton*, 107 So.2d 798, 800 (Fla. 3d DCA 1959). There are several connected cases at 117 So.2d 33, 132 So.2d 616, and 158 So.2d 759.

5. **Right to an Accounting:** It may be said generally that whenever there is a fiduciary relation such as that of trustee, agent, executor, etc., the right to an accounting in equity is undoubted. The right in such cases is based upon the substantive equity of trusts which jurisdiction equity always had. *Royal Indemnity Co. v. Knott*, 136 So. 474, 478 (Fla. 1931). The mere relation of an agent to his principal is of itself insufficient to entitle the agent to maintain a bill for an accounting against the principal. This rule is predicated on the ground that there is no duty on the part of the principal as there is on the part of the agent to keep an account of the dealings between them and there is no confidence reposed by the agent in the principal as there is by the principal in the agent. This rule is subject to the exception that, where the relation between the agent and the principal is of a fiduciary character, or the transactions between the parties are so involved and complicated that the remedy at law is insufficient to administer complete justice, a court of equity will entertain a bill by an agent for an accounting. *McLeod v. Gaither*, 113 So. 687, 688 (Fla. 1927). *See also Ashemimry v. Ba Nafa*, 778 So.2d 495, 498 (Fla. 5th DCA 2001). "In 1 Corpus Juris Secundum, Accounting, p. 655, §19, it is stated: 'Equity has jurisdiction of an accounting where a fiduciary relation exists as to money or property; an accounting is necessary to determine the amount due, even though the accounts are not mutual or complicated and no discovery is sought and there is a concurrent remedy

at law; but a bare agency is insufficient to confer jurisdiction.'" *Armour & Co. v. Lambdin*, 16 So.2d 805, 810 (Fla. 1944). *See also The Board of Trustees of the City of Gainesville Consol. Police Officers' and Firefighters' Retirement Plan v. Montag & Caldwell, Inc*., 821 So.2d 1251 (Fla. 1st DCA 2002).

6. **Special Master:** A special master may be appointed to take an accounting. *Goldfarb Novelty Company of Florida v. Vann*, 94 So.2d 845, 849 (Fla. 1957), *connected case*, *All Florida Surety Company v. Vann*, 128 So.2d 768 (Fla. 3d DCA 1961). *See also Novak v. O'Donnell*, 211 So.2d 855 (Fla. 3d DCA 1968). Reference to a master for an accounting is the approved procedure and one generally commended as the proper procedure to be followed. But there is no rule absolutely requiring reference to a master. *Childs v. Boots*, 152 So. 212, 214 (Fla. 1933), *connected case*, *Childs v. Boots*, 152 So. 214 (Fla. 1933). *See also Akers v. Corbett*, 190 So. 28, 29 (Fla. 1939), *connected case*, *Akers v. Corbett*, 190 So. 31 (Fla. 1939).

§4:20.6 Sample Cause of Action

COUNT FOR ACCOUNTING

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Plaintiff and defendant share a fiduciary relationship or entered a complex transaction.

A remedy at law is inadequate.

WHEREFORE, Plaintiff demands damages against Defendant for negligence and such other relief this Court deems just and proper.

§4:30 ANTITRUST ACT, VIOLATION OF FLORIDA

§4:30.1 Florida Statutes

Florida Statutes §542.18 Restraint of trade or commerce.

Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful. Fla. Stat. §542.18 (1980) (Current through the 2018 Second regular Session of the 25th Legislature).

Florida Statutes §542.19 Monopolization; attempts, combinations, or conspiracies to monopolize.

It is unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce in this state. Fla. Stat. §542.19 (1980) (Current through the 2018 Second regular Session of the 25th Legislature).

Florida Statutes §542.32 Rule of construction and coverage.

It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes. In particular, the failure to include in this chapter the substantive provisions of s. 3 of the Clayton Act, 15 U.S.C. s. 14, shall not be deemed in any way to limit the scope of s. 542.18 or s. 542.19. Fla. Stat. §542.32 (1980) (Current through the 2018 Second regular Session of the 25th Legislature).

§4:30.2 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§4:30.2.1 Elements of Cause of Action — 1st DCA

A complaint which does not allege a per se violation must in sum contain three elements:

1. a specifically defined market;
2. an allegation that the defendants possessed the ability to affect price or output; and

3. an allegation that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market.

It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general.

Source

Noack v. Blue Cross and Blue Shield of Florida, Inc., 742 So.2d 433, 436 (Fla. 1st DCA 1999), *subsequent appeal*, 859 So.2d 608 (Fla. 1st DCA 2003).

§4:30.2.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

See Also

1. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028 (Fla. 2d DCA 1984).

§4:30.2.3 Elements of Cause of Action — 3rd DCA

A complaint which does not allege a per se violation must in sum contain three elements:

1. a specifically defined market;
2. an allegation that the defendants possessed the ability to affect price or output; and
3. an allegation that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market.

It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general.

A per se violation is one which requires no proof of anti-competitive effect and is limited to practices which are presumed to affect the market such as price-fixing, group boycotts, and customer allocations.

Source

Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc., 629 So.2d 252, 257 (Fla. 3d DCA 1993).

See Also

1. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028 (Fla. 2d DCA 1984).

§4:30.2.4 Elements of Cause of Action — 4th DCA

Only vertical conspiracies to set prices constitute *per se* violations of antitrust laws. … Other violations are governed by the "rule of reason," which requires the plaintiff to prove that a restrictive practice constitutes an unreasonable restraint on competition.

"Under [the rule of reason], the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."

Three elements must be alleged and proved under the rule of reason test:

1. that there is a specifically defined market;
2. that the defendants possessed the ability to affect price or output; and
3. that plaintiff's exclusion from the market did affect or was intended to affect the price or supply of goods in that market.

… "It is not enough to allege that plaintiffs were injured; there must be an allegation of harm to competition in general."

Source

MYD Marine Distributor, Inc. v. International Paint, LTD, 76 So.3d 42 (Fla. 4th DCA 2011); *Parts Depot Company, L.P. v. Florida Auto Supply, Inc.*, 669 So.2d 321, 325 (Fla. 4th DCA 1996).

See Also

1. *Okeelanta Power Limited Partnership v. Florida Power & Light Co.*, 766 So.2d 264, 267 (Fla. 4th DCA 2000) (To prevail on a monopolization claim, a party must show: (1) possession of monopoly power in a relevant market; (2) willful acquisition or maintenance of that power in an exclusionary manner; and (3) causal antitrust injury.).
2. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028 (Fla. 2d DCA 1984).

§4:30.2.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§4:30.3 Statute of Limitations

Four Years. Fla. Stat. §542.26(1).

§4:30.4 References

1. 37 Fla. Jur. 2d *Monopolies and Restraints of Trade* §§8, 23 (2004).
2. 54, 54A Am. Jur. 2d *Monopolies, Restraints of Trade, and Unfair Trade Practices* §§1 et seq. (1996).
3. 58 C.J.S. *Monopolies* §§189–242 (1998).
4. Fla. Stat. ch. 542 (2005) (Florida Antitrust Act of 1980).
5. Florida Statutes §542.23 (2005) (Equitable Remedies).

§4:30.5 Defenses

1. **Business of Insurance:** The United States Supreme Court, in interpreting the McCarran-Ferguson Act [15 U.S.C.A. §§1011–1015 (1997)] exemption, holds that the act exempts only the "business of insurance" not the "business of insurance companies" from antitrust claims. *Noack v. Blue Cross and Blue Shield of Florida, Inc.*, 742 So.2d 433, 435 (Fla. 1st DCA 1999).

2. **Exemptions:** Under Florida law, any activity or conduct exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this Fla. Stat. Ch. 542. Thus, the doctrine of state action immunity which has developed under federal antitrust law is also an available defense to a suit against a municipality for a violation of Florida's antitrust laws. *See* Florida Statutes §542.20 (2005); *Duck Tours Seafari, Inc. v. City of Key West*, 875 So.2d 650, 653 (Fla. 3d DCA 2004).

§4:30.6 Related Matters

1. **Civil Conspiracy:** The tort of conspiracy through abuse of economic power is actionable where a plaintiff can show some peculiar power of coercion possessed by the conspirators by virtue of their combination, which could not be possessed by an individual. *Churruca v. Miami Jai-Alai, Inc.*, 353 So.2d 547 (Fla. 1977). *Accord, Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.*, 629 So.2d 252, 257 (Fla. 3d DCA 1993). A complaint must sufficiently plead conspiracy, and a pleading which merely asserts that a manufacturer received complaints from competing dealers followed by the termination of a discounter is insufficient to create a "reasonable inference" of conspiracy. *MYD Marine Distributor, Inc. v. International Paint, LTD*, 67 So.3d 42, 47 (Fla. 4th DCA 2011) (a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with plaintiff, standing alone, does not constitute a conspiracy; there must also be some other evidence of a tacit understanding or agreement). The complaint must be enough to raise a right to relief above the speculative level, and must contain "enough factual matter (taken as true) to suggest that an agreement was made" and "allegations plausibly suggesting (not merely consistent with) agreement." *MYD Marine Distributor, Inc.*, 67 So.3d at 47, *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Complainant must show both agreement and that agreement was an unreasonable restraint on competition. *MYD Marine Distributor, Inc.*, 67 So.3d at 48.

2. **Local Government:** Florida's antitrust laws apply to local government. The remedies available against local government are injunctive or other equitable relief, but not damages. *See* Florida Statutes §542.235 (2005); *Duck Tours Seafari, Inc. v. City of Key West*, 875 So.2d 650, 653 (Fla. 3d DCA 2004), *rev. denied*, 890 So.2d 1114 (Fla. 2004).

3. **Market-Share Alternate Theory of Liability:** Accordingly, we adopt the market-share alternate theory of liability as formulated by the Washington Supreme Court. However, as a prerequisite to its use, a plaintiff must make a showing that she has made a genuine attempt to locate and to identify the manufacturer responsible for her injury. We further restrict this vehicle of recovery to those actions sounding in negligence; it may not be used in conjunction with allegations of fraud, breach of warranty or strict liability. *Conley v. Boyle Drug Co*., 570 So.2d 275, 286 (Fla. 1990).

4. **Per Se Violations:** Within the foregoing broad definition of *per se* violations, certain types of conduct are generally considered by the case law to be *per se* unlawful. These include price fixing, customer allocations, geographical market divisions, group boycotts, tying arrangements, and certain types of reciprocal dealing. *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028, 1040 (Fla. 2d DCA 1984). *Accord, Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.*, 629 So.2d 252, 257 (Fla. 3d DCA 1993); *MYD Marine Distributor, Inc. v. International Paint, LTD*, 67 So.3d 42 (Fla. 4th DCA 2011) (price-fixing alleged distributors conspire to induce manufacturer to refuse to deal with a particular distributor is per se unlawful, and elimination, by joint collaboration, of discounters from access to the market is per se a violation of the Sherman Act).

5. **Vertical Restraints and Horizontal Restraints:** Vertical restraints upon competition are those imposed by persons or firms on a different level of the distribution system from the level of the persons or firms receiving the impact of the restraints, e.g., resale price fixing may involve a manufacturer dictating the price at which a dealer sells a product. On the other hand, horizontal restraints are those imposed within the same distribution level, e.g., by some dealers refusing to sell to other dealers. Horizontal restraints also encompass the situation where dealers conspire to induce the manufacturer to death with a particular dealer. *MYD Marine Distributor, Inc. v. International Paint, LTD*, 67 So.3d 42 (Fla. 4th DCA 2011), *citing Parts Depot Co. v. Fla. Auto Supply, Inc.*, 669 So.2d 321, 324 (Fla. 4th DCA 1996).

6. **Scope:** The Florida statute is broader than the comparable provision of the Sherman Antitrust Act because it expressly brings "services" within the definition of "trade or commerce." *Hackett v. Metropolitan General Hospital*, 422 So.2d 986, 988 (Fla. 2d DCA 1982).

7. **Unlawful Group Boycott:** An essential element of an unlawful group boycott is that "at least some of the boycotters are competitors of each other and the target." *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028, 1040 (Fla. 2d DCA 1984).

§4:40 APPROPRIATION (COMMERCIAL EXPLOITATION OF THE PROPERTY VALUE OF ONE'S NAME)

§4:40.1 Florida Statutes

Florida Statutes §540.08 Unauthorized publication of name or likeness.

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:
   (a) Such person; or
   (b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or
   (c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) The provisions of this section shall not apply to:

(a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;

(b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or

(c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

(4) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

(5) As used in this section, a person's "surviving spouse" is the person's surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person's "children" are her or his immediate offspring and any children legally adopted by the person. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of her or his person or by either parent.

(6) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy. Fla. Stat. §540.08 (2007) (Current through the 2018 Second regular Session of the 25th Legislature).

Florida Statutes §540.10 Exception of news media from liability.

No relief may be obtained under s. 540.08 or 540.09, against any broadcaster, publisher or distributor broadcasting, publishing or distributing paid advertising matter by radio or television or in a newspaper, magazine, or similar periodical without knowledge or notice that any consent required by s. 540.08 or 540.09, in connection with such advertising matter has not been obtained, except an injunction against the presentation of such advertising matter in future broadcasts or in future issues of such newspaper, magazine, or similar periodical. Fla. Stat. §540.10 (Current through the 2018 Second regular Session of the 25th Legislature).

See Also

1. *Ewing v. A-1 Management, Inc.,* 481 So.2d 99 (Fla. 3d DCA 1986) (Section 540.08, Florida Statutes (1983) has no application to this case because the defendants' wanted poster fell within the exception provisions of subsection (3)(a) of the above statute.).
2. *Nottage v. American Express Company,* 452 So.2d 1066 (Fla. 3d DCA 1984) (whether the exception provided in Section 540.08(3)(c) applies to the facts of this case cannot be determined on a motion to dismiss).
3. *Genesis Publications, Inc. v. Goss,* 437 So.2d 169 (Fla. 3d DCA 1983), *rev. denied*, 449 So.2d 264 (Fla. 1984).
4. *Loft v. Fuller,* 408 So.2d 619 (Fla. 4th DCA 1981) ("Florida Statute 540.08 applies only to actions in which a person's name or likeness is used for commercial trade or advertising purposes.").

§4:40.2 Statute of Limitations

§95.11(3)(a), Fla. Stat. (four years); *Haskins v. City of Fort Lauderdale*, 898 So.2d 1120, 1123 (Fla. 4th DCA 2005).

§4:40.3 References

1. 19A Fla. Jur. 2d *Defamation and Privacy* §§226–230 (2005).
2. 62A Am. Jur. 2d *Privacy* §§68–91 (2005).
3. 77 C.J.S. *Right of Privacy and Publicity* §§9–16 (1994).
4. Restatement (Second) of Torts §652(c) (1977).
5. Restatement of Unfair Competition §§46–49 (1995).
6. Robert C. Sanchez, *Unauthorized Appropriation of an Individual's Name or Likeness - Florida's Appellate Courts and §540.08*, 72 Fla. Bar J. 57 (1998).
7. Note, *Privacy in Personal Medical Information; A Diagnosis*, 33 U. Fla. L. Rev. 394 (1981).
8. Phillip E. Hassman, *Invasion of Privacy by Use of a Picture of Plaintiff's Property for Advertising Purposes*, 87 A.L.R.3d 1279 (1978).
9. Annotation, *Invasion of Privacy by Use of Plaintiff's Name or Likeness for Nonadvertising Purposes*, 30 A.L.R.3d 203 (1970).
10. Annotation, *Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising*, 23 A.L.R.3d 865 (1969).
11. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).
12. *Lane v. MRA Holdings, LLC*, 242 F.Supp.2d 1205 (2002).

§4:40.4 Defenses

1. **First Amendment Exception:** The statute does *not* apply to: The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes; §540.08(3)(a), Fla. Stat. This court has given an expansive interpretation to this exception. In *Loft v. Fuller*, 408 So.2d 619, 622 (Fla. 4th DCA 1981), this court stated: In our view, Section 540.08, by prohibiting the use of one's name or likeness for trade, commercial or advertising purposes, is designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher. Thus, the publication is harmful not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates the individual's name or his personality with something else. Such is not the case here. While we agree that at least one of the purposes of the author and publisher in releasing the publication in question was to make money through sales of copies of the book and that such a publication is commercial in that sense, this in no way distinguishes this book from almost all other books, magazines or newspapers and simply does not amount to the kind of commercial exploitation prohibited by the statute. We simply do not believe that the term "commercial," as employed in Section 540.08, was meant to be construed to bar the use of people's names in such a sweeping fashion. We also believe that acceptance of appellants' view of the statute would result in a substantial confrontation between this statute and the first amendment to the United States Constitution guaranteeing freedom of the press and of speech. *Weinstein Design Group, Inc. v. Fielder*, 884 So.2d 990, 997 (Fla. 4th DCA 2004), *subsequent appeal*, 891 So.2d 1095 (Fla. 4th DCA 2004).

2. **Publications not Directly Promoting Product or Service:** The term "commercial purpose" as used in section 540.08(1) does not apply to publications, including motion pictures, which do not directly promote a product or service. *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So.2d 802, 810 (Fla. 2005).

3. **Purposes of Trade:** As a matter of law, this Court finds that Lane's image and likeness were not used to promote a product or service. In coming to this conclusion, this Court relies on section 47 of the Restatement (Third) of Unfair Competition which defines "the purposes of trade" as follows: The names, likeness, and other indicia of a person's identity are used "for the purposes of trade" … if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use "for the purpose of trade" does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising incidental to such uses. *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So.2d 802, 807 (Fla. 2005).

4. **Types of Invasion of Privacy:** Florida recognizes three categories of invasion of privacy: (1) appropriation-the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion-physically or electronically intruding into one's private quarters; and (3) public disclosure of private facts-the dissemination of truthful private information which a reasonable person would find objectionable. *Jews For Jesus, Inc. v. Rapp,* 997 So.2d 1098, 1102-03, 1115 (Fla. 2008) (finding that false light is not a recognized invasion of privacy tort in Florida).

§4:50 BREACH OF FIDUCIARY DUTY

§4:50.1 Elements of Cause of Action — Florida Supreme Court

The elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages.

Source

Gracey v. Eaker, 837 So.2d 348, 353 (Fla. 2002).

§4:50.1.1 Elements of Cause of Action — 1st DCA

The elements of a breach of fiduciary duty claim include: "(1) existence of a fiduciary duty, (2) breach of that duty, and (3) damages flowing from the breach."

Source

Columbia Bank v. Turbeville, 143 So.3d 964, 970 (Fla. 1st DCA 2014).

See Also

Cassedy v. Alland Investments Corp., 128 So.3d 976, 978 (Fla. 1st DCA 2014).

§4:50.1.2 Elements of Cause of Action — 2nd DCA

To state a cause of action for breach of fiduciary duty, a plaintiff must allege three elements: the existence of a fiduciary duty, a breach of that duty, and plaintiff's damages proximately caused by the breach.

Source

Rocco v. Glenn, Rasmussen, Fogarty & Hooker, P.A., 32 So.3d 111, 116 (Fla. 2d DCA 2009).

See Also

1. *Jacobs v. Vaillancourt*, 634 So.2d 667, 670 (Fla. 2d DCA 1994), *rev. denied*, 642 So.2d 746 (Fla. 1994) ("The term 'fiduciary or confidential relation,' is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused—in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.").
2. *Atlantic National Bank of Florida v. Vest,* 480 So.2d 1328, 1333 (Fla. 2d DCA 1985), *rev. denied*, 491 So.2d 281 (Fla. 1986), *rev. denied*, 508 So.2d 16 (Fla. 1987).
3. *Baggett v. Electricians Local 915 Credit Union*, 620 So.2d 784, 786 (Fla. 2d DCA 1993) ("To demonstrate a breach of fiduciary duty, it must be shown that influence by one party was acquired and abused to the detriment of another party.").

§4:50.1.3 Elements of Cause of Action — 3rd DCA

To establish a breach of fiduciary duty, it must be shown that influence by one party was acquired through the advisement, counsel, or protection of the weaker party and abused to the detriment of the other party.

Source

Real Estate Value Co. v. Carnival Corp., 92 So. 3d 255, 261-262 (Fla. 3d DCA 2012).

See Also

1. *Mejia v. Egleston*, 319 So.3d 159, 160 n.4 (Fla. 3d DCA 2021).
2. *Fonseca v. Taverna Imporsts, Inc.,* 212 So.3d 431, 442 (Fla. 3d DCA 2017).

§4:50.1.4 Elements of Cause of Action — 4th DCA

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) its breach; and (3) damages proximately caused by the breach.

Source

Reed v. Long, 111 So. 3d 237, 239-240 (Fla. 4th DCA 2013).

See Also

1. *Guarino v. Mandel,* 327 So.3d 853, 861-62 (Fla. 4th DCA 2021).
2. *Taubenfeld v. Lasko,* 324 So.3d 529, 537-38 (Fla. 4th DCA 2021).
3. *Patten v. Winderman,* 965 So.2d 1222, 1224 (Fla. 4th DCA 2007).

§4:50.1.5 Elements of Cause of Action — 5th DCA

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a duty; (2) breach of that duty; and (3) damages flowing from the breach.

Source

Miller v. Miller, 89 So.3d 962 (Fla. 5th DCA 2012) *(citing Crusselle v. Mong*, 59 So.3d 1178, 1181 (Fla. 4th DCA 2011).

See Also

1. *Sola v. Markel*, 320 So.3d 326, 328 (Fla. 5th DCA 2021).
2. *LeBlanc v. Acevedo*, 258 So.3d 555, 557 (Fla. 5th DCA 2018).
3. *Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp.*, 850 So.2d 536 (Fla. 5th DCA 2003), *rev. denied*, 860 So.2d 977 (Fla. 2003).
4. *Brouwer v. Wyndham Vacation Resorts, Inc.*, 2022 WL 722914, *1 (Fla. 5th DCA Mar. 11, 2022).
5. *Yaeger v. Wyndham Vacation Resorts, Inc.*, 335 So.3d 772, 773 (Fla. 5th DCA 2022).

§4:50.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p).

§4:50.3 References

1. 27 Fla. Jur. 2d *Fraud and Deceit* §4 (2000).
2. 37 Am. Jur. 2d *Fraud and Deceit* §§30–36 (2001).
3. 37 C.J.S. *Fraud* §6 (1997).
4. Restatement (Second) of Torts §542(b) (1977).
5. Restatement (Second) of Torts §874 (1979).
6. Restatement (Second) of Trusts §170(a) (1957).
7. Annotation, *Existence of Fiduciary Relationship between Bank and Depositor or Customer so as to Impose Special Duty of Disclosure upon Bank*, 70 A.L.R.3d 1344 (1976).

§4:50.4 Defenses

1. **Full Disclosure Given:** While occupying such a fiduciary relation, the officers and directors of a corporation are precluded from receiving any personal advantage without the fullest disclosure to, and assent of, all concerned. *Avila South Condominium Assoc. Inc. v. Kappa Corp.*, 347 So.2d 599, 606 (Fla. 1977). *See also First Union Nat. Bank v. Turney*, 824 So.2d 172, 188 (Fla. 1st DCA 2001), *rev. denied*, 828 So.2d 385 (Fla. 2002).

2. **Delayed discovery doctrine:** Breach of fiduciary duty claim does not toll the running of the statute of limitations. *See Zainulabeddin v. Univ. of S. Fl. Board of Trustees,* No. 8:16-cv-637-T-30TGW, 2017 WL 5202998, at *11 (M.D. Fla. April 19, 2017).

§4:50.5 Related Matters

1. **Arms-Length Transaction:** In an arms-length transaction, there is no duty imposed on either party to act for the benefit or protection of the other party, or to disclose facts that the other party could, by its own diligence have discovered. *Watkins v. NCNB National Bank of Florida, N.A.*, 622 So.2d 1063, 1065 (Fla. 3d DCA 1993), *rev. denied*, 634 So.2d 629 (Fla. 1994). *See also Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp*., 850 So.2d 536, 540 (Fla. 5th DCA 2003), *rev. denied*, 860 So.2d 977 (Fla. 2003); *CDG Int'l Corp. v. Q Capital Strategies, LLC*, No. 17-23902-CIV, 2018 WL 278891, at *9 (S.D. Fla. Jan. 3, 2018).

2. **Banks:** Where a bank becomes involved in a transaction with a customer with whom it has established a relationship of trust and confidence, and it is a transaction from which the bank is likely to benefit at the customer's expense, the bank may be found to have assumed a duty to disclose facts material to the transaction, peculiarly within its knowledge, and not otherwise available to the customer. *Barnett Bank of West Florida v. Hooper*, 498 So.2d 923, 925 (Fla. 1986). The relationship between bank and borrower is generally that of creditor and debtor, to which the bank owes no fiduciary duty. However, in some circumstances, a fiduciary duty may be found in a creditor/debtor relationship. *Maxwell v. First United Bank*, 782 So.2d 931, 934 (Fla. 4th DCA 2001).

3. **Corporate Directors:** At common law, the directors of a private corporation are considered by equity to be in a fiduciary relationship with the corporation and its shareholders. *Fox v. Professional Wrecker Operators of Florida, Inc*., 801 So.2d 175, 180 (Fla. 5th DCA 2001).

4. **Fiduciary Relationship:** To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party. *Watkins v. NCNB National Bank of Fla., N.A.*, 622 So.2d 1063, 1065 (Fla. 3d DCA 1993), *rev. denied*, 634 So.2d 629 (Fla. 1994). *See also Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp*., 850 So.2d 536, 540 (Fla. 5th DCA 2003), *rev. denied*, 860 So.2d 977 (Fla. 2003). A fiduciary relationship may be either express or implied. *Maxwell v. First United Bank*, 782 So.2d 931, 933 (Fla. 4th DCA 2001). *See also B & C Investors, Inc. v. Vojak*, 79 So. 3d 42, 47 (Fla. Dist. Ct. App. 2d Dist. 2011) (statute of frauds would not bar a claim against an attorney for breach of fiduciary duty and legal malpractice which are independent torts, even if same arises from an oral conveyance of land as a result of attorney's self-dealing).

5. **Intentional Tort:** Breach of fiduciary duty is an intentional tort. *Halkey-Roberts Corp. v. Mackal,* 641 So.2d 445, 447 (Fla. 2d DCA 1994). However, in *Palafrugell Holdings, Inc. v. Cassel*, 825 So.2d 937, 939 (Fla. 3d DCA 2001), *corrected by*, 854 So.2d 225 (Fla. 3d DCA 2003), the court said a "claim for breach of fiduciary duty may arise out of either negligent or intentional conduct. When the conduct underlying the breach is intentional, the breach is intentional; when the conduct underlying the breach is negligent, the breach is negligent." *See also Horizons Rehabilitation, Inc. v. Health Care And Retirement Corp*., 810 So.2d 958, 964 (Fla. 5th DCA 2002), *rev. denied*, 832 So.2d 104 (Fla. 2002). A breach of fiduciary duty is constructive fraud and thus may form the basis to apply an exception to the homestead protection. *Hirchert Family Trust v. Hirchert*, 65 So.3d 548 (Fla. 5th DCA June 17, 2011), *rehearing denied by* 2011 Fla. App. LEXIS 12846 (Fla. 5th DCA July 19, 2011).

6. **Nominal Damages:** Nominal damages can be awarded when a legal wrong has been proven, but the aggrieved party has suffered no damages or where recoverable damages were not proven. *Stevens v. Cricket Club Condo., Inc*. 784 So.2d 517, 519 (Fla. 3d DCA 2001). *See also Rocco v. Glenn, Rasmussen, Fogarty & Hooker, P.A.*, 32 So.3d 111, 116 (Fla. 2d DCA 2009) ("However, a defendant may be liable for nominal damages for a breach of fiduciary duty even if the plaintiff cannot prove actual damages.").

7. **Silence:** The mere silence by one under such a fiduciary duty to disclose is fraudulent concealment. *First Union Nat. Bank v. Turney*, 824 So.2d 172, 189 (Fla. 1st DCA 2001), *rev. denied*, 828 So.2d 385 (Fla. 2002).

8. **Transfer of Duty to Another:** Fiduciaries are generally not able to avoid the negligent performance of their own special responsibilities by handing them off to someone else. *Morgan Stanley DW Inc. v. Halliday*, 873 So.2d 400, 403 (Fla. 4th DCA 2004).

9. See *Beach v. Williamson,* 83 So. 860, 863 (Fla. 1919).

10. **Joint Venture:** A joint venture is created when two or more persons join their property or time, or some combination thereof, in conducting a particular line of trade or for some particular business deal. *Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So.3d 1076, 1089 (Fla. 2008). The fiduciary relationship between parties arises by virtue of the existence of the joint venture agreement, requiring the parties to deal with each other fairly and in good faith. *De Ribeaux v. Del Valle*, 531 So.2d 992, 993-94 (Fla. 3d DCA 1988). However, if the performance of an action complained of is allowed in the contract itself, the performance of that action cannot form the basis for a breach of fiduciary duty. *Hallock v. Holiday Isle Resort & Marina, Inc.*, 4 So.3d 17, 21 (Fla. 3d DCA 2009).

11. **Non-Profits/Ecclesiastical Entanglement Defense:** The First Amendment prohibits civil courts from adjudicating ecclesiastical matters. The First Amendment provides churches with the power to decide for themselves free from state interference, in matters of church government as well as those of faith and doctrine. *Malicki v. Doe*, 814 So.2d 347, 356 (Fla. 2002). *See also Rosenberger v. Jamison*, 72 So.3d 199 (Fla. 1st DCA 2011) (court did not recognize breach of fiduciary claim based on allegations that certain church members removed certain other members, elected new directors, and changed church's governing documents in contravention of Fla. Stat. ch. 617, which governs nonprofit entities); *compare Bendross v. Readon*, 89 So. 3d 258, 259 (Fla. Dist. Ct. App. 3d Dist. 2012) (recognizing that a breach of fiduciary claim could exist in a intra-church dispute, and the court has a right to redress where there is a showing of fraud, collusion, or arbitrary conduct on the part of church authorities, and if the case was capable of being resolved by applying neutral principles of law as expressed in Fla. Stat. ch. 617, without inquiry into religious doctrine); *Sharma v. Ramlal*, 76 So.3d 955, 956 (Fla. 2d DCA 2011) (LaRose, J., concurring) (where the record suggests that disputes arose over forms of Hindu temple worship, a court cannot entangle itself in an ecclesiastical matter, but "the dispute [eventually] spiraled into a battle over corporate governance, control and management" which could support a breach of fiduciary duty claim if alleged properly in a representative capacity as a derivative claim).

§4:50.6 Sample Cause of Action

COUNT FOR BREACH OF
FIDUCIARY DUTY

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Plaintiff and Defendant share a relationship whereby **(a)** Plaintiff reposes trust and confidence in Defendant, and **(b)** Defendant undertakes such trust and assumes a duty to advise, counsel and/or protect Plaintiff.
Defendant breached its duties to Plaintiff.
Defendant's breach caused Plaintiff to suffer damages.

WHEREFORE, Plaintiff demands damages against Defendant for breach of fiduciary duty and such other relief this Court deems just and proper.

§4:60 CANCELLATION OF DEED

§4:60.1 Elements of Cause of Action — Florida Supreme Court

A deed, the consideration for which is the support of the grantor, will be cancelled where to deny relief would be perpetrating a fraud on the grantor. Relief in equity in this class of cases is not a matter of strict right, but is granted or refused according to whether from all the circumstances, it is just and reasonable in the particular case, because it is made to appear that fraud has been practiced on the grantor.

Source

Collins v. McKelvain, 189 So. 655, 656 (Fla. 1939).

See Also

1. *Beck v. Hamilton,* 174 So. 588 (Fla. 1937).

§4:60.1.1 Elements of Cause of Action — 1st DCA

[T]his court held that entitlement to rescission or cancellation of a deed will lie when the deed has been obtained:

1. through misrepresentation upon which the grantor relied;
2. inadequate consideration; and
3. an abuse of a confidential or fiduciary relationship.

Source

Steigman v. Danese, 502 So.2d 463, 465 (Fla. 1st DCA 1987), *rev. denied*, 511 So.2d 998 (Fla. 1987), *overruled on other grounds by Spohr v. Berryman,* 589 So.2d 225, 228-29 (Fla. 1991), *and order vacated by In re Estate of Danese*, 601 So.2d 570, 571 (Fla. 1st DCA 1992).

See Also

1. *Harrell v. Branson,* 344 So.2d 604, 606 (Fla. 1st DCA 1977), *cert. denied,* 353 So.2d 675 (Fla. 1977).

§4:60.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§4:60.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§4:60.1.4 Elements of Cause of Action — 4th DCA

[No citation for this edition.]

§4:60.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

See Also

Townsend v. Morton, 36 So.3d 865 (Fla. 5th DCA 2010).

§4:60.2 Statute of Limitations

Section 95.231(2), Fla. Stat. (20 years) ("After 20 years from the recording of a deed or the probate of a will purporting to convey real property, no person shall assert any claim to the property against the claimants under the deed or will or their successors in title.").

§4:60.3 References

1. 9 Fla. Jur. 2d *Cancellation, Rescission, and Reformation of Instruments* §§41–48 (2004).
2. 13 Am. Jur. 2d *Cancellation of Instruments* §§1–5, 50–59 (2000).
3. 12A C.J.S. *Cancellation of Instruments; Rescission* §§56, 122–135 (2004).

§4:60.4 Related Matters

1. **Confidential Relationship:** The term "confidential relationship" encompasses "virtually all relationships of trust and dependence," and "courts have been especially quick to find a confidential relationship where the grantor and grantee are related by blood and the grantor has become dependent on the grantee." *Thomas for Fennell v. Lampkin*, 470 So.2d 37, 39 (Fla. 5th DCA 1985). Thus, a presumption of undue influence will arise when the evidence establishes: (1) the existence of a confidential relationship between the grantor and the beneficiary, and (2) that the beneficiary actively procured the deed. *Jordan v. Noll*, 423 So.2d 368, 369 (Fla. 1st DCA 1982), *pet. for rev. denied,* 430 So.2d 451 (Fla. 1983). Once the presumption of undue influence arises, the beneficiary has "the burden of giving a reasonable explanation for the active role in the affairs of the grantor." 423 So.2d at 369. *See also Thomas for Fennell v. Lampkin*, 470 So.2d at 39, where the court said: "It is a well-established proposition in Florida that a deed may be set aside because of undue influence exercised on the grantor by the grantee." Accord *Adams v. Stringfellow*, 107 So. 633 (Fla. 1926); *Pratt v. Carns*, 85 So. 681 (Fla. 1920). *See Steigman v. Danese,* 502 So.2d 463, 466 (Fla. 1st DCA 1987), *rev. denied*, 511 So.2d 998 (Fla. 1987), *overruled on other grounds by Spohr v. Berryman,* 589 So.2d 225, 228-29 (Fla. 1991), *and order vacated by In re Estate of Danese*, 601 So.2d 570, 571 (Fla. 1st DCA 1992).

2. **Harsh Remedy:** Rescission and cancellation of a deed is a harsh remedy not generally favored by the courts. Indeed, a court of equity will ordinarily rescind or cancel an instrument only for fraud, accident or mistake and not because of the mere want or failure of consideration. An action for damages at law is usually adequate in the latter instances. *Rennolds v. Rennolds*, 312 So.2d 538, 541 (Fla. 2d DCA 1975).

§4:70 CONSPIRACY, CIVIL

§4:70.1 Elements of Cause of Action — Florida Supreme Court

It is fundamental that the allegations of a declaration for civil conspiracy must charge a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means or it must allege that the confederates committed acts unlawfully, willfully, and maliciously that resulted in injury to the plaintiff.

Carson in his work on Common Law Pleading, page 174, lists the essentials of such a declaration to be:

1. Conspiracy between two or more persons to do an unlawful act or to do a lawful act by unlawful means,
2. the doing of some overt act in pursuance of the conspiracy, and
3. damage to the plaintiff as a result of the acts done in furtherance of the conspiracy.

Source

Patten v. Daoud, 12 So.2d 299, 301 (Fla. 1943).

See Also

1. *Phillip Morris USA, Inc. v. Russo,* 175 So.3d 681, 686 (Fla. 2015).

2. *Churruca v. Miami Jai-Alai, Inc.*, 353 So.2d 547, 550 (Fla. 1977), *portion in conflict with opinion of Supreme Court of Florida is vacated*, 354 So.2d 974 (Fla. 3d DCA 1978).
3. *Snipes v. West Flagler Kennel Club, Inc.*, 105 So.2d 164, 165 (Fla. 1958).
4. *Loeb v. Geronemus*, 66 So.2d 241, 243 (Fla. 1953).
5. *Liappas v. Augoustis*, 47 So.2d 582 (Fla. 1950).
6. *Dr. P. Phillips & Sons, Inc. v. Kilgore*, 12 So.2d 465, 466 (Fla. 1943).

§4:70.1.1 Elements of Cause of Action — 1st DCA

A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means.

The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy and which results in damage to plaintiff. Thus, a cause of action for civil conspiracy exists only if the basis for the conspiracy is an independent wrong or tort which would constitute a cause of action if the wrong were done by one person.

Source

Rivers v. Dillards Department Store, Inc., 698 So.2d 1328, 1333 (Fla. 1st DCA 1997).

See Also

1. *Cedar Hills Properties Corp. v. Eastern Federal Corp.*, 575 So.2d 673, 676 (Fla. 1st DCA 1991), *rev. denied*, 589 So.2d 290 (Fla. 1991).
2. *Kurnow v. Abbott*, 114 So.3d 1099, 1102 n.4 (Fla. 1st DCA 2013).
3. *Ocala Loan Co. v. Smith*, 155 So.2d 711, 716 (Fla. 1st DCA 1963).

§4:70.1.2 Elements of Cause of Action — 2nd DCA

A cause of action for conspiracy requires showing: (1) a conspiracy between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts performed pursuant to the conspiracy.

Source

Olson v. Johnson, 961 So.2d 356, 359 (Fla. 2d DCA 2007).

See Also

1. *American Diversified Insurance Services, Inc. v. Union Fidelity Life Insurance Co.*, 439 So.2d 904, 906 (Fla. 2d DCA 1983).
2. *Renpak, Inc. v. Oppenheimer*, 104 So.2d 642, 646 (Fla. 2d DCA 1958).
3. *Regan v. Davis*, 97 So.2d 324, 326 (Fla. 2d DCA 1957).
4. *Kilgore Ace Hardware, Inc. v. Newsome*, 352 So.2d 918, 920 (Fla. 2d DCA 1977) ("Civil conspiracy is an agreement, confederation, or combination of two or more persons to do an unlawful act or do or accomplish a lawful act or legal end by unlawful means, to do something wrongful either as a means or an end, or to effect an illegal purpose either by legal or illegal means or to effect a legal purpose by illegal means.").

§4:70.1.3 Elements of Cause of Action — 3rd DCA

A civil conspiracy requires:

1. an agreement between two or more parties,
2. to do an unlawful act or to do a lawful act by unlawful means,
3. the doing of some overt act in pursuance of the conspiracy, and
4. damage to plaintiff as a result of the acts done under the conspiracy.

Additionally, an actionable conspiracy requires an actionable underlying tort or wrong.

Source

MP, LLC v. Sterling Holding, LLC, 231 So.3d 517, 521-22 (Fla. 3d DCA 2017); *Rey v. Phillip Morris, Inc.*, 75 So.3d 378 (Fla. 3d DCA 2011); *Charles v. Florida Foreclosure Placement Ctr., LLC,* 988 So.2d 1157, 1159-60 (Fla. 3d DCA 2008).

See Also

1. *GE Real Estate Services, Inc. v. Mandich Real Estate Advisors, Inc*., 2021 WL 6129766, *3 (Fla. 3d DCA Dec. 29, 2021).
2. *Phelan v. Lawhon*, 229 So.3d 853, 858 (Fla. 3d DCA 2017).
3. *Lipsig v. Ramlawi*, 760 So.2d 170, 180 (Fla. 3d DCA 2000), *rev. denied*, 786 So.2d 579 (Fla. 2001).
4. *Union Oil of California, Amsco Division v. Watson*, 468 So.2d 349 (Fla. 3d DCA 1985), *petition for rev. denied*, 479 So.2d 119 (Fla. 1985).
5. *Blatt v. Green, Rose, Kahn & Piotrkowski*, 456 So.2d 949, 950 (Fla. 3d DCA 1984).
6. *Buckner v. Lower Florida Keys Hospital District*, 403 So.2d 1025 (Fla. 3d DCA 1981), *petition for rev. denied*, 412 So.2d 463 (Fla. 1982).
7. *Churruca v. Miami Jai-Alai, Inc.*, 338 So.2d 228, 229 (Fla. 3d DCA 1976), *reversed on other grounds and remanded*, 353 So.2d 547 (Fla. 1977), *portion in conflict with opinion of Supreme Court of Florida is vacated*, 354 So.2d 974 (Fla. 3d DCA 1978).
8. *Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. 3d DCA 1997), *rev. denied*, 717 So.2d 531 (Fla. 1998).

§4:70.1.4 Elements of Cause of Action — 4th DCA

A conspiracy itself becomes the gist of the action where no civil wrong is the object of the conspiracy, but the mere force of numbers, acting in unison, or other exceptional circumstances, gives rise to an independent wrong.

The gist of a civil action for conspiracy is not the conspiracy itself, but the civil wrong which is done pursuant to the conspiracy and which results in damage to the plaintiff; an act which does not constitute a basis for an action against one person cannot be made the basis of a civil action for conspiracy.

The essentials of a complaint for civil conspiracy are:

1. A conspiracy between two or more parties;
2. To do an unlawful act or to do a lawful act by unlawful means;
3. The doing of some overt act in pursuance of the conspiracy; and
4. Damage to plaintiff as a result of the acts done under the conspiracy.

General allegations of conspiracy are inadequate. A complaint must set forth clear, positive, and specific allegations of civil conspiracy.

Source

Eagletech Communs., Inc. v. Bryn Mawr Inv. Group, Inc., 79 So. 3d 855, 863 (Fla. 4th DCA 2012); *Palm Beach County Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So.3d 1090, 1096 (Fla. 4th DCA 2009).

See Also

1. *R.J. Reynolds Tobacco Co. v. Neff*, 325 So.3d 872, 884 (Fla. 4th DCA 2021).
2. *Bond v. Koscot Interplanetary, Inc.*, 246 So. 2d 631, 635 (Fla. 4th DCA 1971), *appeal after remand*, 276 So.2d 198 (Fla. 4th DCA 1973), *cert. denied*, 283 So.2d 866 (Fla. 1973).
3. *Segal v. Rhumbline Intern., Inc.*, 688 So.2d 397, 400 (Fla. 4th DCA 1997) ("A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose by unlawful means. … Each act done in pursuance of a conspiracy by one of several conspirators is an act for which each is jointly and severally liable.").
4. *Russo v. Fink*, 87 So.3d 815, 819 (Fla. 4th DCA 2012).
5. *Gilison v. Flagler Bank*, 303 So. 3d 999, 1004 (Fla. 4th DCA 2020).

§4:70.1.5 Elements of Cause of Action — 5th DCA

The essentials of a complaint for civil conspiracy are:
1. a conspiracy between two or more parties,
2. to do an unlawful act or to do a lawful act by unlawful means,
3. the doing of some overt act in pursuance of the conspiracy, and
4. damage to plaintiff as a result of the acts done under the conspiracy.

Source

Olesen v. GE Capital Corp., 135 So. 3d 389, 398-399 (Fla. 5th DCA 2014).

See Also

1. *Walters v. Blankenship*, 931 So.2d 137, 140 (Fla. 5th DCA 2006).
2. *Hoch v. Rissman, Weisberg, Barrett*, 742 So.2d 451, 460 (Fla. 5th DCA 1999), *rev. denied*, 760 So.2d 948 (Fla. 2000).
3. *Nicholson v. Kellin*, 481 So.2d 931, 935 (Fla. 5th DCA 1985).
4. *Wright v. Yurko*, 446 So.2d 1162, 1165 (Fla. 5th DCA 1984).
5. *Kent v. Kent*, 431 So.2d 279, 281 (Fla. 5th DCA 1983).

§4:70.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p); *Young v. Ball*, 835 So.2d 385 (Fla. 2nd DCA 2003); *King v. Bencie*, 806 Fed.Appx. 873, 875 (11th Cir. 2020).

§4:70.3 References

1. 10 Fla. Jur. 2d *Conspiracy–Civil Aspects* §1 (2003).
2. 16 Am. Jur. 2d *Conspiracy* §§50–73 (1998).
3. 15A C.J.S. *Conspiracy* §§4–8, 28–31 (2002).
4. Restatement (Second) of Torts §§875, 876 (1979).

§4:70.4 Related Matters

1. **Black Listing Employees:** When the conduct of a combination of employers, maliciously conceived and executed, amounts to a "black listing" of employees so as to permanently deprive them of the means of earning a livelihood, a common law cause of action is presented upon which a jury may return damages. *Churruca v. Miami Jai-Alai, Inc.*, 353 So.2d 547, 551 (Fla. 1977), *portion in conflict with opinion of Supreme Court of Florida is vacated*, 354 So.2d 974 (Fla. 3d DCA 1978).

2. **Circumstantial Evidence:** While a conspiracy may be proven by circumstantial evidence, this may be done only when the inference sought to be created by such circumstantial evidence outweighs all reasonable inferences to the contrary. *Diamond v. Rosenfeld*, 511 So.2d 1031, 1034 (Fla. 4th DCA 1987), *rev. denied*, 520 So.2d 586 (Fla. 1988). *See also Raimi v. Furlong*, 702 So.2d 1273, 1284 (Fla. 3d DCA 1997), *rev. denied*, 717 So.2d 531 (Fla. 1998).

3. **Conspiracy to Monopolize:** Conspiracy to monopolize under section two of the Sherman Act requires three elements: (1) existence of a conspiracy, (2) directed at an appreciable part of interstate commerce, and (3) undertaken with specific intent of achieving monopoly power. A section two violation under Section 542.19, Florida Statutes, need not affect interstate commerce. *Fina Oil and Chemical Co. v. Boyette*, 530 So.2d 1037, 1038 (Fla. 1st DCA 1988); *Parts Depot Company, L.P. v. Florida Auto Supply, Inc.*, 669 So.2d 321, 325 (Fla. 4th DCA 1996); *MYD Marine Distributor, Inc. v. International Paint, LTD*, 67 So.3d 42 (Fla. 4th DCA 2011).

4. **Corporations:** A conspiracy requires the combination of two or more persons—a meeting of two independent minds intent on one purpose. … Since a corporation is a legal entity which can only act through

its agents, officers and employees, a corporation cannot conspire with its own agents unless the agent has a personal stake in the activities that are separate and distinct from the corporation's interest. *Cedar Hills Properties Corp. v. Eastern Federal Corp.*, 575 So.2d 673, 676 (Fla. 1st DCA 1991), *rev. denied*, 589 So.2d 290 (Fla. 1991); *Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc.*, 629 So.2d 252, 256 (Fla. 3d DCA 1993); *Hoon v. Pate Construction Co.*, 607 So.2d 423, 430 (Fla. 4th DCA 1992), *rev. denied*, 618 So.2d 210 (Fla. 1993). *McLeod v. Barber*, 764 So.2d 790, 793 (Fla. 5th DCA 2000).

5. **Crime of Conspiracy:** In order to prove the crime of conspiracy, the state must prove the following two elements: (1) an agreement and (2) an intention to commit an offense. *Saint Louis v. State*, 561 So.2d 628, 629 (Fla. 2d DCA 1990).

6. **Hearsay Exception:** Florida Statutes §90.803(18)(e) provides that "[a] statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph." In order to admit evidence under this exception, the State must establish: (1) that a conspiracy existed; (2) that the declarant/coconspirator and the defendant against whom the statements are offered were members of the conspiracy; and (3) that the statements were made during the course and in furtherance of the conspiracy. *Brooks v. State*, 787 So.2d 765, 778 (Fla. 2001).

7. **Independent Tort:** Although the general rule is that "an act which constitutes no ground of action against one person cannot be made the basis of a civil action for conspiracy," … in certain circumstances mere force of numbers acting in unison may comprise an actionable wrong. In essence, this Court stated that ordinarily there can be no independent tort for conspiracy. However, if the plaintiff can show some peculiar power of coercion possessed by the conspirators by virtue of their combination, which power an individual would not possess, then conspiracy itself becomes an independent tort. … The essential elements of this tort are a malicious motive and coercion through numbers or economic influence. *Churruca v. Miami Jai-Alai, Inc.*, 353 So.2d 547, 550 (Fla. 1977), *reversed on other grounds and remanded*, 353 So.2d 547 (Fla. 1977), *portion in conflict with opinion of Supreme Court of Florida is vacated*, 354 So.2d 974 (Fla. 3d DCA 1978); *Wilcox v. Stout*, 637 So.2d 335, 336 (Fla. 2d DCA 1994); *Peoples National Bank of Commerce v. First Union National Bank of Florida, N.A.*, 667 So.2d 876, 879 (Fla. 3d DCA 1996).

8. **Joint and Several Liability:** Each act done in pursuance of a conspiracy by one of several conspirators is an act for which each is jointly and severally liable. *Segal v. Rhumbline International, Inc.*, 688 So.2d 397, 400 (Fla. 4th DCA 1997).

9. **Underlying Wrongful Act:** An underlying wrongful act which would not be actionable against an individual person cannot form the basis for a conspiracy claim. *See Kee v. National Reserve Life Ins. Co.,* 918 F. 2d 1538, 1542 (11th Cir. 1990); *Banco de los Trabajadores v. Cortez Moreno*, 237 So.3d 1127, 1136 (Fla. 3d DCA 2018).

§4:70.5 Sample Cause of Action

COUNT FOR CIVIL CONSPIRACY

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Defendants [INSERT NAMES OF DEFENDANTS] are parties to a civil conspiracy.
Defendants [INSERT NAMES OF DEFENDANTS] conspired [to do an unlawful act or to do a lawful act by unlawful means].
Defendants [INSERT NAMES OF DEFENDANTS] conspired to [INSERT DESCRIPTION OF UNLAWFUL ACT OR UNLAWFUL MEANS EMPLOYED].

Defendant owed a duty to plaintiff to protect the plaintiff from [INSERT DESCRIPTION OF THE EVENT CAUSING DAMAGE].
Defendants [INSERT NAMES OF DEFENDANTS] committed an overt act in furtherance of their conspiracy, including [DESCRIBE THE OVERT ACT].
Defendants' conspiracy and their respective overt acts caused Plaintiff to suffer damages.

WHEREFORE, Plaintiff demands damages against Defendant [insert name of Defendant] for civil conspiracy and such other relief this Court deems just and proper.

§4:80 CONVERSION

§4:80.1 Elements of Cause of Action — Florida Supreme Court

Where there is a taking of chattels with intent to exercise over them an ownership inconsistent with the real owner's right of possession, there is a conversion. Any act of a person in asserting a right of dominion over chattels which is inconsistent with the right of the owner may amount in law to a conversion.

Source

Quitman Naval Stores Co. v. Conway, 58 So. 840 (Fla. 1912).

See Also

1. *Wilson Cypress, Co. v. Logan*, 162 So. 489, 490 (Fla. 1935), *affirmed following remand*, 184 So. 331 (Fla. 1938) ("The essential elements of a conversion is a wrongful deprivation of property to the owner.").
2. *West Yellow Pine Co. v. Stephens*, 86 So. 241, 243 (Fla. 1920).
3. *Star Fruit Co. v. Eagle Lake Growers, Inc*., 33 So.2d 858, 860 (Fla. 1948): "Essential element of a conversion is a wrongful deprivation of property to the owner."
   "The gist of a conversion has been declared to be not the acquisition of the property of the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled. A conversion consists of an act in derogation of the plaintiff's possessory rights, and any wrongful exercise or assumption of authority over another's goods, depriving him of the possession, permanently or for an indefinite time, is a conversion."

§4:80.1.1 Elements of Cause of Action — 1st DCA

It is well settled that a conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time. Conversion may be demonstrated by a plaintiff's demand and a defendant's refusal.

Source

Beach Cmty. Bank v. Disposal Services, LLC, 199 So.3d 1132, 1134 (Fla. 1st DCA 2016).

See Also

1. *Howard v. Murray*, 184 So.3d 1155, n. 24 (Fla. 1st DCA 2015) (elements of civil theft cause of action).
2. *Black Business Inv. Fund of Cent. Florida, Inc. v. State, Dept. of Economic Opportunity*, 178 So.3d 931, 936-37 (Fla. 1st DCA 2015) ("A conversion claim is based on a positive, overt act or acts of dominion or authority over the money or property inconsistent with and adverse to the rights of the true owner.").
3. *Mayo v. Allen*, 973 So.2d 1257, 1258–59 (Fla. 1st DCA 2008).
4. *S. S. Jacobs Co. v. Weyrick,* 164 So.2d 246, 250 (Fla. 1st DCA 1964), *cert. denied*, 169 So.2d 388 (Fla. 1964).
5. *Florida Farm Bureau Casualty Insurance Co. v. Patterson,* 611 So.2d 558, 559 (Fla. 1st DCA 1992).
6. *General Finance Corp. of Jacksonville, Inc. v. Sexton*, 155 So.2d 159, 161 (Fla. 1st DCA 1963) ("That disseisin of chattels which is called conversion has been described as an: 'act of dominion wrongfully asserted over another's personal property inconsistent with his ownership therein.'").

§4:80.1.2 Elements of Cause of Action — 2nd DCA

Conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time. … A conversion occurs when a person who has a right to possession of property demands its return and the demand is not or cannot be met. However, a demand and refusal are unnecessary where it would be futile and the act preventing a return results in a depriving of possession and, thus, equates to a conversion.

Source

Shelby Mutual Insurance Co. of Shelby, Ohio v. Crain Press, Inc., 481 So.2d 501, 503 (Fla. 2d DCA 1985), *review denied*, 491 So.2d 278 (Fla. 1986).

See Also

1. *Spradley v. Spradley*, 213 So.3d 1042, 1044 (Fla. 2d DCA 2017).
2. *King v. Saucier*, 356 So.2d 930, 931 (Fla. 2d DCA 1978).
3. *Charter Air Center, Inc. v. Miller*, 348 So.2d 614, 616 (Fla. 2d DCA 1977), *cert. denied*, 354 So.2d 983 (Fla. 1977).
4. *Goodrich v. Malowney*, 157 So.2d 829, 831 (Fla. 2d DCA 1963).

§4:80.1.3 Elements of Cause of Action — 3rd DCA

The essence of the tort of conversion is the exercise of wrongful dominion or control over property to the detriment of the rights of the actual owner. Thus, conversion may occur where a person wrongfully refuses to relinquish property to which another has the right of possession. The tort may be established despite evidence that the defendant took or retained property based upon the mistaken belief that he had a right to possession, since malice is not an essential element of the action.

An essential element of any conversion claim is that the defendant must have taken possession of the item the plaintiff has the right to possess. *DePrince v. Starboard Cruise Services, Inc.*, 163 So.3d 586, 597 (Fla. 3d DCA 2015).

Source

Orozco v. McCormick 105, LLC, 276 So.3d 932, 935 (Fla. 3d DCA 2019).

See Also

1. *Transway Airfreight Cargo, Inc. v. Biltagi*, 2022 WL 1559922, *1 (Fla. 3d DCA May 18, 2022).
2. *Glover v. Vasallo*, 314 So. 3d 447, 450 (Fla. 3d DCA 2020).
3. *DePrince v. Starboard Cruise Services, Inc.*, 163 So.3d 586, 597 (Fla. 3d DCA 2015).
4. *Biernath v. First National Bank and Trust of Beverly, New Jersey*, 530 So.2d 505 (Fla. 3d DCA 1988).
5. *Tourismart of American, Inc. v. Gonzalez*, 498 So.2d 469, 470 (Fla. 3d DCA 1986).
6. *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So.2d 1157, 1160 (Fla. 3d DCA 1984) ("Conversion is an unauthorized act which deprives another of his property permanently or for an indefinite time.").

§4:80.1.4 Elements of Cause of Action — 4th DCA

Conversion is an act of dominion wrongfully asserted over another's property inconsistent with his ownership therein.

Source

Palm Beach Florida Hotel v. Nantucket Enterprises, Inc., 211 So.3d 42, 45 (Fla. 4th DCA 2016).

See Also

1. *Point Conversions, LLC v. WPB Hotel Partners, LLC*, 324 So.3d 947, 957 (Fla. 4th DCA 2021).
2. *Taubenfeld v. Lasko*, 324 So.3d 529, 541-42 (Fla. 4th DCA 2021).
3. *Edwards v. Landsman*, 51 So.3d 1208, 1213 (Fla. 4th DCA 2011).
4. *Intercapital Funding Corp. v. Gisclair*, 683 So.2d 530, 532 (Fla. 4th DCA 1996).
5. *Stearns v. Landmark First National Bank of Fort Lauderdale*, 498 So.2d 1001 (Fla. 4th DCA 1986).
6. *Belford Trucking Co. v. Zagar*, 243 So.2d 646, 648 (Fla. 4th DCA 1970).

§4:80.1.5 Elements of Cause of Action — 5th DCA

Any act of a person in asserting a right of dominion over a chattel which is inconsistent with the right of the owner and deprives the owner of the right of possession to which the owner is entitled may constitute a conversion, whether the act is accomplished with, or without, any specific mental intent.

Source

City of Cars, Inc. v. Simms, 526 So.2d 119, 120 (Fla. 5th DCA 1988), *rev. denied*, 534 So.2d 401 (Fla. 1988).

See Also

1. *Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351 (Fla. Dist. Ct. App. 5th Dist. 2012).
2. *Seymour v. Adams*, 638 So.2d 1044, 1046 (Fla. 5th DCA 1994).
3. *United American Bank of Cent. Florida, Inc. v. Seligman*, 599 So.2d 1014, 1017 (Fla. 5th DCA 1992) ("The tort of conversion constitutes the exercise of wrongful dominion or control of the property to the detriment of the rights of its actual owner. The essence of the tort cause of action of conversion is the disseisin of the owner or interference with legal rights incident to ownership, such as the right to possession.").
4. *E.J. Strickland Construction, Inc. v. Department of Agriculture and Consumer Services of Florida*, 515 So.2d 1331, 1335 (Fla. 5th DCA 1987) ("A conversion consists of an act in derogation of the plaintiff's possessory rights, and any wrongful exercise or assumption of authority over another's goods, depriving him of the possession, permanently or for an indefinite time, is a conversion, for which there has always been a remedy.").

§4:80.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(h); *Small Business Admin. v. Eschevarria*, 864 F. Supp. 1254, 1260 (S.D. Fla. 1994); *Bobo's Drugs, Inc. v. Fagron, Inc.*, No. 8:17–cv–1862–T–36TBM, 2018 WL 2762582, at *2 (M.D. Fla. June 8, 2018).

§4:80.3 References

1. 12 Fla. Jur. 2d *Conversion and Replevin* §§1–26 (2005).
2. 18 Am. Jur. 2d *Conversion* §§1–6, 64–86 (2004).
3. 18 C.J.S. *Conversion* §§1–4 (1990).
4. Restatement (Second) of Torts §222A (1965).

§4:80.4 Defenses

1. **Consent:** No conversion where plaintiff consented to defendant's possession. *National Bank of Melbourne and Trust Co. v. Batchelor*, 266 So.2d 185, 187 (Fla. 4th DCA 1972), *cert. denied*, 269 So.2d 369 (Fla. 1972); *Premier Gaming Trailers, LLC v. Luna Diversified Enterprises, Inc.,* No. 8:16–cv–3378–T–33TGW, 2018 WL 2238060, at *3 (M.D. Fla. May 16, 2018).

2. **Contract Dispute:** Where the parties are engaged in a contractual dispute over the amount owed and no fraud is involved no civil theft or conversion can occur. *Rosen v. Marlin,* 486 So.2d 623 (Fla. 3d DCA 1986), *rev. denied*, 494 So.2d 1151 (Fla. 1986); *Douglas v. Braman Porsche Audi, Inc.*, 451 So.2d 1038 (Fla. 3d DCA 1984); *Pathway Financial v. Miami Intern. Realty Co*., 588 So.2d 1000, 1004 (Fla. 3d DCA 1991).

3. **Demand, Failure to make:** The Shelby demand is an essential element in any claim for conversion and failure to make such a demand or allege the futility of doing so is fatal. *Shelby Mutual Insurance Co. of Shelby, Ohio v. Crain Press, Inc.*, 481 So.2d 501, 503 (Fla. 2d DCA 1985), *review denied*, 491 So.2d 278 (Fla. 1986). *See also Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490, 500 (Fla. 3d DCA 1994), *rev. denied*, 659 So.2d 272 (Fla. 1995); *but see Columbia Bank v. Turbeville*, 143 So.3d 964, 969 (Fla 1st DCA 2014) (holding it was error to dismiss with prejudice based on failure to demonstrate demand and refusal, where the facts alleged would otherwise establish a conversion had occurred).

4. **Malice:** The tort may be established despite evidence that the defendant took or retained property based upon the mistaken belief that he had a right to possession, since malice is not an essential element of the action. *Seymour v. Adams*, 638 So.2d 1044, 1047 (Fla. 5th DCA 1994).

5. **Money:** Money must be capable of identification. *Belford Trucking Co. v. Zagar*, 243 So.2d 646, 648 (Fla. 4th DCA 1970); *Transcapital Bank v. Shadowbrook at Vero, LLC*, 226 So.3d 856, 864 (Fla. 4th DCA 2017).

6. **Obligation to Pay Money:** A mere obligation to pay money may not be enforced by a conversion action. *Rosen v. Marlin*, 486 So.2d 623, 625 (Fla. 3d DCA 1986), *rev. denied*, 494 So.2d 1151 (Fla. 1986); *Transcapital Bank v. Shadowbrook at Vero, LLC*, 226 So.3d 856, 864 (Fla. 4th DCA 2017).

7. **Ownership Interest:** In a conversion action, one who has a special interest in personal property can only recover the value of his interest in the property. *Page v. Matthews*, 386 So.2d 815, 816 (Fla. 5th DCA 1980).

8. **Real Property:** Real property cannot be the subject of conversion. *American International Land Corp. v. Hanna*, 323 So.2d 567, 569 (Fla. 1975).

§4:80.5 Related Matters

1. **Civil Theft:** *See* §812.035, Florida Statutes, and chapter 772, Florida Statutes (Civil Remedies for Criminal Practices Act); *Lewis v. Morgan*, 79 So. 3d 926, 929 (Fla. Dist. Ct. App. 1st Dist. 2012) (conversion, and thus theft under §812.014, Fla. Stat., occurs when a person who has the right to possess certain property demands its return, and the property is not relinquished; how the defendant acquired the other person's property is not relevant).

2. **Damages:** The measure of damages in an action for conversion is the fair market value of the property *at the time of the conversion* plus legal interest to the date of the verdict. *Pain Care First of Orlando, LLC v. Edwards*, 84 So. 3d 351, 354 (Fla. Dist. Ct. App. 5th Dist. 2012) (reversing a damage award for failure to specifically plead the unique value of the medical records and failing to offer evidence as to special value on that item apart from the value of the entire business, and yet allowing the matter to proceed to judgment on legally insufficient proof, so that appellant did not get a do-over); *Saewitz v. Saewitz*, 79 So. 3d 831, 833 (Fla. Dist. Ct. App. 3d Dist. 2012) (testimony as to damages was not tied to a legally relevant time period, and was insufficient to satisfy the "reasonable certainty" threshold); *Florida Farm Bureau Casualty Insurance Co. v. Patterson,* 611 So.2d 558, 559 (Fla. 1st DCA 1992). Although we have found no cases in Florida which deal with the question of nominal damages in a conversion suit, it is clear the general rule in this state is that where a plaintiff shows the invasion of a legal right, he may recover at least nominal damages. *King v. Saucier*, 356 So.2d 930, 931 (Fla. 2nd DCA 1978).

3. **Replevin:** Unlike conversion, the essence of an action for replevin is the unlawful detention of personal property from plaintiff at the commencement of the action, regardless of whether defendant acquired possession rightfully or wrongfully. *Pavlis v. Atlas-Imperial Diesel Engine Co.*, 163 So. 515, 516 (Fla. 1935), *affirmed following remand*, 172 So. 57 (Fla. 1937). *See* "History & Analysis" under Replevin.

4. **Venue:** Since conversion is a continuous act, if the property converted has been taken from one county to another, it may be said to have been committed in either county for purposes of venue. *Intercapital Funding Corp. v. Gisclair*, 683 So.2d 530, 532 (Fla. 4th DCA 1996).

§4:80.6 Fla.R.Civ.P. Form 1.939

COMPLAINT

Plaintiff A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).

2. On or about _____(date)_____, defendant converted to his/her own use (insert description of property converted) that was then the property of plaintiff of the value of $_____.

WHEREFORE plaintiff demands judgment for damages against defendant.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§4:80.7 Sample Complaints

See Complaint Library, 3:10-6 (Breach of Contract; Conversion; Promissory Estoppel; Specific Performance) on Digital Access; *see also:*

- Form 2:40-3 (Violation of Chapter 497 (Funeral and Cemetery Services), Florida Statutes; Negligence; Negligent Infliction of Emotional Distress; Breach of Contract; Conversion; Gross Negligence).
- Form 3:10-7 (Breach of Contract; Unjust Enrichment; Conversion).

§4:90 EVICTION, TENANT

§4:90.1 Fla.R.Civ.P. Form 1.947

COMPLAINT

Plaintiff, A. B., sues defendant, C. D., and alleges:

1. This is an action to evict a tenant from real property in _____ County, Florida.
2. Plaintiff owns the following described real property in said county:
(describe property)
3. Defendant has possession of the property under (oral, written) agreement to pay rent of $ _____ payable _____.
4. Defendant failed to pay rent due _____(date)_____.
5. Plaintiff served defendant with a notice on _____(date)_____, to pay the rent or deliver possession but defendant refuses to do either.

WHEREFORE plaintiff demands judgment for possession of the property against defendant.

NOTE: Paragraph 3 must specify whether the rental agreement is written or oral and if written, a copy must be attached.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

See Also

Chapter 83, Florida Statutes (Landlord and Tenant).

§4:90.2 Statute of Limitations

Seven Years. Fla. Stat. §95.12.

§4:90.3 References

1. 34 Fla. Jur. 2d *Landlord and Tenant* §§251–266 (2000).

§4:90.4 Defenses

1. **Deposit Accrued Rent:** For a tenant to contest an eviction action, any defense other than payment requires the tenant to deposit accrued rent and any rent which accrues during the pendency of the proceeding into the court registry. *See* Florida Statutes §83.60(2) (2005). *Blanco v. Novoa*, 854 So.2d 672, 674 (Fla. 3d DCA 2003).

2. **Breach of Covenant of Quiet Enjoyment:** A tenant may claim damages based on the breach of the implied covenant of quiet enjoyment even where the landlord's actions do not rise to the level of eviction and the tenant remains in possession. *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So.3d 251 (Fla. 2d DCA 2011) (covenant of quiet enjoyment encompasses common areas).

§4:90.5 Related Matters

1. **Wrongful Eviction:** In a claim for wrongful eviction, a tenant may recover general damages consisting of the difference between the market value of the leasehold and the rent payable, as well as lost profits that can be determined with a reasonable degree of certainty. *Ardell v. Milner,* 166 So.2d 714, 716 (Fla. 3d DCA 1964); *Young v. Cobbs,* 83 So.2d 417, 419 (Fla. 1955). In addition, a tenant may be able to recover damages "for losses that are the natural, direct, and necessary consequences of the breach when they are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties." *Moses v. Autuono,* 47 So. 925, 927 (Fla. 1908) (involving a claim against the landlord for damages for breach of a contract to lease land and tenements). Although *Moses* did not involve a wrongful eviction, plaintiffs in wrongful eviction actions have been permitted to recover special damages such as the cost of improvements to the leased property or the cost of renting substitute property. *See Young,* 83 So.2d at 419; *Iglesia Bautista De "Renovacion Cristiana" v. Tamiami Baptist Church of Miami, Inc*., 678 So.2d 1, 2 (Fla. 3d DCA 1996). *Rost v. Bowling*, 861 So.2d 1246, 1247 (Fla. 2d DCA 2003); *Ward v. Estate of Ward*, 1 So.3d 238, 239 (Fla. 1st DCA 2008) (ejectment is proper remedy, not eviction where appellation alleged an equitable interest in the land); *Ward v. Ward*, 80 So. 3d 1138, 1139 (Fla. Dist. Ct. App. 1st Dist. 2012) (the mere fact that appellants were lawfully ejected from property is not a complete defense to their claim that they were wrongfully evicted pursuant to an earlier action in county court).

2. **Interpleader of Rent Into Court Registry:** Fla. Stat. 83.232(1). *Tribeca Aesthetic Med. Solutions, LLC v. Edge Pilates Corp.*, 82 So. 3d 899, 901 (Fla. Dist. Ct. App. 4th Dist. 2011) (court should not have released to landlord entire funds paid into court registry by subtenant, as there remained a genuine dispute between subtenant and tenant as to amount of rent owed, accounting for offsets for advertising and marketing owed by tenant to subtenant).

§4:100 FORECLOSURE, MORTGAGE

The Florida Fair Foreclosure Act, H.B. 87 (the "Act"), passed on June 13, 2013 and substantially changed mortgage foreclosures in the state of Florida. Although the Act focuses on residential foreclosures, it will have an impact on commercial foreclosures as well. The Act is intended to expedite the process by requiring documentation of the plaintiff's status and its right to pursue foreclosure be disclosed at the initiation of the proceedings.

The Act is remedial in nature and applies to all mortgages encumbering real property and all promissory notes secured by a mortgage, whether executed before, on, or after the Act's effective date. The Legislature found that Florida Statute §702.015, as created by this Act, applies to cases filed on or after July 1, 2013. However, the amendments to Florida Statutes §702.10 and §702.11 created by the Act apply to causes of action pending on the effective date of this act.

The Act directs the Supreme Court to amend the Florida Rules of Civil Procedure to provide expedited foreclosure proceedings, and to develop and publish forms for use in such proceedings.

Fla. Stat. §702.015: This section provides that, for a complaint in foreclosure in connection with a dwelling of one to four families (including individual condominium units), the complaint must contain (a) an affirmative allegation that the plaintiff is the holder of the note, or (b) allegations "with specificity" that the factual basis for the plaintiff's claim that it is entitled to enforce the loan. If the plaintiff is proceeding under delegated authority, the complaint must describe the authority and identify "with specificity" the document that grants the authority. If the plaintiff is in possession of the original promissory note, concurrently with the complaint, it must file a certification concerning the note that includes (i) the physical location of the note, (ii) the name and title of the individual providing the certification, (iii) the name of the person who verified the note's location, and (iv) the time and date

on which possession was verified. Copies of the note and the allonges must be attached to the certification, and the *original* note and allonges must be filed with the court before entry of judgment of foreclosure or on the note.

If the plaintiff seeks to pursue foreclosure of a lost, destroyed, or stolen instrument, the plaintiff must submit an affidavit signed under penalty of perjury that (a) details a clear chain of all endorsements, transfers, or assignments of the promissory note, (b) sets forth facts showing that the plaintiff is entitled to enforce a lost, destroyed, or stolen instrument pursuant to section 673.3091, and (c) includes as exhibits to the affidavit such copies of the note and the allonges to the note, audit reports showing receipt of the original note, or other evidence of the acquisition, ownership, and possession of the note as may be available to the plaintiff. Under these circumstances, the plaintiff will be required to provide adequate security as provided in Fla. Stat. §702.11 to indemnify and hold harmless the maker of the note for a claim by another to entitlement to enforce the note.

The court may, in response to a request from the lienholder, issue an order to show cause to any named parties as to why the judgment in foreclosure should not be entered. Fla. Stat. §702.10 details the contents of the order to show cause and the requirements of any responses of any opposition thereto. Fla. Stat. §702.015 (2013) (Current through the 2018 Second regular Session of the 25th Legislature).

Fla. Stat. §702.036: In an action to set aside or challenge the validity of a mortgage foreclosure judgment, or to establish or reestablish a lien or encumbrance in abrogation of the foreclosure judgment, the court must treat the request as a claim for monetary damages, and may not grant relief` that adversely affects the quality or character of the title to the property if (a) the party seeking relief was properly served with the foreclosure lawsuit, (b) final judgment of foreclosure was entered on the property, (c) all appeals periods have run without an appeal being taken, and (d) The property has been acquired for value by a person not affiliated with the foreclosing lender or the foreclosed owner, at a time in which no *lis pendens* regarding the suit to set aside, invalidate, or challenge the foreclosure appears in the official records. Fla. Stat. §702.036 (2013) (Current through the 2018 Second regular Session of the 25th Legislature).

Fla. Stat. §702.06: In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound discretion of the court; however, in the case of an owner-occupied residential property, the amount of the deficiency may not exceed the difference between the judgment amount, or in the case of a short sale, the outstanding debt, and the fair market value of the property on the date of sale. For purposes of this section, there is a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property. The complainant shall also have the right to sue at common law to recover such deficiency, unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment. Fla. Stat. §702.06 (2013) (Current through the 2018 Second regular Session of the 25th Legislature).

§4:100.1 Elements of Cause of Action — Florida Supreme Court

The Supreme Court has approved a form complaint for a mortgage foreclosure in which the elements of the cause of action are set forth as: (1) jurisdiction; (2) the existence and execution of a note and mortgage; (3) the legal description of the property; (4) the present owner and holder of the note and mortgage is foreclosing; (5) the name parties whose interest in and possession of the property will be foreclosed; (6) the monies owed on the debt; (7) default; and (8) acceleration. Where a party in a suit in chancery depends upon an instrument or writing as the basis for his right or defense, he must in his pleadings state the substance thereof and file with, or attach to, such pleadings as an exhibit such instrument or writing or a true copy thereof, or assign by allegations in his pleadings some satisfactory reason for their non-production.

Source

Fla. R. Civ. Pro. Form 1.944 (2011); *Edason v. Cent. Farmers Trust, Co.*, 129 So. 698, 700 (Fla. 1930); *Cole v. Exchange Nat'l Bank of Chicago*, 183 So. 2d 195 (Fla. 1966). NOTE: At the time of publication, the Supreme Court had not developed or published forms for expedited foreclosure proceedings as directed by HB 87.

See Also

1. *Ruth v. Dep't of Legal Affairs*, 684 So. 2d 181, 185 (Fla. 1996) (to establish in rem jurisdiction, the court must have: (1) jurisdiction over the class of cases to which the case belongs; and (2) jurisdictional authority over the property (res) that is the subject of the case; "[w]hen the property that is the subject matter of the controversy is real and the parties are seeking to act directly on the property or the title thereto, jurisdictional authority exists over the property only in the circuit where the land is situated").
2. *Pino v. Bank of New York*, 38 Fla. L. Weekly S 168 (Fla. Feb. 7, 2013) (residential mortgage foreclosure complaints must now be verified. See Florida Rule of Civil Procedure 1.110(b) and section 92.525, Florida Statutes (2011) (when filing an action for foreclosure of a mortgage on residential real property, the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief").

   NOTE: Florida Statute §702.015(3) (2013) requires disclosure of a plaintiff's status upon the filing of a foreclosure action. See above. Specifically, the plaintiff must allege either that it holds the note or it must allege why it is entitled to enforce the note. In the latter situation, plaintiff must describe in the complaint the specific document that gives it the authority to proceed with the foreclosure action.

§4:100.1.1 Elements of Cause of Action — 1st DCA

To establish a cause of action for foreclosure, the complaint should allege that the plaintiff is the holder of the note and mortgage.

Source

Chemical Residential Mortgage v. Rector, 742 So. 2d 300 (Fla. 1st DCA 1998); *but see* Fla. Stat. §702.015 (2013).

See Also

1. *Clay County Land Trust #08–04–25–0078–014–27, Orange Park Trust Services, LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 152 So.3d 83, 84-85 (Fla. 1st DCA 2014).
2. *Lindsey v. Wells Fargo Bank, N.A.*, 38 Fla. L. Weekly D 464 (Fla. 1st DCA 2013) (a plaintiff must establish it has the note before filing a foreclosure action).
3. *Pennington v. Ocwen Loan Servicing, LLC*, 151 So.3d 52, 53 (Fla. 1st DCA 2014).

NOTE: *See* above requirements under Fla. Stat. §702.015(3) (2013).

§4:100.1.2 Elements of Cause of Action — 2nd DCA

The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative. In order to allege a cause of action of foreclosure, the party must allege that it is the holder of the note and mortgage, and attach copies. Fla.R.Civ.P. 1.130(a) (2011) requires that a copy of the note and mortgage be attached to the complaint. When exhibits are attached to a complaint, the contents of the exhibits control over the allegations of the complaint.

Source

Sorrell v. U.S. Bank Nat. Ass'n, 198 So.3d 845, 847 (Fla. 2d DCA 2016); *BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So. 3d 936 (Fla. 2d DCA 2010); *Eigen v. FDIC*, 492 So. 2d 826 (Fla. 2d DCA 1986).

See Also

1. *Sandoro v. HSBC Bank*, 55 So. 3d 730 (Fla. 2d DCA 2011) (stating that the trial court's granting of summary judgment of a foreclosure complaint while the defendant's motion to dismiss was pending was improper because the bank failed to attach a notice of acceleration and the promissory note to the complaint and genuine issues of material fact existed regarding the purported assignment of mortgage and whether the borrower had been provided with a notice of acceleration).
2. *Feltus v. U.S. Bank Nat. Ass'n*, 80 So. 3d 375 (Fla. 2d DCA 2012) (complaint must allege that the plaintiff "was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly

acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred") (citing Fla. Stat. §673.3091(1)(a)).

3. *BAC Home Loan Servicing, L.P. v. Stentz*, 91 So. 3d 235 (Fla. 2d DCA 2012) (verification of mortgage foreclosure complaints do not have to state that statements are true and correct; rather they may be based on information and belief that the allegations are true and correct); *Wells Fargo Bank, N.A. v. Taboada*, 93 So. 3d 1073 (Fla. 2d DCA 2012) (same). NOTE: But see above re Fla. Stat. §702.015(3) (2013).

§4:100.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§4:100.1.4 Elements of Cause of Action — 4th DCA

To state a cause of action for a mortgage foreclosure, a complaint need only state ultimate facts sufficient to indicate the existence of a cause of action. If note and mortgage are assigned, the complaint should allege the assignment. Although attachment of the assignment is preferred, it may not be required, since the cause of action is based on the mortgage and not the assignment.

Source

Greenwald v. Triple D Properties, 424 So. 2d 185, 187 (Fla. 4th DCA 1983) (*citing Hammonds v. Buckeye Cellulose Corporation*, 285 So. 2d 7 (Fla. 1973)); *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680, 682 (Fla. 4th DCA 2004).

But see above re Fla. Stat. §702.015(3) (2013).

See Also

1. *Riggs v. Aurora Loan Servs., LLC,* 36 So. 3d 932, 933 (Fla. 4th DCA 2011) (plaintiff's "possession of the original note, endorsed in blank, was sufficient under Florida's Uniform Commercial Code to establish that it was the lawful holder of the note, entitled to enforce its terms").
2. *Jeff-Ray Corp. v. Jacobson*, 566 So. 2d 885 (Fla. 4th DCA 1990) (the court upheld a dismissal of a complaint of foreclosure that could not have stated a cause of action at the time it was filed based on a document that did not exist until some four months later).
3. *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170 (Fla. 4th DCA 2012) (plaintiff must establish it has the note before filing foreclosure action; a party's standing is determined as of the time the complaint was filed); *Rigby v. Wells Fargo Bank, N.A.*, 84 So. 3d 1195 (Fla. 4th DCA 2012) (defect of standing at time of filing cannot be remedied by subsequent assignment to create standing).
4. *Duke v. HSBC Mortg. Services, LLC*, 79 So. 3d 778 (Fla. 4th DCA 2012) (plaintiff has burden to provide original note to court or otherwise re-establish, even if Court loses the note).
5. *CitiBank, N.A. for WAMU Series 2007-HE2 Trust v. Manning*, 221 So.3d 677, 682-83 (Fla. 4th DCA 2017).

§4:100.1.5 Elements of Cause of Action — 5th DCA

The holder of the note has standing to seek enforcement of the note; standing in the context of the presently considered documents is broader than just actual ownership of the beneficial interest in the note. For example, "[t]he Florida real party in interest rule, Fla. R.Civ. P. 1.210(a), permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest."

The party that holds the note and mortgage in question has standing to bring and maintain a foreclosure action. Additionally, the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder. Therefore, the party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question, in order to proceed with a foreclosure action. Since the lien follows the debt, Florida does not require a plaintiff to attach a written or recorded assignment of the mortgage in order to pursue a foreclosure action.

Source

Walsh v. Bank of NY Mellon Trust, 219 So.3d 929, 930 (Fla. 5th DCA 2017); *Green v. Green Tree Servicing, LLC,* 230 So.3d 989, 990 (Fla. 5th DCA 2017); *Taylor v. Deutsche Bank Nat'l Trust Co.*, 44 So. 3d 618 (Fla. 5th DCA 2010).

But see above re Fla. Stat. §702.015(3) (2013).

See Also

1. *Khan v. Bank of Am., N.A.*, 58 So. 3d 927 (Fla. 5th DCA 2011) ("proper party with standing to foreclose a note and mortgage is the holder of the note and mortgage or the holder's representative"; where exhibits to complaint contradict allegations, the plaintiff has not established standing).
2. *Beaumont v. Bank of N.Y. Mellon*, 81 So. 3d 553 (Fla. 5th DCA 2012) (appellate court raised jurisdictional defect *sua sponte* and held that trial court committed fundamental error in entering summary judgment on behalf of non-party alleged holder of a lost note).
3. *Deutsche Bank Nat. Trust Co. v. Lippi*, 78 So. 3d 81 (Fla. 5th DCA 2012) (assignment endorsed in blank on note and allegation that plaintiff was owner and holder was enough to establish standing).

§4:100.2 Statute of Limitations

Five years, if final maturity of obligation is ascertainable; 20 years, if final maturity of obligation is not ascertainable. Fla. Stat. §95.281; *Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993); see also *Madura v. BAC Home Loans Servicing, L.P.*, No. 8:11-cv-2511-T-33TBM, 2012 U.S. Dist. LEXIS 100933 (M.D. Fla. July 20, 2012) (counterclaim to foreclose mortgage filed five years after mortgagor stopped making payments was not barred by statute of limitations where mortgage contained discretionary acceleration clause and counterclaim was filed within five years after plaintiff invoked the acceleration); *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3d DCA 2012) (summary judgment should not have been granted where "[i]t appears on the face of the existing record, then, that acceleration likely occurred over five years before this lawsuit was filed").

Florida Statute 95.11(5)(h), as of June 7, 2013, has shortened the time period during which lenders can seek deficiency judgments against homeowners of one- to four-family dwellings from five years to one year. The limitations period commences "on the day after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure." This amendment applies to any actions commenced on or after July 1, 2013. Any action that would not have been barred under existing law as of July 1, 2013 must be filed within five years after the action accrued or July 1, 2014, whichever occurs first.

§4:100.3 References

1. 37 Fla. Jur. 2d *Mortgages and Deeds of Trust* §§245-274 (2004).
2. 10A Fla. Jur. 2d *Consumer & Borrower Protection* §§114-121 (2003).
3. 55 Am. Jur. 2d *Mortgages* §§512-942 (1996).
4. 59, 59A C.J.S. *Mortgages* §§490-990 (1998).
5. Florida Statutes §45.031 (2005) (Judicial Sales Procedure).
6. Florida Statutes §45.0315 (2005) (Right of Redemption).
7. Florida Statutes §95.11 (2013) (Statute of Limitations).
8. Florida Statutes §494.0078 (2005) (Florida Fair Lending Act).
9. Florida Statutes §687.01 (2005) (Rate of Interest in Absence of Contract).
10. Florida Statutes §695.01 (2005) (Conveyances to be Recorded).
11. Florida Statutes §697.01 (2005) (Instruments Deemed Mortgages).
12. Florida Statutes §701.01 (2005) (Assignment).
13. Florida Statutes §702.01 (2005) (Equity).
14. David H. Simmons, *Agreement for Deed as a Creative Financing Technique*, 55 Fla. Bar J. 395 (1981).
15. *Mortgage Foreclosures and Alternatives* (4th ed. 2005), ISBN 0-8205-7982-4.
16. Kendall Coffee, *Florida Foreclosures*, D&S Florida Practice Series, ISBN 0-327-01367-2.
17. *Residential Foreclosure Bench Book*, (2010).
18. Florida Statutes§702.015 (2013) (Florida Fair Foreclosure Act).
19. Florida Statutes §702.036 (2013)
20. Florida Statutes §§702.10 and 702.11 (2013).

§4:100.4 Defenses

1. **Estoppel:** Estoppel is designed to prevent fraud and injustice. *Sourcetrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526-27 (Fla. 2d DCA 2007). The elements are a representation as to a material fact that is contrary to a later asserted position, reliance on that representation, and a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Justice Admin. Comm. v. Berry*, 5 So. 3d 696, 699 (Fla. 3d DCA 2009). While waiver operates to estop one from asserting a position upon which he otherwise might have relied, unlike estoppel, waiver does not require detrimental reliance. *Sourcetrack*, 958 So. 2d at 527.

2. **Failure to Join the Fee Simple Owner:** The owner of the fee simple title is an indispensable party to a foreclosure action. *English v. Bankers Trust Co. of Calif., N. A.*, 895 So. 2d 1120, 1121 (Fla. 4th DCA 2005). Foreclosure is void if titleholder is omitted. *Id*.

3. **Failure to Produce or Reestablish Original Promissory Note:** The party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action. A plaintiff must tender the original promissory note to the trial court or seek to reestablish the lost note under §673.3091, Fla. Stat. (2010). *Gee v. U.S. Bank N.A.*, 72 So. 3d 211 (Fla. 5th DCA 2011). *Florida Statute 702.015 now requires a certification that the plaintiff has the original promissory note be filed with the initial complaint if plaintiff is in possession of the original note.* A final judgment on a mortgage foreclosure cannot stand without requiring either production of the original promissory note or reestablishment of those documents under section 673.3091, Florida Statutes. *Beaumont v. Bank of N.Y. Mellon*, 81 So. 3d 553 (Fla. 5th DCA 2012); *Emerald Plaza West v. Salter*, 466 So. 2d 1129 (Fla. 3d DCA 1985) (*citing Telephone Utility Terminal Co. v. EMC Industries, Inc.*, 404 So. 2d 183 (Fla. 5th DCA 1981) and §90.953(1), Fla. Stat. (1983)); *see also Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725 (Fla. 5th DCA 2004) (*citing Figueredo v. Bank Espirito Santo*, 537 So. 2d 1113 (Fla. 3d DCA 1989)). If the original note is lost, destroyed or stolen, the plaintiff must now file an affidavit clearly indicating all assignments, transfers and endorsements. Fla. Stat. §702.015; *see also* Fla. Stat. §702.11, which delineates methods of providing adequate protection where the lender does not have an original promissory note.

4. **Fraud in the Inducement:** Applies where parties to a contract appear to negotiate freely, but where the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239-40 (Fla. 1996). Affirmative defense of fraud in the inducement based on allegation that seller failed to disclose extensive termite damage resulted in reversal of foreclosure judgment. *Hinton v. Brooks*, 820 So. 2d 325, 326 (Fla. 5th DCA 2001) (reversing final judgment of foreclosure).

5. **Usury:** A usurious contract is unenforceable according to the provisions of Section 687.071(7), Fla. Stat. (2010). Under Section 687.03, Fla. Stat. (2011), a usurious contract is one for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest. If the loan exceeds $500,000 in amount or value, then the applicable statutory section is Section 87.071, Fla. Stat. (2011). When usury is raised as a defense, the borrower must affirmatively plead and establish the four elements of a usurious transaction by clear and satisfactory evidence. *Dixon v. Sharp*, 276 So. 2d 817, 81¬9-20 (Fla. 1973); *Sumner v. Investment Mortgage Company of Florida*, 332 So. 2d 103, 105 (Fla. 1st DCA 1976), *cert. dismissed*, 344 So. 2d 327 (Fla. 1977); *Gergora v. Goldstein Professional Assoc.*, 500 So. 2d 695, 697 (Fla. 3d DCA 1987); *Rebman v. Flagship First Nat'l Bank*, 472 So.2d 1360, 1362 (Fla. 2d DCA 1985). In other words, that the lender willfully and with corrupt intent charged or accepted more than the prohibited interest must be specifically and affirmatively pleaded, and established by clear and satisfactory evidence. *River Hills, Inc. v. Edwards*, 190 So. 2d 415, 424 (Fla. 2d DCA 1966); *see also American National Growers Corporation v. Harris*, 120 So. 2d 212, 213 (Fla. 2d DCA 1960); *Rollins v. Odom*, 519 So. 2d 652, 657 (Fla. 1st DCA 1988), *rev. denied*, 529 So. 2d 695 (Fla. 1988).

6. **Payment:** Foreclosure will be denied if payment was attempted, but misunderstanding or excusable neglect coupled with lender's conduct contributed to the borrower's failure to pay. *Campbell v. Werner*, 232 So. 2d

252, 256-57 (Fla. 3d DCA 1970) (one ground for not granting a foreclosure is "where there was intent to make timely payment, and it was attempted, or steps taken to accomplish it, but nevertheless the payment was not made due to a misunderstanding or excusable neglect coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due or within the grace period"); *Lieberbaum v. Surfcomber Hotel Corp.*, 122 So. 2d 28, 29-30 (Fla. 3d DCA 1960) (court dismissed a foreclosure complaint where the plaintiffs knew that some excusable oversight was the cause for non-payment, plaintiffs refused payments that subsequently deposited by defendants into the court registry).

7. **Res Judicata:** "While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue." *Singleton v. Greymar Assoc.*, 882 So. 2d 1004, 1007 (Fla. 2004); *see also Star Funding Solutions, LLC v. Krondes*, 101 So. 3d 403 (Fla. 4th DC 2012) (res judicata does not prevent a mortgagee from instituting a new foreclosure action based on a different act of default than alleged in the previously dismissed action).

8. **Unclean Hands:** "The 'clean hands' maxim and the equitable principle for which it stands signify that a litigant may be denied affirmative equitable relief by a court of equity on the ground that his conduct has been inequitable, unfair, dishonest, fraudulent or deceitful as to the controversy in issue. This maxim refers to the acceptability, cleanliness and decency of the claim put forth and describes equity's practice of refusing an equitable remedy to enforce a claim that is itself inequitable, unconscionable or tainted by fraud or misrepresentation." *Henry v. Ecker*, 415 So. 2d 137, 140 (Fla. 5th DCA 1982). "A lender can be estopped from foreclosing on an accelerated basis … where the borrower establishes that the lender has unclean hands." *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 85 (Fla. 4th DCA 2008); *see also Shahar v. Green Tree Servicing LLC*, 38 Fla. L. Weekly D 563 (Fla. 4th DCA March 6, 2013) (lender had unclean hands where it altered borrower's income on loan application and destroyed borrower's income documentation).

9. **Waiver:** Waiver is the voluntary and intentional relinquishment of a known right or conduct which infers the relinquishment of a known right. *Kirschner v. Baldwin*, 988 So. 2d 1138, 1142 (Fla. 5th DCA 2008) ("When a waiver is implied, the acts, conduct or circumstances relied upon to show waiver must make out a clear case."). Contractual terms may be waived, both expressly and implicitly, by the party whom the term benefits. *Hammond v. DSY Dev.*, LLC, 951 So. 2d 985, 988 (Fla. 3d DCA 2007). The crux of the waiver doctrine rests upon conduct demonstrating an intent to relinquish a known right. *Destin Sav. Bank v. Summerhouse of FWB, Inc.*, 579 So. 2d 232, 235 (Fla. 1991) ("In order to establish a valid waiver, the following elements must be satisfied: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit that may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish that right, privilege, advantage or benefit"). Whether waiver has occurred is generally a question of fact. *Hale v. Dept. of Revenue*, 973 So. 2d 518, 523 (Fla. 1st DCA 2007), *rev. denied*, 825 So. 2d 934 (Fla. 2008).

10. **Lack of Personal Knowledge:** Before a document may be admitted as a business record, a foundation for such admission must be laid. Section 90.803(6), Florida Statutes (2010), allows the admission of records of a regularly kept business activity when the business record was made at or near the time of the matters reported and when the business record is made by a person having personal knowledge of the matters reported, or when the information supplied in the record is supplied by a person with knowledge. Further, it must be shown that the business record was kept in the ordinary course of a regularly conducted business activity, and that it is the regular practice of the business keeping the record to make such a business record. While it is not necessary to call the individual who prepared the document, the witness through whom a document is being offered must be able to show each of the requirements for establishing a proper foundation. *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (no proper foundation was laid where the witness for bank candidly admitted that he had no knowledge as to the preparation or maintenance of the documents offered by the bank, including the affidavit as to amounts due and owing, and could not have testified that the affidavit as to the amounts owed was actually kept in the regular course of business or if the source of the information contained in the affidavit was correct, or if the amounts reported in the affidavit were accurate).

11. **Loan Modification:** In a foreclosure action, summary judgment was denied where borrower's affirmative defense of waiver or equitable estoppel based on his compliance with a loan modification which created a genuine issue of material fact. *Kimmick v. U.S. Bank Nat. Ass'n*, 83 So. 3d 877 (Fla. 4th DCA 2012).

12. **Lack of Standing:** Defense of lack of standing cannot be raised for first time in motion to vacate judgment. *Rooney v. Wells Fargo Bank, N.A.*, 102 So. 3d 734 (Fla. 4th DCA 2012). To the contrary, it is waived unless asserted in an answer. *Lindsey v. Wells Fargo Bank, N.A.*, 38 Fla. L. Weekly D 464 (Fla. 1st DCA Feb. 27, 2013).

§4:100.5 Related Matters

1. **Arbitration of Foreclosure:** When the parties' contract so provides, foreclosure claims may be subject to arbitration. *MDC 6, LLC v. NRG Inv. Partners, LLC*, 93 So. 3d 1145, 1147 (Fla. 2d DCA 2012) ("the plain meaning of the agreement is to require arbitration for foreclosure claims"); *Perdido Key Island Resort Dev., L.L.P. v. Regions Bank*, 102 So. 3d 1, 6 (Fla. 1st DCA 2012) ("through the express incorporation of the note's terms into the mortgage, the parties plainly agreed to arbitrate claims on the mortgage"). However, in another case, counts for breach of contract in a complaint to foreclose a mortgage were stayed pending arbitration while the equitable count of foreclosure was permitted to move forward because the bank had the right to pursue equitable claims in court. *Swan Landing Dev., LLC v. Fla. Capital Bank, N.A.*, 19 So. 3d 1068, 1071-72 (Fla. 2d DCA 2009). Parties may enter into any contract they desire, and they are bound by the language of that contract. *Id*.

2. **Automatic Stay:** Real property that is listed as part of the bankruptcy estate is protected by the automatic stay under 11 U.S.C. §§362(a)(1) & (2) (2011). 11 U.S.C. §541.

3. **Deficiency:** Deficiency is the difference between the fair market value of the security received and the amount of the debt. *Mandell v. Fortenberry*, 290 So. 2d 3, 8 (Fla. 1974); *Grace v. Hendricks*, 140 So. 790, 794 (Fla. 1932) ("A deficiency decree has been defined by this Court as one for the balance of the indebtedness after applying the proceeds of the sale of the mortgage property to such indebtedness"). A judgment of foreclosure is a final order; but the law contemplates a continuance of the proceedings for entry of a deficiency judgment as a means of avoiding the expense and inconvenience of an additional suit at law to obtain the balance of the obligation owed by a debtor. Fla. Stat. §702.06 (2011); *L.A.D. Prop. Ventures, Inc. v. First Bank*, 19 So. 3d 1126, 1127 (Fla. 2d DCA 2009). "As long as no deficiency has been entered against the debtors in the foreclosure action, the creditor bank may bring an action against them after the sale to satisfy the balance due on the note." *Bank of Florida in South Florida v. Keenan*, 519 So. 2d 51, 52 (Fla. 3d DCA 1988). The formula for determining a deficiency judgment is the total debt less the fair market value of the property on the foreclosure sale date. *Empire Developers Group, LLC v. Liberty Bank*, 87 So. 3d 51, 53 (Fla. 2d DCA 2012) (citing *Estepa v. Jordan*, 678 So. 2d 876, 878 (Fla. 5th DCA 1996).

   NOTE: As of June 7, 2013, Fla. Stat. §702.06 limits of the amount of any deficiency judgment and provides that a suit at common law cannot be pursued if the court in the foreclosure action has granted or denied a claim for a deficiency judgment.

4. **Florida Constitutional Right to Foreclose:** Fla. Const. art. I, §10 prevented the trial court from exercising equitable power to refuse foreclosure after debtors paid amount in arrears where mortgagee properly exercised its contractual right to accelerate the debt. *Old Republic Ins. Co. v. Lee*, 507 So. 2d 754, 755 (Fla. 5th DCA 1987); *see David v. Sun Federal Savings & Loan Ass'n*, 461 So. 2d 93, 95 (Fla. 1984) ("Only under certain clearly defined circumstances may a court of equity refuse to foreclose a mortgage. Mere notions or concepts of natural justice of a trial judge which are not in accord with established equitable rules and maxims may not be applied in rendering a judgment").

5. **Non-Jury Trial Only:** "All mortgages shall be foreclosed in equity. In a mortgage foreclosure action, the court shall sever for separate trial all counterclaims against the foreclosing mortgagee. The foreclosure claim shall, if tried, be tried to the court without a jury." Fla. Stat. §702.01 (2011).

6. **Non-Resident Cost Bond:** "When a nonresident plaintiff begins an action … he or she shall file a bond with surety to be approved by the clerk of $100, conditioned to pay all costs which may be adjudged against him or her in said action in the court in which the action is brought. On failure to file such bond within 30 days after such commencement or such removal, the defendant may, after 20 days' notice to plaintiff (during which the plaintiff may file such bond), move to dismiss the action or may hold the attorney bringing or prosecuting the action liable for said costs and if they are adjudged against plaintiff, an execution shall issue against said attorney." Fla. Stat. §57.011. "[A] domestic corporation is an artificial person whose residence or domicile is fixed by law within the territorial jurisdiction of the state that created it. That residence cannot be changed temporarily or permanently by the migrations of its officers or agents to other jurisdictions." *Fowler v. Chillingworth*, 113 So. 667, 669 (Fla. 1927). A corporation's "residence, citizenship, domicile, or place of abode is within the state that created it." *Id*.

   NOTE: As of June 7, 2013, a plaintiff is required to provide adequate security as provided in Fla. Stat. §702.11 to indemnify and hold harmless the maker of the note for a claim by another to entitlement to enforce the note if the foreclosure is based on a note that has been lost, destroyed, or stolen.

7. **Right of Redemption:** "At any time before the later of the filing of a certificate of sale by the clerk of the court or the time specified in the judgment, order, or decree of foreclosure, the mortgagor or the holder of any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale by paying the amount of money specified in the judgment, order, or decree of foreclosure, or if no judgment, order, or decree of foreclosure has been rendered, by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorneys' fees of the creditor. Otherwise, there is no right of redemption." Fla. Stat. §45.0315 (2011). Court approval is not required to redeem. *Indian River Farms v. YBF Partners*, 777 So. 2d 1096, 1099 (Fla. 4th DCA 2001); *Saidi v. Wasko*, 687 So. 2d 10, 12 (Fla. 5th DCA 1996). The right to redeem is incident to every mortgage and can be assigned by anyone claiming under him. *VOSR Indus., Inc. v. Martin Properties, Inc.*, 919 So. 2d 554, 556-57 (Fla. 4th DCA 2006). "Lessees can 'only redeem the property under or through [the mortgagor's] rights,' and have 'no independent right to redemption.'" *Sedra Family, Ltd. Partnership v. 4750 LLC*, 37 Fla. Law Weekly D 2681 (Fla. 4th DCA Nov. 21, 2012).

8. **Right to Contest Judgment of Foreclosure:** Section 4 of The 2013 Florida Fair Foreclosure Act created Florida Statute §702.036, which provides a procedure for a party to contest a foreclosure judgment after a property has been foreclosed. If certain criteria are met, the party seeking to overturn the foreclosure may be successful, but in most cases the party will be limited to monetary relief.

9. **Truth in Lending (TILA):** Hypertechnical violations of TILA do not impose liability on lender or defeat foreclosure. *Kasket v. Chase Manhattan Mortgage Corp.*, 759 So. 2d 726 (Fla. 4th DCA 2000); 15 U.S.C. §1600. A consumer has an absolute right to rescind a consumer credit transaction secured by the consumer's principal dwelling up to three days following the closing of the transaction or delivery of the information containing the material disclosures required by the Truth in Lending Act. 15 U.S.C.S. §1635 (2011); *Dailey v. Leshin*, 792 So. 2d 527, 532 (Fla. 4th DCA 2001), *rev. den.* 821 So. 2d 294 (Fla. 2002). However, even if the material information is not provided, the consumer's right to rescind expires three years after the date the transaction is consummated or upon sale of the property, whichever occurs first. *Id.; see also Martinec v. Early Bird Int'l., Inc.*, 37 Fla. L. Weekly D 1340 (Fla. 4th DCA June 6, 2012) (a non-traditional lender was a "creditor" as defined by TILA because it originated loan where mortgage broker connected them with prospective borrower).

10. **Verification:** When filing an action for foreclosure of a mortgage on residential real property, the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief." Fla. R.Civ. Pro. 1.110(b) (2011). A loan servicer with a durable power of attorney can verify a residential

mortgage foreclosure complaint. *Deutsche Bank Nat. Trust v. Prevratil*, 38 Fla. L. Weekly D 1123 (Fla. 2d DCA May 22, 2013).

11. **Order to Show Cause:** Fla. Stat. §702.10(6) (2013) allows any lienholder (not just the foreclosing lender) to request an order to show cause for the entry of a foreclosure judgment in a foreclosure action. For instance, condominium and homeowner associations now have a remedy for moving foreclosure cases when foreclosing lenders are not proceeding with their actions. In non-homestead properties, the foreclosing lender may request an order requiring borrowers to make payments during the pendency of the foreclosure action and even order parties to vacate the premises for non-payment.

12. **Surplus:** Florida Statute Section 45.032(2) establishes a rebuttable presumption that the owner of record shall receive all "surplus funds after payment of subordinate lienholders who have timely filed a claim." *Pineda v. Wells Fargo Bank, N.A*., 143 So.3d 1008, 1009 (Fla. 3d DCA 2014).

13. **Post-Judgment Jurisdiction:** "In a foreclosure case, after entry of a final judgment and expiration of time to file a motion for rehearing or for a new trial, the trial court loses jurisdiction of the case … unless jurisdiction was reserved to address that matter or the issue is allowed to be considered post-judgment by statute or under a provision of the Florida Rules of Civil Procedure" (*Ross v. Damas*, 31 So. 3d 201, 203 (Fla. 3d DCA 2010) (citation omitted)), including but not limited to the determination of "the amount of any assessments owed to [Homeowner] Associations." *Cent. Mortg. Co. v. Callahan*, 155 So.3d 373, 375 (Fla. 3d DCA 2014).

§4:100.6 Fla. R.Civ. P. Form 1.944

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action to foreclose a mortgage on real property in _____ County, Florida.
2. On _____(date)_____, defendant executed and delivered a promissory note and a mortgage securing payment of the note to plaintiff. The mortgage was recorded on _____(date)_____, in Official Records Book at page _____ of the public records of _____ County, Florida, and mortgaged the property described in the mortgage then owned by and in possession of the mortgagor, a copy of the mortgage containing a copy of the note being attached.
3. Plaintiff owns and holds the note and mortgage.
4. The property is now owned by defendant who holds possession.
5. Defendant has defaulted under the note and mortgage by failing to pay the payment due _____(date)_____, and all subsequent payments.
6. Plaintiff declares the full amount payable under the note and mortgage to be due.
7. Defendant owes plaintiff $_____ that is due on principal on the note and mortgage, interest from _____(date)_____, and title search expense for ascertaining necessary parties to this action.
8. Plaintiff is obligated to pay plaintiff's attorneys a reasonable fee for their services.

WHEREFORE plaintiff demands judgment foreclosing the mortgage and, if the proceeds of the sale are insufficient to pay plaintiff's claim, a deficiency judgment.

NOTE: This form is for installment payments with acceleration. It omits allegations about junior encumbrances, unpaid taxes, and unpaid insurance premiums, and for a receiver. They must be added when proper. Copies of the note and mortgage must be attached.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So. 2d 1098 (Fla. 2000).

NOTE: The Florida Fair Foreclosure Act directs the Supreme Court to amend the Florida Rules of Civil Procedure to provide expedited foreclosure proceedings, and to develop and publish forms for use in such proceedings. As of the time of publication, such forms have not been published.

§4:110 GOODS SOLD

§4:110.1 Fla.R.Civ.P. Form 1.935

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. Defendant owes plaintiff $_____ that is due with interest since _____(date)_____, for the following goods sold and delivered by plaintiff to defendant between _____(date)_____, and _____(date)_____:

(list goods and prices)

WHEREFORE plaintiff demands judgment for damages against defendant.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

SEE ALSO

1. Fla.Sm.Cl.R. Form 7.331 Statement of Claim (For Goods Sold).

§4:120 MISLEADING ADVERTISEMENT

§4:120.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§4:120.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§4:120.1.2 Elements of Cause of Action — 2d DCA

A consumer party may state a claim for statutory misleading by pleading that:
(1) The party relied on some identifiable alleged misleading advertising, and
(2) The representor made a misrepresentation of a material fact;
(3) The representor knew or should have known of the falsity of the statement;
(4) The representor intended that the representation would induce another to relay and act on it; and
(5) The plaintiff suffered injury in justifiable reliance on the representation.

SOURCE

Rollins, Inc. v. Butland, 951 So.2d 860, 877 (Fla. 2d DCA 2006).

§4:120.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§4:120.1.4 Elements of Cause of Action — 4th DCA

A consumer party may state a claim for statutory misleading advertising by pleading that:
(1) The party relied on some identifiable alleged misleading advertising, and
(2) The representor made a misrepresentation of a material fact;
(3) The representor knew or should have known of the falsity of the statement;
(4) The representor intended that the representation would induce another to relay and act on it; and
(5) The plaintiff suffered injury in justifiable reliance on the representation.

Source

Vance v. Indian Hammock Hunt & Riding Club, Ltd., 403 So.2d 1367, 1370 (Fla. 4th DCA 1981).

§4:120.1.5 Elements of Cause of Action — 5th DCA

A consumer party may state a claim for statutory misleading advertising by pleading that:
(1) The party relied on some identifiable alleged misleading advertising, and
(2) The representor made a misrepresentation of a material fact;
(3) The representor knew or should have known of the falsity of the statement;
(4) The representor intended that the representation would induce another to relay and act on it; and
(5) The plaintiff suffered injury in justifiable reliance on the representation.

Source

Black Diamond Properties v. Haines, 69 So.3d 1090 (Fla. 5th 2010); *Joseph v. Liberty Nat'l Bank*, 873 So.2d 384, 388 (Fla. 5th DCA 2004).

§4:120.2 Florida Statutes

Florida Statutes §817.41 Misleading advertising prohibited.

(1) It shall be unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.
(2) It shall be unlawful for any person to advertise, in any way or by any medium whatsoever, any sale as a "wholesale sale," "below cost sale," or terms of similar purport, unless the goods, wares or merchandise offered for sale thereby are offered by the seller at or below his or her delivered net cost price, or below the average wholesale price of such goods, wares, or merchandise. Such advertising of goods, wares, or merchandise for sale shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.
(3) Any retailer using the term or phrase "wholesale sale," "below cost sale," or terms of similar purport, in connection with the sale of goods, wares, or merchandise at retail, shall, upon demand by a customer, forthwith make available, unless the same shall have theretofore been made available, to the Better Business Bureau, the Merchant's Division of the Chamber of Commerce, or to the state attorney's office for inspection, invoices, or shipping charges or true and correct copies thereof, of any goods, wares, or merchandise so offered for sale, described or represented, indicating the delivery net cost to the seller of the particular goods, wares or merchandise sold or offered for sale, from which the seller's delivered net cost may be determined. The said retailer shall also and at the same time give all reasonable assistance in determining and ascertaining his or her net cost price of said goods, wares, or merchandise. The said Better Business Bureau, Merchant's Division of the Chamber of Commerce or state attorney, upon determining the said delivered net cost, shall forthwith issue a certificate evidencing such delivered net cost, as determined, and deliver the same to the retailer for delivery or exhibition to the customer. Unless such certificate shall show a delivered net cost equal to or in excess of the advertised price, the retailer shall be presumed to have violated this law.
(4) There shall be a rebuttable presumption that the person named in or obtaining the benefits of any misleading advertisement or any such sale is responsible for such misleading advertisement or unlawful sale.

(5) No retailer shall knowingly and willfully advertise merchandise for sale at a special or wholesale price, in any way or by any medium whatsoever, if he or she does not have sufficient quantities of the advertised merchandise to meet the reasonably foreseeable demand, unless the fact of limited quantity and the approximate number of items is stated in the advertisement, or unless the retailer provides a means by which the consumer may obtain the advertised item at the advertised price within a reasonable time or a value equivalent thereto.

(6) Any person prevailing in a civil action for violation of this section shall be awarded costs, including reasonable attorney's fees, and may be awarded punitive damages in addition to actual damages proven. This provision is in addition to any other remedies prescribed by law. Fla. Stat. §817.41 (1997) (Current through the 2018 Second regular Session of the 25th Legislature).

Florida Statutes §817.40(5) "Misleading advertising" defined.

(5) The phrase "misleading advertising" includes any statements made, or disseminated, in oral, written, electronic, or printed form or otherwise, to or before the public, or any portion thereof, which are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue or misleading, and which are or were so made or disseminated with the intent or purpose, either directly or indirectly, of selling or disposing of real or personal property, services of any nature whatever, professional or otherwise, or to induce the public to enter into any obligation relating to such property or services. Fla. Stat. §817.40 (2015) (Current through the 2018 Second regular Session of the 25th Legislature).

See Also

1. See definitions at Florida Statutes §817.40 (2005).
2. Florida Statutes §817.44 (2005) (Intentional false advertising prohibited).
3. Florida Statutes §§501.201–501.213 (2005) (Florida Deceptive and Unfair Trade Practices Act).
4. *Samuels v. King Motor Company of Fort Lauderdale*, 782 So.2d 489 (Fla. 4th DCA 2001).
5. *Black Diamond Properties, Inc. v. Haines*, 69 So.3d 1090 (Fla. 5th DCA 2010).

§4:120.3 Statutes of Limitations

Four Years. Fla. Stat. §95.11(3)(j); *Black Diamond Prop., Inc. v. Haines*, 69 So.3d 1090 (Fla. 5th DCA 2010); *Joseph v. Liberty Nat. Bank*, 873 So.2d 384, 388 (Fla. 5th DCA 2004) (elements of claims are the same as those of common law fraud).

§4:120.4 Related Matters

1. **Exculpatory Clauses:** The law in Florida is well settled that a party may not contractually thwart liability for its own fraud. "Fraud is an intentional tort and thus not subject to the cathartic effect of the exculpatory clauses found in contracts." *L. Luria & Son, Inc. v. Honeywell, Inc.*, 460 So.2d 521, 523 (Fla. 4th DCA 1984); *Oceanic Villas v. Godson*, 4 So.2d 689 (Fla. 1941); *Goyings v. Jack and Ruth Eckerd Found*, 403 So.2d 1144 (Fla. 2d DCA 1981); *Zuckerman-Vernon Corp. v. Rosen*, 361 So.2d 804 (Fla. 4th DCA 1978); *Fuentes v. Owen*, 310 So.2d 458 (Fla. 3d DCA 1975). Thus, the claims of Burton and MLG for damages arising from fraud and deceit and false advertising are not precluded by the exculpatory clauses contained in the lease. *Burton v. Linotype Co*., 556 So.2d 1126, 1127 (Fla. 3d DCA 1989), *rev. denied*, 564 So.2d 1086 (Fla. 1990).

2. **Sufficiency of Pleadings:** While it would be better pleading practice, purchasers were not required to specifically designate or refer to this section in order to maintain action under it, so long as they pleaded sufficient facts to bring allegations of the complaint within the statute. *Vance v. Indian Hammock Hunt & Riding Club, Ltd*., 403 So.2d 1367 (Fla. 4th DCA 1981). One seeking to maintain a civil action for violation of statute prohibiting misleading advertising must prove each of the elements of common law fraud in the inducement, including reliance and detriment, in order to recover damages. This is so despite the fact that the state, in charging a crime under Section 817.41(1), Florida Statutes, need not prove either reliance or detriment in order to obtain a conviction. *Major v. State*, 180 So.2d 335 (Fla. 1965). The reason is that in the criminal case the wrong for which public vindication is sought is the knowing making or

dissemination of the false or misleading advertising with the intent or purpose of inducing a member of the public to enter into some obligation relating to the property or the services being advertised. The offense occurs irrespective of reliance by or detriment to a member of the public. On the other hand, one who seeks by civil suit to vindicate a violation of the statute as a private wrong must show that the wrong was the proximate cause of his injury or damage, and proof of reliance is necessary in order to prove the causal connection. *See Joseph v. Liberty Nat. Bank*, 873 So.2d 384 (Fla. 5th DCA 2004); *Vance v. Indian Hammock Hunt & Riding Club, Ltd*., 403 So.2d 1367 (Fla. 4th DCA 1981); *Joseph v. Liberty Nat. Bank*, 873 So.2d 384, 388 (Fla. 5th DCA 2004), *rev. denied*, 884 So.2d 23 (Fla. 2004).

§4:130 MONEY LENT

§4:130.1 Fla.R.Civ.P. Form 1.936

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. Defendant owes plaintiff $_____ that is due with interest since _____(date)_____, for money lent by plaintiff to defendant on _____(date)_____.

WHEREFORE plaintiff demands judgment for damages against defendant.

See Amendments to the Florida Rules of Civil Procedure, 773 So.2d 1098 (Fla. 2000).

§4:140 OPEN ACCOUNT

§4:140.1 Elements of Cause of Action — Florida Supreme Court

The elements of an action on open account are: (1) that a sales contract existed between the creditor and debtor; (2) that the amount claimed by the creditor represents either the agreed-upon sales price or the reasonable value of the goods delivered; and (3) that the goods were actually delivered.

Source

Evans v. Delro Indus., Inc., 509 So.2d 1262, 1263 (Fla. 1st DCA 1987).

§4:140.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

See Also

Alderman Interior Sys. v. First Nat'l-Heller Factors, 376 So.2d 22, 24 (Fla. 2d DCA 1979).

§4:140.1.2 Elements of Cause of Action — 2nd DCA

See Also

Alderman Interior Sys. v. First Nat'l-Heller Factors, 376 So.2d 22, 24 (Fla. 2d DCA 1979).

§4:140.1.3 Elements of Cause of Action — 3rd DCA

An open account has been defined as an "unsettled debt arising from items of work and labor, goods sold and delivered with the expectation of further transactions subject to further settlement." *Central Ins. Underwriters, Inc. v. National Ins. Finance Co.,* 599 So.2d 1371, 1373 (Fla. 3d DCA 1992); *S. Dade Motor Co. of Dade Cty. v. Accountable Constr. Co.*, 707 So.2d 909, 912 (Fla. 3d DCA 1998).

§4:140.1.4 Elements of Cause of Action — 4th DCA

An open account "is an unsettled debt arising from items of work and labor, with the expectation of further transactions subject to future settlements and adjustment." In order to state a valid claim on an open account, the claimant must attach an 'itemized' copy of the account. Actions for an account stated and an open account are two distinct causes of actions requiring different burdens of proof. Unlike an action for an account stated, an itemized statement of underlying charges is required to establish a claim for an open account.

Source

Farley v. Chase Bank, U.S.A., N.A., 37 So.3d 936 (Fla. 4th DCA 2010).

§4:140.1.5 Elements of Cause of Action — 5th DCA

Attached to the amended complaint is a substantially illegible application for credit in the name of Contractors Unlimited, Inc. and signed by Wade, as well as an account statement and an invoice billed to the corporate defendant. The statement is an itemized copy reflecting unpaid invoices and the account balance. The invoice references a recent transaction. These documents were sufficient to support the cause of action for open account.

Source

Contractors Unlimited, Inc. v. Nortrax Equipment Co. Southeast, 833 So.2d 286, 287 (Fla. 5th DCA 2002).

See Also

1. *H & H Design Builders, Inc. v. Travelers' Indem. Co*., 639 So.2d 697, 700 (Fla. 5th DCA 1994) ("In order to state a valid claim on an open account, the claimant must attach an "itemized" copy of the account. *Moore v. Boyd,* 62 So.2d 427 (Fla. 1952). The statement of account attached to the complaint involved in this case stated only the lump-sum balance due claimed for each policy period, not the items on which the claim was based.").

§4:140.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(k); *Hawkins v. Barnes*, 661 So.2d 1271, 1273 (Fla. 5th DCA 1995).

§4:140.3 References

1. 42 Fla. Jur. 2d *Property* §10 (2000).
2. 1 Am. Jur. 2d *Accounts and Accounting* §§4–7 (2005).
3. 1 C.J.S. *Account, Action on* §§1–20 (2005).

§4:140.4 Related Matters

1. **Account Stated and Open Account Compared:** Actions for an account stated and an open account are two distinct causes of actions requiring different burdens of proof. An account stated claim is "an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions and promising payment." Thus, for an account stated to exist, there must be an agreement that a certain balance is correct and due, and an express or implicit promise to pay that balance. An account opened is an unsettled debt arising from items of work and labor, with the expectation of further transactions subject to future settlement and adjustment. *South Motor Company of Dade County v. Accountable Construction Co.*, 707 So.2d 909, 912 (Fla. 3d DCA 1998). It is not as easy as it should be to identify what does—or does not—constitute a cause of action for an "open account." *Central Ins. Underwriters, Inc. v. National Ins. Finance Co.,* 599 So.2d 1371, (Fla. 3d DCA 1992); *Robert W. Gottfried, Inc. v. Cole,* 454 So.2d 695 (Fla. 4th DCA 1984). In commercial transactions, an "open account" should refer to an unsettled debt, arising from items of work or labor, goods sold and other open transactions not reduced to writing, the sole record of which is usually in the account books of the owner of the demand. It should not include express contracts or other obligations that have been reduced to writing. *H & H Design Builders, Inc. v. Travelers' Indem. Co*., 639 So.2d 697, 700 (Fla. 5th DCA 1994).

2. **Itemized Statement:** "In order to state a valid claim on an open account, the claimant must attach an 'itemized' copy of the account." *H & H Design Builders v. Travelers' Indem. Co.*, 639 So. 2d 697, 700 (Fla. 5th DCA 1994).

§4:140.5 Fla.R.Civ.P. Form 1.932

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. Defendant owes plaintiff $_____ that is due with interest since _____(date)_____, according to the attached account.

WHEREFORE plaintiff demands judgment for damages against defendant.

NOTE: A copy of the account showing items, time of accrual of each, and amount of each must be attached.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§4:150 PROMISSORY NOTE

§4:150.1 Fla.R.Civ.P. Form 1.934

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. On _____(date)_____, defendant executed and delivered a promissory note, a copy being attached, to plaintiff in _____ County, Florida.
3. Plaintiff owns and holds the note.
4. Defendant failed to pay (use a or b)
   a. the note when due.
   b. the installment payment due on the note on _____(date)_____, and plaintiff elected to accelerate payment of the balance.
5. Defendant owes plaintiff $_____ that is due with interest since _____(date)_____, on the note.
6. Plaintiff is obligated to pay his/her attorneys a reasonable fee for their services.

WHEREFORE, plaintiff demands judgment for damages against defendant.

NOTE: A copy of the note must be attached. Use paragraph 4a or b as applicable and paragraph 6 if appropriate.

Committee Notes: 1980 Amendment. Paragraph 3 is added to show ownership of the note, and paragraph 4 is clarified to show that either 4a or 4b is used, but not both.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§4:150.2 Statute of Limitations

Five Years. Fla. Stat. §95.11(2)(b); *Central Home Trust. Co. of Elizabeth v. Lippincott*, 392 So.2d 931, 932 (Fla. 5th DCA 1980).

§4:150.3 Defenses

1. **Discharge:** Under Florida Statutes §673.6041(1) (1997), an instrument may be discharged by an intentional voluntary act including, surrender of the instrument; destruction, mutilation or cancellation of the instrument; cancellation or striking out of the party's signature; or addition of words to the instrument indicating a discharge. Further, an instrument may be discharged by the person entitled to enforce an instrument agreeing not to sue or otherwise renouncing rights against the party obligated to pay the instrument by a signed writing. Finally, in addition to the specific discharge provisions under §673.6011(1), the obligation of a party to pay an instrument may be discharged by an act or agreement with the party which would discharge an obligation to pay money under a simple contract. Under this section, an oral agreement supported by consideration may be sufficient to discharge a party under an instrument. *Cole Taylor Bank v. Shannon*, 772 So.2d 546, 551 (Fla. 1st DCA 2000).

2. **Documentary Taxes:** Promissory notes for which documentary taxes have not been paid are, as a matter of law, unenforceable by any Florida court. *See Somma v. Metra Elecs. Corp.*, 727 So.2d 302, 304 (Fla. 5th DCA 1999); *Rappaport v. Hollywood Beach Resort Condominium Ass'n, Inc*., 905 So.2d 1024 (Fla. 4th DCA 2005); Florida Statutes §210.08(1) (2005) ("The mortgage, trust deed, or other instrument shall not be enforceable in any court of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid.").

3. **Oral Extension:** An oral extension of a contract like an oral contract is valid. *Schroeder v. Manceri*, 893 So.2d 603, 606 (Fla. 4th DCA 2005); *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.,* 145 So.3d 989, 992 (Fla. 4th DCA 2014).

4. **Original must be Produced and Surrendered:** A promissory note is clearly a negotiable instrument within the definition of §673.1041(1), and either the original must be produced, or the lost document must be reestablished under §673.3091, Florida Statutes (2002). *See Mason v. Rubin*, 727 So.2d 283 (Fla. 4th DCA 1999). *See also Downing v. First Nat'l Bank of Lake City*, 81 So.2d 486 (Fla. 1955); *Thompson v. First Union Nat'l Bank*, 643 So.2d 1179, 1180 (Fla. 5th DCA 1994); *Figueredo v. Bank Espirito Santo*, 537 So.2d 1113 (Fla. 3d DCA 1989). A mortgage, on the other hand, does not fit into the definition of the documents required by §90.952 to be produced in their original form, and may thus be proved by using a properly authenticated duplicate. *Cf. Home Bldg. & Loan Co. v. Rivers*, 145 So. 873 (Fla. 1933); *Routh v. Richards*, 138 So. 69 (Fla. 1931). A mortgage is the security for the payment of the negotiable promissory note, and is a mere incident of and ancillary to such note. *See Scott v. Taylor*, 58 So. 30 (Fla. 1912). *See also Johns Supply Co. v. McNeeley*, 169 So. 732, 734 (Fla. 1936). Because it is negotiable, the promissory note must be surrendered in a foreclosure proceeding so that it does not remain in the stream of commerce. *Perry v. Fairbanks Capital Corp*., 888 So.2d 725, 727 (Fla. 5th DCA 2004).

§4:150.4 Related Matters

1. **Burden of Proof:** A payee's possession of an original uncanceled promissory note raises a presumption of non-payment that shifts the burden of proof to the payor to establish payment or another defense. *Cole Taylor Bank v. Shannon*, 772 So.2d 546, 550 (Fla. 1st DCA 2000).
2. **Conflict with mortgage:** While a note and mortgage must be read together, the terms of the note will prevail in the event of a conflict between the two. *WVMF Funding v. Palmero*, 320 So.3d 689, 694 (Fla. 2021).

§4:150.5 Sample Complaint

See Complaint Library, 4:150-5 (Breach of Promissory Note; Breach of Credit Agreement; Account Stated) on Digital Access.

§4:160 REPLEVIN

§4:160.1 Elements of Cause of Action Pursuant to Fla. Stat. §78.055

To obtain an order authorizing the issuance of a writ of replevin prior to final judgment, the plaintiff shall first file with the clerk of the court a complaint reciting and showing the following information:

(1) A description of the claimed property that is sufficient to make possible its identification and a statement, to the best knowledge, information, and belief of the plaintiff of the value of such property and its location.
(2) A statement that the plaintiff is the owner of the claimed property or is entitled to possession of it, describing the source of such title or right. If the plaintiff's interest in such property is based on a written instrument, a copy of said instrument must be attached to the complaint.
(3) A statement that the property is wrongfully detained by the defendant, the means by which the defendant came into possession thereof, and the cause of such detention according to the best knowledge, information, and belief of the plaintiff.
(4) A statement that the claimed property has not been taken for a tax, assessment, or fine pursuant to law.
(5) A statement that the property has not been taken under an execution or attachment against the property of the plaintiff or, if so taken, that it is by law exempt from such taking, setting forth a reference to the exemption law relied upon. Fla. Stat. §78.055 (1973) (Current through the 2018 Second regular Session of the 25th Legislature).

Source

Fla. Stat. §78.055. *See* form of complaint at §4:160.6, Fla.R.Civ.P. Form 1.937.

§4:160.1.1 Elements of Cause of Action — Florida Supreme Court

Our statutes govern proceedings in replevin in this state and section 3494, Rev. Gen. St., section 5347, Comp. Gen. Laws, provide the only conditions under which the defendant in replevin may have judgment against the plaintiff.

Source

State v. Frederick, 163 So. 885, 887 (Fla. 1935), *motion for peremptory writ granted*, 167 So. 41 (Fla. 1936).

§4:160.1.2 Elements of Cause of Action — 1st DCA

[R]eplevin is a "possessory statutory interest at law."

Source

Johnson v. American First Federal, Inc., 133 So.3d 559, 561 (Fla. 1st DCA 2014).

§4:160.1.3 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§4:160.1.4 Elements of Cause of Action — 3rd DCA

The right to institute replevin is a creature of statute.

Source

National Leasing Corp. v. Bombay Hotel, Inc., 159 So.2d 111, 113 (Fla. 3d DCA 1963).

§4:160.1.5 Elements of Cause of Action — 4th DCA

[No citation for this edition.]

§4:160.1.6 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§4:160.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(i); *Auto Elec., Inc. v. Helton*, 451 So.2d 538 (Fla. 2nd DCA 1984).

§4:160.3 References

1. Fla. Stat. chapter 78 (2005).
2. 12 Fla. Jur. 2d, *Conversion and Replevin* §§41–91 (2005).
3. 66 Am. Jur. 2d *Replevin* §§1–10, 49–62 (2001).
4. 77 C.J.S. *Replevin* §§1–24, 33–45, 99–110 (1994).
5. Restatement (Second) of Torts §§266, 927) (1979).
6. Fla.R.Civ.P. 1.995 (Final Judgment of Replevin).
7. Fla.R.Civ.P. 1.916 (Replevin Order to Show Cause).
8. Fla.R.Civ.P. 1.908 (Writ of Replevin).
9. Patrick C. Barthet & Daniel Morman, *Obtaining a Replevin Writ Prior to Final Judgment,* 76 Fla. Bar J. 44 (2002).

§4:160.4 Defenses

1. **Real Property:** Real property cannot be the subject of replevin. *See* Fla. Stat. §78.01 (2005); *Richbourg v. Rose*, 44 So. 69, 74 (Fla. 1907).

2. **Money:** Money must be capable of identification. *Williams Management Enterprises, Inc. v. Buonauro*, 489 So.2d 160, 164 (Fla. 5th DCA 1986).

§4:160.5 Related Matters

1. **Due Process Protection:** In *Gazil,* the Florida Supreme Court found that section 78.068 contains adequate due process protection because:
   a. the law requires plaintiffs to show facts indicating a right to the property sought to be replevied, and the allegations must be verified;
   b. an application for replevin without notice must be presented to a judge, as opposed to a ministerial court official;
   c. the facts alleged must show the necessity for replevin, which is sufficiently shown if the debtor is in possession of the property and the applicant establishes that there is a possibility of waste, concealment or transfer of the property, or that the debtor is in default on his payments;
   d. the plaintiff must post a bond to protect the debtor from mistaken repossession; and
   e. the debtor must be entitled to an immediate hearing on the issue of possession. *Gazil, Inc. v. Super Food Services, Inc.*, 356 So.2d 312, 313 (Fla. 1978). Because all of the protections provided by the statute sufficiently balanced the parties' interests, the court found the statute to be constitutional pursuant to the dictates of *Mitchell.* Thus compliance with all of the requirements is necessary to ensure due process to the party adversely affected by issuance of the writ. *Lennox Retail, Inc. v. McMillan*, 786 So.2d 1252, 1255 (Fla. 5th DCA 2001).

2. **History & Analysis:** Replevin was originally recognized by Glanvil, the earliest English law writer, as being a remedy to enable a tenant whose goods were wrongfully distrained to litigate the right of the landlord to make the distress. Later, it was extended to any wrongful taking of personalty and, now in Florida by statute, it lies for any wrongful taking or wrongful detention of any specific personal property. §78.01, Fla. Stat. It is a possessory action (§78.02(4), Fla. Stat.) and the object is to enable the plaintiff to secure the immediate possession of chattels wrongfully detained and, incidentally, damages for the detention. *See Foresight Enterprises v. Leisure Time Prop*., 466 So.2d 283 (Fla. 5th DCA 1985). Replevin can be an in rem action in that the action can proceed to judgment for possession of the property based on the sheriff's seizure of the property itself, under a writ of replevin, and process by publication without personal service of process on the defendant. *See* §§49.011(7), 78.065(2)(c), Fla. Stat.

   Originally detinue was purely an action to recover goods in specie, if obtainable, and if not, their value at the time of the verdict, in cases where there was no wrongful taking. However, even before the Declaration of Independence by the American colonies of July 4, 1776, (the date as of which Florida has adopted the common law of England, *see* §2.01, Fla. Stat.) English law had extended the action of detinue to cover all cases of wrongful detention, which is the gist of the case. Like replevin, detinue was for the recovery of specific property, but unlike replevin, the action proceeded without a prejudgment seizure of the property and the plaintiff was not required to post bond. Also unlike replevin, in detinue, judgment for the plaintiff was for the goods or their value at the time of the verdict and the defendant had the choice of delivering the goods, or retaining them and paying their value as fixed by the jury. In detinue, the determination of value at the time of the verdict differed from the action of trover (conversion) where the value was determined as of the date of the conversion. Notwithstanding the distinction as to the date of determining value and the fact that the action of detinue has never been formally abolished, it is usually said that the action of detinue is obsolete because in Florida, now by statute, replevin relates to property both wrongfully taken and wrongfully detained.

   The action of trover and conversion developed as a special kind of trespass on the case. Originally used against a finder who wrongfully refused on demand to surrender the goods to the owner from which

finding and converting, it was called trover and conversion. This action became the established remedy in all cases of conversion to try the right to possession of chattels where the plaintiff prefers to recover money damages rather than the chattels themselves. The gist of the action is the conversion of the goods. The action is now commonly called simply conversion.

The action of debt is an alternative cause of action for a wrongful taking or wrongful detention of personalty, because the rightful possessor has the option to waive the tortious taking or detention and sue ex contractu in assumpsit on the promise implied by the law from the facts that the wrongdoer had agreed to pay for the property wrongfully taken or, if the owner has regained possession, the value of its use while wrongfully detained. *See* Annotation: Waiver of tort and recovery in assumpsit for conversion as dependent on or affected by sale of the goods by the converter, 97 A.L.R. 251 (1935). *Williams Management Enterprises, Inc. v. Buonauro*, 489 So.2d 160 (Fla. 5th DCA 1986).

3. **Objective of Replevin:** The action of replevin is not brought, like the action of assumpsit, for example, for the purpose of recovering the amount which might be found to be due from the defendant to the plaintiff on account, but to recover the property in dispute. *Malsby v. Gamble*, 54 So. 766, 768 (Fla. 1911).

4. **Procedure:** At the conclusion of an action for replevin where the defendant has retained possession of the property during the pendency of the litigation, a plaintiff who prevails on the merits is entitled to a final judgment for the recovery of the property or its value, or the value of the plaintiff's lien or special interest. §78.19; Fla.R.Civ.P. Form 1.995(b). The plaintiff who prevails is also entitled to damages sustained as a result of the wrongful taking or detention. *See* §78.01; *McMurrain v. Fason*, 584 So.2d 1027, 1030 (Fla. 1st DCA 1991). However, a plaintiff in a replevin action may elect to seek a writ of replevin prior to the entry of final judgment in order to obtain possession of the property during the pendency of the replevin action and until the parties' claims are finally adjudicated. Chapter 78 of the Florida Statutes provides two separate and distinct methods of obtaining a writ of replevin prior to the entry of final judgment in the replevin action. Pursuant to sections 78.065 and 78.067, and in the absence of an effective waiver, the defendant must be given notice and a show cause hearing held before the writ of replevin may issue prior to the entry of final judgment. Pursuant to section 78.068, the prejudgment writ may issue without notice and a hearing, but the plaintiff must post a bond. *See Prestige Rent-A-Car, Inc. v. Advantage Car Rental & Sales, Inc. (ACRS)*, 656 So.2d 541, 545 (Fla. 5th DCA 1995); *Comcoa, Inc. v. Coe*, 587 So.2d 474, 476 (Fla. 3d DCA 1991); *Weinberg v. Siemens Fin. Servs.*, 88 So. 3d 220, 222 (Fla. Dist. Ct. App. 3d Dist. 2011) (if a replevin order was issued pursuant to section 78.067(2), and defendant elected to post a bond to stay the seizure of the property, the bond should have been in an amount equal to the value of the property, not 1.25 times the amount owed). In a case where the plaintiff has recovered possession of the property prior to the entry of final judgment, the plaintiff who prevails on the merits is entitled to a final judgment declaring the plaintiff's right to retain possession of the property plus damages sustained as a result of the wrongful taking or detention. §78.18; *see* Fla.R.Civ.P. Form 1.995(a); *HEG, Inc. v. Bay Bank & Trust Co.*, 591 So.2d 1011 (Fla. 1st DCA 1991). *Brown v. Reynolds*, 872 So.2d 290, 294 (Fla. 2d DCA 2004).

5. **Rules of Civil Procedure Apply:** An action for replevin is a civil action, and the Florida Rules of Civil Procedure apply. *Traces Fashion Group, Inc., v. C & C Mgmt., Inc.*, 763 So.2d 502, 503 (Fla. 3d DCA 2000); *Weigh Less for Life, Inc., v. Barnett Bank of Orange Park*, 399 So.2d 88, 90 (Fla. 1st DCA 1981). Therefore, the trial court must comply with the provisions of Rule 1.440 in setting a replevin action for trial. *Brown v. Reynolds*, 872 So.2d 290, 296 (Fla. 2d DCA 2004).

§4:160.6 Fla.R.Civ.P. Form 1.937

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action to recover possession of personal property in _____ County, Florida.
2. The description of the property is: (list property)
   To the best of plaintiff's knowledge, information, and belief, the value of the property is $_____.
3. Plaintiff is entitled to the possession of the property under a security agreement dated _____(date)_____, a copy of the agreement being attached.
4. To plaintiff's best knowledge, information, and belief, the property is located at _____.
5. The property is wrongfully detained by defendant. Defendant came into possession of the property by (method of possession). To plaintiff's best knowledge, information, and belief, defendant detains the property because (give reasons).
6. The property has not been taken for any tax, assessment, or fine pursuant to law.
7. The property has not been taken under an execution or attachment against plaintiff's property.

WHEREFORE plaintiff demands judgment for possession of the property.

NOTE: Paragraph 3 must be modified if the right to possession arose in another manner. Allegations and a demand for damages, if appropriate, can be added to the form.

Committee Notes: 1980 Amendment. The form is amended to comply with the amendments to the replevin statutes pursuant to *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§4:170 RICO, CIVIL (CIVIL REMEDIES FOR CRIMINAL PRACTICES ACT)

§4:170.1 Florida Statutes

Florida Statutes §772.103 - Prohibited Activities.

It is unlawful for any person:

(1) Who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of criminal activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) Through a pattern of criminal activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly in such enterprise through a pattern of criminal activity or the collection of an unlawful debt.

(4) To conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3). Fla. Stat. §772.103 (1986) (Current through the 2018 Second regular Session of the 25th Legislature)

Florida Statutes §772.104 - Civil Cause of Action.

Any person who proves by clear and convincing evidence that he or she has been injured by reason of any violation of the provisions of s. 772.103 shall have a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200, and reasonable attorney's fees and court costs in the trial and appellate courts. In no event shall punitive damages be awarded under this section. The defendant shall be entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim which was without substantial fact or legal support. In awarding attorney's fees and costs under this section, the court shall not consider the ability of the opposing party to pay such fees and costs. Nothing under this section shall be interpreted as limiting any right to recover attorney's fees or costs provided under other provisions of law. Fla. Stat. §772.104 (2006) (Current through the 2018 Second regular Session of the 25th Legislature).

§4:170.2 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition, however, *see In re Standard Jury Instructions in Criminal Cases*, 850 So.2d 1272 (Fla. 2003), which were prepared for Florida Statutes §895.03.]

§4:170.2.1 Elements of Cause of Action — 1st DCA

The elements of a RICO offense under the Florida RICO Act have been described as:

1. the existence of an enterprise, which the defendant was employed by or associated with in committing the crimes,
2. a pattern of racketeering activity, and
3. at least two "incidents" of racketeering or racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

Shimek v. State, 610 So.2d 632, 634-35 (Fla. 1st DCA 1992). Although no provision of the Florida RICO Act explicitly provides that the "pattern of racketeering activity" includes a "continuity" requirement, in *Bowden v. State*, 402 So.2d 1173 (Fla. 1981), the supreme court made it quite clear that the Florida RICO Act, similar to the federal act, includes a "continuity" requirement. Likewise, in *State v. Lucas*, 600 So.2d 1093 (Fla. 1992), the court recently reaffirmed that requirement and approved the concepts expressed by the United States Supreme Court in *H.J., Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), concerning the continuity requirement and the proof necessary to establish it.

Source

Shimek v. State, 610 So.2d 632, 634 (Fla. 1st DCA 1992), *rev. denied*, 621 So.2d 1066 (Fla. 1993), *cert. denied*, 114 S.Ct. 320 (1993) (This case actually sets forth the elements of §895.03(3), Florida Statutes which is similar to §772.103(3), Florida Statutes. Attention should be given to whether the elements are being stated for §772.103(1), (2), (3) or (4), Florida Statutes.).

See Also

1. *In re Standard Jury Instructions in Criminal Cases*, 850 So.2d 1272 (Fla. 2003), which were prepared for Florida Statutes §895.03.
2. *State v. Lucas*, 600 So.2d 1093 (Fla. 1992).
3. *Flanagan v. State*, 566 So.2d 868 (Fla. 2d DCA 1990).
4. *Polakoff v. State*, 586 So.2d 385 (Fla. 5th DCA 1991), *rev. denied*, 593 So.2d 1053 (Fla. 1991).

§4:170.2.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition; however, *see In re Standard Jury Instructions in Criminal Cases*, 850 So.2d 1272 (Fla. 2003), which were prepared for Florida Statutes §895.03.]

See Also

Santiago v. State, 23 So.3d 1206, 1206-07 (Fla. 2d DCA 2009) ("*See generally Gross v. State,* 765 So.2d 39, 42 (Fla. 2000) (discussing elements of a crime under Florida's RICO statute).").

§4:170.2.3 Elements of Cause of Action — 3rd DCA

Unless it is shown that the individual not only:

1. committed the designated crime, but also
2. associated with an enterprise and participated in the conduct of the enterprise's affairs through a
3. pattern of racketeering activity, a RICO conviction cannot stand.

Source

Boyd v. State, 578 So.2d 718, 721 (Fla. 3d DCA 1991), *rev. denied*, 581 So.2d 1310 (Fla. 1991), *disapproved of on other grounds by Gross v. State*, 765 So.2d 39 (Fla. 2000) (This case actually sets forth the elements of §895.03(3), Florida Statutes which is similar to §772.103(3), Florida Statutes. Attention should be given to whether the elements are being stated for §772.103(1), (2), (3) or (4), Florida Statutes. The definition of "enterprise" used in *Boyd* was disapproved in *Gross v. State*, 765 So.2d 39 (Fla. 2000)).

See Also

1. *In re Standard Jury Instructions in Criminal Cases*, 850 So.2d 1272 (Fla. 2003), which were prepared for Florida Statutes §895.03.

§4:170.2.4 Elements of Cause of Action — 4th DCA

The elements of a RICO civil action are:
1. violation of 18 U.S.C. §1962;
2. injury to business or property; and
3. that the violation caused the alleged injury.

Source

TransPetrol, Ltd. v. Radulovic, 764 So.2d 878, 880 (Fla. 4th DCA 2000).

See Also

1. *In re Standard Jury Instructions in Criminal Cases*, 850 So.2d 1272 (Fla. 2003), which were prepared for Florida Statutes §895.03.
2. *Vargas v. State*, 34 So.3d 44, 47 (Fla. 4th DCA 2010).
3. *Eagletech Communs., Inc. v. Bryn Mawr Inv. Group, Inc*., 79 So. 3d 855 (Fla. Dist. Ct. App. 4th Dist. 2012).

§4:170.2.5 Elements of Cause of Action — 5th DCA

[No citation for this edition, however, *see In re Standard Jury Instructions in Criminal Cases*, 850 So.2d 1272 (Fla. 2003), which were prepared for Florida Statutes §895.03.]

§4:170.3 Statute of Limitations

Five Years. Fla. Stat. §§772.17; 895.05(10).

§4:170.4 References

1. 16A Fla. Jur. 2d *Criminal Law* §§4659–4673 (2001).
2. 31A Am. Jur. 2d *Extortion, Blackmail, and Threats* §§107–223 (2002).
3. 77 C.J.S. *RICO* §18 (1994).
4. Florida Statutes §§772.101 through 772.104.
5. *In re Standard Jury Instructions in Criminal Cases*, 850 So.2d 1272 (Fla. 2003), which were prepared for Florida Statutes §895.03.
6. Marjorie A. Shields, Annotation, *Criminal Prosecutions under State RICO Statutes for Engaging in Organized Criminal Activity*, 89 A.L.R. 5th 629 (2001).
7. Ann K. Wooster, Annotation, *Validity, Construction, and Application of Racketeer Influenced and Corrupt Organizations Act, 18 USCA §§1961 et. seq.–Supreme Court Cases*, 171 A.L.R. Fed. 1 (2001).
8. Jennifer Daley, *Tightening the Net of Florida's RICO Act*, 21 Fla. St. U. L. Rev. 381 (1993).
9. Jacqueline Dowd, *Interpreting RICO: In Florida, the Rules are Different*, 40 Fla. L. Rev. 127 (1988).
10. Mary C. Green, *The Recent Changes in Florida RICO*, 62 Fla. Bar J. 75 (Nov. 1988).
11. John E. Floyd, *RICO State by State* (1998) (published by the Antitrust Law Section of the American Bar Association). ISBN: 1-57073-396-1.

12. *Sample Civil RICO Jury Instructions*, (1994) (published by the Antitrust Law Section of the American Bar Association). ISBN: 0-89707-943-4.
13. Gregory G. Sarno, Annotation, *Liability, Under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS §§1961–1968), for Retaliation against Employee for Disclosing or Refusing to Commit Wrongful Act*, 100 A.L.R. Fed. 667 (1990).
14. Annette M. Sansone, Annotation, *Recovery of Damages for Personal Injuries in Civil Action for Damages under Racketeer Influenced and Corrupt Organization Act (18 USCS §1964(c))*, 96 A.L.R. Fed. 881 (1990).
15. Gregory P. Joseph, *Civil RICO* (1992). ISBN: 0-89707-724-5.
16. David G. Duggan, *Pleading a RICO Claim*, 78 Ill. Bar J. 454 (1990).
17. M. E. DuVal, *Civil Action for Damages Under State Racketeer Influenced and Corrupt Organizations Acts (RICO) for Losses from Racketeering Activity*, 62 A.L.R.4th 654 (1988).
18. Robert G. Gough, *Wrongful discharge: Can RICO come to the rescue?*, 61 Fla. Bar J. 91 (June 1987).
19. John C. Fricano, *Guide to RICO* (1986). ISBN: 0-87179-904-9.
20. M. E. DuVal, *A Trial Lawyer's Guide: Everything You Always Wanted to Know About RICO Before Your Case Was Dismissed*, 12 Wm. Mitchell L. Rev. 291 (1986).
21. Wesley Kobylak, Annotation, *Civil Action for Damages under 18 USCS §1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 USCS §§1961 et. seq.) for Injuries Sustained by Reason of Racketeering Activity*, 70 A.L.R. Fed. 538 (1984).
22. Donald J. Moran, *Pleading a Civil RICO Action Under Section 1962(c): Conflicting Precedent and Practitioner's Dilemma*, 57 Temp. L.Q. 731 (1984).
23. George K. Chamberlin, Annotation, *What is an "Enterprise," as Defined at 18 U.S.C.S. §1961(4), for Purposes of the Racketeer Influenced and Corrupt Organizations (RICO) Statute (18 U.S.C.S. §§1961 et seq.)*, 52 A.L.R. Fed. 818 (1981).

§4:170.5 Defenses

1. **Criminal Activity Required:** Florida's RICO statute applies only where there has been some sort of ongoing criminal behavior. Its purpose is to punish, through civil penalties, actions which are ongoing and criminal in nature. Florida's Civil Remedies for Criminal Practices Act simply cannot apply where there has been no criminal activity. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490, 501 (Fla. 3d DCA 1994), *rev. denied*, 659 So.2d 272 (Fla. 1995).

2. **Indirect Injuries—No Recovery:** Indirect injuries, that is injuries sustained not as a direct result of predicate acts, will not allow recovery under Florida RICO. *O'Malley v. St. Thomas Univ., Inc.,* 599 So.2d 999, 1000 (Fla. 3d DCA 1992) (adopting the reasoning in *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989)). *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc.* 881 So.2d 565, 570 (Fla. 3d DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).

3. **Proximate Cause Requirement:** A civil RICO plaintiff must show that he was injured by reason of the defendant's acts of deception. As the Supreme Court stated in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." The Court went on to hold that the plaintiff's damages must "flow from the commission of the predicate acts." Section 1964(c), as interpreted by the Supreme Court and lower courts, thus imposes a proximate cause requirement: the plaintiff's injury must have been proximately caused by the commission of the predicate acts. *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc*., 881 So.2d 565, 570 (Fla. 3d DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).

4. **Standing:** The test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable. *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc*., 881 So.2d 565, 573 (Fla. 3d DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).

5. **Statute Strictly Construed:** Due to the enhanced sentences involved in RICO, it is essential that definitions used in RICO statutes be strictly construed in order to insure that criminal organizations, which

are RICO's target, are distinguished from individuals who merely associate for the commission of crime. *Flanagan v. State*, 566 So.2d 868, 869 (Fla. 2d DCA 1990) (addressing criminal actions under RICO).

6. **Specificity of Pleading:** RICO claims are insufficient when allegations merely track the language of the statute in an attempt to allege a cause of action. *Eagletech Communs., Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 864 (Fla. Dist. Ct. App. 4th Dist. 2012) ("a party does not properly allege a cause of action by alleging in conclusive form, which tracks the language of the statute, acts which lack factual allegations and merely state bare legal conclusions").

§4:170.6 Related Matters

1. **Compare with 18 U.S.C. §1962:** Florida Statutes §772.103(1), (2), (3) and (4) correlate with 18 U.S.C. §1962(a), (b), (c) and (d) respectively. The Florida Racketeer Influenced and Corrupt Organization (RICO) Act, chapter 895, Florida Statutes (1989), is patterned after the federal RICO statute, 18 U.S.C.A. §§1961-1968. Florida courts, therefore, have looked to the federal courts for guidance in interpreting and applying the Act. *Boyd v. State*, 578 So.2d 718, 721 (Fla. 3d DCA 1991), *rev. denied*, 581 So.2d 1310 (Fla. 1991), *disapproved of on other grounds by Gross v. State*, 765 So.2d 39 (Fla. 2000). *See also Bejerano v. State of Florida*, 760 So.2d 218, 220 (Fla. 5th DCA 2000), *rev. denied*, 779 So.2d 269 (Fla. 2000); *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc*., 881 So.2d 565, 570 (Fla. 3d DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).

   18 U.S.C. §1962(a): It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer either in law or in fact, the power to elect one or more directors of the issuer.

   (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of any unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

   (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

   (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

2. **Elements of 18 U.S.C. §1962(a):** The plain language of 18 U.S.C. §1962(a) requires a plaintiff to plead that a defendant invested income derived from a pattern of racketeering activity to acquire an interest in, establish, or operate an enterprise. Courts have been in disagreement over whether a plaintiff must plead an injury proximately caused by the investment of income derived from a pattern of activity. Some courts have held that a plaintiff may recover from an injury as a result of the predicate acts alone. The District Court [ ] concluded that pleading injury from the racketeering acts, without more, is insufficient to state a claim under §1962(a). Thus, the court required the plaintiff to allege that it was injured by reason of the defendants use or investment of racketeering proceeds… [A] defendant's conduct can injure a RICO plaintiff if that plaintiff is injured by the use or investment of proceeds derived from the pattern, or, if that plaintiff is injured by the operation of the enterprise in which defendant used or invested the income or proceeds. *Colonial Penn Ins. Co. v. Value Rent-A-Car Inc.*, 814 F.Supp. 1084, 1095 (S.D. Fla. 1992).

3. **Elements of 18 U.S.C. §1962(c):** A violation of §1962(c), the section on which Sedima relies, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). *See also Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1165 (3d Cir. 1989).

4. **Elements of 18 U.S.C. §1962(d):** In order to establish a RICO conspiracy, there must be evidence of an agreement to violate a substantive provision of the statute. A conspirator need not have full knowledge of every detail regarding the conspiracy; it is sufficient if one knows of the "essential nature of the plan." Although alleging an agreement to violate 18 U.S.C. §1962(a), (b) or (c) is essential to establish a conspiracy claim under §1962(d), proof of such a claim is often established by circumstantial evidence. *Colonial Penn Ins. Co. v. Value Rent-A-Car Inc.*, 814 F.Supp. 1084, 1096-97 (S.D. Fla. 1992).

5. **Enterprise:** In order to prove RICO's enterprise element, the State must prove the following two elements: (1) an ongoing organization, formal or informal, with a common purpose of engaging in a course of conduct, which (2) functions as a continuing unit. Accordingly, we disapprove of the opinion in *Boyd,* and approve the outcome in *Gross* in accord with our opinion today. *Gross v. State*, 765 So.2d 39, 47 (Fla. 2000). *See also Helmadollar v. State*, 811 So.2d 819, 821 (Fla. 5th DCA 2002), *rev. denied*, 831 So.2d 672 (Fla. 2002) ("This Circuit has interpreted "enterprise" to include an informal criminal network engaged in racketeering activity, such as the association of Cagnina and his colleagues.").

6. **Mail or Wire Fraud:** In a civil RICO action predicated upon mail or wire fraud, the plaintiff has the burden of proving: (1) that the defendant intentionally participated; (2) in a scheme to defraud; (3) the plaintiff of money or property; (4) by means of material misrepresentations; (5) using the mails or wires; (6) and that the plaintiff relied on a misrepresentation made in furtherance of the fraudulent scheme; (7) that such misrepresentation would have been relied upon by a reasonable person; (8) that the plaintiff suffered injury as a result of such reliance; and (9) that the plaintiff incurred a specifiable amount of damages. *Palmas Y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc*., 881 So.2d 565, 571 (Fla. 3d DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).

§4:170.7 Florida Standard Jury Instructions in Criminal Cases

26.2 Rico-Use Or Investment Of Proceeds From Pattern Of Racketeering Activity §895.03(1), Fla. Stat.

To prove the crime of Unlawful Use or Investment of Proceeds from a Pattern of Racketeering Activity, the State must prove the following four elements beyond a reasonable doubt:

1. At least two of the following incidents occurred. Read incidents alleged in information.
   Modify 1 and 2 if only two incidents alleged
2. Of those incidents which did occur, at least two of them had the same or similar [intents] [results] [accomplices] [victims] [methods of commission] or were interrelated by distinguishing characteristics and were not isolated incidents.
3. (Defendant) with criminal intent received proceeds which were derived directly or indirectly from such incidents.
4. (Defendant) [used] [invested] some of these proceeds [or proceeds derived from the investment or use thereof] either directly or indirectly [in acquiring some right, title, equity or interest in real property] [in establishing or operating an enterprise].

Define the crimes alleged as incidents.

Instruct as to the five-year limitation period if appropriate. See §895.02(4), Fla. Stat.

Give in every case

"Receiving proceeds with criminal intent" means that the defendant, at the time [he][she] received the proceeds, either knew the source of the proceeds or had [his][her] suspicions aroused but deliberately failed to make further inquiry as to the source of the proceeds."

Give as applicable §895.02(9), Fla. Stat.

"Real property" means land and whatever is erected on it. It includes but is not limited to any lease or mortgage or other interest in that property.

Give as applicable

An "enterprise" is an ongoing organization, formal or informal, that functions both as a continuing unit and has a common purpose of engaging in a course of conduct.

26.3 RICO-USE OR INVESTMENT OF PROCEEDS FROM COLLECTION OF UNLAWFUL DEBT §895.03(1), FLA. STAT.

To prove the crime of Unlawful Use or Investment of Proceeds from Collection of Unlawful Debt, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) with criminal intent received proceeds which were derived directly or indirectly through the collection of an unlawful debt.
2. (Defendant) [used] [invested] some of these proceeds [or proceeds derived from the investment or use thereof] either directly or indirectly [in acquiring some right, title, equity, or interest in real property] [in establishing or operating an enterprise].

Give in every case

"Receiving proceeds with criminal intent" means that the defendant, at the time [he][she] received the proceeds, either knew the source of the proceeds or had [his][her] suspicions aroused but deliberately failed to make further inquiry as to the source of the proceeds." §895.02(2), Fla. Stat.

"Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in Florida in whole or in part because the debt was incurred or contracted in violation of the following law:

(Recite applicable section and define crime).

Give as applicable §895.02(9), Fla. Stat.

"Real property" means land and whatever is erected on it. It includes but is not limited to any lease or mortgage or other interest in that property.

Give as applicable

An "enterprise" is an ongoing organization, formal or informal, that both functions as a continuing unit and has a common purpose of engaging in a course of conduct.

26.4 RICO-ACQUISITION OR MAINTENANCE THROUGH PATTERN OF RACKETEERING ACTIVITY §895.03(2), FLA. STAT.

To prove the crime of unlawfully [acquiring] [maintaining] an interest in or control of [an enterprise] [real property], the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) engaged in at least two of the following incidents. *Read incident alleged in information*. Modify 1 and 2 if only two incidents alleged
2. Of those incidents in which (defendant) was engaged, at least two of them had the same or similar [intents] [results] [accomplices] [victims] [methods of commission] or were interrelated by distinguishing characteristics and were not isolated incidents.
3. As a result of such incidents (defendant) [acquired] [maintained], directly or indirectly, interest in or control of [an enterprise] [real property].

Define the crimes alleged as incidents.

Instruct as to the five-year limitation period if appropriate. See §895.02(4), Fla. Stat.

Give as applicable

An "enterprise" is an ongoing organization, formal or informal, that both functions as a continuing unit and has a common purpose of engaging in a course of conduct.

Give as applicable §895.02(9), Fla. Stat.

"Real property" means land and whatever is erected on it. It includes but is not limited to any lease or mortgage or other interest in that property.

26.5 RICO-ACQUISITION OR MAINTENANCE THROUGH COLLECTION OF UNLAWFUL DEBT §895.03(2), FLA. STAT.

To prove the crime of unlawfully [acquiring] [maintaining] an interest in or control of [an enterprise] [real property], the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) [acquired] [maintained], directly or indirectly, interest in or control of [an enterprise] [real property].
2. [He][She] did so through the knowing collection of an unlawful debt.

Give in every case

"Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in Florida in whole or in part because the debt was incurred or contracted in violation of the following law: (recite applicable section and define crime).

Give as applicable

An "enterprise" is an ongoing organization, formal or informal, that both functions as a continuing unit and has a common purpose of engaging in a course of conduct.

Give as applicable §895.02(9), Fla. Stat.

"Real property" means land and whatever is erected on it. It includes but is not limited to any lease or mortgage or other interest in that property.

26.6 RICO-CONDUCT OF OR PARTICIPATION IN AN ENTERPRISE THROUGH COLLECTION OF UNLAWFUL DEBT §895.03(3), FLA. STAT.

To prove the crime of unlawfully [conducting] [participating in] an enterprise, the State must prove the following two elements beyond a reasonable doubt:

1. (Defendant) was [employed by] [associated with] an enterprise.
2. (Defendant) [conducted] [participated in], directly or indirectly, such enterprise through the knowing collection of an unlawful debt.

Definitions, §895.02(2), Fla. Stat.

"Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in Florida in whole or in part because the debt was incurred or contracted in violation of the following law: (recite applicable section and define crime).

An "enterprise" is an ongoing organization, formal or informal, that both functions as a continuing unit and has a common purpose of engaging in a course of conduct.

26.7 RICO-CONDUCT OF OR PARTICIPATION IN AN ENTERPRISE THROUGH A PATTERN OF RACKETEERING ACTIVITY §895.03(3), FLA. STAT.

To prove the crime of unlawfully [conducting] [participating in] an enterprise, the State must prove the following three elements beyond a reasonable doubt.

1. (Defendant) was [employed by] [associated with] an enterprise.
2. (Defendant) [conducted] [participated in], directly or indirectly, such enterprise by engaging in at least two of the following incidents. *Read incidents alleged in information.*
3. Of those incidents in which (defendant) was engaged at least two of them had the same or similar [intents] [results] [accomplices] [victims] [methods of commission] or were interrelated by distinguishing characteristics and were not isolated incidents.

Define the crimes alleged as incidents.

Instruct as to the five-year limitation period if appropriate. See §895.02(4), Fla. Stat.

Give as applicable

An "enterprise" is an ongoing organization, formal or informal, that both functions as a continuing unit and has a common purpose of engaging in a course of conduct.

26.8 Conspiracy To Engage In Pattern Of Racketeering Activity §895.03(4), Fla. Stat.

A "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish an offense which would be in violation of the law. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member.

The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement or that they directly discussed between themselves the details of the scheme and its purpose or the precise ways in which the purpose was to be accomplished. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such nor that the alleged conspirators actually succeeded in accomplishing their unlawful objectives nor that any alleged member of the conspiracy did any act in furtherance of the conspiracy.

What the evidence in the case must show beyond a reasonable doubt before you may find the defendant guilty of conspiring to violate the RICO Act is:

1. Two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, namely to engage in a "pattern of racketeering activity" as charged in the Information; and
2. The defendant knowingly and willfully became a member of such conspiracy; and
3. At the time the defendant joined such conspiracy, [he][she] did so with the specific intent either to personally engage in at least two incidents of racketeering, as alleged in the Information, or [he][she] specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would engage in at least two incidents of racketeering, as alleged in the Information, as part of a "pattern of racketeering activity."

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict [him][her] for conspiracy, even though [he][she] did not participate before and even though [he][she] played only a minor part.

Of course, mere presence at the scene of a transaction or event or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of a conspiracy does not thereby become a conspirator.

Defense; give if applicable; §777.04(5)(c), Fla. Stat.

It is a defense to the charge of conspiracy to engage in a pattern of racketeering activity that (defendant), after knowingly entering into such a conspiracy with one or more persons, thereafter persuaded such persons not to engage in such activity or otherwise prevented commission of the offense. In this regard you are instructed that a mere endeavor to dissuade one from engaging in such activity is insufficient.

An endeavor to dissuade a coconspirator is insufficient to constitute the statutory defense of withdrawal. State v. Bauman, 425 So.2d 32, 34 (Fla. 4th DCA 1982).

Definitions

"Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents.

An "enterprise" is an ongoing organization, formal or informal, that both functions as a continuing unit and has a common purpose of engaging in a course of conduct.

§4:180 TORTIOUS INTERFERENCE WITH ADVANTAGEOUS BUSINESS RELATIONSHIP

§4:180.1 Elements of Cause of Action — Florida Supreme Court

The district court canvassed the law on pleading a prima facie case of tortious interference with a business relationship and determined that four elements were required to establish such a case:

1. the existence of a business relationship, not necessarily evidenced by an enforceable contract;

2. knowledge of the relationship on the part of the defendant;
3. an intentional and unjustified interference with the relationship by the defendant; and
4. damage to the plaintiff as a result of the breach of the relationship.

Source

Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126, 1127 (Fla. 1985).

See Also

1. *Gossard v. Adia Services, Inc.*, 723 So.2d 182, 184 (Fla. 1998).
2. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 814 (Fla. 1994).
3. *Dade Enterprises v. Wometco Theatres,* 160 So. 209, 210 (Fla. 1935) ("If one maliciously interferes with a contract between two persons, and induces one of them to breach the contract to the injury of the other, the injured party may maintain an action against the wrongdoer, and where the act was intentional, malice will be inferred.").
4. *In re Standard Jury Instructions In Civil Cases-Report No. 09-01*, 35 So.3d 666, 698 (Fla. 2010).

§4:180.1.1 Elements of Cause of Action — 1st DCA

To bring a claim for tortious interference with a business relationship, the respondent was required to show:
1. the existence of a business relationship, not necessarily evidenced by an enforceable contract,
2. knowledge of the relationship on the part of the defendant,
3. an intentional and unjustified interference with the relationship by the defendant, and
4. damage to the plaintiff as a result of the breach of the relationship.
   Imbedded within these elements is the requirement that the plaintiff establish that the defendant's conduct caused or induced the breach that resulted in the plaintiff's damages.

Source

Univ. of West Florida Bd. of Trustees v. Habegger, 125 So.3d 323, 326 (Fla. 1st DCA 2013).

See Also

1. *Howard v. Murray*, 184 So.3d 1155, 1166 (Fla. 1st DCA 2015).
2. *Linafelt v. Beverly Enterprises-Florida*, 745 So.2d 386, 389 (Fla. 1st DCA 1999).
3. *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1098 (Fla. 1st DCA 1999), *rev. denied*, 744 So.2d 453 (Fla. 1999).
4. *C.A. Register v. Pierce*, 530 So.2d 990, 993 (Fla. 1st DCA 1988), *rev. denied*, 537 So.2d 569 (Fla. 1988).
5. *McCurdy v. Collis*, 508 So.2d 380, 382 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987).
6. *Water & Sewer Utility Construction, Inc. v. Mandarin Utilities, Inc.*, 440 So.2d 428, 430 (Fla. 1st DCA 1983).
7. *Tamiami Trail Tours, Inc. v. Cotton,* 432 So.2d 148, 151 (Fla. 1st DCA 1983), *approved in part, and remanded,* 463 So.2d 1126 (Fla. 1985).
8. *Peacock v. General Motors Acceptance Corp.*, 432 So.2d 142, 145 (Fla. 1st DCA 1983).
9. *Sutton v. Stewart*, 358 So.2d 119, 120 (Fla. 1st DCA 1978).
10. *Smith v. Ocean State Bank,* 335 So.2d 641, 644 (Fla. 1st DCA 1976).
11. *Franklin v. Brown,* 159 So.2d 893 (Fla. 1st DCA 1964).

§4:180.1.2 Elements of Cause of Action — 2nd DCA

The following elements are required for tortious interference with an advantageous business relationship:
1. the existence of a business relationship under which the plaintiff has legal rights;
2. an intentional and unjustified interference with that relationship by the defendant; and
3. damage to the plaintiff as a result of the breach of the business relationship.

Source

Murtagh v. Hurley, 40 So.3d 62, 66 (Fla. 2d DCA 2010).

See Also

1. *Fiberglass Coatings, Inc. v. Interstate Chem., Inc.*, 16 So.3d 836, 838 (Fla. 2d DCA 2009).
2. *Toledo v. Hillsborough County Hosp. Authority*, 841 So.2d 482, 483 (Fla. 2d DCA 2003).

3. *Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Florida, Inc*., 832 So.2d 810, 814 (Fla. 2d DCA 2002).
4. *GNB, Inc. v. United Danco Batteries, Inc.*, 627 So.2d 492, 493 (Fla. 2d DCA 1993).
5. *Amedas, Inc. v. Brown*, 505 So.2d 1091, 1093 (Fla. 2d DCA 1987), *appeal after remand*, 632 So.2d 614 (Fla. 2d DCA 1994), *rev. denied*, 639 So.2d 975 (Fla. 1994).
6. *Southern Alliance Corp. v. City of Winter Haven*, 505 So.2d 489, 496 (Fla. 2d DCA 1987).
7. *Fearick v. Smugglers Cove, Inc.*, 379 So.2d 400, 403 (Fla. 2d DCA 1980).
8. *Azar v. Lehigh Corporation*, 364 So.2d 860, 862 (Fla. 2d DCA 1978).
9. *Nichols v. MoAmCo Corp.,* 311 So.2d 750, 752 (Fla. 2d DCA 1975).
10. *Security Title Guarantee Corporation of Baltimore v. McDill Columbus Corporation*, 543 So.2d 852, 854 (Fla. 2d DCA 1989).

§4:180.1.3 Elements of Cause of Action — 3rd DCA

The elements of a claim for tortious interference with a business relationship are:
1. the existence of a business relationship, not necessarily evidenced by an enforceable contract;
2. knowledge of the relationship on the part of the defendant;
3. an intentional and unjustified interference with the relationship by the defendant; and
4. damages to the plaintiff as a result of the breach of the relationship.

Source

Fernandez v. Haber & Ganguzza, LLP, 30 So.3d 644, 646 (Fla. 3d DCA 2010); *Alexis v. Ventura*, 66 So.3d 986 (Fla. 3d DCA 2011).

See Also

1. *Crawley-Kitzman v. Hernandez*, No. 3D20-420, 2021 WL 2559091, at *5 (Fla. 3d DCA June 23, 2021).
2. *de Castro v. Stoddard*, 314 So. 3d 397, 402 (Fla. 3d DCA 2020).
3. *DNA Sports Performance Lab, Inc. v. Club Atlantis Condo. Assoc., Inc.*, 219 So.3d 107, 110 (Fla. 3d DCA 2017).
4. *Popular Bank of Florida v. R.C. Asesores Financieros, C.A*., 797 So.2d 614, 622 (Fla. 3d DCA 2001).
5. *Greenberg v. Mount Sinai Medical Center,* 629 So.2d 252, 255 (Fla. 3d DCA 1993).
6. *Harllee v. Professional Service Industries, Inc.*, 619 So.2d 298, 299 (Fla. 3d DCA 1992), *rev. denied*, 629 So.2d 134 (Fla. 1993).
7. *Perez v. Rivero*, 534 So.2d 914 (Fla. 3d DCA 1988).
8. *Marquez v. PanAmerican Bank*, 943 So.2d 284, 286 (Fla. 3d DCA 2006).
9. *Networkip, LLC v. Spread Enterprises, Inc.*, 922 So.2d 355, 357–58 (Fla. 3rd DCA 2006).

§4:180.1.4 Elements of Cause of Action — 4th DCA

A party seeking redress pursuant to a claim for tortious interference with a business relationship must show:
1. the existence of a business relationship, not necessarily evidenced by an enforceable contract;
2. knowledge of the relationship on the part of the defendant;
3. an intentional and unjustified interference with the relationship; and
4. damage to the plaintiff as a result of the tortious interference with the relationship.

An action for tortious interference with a prospective business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered.

Source

Realauction.com, LLC v. Grant St. Group, Inc., 82 So. 3d 1056, 1058 (Fla. 4th DCA 2011); *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So.3d 68 (Fla. 4th DCA 2010).

See Also

1. *Jay v. Mobley*, 783 So.2d 297, 299 (Fla. 4th DCA 2001), *rev. denied*, 800 So.2d 614 (Fla. 2001).
2. *Seminole Tribe of Florida v. Times Pub. Co., Inc*., 780 So.2d 310, 315 (Fla. 4th DCA 2001).
3. *Martin Petroleum Corp. v. Amerada Hess Corp*., 769 So.2d 1105, 1107 (Fla. 4th DCA 2000).

4. *Abele v. Sawyer*, 750 So.2d 70, 74 (Fla. 4th DCA 1999).
5. *ISS Cleaning Services Group, Inc. v. Cosby*, 745 So.2d 460, 462 (Fla. 4th DCA 1999).
6. *North American Van Lines, Inc. v. Ferguson Transportation, Inc.*, 639 So.2d 32, 33 (Fla. 4th DCA 1994), *affirmed*, 687 So.2d 821 (Fla. 1996).
7. *Bernstein v. True*, 636 So.2d 1364, 1366 (Fla. 4th DCA 1994).
8. *Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So.2d 1371, 1373 (Fla. 4th DCA 1987).
9. *Wackenhut Corp. v. Maimone,* 389 So.2d 656, 657 (Fla. 4th DCA 1980), *petition for rev. denied*, 411 So.2d 383 (Fla. 1981).
10. *Symon v. J. Rolfe Davis, Inc.,* 245 So.2d 278, 280 (Fla. 4th DCA 1971), *cert. denied,* 249 So.2d 36 (Fla. 1971).
11. *Kreizinger v. Schlesinger*, 925 So.2d 431, 433 (Fla. 4th DCA 2006).
12. *Palm Beach County Health Care Dist. v. Prof'l Med. Educ.*, 13 So.3d 1090, 1094 (Fla. 4th DCA 2009).
13. *Volvo Aero Leasing, LLC v. VAS Aero Servs., LLC*, 268 So.3d 785, 789 (Fla. 4th DCA 2019).
14. *Bridge Fin., Inc. v. J. Fischer & Assocs., Inc.*, 310 So. 3d 45, 49 (Fla. 4th DCA 2020).
15. *Font & Nelson, PLLC v. Path Med., LLC*, 317 So.3d 134, 138-39 (Fla. 4th DCA 2021).

§4:180.1.5 Elements of Cause of Action — 5th DCA

In order to state a cause of action for tortious interference with a business relationship, the plaintiff must allege:
1. the existence of a business relationship, not necessarily evidenced by an enforceable contract;
2. knowledge of the relationship on the part of the defendant;
3. an intentional and unjustified interference with the relationship by the defendant; and
4. damage to the plaintiff as a result of the breach of the relationship.

Source

Southeastern Integrated Med., P.L. v. N. Fla. Women's Physicians, 50 So.3d 21, 23 (Fla. 5th DCA 2010).

See Also

1. *Kenniasty v. Bionetics Corp.*, 82 So. 3d 1071, 1074 (Fla. Dist. Ct. App. 5th Dist. 2011), *quashed on other grounds*, 69 So.3d 943 (Fla. 2011), *after remand*, 82 So. 3d 1071 (Fla. 5th DCA 2011).
2. *Sobi v. Fairfield Resorts, Inc*., 846 So.2d 1204, 1207 (Fla. 5th DCA 2003).
3. *Central States, Southeast & Southwest v. Florida Soc. of Pathologists*, 824 So.2d 935, 940 (Fla. 5th DCA 2002), *rev. denied*, 844 So.2d 645 (Fla. 2003).
4. *St. Johns River Water Management Dist. v. Fernberg Geological Services, Inc*., 784 So.2d 500, 504 (Fla. 5th DCA 2001), *rev. denied*, 805 So.2d 806 (Fla. 2001).
5. *Rockledge Mall Associates, Ltd. v. Custom Fences of South Brevard, Inc*., 779 So.2d 554, 557 (Fla. 5th DCA 2001).
6. *Magre v. Charles*, 729 So.2d 440, 443 (Fla. 5th DCA 1999).
7. *Florida Fern Growers Association, Inc. v. Concerned Citizens of Putnam Co.*, 616 So.2d 562, 565 (Fla. 5th DCA 1993).
8. *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1076 (Fla. 5th DCA 1982).
9. *Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc.*, 384 So.2d 303, 306 (Fla. 5th DCA 1980).
10. *Walters v. Blankenship*, 931 So.2d 137, 140 (Fla. 5th DCA 2006).

§4:180.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p).

§4:180.3 References

1. 32 Fla. Jur. 2d *Interference* §§5–13 (2003).
2. Florida Standard Jury Instructions in Civil Cases MI 7.2 (1997).
3. Early case: *Chipley v. Atkinson,* 1 So. 934 (Fla. 1887).
4. 45 Am. Jur. 2d *Interference* §§3–35, 47–51 (1999).
5. 86 C.J.S. *Torts* §§45–58, 99, 100 (1997).

6. Restatement (Second) of Torts §§762–774A (1979).
7. James O. Pearson, Jr., 5 A.L.R.4th 9 *Liability for Interference with At Will Business Relationship* (1981).
8. Annotation, 9 A.L.R.2d 228 *Liability of one who induces or causes third person not to enter into or continue a business relation with another* (1950).

§4:180.4 Defenses

1. **Absolute Immunity:** In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as tortious interference with a business relationship so long as the act has some relation to the proceeding. *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co.*, 639 So.2d 606, 608 (Fla. 1994); *Davis v. Bailynson*, 268 So.3d 762, 770 (Fla. 4th DCA 2019); *but see DelMonico v. Traynor*, 116 So.3d 1205, 1220 (Fla. 2013) (holding that statements made during ex-parte, out-of-court questioning of potential witnesses are subject only to qualified privilege).

2. **Act Legal in Itself:** Where one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice, or other bad motive toward another, does not give the latter a right of action against the former. *Ethyl Corporation v. Balter*, 386 So.2d 1220, 1225 (Fla. 3d DCA 1980), *rev. denied*, 392 So.2d 1371 (Fla. 1981), *cert. denied*, 101 S.Ct. 3099 (1981).

3. **Business and Legal Affairs:** Absent proof of a duty owed by defendant to plaintiff, defendant was entitled to conduct its business and legal affairs in the manner it determined to be in its own best interests without regard to the effects on plaintiff. *Paparone v. Bankers Life & Casualty Company*, 496 So.2d 865, 868 (Fla. 2d DCA 1986).

4. **Contract Terminable At Will:** The general rule is that an action for tortious interference will not lie where a party tortiously interferes with a contract terminable at will. This is so because when a contract is terminable at will there is only an expectancy that the relationship will continue. In such a situation, a competitor has a privilege of interference in order to acquire the business for himself. *Greenberg v. Mount Sinai Medical Center,* 629 So.2d 252, 255 (Fla. 3d DCA 1993). *See also Perez v. Rivero,* 534 So.2d 914, 916 (Fla. 3d DCA 1988); *Wackenhut Corp. v. Maimone,* 389 So.2d 656, 658 (Fla. 4th DCA 1980), *petition for rev. denied,* 411 So.2d 383 (Fla. 1981). However, even if the contract is terminable at will, the interferer's actions are tortious and actionable if the motive is purely malicious and not coupled with any legitimate competitive economic interest. *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1076 (Fla. 5th DCA 1982).

5. **First Amendment:** Although the trial court had subject matter jurisdiction over the rabbi's breach of contract claim, the court lacked jurisdiction over his complaint for defamation and tortious interference because resolving these disputes would require the court to become excessively entangled with religious beliefs. *Goodman v. Temple Shir Ami, Inc.*, 712 So.2d 775 (Fla. 3d DCA 1998), *appeal dismissed*, 737 So.2d 1077 (Fla. 1999), *cert. denied*, 120 S.Ct. 789 (2000).

6. **Honest Advice:** An agent that gives, on request by his or her principal, "honest advice" in his or her principal's best interest to breach an existing relationship is not liable for tortious interference. Restatement (Second) of Torts §772 (1965); *Scussel v. Balter* 386 So.2d 1227, 1228 (Fla. 3d DCA 1980).

7. **Lawful Competition:** If a competitor proves that the interference was lawful competition, he will not be found to have committed the tort. *Greenberg v. Mount Sinai Medical Center,* 629 So.2d 252, 255 (Fla. 3d DCA 1993). *Accord, Harllee v. Professional Service Industries, Inc.*, 619 So.2d 298, 299 (Fla. 3d DCA 1992), *rev. denied*, 629 So.2d 134 (Fla. 1993); *Unistar Corp. v. Child,* 415 So.2d 733, 734 (Fla. 3d DCA 1982); *Jay v. Mobley*, 783 So.2d 297, 299 (Fla. 4th DCA 2001), *rev. denied*, 800 So.2d 614 (Fla. 2001); *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1076 (Fla. 5th DCA 1982). Once a plaintiff has made a prima facie case, the burden shifts to the defendant to justify that the interference was lawful competition. *ISS Cleaning Services Group, Inc. v. Cosby*, 745 So.2d 460, 462 (Fla. 4th DCA 1999).

8. **Protection of Contractual Rights:** The law recognizes that a contracting party has a privilege to interfere with a contractual or business relationship, where the interference is necessary to protect his own contractual rights provided that such interference is without malice. *Marquez v. PanAmerican Bank*, 943 So.2d 284, 286 (Fla. 3d DCA 2006). A qualified privilege to interfere is not negated by concomitant evidence of malice. It is only when malice is the *sole* basis for interference that it will be actionable. *McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987). *Compare Ethyl Corporation v. Balter*, 386 So.2d 1220, 1225 (Fla. 3d DCA 1980), *rev. denied*, 392 So.2d 1371 (Fla. 1981), *cert. denied*, 101 S.Ct. 3099 (1981).

9. **Right of Interference:** A tortious interference claim cannot be brought when a contract provision expressly reserves the right of interference. *McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987).

10. **Specific Business Relationship**: "In Florida, a plaintiff may properly bring a cause of action alleging tortious interference with present or prospective customers, but no cause of action exists for tortious interference with a business's relationship to the community at large. As a general rule, an action for tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *Ethan Allen v. Georgetown Manor*, 647 So. 2d 812, 815 (Fla. 1994) (internal citation omitted).

§4:180.5 Related Matters

1. **Burden of Proof:** Once a plaintiff has made a prima facie case, the burden shifts to the defendant to justify that the interference was lawful competition. *See Wackenhut Corp. v. Maimone,* 389 So.2d 656, 658 (Fla. 4th DCA 1980); *ISS Cleaning Services Group, Inc. v. Cosby*, 745 So.2d 460, 462 (Fla. 4th DCA 1999).

2. **Business Advantage Not Required:** Unjustified interference with a business relationship does not require a showing that the interference was intended to secure a business advantage over the plaintiff. There is no logical reason why one who damages another in his business relationship should escape liability because his motive is malice rather than greed. *McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987).

3. **Community at Large:** In Florida, a plaintiff may properly bring a cause of action alleging tortious interference with present or prospective customers, but no cause of action exists for tortious interference with a business's relationship to the community at large. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 815 (Fla. 1994). *Accord, North American Van Lines, Inc. v. Ferguson Transportation, Inc.*, 639 So.2d 32, 33 (Fla. 4th DCA 1994), *affirmed*, 687 So.2d 821 (Fla. 1996). As a general rule, an action for tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered. *Ferguson Transportation, Inc. v. North American Van Lines, Inc.*, 687 So.2d 821, 822 (Fla. 1997). *See also Sarkis v. Pafford Oil Company, Inc.*, 697 So.2d 524, 526 (Fla. 1st DCA 1997); *ISS Cleaning Services Group, Inc. v. Cosby*, 745 So.2d 460, 462 (Fla. 4th DCA 1999).

4. **Conspiracy to Interfere:** An action for conspiracy to interfere with one's profession requires a combination of two or more persons or entities, having a common purpose, seeking to accomplish the underlying tort of interference. *Greenberg v. Mount Sinai Medical Center,* 629 So.2d 252, 256 (Fla. 3d DCA 1993). *See also Buckner v. Lower Florida Keys Hosp. Dist.,* 403 So.2d 1025, 1029 (Fla. 3d DCA 1981), *petition for rev. denied,* 412 So.2d 463 (Fla. 1982).

5. **Definition of Key Terms:** Causation is established when one intentionally and improperly interferes with a business relationship between two other parties by "inducing or otherwise causing" one party to breach or sever the business relationship. *Gossard,* 723 So.2d at 184 (quoting from the Restatement (Second) of Torts, §766 (1979)). "Induce" means to cause one party "to choose one course of conduct rather than another." *Id.* at 185 n. 1 (quoting Restatement (Second) of Torts, §766, comment h (1979)).

The inducement may be by persuasion or intimidation so long as the party induced is free to choose one course over another if he or she is willing to suffer the consequences. *Id.* The term "otherwise causing" refers to the situation where the party is left no choice because he or she is rendered incapable of carrying on the business relationship. *Id.* Thus in order to establish causation, there must be a business relationship in existence. *St. Johns River Water Management Dist. v. Fernberg Geological Services, Inc*., 784 So.2d 500, 505 (Fla. 5th DCA 2001), *rev. denied*, 805 So.2d 806 (Fla. 2001).

6. **Factors to Consider:** The factors to consider in evaluating the propriety of interference with *contractual relations* are stated in Restatement (Second) of Torts §767 (1977), as:

   In determining whether an actor's conduct in intentionally interfering with a *contract* or a *prospective contractual relation* of another is improper or not, consideration is given to the following factors:
   (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. *See McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987).

   See also Seminole Tribe of Florida v. Times Pub. Co., Inc., 780 So.2d 310, 315 (Fla. 4th DCA 2001).

7. **Injurious Falsehood:** The Restatement (Second) of Torts, Section 623A, recognizes that while an action for injurious falsehood is similar to defamation in that both involve "the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff," the two torts protect different interests. The defamation action protects the personal reputation of the injured party, while an action for injurious falsehood protects economic interests of the injured party against pecuniary loss. Restatement (Second) of Torts §623A (1977). Prosser and Keaton suggest that injurious falsehood claims should be regarded as one form of intentional interference with economic relations rather than as a branch of the more general harm to reputation involved in libel and slander. *See* Page Keeton, et al., *Prosser and Keeton on The Law of Torts* §128 at 964 (5th ed. 1984). Nevertheless, the courts of this state have afforded the two torts identical treatment, distinguishing them only to the extent that "slander of title" is defined as defamation of property interest, while libel and slander are defined as defamation of character of the person. *Old Plantation,* 68 So.2d at 181; *Sailboat Key,* 378 So.2d at 48. *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp*., 831 So.2d 204, 209 (Fla. 4th DCA 2002).

8. **Negligent Interference:** Nor is there a cause of action for negligent interference; to be actionable, the conduct must be intentional. *McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987).

9. **Temporary Injunction:** Temporary injunctions have been recognized as a viable form of relief in a suit for tortious interference with a contract. *Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc.*, 418 So.2d 1074, 1075 (Fla. 5th DCA 1982).

10. **Void Contract:** A claim for tortious interference can be maintained even though the business relationship is based on a contract which is void and unenforceable. *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 815 (Fla. 1995).

§4:180.6 Sample Complaint

See Complaint Library, Form 17:10-7 (Emergency Injunctive Relief and Damages; Misappropriation of Trade Secrets; Breach of Contract; Tortious Interference With Business Relationship) on Digital Access.

§4:190 TRUST, CONSTRUCTIVE

A constructive trust is an extraordinary remedy, arising in equity to prevent unjust enrichment resulting from fraud, undue influence, or breaches of fiduciary duty. *Estate of Kester v. Rocco*, 117 So.3d 1196 (Fla. 1st DCA 2013). Although often confused, constructive trust is not a traditional cause of action, but an equitable remedy. *Diamond "S" Development Corp. v. Mercantile Bank*, 989 So.2d 696 (Fla. 1st DCA 2008). Because a constructive trust is a remedy, it must be imposed based upon an established cause of action. *Swope Rodante, P.A. v. Harmon*, 85 So.3d 508 (Fla. 2nd DCA 2012).

A constructive trust serves two purposes: to restore property to the rightful owner and to prevent unjust enrichment. It is 'constructed' by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem. *Abdo v. Abdo*, 284 So. 3d 1101, 1103 (Fla. 2nd DCA 2019) (internal citations omitted). The very essence of the remedy of constructive trust is the identification of specific property or funds as the res upon which the trust may be attached. It may be imposed only where the trust res is 'specific and identifiable' property, or can be clearly traced in the assets of the defendant. *Id.*

On the remedy of constructive trusts, the United States Supreme Court has stated:

> A court of equity [can] order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Restatement of Restitution, supra, §215, Comment a at 867. Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property which are in the defendant's possession.

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 212-13 (2002).

§4:190.1 Required Elements — Florida Supreme Court

"The imposition of a constructive trust requires: '(1) a promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship and (4) unjust enrichment, (quoting *Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022, 1025 (Fla. 4th DCA 1996)). The limitations period is four years. §95.11(3)(j), Fla. Stat. (2004)". *Ryan v. De Gonzalez*, 921 So. 2d 572, 578 (Fla. 2005).

A constructive trust is properly imposed when, as a result of a mistake in a transaction, one party is unjustly enriched at the expense of another. *Wadlington v. Edwards,* 92 So.2d 629 (Fla.1957). Although this equitable remedy is usually limited to circumstances in which fraud or a breach of confidence has occurred, it is proper in cases in which one party has benefited by the mistake of another at the expense of a third party. *Holmes v. Holmes,* 463 So.2d 578 (Fla. 1st DCA 1985). The imposition of a constructive trust might be appropriate where a will (and thus a trust) has been validly executed, but that remedy is not appropriate where there is an error in the execution of the document. *Kelly v. Lindenau*, 223 So. 3d 1074, 1078 (Fla. 2d DCA 2017).

Source

In re Estate of Tolin, 622 So.2d 988, 990-91 (Fla. 1993).

See Also

1. *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla.1957).

As distinguished from an express trust, there are two types of so-called implied trusts. One is known as a 'resulting trust.' The other is known as a 'constructive trust.' Although some confusion exists as to the distinction between the two, it appears to us that our own decisions make the differences clear and dispose of the confusing elements. A resulting trust is simply a status that automatically arises by operation of law out of certain circumstances. A constructive trust is a remedy which equity applies in order to do justice. In the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or

establish adequate evidence of the intent. The typical illustration is where one man furnishes the money to buy a parcel of land in the name of another with both parties intending at the time that the legal title is held by the named grantee for the benefit of the unnamed beneficiary. *Sorrels v. McNally*, 105 So. 106 (Fla. 1925); *Smith v. Smith*, 196 So. 409 (Fla. 1940); *Grable v. Nunez*, 64 So. 2d 154 (Fla. 1953).

By contrast, a constructive trust is a relationship adjudicated to exist by a court of equity based on particular factual situations created by one or the other of the parties. The element of intent or agreement, either oral or written, to create the trust relationship is totally lacking. The trust is 'constructed' by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem. *Doing v. Riley*, 176 F.2d 449 (5th Cir. 1949); *Seestedt v. S. Laundry,* 149 Fla. 402, 5 So. 2d 859 (1942); *Tillman v. Pitt Cole Co.,* 82 So.2d 672 (Fla. 1955); Restatement of the Law of Trusts, Section 44(1).

§4:190.1.1 Required Elements — 1st DCA

Where money is the asset upon which it is proposed that a constructive trust be imposed, it is necessary that a specific amount be identified and located, either by tracing it to a specific and existing account, or where the funds have been converted into another type of asset, such as by the purchase of some item of property, by tracing and identifying the transaction in which the conversion occurred and thus tracing the money into the item of property. *Keul v. Hodges Blvd. Presbyterian Church,* 180 So.3d 1074 (Fla. 1st DCA 2015) (quoting *Arduin v. McGeorge*, 595 So. 2d 203, 204 (Fla. 4th DCA 1992)).

Courts may impose a constructive trust "where there is 'clear and convincing proof of (1) a promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship, and (4) unjust enrichment.'" *Bank of Am. v. Bank of Salem*, 48 So. 3d 155, 158 (Fla. 1st DCA 2010) (citing *Gersh v. Cofman*, 769 So.2d 407, 409 (Fla. 4th DCA 2000)). Constructive trusts are used to prevent a party from being unjustly enriched through abuse of confidence, duress, or fraud. *Id.* (citing *Harrell v. Branson*, 344 So.2d 604, 605-7, (Fla. 1st DCA 1977).

Source

Bank of Am. v. Bank of Salem, 48 So. 3d 155, 158 (Fla. 1st DCA 2010).

§4:190.1.2 Required Elements — 2nd DCA

A trust may be constructed in equity where a confidential relationship is abused. A trust may also be constructed where the mistake is clear and the mistake benefits a third party. A constructive trust is not itself a cause of action but, rather, something which must be imposed based upon an established cause of action.

Source

Browning v. Browning, 784 So.2d 1145, 1147 (Fla. 2d DCA 2001) (citation omitted); *see also Abdo v. Abdo*, 284 So. 3d 1101, 1103 (Fla. 2nd DCA 2019).

See Also

1. *B & C Investors, Inc. v. Vojak*, 79 So. 3d 42, 46 (Fla. 2d DCA 2011) (citing *Collinson v. Miller*, 903 So.2d 221, 228 (Fla. 2d DCA 2005) holding *"[a] constructive trust ... is not a traditional cause of action; it is more accurately defined as an equitable remedy.")* A constructive trust is not itself a cause of action but, rather, something which "must be imposed based upon an established cause of action." *see id*.
2. *Swope Rodante, P.A. v. Harmon,* 85 So. 3d 508, 510 (Fla. 2nd DCA 2012) (citing *Collinson,* 903 So.2d 221 and *Vojak,* 79 So.3d 42, for same principle).

§4:190.1.3 Required Elements — 3rd DCA

"A constructive trust may be imposed only where the trust res is 'specific and identifiable property,' or can be 'clearly traced in assets of the defendant.'" *Frieri v. Capital Inv. Servs.*, 194 So.3d 451, 455 (Fla. 3rd DCA 2016) (quoting *Bank of Am. v. Bank of Salem*, 48 So.3d 155, 158 (Fla. 1st DCA 2010)).

"To impose a constructive trust, there must be (1) a promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship and (4) unjust enrichment." *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022, 1025 (Fla. 4th DCA 1996) (citing *Abreu v. Amaro*, 534 So.2d 771 (Fla. 3d DCA 1988)). In

this case, there is clear and convincing evidence of the first element: there was, at a minimum, an implied promise that the husband would provide support for the wife and her daughters and that the home would be the family home. The court's final judgment finds that the wife permitted the home to be titled in Daniel's name as "her way of proving that she was serious about his being head of the household and that she was committed to the marriage." The record evidence establishes an implied promise.

"A constructive trust is a remedy which equity applies in order to do justice.... The trust is 'constructed' by equity to prevent an unjust enrichment of one person at the expense of another...." *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla.1957); *see Zanakis v. Zanakis*, 629 So.2d 181 (Fla. 4th DCA 1993).

[A] court of equity will raise a constructive trust and compel restoration where one, through actual fraud, abuse of confidence reposed and accepted, or through other questionable means gains something for himself *which in equity and good conscience he should not be permitted to hold*. *Quinn v. Phipps*, 93 Fla. 805, 814, 113 So. 419, 422 (Fla.1927) (emphasis added). Even when a property has not been acquired by fraud, a constructive trust will be imposed if equity would be offended should the property be retained by the person holding it. *See Provence*, 676 So.2d at 1022. This is so because a constructive trust is a remedial device with the dual objectives of restoring property to its rightful owner and preventing unjust enrichment. *See Abreu*, 534 So.2d 771.

Source

Saporta v. Saporta, 766 So.2d 379, 381-82 (Fla. 3d DCA 2000).

See Also

1. *Crawley-Kitzman v. Hernandez*, 324 So. 3d 968, 976 (Fla. 3d DCA 2021).
2. *Silva v. De La Noval*, 307 So. 3d 131, 134 (Fla. 3d DCA 2020).
3. *Frieri v. Capital Inv. Servs., Inc.*, 194 So.3d 451, 455 (Fla. 3d DCA 2016) ("The essence of the equitable remedy of constructive trust is whether specific property or funds can be identified as the res upon which a constructive trust should be imposed.") *Abreu v. Amaro*, 534 So.2d 771, 772 (Fla. 3d DCA 1988) ("A constructive trust is a remedial device with dual objectives—to restore property to the rightful owner and prevent unjust enrichment. To impose a constructive trust there must be "(1) a promise express or implied, (2) transfer of the property and reliance thereon, (3) confidential relationship, and (4) unjust enrichment." 5 G. Thompson, On Real Property §2345, at 134 (1979 Repl.). The person seeking to impose a constructive trust must prove those factors giving rise to a trust by clear and convincing evidence. *Hiestand v. Geier*, 396 So.2d 744 (Fla. 3d DCA), *rev. denied*, 407 So.2d 1103 (Fla.1981); *Kramer v. Freedman*, 272 So.2d 195 (Fla. 3d DCA), *cert. discharged*, 295 So.2d 97 (Fla.1973); *Harris v. Harris*, 260 So.2d 854 (Fla. 1st DCA 1972).").

§4:190.1.4 Required Elements — 4th DCA

A constructive trust is an equitable remedy available "in a situation where there is a wrongful taking of the property of another," *Abele v. Sawyer*, 750 So. 2d 70 (Fla. 4th DCA 1999), or "when a confidential relationship has been abused." *Hutson v. Brooks*, 646 So. 2d 276, 277 (Fla. 2d DCA 1994). "The trust is 'constructed' by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem." *Wadlington v. Edwards,* 92 So. 2d 629, 631 (Fla. 1957) (citation omitted). A constructive trust may be imposed against a recipient of funds who has not engaged in the wrongful conduct that justifies the imposition of the trust. *See Browning v. Browning,* 784 So. 2d 1145, 1148 (Fla. 2d DCA 2001). The remedy is "an extraordinary one," subject to the discretion of the court and traditional equitable defenses. *See Provence v. Palm Beach Taverns, Inc.,* 676 So. 2d 1022, 1025 (Fla. 4th DCA 1996).

Source

Joseph v. Chanin, 940 So. 2d 483, 487 (Fla. 4th DCA 2006).

The elements for a constructive trust are: (1) a promise; (2) transfer of the property and reliance thereon; (3) a confidential relationship; and (4) unjust enrichment. *See Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996).

See Also

1. *Silvas v. Silvas*, 334 So. 3d 630, 632-33 (Fla. 4th DCA 2022).
2. *Maio v. Clarke*, 255 So. 3d 369, 371 (Fla. 4th DCA 2018).

3. *Bergmann v. Slater*, 922 So.2d 1110, 1112 (Fla. 4th DCA 2006).

§4:190.1.5 Required Elements — 5th DCA

The four elements that must be established for a court to impose a constructive trust include: (1) a promise, express or implied; (2) a transfer of property and reliance thereon; (3) a confidential relationship; and (4) unjust enrichment. *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022, 1024 (Fla. 4th DCA 1996); *Heina v. LaChucua Paso Fino Horse Farm, Inc.*, 752 So.2d 630, 637 n. 4 (Fla. 5th DCA 1999).

Source

Castetter v. Henderson, 113 So. 3d 153, 155 (Fla. 5th DCA 2013).

§4:190.2 Statute of Limitations

"[Breach of fiduciary duty, money had and received, unjust enrichment, conversion, **constructive trust**, and accounting] claims are subject to Florida's four-year statute of limitations. [Fla. Stat.] §95.11(3)." (emphasis added). *Chau Kieu Nguyen v. JP Morgan Chase Bank, NA*, 709 F.3d 1342, 1345 (11th Cir. 2013).

However, "[t]here is no statute of limitations for the imposition of a constructive trust. Instead, the doctrine of laches applies." *Small Bus. Admin. v. Echevarria*, 864 F. Supp. 1254, 1265 (S.D. Fla. 1994) (citing *Ruff v. Lake Abstract Guar. Co.*, 101 B.R. 763 (Bankr.M.D.Fla.1989).); *but see Grable v. Nunez*, 64 So.2d 154, 159 (Fla. 1953) ("Constructive trusts are subject to statutes of limitation, and the period of limitation commences to run from the time when the trust came into being.") (citations omitted); *Collinson v. Miller*, 903 So.2d 221, 229 (Fla. 2d DCA 2005) (claim for constructive trust based on a breach of contract is four years from the time the cause of action accrues).

Some of the decisions state broadly that the claim of a beneficiary under a constructive trust is subject to the bar of the applicable statute of limitations. We think, however, that a preferable statement of the rule would be that in a court of equity the claims of the beneficiary of a constructive trust are subject to the application of the doctrine of laches, which may be based on the provisions in statutes of limitations relating to actions at law of like character. *Wadlington v. Edwards,* 92 So.2d 629, 632 (Fla. 1957).

§4:190.3 References

1. 18 Fla. Prac., *Law of Trusts* §13:1 (2012 ed.)
2. 79 Am. Jur. *Proof of Facts* 3d 269 (Originally published in 2004), *available at* Westlaw (updated April 2015).
3. 74 Am. Jur. *Proof of Facts* 3d 353 §10 (Originally published in 2003), *available at* Westlaw (updated April 2015)
4. 24 George Gleason Bogert, et al., *Bogert's Trusts And Trustees* §§471-473, 476, 482, 496 and 953 (2006), *available at* Westlaw (updated December 2013).
5. Am. Jur. 2d, Trusts §§168 to 204 (2007), available at Westlaw (updated May 2015).
6. C.J.S., Trusts §§176 to 205
7. 55A Fla. Jur 2d Trusts §§103-120, *available at* Westlaw (updated May 2015)
8. Florida Pleading and Practice Forms §55:6 (Constructive trusts)

§4:190.4 Defenses

1. **Not a Cause of Action:** "A constructive trust … is not a traditional cause of action; it is more accurately defined as an equitable remedy." *Collinson v. Miller,* 903 So.2d 221, 228 (Fla. 2d DCA 2005). Therefore, "[b]ecause a constructive trust is a remedy, it must be imposed based upon an established cause of action." *Id" Swope Rodante, P.A. v. Harmon*, 85 So. 3d 508, 511 (Fla. 2d DCA 2012).

2. **Laches:** "[S]imilar to any equitable remedy, the enforcement of a constructive trust is tempered by equitable defenses, including laches and estoppel." *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022, 1025 (Fla. 4th DCA 1996).

3. **Evidentiary Burden:** Plaintiff must prove elements of claim by clear and convincing evidence. *Abreu v. Amaro*, 534 So.2d 771, 772 (Fla. 3d DCA 1988).

4. **Remedy at Law:** Plaintiff has an adequate remedy at law. *Bender v. CenTrust Mortg. Corp.*, 51 F.3d 1027, 1030 (11th Cir. 1995), *modified on other grounds*, 60 F.3d 1507 (11th Cir. 1995).

§4:190.5 Related Matters

1. **Specific Property:** A constructive trust may only be imposed on specific or identifiable property or property which can be clearly traced in assets of the defendant. *See Small Bus. Admin. v. Echevarria*, 864 F. Supp. 1254, 1265 (S.D. Fla. 1994); *see also Gersh v. Cofman*, 769 So. 2d 407, 409 (Fla. 4th DCA 2000) ("A constructive trust may be imposed only where the trust res is specific and identifiable property, or can be clearly traced in assets of the defendant."); *Bank of Am. v. Bank of Salem*, 48 So.3d 155, 158 (Fla. 1st DCA 2010).

2. **Traceable Assets:** A constructive trust may be imposed only on **clearly traced assets**. *See Small Bus. Admin. v. Echevarria*, 864 F. Supp. 1254, 1266 (S.D. Fla. 1994); *see also Finkelstein v. Se. Bank*, N.A., 490 So. 2d 976, 982 (Fla. 4th DCA 1986); *Trend Setter Villas of Deer Creek v. Villas on the Green, Inc.,* 569 So. 2d 766 (Fla. 4th DCA 1990).

3. **Limits of Constructive Trust:** A constructive trust cannot be imposed simply to preserve assets to satisfy a potential money judgment or for mere failure to pay a debt. *See Bender v. CenTrust Mortg. Corp*., 51 F.3d 1027, 1030 (11th Cir. 1995), *modified on other grounds*, 60 F.3d 1507 (11th Cir. 1995); *Arduin v. McGeorge*, 595 So. 2d 203, 204 (Fla. 4th DCA 1992).

4. **Presumption of Ownership:** Presumption of equitable ownership is increased when there is evidence that one party has paid all or a considerable part of the purchase price, since "[o]ne who provides the purchase price or a part thereof is presumed to be an equitable owner unless a contrary intent is ascertainable from the dealings of the parties." *Waters v. Waters,* 310 So.2d 452, 454 (Fla. 3d DCA 1975); *Williams v. Dep't of Health & Rehabilitative Services*, 522 So. 2d 951, 954 (Fla. 1st DCA 1988).

§4:190.6 Related Remedies

Resulting Trust

§4:200 TRUST, RESULTING

PRACTITIONER NOTES

A resulting trust is an equitable remedy. *Int'l Alliance of Theatrical Stage Employees & Moving Picture Technicians, Artists & Allied Crafts of U.S., its Territories, & Canada Local 500 v. Int'l Alliance of Theatrical Stage Employees & Moving Picture Mach. Operators Holding Co., Inc.*, 902 So. 2d 959, 962-63 (Fla. 4th DCA 2005).

§4:200.1 Required Elements — Florida Supreme Court

"A resulting trust is simply a status that automatically arises by operation of law out of certain circumstances. … In the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of the intent." *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla. 1957). In a resulting trust "[A] vital element is the intention which will be presumed from the facts." *Smith v. Smith, 143 Fla. 159*, 196 So. 409 (1940).

Source

Grapes v. Mitchell, 159 So.2d 465, 467-468 (Fla.1963).

See Also

1. *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla. 1957) ("As distinguished from an express trust, there are two types of so-called implied trusts. One is known as a 'resulting trust'. The other is known as a 'constructive trust'. Although some confusion exists as to the distinction between the two, it appears to us that our own

decisions make the differences clear and dispose of the confusing elements. A resulting trust is simply a status that automatically arises by operation of law out of certain circumstances. A constructive trust is a remedy which equity applies in order to do justice. In the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of the intent. The typical illustration is where one man furnishes the money to buy a parcel of land in the name of another with both parties intending at the time that the legal title is held by the named grantee for the benefit of the unnamed beneficiary."); *Frank v. Eeles*, 13 So. 2d 216, 218 (Fla. 1943) (explaining a resulting trust can be "founded on the presumed intention of the parties that the one furnishing the money should have beneficial interest, while the other held the title for convenience or collateral purpose.").

§4:200.1.1 Required Elements — 1st DCA

A resulting trust arises where an express trust fails, in whole or in part; where the purposes of an express trust are fully accomplished, without exhausting the trust estate; or, of particular pertinence here, "'where a person furnishes money to purchase property in the name of another, with both parties intending at the time that the legal title be held by the named grantee for the benefit of the unnamed purchaser of the property.'" *Steigman v. Danese,* 502 So.2d 463, 467 (Fla. 1st DCA 1987) (quoting *Steinhardt v. Steinhardt,* 445 So.2d 352, 357-58 (Fla. 3d DCA 1984)), *disapproved of on other grounds by Spohr v. Berryman,* 589 So.2d 225, 228-29 (Fla.1991), *and order vacated by In re Estate of Danese,* 601 So.2d 570, 571 (Fla. 1st DCA 1992). *See also F.J. Holmes Equip., Inc. v. Babcock Bldg. Supply, Inc.,* 553 So.2d 748, 749 (Fla. 5th DCA 1989) ("A resulting trust may arise in favor of one who furnishes money used to purchase property the legal title to which is taken in the name of another."). A resulting trust can, indeed, be "founded on the presumed intention of the parties that the one furnishing the money should have the beneficial interest, while the other held the title for convenience or for a collateral purpose." *Frank v. Eeles,* 152 Fla. 869, 13 So.2d 216, 218 (1943) (internal quotation marks and citation omitted). *See also* Restatement (Third) of Trusts §7 cmt. c (2003).

Source

Key v. Trattmann, 959 So. 2d 339, 342-43 (Fla. 1st DCA 2007).

See Also

Steigman v. Danese, 502 So. 2d 463, 467 (Fla. 1st DCA 1987), vacated on other grounds, 601 So. 2d 570 (Fla. 1st DCA 1992).

§4:200.1.2 Required Elements — 2nd DCA

A resulting trust arises when the legal estate in property is disposed of, conveyed or transferred, but the intent appears to be or is inferred from the terms of the disposition or from accompanying facts and circumstances, that the beneficial interest is not to go to or be enjoyed with the legal title. In such a case, a trust is implied or results in favor of the person whom equity deems to be the real owner. *Howell v. Fiore,* 210 So. 2d 253, 255 (Fla. 2d DCA 1968) (quoted in *Foundation for the Developmentally Disabled, Inc. v. Step by Step Early Childhood Educ. & Therapy Ctr., Inc.,* 29 So. 3d 1221).

Source

Foundation for Developmentally Disabled, Inc. v. Step By Step Early Childhood Educ. & Therapy Ctr., Inc., 29 So.3d 1221, 1225 (Fla. 2d DCA 2010).

"The evidentiary burden to prove a resulting trust is clear, strong and unequivocal, beyond a reasonable doubt." *Persan v. Life Concepts, Inc.*, 738 So. 2d 1008, 1009 (Fla. 5th DCA 1999). To establish a resulting trust, the parties must actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of the intent. … "A resulting trust arises when the legal estate in property is disposed of, conveyed or transferred, but the intent appears or is inferred from the terms of the disposition, or from accompanying facts and circumstances, that the beneficial interest is not to go to or be enjoyed with the legal title. In such a case a trust is implied or results in favor of the person whom equity deems to be the real owner." *Howell v. Fiore*, 210 So.2d 253, 255 (Fla. 2d DCA 1968).

Source

Foundation for Developmentally Disabled, Inc. v. Step By Step Early, 29 So.3d 1221, 1225 (Fla. 2d DCA 2010).

See Also

1. If the designation of beneficiaries is deemed too indefinite for enforcement of the provisions of a trust, the usual result is that the trust is void and "the designated trustee holds the corpus under a resulting trust in favor of the estate of the settlor." *Megiel-Rollo v. Megiel*, 162 So. 3d 1088, 1096 (Fla. 2d DCA 2015) (quoting *McLemore v. McLemore*, 675 So. 2d 202 (Fla. 1st DCA 1996)).

§4:200.1.3 Required Elements — 3rd DCA

In Florida, "[a] resulting trust arises where … a person furnishes money to purchase property in the name of another, with both parties intending at the time that the legal title be held by the named grantee for the benefit of the unnamed purchaser of the property."

Source

Petithomme v. Petithomme, 232 So. 3d 1058, 1061 (Fla. 3rd DCA 2017).

See Also

1. *Fernandez v. Marrero*, 282 So. 3d 928, 931 (Fla. 3rd DCA 2019) (Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid. (citing Restatement (Second) of Trusts §440 (Am. Law Ins. 1959)). However, [a] resulting trust does not arise where a transfer of property is made to one person and the purchase price is paid by another, if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise.)
2. *Calderon v. Vazquez*, 251 So. 3d 303 (Fla. 3d DCA July 11, 2018). In this case, the court found that a pleading could be filed arguing that the designated beneficiary of a life insurance policy was really nominated as a trustee to hold the policy proceeds in trust for the benefit of others. Whether or not it was the insured's intent to create a trustee-beneficiary relationship vis-à-vis the proceeds would be something to be proven with evidence at trial.
3. *Stonely v. Moore*, 851 So. 2d 905, 906-07 (Fla. 3d DCA 2003) (Resulting trusts involving real estate can be based on parol evidence.).
4. *Marks v. Millman*, 641 So.2d 414, 415-416 (Fla. 3rd DCA 1993) ("A resulting trust is simply a status that automatically arises by operation of law out of certain circumstances…. In the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship *but fail to execute documents or establish adequate evidence of the intent*. The typical illustration is where one man furnishes the money to buy a parcel of land in the name of another *with both parties intending at the time that the legal title is held by the named grantee for the benefit of the unnamed beneficiary.*") (quoting *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla.1957) (citations omitted; emphasis added)).
5. *Kunce v. Robinson*, 469 So. 2d 874, 877 (Fla. 3d DCA 1985) (A "portion of the designation of beneficiaries … does not identify any particular entity, person or class, the members of which can enforce the trust [and] must therefore be deemed void for indefiniteness.").
6. *Steinhardt v. Steinhardt*, 445 So.2d 352, 357 (Fla. 3d DCA 1984), rev. denied, 456 So.2d 1181 (The law is well-settled that "[i]n the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of the intent." *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla.1957). A resulting trust, in turn, arises in three situations, none of which exists in this case, to wit: (1) where an express trust fails in whole or in part, (2) where an express trust is fully performed without exhausting the trust estate, and (3) where a person furnishes the money to purchase property in the name of another, with both parties intending at the time that the legal title be held by the named grantee for the benefit of the unnamed purchaser of the property.") (citations omitted).

§4:200.1.4 Required Elements — 4th DCA

The Supreme Court of Florida, in *Wadlington v. Edwards*, 92 So.2d 629, 631 (Fla.1957), dealt with the matter of resulting trusts and constructive trusts. The court, speaking through Justice Thornal, held: "A resulting trust is simply a status that automatically arises by operation of law out of certain circumstances. A constructive trust is a

remedy which equity applies in order to do justice. In the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of intent."

Source

Mordue v. Case, 201 So. 2d 844, 845 (Fla. 4th DCA 1967).

See Also

1. *Int'l Alliance of Theatrical Stage Employees & Moving Picture Technicians, Artists & Allied Crafts of U.S., its Territories, & Canada Local 500 v. Int'l Alliance of Theatrical Stage Employees & Moving Picture Mach. Operators Holding Co., Inc.*, 902 So. 2d 959, 963 n.1 (Fla. 4th DCA 2005)*; Brake v. Murphy*, 687 So.2d 842 (Fla. 3d DCA 1997). Here, legal and equitable issues were "intertwined" so there was no error in submitting such fact issues to the jury. *See Billian v. Mobil Corp.*,710 So.2d 984 (Fla. 4th DCA 1998). Also, unlike *Chabad House-Lubavitch of Palm Beach County, Inc. v. Banks,* 602 So.2d 670 (Fla. 4th DCA 1992), this was **not** a case where any party objected to 'equitable [fact] issues being determined by the jury.*'")*; *Zanakis v. Zanakis*, 629 So.2d 181, 182-83 (Fla. 4th DCA 1993).
2. "A resulting trust is generally found to exist in transactions affecting community property in noncommunity property states where a husband buys property in his own name." *Johnson v. Townsend*, 259 So.3d 851, 857 (Fla. 4th DCA 2018) (*citing Quintana v. Ordono*, 195 So.2d 577, 580 (Fla. 3rd DCA 1977)).
3. "Although the decedent's possession of the community property in his name may have created a resulting trust, upon the decedent's death, his estate became liable to the wife for her community property interest. Thus, upon the decedent's death, the wife's community property interest was a claim which the wife had to pursue." *Johnson v. Townsend*, 259 So.3d 851, 857 (Fla. 4th DCA 2018).

§4:200.1.5 Required Elements — 5th DCA

A resulting trust may arise in favor of one who furnishes money used to purchase property, the legal title to which is taken in the name of another. The equities in this direction are especially strong when the parties intended that the title was to be held by the legal grantee for the use and benefit of the person supplying the consideration for the purchase. *F.J. Holmes Equip., Inc. v. Babcock Bldg. Supply, Inc.*, 553 So. 2d 748, 749 (Fla. 5th DCA 1989).

In *Towerhouse Condominium, Inc. v. Millman*, 475 So.2d 674, 677 (Fla. 1985), the court explained how a resulting trust arises:

> As a matter of law, where property is acquired in the name of one person or entity with consideration provided by others, the transferee is presumed to hold title on a resulting trust for those who provided the consideration.
>
> Although *Marks v. Millman*, 641, So.2d 414, 415-16 (Fla. 3d DCA 1993), *rev. denied*, 651 So.2d 1195 (Fla. 1995), quoting *Wadlington v. Edwards*, 92 So.2d 629, Fla. 1957), holds: "In the creation of a resulting trust it is essential that the parties actually intend to create the trust relationship but fail to execute documents or establish adequate evidence of the intent," the court in *Abreu v. Amaro*, 534 So.2d 771 (Fla. 3d DCA 1988) explained that such intent is presumed when the critical fact of payment of the purchase price is established.
>
> Under Florida Law, once a plaintiff proves that he paid the purchase price for a piece of property, a presumption arises that it was the parties' intention that the individual holding legal title was to hold the property in trust for the payor. On such facts, a resulting trust is presumed as a matter of law. The burden then shifts to the transferee to show that the money was a gift or loan.

Abreu at 772 (citing *Pyle v. Pyle*, 53 So.2d 312 (Fla. 1951)).

If the transferee can show that the payor is under a legal or moral obligation to provide for the transferee, [*Frank v. Eeles*, 152 Fla. 869, 13 So.2d 216, 218 (1943)], that the transferee is "the natural object of the payor's bounty" [*Abreu*, 534 So.2d at 772] or that the payor stands in a position of *in loco parentis* to the transferee, *Id.,* then a rebuttable presumption of gift is raised and the burden again shifts.

Source

Maliski v. Maliski, 664 So.2d 341, 342 (Fla. 5th DCA 1995).

See Also

1. *Persan v. Life Concepts, Inc.*, 738 So. 2d 1008, 1012 (Fla. 5th DCA 1999) ("A resulting trust is a reversionary, equitable interest that arises under circumstances which raise the unrebutted inference that the transferor does not intend the one who receives the property to have the beneficial interest. It is called a 'resulting trust' because the conveyance to the transferee is deemed incomplete in that the beneficial interest in equity cannot go to him. A resulting trust most commonly covers a situation where one person supplies the funds to another to purchase land on his behalf.").

§4:200.2 Statute of Limitations

Some courts have held that the statute of limitations does not apply to resulting trusts, since "the enforcement of a resulting trust in equity is governed by the doctrine of laches and not by the statute of limitations." *See Fisher v. Creamer*, 332 So.2d 50, 52 (Fla. 3d DCA 1976), superseded by statute on other grounds, *Velzy v. Estate of Miller*, 502 So.2d 1297, 1299-1301 (Fla. 2d DCA 1987); *see also Trustman v. Gelfman*, 724 So.2d 1266, 1266 (Fla. 3d DCA 1999) (holding summary judgment proper in a probate action seeking to impose a resulting trust where the action was barred by laches).

However, some courts have applied the statute of limitations to resulting trusts. *See, e.g., Steigman v. Danese,* 502 So.2d 463, 470 (Fla. 1st DCA 1987), *rev. denied*, 511 So.2d 998 (Fla. 1987), *overruled on other grounds by Spohr v. Berryman,* 589 So.2d 225, 228-29 (Fla. 1991) (*overruled on other grounds by Baillargeon v. Sewell*, 33 So.3d. 130 (Fla. 2d DCA 2010)), *and order vacated by In re Estate of Danese*, 601 So.2d 570, 571 (Fla. 1st DCA 1992) (holding that, if the action seeking a resulting or constructive trust was based on alleged fraud of the other party, the four-year statute of limitations applied).

Additionally, the First District Court has recently acknowledged that a statute of limitations does apply, *Key v. Trattmann,* 959 So. 2d 339, 346 (Fla. 1st DCA 2007) (citing a Fifth District Court opinion that held the "beneficiary of a resulting trust is not bound to act until the trustee repudiates the trust or begins to hold the property adversely with knowledge on the part of the beneficiary." *Bradbury v. Fuller,* 385 So.2d 7, 8 (Fla. 5th DCA 1980)). *See also Grable v. Nunez,* 64 So.2d 154, 160 (Fla.1953) ("The statutes of limitations do not operate against a resulting trust until the trustee has disclaimed the trust and begins to hold adversely to the beneficial interest.").

§4:200.3 References

1. 45 A.L.R.2d 382 (1956).
2. 45 A.L.R.2d 1285 (1953).
3. 45 A.L.R.2d 1500 (1923).
4. 76 Am. Jur. 2d *Trusts* §§135 to 167 (2007), available at Westlaw (updated May 2015).
5. 85 Am. Jur. *Proof of Facts* 3d 221 (Originally published in 2005), *available at* Westlaw (updated April 2015).
6. 74 Am. Jur. *Proof of Facts* 3d 353 §9 (Originally published in 2003), *available at* Westlaw (updated April 2015)
7. 24 George Gleason Bogert, et al., *Bogert's Trusts And Trustees* §§454–456, 464 and 466 (2006), *available at* Westlaw (updated December 2013).
8. 18 Fla. Prac., *Law of Trusts* §§12-6, 13-1 and 13-2 (2012 ed).
9. 55A Fla. Jur 2d Trusts §§91-102, *available at* Westlaw (updated May 2015)
10. 90 C.J.S. Trusts §176 (2010), *available at* Westlaw (updated June 2015)
11. Florida Pleading and Practice Forms §55:5 (Resulting trusts).
12. Florida Pleading and Practice Forms §55:22 (Complaint—To declare resulting trust—Purchase of property for nephew).
13. Florida Pleading and Practice Forms §55:25 (Allegation for creation of trust—By operation of law—Resulting trust).

§4:200.4 Defenses

See Fla. R. Civ. P. §1.110(d) and Other Standard Defenses, §200:00.

§4:200.5 Related Matters

1. **Parol Evidence Rule:** *Zanakis v. Zanakis*, 629 So.2d 181, 183 (Fla. 4th DCA 1993) ("Although it would appear that the establishment of equitable trusts involving real estate would violate the parol evidence rule, since these trusts do of course vary the terms of documents, **there are probably few rules more well-established than that constructive or resulting trusts involving real estate can be based on parol evidence.** *Elvins v. Seestedt*, 148 Fla. 408, 4 So.2d 532 (1941), and cases cited therein; *Williams v. Grogan*, 100 So.2d 407 (Fla.1958); and *Varnes v. Dawkins*, 624 So.2d 349 (Fla. 1st DCA 1993). This exception to the parol evidence rule is consistent with and may well have emanated from our statute of frauds which specifically excepts these equitable trusts from having to be in writing even though they involve real property. Section 689.05, Florida Statutes (1991), and *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419 (1927).") (emphasis added).
2. **Evidentiary Burden:** "Although some Florida courts have required evidence to be 'clear, strong and unequivocal …' (*Found for Developmentally Disabled, Inc. v. Step By Step Early*, 29 So.3d 1221, 1225 (Fla. 2d DCA 2010); *Grapes v. Mitchell,* 159 So.2d 465 (Fla. 1963); *Goldman v. Olsen*, 159 Fla. 435, 31 So.2d 623 (1947); *Geter v. Simmons,* 57 Fla. 423, 49 So. 131 (1909); *Harnish v. Peele*, 386 So.2d 8 (Fla.5th DCA 1980); *Jones v. Jones,* 140 So.2d 318 (Fla. 3d DCA 1962); *Estey v. Vizor,* 113 So.2d 576 (Fla. 3d DCA 1959)), the 'clear and convincing evidence' standard is also found. … The standard that 'evidence must be so clear, strong, and unequivocal as to remove from the mind of the Chancellor every reasonable doubt as to the existence of the trust,' *Goldman*, 31 So.2d at 624, is countermanded by the holding of *King v. King,* 111 So.2d 33 (Fla. 1959), that evidence of an implied trust must be of 'clear and convincing character.'" *Marks v. Millman,* 641 So.2d 414, 415-416 (Fla. 3rd DCA 1993) (quoting *Wadlington v. Edwards,* 92 So.2d 629, 631 (Fla.1957) (citations omitted; emphasis added).
3. **Statute of Frauds:** *Key v. Trattmann*, 959 So. 2d 339, 345 (Fla. 1st DCA 2007) ("**The statute of frauds does not apply to resulting trusts**, however. Because a resulting trust arises not ex contractu but by operation of law, the statute of frauds does not pertain. *See, e.g., Williams v. Grogan*, 100 So.2d 407, 410 (Fla.1958) ("A trust which is created by operation of law is not within the statute of frauds and may be proved by parol evidence."); *Stonely v. Moore*, 851 So.2d 905, 906 (Fla. 3d DCA 2003) (reversing summary judgment entered on a claim seeking to establish a resulting or constructive trust where the trial court relied on the statute of frauds, because " 'resulting trusts involving real estate can be based on parol evidence' ") (quoting *Zanakis v. Zanakis*, 629 So.2d 181, 183 (Fla. 4th DCA 1993))")(emphasis added).

§4:200.6 Related Remedies

1. Constructive Trust

§4:210 BREACH OF JOINT VENTURE AGREEMENT

§4:210.1 Elements of Cause of Action — Florida Supreme Court

A joint venture is created when two or more persons join their property or time, or some combination thereof, in conducting a particular line of trade or for some particular business deal. To plead a cause of action for breach of a joint venture agreement, the following elements must be alleged:

1. the elements of an ordinary contract, and
2. a community of interest in the performance of the common purpose,
3. joint control or right of control,
4. a joint proprietary interest in the subject matter,
5. a right to share in the profits, and
6. a duty to share in any losses which may by sustained.

Source

Jackson-Shaw Co. v. Jacksonville Aviation Auth., 8 So.3d 1076, 1089 (Fla. 2008).

See Also

1. *Kislak v. Kreedian*, 95 So.2d 510, 515 (Fla. 1957) ("Inherent in contracts of this nature is the right and the authority of any one of the co-adventurers to bind the others with reference to the subject matter of the co-adventure.")

§4:210.1.1 Elements of Cause of Action — 1st DCA

To plead a cause of action for breach of a joint venture agreement, the following elements must be alleged:

1. the elements of an ordinary contract, and
2. a community of interest in the performance of the common purpose,
3. joint control or right of control,
4. a joint proprietary interest in the subject matter,
5. a right to share in the profits, and
6. a duty to share in any losses which may be sustained.

Source

USA Independence Mobilehome Sales, Inc. v. City of Lake City, 908 So.2d 1151, 1158 (Fla. 1st DCA 2005).

See Also

1. *Austin v. Duval County Sch. Bd.*, 657 So.2d 945, 948 (Fla. 1st DCA 1995) ("The standard has been construed strictly, so that the absence of even one of the five elements has precluded a finding of joint venture.")

§4:210.1.2 Elements of Cause of Action — 2nd DCA

To plead a cause of action for breach of a joint venture agreement, the following elements must be alleged:

1. the elements of an ordinary contract, and
2. a community of interest in the performance of the common purpose,
3. joint control or right of control,
4. a joint proprietary interest in the subject matter,
5. a right to share in the profits, and
6. a duty to share in any losses which may be sustained.

Source

Phillips v. U.S. Fid. & Guar. Co., 155 So.2d 415, 418 (Fla. 2d DCA 1963) ("'Share of Losses' means to be responsible or liable for the losses created by the venture and liability, if any, to creditors or third parties.")

See Also

1. *Stonepeak Partners, LP v. Tall Tower Cap., LLC*, 231 So. 3d 548, 553 (Fla. 2d DCA 2017).

§4:210.1.3 Elements of Cause of Action — 3rd DCA

A "joint venture" only exists under a contract specifically providing:

1. a community of interest in the performance of the common purpose,
2. joint control or right of control,
3. a joint proprietary interest in the subject matter,
4. a right to share in the profits, and
5. a duty to share in any losses which may be sustained.

Source

E&H Cruises, Ltd. v. Baker, 88 So.3d 291, 295 (Fla. 3d DCA 2012).

See Also

1. *Marriott Int'l, Inc. v. Am. Bridge Bahamas, Ltd.*, 193 So. 3d 902, 906 (Fla. 3d DCA 2015).

2. *De Ribeaux v. Del Valle*, 531 So.2d 992, 993 (Fla. 3d DCA 1988) (citing *Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536 (Fla. 3d DCA 1974).

§4:210.1.4 Elements of Cause of Action — 4th DCA

To plead a cause of action for breach of a joint venture agreement, the following elements must be alleged:
1. the elements of an ordinary contract, and
2. a community of interest in the performance of the common purpose,
3. joint control or right of control,
4. a joint proprietary interest in the subject matter,
5. a right to share in the profits, and
6. a duty to share in any losses which may be sustained.

Source

Shoreline Found., Inc. v. Brisk, 278 So.3d 68, 73 (Fla. 4th DCA 2019).

See Also

1. *Dev. Corp. of Palm Beach v. WBC Constr., L.L.C.*, 925 So.2d 1156, 1161 (Fla. 4th DCA 2006).
2. *Vannamei Corp. v. Elite Intn'l Telecommunications, Inc.*, 881 So.2d 561, 562 (Fla. 4th DCA 2004) ("The [joint venture] relationship must arise out of a contract, express or implied. Such a contract is an 'indispensable prerequisite' to the venture's existence.")
3. *Chase Manhattan Mortgage Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A.*, 694 So.2d 827, 831 (Fla. 4th DCA 1997).
4. *Conklin Shows, Inc. v. Dep't of Revenue*, 684 So.2d 328, 332 (Fla. 4th DCA 1996).
5. *DK Arena, Inc. v. EB Acquisitions I, LLC*, 31 So.3d 313, 326 (Fla. 4th DCA 2010) ("A "joint venture" is an association of persons or legal entities to carry out a single business enterprise for profit; it is a partnership of limited scope and duration.").

§4:210.1.5 Elements of Cause of Action — 5th DCA

To plead a cause of action for breach of a joint venture agreement, the following elements must be alleged:
1. the elements of an ordinary contract, and
2. a community of interest in the performance of the common purpose,
3. joint control or right of control,
4. a joint proprietary interest in the subject matter,
5. a right to share in the profits, and
6. a duty to share in any losses which may be sustained.

Source

S&W Air Vac Sys., Inc. v. Dep't of Revenue, State of FL, 697 So.2d 1313, 1315 (Fla. 5th DCA 1997) ("To share in losses means that each party is responsible or liable for the losses created by the venture and is exposed to liability, if any, to creditors or third parties.")

§4:210.2 Statute of Limitations

Four years. Fla. Stat. §95.11(3)(k).

§4:210.3 References

1. 48 C.J.S. *Joint Adventures* §2 (2009).
2. 12 Am. Jur. 2d *Existence of Joint Venture* §§1-6 (2009).
3. 46 Am. Jur. 2d *Joint Ventures* §26 (2009).
4. *What Amounts to Joint Adventure*, 138 A.L.R. 968 (1942).

§4:210.4 Defenses

1. **Statute of Frauds**: Joint venture agreements are not required to be in writing. *De Ribeaux v. Del Valle*, 531 So.2d 992, 993 (Fla. 3d DCA 1988). Where the agreement has no fixed time for performance and there is no indication within the terms that performance could not be made within one year, the agreement should not be construed as falling within the statute of frauds. *Id.; Vannamei Corp. v. Elite Intern. Telecomm., Inc.,* 881 So.2d 561, 562 (Fla. 3d DCA 2004).

2. **Constitutional Prohibition**: Article VII, section 10 of the Florida Constitution provides "[n]either the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person …" Art. VII, §10, Fla. Const. (1968); *see also Donovan v. Okaloosa County,* 82 So.3d 801, 809 (Fla. 2012) (holding that "the purpose of this provision is to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited").

§4:210.5 Related Matters

1. **Fiduciary Relationship**: The fiduciary relationship between parties arises by virtue of the existence of the joint venture agreement, requiring the parties to deal with each other fairly and in good faith. *De Ribeaux v. Del Valle*, 531 So.2d 992, 993-94 (Fla. 3d DCA 1988). However, if the performance of an action complained of is allowed in the contract itself, the performance of that action cannot form the basis for a breach of fiduciary duty. *Hallock v. Holiday Isle Resort & Marina, Inc.*, 4 So.3d 17, 21 (Fla. 3d DCA 2009).

2. **Burden of Proof**: The party alleging the existence of a joint venture has the burden of alleging and proving an agreement or contract supports the joint venture relationship. *Vannamei Corp.*, 881 So.2d at 562. Where the events and transactions forming the basis of the alleged joint venture relationship are not in writing, the burden of establishing the existence of the contract, and all the essential elements, is a heavy and difficult one. *Id.* While it is unnecessary to produce a written agreement for the purpose of establishing a joint venture, the failure to do so is evidence that no such agreement actually existed. *Conklin Shows, Inc.*, 684 So.2d at 332.

3. **Jurisdiction**: Under Florida law, members of a joint venture fall within the reach of the long-arm statute for the purpose of establishing jurisdiction where the causes of action arise out of the joint venture's business activities to be performed in the forum state. *Dev. Corp. of Palm Beach*, 925 So.2d at 1161; *see also Sutton v. Smith*, 603 So.2d 693, 698-99 (Fla. 1st DCA 1992).

CHAPTER 5

WARRANTY CASES

§5:10 WARRANTY, BREACH OF UCC

§5:10.1 Elements of Cause of Action — Florida Supreme Court
- §5:10.1.1 Elements of Cause of Action — 1st DCA
- §5:10.1.2 Elements of Cause of Action — 2nd DCA
- §5:10.1.3 Elements of Cause of Action — 3rd DCA
- §5:10.1.4 Elements of Cause of Action — 4th DCA
- §5:10.1.5 Elements of Cause of Action — 5th DCA

§5:10.2 Statute of Limitations
§5:10.3 References
§5:10.4 Defenses
§5:10.5 Related Matters
§5:10.6 Standard Jury Instructions — Product Liability

§5:20 WARRANTY, COMMON LAW

§5:20.1 Elements of Cause of Action — Florida Supreme Court
- §5:20.1.1 Elements of Cause of Action — 1st DCA
- §5:20.1.2 Elements of Cause of Action — 2nd DCA
- §5:20.1.3 Elements of Cause of Action — 3rd DCA
- §5:20.1.4 Elements of Cause of Action — 4th DCA
- §5:20.1.5 Elements of Cause of Action — 5th DCA

§5:20.2 Statute of Limitations
§5:20.3 References
§5:20.4 Defenses
§5:20.5 Related Matters

§5:30 WARRANTY, CONDOMINIUM STATUTORY

§5:30.1 Florida Statutes
§5:30.2 Statute of Limitations
§5:30.3 References
§5:30.4 Related Matters

§5:40 WARRANTY, IMPLIED

§5:40.1 Fla.R.Civ.P. Form 1.949
§5:40.2 Statute of Limitations
§5:40.3 References
§5:40.4 Defenses
§5:40.5 Related Matters
§5:40.6 Standard Jury Instructions — Product Liability

§5:50 WARRANTY, PET DEALER'S STATUTORY
§5:50.1 Florida Statutes
§5:50.2 Statute of Limitations
§5:50.3 References

§5:10 WARRANTY, BREACH OF UCC

§5:10.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§5:10.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§5:10.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§5:10.1.3 Elements of Cause of Action — 3rd DCA

The proper method of pleading a cause of action for breach of warranties under the Florida U.C.C. is described in *Dunham-Bush, Inc. v. Thermo-Air Services, Inc.*, 351 So.2d 351 (Fla. 4th DCA 1977).

Source

Januse v. U-Haul Company, Inc., 399 So.2d 402, 403 (Fla. 3d DCA 1981).

§5:10.1.4 Elements of Cause of Action — 4th DCA

In order to properly plead a cause of action for breach of warranties under the Florida Uniform Commercial code a complaint should contain at least the following allegations:

1. Facts in respect to the sale of the goods;
2. Identification of the types of warranties created, i.e., express warranty (Section 672.313, Florida Statutes (1975)); implied warranty of merchantability (Section 672.314, Florida Statutes (1975)); implied warranty of fitness for a particular purpose (Section 672.315, Florida Statutes (1975));
3. Facts in respect to the creation of the particular warranty. For example, in the case of an implied warranty of fitness for a particular purpose, the complaint should allege that the seller had reason to know the particular purpose for which the goods were purchased by the buyer and that the buyer relied on the seller's judgment in providing suitable goods. Section 672.315, Florida Statutes (1975);
4. Facts in respect to the breach of warranty;
5. Notice to seller of breach. Section 672.607(3)(a), Florida Statutes (1975);
6. The injuries sustained by the buyer as a result of the breach of warranty.

Source

Dunham-Bush, Inc. v. Thermo-Air Services, Inc., 351 So.2d 351 (Fla. 4th DCA 1977).

§5:10.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§5:10.2 Statute of Limitations

Five years, §95.11(2)(b), Fla. Stat.; *but see Dubin v. Dow Corning Corp.*, 478 So.2d 71, 72 (Fla. 2d DCA 1985) (four year statute of limitations provided by §95.11(3)(c), Fla. Stat., applies to all breach of warranty claims arising from construction of, or improvements to, real property).

§5:10.3 References

1. 41A Fla. Jur. 2d *Products Liability* §§43–64 (2004).

2. 45 Fla. Jur. 2d *Sales and Exchange of Goods* §§152–182 (2001).
3. 67A Am. Jur. 2d *Sales* §§795–893, 1034–1127 (2003).
4. 77A C.J.S. *Sales* §§236–324 (1994).
5. Florida Statutes §681.104 (2005) (Nonconformity of Motor Vehicles).
6. Jeffrey A. Grebe, *What Is "As Is" in Florida?,* 30 Stetson L. Rev. 875 (2001).
7. Ronald A. Anderson, *Anderson on the Uniform Commercial Code* §§2–312 et seq. (3d ed. 1997).
8. Duane A. Daiker, Note, *Florida's Motor Vehicle Warranty Enforcement Act: Lemon-Aid for the Consumer,* 45 Fla. L. Rev. 253, 255 (1993).
9. Michael Flynn, *Uniform Commercial Code Express Warranties: Florida's "Basis"—Less Bargain*, 66 Fla. Bar J. 52 (August 1992).
10. Susan E. Grady, *Inadvertent creation of express warranties: Caveats for pictorial product representations*, 15 UCC L.J. 268 (1983).
11. Luis Prats, *Strict liability in tort and breach of implied warranty of merchantability*, 55 Fla. Bar J. 614 (1981).
12. Daniel E. Murray, *Qualities of fitness and merchantability disclaimers, inspection and latent defects*, 21 U. Miami L. Rev. 388 (1966).
13. Calvin A. Kuenzel, *Warranties of quality and of merchantability under Art. 2 of the Code*, 36 Fla. Bar. J. 1020 (1962).

§5:10.4 Defenses

1. **Contributory Negligence:** In an action upon implied warranty the defense of contributory or comparative negligence may be interposed, for the injured person is required to exercise "ordinary due care." *West v. Caterpillar Tractor Company, Inc.*, 336 So.2d 80, 91 (Fla. 1976).

2. **Pre-purchase Inspection of the Goods:** Only the implied warranties are potentially waived when a buyer makes or is given an opportunity to complete a pre-purchase inspection of the goods. *Doug Connor, Inc. v. Proto-Grind, Inc*., 761 So.2d 426, 428 (Fla. 5th DCA 2000).

3. **Delivering or Presenting the Warranty:** Delivering, presenting, or explaining manufacturer's warranty, without more, does not render dealer a cowarrantor by adoption. *Motor Homes of America, Inc. v. O'Donnell*, 440 So.2d 422 (Fla. 4th DCA 1983), *rev. denied*, 451 So.2d 849 (Fla. 1984).

4. **No Obligation to Provide the Best:** Implied warranty of fitness does not extend beyond obligation to supply an article reasonably fit for purpose intended, and does not impose a duty to furnish the best article of its kind or an article equal to any other similar or competing article. *Borrell-Bigby Elec. Co., Inc. v. United Nations, Inc*., 385 So.2d 713 (Fla. 2d DCA 1980).

5. **Product Manufactured or Sold by Defendant:** It is aphoristic that a plaintiff cannot prevail on claims for negligence, breach of warranty or strict liability, unless the plaintiff establishes that the product which allegedly caused the plaintiff's injury was manufactured or sold by the defendant. Defendant cannot be held liable where Plaintiff cannot prove that Defendant's products caused his injuries. *Mahl v. Dade Pipe and Plumbing Supply Co.*, 546 So.2d 740 (Fla. 3d DCA 1989).

6. **Puffing:** Salesmen's talk comprised of affirmation of value of goods or opinion or commendation of goods is "puffing" and does not create a warranty. *Lou Bachrodt Chevrolet, Inc. v. Savage*, App. 4 Dist., 570 So.2d 306 (Fla. 4th DCA 1990), *rev. denied*, 581 So.2d 165 (Fla. 1991).

7. **Rental Equipment:** Liability of manufacturer on implied warranty of fitness does not extend to one who merely rents or bails to another personalty purchased from the manufacturer. *Brookshire v. Florida Bendix Co.*, 153 So.2d 55, 58 (Fla. 3d DCA 1963), cert. dismissed, 163 So.2d 881 (Fla. 1964), *disapproved of on other grounds by W. E. Johnson Equip. Co. v. United Airlines Inc.*, 238 So.2d 98 (Fla. 1970).

§5:10.5 Related Matters

1. **Attorney Fees:** Magnuson-Moss (co-extensive with a right of action created by the Florida Uniform Commercial Code) authorizes recovery of attorney fees in an action where the consumer is damaged by a supplier's failure to comply with any obligation under an implied warranty and provides the consumer may bring a civil action for damages and other legal and equitable relief in any state court. *Tuppens, Inc. v. Bayliner Marine Corp.*, 541 So.2d 1281 (Fla. 4th DCA 1989).

2. **Common Law:** The Uniform Commercial Code, in codifying the law of sales, did nothing to restrict the common-law doctrine of implied warranty under state law. *Cardozo v. True*, 342 So.2d 1053 (Fla. 2d DCA 1977), *cert. denied*, 353 So.2d 674 (Fla. 1977).

3. **Contract:** "A warranty, whether express or implied, is fundamentally a contract." *Navajo Circle, Inc. v. Dev. Concepts Corp.,* 373 So.2d 689, 692 (Fla. 2d DCA 1979), *disapproved of on other grounds by Casa Clara Condo. Ass'n, Inc. v. Charley Toppino and Sons, Inc.,* 620 So.2d 1244 (Fla. 1993).

4. **Defect:** "Without proof of a defect, no cause of action for breach of implied warranty can be maintained." *Lauck v. Publix Market, Inc.*, 335 So.2d 589, 591 (Fla. 3d DCA 1976).

5. **Disclaimer of Warranties:** To be effective, seller's disclaimer of warranties in sale of consumer goods must be part of the basis of bargain between the parties. *Knipp v. Weinbaum*, 351 So.2d 1081 (Fla. 3d DCA 1977), *cert. denied*, 357 So.2d 188 (Fla. 1978). To exclude a warranty of fitness for a particular purpose, the language must express that there are no warranties which extend beyond the description on the face of the agreement. *Family Boating & Marine Centers of Florida, Inc. v. Bell*, 779 So.2d 402, 403 (Fla. 2d DCA 2000). Where a dealer has properly disclaimed all warranties, the delivering, presenting, or explaining of a manufacturer's warranty, without more, does not render the dealer a co-warrantor by adoption. *Perez v. Freightliner Trucks of South Florida, Inc*., 802 So.2d 515 (Fla. 3d DCA 2001); *Equico Lessors, Inc. v. Ramadan*, 493 So.2d 516, 518 (Fla. 1st DCA 1986).

6. **Intent:** The intent of the seller is not controlling as to whether a warranty arises. *Carter Hawley Hale Stores, Inc. v. Conley*, 372 So.2d 965 (Fla. 3d DCA 1979).

7. **Privity:** "The breach of implied warranty counts cannot stand because they fail to allege an essential element of the action, to wit: privity of contract between the plaintiff and the defendant." *Affiliates for Evaluation and Therapy, Inc. v. Viasyn Corp.,* 500 So.2d 688, 693 (Fla. 3d DCA 1987). *See also Weiss v. Johansen*, 898 So.2d 1009, 1012 (Fla. 4th DCA 2005); *but see Rentas v. DaimlerChrysler Corp.*, 936 So.2d 747 (Fla. 4th DCA 2006) (finding that Magnuson-Moss Warranty Act did not require require privity for a written warranty, especially where there were no limitations placed in the original written warranty, but breach of implied warranty claim did require privity).

§5:10.6 Standard Jury Instructions — Product Liability

The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective:

PL 1 express warranty

if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction], on which (name) relied in the [purchase and] use of the product. [Such a representation must be one of fact, rather than opinion.]

PL 2 implied warranty of merchantability

if it is not reasonably fit for the uses intended or reasonably foreseeable by (defendant).

PL 3 implied warranty of fitness for particular purpose

if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which the purchaser bought the product in reliance on the judgment of (defendant).

PL 4 strict liability (manufacturing flaw)

if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

PL 5 strict liability (design defect)

if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].

If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).

[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)]. [However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

See Standard Jury Instructions—Civil Cases, 872 So.2d 893 (Fla. 2004).

§5:20 WARRANTY, COMMON LAW

§5:20.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§5:20.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

See Also

1. *Posey v. Ford Motor Company,* 128 So.2d 149, 150 (Fla. 1st DCA 1961) ("While the complaint may not be a model of perfection, it clearly alleges that each of the defendants warranted and represented to plaintiff that the tractor purchased by plaintiff was well constructed without defective parts and was suitable for use as a general farm tractor, that plaintiff was thereby induced to purchase it from the defendants, and that said warranties and representations were breached to the injury of the plaintiff."), *same case*, 138 So.2d 781 (Fla. 1st DCA 1962).

§5:20.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§5:20.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§5:20.1.4 Elements of Cause of Action — 4th DCA

When a pleader seeks to allege a cause of action based on warranty, the complaint should expressly set forth the following essential allegations:

1. Facts in respect to sale of the product or other circumstances giving rise to warranty, express or implied, identifying the type of warranties accompanying the pertinent transactions involved.
2. Reliance upon the representations by the seller or skill and judgment of the seller where the action is based upon express warranty or warranty of fitness for a particular purpose.
3. Circumstances of the injury as caused by the breach of warranty.
4. Notice of breach of warranty.
5. Injuries sustained and damages.

Source

Weimar v. Yacht Club Point Estates, Inc., 223 So.2d 100, 104 (Fla. 4th DCA 1969).

See Also

1. *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.,* 351 So. 2d 351, 353 (Fla. 4th DCA 1977).
2. *In re Masonite Corp. Hardboard Siding Products Liability Litigation*, 21 F.Supp.2d 593, 598 (E.D.La. 1998) (To prevail on its warranty claims, plaintiff must prove five elements: (1) facts respecting sale of a product supporting a warranty, either express or implied; (2) reliance on representations of the seller constituting the warranty; (3) notice of breach; (4) injuries caused by the breach; and (5) damages. *Weimar v. Yacht Club Point Estates, Inc.,* 223 So.2d 100, 104 (Fla. 4th DCA 1969)).

§5:20.1.5 Elements of Cause of Action — 5th DCA

[A plaintiff] must prove four elements in order to recover under a theory of implied warranty: (1) he or she was a foreseeable user of the product; (2) the product was being used in the intended manner at the time of the injury; (3) the product was defective when transferred from the warrantor; and (4) the defect caused his or her injury.

Source

Masci Corp. v. Fortiline, Inc., 202 So.3d 434, 435 (Fla. 5th DCA 2016), *quoting McCarthy v. Fla. Ladder Co.*, 295 So.2d 707, 709 (Fla. 2d DCA 1974).

§5:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(c), (e), (p).

§5:20.3 References

1. 41A Fla. Jur. 2d *Products Liability* §§39–73, 151 (2004).
2. 45 Fla. Jur. 2d *Sales and Exchanges of Goods* §§152–182 (2001).
3. 67A Am. Jur. 2d *Sales* §§625–794, 1128–1131 (2003).
4. 77A C.J.S. *Sales* §§236–324 (1994).

§5:20.4 Defenses

1. **Contributory Negligence:** In an action upon implied warranty the defense of contributory or comparative negligence may be interposed, for the injured person is required to exercise "ordinary due care." *West v. Caterpillar Tractor Company, Inc.*, 336 So.2d 80, 91 (Fla. 1976).

2. **Other Defenses** Defenses include wear and tear, coupled with lapse of time and the propensity of the product to degenerate; misuse of the product; and intervening cause. *Creviston v. General Motors Corp.*, 225 So.2d 331, 334 (Fla. 1969). *See also Standard Havens Products, Inc. v. Benitez*, 648 So.2d 1192, 1196 (Fla. 1994).

§5:20.5 Related Matters

1. **Contract:** "A warranty, whether express or implied, is fundamentally a contract." *Navajo Circle, Inc. v. Dev. Concepts Corp.,* 373 So.2d 689, 692 (Fla. 2d DCA 1979), *disapproved of on other grounds by Casa Clara Condo. Ass'n, Inc. v. Charley Toppino and Sons, Inc.,* 620 So.2d 1244 (Fla. 1993).

2. **Defect:** "Without proof of a defect, no cause of action for breach of implied warranty can be maintained." *Lauck v. Publix Market, Inc.*, 335 So.2d 589, 591 (Fla. 3d DCA 1976).

3. **Privity:** "[T]he breach of implied warranty counts cannot stand because they fail to allege an essential element of the action, to wit: privity of contract between the plaintiff and the defendant." *Affiliates for Evaluation and Therapy, Inc. v. Viasyn Corp.,* 500 So.2d 688, 693 (Fla. 3d DCA 1987); *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 38 (Fla. 1988).

4. **Reliance:** Although at first blush it appears that reliance is required to recover for breach of an express warranty, *Spolski General Contractor, Inc. v. Jett-Aire Corp. Aviation Management*, 637 So.2d 968 (Fla. 5th DCA 1994); *Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d 100, 104 (Fla. 4th DCA 1969), the reliance element must be confined under Florida law to cases which do not involve express written warranties. In both *Spolski* and *Weimar*, reliance was discussed only in the context of the statutory scenario for transforming a seller's affirmations and representations into a warranty; these cases did not involve written warranties. *Lennar Homes, Inc. v. Masonite Corp*., 32 F.Supp.2d 396, 398 (E.D.La. 1998).

§5:30 WARRANTY, CONDOMINIUM STATUTORY

§5:30.1 Florida Statutes

Florida Statutes §718.203 Warranties.

(1) The developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended as follows:
   (a) As to each unit, a warranty for 3 years commencing with the completion of the building containing the unit.
   (b) As to the personal property that is transferred with, or appurtenant to, each unit, a warranty which is for the same period as that provided by the manufacturer of the personal property, commencing with the date of closing of the purchase or the date of possession of the unit, whichever is earlier.
   (c) As to all other improvements for the use of unit owners, a 3-year warranty commencing with the date of completion of the improvements.
   (d) As to all other personal property for the use of unit owners, a warranty which shall be the same as that provided by the manufacturer of the personal property.
   (e) As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, except mechanical elements serving only one unit, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.

(f) As to all other property which is conveyed with a unit, a warranty to the initial purchaser of each unit for a period of 1 year from the date of closing of the purchase or the date of possession, whichever occurs first.

(2) The contractor, and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows:
   (a) For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit.
   (b) For a period of 1 year after completion of all construction, a warranty as to all other improvements and materials.

(3) "Completion of a building or improvement" means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and in jurisdictions where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

(4) These warranties are conditioned upon routine maintenance being performed, unless the maintenance is an obligation of the developer or a developer-controlled association.

(5) The warranties provided by this section shall inure to the benefit of each owner and his or her successor owners and to the benefit of the developer.

(6) Nothing in this section affects a condominium as to which rights are established by contracts for sale of 10 percent or more of the units in the condominium by the developer to prospective unit owners prior to July 1, 1974, or as to condominium buildings on which construction has been commenced prior to July 1, 1974.

(7) Residential condominiums may be covered by an insured warranty program underwritten by a licensed insurance company registered in this state, provided that such warranty program meets the minimum requirements of this chapter; to the degree that such warranty program does not meet the minimum requirements of this chapter, such requirements shall apply.

Fla. Stat. §718.20(1) - (7) (2015). (Current through the 2018 Second Regular Session of the 25th Legislature.)

§5:30.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(c); *Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n*, 658 So.2d 922, 925 (1994).

§5:30.3 References

1. Florida Statutes §718.1255(4)(a) (2005) (nonbinding arbitration).
2. *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,* 654 So.2d 911 (Fla. 1995), *on remand*, 666 So.2d 1053 (Fla. 4th DCA 1996), *on remand*, 683 So.2d 509 (Fla. 4th DCA 1996).
3. *David v. B & J Holding Corp.,* 349 So.2d 676 (Fla. 3d DCA 1977).
4. H. Hugh McConnell, *Diminished Capacity - Owners' Ability to Sue for Construction Defects in Florida*, 71 Fla. Bar J. 64 (June 1997).
5. Steven B. Lesser and Robert J. Manne, *Discovery in Construction Litigation*, 62 Fla. Bar J. 17 (Dec. 1988).
6. Mark Somerstein, *The Application of Florida's Statutory Warranty to Commercial Condominiums*, 56 Fla. Bar J. 579 (June 1982).
7. David St. John and Rodney L. Tennyson, *Construction Defects in Condominium Conversions—the legal issues*, 55 Fla. Bar J. 127 (Feb. 1981).

§5:30.4 Related Matters

1. **Builder's Risk Insurance:** The Florida Supreme Court has very recently said that a builder's risk policy is not a liability policy: "Builder's risk insurance is a type of property insurance coverage, not liability insurance or warranty coverage. The purpose of this type of insurance is to provide protection for fortuitous loss sustained during the construction of the building." *Swire Pacific Holdings, Inc. v. Zurich Ins.*

Co., 845 So.2d 161, 165 (Fla. 2003). Further, as the Third District explained in *Gerrits,* a builder's risk policy is a first-party contract and does not indemnify a third party, such as a condominium association, for faulty workmanship. *U.S. Fire Ins. Co. v. Sovran Constr. Co., Inc*., 854 So.2d 221, 222 (Fla. 1st DCA 2003), *rev. denied*, 866 So.2d 1212 (Fla. 2004).

2. **Comprehensive General Liability Policy:** The Florida Supreme Court in *LaMarche v. Shelby Mutual Insurance Co.*, 390 So.2d 325 (Fla. 1980), analyzed the purpose of the comprehensive general liability policy as follows: The majority view holds that the purpose of this comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product. *Home Owners Warranty Corp. v. Hanover Ins. Co*., 683 So.2d 527, 529 (Fla. 3d DCA 1996), *rev. denied*, 695 So.2d 700 (Fla. 1997).

3. **Hidden Defects:** *See generally* Jeffrey A. Grebe, *What Is "As Is" in Florida?,* 30 Stetson L. Rev. 875 (2001). An "as is" clause in a contract for the sale of residential real property does not waive the duty imposed by *Johnson v. Davis* to disclose hidden defects in the property. *See Levy v. Creative Constr. Servs. of Broward, Inc.*, 566 So.2d 347 (Fla. 3d DCA 1990); *Rayner v. Wise Realty Co. of Tallahassee*, 504 So.2d 1361, 1364 (Fla. 1st DCA 1987). Therefore, the Buyers' claim against the Listing Broker for nondisclosure of hidden defects under *Johnson v. Davis* stated a cause of action. *Syvrud v. Today Real Estate, Inc*., 858 So.2d 1125, 1130 (Fla. 2d DCA 2003).

4. **Materials Supplied:** "Materials supplied," as used in contractor's statutory warranty as to fitness of work performed or materials supplied, does not include manufactured personal property covered by developer's warranty of merchantability and fitness for intended purpose; thus, contractor does not guarantee operating efficiency or design of items such as air conditioners. Contractor's statutory warranty of fitness applies to manufactured items such as air conditioning units supplied by contractor for use in building project, but contractor does not warrant those items for specific purpose under provisions of statute governing statutory implied warranties of fitness as to work performed or materials supplied. *Leisure Resorts, Inc. v. Frank J. Rooney, Inc*., 654 So.2d 911, 912 (Fla. 1995).

§5:40 WARRANTY, IMPLIED

§5:40.1 Fla.R.Civ.P. Form 1.949

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. Defendant manufactured a product known and described as (describe product).
3. Defendant warranted that the product was reasonably fit for its intended use as (describe intended use).
4. On _____(date)_____, at _____ in _____ County, Florida, the product (describe the occurrence and defect that resulted in injury) while being used for its intended purpose, causing injuries to plaintiff who was then a user of the product.
5. As a result plaintiff was injured in and about his/her body and extremities, suffered pain therefrom, incurred medical expense in the treatment of the injuries, and suffered physical handicap, and his/her working ability was impaired; the injuries are either permanent or continuing in their nature and plaintiff will suffer the losses and impairment in the future.

WHEREFORE plaintiff demands judgment for damages against defendant.

Committee Notes: 1972 Amendment. This form is changed to require an allegation of the defect in paragraph 4. Contentions were made in trial courts that the form as presently authorized eliminated the substantive requirement

that the plaintiff prove a defect except under those circumstances when substantive law eliminates the necessity of such proof. Paragraph 4 is amended to show that no substantive law change was intended.

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§5:40.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(c)(e).

§5:40.3 References

1. 41A Fla. Jur. 2d *Products Liability* §§39–51 (2004).
2. 45 Fla. Jur. 2d *Sales and Exchanges of Goods* §§167–173 (2001).
3. Florida Statutes §681.104 (2005) (Nonconformity of Motor Vehicles).
4. Jeffrey A. Grebe, *What Is "As Is" in Florida?,* 30 Stetson L. Rev. 875 (2001).
5. Duane A. Daiker, Note, *Florida's Motor Vehicle Warranty Enforcement Act: Lemon-Aid for the Consumer,* 45 Fla. L. Rev. 253 (1993).
6. 67A Am. Jur. 2d *Sales* §§676–728 (2003).
7. 77A C.J.S. *Sales* §§252–262 (1994).

§5:40.4 Defenses

1. **Contributory Negligence:** In an action upon implied warranty the defense of contributory or comparative negligence may be interposed, for the injured person is required to exercise "ordinary due care." *West v. Caterpillar Tractor Company, Inc.*, 336 So.2d 80, 91 (Fla. 1976).

2. **Defect:** Without proof of a defect, no cause of action for breach of implied warranty can be maintained. *Lauck v. Publix Market, Inc.*, 335 So.2d 589, 591 (Fla. 3d DCA 1976).

3. **Delivering or Presenting the Warranty:** Delivering, presenting, or explaining manufacturer's warranty, without more, does not render dealer a cowarrantor by adoption. *Motor Homes of America, Inc. v. O'Donnell*, 440 So.2d 422 (Fla. 4th DCA 1983), *rev. denied*, 451 So.2d 849 (Fla. 1984).

4. **Other Defenses:** Defenses include wear and tear, coupled with lapse of time and the propensity of the product to degenerate; misuse of the product; and intervening cause. *Creviston v. General Motors Corp.*, 225 So.2d 331, 334 (Fla. 1969). *See also Standard Havens Products, Inc. v. Benitez*, 648 So.2d 1192, 1196 (Fla. 1994).

5. **Privity:** The breach of implied warranty counts cannot stand because they fail to allege an essential element of the action, to wit: privity of contract between the plaintiff and the defendant. *Affiliates for Evaluation and Therapy, Inc. v. Viasyn Corp.,* 500 So.2d 688, 693 (Fla. 3d DCA 1987); *Kramer v. Piper Aircraft Corp.*, 520 So.2d 37, 39 (Fla. 1988); *Weiss v. Johansen*, 898 So.2d 1009, 1012 (Fla. 4th DCA 2005); *Rentas v. DaimlerChrysler Corp.*, 936 So.2d 747 (Fla. 4th DCA 2006); *Mesa v. BMW of North America, LLC*, 904 So.2d 450, 458 (Fla. 3d DCA 2005). The adoption of the doctrine of strict liability in tort does not result in the demise of implied warranty. If a user is injured by a defective product, but the circumstances do not create a contractual relationship with a manufacturer, then the vehicle for recovery could be strict liability in tort. If there is a contractual relationship with the manufacturer, the vehicle of implied warranty remains. *West v. Caterpillar Tractor Co., Inc*., 336 So.2d 80, 91 (Fla. 1976).

§5:40.5 Related Matters

1. **Common Law:** The Uniform Commercial Code, in codifying the law of sales, did nothing to restrict the common-law doctrine of implied warranty under state law. *Cardozo v. True*, 342 So.2d 1053 (Fla. 2d DCA 1977), *cert. denied*, 353 So.2d 674 (Fla. 1977).

2. **Construction:** As to original purchasers, there exists an implied warranty of substantial compliance with plans and specifications approved by the governmental authority, of compliance with applicable building codes, and of fitness and merchantability. This does not mean that the developer must deliver a perfect house. But it does mean that major defects, as determined by the trier of fact, entitle the original buyer to damages to remedy or repair the defects. "[I]mplied warranties of fitness and merchantability do extend to the purchasers of new homes and new condominium units and likewise liability has been predicated upon the breach of the building contract in the form of deviation from specifications, such deviation resulting in a defective condition. … [F]lorida as with the sale of other commodities has adopted the rule of law that implied warranties of fitness and merchantability extend to the purchase of new condominium units from builder-developers." *David v. B&J Holding Corp.*, 349 So.2d 676, 677-78 (Fla. 3d DCA 1977).

3. **Contract:** A warranty, whether express or implied, is fundamentally a contract. *Navajo Circle, Inc. v. Dev. Concepts Corp.,* 373 So.2d 689, 692 (Fla. 2d DCA 1979), *disapproved of on other grounds by Casa Clara Condo. Ass'n, Inc. v. Charley Toppino and Sons, Inc.,* 620 So.2d 1244 (Fla. 1993).

4. **Implied Warranty of Authority:** An action for breach of implied warranty of authority was first adopted by the Florida Supreme Court in *Tedder v. Riggin*, 61 So. 244, 245 (Fla. 1913), wherein the court described the cause of action in the following manner: In an action on an implied warranty of authority to act as agent in making a contract, the action is not on the contract purported to have been authorized, but it is on the unauthorized conduct of the supposed agent, who acted under claim of authority. The object is to recover damages for the actual losses sustained by the plaintiff as the natural and proximate result of the breach by the defendant of his implied warranty that he was authorized to make the contract. Whether it be ex contractu or ex delicto, the gist of the action is the misrepresentation made by the defendant to the plaintiff's pecuniary injury; and the purpose of the action is compensation. In such cases, the rule of compensation seeks to put the party misled back into the condition in which he was before he acted on the asserted authority of the defendant to make a contract for another. *See* 2 Sedgwick on Damages, §439; *Margolis v. Andromides*, 732 So.2d 507, 509 (Fla. 4th DCA 1999), *rev. denied*, 770 So.2d 159 (Fla. 2000).

5. **Magnuson-Moss Act:** The Magnuson-Moss Act permits a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract to file suit for damages. 15 U.S.C. §2310(d)(1). The Act was intended to increase the enforceability of warranties. *Dekelaita v. Nissan Motor Corp.*, 799 N.E.2d 367, 369 (2003), *appeal denied*, 807 N.E.2d 974 (2004), and protect the ultimate user of the product. *Peterson v. Volkswagen of Am., Inc.*, 679 N.W.2d 840, 846 (2004), *rev. granted,* 684 N.W.2d 136 (2004*). O'Connor v. BMW of North America, LLC*, 905 So.2d 235, 236 (Fla. 2d DCA 2005).

6. **Viable Cause of Action:** The U.C.C. in codifying the law of sales did nothing to restrict the common law doctrine of implied warranty under Florida law. To the contrary, the code raised the dignity of the doctrine to statute and made it a certainty that warranties would be implied in accordance with the statutory design where the seller is a merchant with respect to goods of that particular kind being sold. *Cardozo v. True*, 342 So.2d 1053, 1057 (Fla. 2d DCA 1977), *cert. denied*, 353 So.2d 674 (Fla. 1977). *See also West v. Caterpillar Tractor Company, Inc.*, 336 So.2d 80, 88 (Fla. 1976).

§5:40.6 Standard Jury Instructions — Product Liability

The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective:

PL 1 express warranty

if it does not conform to representations of fact made by (defendant), orally or in writing, in connection with the [sale] [transaction], on which (name) relied in the [purchase and] use of the product. [Such a representation must be one of fact, rather than opinion.]

PL 2 implied warranty of merchantability

if it is not reasonably fit for the uses intended or reasonably foreseeable by (defendant).

PL 3 implied warranty of fitness for particular purpose

if it is not reasonably fit for the specific purpose for which (defendant) knowingly sold the product and for which the purchaser bought the product in reliance on the judgment of (defendant).

PL 4 strict liability (manufacturing flaw)

if it is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

PL 5 strict liability (design defect)

if by reason of its design the product is in a condition unreasonably dangerous to [the user] [a person in the vicinity of the product] and the product is expected to and does reach the user without substantial change affecting that condition.

A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs the benefits].

If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).

[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for (claimant) and against (defendant)]. [However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues)].

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

See Standard Jury Instructions—Civil Cases, 872 So.2d 893 (Fla. 2004).

§5:50 WARRANTY, PET DEALER'S STATUTORY

§5:50.1 Florida Statutes

Florida Statutes §828.29: Dogs and cats transported or offered for sale; health requirements; consumer guarantee.

(5) If, within 14 days following the sale by a pet dealer of an animal subject to this section, a licensed veterinarian of the consumer's choosing certifies that, at the time of the sale, the animal was unfit for purchase due to illness or disease, the presence of symptoms of a contagious or infectious disease, or the presence of internal or external parasites, excluding fleas and ticks; or if, within 1 year following the sale of an animal subject to this section, a licensed veterinarian of the consumer's choosing certifies such animal to be unfit for purchase due to a congenital or hereditary disorder which adversely affects the health of the animal; or if, within 1 year following the sale of an animal subject to this section, the breed, sex, or health of such animal is found to have been misrepresented to the consumer, the pet dealer shall afford the consumer the right to choose one of the following options:

(a) The right to return the animal and receive a refund of the purchase price, including the sales tax, and reimbursement for reasonable veterinary costs directly related to the veterinarian's examination and

certification that the dog or cat is unfit for purchase pursuant to this section and directly related to necessary emergency services and treatment undertaken to relieve suffering;

(b) The right to return the animal and receive an exchange dog or cat of the consumer's choice of equivalent value, and reimbursement for reasonable veterinary costs directly related to the veterinarian's examination and certification that the dog or cat is unfit for purchase pursuant to this section and directly related to necessary emergency services and treatment undertaken to relieve suffering; or

(c) The right to retain the animal and receive reimbursement for reasonable veterinary costs for necessary services and treatment related to the attempt to cure or curing of the dog or cat.

Reimbursement for veterinary costs may not exceed the purchase price of the animal. The cost of veterinary services is reasonable if comparable to the cost of similar services rendered by other licensed veterinarians in proximity to the treating veterinarian and the services rendered are appropriate for the certification by the veterinarian.

(6) A consumer may sign a waiver relinquishing his or her right to return the dog or cat for congenital or hereditary disorders. In the case of such waiver, the consumer has 48 normal business hours, excluding weekends and holidays, in which to have the animal examined by a licensed veterinarian of the consumer's choosing. If the veterinarian certifies that, at the time of sale, the dog or cat was unfit for purchase due to a congenital or hereditary disorder, the pet dealer must afford the consumer the right to choose one of the following options:

(a) The right to return the animal and receive a refund of the purchase price, including sales tax, but excluding the veterinary costs related to the certification that the dog or cat is unfit; or

(b) The right to return the animal and receive an exchange dog or cat of the consumer's choice of equivalent value, but not a refund of the veterinary costs related to the certification that the dog or cat is unfit.

(7) A pet dealer may specifically state at the time of sale, in writing to the consumer, the presence of specific congenital or hereditary disorders, in which case the consumer has no right to any refund or exchange for those disorders.

(8) The refund or exchange required by subsection (5) or subsection (6) shall be made by the pet dealer not later than 10 business days following receipt of a signed veterinary certification as required in subsection (5) or subsection (6). The consumer must notify the pet dealer within 2 business days after the veterinarian's determination that the animal is unfit. The written certification of unfitness must be presented to the pet dealer not later than 3 business days following receipt thereof by the consumer.

(9) An animal may not be determined unfit for sale on account of an injury sustained or illness contracted after the consumer takes possession of the animal. A veterinary finding of intestinal or external parasites is not grounds for declaring a dog or cat unfit for sale unless the animal is clinically ill because of that condition.

(10) If a pet dealer wishes to contest a demand for veterinary expenses, refund, or exchange made by a consumer under this section, the dealer may require the consumer to produce the animal for examination by a licensed veterinarian designated by the dealer. Upon such examination, if the consumer and the dealer are unable to reach an agreement that constitutes one of the options set forth in subsection (5) or subsection (6) within 10 business days following receipt of the animal for such examination, the consumer may initiate an action in a court of competent jurisdiction to recover or obtain reimbursement of veterinary expenses, refund, or exchange.

(11) This section does not in any way limit the rights or remedies that are otherwise available to a consumer under any other law.

(12) Every pet dealer who sells an animal to a consumer must provide the consumer at the time of sale with a written notice, printed or typed, which reads as follows:

> It is the consumer's right, pursuant to section 828.29, Florida Statutes, to receive a certificate of veterinary inspection with each dog or cat purchased from a pet dealer. Such certificate shall list all vaccines and deworming medications administered to the animal and shall state that the animal has been examined by a Florida-licensed veterinarian who certifies that, to the best of the veterinarian's knowledge, the animal was found to have been healthy at the time of the veterinary examination. In the event that the consumer purchases the animal and finds it to have been unfit for purchase as provided in section 828.29(5), Florida Statutes, the consumer must notify the pet dealer within 2 business days of the veterinarian's determination that the animal was unfit. The consumer has the right to retain, return, or exchange the animal and receive reimbursement for certain related veterinary services rendered to the animal, subject to the right of the dealer to have the animal examined by another veterinarian.

(13) For the purposes of subsections (5)-(12) and (16), the term "pet dealer" means any person, firm, partnership, corporation, or other association which, in the ordinary course of business, engages in the sale of more than two litters, or 20 dogs or cats, per year, whichever is greater, to the public. This definition includes breeders of animals who sell such animals directly to a consumer.

Fla. Stat. §828.29(5) – (17) (2002). (Current through the 2018 Second Regular Session of the 25th Legislature.)

Author's Notes:

1. To insure compliance with all technical requirements of the statute, please review, in detail, the full statutory text.
2. Due to the numerous technical requirements in the statute and the lack of case law interpreting the statute, it is suggested that the plaintiff consider including causes of action for breach of contract and/or breach of UCC implied warranty of merchantability and/or breach of UCC implied warranty of fitness for particular purpose. *See* Florida Statutes §§672.104(1), 672.313, 672.314, 672.315, 672.316, 672.317, 672.607, 672.715 and 672.719.

§5:50.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(e),(p).

§5:50.3 References

1. 45 Fla. Jur. 2d *Sales and Exchanges of Goods* §§152–182 (2001).
2. Annotation, *Elements and Measure of Damages for Breach of Warranty in Sale of Horse*, 91 A.L.R.3d 419 (1979).
3. Annotation, *Measure and Elements of Recovery of Buyer Rescinding Sale of Domestic Animal for Seller's Breach of Warranty*, 35 A.L.R.2d 1273 (1954).
4. Mary Randolph, *Dog Law* (1989) (Library of Congress Catalog Card Number 88-063101; ISBN 87337-078-3). This book is a self-help book for dog owners.

See Also

1. *Dempsey v. Rosenthal*, 468 N.Y.S.2d 441 (N.Y. Civ. Ct. 1983) (action against a kennel for breach of implied warranty of merchantability and fitness for a particular purpose in the sale of a poodle).
2. *O'Brien v. Wade*, 540 S.W.2d 603 (Mo. Ct. App. 1976) (action for breach of implied warranty of fitness of a dog for use as a retriever).
3. *Whitmer v. Schneble*, 331 N.E.2d 115, 118 (Ill. 1975) ("(T)he law will not lend itself to the creation of an implied warranty which patently runs counter to the experience of mankind or known forces of nature. It will not read into any sale or bailment a condition or proviso which is unreasonable, impossible or absurd. … There is no warranty by the seller that the dog's personality will not change in the future.").
4. *Whitehouse v. Lange*, 910 P.2d 801 (Idaho Ct. App. 1996) (action alleging breach of implied warranty of fitness for particular purpose and implied warranty of merchantability in the sale of a horse for breeding purposes).
5. *Reimschiissel v. Russell*, 649 P.2d 26 (Utah 1982) (action alleging breach of implied warranty of merchantability in the sale of a cow).

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CHAPTER 6

INDEMNITY ACTIONS

§6:10 INDEMNITY, COMMON LAW
- §6:10.1 Elements of Cause of Action — Florida Supreme Court
  - §6:10.1.1 Elements of Cause of Action — 1st DCA
  - §6:10.1.2 Elements of Cause of Action — 2nd DCA
  - §6:10.1.3 Elements of Cause of Action — 3rd DCA
  - §6:10.1.4 Elements of Cause of Action — 4th DCA
  - §6:10.1.5 Elements of Cause of Action — 5th DCA
- §6:10.2 Statute of Limitations
- §6:10.3 References
- §6:10.4 Defenses
- §6:10.5 Related Matters

§6:20 INDEMNITY, CONTRACTUAL
- §6:20.1 Elements of Cause of Action — Florida Supreme Court
  - §6:20.1.1 Elements of Cause of Action — 1st DCA
  - §6:20.1.2 Elements of Cause of Action — 2nd DCA
  - §6:20.1.3 Elements of Cause of Action — 3rd DCA
  - §6:20.1.4 Elements of Cause of Action — 4th DCA
  - §6:20.1.5 Elements of Cause of Action — 5th DCA
- §6:20.2 Statute of Limitations
- §6:20.3 References
- §6:20.4 Defenses
- §6:20.5 Related Matters

§6:30 INDEMNITY, IMPLIED
- §6:30.1 Elements of Cause of Action — Florida Supreme Court
  - §6:30.1.1 Elements of Cause of Action — 1st DCA
  - §6:30.1.2 Elements of Cause of Action — 2nd DCA
  - §6:30.1.3 Elements of Cause of Action — 3rd DCA
  - §6:30.1.4 Elements of Cause of Action — 4th DCA
  - §6:30.1.5 Elements of Cause of Action — 5th DCA
- §6:30.2 Statute of Limitations
- §6:30.3 References
- §6:30.4 Defenses
- §6:30.5 Related Matters

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§6:10 INDEMNITY, COMMON LAW

§6:10.1 Elements of Cause of Action — Florida Supreme Court

First, the party seeking indemnification must be without fault, and its liability must be vicarious and solely for the wrong of another. … Second, indemnification can only come from a party who was at fault. … Additionally, Florida courts have required a special relationship between the parties in order for common law indemnification to exist.

Source

Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 642 (Fla. 1999).

See Also

1. Indemnity is generally defined as the "duty to make good any loss, damage, or liability incurred by another" or "[t]he right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty." *Wendt v. La Costa Beach Resort Cond. Assoc.*, 64 So.3d 1228, 1230 (Fla. 2011) (holding that Fla. Stat. section 607.0850 provides for indemnification in cases in which a corporation has sued its own director); *see also Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490, 493 (Fla. 1979). Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the *whole* fault is in the one against whom indemnity is sought. … A weighing of the relative fault of tortfeasors has no place in the concept of indemnity for the one seeking indemnity must be without fault. *Seaboard Coast Line Railroad Co. v. Smith; Stuart v. Hertz Corporation.* Indemnity can only be applied where the liability of the person seeking indemnity is solely constructive or derivative and only against one who, because of his act, has caused such constructive liability to be imposed.
2. Compare *State of Florida, Department of Transportation v. Southern Bell Telephone and Telegraph Company, Inc.*, 635 So.2d 74, 77 (Fla. 1st DCA 1994).

§6:10.1.1 Elements of Cause of Action — 1st DCA

In order to prevail on a common law indemnity claim, the following two-pronged test must be satisfied: (1) the party seeking indemnity (the indemnitee) must be without fault and its liability must be solely vicarious for the wrongdoing of another; and (2) the party against whom indemnity is sought (the indemnitor) must be wholly at fault.

Source

Heapy Engineering, LLP v. Pure Lodging, Ltd., 849 So.2d 424, 425 (Fla. 1st DCA 2003).

See Also

1. *Florida Employers Ins. Service Corp. v. Norco, Inc*., 723 So.2d 875, 877 (Fla. 1st DCA 1998) (See dissent).
2. Compare *Paul N. Howard Company v. Affholder, Inc.*, 701 So.2d 402, 403 (Fla. 5th DCA 1997), *connected case*, 721 So.2d 1254 (Fla. 5th DCA 1998).
3. *State of Florida, Department of Transportation v. Southern Bell Telephone and Telegraph Company, Inc.*, 635 So.2d 74, 77 (Fla. 1st DCA 1994).
4. *Federal Insurance Company v. Western Waterproofing Company of America*, 500 So.2d 162, 165, 167 (Fla. 1st DCA 1986) ("… an essential element of a claim for common law indemnity is freedom from active negligence.").

§6:10.1.2 Elements of Cause of Action — 2nd DCA

"Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the whole fault is in the one against whom indemnity is sought." *Houdaille Ind., Inc. v. Edwards*, 374 So.2d 490, 492 (Fla. 1979). Indemnity shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable. *Houdaille.*

Source

Tsafatinos v. Family Dollar Stores of Florida, Inc., 116 So.3d 576, 581 (Fla. 2d DCA 2013).

See Also

1. *Tank Tech, Inc. v. Valley Tank Testing, LLC,* 244 So.3d 383, 395 (Fla. 2d DCA, 2018).
2. *Welch v. Complete Care Corp*., 818 So.2d 645, 649 (Fla. 2d DCA 2002).
3. *Hiller Group, Inc. v. Redwing Carriers, Inc*., 779 So.2d 602, 603 (Fla. 2d DCA 2001).
4. *Dominion of Canada v. State Farm Fire and Cas. Co.*, 754 So.2d 852, 855 (Fla. 2d DCA 2000), *disapproved of on other grounds by Metropolitan Cas. Ins. Co. v. Tepper*, 2 So.3d 209 (Fla. 2009).
5. *Dacryn Corporation v. Peacock*, 630 So.2d 1169, 1170 (Fla. 2d DCA 1993).
6. *Costco Wholesale Corporation v. Tampa Wholesale Liquor Co., Inc.*, 573 So.2d 347, 348 (Fla. 2d DCA 1990).
7. *Castle Construction Company v. Huttig Sash & Door Company*, 425 So.2d 573, 574 (Fla. 2d DCA 1982).

§6:10.1.3 Elements of Cause of Action — 3rd DCA

"Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the *whole* fault is in the one against whom indemnity is sought." *Houdaille Indus., Inc. v. Edwards*, 374 So.2d 490 (Fla. 1979).

Source

Brickell Biscayne Corporation v. WPL Associates, Inc., 671 So.2d 247, 248 (Fla. 3d DCA 1996), *connected case*, 683 So.2d 168 (Fla. 3d DCA 1996), *rev. denied*, 695 So.2d 698 (Fla. 1997).

See Also

1. *Brother's Painting & Pressure Cleaning Corp. v. Curry-Dixon Constr., LLC*, 298 So. 3d 1191, 1194 (Fla. 3d DCA 2020).
2. *National Beverage Corp. v. Costco Wholesale Corp.*, 736 So.2d 142, 144 (Fla. 3d DCA 1999) ("The law is clear that a party seeking common law indemnification must be without fault, and its liability must be vicarious and solely for the wrong of another.").
3. Compare *State of Florida, Department of Transportation v. Southern Bell Telephone and Telegraph Company, Inc.*, 635 So.2d 74, 77 (Fla. 1st DCA 1994).
4. *Brickell Biscayne Corporation v. Morse/Diesel, Incorporated*, 683 So.2d 168, 170 (Fla. 3d DCA 1996), *rev. denied*, 695 So.2d 698 (Fla. 1997) ("Because of the presence of each of the legal prerequisites—including the significant ones (i) that it was claimed that the entire fault for the defective building lay with these appellees and none with the developer and (ii) that contractual relationships existed with the plaintiff—the claim for common law indemnity of the previous settlement was properly maintainable.").
5. *Seitlin & Company v. Phoenix Insurance Company*, 650 So.2d 624, 627 (Fla. 3d DCA 1994).
6. *Robert L. Turchin, Inc. v. Gelfand Roofing, Inc.*, 450 So.2d 554, 556 (Fla. 3d DCA 1984), *petition for rev. denied*, 453 So.2d 1365 (Fla. 1984).
7. *Industrial Waste Service, Inc. v. McDonald's of Homestead, Inc.*, 438 So.2d 151 (Fla. 3d DCA 1983) ("We hold that appellant, Industrial Waste, failed to state a cause of action for indemnification in that it did not allege that it was without fault or that it had the requisite special relationship with McDonald's which would render Industrial vicariously liable for McDonald's negligence.").
8. *Atlantic Coast Development Corporation v. Napoleon Steel Contractors, Inc.*, 385 So.2d 676, 679 (Fla. 3d DCA 1980).
9. *Florida Rock & Sand Company v. Cox*, 344 So.2d 1296, 1298 (Fla. 3d DCA 1977).

§6:10.1.4 Elements of Cause of Action — 4th DCA

In order for a common law indemnity claim to stand, a two-pronged test must be satisfied:

1. the indemnitee must be faultless, and
2. the indemnitee's liability must be solely vicarious for the wrongdoing of another.

Source

Zeiger Crane Rentals, Inc. v. Double A Indus., Inc., 16 So.3d 907, 911 (Fla. 4th DCA 2009).

See Also

1. *Walter Taft Bradshaw & Associates, P.A. v. Bedsole*, 374 So.2d 644, 646 (Fla. 4th DCA 1979).
2. *Safecare Medical Center v. Howard*, 670 So.2d 1020, 1022 (Fla. 4th DCA 1996).
3. *Olivieri v. Florida Association of Public Employee Pension Trustees, Inc.*, 627 So.2d 1335 (Fla. 4th DCA 1993).
4. *General Portland Land Development Company v. Stevens*, 395 So.2d 1296, 1299 (Fla. 4th DCA 1981).
5. *Wendt v. La Costa Beach Resort Condo. Ass'n, Inc.*, 14 So.3d 1179, 1181 (Fla. 4th DCA 2009) ("Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the whole fault is in the one against whom indemnity is sought; it shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable."), *quashed on other grounds,* 64 So.3d 1228 (Fla. 2011) (the plain language of Fla. Stat. §607.0850 does not prohibit indemnification of a corporation's directors by the corporation when the suit against the directors was brought by the corporation itself).

§6:10.1.5 Elements of Cause of Action — 5th DCA

To plead a cause of action for common law indemnity in Florida, the party seeking indemnity must allege three elements: 1) that he is wholly without fault; 2) that the party from whom he is seeking indemnity is at fault; and 3) that he is liable to the injured party only because he is vicariously, constructively, derivatively, or technically liable for the wrongful acts of the party from whom he is seeking indemnity.

Source

Florida Peninsula Ins. Co. v. Ken Mullen Plumbing Inc., 171 So.3d 194, 196 (Fla. 5th DCA 2015).

See Also

1. *Horowitz v. Laske*, 855 So.2d 169, 174 (Fla. 5th DCA 2003).
2. *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co*., 853 So.2d 1072, 1077 (Fla. 5th DCA 2003), *rev. denied*, 884 So.2d 23 (Fla. 2004).
3. *Rosati v. Vaillancourt*, 848 So.2d 467, 470 (Fla. 5th DCA 2003).
4. *Florida Farm Bureau General Insurance Co. v. Insurance Co. of North America*, 763 So.2d 429, 435 (Fla. 5th DCA 2000).
5. *Doles v. Koden International, Inc.*, 779 So.2d 609, 611 (Fla. 5th DCA 2001).
6. *Paul N. Howard Company v. Affholder, Inc.*, 701 So.2d 402, 403 (Fla. 5th DCA 1997), *connected case*, 721 So.2d 1254 (Fla. 5th DCA 1998).
7. Compare *State of Florida, Department of Transportation v. Southern Bell Telephone and Telegraph Company, Inc.*, 635 So.2d 74, 77 (Fla. 1st DCA 1994).

§6:10.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p); *Villa Maria Nursing and Rehab. Ctr., Inc. v. South Broward Hosp. Dist.*, 8 So.3d 1167, 1170 (Fla. 4th DCA 2009).

§6:10.3 References

1. 12 Fla. Jur. 2d *Contribution, Indemnity, and Subrogation* §§32, 41–44 (2005).
2. Fla.R.Civ.P. 1.170(g), 1.180 (2001).
3. 41 Am. Jur. 2d *Indemnity* §§20–22 (2005).
4. 42 C.J.S. *Indemnity* §§29, 52 (1991).

§6:10.4 Defenses

1. **Fault:** "Whitehurst also asserts that FDOT must support the indemnity claim by alleging it is without fault. Although such a pleading requirement holds true for common law indemnity, it does not apply to

contractual indemnity." *State of Florida Department of Transportation v. Whitehurst & Sons, Inc.*, 636 So.2d 101 (Fla. 1st DCA 1994), *rev. denied*, 645 So.2d 456 (Fla. 1994). "Regardless of what specific terms are employed—whether the courts say active-passive or primary-secondary—what they are really speaking of is fault or no fault." *Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490, 493 (Fla. 1979).

2. **Limited Application:** In Florida, actions for indemnity have been restricted to situations involving either a duty, an express contract, or the existence of active and passive negligence. *Atlantic National Bank of Florida v. Vest*, 480 So.2d 1328 (Fla. 2d DCA 1985), *rev. denied*, 491 So.2d 281 (Fla. 1986), *rev. denied*, 508 So.2d 16 (Fla. 1987). *See also Hiller Group, Inc. v. Redwing Carriers, Inc.*, 779 So.2d 602, 603 (Fla. 2d DCA 2001).

3. **Special Relationship:** For the right to indemnification to arise, there must be a special relationship between the parties that gives rise to the technical liability of the would-be indemnitee. The allowance of indemnity is premised upon a special relationship between the primary defendant and the third-party defendant. *Horowitz v. Laske*, 855 So.2d 169, 174 (Fla. 5th DCA 2003). *See also Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 642 (Fla. 1999); *C.B. Contractors LLC v. Allens Steel Prod., Inc.*, 261 So.3d 711, 713 (Fla. 5th DCA 2018); *Dominion of Canada v. State Farm Fire and Cas. Co.*, 754 So.2d 852, 855 (Fla. 2d DCA 2000), *disapproved of on other grounds by Metropolitan Cas. Ins. Co. v. Tepper*, 2 So.3d 209 (Fla. 2009).

§6:10.5 Related Matters

1. **Contribution, Distinction:** There is a fundamental distinction between indemnity and contribution. Traditionally, indemnity has evolved from the concept of express or implied contract while the doctrine of contribution has been based upon equitable rights. In the case of indemnity the defendant is liable for the whole outlay, while in contribution he is chargeable only with a ratable proportion. *Stuart v. Hertz Corporation*, 351 So.2d 703, 706 (Fla. 1977).

2. **Definition:** Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the *whole* fault is in the one against whom indemnity is sought. … It shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable. *Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490, 492 (Fla. 1979).

3. **Express Contract Unnecessary:** The obligation to indemnify need not be based upon an express contract of indemnification but may arise out of implied contractual relations or out of liability imposed by law. *Mims Crane Service, Inc. v. Insley Manufacturing Corp.*, 226 So.2d 836, 839 (Fla. 2d DCA 1969), *cert. denied*, 234 So.2d 122 (Fla. 1969).

4. **Fees and Costs:** It is true that principles of common law indemnity apply to permit the recovery of a judgment, fees and costs which one, such as an employer like the hospital here, is required to expend when it is held liable only because of the vicarious wrongdoing of another. *Amisub of Florida, Inc. v. Billington*, 560 So.2d 1271 (Fla. 3d DCA 1990). *See also Hiller Group, Inc. v. Redwing Carriers, Inc.*, 779 So.2d 602, 603 (Fla. 2d DCA 2001).

5. **Florida Statutes §725.06:** Monetary limitation on extent of indemnification and specific consideration required in construction contracts. *See A-T-O, Inc. v. Garcia*, 374 So.2d 533, 536 (Fla. 3d DCA 1979).

6. **Guaranty, Distinction:** The essential distinction between an indemnity contract and a contract of guaranty is that the promisor in an indemnity contract undertakes to protect the promisee against loss or damage through a liability on the part of latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his

obligation to the promisee. *American Casualty Company of Reading, Pennsylvania v. Bloch*, 176 So.2d 579, 581 (Fla. 3d DCA 1965).

7. **Own Negligence:** For an indemnity agreement to indemnify against indemnitee's own negligence, it must contain a specific provision protecting the indemnitee from liability caused by his own negligence. *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507, 511 (Fla. 1973). *Accord*, *Joseph L. Rozier Machinery, Co. v. Nilo Barge Line, Inc.*, 318 So.2d 557 (Fla. 2d DCA 1975), *cert. denied*, 328 So.2d 843 (Fla. 1976).

8. **Pleading:** A defendant is permitted to file a cross-claim for indemnity prior to the resolution of the defendant's liability to the plaintiff. *Rea v. Barton Protective Services, Inc.*, 660 So.2d 772, 773 (Fla. 4th DCA 1995). The entry of a judgment provides the prerequisite for an indemnification action, not payment of the judgment. *Mellish Enterprises, Inc. v. Weatherford International, Inc.*, 678 So.2d 913, 914 (Fla. 4th DCA 1996).

9. **Subrogation, Distinction:** *Allstate Insurance Company v. Metropolitan Dade County*, 436 So.2d 976, 978 (Fla. 3d DCA 1983), *petition for rev. denied*, 447 So.2d 885 (Fla. 1984) (comparing subrogation and indemnification); *Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc.*, 526 So.2d 116 (Fla. 3d DCA 1988), *rev. denied*, 534 So.2d 402 (Fla. 1988).

10. **Two-Prong Test:** "We believe that *Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490 (Fla. 1974), is limited to our so-called first prong. It was unnecessary for the supreme court to go further once it determined that the only possibility for holding Florida Wire liable was its own active negligence." *General Portland Land Development Company v. Stevens*, 395 So.2d 1296, 1299 (Fla. 4th DCA 1981).

11. **Vouching in Rule:** The general rule of indemnification, the "vouching in rule," is that an indemnitor who has notice of the suit filed against the indemnitee by the injured party and who is afforded an opportunity to appear and defend it is bound by a judgment rendered against the indemnitee as to all material questions determined by the judgment. *Hull & Co. v. McGetrick,* 414 So.2d 243, 244 (Fla. 3d DCA 1982); *Hoskins v. Midland Ins. Co.,* 395 So.2d 1159 (Fla. 3d DCA 1981); *MacArthur v. Gaines,* 286 So.2d 608 (Fla. 3d DCA 1973); *Westinghouse Elec. Corp. v. J.C. Penney Co.,* 166 So.2d 211 (Fla. 1st DCA 1964); *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co*., 853 So.2d 1072, 1079 (Fla. 5th DCA 2003), *rev. denied*, 884 So.2d 23 (Fla. 2004).

§6:20 INDEMNITY, CONTRACTUAL

§6:20.1 Elements of Cause of Action — Florida Supreme Court

A contract for indemnity is an agreement by which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.

Source

Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638, 643 (Fla. 1999).

See Also

1. *Royal Indem. Co. v. Knott,* 136 So. 474, 479 (Fla. 1931).

§6:20.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

See Also

Coastal Cmty. Bank v. Jones, 23 So.3d 757, 759 (Fla. 1st DCA 2009) ("Under Florida law, a contract to pay attorney fees is a contract for indemnity; such provisions are meant to indemnify a party, such as the holder of a note and mortgage, for money spent to protect its interest.").

§6:20.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

See Also

1. *Metropolitan Dade County v. Florida Aviation Fueling Company, Inc.*, 578 So.2d 296, 298 (Fla. 3d DCA 1991), *rev. denied*, 589 So.2d 290 (Fla. 1991), *rev. denied*, 589 So.2d 291 (Fla. 1991) ("Under that decision, when a settlement is paid, the party seeking indemnification has the burden to show that the settlement, or portions thereof, fell within the coverage of the indemnity clause. … The question on remand is therefore whether, and to what extent, the settlement was for a claim covered by the indemnification agreement. *See Keller Indus., Inc.*, 429 So.2d at 780. In order to prevail, the County is required to establish (1) that the settlement or a portion thereof was attributable to the vicarious liability claim which, we conclude, was a potentially viable claim as a matter of law, and (2) that the portion of the settlement attributable to the vicarious liability claim was reasonable as to its amount.").
2. *On Target, Inc. v. Allstate Floridian Ins. Co.*, 23 So.3d 180, 183-84 (Fla. 2d DCA 2009) ("In order for an indemnity clause or contract to indemnify against an indemnitee's own negligence, the clause or contract must expressly state that such liability is undertaken by the indemnitor.").

§6:20.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§6:20.1.4 Elements of Cause of Action — 4th DCA

Indemnification "shifts the entire loss from one … to another who should bear the costs" for damages resulting from tortious activity. *Houdaille Indus., Inc. v. Edwards*, 374 So.2d 490, 493 (Fla.1979). Indemnification may be arranged by contract, whereby "the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party." *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 643 (Fla.1999).

Source

Claire's Boutiques v Locastro, 85 So.3d 1192, 1198 (Fla. 4th DCA 2012).

See Also

1. *School Bd. of Broward County v. Pierce Goodwin Alexander & Linville*, 137 So.3d 1059, 1067 (Fla. 4th DCA 2014).
2. *Zeiger Crane Rentals, Inc. v. Double A Indus., Inc.*, 16 So.3d 907, 914 (Fla. 4th DCA 2009) ("Florida courts view with disfavor contracts that attempt to indemnify a party against its own negligence. The parties' contract in this case is enforceable, however, because it expresses in clear and unequivocal terms Double A's intent to indemnify Zeiger against its own or its employees' own wrongful acts. In addition, the parties did not limit the term "negligence" in the contract, so that term should include any kind of negligence, whether simple or gross.").

§6:20.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

See Also

1. *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co*., 853 So.2d 1072, 1077 (Fla. 5th DCA 2003), *rev. denied*, 884 So.2d 23 (Fla. 2004) ("In cases involving contractual indemnity, the terms of the agreement will determine whether the indemnitor is obligated to reimburse the indemnitee for a particular claim.").
2. *Gencor Indus., Inc. v. Fireman's Fund Ins. Co.*, 988 So.2d 1206, 1208 (Fla. 5th DCA 2008) ("Florida law disfavors agreements to indemnify parties against their own wrongful acts; such agreements are not enforceable in the absence of a clear and unequivocal contractual expression of such an intent.").

§6:20.2 Statute of Limitations

Five Years. Fla. Stat. §95.11(2)(b); *Abbott Laboratories, Inc. v. General Elec. Capital*, 765 So.2d 737 (Fla. 5th DCA 2000).

§6:20.3 References

1. 12 Fla. Jur. 2d *Contribution, Indemnity, and Subrogation* §§37–40 (2005).
2. Fla.R.Civ.P. 1.170(g), 1.180 (2001).
3. 41 Am. Jur. 2d *Indemnity* §§1–19 (2005).
4. 42 C.J.S. *Indemnity* §§5–28, 52 (1991).

§6:20.4 Defenses

1. **Consideration:** In order to have indemnification, there must be consideration to support indemnification. *Matey v. Pruitt*, 510 So.2d 351, 353 (Fla. 2d DCA 1987), *rev. denied*, 518 So.2d 1276 (Fla. 1987), *rev. denied*, 520 So.2d 585 (Fla. 1988).

2. **Construction:** An indemnity provision must be construed strictly in favor of the indemnitor when such provision is not given by one in the insurance business but is given as an incident to a contract, the main purpose of which is not indemnification. *Bodon Industries, Inc. v. Brown*, 645 So.2d 33, 36 (Fla. 5th DCA 1994). Indemnity contracts are subject to the general rules of contractual construction; thus an indemnity contract must be construed based on the intentions of the parties. *Dade County School Bd. v. Radio Station WQBA*, 731 So.2d 638, 643 (Fla. 1999).

3. **Contract Required:** Contractual indemnity requires a contract between the paying party and the injuring party. *Allstate Insurance Company v. Metropolitan Dade County*, 436 So.2d 976, 978 (Fla. 3d DCA 1983), *rev. denied*, 447 So.2d 885 (Fla. 1984).

4. **Fault: "**Whitehurst also asserts that FDOT must support the indemnity claim by alleging it is without fault. Although such a pleading requirement holds true for common law indemnity, it does not apply to contractual indemnity." *State of Florida Department of Transportation v. V. E. Whitehurst & Sons, Inc.*, 636 So.2d 101 (Fla. 1st DCA 1994), *rev. denied*, 645 So.2d 456 (Fla. 1994).

5. **Florida Statutes §725.06:** Monetary limitation on extent of indemnification and specific consideration required in construction contracts. *See A-T-O, Inc. v. Garcia*, 374 So.2d 533, 536 (Fla. 3d DCA 1979).

6. **Limited Application:** In Florida, actions for indemnity have been restricted to situations involving either a duty, an express contract, or the existence of active and passive negligence. *Atlantic National Bank of Florida v. Vest*, 480 So.2d 1328 (Fla. 2d DCA 1985), *rev. denied*, 491 So.2d 281 (Fla. 1986), *rev. denied*, 508 So.2d 16 (Fla. 1987). *See also Hiller Group, Inc. v. Redwing Carriers, Inc.*, 779 So.2d 602, 603 (Fla. 2d DCA 2001).

7. **Own Negligence:** For an indemnity agreement to indemnify against indemnitee's own negligence, it must contain a specific provision protecting the indemnitee from liability caused by his own negligence. *Repor Bros, Inc. v Moore*, 83 So. 3d 903 (Fla. 3d DCA 2012); *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507, 511 (Fla. 1973). *Accord*, *Joseph L. Rozier Machinery, Co. v. Nilo Barge Line, Inc.*, 318 So.2d 557 (Fla. 2d DCA 1975), *cert. denied*, 328 So.2d 843 (Fla. 1976); *State of Florida, Department of Transportation v. V.E. Whitehurst & Sons, Inc.*, 636 So.2d 101 (Fla. 1st DCA 1994), *rev. denied*, 645 So.2d 456 (Fla. 1994).

§6:20.5 Related Matters

1. **Duty to Defend:** We follow the ordinary rule that when a complaint contains a covered claim and a claim which is not covered by the indemnity agreement, then the duty to defend extends to the entire lawsuit. *Metropolitan Dade County v. Florida Aviation Fueling Company, Inc.*, 578 So.2d 296, 298 (Fla. 3d DCA 1991), *rev. denied*, 589 So.2d 290 (Fla. 1991), *rev. denied*, 589 So.2d 291 (Fla. 1991).

2. **Exculpatory Clause:** Although there is a distinction in definition between an exculpatory clause and an indemnity clause in a contract, they both attempt to shift ultimate responsibility for negligent injury, and so are generally construed by the same principles of law. An exculpatory clause purports to deny an injured party the right to recover damages from the person negligently causing his injury. An indemnification clause attempts to shift the responsibility for the payment of damages to someone other than the negligent party (sometimes back to the injured party, thus producing the same result as an exculpatory provision). *Kitchens of the Oceans, Inc. v. McGladrey & Pullen, LLP*, 832 So.2d 270, 272 (Fla. 4th DCA 2002).

3. **Express Contract Unnecessary:** The obligation to indemnify need not be based upon an express contract of indemnification but may arise out of implied contractual relations or out of liability imposed by law. *Mims Crane Service, Inc. v. Insley Manufacturing Corp.*, 226 So.2d 836, 839 (Fla. 2d DCA 1969), *cert. denied*, 234 So.2d 122 (Fla. 1969).

4. **Guaranty, Distinction:** The essential distinction between an indemnity contract and a contract of guaranty is that the promisor in an indemnity contract undertakes to protect the promisee against loss or damage through a liability on the part of latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligation to the promisee. *American Casualty Company of Reading, Pennsylvania v. Bloch*, 176 So.2d 579, 581 (Fla. 3d DCA 1965).

5. **Reasonableness of Amount Paid:** The recovery must be reasonable, based upon the accepted measure of damages. As pointed out in the Restatement of Restitution, §80: "A person who has discharged a duty which, as between himself and another, should have been performed by the other, and who is entitled to indemnity from the other under the rules stated in §§76-79, is entitled to reimbursement, limited (a) to the amount of his net outlay *properly expended*, except where he became subject to the duty by the fraud or duress of the other, and (b) if the payor became a party to the transaction without the consent or fault of the other, to the amount by which the other has thereby benefited." *Port Everglades Authority v. R.S.C. Industries, Incorporated*, 351 So.2d 1148, 1150 (Fla. 4th DCA 1976).

6. **Special Relation not Required:** A party like CDM who is seeking to recover under a contractual indemnity clause is not required to establish that there was a special relationship between the parties to maintain an action for damages under the clause. *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co*., 721 So.2d 1254, 1257 (Fla. 5th DCA 1998).

7. **Vouching in Rule:** The general rule of indemnification, the "vouching in rule," is that an indemnitor who has notice of the suit filed against the indemnitee by the injured party and who is afforded an opportunity to appear and defend it is bound by a judgment rendered against the indemnitee as to all material questions determined by the judgment. *Hull & Co. v. McGetrick,* 414 So.2d 243, 244 (Fla. 3d DCA 1982); *Hoskins v. Midland Ins. Co.,* 395 So.2d 1159 (Fla. 3d DCA 1981); *MacArthur v. Gaines,* 286 So.2d 608 (Fla. 3d DCA 1973); *Westinghouse Elec. Corp. v. J.C. Penney Co.,* 166 So.2d 211 (Fla. 1st DCA 1964); *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co*., 853 So.2d 1072, 1079 (Fla. 5th DCA 2003), *rev. denied*, 884 So.2d 23 (Fla. 2004).

§6:30 INDEMNITY, IMPLIED

§6:30.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§6:30.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§6:30.1.2 Elements of Cause of Action — 2nd DCA

We agree with the authors of an article entitled "Indemnity After Houdaille," 34 Miami L.Rev. 727, 748 (1980), that a third party action for implied indemnity must satisfy the following criteria:

(a) the plaintiff's complaint must allege a cause of action against the indemnitee based at least in part on imputed liability, and
(b) the third party complaint must allege:
  (1) there existed a special duty running from the indemnitor to the indemnitee;
  (2) the indemnitor breached his special duty to the indemnitee;
  (3) the plaintiff's injuries resulted from the same actions that breached the indemnitor's duty to the indemnitee; and
  (4) the indemnitee can be held liable to the plaintiff for the injuries to the plaintiff resulting from the indemnitor's act.

These elements must not only be alleged, they must be proven.

Source

Atlantic National Bank of Florida v. Vest, 480 So.2d 1328 (Fla. 2d DCA 1985) (see footnote 2), *rev. denied*, 491 So.2d 281 (Fla. 1986), *rev. denied*, 508 So.2d 16 (Fla. 1987).

See Also

1. *State of Florida Department of Transportation v. V. E. Whitehurst & Sons, Inc.*, 636 So.2d 101 (Fla. 1st DCA 1994), *rev. denied*, 645 So.2d 456 (Fla. 1994) ("Whitehurst also asserts that FDOT must support the indemnity claim by alleging it is without fault. Although such a pleading requirement holds true for common law indemnity, it does not apply to contractual indemnity.").

§6:30.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§6:30.1.4 Elements of Cause of Action — 4th DCA

We find that the amended third-party complaint fails to allege sufficient facts to state a cause of action for indemnity based on breach of warranty because certain minimum allegations are absent. The complaint should set forth factual allegations designating the basis for the right to indemnity such as contract, either express or implied, or from the existence and violation of a duty as between tortfeasors. … Or, equity may be applied to support a claim for indemnity as a result of the peculiar relation between the parties.

Source

Dunham-Bush, Inc. v. Thermo-Air Service, Inc., 351 So.2d 351, 352 (Fla. 4th DCA 1977).

See Also

1. *Olin's Rent-A-Car System, Inc. v. Royal Continental Hotels, Inc*., 187 So.2d 349, 352 (Fla. 4th DCA 1966), *cert. denied*, 194 So.2d 621 (Fla. 1966) (In 42 C.J.S. Indemnity §21, we find the following: It is well-recognized rule that an implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of the negligent or tortious act of another, the former having a right of action against the latter for indemnity, provided they are not joint tortfeasors. … This right of indemnity is based on the principle that everyone is responsible for his own negligence, and if another person has been compelled by the judgment of a court having jurisdiction to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.).

§6:30.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§6:30.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p); *Rosenberg v. Cape Coral Plumbing, Inc.*, 920 So.2d 61 (Fla. 2nd DCA 2005) (claim for implied indemnity treated as claim for common law indemnity).

§6:30.3 References

1. 12 Fla. Jur. 2d *Contribution, Indemnity, and Subrogation* §32, 41–44 (2005).
2. Fla.R.Civ.P. 1.170(g), 1.180 (2001).
3. 41 Am. Jur. 2d *Indemnity* §§20–22 (2005).
4. 42 C.J.S. *Indemnity* §§29–52 (1991).

§6:30.4 Defenses

1. **Fault:** "Whitehurst also asserts that FDOT must support the indemnity claim by alleging it is without fault. Although such a pleading requirement holds true for common law indemnity, it does not apply to contractual indemnity." *State of Florida Department of Transportation v. V. E. Whitehurst & Sons, Inc.*, 636 So.2d 101 (Fla. 1st DCA 1994), *rev. denied*, 645 So.2d 456 (Fla. 1994).

2. **Florida Statutes §725.06:** Monetary limitation on extent of indemnification and specific consideration required in construction contracts. *See A-T-O, Inc. v. Garcia*, 374 So.2d 533, 536 (Fla. 3d DCA 1979).

3. **Limited Application:** In Florida, actions for indemnity have been restricted to situations involving either a duty, an express contract, or the existence of active and passive negligence. *Atlantic National Bank of Florida v. Vest*, 480 So.2d 1328 (Fla. 2d DCA 1985), *rev. denied*, 491 So.2d 281 (Fla. 1986), *rev. denied*, 508 So.2d 16 (Fla. 1987).

4. **Own Negligence:** For an indemnity agreement to indemnify against indemnitee's own negligence, it must contain a specific provision protecting the indemnitee from liability caused by his own negligence. *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507, 511 (Fla. 1973). *Accord Joseph L. Rozier Machinery, Co. v. Nilo Barge Line, Inc.*, 318 So.2d 557 (Fla. 2d DCA 1975), *cert. denied*, 328 So.2d 843 (Fla. 1976).

5. **Special Relationship:** The right to indemnity arises through express or implied contract. Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other, and is available only where the whole fault is in the one from whom indemnity is sought. It shifts the entire loss from one who, although without fault, has been obligated to pay because of some vicarious, constructive, derivative, or technical liability to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable. For the right to indemnification to arise, there must be a special relationship between the parties that gives rise to the technical liability of the would-be indemnitee. *Horowitz v. Laske*, 855 So.2d 169, 174 (Fla. 5th DCA 2003).

§6:30.5 Related Matters

1. **Definition:** Indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other and is allowable only where the Whole fault is in the one against whom indemnity is sought. … It shifts the entire loss from one who, although without active negligence or fault, has been obligated to pay, because of some vicarious, constructive, derivative, or technical liability, to another who should bear the costs because it was the latter's wrongdoing for which the former is held liable. *Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490, 492 (Fla. 1979).

2. **Express Contract Unnecessary:** The obligation to indemnify need not be based upon an express contract of indemnification but may arise out of implied contractual relations or out of liability imposed by law. *Mims Crane Service, Inc. v. Insley Manufacturing Corp.*, 226 So.2d 836, 839 (Fla. 2d DCA 1969), *cert. denied*, 234 So.2d 122 (Fla. 1969).

3. **Guaranty, Distinction:** The essential distinction between an indemnity contract and a contract of guaranty is that the promisor in an indemnity contract undertakes to protect the promisee against loss or damage through a liability on the part of latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligation to the promisee. *American Casualty Company of Reading, Pennsylvania v. Bloch*, 176 So.2d 579, 581 (Fla. 3d DCA 1965).

CHAPTER 7

EMPLOYMENT CASES

§7:10 DISCRIMINATION, EMPLOYMENT—DISABILITY UNDER FLORIDA CIVIL RIGHTS ACT
§7:10.1 Elements of Cause of Action — Florida Supreme Court
§7:10.1.1 Elements of Cause of Action — 1st DCA
§7:10.1.2 Elements of Cause of Action — 2nd DCA
§7:10.1.3 Elements of Cause of Action — 3rd DCA
§7:10.1.4 Elements of Cause of Action — 4th DCA
§7:10.1.5 Elements of Cause of Action — 5th DCA
§7:10.2 Statute of Limitations
§7:10.3 References
§7:10.4 Defenses
§7:10.5 Related Matters

§7:20 RETALIATORY DISCHARGE—MEMBERSHIP IN LABOR ORGANIZATION
§7:20.1 Florida Statutes
§7:20.2 Elements of Cause of Action — Florida Supreme Court
§7:20.3 Statute of Limitations
§7:20.4 References
§7:20.5 Defenses
§7:20.6 Related Causes of Action
§7:20.7 Sample Cause of Action

§7:30 RETALIATORY DISCHARGE—PUBLIC SECTOR WHISTLE-BLOWER'S ACT
§7:30.1 Florida Statutes
§7:30.2 Elements of Cause of Action — Florida Supreme Court
§7:30.3 Statute of Limitations
§7:30.4 References
§7:30.5 Defenses
§7:30.6 Related Matters
§7:30.7 Related Causes of Action
§7:30.8 Sample Cause of Action

§7:40 RETALIATORY DISCHARGE—PRIVATE SECTOR WHISTLE-BLOWER'S ACT
§7:40.1 Florida Statutes
§7:40.2 Elements of Cause of Action — Florida Supreme Court
§7:40.2.1 Elements of Cause of Action — 1st DCA
§7:40.2.2 Elements of Cause of Action — 2nd DCA
§7:40.2.3 Elements of Cause of Action — 3rd DCA
§7:40.2.4 Elements of Cause of Action — 4th DCA
§7:40.2.5 Elements of Cause of Action — 5th DCA

§7:40.3 Statute of Limitations
§7:40.4 References
§7:40.5 Defenses
§7:40.6 Related Matters
§7:40.7 Sample Cause of Action

§7:50 RETALIATORY DISCHARGE—WORKERS' COMPENSATION
§7:50.1 Florida Statutes—F.S. §440.205
§7:50.2 Elements of Cause of Action — Florida Supreme Court
§7:50.2.1 Elements of Cause of Action — 1st DCA
§7:50.2.2 Elements of Cause of Action — 2nd DCA
§7:50.2.3 Elements of Cause of Action — 3rd DCA
§7:50.2.4 Elements of Cause of Action — 4th DCA
§7:50.2.5 Elements of Cause of Action — 5th DCA
§7:50.3 Statute of Limitations
§7:50.4 References
§7:50.5 Defenses
§7:50.6 Related Matters
§7:50.7 Related Causes of Action
§7:50.8 Sample Cause of Action

§7:60 WRONGFUL GARNISHMENT
§7:60.1 Elements of Cause of Action — Florida Supreme Court
§7:60.1.1 Elements of Cause of Action — 1st DCA
§7:60.1.2 Elements of Cause of Action — 2nd DCA
§7:60.1.3 Elements of Cause of Action — 3rd DCA
§7:60.1.4 Elements of Cause of Action — 4th DCA
§7:60.1.5 Elements of Cause of Action — 5th DCA
§7:60.2 Statute of Limitations
§7:60.3 References
§7:60.4 Related Matters

§7:10 DISCRIMINATION, EMPLOYMENT— DISABILITY UNDER FLORIDA CIVIL RIGHTS ACT

§7:10.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§7:10.1.1 Elements of Cause of Action — 1st DCA

The criteria established by section 504 [of the federal Rehabilitation Act of 1973] place the burden on a plaintiff to establish a prima facie case of employment discrimination by showing: (1) that he or she is a handicapped individual under the act; (2) that he or she is otherwise qualified for the position sought or hired; (3) that he or she was excluded from the position sought solely by reason of his or her handicap; and (4) that the program or activity in question receives federal financial assistance. *See Harris v. Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991); *Rosiak v. United States Dep't of the Army*, 679 F.Supp. 444, 449 (M.D.Pa. 1987); *Dexler v. Tisch*, 660 F.Supp. 1418, 1427 (D.Conn. 1987). Obviously, the fourth criterion is inapplicable to a claim brought pursuant to Florida's Human Rights Act.

Source

Brand v. Florida Power Corporation, 633 So.2d 504, 510 (Fla. 1st DCA 1994).

See Also

1. The Florida Civil Rights Act, sections 760.01–760.11, and 509.092, Florida Statutes (1999), should be construed in conformity with the federal Rehabilitation Act, 29 U.S.C. §701 et seq., and the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., and related regulations. *See Greene v. Seminole Elec. Coop., Inc.,* 701 So.2d 646, 647 (Fla. 5th DCA 1997); *Tourville v. Securex, Inc*., 769 So.2d 491, 492 (Fla. 4th DCA 2000); *McCaw Cellular Communications of Fla., Inc. v. Kwiatek,* 763 So.2d 1063, 1065 (Fla. 4th DCA 1999); *Wimberly v. Securities Technology Group, Inc*., 866 So.2d 146, 147 (Fla. 4th DCA 2004).

§7:10.1.2 Elements of Cause of Action — 2nd DCA

To plead a prima facie case of handicap discrimination, plaintiff is required to allege that he was a handicapped person under the law, he qualified for the position apart from handicap, and he was denied employment solely because of handicap.

Source

Davidson v. Iona-McGregor Fire Protection and Rescue District, 674 So.2d 858, 860 (Fla. 2d DCA 1996) (citing *Brand v. Florida Power Corporation*, 633 So.2d 504, 510 (Fla. 1st DCA 1994).

§7:10.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§7:10.1.4 Elements of Cause of Action — 4th DCA

To survive summary judgment on a claim of harassment based on handicap discrimination, the plaintiff must show that she or he: (1) is a qualified individual with a disability under the ADA; (2) was subject to unwelcome harassment; (3) the harassment was based on his or her disability; (4) the harassment was sufficiently severe or pervasive to alter the conditions of his or her employment and to create an abusive working environment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

Source

Razner v. Wellington Regional Medical Center, Inc., 837 So.2d 437, 441 (Fla. 4th DCA 2002).

See Also

Byrd v. BT Foods, Inc., 26 So.3d 600, 603 (Fla. 4th DCA 2009) ("The Florida Civil Rights Act, Fla. Stat. § 760.01 et seq., prohibits employers from discharging or otherwise discriminating against any employee with a 'handicap' because of the employee's 'handicap.'").

§7:10.1.5 Elements of Cause of Action — 5th DCA

To present a prima facie case of employment discrimination based on disability under Florida Civil Rights Act, a plaintiff must show: (1) that he or she is a person with a disability; (2) that he or she is "qualified" for the position apart from his or her disability; and (3) that he or she was denied the position solely because of his or her disability.

Source

Smith v. Avatar Properties, Inc., 714 So.2d 1103, 1106 (Fla. 5th DCA 1998).

See Also

1. *Smith v. Brevard Optometry Assocs.*, 136 So.3d 761, n.1 (Fla. 5th DCA 2014) (reciting the three-step burden shifting analysis under the *McDonnell Douglas* framework).

§7:10.2 Statute of Limitations

Three hundred sixty-five days to file complaint with the EEOC. EEOC has 180 days to investigate thereafter. If EEOC finds reasonable cause that violation of FL Civil Rights Act has occurred, aggrieved party has 1 year from date of such finding to file civil action in court. Fla. Stat. §760.11(1), (4)-(5).

§7:10.3 References

1. 9 Fla. Jur. 2d *Civil Rights* §§13–33 (2004).
2. 15 Am. Jur. 2d *Civil Rights* §§148–157 (2000).
3. 14A C.J.S. *Civil Rights* §§143–217, 340–447 (1991).
4. Art I, §2, Florida Constitution (1968).
5. Chapter 760, Fla. Stat. (2005) (Florida Civil Rights Act of 1992).
6. Section 760.01(2), Fla. Stat. (2005) ("The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights and privileges of individuals within the state.").
7. Section 413.08, Fla. Stat. (2005) (Rights of Physically Disabled Persons).
8. Section 744.3215, Fla. Stat. (2005) (Rights of Persons Determined Incapacitated).
9. Fla. Admin. Code Chapter 60Y-5 (The Florida Commission on Human Relations).
10. David J. Linesch, *The New Federal and Florida Civil Rights Legislation*, Fla. Bar J., April 1993, at 51.
11. Jeffrey H. Klink, *Florida's New Human Rights Act*, Fla. Bar J., April 1978, at 321.
12. Jane M. Draper, Annotation, *What Constitutes Handicap Under State Legislation Forbidding Job Discrimination on Account of Handicap*, 82 A.L.R.4th 26 (1990).
13. Jane M. Draper, Annotation, *Validity and Construction of State Statutes Requiring Construction of Handicapped Access Facilities in Buildings Open to Public*, 82 A.L.R.4th 121 (1990).
14. Jane M. Draper, Annotation, *Discrimination "Because of Handicap" or "on the Basis of Handicap" Under State Statutes Prohibiting Job Discrimination on Account of Handicap*, 81 A.L.R.4th 144 (1990).
15. Jane M. Draper, Annotation, *Handicap as Job Discrimination Under State Legislation Forbidding Job Discrimination on Account of Handicap*, 78 A.L.R.4th 265 (1990).
16. Jane M. Draper, Annotation, *Damages and Other Relief Under State Legislation Forbidding Job Discrimination on Account of Handicap*, 78 A.L.R.4th 435 (1990).
17. Jane M. Draper, Annotation, *Accommodation Requirement Under State Legislation Forbidding Job Discrimination on Account of Handicap*, 76 A.L.R.4th 310 (1990).

18. William H. Danne, Jr., Annotation, *Denial, Suspension, or Cancellation of Driver's License Because of Physical Disease or Defect*, 38 A.L.R.3d 452 (1971).
19. Annotation, *Right of Employer to Terminate Contract Because of Employee's Disease or Physical Incapacity*, 21 A.L.R.2d 1247 (1952).
20. James O. Pearson, Jr., Annotation, *What Constitutes "Business Necessity" Justifying Employment Practice Prima Facie Discriminatory Under Title VII of Civil Rights Act of 1964*, 36 A.L.R. Fed. 9 (1978).
21. Thomas E. Seguine, Comment, *What's a Handicap Anyway? Analyzing Handicap Claims Under the Rehabilitation Act of 1973 and Analogous State Statutes*, 22 Willamette L. Rev. 529 (1986).
22. Richard I. Lehr, *Employer Duties to Accommodate Handicapped Employees*, 31 Lab. L.J. 174 (1980).

§7:10.4 Defenses

1. **Bona Fide Occupational Qualification:** A bona fide occupational qualification is an affirmative defense. *Davidson v. Iona-McGregor Fire Protection and Rescue District*, 674 So.2d 858, 861 (Fla. 2d DCA 1996).

2. **Stereotype-Free Assessment:** Just as Title VII of the Civil Rights Act of 1964 ensures only equal treatment and not "correct" decisions, so the Rehabilitation Act requires only a stereotype-free assessment of the person's abilities and prospects rather than a correct decision. In other words, the Rehabilitation Act was structured for the purpose of replacing reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments. *Brand v. Florida Power Corp*., 633 So.2d 504, 508 (Fla. 1st DCA 1994).

§7:10.5 Related Matters

1. **At-Will Employment:** The general rule of at-will employment is that an employee can be discharged, as long as he is not terminated for a reason prohibited by law. *Davidson v. Iona-McGregor Fire Protection and Rescue District*, 674 So.2d 858, 861 (Fla. 2d DCA 1996).

2. **Burden of Producing Evidence:** In considering the merits of handicap discrimination claims, the federal courts have modified the *McDonnell Douglas-Burdine* analysis applicable to Title VII claims and, while retaining the analysis's basic allocation of burden-shifting, have adopted the criteria that are uniquely pertinent to actions brought under sections 501 or 504, resulting in the following analysis. First, a plaintiff is considered to have established a prima facie case of handicap discrimination if such person can make a facial showing that he or she is a handicapped person under the Act, is qualified for the position apart from his or her handicap, and was denied the job solely because of the handicap. If the plaintiff is unable to make a prima facie case of handicap discrimination, the burden of producing rebuttal evidence does not shift to the employer, and judgment is invariably entered in favor of the employer. If a prima facie case is established, the burden of producing evidence is then placed on the employer to show that its consideration of the handicap was relevant to the qualifications of the position sought.

   [T]he employer may meet its burden by showing (1) that the plaintiff's handicap is such that it simply cannot possibly be accommodated, or (2) if the handicap is such that accommodation is possible, the proposed accommodation is unreasonable because it would result in an undue hardship on the defendant's activities.

   Once the defendant places into evidence valid reasons for the rejection, the plaintiff cannot remain silent, but must rebut the employer's position with evidence concerning his or her individual capabilities "and suggestions for possible accommodations." … Moreover, the fact that a "'defendant could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that additional accommodations were necessary.'" *Brand v. Florida Power Corporation*, 633 So.2d 504, 510 (Fla. 1st DCA 1994). *See also George Cabany v. Hollywood Memorial Hospital*, 12 F.A.L.R. 2020, 2026 (Fla. Commission on Human Relations 1990).

3. **Classes of Cases Arising under the Federal Rehabilitation Act:** *Barth v. Gelb*, 2 F.3d 1180, 1183 (D.C. Cir. 1983), identifies three classes of cases arising under the federal Rehabilitation Act: First, one in which the employer contends the employment decision was made for reasons unrelated to the person's handicap; second, one wherein the employer contests the plaintiff's claim that he or she is a qualified handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question; and third, one in which the employer asserts it is unable to provide the accommodation necessary, because it would impose an undue hardship on its operations. Only the first category is subject to the *Burdine* analysis; the Rehabilitation Act's own criteria apply to the last two classes of cases. *Barth,* 2 F.3d at 1186. *Brand v. Florida Power Corp*., 633 So.2d 504, 508 (Fla. 1st DCA 1994).

4. **Construction:** The Act [Florida Civil Rights Act of 1992] should be construed in conformity with the federal Rehabilitation Act, 29 U.S.C. §701 et seq., and the Americans With Disabilities Act, 42 U.S.C. §12101 et seq., and related regulations. *Greene v. Seminole Electric Cooperative, Inc.*, 701 So.2d 646, 647 (Fla. 5th DCA 1997). *See also*, *Brand v. Florida Power Corporation*, 633 So.2d 504, 509 (Fla. 1st DCA 1994); Florida's Human Rights Act is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. *O'Loughlin v. Pinchback*, 579 So.2d 788, 791 (Fla. 1st DCA 1991).

5. **Employer, Defined:** Employer means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person. (Section 760.02(7), Fla. Stat. (2005). *See Regency Towers Owners Association, Inc. v. Pettigrew*, 436 So.2d 266, 267 (Fla. 1st DCA 1983), *rev. denied*, 444 So.2d 417 (Fla. 1984) (interpreting the definition of the term "employer").

6. **Handicap, Defined:** Handicap means: (a) A person has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment; or (b) A person has a developmental disability as defined in s. 393.063. (Section 760.22(7), Fla. Stat. (2005)). *See* definitions under the Americans With Disabilities Act.

7. **Obesity:** Obesity can be a disability. *Greene v. Seminole Electric Cooperative, Inc.*, 701 So.2d 646, 647 (Fla. 5th DCA 1997).

8. **Regarded as Impaired:** The United States Supreme Court has ruled that the definition of a handicapped individual includes not only those who are actually physically impaired, but also those who are regarded by others as impaired. *School Bd. of Nassau County, Fla. v. Arline,* 480 U.S. 273, 281, 107 S.Ct. 1123, 1128, 94 L.Ed.2d 307 (1987). *See also Davidson v. Iona-McGregor Fire Protection and Rescue Dist*., 674 So.2d 858, 860 (Fla. 2d DCA 1996); *Razner v. Wellington Regional Medical Center, Inc*., 837 So.2d 437, 441 (Fla. 4th DCA 2002).

9. **Title VII Action:** To establish a *prima facie* claim for retaliation under Title VII of the Civil Rights Act of 1964 a plaintiff must demonstrate: (1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action; and (3) there is a causal relation between the two events. *Harper,* 139 F.3d at 1385. As this court recently noted in *Rice-Lamar,* 853 So.2d at 1125: the causal link requirement under Title VII must be construed broadly; "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Once the prima facie case is established, the employer must proffer a legitimate, non-retaliatory reason for the adverse employment action. The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct. *See Guess v. City of Miramar*, 889 So.2d 840, 846 (Fla. 4th DCA 2004); *Brand v. Florida Power Corp*. 633 So.2d 504, 507 (Fla. 1st DCA 1994).

10. **Pregnancy:** Discrimination based on pregnancy is unlawful discrimination because of sex since pregnancy is a primary characteristic of the female sex and a natural condition unique to women. *Delva v. Continental Group, Inc.*, 137 So.3d 371 (Fla. 2014).

§7:20 RETALIATORY DISCHARGE — MEMBERSHIP IN LABOR ORGANIZATION

The following statutes are excerpts from Florida Statute Chapter 447, Part I (Labor Organizations/General Provisions). Practitioners should consult the entirety of this chapter and part when litigating such claims.

§7:20.1 Florida Statutes

F.S. §447.17 Civil Remedy; Injunctive Relief.

(1) Any person who may be denied employment or discriminated against in his or her employment on account of membership or nonmembership in any labor union or labor organization shall be entitled to recover from the discriminating employer, other person, firm, corporation, labor union, labor organization, or association, acting separately or in concert, in the courts of this state, such damages as he or she may have sustained and the costs of suit, including reasonable attorney's fees. If such employer, other person, firm, corporation, labor union, labor organization, or association acted willfully and with malice or reckless indifference to the rights of others, punitive damages may be assessed against such employer, other person, firm, corporation, labor union, labor organization, or association.

(2) Any person sustaining injury as a result of any violation or threatened violation of the provisions of this section shall be entitled to injunctive relief against any and all violators or persons threatening violation.

(3) The remedy and relief provided for by this section shall not be available to public employees as defined in part II of this chapter.

Fla. Stat. §447.17 (1997) (Current through the 2018 Second Regular Session of the 25th Legislature).

F.S. §447.11 Actions And Suits; Labor Organizations As Parties

Any labor organization may maintain any action or suit in its commonly used name and shall be subject to any suit or action in its commonly used name in the same manner and to the same extent as any corporation authorized to do business in this state. All process, pleadings and other papers in such action may be served on the president or other officer, business agent, manager or person in charge of the business of such labor organization. Judgment in such action may be enforced against the common property only of such labor organization.

Fla. Stat. §447.11 (Current through the 2018 Second Regular Session of the 25th Legislature).

§7:20.2 Elements of Cause of Action

[No citation for this edition.]

§7:20.3 Statute of Limitations

Four years. §95.11(f) and (p), Fla. Stat.

§7:20.4 References

1. Raymond G. McGuire, *Public employee collective bargaining in Florida*, 1 Fla. St. U.L.Rev. 28 (1973).
2. Charles B. Craver and Russell W. LaPeer, *Recognition-certification under P.E.R.A.*, 27 U. Fla. L.Rev. 705 (1975).
3. 34 Fla. Jur. 2d *Labor & Labor Relations* §15 (2007).

§7:20.5 Defenses

1. **Preemption:** The National Labor Relations Act "preempts state jurisdiction of simple claims for wrongful discharge on account of collective bargaining activities, for such claims are cognizable by the NLRB. *See, e.g., Carpenters Dist. Council of Jacksonville and Vicinity v. Waybright*, 279 So.2d 300 (Fla. 1973), *cert. granted by William E. Arnold Co. v. Carpenters Dist. Council of Jacksonville and Vicinity*, 414 U.S. 1063 (1973), *judgment reversed on other grounds*, 417 U.S. 12 (1974). However, a state court may entertain action for money damages predicated on "outrageous" employer conduct amounting to a tort by statute or common law," *Mobley v. Southern Plasma Corp*., 366 So.2d 480, 481-82 (Fla. 1st DCA 1979).

§7:20.6 Related Causes of Action

✓ Breach of Contract, §3:10

§7:20.7 Sample Cause of Action

COUNT FOR VIOLATION OF RETALIATORY DISCHARGE STATUTE (RETALIATORY DISCHARGE STATUTE—DISCRIMINATION BASED ON MEMBERSHIP IN LABOR ORGANIZATION)

(Florida Statute §447.17)

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Plaintiff is a member of a labor union.
Defendant Employer denied an employment opportunity to Plaintiff by refusing to hire Plaintiff.
Defendant Employer refused to hire Plaintiff because Plaintiff is a member of a labor union.
Defendant Employer's conduct caused Plaintiff Employee to suffer damages.

WHEREFORE, Plaintiff demands damages and reasonable attorney's fees against Defendant for violation of Section 447.17, Fla. Stat., and such other relief this Court deems just and proper.

§7:30 RETALIATORY DISCHARGE—PUBLIC SECTOR WHISTLE-BLOWER'S ACT

The following statutes are excerpts from Florida's Public Sector Whistle-Blower's Act. Practitioners should consult the entirety of the Act when litigating Whistle-Blower's Act claims.

§7:30.1 Florida Statutes

F.S. §112.3187 Adverse action against employee for disclosing information of specified nature prohibited; employee remedy and relief.

1. **Short title.—**Sections 112.3187-112.31895 may be cited as the "Whistle-Blower's Act."

2. **Legislative intent.—**It is the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee.

3. **Definitions.—**As used in this act, unless otherwise specified, the following words or terms shall have the meanings indicated:
   (a) "Agency" means any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university.
   (b) "Employee" means a person who performs services for, and under the control and direction of, or contracts with, an agency or independent contractor for wages or other remuneration.
   (c) "Adverse personnel action" means the discharge, suspension, transfer, or demotion of any employee or the withholding of bonuses, the reduction in salary or benefits, or any other adverse action taken against an employee within the terms and conditions of employment by an agency or independent contractor.
   (d) "Independent contractor" means a person, other than an agency, engaged in any business and who enters into a contract, including a provider agreement, with an agency.

(e) "Gross mismanagement" means a continuous pattern of managerial abuses, wrongful or arbitrary and capricious actions, or fraudulent or criminal conduct which may have a substantial adverse economic impact.

4. **Actions prohibited.—**
   (a) An agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section.
   (b) An agency or independent contractor shall not take any adverse action that affects the rights or interests of a person in retaliation for the person's disclosure of information under this section.
   (c) The provisions of this subsection shall not be applicable when an employee or person discloses information known by the employee or person to be false.

5. **Nature of information disclosed.—**The information disclosed under this section must include:
   (a) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare.
   (b) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.

6. **To whom information disclosed.—**The information disclosed under this section must be disclosed to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act, including, but not limited to, the Office of the Chief Inspector General, an agency inspector general or the employee designated as agency inspector general under §112.3189(1) or inspectors general under §20.055, the Florida Commission on Human Relations, and the whistle-blower's hotline created under §112.3189. However, for disclosures concerning a local governmental entity, including any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing, the information must be disclosed to a chief executive officer as defined in §447.203(9) or other appropriate local official.

7. **Employees and persons protected.—**This section protects employees and persons who disclose information on their own initiative in a written and signed complaint; who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity; who refuse to participate in any adverse action prohibited by this section; or who initiate a complaint through the whistle-blower's hotline or the hotline of the Medicaid Fraud Control Unit of the Department of Legal Affairs; or employees who file any written complaint to their supervisory officials or employees who submit a complaint to the Chief Inspector General in the Executive Office of the Governor, to the employee designated as agency inspector general under §112.3189(1), or to the Florida Commission on Human Relations. The provisions of this section may not be used by a person while he or she is under the care, custody, or control of the state correctional system or, after release from the care, custody, or control of the state correctional system, with respect to circumstances that occurred during any period of incarceration. No remedy or other protection under §§112.3187-112.31895 applies to any person who has committed or intentionally participated in committing the violation or suspected violation for which protection under §§112.3187-112.31895 is being sought.

8. **Remedies.—**
   (a) Any employee of or applicant for employment with any state agency, as the term "state agency" is defined in §216.011, who is discharged, disciplined, or subjected to other adverse personnel action, or denied employment, because he or she engaged in an activity protected by this section may file a complaint, which complaint must be made in accordance with §112.31895. Upon receipt of notice from the Florida Commission on Human Relations of termination of the investigation, the complainant may elect to pursue the administrative remedy available under §112.31895 or bring a civil action within 180 days after receipt of the notice.

(b) Within 60 days after the action prohibited by this section, any local public employee protected by this section may file a complaint with the appropriate local governmental authority, if that authority has established by ordinance an administrative procedure for handling such complaints or has contracted with the Division of Administrative Hearings under §120.65 to conduct hearings under this section. The administrative procedure created by ordinance must provide for the complaint to be heard by a panel of impartial persons appointed by the appropriate local governmental authority. Upon hearing the complaint, the panel must make findings of fact and conclusions of law for a final decision by the local governmental authority. Within 180 days after entry of a final decision by the local governmental authority, the public employee who filed the complaint may bring a civil action in any court of competent jurisdiction. If the local governmental authority has not established an administrative procedure by ordinance or contract, a local public employee may, within 180 days after the action prohibited by this section, bring a civil action in a court of competent jurisdiction. For the purpose of this paragraph, the term "local governmental authority" includes any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing.

(c) Any other person protected by this section may, after exhausting all available contractual or administrative remedies, bring a civil action in any court of competent jurisdiction within 180 days after the action prohibited by this section.

9. **Relief.—**In any action brought under this section, the relief must include the following:
   (a) Reinstatement of the employee to the same position held before the adverse action was commenced, or to an equivalent position or reasonable front pay as alternative relief.
   (b) Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate.
   (c) Compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the adverse action.
   (d) Payment of reasonable costs, including attorney's fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith.
   (e) Issuance of an injunction, if appropriate, by a court of competent jurisdiction.
   (f) Temporary reinstatement to the employee's former position or to an equivalent position, pending the final outcome on the complaint, if an employee complains of being discharged in retaliation for a protected disclosure and if a court of competent jurisdiction or the Florida Commission on Human Relations, as applicable under §112.31895, determines that the disclosure was not made in bad faith or for a wrongful purpose or occurred after an agency's initiation of a personnel action against the employee which includes documentation of the employee's violation of a disciplinary standard or performance deficiency. This paragraph does not apply to an employee of a municipality.

10. **Defenses.—**It shall be an affirmative defense to any action brought pursuant to this section that the adverse action was predicated upon grounds other than, and would have been taken absent, the employee's or person's exercise of rights protected by this section.

11. **Existing rights.—**Sections 112.3187-112.31895 do not diminish the rights, privileges, or remedies of an employee under any other law or rule or under any collective bargaining agreement or employment contract; however, the election of remedies in § 447.401 also applies to whistle-blower actions.

Fla. Stat. §112.3187 (2002) (Current through the 2018 Second Regular Session of the 25th Legislature).

F.S. §112.3188 Confidentiality of information given to the Chief Inspector General, internal auditors, inspectors general, local chief executive officers, or other appropriate local officials.

(1) The name or identity of any individual who discloses in good faith to the Chief Inspector General or an agency inspector general, a local chief executive officer, or other appropriate local official information that alleges that an employee or agent of an agency or independent contractor:
   (a) Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or

(b) Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty may not be disclosed to anyone other than a member of the Chief Inspector General's, agency inspector general's, internal auditor's, local chief executive officer's, or other appropriate local official's staff without the written consent of the individual, unless the Chief Inspector General, internal auditor, agency inspector general, local chief executive officer, or other appropriate local official determines that: the disclosure of the individual's identity is necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime; or the disclosure is unavoidable and absolutely necessary during the course of the audit, evaluation, or investigation.

(2) (a) Except as specifically authorized by §112.3189, all information received by the Chief Inspector General or an agency inspector general or information produced or derived from fact-finding or other investigations conducted by the Florida Commission on Human Relations or the Department of Law Enforcement is confidential and exempt from §119.07(1) if the information is being received or derived from allegations as set forth in paragraph (1)(a) or paragraph (1)(b), and an investigation is active.

(b) All information received by a local chief executive officer or appropriate local official or information produced or derived from fact-finding or investigations conducted pursuant to the administrative procedure established by ordinance by a local government as authorized by §112.3187(8)(b) is confidential and exempt from §119.07(1) and §24(a), Art. I of the State Constitution, if the information is being received or derived from allegations as set forth in paragraph (1)(a) or paragraph (1)(b) and an investigation is active.

(c) Information deemed confidential under this section may be disclosed by the Chief Inspector General, agency inspector general, local chief executive officer, or other appropriate local official receiving the information if the recipient determines that the disclosure of the information is absolutely necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime. Information disclosed under this subsection may be disclosed only to persons who are in a position to prevent the danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime based on the disclosed information.

1. An investigation is active under this section if:
   a. It is an ongoing investigation or inquiry or collection of information and evidence and is continuing with a reasonable, good faith anticipation of resolution in the foreseeable future; or
   b. All or a portion of the matters under investigation or inquiry are active criminal intelligence information or active criminal investigative information as defined in §119.011.
2. Notwithstanding sub-subparagraph 1.a., an investigation ceases to be active when:
   a. The written report required under §112.3189(9) has been sent by the Chief Inspector General to the recipients named in §112.3189(9);
   b. It is determined that an investigation is not necessary under §112.3189 (5); or
   c. A final decision has been rendered by the local government or by the Division of Administrative Hearings pursuant to §112.3187(8)(b).
3. Notwithstanding paragraphs (a), (b), and this paragraph, information or records received or produced under this section which are otherwise confidential under law or exempt from disclosure under chapter 119 retain their confidentiality or exemption.
4. Any person who willfully and knowingly discloses information or records made confidential under this subsection commits a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Fla. Stat. §112.3188 (1999) (Current through the 2018 Second Regular Session of the 25th Legislature.)

F.S. §112.31895 Investigative procedures in response to prohibited personnel actions.

(1) (a) If a disclosure under §112.3187 includes or results in alleged retaliation by an employer, the employee or former employee of, or applicant for employment with, a state agency, as defined in §216.011, that is so affected may file a complaint alleging a prohibited personnel action, which complaint must be made by filing a written complaint with the Office of the Chief Inspector General in the Executive Office of the Governor or the Florida Commission on Human Relations, no later than 60 days after the prohibited personnel action.

(b) Within three working days after receiving a complaint under this section, the office or officer receiving the complaint shall acknowledge receipt of the complaint and provide copies of the complaint and any other preliminary information available concerning the disclosure of information under §112.3187 to each of the other parties named in paragraph (a), which parties shall each acknowledge receipt of such copies to the complainant.

(2) **Fact finding.—**The Florida Commission on Human Relations shall:

(a) Receive any allegation of a personnel action prohibited by §112.3187, including a proposed or potential action, and conduct informal fact finding regarding any allegation under this section, to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel action under §112.3187 has occurred, is occurring, or is to be taken.

(b) Notify the complainant, within 15 days after receiving a complaint, that the complaint has been received by the department.

(c) Within 90 days after receiving the complaint, provide the agency head and the complainant with a fact-finding report that may include recommendations to the parties or proposed resolution of the complaint. The fact-finding report shall be presumed admissible in any subsequent or related administrative or judicial review.

(3) **Corrective action and termination of investigation.—**

(a) The Florida Commission on Human Relations, in accordance with this act and for the sole purpose of this act, is empowered to:

1. Receive and investigate complaints from employees alleging retaliation by state agencies, as the term "state agency" is defined in §216.011.
2. Protect employees and applicants for employment with such agencies from prohibited personnel practices under §112.3187.
3. Petition for stays and petition for corrective actions, including, but not limited to, temporary reinstatement.
4. Recommend disciplinary proceedings pursuant to investigation and appropriate agency rules and procedures.
5. Coordinate with the Chief Inspector General in the Executive Office of the Governor and the Florida Commission on Human Relations to receive, review, and forward to appropriate agencies, legislative entities, or the Department of Law Enforcement disclosures of a violation of any law, rule, or regulation, or disclosures of gross mismanagement, malfeasance, misfeasance, nonfeasance, neglect of duty, or gross waste of public funds.
6. Review rules pertaining to personnel matters issued or proposed by the Department of Management Services, the Public Employees Relations Commission, and other agencies, and, if the Florida Commission on Human Relations finds that any rule or proposed rule, on its face or as implemented, requires the commission of a prohibited personnel practice, provide a written comment to the appropriate agency.
7. Investigate, request assistance from other governmental entities, and, if appropriate, bring actions concerning, allegations of retaliation by state agencies under subparagraph 1.
8. Administer oaths, examine witnesses, take statements, issue subpoenas, order the taking of depositions, order responses to written interrogatories, and make appropriate motions to limit discovery, pursuant to investigations under subparagraph 1.
9. Intervene or otherwise participate, as a matter of right, in any appeal or other proceeding arising under this section before the Public Employees Relations Commission or any other appropriate agency, except that the Florida Commission on Human Relations must comply with the rules of the commission or other agency and may not seek corrective action or intervene in an appeal or other proceeding without the consent of the person protected under §§112.3187-112.31895.
10. Conduct an investigation, in the absence of an allegation, to determine whether reasonable grounds exist to believe that a prohibited action or a pattern of prohibited action has occurred, is occurring, or is to be taken.

(b) Within 15 days after receiving a complaint that a person has been discharged from employment allegedly for disclosing protected information under §112.3187, the Florida Commission on Human Relations shall review the information and determine whether temporary reinstatement is appropriate

under §112.3187(9)(f). If the Florida Commission on Human Relations so determines, it shall apply for an expedited order from the appropriate agency or circuit court for the immediate reinstatement of the employee who has been discharged subsequent to the disclosure made under §112.3187, pending the issuance of the final order on the complaint.

(c) The Florida Commission on Human Relations shall notify a complainant of the status of the investigation and any action taken at such times as the commission considers appropriate.

(d) If the Florida Commission on Human Relations is unable to conciliate a complaint within 60 days after receipt of the fact-finding report, the Florida Commission on Human Relations shall terminate the investigation. Upon termination of any investigation, the Florida Commission on Human Relations shall notify the complainant and the agency head of the termination of the investigation, providing a summary of relevant facts found during the investigation and the reasons for terminating the investigation. A written statement under this paragraph is presumed admissible as evidence in any judicial or administrative proceeding but is not admissible without the consent of the complainant.

(e) 1. The Florida Commission on Human Relations may request an agency or circuit court to order a stay, on such terms as the court requires, of any personnel action for 45 days if the Florida Commission on Human Relations determines that reasonable grounds exist to believe that a prohibited personnel action has occurred, is occurring, or is to be taken. The Florida Commission on Human Relations may request that such stay be extended for appropriate periods of time.

2. If, in connection with any investigation, the Florida Commission on Human Relations determines that reasonable grounds exist to believe that a prohibited action has occurred, is occurring, or is to be taken which requires corrective action, the Florida Commission on Human Relations shall report the determination together with any findings or recommendations to the agency head and may report that determination and those findings and recommendations to the Governor and the Chief Financial Officer. The Florida Commission on Human Relations may include in the report recommendations for corrective action to be taken.

3. If, after 20 days, the agency does not implement the recommended action, the Florida Commission on Human Relations shall terminate the investigation and notify the complainant of the right to appeal under subsection (4), or may petition the agency for corrective action under this subsection.

4. If the Florida Commission on Human Relations finds, in consultation with the individual subject to the prohibited action, that the agency has implemented the corrective action, the commission shall file such finding with the agency head, together with any written comments that the individual provides, and terminate the investigation.

(f) If the Florida Commission on Human Relations finds that there are no reasonable grounds to believe that a prohibited personnel action has occurred, is occurring, or is to be taken, the commission shall terminate the investigation.

(g) 1. If, in connection with any investigation under this section, it is determined that reasonable grounds exist to believe that a criminal violation has occurred which has not been previously reported, the Florida Commission on Human Relations shall report this determination to the Department of Law Enforcement and to the state attorney having jurisdiction over the matter.

2. If an alleged criminal violation has been reported, the Florida Commission on Human Relations shall confer with the Department of Law Enforcement and the state attorney before proceeding with the investigation of the prohibited personnel action and may defer the investigation pending completion of the criminal investigation and proceedings. The Florida Commission on Human Relations shall inform the complainant of the decision to defer the investigation and, if appropriate, of the confidentiality of the investigation.

(h) If, in connection with any investigation under this section, the Florida Commission on Human Relations determines that reasonable grounds exist to believe that a violation of a law, rule, or regulation has occurred, other than a criminal violation or a prohibited action under this section, the commission may report such violation to the head of the agency involved. Within 30 days after the agency receives the report, the agency head shall provide to the commission a certification that states that the head of the agency has personally reviewed the report and indicates what action has been or is to be taken and when the action will be completed.

(i) During any investigation under this section, disciplinary action may not be taken against any employee of a state agency, as the term "state agency" is defined in §216.011, for reporting an alleged prohibited

personnel action that is under investigation, or for reporting any related activity, or against any employee for participating in an investigation without notifying the Florida Commission on Human Relations.

(j) The Florida Commission on Human Relations may also petition for an award of reasonable attorney's fees and expenses from a state agency, as the term "state agency" is defined in §216.011, pursuant to §112.3187(9).

(4) **Right to appeal.—**

(a) Not more than 60 days after receipt of a notice of termination of the investigation from the Florida Commission on Human Relations, the complainant may file, with the Public Employees Relations Commission, a complaint against the employer-agency regarding the alleged prohibited personnel action. The Public Employees Relations Commission shall have jurisdiction over such complaints under §§112.3187 and 447.503(4) and (5).

(b) Judicial review of any final order of the commission shall be as provided in §120.68.

Fla. Stat. §112.31895 (2003). (Current through the 2018 Second Regular Session of the 25th Legislature.).

§7:30.2 Elements of Cause of Action

To establish a prima facie claim for retaliation under Florida's Whistle-Blower's Act, Fla. Stat. §§112.3187 - 112.31895 (2007), a plaintiff must demonstrate:

(1) He/she engaged in protected activity;

(2) He/she suffered an adverse employment action; and

(3) There is a causal relation between the two events.

To establish a causal connection, a plaintiff need only show that the protected activity and the adverse action were not wholly unrelated. Close temporal proximity between the protected activity and the adverse employment action can show that the two events were not wholly unrelated. If there is substantial delay between the two events, the plaintiff must present other evidence tending to show causation. A plaintiff can also meet the burden of causation by providing sufficient evidence that the decision maker was aware of the protected conduct at the time of the adverse employment action. Alternatively, a plaintiff can establish causation under a "cat's paw" theory when the harasser is not the decision maker. Under the "cat's paw" theory, the decision maker acts in accordance with the harasser's decision when the decision maker fails to conduct an independent investigation, and instead rubber stamps the recommendations of the harasser.

Source

Florida Department of Children and Families v. Shapiro, 68 So.3d 298, 300 (Fla. 4th DCA 2011); *Kogan v. Israel,* 211 So.3d 101 (Fla. 4th DCA 2017).

§7:30.3 Statute of Limitations

State employee: 60 days to file complaint with Office of Chief Inspector General or Florida Commission on Human Relations. If the investigation is terminated and notice of termination is sent to employee, then employee has 180 days after receipt of notice to file civil action.

Local public employee: 60 days to file complaint with local govtermental authority, if that authority has established by ordinance an administrative procedure. Employee can then file civil action within 180 days after entry of final decision from local govermental authority. If there is no ordinance establishing an administrative procedure, then employee has 180 days to file civil action.

All others: 180 days.

Fla. Stat. §112.3187(8) (2002) (Current through the 2018 Second Regular Session of the 25th Legislature).

§7:30.4 References

1. 10 A.L.R.6th 531 (2006).
2. 13 A.L.R.6th 499 (2006).
3. 82 Am. Jur. 2d *Wrongful Discharge* §120 (2007).
4. 60A Am. Jur. 2d *Pensions* §78 (2007).

5. 56 Am. Jur. 2d *Municipal Corporations, Etc.* §284 (2007).
6. 4 Emp. Discrim. Coord. *Analysis of State Law* §13:16 (2007).
7. 2A Fla. Jur 2d *Agency and Employment* §§184, 187 and 189 (2007).
8. 9 Fla. Jur 2d *Civil Servants* §§175 & 176 (2007).

§7:30.5 Defenses

1. **Grounds for Termination:** Grounds for termination apart from the whistle-blowing activities constitute a defense to a whistle-blower claim. *City of Hollywood v. Witt*, 939 So.2d 315, 318 (Fla. 4th DCA 2006). *See also Martin County v. Edenfield*, 609 So.2d 27 (Fla. 1992).

2. **Participation in the Allegedly Corrupt Activities:** "[D]efendants can raise in defense … the fact that the employee was involved in the corruption in question and was subjected to adverse action for that reason, and that reason alone, or for some other neutral and nonpretextual reason." *Martin County v. Edenfeld*, 609 So.2d 27, 29-30 (Fla. 1992) ("we do not imply that employees or other persons protected by the act can render themselves immune from being penalized on the job for their participation in misconduct simply by being the first to blow the whistle. So long as the employer takes adverse action based solely on the misconduct or some other neutral and nonpretextual reason, the whistle-blowing employee would have no cause of action as a matter of law and a motion for summary judgment would be appropriately granted. However, the meting of lesser penalties to "silent" FN5 co-perpetrators who are of equal or greater culpability often may be sufficient grounds to require that the motion for summary judgment be denied unless the employer can conclusively establish some neutral, nonpretextual reason for the adverse action.")

§7:30.6 Related Matters

1. **Burden of Proof:** To prevail, a plaintiff demonstrate "1) prior to termination the employee made a disclosure protected by the statute; 2) the employee was discharged; and 3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee." *State, Dept. of Transp. v. Florida Com'n on Human Relations*, 842 So.2d 253, 255 (Fla. 1st DCA 2003) (citation omitted).

2. **Remedial Statute:** "The act is remedial in nature and should be construed liberally in favor of granting access to the remedy so as not to frustrate the legislative intent." *Rice-Lamar v. City of Fort Lauderdale,* 853 So.2d 1125, 1132 (Fla. 4th DCA 2003).

3. **Demotions:** The Act does not provide for reinstatement to employees who were demoted, rather than discharged. *Metropolitan Dade County v. Milton*, 707 So.2d 913, 916 (Fla. 3rd DCA 1998) ("In enacting the Whistle-blower's Act, the legislature has commendably created a cause of action against state agencies for an employee who is subject to certain adverse personnel action in retaliation for disclosures under the Act. … The legislature should consider extending this protection in order to render the Act truly effective by safeguarding an employee who has been demoted. … As presently written, the limitation of the temporary reinstatement subsection does not fairly serve the whistle-blower. We invite the legislature, in its wisdom, to address this deficiency.").

4. **No Individual Liability:** The Whistle-blower's Act does not "subject officials or officers of an agency to suit in their individual capacities for alleged violations of the Act." *DeArmas v. Ross*, 680 So.2d 1130 Fla. 3d DCA 1996) (citations omitted).

5. **Release/Settlement:** *Caballero v. Phoenix Am. Holdings, Inc.*, 79 So.3d 106, 107-08 (Fla. 3d DCA 2012) (settlement reached with ex-employee only covered misconduct of employer as related to employment, termination and compensation through the date of settlement, and did not release any claims for tortious interference of subsequent employment relationship which is alleged to have occurred after the date of the execution of the release).

§7:30.7 Related Causes of Action

✓ Private Sector Whistle-Blower's Act (§§448.101–448.105, Fla. Stat.), §7:40

§7:30.8 Sample Cause of Action

COUNT FOR VIOLATION OF RETALIATORY DISCHARGE STATUTE
(PUBLIC SECTOR WHISTLE-BLOWER'S ACT)

(Florida Statutes §§112.3187-112.31895)

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Plaintiff Employee is a person that performs services for, and under the control and direction of, or contracts with, an Agency (as defined by Section §112.3187(3)(a), Fla. Stat.) or Independent Contractor (as defined by Section §112.3187(3)(d), Fla. Stat.) for wages or other remuneration
Plaintiff Employee disclosed to [insert name of appropriate agency or government entity, and where appropriate official, as defined by Section §112.3187(6), Fla. Stat.] [INSERT DESCRIPTION OF VIOLATION/CONDUCT DISCLOSED].
The violation/conduct disclosed is [INSERT AS APPLICABLE: (a) a violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare or (b) an act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor].
Subsequent to making the disclosure, Defendant Employer discharged Plaintiff.
Plaintiff Employee's disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee.
Defendant Employer's conduct caused Plaintiff Employee to suffer damages.

WHEREFORE, Plaintiff demands damages against Defendant for violation of Florida's Public Sector Whistle-Blower's Act (Sections 112.3187-112.31895, Fla. Stat.), including but not limited to all relief available under Section §112.3187(9), Fla. Stat., and such other relief this Court deems just and proper.

§7:40 RETALIATORY DISCHARGE—PRIVATE SECTOR WHISTLE-BLOWER'S ACT

§7:40.1 Florida Statutes

Fla. Stat. §448.102: Florida's Private Sector Whistle-Blower's Act.

§7:40.2 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§7:40.2.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§7:40.2.2 Elements of Cause of Action — 2nd DCA

A claim under section 448.102(3) requires the plaintiff to prove "(1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) the adverse employment action was causally linked to the statutorily protected activity." *White v. Purdue Pharma, Inc.*, 369 F.Supp.2d 1335, 1336 (M.D.Fla.2005).

Source

Kearns v Farmer Acquisition Co., 157 So.3d 458, 462 (Fla. 2d DCA 2015).

§7:40.2.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§7:40.2.4 Elements of Cause of Action — 4th DCA

To establish a prima facie claim under Florida's Whistle-Blower statute, the requisite elements set forth under a Title VII retaliation claim are applied. To establish a prima facie case of retaliation under Title VII, a plaintiff must show that: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is some causal relation between the two events. We previously have noted that the causal link requirement under Title VII must be construed broadly; "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Once the prima facie case is established, the employer must proffer a legitimate, non-retaliatory reason for the adverse employment action. The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct. *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998); *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000) (applying Title VII retaliation analysis to claim arising under private-sector Florida Whistle-Blower's Act on a case of first impression).

Source

Rice-Lamar v. City of Fort Lauderdale, 853 So.2d 1125, 1132 (Fla. 4th DCA 2003), *rev. denied*, 868 So.2d 522 (Fla. 2004).

See Also

1. *Kogan v. Israel,* 211 So.3d 101, 108 (Fla. 4th DCA 2017).
2. *Usher v. Nipro Diabetes Systems, Inc.*, 184 So.3d 1260, 1261-62 (Fla. 4th DCA 2016).
3. *Rustowicz v. North Broward Hosp. Dist.*, 174 So.3d 414, 419 (Fla. 4th DCA 2015).

§7:40.2.5 Elements of Cause of Action — 5th DCA

To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered an adverse employment action; and (3) that the adverse employment action was causally related to the protected activity.

See Also

Blizzard v. Appliance Direct, Inc., 16 So.3d 922, 926 (Fla. 5th DCA 2009).

§7:40.3 Statute of Limitations

Two years, if employee discovers retaliatory action was taken; or Four years after retaliatory action was taken, whichever is earlier. Fla. Stat. §448.103(1)(a).

§7:40.4 References

1. 2A Fla. Jur. 2d *Agency and Employment* §§184–192 (2005).
2. 9 Fla. Jur. 2d *Civil Servants* §§175–183 (2004).
3. 82 Am. Jur. 2d *Wrongful Discharge* §§117–134 (2003).
4. 30 C.J.S. *Employer–Employee* §§80–105 (1992).
5. Florida Statutes §448.102 (2005) (Florida's Private Sector Whistle-Blower's Act).
6. Richard D. Tuschman, *Another Look at the Notice Requirements of the Florida Private Sector Whistleblower's Act*, 71 Fla. Bar J. 43 (Nov. 1997).
7. Daniel R. Levine, *Baiton v. Carnival Cruise Lines: An Important Decision in The Evolution of Florida's Whistle-blower's Act*, 70 Fla. Bar J. 59 (May 1996).

8. Kimberly A. McCoy, Comment, *Litigating Under the Florida Private Sector Whistle-blower's Act: Plaintiff Protection and Good Faith*, 52 U. Miami L. Rev. 855 (1998).
9. Gregory G. Sarno, Annotation, *Liability for Retaliation against At-Will Employee for Public Complaints or Efforts Relating to Health or Safety*, 75 A.L.R.4th 13 (1990).
10. Gregory G. Sarno, Annotation, *Federal Pre-emption of Whistleblower's State-Law Action for Wrongful Retaliation*, 99 A.L.R.Fed 775 (1990).
11. Richard Schoolman, *Developments in the Preemption or Preclusion of Otherwise Justiciable Employment-Related Claims by the Railway Labor Act's Adjustment Board Procedures, and in the Usefulness of Such Procedures (or Their Resulting Decisions) in Defending Against Certain Civil Rights Claims*, SH094 ALI-ABA 989, 997 (April 2003).

§7:40.5 Defenses

1. **Individual Liability Unavailable:** The private sector Whistle-Blower's Act is even less susceptible to an interpretation imposing individual liability upon the corporate officers of an employer than its public sector counterpart. The remedies available under section 448.103(2) are similar to those available under section 112.3187(9), leading to the conclusion that the private sector Whistle-Blower's Act is directed at the employer, not at the individuals who act on behalf of the employer. *Tracey-Meddoff v. J. Altman Hair & Beauty Centre, Inc*., 899 So.2d 1167, 1169 (Fla. 4th DCA 2005).

2. **Law, Rule or Regulation:** Neither the Governor's executive order nor the Flagler County order requiring mandatory evacuation of Flagler County is a law, rule or regulation as defined in Section 448.101(4), Florida Statutes. *Gillyard v. Delta Health Group, Inc*., 757 So.2d 601, 603 (Fla. 5th DCA 2000); *Juarez v. New Branch Corp.*, 67 So.3d 1159 (Fla. 3d DCA 2011) (while being struck by a co-employee is a hazard prohibited by OSHA, employee did not file report with OSHA, but with the police, and even then, as against the co-employee, not the employer, and employee failed to offer any evidence that the violence committed by the co-employee was an activity, policy or practice of the employer or committed to further the employer's business).

3. **Other Reasons Supported Employer's Action:** *See* Florida Statutes §112.3187(10) (2005).

§7:40.6 Related Matters

1. **Common Law:** The Florida common law does not recognize the tort of retaliatory discharge. *See Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 424 (Fla. 1994). The Whistle-blower's Act created a new cause of action. *Tracey-Meddoff v. J. Altman Hair & Beauty Centre, Inc*., 899 So.2d 1167, 1168 (Fla. 4th DCA 2005).

2. **Federal Arbitration Act:** The Federal Arbitration Act supersedes Florida law where interstate commerce is involved. *United Servs. Gen. Life Co. v. Bauer*, 568 So.2d 1321, 1322 (Fla. 2d DCA 1990); *Mora v. Abraham Chevrolet-Tampa, Inc*., 913 So.2d 32, 35 (Fla. 2d DCA 2005).

3. **Federal Aviation Administration Authorization Act:** The Federal Aviation Administration Authorization Act (FAAAA) does not preempt Florida's Whistle-Blower's Act because Whistle-Blower's Act does not impinge on air carriers' rates, routes, or services. *Vanacore v. UNC Ardco Inc*., 697 So.2d 892, 893 (Fla. 4th DCA 1997).

4. **Florida Bar Rules:** The rules governing the conduct of members of The Florida Bar do not flow from either a legislatively enacted statute, ordinance, or administrative rule. Neither do they originate from any similar federal source. Rather, the rules are promulgated by the Florida Supreme Court, the head of the judicial branch of state government, under the authority given to it by article V, section 15 of the Florida Constitution. Thus, it cannot be said that the Bar rules are either laws, rules, or regulations as defined in section 448.104, despite their designation as "rules." *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A*., 896 So.2d 787, 791 (Fla. 2d DCA 2005).

5. **Florida Civil Rights Act:** Both the Florida Civil Rights Act and the Whistle-Blower's Act protect against retaliation. If there is a difference between the two acts in this regard, it lies in the fact that the Whistle-Blower's Act has retaliatory firing as its central purpose, whereas the anti-retaliation provision of the Florida Civil Rights Act appears to be auxiliary in nature. Thus, unlike Texas, Florida's more specific statute is the Whistle-Blower's Act. In any event, we see no reason why these two statutes cannot be harmonized to give effect to both. It appears that these statutes were intended to provide dual remedies in "overlap" cases, and that they should be so construed. *Rivera v. Torfino Enterprises, Inc*., 914 So.2d 1087 (Fla. 4th DCA 2005).

6. **Independent Contractors of State Agencies:** The only reason for finding that Ms. Dahl's complaint does not state a cause of action under the private-sector act is that Eckerd was an independent contractor of a state agency and thus fell within the public sector act. Nowhere, however, does the public sector act provide that it is the exclusive remedy for employees of independent contractors of state agencies who are retaliated against for their whistle-blowing activities. To the contrary, both of these statutes are remedial and should be broadly construed. The most important relationship they speak to is that between the employer and the employee; the fact that the employer might be an independent contractor of the state is incidental and does not exclude the employer's actions from the private sector Whistle-Blower's Act. Both acts are designed for the protection of employees who "report or refuse to assist employees who violated laws enacted to protect the public." *Dahl v. Eckerd Family Youth Alternatives, Inc*., 843 So.2d 956, 958 (Fla. 2d DCA 2003).

7. **Notice:** Whether or not written notice to the employer is a required element of a whistle-blower claim appears to be a question of first impression in Florida. The Court finds that the plain language of the statute imposes a written notice and opportunity to cure requirement as an element of proof in every private sector whistle-blower claim because 448.103(1)(c) incorporates the notice provision set forth in 448.102(2). In *Park v. First Union Brokerage Services*, 926 F.Supp. 1085 (M.D.Fla. 1996), the same federal district followed the third district's *Baiton* decision noting the ambiguity of the statute and the fact that a federal court district is to adhere to the decisions of the "state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Park,* 926 F.Supp. at 1089. The notice requirement has also been the topic of two Florida Bar Journal articles. *Compare Baiton v. Carnival Cruise Lines: An Important Decision in The Evolution of Florida's Whistle Blower's Act,* 70 Fla. Bar. J. 59 (1996) (author concluded that the third district in *Baiton* reached a just result) *with Another Look at the Notice Requirements of the Florida Private Sector Whistle Blower's Act,* 71 Fla. Bar J. 43 (1997) (author argues that the written notice requirement must apply to all whistle-blower actions). We align ourselves with the third district in the interpretation of the Whistle-blower's Act's notice provisions, certify conflict with the second district, vacate the order dismissing Jenkins' complaint, and remand for further proceedings. *Jenkins v. Golf Channel*, 714 So.2d 558, 562 (Fla. 5th DCA 1998), *approved*, 752 So.2d 561 (Fla. 2000).

8. **Remedial Provisions Liberally Construed:** Remedial statutes should be liberally construed in favor of granting access to the remedy provided by the Legislature. *Golf Channel v. Jenkins*, 752 So.2d 561, 565 (Fla. 2000) (holding that any ambiguities in paragraph 448.103(1)(c), a section of the Whistle-blower's Act which was remedial in nature, should be liberally construed in favor of granting access to the remedy provided by the Legislature). *Bruner v. GC-GW, Inc*., 880 So.2d 1244, 1246 (Fla. 1st DCA 2004). For Florida Statutes §112.3187, see *Rice-Lamar v. City of Fort Lauderdale*, 853 So.2d 1125, 1132 (Fla. 4th DCA 2003), *rev. denied*, 868 So.2d 522 (Fla. 2004).

9. **Release/Settlement:** *Caballero v. Phoenix Am. Holdings, Inc.*, 79 So.3d 106, 107-08 (Fla. 3d DCA 2012) (settlement reached with ex-employee only covered misconduct of employer as related to employment, termination and compensation through the date of settlement, and did not release any claims for tortious interference of subsequent employment relationship which is alleged to have occurred after the date of the execution of the release).

§7:40.7 Sample Cause of Action

COUNT FOR VIOLATION OF RETALIATORY DISCHARGE
STATUTE (PRIVATE SECTOR WHISTLE-BLOWER'S ACT)

(Florida Statute §448.102)

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Plaintiff Employee is a person who performs services for and under the control and direction of Defendant Employer for wages or other remuneration.
Defendant is a private individual, firm, partnership, institution, corporation, or association that employs ten or more persons.
Plaintiff [insert allegations set forth in paragraph 1, 2 and/or 3 as applicable]:
   (1) disclosed [or threatened to disclose], to a governmental agency, under oath, in writing, an activity, policy, or practice of Defendant Employer that is in violation of a law, rule, or regulation. Plaintiff Employee also has brought, in writing, the activity, policy, or practice to the attention of a supervisor of Defendant Employer [or Defendant Employer] and has afforded Defendant Employer a reasonable opportunity to correct the activity, policy, or practice.
   (2) provided information to, or testified before, a governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by Defendant Employer.
   (3) objected to, or refused to participate in, an activity, policy, or practice of Defendant Employer which is in violation of a law, rule, or regulation.
Defendant Employer committed a retaliatory personnel action against Plaintiff Employee because in retaliation for, and as a direct result of, the conduct described in paragraphs __ - __ above, Defendant Employer discharged, suspended, and/or demoted Plaintiff Employee.
Defendant Employer's conduct caused Plaintiff to suffer damages.

WHEREFORE, Plaintiff demands damages against Defendant for violation of Florida's Private Sector Whistle-Blower's Act (Section 448.102, Fla. Stat.), including but not limited to all relief available under Section 448.103, Fla. Stat., such as (a) an injunction restraining continued violation of this act, (b) reinstatement of the employee to the same position held before the retaliatory personnel action, or to an equivalent position, (c) reinstatement of full fringe benefits and seniority rights, (d) compensation for lost wages, benefits, and other remuneration, (e) any other compensatory damages allowable at law, and (e) attorney's fees, court costs and expenses, and (f) such other relief this Court deems just and proper.

§7:50 RETALIATORY DISCHARGE—WORKERS' COMPENSATION

§7:50.1 Florida Statutes—F.S. §440.205

No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law.

Fla. Stat. §440.205 (Current through the 2018 Second Regular Session of the 25th Legislature).

§7:50.2 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§7:50.2.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§7:50.2.2 Elements of Cause of Action — 2nd DCA

A claim under the statute has three elements: (1) the employee engaged in statutorily protected activity; (2) an adverse employment action occurred; and (3) the adverse action and the employee's protected activity were causally related. *Ortega v. Eng'g Sys. Tech., Inc.*, 30 So.3d 525, 528 (Fla. 3d DCA 2010) (citing *Russell v. KSL Hotel Corp.*, 887 So.2d 372, 379 (Fla. 3d DCA 2004)). In order to establish a claim under section 440.205, the employee's pursuit of workers' compensation need not be the only reason for a discharge. *Allan v. SWF Gulf Coast, Inc.*, 535 So.2d 638, 639 (Fla. 1st DCA 1988). "The statute prohibits any discharge 'by reason of' an attempt to claim compensation even if there may also be other reasons for the discharge." *Id*. In addition, proof of a discharge is not essential to a recovery under the statute. Section 440.205 creates a cause of action for intimidation or coercion even in the absence of a discharge. *Chase v. Walgreen Co.*, 750 So.2d 93, 97–98 (Fla. 5th DCA 1999). Finally, the employee need not establish a specific retaliatory intent in order to prevail. *Allan*, 535 So.2d at 639.

Source

Atha v. Allen P. Van Overbeke, D.M.D., P.A., 213 So.3d 1073, 1074 (Fla. 2d DCA 2017); *Hornfischer v. Manatee County Sheriff's Office*, 136 So.3d 703, 706 (Fla. 2d DCA, 2014).

§7:50.2.3 Elements of Cause of Action — 3rd DCA

To prevail on claim for retaliatory discharge for making a valid workers' compensation claim, the employee must prove: (1) he engaged in a statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was causally related to the employee's protected activity. Once a plaintiff asserting a claim for retaliatory discharge for making a valid workers' compensation claim establishes a prima facie case by proving the protected activity and the negative employment action are not completely unrelated, the burden then shifts to the employer to proffer a legitimate reason for the adverse employment action.

Source

Ortega v. Engineering Sys. Tech., Inc., 30 So.3d 525, 528 (Fla. 3d DCA 2010).

§7:50.2.4 Elements of Cause of Action — 4th DCA

[No citation for this edition.]

§7:50.2.5 Elements of Cause of Action — 5th DCA

In order to establish a prima facie workers' compensation retaliation claim, the plaintiff must demonstrate the following elements: (1) a statutorily protected expression; (2) an adverse employment action; and, (3) a causal connection between participation in the protected expression and the adverse action.

Source

Andrews v. Direct Mail Exp., Inc., 1 So.3d 1192, 1193 (Fla. 5th DCA 2009).

§7:50.3 Statute of Limitations

Four years. §95.11(3)(f), Fla. Stat.; *Scott v. Otis Elevator Co*., 524 So.2d 642, 643 (Fla. 1988).

§7:50.4 References

1. FL Jur. 2d *Workers' Compensation* §518, Prohibition of Employer Retaliation.
2. FL Jur. 2d *Workers' Compensation* §519, Action for Wrongful Discharge, Intimidation, or Coercion.
3. FL Jur. 2d *Workers' Compensation* §521, Action for Wrongful Discharge, Intimidation, or Coercion — Effect of Assignment of Claim.
4. *Handling retaliatory discharge cases under the Workers' Compensation Act*. Algia R. Cooper and R. John Westberry, 58 Fla.B.J. 253 (1984).

§7:50.5 Defenses

1. **Presuit Requirement for Claims Against the State:** A plaintiff asserting a claim under Section 440.205, Fla. Stat., against the state or one of its agencies or officials, must comply with the presuit requirements of Section 768.28, Fla. Stat. *E.g., Osten v. City of Homestead*, 757 So.2d 1243, 1244 (Fla. 3d DCA 2000).

2. **Nondiscriminatory Basis for Termination:** Employers still retain their traditional right to terminate employees for legitimate business reasons, such as unsatisfactory job performance or excessive absenteeism. *Pericich v. Climatrol, Inc.*, 523 So.2d 684, 685 (Fla. 3d DCA 1988).

§7:50.6 Related Matters

1. **Prima Facie Case:** "In order to establish a prima facie retaliation case, the plaintiff must demonstrate the following elements: (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal connection between the participation in the protected expression and the adverse action." *Russell v. KSL Hotel Corp*., 882 So.2d 372, 379 (Fla. 3d DCA 2004) (citations omitted).

2. **Burden Shifting:** If the defendant offers a legitimate, nondiscriminatory basis for termination, "[p]laintiff then bears the burden of persuasion that the proffered reasons are pretextual. *McDonnell Douglas Corp*., 411 U.S. at 802, 93 S.Ct. 1817. Plaintiff may carry her burden by showing that the reason offered for her termination had no basis in fact, that the reason was not the true factor motivating the termination decision, or that the stated reason was insufficient to motivate the decision." *Humphrey v. Sears Roebuck, and Co.*, 192 F.Supp. 1371, 1374-75 (S.D. Fla. 2002) (citation omitted).

3. **Punitive Damages:** Punitive damages are available to plaintiff asserting claim for wrongful discharge based on assertion of workers' compensation claim if the employer's "conduct reached the requisite level of culpability." *Rease v. Anheuser-Busch*, 644 So.2d 1383, 1388 (Fla. 1st DCA 1994) (citing *Scott v. Otis Elevator Co*., 572 So.2d 902, n. 5 (Fla. 1990).

4. **Private Right of Action Based on Prior Claim:** "Section 440.205, which is clear and unambiguous, provides for a civil cause of action against an employer who discharges an employee for having filed a workers' compensation claim against a previous employer." *Bruner v. GC-GW, Inc.*, 880 So.2d 1244, 1247 (Fla. 1st DCA 2004).

5. **Assignment of Claim:** Employee fired for assertion of workers' compensation claim may assign such claim to employer's workers' compensation carrier. *Notarian v. Plantation AMC Jeep, Inc.*, 567 So.2d 1034, 1036 (Fla. 4th DCA 1990).

6. **Workers' Compensation Disability Benefits:** The Supreme Court of Florida ruled that the 104-week temporary total disability time limit was unconstitutional because the "statute deprives a severely injured worker of disability benefits at a critical time." *See Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016).

7. **Workers' Compensation Attorney's Fees:** "The statute mandating a conclusive fee schedule for awarding attorney fees to a successful workers' compensation claimant violates the state and federal constitutional guarantees of due process." *See Castellanos v. Next Door Co.*, 192 So.3d 431 (Fla. 2016).

§7:50.7 Related Causes of Action

✓ Breach of Contract, §3:10

§7:50.8 Sample Cause of Action

COUNT FOR VIOLATION OF RETALIATORY DISCHARGE STATUTE—
WORKERS' COMPENSATION

(Florida Statute §448.205)

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs _-__ above as if set forth herein in full.

Plaintiff Employee made a workers' compensation claim under Florida's Workers' Compensation Law.
In direct retaliation for Plaintiff Employee's pursuit of a workers' compensation claim, Defendant Employer discharged, threatened to discharge, intimidate, and/or coerced Plaintiff Employee.
Defendant Employer's conduct caused Plaintiff Employee to suffer damages.

WHEREFORE, Plaintiff demands damages against Defendant for violation of Section 448.205, Fla. Stat., and such other relief this Court deems just and proper.

§7:60 WRONGFUL GARNISHMENT

§7:60.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§7:60.1.1 Elements of Cause of Action — 1st DCA

It is settled that one has a common law cause of action against the creditor for the wrongful and malicious seizure of his property without probable cause under a writ of attachment or garnishment. Originally, this action was commenced as an action of trespass, but is now more nearly analogous to an action for malicious prosecution.

Source

Strickland v. Commerce Loan Co. of Jacksonville, 158 So.2d 814, 816 (Fla. 1st DC 1963).

§7:60.1.2 Elements of Cause of Action — 2nd DCA

A cause of action in tort for the wrongful and malicious seizure of property under a writ of garnishment or attachment is recognized in Florida. *Strickland v. Commerce Loan Company of Jacksonville*, 158 So.2d 814, 816 (Fla. 1st DCA 1963). It is well established that the principles governing a common law action for the wrongful issuance of such writs are those common law principles applicable to actions for malicious prosecution.

Source

Iowa Mutual Ins. Co. v. Gulf Heating & Refrigeration Co., 184 So.2d 705, 706 (Fla. 2d DCA 1966), *quashed on other grounds*, 193 So.2d 4 (Fla. 1966).

§7:60.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§7:60.1.4 Elements of Cause of Action — 4th DCA

The principles governing a common law action for the wrongful issuance of a garnishment writ "are those common law principles applicable to actions for malicious prosecution." *Iowa Mutual Ins. Co. v. Gulf Heating & Refrigeration Co.*, 184 So.2d 705, 706 (Fla. 2d DCA 1966), *quashed on other grounds*, 193 So.2d 4 (Fla. 1966).

As with the tort of malicious prosecution, two of the necessary elements of a cause of action for wrongful garnishment are: (1) an absence of probable cause for such proceeding; and (2) the presence of legal malice, which "may be inferred entirely from a lack of probable cause." *Adams v. Whitfield*, 290 So.2d 49, 51 (Fla. 1974); *Iowa Mutual Ins. Co. v. Gulf Heating & Refrigeration Co*., 184 So.2d 705, 706 (Fla. 2d DCA 1966), *quashed on other grounds*, 193 So.2d 4 (Fla. 1966); *Strickland v. Commerce Loan Co. of Jacksonville*, 158 So.2d 814, 816 (Fla. 1st DCA 1963). Legal malice may also be inferred from "gross negligence, or great indifference to persons, property, or the rights of others."

Source

Burshan v. National Union Fire Ins. Co. of Pittsburgh, PA, 805 So.2d 835, 845 (Fla. 4th DCA 2001), *rev. denied*, 835 So.2d 265 (Fla. 2002).

§7:60.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§7:60.2 Statute of Limitations

See generally *Burshan v. National Union Fire Ins. Co. of Pittsburgh*, 805 So.2d 835 (Fla. 4th DCA 2001) (analyzing statutes of limitation applicable to garnishment actions).

§7:60.3 References

1. 13 Fla. Jur. 2d *Creditors' Rights and Remedies* §§188–197 (2005).
2. 6 Am. Jur. 2d *Attachment and Garnishment*, §§604–655 (1999).
3. 7 C.J.S. *Attachment* §§553–575 (2004).
4. 38 C.J.S. *Garnishment* §§361–364 (1996).
5. Florida Statutes §77.01 (2005) (Garnishment)

§7:60.4 Related Matters

1. **Separate Proceeding:** Florida Statutes §77.07 provides for dissolution of garnishment by the court that entered the writ. We feel that either the proceedings outlined in Florida Statutes §77.07 or the posting of a bond under Florida Statutes §77.24 result in sufficient discharge or dissolution of the writ to allow a later suit for improper garnishment. In the case of *Nash v. Walker*, 78 So.2d 685 (Fla. 1955), the Florida Supreme Court also recognized that a garnishment may be discharged under both Florida Statutes §77.07 and 77.24. *See also Jones-Mahoney Corp. v. C. A. Fielland, Inc*., 114 So.2d 18 (Fla. 2d DCA 1959), holding that an action for improper garnishment should be brought in a separate proceeding, and not as a counterclaim in the principal suit. In the case at bar, the action was properly brought as a separate proceeding. *Dynatronics, Inc. v. Knorr*, 247 So.2d 70, 71 (Fla. 1971). However, compare *Jones-Mahoney Corp. v. C. A. Fielland, Inc*., 114 So.2d 18, 20 (Fla. 2d DCA 1959) where the court said: "The Supreme Court of Florida concluded that the counterclaim should not have been entertained because of the confusion created by the differing causes of action. The opinion there nowhere suggests that the counterclaim should have been stricken or dismissed. We construe it as saying only that the two issues should not have been tried at the same time before a jury but not as prohibiting the retention of the counterclaim for separate proceedings." *See also Strickland v. Commerce Loan Co. of Jacksonville*, 158 So.2d 814, 816 (Fla. 1st DCA 1963).

CHAPTER 8

FRAUD

§8:10 FRAUD
§8:10.1 Elements of Cause of Action — Florida Supreme Court
§8:10.1.1 Elements of Cause of Action — 1st DCA
§8:10.1.2 Elements of Cause of Action — 2nd DCA
§8:10.1.3 Elements of Cause of Action — 3rd DCA
§8:10.1.4 Elements of Cause of Action — 4th DCA
§8:10.1.5 Elements of Cause of Action — 5th DCA
§8:10.2 Statute of Limitations
§8:10.3 References
§8:10.4 Defenses
§8:10.5 Related Matters

§8:20 FRAUD, CONSTRUCTIVE
§8:20.1 Elements of Cause of Action — Florida Supreme Court
§8:20.1.1 Elements of Cause of Action — 1st DCA
§8:20.1.2 Elements of Cause of Action — 2nd DCA
§8:20.1.3 Elements of Cause of Action — 3rd DCA
§8:20.1.4 Elements of Cause of Action — 4th DCA
§8:20.1.5 Elements of Cause of Action — 5th DCA
§8:20.2 Statute of Limitations
§8:20.3 References
§8:20.4 Defenses
§8:20.5 Related Matters

§8:30 FRAUD IN THE INDUCEMENT
§8:30.1 Elements of Cause of Action — Florida Supreme Court
§8:30.1.1 Elements of Cause of Action — 1st DCA
§8:30.1.2 Elements of Cause of Action — 2nd DCA
§8:30.1.3 Elements of Cause of Action — 3rd DCA
§8:30.1.4 Elements of Cause of Action — 4th DCA
§8:30.1.5 Elements of Cause of Action — 5th DCA
§8:30.2 Statute of Limitations
§8:30.3 References
§8:30.4 Defenses
§8:30.5 Related Matters

§8:40 FRAUDULENT MISREPRESENTATION

§8:40.1 Elements of Cause of Action — Florida Supreme Court
§8:40.1.1 Elements of Cause of Action — 1st DCA
§8:40.1.2 Elements of Cause of Action — 2nd DCA
§8:40.1.3 Elements of Cause of Action — 3rd DCA
§8:40.1.4 Elements of Cause of Action — 4th DCA
§8:40.1.5 Elements of Cause of Action — 5th DCA
§8:40.2 Statute of Limitations
§8:40.3 References
§8:40.4 Defenses
§8:40.5 Related Matters

§8:10 FRAUD

§8:10.1 Elements of Cause of Action — Florida Supreme Court

The elements for actionable fraud are:
1. a false statement concerning a material fact;
2. knowledge by the person making the statement that the representation is false;
3. the intent by the person making the statement that the representation will induce another to act on it; and
4. consequent injury suffered by the person acting in reliance on the representation

In summary, there must be an intentional material misrepresentation upon which the other party relies to his detriment.

Source

Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010)("Justifiable reliance is not a necessary element of fraudulent misrepresentation.").

See Also

1. *Prentice v. R.J. Reynolds Tobacco Co*., 2022 WL 805951, *4 (Fla. Mar. 17, 2022).
2. *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984).
3. *American International Land Corp. v. Hanna*, 323 So.2d 567, 569 (Fla. 1975).
4. *Joiner v. McCullers*, 28 So.2d 823, 824 (Fla. 1947).
5. *Mizell v. Upchurch*, 35 So. 9, 12 (1903).

§8:10.1.1 Elements of Cause of Action — 1st DCA

The elements for actionable fraud are: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induced another to act on it; and (4) consequent injury by the party acting in reliance on the representation.

Source

Sheridan v. Rennhack, 200 So.3d 255, 258 (Fla. 1st DCA 2016); *Cohen v. Corbitt*, 135 So.3d 527, 529 (Fla. 1st DCA 2014).

See Also

1. *R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So.3d 536, 538 (Fla. 1st DCA 2018).
2. *Howard v. Murray*, 184 So.3d 1155, n. 22 (Fla. 1st DCA 2015).
3. *Connecticut Gen. Life Ins. Co. v. Jones,* 764 So.2d 677, 682 (Fla.1st DCA 2000).
4. *Miller v. Sullivan*, 475 So.2d 1010, 1011 (Fla. 1st DCA 1985).
5. *Yost v. Rieve Enterprises, Inc.*, 461 So.2d 178, 182 (Fla. 1st DCA 1984), *petition for rev. denied*, 469 So.2d 750 (Fla. 1985).
6. *Barnett Bank of Tallahassee v. Capital City First National Bank*, 348 So.2d 643, 645 (Fla. 1st DCA 1977).
7. *Tucker v. Mariani*, 655 So.2d 221, 225 (Fla. 1st DCA 1995).

§8:10.1.2 Elements of Cause of Action — 2nd DCA

The elements for actionable fraud are:
1. a false statement concerning a material fact;
2. knowledge by the person making the statement that the representation is false;
3. the intent by the person making the statement that the representation will induce another to act on it; and
4. reliance on the representation to the injury of the other party.

Source

Pirate's Treasure, Inc. v. City of Dunedin, 277 So.3d 1124, 1129 (Fla. 2d DCA 2019).

See Also

1. *GEICO General Ins, Co, v. Hoy*, 136 So. 3d 647, 651 (Fla. 2d DCA 2013).
2. *Parham v. Florida Health Sciences Ctr., Inc.*, 35 So.3d 920, 928 (Fla. 2d DCA 2010).

3. *Gandy v. Trans World Computer Technology Group*, 787 So.2d 116 (Fla. 2d DCA 2001).
4. *Crown Eurocars, Inc. v. Schropp*, 636 So.2d 30 (Fla. 2d DCA 1993), *rev. granted*, 645 So.2d 454 (Fla. 1994), *affirmed*, 654 So.2d 1158 (Fla. 1995).
5. *Perry v. Cosgrove*, 464 So.2d 664, 666 (Fla. 2d DCA 1985).
6. *Osborne v. Delta Maintenance and Welding, Inc.*, 365 So.2d 425, 427 (Fla. 2d DCA 1978).
7. *C & J Sapp Publishing Co. v. Tandy Corp.*, 585 So.2d 290, 292 (Fla. 2d DCA 1991).

§8:10.1.3 Elements of Cause of Action — 3rd DCA

The elements of a fraud claim are:
1. a false statement concerning a specific material fact;
2. the maker's knowledge that the representation is false;
3. an intention that the representation induce another's reliance; and
4. consequent injury by the other party acting in reliance upon the representation.

Source

Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc., 842 So.2d 204, 209 (Fla. 3d DCA 2003).

See Also

1. *Plastiquim v. Odebrecht Constr., Inc.*, 2022 WL 1231254, *2 (Fla. 3d DCA Apr. 27, 2022).
2. *Brooks v. Henry*, 333 So.3d 298, 299 (Fla. 3d DCA 2022).
3. *Bailey v. Covington*, 317 So.3d 1223, 1227-28 (Fla. 3d DCA 2021).
4. *Pritchard v. Levin*, 305 So.3d 628, 630 (Fla. 3d DCA 2020).
5. *Falsetto v. Liss*, 275 So.3d 693, 697 (Fla. 3d DCA 2019).
6. *Gemini Inv'rs III, L.P. v. Nunez,* 78 So.3d 94, 97 (Fla. 3d DCA 2012).
7. *Lopez-Infante v. Union Cent. Life Ins. Co*., 809 So.2d 13, 15 (Fla. 3d DCA 2002), *rev. denied*, 832 So.2d 106 (Fla. 2002).
8. *Ward v. Atlantic Security Bank*, 777 So.2d 1144, 1146 (Fla. 3d DCA 2001).
9. *Iden v. Kasden*, 609 So.2d 54, 55 (Fla. 3d DCA 1992), *rev. denied*, 620 So.2d 761 (Fla. 1993).
10. *McCloskey v. Fonseca*, 587 So.2d 575 (Fla. 3d DCA 1991).
11. *Tourismart of America, Inc. v. Gonzalez*, 498 So.2d 469, 471 (Fla. 3d DCA 1986).
12. *Poliakoff v. National Emblem Insurance Co.*, 249 So.2d 477, 478 (Fla. 3d DCA 1971), *cert. denied*, 254 So.2d 790 (Fla. 1971).

§8:10.1.4 Elements of Cause of Action — 4th DCA

The elements of fraud are:
1. a false statement of material fact;
2. the maker of the false statement knew or should have known of the falsity of the statement;
3. the maker intended that the false statement induce another's reliance; and
4. the other party justifiably relied on the false statement to its detriment

Source

Cong. Park Office II, LLC v. First-Citizens Bank & Trust Co., 105 So. 3d 602, 606 *(Fla. 4th DCA 2013).*

See Also

1. *Gilison v. Flagler Bank*, 303 So. 3d 999, 1002-03 (Fla. 4th DCA 2020).
2. *Rhodes v. O. Turner & Co., LLC,* 117 So.3d 872, 876 (Fla. 4th DCA 2013).
3. *Cohen v. Kravit Estate Buyers, Inc*., 843 So.2d 989, 991 (Fla. 4th DCA 2003).
4. *Hollywood Lakes Country Club, Inc. v. Community Association Services, Inc.*, 770 So.2d 716, 718 (Fla. 4th DCA 2000).
5. *Gutter v. Wunker*, 631 So.2d 1117, 1118 (Fla. 4th DCA 1994), *cause dismissed*, 637 So.2d 235 (Fla. 1994).
6. *Sheen v. Jenkins*, 629 So.2d 1033, 1035 (Fla. 4th DCA 1993).
7. *Martin v. Brown*, 566 So.2d 890, 891 (Fla. 4th DCA 1990).
8. *A.S.J. Drugs, Inc. v. Berkowitz*, 459 So.2d 348, 349 (Fla. 4th DCA 1984).
9. *Lawnwood Med. Ctr., Inc., v. Sadow*, 43 So. 3d 710, 728 (Fla. 4th DCA 2010) ("It is fundamental that '[a]ctual damages and the measure thereof are essential as a matter of law in establishing a claim of

fraud.' 'Damage is of the very essence of an action for fraud or deceit.' Without proof of actual damage the fraud is not actionable. Thus, to prevail in an action for fraud, a plaintiff must prove its actual loss or injury from acting in reliance on the false representation.").

§8:10.1.5 Elements of Cause of Action — 5th DCA

The elements that must be established to prove a claim of fraud are:
1. a false statement concerning a material fact;
2. the representor's knowledge that the representation is false;
3. an intention that the representation induce another to act on it; and,
4. consequent injury by the party acting in reliance on the representation.

Source

Townsend v. Morton, 36 So. 3d 865, 868 (Fla. 5 th DCA 2010).

See Also

1. *Essex Insurance Co., Inc. v. Universal Entertainment & Skating Center, Inc.*, 665 So.2d 360, 362 (Fla. 5th DCA 1995).
2. *Palm Beach Roamer, Inc. v. McClure*, 727 So.2d 1005, 1007 (Fla. 5th DCA 1999), *rev. denied*, 744 So.2d 456 (Fla. 1999).
3. *Myers v. Myers*, 652 So.2d 1214, 1215 (Fla. 5th DCA 1995).
4. *Barroso v. Respiratory Care Services, Inc.*, 518 So.2d 373, 376 (Fla. 5th DCA 1987), *rev. denied*, 525 So.2d 880 (Fla. 1988).
5. *S.H. Investment and Development Corp., v. Kincaid*, 495 So.2d 768, 770 (Fla. 5th DCA 1986), *rev. denied*, 504 So.2d 767 (Fla. 1987).
6. *Simon v. Celebration Co.*, 883 So.2d 826, 832 (Fla. 5th DCA 2004).

§8:10.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(j).

§8:10.3 References

1. 27 Fla. Jur. 2d *Fraud and Deceit* §§10–44 (2000).
2. 27 Fla. Jur. 2d *Fraud and Deceit* §7 (1981).
3. 37 Am. Jur. 2d *Fraud and Deceit* §§20–36 (2001).
4. 37 C.J.S. *Fraud* §§7–58 (1997).
5. Restatement (Second) of Torts §525 (1977).

§8:10.4 Defenses

1. **Bad Faith:** Under the broad rule announced in *First Interstate Dev. Corp. v. Ablanedo*, 511 So.2d 536, 539 (Fla. 1987), bad faith must be deemed to be a necessary element of any action for fraud whether the fraud action is based on intentional misconduct or on reckless disregard for the truth. *Parker v. State of Florida Board of Regents*, 724 So.2d 163, 169 (Fla. 1st DCA 1998).

2. **Class Actions:** The Florida Supreme Court has clearly and unequivocally held that class actions seeking relief from separate contracts on the basis of fraud, whatever the genesis of the fraud, are prohibited. *Humana, Inc. v. Castillo*, 728 So.2d 261, 264 (Fla. 2d DCA 1999), *rev. dismissed*, 741 So.2d 1134 (Fla. 1999).

3. **Damages:** There isn't necessarily damage where there is fraud, which is why no cause of action for fraud exists unless there is damage due to fraud that is separate from damages that may result from any subsequent contractual breach. *La Pesca Grande Charters, Inc. v. Moran*, 704 So.2d 710, 713 (Fla. 5th DCA 1998). Not every false representation constitutes fraud on which a claim for relief can be based. *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1550 (11th Cir. 1985) (quoting *Greenwald v. Food Fair Stores Corp.*, 100 So.2d 200, 202 (Fla. 3d DCA 1958)). *See also Kent v. Sullivan*, 793 So.2d 1027, 1028 (Fla. 5th DCA 2001).

4. **In Pari Delicto:** One who himself engages in a fraudulent scheme, that is, acts *in pari delicto*, may forfeit his right to any legal remedy against a co-perpetrator. *Kulla v. E.F. Hutton & Company, Inc.*, 426 So.2d 1055, 1057 (Fla. 3d DCA 1983).

5. **Judicial Immunity:** *See Limehouse v. Whittemore*, 773 So.2d 86, 87 (Fla. 2d DCA 2000), *rev. denied*, 786 So.2d 1186 (Fla. 2001).

6. **Past or Existing Fact:** A false statement of fact, to be a ground for fraud, must be of a past or existing fact, not a promise to do something in the future. However, the cases recognize an exception where the promise to perform a material matter in the future is made without any intention of performing or made with the positive intention not to perform. *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So.2d 1367, 1371 (Fla. 4th DCA 1981).

7. **Promise Not Performed:** As a general rule, fraud cannot be predicated upon a mere promise not performed. However, under certain circumstances, a promise may be actionable as fraud where it can be shown that the promissor had a specific intent not to perform the promise at the time the promise was made, and the other elements of fraud are established. *940 Lincoln Road Assocs. LLC v. 940 Lincoln Road Enterps. Inc.,* 237 So.3d 1099, 1102 (Fla. 3d DCA 2017); *Alexander/Davis Properties, Inc. v. Graham*, 397 So.2d 699, 706 (Fla. 4th DCA 1981), *rev. denied*, 408 So.2d 1093 (Fla. 1981). *See also Noack v. Blue Cross and Blue Shield of Florida, Inc.*, 742 So.2d 433, 434 (Fla. 1st DCA 1999), *subsequent appeal*, 859 So.2d 608 (Fla. 1st DCA 2003).

8. **Puffing:** A seller's "puffing" or statements of opinion do not relieve a buyer of the duty to investigate the truth of those statements and do not constitute fraudulent misrepresentation. *Wasser v. Sasoni*, 652 So.2d 411, 412 (Fla. 3d DCA 1995).

9. **Opinion:** Generally, the misrepresentation, to be actionable, must be one of fact rather than of opinion. *Tonkovich v. South Florida Citrus Industries, Inc.*, 185 So.2d 710, 713 (Fla. 2d DCA 1966), *cert. granted and remanded*, 196 So.2d 438 (Fla. 1967), *affirmed on remand*, 202 So.2d 579 (Fla. 2d DCA 1967); *MDVIP, Inc. v. Beber*, 222 So.3d 555, 561 (Fla. 4th DCA 2017).

10. **Waiver:** Waiver of fraud can occur where a party should have discovered the fraud through ordinary diligence. *See Hurner v. Mut. Bankers Corp.*, 191 So. 831, 833 (1939); *Zurstrassen v. Stonier*, 786 So.2d 65, 70 (Fla. 4th DCA 2001).

§8:10.5 Related Matters

1. **Background:** An action for deceit has existed at common law since 1201. William L. Prosser, *Handbook of the Law of Torts*, §105 (4th ed. 1971). The modern common law of fraud traces its roots to *Pasley v. Freeman*, 3 Term Rep. 51, 100 Eng.Rep. 450 (1789). In general terms, the interest protected by fraud is society's need for true factual statements in important human relationships, primarily commercial or business relationships. More specifically, the interest protected by fraud is a plaintiff's right to justifiably rely on the truth of a defendant's factual representation in a situation where an intentional lie would result in loss to the plaintiff. But see T*iara Condominium Assoc., Inc. v. March & McClennan Cos. Inc.*, 110 So.3d 399, 401 (Fla. 2013) (explaining that the economic loss doctrine is limited to product liability cases and bars causes of action in tort unless the defective product injures a person or damages property other than the defective product itself).

2. **Constructive Trust:** A constructive trust is properly imposed when, as a result of a mistake in a transaction, one party is unjustly enriched at the expense of another. Although this equitable remedy is usually limited to circumstances in which fraud or a breach of confidence has occurred, it is proper in cases in which one party has benefited by the mistake of another at the expense of a third party. *Logie v. J.P. Morgan, Florida, F.S.B.*, 716 So.2d 319, 320 (Fla. 4th DCA 1998).

3. **Defendant's Physical Presence:** In order to "commit a tortious act" in Florida, a defendant's physical presence is not required. *Merkin v. PCA Health Plans of Fla. Inc*., 855 So.2d 137, 140 (Fla. 3d DCA 2003).

4. **Intentional Omission:** Fraud also includes the intentional omission of a material fact. *Ward v. Atlantic Security Bank*, 777 So.2d 1144, 1146 (Fla. 3d DCA 2001). *See also Solorzano v. First Union Mortg. Corp*., 896 So.2d 847, 849 (Fla. 4th DCA 2005); *First Union Nat. Bank v. Turney*, 824 So.2d 172, 189 (Fla. 1st DCA 2001), *rev. denied*, 828 So.2d 385 (Fla. 2002).

5. **Knowledge:** The knowledge, by the maker of the representation, of its falsity, or, in technical phrase, the scienter, can be established by either one of the three following phases of proof: (1) That the representation was made with actual knowledge of its falsity; (2) without knowledge either of its truth or falsity; (3) under circumstances in which the person making it ought to have known, if he did not know, of its falsity. Under the first phase the proof must show actual knowledge of the falsity of the representation. Under the second phase it should show that the representation was made in such absolute, unqualified, and positive terms as to imply that the party making it had knowledge of its truth, and that he made such absolute, unqualified, and positive assertion on a subject of which he was ignorant, and that he had no knowledge whether his assertion in reference thereto was true or false. Under the third phase, the proof should show that the party occupied such a special situation or possessed such means of knowledge as made it his duty to know as to the truth or falsity of the representation made. If the proof establishes either one of these three phases, the scienter is sufficiently made out. *Parker v. State of Florida Board of Regents*, 724 So.2d 163, 168 (Fla. 1st DCA 1998).

6. **Fraud Ordinarily Not Proper for Summary Judgment:** "The issue of fraud is not ordinarily a proper subject for summary judgment. Fraud is a subtle thing, requiring a full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud." *Sanders Farm of Ocala, Inc. v. Bay Area Truck Sales, Inc.,* 235 So.3d 1010, 1012 (Fla. 2d DCA 2017) (citations omitted); *Gorrin v. Poker Run Acquisitions, Inc.,* 237 So.3d 1149, 1154-1155 (Fla. 3d DCA 2018) (citations omitted).

§8:20 FRAUD, CONSTRUCTIVE

§8:20.1 Elements of Cause of Action — Florida Supreme Court

Constructive fraud is simply a term applied to a great variety of transactions … which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud, …

It is not necessary that there should have been a fiduciary relation between the parties, nor that it be positively shown that the one was not left to act upon his own free will, in order to constitute constructive fraud; but "inadequacy of consideration, coupled with such a degree of mental weakness as would justify the inference that advantage had been taken of that weakness, will furnish sufficient ground for equitable interference."

And where a contract is executed on an insufficient consideration by one enfeebled in body and mind, a presumption of fraud arises.

Source

Douglas v. Ogle, 85 So. 243, 244 (Fla. 1920).

§8:20.1.1 Elements of Cause of Action — 1st DCA

Constructive fraud may exist independently of an intent to defraud. It is a term which is applied to a great variety of transactions that equity regards as wrongful, to which it attributes the same or similar effects as those that follow from actual fraud and for which it gives the same or similar relief. Thus constructive fraud is deemed to exist where a duty under a confidential or fiduciary relationship has been abused.

A fiduciary relation may result from an offer of assistance where the nature of the proposal is one that is naturally calculated to repose confidence and trust in the one making the proposal.

The relation and correlative duties need not be legal but may be moral, social, domestic or merely personal.

Source

Harrell v. Branson, 344 So.2d 604, 606 (Fla. 1st DCA 1977), *cert. denied,* 353 So.2d 675 (Fla. 1977).

See Also

1. *First Union Nat. Bank v. Turney*, 824 So.2d 172, 191 (Fla. 1st DCA 2001), *rev. denied*, 828 So.2d 385 (Fla. 2002) ("Constructive fraud is the term typically applied where a duty under a confidential or fiduciary relationship has been abused, or where an unconscionable advantage has been taken. Constructive fraud may be based on misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party.").
2. *Steigman v. Danese,* 502 So.2d 463, 468 (Fla. 1st DCA 1987), *rev. denied*, 511 So.2d 998 (Fla. 1987), *overruled on other grounds by Spohr v. Berryman,* 589 So.2d 225, 228-29 (Fla. 1991) (*overruled on other grounds by Baillargeon v. Sewell*, 33 So.3d 130 (Fla. 2d DCA 2010)), *and order vacated by In re Estate of Danese*, 601 So.2d 570, 571 (Fla. 1st DCA 1992) (Constructive fraud arises when a confidential or fiduciary relationship has been used to take advantage of the party seeking affirmative relief.).
3. *Taylor v. Kenco Chemical & Mfg. Corp.,* 465 So.2d 581, 589 (Fla. 1st DCA 1985) (Fraud contemplates an intent to deceive, however, "[c]onstructive fraud may exist independently of an intent to defraud." … Constructive fraud is a term applied to a wrongful transaction having similar attributes or effects as actual fraud, and "is deemed to exist where a duty under a confidential or fiduciary relationship has been abused.").

§8:20.1.2 Elements of Cause of Action — 2nd DCA

Constructive fraud is simply a term applied to a great variety of transactions . . . which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud, …

Source

Halkey-Roberts Corp. v. Mackal, 641 So.2d 445, 447 (Fla. 2d DCA 1994).

§8:20.1.3 Elements of Cause of Action — 3rd DCA

Constructive fraud occurs when a duty under a confidential or fiduciary relationship has been abused or where an unconscionable advantage has been taken. *See Beers v. Beers*, 724 So.2d 109 (Fla. 5th DCA 1998) citing *Rogers v. Mitzi*, 584 So.2d 1092 (Fla. 5th DCA 1991). Constructive fraud may be based on a misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party.

Source

Levy v. Levy, 862 So.2d 48, 53 (Fla. 3d DCA 2003).

§8:20.1.4 Elements of Cause of Action — 4th DCA

Constructive fraud is the term typically applied where a duty under a confidential or fiduciary relationship has been abused, or where an unconscionable advantage has been taken. Constructive fraud may be based on misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party.

Source

Niles v. Mallardi, 828 So.2d 1076, 1078 (Fla. 4th DCA 2002).

See Also

National Ventures, Inc. v. Water Glades 300 Condo. Ass'n, 847 So.2d 1070, 1074 (Fla. 4th DCA 2003) ("A constructive fraud is deemed to exist where a duty under a … fiduciary relationship has been abused.").

§8:20.1.5 Elements of Cause of Action — 5th DCA

Constructive fraud is the term typically applied where a duty under a confidential or fiduciary relationship has been abused, or where an unconscionable advantage has been taken. Constructive fraud may be based on

misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party.

Source

Wishinsky v. Choufani, 278 So.3d 803, 804-05 (Fla. 5th DCA 2019).

See Also

1. *Beers v. Beers*, 724 So.2d 109, 116 (Fla. 5th DCA 1999), rev denied, 735 So.2d 1283 (Fla. 1999).
2. *Rogers v. Mitzi,* 584 So.2d 1092 (Fla. 5th DCA 1991), *rev. denied,* 598 So.2d 77 (Fla. 1992).
3. *Allie v. Ionata,* 466 So.2d 1108, 1110 (Fla. 5th DCA 1985), *dismissed* 469 So.2d 749 (Fla. 1985), *affirmed*, 503 So.2d 1237 (Fla. 1987).
4. *Canal Authority of the State of Florida v. Harbond, Inc.,* 433 So.2d 1345, 1348 (Fla. 5th DCA 1983).

§8:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(j). *See also* Fla. Stat. §95.031(2)(a) (An action founded upon fraud under s. 95.11(3), including constructive fraud … must be begun within 12 years after the date of the commission of the alleged fraud). *See also*, *Allie v. Ionata*, 466 So.2d 1108, 1110 (Fla. 5th DCA 1985).

§8:20.3 References

1. 27 Fla. Jur. 2d *Fraud and Deceit* §8 (2000).
2. 37 Am. Jur. 2d *Fraud and Deceit* §9 (2001).
3. 37 C.J.S. *Fraud* §5 (1997).

§8:20.4 Defenses

1. **Marital Relationship:** One spouse may not be sued by the other in tort for a breach of this confidential relationship which results in a loss of marital property, in the absence of a distinct agreement or transaction between the spouses. *Beers v. Beers*, 724 So.2d 109, 117 (Fla. 5th DCA 1999), *rev. denied*, 735 So.2d 1283 (Fla. 1999).

§8:20.5 Related Matters

1. **Assignment of Fiduciary Duty:** Fiduciaries are generally not able to avoid the negligent performance of their own special responsibilities by handing them off to someone else. *See State ex rel. Simmons v. Harris*, 161 So. 374, 378 (Fla. 1935); *Morgan Stanley DW Inc. v. Halliday*, 873 So.2d 400, 403 (Fla. 4th DCA 2004).

2. **Intent to Deceive:** Constructive fraud is possible even in the absence of an intent to deceive. *See Taylor v. Kenco Chem. & Mfg. Corp.*, 465 So.2d 581, 589 (Fla. 1st DCA 1985); *First Union Nat. Bank v. Turney*, 824 So.2d 172, 191 (Fla. 1st DCA 2001), *rev. denied*, 828 So.2d 385 (Fla. 2002).

§8:30 FRAUD IN THE INDUCEMENT

§8:30.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§8:30.1.1 Elements of Cause of Action — 1st DCA

To prove fraud, a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by the plaintiff.

Source

Connecticut Gen. Life Ins. Co. v. Jones, 764 So.2d 677, 682 (Fla.1st DCA 2000).

See Also

1. *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So.2d 297, 304 (Fla. 1st DCA 1999).

§8:30.1.2 Elements of Cause of Action — 2nd DCA

The elements of a cause of action for fraud in the inducement are as follows: (1) a false statement concerning a material fact, (2) knowledge by the person making the statement that the representation is false, (3) intent by the person making the statement that the representation will induce another to act upon it, and (4) reliance on the representation to the injury of the other party.

Source

GEICO General Ins. Co. v. Hoy, 136 So.3d 647, 651 (Fla. 2d DCA 2013).

See Also

1. *C & J Sapp Publishing Co. v. Tandy Corp.*, 585 So.2d 290, 292 (Fla. 2d DCA 1991).
2. *Mettler, Inc. v. Ellen Tracy, Inc.,* 648 So.2d 253, 255 (Fla. 2d DCA 1994).
3. *Parham v. Florida Health Sciences Ctr., Inc.*, 35 So. 3d 920, 928 (Fla. 2d DCA 2010).
4. *U.S. Bank N.A. v. Rios*, 166 So.3d 202, 210 (Fla. 2d DCA 2015).

§8:30.1.3 Elements of Cause of Action — 3rd DCA

In order to state a cause of action for fraud in the inducement, a plaintiff must allege that:

1. the representor made a misrepresentation of a material fact;
2. the representor knew or should have known of the falsity of the statement;
3. the representor intended that the representation would induce another to rely and act on it; and
4. the plaintiff suffered injury in justifiable reliance on the representation.

Source

Houri v. Boaziz, 196 So.3d 383, 393 (Fla. 3d DCA 2016); *Moriber v. Dreiling*, 194 So.3d 369, 373 (Fla. 3d DCA 2016); *Witt v. La Gorce Country Club, Inc.* 35 So. 3d 1033, 1040 (Fla.3d DCA 2010).

See Also

1. *Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc.*, 903 So.2d 251, 255 (Fla. 3d DCA 2005).
2. *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So.2d 204, 209 (Fla. 3d DCA 2003).
3. *Suntogs of Miami, Inc. v. Burroughs Corp.,* 433 So.2d 581, 585 (Fla. 3d DCA 1983), *quashed and remanded*, 472 So.2d 1166 (Fla. 1985), *judgment vacated to the extent inconsistent with the opinion of the Supreme Court of Florida*, 482 So.2d 391 (Fla. 3d DCA 1985).
4. *Brooks Tropicals, Inc. v. Acosta*, 959 So.2d 288, 294–95 (Fla. 3rd DCA 2007).

§8:30.1.4 Elements of Cause of Action — 4th DCA

To state a cause of action for fraud in the inducement, the Plaintiff must allege:

1. a false statement of material fact;
2. the maker of the false statement knew or should have known of the falsity of the statement;
3. the maker intended that the false statement induce another's reliance; and
4. the other party justifiably relied on the false statement to its detriment.

Source

Sena v. Pereira, 179 So.3d 433, 436 (Fla. 4th DCA 2015).

See Also

1. *Lorber v. Passick as Tr of Sylvia Passick Revocable Trust*, 327 So.3d 297, 304 (Fla. 4th DCA 2021).

2. *Prewitt Enterprises, LLC v. Tommy Constantine Racing, LLC*, 185 So.3d 566, 569 (Fla. 4th DCA 2016) (distinguishing between fraud in the inducement (a false representation is made and relied upon in forming the contract) and fraud in the performance (a party to the contract claims to have performed but has actually just tricked the other party into believing that they have)).
3. Prieto v. Smook, Inc., 97 So. 3d 916, 917 (Fla. 4th DCA 2012).
4. *Output, Inc. v. Danka Business Sys., Inc.,* 991 So.2d 941, 944 (Fla 4th DCA 2008).
5. *Hillcrest Pacific Corporation v. Yamamura*, 727 So.2d 1053, 1055 (Fla. 4th DCA 1999).
6. *Lou Bachrodt Chevrolet, Inc. v. Savage,* 570 So.2d 306, 308 (Fla. 4th DCA 1990), *rev. denied,* 581 So.2d 165 (Fla. 1991).
7. *Spitz v. Prudential-Bache Securities, Inc.,* 549 So.2d 777, 778 (Fla. 4th DCA 1989).
8. *Alexander/Davis Properties, Inc. v. Graham,* 397 So.2d 699, 706 (Fla. 4th DCA 1981), *petition for rev. denied,* 408 So.2d 1093 (Fla. 1981).
9. *Samuels v. King Motor Company of Fort Lauderdale*, 782 So.2d 489, 497 (Fla. 4th DCA 2001).

§8:30.1.5 Elements of Cause of Action — 5th DCA

In order to allege a viable cause of action for fraudulent inducement a plaintiff must allege that:
1. the defendant made a false statement regarding a material fact;
2. the defendant knew that the statement was false when he made it or made the statement knowing he was without knowledge of its truth or falsity;
3. the defendant intended that the plaintiff rely and act on the false statement; and
4. the plaintiff justifiably relied on the false statement to his detriment.

Source

Simon v. Celebration Co., 883 So.2d 826, 832 (Fla. 5th DCA 2004).

See Also

1. *Black Diamond Props., Inc. v. Haines,* 69 So.3d 1090, 1095 (Fla 5th DCA 2011).
2. *Joseph v. Liberty Nat'l Bank,* 873 So.2d 384, 388 (Fla 5th DCA 2004).
3. *Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp*., 850 So.2d 536, 542 (Fla. 5th DCA 2003), *rev. denied*, 860 So.2d 977 (Fla. 2003).
4. *Palumbo v. Moore*, 777 So.2d 1177, 1179 (Fla. 5th DCA 2001).
5. *Townsend v. Morton,* 36 So. 3d 865, 868 (Fla. 5th DCA 2010).

§8:30.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(j).

§8:30.3 References

1. 27 Fla. Jur. 2d *Fraud and Deceit* §§7, 9, 56, 76 (2000).
2. 37 Am. Jur. 2d *Fraud and Deceit* §§2, 411 (2001).
3. Fla. Std. Jury Instr. (Civ.) MI 8.

§8:30.4 Defenses

1. **Class Actions:** The Florida Supreme Court has clearly and unequivocally held that class actions seeking relief from separate contracts on the basis of fraud, whatever the genesis of the fraud, are prohibited. *Humana, Inc. v. Castillo*, 728 So.2d 261, 264 (Fla. 2d DCA 1999), *rev. dismissed*, 741 So.2d 1134 (Fla. 1999).

2. **In Pari Delicto:** One who himself engages in a fraudulent scheme, that is, acts *in pari delicto*, may forfeit his right to any legal remedy against a co-perpetrator. *Kulla v. E.F. Hutton & Company, Inc.*, 426 So.2d 1055, 1057 (Fla. 3d DCA 1983).

3. **Merger Clause:** The presence of a merger clause is not an impediment to a cause of action for fraud in the inducement. *Noack v. Blue Cross and Blue Shield of Florida, Inc.*, 742 So.2d 433, 434 (Fla. 1st DCA 1999).

4. **Promise Not Performed:** As a general rule, fraud cannot be predicated upon a mere promise not performed. However, under certain circumstances, a promise may be actionable as fraud where it can be shown that the promissor had a specific intent not to perform the promise at the time the promise was made, and the other elements of fraud are established. *Alexander/Davis Properties, Inc. v. Graham*, 397 So.2d 699, 706 (Fla. 4th DCA 1981), *petition for review denied*, 408 So.2d 1093 (Fla. 1981). *See also Noack v. Blue Cross and Blue Shield of Florida, Inc.*, 742 So.2d 433, 434 (Fla. 1st DCA 1999).

5. **Opinion:** Generally, the misrepresentation, to be actionable, must be one of fact rather than of opinion. *Tonkovich v. South Florida Citrus Industries, Inc.*, 185 So.2d 710, 713 (Fla. 2d DCA 1966), *cert. granted and remanded*, 196 So.2d 438 (Fla. 1967), *affirmed on remand*, 202 So.2d 579 (Fla. 2d DCA 1967); *MDVIP, Inc. v. Beber*, 222 So.3d 555, 561 (Fla. 4th DCA 2017).

§8:30.5 Related Matters

1. **Constructive Trust:** A constructive trust is properly imposed when, as a result of a mistake in a transaction, one party is unjustly enriched at the expense of another. Although this equitable remedy is usually limited to circumstances in which fraud or a breach of confidence has occurred, it is proper in cases in which one party has benefited by the mistake of another at the expense of a third party. *Logie v. J.P. Morgan, Florida, F.S.B.*, 716 So.2d 319, 320 (Fla. 4th DCA 1998).

2. **Pleading with Particularity:** In order for a claim of fraud in the inducement to withstand a motion to dismiss, it must allege fraud with the requisite particularity required by Fla.R.Civ.P. 1.120(b), including who made the false statement, the substance of the false statement, the time frame in which it was made, and the context in which the statement was made. *Bankers Mutual Capital Corp. v. United States Fidelity and Guaranty Co.*, 784 So.2d 485, 490 (Fla. 4th DCA 2001).

§8:40 FRAUDULENT MISREPRESENTATION

§8:40.1 Elements of Cause of Action — Florida Supreme Court

In the state of Florida, relief for a fraudulent misrepresentation may be granted only when the following elements are present:

1. a false statement concerning a material fact;
2. the representor's knowledge that the representation is false;
3. an intention that the representation induce another to act on it; and
4. consequent injury by the party acting in reliance on the representation.

Source

Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010).

See Also

Johnson v. Davis, 480 So.2d 625, 627 (Fla. 1985).

On (claimant's) claim for fraudulent misrepresentation, the issues for your determination are:

- First, whether (defendant) [intentionally]* made a false statement concerning a material fact;
- Second, whether (defendant) knew the statement was false when [he][she] [it] made it or made the statement knowing [he][she] [it] was without knowledge of its truth or falsity;
- Third, whether in making the false statement, (defendant) intended that another would rely on the false statement;
- Fourth, whether (claimant) relied on the false statement;
- Fifth, whether (claimant) suffered [loss] [injury] [or] [damage] as a result.

* *The word intentionally should be used for clarity when there is also a claim for negligent misrepresentation.*

[On this claim for fraudulent misrepresentation, the]**[The] (claimant) may rely on a false statement, even though its falsity could have been discovered if (claimant) had made an investigation. However, (claimant) may not rely on a false statement if [he][she] [it] knew it was false or its falsity was obvious to [him][her] [it].

** *The bracketed language should be used for clarity when there is also a claim for negligent misrepresentation.*

Source

Standard Jury Instructions—Civil Cases (No. 99-2), 777 So.2d 378, 381 (Fla. 2000).

See Also

1. *Standard Jury Instructions—Civil Cases (No. 99-2)*, 777 So.2d 378, 381 (Fla. 2000).
2. *Standard Jury Instructions—Civil Cases (1.0, 6.1d, MI8)*, 613 So.2d 1316, 1317 (Fla. 1993).
3. *American International Land Corp. v. Hanna*, 323 So.2d 567, 569 (Fla. 1975).
4. *Huffstetler v. Our Home Life Ins. Co.*, 65 So. 1 (Fla. 1914).

§8:40.1.1 Elements of Cause of Action — 1st DCA

To prevail on an action for fraudulent misrepresentation, a plaintiff must establish: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation.

Source

Arlington Pebble Creek, LLC v. Campus Edge Condo Ass'n, 232 So.3d 502, 505 (Fla 1st DCA 2017).

See Also

1. *Howard v. Murray,* 184 So.3d 155, n. 22 (Fla. 1st DCA 2015).
2. Cohen v. Corbitt, 135 So.3d 527, 529 (Fla. 1st DCA 2014).
3. *Connecticut Gen. Life Ins. Co. v. Jones*, 764 So.2d 677, 682 (Fla.1st DCA 2000).
4. *State of Florida, Department of Transportation v. Southern Bell Telephone and Telegraph Company, Inc.*, 635 So.2d 74, 78 (Fla. 1st DCA 1994) ("Moreover, under certain circumstances, concealment or nondisclosure of a material fact may also form a basis for a claim in misrepresentation.").
5. *Stow v. National Merchandise Company, Inc.*, 610 So.2d 1378, 1382 (Fla. 1st DCA 1992).
6. *Taylor v. Kenco Chemical & Mfg. Corp.*, 465 So.2d 581, 589 (Fla. 1st DCA 1985).
7. *Baker v. United Services Automobile Association*, 661 So.2d 128, 131 (Fla. 1st DCA 1995), *rev. denied*, 669 So.2d 252 (Fla. 1996).

§8:40.1.2 Elements of Cause of Action — 2nd DCA

The elements of fraudulent misrepresentation are

1. a false statement concerning a material fact;
2. the representor's knowledge that the representation is false;
3. an intention that the representation induce another to act on it; and
4. consequent injury by the party acting in reliance on the representation.

Source

Bacon & Bacon Mfg. Co. v. Bonsey Partners, 62 So.3d 1285 (Fla. 2d DCA 2011).

See Also

1. *Grimes v. Lottes,* 241 So.3d 892, 896 (Fla 2d DCA 2018).
2. *Webb v. Kirkland*, 899 So.2d 344, 346 (Fla. 2d DCA 2005).
3. *Greatland Gold, Inc. v. Berger*, 617 So.2d 870 (Fla. 2d DCA 1993).
4. *Lyle v. National Savings Life Insurance Co.*, 558 So.2d 1047, 1048 (Fla. 1st DCA 1990).
5. *Webb v. Kirkland*, 899 So.2d 344, 346 (Fla. 2d DCA 2005).
6. *Gandy v. Trans World Computer Tech. Group*, 787 So.2d 116, 118 (Fla. 2nd DCA 2001).
7. *Parham v. Florida Health Sciences Ctr., Inc.,* 35 So. 3d 920, 928 (Fla. 2d DCA 2010)

§8:40.1.3 Elements of Cause of Action — 3rd DCA

To state a cause of action for fraudulent misrepresentation in Florida, a plaintiff is required to allege:
1. a misrepresentation of a material fact;
2. which the person making the misrepresentation knew to be false;
3. that the misrepresentation was made with the purpose of inducing another person to rely upon it;
4. that the person relied on the misrepresentation to his detriment; and
5. that this reliance caused damages.

Source

Romo v. Amedex Ins. Co., 930 So.2d 643, 650-51 (Fla. 3d DCA 2006).

See Also

1. *Brooks v. Henry*, 333 So.3d 298, 299 (Fla. 3d DCA 2022).
2. *Pritchard v. Levin*, 305 So. 3d 628, 630 (Fla. 3d DCA 2020).
3. *Woodson Elec. So., Inc. v. Port Royal Prop., LLC*, 271 So.3d 111, 111 n.2 (Fla. 3d DCA 2019).
4. *Moriber v. Dreiling,* 194 So.3d 369, 373 (Fla. 3d DCA 2016).
5. *Elders v. United Methodist Church*, 793 So.2d 1038, 1042 (Fla. 3d DCA 2001).
6. *Yanks v. Barnett*, 563 So.2d 776, 777 (Fla. 3d DCA 1990), *rev. denied*, 576 So.2d 295 (Fla. 1991).
7. *S & S Air Conditioning Co. v. Freire*, 555 So.2d 387, 388 (Fla. 3d DCA 1989).
8. *Assad v. Mendell*, 511 So.2d 682, 683 (Fla. 3d DCA 1987), *subsequent appeal*, 550 So.2d 52 (Fla. 3d DCA 1989).
9. *Chino Electric, Inc. v. United States Fidelity & Guaranty Co.*, 578 So.2d 320, 323 (Fla. 3d DCA 1991).

§8:40.1.4 Elements of Cause of Action — 4th DCA

The elements necessary to establish a cause of action for fraudulent misrepresentation are:
1. a false statement or misrepresentation of a material fact;
2. the representor's knowledge at the time the misrepresentation is made that such statement is false;
3. such misrepresentation was intended to induce another to act in reliance thereon;
4. action in justifiable reliance on the representation; and
5. resulting damage or injury to the party so acting.

Source

Hurchalla v. Lake Point Phase I, LLC, 278 So.3d 58, 67 (Fla. 4th DCA 2019).

See Also

1. *Lorber v. Passick as Tr of Sylvia Passick Revocable Trust*, 327 So.3d 297, 304 (Fla. 4th DCA 2021).
2. *Off the Wall & Gameroom LLC v. Gabbai*, 301 So. 3d 281, 284 (Fla. 4th DCA 2020).
3. *Sena v. Pereira*, 179 So.3d 433 (Fla. 4th DCA 2015).
4. *Posner & Sons, Inc. v. Transcapital Bank*, 65 So.3d 1193 (Fla. 4th DCA 2011).
5. *Mosley v. American Medical International, Inc.*, 712 So.2d 1149, 1151 (Fla. 4th DCA 1998), *rev. denied*, 719 So.2d 893 (Fla. 1998) (citing *Thor Bear, Inc. v. Crocker Minzer Park, Inc.*, 648 So.2d 168, 172 (Fla. 4th DCA 1994)).
6. *Eastern Cement v. Halliburton Co.*, 600 So.2d 469, 471 (Fla. 4th DCA 1992), *rev. denied*, 613 So.2d 4 (Fla. 1992), *appeal after remand*, 672 So.2d 844 (Fla. 4th DCA 1996), *rev. denied*, 683 So.2d 483 (Fla. 1996).
7. *Sun Life Assurance Company of Canada v. Land Concepts, Inc.*, 435 So.2d 862, 863 (Fla. 4th DCA 1983).
8. *Thor Bear, Inc. v. Crocker Minzer Park, Inc.*, 648 So.2d 168, 172 (Fla. 4th DCA 1994).

§8:40.1.5 Elements of Cause of Action — 5th DCA

The elements of a fraudulent misrepresentation were set forth in Johnson v. Davis, 480 So.2d 625 (Fla. 1985):
1. A false statement concerning a material fact.
2. The representor's knowledge that the representation is false.
3. An intention that the representation induce another to act on it.

4. Reliance by the plaintiff and subsequent injury to the plaintiff.

Source

Fry v. J.E. Jones Construction Company, 567 So.2d 901 (Fla. 5th DCA 1990).

See Also

1. *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So.2d 1210, 1213 (Fla. 5th DCA 1995).
2. *S.H. Investment and Development Corporation, HIC v. Kincaid*, 495 So.2d 768, 770 (Fla. 5th DCA 1986), *rev. denied*, 504 So.2d 767 (Fla. 1987).
3. *Townsend v. Morton,* 36 So. 3d 865, 868 (Fla. 5th DCA 2010).
4. *Winfield Inv., LLC v. Pascal-Gaston Inv., LLC*, 254 So.3d 589, 592 (Fla. 5th DCA 2018).

§8:40.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(j).

§8:40.3 References

1. 27 Fla. Jur. 2d *Fraud and Deceit* §§10–44 (2000).
2. 37 Am. Jur. 2d *Fraud and Deceit* §§7, 56–137 (2001).
3. 37 C.J.S. *Fraud* §§7–58 (1997).
4. Florida Standard Jury Instruction (Civ.) MI 8.
5. Restatement (Second) of Torts §525 (1977).

§8:40.4 Defenses

1. **Competent, Substantial Evidence:** An essential element in any claim of fraudulent misrepresentation is competent, substantial evidence that a false statement concerning a material fact was made. Fraud is not presumed but must be proved. *See Barrett v. Quesnel,* 90 So.2d 706 (Fla. 1956); *Nagel v. Cronebaugh*, 782 So.2d 436, 439 (Fla. 5th DCA 2001), *rev. denied*, 816 So.2d 126 (Fla. 2002).

2. **Governmental Tort Liability:** For there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. Florida courts have consistently declined to hold governmental entities liable for a failure to maintain and provide accurate information in public records. *Hillsborough County v. Morris*, 730 So.2d 367, 368 (Fla. 2d DCA 1999).

3. **Information Contained in a Public Record:** *See M/I Schottenstein Homes, Inc. v. Azam*, 813 So.2d 91 (Fla. 2002).

4. **Opinions and Promises:** Averments in pleas of mere opinions and promises and of indefinite matters are not sufficient to show fraud. *Huffstetler v. Our Home Life Ins. Co.*, 65 So. 1 (Fla. 1914). *Accord, Baker v. United Services Automobile Association*, 661 So.2d 128, 131 (Fla. 1st DCA 1995), *rev. denied*, 669 So.2d 252 (Fla. 1996); *Chino Electric, Inc. v. United States Fidelity & Guaranty Co.*, 578 So.2d 320, 323 (Fla. 3d DCA 1991). *But see, Stow v. National Merchandise Company, Inc.*, 610 So.2d 1378, 1382 (Fla. 1st DCA 1992) ("A promise as to future conduct may serve as a predicate for a claim of fraud if such promise is made without any intention of performing, or with the positive intention not to perform."). *Accord, Thor Bear, Inc. v. Crocker Minzer Park, Inc.*, 648 So.2d 168, 172 (Fla. 4th DCA 1994).

5. **Past or Existing Fact:** The general rule of law is that a false statement of fact must concern a past or existing fact in order to be actionable. A successful action for fraudulent misrepresentation may not ordinarily be premised upon a promise of future action. However, an exception to this rule is recognized where the promise of future action is made with no intention of performing or with a positive intention not to perform. *Thor Bear, Inc. v. Crocker Minzer Park, Inc.*, 648 So.2d 168, 172 (Fla. 4th DCA 1994).

6. **Specific Averments:** Whenever fraud is relied upon in any pleading, either at law or in equity, the allegations or averments should be specific, and the ultimate facts constituting the particular fraud relied upon should be stated with certainty and distinctness, else such pleading, upon proper attach, will be held bad. *Huffstetler v. Our Home Life Ins. Co.*, 65 So. 1 (Fla. 1914).

7. **Cannot Rely on Representations Made by Adverse Party Seeking to Avoid Litigation:** Generally, adverse parties negotiating a settlement agreement in an attempt to avoid litigation cannot support a fraudulent misrepresentation claim that relies upon the settlement representations of one another. Such assurances and representations are better enforced through contract principles (e.g., warranties, indemnities, etc.), rather than fraud claims. *Moriber v. Dreiling*, 194 So.3d 369, 374 (Fla. 3d DCA 2016).

§8:40.5 Related Matters

1. **Agency Liability:** An agent, though acting for an acknowledged principal, is independently liable for fraudulent misrepresentation. *Lyle v. National Savings Life Insurance Co.*, 558 So.2d 1047, 1048 (Fla. 1st DCA 1990).

2. **Comparative Negligence:** Fraudulent misrepresentation is an intentional tort. Therefore, comparative negligence is not available as a defense, and the trial court did not err in denying appellants' requested jury instruction thereon. *Cruise v. Graham*, 622 So.2d 37, 40 (Fla. 4th DCA 1993).

3. **Fraudulent Concealment:** The intentional withholding of information for the purpose of inducing action has been regarded as equivalent to a fraudulent misrepresentation. Fraud also includes the intentional omission of a material fact. *Ward v. Atlantic Security Bank*, 777 So.2d 1144, 1146 (Fla. 3d DCA 2001). *See also Solorzano v. First Union Mortg. Corp*., 896 So.2d 847, 849 (Fla. 4th DCA 2005); *First Union Nat. Bank v. Turney*, 824 So.2d 172, 189 (Fla. 1st DCA 2001), *rev. denied*, 828 So.2d 385 (Fla. 2002); *Meyer v. Thompson,* 861 So.2d 1256 (Fla. 4th DCA 2003); *Soler v. Secondary Holdings, Inc.,* 771 So.2d 62 (Fla. 3d DCA 2000); *Billian v. Mobil Corp.,* 710 So.2d 984 (Fla. 4th DCA 1998), *rev. denied*, 725 So.2d 1109 (Fla. 1998); *Smith v. Spitale*, 675 So.2d 207 (Fla. 2d DCA 1996).

4. **Investigate, Duty to:** A misrepresentation as to the extent of past experience can be a foundation for an action for fraud, especially as there is no duty to investigate its truth or falsity unless the recipient knows of its falsity, a situation not present here. *Eastern Cement v. Halliburton Co.*, 600 So.2d 469, 471 (Fla. 4th DCA 1992), *rev. denied*, 613 So.2d 4 (Fla. 1992), *appeal after remand*, 672 So.2d 844 (Fla. 4th DCA 1996), *rev. denied*, 683 So.2d 483 (Fla. 1996).

5. **Knowledge Element:** The knowledge element of fraudulent misrepresentation is satisfied where a representation is made "without knowledge as to either truth or falsity" or when a representation is made "under circumstances in which the representor ought to have known, if he did not know, of the falsity thereof." *Thor Bear, Inc. v. Crocker Minzer Park, Inc.*, 648 So.2d 168, 172 (Fla. 4th DCA 1994). *Accord, Sun Life Assurance Company of Canada v. Land Concepts, Inc.*, 435 So.2d 862, 863 (Fla. 4th DCA 1983).

6. **Negligent Misrepresentation & Fraudulent Misrepresentation Compared:** In fraudulent misrepresentation, a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had the recipient made an investigation, unless the recipient knows the representation to be false or its falsity is obvious. A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two—fraud and negligence—negligence is less objectionable than fraud. *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So.2d 334, 336 (Fla. 1997). *See also Newbern v. Mansbach*, 777 So.2d 1044, 1045 (Fla. 1st DCA 2001).

7. **"Flexible" theory of damages:** Florida has developed a "flexible" theory of damages in cases of fraudulent misrepresentation to assure that an injured party will obtain full compensation for the effect of the fraud. An injured party may recover either the out-of-pocket loss or the benefit of the bargain loss. *Minotty v. Baudo*, 42 So.3d 824, 835 (Fla. 4th DCA 2010). *See also, Martin v. Brown,* 566 So.2d 890, 891-892 (Fla. 4th DCA 1990) (explaining the differences between "benefit of the bargain" damages and "out-of-pocket" damages).

CHAPTER 9

DEFAMATION & PRIVACY

§9:10 DEFAMATION
§9:10.1 Elements of Cause of Action — Florida Supreme Court
§9:10.1.1 Elements of Cause of Action — 1st DCA
§9:10.1.2 Elements of Cause of Action — 2nd DCA
§9:10.1.3 Elements of Cause of Action — 3rd DCA
§9:10.1.4 Elements of Cause of Action — 4th DCA
§9:10.1.5 Elements of Cause of Action — 5th DCA
§9:10.2 Statute of Limitations
§9:10.3 References
§9:10.4 Defenses
§9:10.5 Related Matters
§9:10.6 Florida Standard Jury Instructions—Civil

§9:20 GOVERNMENTAL INTRUSION
§9:20.1 Florida Constitution
§9:20.2 Elements of Cause of Action — Florida Supreme Court
§9:20.2.1 Elements of Cause of Action — 1st DCA
§9:20.2.2 Elements of Cause of Action — 2nd DCA
§9:20.2.3 Elements of Cause of Action — 3rd DCA
§9:20.2.4 Elements of Cause of Action — 4th DCA
§9:20.2.5 Elements of Cause of Action — 5th DCA
§9:20.3 Statute of Limitation
§9:20.4 Related Matters

§9:30 SECURITY OF COMMUNICATIONS ACT, VIOLATION OF
§9:30.1 Florida Statutes
§9:30.2 Statute of Limitations
§9:30.3 References
§9:30.4 Defenses
§9:30.5 Related Matters

§9:40 INVASION OF PRIVACY, GENERALLY
§9:40.1 Elements of Cause of Action — Florida Supreme Court
§9:40.1.1 Elements of Cause of Action — 1st DCA
§9:40.1.2 Elements of Cause of Action — 2nd DCA
§9:40.1.3 Elements of Cause of Action — 3rd DCA
§9:40.1.4 Elements of Cause of Action — 4th DCA
§9:40.1.5 Elements of Cause of Action — 5th DCA

§9:40.2 Statute of Limitations
§9:40.3 References
§9:40.4 Defenses
§9:40.5 Related Matters

§9:50 INVASION OF PRIVACY — PUBLIC DISCLOSURE OF PRIVATE FACTS
§9:50.1 Elements of Cause of Action — Florida Supreme Court
§9:50.1.1 Elements of Cause of Action — 1st DCA
§9:50.1.2 Elements of Cause of Action — 2nd DCA
§9:50.1.3 Elements of Cause of Action — 3rd DCA
§9:50.1.4 Elements of Cause of Action — 4th DCA
§9:50.1.5 Elements of Cause of Action — 5th DCA
§9:50.2 Statute of Limitations
§9:50.3 Defenses
§9:50.4 Related Matters

§9:60 INVASION OF PRIVACY — INTRUSION
§9:60.1 Elements of Cause of Action — Florida Supreme Court
§9:60.1.1 Elements of Cause of Action — 1st DCA
§9:60.1.2 Elements of Cause of Action — 2nd DCA
§9:60.1.3 Elements of Cause of Action — 3rd DCA
§9:60.1.4 Elements of Cause of Action — 4th DCA
§9:60.1.5 Elements of Cause of Action — 5th DCA
§9:60.2 Statute of Limitations
§9:60.3 Defenses
§9:60.4 Related Matters

§9:70 INVASION OF PRIVACY — APPROPRIATION
§9:70.1 Florida Statutes
§9:70.2 Statute of Limitations
§9:70.3 Related Matters

§9:10 DEFAMATION

§9:10.1 Elements of Cause of Action — Florida Supreme Court

Defamation has the following five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory.

Source

Jews For Jesus, Inc. v. Rapp, 997 So.2d 1098, 1106 (Fla. 2008).

See Also

1. The following statement is set forth in the dissent in *Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan,* 629 So.2d 113, 115 (Fla. 1993).
2. *Cooper v. Miami Herald,* 31 So.2d 382, 384 (Fla. 1947).

The Restatement of Torts defines the elements of a cause of action:

Sec. 558. Elements Stated

To create liability for defamation there must be:

1. a false and defamatory statement concerning another;
2. an unprivileged publication to a third party;
3. fault amounting at least to negligence on the part of the publisher; and
4. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts Sec. 558 (1977).

The last element, special damages, may be summarized as "damages, either presumed or proved," and includes four classes: nominal, general, special, and emotional or bodily harm or injury.

§9:10.1.1 Elements of Cause of Action — 1st DCA

The elements of a defamation claim include:

1. a false and defamatory statement concerning another;
2. an unprivileged publication to a third party;
3. fault amounting at least to negligence on the part of the publisher; and
4. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts §558 (1977). To state a cause of action against a media defendant for the common law tort of libel, "a private person must allege publication

1. of false and defamatory statements of and concerning that private person,
2. without reasonable care as to the truth or falsity of those statements,
3. resulting in actual damage to that private person."

Source

Thomas v. Jacksonville Television, Inc., 699 So.2d 800, 803 (Fla. 1st DCA 1997).

See Also

1. *From v. Tallahassee Democrat, Inc.,* 400 So.2d 52, 57 (Fla. 1st DCA 1981), *petition for rev. denied*, 412 So.2d 465 (Fla. 1982) ("We are not unmindful that several post-*Gertz* cases decided by Florida courts appear to indicate in dicta that a negligence standard has been adopted vis-a-vis private citizen plaintiffs.").

§9:10.1.2 Elements of Cause of Action — 2nd DCA

To state a cause of action for libel, a private person must allege publication:

1. of false and defamatory statements of and concerning that private person;
2. without reasonable care as to the truth or falsity of those statements;
3. resulting in actual damage to that private person.

Source

Hay v. Independent Newspapers, Inc., 450 So.2d 293, 295 (Fla. 2d DCA 1984) (stating the elements of a cause of action against a media defendant for the common law tort of libel).

See Also

1. *Bass v. Rivera*, 826 So.2d 534, 535 (Fla. 2d DCA 2002).
2. *Tribune Company v. Levin,* 426 So.2d 45, 46 (Fla. 2d DCA 1982), *affirmed*, 458 So.2d 243 (Fla. 1984) ("[T]he Third District Court of Appeal rejected the newspaper's contention that a private plaintiff must establish that the defamatory statement was published with actual malice. Instead, the court held that Florida follows the federal law and applies negligence as the standard for recovery of compensatory damages by a private plaintiff who is neither a public official nor a public figure in a defamation suit.").

§9:10.1.3 Elements of Cause of Action — 3rd DCA

The five elements of a legally sufficient cause of action for libel involving a public figure are: (1) publication, (2) falsity, (3) the defendant's knowledge of, or reckless disregard for, the falsity (i.e., actual malice), (4) actual damages, and (5) the false statement must be defamatory.

Source

Greene v. Times Pub. Co., 130 So.3d 724, 729 (Fla. 3d DCA 2014).

See Also

1. *Readon v. WPLG, LLC*, 317 So.3d 1229, 1237 (Fla. 3d DCA 2021).
2. *Hullick v. Gibraltar Private Bank & Tr. Co.*, 279 So.3d 809, 812 n. 5 (Fla. 3d DCA 2019).
3. *Cousins v. Post-Newsweek Stations Florida, Inc.*, 275 So.3d 674, 681 n.5 (Fla. 3d DCA 2019).
4. *Del Pino-Allen v. Santelises*, 240 So.3d 89, 91 (Fla. 3d DCA 2018).
5. *Miami Herald Publishing Company v. Ane,* 423 So.2d 376, 388 (Fla. 3d DCA 1982), *affirmed*, 458 So.2d 239 (Fla. 1984) ("Without dispute, the plaintiff Ane was a private individual who was neither a public official nor a public figure. Under the applicable First Amendment and Florida law, he was entitled to recover in his libel action if he established at trial that the defendant Miami Herald published (1) false and defamatory statements of and concerning him, (2) without reasonable care as to whether those statements were true or false, (3) resulting in actual damage to himself.").
6. *Ortega v. Post-Newsweek Stations, Florida, Inc.,* 510 So.2d 972, 975 (Fla. 3d DCA 1987), *rev. denied*, 518 So.2d 1277 (Fla. 1987) ("Florida has chosen to require only a showing of negligence; thus if the press is negligent in its reporting, then it is liable for that negligence.").
7. *Karp v. Miami Herald Publishing Co.,* 359 So.2d 580, 581 (Fla. 3d DCA 1978), *dismissed*, 365 So.2d 712 (Fla. 1978).

§9:10.1.4 Elements of Cause of Action — 4th DCA

The elements of a defamation claim include:

1. a false and defamatory statement concerning another;
2. an unprivileged publication to a third party;
3. fault amounting at least to negligence on the part of the publisher; and
4. either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Source

Rapp v. Jews for Jesus, Inc., 944 So.2d 460, 464–65 (Fla. 4th DCA 2006), *quashed on other grounds by*, 997 So.2d 1098 (Fla. 2008).

See Also

1. *Mastandrea v. Snow*, 333 So.3d 326, 328 (Fla. 4th DCA 2022).
2. *Lowery v. McBee*, 322 So.3d 110, 114 (Fla. 4th DCA 2021).
3. *Hoch v. Loren*, 273 So.3d 56, 57 (Fla. 4th DCA 2019).
4. *Tilton v. Wrobel*, 198 So.3d 909, 910 (Fla. 4th DCA 2016).
5. *Blake v. Giustibelli*, 182 So.3d 881, 884 (Fla. 4th DCA 2016).
6. NITV, LLC v. Baker, 61 So.3d 1249, 1254 (Fla. 4th DCA 2011), rev. denied, 92 So.3d 213 (Fla. 2012).
7. *Mile Marker, Inc. v. Petersen Publishing, L.L.C*., 811 So.2d 841, 845 (Fla. 4th DCA 2002).
8. *Razner v. Wellington Regional Medical Center, Inc*., 837 So.2d 437, 442 (Fla. 4th DCA 2002) ("To establish a cause of action for defamation, a plaintiff must show that (1) the defendant published a false statement about the plaintiff, (2) to a third party, and (3) the falsity of the statement caused injury to the plaintiff.").
9. *Seropian v. Forman,* 652 So.2d 490, 494 (Fla. 4th DCA 1995).
10. *Byrd v. Hustler Magazine, Inc.,* 433 So.2d 593, 595 (Fla. 4th DCA 1983), *petition for rev. denied*, 443 So.2d 979 (Fla. 1984).

§9:10.1.5 Elements of Cause of Action — 5th DCA

As for the fault required under Florida law in order for a private individual to recover actual damages, the appropriate standard after *Gertz* is negligence - *i.e.,* publication of false and defamatory statements without reasonable care to determine their falsity.

Source

Boyles v. Mid-Florida Television Corp., 431 So.2d 627, 634 (Fla. 5th DCA 1983), *affirmed*, 467 So.2d 282 (Fla. 1985).

See Also

1. *Scholz v. RDV Sports, Inc.*, 710 So.2d 618 (Fla. 5th DCA 1998), *rev. denied*, 718 So.2d 170 (Fla. 1998).

§9:10.2 Statute of Limitations

Two Years. Fla. Stat. §95.11(4)(g).

§9:10.3 References

1. 19A Fla. Jur. 2d *Defamation and Privacy* §§141–150 (2005).
2. 50 Am. Jur. 2d *Libel and Slander* §§7, 21–29, 430–451 (1995).
3. 53 C.J.S. *Libel and Slander* §§2, 181–219 (2005).
4. Restatement (Second) of Torts §§558, 623 (1977).
5. Florida Statutes §621.07 (2005) (Liability of officers, agents, employees, shareholders, members, and corporation or limited liability company).
6. Florida Statutes §768.095 (2005) (Employer immunity from liability; disclosure of information regarding former or current employees).
7. Fla. Stat. ch. 770 (2005) (Civil Actions for Libel).
8. *Standard Jury Instructions—Civil Cases (No. 00-1)*, 795 So.2d 51, 55 (Fla. 2001).
9. Gregory G. Sarno, Annotation, *Libel and Slander: Defamation by Cartoon*, 52 A.L.R.4th 424 (1987).
10. George K. Rahdert and David M. Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander*, 11 Stetson L. Rev. 1 (1981).

§9:10.4 Defenses

1. **Absolute Privilege:** The absolute privilege accorded to defamatory statements made during judicial proceedings arises upon doing of any act necessarily preliminary to judicial proceedings. *Burton v. Salzberg*, 725 So.2d 450, 451 (Fla. 3d DCA 1999), *rev. dismissed*, 741 So.2d 1134 (Fla. 1999); *Blake v. City of Port St. Lucie*, 73 So.3d 905 (Fla. 4th DCA 2011) ("[p]ublic officials who make statements within the scope of their duties are absolutely immune from suit for defamation"); *Ball v. D'Lites Enterprises,*

Inc., 65 So.3d 637 (Fla. 4th DCA 2011) (refusing to extend privilege where statements about a judicial proceeding were made on commercial website). The absolute litigation privilege applies when the allegedly defamatory statements have some relation to the subject of the underlying lawsuit. The maliciousness or falsity of the statements is irrelevant to the application of the privilege. *James v. Leigh*, 145 So.3d 1006 (Fla. 1st DCA 2014); *Rolle v. Cold Stone Creamery, Inc.*, 212 So.3d 1073, 1076 (Fla. 3d DCA 2017).

2. **First Amendment:** Although the trial court had subject matter jurisdiction over the rabbi's breach of contract claim, the court lacked jurisdiction over his complaint for defamation and tortious interference because resolving these disputes would require the court to become excessively entangled with religious beliefs. *Goodman v. Temple Shir Ami, Inc.*, 712 So.2d 775 (Fla. 3d DCA 1998), *appeal dismissed*, 737 So.2d 1077 (Fla. 1999), *cert. denied*, 120 S.Ct. 789 (2000).

3. **Group of Persons:** As a general rule, no action lies for the publication of defamatory words concerning a large group or class of persons. *Thomas v. Jacksonville Television, Inc.*, 699 So.2d 800, 803 (Fla. 1st DCA 1997). *See also* Restatement (Second) of Torts §564 (1977).

4. **Litigation:** Generally, statements made during the course of litigation are privileged and will not constitute the basis of an action for defamation. *LatAm Inv., LLC v. Holland & Knight, LLP*, 88 So. 3d 240, 244-245 (Fla.3d DCA 2011) (extends to ex parte questioning of witness); *Scholz v. RDV Sports, Inc.*, 710 So.2d 618, 627 (Fla. 5th DCA 1998), *rev. denied*, 718 So.2d 170 (Fla. 1998). *See also Fariello v. Gavin*, 873 So.2d 1243, 1245 (Fla. 5th DCA 2004).

5. ***Per se* and *Per quod*:** Slander *per se* is actionable on its face, but slander *per quod* requires additional explanation of the words used to show that they have a defamatory meaning or that the person defamed is the plaintiff. In slander *per se* actions, general damages are presumed; for *per quod* actions, the plaintiff must allege and prove special damages. *Hoch v. Rissman, Weisberg, Barrett*, 742 So.2d 451, 457 (Fla. 5th DCA 1999), *rev. denied*, 760 So.2d 948 (Fla. 2000).

6. **Public Official:** In Florida, public officials who make statements within the scope of their duties are absolutely immune from suit for defamation. *Bates v. St. Lucie County Sheriff's Office*, 31 So.3d 210, 213 (Fla. 4th DCA 2010); *Blake v. City of Port St. Lucie*, 73 So.3d 905 (Fla. 4th DCA 2011), *citing* Fla. Stat. §§943.139(4) and 768.095; *Fla. Stat. Univ. Bd. of Trs. v. Monk*, 68 So.3d 315 (Fla. 1st DCA 2011); *Hauser v. Urchisin*, 231 So.2d 6, 8 (Fla. 1970).

7. **Public Figure:** As a public official, Plaintiff was required to prove that the publisher of the defamatory statement acted with actual malice. Actual malice is established by showing that the publication was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Hoch v. Rissman, Weisberg, Barrett*, 742 So.2d 451, 460 (Fla. 5th DCA 1999), *rev. denied*, 760 So.2d 948 (Fla. 2000). *See also Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So.2d 841, 845 (Fla. 4th DCA 2002); *Dockery v. Florida Democratic Party*, 799 So.2d 291, 294 (Fla. 2d DCA 2001); *Scholz v. RDV Sports, Inc.*, 710 So.2d 618, 626 (Fla. 5th DCA 1998), *rev. denied*, 718 So.2d 170 (Fla. 1998). We find Mile Marker is a "public figure" in the constitutional sense. *See Saro Corp. v. Waterman Broad. Corp.*, 595 So.2d 87 (Fla. 2d DCA 1992) (the "public figure status" of a defamation claimant is a question of law to be determined by the court). Under U.S. constitutional defamation law there are two classes of "public figures"—"general public figures" of requisite fame or notoriety in a community who are always considered public figures, and "limited public figures" who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). We find the "limited public figure" classification more germane to the instant case, and undertake our analysis accordingly. Courts are to employ a two-step process in determining whether a particular claimant is a limited public figure or simply a private plaintiff. First, the court must determine whether there is a "public controversy." *Id.* In determining whether a matter is a "public controversy," the court should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. *Id.* We find there was a pre-existing public controversy in a segment of the population regarding the merits of hydraulic versus electric winches. Though winch performance may not be a topic on the daily evening news, clearly there is a segment of the population,

namely off-road enthusiasts, winch owners, those contemplating winch purchases, and readers of "4 Wheel & Off Road" and similar magazines, who would be impacted by the resolution of the instant dispute. We distinguish the instant case from an essentially private dispute, such as a divorce, which, regardless of the public's "interest" in the subject matter, is not a "public controversy." *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976). Surely Mile Marker, Petersen, and non-party dispute participant Warn recognized the results of a product comparison test would have ramifications beyond the immediate participants. *See generally Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3rd Cir.1980) (recognizing consumer reporting involves inherent matters of particular interest to the public in that it enables citizens to make better informed purchasing decisions). After defining a public controversy, the court must then determine whether the plaintiff played a sufficiently central role in the instant controversy to be considered a public figure for purposes of that controversy. *Della-Donna v. Gore Newspapers Co.*, 489 So.2d 72, 75 (Fla. 4th DCA 1986); *Gertz,* 418 U.S. at 345, 94 S.Ct. 2997. In analyzing the extent of a corporate defamation claimant's participation in a public controversy relating to its products, courts should examine the nature and extent of the advertising and publicity campaigns previously undertaken by the claimant, paying particular attention to the pursuit of a marketing strategy that emphasizes the controversy, *e.g.*, the active solicitation of independent product testing and reviews. *See Quantum Electronics Corp. v. Consumers Union of U.S., Inc.*, 881 F.Supp. 753 (D.R.I. 1995) (noting where corporate claimants seek to influence the outcome of pre-existing controversies they consequently invite attention, comment, and criticism). Additionally, the level of media access enjoyed by a particular claimant should be considered as part of the public figure calculus. *See Gertz,* 418 U.S. at 344, 94 S.Ct. 2997 (noting the state's interest in protecting public figures is less acute than its interest in protecting private individuals since public figures have assumed the risk of injury by voluntarily entering the public arena and they are less vulnerable to injury from defamatory falsehoods due to greater access to the channels of communication). *Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So.2d 841, 845 (Fla. 4th DCA 2002).

8. **Publishers:** Thus, liability without fault, which may be present in an action for breach of implied warranty, has long been held inappropriate in an action against one passing on printed words without an opportunity to investigate them. The principle against imposing liability without fault on a publisher in a defamation action has recently been given constitutional status. *See Gertz v. Robert Welch, Inc*., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Time Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). The common theme running through these decisions is that ideas hold a privileged position in our society. They are not equivalent to commercial products. Those who are in the business of distributing the ideas of other people perform a unique and essential function. To hold those who perform this essential function liable, regardless of fault, when an injury results would severely restrict the flow of the ideas they distribute. We think that holding Ellie's liable under the doctrine of implied warranty would, based upon the facts as certified to us, have the effect of imposing a liability without fault not intended by the Uniform Commercial Code. *Cardozo v. True*, 342 So.2d 1053, 1056 (Fla. 2d DCA 1977), *cert. denied*, 353 So.2d 674 (Fla. 1977).

9. **Pure Opinion:** Pure opinion is protected under the First Amendment, but mixed opinion is not. *Hay v. Independent Newspapers, Inc.,* 450 So.2d 293, 295 (Fla. 2d DCA 1984). Pure opinion is based upon facts that the communicator sets forth in a publication, or that are otherwise known or available to the reader or the listener as a member of the public. Mixed opinion is based upon facts regarding a person or his conduct that are neither stated in the publication nor assumed to exist by a party exposed to communication. *From v. Tallahassee Democrat, Inc.,* 400 So.2d 52, 57 (Fla. 1st DCA 1981), *petition for rev. denied*, 412 So.2d 465 (Fla. 1982); *Hay v. Independent Newspapers, Inc.,* 450 So.2d 293, 295 (Fla. 2d DCA 1984). Whether a statement is one of pure or mixed opinion is an issue of law. In determining whether the statement is one of pure or mixed opinion, the court must examine the statement in its totality and the context in which it was uttered or published. The court must consider all of the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement and consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published. *Fidelity Warr. Servs. v. Firstate Ins. Holdings, Inc.*, 74 So.3d 506 (Fla. 4th DCA 2011); *Hoch v. Rissman, Weisberg, Barrett*, 742 So.2d 451, 460 (Fla. 5th DCA 1999), *rev. denied*, 760 So.2d 948 (Fla. 2000). *See also LRX, Inc. v. Horizon Associates Joint Venture ex rel. Horizon-ANF, Inc*., 842 So.2d 881, 885 (Fla. 4th DCA 2003),

rev. denied, 859 So.2d 514 (Fla. 2003); *Lipsig v. Ramlawi*, 760 So.2d 170, 184 (Fla. 3d DCA 2000), *rev. denied*, 786 So.2d 579 (Fla. 2001); *Morse v. Ripken*, 707 So.2d 921, 922 (Fla. 4th DCA 1998).

10. **Qualified Privilege:** One who publishes defamatory matter concerning another is not liable for the publication if (a) the matter is published upon an occasion that makes it conditionally privileged and (b) the privilege is not abused. Restatement (Second) of Torts §593 (1976). The law of Florida embraces a broad range of the privileged occasions that have come to be recognized under the common law. *See* Rahdert & Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander*, 11 Stetson L. Rev. 1 (1981). A communication made in good faith on any subject matter by one having an interest therein, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which would otherwise be actionable, and though the duty is not a legal one but only a moral or social obligation. *Magre v. Charles*, 729 So.2d 440, 442 (Fla. 5th DCA 1999). *See also Thomas v. Tampa Bay Downs, Inc.*, 761 So.2d 401, 404 (Fla. 2d DCA 2000). Because the standard of negligence set out in *Ane* still remains, the qualified privilege of reporting on official proceeding is limited in Florida. Thus, while the press may report upon a defamatory statement made at an official proceeding, it will nevertheless be liable if the private plaintiff shows that the press failed to take reasonable measures to insure that the report of the *proceeding* is accurate. *Ortega v. Post-Newsweek Stations, Florida, Inc.,* 510 So.2d 972, 975 (Fla. 3d DCA 1987), *rev. denied*, 518 So.2d 1277 (Fla. 1987). *See also Canto v. J.B Ivey and Company*, 595 So.2d 1025, 1028 (Fla. 1st DCA 1992). Qualified privilege protects defamatory statements made by private individuals to the police or to the state's attorney prior to the institution of criminal charges. *Fridovich v. Fridovich*, 598 So.2d 65, 69 (Fla. 1992).

11. **Truth:** If upon a lawful occasion for making a publication he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. *Grad v. Copeland,* 280 So.2d 461, 468 (Fla. 4th DCA 1973), *cert. denied*, 287 So.2d 682 (Fla. 1973). *See* Fla. Const. art. I, §4 ("In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motive, the party shall be acquitted or exonerated."). *See also Lipsig v. Ramlawi*, 760 So.2d 170, 183 (Fla. 3d DCA 2000), *rev. denied*, 786 So.2d 579 (Fla. 2001) (under Florida law, truth is only a defense to defamation when the truth has been coupled with good motive.). *See also LRX, Inc. v. Horizon Associates Joint Venture ex rel. Horizon-ANF, Inc*., 842 So.2d 881, 886 (Fla. 4th DCA 2003), *rev. denied*, 859 So.2d 514 (Fla. 2003).

12. **Verbatim Statement Not Required:** A defamatory statement does not need to be accounted for "verbatim" to state a cause of action for slander. *Lipsig v. Ramlawi*, 760 So.2d 170, 184 (Fla. 3d DCA 2000). When bringing a cause of action for defamation based on oral statements, a plaintiff need not set out the defamatory language verbatim. It is sufficient that the plaintiff set out the substance of the spoken words with sufficient particularity to enable the court to determine whether the publication was defamatory. *Razner v. Wellington Regional Medical Center, Inc*., 837 So.2d 437, 442 (Fla. 4th DCA 2002).

§9:10.5 Related Matters

1. **Conditionally Privileged Publication:** The elements essential to the finding of a conditionally privileged publication are: (1) good Faith; (2) an interest to be upheld; (3) a statement limited in its scope to this purpose; (4) a proper occasion; and (5) publication in a proper manner. *Beck v. Lipkind*, 681 So.2d 794, 795 (Fla. 3d DCA 1996).

2. **Conspiracy to Defame:** A cause of action for defamation is a necessary predicate to a cause of action for conspiracy to defame. *Beck v. Lipkind*, 681 So.2d 794, 795 (Fla. 3d DCA 1996).

3. **Doctrine of Compelled Self-Defamation:** Under the doctrine of compelled self-defamation the publication to a third person is, in essence, eliminated. Under the doctrine, a defendant will be liable for alleged defamatory statements made to the plaintiff in private if the plaintiff is compelled to repeat or republish the alleged defamatory statements to a third party. It appears that Florida has not recognized this exception to the publication requirement. See *Valencia v. Citibank International*, 728 So.2d 330 (Fla. 3d DCA 1999).

4. **Florida Law:** Under Florida law, a civil action for libel will lie when there has been a false and unprivileged publication by letter, or otherwise, which exposes a person to distrust, hatred, contempt, ridicule or obloquy or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business or employment. *Thomas v. Jacksonville Television, Inc.*, 699 So.2d 800, 803 (Fla. 1st DCA 1997).

5. **Injurious Falsehood:** The Restatement (Second) of Torts, Section 623A, recognizes that while an action for injurious falsehood is similar to defamation in that both involve "the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff," the two torts protect different interests. The defamation action protects the personal reputation of the injured party, while an action for injurious falsehood protects economic interests of the injured party against pecuniary loss. Restatement (Second) of Torts §623A (1977). Prosser and Keeton suggest that injurious falsehood claims should be regarded as one form of intentional interference with economic relations rather than as a branch of the more general harm to reputation involved in libel and slander. See Page Keeton, et al., Prosser and Keeton on The Law of Torts §128 at 964 (5th ed. 1984). Nevertheless, the courts of this state have afforded the two torts identical treatment, distinguishing them only to the extent that "slander of title" is defined as defamation of property interest, while libel and slander are defined as defamation of character of the person. Old Plantation, 68 So.2d at 181; Sailboat Key, 378 So.2d at 48. *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 209 (Fla. 4th DCA 2002).

6. **Media Defendant:** See *Thomas v. Jacksonville Television*, Inc., 699 So.2d 800, 803 (Fla. 1st DCA 1997) (stating the elements of a cause of action against a media defendant for the common law tort of libel). See also *Hay v. Independent Newspapers, Inc.*, 450 So.2d 293, 295 (Fla. 2d DCA 1984); *Thomas v. Jacksonville Television, Inc.*, 699 So.2d 800, 804 (Fla. 1st DCA 1997).

7. **Multiple Publication Rule:** We conclude that the multiple publication rule should be applied to determine when the statute of limitations begins to run on the common law tort of credit slander. *Musto v. Bell South Telecommunications Corp.*, 748 So.2d 296, 298 (Fla. 4th DCA 1999), rev. denied, 753 So.2d 563 (Fla. 2000). Florida courts have held that a single wrongful act gives rise to a single cause of action, and that the various injuries resulting from it are merely items of damage arising from the same wrong. *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607, 609 (Fla. 4th DCA 1975). See also *Ovadia v. Bloom*, 756 So.2d 137, 141 (Fla. 3d DCA 2000).

8. **Out-of-State Telephone Call:** Committing defamation by telephone call into Florida constituted the commission of a tort in Florida and subjected defendant to personal jurisdiction. *See Carida v. Holy Cross Hosp., Inc.*, 424 So.2d 849, 851 (Fla. 4th DCA 1982), *disapproved of on other grounds by Doe v. Thompson*, 620 So.2d 1004 (Fla. 1993).

9. **Constitutional Issues:** Defamation actions often raise Constitutional concerns and First Amendment jurisprudence distinguishes between two classifications of plaintiffs: "private individuals" and "public figures." Private individuals are governed by the common law test as laid out above; as such, they need only allege negligence on behalf of the publisher in order to maintain a defamation action. However, where public figures are concerned, the state's interest in protecting the defamed subject's reputation is lessened, and as such, public plaintiffs must allege a higher level of mens rea on behalf of defendant publishers, in order to balance the attendant First Amendment concerns bound up with defamation and public speech. *Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So.2d 841, 845 (Fla. 4th DCA 2002).

§9:10.6 Florida Standard Jury Instructions—Civil

MI 4.1 Defamation: Public Official Or Public Figure Claimant

The issues for your determination on the claim of (claimant) against (defendant) are:

a. Issue whether publication concerning claimant was made as claimed:
Whether (defendant) [made] [published] [broadcast] the statement concerning (claimant) as (claimant) contends; and, if so,

b. Issue whether publication was false and defamatory:

Whether (defendant's) statement concerning (claimant) was in some significant respect a false statement of fact * and [tended to expose (claimant) to hatred, ridicule, or contempt] [or] [tended to injure (claimant) in his business, reputation, or occupation] [or] [charged that (claimant) committed a crime].

A statement is in some significant respect false if its substance or gist conveys a materially different meaning than the truth would have conveyed. In making this determination, you should consider the context in which the statement is made and disregard any minor inaccuracies that do not affect the substance of the statement.

If the greater weight of the evidence does not support the claim of (claimant) on the issues I have just mentioned, then your verdict should be for (defendant). "Greater weight of the evidence" means the more persuasive force and effect of the entire evidence in the case. However, if the greater weight of the evidence does support the claim of (claimant) on those issues, then:

** In some instances, a statement of opinion may be interpretable as a false statement of fact expressly stated or implied from an expression of opinion. Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); Florida Medical Center, Inc. v. New York Post Co., Inc., 568 So.2d 454 (Fla. 4th DCA 1990).*

c. Issue whether defendant acted with actual malice:

You must next determine whether clear and convincing evidence shows that at the time the statement was made (defendant) knew the statement was false or had serious doubts as to its truth.

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

If clear and convincing evidence does not show that (defendant) knew when the statement was made that it was false, or that he had serious doubts then as to its truth, your verdict should be for (defendant).

However, if clear and convincing evidence does support (claimant's) claim on this issue, and the greater weight of the evidence supports (claimant's) claim on the other issues on which I have instructed you, then your verdict should be for (claimant).

Proceed to MI 4.4, Defamation: Causation and Damages.

MI 4.2 Defamation: Private Claimant, Media Defendant

The issues for your determination on the claim of (claimant) against (defendant) are:

a. Issue whether publication concerning claimant was made as claimed:

Whether (defendant) [published] [broadcast] the statement concerning (claimant) as (claimant) contends; and, if so,

b. Issue whether publication was false and defamatory:

Whether (defendant's) statement concerning (claimant) was in some significant respect a false statement of fact and [tended to expose (claimant) to hatred, ridicule, or contempt] [or] [tended to injure (claimant) in his business, reputation, or occupation] [or] [charged that (claimant) committed a crime]; and, if so,

** In some instances, a statement of opinion may be interpretable as a false statement of fact expressly stated or implied from an expression of opinion. Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); Florida Medical Center, Inc. v. New York Post Co., 568 So.2d 454 (Fla. 4th DCA 1990).*

c. Issue whether defendant was negligent:

Whether (defendant) was negligent in making that statement.

A statement is in some significant respect false if its substance or gist conveys a materially different meaning than the truth would have conveyed. In making this determination, you should consider the context in which the statement is made and disregard any minor inaccuracies that do not affect the substance of the statement.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

If the greater weight of the evidence does not support the claim of (claimant) on these issues, then your verdict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant) on these issues, then your verdict should be for (claimant) and against (defendant).

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

Proceed to MI 4.4, Defamation: Causation and Damages.

MI 4.3 Defamation: Private Claimant, Nonmedia Defendant With Or Without Qualified Privilege

The issues for your determination on the claim of (claimant) against (defendant) are:

a. Issue whether a defamatory publication concerning claimant was made as claimed:

Whether (defendant) made the statement concerning (claimant) as (claimant) contends; and, if so, whether the statement [tended to expose (claimant) to hatred, ridicule, or contempt] [or] [tended to injure (claimant) in his business, reputation, or occupation] [or] [charged that (claimant) committed a crime].

If the greater weight of the evidence does not support the claim of (claimant) on these issues, then your verdict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant) on these issues, then [your verdict should be for (claimant) in the total amount of his damages] [you shall consider [the defense of truth and good motives] [and] [the defense of privilege] raised by (defendant)].

b. Defense issues of truth and good motives:

On the [first] defense, the issue for your determination is whether the statement made by (defendant) was substantially true and was made by (defendant) with good motives.

A statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed. In making this determination, you should consider the context in which the statement is made and disregard any minor inaccuracies that do not affect the substance of the statement.

If the greater weight of the evidence supports this defense, your verdict should be for (defendant).

If the greater weight of the evidence does not support this defense, [and the greater weight of the evidence does support the claim of (claimant) on the issues I previously mentioned, then your verdict should be for (claimant) in the total amount of his damages.] [then you shall consider the defense of privilege raised by (defendant).]

c. Defense issue whether defendant had qualified privilege:

If defendant has a qualified privilege as a matter of law, skip to 4.3d.

On the defense of privilege, I instruct you that provided one does not speak with improper motives, which I shall explain in a moment, a person such as (defendant) is privileged to make a statement to [someone such as (name)] [an audience such as (describe)] about another such as (claimant), even if the statement is untrue, under the following circumstances:

Describe in general terms, sufficient for the jury to understand the interests protected by law, the facts which if proved would give rise to a qualified privilege. See Comment 6.

If the greater weight of the evidence does not show that these circumstances existed, then you must find that (defendant) had no privilege to make such a statement even with proper motives. However, if the greater weight of the evidence does show that (defendant) spoke under circumstances creating such a privilege, then you should determine whether, as (claimant) contends, (defendant) made the statement with improper motives abusing that privilege.

d. Issue whether defendant abused qualified privilege:

(Defendant) had a privilege to make a statement even if untrue, provided he did so with proper motives. Such a privilege existed because:

Describe in general terms, sufficient for the jury to understand the interests protected by law, the facts giving rise to the qualified privilege. See Comment 6.

The issue for your determination is therefore whether, as (claimant) contends, (defendant) made the statement with improper motives abusing that privilege. One makes a false statement about another with improper motives if one's primary motive and purpose in making the statement is to gratify one's ill will, hostility and intent to harm the other, rather than [to advance or protect (defendant's) interest, right or duty to speak to (name) on that subject] [or] [to advance or protect the interests of the person to whom the statement was made].

If the greater weight of the evidence does not support the claim of (claimant) that (defendant) abused any privilege he had [and the greater weight of the evidence does support the defense of privilege], then your verdict should be for (defendant).

However, if the greater weight of the evidence does support the claim of (claimant) that (defendant) abused any privilege he had, then your verdict should be for (claimant) in the total amount of his damages.

e. "Greater weight of evidence" defined:

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

Proceed to MI 4.4, Defamation: Causation and Damages.

See Standard Jury Instructions—Civil Cases (No. 00-1), 795 So.2d 51, 55 (Fla. 2001).

§9:20 GOVERNMENTAL INTRUSION

§9:20.1 Florida Constitution

Article I, §23, Florida Constitution:

§23. Right of privacy

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Source

Art. I, §23, Fla. Const.

§9:20.2 Elements of Cause of Action — Florida Supreme Court

When analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive the highest level of scrutiny: The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. *Winfield*, 477 So.2d at 547; *see also B.B.*, 659 So.2d at 259. In holding that "this is a highly stringent standard" of review, this Court in *In re T.W.* noted that it could cite no cases in Florida in which "government intrusion in personal decisionmaking" survived the compelling state interest test. 551 So.2d at 1192.

Source

Gainesville Woman Care, LLC v. State, 210 So.3d 1243, 1252-53 (Fla. 2017); *Von Eiff v. Azicri,* 720 So.2d 510, 514 (Fla. 1998).

See Also

1. *Beagle v. Beagle,* 678 So.2d 1271, 1275 (Fla. 1996) ("The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.").
2. *City of North Miami v. Kurtz,* 653 So.2d 1025, 1027 (Fla. 1995), *cert. denied*, 116 S.Ct. 701 (1996) ("Unlike the implicit privacy right of the federal constitution, Florida's privacy provision is, in and of itself, a fundamental one that, once implicated, demands evaluation under a compelling state interest standard. … Thus to determine whether Kurtz, as a job applicant, is entitled to protection under article I, section 23, we must first determine whether a governmental entity is intruding into an aspect of Kurtz's life in which she has a 'legitimate expectation of privacy.' If we find in the affirmative, we must then look to whether a compelling interest exists to justify that intrusion and, if so, whether the least intrusive means is being used to accomplish the goal.").
3. *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985).
4. See cases under the heading "Invasion of Privacy" and "Appropriation."

§9:20.2.1 Elements of Cause of Action — 1st DCA

Right to privacy is a fundamental right that requires evaluation under a compelling state interest standard; however, before the right to privacy attaches and the standard is applied, a reasonable expectation of privacy must exist. Whether an individual has a legitimate expectation of privacy is determined by considering all the circumstances, especially objective manifestations of that expectation.

Source

A.H. v. State, 949 So.2d 234, 237 (Fla. 1st DCA 2007).

See Also

Caddy v. State, Dept. of Health, Bd. of Psychology, 764 So.2d 625, 629 (Fla. 1st DCA 2000).

§9:20.2.2 Elements of Cause of Action — 2nd DCA

The constitutional right of privacy is regarded as a fundamental right. See art. I, §23, Fla. Const. Under the "compelling state interest standard," if an individual possesses a legitimate expectation of privacy in the information at issue, the burden of proof is on the State to justify an intrusion on that individual's privacy. Such a burden can be met by demonstrating that the intrusion serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Source

State v. Crumbley, 143 So.3d 1059, 1068 (Fla. 2d DCA 2014).

See Also

Thomas v. Smith, 882 So.2d 1037, 1044 (Fla. 2d DCA 2004).

§9:20.2.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§9:20.2.4 Elements of Cause of Action — 4th DCA

The Florida Constitution expressly protects an individual's right to privacy. See Art. I, §23, Fla. Const. ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."). This right is broader than the right to privacy implied in the Federal Constitution. The right to privacy in the Florida Constitution "ensures that individuals are able 'to determine for themselves when, how and to what extent information about them is communicated to others.'" *Shaktman v. State*, 553 So.2d 148, 150 (Fla.1989) (quoting A. Westin, *Privacy and Freedom* 7 (1967)). Before the right to privacy attaches, there must exist a legitimate expectation of privacy. Once a legitimate expectation of privacy is shown, the burden is on the party seeking disclosure to show the invasion is warranted by a compelling interest and that the least intrusive means are used. *Id.*

Source

Nucci v. Target, 162 So.3d 146, 153 (Fla 4th DCA 2015).

See Also

1. *Board of County Comm'rs of Palm Beach County v. D.B.*, 784 So.2d 585, 588 (Fla. 4th DCA 2001), *rev. denied*, 807 So.2d 653 (Fla. 2002).
2. *Favalora v. Sidaway*, 996 So.2d 895, 899 (Fla. 4th DCA 2008) ("State constitution affords Floridians the right of privacy and ensures that each person has the right to determine for themselves when, how and to what extent information about them is communicated to others.").

§9:20.2.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§9:20.3 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p).

§9:20.4 Related Matters

1. **Broader than the Federal Right to Privacy:** Florida's right to privacy is broader than the federal right to privacy. *In re Commitment of Sutton*, 884 So.2d 198, 204 (Fla. 2d DCA 2004). The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and

succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution. *Von Eiff v. Azicri*, 699 So.2d 772, 780 (Fla. 3d DCA 1997), *quashed by*, 720 So.2d 510 (Fla. 1998); *Board of County Comm'rs of Palm Beach County v. D.B.*, 784 So.2d 585, 588 (Fla. 4th DCA 2001), *rev. denied*, 807 So.2d 653 (Fla. 2002); *Mozo v. State of Florida,* 632 So.2d 623, 633 (Fla. 4th DCA 1994), *review granted*, 640 So.2d 1108 (Fla. 1994), *approved*, 655 So.2d 1115 (Fla. 1995).

2. **Care and Upbringing of Children:** This Court has recognized a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism. *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So.2d 565, 570 (Fla. 1991), *superseded by* Fla. Stat. §38.10; *State v. J.P.*, 907 So.2d 1101 (Fla. 2004). The government has broader authority over the actions of children than over those of adults. *See Prince v. Massachusetts,* 321 U.S. 158, 168, 64 S.Ct. 438, 88 L.Ed. 645 (1944). There are three reasons why the constitutional rights of children are not coextensive with those of adults: (1) the peculiar vulnerability of children; (2) a child's inability to make critical decisions in an informed, mature manner; and (3) the importance of a parent's role in child rearing. *See J.M.,* 768 P.2d at 223 (citing *Bellotti,* 443 U.S. 622, 99 S.Ct. 3035); *D.P. v. State*, 705 So.2d 593, 604 (Fla. 3d DCA 1997).

3. **Categories of Interest:** This right to privacy encompasses at least two different categories of interest. The first is "the individual interest in avoiding disclosure of personal matters[.]" *Rasmussen v. S. Fla. Blood Serv., Inc.,* 500 So.2d 533, 536 (Fla. 1987) (quoting *Whalen v. Roe,* 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)). The second is "the interest in independence in making certain kinds of important decisions." *Id.* In deciding whether this constitutional right is impacted, the courts consider both the individual's subjective expectation and the values of privacy that our society seeks to foster. *G.P. v. State*, 842 So.2d 1059, 1062 (Fla. 4th DCA 2003).

4. **Three Types of Wrongful Conduct:** Florida recognizes three categories of invasion of privacy: (1) appropriation-the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion-physically or electronically intruding into one's private quarters; and (3) public disclosure of private facts-the dissemination of truthful private information which a reasonable person would find objectionable. *Jews For Jesus, Inc. v. Rapp,* 997 So.2d 1098, 1102-03, 1115 (Fla. 2008) (finding that false light is not a recognized invasion of privacy tort in Florida).

5. **Legitimate Expectation of Privacy:** Before the right to privacy attaches, there must be a legitimate expectation of privacy. *City of N. Miami v. Kurtz,* 653 So.2d 1025 (Fla. 1995). Determining whether an individual has a legitimate expectation of privacy must be made by considering all the circumstances, especially objective manifestations of that expectation. *In re Commitment of Sutton*, 884 So.2d 198, 204 (Fla. 2d DCA 2004).

6. **Liberty and Self-Determination:** This privacy right includes the right to liberty and self-determination. *See In re Guardianship of Browning*, 568 So.2d 4, 9 (Fla. 1990); *State v. J.P.*, 907 So.2d 1101, 1115 (Fla. 2004).

7. **Personal Privacy Cases:** *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998) (addressing the visitation rights of grandparents when a child's parent is deceased); *J.A.S. v. State*, 705 So.2d 1381 (Fla. 1998) (addressing a statutory rape law as applied to particular defendants); *Krischer v. McIver*, 697 So.2d 97 (Fla. 1997) (addressing assisted suicide); *Beagle v. Beagle,* 678 So.2d 1271 (Fla. 1996) (addressing the visitation rights of grandparents when a child's parents are living together); *In re Dubreuil*, 629 So.2d 819 (Fla. 1994) (addressing a patient's right to refuse a blood transfusion for religious reasons, where the patient is the parent of four minor children); *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990) (addressing whether a surrogate may exercise an incompetent patient's right to decline medical treatment); *In re T.W.*, 551 So.2d 1186 (Fla. 1989) (addressing parental consent for a minor to obtain an abortion); *Public Health Trust v. Wons*, 541 So.2d 96 (Fla. 1989) (addressing a patient's right to refuse a life-sustaining blood transfusion); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988) (addressing the closure of court proceedings and records); *Rasmussen v. S. Fla. Blood Serv.*, 500 So.2d 533 (Fla. 1987) (addressing the confidentiality of donor information concerning an AIDS-tainted blood supply); *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985) (addressing the confidentiality of

bank records); *Corbett v. D'Alessandro*, 487 So.2d 368 (Fla. 2d DCA 1986), *rev. denied*, 492 So.2d 1331 (Fla. 1986) (addressing the removal of a nasogastric feeding tube from an adult in a permanent vegetative state). *Cf. Renee B. v. Fla. Agency for Health Care Admin.*, 790 So.2d 1036 (Fla. 2001) (holding that the right of privacy was not implicated by agency rules that barred public funding for abortions); *City of N. Miami v. Kurtz*, 653 So.2d 1025 (Fla. 1995) (holding that the right of privacy was not implicated by an administrative regulation that required all job applicants to sign an affidavit stating they have not used tobacco products during the preceding year). Note: These cases are listed in *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 619 (Fla. 2003).

8. **Private Financial Worth Information:** Private financial worth information is thus usually withheld from the world at large unless the courts compel such disclosure. Even then, disclosure is made only so far as necessary. *Woodward v. Berkery*, 714 So.2d 1027, 1035 (Fla. 4th DCA 1998), *rev. denied*, 717 So.2d 528 (Fla. 1998). *See also Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla. 1985) (law in Florida recognizes an individual's legitimate expectation of privacy in individual's private bank account, financial records).

§9:30 SECURITY OF COMMUNICATIONS ACT, VIOLATION OF

§9:30.1 Florida Statutes

Florida Statutes §934.10:

(1) Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of ss. 934.03 - 934.09 shall have a civil cause of action against any person or entity who intercepts, discloses, or uses, or procures any other person or entity to intercept, disclose, or use, such communications and shall be entitled to recover from any such person or entity which engaged in that violation such relief as may be appropriate, including:
   (a) Preliminary or equitable or declaratory relief as may be appropriate;
   (b) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
   (c) Punitive damages; and
   (d) A reasonable attorney's fee and other litigation costs reasonably incurred.

(2) A good faith reliance on:
   (a) A court order, subpoena, or legislative authorization as provided in ss. 934.03 - 934.09,
   (b) A request of an investigative or law enforcement officer under s. 934.09(7), or
   (c) A good faith determination that Florida or federal law, other than 18 U.S.C. s. 2511(2)(d), permitted the conduct complained of shall constitute a complete defense to any civil or criminal, or administrative action arising out of such conduct under the laws of this state.

(3) A civil action under this section may not be commenced later than 2 years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Source

Fla. Stat. §934.10 (2000) (Current through the 2018 Second Regular Session of the 25th Legislature).

Florida Statutes §934.27—Civil action: relief; damages; defenses.

(1) Except as provided in s. 934.23(5), any provider of electronic communication service, or subscriber or customer thereof, aggrieved by any violation of ss. 934.21 - 934.28 in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as is appropriate.

(2) In a civil action under this section, appropriate relief includes:
   (a) Such preliminary and other equitable or declaratory relief as is appropriate.
   (b) Damages under subsection (3).
   (c) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a plaintiff entitled to recover be awarded less than $1,000.
(4) A good faith reliance on any of the following is a complete defense to any civil or criminal action brought under ss. 934.21 - 934.28:
  (a) A court warrant or order, a subpoena, or a statutory authorization, including but not limited to, a request of an investigative or law enforcement officer to preserve records or other evidence, as provided in s. 934.23(7).
  (b) A request of an investigative or law enforcement officer under s. 934.09(7).
  (c) A good faith determination that s. 934.03(3) permitted the conduct complained of.
(5) A civil action under this section may not be commenced later than 2 years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

Source

Fla. Stat. §934.27 (2002) (Current through the 2018 Second Regular Session of the 25th Legislature).

§9:30.2 Statute of Limitations

Two Years. Fla. Stat. §934.27(5).

§9:30.3 References

1. 14A Fla. Jur. 2d *Criminal Law* §§886–930 (2001).
2. 68 Am. Jur. 2d *Searches and Seizures* §§332–373 (2000).
3. 86 C.J.S. *Telecommunication* §256 (1997).
4. Kirk W. Munroe, *Commercial Eavesdropping, A Catch 22*, 63 Fla. Bar J. 11 (March 1989).
5. Cynthia L. Greene, *Woods Have Eyes as Walls Have Ears: Intraspousal Wiretapping and Eavesdropping in Domestic Relations Cases*, 56 Fla. Bar J. 643 (1982).
6. Kirk W. Munroe, *Consensual Electronic Surveillance and the Explosive Impact of Sarmiento*, 56 Fla. Bar J. 355 (1982).
7. Barry Krischer, *Body Bugs*, 52 Fla. Bar J. 553 (1978).
8. James H. Walsh, *The Key to Legal Bugging*, 47 Fla. Bar J. 366 (1973).
9. Todd R. Smyth, Annotation, *Eavesdropping on Extension Telephone as Invasion of Privacy*, 49 A.L.R.4th 430 (1986).
10. Russell G. Donaldson, Annotation, *Construction and Application of State Statutes Authorizing Civil Causes of Action by Person Whose Wire or Oral Communication is Intercepted, Disclosed, or Used in Violation of Statutes*, 33 A.L.R.4th 506 (1984).
11. Annotation, *Eavesdropping as Invasion of Privacy*, 11 A.L.R.3d 1296 (1967).
12. Carol M. Bast, *Eavesdropping in Florida: Beware a Time-Honored But Dangerous Pastime*, 21 Nova L. Rev. 431 (Fall 1996).
13. Daniel J. Mumaw, Comment, *Does the "One-Party Consent" Exception Effectuate the Underlying Goals of Title III*, 18 Akron L. Rev. 495 (1985).
14. Jonathan J. Green, Note, *Electronic Monitoring in the Workplace: The Need for Standards*, 52 Geo. Wash. L. Rev. 438 (1984).
15. Mitchell K. Bloomberg & Harold Bluestein, Comment, *Intercepted Communications: "Just Cause" for Refusing to Answer the Questions of the Grand Jury*, 29 U. Miami L. Rev. 334 (1974-75).

§9:30.4 Defenses

1. **Good-Faith Reliance:** The plain language of the statute states that a good-faith reliance on a good-faith determination that federal or Florida law permits the conduct complained of shall constitute a complete defense to any criminal action arising out of the conduct. Because appellant's proffered testimony was relevant to this defense, the trial court abused its discretion by disallowing same. *Wood v. State*, 654 So.2d 218, 220 (Fla. 1st DCA 1995).

2. **Interspousal Tort Immunity:** The remedy afforded by section 934.10 should not be circumscribed by the doctrine of interspousal tort immunity. *Burgess v. Burgess*, 447 So.2d 220, 222 (Fla. 1984).

3. **Long-Arm Jurisdiction:** The nonconsensual interception by an out-of-state defendant of a communication originating within Florida does not constitute a tortuous act committed within Florida to establish long-arm jurisdiction under Section 48.193(b), Fla. Stat. *Kountze v. Kountze*, 996 So.2d 246, 248, 252-53 (Fla. 2d DCA 2008) (*receding from Koch v. Kimball*, 710 So.2d 5, 7 (Fla. 2d DCA 1998), finding that nonconsensual interception by an out-of-state defendant of a communication originating within Florida, standing alone, was sufficient to constitute a tortuous act within Florida to support jurisdiction over an utterance made in Florida but recorded in Georgia). However, the direction of communication that is "defamatory, fraudulent or otherwise an element of an intentional tort" by an out-of-state defendant into Florida is sufficient to establish long-arm jurisdiction. *Kountze*, 996 So.2d at 248, 252.

4. **Safeguards:** Federal law has preempted the field of wiretaps, and any state law regulating the interception of wire communications must provide safeguards at least as stringent as those set out in the federal statute. *State v. Aurilio*, 366 So.2d 71, 74 (Fla. 4th DCA 1978).

§9:30.5 Related Matters

1. **Expectation of Privacy on Cordless Phones:** The interception of a conversation from a cordless telephone that originates from one's home violates Florida's Security of Communications Act because "citizens are guaranteed a reasonable expectation of privacy in their own home." *State v. Mozo*, 655 So.2d 1115, 1117 (Fla. 1995) (citing U.S. Const. amnd IV; Art. I §§12, 23, Fla. Const.)

2. **Interrogatory Responses:** The court cannot compel petitioner to answer respondent's interrogatories as the answers relating to her alleged interception of the telephone conversation might incriminate her. *Roberts v. Jardine*, 358 So.2d 588, 589 (Fla. 2d DCA 1978), *appeal after remand*, 366 So.2d 124 (Fla. 1979).

3. **Legislative Intent:** Hence, the Florida act evinces a greater concern for the protection of one's privacy interests in a conversation than does the federal act. Equally certain is the fact that the 1974 amendment to chapter 934 was designed to proscribe the method of interception used in this case. On the floor of the Florida House of Representatives, the only recorded debate on the two-party consent requirement of section 934.03(2)(d) was this comment by Representative Shreve: [What this bill does] is to prevent, make it illegal, for a person to record a conversation, even though he's a party to it, without the other person's consent. *Guilder v. State*, 899 So.2d 412, 418 (Fla. 4th DCA 2005). The clear intent of the Legislature in enacting section 934.03 was to make it illegal for a person to intercept wire, oral, or electronic communications. *O'Brien v. O'Brien*, 899 So.2d 1133, 1135 (Fla. 5th DCA 2005).

4. **Oral Communication—Definition:** "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication. Fla. Stat. §934.02(2) (2001).

5. **Oral Communication, Elements of:** For a conversation to qualify as "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication, and society must be prepared to recognize the expectation as reasonable under the circumstances. Where both elements are present, the statute has been violated whether the intercepted communication is private in nature or not. *Stevenson v. State*, 667 So.2d 410, 412 (Fla. 1st DCA 1996). An oral communication is protected under §934.03 if it satisfies two conditions: A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy as well as whether society is prepared to recognize this expectation as reasonable. *Jatar v. Lamaletto*, 758 So.2d 1167, 1169 (Fla. 3d DCA 2000), *dismissed*, 786 So.2d 1186 (Fla. 2001). *See also State v. Smith*, 641 So.2d 849, 851 (Fla. 1994); *Cohen Brothers, LLC v. ME Corp., S.A.*, 872 So.2d 321, 324 (Fla. 3d DCA 2004).

6. **Persons Protected:** The purpose of Chapter 934 was to protect the victims of illegal intercepts, not those who perpetrate them. *State v. News-Press Publishing Co.*, 338 So.2d 1313, 1317 (Fla. 2d DCA 1976).

7. **Preemption:** Federal law has preempted the field of wiretaps, and any state law regulating the interception of wire communications must provide safeguards at least as stringent as those set out in the federal statute. *State v. Aurilio*, 366 So.2d 71, 74 (Fla. 4th DCA 1978), *cert. denied*, 376 So.2d 76 (Fla. 1979). *See also State v. McGillicuddy*, 342 So.2d 567, 568 (Fla. 2d DCA 1977).

8. **Strictly Construed:** Portions of chapter 934 authorizing the interception of wire or oral communications are statutory exceptions to the federal and state constitutional right of privacy. *In re Grand Jury Investigation*, 287 So.2d 43 (Fla. 1973). As such, they must be strictly construed. *Copeland v. State*, 435 So.2d 842, 844 (Fla. 2d DCA 1983), *rev. denied*, 443 So.2d 980 (Fla. 1983). *See also State v. Aurilio*, 366 So.2d 71, 73 (Fla. 4th DCA 1978), *cert. denied*, 376 So.2d 76 (Fla. 1979).

9. **Testimony of a Third Person:** Testimony of a third person who overhears a confidential communication is admissible. *Horn v. State*, 298 So.2d 194, 196 (Fla. 1st DCA 1974), *cert. denied*, 308 So.2d 117 (Fla. 1975).

10. **Wire Communication—Definition:** "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception including the use of such connection in a switching station furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce. Such term includes any electronic storage of such communication. Fla. Stat. §934.02(1) (2001).

§9:40 INVASION OF PRIVACY, GENERALLY

§9:40.1 Elements of Cause of Action — Florida Supreme Court

Florida recognizes three categories of invasion of privacy: (1) appropriation-the unauthorized use of a person's name or likeness to obtain some benefit; (2) intrusion-physically or electronically intruding into one's private quarters; and (3) public disclosure of private facts-the dissemination of truthful private information which a reasonable person would find objectionable.

Source

Jews For Jesus, Inc. v. Rapp, 997 So.2d 1098, 1102-03, 1115 (Fla. 2008) (finding that false light is not a recognized invasion of privacy tort in Florida).

See Also

1. *Cason v. Baskin*, 155 Fla. 198, 209-10 (1945) (first defining the right of privacy to be "the right to be let alone, the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze.")
2. *Resha v. Tucker*, 670 So.2d 56, 59 (Fla. 1996) ("Florida courts are open to invasion of privacy claims under the common law, provided all the elements of the cause of action are proved.")
3. *Forsberg v. Hous. Auth. of the City of Miami Beach*, 455 So.2d 373, 376 (Fla. 1984) ("This Court, following the majority rule, has expressly recognized a right to sue in tort for the civil wrong of 'invasion of privacy.'")
4. *Allstate Ins. Co. v. Ginsberg,* 863 So.2d 156, 162 (Fla. 2003); *but see Jews For Jesus, Inc. v. Rapp,* 997 So.2d 1098, 1102-03, 1115 (Fla. 2008) (finding that false light is not a recognized invasion of privacy tort in Florida).
5. *Anderson v. Gannett Co.*, 994 So.2d 1048, 1051 (Fla. 2008) ("False light invasion of privacy is not a viable cause of action in Florida.").

§9:40.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

See Also

1. *Thompson v. City of Jacksonville,* 130 So.2d 105, 108 (Fla. 1st DCA 1961), *cert. denied*, 147 So.2d 530 (Fla. 1962) ("Florida is one of a minority of the states in this country that have recognized the right of privacy, though with limitations.")

§9:40.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§9:40.1.3 Elements of Cause of Action — 3rd DCA

An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in the manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

Source

State Farm Fire & Cas. Co. v. Compupay, Inc., 654 So.2d 944, 948-49 (Fla. 3d DCA 1995).

See Also

1. *Harms v. Miami Daily News, Inc.,* 127 So.2d 715, 717 (Fla. 3d DCA 1961) ("Florida has adopted the view recognizing the right of privacy […]. The right of privacy is defined as the right of an individual to be let alone and to live a life free from unwarranted publicity.").

§9:40.1.4 Elements of Cause of Action — 4th DCA

The common law tort of invasion of privacy includes four general categories: (1) Intrusion, i.e., invading plaintiffs' physical solitude or seclusion; (2) Disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name.

Source

Loft v. Fuller, 408 So.2d 619, 622 (Fla. 4th DCA 1981), *rev. denied*, 419 So.2d 1198 (Fla. 1982); *But see Jews For Jesus, Inc. v. Rapp,* 997 So.2d 1098, 1102-03, 1115 (Fla. 2008) (finding that false light is not a recognized invasion of privacy tort in Florida).

See Also

1. *Guin v. City of Riviera Beach*, 388 So.2d 604, 606 (Fla. 4th DCA 1980) ("The tort of invasion is ordinarily considered to encompass four categories […].")

§9:40.1.5 Elements of Cause of Action — 5th DCA

The four general categories of the tort of invasion of privacy are: (1) Intrusion, i.e., invading plaintiffs' physical solitude, or seclusion; (2) Public Disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name.

Source

Armstrong v. H&C Commc'n, *Inc.*, 575 So.2d 280, 282 (Fla. 5th DCA 1991); *But see Jews For Jesus, Inc. v. Rapp,* 997 So.2d 1098, 1102-03, 1115 (Fla. 2008) (finding that false light is not a recognized invasion of privacy tort in Florida).

See Also

Stoddard v. Wohlfahrt, 573 So.2d 1060 (Fla. 5th DCA 1991) ("Florida recognizes a cause of action for invasion of privacy.").

§9:40.2 Statute of Limitations

Four years. *See* Fla. Stat. §95.11(3)(a) (applying a four-year statute of limitations to all actions "not specifically provided for in these statutes"); *Haskins v. City of Fort Lauderdale*, 898 So.2d 1120, 1123 (Fla. 4th DCA 2005). ("In Florida, the statute of limitations period for an invasion of privacy claim… is four years.").

§9:40.3 References

1. 19A Fla. Jur. 2d *Defamation and Privacy* §§207–230 (2005).
2. 62A Am. Jur. 2d *Privacy* §§29, 30, 39, 92, 129, 175, 252–254 (2005).
3. 77 C.J.S. *Right of Privacy and Publicity* §§8–10, 34–39 (1994).
4. Restatement (Second) of Torts §§652A–652I (1977).
5. Florida Statutes ch. 934 (2005) (Security of Communications).
6. Annotation, *Waiver or Loss of Right of Privacy,* 57 A.L.R.3d 16 (1974).
7. Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy,* 6 Fla. St .U. L. Rev. 671 (1978).
8. Stephen T. Maher, *Has the Florida Constitutional Right to Decisional Privacy Finally Come of Age?* 64 Fla. Bar. J. 23 (July/Aug. 1990).

§9:40.4 Defenses

1. **Malice, Truth, Special Damages:** It was further held that malice was not required to be shown by plaintiff; that neither truth, nor the entire absence of malice or wrongful motive on the part of the defendant, constituted any defense; and that plaintiff, under the declaration, did not have to allege or prove any special or pecuniary damages. Hence the law of the cause of action has been heretofore established by this Court. *Cason v. Baskin,* 30 So.2d 635, 636 (Fla. 1947).

2. **Standing**: Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded. *Loft v. Fuller*, 408 So.2d 619, 622 (Fla. 4th DCA 1982); *see also* Restatement (Second) of Torts, §652I. The cause of action is not assignable, and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his. Restatement (Second) of Torts, §652I, cmt. a.

3. **Public Concern**: The right to privacy does not prohibit the publication of matter which is of legitimate public concern. *Walker v. Florida Dept. of Law Enforcement*, 845 So.2d 339, 340 (Fla. 3d DCA 2003); *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1104 (Fla. 2008).

§9:40.5 Related Matters

1. **Discovery:** The potential for invasion of privacy is inherent in the litigation process. Under the Florida discovery rules, any nonprivileged matter that is relevant to the subject matter of the action is discoverable. The discovery rules also confer broad discretion on the trial court to limit or prohibit discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Under this authority, a court may act to protect the privacy of the affected person. *Friedman v. Heart Institute of Port St. Lucie, Inc*., 863 So.2d 189, 193 (Fla. 2003). Such a privacy claim by a nonparty may be asserted pursuant to the provision of rule 3.220(m)(1) that "[*a*]*ny person* may move for an order denying or regulating disclosure of sensitive matters." Under this provision, a nonparty has "standing to challenge the release of the discovery materials. *Post-Newsweek Stations, Fla. Inc. v. Doe*, 612 So.2d 549, 550 (Fla. 1992); *Times Pub. Co. v. State*, 903 So.2d 322 (Fla. 2d DCA 2005).

2. **Emotional Distress:** The impact rule does not apply to recognized intentional torts that result in predominantly emotional damages, including the intentional infliction of emotional distress, *see Eastern Airlines, Inc. v. King*, 557 So.2d 574, 576 (Fla. 1990); defamation, *see Miami Herald Publishing Co. v. Brown*, 66 So.2d 679, 681 (Fla. 1953); and invasion of privacy, *see Cason v. Baskin*, 20 So.2d 243, 251 (Fla. 1944); *Rowell v. Holt*, 850 So.2d 474, 478 (Fla. 2003). *See also* Restatement (Second) of Torts §§569, 570, 652H, cmt. b (1977); *Hagan v. Coca-Cola Bottling Co*., 804 So.2d 1234, 1237 (Fla. 2001).

3. **Public Identification:** Public identification is a prerequisite to invasion of privacy claims. *Doe v. Beasley Broad. Grp., Inc*., 105 So.3d 1, 3 (Fla. 2d DCA 2012).

4. **Standing**: A cause of action for invasion of the common law right of privacy is a strictly personal right, peculiar to the individual whose privacy is invaded, and the cause of action can only be maintained by the affected person. Relatives of the person whose privacy is invaded have no right of action for invasion of privacy of the affected person regardless of how close such personal relationship is/was. *Loft v. Fuller*, 408 So.2d 619, 622 (Fla. 4th DCA 1981), *rev. denied*, 419 So.2d 1198 (Fla. 1982); Restatement (Second) of Torts §652, cmt. a.

§9:50 INVASION OF PRIVACY — PUBLIC DISCLOSURE OF PRIVATE FACTS

§9:50.1 Elements of Cause of Action — Florida Supreme Court

The elements of the tort of invasion of privacy by public disclosure of private facts (private-facts tort) can be summarized as (1) the publication, (2) of private facts, (3) that are offensive, and (4) are not of public nature.

Source

Cape Publ'ns, Inc. v. Hitchner, 549 So.2d 1374, 1377 (Fla. 1989), *appeal dismissed*, 493 U.S. 929 (1989).

See Also:

1. Restatement (Second) of Torts §652D (1977) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of the kind that (a) would be highly offensive to a reasonable person, and (b) is not a legitimate concern to the public.")

§9:50.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§9:50.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§9:50.1.3 Elements of Cause of Action — 3rd DCA

The elements of the tort of invasion of privacy by public disclosure of private facts (private-facts tort) can be summarized as (1) the publication, (2) of private facts, (3) that are offensive, and (4) are not of public nature.

Source

Doe v. Univision Television Group, Inc., 717 So.2d 63, 64 (Fla. 3d DCA 1998).

See Also

1. *Woodard v. Sunbeam Television Corp.*, 616 So.2d 501, 503 (Fla. 3d DCA 1993).
2. *Harms v. Miami Daily News, Inc.*, 127 So.2d 715, 716 (Fla. 3d DCA 1961) ("The right of privacy is defined as the right of an individual to be let alone and to live a life free from unwarranted publicity.")
3. Restatement (Second) of Torts §652D (1977).

§9:50.1.4 Elements of Cause of Action — 4th DCA

[No citation for this edition.]

See Also

1. *Guarino v. Mandel*, 327 So.3d 853, 863 (Fla. 4th DCA 2021).
2. *Straub v. Scarpa*, 967 So.2d 437, 439 (Fla. 4th DCA. 2007)(false light).

§9:50.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

See Also

1. *Williams v. City of Minneola*, 575 So.2d 683, 689 (Fla. 5th DCA 1991).

2. *Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So.2d 608, 613 (Fla. 5th DCA 2007) ("To prove the tort of invasion of privacy by publication of private facts, publication must be 'highly offensive to a reasonable person'.").

§9:50.2 Statute of Limitations

Four years. *See* Fla. Stat. §95.11(3)(a) (applying a four-year statute of limitations to all actions "not specifically provided for in these statutes"); *Haskins v. City of Fort Lauderdale*, 898 So.2d 1120, 1123 (Fla. 4th DCA 2005).

§9:50.3 Defenses

1. **Republication of Facts**: Facts already publicized elsewhere and republicized cannot provide a basis for an invasion of privacy claim. *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1149 (S.D. Fla. 1990).

2. **Hypersensitive Individual**: In determining the extent of the right of privacy, the standard by which the right is measured is based upon a concept of the man of reasonable sensitivity; the hypersensitive individual will not be protected. Whether the remarks published by the appellees would be objectionable to a reasonable person is a question for the jury to decide. *Harms v. Miami Daily News, Inc.*, 127 So.2d 715, 718 (Fla. 1961).

3. **Public's Right to Know**: The right to privacy does not forbid the publication of information that is of public benefit or general interest, and the right does not exist as to persons and events in which the public has a rightful interest. *Cason v. Baskin*, 30 So.2d 635, 638 (Fla. 1947); *Harms v. Miami Daily News, Inc.*, 127 So.2d 715, 717 (Fla. 3d DCA 1961).

4. **Judicial Proceedings**: The right to privacy does not forbid the publication of information that serves to guarantee the fairness of trials and to bring the beneficial effects of public scrutiny upon the administration of justice. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Cape Publications, Inc. v. Hitchner*, 549 So.2d 1374, 1377 (Fla. 1989).

§9:50.4 Related Matters

1. **Public Identification:** Public identification is a prerequisite to invasion of privacy claims. *Doe v. Beasley Broad. Grp., Inc.*, 105 So.3d 1,3 (Fla. 2d DCA 2012).

2. **Standing**: A cause of action for invasion of the common law right of privacy is a strictly personal right, peculiar to the individual whose privacy is invaded, and the cause of action can only be maintained by the affected person. Relatives of the person whose privacy is invaded have no right of action for invasion of privacy of the affected person regardless of how close such personal relationship is/was. *Loft v. Fuller*, 408 So.2d 619, 622 (Fla. 4th DCA 1981), *rev. denied*, 419 So.2d 1198 (Fla. 1982); Restatement (Second) of Torts §652, cmt. a.

§9:60 INVASION OF PRIVACY — INTRUSION

§9:60.1 Elements of Cause of Action — Florida Supreme Court

A cause of action for an invasion of privacy based on intrusion upon seclusion requires a trespass or intrusion upon physical solitude. An unlawful trespass occurs where forced entry is made, with objection by the owner or possessor, and not done under any common custom or usage such as in emergencies.

Source

FL Publ'g Co. v. Fletcher, 340 So.2d 914, 918 (Fla. 1977).

See Also

1. *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156, 162 (Fla. 2003) (stating that "[t]he intrusion to which this [tort] refers is into a 'place' in which there is a reasonable expectation of privacy and is not referring to a body part. … this is a tort in which the focus is the right of a private person to be free from public gaze.")
2. *Agency for Health Care Admin. v. Associated Indus. of FL, Inc.*, 678 So.2d 1239, 1252 (Fla. 1996).

§9:60.1.1 Elements of Cause of Action — 1st DCA

[No citation entered for this edition.]

See Also

1. *Hennagan v. Dep't. of Highway Safety and Motor Vehicles*, 467 So.2d 748 (Fla. 1st DCA 1985).
2. *Thompson v. City of Jacksonville*, 130 So.2d 105, 108 (Fla. 1st DCA 1961) ("Florida is one of a minority of the states in this country that have recognized the right of privacy [based on intrusion].")

§9:60.1.2 Elements of Cause of Action — 2nd DCA

[No citation entered for this edition.]

See Also

1. *Jackman v. Cebrink-Swartz*, 334 So.3d 653, 656 (Fla. 2d DCA 2021).
2. *State v. Tamulonis*, 39 So.3d 524, 528 (Fla. 2d DCA 2010).
3. *Ponton v. Scarfone*, 468 So.2d 1009 (Fla. 2d DCA 1985), *petition for rev. denied*, 478 So.2d 54 (Fla. 1985) (recognizing an exception to the requirement of proof of allegation and publication to a third person of a personal matter in circumstances where the plaintiff's person has been touched in an undesired or offensive manner.)

§9:60.1.3 Elements of Cause of Action — 3rd DCA

[No citation entered for this edition.]

See Also

1. *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So.2d 944, 948-49 (Fla. 3d DCA 1995) ("defin[ing] an actionable invasion of the right of privacy as: the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. Claims based on this tort require the allegation and proof of publication to a third person of personal matter.")

§9:60.1.4 Elements of Cause of Action — 4th DCA

[No citation entered for this edition.]

See Also

1. *Guin v. City of Riviera Beach*, 388 So.2d 604, 606 (Fla. 4th DCA 1980) ("The tort of invasion of privacy is ordinarily considered to encompass four categories, one of which consists of 'intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home.'")

§9:60.1.5 Elements of Cause of Action — 5th DCA

[No citation entered for this edition.]

See Also

1. *Stoddard v. Wohlfahrt*, 573 So.2d 1060, 1062 (Fla. 5th DCA 1991), *dismissed*, 581 So.2d 1310 (Fla. 1991) (recognizing an exception to the requirement of proof of allegation and publication to a third

person of a personal matter in circumstances where the plaintiff's person has been touched in an undesired or offensive manner.)

§9:60.2 Statute of Limitations

Four years. *See* Fla. Stat. §95.11(3)(a) (applying a four-year statute of limitations to all actions "not specifically provided for in these statutes."); *Haskins v. City of Fort Lauderdale*, 898 So.2d 1120, 1123 (Fla. 4th DCA 2005).

§9:60.3 Defenses

1. **Consent**: Consent is an absolute defense to an action for trespass and invasion of privacy based on intrusion. *FL Publ'g Co.,* 340 So.2d at 917. Additionally, implied consent from custom, usage, or conduct is an absolute defense to an action for trespass and invasion of privacy based on intrusion. *Id.* However, implied consent would disappear if one were informed not to enter at that time by the owner or possessor or by their direction. *Id.* at 918.

2. **Public Concern:** The right to privacy does not prohibit the publication of matter which is of legitimate public concern. *Walker v. Florida Dept. of Law Enforcement*, 845 So.2d 339, 340 (Fla. 3d DCA 2003); *Jews For Jesus, Inc. v. Rapp*, 997 So.2d 1098, 1104 (Fla. 2008).

§9:60.4 Related Matters

1. **Standing**: A cause of action for invasion of the common law right of privacy is a strictly personal right, peculiar to the individual whose privacy is invaded, and the cause of action can only be maintained by the affected person. Relatives of the person whose privacy is invaded have no right of action for invasion of privacy of the affected person regardless of how close such personal relationship is/was. *Loft v. Fuller*, 408 So.2d 619, 622 (Fla. 4th DCA 1981), *rev. denied*, 419 So.2d 1198 (Fla. 1982); Restatement (Second) of Torts §652, cmt. a.

§9:70 INVASION OF PRIVACY — APPROPRIATION

§9:70.1 Florida Statutes

F.S. §540.08 Unauthorized Publication of Name or Likeness.

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:
   (a) Such person; or
   (b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or
   (c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) If a person uses the name, portrait, photograph, or other likeness of a member of the armed forces without obtaining the consent required in subsection (1) and such use is not subject to any exception listed in this section, a court may impose a civil penalty of up to $1,000 per violation in addition to the civil remedies contained in subsection (2). Each commercial transaction constitutes a violation under this section. As used in this section, the term "member of the armed forces" means an officer or enlisted member of the

Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, the Florida National Guard, and the United States Reserve Forces, including any officer or enlisted member who died as a result of injuries sustained in the line of duty.

(4) The provisions of this section shall not apply to:
   (a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;
   (b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or
   (c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

(5) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

(6) As used in this section, a person's "surviving spouse" is the person's surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person's "children" are her or his immediate offspring and any children legally adopted by the person. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of her or his person or by either parent.

(7) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.

Source

Fla. Stat. §540.08 (2009).

See Also

1. *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156, 162 (Fla. 2003) (recognizing "appropriation- the unauthorized use of a person's name or likeness to obtain some benefit" as a category within the common law tort of invasion of privacy.)
2. *Loft v. Fuller*, 408 So.2d 619, 622-23 (Fla. 4th DCA 1982), *petition for rev. denied*, 419 So.2d 1198 (Fla. 1982) ("Section 540.08 […] is designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher. Thus, the publication is harmful not simply because it is included in a publication that is sold for a profit, but rather because of the way it associates the individual's name or his personality with something else.")

§9:70.2 Statute of Limitations

Four years. *See* Fla. Stat. §95.11(3)(a) (applying a four-year statute of limitations to all actions "not specifically provided for in these statutes."); *Haskins v. City of Fort Lauderdale*, 898 So.2d 1120, 1123 (Fla. 4th DCA 2005).

§9:70.3 Related Matters

1. **Public Identification:** Public identification is a prerequisite to invasion of privacy claims. *Doe v. Beasley Broad. Grp., Inc.*, 105 So.3d 1,3 (Fla. 2d DCA 2012).
2. **Standing**: A cause of action for invasion of the common law right of privacy is a strictly personal right, peculiar to the individual whose privacy is invaded, and the cause of action can be maintained by the affected person. Since appropriation is similar to impairment of a property right and involves an aspect of unjust enrichment of the defendant or his estate, survival rights may be held to exist following the death of either party. *Loft v. Fuller*, 408 So.2d 619, 622 (Fla. 4th DCA 1981), *rev. denied*, 419 So.2d 1198 (Fla. 1982); Restatement (Second) of Torts §652, cmt. a.

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CHAPTER 10

INTENTIONAL TORTS

§10:10 INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS
- §10:10.1 Elements of Cause of Action — Florida Supreme Court
  - §10:10.1.1 Elements of Cause of Action — 1st DCA
  - §10:10.1.2 Elements of Cause of Action — 2nd DCA
  - §10:10.1.3 Elements of Cause of Action — 3rd DCA
  - §10:10.1.4 Elements of Cause of Action — 4th DCA
  - §10:10.1.5 Elements of Cause of Action — 5th DCA
- §10:10.2 Statute of Limitations
- §10:10.3 References
- §10:10.4 Defenses
- §10:10.5 Related Matters

§10:20 INTERFERENCE WITH CHILD CUSTODY
- §10:20.1 Elements of Cause of Action — Florida Supreme Court
  - §10:20.1.1 Elements of Cause of Action — 1st DCA
  - §10:20.1.2 Elements of Cause of Action — 2nd DCA
  - §10:20.1.3 Elements of Cause of Action — 3rd DCA
  - §10:20.1.4 Elements of Cause of Action — 4th DCA
  - §10:20.1.5 Elements of Cause of Action — 5th DCA
- §10:20.2 Statute of Limitations
- §10:20.3 References
- §10:20.4 Defenses
- §10:20.5 Related Matters

§10:30 THEFT, CIVIL
- §10:30.1 Elements of Cause of Action — Florida Supreme Court
  - §10:30.1.1 Elements of Cause of Action — 1st DCA
  - §10:30.1.2 Elements of Cause of Action — 2nd DCA
  - §10:30.1.3 Elements of Cause of Action — 3rd DCA
  - §10:30.1.4 Elements of Cause of Action — 4th DCA
  - §10:30.1.5 Elements of Cause of Action — 5th DCA
- §10:30.2 Florida Statutes
- §10:30.3 Statute of Limitations
- §10:30.4 References
- §10:30.5 Defenses
- §10:30.6 Related Matters

§10:40 INTERFERENCE WITH TESTAMENTARY EXPECTATION

§10:40.1 Elements of Cause of Action — Florida Supreme Court
§10:40.1.1 Elements of Cause of Action — 1st DCA
§10:40.1.2 Elements of Cause of Action — 2nd DCA
§10:40.1.3 Elements of Cause of Action — 3rd DCA
§10:40.1.4 Elements of Cause of Action — 4th DCA
§10:40.1.5 Elements of Cause of Action — 5th DCA
§10:40.2 Statute of Limitations
§10:40.3 References
§10:40.4 Defenses
§10:40.5 Related Matters

§10:10 INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS

§10:10.1 Elements of Cause of Action — Florida Supreme Court

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Source

Eastern Airlines, Inc. v. King, 557 So.2d 574, 575 (Fla. 1990).

See Also

1. *Metropolitan Life Insurance Co. v. McCarson,* 467 So.2d 277 (Fla. 1985).
2. *Slocum v. Food Fair Stores of Florida, Inc.*, 100 So.2d 396, 397 (Fla. 1958).

§10:10.1.1 Elements of Cause of Action — 1st DCA

The elements of a cause of action for this tort are:

1. the wrongdoer's conduct was intentional or reckless; that is, the wrongdoer intended the behavior when he knew or should have known that emotional distress would likely result;
2. the conduct was outrageous; that is, beyond all bounds of decency, atrocious, and utterly intolerable in a civilized community;
3. the conduct caused emotional distress; and
4. the emotional distress was severe.

Source

Rivers v. Dillards Department Store, Inc., 698 So.2d 1328, 1333 (Fla. 1st DCA 1997) (See dissent).

See Also

1. *Johnson v. Thigpen*, 788 So.2d 410, 412 (Fla. 1st DCA 2001).
2. *Dowling v. Blue Cross of Florida, Inc.*, 338 So.2d 88, 89 (Fla. 1st DCA 1976).
3. *Fletcher v. Florida Publ'g Co.*, 319 So.2d 100, 112 (Fla. 1st DCA 1975), *decision quashed on other grounds*, 340 So.2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977).

§10:10.1.2 Elements of Cause of Action — 2nd DCA

The elements of a claim for intentional infliction of emotional distress are:

1. deliberate or reckless infliction of mental suffering;
2. outrageous conduct;
3. the conduct caused the emotional distress; and
4. the distress was severe.

"Additionally, the conduct must be 'so outrageous in character, and so extreme in degree,' that it is considered 'atrocious [ ] and utterly intolerable in a civilized community.'"

Source

Thomas v. Hospital Bd. of Dir. of Lee County, 41 So.3d 246, 256 (Fla. 2d DCA 2010).

See Also

1. *Ponton v. Scarfone,* 468 So.2d 1009 (Fla. 2d DCA 1985), *petition for rev. denied*, 478 So.2d 54 (Fla. 1985).
2. *Johnson v. Department of Health and Rehabilitative Services*, 695 So.2d 927, 929 (Fla. 2d DCA 1997), *appeal after remand*, 793 So.2d 20 (Fla. 2d DCA 2001).
3. *Liberty Mutual Insurance Co. v. Steadman*, 968 So.2d 592, 594-95 (Fla. 2d DCA 2007).
4. *Gallogly v. Rodriguez*, 970 So.2d 470, 471 (Fla. 2d DCA 2007).
5. *Winter Haven Hosp., Inc. v. Liles,* 148 So.3d 507, 515 (Fla. 2d DCA 2014).
6. *Kim v. Jung Hyun Chang,* 249 So.3d 1300, 1305 (Fla. 2d DCA 2018).

§10:10.1.3 Elements of Cause of Action — 3rd DCA

The elements for this tort are:
1. The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;
2. the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
3. the conduct caused emotional distress; and
4. the emotional distress was severe.

Source

Deauville Hotel Management, LLC v. Ward, 219 So.3d 949, 954 (Fla. 3d DCA 2017); *LeGrande v. Emmanuel*, 889 So.2d 991, 994 (Fla. 3d DCA 2004).

See Also

1. *Escadote I Corp. v. Ocean Three Condo. Ass'n, Inc.*, 307 So. 3d 938, 943 (Fla. 3d DCA 2020).
2. *Deauville Hotel Management, LLC v. Ward,* 219 So.3d 949, 954 (Fla. 3d DCA 2017).
3. *Williams v. Worldwide Flight Servs.,* 877 So. 2d 869, 870 (Fla. 3d DCA 2009).
4. *Williams v. Worldwide Flight SVCS., Inc*., 877 So.2d 869, 870 (Fla. 3d DCA 2004).
5. *De La Campa v. Grifols America, Inc*., 819 So.2d 940, 943 (Fla. 3d DCA 2002).
6. *Clemente v. Horne*, 707 So.2d 865, 866 (Fla. 3d DCA 1998).
7. *Mallock v. Southern Memorial Park, Inc.*, 561 So.2d 330, 331 (Fla. 3d DCA 1990).
8. *King v. Eastern Airlines, Inc.*, 536 So.2d 1023, 1024 (Fla. 3d DCA 1987), *reversed on other grounds*, 557 So.2d 574 (Fla. 1990) ("One who by extreme and outrageous conduct *intentionally or recklessly* causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.").
9. *Dominguez v. Equitable Life Assurance Society of the United States*, 438 So.2d 58, 59 (Fla. 3d DCA 1983), *approved*, 467 So.2d 281 (Fla. 1985).
10. *Gellert v. Eastern Air Lines, Inc.*, 370 So.2d 802 (Fla. 3d DCA 1979), *cert. denied*, 381 So.2d 766 (Fla. 1980).

§10:10.1.4 Elements of Cause of Action — 4th DCA

The elements of a claim for intentional infliction of emotional distress have frequently been outlined in the case law:
1. the wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;
2. the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community;
3. the conduct caused emotional distress; and
4. the emotional distress was severe.

Source

Stewart v. Walker, 5 So.3d 746 (Fla. 4th DCA 2009).

See Also

1. *American Nat. Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co*., 810 So.2d 996, 999 (Fla. 4th DCA 2002).
2. *Paul v. Humana Medical Plan, Inc.*, 682 So.2d 1119, 1121 (Fla. 4th DCA 1996), *rev. denied,* 695 So.2d 700 (Fla. 1997).
3. *Scheller v. American Medical International, Inc.*, 502 So.2d 1268, 1270 (Fla. 4th DCA 1987), *rev. denied*, 513 So.2d 1060 (Fla. 1987) (See subsequent history at 583 So.2d 1047 (Fla. 4th DCA 1991), *appeal after remand*, 590 So.2d 947 (Fla. 4th DCA 1991), *rev. dismissed*, 602 So.2d 533 (Fla. 1992)).
4. *Anderson v. Rossman & Baumberger, P.A.*, 440 So.2d 591 (Fla. 4th DCA 1983), *petition for rev. denied*, 450 So.2d 485 (Fla. 1984).
5. *Brown v. Brown*, 800 So.2d 359, 362 (Fla. 4th DCA 2001).

§10:10.1.5 Elements of Cause of Action — 5th DCA

The elements of a cause of action for the intentional infliction of emotional distress are:

1. the wrongdoer's conduct was intentional or reckless, *i.e.*, he intended his behavior when he knew or should have known that emotional distress would likely result;
2. the conduct was outrageous, *i.e.*, beyond all bounds of decency, atrocious and utterly intolerable in a civilized community;
3. the conduct caused emotional distress; and
4. the emotional distress was severe.

Source

State Farm Mutual Automobile Insurance Co. v. Novotny, 657 So.2d 1210, 1212 (Fla. 5th DCA 1995).

See Also

1. *Kendron v. SCI Funeral Services of Florida, LLC*, 230 So.3d 636, 637 (Fla. 5th DCA 2017).
2. *Horizons Rehabilitation, Inc. v. Health Care And Retirement Corp*., 810 So.2d 958, 964 (Fla. 5th DCA 2002), *rev. denied*, 832 So.2d 104 (Fla. 2002).
3. *Food Lion, Inc. v. Clifford*, 629 So.2d 201, 202 (Fla. 5th DCA 1993), *rev. denied*, 632 So.2d 1025 (Fla. 1994).
4. *Williams v. City of Minneola*, 619 So.2d 983, 986 (Fla. 5th DCA 1993).
5. *McAlpin v. Sokolay*, 596 So.2d 1266, 1269 (Fla. 5th DCA 1992).

10:10.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(o), (p); *Ross v. Twenty-Four Collection Inc*., 617 So.2d 428, 428 (Fla. 3d DCA 1993).

§10:10.3 References

1. 17 Fla. Jur. 2d *Damages* §§95-100 (2004).
2. 22 Am. Jur. 2d *Damages* §§211-216 (2003).
3. 25 C.J.S. *Damages* §§94-104 (2002).
4. Restatement (Second) of Torts §§46, 47 (1965).
5. Florida Standard Jury Instruction MI 10.

§10:10.4 Defenses

1. **Assertion of Legal Rights:** A privilege exists as a matter of law to engage in reckless or even outrageous conduct if there is sufficient evidence that shows the defendant did no more than assert legal rights in a legally permissible way. *Canto v. J.B. Ivey and Company*, 595 So.2d 1025, 1028 (Fla. 1st DCA 1992). *See Also Metropolitan Life Insurance Co. v. McCarson,* 467 So.2d 277, 279 (Fla. 1985).

2. **Defamation Privilege:** The successful invocation of a defamation privilege will preclude a cause of action for intentional infliction of emotional distress if the sole basis for the latter cause of action is the defamatory publication. *Fridovich v. Fridovich*, 598 So.2d 65, 70 (Fla. 1992).

3. **High Standard:** The standard for outrageous conduct is particularly high in Florida. It is not enough that the intent is tortious or criminal; it is not enough that the defendant intended to inflict emotional distress; and it is not enough if the conduct was characterized by malice or aggravation which would entitle the plaintiff to punitive damages for another tort. *Clemente v. Horne*, 707 So.2d 865, 867 (Fla. 3d DCA 1998).

§10:10.5 Related Matters

1. **Gross Negligence:** Gross negligence does not meet the standard for an award of punitive damages, … and, thus, certainly cannot meet the standard to establish the tort of outrageous and reckless conduct. *Williams v. City of Minneola*, 619 So.2d 983, 986 (Fla. 5th DCA 1993).

2. **Health Insurer's Bad Faith:** The standard for an insured's recovery of damages for emotional distress for a first-party health insurer's bad faith failure to settle requires proof: (1) that the bad-faith conduct resulted in the insured's failure to receive necessary or timely health care; (2) that, based upon a reasonable medical probability, the failure caused or aggravated the insured's medical or psychiatric condition; and (3) that the insured suffered mental distress related to the condition or the aggravation of the condition. In order for the insured to recover, these allegations will have to be substantiated by testimony of a qualified health care provider. *Time Insurance Company, Inc. v. Burger*, 712 So.2d 389, 393 (Fla. 1998).

3. **Question for the Trial Court:** What constitutes outrageous conduct is a question for the trial court to determine as a matter of law. *See Johnson v. Thigpen*, 788 So.2d 410, 413 (Fla. 1st DCA 2001); *De La Campa v. Grifols America, Inc*., 819 So.2d 940, 943 (Fla. 3d DCA 2002).

§10:20 INTERFERENCE WITH CHILD CUSTODY

§10:20.1 Elements of Cause of Action — Florida Supreme Court

The most recent version, Restatement of Torts (Second) §700 (1977), provides the common law cause of action with its contemporary definition:

One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.

In its twentieth-century form, the action may be brought by either parent, and loss of services is no longer always a predicate to recovery. *See, e.g., Pickle*, 169 N.E. at 479-82; Keeton, *supra*, §124. This more modern view recognizes that the tort serves to protect the parent-child relationship. *See* Keeton, *supra*, §124, at 924-25.

The elements of the cause of action include that the plaintiff had superior custody rights to the child and that the defendant intentionally interfered with those rights. *See* Restatement (Second) of Torts, §700 cmt. c. The Supreme Court of West Virginia recently elaborated on the elements by holding that a prima facie case for tortious interference requires a showing that:

(1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.

Kessel v. Leavitt, 511 S.E.2d 720, 765-66 (W. Va. 1998), *cert. denied*, 119 S.Ct. 1035 (1999). Similarly, the Alabama Supreme Court has held that:

To state a claim of intentional or malicious custodial interference, a plaintiff need only plead facts tending to show:

> "(1) [S]ome active or affirmative effort by [the] defendant to detract the child from the parent's custody or service, (2) [that] the enticing or harboring [was] willful, [and] (3) [that the enticing or harboring was done] with notice or knowledge that the child had a parent whose rights were thereby invaded."

Anonymous v. Anonymous, 672 So.2d 787, 790 (Ala. 1995) (quoting 67A C.J.S. Parent & Child §131 (1978)).

Source

Stone v. Wall, 734 So.2d 1038 (Fla. 1999) (See subsequent history at 188 F.3d 1293 (11th Cir. 1999)).

See Also

1. *Stone v. Wall*, 135 F.3d 1438 (11th Cir. 1998).
2. Restatement (Second) of Torts §700 (1977) ("One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.").

§10:20.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§10:20.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§10:20.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§10:20.1.4 Elements of Cause of Action — 4th DCA

In *Stone v. Wall,* 734 So.2d 1038, 1047 (Fla. 1999), the Florida Supreme Court first recognized the cause of action of tortious interference with a custodial parent-child relationship by a non-parent. The court cited Restatement of Torts (Second) §700 (1977) for the modern definition of this cause of action:

One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.

A key element of the cause of action is that "the *plaintiff had superior custody rights* to the child and that the defendant intentionally interfered with those rights."

Source

Stewart v. Walker, 5 So.3d 746, 748 (Fla. 4th DCA 2009).

See Also

1. *Davis v. Hilton*, 780 So.2d 974, 975 (Fla. 4th DCA 2001), *rev. denied*, 796 So.2d 536 (Fla. 2001).
2. *Brown v. Brown*, 800 So.2d 359, 361 (Fla. 4th DCA 2001).

§10:20.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§10:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(o).

§10:20.3 References

1. 25 Fla. Jur. 2d *Family Law* §94 (2002).
2. 59 Am. Jur. 2d *Parent and Child* §§26-40, 123 (2002).
3. 67A C.J.S. *Parent & Child* §§321-326 (2002).
4. 1 C.J.S. *Abduction* §2 (1985).
5. Restatement (Second) of Torts §700 (1977).
6. Restatement of Torts §700 (1938).
7. Fla. Stat. §787.03 (2005) (criminal statutory prohibition against interference with custody).
8. Fla. Stat. §787.04 (2005).
9. Fla. Stat. §827.04 (2005) (abuse of children).
10. Evan R. Marks, *Fighting Back–The Attorney's Role in a Parental Kidnapping Case*, 64 Fla. Bar J., June 1990, at 23.
11. Steven G. Shutter, *Parental Kidnapping Prevention Act—Panacea or Toothless Tiger*, 55 Fla. Bar J. 479 (1981).
12. William B. Johnson, Annotation, *Liability of Legal or Natural Parent, or One Who Aids and Abets, for Damages Resulting from Abduction of Own Child*, 49 A.L.R.4th 7 (1986).

13. William B. Johnson, Annotation, *Kidnapping or Related Offense by Taking or Removing of Child by or Under Authority of Parent or One in Loco Parentis*, 20 A.L.R.4th 823 (1983).
14. Joy M. Feinberg & Lori Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. Am. Acad. Matrimonial L. 271 (1994).
15. Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 Wm. Mitchell L. Rev. 1 (1993).
16. Greg Geisman, Comment, *Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities*, 38 S.D. L. Rev. 568 (1992-93).
17. Susan J. G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 Cooley L. Rev. 273 (1991).
18. Joseph R. Hillebrand, Note, *Parental Kidnapping and the Tort of Custodial Interference: Not in a Child's Best Interests*, 25 Ind. L. Rev. 893 (1991).
19. Mark L. Johnson, Note, *Compensating Parents for the Loss of Their Nonfatally Injured Child's Society: Extending the Notion of Consortium to the Filial Relationship*, U. Ill. L. Rev. 761 (1989).
20. Esther L. Blynn, Comment, *In Re: International Child Abduction v. Best Interests of the Child: Comity Should Control*, 18 U. Miami Inter-Am. L. Rev. 353, Winter 1986-87.
21. Sue T. Bentch, Comment, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 St. Mary's L.J. 361 (1986).
22. Richard A. Campbell, Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, U. Ill. L. Rev. 229 (1983).

§10:20.4 Defenses

1. **Defenses:** We readily agree with appellants' argument that the *Stone* court, in adopting the cause of action for intentional interference with a custodial parent-child relationship, also adopted the well-recognized, affirmative defenses discussed in the opinion. To reach this conclusion, we need look no further than the language of the opinion itself. Immediately after describing the elements of the cause of action, the court approvingly wrote: It is a defense to the cause of action that the plaintiff did not have superior custodial rights, that the defendant took the child to prevent physical harm to the child, or that the defendant "possessed a reasonable, good faith belief that the interference was proper." *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, 766 (1998), *cert. denied*, 525 U.S. 1142, 119 S.Ct. 1035, 143 L.Ed.2d 43 (1999). *Stone,* 734 So.2d at 1042. *See Also Brown v. Brown*, 800 So.2d 359, 362 (Fla. 4th DCA 2001); *Stone vs. Wall*, 734 So.2d 1038 (Fla. 1999).

2. **Privilege to Rescue from Physical Violence:** One is not liable for rescuing a child from physical violence inflicted by its parent in excess of his parental privilege. Restatement (Second) of Torts §700 cmt. e (1977).

§10:20.5 Related Matters

1. **Background:** A cause of action for interference with a custodial parent-child relationship has its roots in English common law, descended from a writ giving the father an action for the abduction of his heir. *Stone vs. Wall*, 734 So.2d 1038 (Fla. 1999).

2. **Negligent Interference:** Although we previously determined in *Stone* that a common law cause of action for intentional interference with the custodial parent-child relationship should be recognized in Florida, *see* 734 So.2d at 1039, 1047, we have never been presented with the issue of whether there is a cause of action for negligent interference with parental rights. *Southern Baptist Hosp. of Florida, Inc. v. Welker*, 908 So.2d 317 (Fla. 2005).

§10:30 THEFT, CIVIL

§10:30.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§10:30.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

See Also

1. *Gothard v. Gothard*, 954 So.2d 736 (Fla. 1st DCA 2007) ("Section 772.11, Florida Statutes, requires that a person, '[b]efore filing an action under this section' seeking treble damages for civil theft 'must make a written demand for payment,' and provides that if the person to whom the written demand is made complies within thirty days after receiving the demand, 'that person shall be given a written release from further civil liability' by the person making the demand. Contrary to the finding of a federal judge in *In re Naturally Beautiful Nails*, 262 B.R. 131 (M.D. Fla. 2001), we find nothing in the statute which bars the filing of a suit for civil theft before the aforementioned thirty-day time period has expired.").
2. *Westinghouse Electric Corp. v. Shuler Bros., Inc.*, 590 So.2d 986, 988 (Fla. 1st DCA 1991) (stating that, in order to obtain treble damages, the plaintiff "had the burden of proving 'by clear and convincing evidence that [it had] been injured in any fashion by reason of any violation of the provisions of ss. 812.012-812.037,' which statutes prohibit theft and dealing in stolen property").

§10:30.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition]

See Also

1. *Winters v. Mulholland*, 33 So.3d 54, 57 (Fla. 2nd DCA 2010) ("[I]t is not enough for a plaintiff prosecuting a cause of action for civil theft to show only that a theft of his or her property occurred. Instead, section 772.11 also requires the plaintiff to prove by clear and convincing evidence that he or she was injured 'by reason of any violation' of the listed theft statutes.").

§10:30.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition]

§10:30.1.4 Elements of Cause of Action — 4th DCA

"In order to establish an action for civil theft, the claimant must prove the statutory elements of theft, as well as criminal intent."

Source

Gersh v. Cofman, 769 So.2d 407, 409 (Fla. 4th DCA 2000), *review denied*, 791 So.2d 1097 (Fla. 2001).

§10:30.1.5 Elements of Cause of Action — 5th DCA

"In order to establish an action for civil theft, the claimant must prove the statutory elements of theft, as well as criminal intent."

Source

Fla. Desk v. Mitchell Int'l, 817 So.2d 1059, 1060 (Fla. 5th DCA 2002) (*citing Gersh v. Cofman*, 769 So.2d 407 (Fla. 4th DCA 2000), *review denied*, 791 So.2d 1097 (Fla. 2001)).

§10:30.2 Florida Statutes

Florida Statutes §772.11 Civil remedy for theft or exploitation.

Any person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of ss. 812.012 - 812.037 or s. 825.103(1) has a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200, and reasonable attorney's fees and court costs in the trial and appellate courts. Before filing an action for damages under this section, the person claiming injury must make a written demand for $200 or the treble damage amount of the person liable for damages under this section. If the person to whom a written demand is made complies with such demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability for the specific act of theft or exploitation by the person making the written demand. Any person who has a cause of action under this section may recover the damages allowed under this section from the parents or legal guardian of any unemancipated minor who lives with his or her parents or legal guardian and who is liable for damages under this section. Punitive damages may not be awarded under this section. The defendant is entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without substantial fact or legal support. In awarding attorney's fees and costs under this section, the court may not consider the ability of the opposing party to pay such fees and costs. This section does not limit any right to recover attorney's fees or costs provided under any other law. Fla Stat. § 772.11 (2014) (Current through the 2018 Second Regular Session of the 25th Legislature).

See Also

1. *City of Cars, Inc. v. Simms*, 526 So.2d 119 (Fla. 5th DCA 1988), *rev. denied*, 534 So.2d 401 (Fla. 1988).
2. *Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So.2d 1157 (Fla. 3rd DCA 1984).

§10:30.3 Statute of Limitations

Five Years. Fla. Stat. §772.17.

§10:30.4 References

1. Florida Standard Jury Instruction (Civ.) MI 11.

§10:30.5 Defenses

1. **Claim Not Based on the Same Conduct That Gave Rise to the Prior Prosecution:** "[W]e hold that a defendant who is adjudicated guilty pursuant to a plea of nolo contendere is collaterally estopped from seeking affirmative relief or defending a civil theft claim that is based on the same conduct that gave rise to the prior prosecution. However, the defendant is estopped only as to matters that necessarily were decided in favor of the State in the prior proceeding. What matters were actually decided in the prior proceeding is a question of fact that must be determined on a case-by-case basis." *Starr Tyme v. Cohen*, 659 So.2d 1064, 1068 (Fla. 1995).

2. **Failure to Allege Criminal Intent:** A plaintiff's failure to allege criminal intent is fatal to the plaintiff's cause of action for civil theft. *Moynet v. Courtois*, 8 So.3d 377, 380 (Fla. 3d DCA 2009).

§10:30.6 Related Matters

1. **Clear and Convincing Evidence Required:** All the elements of civil theft must be proven by clear and convincing evidence, which is an intermediate standard, between the preponderance of the evidence standard and the criminal beyond a reasonable doubt standard. *Anthony Distributors, Inc. v. Miller Brewing Co*., 941 F.Supp. 1567, 1575 (M.D. Fla. 1996).

2. **Proof:** In order to prove civil theft, it is necessary to show not only that the defendant obtained or endeavored to obtain the plaintiff's property, but that he did so with the felonious intent to commit a theft. *Ames v. Provident Life and Accident Insurance Co*, 942 F.Supp. 551, 560 (S.D. Fla. 1994), *affirmed*, 86 F.3d 1168 (11th Cir. 1996).

3. **Property Under Contract:** In order to establish an action for civil theft, the claimants must prove the statutory elements of theft, as well as criminal intent. Where the property at issue is also the subject of a contract between the parties, a civil theft claim requires additional proof of an intricate sophisticated scheme of deceit and theft. *Gersh v. Cofman*, 769 So.2d 407, 409 (Fla. 4th DCA 2000). The mere existence of a contractual relationship between the parties does not preclude an action for civil theft. *Seymour v. Adams*, 638 So.2d 1044, 1049 (Fla. 5th DCA 1994). Florida law does not bar a civil theft claim simply because a contractual relationship is involved. However, where a contractual relationship exits, the alleged loss which results from the theft, must be separate and distinct from any loss alleged to have resulted from the breach of contract. *Colonial Penn Insurance Co. v. Value Rent-A-Car, Inc*., 814 F.Supp. 1084, 1098 (S.D. Fla. 1992). *See Also Escudero v. Hasbun*, 689 So.2d 1144 (Fla. 3d DCA 1997).

4. **Violation of Provisions of Criminal Theft Laws:** Under Florida law, a cause of action for civil theft derives from two statutory Sources: the criminal section setting forth the elements of theft, and the civil section granting private parties a cause of action for violation of the criminal section. *Palmer v. Gotta Have It Golf Collectibles, Inc*., 106 F.Supp.2d 1289, 1303 (S.D. Fla. 2000). To maintain a cause of action under the civil theft statute one must have been injured by the defendant's violation of one or more of the provisions of the criminal theft laws found in §§812.012-037, Florida Statutes (1989). *See* §772.11, Florida Statutes (1989). This injury can only be established if it is shown that the victim has a legally recognized property interest in the items stolen. *Sussex Mutual Insurance Co. v. Gabor*, 568 So.2d 1004 (Fla. 3rd DCA 1990); *Balcor Property Management, Inc. v. Ahronovitz*, 634 So.2d 277, 279 (Fla. 4th DCA 1994); *Anthony Distributors, Inc. v. Miller Brewing Co*., 941 F.Supp. 1567, 1575 (M.D. Fla. 1996).

§10:40 INTERFERENCE WITH TESTAMENTARY EXPECTATION

§10:40.1 Elements of Cause of Action — Florida Supreme Court

To state a cause of action for intentional interference with testamentary expectation, the complaint must allege:
1. Plaintiff had an expectancy to be a beneficiary of and receive property from a testator's estate;
2. Defendant intentionally interfered with the expectancy through tortious conduct, including duress, fraud or undue influence;
3. Defendant's actions caused Plaintiff to suffer damage; and
4. Plaintiff suffered damage.

Source

DeWitt v. Duce, 408 So.2d 216, 218 n.3 (Fla. 1981).

§10:40.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§10:40.1.2 Elements of Cause of Action — 2nd DCA

The tort of intentional interference with an expectancy includes the following elements:
1. the existence of an expectancy;
2. intentional interference with the expectancy through tortious conduct;
3. causation; and
4. damages.

Source

Henry v. Jones, 202 So.3d 129, 132-33 (Fla. 2d DCA 2016); *Claveloux v. Bacotti*, 778 So.2d 399, 400 (Fla. 2d DCA 2001).

See Also

1. *Whalen v. Prosser*, 719 So.2d 2, 5 (Fla. 2d DCA 1998).

§10:40.1.3 Elements of Cause of Action — 3rd DCA

To state a cause of action for intentional interference with an expectancy of inheritance, the complaint must allege the following elements:

1. the existence of an expectancy;
2. intentional interference with the expectancy through tortious conduct;
3. causation; and
4. damages.

Source

Saewitz v. Saewitz, 79 So. 3d 831, 833 (Fla. Dist. Ct. App. 3d Dist. 2012); *Schilling v. Herrera*, 952 So.2d 1231, 1234 (Fla. 3rd DCA 2007).

See Also

1. *In re Estate of Hatten*, 880 So.2d 1271, 1273 (Fla. 3rd DCA 2004) ("The cause of action is available where the defendant has maliciously destroyed a will, and the plaintiff is unable to reestablish the destroyed will in a probate proceeding.").

§10:40.1.4 Elements of Cause of Action — 4th DCA

[No citation for this edition]

§10:40.1.5 Elements of Cause of Action — 5th DCA

A claim for tortious interference of a testamentary expectancy includes: (1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages.

Source

Mulvey v. Stephens, 250 So.3d 106, 109 (Fla. 4th DCA 2018).

§10:40.2 Statute of Limitations

Four years. Fla. Stat. § 95.11(3)(o).

§10:40.3 References

1. Nita Ledford, *Intentional Interference with Inheritance*, 30 Real Prop. Prob. & Tr. J. 3235 (1995).
2. Restatement (Second) of Torts, Section 774B (1977).
3. Marilyn Marmai, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 Conn. Prob. L.J. 295 (1991).
4. Liability in damages for interference with expected inheritance or gift, 22 A.L.R.4th 1229 (1983).
5. 2 Causes of Action 2d 1, Cause of Action for Interference With Expected Gift or Inheritance (2008).
6. 36 Causes of Action 2d 1, Cause of Action for Interference with Expected Gift or Inheritance (2008).

§10:40.4 Defenses

1. **Failure to Exhaust Probate Remedies:** The rule is that if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued. *DeWitt v. Duce*, 408 So.2d 216, 218 (Fla. 1981). In sum, we find that appellants had an adequate remedy in probate with a fair opportunity to pursue it. Because they lacked assiduity in failing to avail themselves of this remedy, we interpret section 733.103(2) as barring appellants from a subsequent action in tort for wrongful interference with a testamentary expectancy … *Id.* at 221.

2. **Compliance with Testator's Instructions:** We hold as a matter of law that an attorney who merely drafts the will of one who changes his or her mind and excludes from a later will a beneficiary who had been included in an earlier one cannot be found to have intentionally interfered with the inheritance of such beneficiary. Drafting a will in accordance with the instruction of the testator or testatrix is simply not tortious conduct. *Chase v. Bowen*, 771 So.2d 1181, 1182-83 (Fla. 5th DCA 2000).

3. **Living Testator:** We decline to permit this pre-death action by a non-family member for reasons both practical and theoretical. As a matter of legal theory, one typically has no protectable interest in a mere expectancy. A competent testator is free to change his or her estate plan as often as he or she wishes. There is no guarantee that the testator's estate will contain any assets at the time of a future death. Thus, prior to death, the hope of an inheritance is not sufficiently concrete to create a property right. The disappointed beneficiary only obtains "vested" rights when the testator dies. *Whalen v. Prosser*, 719 So.2d 2, 3 (Fla. 2d DCA 1998).

4. **Estoppel:** We are of the opinion that the appellee has had the opportunity, and did in fact, litigate the same issues against the same parties in the prior revocation proceedings and did not prevail. Thus, as to appellee's claim for malicious interference, we hold that such claim is barred under the theory of collateral estoppel or estoppel by judgment. *Kramer v. Freedman*, 272 So.2d 195, 199 (Fla. 3rd DCA 1973).

§10:40.5 Related Matters

1. **Inter Vivos Gifts:** We find that the allegations sufficiently make a claim for the tort of wrongful interference with an expected gift. *Watts v. Haun*, 393 So.2d 54, 56 (Fla. 2d DCA 1981).

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CHAPTER 11

PROCEDURAL TORTS

§11:10 ABUSE OF PROCESS

§11:10.1 Elements of Cause of Action — Florida Supreme Court
- §11:10.1.1 Elements of Cause of Action — 1st DCA
- §11:10.1.2 Elements of Cause of Action — 2nd DCA
- §11:10.1.3 Elements of Cause of Action — 3rd DCA
- §11:10.1.4 Elements of Cause of Action — 4th DCA
- §11:10.1.5 Elements of Cause of Action — 5th DCA

§11:10.2 Statute of Limitations
§11:10.3 References
§11:10.4 Defenses
§11:10.5 Related Matters

§11:20 MALICIOUS PROSECUTION

§11:20.1 Elements of Cause of Action — Florida Supreme Court
- §11:20.1.1 Elements of Cause of Action — 1st DCA
- §11:20.1.2 Elements of Cause of Action — 2nd DCA
- §11:20.1.3 Elements of Cause of Action — 3rd DCA
- §11:20.1.4 Elements of Cause of Action — 4th DCA
- §11:20.1.5 Elements of Cause of Action — 5th DCA

§11:20.2 Statute of Limitations
§11:20.3 References
§11:20.4 Defenses
§11:20.5 Related Matters

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§11:10 ABUSE OF PROCESS

§11:10.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§11:10.1.1 Elements of Cause of Action — 1st DCA

Abuse of process consists rather of a willful and intentional misuse of process for some wrongful and unlawful object or collateral purpose.

Source

Gause v. First Bank of Marianna, 457 So.2d 582, 584 (Fla. 1st DCA 1984).

See Also

1. *Bradley v. Peaden*, 347 So.2d 455, 456 (Fla. 1st DCA 1977).
2. *Strickland v. Commerce Loan Company of Jacksonville*, 158 So.2d 814 (Fla. 1st DCA 1963) (discussing an action for wrongful garnishment).

§11:10.1.2 Elements of Cause of Action — 2nd DCA

A cause of action for abuse of process requires a showing of a willful and intentional misuse of process for some wrongful and unlawful object, or collateral purpose. … The abuse consists not in the issuance of process, but rather in the perversion of the process after its issuance. The writ or process must be used in a manner, or for a purpose for which it is not by law intended.

Source

Peckins v. Kaye, 443 So.2d 1025, 1026 (Fla. 2d DCA 1983).

§11:10.1.3 Elements of Cause of Action — 3rd DCA

A cause of action for abuse of process requires:

1. an illegal, improper, or perverted use of process by the defendant;
2. an ulterior motive or purpose in exercising the illegal, improper, or perverted process; and
3. damage to the plaintiff as a result of the defendant's action.

Source

Wolfe v. Foreman, 128 So.3d 67, 69 (Fla. 3d DCA 2013).

See Also

1. *Blue v. Weinstein*, 381 So.2d 308, 310 (Fla. 3d DCA 1980) ("In an action for abuse of process, it is not essential to show a termination of the proceeding in favor of the person against whom the process was issued and used, or to show want of probable cause or malice.").
2. *Thomson McKinnon Securities, Inc. v. Light*, 534 So.2d 757 (Fla. 3d DCA 1988).
3. *Bothmann v. Harrington*, 458 So.2d 1163, 1169 (Fla. 3d DCA 1984) ("Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed.").
4. *Baya v. Revitz*, 345 So.2d 340 (Fla. 3d DCA 1977), *rev'd on other grounds*, 363 So.2d 44 (Fla. 3d DCA 1978). With regard to the common law elements of abuse of process, this case makes reference to the following two cases: (1) *Cline v. Flagler Sales Corp.,* 207 So.2d 709, 711 (Fla. 3d DCA 1968), and (2) *Concord Shopping Center, Inc. v. Litowitz,* 183 So.2d 562 (Fla. 3d DCA 1966).
5. *Cline v. Flagler Sales Corp.,* 207 So.2d 709, 711 (Fla. 3d DCA 1968).

§11:10.1.4 Elements of Cause of Action — 4th DCA

A cause of action for abuse of process contains three elements: (1) that the defendant made an illegal, improper, or perverted use of process; (2) that the defendant had ulterior motives or purposes in exercising such illegal, improper, or perverted use of process; and (3) that, as a result of such action on the part of the defendant, the plaintiff suffered damage.

Source

S & I Inv. v. Payless Flea Mkt., Inc., 36 So.3d 909 (Fla. 4th DCA 2010).

See Also

1. *P.T.S. Trading Corp. v. Habie*, 673 So.2d 498, 500 (Fla. 4th DCA 1996), *rev. dismissed*, 678 So.2d 339 (Fla. 1996), *mandamus denied*, 686 So.2d 580 (Fla. 1996) ("Abuse of process is the use of process in an illegal, improper or perverted manner, with an ulterior purpose.").
2. *McMurray v. U-Haul Company, Inc.*, 425 So.2d 1208 (Fla. 4th DCA 1983) ("In order to sustain an action for abuse of process two elements are essential, (1) the existence of an ulterior motive, and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.").
3. *Della-Donna v. Nova University, Inc.* 512 So.2d 1051 (Fla. 4th DCA 1987).

§11:10.1.5 Elements of Cause of Action — 5th DCA

A cause of action for abuse of process requires proof that:

1. the defendant made an illegal, improper, or perverted use of process;
2. the defendant had an ulterior motive or purpose in exercising the illegal, improper or perverted process;
3. the plaintiff was injured as a result of defendant's action.

Source

Hardick v. Homol, 795 So.2d 1107, 1111 (Fla. 5th DCA 2001).

See Also

1. *Verdon v. Song*, 251 So. 3d 256, 258 (Fla. 5th DCA 2018).
2. *Cazares v. Church of Scientology of California, Inc.*, 444 So.2d 442, 444 (Fla. 5th DCA 1984) ("[A]buse of process requires an act constituting the misuse of process after it issues. The maliciousness or lack of foundation of the asserted cause of action itself is actually irrelevant to the tort of abuse of process.").

§11:10.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(o); *Blue v. Weinstein*, 381 So.2d 308, 311 (Fla. 3rd DCA 1980).

§11:10.3 References

1. 41A Fla. Jur. 2d *Process* §6 (2004).
2. 1 Am. Jur. 2d *Abuse of Process* §§5–10, 22–25 (2005).
3. 72 C.J.S. *Process* §§106, 107 (1987).
4. Fla. Stat. ch. 48 (2005) (Process and Service of Process).
5. 14 A.L.R.2d 322 (1950).
6. Restatement (Second) of Torts §682 (1977).
7. See dissent in *Baya v. Revitz*, 345 So.2d 340 (Fla. 3d DCA 1977), *rev'd on other grounds*, 363 So.2d 44 (Fla. 3d DCA 1978).

§11:10.4 Defenses

1. **Absolute Immunity:** Absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior so long as the act has some relation to the proceeding. Prior to *Levin, Middlebrooks, Mabie,*

Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So.2d 606 (Fla. 1994), the supreme court had already decided that statements amounting to perjury, libel, slander, and defamation were not actionable. *American National Title & Escrow of Florida, Inc. v. Guarantee Title & Trust Co.*, 748 So.2d 1054, 1055 (Fla. 4th DCA 2000), *rev. denied*, 767 So.2d 453 (Fla. 2000).

2. **Act after Process Issues:** Abuse of process requires an act constituting the misuse of process after it issues. The maliciousness or lack of foundation of the asserted cause of action itself is actually irrelevant. *Cazares v. Church of Scientology of California, Inc.*, 444 So.2d 442, 444 (Fla. 5th DCA 1984). *See Also Marty v. Gresh*, 501 So.2d 87, 90 (Fla. 1st DCA 1987); *Della-Donna v. Nova University, Inc.*, 512 So.2d 1051, 1056 (Fla. 4th DCA 1987); *Verdon v. Song*, 251 So.3d 256, 258 (Fla. 5th DCA 2018).

3. **Intended Purpose:** For the cause of action to exist there must be a use of the process for an *immediate purpose* other than that for which it was designed. There is no abuse of process, however, when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose. In other words, the usual case of abuse of process involves some form of extortion. *Bothmann v. Harrington*, 458 So.2d 1163, 1169 (Fla. 3d DCA 1984); *Thomson McKinnon Secs., Inc. v. Light*, 534 So. 2d 757, 760 (Fla. 3d DCA 1988).

§11:10.5 Related Matters

1. **Counterclaim:** The filing of a counterclaim may constitute issuance of process for the purpose of an abuse of process action. *Peckins v. Kaye*, 443 So.2d 1025, 1026 (Fla. 2d DCA 1983). An abuse of process claim may henceforth be brought as a counterclaim when directed against process served in the pending main action because, in accord with *Cline*, abuse of process does not require as one of its essential elements a termination of the action in favor of the person against which process was issued. *Blue v. Weinstein*, 381 So.2d 308, 310 (Fla. 3d DCA 1980).

2. **Maintenance and Champerty:** The causes of action for maintenance and champerty have been supplanted by causes of action for malicious prosecution and abuse of process, frivolous litigation statutes, and rules of professional conduct for attorneys. "It has been specifically held that the doctrine of champerty remains viable only as a defense in contract actions, [and] that damages resulting from a champertous agreement can be recovered only by means of an action under one of the aforementioned theories of recovery." 14 Am.Jur. *Champerty, Maintenance, and Barratry* §4 (2000) (citing *McCullar v. Credit Bureau Systems, Inc.,* 832 S.W.2d 886 (Ky. 1992)). We concur with this reasoning and adopt it as our own. *Hardick v. Homol*, 795 So.2d 1107, 1111 (Fla. 5th DCA 2001).

§11:20 MALICIOUS PROSECUTION

§11:20.1 Elements of Cause of Action — Florida Supreme Court

In order to prevail in a malicious prosecution action, a plaintiff must establish that:
1. an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued;
2. the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding;
3. the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff;
4. there was an absence of probable cause for the original proceeding;
5. there was malice on the part of the present defendant; and
6. the plaintiff suffered damage as a result of the original proceeding.

Source

Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352, 1355 (Fla. 1994); *Debrincat v. Fischer*, 217 So.3d 68, 70 (Fla. 2017).

See Also

1. *Burns v. GCC Beverages, Inc.,* 502 So.2d 1217, 1218 (Fla. 1986).
2. *Buchanan v. Miami Herald Publishing Co.,* 230 So.2d 9, 11 (Fla. 1969).
3. *Duval Jewelry Co. v. Smith*, 136 So. 878, 880 (Fla. 1931).

§11:20.1.1 Elements of Cause of Action — 1st DCA

To prevail in an action for malicious prosecution, a plaintiff must show:

1. that an original criminal or civil judicial proceeding was commenced or continued;
2. that the defendant was the legal cause of the judicial proceeding;
3. that the judicial proceeding was terminated in the plaintiff's favor;
4. that probable cause for the proceeding was absent;
5. that malice was present; and
6. that the plaintiff suffered resulting damage.

Source

McCraney v. Barberi, 677 So.2d 355, 356 (Fla. 1st DCA 1996).

See Also

1. *Lewis v. Morgan*, 79 So. 3d 926, 929 (Fla. 1st DCA 2012).
2. *Jones v. State Farm Mutual Automobile Insurance Co.*, 578 So.2d 783, 785 (Fla. 1st DCA 1991).
3. *Cox v. Klein*, 546 So.2d 120, 122 (Fla. 1st DCA 1989).
4. *Harris v. Boone*, 519 So.2d 1065 (Fla. 1st DCA 1988).

§11:20.1.2 Elements of Cause of Action — 2nd DCA

In order to prevail in a malicious prosecution action, the plaintiff must establish each of six elements:

1. an original judicial proceeding against the present plaintiff was commenced or continued;
2. the present defendant was the legal cause of the original proceeding;
3. the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff;
4. there was an absence of probable cause for the original proceeding;
5. there was malice on the part of the present defendant; and
6. the plaintiff suffered damages as a result of the original proceeding.

Source

Sharaka v. E & A, Inc., 135 So.3d 428, 431 (Fla. 2d DCA 2014).

See Also

1. *MacAlister v. Bevis Const., Inc.*, 164 So.3d 773, 776 (Fla. 2d DCA 2015).
2. *Durkin v. Davis*, 814 So.2d 1246, 1248 (Fla. 2d DCA 2002).
3. *Cuccia v. Westberry*, 506 So.2d 1059, 1061 (Fla. 2d DCA 1987).
4. *Maybin v. Thompson*, 606 So.2d 1240, 1241 (Fla. 2d DCA 1992).
5. *Lindeman v. C.J. Stoll, Inc.*, 490 So.2d 101, 102 (Fla. 2d DCA 1986), *rev. denied*, 500 So.2d 543 (Fla. 1986).
6. *Central Florida Machinery Co., Inc. v. Williams*, 424 So.2d 201, 202 (Fla. 2d DCA 1983), *rev. denied*, 434 So.2d 886 (Fla. 1983).

§11:20.1.3 Elements of Cause of Action — 3rd DCA

The elements of a malicious prosecution claim are:

1. an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued;
2. the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding;
3. the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff;

4. there was an absence of probable cause for the original proceeding;
5. there was malice on the part of the present defendant; and
6. the plaintiff suffered damage as a result of the original proceeding.

Source

Miami-Dade County v. Asad, 78 So.3d 660 (Fla. 3d DCA 2012).

See Also

1. *Scozari v. Barone*, 546 So.2d 750, 751 (Fla. 3d DCA 1989).
2. *Union Oil of California, Amsco Division v. Watson*, 468 So.2d 349, 353 (Fla. 3d DCA 1985), *rev. denied,* 479 So.2d 119 (Fla. 1985).
3. *Wagner v. Nottingham Associates*, 464 So.2d 166 (Fla. 3d DCA 1985), *rev. denied*, 475 So.2d 696 (Fla. 1985).
4. *Guthrie v. Florida Power and Light Co.*, 460 So.2d 1032, 1033 (Fla. 3d DCA 1985).
5. *Valdes v. GAB Robins North America, Inc.*, 924 So.2d 862, 866 n.1 (Fla. 3d DCA 2006).
6. *Wolfe v. Foreman*, 128 So.3d 67, 70 (Fla. 3d DCA 2013).
7. *Alvarez-Mena v. Miami-Dade Cty.*, 305 So. 3d 63, 67 (Fla. 3d DCA 2019).

§11:20.1.4 Elements of Cause of Action — 4th DCA

The elements of a malicious prosecution claim are:

1. an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued;
2. the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding;
3. the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff;
4. there was an absence of probable cause for the original proceeding;
5. there was malice on the part of the present defendant; and
6. the plaintiff suffered damage as a result of the original proceeding.

Source

Rivernider v. Meyer, 174 So.3d 602, 604 155 (Fla. 4th DCA 2015); *Hickman v. Barclay's Intern. Realty, Inc.*, 16 So.3d 154, 155 (Fla. 4th DCA 2009).

See Also

1. *Jallali v. Christiana Tr.*, 297 So.3d 580, 584-85 (Fla. 4th DCA 2020).
2. *Jackson v. Navarro*, 665 So.2d 340, 341 (Fla. 4th DCA 1995).
3. *Rowen v. Holiday Pines Property Owner's Association, Inc.*, 759 So.2d 13, 15 (Fla. 4th DCA 2000), *rev. denied*, 790 So.2d 1104 (Fla. 2001), *rev. denied*, 790 So.2d 1107 (Fla. 2001).
4. *Beizer v. Judge*, 743 So.2d 134, 136 (Fla. 4th DCA 1999).
5. *Rushing v. Bosse*, 652 So.2d 869 (Fla. 4th DCA 1995).
6. *Alamo Rent-A-Car, Inc. v. Mancusi,* 599 So.2d 1010, 1012 (Fla. 4th DCA 1992), *approved in part, quashed in part*, 632 So.2d 1352 (Fla. 1994).
7. *Dorf v. Usher*, 514 So.2d 68, 69 (Fla. 4th DCA 1987).
8. *Fernander v. Bonis*, 947 So.2d 584, 589 (Fla. 4th DCA 2007).

§11:20.1.5 Elements of Cause of Action — 5th DCA

The elements of the cause of action for malicious prosecution are:

1. The prior commencement or continuation of an original civil or criminal judicial proceeding;
2. Its legal causation by the present defendant against the plaintiff who was defendant in the original proceeding;
3. Its bona fide termination in favor of the present plaintiff;
4. The absence of probable cause for prosecution of such proceeding;
5. The presence of malice in instituting the proceeding; and
6. Damages conforming to legal standards resulting to the plaintiff.

Source

Pellegrini v. Winter, 552 So.2d 213, 214 (Fla. 5th DCA 1989).

See Also

1. *Verdon v. Song*, 251 So.3d 256, 259n.2 (Fla. 5th DCA 2018).
2. *Hardick v. Homol*, 795 So.2d 1107, 1111 (Fla. 5th DCA 2001).
3. *Pellegrini v. Winter*, 476 So.2d 1363, 1365 (Fla. 5th DCA 1985).
4. *Orr v. Belk Lindsey Stores, Inc.*, 462 So.2d 112, 113 (Fla. 5th DCA 1985), *appeal after remand*, 501 So.2d 714 (Fla. 5th DCA 1987).
5. *Cazares v. Church of Scientology of California, Inc.*, 444 So.2d 442, 444 (Fla. 5th DCA 1983).

§11:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(o); *Levine v. Hunt*, 932 So.2d 1292 (Fla. 2nd DCA 2006).

§11:20.3 References

1. 24A Fla. Jur. 2d *False Imprisonment and Malicious Prosecution* §§20–38 (2003).
2. 52 Am. Jur. 2d *Malicious Prosecution* §§8, 9 (2000).
3. 54 C.J.S. *Malicious Prosecution or Wrongful Litigation* §§4, 5, 48–55 (2005).
4. Restatement (Second) of Torts §§653–673 (1977).

§11:20.4 Defenses

1. **Absolute Immunity:** State prosecutors are entitled to absolute immunity when they perform their quasi-judicial functions of initiating prosecution and presenting the state's case. *Hansen v. State of Florida*, 503 So.2d 1324, 1326 (Fla. 1st DCA 1987); *see also* § 768.28, Fla. Stat. (sovereign immunity).

2. **Advice of counsel:** *See, Burchell v. Bechert,* 356 So.2d 377, 378 (Fla. 4th DCA 1978), *cert. denied*, 367 So.2d 1122 (Fla. 1978). However, reliance on advice of counsel is not an absolute defense in a malicious prosecution case. Advice of counsel is a defense to an action predicated upon malicious prosecution only in the event there has been a full and complete disclosure made to the attorney before his advice is given and followed. *Wright v. Yurko*, 446 So.2d 1162, 1167 (Fla. 5th DCA 1984); *Mee Industries v. Dow Chemical Co.*, 608 F.3d 1202, 1218 (11th Cir. 2010) (holding that "[a]cting on the advice of counsel is a complete defense to an action for malicious prosecution…however, that advice must be sought in good faith, with the sole purpose of being advised as to the law").

3. **Dismissal on grounds not inconsistent with the guilt of the accused:** Where dismissal is on technical grounds, for procedural reasons, or any other reason not inconsistent with the guilt of the accused, it does not constitute a favorable termination. The converse of that rule is that a favorable termination exists where a dismissal is of such a nature as to indicate the innocence of the accused. *Della-Donna v. Nova University, Inc.*, 512 So.2d 1051 (Fla. 4th DCA 1987). *See Also Union Oil of California, Amsco Division v. Watson*, 468 So.2d 349 (Fla. 3d DCA 1985), *rev. denied,* 479 So.2d 119 (Fla. 1985); *Jones v. State Farm Mutual Automobile Insurance Co.*, 578 So.2d 783, 785 (Fla. 1st DCA 1991); *C.A. Hansen Corp. v. Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, P.A.*, 565 So.2d 812, 813 (Fla. 3d DCA 1990), *rev. denied*, 576 So.2d 294 (Fla. 1991).

4. **Settlement:** Where the matter was settled, it will not support a claim for malicious prosecution. *Cline v. Flagler Sales Corp.,* 207 So.2d 709, 710 (Fla. 3d DCA 1968).

§11:20.5 Related Matters

1. **Attorneys, Standard for:** An action for malicious prosecution is a serious matter and this is especially so when such an action is filed against the losing attorney in the earlier case supposedly giving rise to the action. Such actions could conceivably prohibit attorneys from pursuing and establishing new causes of action and could hinder the development of new legal theories. We commend the language of the California Court of Appeals in *Norton v. Hines*, 49 Cal.App.3d 917, 123 Cal.Rptr. 237 (1975), as descriptive of the standard that should obtain here: *Central Florida Machinery Co., Inc. v. Williams*, 424 So.2d 201, 203 (Fla. 2d DCA 1983), *rev. denied*, 434 So.2d 886 (Fla. 1983).

2. **Bargaining or Negotiating:** Bargaining or negotiating, in and of itself, does not always negate the bona fide nature of the termination. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352, 1356 (Fla. 1994). *Compare Union Oil of California, Amsco Division v. Watson*, 468 So.2d 349, 354 (Fla. 3d DCA 1985), *rev. denied,* 479 So.2d 119 (Fla. 1985).

3. **Bona Fide Termination:** The element that there be a bona fide termination of the underlying civil suit is satisfied by either a favorable decision on the merits or a bona fide termination of that lawsuit. Two policies underlie the rule that a favorable or bona fide termination of an earlier lawsuit is a necessary element of malicious prosecution. First, fairness requires that a defendant in a malicious prosecution action "have his day in court in the locus where he began the controversy." A "day in court" means that the defendant has had the chance to litigate the merits as the plaintiff in the original action. Second, judicial economy favors making a plaintiff "await the outcome of the first" case before commencing a malicious prosecution action, in order to save the time and expense of litigants and courts. *Rowen v. Holiday Pines Property Owner's Association, Inc.*, 759 So.2d 13, 15 (Fla. 4th DCA 2000), *rev. denied*, 790 So.2d 1104 (Fla. 2001), *rev. denied*, 790 So.2d 1107 (Fla. 2001). *See Also* Restatement (Second) of Torts §674, Comment j (1977).

4. **Counterclaim:** A counterclaim for malicious prosecution cannot be maintained in a pending action since the pending suit cannot be said to have terminated in favor of the counter-defendant. *Bieley v. duPont, Glore, Forgan, Inc.*, 316 So.2d 66, 67 (Fla. 3d DCA 1975), *receded from on other grounds by Blue v. Weinstein*, 381 So.2d 308 (Fla. 3d DCA 1980). *See Also Blue v. Weinstein*, 381 So.2d 308 (Fla. 3d DCA 1980).

5. **Malice:** Malice may be either (a) actual or subjective malice, sometimes called "malice in fact," which results in intentional wrong; or (b) "legal malice," which may be inferred from circumstances such as the want of probable cause, even though no actual malevolence or corrupt design is shown. *Morgan International Realty, Inc. v. Dade Underwriters Insurance Agency*, 617 So.2d 455, 458 (Fla. 3d DCA 1993). *See Also Durkin v. Davis*, 814 So.2d 1246, 1248 (Fla. 2d DCA 2002).

6. **Nolle Prosequi or Declination to Prosecute:** The essential element of a bona fide termination in a plaintiff's favor is satisfied where the prosecutor in good faith enters a nolle prosequi or declination to prosecute in the prior proceedings. *Lindeman v. C.J. Stoll, Inc.*, 490 So.2d 101, 103 (Fla. 2d DCA 1986), *rev. denied*, 500 So.2d 543 (Fla. 1986).

7. **Probable Cause:** Where the facts are undisputed, probable cause is a pure question of law for the court; however, where the facts are disputed, the question must be submitted to the jury. *Johnson v. City of Pompano Beach*, 406 So.2d 1257, 1259 (Fla. 4th DCA 1981). Probable cause to have instituted the prior judicial proceeding is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged. *Bell v. Anderson*, 414 So.2d 550, 551 (Fla. 1st DCA 1982), *pet. for rev. denied*, 424 So.2d 760 (Fla. 1982).

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CHAPTER 12

PHYSICAL TORTS

§12:10 ASSAULT

§12:10.1 Elements of Cause of Action — Florida Supreme Court
- §12:10.1.1 Elements of Cause of Action — 1st DCA
- §12:10.1.2 Elements of Cause of Action — 2nd DCA
- §12:10.1.3 Elements of Cause of Action — 3rd DCA
- §12:10.1.4 Elements of Cause of Action — 4th DCA
- §12:10.1.5 Elements of Cause of Action — 5th DCA

§12:10.2 Statute of Limitations
§12:10.3 References
§12:10.4 Defenses
§12:10.5 Related Matters
§12:10.6 Sample Complaint

§12:20 BATTERY

§12:20.1 Elements of Cause of Action — Florida Supreme Court
- §12:20.1.1 Elements of Cause of Action — 1st DCA
- §12:20.1.2 Elements of Cause of Action — 2nd DCA
- §12:20.1.3 Elements of Cause of Action — 3rd DCA
- §12:20.1.4 Elements of Cause of Action — 4th DCA
- §12:20.1.5 Elements of Cause of Action — 5th DCA

§12:20.2 Statute of Limitations
§12:20.3 References
§12:20.4 Defenses
§12:20.5 Related Matters
§12:20.6 Sample Complaint

§12:30 FALSE IMPRISONMENT

§12:30.1 Elements of Cause of Action — Florida Supreme Court
- §12:30.1.1 Elements of Cause of Action — 1st DCA
- §12:30.1.2 Elements of Cause of Action — 2nd DCA
- §12:30.1.3 Elements of Cause of Action — 3rd DCA
- §12:30.1.4 Elements of Cause of Action — 4th DCA
- §12:30.1.5 Elements of Cause of Action — 5th DCA

§12:30.2 Statute of Limitations
§12:30.3 References
§12:30.4 Defenses
§12:30.5 Related Matters
§12:30.6 Sample Cause of Action

§12:40 FORCIBLE ENTRY AND DETENTION
§12:40.1 Fla.R.Civ.P. Form 1.938
§12:40.2 Statute of Limitations
§12:40.3 References
§12:40.4 Related Matters

§12:10 ASSAULT

§12:10.1 Elements of Cause of Action — Florida Supreme Court

An assault is any intentional, unlawful offer of corporeal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as to create a well-founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented.

Source

Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 217 (Fla. 1936).

See Also

Doe v. Evans, 814 So.2d 370, 379 (Fla. 2002) (Wells, C.J., dissenting) ("[A]n assault is the apprehension of immediate harmful or offensive contact with the plaintiff's person, caused by acts intended to result in such contacts, or the apprehension of them, directed at the plaintiff or a third person.").

§12:10.1.1 Elements of Cause of Action — 1st DCA

An "assault" is "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." §784.011, Fla. Stat. (2012). To prove assault, §784.011, Florida Statutes, requires proof of the following three elements: (1) an intentional, unlawful threat; (2) an apparent ability to carry out the threat; and (3) creation of a well-founded fear that the violence is imminent.

Source

J.A.F. v. A.J.R., 292 So.3d 467, 469 (Fla. 2d DCA 2020).

See Also

1. *Canon v. Thomas ex rel. Jewett*, 133 So.3d 634, 639 (Fla. 1st DCA 2014).
2. *Johnson v. Brooks*, 567 So.2d 34, 35 (Fla. 1st DCA 1990) ("A person's mere intention to commit an assault is not enough; there must be some overt act sufficient to demonstrate a threat directed at the person placed in fear.").
3. *McDonald v. Ford*, 223 So.2d 553, 555 (Fla. 2d DCA 1969).

§12:10.1.2 Elements of Cause of Action — 2nd DCA

An assault is an intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as to create a fear of imminent peril, coupled with the apparent present ability to effectuate the attempt. The essential element of an assault is the violence offered, and not actual physical contact.

Source

McDonald v. Ford, 223 So.2d 553, 555 (Fla. 2d DCA 1969).

§12:10.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

See Also

Boschetti v. Landon, 660 So.2d 365, 366 (Fla. 3d DCA 1995).

§12:10.1.4 Elements of Cause of Action — 4th DCA

An "assault" is an intentional, unlawful offer of corporal injury to another by force, or exertion of force directed toward another under such circumstances as to create a reasonable fear of imminent peril.

Source

Sullivan v. Atlantic Federal Savings & Loan Association, 454 So.2d 52, 54 (Fla. 4th DCA 1984), *rev. denied*, 461 So.2d 116 (Fla. 1985).

See Also

1. *Clark v. State*, 318 So.2d 487, 488 (Fla. 4th DCA 1975), *reversed on other grounds*, 337 So.2d 798 (Fla. 1976) ("We find the tort of assault defined as any intentional unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another under such circumstances as to create a well founded fear of imminent peril coupled with the apparent present ability to effectuate the attempt if not prevented.").
2. *Blanton v. State,* 388 So.2d 1271, 1273 (Fla. 4th DCA 1980).

§12:10.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§12:10.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(o).

§12:10.3 References

1. 3A Fla. Jur. 2d *Assault—Civil Aspects* §§5–15 (2002).
2. 15B Fla. Jur. 2d *Criminal Law* §§3238–3247 (2001).
3. 6 Am. Jur. 2d *Assault and Battery* §95 (1999).
4. 6A C.J.S. *Assault and Battery* §§4–49 (2004).
5. Restatement (Second) of Torts §21 (1965).
6. Restatement (Second) of Torts §892B (1979).

§12:10.4 Defenses

1. **Defenses:** *See* 3A Fla. Jur. 2d *Assault—Civil Aspects* §§8–15 (2002) (discussing self-defense, consent, provocation, arrest, and defense of property).

2. **Failure to Act:** The complaint fails to state a cause of action because assault and battery cannot be premised upon an omission or failure to act. *Sullivan v. Atlantic Federal Savings & Loan Association*, 454 So.2d 52, 54 (Fla. 4th DCA 1984), *rev. denied*, 461 So.2d 116 (Fla. 1985).

3. **Insanity:** The common law principle that an insane person is responsible in damages for his tortious acts has not been abrogated in Florida. The principle is based not only upon the fact that, at common law, torts were not grounded upon the fault concept, but also upon the idea that the victim of a wrongful act must be compensated. *Kaczer v. Marrero*, 324 So.2d 717, 719 (Fla. 3d DCA 1976).

4. **Omission:** Omission is insufficient as a matter of law to state a cause of action for assault and battery. *Sullivan v. Atlantic Federal Savings & Loan Association*, 454 So.2d 52, 55 (Fla. 4th DCA 1984), *rev. denied*, 461 So.2d 116 (Fla. 1985).

5. **Self-defense:** A person unlawfully assaulted may repel force by force to the extent which to him seems reasonably necessary under the circumstances to protect himself from injury. A person who has no reason to believe that he can with safety avoid the necessity of defending himself is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he himself reasonably believes that the other is about to inflict upon him an intentional bodily harm or death. The conduct of a person acting in self defense is measured by an objective standard, but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self defense. *Price v. Gray's Guard Serv., Inc.*, 298 So.2d 461, 464 (Fla. 1st DCA 1974), *cert. denied*,

305 So.2d 208 (Fla. 1974). In a civil action for assault and battery the general rule is that one who uses force exceeding that privileged to use, even though acting in self-defense, is liable for the excessive force. *Austin v. U-Tote-M of Broward*, 241 So.2d 186, 187 (Fla. 4th DCA 1970). Self-defense is in the nature of a confession and avoidance, and the party interposing the claim of self-defense has the burden of proving it. *Johns v. Ford Motor Credit Co.*, 226 So.2d 403, 404 (Fla. 1st DCA 1969), *appeal after remand*, 269 So.2d 54 (Fla. 1st DCA 1972). The Stand Your Ground law does not automatically confer civil liability immunity to a criminal defendant who is determined to be immune from prosecution in the criminal case. *Kumar v. Patel*, 227 So.3d 557, 561 (Fla. 2017).

6. **Victim Unaware:** If the intended victim is unaware of the attempt, he has suffered no harm and is not entitled to compensation for the tort committed against him. *McCullers v. State*, 206 So.2d 30, 33 (Fla. 4th DCA 1968), *overruled on other grounds by State v. White*, 324 So.2d 630 (Fla. 1975).

7. **Words Alone:** Spoken words do not constitute justification for an assault. *Anderson v. Maddox*, 65 So.2d 299, 300 (Fla. 1953). Abusive, insulting and defamatory words applied by the plaintiff to the defendant in a civil action for assault and battery may be shown in mitigation of punitive damages if they are of so recent occurrence and are so connected with the assault as to warrant an inference that it was committed under the influence of the passion produced by them. *Brown v. Palmer*, 245 So.2d 860, 862 (Fla. 1971). Words coupled with an appearance of rage and with a just completed shove could constitute an assault. *Lay v. Kremer*, 411 So.2d 1347, 1349 (Fla. 1st DCA 1982). *See Also Austin v. U-Tote-M of Broward*, 241 So.2d 186, 188 (Fla. 4th DCA 1970).

§12:10.5 Related Matters

1. **Statute of Limitation for Claims Based on Sexual Battery Where Victim Under the Age of 16:** "An action related to an act constituting a violation of s. 794.011 involving a victim who was under the age of 16 at the time of the act may be commenced at any time. This subsection applies to any such action other than one which would have been time barred on or before July 1, 2010." Section 95.11(9), Fla. Stat.

2. **Damages, Punitive:** A tort committed by mistake in the bona fide assertion of a supposed right, but absent any element of malicious motive or wrong intention, or circumstances of reckless or gross negligence in conduct amounting to the same thing, will not warrant the giving of exemplary or punitive damages. The following conclusion is so because elements of damage such as for indignity suffered, humiliation experienced, and the like are allowed as compensation for the injury and as the money value equivalent to plaintiff of the legal right of peaceful security plaintiff has been deprived of by defendant's tortious wrong. Punitive damages are allowable, however, for the malicious or wanton state of mind with which the defendant violated plaintiff's legal right, and can only be imposed in cases where either by direct or circumstantial evidence some reasonable basis for an inference of wantonness, actual malice, deliberation, gross negligence, or utter disregard of law on defendant's part may be legitimately drawn by the jury trying the case. *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 222 (Fla. 1936). The very act of intentional assault and battery committed without legal justification supplies the proof of malice. *Holland v. Glass*, 213 So.2d 320, 321 (Fla. 4th DCA 1968). *See Also Parsons v. Weinstein Enterprises, Inc.*, 387 So.2d 1044, 1046 (Fla. 3d DCA 1980); *Glickstein v. Setzer*, 78 So.2d 374, 375 (Fla. 1955).

§12:10.6 Sample Complaint

See Sample Complaints and Forms, Chapter 12, available through Digital Access.

§12:20 BATTERY

§12:20.1 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

See Also

Doe v. Evans, 814 So.2d 370, 379-80 (Fla. 2002) (Wells, C.J., dissenting) ("[A] battery is the 'unpermitted, unprivileged contact[ ] with [the plaintiff's] person, caused by acts intended to result in such contact[ ] … directed at the [plaintiff's person] or a third person.'").

§12:20.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§12:20.1.2 Elements of Cause of Action — 2nd DCA

To establish a battery, a plaintiff must suffer a harmful or offensive contact, and the tortfeasor must have intended to cause such contact. The intent may be established if the plaintiff demonstrates the tortfeasor acted with reckless disregard of the consequences of his acts.

Source

Chorak v. Naughton, 409 So.2d 35, 39 (Fla. 2d DCA 1981).

See Also

1. *McDonald v. Ford*, 223 So.2d 553, 555 (Fla. 2d DCA 1969). A battery is defined as an unlawful touching or striking or the use of force against the person of another with the intention of bringing about a harmful or offensive contact or apprehension thereof. The degree of force used is immaterial, except upon the question of damages. The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff.

§12:20.1.3 Elements of Cause of Action — 3rd DCA

The Restatement (Second) of Torts §18, states the essential elements of the intentional tort of battery are intent and contact:

(1) An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results.

(2) An act which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

A cause of action for battery requires the showing of intentional affirmative conduct and cannot be premised upon an omission or failure to act.

Source

City of Miami v. Sanders, 672 So.2d 46, 47 (Fla. 3d DCA 1996), *rev. denied*, 683 So.2d 484 (Fla. 1996); *Gonzalez v. State*, 271 So.3d 80 (Fla. 3d DCA 2019).

§12:20.1.4 Elements of Cause of Action — 4th DCA

A battery consists of the intentional infliction of a harmful or offensive contact upon the person of another. The defendant must have done some positive and affirmative act which must cause, and must be intended to cause, an unpermitted contact. Mere negligence, or even recklessness which only creates a risk that the contact will result, may afford a distinct cause of action in itself, but under modern usage of the term it is not enough for battery.

Source

Sullivan v. Atlantic Federal Savings & Loan Association, 454 So.2d 52, 54 (Fla. 4th DCA 1984), *rev. denied*, 461 So.2d 116 (Fla. 1985); *Twigg v. State*, 254 So.3d 464, 467 (Fla. 4th DCA 2018).

§12:20.1.5 Elements of Cause of Action — 5th DCA

Battery consists of the infliction of a harmful or offensive contact upon another with the intent to cause such contact or the apprehension that such contact is imminent.

Source

Quilling v. Price, 894 So.2d 1061, 1063 (Fla. 5th DCA 2005).

See Also

1. *Paul v. Holbrook*, 696 So.2d 1311, 1312 (Fla. 5th DCA 1997).

§12:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(o).

§12:20.3 References

1. 15B Fla. Jur. 2d *Criminal Law* §§3248–3254 (2001).
2. 6 Am. Jur. 2d *Assault and Battery* §96 (1999).
3. 6A C.J.S. *Assault and Battery* §§8–49 (2004).
4. Restatement (Second) of Torts §§13–20 (1965).

§12:20.4 Defenses

1. **Insanity:** The common law principle that an insane person is responsible in damages for his tortious acts has not been abrogated in Florida. The principle is based not only upon the fact that, at common law, torts were not grounded upon the fault concept, but also upon the idea that the victim of a wrongful act must be compensated. *Kaczer v. Marrero*, 324 So.2d 717, 719 (Fla. 3d DCA 1976).

2. **Omission:** Omission is insufficient as a matter of law to state a cause of action for assault and battery. *Sullivan v. Atlantic Federal Savings & Loan Association*, 454 So.2d 52, 55 (Fla. 4th DCA 1984), *rev. denied*, 461 So.2d 116 (Fla. 1985).

3. **Resisting Arrest:** Even if a citizen is illegally detained, there is no right to commit a battery upon the law enforcement officer. *State v. Roux*, 702 So.2d 240, 241 (Fla. 5th DCA 1997).

4. **Self-defense:** A person unlawfully assaulted may repel force by force to the extent which to him seems reasonably necessary under the circumstances to protect himself from injury. A person who has no reason to believe that he can with safety avoid the necessity of defending himself is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he himself reasonably believes that the other is about to inflict upon him an intentional bodily harm or death. The conduct of a person acting in self defense is measured by an objective standard, but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self defense. *Price v. Gray's Guard Service, Inc.*, 298 So.2d 461, 464 (Fla. 1st DCA 1974), *cert. denied*, 305 So.2d 208 (Fla. 1974). In a civil action for assault and battery the general rule is that one who uses force exceeding that privileged to use, even though acting in self-defense, is liable for the excessive force. *Austin v. U-Tote-M of Broward*, 241 So.2d 186, 187 (Fla. 4th DCA 1970). Self-defense is in the nature of a confession and avoidance, and the party interposing the claim of self-defense has the burden of proving it. *Johns v. Ford Motor Credit Company*, 226 So.2d 403, 404 (Fla. 1st DCA 1969), *appeal after remand*, 269 So.2d 54 (Fla. 1st DCA 1972). The Stand Your Ground law does not automatically confer civil liability immunity to a criminal defendant who is determined to be immune from prosecution in the criminal case. *Kumar v. Patel*, 227 So.3d 557, 561 (Fla. 2017).

5. **Words Alone:** Spoken words do not constitute justification for an assault. *Anderson v. Maddox*, 65 So.2d 299, 300 (Fla. 1953). Abusive, insulting and defamatory words applied by the plaintiff to the defendant in a civil action for assault and battery may be shown in mitigation of punitive damages if they are of so recent occurrence and are so connected with the assault as to warrant an inference that it was committed under the influence of the passion produced by them. *Brown v. Palmer*, 245 So.2d 860, 862 (Fla. 1971). Words coupled with an appearance of rage and with a just completed shove could constitute an assault. *Lay v. Kremer*, 411 So.2d 1347, 1349 (Fla. 1st DCA 1982). *See Also Austin v. U-Tote-M of Broward*, 241 So.2d 186, 188 (Fla. 4th DCA 1970).

6. **Immunity:** The state or its subdivisions are immune from liability in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *See Gaviria v. Guerra*, No. 17-23490-CIV, 2018 WL 1876124, at *9 (S.D. Fla. April 19, 2018).

§12:20.5 Related Matters

1. **Statute of Limitation for Claims Based on Sexual Battery Where Victim Under the Age of 16:** "An action related to an act constituting a violation of s. 794.011 involving a victim who was under the age of 16 at the time of the act may be commenced at any time. This subsection applies to any such action other than one which would have been time barred on or before July 1, 2010." Section 95.11(9), Fla. Stat.

2. **Crime of Battery:** There is no difference between the tort of battery and the crime of battery. *Mason v. Florida Sheriffs' Self-Insurance Fund*, 699 So.2d 268, 270 (Fla. 5th DCA 1997).

3. **Damages, Punitive:** A tort committed by mistake in the bona fide assertion of a supposed right, but absent any element of malicious motive or wrong intention, or circumstances of reckless or gross negligence in conduct amounting to the same thing, will not warrant the giving of exemplary or punitive damages. The following conclusion is so because elements of damage such as for indignity suffered, humiliation experienced, and the like are allowed as compensation for the injury and as the money value equivalent to plaintiff of the legal right of peaceful security plaintiff has been deprived of by defendant's tortious wrong. Punitive damages are allowable, however, for the malicious or wanton state of mind with which the defendant violated plaintiff's legal right, and can only be imposed in cases where either by direct or circumstantial evidence some reasonable basis for an inference of wantonness, actual malice, deliberation, gross negligence, or utter disregard of law on defendant's part may be legitimately drawn by the jury trying the case. *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 222 (Fla. 1936). The very act of intentional assault and battery committed without legal justification supplies the proof of malice. *Holland v. Glass*, 213 So.2d 320, 321 (Fla. 4th DCA 1968). *See Also Food Fair Stores, Inc. v. Morgan*, 338 So.2d 89, 91 (Fla. 2d DCA 1976); *Parsons v. Weinstein Enterprises, Inc.*, 387 So.2d 1044, 1046 (Fla. 3d DCA 1980); *Glickstein v. Setzer*, 78 So.2d 374, 375 (Fla. 1955).

4. **Excessive Force, Arrest:** A presumption of good faith attaches to an officer's use of force in making a lawful arrest and an officer is liable for damages only where the force used is clearly excessive. If excessive force is used in an arrest, the ordinarily protected use of force by a police officer is transformed into a battery. A battery claim for excessive force is analyzed by focusing upon whether the amount of force used was reasonable under the circumstances. There is no cause of action for the negligent use of excessive force in making a lawful arrest as there is no such thing as the negligent commission of an intentional tort. *City of Miami v. Sanders*, 672 So.2d 46, 47 (Fla. 3d DCA 1996), *rev. denied*, 683 So.2d 484 (Fla. 1996). The limit of the force to be used by the police is set at the exercise of such force as reasonably appears necessary to carry out the duties imposed upon the officer by the public. *City of Fort Pierce v. Cooper*, 190 So.2d 12, 14 (Fla. 4th DCA 1966).

5. **Intent:** Proof of intent to commit a battery is rarely subject to direct proof, but must be established based on surrounding circumstances. *Paul v. Holbrook*, 696 So.2d 1311, 1312 (Fla. 5th DCA 1997).

6. **Medical Treatment:** A competent individual has the categorical authority to refuse even lifesaving medical treatment. A physician who treats a patient despite such a refusal is civilly (and criminally) liable for assault and battery. *Rodriguez v. Pino*, 634 So.2d 681, 685 (Fla. 3d DCA 1994), *rev. denied*, 645 So.2d 454 (Fla. 1994).

7. **Sexually Transmitted Disease:** To establish a claim for battery, the plaintiff must establish that the defendant had genital herpes, that he knew he had it, and that he fraudulently concealed the existence of the disease or misrepresented that he did not have it. *Lopez v. Clarke*, 189 So.2d 805, 810 (Fla. 4th DCA 2015) (evidence that plaintiff's former boyfriend was tested and obtained a clean bill of health before starting his relationship with plaintiff precluded a claim for battery since the boyfriend lacked knowledge that he had herpes); *See Hogan v. Tavzel*, 660 So.2d 350 (Fla. 5th DCA 1995), rev. denied, 666 So.2d 901 (Fla. 1996); Paula C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. Ill. L. Rev. 779; Restatement (Second) of Torts §892B illus. 5 (1977) ("A" consents to sexual intercourse with "B", who knows that "A" is ignorant of the fact that "B" has a venereal disease. "B" is subject to liability to "A" for battery.).

8. **Transferred Intent:** One definite area in which there is more extensive liability for intent than for negligence is that covered by the curious surviving fiction of "transferred intent." If the defendant shoots or strikes at A, intending to wound or kill him, and unforeseeably hits B instead, he is held liable to B for an intentional tort. The intent to commit a battery upon A is pieced together with the resulting injury to B; it is "transferred" from A to B. The intention follows the bullet. *City of Winter Haven v. Allen*, 541 So.2d 128, 138 (Fla. 2d DCA 1989), *rev. denied*, 548 So.2d 662 (Fla. 1989).

§12:20.6 Sample Complaint

See Sample Complaints and Forms, Chapter 12, available through Digital Access.

§12:30 FALSE IMPRISONMENT

§12:30.1 Elements of Cause of Action — Florida Supreme Court

False imprisonment is the unlawful restraint of a person against his will, the gist of which action is the unlawful detention of the plaintiff and deprivation of his liberty.

A person is not liable for false imprisonment unless his act is done for the purpose of imposing a confinement, or with knowledge that such confinement will, to a substantial certainty, result from it.

Actual malice or bad motive is not an element essential to sustain an action for false imprisonment.

To be liable in an action for false imprisonment, one must have personally and actively participated therein, directly or by indirect procurement. All those who, by direct act or indirect procurement, personally participate in or proximately cause the false imprisonment and unlawful detention are liable, therefore.

Source

Johnson v. Weiner, 19 So.2d 699 (Fla. 1944).

See Also

1. However, see defense of honest, good faith mistake discussed in *Pokorny v. First Federal Savings & Loan Association*, 382 So.2d 678, 682 (Fla. 1980).
2. *Dodson v. Solomon*, 183 So. 825, 826 (Fla. 1938).
3. *S. H. Kress & Co. v. Powell*, 180 So. 757, 762 (Fla. 1938).
4. *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 218 (Fla. 1936).
5. *Fisher v. Payne*, 113 So. 378, 380 (Fla. 1927).

§12:30.1.1 Elements of Cause of Action — 1st DCA

The tort of false imprisonment or false arrest is defined as "the unlawful restraint of a person against his will, the gist of which action is the unlawful detention of the plaintiff and the deprivation of his liberty. A plaintiff must show that the detention was unreasonable and unwarranted under the circumstances."

Source

Rivers v. Dillards Department Store, Inc., 698 So.2d 1328, 1331 (Fla. 1st DCA 1997).

See Also

1. *Spears v. Albertson's, Inc*., 848 So.2d 1176, 1178 (Fla. 1st DCA 2003).
2. *Escambia County School Board v. Bragg*, 680 So.2d 571, 572 (Fla. 1st DCA 1996).
3. *Rotte v. City of Jacksonville*, 509 So.2d 1252, 1253 (Fla. 1st DCA 1987).
4. *Harris v. Lewis State Bank*, 436 So.2d 338, 341 (Fla. 1st DCA 1983). For related cases *see Harris v. Lewis State Bank*, 482 So.2d 1378 (Fla. 1st DCA 1986), and *Harris v. Boone*, 519 So.2d 1065 (Fla. 1st DCA 1988).
5. *Lewis v. Atlantic Discount Company, Inc.*, 99 So.2d 241, 242 (Fla. 1st DCA 1957).

§12:30.1.2 Elements of Cause of Action — 2nd DCA

The essential elements of a cause of action for false imprisonment include: (1) the unlawful detention and deprivation of liberty of a person; (2) against that person's will; (3) without legal authority or color of authority; and (4) which is unreasonable and unwarranted under the circumstances.

Source

Mathis v. Coats, 24 So.3d 1284, 1289 (Fla. 2d DCA 2010).

See Also

Maybin v. Thompson, 606 So.2d 1240, 1241 (Fla. 2d DCA 1992).

§12:30.1.3 Elements of Cause of Action — 3rd DCA

As to false arrest and false imprisonment, plaintiff was required to show that defendants, in procuring his arrest, exercised unlawful restraint and detained him against his will.

Source

City of Hialeah v. Rehm, 455 So.2d 458, 461 (Fla. 3d DCA 1984), *petition for rev. denied*, 462 So.2d 1107 (Fla. 1985).

See Also

1. *Rivero v. Howard*, 218 So. 3d 992, 994 (Fla. 3d DCA 2017).
2. *Tursi v. Metropolitan Dade County*, 579 So.2d 150, 152 (Fla. 3d DCA 1991).
3. *Kanner v. First National Bank of South Miami*, 287 So.2d 715, 717 (Fla. 3d DCA 1974).

§12:30.1.4 Elements of Cause of Action — 4th DCA

The elements of a cause of action for false imprisonment have been stated in various ways by Florida courts, but, essentially, all have agreed that the elements include:

1. the unlawful detention and deprivation of liberty of a person;
2. against that person's will;
3. without legal authority or "color of authority;" and
4. which is unreasonable and unwarranted under the circumstances.

Source

Montejo v. Martin Memorial Medical Center, Inc., 935 So.2d 1266, 1268–69 (Fla. 4th DCA 2006).

See Also

1. *Florez v. Broward Sheriff's Office*, 270 So.3d 417, 421 (4th DCA 2019).
2. *City of Boca Raton v. Basso,* 242 So.3d 1141, 1142 (Fla. 4th DCA 2018).
3. *Harder v. Edwards,* 174 So.3d 524 (Fla. 4th DCA 2015).
4. *Laguerre v. City of Coral Springs*, 673 So.2d 60, 61 (Fla. 4th DCA 1996).
5. *Jackson v. Navarro*, 665 So.2d 340 (Fla. 4th DCA 1995).
6. *Johnson v. City of Pompano Beach*, 406 So.2d 1257, 1259 (Fla. 4th DCA 1981).

§12:30.1.5 Elements of Cause of Action — 5th DCA

(1) Defendant intended to confine the plaintiff;
(2) Defendant performed an act resulting in plaintiff's confinement; and
(3) Plaintiff was conscious of the confinement or resulting harm.

Source

Everett v. Florida Inst. of Tech., 503 So.2d 1382, 1383 (Fla. 5th DCA 1987).

See Also

1. *City Of St. Petersburg v. Austrino*, 898 So. 2d 955, 957 (Fla. 5th DCA 2005).
2. *Foshee v. Health Management Associates*, 675 So.2d 957, 960 (Fla. 5th DCA 1996), *rev. denied*, 686 So.2d 578 (Fla. 1996).
3. *Erp v. Carroll*, 438 So.2d 31, 40 (Fla. 5th DCA 1983).

§12:30.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(o); *Ervans v. City of Venice*, 169 So.3d 267, 268 (Fla. 2d DCA 2015).

§12:30.3 References

1. 24A Fla. Jur. 2d *False Imprisonment and Malicious Prosecution* §1 (2003).
2. 32 Am. Jur. 2d *False Imprisonment* §§8–34 (1995).
3. 35 C.J.S. *False Imprisonment* §§8–36 (1999).
4. Restatement (Second) of Torts §§35–45A, 118–139 (1965).
5. Florida Standard Jury Instruction (Civ.) MI 6.1.
6. Fla. Stat. §787.02 (criminal action for false imprisonment).
7. Fla. Stat. §810.08 (trespass in structure or conveyance).
8. Fla. Stat. §810.09 (trespass on property other than structure or conveyance).
9. Fla. Stat. §812.015(3)(c) (exemption from liability for false arrest).
10. William B. Johnson, Annotation, *Liability for False Arrest or Imprisonment under Warrant as Affected by Mistake as to Identity of Person Arrested*, 39 A.L.R.4th 705 (1985).
11. Wanda E. Wakefield, Annotation, *Civil Liability for "Deprogramming" Member of Religious Sect*, 11 A.L.R.4th 228 (1982).
12. Donald M. Zupanec, Annotation, *False Imprisonment in Connection with Confinement in Nursing Home or Hospital*, 4 A.L.R.4th 449 (1981).
13. Debra T. Landis, Annotation, *False Imprisonment: Liability of Private Citizen, Calling on Police for Assistance After Disturbance or Trespass, for False Arrest by Officer*, 98 A.L.R.3d 542 (1980).
14. Milton Roberts, Annotation, *Principal's Liability for Punitive Damages Because of False Arrest or Imprisonment, or Malicious Prosecution, by Agent or Employee*, 93 A.L.R.3d 826 (1979).
15. Patricia J. Lamkin, Annotation, *Immunity of Prosecuting Attorney or Similar Officer from Action for False Arrest or Imprisonment*, 79 A.L.R.3d 882 (1977).
16. Robert A. Brazener, Annotation, *Construction and Effect, in False Imprisonment Action, of Statute Providing for Detention of Suspected Shoplifters*, 47 A.L.R.3d 998 (1973).
17. Robert A. Brazener, Annotation, *Liability of One Contracting for Private Police or Security Service for Acts of Personnel Supplied*, 38 A.L.R.3d 1332 (1971).

18. D. A. Johns, Annotation, *Admissibility of Defendant's Rules or Instructions for Dealing with Shoplifters, in Action for False Imprisonment or Malicious Prosecution*, 31 A.L.R.3d 705 (1970).
19. R. F. Chase, Annotation, *Liability for False Imprisonment Predicated Upon Institution of, or Conduct in Connection with, Insanity Proceedings*, 30 A.L.R.3d 523 (1970).
20. A. L. Azores, Annotation, *Attorney's Fees as Element of Damages in Action for False Imprisonment or Arrest, or for Malicious Prosecution*, 21 A.L.R.3d 1068 (1968).
21. D. A. Cox, Annotation, *Right, without Judicial Proceeding, to Arrest and Detain One Who Is, or Is Suspected of Being, Mentally Deranged*, 92 A.L.R.2d 570 (1963).
22. W. E. Shipley, Annotation, *Pleading Good Faith or Lack of Malice in Mitigation of Damages in Action for False Arrest or Imprisonment*, 49 A.L.R.2d 1460 (1956).
23. W. E. Shipley, Annotation, *Excessiveness or Inadequacy of Damages for False Imprisonment or Arrest*, 35 A.L.R.2d 273 (1954).
24. Michael A. DiSabatino, Annotation, *Actionability, Under 42 USCS §1983, of Claims Against Persons other than Police Officers for Unlawful Arrest or Imprisonment*, 44 A.L.R. Fed. 225 (1979).

§12:30.4 Defenses

1. **Active Participation:** To be liable for false imprisonment, a person must personally and actively participate, directly or indirectly by procurement, in the unlawful restraint of another person against their will. Merely providing information to the authorities that a violation of law occurred is not sufficient to support an action for false arrest. *Moore v. Department of Corrections, State of Florida*, 833 So.2d 822, 824 (Fla. 4th DCA 2002). *See Also Harris v. Kearney*, 786 So.2d 1222, 1225 (Fla. 4th DCA 2001).

2. **Fla. Stat. §812.015(3)(c):** *See* Fla. Stat. §812.015(3)(c) (exemption from liability for false arrest).

3. **Honest, Good Faith Mistake:** We hold that under Florida law a private citizen may not be held liable in tort where he neither actually detained another nor instigated the other's arrest by law enforcement officers. If the private citizen makes an honest, good faith mistake in reporting an incident, the mere fact that his communication to an officer may have caused the victim's arrest does not make him liable when he did not in fact request any detention. *Pokorny v. First Federal Savings & Loan Association*, 382 So.2d 678, 682 (Fla. 1980); *Boca Raton v. Coughlin*, 299 So.2d 105, 107 (Fla. 4th DCA 1974).

4. **Investigative Stop:** In *Terry v. Ohio*, 88 S.Ct. 1868 (1968), the Court created a two-part test designed to measure the reasonableness of an investigative stop against the intrusion on the detainee's right to be secure from unreasonable searches. Under this test, we must consider whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Melendez v. Sheriff of Palm Beach County*, 743 So.2d 1145, 1148 (Fla. 4th DCA 1999).

5. **Judicial Immunity:** Florida's highest court has clearly established that the doctrine of judicial immunity exists in Florida apart from the concept of sovereign immunity; that this type of immunity embraces persons who exercise a judicial or quasi-judicial function; and that this immunity is unaffected by Florida's waiver of sovereign immunity. *Andrews v. Florida Parole Commission*, 768 So.2d 1257, 1261 (Fla. 1st DCA 2000), *rev. dismissed*, 791 So.2d 1093 (Fla. 2001).

6. **Probable Cause:** In malicious prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff, whereas in false imprisonment the allegation of want of probable cause is not essential, and the burden is on defendant to prove probable cause as a defense or in mitigation. *Johnson v. Weiner*, 19 So.2d 699, 700 (Fla. 1944). *See Also City of Hialeah v. Rehm*, 455 So.2d 458, 461 (Fla. 3d DCA 1984), *petition for rev. denied*, 462 So.2d 1107 (Fla. 1985); *Harris v. Solvonic*, 386 So.2d 19, 20 (Fla. 3d DCA 1980), *petition for rev. dismissed*, 392 So.2d 1372 (Fla. 1980), *petition for rev. denied*, 392 So.2d 1379 (Fla. 1980); *City of Miami v. Albro*, 120 So.2d 23, 26 (Fla. 3d DCA 1960); *Jackson v. Navarro*, 665 So.2d 340 (Fla. 4th DCA 1995); *Phillips v. State*, 314 So.2d 619 (Fla. 4th DCA 1975); *Boca Raton v. Coughlin*, 299 So.2d 105, 107 (Fla. 4th DCA 1974).

Where the facts are undisputed, probable cause is a pure question of law for the court; however, where the facts are disputed, the question must be submitted to the jury. *Johnson v. City of Pompano Beach*, 406 So.2d 1257, 1259 (Fla. 4th DCA 1981).

7. **Probable Cause, Test:** The test for probable cause is whether the officer had knowledge of facts and circumstances which would warrant an individual of reasonable caution in believing that an offense had been committed. Moreover, the facts constituting probable cause need not reach the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based. *Tursi v. Metropolitan Dade County*, 579 So.2d 150, 152 (Fla. 3d DCA 1991).

§12:30.5 Related Matters

1. **Attorney Fees:** There are instances in which attorney's fees are recoverable, such as wrongful attachment, false imprisonment and malicious prosecution. *Glusman v. Lieberman*, 285 So.2d 29, 31 (Fla. 4th DCA 1973).

2. **Baker Act:** A claim for the tort of false imprisonment can be asserted based on allegations that a person was involuntarily held without compliance with the Baker Act. *Liles v. P.I.A. Medfield, Inc.*, 681 So.2d 711, 712 (Fla. 2d DCA 1995); *Everett v. Florida Institute of Technology*, 503 So.2d 1382, 1383 (Fla. 5th DCA 1987), *dismissed*, 511 So.2d 998 (Fla. 1987).

3. **Commercial Properties:** *See* Florida Statutes §821.01; *Corn v. State*, 332 So.2d 4 (Fla. 1976); *State v. Woods*, 624 So.2d 739 (Fla. 5th DCA 1993), *rev. denied*, 634 So.2d 629 (Fla. 1994).

4. **Constitutionally Protected Right:** The right to be free from unlawful arrest and imprisonment is such a protected right under the Fourth and Fourteenth Amendments, a violation of which may form the basis for a §1983 claim. *Barton Protective Services, Inc. v. Faber*, 745 So.2d 968, 972 (Fla. 4th DCA 1999).

5. **Criminal Cause of Action:** Before you can find the defendant guilty of False Imprisonment, the State must prove the following two elements beyond a reasonable doubt: (1) (Defendant) [forcibly] [secretly] [by threat] [confined] [abducted] [imprisoned] [restrained] (victim) against [his] [her] will. (2) (Defendant) had no lawful authority. Confinement of a child under the age of 13 is against [his] [her] will if such confinement is without the consent of [his] [her] parent or legal guardian. *Standard Jury Instructions in Criminal Cases*, 723 So.2d 123 (Fla. 1998). *See Also* Florida Statutes §787.02.

6. **False Arrest:** The action for false imprisonment is usually distinguishable in terminology only from the action for false arrest. *Johnson v. Weiner*, 19 So.2d 699, 700 (Fla. 1944). *See Also Jackson v. Biscayne Medical Center, Inc.*, 347 So.2d 721, 723 (Fla. 3d DCA 1977).

7. **Malice:** The tort of false imprisonment does not require malice, *see Jackson v. Navarro*, 665 So.2d 340 (Fla. 4th DCA 1995), but it is an intentional tort requiring proof of some level of intent to imprison or confine the plaintiff. *See Foshee v. Health Mgmt. Assocs.*, 675 So.2d 957 (Fla. 5th DCA 1996), *rev. denied*, 686 So.2d 578 (Fla. 1996); *Rowell v. Holt*, 850 So.2d 474, 482 (Fla. 2003).

8. **Malicious Prosecution Compared:** Although not always observed, the distinction between malicious prosecution and false imprisonment is fundamental. But briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which false imprisonment will lie, is that in the former the detention is malicious but under the due forms of law, whereas in the later the detention is without color of legal authority. In malicious prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff, whereas in false imprisonment the allegation of want of probable cause is not essential, and the burden is on defendant to prove probable cause as a defense or in mitigation. Malice is material only on the issue of damages, and the termination of the proceeding is not material. If the imprisonment is under legal authority it may be malicious, but it cannot be false. This is true

where legal authority is shown by valid process, even if irregular or voidable. Void process will not constitute legal authority within this rule. *Johnson v. Weiner*, 19 So.2d 699, 700 (Fla. 1944).

9. **Negligently Swearing Out a Warrant:** Florida courts have never recognized a separate tort for "negligently" swearing out a warrant for arrest. Such cases may be brought only in the form of civil suits for malicious prosecution. … A plaintiff contending that he had been improperly arrested as the result of negligence in swearing out a warrant must bear the burden of establishing malice and want of probable cause. Mere negligence alone is insufficient. *Pokorny v. First Federal Savings & Loan Association*, 382 So.2d 678, 683 (Fla. 1980). *See Also Hudson v. Dykes*, 402 So.2d 491, 493 (Fla. 1st DCA 1981).

10. **Oral Protest Not Required:** The plaintiff need not show that force was used in the detention, nor that she made an oral protest to demonstrate that the detention was against her will. *Harris v. Lewis State Bank*, 436 So.2d 338, 341 (Fla. 1st DCA 1983). For related cases *see Harris v. Lewis State Bank*, 482 So.2d 1378 (Fla. 1st DCA 1986), and *Harris v. Boone*, 519 So.2d 1065 (Fla. 1st DCA 1988).

11. **Recoverable Compensatory Damages:** Damages recoverable in an action for false imprisonment include bodily injury, physical suffering, physical inconvenience and discomfort, loss of time, losses in the plaintiff's business or employment, and expenses incurred due to the imprisonment. *S.H. Kress & Co. v. Powell,* 180 So. 757, 763 (Fla. 1938). Damages are also recoverable for mental suffering such as embarrassment, humiliation, deprivation of liberty, and disgrace and injury to the person's feelings and reputation. *Normius v. Eckerd Corp*., 813 So.2d 985, 987 (Fla. 2d DCA 2002). *See Also Margaret Ann Super Markets, Inc. v. Dent*, 64 So.2d 291, 292 (Fla. 1953).

§12:30.6 Sample Cause of Action

COUNT FOR FALSE
IMPRISONMENT

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Defendant intended to confine Plaintiff.
Defendant performed an act resulting in Plaintiff's confinement.
Plaintiff was conscious of the confinement or resulting harm.
Defendant's confinement of Plaintiff caused Plaintiff to suffer damages.

WHEREFORE, Plaintiff demands damages against Defendant for false imprisonment and such other relief this Court deems just and proper.

For a complete sample form, see Sample Complaints and Forms, Chapter 12, available through Digital Access.

§12:40 FORCIBLE ENTRY AND DETENTION

§12:40.1 Fla.R.Civ.P. Form 1.938

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action to recover possession of real property unlawfully (forcibly) detained in _____ County, Florida.
2. Plaintiff is entitled to possession of the following real property in said county:
(insert description of property)
3. Defendant has unlawfully (forcibly) turned plaintiff out of and withholds possession of the property from plaintiff.

WHEREFORE plaintiff demands judgment for possession of the property and damages against defendant.

NOTE: Substitute "forcibly" for "unlawfully" or add it as an alternative when applicable. This form cannot be used for residential tenancies.

See *In re Amendments to the Florida Rules of Civil Procedure*, 604 So.2d 1110 (Fla. 1992).

§12:40.2 Statute of Limitations

Three Years. Fla. Stat. §§82.03, 82.04; *Florida Athletic & Health Club v. Royce*, 33 So.2d 222, 224 (1948).

§12:40.3 References

1. 20 Fla. Jur. 2d *Ejectment and Related Remedies* §59–75 (2000).
2. Florida Statutes §82.02 (2005).

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CHAPTER 13

REAL PROPERTY ACTIONS

§13:10 EASEMENT, PRESCRIPTIVE
§13:10.1 Elements of Cause of Action — Florida Supreme Court
§13:10.1.1 Elements of Cause of Action — 1st DCA
§13:10.1.2 Elements of Cause of Action — 2nd DCA
§13:10.1.3 Elements of Cause of Action — 3rd DCA
§13:10.1.4 Elements of Cause of Action — 4th DCA
§13:10.1.5 Elements of Cause of Action — 5th DCA
§13:10.2 Statute of Limitations
§13:10.3 References
§13:10.4 Defenses
§13:10.5 Related Matters

§13:20 EJECTMENT
§13:20.1 Fla.R.Civ.P. Form 1.940
§13:20.2 Statute of Limitations
§13:20.3 References
§13:20.4 Related Matters

§13:30 INVERSE CONDEMNATION
§13:30.1 Elements of Cause of Action — Florida Supreme Court
§13:30.1.1 Elements of Cause of Action — 1st DCA
§13:30.1.2 Elements of Cause of Action — 2nd DCA
§13:30.1.3 Elements of Cause of Action — 3rd DCA
§13:30.1.4 Elements of Cause of Action — 4th DCA
§13:30.1.5 Elements of Cause of Action — 5th DCA
§13:30.2 Statute of Limitations
§13:30.3 References
§13:30.4 Defenses
§13:30.5 Related Matters

§13:40 SLANDER OF TITLE (DISPARAGEMENT OF PROPERTY)
§13:40.1 Elements of Cause of Action — Florida Supreme Court
§13:40.1.1 Elements of Cause of Action — 1st DCA
§13:40.1.2 Elements of Cause of Action — 2nd DCA
§13:40.1.3 Elements of Cause of Action — 3rd DCA
§13:40.1.4 Elements of Cause of Action — 4th DCA
§13:40.1.5 Elements of Cause of Action — 5th DCA
§13:40.2 Statute of Limitations

§13:40.3 References
§13:40.4 Defenses
§13:40.5 Related Matters
§13:40.6 Sample Cause of Action

§13:50 TRESPASS ON THE CASE
§13:50.1 Elements of Cause of Action — Florida Supreme Court
§13:50.1.1 Elements of Cause of Action — 1st DCA
§13:50.1.2 Elements of Cause of Action — 2nd DCA
§13:50.1.3 Elements of Cause of Action — 3rd DCA
§13:50.1.4 Elements of Cause of Action — 4th DCA
§13:50.1.5 Elements of Cause of Action — 5th DCA
§13:50.2 Statute of Limitations
§13:50.3 References
§13:50.4 Defenses
§13:50.5 Related Matters

§13:60 IMPLIED WAY OF NECESSITY
§13:60.1 Florida Statutes
§13:60.2 Elements of Cause of Action — Florida Supreme Court
§13:60.2.1 Elements of Cause of Action — 1st DCA
§13:60.2.2 Elements of Cause of Action — 2nd DCA
§13:60.2.3 Elements of Cause of Action — 3rd DCA
§13:60.2.4 Elements of Cause of Action — 4th DCA
§13:60.2.5 Elements of Cause of Action — 5th DCA
§13:60.3 Statute of Limitations
§13:60.4 References
§13:60.5 Defenses
§13:60.6 Related Matters

§13:70 STATUTORY WAY OF NECESSITY
§13:70.1 Florida Statutes
§13:70.2 Elements of Cause of Action — Florida Supreme Court
§13:70.2.1 Elements of Cause of Action — 1st DCA
§13:70.2.2 Elements of Cause of Action — 2nd DCA
§13:70.2.3 Elements of Cause of Action — 3rd DCA
§13:70.2.4 Elements of Cause of Action — 4th DCA
§13:70.2.5 Elements of Cause of Action — 5th DCA
§13:70.3 Statute of Limitations
§13:70.4 References
§13:70.5 Defenses
§13:70.6 Related Matters

§13:80 QUIET TITLE
§13:80.1 Florida Statutes
§13:80.2 Elements of Cause of Action — Florida Supreme Court
§13:80.2.1 Elements of Cause of Action — 1st DCA
§13:80.2.2 Elements of Cause of Action — 2nd DCA
§13:80.2.3 Elements of Cause of Action — 3rd DCA
§13:80.2.4 Elements of Cause of Action — 4th DCA
§13:80.2.5 Elements of Cause of Action — 5th DCA
§13:80.3 Statute of Limitations
§13:80.4 References
§13:80.5 Defenses
§13:80.6 Related Matters

§13:10 EASEMENT, PRESCRIPTIVE

§13:10.1 Elements of Cause of Action — Florida Supreme Court

In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.

Further in either prescription or adverse possession, the use or possession is presumed to be in subordination to the title of the true owner, and with his permission and the burden is on the claimant to prove that the use or possession is adverse. This essential element as well as all others must be proved by clear and positive proof, and cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture. *Horton v. Smith-Richardson Inv. Co*., 1921, 81 Fla. 255, 87 So. 905; *J. C. Vereen & Sons v. Houser*, 1936, 123 Fla. 641, 167 So. 45.

In Florida there is no presumption that adverse possession once shown to exist continues to do so. The claimant must, by clear, definite and accurate proof show that the possession continued for the full period required by law. *Atlantic Coast Line R. Co. v. Seward*, 1933, 112 Fla. 326, 150 So. 257.

Also, "the limits, location, and extent of his occupation must be definitely and clearly established by affirmative proof, and cannot be established or extended by presumption" *Wilkins v. Pensacola City*, 1895, 36 Fla. 36, 18 So. 20, 26. And the pleadings, as well as the proof, particularly where a prescriptive way is claimed, must show a reasonably certain line, by definite route and termini. *Crosier v. Brown*, 1909, 66 W.Va. 273, 66 S.E. 326, 25 L.R.A. N.S. 174; 25 Am.Jur., Sec. 15, p. 349.

Acquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted. *Irion v. Nelson*, 1952, 207 Okl. 243, 249 P.2d 107; 28 C.J.S. Easements at 10, p. 645. Any doubts as to the creation of the right must be resolved in favor of the owner.

While there are slight differences in the essentials of the two actions, they are not great. In acquiring title by adverse possession, there must of course be "possession". In acquiring a prescriptive right this element is use of the privilege, without actual possession. Further, to acquire title the possession must be exclusive, while with a prescriptive right the use may be in common with the owner, or the public.

Under the principles of law above set forth and the cases and authorities cited it was necessary for the defendants to allege and, by clear and positive proof, to prove (1) that the public had the continued and uninterrupted use or enjoyment of the plaintiff's lands for a roadway for a period of at least twenty years prior to the barricading thereof by the plaintiff's husband in February 1952, (2) the identity of the roadway, i.e., its route, termini, and width, and (3) that the use or enjoyment was adverse or under claim of right. *J. C. Vereen & Sons v. Houser*, supra.

Source

Downing v. Bird, 100 So.2d 57, 64 (Fla. 1958), *affirmed following remand*, 145 So.2d 559 (Fla. 3d DCA 1962).

§13:10.1.1 Elements of Cause of Action — 1st DCA

To establish entitlement to a prescriptive easement, one must prove

1. that he or she and any predecessors in title have made actual, continuous and uninterrupted use of the lands of another for the prescriptive period (twenty years);
2. that (when the claim is to a right-of-way) the use has entailed a definite route with a reasonably certain line, width and termini;
3. that the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use must be imputed to the owner; and
4. that the use has been adverse to the owner - that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner and such that, for the entire period, the owner could have sued to prevent further use.

Source

Suwannee River Water Management Dist. v. Price, 651 So.2d 749, 750 (Fla. 1st DCA 1995), *rev. denied*, 660 So.2d 714 (Fla. 1995) (citing *Downing v. Bird,* 100 So.2d 57, 64 (Fla. 1958)).

See Also

1. *Suwannee River Water Management Dist. v. Price*, 740 So.2d 46, 47 (Fla. 1st DCA 1999), *rev. denied*, 741 So.2d 1136 (Fla. 1999).
2. *Cook v. Proctor & Gamble Cellulose Co.,* 648 So.2d 180, 181 (Fla. 1st DCA 1995) (discussing a public prescriptive easement).
3. *Cook v. Proctor & Gamble Cellulose Co.,* 599 So.2d 688, 689 (Fla. 1st DCA 1992).

§13:10.1.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

See Also

1. *Sapp v. General Development Corp.,* 472 So.2d 544 (Fla. 2d DCA 1985) ("By virtue of having demonstrated that his property was landlocked, Sapp established that he had a way of necessity. Therefore, he was not entitled to claim a prescriptive easement.").
2. *City of Pompano Beach v. Beatty*, 177 So.2d 261 (Fla. 2d DCA 1965).

§13:10.1.3 Elements of Cause of Action — 3rd DCA

In order to establish a prescriptive easement, the claimant thereof must, by clear and positive proof, prove:

1. actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years;
2. that during the whole prescribed period the use has been either with the actual knowledge of the owner or so open, notorious and visible that knowledge of the use is imputed to the owner;
3. that the use related to a certain limited and defined area of land or, if for a right-of-way, the use was of a definite route with a reasonably certain line, width, and termini; and
4. that during the whole prescribed period the use has been adverse to the lawful owner; that is, (a) the use has been made without the permission of the owner and under some claim of right other than permission from the owner, (b) the use has been either exclusive of the owner or inconsistent with the rights of the owner of the land to its use and enjoyment, and (c) the use has been such that, during the whole prescribed period, the owner had a cause of action against the user for the use being made.

Source

Dan v. BSJ Realty, LLC, 953 So.2d 640, 642 (Fla. 3rd DCA 2007).

§13:10.1.4 Elements of Cause of Action — 4th DCA

The elements necessary to prove a prescriptive easement or adverse possession of the property in question are:

1. Continued, uninterrupted use of the property by the public for road purposes for a period of twenty years or more;
2. the use was adverse or under claim of right;
3. the parameters of the right of way, i.e., the width and length thereof.

All of these elements "must be proved by clear and positive proof, and can not be established by loose, uncertain testimony which necessitates resort to mere conjecture."

Source

Genet v. City of Hollywood, 400 So.2d 787, 789 (Fla. 4th DCA 1981), *petition for rev. denied*, 411 So.2d 381 (Fla. 1981).

§13:10.1.5 Elements of Cause of Action — 5th DCA

To establish a prescriptive easement, a claimant must prove, by clear and positive proof: (1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years; (2) that the use was related to a certain, limited and defined area of land; (3) that the use has been either with the actual knowledge of the owner, or so open, notorious, and visible that knowledge of the

use must be imputed to the owner; and (4) that the use has been adverse to the owner, that is, without express or implied permission from the owner, under some claim of right, inconsistent with the rights of the owner, and such that, for the entire period, the owner could have sued to prevent further use.

Source

Stackman v. Pope, 28 So.3d 131, 133 (Fla. 5th DCA 2010).

See Also

1. *Martin v. Kavanagh*, 773 So.2d 1250, 1253 (Fla. 5th DCA 2000).
2. *Brewer v. Flankey,* 660 So.2d 761 (Fla. 5th DCA 1995).
3. *Supal v. Miller,* 455 So.2d 593, 594 (Fla. 5th DCA 1984).
4. *Gay Brothers Construction Co. v. Florida Power & Light Co.,* 427 So.2d 318, 320 (Fla. 5th DCA 1983) (quoting *Downing v. Bird,* 100 So.2d 57, 64 (Fla. 1958)).
5. *Deseret Ranches of Florida, Inc. v. Bowman,* 389 So.2d 1072, 1073 (Fla. 5th DCA 1980), *petition for rev. denied*, 397 So.2d 777 (Fla. 1981).
6. *Crigger v. Florida Power Corp.,* 436 So.2d 937, 944 (Fla. 5th DCA 1983), *appeal after remand*, 469 So.2d 941 (Fla. 5th DCA 1985), *appeal after remand*, 509 So.2d 1322 (Fla. 5th DCA 1987), *rev. denied*, 519 So.2d 986 (Fla. 1987).
7. *Trepanier v. County of Volusia*, 965 So.2d 276, 284 (Fla. 5th DCA 2007) ("For the public to gain a prescriptive easement in land, its use of private land must be continuous, for the statutory period of twenty years, actual, adverse under a claim of right, and either known to the owner or so open, notorious, and visible that knowledge of the adverse use by the public can be imputed to the owner.").

§13:10.2 Statute of Limitations

Estate of Johnston v. TPE Hotels, Inc., 719 So.2d 22, 26 n. 9 (Fla. 5th DCA 1998) (applicable statutes of limitation include "§95.11(2)(b), Fla. Stat. (5 years for a legal or equitable action on a contract, obligation or liability founded on a written instrument); §95.11(3)(p) (4 years for suits not specifically provided for in the statutes).")

§13:10.3 References

1. 2 Fla. Jur. 2d *Adverse Possession* §§7 – 34 (2005).
2. 20 Fla. Jur. 2d *Easements* §66 (2000).
3. 25 Am. Jur. 2d *Easements and Licenses* §§48 – 63 (2004).
4. 28A C.J.S. *Easements* §§14 – 51, 139 (1996).
5. For adverse possession see Fla. Stat. §§95.16, 95.18 (2005).

§13:10.4 Defenses

1. **Burden of Proof:** Because the law does not favor the acquisition of prescriptive rights, use or possession of another's land is presumed to be subordinate to the owner's title, and with the owner's permission; and the burden is on the claimant to prove that such use or possession is adverse to the owner. Doubts as to the existence of an easement are to be resolved in favor of the landowner, and the proof required to overcome the presumption of permission cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture. *Farley v. Hiers*, 668 So.2d 248, 250 (Fla. 1st DCA 1996). *See Also Cook v. Proctor & Gamble Cellulose Co.,* 648 So.2d 180, 181 (Fla. 1st DCA 1995).

§13:10.5 Related Matters

1. **Dedicated to Public Use:** A roadway can become dedicated to public use either under common law or by statutory presumptive dedication. Common law dedication requires proof of (1) an intention by the landowner to dedicate the property to public use, and (2) an acceptance by the public. Proof of both elements must be clear and unequivocal, and the burden of proof is on the party claiming the dedication. *Hancock v. Tipton*, 732 So.2d 369, 372 (Fla. 2d DCA 1999).

§13:20 EJECTMENT

§13:20.1 Fla.R.Civ.P. Form 1.940

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action to recover possession of real property in _____ County, Florida.
2. Defendant is in possession of the following real property in the county:

(describe property)

to which plaintiff claims title as shown by the attached statement of plaintiff's chain of title.

3. Defendant refuses to deliver possession of the property to plaintiff or pay plaintiff the profits from it.

WHEREFORE plaintiff demands judgment for possession of the property and damages against defendant.

NOTE: A statement of plaintiff's chain of title must be attached.
Committee Notes: 1980 Amendment. The words "possession of" are inserted in paragraph 1 for clarification. See *In re Amendments to the Florida Rules of Civil Procedure*, 604 So.2d 1110 (Fla. 1992).

§13:20.2 Statute of Limitations

Seven Years. Fla. Stat. §95.12; *Tarin v. Sniezek*, 942 So.2d 458, 461-62 (Fla. 4th DCA 2006).

§13:20.3 References

1. Florida Statutes §66.021 (2018). (Current through the 2018 Second Regular Session of the 25th Legislature).
2. Fla. Stat. ch. 66 (2005) (Ejectment).
3. 20 Fla. Jur. 2d *Ejectment and Related Remedies* §§20 – 30 (2000).
4. 25 Am. Jur. 2d *Ejectment* §§28 – 35 (2004).
5. 28A C.J.S. *Ejectment* §§59 – 82 (1996).
6. Fla.R.Civ.P. 1.580(a).

§13:20.4 Related Matters

1. **Boundary Disputes:** An action for ejectment is the appropriate method for determining boundary disputes. See *Stark v. Marshall*, 67 So.2d 235 (Fla. 1953); *Petryni v. Denton*, 807 So.2d 697, 699 (Fla. 2d DCA 2002), *rev. denied*, 828 So.2d 385 (Fla. 2002).

2. **Common Law Rule Codified:** The ejectment and landlord / tenant statutes essentially codified the common law rule regarding writs designed to restore possession of real property. *Cohen v. Ginsberg*, 715 So.2d 1113, 1114 (Fla. 4th DCA 1998).

3. **Strength of Plaintiff's Title:** In an ejectment action, a plaintiff may recover only on the strength of the Plaintiff's own title, not on the weaknesses of defendant's title. *Davis v. Hinson*, 67 So.3d 1107 (Fla. 1st DCA 2011) (plaintiffs did not have good title as a result of a failure in the chain of title, and as such, had no standing to bring an ejectment claim). *See Florida Fin. Co. v. Sheffield*, 48 So. 42 (Fla. 1908); *Mobley v. Hunt*, 722 So.2d 248, 249 (Fla. 2d DCA 1998).

4. **Wrongful Eviction and Ejectment Compared:** *Ward v. Ward*, 80 So. 3d 1138 (Fla. Dist. Ct. App. 1st Dist. 2012)*; Ward v. Estate of Ward (I)*, 1 So.3d 238, 239 (Fla. 1st DCA 2008).

§13:30 INVERSE CONDEMNATION

§13:30.1 Elements of Cause of Action — Florida Supreme Court

Further, where a government agency, by its conduct or activities, has effectively taken private property without a formal exercise of the power of eminent domain, a cause of action for inverse condemnation will lie. . . . Proof that the government body has effected a taking of the property is an essential element of an inverse condemnation action.

A taking may occur in a wide variety of circumstances and may be either temporary or permanent. For example, a taking may occur when governmental action causes a loss of access to one's property even though there is no physical appropriation of the property itself.

Source

Rubano v. Department of Transportation, 656 So.2d 1264, 1266 (Fla. 1995).

See Also

1. See definition of "taking" under "Related Matters" herein.
2. *Schick v. Department of Agriculture and Consumer Services*, 599 So.2d 641 (Fla. 1992) ("Schick's initial complaint was dismissed for failure to state a cause of action. However, the district court reversed on appeal, holding that the complaint alleged substantial interference with the beneficial use and enjoyment of the property and was sufficient to state a cause of action for inverse condemnation.").
3. *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990) ("The modern, prevailing view is that *any substantial interference* with private property which destroys or lessens its value.… is, in fact and in law, a 'taking' in a constitutional sense.").
4. *White v. Pinellas County, Florida*, 185 So.2d 468 (Fla. 1966), *on remand*, 203 So.2d 348 (Fla. 2d DCA 1967), *cert. denied*, 211 So.2d 215 (Fla. 1968).

§13:30.1.1 Elements of Cause of Action — 1st DCA

Generally, the only issues decided by the court in an inverse condemnation proceeding are:

1. whether the governmental agency has effected a taking;
2. the nature and extent of the property rights taken; and
3. the date of the taking, which is used for valuation purposes.

If the court determines that a taking has occurred, a jury trial is held wherein the jury determines the amount of compensation to which the property owner is entitled. The valuation proceeding is to be held in accordance with chapters 73 and 74, Florida Statutes, and the process is the same as if the cause were a statutory eminent domain action.

Source

Bd. of Tr. of Internal Imp. Trust Fund v. Walton County, 121 So.3d 1166, 1171 (Fla. 1st DCA 2013); *Foster v. City of Gainesville*, 579 So.2d 774 (Fla. 1st DCA 1991).

See Also

1. *Patchen v. Florida Dep't. of Agr. and Consumer Services*, 906 So.2d 1005 (Fla. 2005).
2. See definition of "taking" under "Related Matters" herein.
3. *Schick v. Florida Department of Agriculture*, 504 So.2d 1318 (Fla. 1st DCA 1987), *rev. denied*, 513 So.2d 1060 (Fla. 1987).
4. *City of Tallahassee v. Boyd*, 616 So.2d 1000 (Fla. 1st DCA 1993), *rev. granted*, 632 So.2d 1029 (Fla. 1994), *affirmed*, 647 So.2d 819 (Fla. 1994).
5. *Kirkpatrick v. City of Jacksonville*, 312 So.2d 487 (Fla. 1st DCA 1975).
6. *Wilson v. State Road Department*, 201 So.2d 619 (Fla. 1st DCA 1967), *cert. denied*, 207 So.2d 690 (Fla. 1967).
7. *City of Jacksonville v. Schumann*, 167 So.2d 95 (Fla. 1st DCA 1964), *cert. denied*, 172 So.2d 597 (Fla. 1965), *affirmed following remand*, 199 So.2d 727 (Fla. 1st DCA 1967).

§13:30.1.2 Elements of Cause of Action — 2nd DCA

Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken. … And, a "taking" occurs when an owner is denied substantially all economically beneficial or productive use of the owner's land. … Furthermore, a determination of whether a taking has occurred rests on a factual inquiry that must be made on a case-by-case basis.

Source

Sarasota Welfare Home, Inc. v. City of Sarasota, 666 So.2d 171 (Fla. 2d DCA 1995).

See Also

1. See definition of "taking" under "Related Matters" herein.
2. *Pinellas County v. Baldwin*, 80 So. 3d 366, 369-370 (Fla. Dist. Ct. App. 2d Dist. 2012).
3. *Lee County v. Morales*, 557 So.2d 652 (Fla. 2d DCA 1990), *rev. denied*, 564 So.2d 1086 (Fla. 1990).
4. *Pinellas County v. Brown*, 450 So.2d 240 (Fla. 2d DCA 1984) ("In an action for inverse condemnation, an essential element is proof of a taking by the governmental body.").
5. *State of Florida, Department of Health and Rehabilitative Services v. Scott*, 418 So.2d 1032 (Fla. 2d DCA 1982).
6. *Alizieri v. Manatee County*, 396 So.2d 240 (Fla. 2d DCA 1981).
7. *Dep't of Transp. v. Butler Carpet Co.*, 231 So.3d 499, 505 (Fla. 2d DCA 2017) (holding that "there is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property independent of whether there was a physical taking").

§13:30.1.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

See Also

Florida Dept. of Envtl. Prot. ex rel. Bd. of Tr. of Internal Imp. Fund v. West, 21 So.3d 96, 97 (Fla. 3d DCA 2009) ("A taking occurs when governmental regulation substantially denies the landowner of all economically beneficial or productive use of his or her property. Generally, the governmental entity institutes eminent domain proceedings to effectuate a formal taking. Where no formal exercise of eminent domain power is undertaken, a property owner may file an inverse condemnation claim to recover the value of property that has been *de facto* taken.").

§13:30.1.4 Elements of Cause of Action — 4th DCA

Inverse condemnation is a cause of action in favor of a property owner against an agency having the power of eminent domain to recover the value of property that has been *de facto* taken, by the agency, even though no formal exercise of the power of eminent domain has been attempted. … A "taking" in Florida requires the deprivation of substantially all use of the property alleged to have been taken.

The lower court correctly perceived that the law provides a remedy for such conduct but, unless there is a deprivation of substantially all economic, beneficial or productive use of the property, inverse condemnation is not the remedy. If an *invalid* exercise of police power causes damage not amounting to a "taking," the claim is for a violation of substantive due process and the remedy is monetary damages.

Source

City of Pompano Beach v. Yardarm Restaurant, Inc., 641 So.2d 1377, 1384 (Fla. 4th DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995), *cert. denied*, 515 U.S. 1144, 115 S.Ct. 2583 (1995).

See Also

1. See definition of "taking" under "Related Matters" herein.
2. *Bakus v. Broward County*, 634 So.2d 641, 642 (Fla. 4th DCA 1993), *rev. denied*, 649 So.2d 232 (Fla. 1994).
3. *State of Florida Department of Transportation v. FMS Management Systems, Inc.*, 599 So.2d 1009 (Fla. 4th DCA 1992).

4. *Dep't of Agric. & Consumer Servs. v. Borgoff*, 35 So. 3d 84, 89 (Fla. Dist. Ct. App. 4th Dist. 2010) ("Whether regulatory action of a public body amounts to a taking must be determined from the facts of each case … and the trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation. It has long been acknowledged that a 'physical invasion' of private property is the clearest example of a governmental taking for which just compensation is due… Whether a regulation amounts to a taking may depend on the unique circumstances of the case, and the court's factual inquiry may change from case to case… [As to the facts of this case] cutting down and destroying healthy non-commercial trees of private citizens could hardly be more definitively a taking. Government has regulatory power for the very purpose of safeguarding the rights of citizens, not for destroying them. Under any possible meaning, if government cuts down and burns private property having value, then government has taken it. And if government has taken it, government must pay for it. It is also settled that a State, by *ipse dixit*, may not transform private property into public property without compensation. … The common law and statutory provisions for inverse condemnation do not displace the constitutional requirement for just compensation when the State destroys privately owned property to aid some industry. The only effect of §581.1845 is to set an opening bid for the price the State will pay without litigation. If the compensation required by the Constitution exceeds a statutory amount, the State will have to pay that amount… In takings cases, "the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case.").

§13:30.1.5 Elements of Cause of Action — 5th DCA

Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken. To determine whether a government regulation of land use amounts to a taking of property, the court must determine whether the government action deprived the owner of all economically beneficial use of the land.

Source

Ocean Palm Golf Club Partnership v. City of Flagler Beach, 139 So.3d 463, 471 (Fla. 5th DCA 2014).

See Also

1. See definition of "taking" under "Related Matters" herein.
2. *Department of Transportation v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993), *non-final appeal reversed following remand*, 625 So.2d 965 (Fla. 5th DCA 1993), *rev. granted*, 626 So.2d 210 (Fla. 1993), *approved*, 640 So.2d 73 (Fla. 1994).
3. *Hansen v. City of Deland*, 32 So.3d 654, 655 (Fla. 5th DCA 2010) ("A property owner can file an inverse condemnation claim to recover the value of property that has been de facto taken by a government entity. Recently, in *Drake v. Walton County,* 6 So.3d 717 (Fla. 1st DCA 2009), the First District addressed a similar claim of inverse condemnation based on flooding. The court explained: We have previously held that a county takes private property when it directs a concentrated flow of water from one property onto another, permanently depriving the owner of all beneficial enjoyment of their property. To assert an inverse condemnation claim based on such governmental action, the property owner must demonstrate that the government's action constitutes a substantial interference with her private property rights for more than a momentary period, and will be continuous or reasonably expected to continuously recur, resulting in a substantial deprivation of the beneficial use of her property… A taking is more likely to have occurred when a governmental action confers a public benefit rather than prevents a public harm.").

§13:30.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(p); *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So.2d 171, 172-73 (Fla. 2nd DCA 1995).

§13:30.3 References

1. 21 Fla. Jur. 2d *Eminent Domain* §§195 – 206 (2005).
2. Article X, §6, Florida Constitution (1968 revision).

3. 27 Am. Jur. 2d *Eminent Domain* §§739 – 757, 799 – 809 (2004).
4. 29A C.J.S. *Eminent Domain* §§375 – 416 (1992).

§13:30.4 Defenses

1. **Nuisance:** In *City of Miami v. Keshbro, Inc.*, 717 So.2d 601 (Fla. 3d DCA 1998), *approved*, 801 So.2d 864 (Fla. 2001), the court concluded that a temporary closing of property, pursuant to section 893.138, Fla. Stat. (1991) because the property was a nuisance, is not a compensable taking. *City of St. Petersburg v. Kablinger*, 730 So.2d 409, 410 (Fla. 2d DCA 1999), *approved*, 801 So.2d 864 (Fla. 2001).

2. **Ripeness:** In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), *abrogated by Goldstein v. Pataki*, 488 F.Supp.2d 254 (E.D.N.Y. 2007), *affirmed*, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, 128 S.Ct. 2964 (2008), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.,* at 186, 105 S.Ct. 3108. *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 570 (Fla. 4th DCA 2002). A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. 121 S.Ct. 2448 (citations omitted). *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 571 (Fla. 4th DCA 2002).

   In gauging ripeness, while there is no requirement to allege a physical invasion, the property owner must allege a loss of its access rights by a proposed governmental plan. A current loss of access can establish a "taking." *See Dep't of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253, 1255 (Fla. 1986). However, mere planning activities by the governmental agency do not cause a current loss of access. *Pembroke Ctr., LLC v. DOT*, 64 So. 3d 737, 740 (Fla. 4th DCA 2011) (Levine, J., concurring) (other jurisdictions have recognized that a plaintiff may be entitled to compensation for damage caused by pre-condemnation announcements).

3. **Standing:** In order for Brown to bring an action against the county to recover compensation for a taking, he must have an interest in the property entitling him to sue. *Pinellas County v. Brown*, 450 So.2d 240 (Fla. 2d DCA 1984).

§13:30.5 Related Matters

1. **Access:** The fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished. The loss of the most convenient access is not compensable where other suitable access continues to exist. A taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished. The extent of the access which remains after a taking is properly considered in determining the amount of the compensation. In any event, the damages which are recoverable are limited to the reduction in the value of the property which was caused by the loss of access. *State of Florida, Dep't. of Transportation v. FMS Management Systems, Inc.*, 599 So.2d 1009 (Fla. 4th DCA 1992); *Palm Beach County v. Tessler*, 538 So.2d 846, 849 (Fla. 1989); *City of Tallahassee v. Boyd*, 616 So.2d 1000 (Fla. 1st DCA 1993), *rev. granted*, 632 So.2d 1029 (Fla. 1994), *affirmed*, 647 So.2d 819 (Fla. 1994); *State of Florida, Dep't. of Transportation v. Suit City of Aventura*, 774 So.2d 9 (Fla. 3d DCA 2000), *rev. denied*, 796 So.2d 537 (Fla. 2001); *Pembroke Ctr., LLC v. DOT*, 64 So.3d 737, 740 (Fla. 4th DCA 2011).

2. **Access, Regulation of:** A taking does not occur when government merely regulates access to property under its police power, such as specifying the location of driveways in and out of abutting property, prohibiting U-turns or left turns, or establishing one-way traffic. *State, Dep't. of Transp. v. Gayety Theatres, Inc*., 781 So.2d 1125, 1127 (Fla. 3d DCA 2001), *rev. denied*, 799 So.2d 217 (Fla. 2001).

3. **Categories of Takings:** Historically, a distinction has been made between categories of takings in inverse condemnation cases. For example, taking may occur by physical occupation, flooding, governmental regulation, and taking of access rights. The importance of these distinctions is that different legal standards may apply to each category of taking. We find that it is much more appropriate to apply the concept of taking by refocusing attention on the different types of takings and the standards applicable to each. *VLX Properties, Inc. v. Southern States Utilities, Inc.*, 2000 Fla. App. LEXIS 9251, at *6 (Fla. 5th DCA 2000), *opinion withdrawn by* 792 So.2d 504 (Fla. 5th DCA 2001); *See Also St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011) (describing takings categories as physical invasion which is a per se taking, regulatory takings for interference depriving the owner of all beneficial use, and land use exactions, and different standards applied for each).

4. **Compensation, Full:** Full compensation in eminent domain matters consists of two elements: the value of the property taken, and severance damages to the remainder, if any, in a partial taking. *Department of Transportation v. Rogers*, 705 So.2d 584, 587 (Fla. 5th DCA 1997). The full compensation required by the Constitution in a direct condemnation action is equally required in inverse condemnation proceedings. *Stewart v. City of Key West*, 429 So.2d 784, 785 (Fla. 3d DCA 1983). Damages in an inverse condemnation action are assessed based on the value of the property on the date of the taking. *Patchen v. Florida Dep't. of Agr. and Consumer Services*, 906 So.2d 1005 (Fla. 2005).

5. **Demolition of Structure:** The destruction of personal property in the course of demolition of a structure condemned as unsafe or a nuisance is not necessarily wrongful, much less a taking. *Lewis v. County of Orange*, 772 So.2d 558, 559 (Fla. 5th DCA 2000), *rev. denied*, 791 So.2d 1098 (Fla. 2001), *cert. denied*, 534 U.S. 1041, 122 S.Ct. 616 (2001). However, demolition of a home by the city without proper notice to the property owners so that they could contest whether the structure (which was already in the process of securing additional renovation permits) was truly unsafe, was a taking without due process of law. *City of West Palm Beach v. Roberts*, 72 So.3d 294 (Fla. 4th 2011).

6. **Exactions:** An exaction is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted. Monetary exactions as a condition of a land use permit must satisfy requirements that government's mitigation demand have an essential nexus and rough proportionality to the impacts of a proposed development. *Koontz v. St. Johns River Water Management District,* ——U.S.——, 133 S.Ct. 2586, 2601, 186 L.Ed.2d 697 (2013) (governmental entity's requirement that landowner fund offsite mitigation projects on public lands as prerequisite for approval of land use permit is properly analyzed as Fifth Amendment taking of property).

7. **Flooding:** Claim for flooding is properly brought as an inverse condemnation claim if and only if the flooding actually does occur. *Kendry v. State Road Dep't. [sic] of Florida*, 213 So.2d 23 (Fla. 4th DCA 1968); *Dudley v. Orange County*, 137 So.2d 859 (Fla. 2d DCA 1962); *Blankenship v. Department Of Transportation*, 890 So.2d 1130, 1132 (Fla. 5th DCA 2004). Generally, to support a claim for inverse condemnation associated with flooding, the flooding must be "an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury, to the property." *See, e.g.*, *Diamond K Corp. v. Leon County*, 677 So.2d 90 (Fla. 1st DCA 1996); *South Florida Water Management Dist. v. Steadman Stahl, P.A., Pension Fund*, 558 So.2d 1087 (Fla. 4th DCA 1990), *rev. denied*, 574 So.2d 143 (Fla. 1990); *Bensch v. Metro. Dade County*, 541 So.2d 1329, 1330 (Fla. 3d DCA 1989); *South Florida Water Management Dist. v. Basore of Florida, Inc*., 723 So.2d 287, 288 (Fla. 4th DCA 1998), *rev. denied*, 740 So.2d 527 (Fla. 1999). It is enough that the flooding causes damage to the owner's land, regardless of whether the owner can show that the governmental authorities' activities which caused the flooding were done for a public purpose. *Pinellas County v. Baldwin*, 80 So. 3d 366, 371 (Fla. Dist. Ct. App. 2d Dist. 2012).

8. **Inability to Obtain Financing:** The inability to obtain financing may be caused by a "taking" or may be some evidence of a "taking," but it is not a taking. *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377, 1386 (Fla. 4th DCA 1994), *rev. denied*, 651 So.2d 1197 (Fla. 1995), *cert. denied*, 515 U.S. 1144, 115 S.Ct. 2583 (1995).

9. **Inverse Condemnation Defined:** Inverse condemnation is a cause of action to recover the value of property by a property owner against an agency which has taken private property without a formal exercise of the power of eminent domain. *See Rubano v. Dep't of Transp.*, 656 So.2d 1264, 1266 (Fla. 1995). The First District has defined inverse condemnation as a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. *Thornburg v. Port of Portland*, 376 P.2d 100 (Or. 1962); *Martin v. Port of Seattle*, 391 P.2d 540 (Wash. 1964). To the same effect but using different words, the New York Supreme Court, Appellate Division, in *Trippe v. Port of New York Auth.*, 17 A.D.2d 472, 474, 236 N.Y.S.2d 312 (N.Y. 1962), *order reversed on other grounds*, 14 N.Y.2d 119, 198 N.E.2d 585, 249 N.Y.S.2d 409 (N.Y. 1964) said that inverse condemnation is a method of compensation wherein "an owner asserting a claim for appropriation of his property may pursue his right by an action in equity for an injunction, and for damages; the court may then, as an alternative to the injunction, make an award for the taking." *City of Jacksonville v. Schumann*, 167 So.2d 95, 98 (Fla. 1st DCA 1964). *See Also State Road Dep't. v. Tharp*, 1 So.2d 868, 869 (Fla. 1941). The full compensation required by the Constitution, in a direct condemnation action, is equally required in inverse condemnation proceedings. *Stewart v. City of Key West*, 429 So.2d 784, 785 (Fla. 3d DCA 1983). Damages in an inverse condemnation action are assessed based on the value of the property on the date of the taking. *Patchen v. Florida Dep't. of Agr. and Consumer Services*, 906 So.2d 1005 (Fla. 2005).

10. **Power to Alter Created Property Rights:** In the context of a federal inverse condemnation claim, it has been said, "Generally, when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes." *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n,* 38 F.3d 603, 606 (D.C. Cir. 1994). *See Also Smalleylogics Corp. v. Dade County,* 176 So.2d 574, 578 (Fla. 3d DCA 1965). We follow that principle here in the context of the inverse condemnation claim under the Florida Constitution. *Agripost, Inc. v. Metropolitan Miami-Dade County*, 845 So.2d 918, 920 (Fla. 3d DCA 2003).

11. **Taking:** Taking has been defined as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof. *State of Florida, Department of Health and Rehabilitative Services v. Scott*, 418 So.2d 1032 (Fla. 2d DCA 1982); *Schick v. Florida Department of Agriculture*, 504 So.2d 1318 (Fla. 1st DCA 1987), *rev. denied*, 513 So.2d 1060 (Fla. 1987). In *VLX Properties, Inc. v. Southern States Utilities, Inc.*, 2000 Fla. App. LEXIS 9251 (Fla. 5th DCA 2000) (opinion withdrawn on grant of rehearing), *superseded by* 792 So.2d 504 (Fla. 5th DCA 2001), the court held that these elements should be applied in the disjunctive rather than the conjunctive. Thus, a taking under *Schick* may occur when the first three elements are established or when the last element is established. *See also Bakus v. Broward County*, 634 So.2d 641, 642 (Fla. 4th DCA 1993), *rev. denied*, 649 So.2d 232 (Fla. 1994).

12. **Type of Property:** The definition of "property" in condemnation cases is sufficiently broad to extend to intangible and incorporeal rights, such as contractual obligations and leasehold interests. *Pinellas County v. Brown*, 450 So.2d 240 (Fla. 2d DCA 1984).

13. **Zoning:** Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the factual criteria to consider when determining whether a taking has occurred are: (1) whether there was a denial of economically viable use of the property as a result of the regulatory imposition; (2) whether the property owner had distinct investment-backed expectations; and (3) whether it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under

common law nuisance doctrine. Whether or not expectations are considered reasonable will depend on whether the property owner had notice in advance of his investment decision that the governmental regulations which are alleged to constitute the taking had been or would be enacted. *Golf Club of Plantation, Inc. v. City of Plantation*, 717 So.2d 166, 170 (Fla. 4th DCA 1998), *subsequent appeal*, 847 So.2d 1028, (Fla. 4th DCA 2003). *Department of Transportation v. Weisenfeld*, 617 So.2d 1071, 1074 (Fla. 5th DCA 1993), *non-final appeal reversed following remand*, 625 So.2d 965 (Fla. 5th DCA 1993), *rev. granted*, 626 So.2d 210 (Fla. 1993), *approved*, 640 So.2d 73 (Fla. 1994). Where a zoning ordinance is held confiscatory, the only remedy available is to obtain a judicial determination that the ordinance is unenforceable and must be stricken. *Lee County v. Morales*, 557 So.2d 652 (Fla. 2d DCA 1990), *rev. denied*, 564 So.2d 1086 (Fla. 1990). In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), *abrogated by Goldstein v. Pataki*, 488 F.Supp.2d 254 (E.D.N.Y. 2007), *affirmed*, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, 128 S.Ct. 2964 (2008), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.,* at 186, 105 S.Ct. 3108. *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 570 (Fla. 4th DCA 2002). A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. See 121 S.Ct. 2448. *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 571 (Fla. 4th DCA 2002).

§13:40 SLANDER OF TITLE (DISPARAGEMENT OF PROPERTY)

§13:40.1 Elements of Cause of Action — Florida Supreme Court

Sec. 624. General Rule.

One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property, in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.

Sec. 625. Intention – Scienter – Malice.

One who publishes matter disparaging to another's property in land, chattels or intangible things is subject to liability under the rule stated in Sec. 624 although he:

(a) did not intend to influence a third person's conduct as purchaser or lessee of the thing in question;
(b) neither knew nor believed the disparaging matter to be false;
(c) did not publish such matter from ill will toward the other or a desire to cause him loss.

Sec. 626. Disparaging Statements of Fact.

One who without a privilege to do so published an untrue statement of fact which is disparaging to the quality of another's land, chattels or intangible things, under circumstances which would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof would be determined thereby, is liable for pecuniary loss resulting to the other from the impairment of vendibility so caused.

Source

Lehman v. Goldin, 36 So.2d 259, 260 (Fla. 1948) (adopting sections 624 – 626 of the Restatement of Torts). Note: Not the Restatement (Second) of Torts.

See Also

1. *Old Plantation Corp. v. Maule Industries, Inc.,* 68 So.2d 180, 181 (Fla. 1953) (" 'Slander of title' may be defined as a false and malicious statement, oral or written, made in dis-paragement of a person's title to real or personal property, or of some right of his, causing him special damages.").

§13:40.1.1 Elements of Cause of Action — 1st DCA

Thus liability is generally imposed upon a defendant who:

1. communicates to a third person;
2. statements disparaging the plaintiff's title;
3. which are not true in fact; and
4. which cause the plaintiff actual damage.

Source

Gates v. Utsey, 177 So.2d 486, 488 (Fla. 1st DCA 1965).

§13:40.1.2 Elements of Cause of Action — 2nd DCA

Recovery in an action for slander of title requires proof that a false and malicious statement was made in disparagement of the plaintiff's title to the property in question and caused him/her/it damage.

Source

Van Loan v. Heather Hills Prop. Owners Assoc., Inc., 216 So.3d 18, 24 (Fla. 2d DCA 2016); *Ridgewood Utilities Corp. v. R. L. King*, 426 So.2d 49, 50 (Fla. 2d DCA 1982).

See Also

1. *Miceli v. Gilmac Developers, Inc.,* 467 So.2d 404, 406 (Fla. 2nd DCA 1985) ("Slander of title arises upon the malicious publication of a falsehood concerning title which impairs the vendibility of the property.").
2. *Continental Development Corp. of Fla. v. Duval Title and Abstract Co.*, 356 So.2d 925, 927 (Fla. 2d DCA 1978).
3. *Kilgore Ace Hardware, Inc. v. Newsome,* 352 So.2d 918 (Fla. 2d DCA 1977).
4. *Collier County Publishing Co., Inc. v. Chapman,* 318 So.2d 492 (Fla. 2d DCA 1975), *cert. denied*, 333 So.2d 462 (Fla. 1976).

§13:40.1.3 Elements of Cause of Action — 3rd DCA

In a disparagement action the plaintiff must allege and prove the following elements:

1. A falsehood;
2. has been published, or communicated to a third person;
3. when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff, and
4. in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and
5. special damages are proximately caused as a result of the published falsehood.

Source

Bothmann v. Harrington, 458 So.2d 1163, 1168 (Fla. 3d DCA 1984).

See Also

1. *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So.2d 944, 948 (Fla. 3d DCA 1995) (Generally, the publication of any false and malicious statement which tends to disparage the quality, condition, or value of the property of another, and which causes him special injury or damage, is actionable. It is essential to a cause of action that the alleged slanderous or disparaging statement be made or published to some third person.).

§13:40.1.4 Elements of Cause of Action — 4th DCA

In an action for disparagement of title the plaintiff must prove the following elements:

1. a falsehood;
2. has been published, or communicated to a third person;
3. when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff and;
4. in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and
5. special damages are proximately caused as a result of the published falsehood.

Source

McAllister v. Breakers Seville Ass'n, Inc., 981 So.2d 566, 573 (Fla. 4th DCA 2008).

See Also

1. *Trigeorgis v. Trigeorgis,* 240 So.3d 772, 775 (Fla. 4th DCA 2018).
2. *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp*., 831 So.2d 204, 209 (Fla. 4th DCA 2002) (This court has noted that an action for disparagement of title actually falls within the group of torts collectively titled "injurious falsehoods." The Restatement of (Second) of Torts, Section 623A (1977), recognizes that while an action for injurious falsehood is similar to defamation in that both involve "the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff," the two torts protect different interests. The defamation action protects the personal reputation of the injured party, while an action for injurious falsehood protects economic interests of the injured party against pecuniary loss.).
3. *Atkinson v. Fundaro,* 400 So.2d 1324, 1326 (Fla. 4th DCA 1981) ("Slander of title is the wrongful, intentional and malicious disparagement of vendibility of title to real property.").
4. *Procacci v. Zacco,* 402 So.2d 425 (Fla. 4th DCA 1981).
5. *Tishman-Speyer Equitable South Fla. Venture v. Knight Investments, Inc.,* 591 So.2d 213 (Fla. 4th DCA 1991), *rev. denied*, 589 So.2d 291 (Fla. 1991).
6. *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 387 (Fla. 4th DCA 1999).

§13:40.1.5 Elements of Cause of Action — 5th DCA

To establish the elements of slander of title, the plaintiff must prove that the defendant has communicated to a third party a false statement disparaging title which has caused the plaintiff actual damages.

In a disparagement action, the plaintiff must allege and prove the following elements:

(1) A falsehood
(2) has been published, or communicated to a third person
(3) when the defendant-publisher knows or reasonably should know that it will likely result in inducing others not to deal with the plaintiff and
(4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and
(5) special damages are proximately caused as a result of the published falsehood.

Source

Medellin v. MLA Consulting, Inc., 69 So.3d 372, 376 (Fla. 5th DCA 2011); *Residential Communities of America v. Escondido Community Assoc.*, 645 So.2d 149, 150 (Fla. 5th DCA 1994).

See Also

1. *Brown v. Kelly,* 545 So.2d 518 (Fla. 5th DCA 1989) (" 'Slander of title' is defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, or of some right of his causing him special damage.").
2. *McDonald v. McDonald*, 402 So.2d 1197, 1200 (Fla. 5th DCA 1981), *appeal dismissed,* 411 So.2d 380 (Fla. 1981) ("The tort of slander of title is defined as making a false or malicious oral or written statement which disparages a person's title to real property, causing him damage.").

§13:40.2 Statute of Limitations

Two Years. Fla. Stat. §95.11(4)(g); See *Sailboat Key, Inc. v. Gardner*, 378 So.2d 47, 48 (Fla. 3d DCA 1979) (slander of title and defamation claims share the same statute of limitations and defenses).

§13:40.3 References

1. 19A Fla. Jur. 2d *Defamation and Privacy* §§191 – 206 (2005).
2. 50 Am. Jur. 2d *Libel and Slander* §§554 – 568 (1995).
3. 53 C.J.S. *Libel and Slander* §§310 – 340 (2005).
4. W. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 Colum. L. Rev. 425 (1959).
5. Restatement of Torts §§624 – 626 (1977).

§13:40.4 Defenses

1. **Good Faith:** *Residential Communities of America v. Escondido Community Assoc.*, 645 So.2d 149, 150 (Fla. 5th DCA 1994).

2. **Higher Price:** No damages to property where property was sold without difficulty at a higher price. *Atkinson v. Fundaro,* 400 So.2d 1324, 1326 (Fla. 4th DCA 1981).

3. **Opinion:** Statements of pure opinion based on known facts do not give rise to defamation claims. *Miami Child's World, Inc. v. Sunbeam Television Corp.*, 669 So.2d 336, 336 (Fla. 3d DCA 1996).

4. **Privilege:** Privilege is an affirmative defense in a slander of title action. *Colen v. Patterson*, 436 So.2d 182, 183 (Fla. 2d DCA 1983), *petition for rev. denied*, 438 So.2d 831 (Fla. 1983); *Procacci v. Zacco*, 402 So.2d 425, 427 (Fla. 4th DCA 1981).

5. **Specific Acts:** Filing an affidavit for specific performance in a lawsuit does not constitute slander of title. *Bonded Inv. & Realty Co. v. Waksman*, 437 So.2d 162 (Fla. 2d DCA 1983). Protecting one's rights by recording a contract does not constitute slander of title. *McDonald v. McGowan*, 402 So.2d 1197 (Fla. 5th DCA 1981). *See Also Domres v. Perrigan*, 760 So.2d 1028, 1030 (Fla. 5th DCA 2000).

6. **Special Damages:** To state a claim, a plaintiff must specifically plead special damages. The special damages rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales. *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 388 (Fla. 4th DCA 1999). The special damages pled must have been foreseeable and normal consequences of the alleged wrongful conduct, and the conduct must be a substantial factor in bringing about the losses. *Bothmann v. Harrington*, 458 So.2d 1163, 1168 (Fla. 3d DCA 1984).

7. **Truth:** Truth is a complete defense to defamation claims. Art. I, §4, Fla. Const.; *Trigeorgis v. Trigeorgis*, 240 So.3d 772, 775 (Fla. 4th DCA 2018).

§13:40.5 Related Matters

1. **Entitlement to Attorney Fees:** Proof of slander of title entitles plaintiff to attorney fees because Section 633 of the Restatement defines the term "pecuniary loss" as including the expense of litigation to remove the cloud cast upon the title. *Glusman v. Lieberman*, 285 So.2d 29, 31 (Fla. 4th DCA 1973); *accord Colen v. Patterson*, 436 So.2d 182, 183 (Fla. 2nd DCA 1983).

2. **Malice:** While malice is an element of a cause of action for slander of title, a plaintiff sustains his burden of proof once he establishes that a defendant has communicated untrue statements to a third person which disparage the plaintiff's title and cause him actual or special damage. *Continental Development Corp. of Fla. v. Duval Title and Abstract Co.*, 356 So.2d 925, 928 (Fla. 2d DCA 1978). *See*

Also Allington Towers Condominium North, Inc. v. Allington Towers North, Inc., 415 So.2d 118 (Fla. 4th DCA 1982).

3. **Punitive Damages:** A plaintiff must prove actual malice in order to recover punitive damages. *Continental Development Corp. of Fla. v. Duval Title and Abstract Co.*, 356 So.2d 925, 928 (Fla. 2d DCA 1978).

4. **Restatement (Second) of Torts:** In *Lehman v. Goldin*, 36 So.2d 259, 260 (Fla. 1948), the supreme court adopted sections 624 – 626 of the Restatement of Torts as the "law applicable" to the tort of injurious falsehood. The supreme court has never adopted the Restatement of Torts (Second) §§623A – 652 (1977) as applicable to injurious falsehood. The Second Restatement's approach to injurious falsehood, unlike the original restatement, bases liability upon a defendant's knowing or reckless falsehood. Prosser and Keeton indicate that the Second Restatement's approach to the tort of injurious falsehood "has much to commend it: a good deal of confusion would be removed, and liability would be placed squarely on serious fault … and to a large extent the matter of privileges, with their shifting burdens of proof, would likewise be avoided." Some Florida law in this area is based on the "unsound analogy to personal defamation, when the proper analogy is rather to cases of interference with contract or to fraud." *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 387 (Fla. 4th DCA 1999).

5. **Wrongful Filing of Lis Pendens:** An intentional, wrongful filing of a notice of lis pendens will support an action for slander of title. *Atkinson v. Fundaro*, 400 So.2d 1324, 1326 (Fla. 4th DCA 1981); *Miceli v. Gilmac Developers, Inc.*, 467 So.2d 404, 405-06 (Fla. 2nd DCA 1985); *Bothmann v. Harrington*, 458 So.2d 1163, 1168 (Fla. 3rd DCA 1984). There is a distinction between an improper filing of a lis pendens in a procedural sense (e.g., facially defective) and a wrongful filing in a substantive sense (e.g., where there is no litigation relative to the property), and only the latter will support a slander of title action because of the "falsehood" requirement. *Bothmann v. Harrington*, 458 So.2d 1163, 1168-69 (Fla. 3rd DCA 1984). A lis pendens properly filed in connection with litigation concerning the property is a privileged communication insufficient to support a slander of title claim. *Tishman-Speyer Equitable South Florida Venture v. Knight Investments, Inc.*, 591 So.2d 213, 214 (Fla. 4th DCA 1991); *Procacci v. Zacco*, 402 So.2d 425, 427 (Fla. 4th DCA 1981). Conversely, there is no privilege where it is substantively improper and does not involve property in litigation. *Atkinson v. Fundaro*, 400 So.2d 1324, 1326 (Fla. 4th DCA 1981). Although privilege is an affirmative defense to the element of malice, a finding of "actual malice" may overcome the privilege. *Residential Communities of America v. Escondido Community Ass'n*, 645 So.2d 149, 150 (Fla. 5th DCA 1994); *Bothmann v. Harrington*, 458 So.2d 1163, 1168 n. 3 (Fla. 3rd DCA 1984); *Allington Towers Condominium North, Inc. v. Allington Towers North*, Inc., 415 So.2d 118, 119 (Fla. 4th DCA 1982); *Gates v. Utsey*, 117 So.2d 486, 488 (Fla. 1st DCA 1965).

6. **Plaintiff's Burden to Prove Falsity.** In a slander of title action, the plaintiff bears the burden of proving falsity. Unlike a personal slander action, there is no presumption that a disparaging statement is false. *Bothmann v. Harrington*, 458 So.2d 1163, 1169 (Fla. 3rd DCA 1984).

§13:40.6 Sample Cause of Action

COUNT FOR SLANDER OF TITLE

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Defendant communicated to a third person a statement disparaging Plaintiff's title.
The statement communicated by Defendant to a third person disparaging Plaintiff's title is untrue.
Defendant's communication caused Plaintiff to suffer actual damages.

WHEREFORE, Plaintiff demands monetary damages against Defendant for slander of title and such other relief this Court deems just and proper.

§13:50 TRESPASS ON THE CASE

§13:50.1 Elements of Cause of Action — Florida Supreme Court

An action on the case lies to recover damages for torts not committed with force, actual or implied; or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate but consequential; or where the interest in the property was only in reversion—in all of which cases trespass is not sustainable.

Source

Atlantic Coast Line R. Co. v. Rutledge, 165 So. 563, 564 (Fla. 1935).

§13:50.1.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§13:50.1.2 Elements of Cause of Action — 2nd DCA

The issue particularized was whether the personal injury claimed was a direct and immediate result of the trespass, or whether it was consequential and collateral. If the former, the appropriate action was designated to be trespass; if the latter, then trespass on the case would be the action, to which contributory negligence could be interposed as a defense.

Source

Leonard v. Nat Harrison Associates, Inc., 137 So.2d 18, 19 (Fla. 2d DCA 1962).

See Also

1. *Lauck v. General Telephone Company*, 300 So.2d 759, 761 (Fla. 2d DCA 1974).
2. *Leonard v. Nat Harrison Associates, Inc.*, 122 So.2d 432 (Fla. 2d DCA 1960) ("If the injury was, in fact, direct and immediate, it is a trespass; but on the other hand, if it is consequential or collateral it will be trespass on the case.").

§13:50.1.3 Elements of Cause of Action — 3rd DCA

An action on the case lies to recover damages for torts not committed with force, actual or implied; or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate but consequential; or where the interest in the property was only in reversion—in all of which cases trespass is not sustainable.

Source

Winselmann v. Reynolds, 690 So.2d 1325, 1327 (Fla. 3d DCA 1997).

See Also

1. *Smith v. McCullough Dredging Company*, 152 So.2d 194, 196 (Fla. 3d DCA 1963), *cert. denied*, 165 So.2d 178 (Fla. 1964) ("The cause of action for simple trespass can be distinguished from that for trespass on the case, or negligence, by the character of the act causing the injury. Where the injury results directly and immediately from the act of the defendant and is not merely consequential, the cause of action is for simple trespass and contributory negligence is no defense. Where the injury is the indirect or secondary consequence of the defendant's act, the cause of action is for trespass on the case and contributory negligence is a defense.").

§13:50.1.4 Elements of Cause of Action — 4th DCA

[No citation for this edition.]

See Also

1. *Osephcook v. Gateway Insurance Company*, 298 So.2d 169, 171 (Fla. 4th DCA 1974).

§13:50.1.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§13:50.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p).

§13:50.3 References

1. 55 Fla. Jur. 2d *Trespass* §§1 – 7 (2000).
2. 1 Fla. Jur. 2d *Actions* §§1 – 8 (2004).
3. 75 Am. Jur. 2d *Trespass* §7 (1991).
4. 1 Am. Jur. 2d *Actions* §§18 – 20 (2005).
5. 87 C.J.S. *Trespass* §70 (2000).
6. 1A C.J.S. *Actions* §128 (2005).
7. Restatement (Second) of Torts §220(a) (1965).
8. Clifford W. Crandall, Florida Common Law Practice (1928).

§13:50.4 Defenses

1. **Assumption of Risk:** See 1 Am. Jur. 2d *Actions* §19 (2005).

2. **Contributory Negligence:** The issue particularized was whether the personal injury claimed was a direct and immediate result of the trespass, or whether it was consequential and collateral. If the former, the appropriate action was designated to be trespass; if the latter, then trespass on the case would be the action, to which contributory negligence could be interposed as a defense. *Leonard v. Nat Harrison Associates, Inc.*, 137 So.2d 18, 19 (Fla. 2d DCA 1962).

3. **Immediate and Consequential:** The terms "immediate" and "consequential" should be understood, not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act, but in reference to the progress and termination of the act, to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act at any moment of its progress, from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence. *Leonard v. Nat Harrison Associates, Inc.*, 122 So.2d 434 (Fla. 2d DCA 1960).

§13:50.5 Related Matters

1. **Background:** The development of "trespass on the case" is discussed in *Leonard v. Nat Harrison Associates, Inc.*, 122 So.2d 432, 434 (Fla. 2d DCA 1960).

2. **Easements:** The proper remedy at law for injury to or disturbance of an easement is an action on the case and not an action of trespass or ejectment. *Florida Power Corporation v. McNeely*, 125 So.2d 311, 316 (Fla. 2d DCA 1961), *cert. denied*, 138 So.2d 341 (Fla. 1961). *See Also Winselmann v. Reynolds*, 690 So.2d 1325, 1327 (Fla. 3d DCA 1997).

3. **Remainderman:** One who has a vested remainder in land has a right to protect the estate so that he may receive the same when it ought to come to him by the terms of the limitation, and he may maintain a proper action for any injury to the inheritance, committed or threatened, whether by the tenant in possession or by a stranger. In the case of a trespass which causes permanent injury to the inheritance, the remainderman may maintain an action of trespass on the case if the trespass was by a stranger, and, if it was by the owner of the particular estate, he can maintain an action of waste or an action in the nature of waste. *Weed v. Knox*, 27 So.2d 419, 420 (Fla. 1946).

§13:60 IMPLIED WAY OF NECESSITY

§13:60.1 Florida Statutes

§704.01 Common-law and statutory easements defined and determined.

(1) IMPLIED GRANT OF WAY OF NECESSITY. The common-law rule of an implied grant of a way of necessity is hereby recognized, specifically adopted, and clarified. Such an implied grant exists where a person has heretofore granted or hereafter grants lands to which there is no accessible right-of-way except over her or his land, or has heretofore retained or hereafter retains land which is inaccessible except over the land which the person conveys. In such instances a right-of-way is presumed to have been granted or reserved. Such an implied grant or easement in lands or estates exists where there is no other reasonable and practicable way of egress, or ingress and same is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. An implied grant arises only where a unity of title exists from a common Source other than the original grant from the state or United States; provided, however, that where there is a common Source of title subsequent to the original grant from the state or United States, the right of the dominant tenement shall not be terminated if title of either the dominant or servient tenement has been or should be transferred for nonpayment of taxes either by foreclosure, reversion, or otherwise. Fla. Stat. 704.01 (2005) (Current through the 2018 Second Regular Session of the 25th Legislature).

§13:60.2 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§13:60.2.1 Elements of Cause of Action — 1st DCA

In order for the owner of a dominant tenement to be entitled to a way of necessity over the servient tenement, (1) both properties must at one time have been owned by the same party, (2) the common Source of title must have created the situation causing the dominant tenement to become landlocked, and (3) at the time the common Source of title created the problem the servient tenement must have had access to a public road.

Source

Enzor v. Rasberry, 648 So.2d 788, 791 (Fla. 1st DCA 1994).

See Also

1. *Matthews v. Quarles*, 504 So.2d 1246, 1247 (Fla. 1st DCA 1986).

§13:60.2.2 Elements of Cause of Action — 2nd DCA

To prove an easement of necessity, the claimant must show that (1) the two parcels of land . . . derive from a common grantor; (2) the only practical and reasonable means of ingress from a public road to the claimant's . . . land is across the property of which it was once a part; (3) the action of the common grantor in dividing his property created the circumstances referred to in (2); and (4) the requested means of access to a public road existed at the time of conveyance from the common grantor.

Source

Star Island Associates v. City of St. Petersburg Beach, 433 So.2d 998, 1002 (Fla. 2d DCA 1983), *rev. denied*, 440 So.2d 351 (Fla. 1983).

§13:60.2.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§13:60.2.4 Elements of Cause of Action — 4th DCA

An implied easement by necessity is granted when land is granted to which there is no accessible right-of-way except over the land. For entitlement to cross the servient land, the following must be present: (1) both properties must at one time have been owned by the same party, (2) the common Source of title must have created the situation causing the dominant tenement to become landlocked, and (3) at the time the common Source of title created the problem the servient tenement must have had access to a public road.

Source

PGA North II of Florida, LLC v. Division of Admin., State of Florida Dept. of Transp., 126 So.3d 1150, 1153-54 (Fla. 4th DCA 2012).

See Also

Roy v. Euro-Holland Vastgoed, 404 So.2d 410, 412 (Fla. 4th DCA 1981).

§13:60.2.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§13:60.3 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p); *Rosenberg v. Cape Coral Plumbing, Inc.*, 920 So.2d 61 (Fla. 2nd DCA 2005) (claim for implied indemnity treated as claim for common law indemnity).

§13:60.4 References

1. 20 Fla. Jur. 2d *Easements and Licenses in Real Property* §§32 – 40, 55 (2000).
2. 25 Am. Jur. 2d *Easements and Licenses in Real Property* §§30 – 38 (2004).
3. 28A C.J.S. *Easements* §§61 –102 (1996).
4. Kelly H. Buzzett & Billy Buzzett, *Establishing Common Law Easement by Necessity*, Fla. Bar J. 83 (May 1994).
5. William B. Johnson, Annotation, *Locating Easement of Way Created by Necessity*, 36 A.L.R.4th 769 (1985).
6. Michael A. DiSabatino, Annotation, *Way of Necessity Where Only Part of Land is Inaccessible*, 10 A.L.R.4th 500 (1981).
7. Michael A. DiSabatino, Annotation, *Way of Necessity Over Another's Land, Where A Means of Access Does Exist, But is Claimed to be Inadequate, Inconvenient, Difficult, or Costly*, 10 A.L.R.4th 447 (1981).
8. Charles C. Marvel, Annotation, *What Constitutes Unity of Title or Ownership Sufficient for an Easement by Implication or Way of Necessity*, 94 A.L.R.3d 502 (1979).
9. Annotation, *Conveyance of "Right of Way," in Connection with Conveyance of Another Tract, as Passing Fee or Easement*, 89 A.L.R.3d 767 (1979).
10. Daniel E. Feld, Annotation, *Right to Maintain Gate or Fence Across Right of Way*, 52 A.L.R.3d 9 (1973).
11. Annotation, *Right of Servient Owner to Maintain, Improve, or Repair Easement of Way at Expense of Dominant Owner*, 20 A.L.R.3d 1026 (1968).
12. Annotation, *Easement: Way by Necessity Where Property is Accessible by Navigable Water*, 9 A.L.R.3d 600 (1966).
13. Annotation, *Necessary Parties Defendant to Suit to Prevent or Remove Obstruction or Interference with Easement of Way*, 28 A.L.R.2d 409 (1953).
14. Comment, *Disregarding the Corporate Entity to Establish the Unitary Ownership Required for an Implied Easement*, Wash. U. L.Q. 201 (1975).
15. Edmond H. Bodkin, *Easements of Necessity and Public Policy*, 89 Law Q. Rev. 87 (Jan. 1973).
16. James W. Simonton, *Ways by Necessity*, 25 Colum. L. Rev. 571 (1925).
17. 2 Thompson on Real Property §362 (1980).

§13:60.5 Defenses

1. **Absolute Necessity Required:** In *Tortoise Island Communities, Inc. v. Moorings Association, Inc.*, 489 So.2d 22 (Fla. 1986), the Supreme Court held that absolute necessity, not merely reasonable necessity, is required for an implied grant of way of necessity. In *Hunter v. Marquardt, Inc.*, 549 So.2d 1095 (Fla. 1st DCA 1989), *rev. denied,* 560 So.2d 234 (Fla. 1990), the First District applied the holding in *Tortoise Island* in reversing a final judgment and summarized the applicable law as follows: An implied easement of a way of necessity should not be granted where there is other reasonable access to the property that will enable the owner to achieve a beneficial use and enjoyment of the property. *Roy v. Euro-Holland Vastgoed, B.V.*, 404 So.2d 410 (Fla. 4th DCA 1981). The term "necessity," as used in the common law doctrine implying ways of necessity, means that no other reasonable mode of accessing the property exists without implying the easement, and the fact that one means of access is more convenient than another does not make the more convenient means a "necessity." *Dupont v. Whiteside*, 721 So.2d 1259, 1262 (Fla. 5th DCA 1998).

2. **Cannot Choose from among Several Means:** A party claiming easement rights may not select its choice from among several means of access, even though one may be more convenient than the rest. *I.R.T. Property Company v. Sheehan*, 581 So.2d 591, 592 (Fla. 2d DCA 1991). *See Also Parham v. Reddick*, 537 So.2d 132, 135 (Fla. 1st DCA 1988); *Matthews v. Quarles*, 504 So.2d 1246, 1248 (Fla. 1st DCA 1986); *Roy v. Euro-Holland Vastgoed*, 404 So.2d 410, 413 (Fla. 4th DCA 1981).

3. **No Access to a Public Road:** A common law way of necessity cannot exist across land which had no access to a public road in existence at the time the property was divided by a common grantor. *Griffin v. North*, 373 So.2d 96, 97 (Fla. 2d DCA 1979).

4. **Sovereign Immunity not a Defense:** Sovereign immunity does not bar a claim for a way of necessity pursuant to section 704.01(1), Florida Statutes. *Gulf Oil Realty Company v. Department of Transportation*, 685 So.2d 1032, 1033 (Fla. 5th DCA 1997). *See Also South Florida Water Management Dist. v. Layton*, 402 So.2d 597 (Fla. 2d DCA 1981).

§13:60.6 Related Matters

1. **Common Source:** The common Source must be a Source other than the original grant from the state or Federal government. *Hunt v. Smith*, 137 So.2d 232, 233 (Fla. 2d DCA 1962). In addition, the "common Source" within contemplation of the rule must be shown to be he who created the situation which ultimately resulted in the landlocked parcel. *Hanna v. Means*, 319 So.2d 61, 63 (Fla. 2d DCA 1975). The common Source of title need not be the immediate grantor but is any common Source in the chain of title to the two estates which meets the other criteria for creation of a way of necessity over the property of another. *Roy v. Euro-Holland Vastgoed*, 404 So.2d 410, 413 (Fla. 4th DCA 1981). *See Also Cirelli v. Ent*, 885 So.2d 423, 427 (Fla. 5th DCA 2004).

2. **Dedicated to Public Use:** A roadway can become dedicated to public use either under common law or by statutory presumptive dedication. Common law dedication requires proof of: (1) an intention by the landowner to dedicate the property to public use; and (2) an acceptance by the public. Proof of both elements must be clear and unequivocal, and the burden of proof is on the party claiming the dedication. *See Star Island Associates v. City of St. Petersburg Beach*, 433 So.2d 998, 1003 (Fla. 2d DCA 1983), *rev. denied*, 440 So.2d 351 (Fla. 1983); *Bishop v. Nussbaum*, 175 So.2d 231, 232 (Fla. 2d DCA 1965); *Hancock v. Tipton*, 732 So.2d 369, 372 (Fla. 2d DCA 1999).

3. **Proposal for Settlement:** See discussion of proposal for settlement in the article by Kelly H. Buzzett & Billy Buzzett, *Establishing Common Law Easement by Necessity*, Fla. Bar J. 83 (May 1994).

4. **Presumption:** A way of necessity results from the application of the presumption that whenever a party conveys property he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. *Roy v. Euro-Holland Vastgoed*, 404 So.2d 410, 413 (Fla. 4th DCA 1981).

5. **Public Policy:** A way of necessity is also said to be supported by the rule of public policy that lands should not be rendered unfit for occupancy or successful cultivation. *Roy v. Euro-Holland Vastgoed*, 404 So.2d 410, 412 (Fla. 4th DCA 1981).

6. **Sections 704.01(1) and (2) Read Sequentially:** Sections 704.01(1) and (2) must be read sequentially. A landowner who has a common-law way of necessity under §704.01(1) is ineligible for a statutory way of necessity under §704.01(2). *Boyd v. Walker*, 776 So.2d 370 (Fla. 5th DCA 2001).

§13:70 STATUTORY WAY OF NECESSITY

§13:70.1 Florida Statutes

F.S. §704.01 Common-law and statutory easements defined and determined.

(2) Statutory way of necessity exclusive of common-law right. Based on public policy, convenience, and necessity, a statutory way of necessity exclusive of any common-law right exists when any land, including land formed by accretion, reliction, or other naturally occurring processes, or portion thereof, which is being used or is desired to be used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stockraising purposes is shut off or hemmed in by lands, fencing, or other improvements by other persons so that no practicable route of egress or ingress is available therefrom to the nearest practicable public or private road in which the landlocked owner has vested easement rights. The owner or tenant thereof, or anyone in their behalf, lawfully may use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service, including, but not limited to, water, wastewater, reclaimed water, natural gas, electricity, and telephone service, over, under, through, and upon the lands which lie between the said shut-off or hemmed-in lands and such public or private road by means of the nearest practical route, considering the use to which said lands are being put; and the use thereof, as aforesaid, shall not constitute a trespass; nor shall the party thus using the same be liable in damages for the use thereof, provided that such easement shall be used only in an orderly and proper manner. Fla. Stat. §704.01 (2005) (Current through the 2018 Second Regular Session of the 25th Legislature).

§13:70.2 Elements of Cause of Action — Florida Supreme Court

Thus, to obtain a statutory way of necessity, the landowner must establish that the land is (1) outside of a municipality, (2) being used or desired to be used for residential or agricultural purposes, and (3) shut off or hemmed in by lands, fencing, or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road. If these three circumstances exist, the owner of the landlocked parcel is entitled to use and maintain an easement for persons, vehicles, stock, franchised cable television service, and any utility service, . . . over, under, through, and upon the lands which lie between the landlocked parcel and the public or private road by means of the nearest practical route.

Source

Blanton v. City of Pinellas Park, 887 So.2d 1224, 1229 (Fla. 2004).

§13:70.2.1 Elements of Cause of Action — 1st DCA

In *Blanton v. City of Pinellas Park*, the Florida Supreme Court explained that to obtain a statutory way of necessity, the landowner must establish that the land is "(1) outside of a municipality, (2) 'being used or desired to be used' for residential or agricultural purposes, and (3) 'shut off or hemmed in by lands, fencing or other improvements of other persons so that no practicable route of egress or ingress shall be available therefrom to the nearest practicable public or private road," 887 So.2d 1224, 1229 (Fla.2004) (quoting §704.01(2), Fla. Stat. (2003)).

Source

Messer v. Sander, 144 So.3d 556, 569 (Fla. 1st DCA 2014).

§13:70.2.2 Elements of Cause of Action — 2nd DCA

[No citation for this edition.]

§13:70.2.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§13:70.2.4 Elements of Cause of Action — 4th DCA

[No citation for this edition.]

§13:70.2.5 Elements of Cause of Action — 5th DCA

Pursuant to section 704.01(2), a statutory way of necessity comes into existence when the following are established: (1) the claimant's property is landlocked by property belonging to others; (2) there is no practicable route of ingress or egress to the nearest public or private road; (3) there is no right to a common law way of necessity under section 704.01(1) because there is no unity of title between the dominant (landlocked) and servient (adjoining) tracts; (4) the landlocked property is situated outside a municipality; (5) the landlocked property is being used or the owner desires to use the property as a dwelling or for agricultural, timber raising or cutting, or stockraising purposes; and (6) the statutory way of necessity sought over the adjoining parcel is the "nearest practicable route" of access.

Source

Cirelli v. Ent, 885 So.2d 423, 432 (Fla. 5th DCA 2004).

§13:70.3 Statute of Limitations

N/A. See Fla. Stat. §704.04; *South Florida Water Management District v. Layton*, 402 So.2d 597 (Fla. 2nd DCA 1981).

§13:70.4 References

1. 20 Fla. Jur. 2d *Easements and Licenses in Real Property* §§33 – 40, 55 (2000).
2. 25 Am. Jur. 2d *Easements and Licenses in Real Property* §§30 – 38 (2004).
3. 28A C.J.S. *Easements* §§91 – 107 (1996).
4. Kelly H. Buzzett & Billy Buzzett, *Establishing Common Law Easement by Necessity*, Fla. Bar J. 83 (May 1994).

§13:70.5 Defenses

1. **Absolute Necessity:** Absolute necessity, not merely reasonable necessity, is required for an implied grant of way of necessity. A claimant is not entitled to elect between several adequate means of access, even though one may be more convenient than another. *C.E. Dupont v. Whiteside*, 721 So.2d 1259, 1262 (Fla. 5th DCA 1998).

2. **Land Use:** The statutory way of necessity exists only when the lands are being used or desired to be used for the purposes specified in the statute. *Hunt v. Smith*, 137 So.2d 232, 233 (Fla. 2d DCA 1962). *See Also Blue Water Corp. v. Hechavarria*, 516 So.2d 17, 18 (Fla. 3d DCA 1987); *Guess v. Azar*, 57 So.2d 443 (Fla. 1952); *Staten v. Gonzalez-Falla*, 904 So.2d 498, 500 (Fla. 1st DCA 2005).

3. **No Express or Implied Easement:** A statutory way may be declared only if no other access exists by common law implication, Section 704.01(1), or by expressed grant. *Ganey v. Byrd*, 383 So.2d 652 (Fla. 1st DCA 1980). *See Also Hewitt v. Menees*, 100 So.2d 161, 164 (Fla. 1958) (resolution passed by the Board of County Commissioners precluded statutory way of necessity); *Reyes v. Perez*, 284 So.2d 493, 495 (Fla. 4th DCA 1973) (existence of a common law easement as described in section (1) bars the establishment of a statutory easement under section (2).); *Faison v. Smith*, 510 So.2d 928, 929 (Fla. 5th DCA 1987)

(It is necessary that the claimant show as a condition of his claim that he is, in fact, hemmed in and that there is no practicable route of ingress or egress.); *Parham v. Reddick*, 537 So.2d 132, 135 (Fla. 1st DCA 1988); *Hancock v. Tipton*, 732 So.2d 369, 373 (Fla. 2d DCA 1999).

4. **Sovereign Immunity:** Sovereign immunity is not a defense to an action for a statutory way of necessity. *South Florida Water Management District v. Layton*, 402 So.2d 597 (Fla. 2d DCA 1981).

§13:70.6 Related Matters

1. **Duty of the Courts:** Where the parties have clearly stated their intentions the court must give effect to those intentions. *Jabour v. Toppino*, 293 So.2d 123, 126 (Fla. 3d DCA 1974). A person granting an easement may restrict the easement in any way he wishes, and the easement holder cannot expand the easement beyond that contemplated at the time it was granted. *Star Island Associates v. City of St. Petersburg Beach*, 433 So.2d 998, 1003 (Fla. 2d DCA 1983), *rev. denied*, 440 So.2d 351 (Fla. 1983).

2. **Intent:** Thus, section 704.01(2) survives constitutional challenge because "it provides a lawful means by which to accomplish full utilization of the state's natural reSources, [and] their development in the ordinary channel of commerce and industry." *Stein v. Darby*, 126 So.2d 313, 316 (Fla. 1st DCA 1961), *cert. denied*, 134 So.2d 232 (Fla. 1961). *See Also Staten v. Gonzalez-Falla*, 904 So.2d 498, 501 (Fla. 1st DCA 2005).

3. **Proposal for Settlement:** See discussion of proposal for settlement in the article by Kelly H. Buzzett & Billy Buzzett, *Establishing Common Law Easement by Necessity*, Fla. Bar J. 83 (May 1994).

4. **Practical and Practicable:** Practicable means capable of being effected or accomplished, and practical means adapted to actual conditions. What is practicable is capable of being done; what is practical is what is capable of being done usefully or valuably. Practicable implies feasibility. Practical is efficient, when governed by actual, ordinary conditions. *Hoffman v. Laffitte*, 564 So.2d 170, 172 (Fla. 1st DCA 1990).

5. **Sections 704.01(1) and (2) Read Sequentially:** Sections 704.01(1) and (2) must be read sequentially. A landowner who has a common-law way of necessity under §704.01(1) is ineligible for a statutory way of necessity under §704.01(2). *Boyd v. Walker*, 776 So.2d 370 (Fla. 5th DCA 2001).

6. **Unreasonable Refusal Defined:** The term "unreasonable refusal," as used in Section 704.04, is susceptible to be understood by a person of common intelligence when the term is defined in its plain and ordinary sense and applied to this situation. The statute is clear so that persons of common intelligence can understand its meaning. *Bell v. Cox*, 642 So.2d 1381, 1383 (Fla. 5th DCA 1994), *rev. denied*, 654 So.2d 918 (Fla. 1995).

§13:80 QUIET TITLE

§13:80.1 Florida Statutes

Chapter 65 Quieting Title

§65.011 Real estate; certain jurisdiction over.

Chancery courts have jurisdiction of actions by any person or corporation claiming to own any land or part thereof, or by two or more claiming to own the same land or part thereof under a common title against more than one person or corporation occupying or claiming title to the land or part thereof adversely to plaintiff, whether defendants claim or hold under a common title or not; and shall determine the title of plaintiff as against defendants and enter judgment quieting the title of, and awarding possession to, the plaintiff entitled thereto and may enter injunctions, temporary or perpetual, appoint receivers, and enter such orders about costs as are necessary to protect the rights of the parties. Fla. Stat. §65.011 (1965) (Current through the 2018 Second Regular Session of the 25th Legislature).

§65.021 Real estate; removing clouds.

Chancery courts have jurisdiction of actions brought by any person or corporation, whether in actual possession or not, claiming legal or equitable title to land against any person or corporation not in actual possession, who has, appears to have or claims an adverse legal or equitable estate, interest, or claim therein to determine such estate, interest, or claim and quiet or remove clouds from the title to the land. It is no bar to relief that the title has not been litigated at law or that there is only one litigant to each side of the controversy or that the adverse claim, estate, or interest is void upon its face, or though not void on its face, requires extrinsic evidence to establish its validity. Fla. Stat. §65.021(1967) (Current through the 2018 Second Regular Session of the 25th Legislature).

§65.031 Real estate; removing clouds; plaintiffs.

An action in chancery for quieting title to, or clearing a cloud from, land may be maintained in the name of the owner or of any prior owner who warranted the title. All lands, the title to which is subject to a common defect, may be embraced in one action irrespective of the number of existing legal or equitable owners. Fla. Stat. §65.031 (1965) (Current through the 2018 Second Regular Session of the 25th Legislature).

§65.041 Real estate; removing clouds; defendants.

No person not a party to the action is bound by any judgment rendered adverse to his or her interest, but any judgment favorable to the person inures to that person's benefit to the extent of his or her legal or equitable title. Fla. Stat. §65.041 (1995) (Current through the 2018 Second Regular Session of the 25th Legislature).

§65.051 Real estate; removing clouds; joinder.

Two or more persons who are interested in removing a cloud from or quieting title to land as against the same clouds or adverse claims may join as plaintiffs in a single action to remove such clouds or quiet the title, although their interests relate to separate lands or parts thereof. Fla. Stat. §65.051 (1967) (Current through the 2018 Second Regular Session of the 25th Legislature).

§65.061 Quieting title; additional remedy.

(1) JURISDICTION.—Chancery courts have jurisdiction of actions by any person or corporation claiming legal or equitable title to any land, or part thereof, or when any two or more persons claim to own the same land, or any part thereof under a common title against all persons or corporations claiming title to or occupying the land adversely to plaintiff, whether defendants claim or hold under a common title or not, and shall determine the title of plaintiff and may enter judgment quieting the title and awarding possession to the party entitled thereto, but if any defendant is in actual possession of any part of the land, a trial by jury may be demanded by any party, whereupon the court shall order an issue in ejectment as to such lands to be made and tried by a jury. Provision for trial by jury does not affect the action on any lands that are not claimed to be in the actual possession of any defendant. The court may enter final judgment without awaiting the determination of the ejectment action.

(2) GROUNDS.—When a person or corporation not the rightful owner of land has any conveyance or other evidence of title thereto, or asserts any claim, or pretends to have any right or title thereto, which may cast a cloud on the title of the real owner, or when any person or corporation is the true and equitable owner of land the record title to which is not in the person or corporation because of the defective execution of any deed or mortgage because of the omission of a seal thereon, the lack of witnesses, or any defect or omission in the wording of the acknowledgment of a party or parties thereto, when the person or corporation claims title thereto by the defective instrument and the defective instrument was apparently made and delivered by the grantor to convey or mortgage the real estate and was recorded in the county where the land lies, or when possession of the land has been held by any person or corporation adverse to the record owner thereof or his or her heirs and assigns until such adverse possession has ripened into a good title under the statutes of this state, such person or corporation may file complaint in any county in which any part of the land is situated to have the conveyance or other evidence of claim or title canceled and the cloud removed from the title and to have his or her title quieted, whether such real owner is in possession or not or is threatened to be disturbed in his or her possession or not, and whether defendant is a resident of this state or not, and whether the title has been litigated at law or not, and whether the adverse claim or title or interest is void on its face or not, or if not void on its face that it may require extrinsic evidence to establish its validity. A guardian ad litem shall not be appointed unless it shall affirmatively appear that the interest of minors, persons of unsound mind, or convicts are involved.

(3) DERAIGNMENT OF TITLE.—The plaintiff shall deraign his or her title from the original Source or for a period of at least 7 years before filing the complaint unless the court otherwise directs, setting forth the book and page of the records where any instrument affecting the title is recorded, if it is recorded, unless plaintiff claims from a common Source with defendant.

(4) JUDGMENT.—If it appears that plaintiff has legal title to the land or is the equitable owner thereof based on one or more of the grounds mentioned in subsection (2), or if a default is entered against defendant (in which case no evidence need be taken), the court shall enter judgment removing the alleged cloud from the title to the land and forever quieting the title in plaintiff and those claiming under him or her since the commencement of the action and adjudging plaintiff to have a good fee simple title to said land or the interest thereby cleared of cloud.

(5) RECORDING FINAL JUDGMENTS.—All final judgments may be recorded in the county or counties in which the land is situated and operate to vest title in like manner as though a conveyance were executed by a special magistrate or commissioner.

(6) OPERATION.—This section is cumulative to other existing remedies. Fla. Stat. §65.061 (2004) (Current through the 2018 Second Regular Session of the 25th Legislature).

§65.071 Quieting title; deeds without joinder of wife when separated for 30 years.

An action in chancery may be brought to quiet title to land to preclude any wife from claiming dower or any heirs from claiming any interest to land when the following facts exist:

(1) When any husband and wife have not cohabited as husband and wife for 30 years or more and during this time the husband has conveyed land as a single man and the land has come into the hands of purchasers for a valuable consideration without notice that the husband was married at the time he conveyed the land, and the purchasers have relied on the acknowledgment to deeds by the husband that he was a single man, and it afterwards became known that he was a married man at the time he deeded the land and his marriage has never been dissolved and he refuses to voluntarily get a dissolution of marriage to clear the title to preclude his wife from claiming any inchoate dower therein and his heirs from claiming any interest therein and when the wife has never lived in the county where the land is located with the husband as his wife and has never asserted any inchoate right to dower in the land, the inchoate right to dower is divested and is a cloud on the title to the land and the purchaser of the land has the right to remove the cloud and to prevent the wife or heirs from claiming any dower or other interest from such purchasers and their successors in title.

(2) When these facts are proven, the court shall adjudge that the wife and heirs of the husband are forever barred and perpetually enjoined from claiming any interest in the land arising out of dower or otherwise, and that the wife did not join in the execution of the deeds by which the husband deeded the land as a single man under the facts above-stated is not effective to reserve an inchoate right of dower in the land held by such purchasers. Fla. Stat. §65.071 (1973) (Current through the 2018 Second Regular Session of the 25th Legislature).

§65.081 Tax titles; quieting title.

(1) PARTIES.—Any grantee under any tax deed issued by the state, or any municipality or other political subdivision thereof, or any purchaser from the state, or any municipality or other political subdivision thereof, of any land the title to which has been acquired by this state or such municipality or political subdivision through any proceeding or foreclosure for the nonpayment of taxes or special assessments, or the successor in title to the grantee or purchaser, may maintain an action in chancery to quiet title to the land included in the tax deed, or so purchased against the holder of the record title to the land, and against any other person or corporation claiming any interest in the land or any lien or encumbrance thereon, before issuance of the tax deed or before the loss of title to the land in the tax proceeding or foreclosure.

(2) DERAIGNING TITLE.—Actions may be maintained hereunder whether or not plaintiff is in possession of the land involved but when defendant is in actual possession of the land a jury trial may be had as provided in other actions to quiet title. When the action is based on a tax deed, the complaint need not deraign title beyond the issuance of the tax deed. When the action is based on a conveyance by this state, or any municipality or other political subdivision thereof, of land the title to which it has acquired through a foreclosure or other proceeding for the nonpayment of taxes, the complaint need not deraign title beyond the deed or other instrument or act vesting title in the state or municipality or other political subdivision of the state.

(3) WHEN TAXES HAVE BEEN PAID.—No defense to the action or attack upon the tax deed shall be made except the defense that the taxes assessed against the property had been paid by the former owner before issuance of the tax deed.

(4) WHEN TAX DEED HAS BEEN ISSUED BEFORE CONVEYANCE BY SOVEREIGN.—No defense shall be made to the action because of assessment of the property or issuance of the tax deed before the United States or the state has parted with title to the property, and no other attack shall be made on it, except the defense that the taxes assessed against the property had been paid by the person, or a claimant under him or her, to whom the United States patent or conveyance from the state was issued before the issuance of the tax deed. Fla. Stat. §65.081 (1995) (Current through the 2018 Second Regular Session of the 25th Legislature).

See Also

Stark v. Frayer, 67 So.2d 237, 239 (Fla. 1953); *Norton v. Jones*, 83 Fla. 81, 101 (Fla. 1922)..

§13:80.2 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§13:80.2.1 Elements of Cause of Action — 1st DCA

It is well settled that he who comes into equity to get rid of a cloud upon his own title must show clearly the validity of his own title and the invalidity of his opponents'. Equity will not act in such cases in the event of a doubtful title and a party to be relieved and to succeed in contests of this character must do so on the strength of his own title and not the weaknesses of his adversaries.

Source

Trustees of Internal Imp. Trust Fund v. Lord, 189 So.2d 534, 535-536 (Fla. 2d DCA 1966).

§13:80.2.2 Elements of Cause of Action — 2nd DCA

The law is clear that, he who comes into equity to get rid of a legal title as a cloud upon his own must show clearly the validity of his own title and the invalidity of his opponent's. Equity will not act in the event of a doubtful title. To succeed a party must do so on the strength of his own title.

Source

Van Loan v. Heather Hills Prop. Owners Assoc., Inc., 216 So.3d 18, 23 (Fla. 2d DCA 2016); *Culbertson v. Montanabault*, 133 So.2d 772, 774 (Fla. 2d DCA 1961).

§13:80.2.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§13:80.2.4 Elements of Cause of Action — 4th DCA

To state a cause of action to quiet title, the homeowners needed to allege that (1) they had title to the subject property; (2) a cloud on the title existed; and (3) that the cloud was invalid.

Source

D'Alessandro v. Fidelity Federal Bank & Trust, 154 So.3d 498, 499 (Fla. 4th DCA 2015).

§13:80.2.5 Elements of Cause of Action — 5th DCA

There are two essential elements in a cause of action to remove a cloud on title. The plaintiff must prove facts showing (1) his own title and (2) the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title.

Source

Mays v. Kirk, 414 F.2d 131, 133 (Fla. 5th DCA 1969).

§13:80.3 Statute of Limitations

The applicable statute of limitations depends upon the underlying action and the property in which the plaintiff seeks to quiet title. *Compare Admiral Sec. & Inv. Co., Curtis*, 804 So.2d 354 (Fla. 4th DCA 2014) (statute of limitations as to quiet title actions involving mortgages is 5 years as set forth in §Fla. Stat. §95.11(2)(c)) *with In re C.L. Whiteside & Assoc. Const. Co. Inc.*, 118 B.R. 886, 888 (S.D. Fla. 1990) (statute of limitations to quiet title to equipment is 4 years under Fla. Stat. §95.11(3)0; See Also *Singleton v. Greymar Assocs.*, 882 So.2d 1004, 1007 (Fla.2004) (discussing the interplay between foreclosure actions and the balances due on the corresponding note) and *Rigby v. Liles*, 505 So.2d 594 (Fla. 2d DCA 1987) (discussing statutes of limitations and laches in the context of quiet title actions).

§13:80.4 References

[Reserved. None for this edition.]

§13:80.5 Defenses

1. **Laches:** *See Brown v. Semple*, 204 So.2d 229, 232 (Fla. 3rd DCA 1967); *Norton v. Jones*, 83 Fla. 81 (Fla. 1922); *Prentice v. Pigate*, 588 So.2d 5 (Fla. 5th DCA 1991) (Quiet title remedy denied where plaintiff knew that title to the property was in another entity, but proffered the note and mortgage to the trial court with the intent that it be accepted as valid, binding legal instrument).

2. **Estoppel:** The doctrine of estoppel is only available as a defense in an action to defend apparent title, not establish title. *Bryant v. Peppe*, 238 So.2d 836, 838 (Fla. 1970). "The purpose of the rule that title may not be created by estoppel is to prevent the uncertainty of titles which would arise if parol evidence of an estoppel could be introduced to show that the paper title is not what it appears to be." *City of Naples v. Morris*, 71 So.2d 905, 906 (Fla. 1954).

§13:80.6 Related Matters

1. **The Federal Quiet Title Act:** *See* 28. U.S.C. §2409(a). The Quiet Title Act "has a twelve-year **statute** of **limitations**, which begins to run when the plaintiff or the plaintiff's predecessor in interest knew or should have known of the government's claim to the property at issue." *Modern, Inc. v. Florida*, 444 F.Supp. 2d 1234, 1244 (M.D. Fla. 2006) (citing 28 U.S.C. §2409a(g)).

2. **Mortgage:** A mortgage is only a lien that transfers no title, right of possession, or interest in land, and a mortgagee has no right to maintain a suit to remove or prevent a cloud on title. *Barclay v. Robert C. Malt & Co., Inc.*, 985 So.2d 53, 55 (Fla. 4th DCA 2008).

3. **Recoupment:** The defense of recoupment cannot be asserted in a quiet title action. *Rybovich Boat Works, Inc. v. Atkins*, 585 So.2d 270 (Fla. 1991).

4. **Attorney Fees:** There is no right to attorney fees in an action to quiet title absent a contractual or statutory basis, therefore. *Price v. Tyler*, 890 So.2d 246 (Fla. 2004). Section 65.061 of the Florida Statutes governs quiet title actions and does not authorize the award of attorney's fees.

5. **Taxes:** A plaintiff seeking to quiet title may be required to reimburse the defendant who has paid taxes or assessments on the property involved. This principle also applies when the defendant is the successful litigant. See *Hollywood, Inc. v. Clark*, 153 Fla. 501, 15 So. 2d 175 (1943); *Helseth v. Cleveland Trust Co.*, 49 So.2d 91 (Fla. 1950).

6. **Possession:** By statute, Florida has removed the common law requirement that a plaintiff be in possession of the property to bring a quiet title action. *Ford v. Turner*, 142 So.2d 335, 339 (Fla.2d DCA 1962).

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CHAPTER 14

CONSTRUCTION CASES

§14:10 BUILDING CODE, VIOLATION OF
§14:10.1 Florida Statutes
§14:10.2 Statute of Limitations
§14:10.3 References
§14:10.4 Related Matters

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§14:10 BUILDING CODE, VIOLATION OF

§14:10.1 Florida Statutes

§553.84 Statutory civil action.

Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation; however, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed.

§558.001 Legislative findings and declaration.

The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners. An effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional, and the insurer of the contractor, subcontractor, supplier, or design professional, with an opportunity to resolve the claim through confidential settlement negotiations without resort to further legal process.

§558.004 Notice and opportunity to repair.

(1) (a) In actions brought alleging a construction defect, the claimant shall, at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter. If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted.

(b) The notice of claim must describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect. Based upon at least a visual inspection by the claimant or its agents, the notice of claim must identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden. The claimant has no obligation to perform destructive or other testing for purposes of this notice.

(c) The claimant shall endeavor to serve the notice of claim within 15 days after discovery of an alleged defect, but the failure to serve notice of claim within 15 days does not bar the filing of an action, subject to s. §558.003. This subsection does not preclude a claimant from filing an action sooner than 60 days, or 120 days as applicable, after service of written notice as expressly provided in subsection (6), subsection (7), or subsection (8).

(2) Within 30 days after service of the notice of claim, or within 50 days after service of the notice of claim involving an association representing more than 20 parcels, the person served with the notice of claim under subsection (1) is entitled to perform a reasonable inspection of the property or of each unit subject to the claim to assess each alleged construction defect. An association's right to access property for either maintenance or repair includes the authority to grant access for the inspection. The claimant shall provide the person served with notice under subsection (1) and such person's contractors or agents reasonable access to the property during normal working hours to inspect the property to determine the nature and cause of each alleged construction defect and the nature and extent of any repairs or replacements necessary to remedy each defect. The person served with notice under subsection (1) shall reasonably coordinate the timing and manner of any and all inspections with the claimant to minimize the number of inspections. The inspection may include destructive testing by mutual agreement under the following reasonable terms and conditions:

(a) If the person served with notice under subsection (1) determines that destructive testing is necessary to determine the nature and cause of the alleged defects, such person shall notify the claimant in writing.

(b) The notice shall describe the destructive testing to be performed, the person selected to do the testing, the estimated anticipated damage and repairs to or restoration of the property resulting from the testing, the estimated amount of time necessary for the testing and to complete the repairs or restoration, and the financial responsibility offered for covering the costs of repairs or restoration.

(c) If the claimant promptly objects to the person selected to perform the destructive testing, the person served with notice under subsection (1) shall provide the claimant with a list of three qualified persons from which the claimant may select one such person to perform the testing. The person selected to perform the testing shall operate as an agent or subcontractor of the person served with notice under subsection (1) and shall communicate with, submit any reports to, and be solely responsible to the person served with notice.

(d) The testing shall be done at a mutually agreeable time.

(e) The claimant or a representative of the claimant may be present to observe the destructive testing.

(f) The destructive testing shall not render the property uninhabitable.

(g) There shall be no construction lien rights under part I of chapter 713 for the destructive testing caused by a person served with notice under subsection (1) or for restoring the area destructively tested to the condition existing prior to testing, except to the extent the owner contracts for the destructive testing or restoration.

If the claimant refuses to agree and thereafter permit reasonable destructive testing, the claimant shall have no claim for damages which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented.

(3) Within 10 days after service of the notice of claim, or within 30 days after service of the notice of claim involving an association representing more than 20 parcels, the person served with notice under subsection (1) may serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible. The notice described in this subsection may not be construed as an admission of any kind. Each such contractor, subcontractor, supplier, and design professional may inspect the property as provided in subsection (2).

(4) Within 15 days after service of a copy of the notice of claim pursuant to subsection (3), or within 30 days after service of the copy of the notice of claim involving an association representing more than 20 parcels, the contractor, subcontractor, supplier, or design professional must serve a written response to the person who served a copy of the notice of claim. The written response must include a report, if any, of the scope of any inspection of the property and the findings and results of the inspection. The written report must include one or more of the offers or statements specified in paragraphs (5)(a)-(e), as chosen by the responding contractor, subcontractor, supplier, or design professional, with all of the information required for that offer or statement.

(5) Within 45 days after service of the notice of claim, or within 75 days after service of a copy of the notice of claim involving an association representing more than 20 parcels, the person who was served the notice under subsection (1) must serve a written response to the claimant. The response shall be served to the attention of the person who signed the notice of claim, unless otherwise designated in the notice of claim. The written response must provide:

(a) A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;

(b) A written offer to compromise and settle the claim by monetary payment, that will not obligate the person's insurer, and a timetable for making payment;

(c) A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person's insurer, that includes a detailed description of the proposed repairs and a timetable for the completion of such repairs and making payment;

(d) A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or

(e) A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of serving the claim, which service shall occur at the same time the claimant is notified of this settlement option,

which the claimant may accept or reject. A written statement under this paragraph may also include an offer under paragraph (c), but such offer shall be contingent upon the claimant also accepting the determination of the insurer whether to make any monetary payment in addition thereto. If the insurer for the person served with the claim makes no response within the 30 days following service, then the claimant shall be deemed to have met all conditions precedent to commencing an action.

(6) If the person served with a notice of claim pursuant to subsection (1) disputes the claim and will neither remedy the defect nor compromise and settle the claim, or does not respond to the claimant's notice of claim within the time provided in subsection (5), the claimant may, without further notice, proceed with an action against that person for the claim described in the notice of claim. Nothing in this chapter shall be construed to preclude a partial settlement or compromise of the claim as agreed to by the parties and, in that event, the claimant may, without further notice, proceed with an action on the unresolved portions of the claim.

(7) A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice of such acceptance or rejection on the person making the offer within 45 days after receiving the settlement offer. If a claimant initiates an action without first accepting or rejecting the offer, the court shall stay the action upon timely motion until the claimant complies with this subsection.

(8) If the claimant timely and properly accepts the offer to repair an alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the claimant's property during normal working hours to perform the repair by the agreed-upon timetable as stated in the offer. If the offeror does not make the payment or repair the defect within the agreed time and in the agreed manner, except for reasonable delays beyond the control of the offeror, including, but not limited to, weather conditions, delivery of materials, claimant's actions, or issuance of any required permits, the claimant may, without further notice, proceed with an action against the offeror based upon the claim in the notice of claim. If the offeror makes payment or repairs the defect within the agreed time and in the agreed manner, the claimant is barred from proceeding with an action for the claim described in the notice of claim or as otherwise provided in the accepted settlement offer.

(9) This section does not prohibit or limit the claimant from making any necessary emergency repairs to the property as are required to protect the health, safety, and welfare of the claimant. In addition, any offer or failure to offer pursuant to subsection (5) to remedy an alleged construction defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability with respect to the defect and is not admissible in an action brought under this chapter.

(10) A claimant's service of the written notice of claim under subsection (1) tolls the applicable statute of limitations relating to any person covered by this chapter and any bond surety until the later of:

(a) Ninety days, or 120 days, as applicable, after service of the notice of claim pursuant to subsection (1); or

(b) Thirty days after the end of the repair period or payment period stated in the offer, if the claimant has accepted the offer. By stipulation of the parties, the period may be extended and the statute of limitations is tolled during the extension.

(11) The procedures in this chapter apply to each alleged construction defect. However, a claimant may include multiple defects in one notice of claim. The initial list of construction defects may be amended by the claimant to identify additional or new construction defects as they become known to the claimant. The court shall allow the action to proceed to trial only as to alleged construction defects that were noticed and for which the claimant has complied with this chapter and as to construction defects reasonably related to, or caused by, the construction defects previously noticed. Nothing in this subsection shall preclude subsequent or further actions.

(12) This chapter does not:

(a) Bar or limit any rights, including the right of specific performance to the extent such right would be available in the absence of this chapter, any causes of action, or any theories on which liability may be based, except as specifically provided in this chapter;

(b) Bar or limit any defense, or create any new defense, except as specifically provided in this chapter; or

(c) Create any new rights, causes of action, or theories on which liability may be based.

(13) This section does not relieve the person who is served a notice of claim under subsection (1) from complying with all contractual provisions of any liability insurance policy as a condition precedent to coverage for any claim under this section. However, notwithstanding the foregoing or any contractual provision,

the providing of a copy of such notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise. Nothing in this section shall be construed to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers except as otherwise specifically provided herein.

(14) To the extent that an arbitration clause in a contract for the sale, design, construction, or remodeling of real property conflicts with this section, this section shall control.

Upon request, the claimant and any person served with notice pursuant to subsection (1) shall exchange, within 30 days after service of a written request, which request must cite this subsection and include an offer to pay the reasonable costs of reproduction, any design plans, specifications, and as-built plans; photographs and videos of the alleged construction defect identified in the notice of claim; expert reports that describe any defect upon which the claim is made; subcontracts; and purchase orders for the work that is claimed defective or any part of such materials; and maintenance records and other documents related to the discovery, investigation, causation, and extent of the alleged defect identified in the notice of claim and any resulting damages. A party may assert any claim of privilege recognized under the laws of this state with respect to any of the disclosure obligations specified in this chapter. In the event of subsequent litigation, any party who failed to provide the requested materials shall be subject to such sanctions as the court may impose for a discovery violation. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared. Fla. Stat. §558.004(2015) (Current through the 2018 Second Regular Session of the 25th Legislature).

§14:10.2 Statute of Limitations

Four Years. Fla. Stat. §93.11(3)(c), (j), (p); *Snyder v. Wernecke*, 813 So.2d 213 (Fla. 4th DCA 2002).

§14:10.3 References

1. *Welcome v. Arvida Community Sales, Inc*., 2004 WL 2340249 (Fla. Cir.Ct. 2004), *affirmed*, 903 So.2d 942 (Fla. 1st DCA 2005). Section 553.84 creates a cause of action for any party "damaged as a result of a violation" of the Florida Building Code, against the party who committed the violation. The present version of the statute, adopted in June 2001, creates an exception if a building permit was obtained and the construction passed inspections under the code, unless the person who violated the code knew or should have known the violation existed. Prior to the June 2001 amendment, the statute referred to violations of state building codes then in effect and contained no exception to liability if building permits were obtained and the construction passed inspections. Although it would apply only to those putative class members whose claim accrued after May 27, 2003, Section 558.04, Florida Statutes requires notice to Defendants and opportunity to cure defects before legal action can be filed.

   Section 553.84 provides a private right of action to enforce the Florida Building Code or its predecessor building codes, but only where a person has been damaged as a result of the violation of the code. As previously noted, a resulting damage is an essential element to a claim under the statute. *See also Griffin v. Ellis Aluminum & Screen, Inc.*, 30 So.3d 714, 719 (Fla. 3d DCA 2010).
2. Byron G. Petersen & Steven S. Goodman, *Section 553.84: Remedy Without a Cause?,* 17 Nova L. Rev. 1111 (1993).
3. H. Hugh McConnell, *Diminished Capacity to Sue-Owners' Ability to Sue for Construction Defects in Florida*, 71 Fla. Bar J. 64 (June 1997).
4. Robert J. Manne, *Condominium Construction Litigation,* 54 Fla. Bar. J. 762 (1980).
5. *Stallings v. Kennedy Electric, Inc.*, 710 So.2d 195 (Fla. 5th DCA 1998), *approved*, *Comptech International, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 2000).
6. Young & Harper, *Quare: Caveat Emptor or Caveat Venditor?*, 24 Ark. L. Rev. 245 (1970).
7. E. F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 Cornell L. Q. 835 (1967).

§14:10.4 Related Matters

1. **Agency's Interpretation:** When an agency with the authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible. *Humhosco v. Dep't of Health & Rehabilitative Servs.*, 476 So.2d 258 (Fla. 1st DCA 1985). Since Longboat Key's interpretation was entitled to such great weight and was not shown to be clearly erroneous, the trial court erred by not accepting the city's interpretation and then directing a verdict in favor of Seibert. *See Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So.2d 815 (Fla. 1983); *Edward J. Seibert, A.I.A. Architect and Planner, P.A. v. Bayport Beach and Tennis Club Ass'n, Inc*., 573 So.2d 889, 892 (Fla. 2d DCA 1990), *rev. denied*, 583 So.2d 1034 (Fla. 1991).

2. **Evidence of Negligence:** Violations of statutes [or ordinances], other than those imposing a form of strict liability, may be either negligence per se or evidence of negligence. *deJesus v. Seaboard Coast Line Railroad Co.*, 281 So.2d 198 (Fla. 1973). Because a building code is designed to protect the general public rather than a particular class of individuals, *Grand Union Co. v. Rocker,* 454 So.2d 14, 16 (Fla. 3d DCA 1984), a violation constitutes evidence of negligence, *id.; Liberty Mutual Ins. Co. v. Kimmel*, 465 So.2d 606, 607 (Fla. 3d DCA 1985), but does not establish negligence per se. *Morrison Cafeterias Consol., Inc. v. Lee*, 215 So.2d 491 (Fla. 1st DCA 1968). *See also Groh v. Hasencamp*, 407 So.2d 949 (Fla. 3d DCA 1981), *rev. denied*, 415 So.2d 1360 (Fla. 1982); *Schulte v. Gold*, 360 So.2d 428 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1367 (Fla. 1979); *Richardson v. Fountain*, 154 So.2d 709 (Fla. 3d DCA 1963), *cert. denied*, 157 So.2d 818 (Fla. 1963). Violation of a building code constitutes *prima facie* evidence of negligence. *Holland v. Baguette, Inc.*, 540 So.2d 197, 198 (Fla. 3d DCA 1989); *Lindsey v. Bill Arflin Bonding Agency Inc*., 645 So.2d 565, 567 (Fla. 1st DCA 1994).

3. **Expert Testimony:** Expert testimony may be presented if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence, or in determining a fact in issue. *See* §§90.702, 90.703, Fla. Stat. (1979). The admission of such testimony has been allowed to explain the character of an object in order to determine if it complies with a statute, ordinance, or code. *Noa v. United Gas Pipeline Co.*, 305 So.2d 182 (Fla. 1974); *Grand Union Co. v. Rocker*, 454 So.2d 14 (Fla. 3d DCA 1984); *Chimeno v. Fontainebleau Hotel Corp.*, 251 So.2d 351 (Fla. 3d DCA 1971). In this case, however, the experts did not testify concerning the character of an object or the type of design, nor did they give testimony concerning disputed facts which would determine the requirements of the Standard Building Code. *See Krispy Kreme Doughnut Co. v. Cornett*, 312 So.2d 771 (Fla. 1st DCA 1975), *cert. denied*, 330 So.2d 16 (Fla. 1976). They instead presented conflicting opinions as to how the code should be interpreted. The jury was allowed to determine the meaning of the code and then whether Seibert violated the code by designing only one fire exit. This was error. An expert should not be allowed to testify concerning questions of law, *Devin v. City of Hollywood*, 351 So.2d 1022 (Fla. 4th DCA 1976); 31A Am. Jur. 2d *Expert & Opinion Evidence* §136 (1989), and the interpretation of the building code presented a question of law. It was the duty of the trial court to interpret the meaning of the code and instruct the jury concerning that meaning. Any conflicts in interpretation were for the court to resolve and their resolution was not a jury issue. *Manning v. Public Serv. Electric & Gas Co.*, 58 N.J. Super. 386, 156 A.2d 260 (N.J. Sup. Ct. App. Div. 1959), o*verruled on other grounds by Black v. Public Serv. Elec. & Gas Co.*, 56 N.J. 63 (N.J. 1970). *Edward J. Seibert, A.I.A. Architect and Planner, P.A. v. Bayport Beach and Tennis Club Ass'n, Inc*., 573 So.2d 889, 891 (Fla. 2d DCA 1990), *rev. denied*, 583 So.2d 1034 (Fla. 1991).

4. **Latent Defects:** Latent defects are generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection, and of which the owner has no knowledge. *Lakes of the Meadow Village Homes Condominium Nos. One, Two, Three, Four, Five, Six, Seven, Eight, and Nine Maintenance Ass'ns, Inc. v. Arvida/JMB Partners, L.P.*, 714 So.2d 1120, 1122 (Fla. 3d DCA 1998) (quoting *Henson v. James M. Barker Co.*, 555 So.2d 901, 909 (Fla. 1st DCA 1990)). *Alexander v. Suncoast Builders, Inc*., 837 So.2d 1056, 1058 (Fla. 3d DCA 2002).

5. **Owner's Duties:** Although the South Florida building code provides that compliance is the responsibility of the owner, the code does not impose a duty on a landowner to supervise construction undertaken by an independent contractor. *Sierra v. Allied Stores Corp*., 538 So.2d 943, 944 (Fla. 3d DCA 1989).

6. **Owner's Implied Warranty of Suitability:** The doctrine of owner's implied warranty of suitability and accuracy of own plans is not applicable when the contractor expressly warrants against the defects alleged. *City of Orlando v. H. L. Coble Const. Co*., 282 So.2d 25 (Fla. 4th DCA 1973), *cert. denied*, 288 So.2d 505 (Fla. 1973).

7. **Sovereign Immunity:** Cases decided since *Trianon* uniformly hold sovereign immunity bars tort liability on the part of the state or its agencies for state agents who negligently misinform members of the public about the issuance of a building permit, provide an incorrectly labeled county utility map showing an existing water main where none existed, and provide incorrect information regarding the requirements for federal flood insurance and negligently issue a building permit. The rationale for these cases is that the government owes no duty to individual members of the public for giving out accurate information or properly enforcing building codes. As one writer commented: "A duty to all is a duty to no one." *Storm v. Town of Ponce Inlet*, 866 So.2d 713, 715 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 624 (Fla. 2004).

CHAPTER 15

LIEN CASES

§15:10 LIEN, CHARGING

§15:10.1 Elements of Cause of Action — Florida Supreme Court
- §15:10.1.1 Elements of Cause of Action — 1st DCA
- §15:10.1.2 Elements of Cause of Action — 2nd DCA
- §15:10.1.3 Elements of Cause of Action — 3rd DCA
- §15:10.1.4 Elements of Cause of Action — 4th DCA
- §15:10.1.5 Elements of Cause of Action — 5th DCA

§15:10.2 Statute of Limitations
§15:10.3 References
§15:10.4 Defenses
§15:10.5 Related Matters

§15:20 LIEN, EQUITABLE

§15:20.1 Elements of Cause of Action — Florida Supreme Court
- §15:20.1.1 Elements of Cause of Action — 1st DCA
- §15:20.1.2 Elements of Cause of Action — 2nd DCA
- §15:20.1.3 Elements of Cause of Action — 3rd DCA
- §15:20.1.4 Elements of Cause of Action — 4th DCA
- §15:20.1.5 Elements of Cause of Action — 5th DCA

§15:20.2 Statute of Limitations
§15:20.3 References
§15:20.4 Defenses
§15:20.5 Related Matters

§15:30 LIEN, RETAINING

§15:30.1 Elements of Cause of Action — Florida Supreme Court
- §15:30.1.1 Elements of Cause of Action — 1st DCA
- §15:30.1.2 Elements of Cause of Action — 2nd DCA
- §15:30.1.3 Elements of Cause of Action — 3rd DCA
- §15:30.1.4 Elements of Cause of Action — 4th DCA
- §15:30.1.5 Elements of Cause of Action — 5th DCA

§15:30.2 References
§15:30.3 Defenses
§15:30.4 Related Matters

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§15:10 LIEN, CHARGING

§15:10.1 Elements of Cause of Action — Florida Supreme Court

To impose such a lien, the attorney must show:
1. an express or implied contract between attorney and client;
2. an express or implied understanding for payment of attorney's fees out of the recovery;
3. either an avoidance of payment or a dispute as to the amount of fees; and
4. timely notice.

Source

Daniel Mones, P.A., v. Smith, 486 So.2d 559, 561 (Fla. 1986).

See Also

1. *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A., v. Baucom,* 428 So.2d 1383, 1384 (Fla. 1983).
2. *Smith v. Daniel Mones, P.A.,* 458 So.2d 796 (Fla. 3d DCA 1984), *approved in part*, *reversed in part*, 486 So.2d 559 (Fla. 1986).

§15:10.1.1 Elements of Cause of Action — 1st DCA

The requirements for the *imposition* of a charging lien are:
1. there must be a contract, express or implied, between the attorney and the client;
2. there must be an understanding, express or implied, between these parties that payment is either dependent upon recovery or that payment will be made out of the recovery; and
3. there must have been an attempt to avoid the payment of fees or there must be a dispute as to the amount involved.

All that is required to entitle the attorney to *perfect* a charging lien is for the attorney to file a notice of charging lien or otherwise pursue the lien in the original action prior to its termination.

Source

Citizens & Peoples National Bank of Pensacola v. Futch, 650 So.2d 1008, 1015 (Fla. 1st DCA 1994), *rev. denied*, 660 So.2d 712 (Fla. 1995).

See Also

1. *Brown v. Vermont Mutual Insurance Co.*, 614 So.2d 574, 580 (Fla. 1st DCA 1993).
2. *Rosenthal, Levy & Simon, P.A. v. Scott*, 17 So.3d 872, 874 (Fla. 1st DCA 2009) ("A charging lien differs in nature from a claim for attorney fees. Florida courts have consistently defined a charging lien as an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit.").
3. *Zaldivar v. Florida Transport 1982, Inc.*, 19 So.3d 1093, 1095 (Fla. 1st DCA 2009) ("In *Zaldivar v. Okeelanta Corp.,* 877 So.2d 927, 930 (Fla. 1st DCA 2004), this court determined that a fee lien does 'not become ripe for adjudication until a settlement create[s] proceeds upon which the lien could attach.' We explained that '[a] charging lien represents a right held by an attorney, rather than one that must be asserted by the claimant.' *Id.* at 931. A lien is an equitable right that generally lasts until the property, here, the settlement of the claimant's case, is created, at which time the attorney can proceed to enforce the lien.").

§15:10.1.2 Elements of Cause of Action — 2nd DCA

Under established case law, in order for an attorney to impose a charging lien there must be:
1. a contract between the attorney and the client;
2. an express or implied understanding that payment is either dependent upon recovery or will come from the recovery;
3. an attempt by the client to avoid paying the fee or a dispute as to the amount of the fee; and
4. timely notice.

Source

Newton v. Kiefer, 547 So.2d 727, 728 (Fla. 2d DCA 1989).

See Also

Jaffe & Hough, P.C. v. Baine, 29 So.3d 456, 459-60 (Fla. 2d DCA 2010) ("As to the charging lien, one of the requirements was timely notice. This could be accomplished by either filing a notice of lien or by pursuing the lien in the original action. 'A summary proceeding in the original action represents the preferred method of enforcing an attorney's charging lien in Florida.' Because the attorney neither filed a notice of lien nor pursued the charging lien in the original action, […] a valid charging lien could not be imposed on the settlement proceeds.").

§15:10.1.3 Elements of Cause of Action — 3rd DCA

A charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. Attorneys wishing to impose such a lien must show:

1. an express or implied contract between attorney and client;
2. an express or implied understanding for payment of attorney's fees, either dependent upon or out of recovery;
3. either avoidance of payment or a dispute as to the amount of fees; and
4. timely notice.

Source

Schur v. Americare Transtech, Inc., 786 So.2d 46, 48 (Fla. 3d DCA 2001).

See Also

1. *Law Offices of David H. Zoberg, P.A. v. Rosen,* 684 So.2d 828, 829 (Fla. 3d DCA 1996).
2. *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A., v. Rojas,* 529 So.2d 749, 750 (Fla. 3d DCA 1988), *rev. denied*, 539 So.2d 476 (Fla. 1988).
3. *Vazquez v. Gustavo Armando Vazquez and Marks, Aronovitz & Leinoff,* 512 So.2d 1045, 1046 (Fla. 3d DCA 1987).
4. *St. Ana v. Wheeler Mattison Drugs, Inc.,* 129 So.2d 184 (Fla. 3d DCA 1961), *cert. denied*, 133 So.2d 646 (Fla. 1961).
5. *Hall, Lamb & Hall, P.A. v. Sherlon Invs. Corp.*, 7 So.3d 639, 641 (Fla. 3d DCA 2009) ("A charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit.").
6. *Brickell Place Condo. Ass'n, Inc. v. Joseph H. Ganguzza & Assoc., P.A.*, 31 So.3d 287, 289-90 (Fla. 3d DCA 2010) ("A charging lien is placed on any monetary recovery due the client at the conclusion of the lawsuit; on the other hand, a retaining lien is a passive lien and rests entirely on the right of an attorney to retain possession of his client's papers, money, securities, and files as security for payment of the fees and costs earned by the law firm to that point.").
7. *CK Regalia, LLC v. Thornton*, 159 So.3d 358, 360 (Fla. 3d DCA 2015) (discussing an attorney's ability to enforce a charging lien under a contingency fee agreement).

§15:10.1.4 Elements of Cause of Action — 4th DCA

A charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. In order for a trial court to properly impose a charging lien, an attorney must show: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute as to the amount of fees; and (4) timely notice.

Source

Menz & Battista, PL v. Ramos, 214 So.3d 698, 699 (Fla. 4th DCA 2017); *Richman Greer Weil Brumbaugh Mirabito & Christensen, P.A. v. Chernak*, 991 So.2d 875, 878 (Fla. 4th DCA 2008).

See Also

1. *Shawzin v. Donald J. Sasser P.A.*, 658 So.2d 1148, 1150 (Fla. 4th DCA 1995), *rev. denied*, 669 So.2d 252 (Fla. 1996).
2. *Glickman v. Scherer*, 566 So.2d 574, 575 (Fla. 4th DCA 1990).

3. *Bailey v. Bailey*, 546 So.2d 104, 105 (Fla. 4th DCA 1989).
4. *Wishoff v. Wishoff*, 497 So.2d 1351, 1352 (Fla. 4th DCA 1986).
5. *Zimmerman v. Livnat*, 507 So.2d 1205, 1206 (Fla. 4th DCA 1987).
6. *Walia v. Hodgson Russ LLP*, 28 So.3d 987, 989 (Fla. 4th DCA 2010) ("A charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. It is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the services.").
7. *McCarthy v. Estate of Krohn*, 16 So.3d 193, 195 (Fla. 4th DCA 2009) ("An award under an attorney's charging lien turns on the express or implied contract between the attorney and client. *See State v. Am. Tobacco Co.,* 723 So.2d 263, 268 (Fla. 1998) (stating that a lawyer's charging lien arises out of an express or implied contract for legal services).").

§15:10.1.5 Elements of Cause of Action — 5th DCA

A charging lien is an equitable right to have costs and fees due an attorney for services in a suit secured to him or her in the judgment or recovery in that particular suit. An attorney wishing to impose a charging lien on the fruits of his or her industry must show: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees, either dependent upon or out of recovery; (3) either avoidance of payment or a dispute as to the amount of fees; and (4) timely notice.

Source

Walther v. Ossinsky & Cathcart, P.A, 112 So.3d 116, 117 (Fla. 5th DCA 2013); *Baker & Hostetler, LLP v. Swearingen*, 998 So.2d 1158, 1161 (Fla. 5th DCA 2008).

See Also

1. *Mid–Continent Casualty Co. v. R.W. Jones Constr., Inc.,* 227 So.3d 785, 788 (Fla. 5th DCA 2017).

§15:10.2 Statute of Limitations

See Zaldivar v. Okeelanta Corp., 877 So.2d 927 (Fla. 1st DCA 2004) (a charging lien is an equitable right that requires only timely notice).

§15:10.3 References

1. 4 Fla. Jur. 2d *Attorneys at Law* §§430–448 (2002).
2. 7 Am. Jur. 2d *Attorneys at Law* §§342–349 (1997).
3. 51 Am. Jur. 2d *Liens* §§1 et seq. (2000).
4. 7A C.J.S. *Attorney and Client* §§443–492 (2004).
5. 53 C.J.S. *Liens* §§1–21 (2005).
6. 10 Williston on Contracts §1285B (3d ed. 1967).
7. Frank Nussbaum, *The Charging Lien: Litigating Client Fee Disputes*, 58 Fla. Bar J. 114 (1984).
8. A. Matthew Miller, *Attorneys' Charging Liens*, 56 Fla. Bar J. 737 (1982).
9. Note, *Attorney and Client: Attorney's Charging Lien*, 4 U. Fla. L. Rev. 58 (1951).
10. Gary L. Garrison, Annotation, *Alimony or Child-Support Awards as Subject to Attorney's Lien*, 49 A.L.R.5th 595 (1997).
11. Jay M. Zitter, Annotation, *Priority Between Attorney's Charging Lien Against Judgment and Opposing Party's Right of Setoff Against Same Judgment*, 27 A.L.R.5th 764 (1995).
12. John H. Derrick, Annotation, *Priority Between Attorney's Lien for Fees Against a Judgment and Lien of Creditor Against Same Judgment*, 34 A.L.R.4th 665 (1984).
13. Wanda E. Wakefield, Annotation, *Attorney's Charging Lien as Including Services Rendered or Disbursements Made in other than Instant Action or Proceeding*, 23 A.L.R.4th 336 (1983).
14. K. R. Newell, Annotation, *Funds in Hands of His Attorney as Subject of Attachment or Garnishment by Client's Creditor*, 35 A.L.R.3d 1094 (1971).

15. D. E. Evins, Annotation, *Attorney's Charging Lien Upon Continuing Payments to which Client Becomes Entitled as Result of Litigation*, 99 A.L.R.2d 451 (1965).
16. J. C. Vance, Annotation, *Sufficiency of Notice to Opposing Party (or of Serving or Filing Thereof) Required to Establish Attorney's Lien Upon Client's Claim or Cause of Action*, 85 A.L.R.2d 859 (1962).
17. W. R. Habeeb, Annotation, *What Constitutes Acceptance or Ratification of, or Acquiescence in, Services Rendered by Attorney so as to Raise Implied Promise to Pay Reasonable Value Thereof*, 78 A.L.R.2d 318 (1961).
18. E.H. Schopler, Annotation, *Conflict of Laws as to Attorneys' Liens*, 59 A.L.R.2d 564 (1958).
19. Annotation, *Attorney's Lien on Property Recovered for His Client*, 93 A.L.R. 667 (1934).

§15:10.4 Defenses

1. **Criminal Actions—Not Applicable:** The requirement that the lien attach to the proceeds of the lawsuit precludes its application in a criminal context where the tangible fruits of the services is an acquittal and not something upon which a lien may attach. *Law Offices of Alan J. Braverman, P.A. v. State of Florida*, 564 So.2d 190, 191 (Fla. 4th DCA 1990).

2. **Jurisdiction:** Where there is no charging lien involved, a lawyer's claim for fees must be prosecuted in a separate action at law. *Cruz v. Brown*, 338 So.2d 245, 246 (Fla. 3d DCA 1976). The trial court lacked jurisdiction to enter the order imposing a charging lien after rendition of the final judgment, which did not reserve jurisdiction for that purpose. *Feltman v. Feltman*, 721 So.2d 424, 425 (Fla. 4th DCA 1998). *See also Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Rojas*, 529 So.2d 749, 750 (Fla. 3d DCA 1988), *rev. denied*, 539 So.2d 476 (Fla. 1988); *Greenberg Traurig, P.A. v. Starling,* 238 So.3d 862, 865 (Fla. 2d DCA 2018).

3. **Minimal Necessities of Life:** An attorney's charging lien should not be enforced against an award of permanent periodic alimony if to do so would deprive a former spouse of daily sustenance or the minimal necessities of life. *Dyer v. Dyer*, 438 So.2d 954, 955 (Fla. 4th DCA 1983). *See also*, *Leone v. Leone*, 619 So.2d 323 (Fla. 3d DCA 1993). In those jurisdictions which have decided the question, enforcement of a charging lien has not been allowed to nullify an award determined to be necessary to assure the support of a child. *Brake v. Sanchez-Lopez*, 452 So.2d 1071, 1072 (Fla. 3d DCA 1984). *See also Glickman v. Scherer*, 566 So.2d 574, 575 (Fla. 4th DCA 1990). Homestead property had been held to be not subject to a charging lien. *Bakst, Cloyd & Bakst, P.A. v. Cole*, 750 So.2d 676 (Fla. 4th DCA 1999).

4. **Notice:** In order to give timely notice of a charging lien an attorney should either file a notice of lien or otherwise pursue the lien in the original action. *Zimmerman v. Livnat*, 507 So.2d 1205, 1207 (Fla. 4th DCA 1987). *See* footnote 6 in *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So.2d 88, 93 (Fla. 3d DCA 1987), *rev. denied*, 525 So.2d 879 (Fla. 1988); *Greenberg Traurig, P.A. v. Starling,* 238 So.3d 862, 865 (Fla. 2d DCA 2018).

5. **Positive Result:** In order to obtain a charging lien for an attorney's services, an attorney must produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the attorney's services. *Rochlin v. Cunningham*, 739 So.2d 1215, 1217 (Fla. 4th DCA 1999), *rev. denied*, 770 So.2d 160 (Fla. 2000).

6. **Priority:** A charging lien attaches to the judgment but relates back and takes effect from the time of the commencement of the services rendered in the action. The attorney fee lien has priority over judgments obtained against the client subsequent to the commencement of the attorney's services. *Miles v. Katz*, 405 So.2d 750, 752 (Fla. 4th DCA 1981). *See also New England Mutual Life Insurance Co. v. Podhurst, Orseck, Josefberg, Eaton, Meadow, Olin & Perwin, P.A.*, 690 So.2d 1354, 1356 (Fla. 3d DCA 1997). An attorney's lien upon a judgment for his services in obtaining it is superior to any equitable setoff of the judgment debtor. *Gimbel v. International Mailing and Printing Co., Inc.*, 505 So.2d 631, 633 (Fla. 4th DCA 1987).

7. **Real Estate:** The established law is that in the absence of statutory authority or an express contract or an implied agreement arising out of special equitable circumstances, an attorney is not entitled to the

imposition of a charging lien on the real estate of his client. *Overholser v. Walsh & Nottebaum*, 362 So.2d 471, 472 (Fla. 3d DCA 1978). Although a charging lien ordinarily attaches only to judgment proceeds, the parties may enter into contracts which expressly subject other property to the charging lien. *Sabin v. Butter*, 522 So.2d 939, 940 (Fla. 3d DCA 1988), *cause dismissed*, 531 So.2d 168 (Fla. 1988). *See* footnote 5 in *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So.2d 88, 92 (Fla. 3d DCA 1987), *rev. denied*, 525 So.2d 879 (Fla. 1988).

8. **Rules Regulating the Florida Bar, Rule 5-1.1 Trust Accounts (Comment):** Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This does not preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections.

9. **Time Records:** Where attorneys have not kept contemporaneous time records, it is permissible for a reconstruction of time to be prepared. *Cohen & Cohen, P.A. v. Angrand*, 710 So.2d 166, 168 (Fla. 3d DCA 1998).

10. **Withdrawal by Attorney:** When an attorney withdraws from representation upon his own volition, and the contingency has not occurred, the attorney forfeits all rights to compensation. This rule is tempered by the court's further holding that if the client's conduct makes the attorney's continued performance of the contract either legally impossible or would cause the attorney to violate an ethical rule, the withdrawing attorney may still be entitled to a fee. *Lynn v. Allstar Steakhouse & Sports Bar, Inc.*, 736 So.2d 722, 723 (Fla. 2d DCA 1999).

§15:10.5 Related Matters

1. **Abandoning Charging Lien:** We know of no rule which prevents the attorney from abandoning the charging lien and proceeding against the former clients on ordinary contract principles. *Attias v. Faroy Realty Co.*, 609 So.2d 105, 106 (Fla. 3d DCA 1992).

2. **Attorneys' Trust Accounts:** The Supreme Court in *Mones v. Smith*, 486 So.2d 559 (Fla. 1986), held that attorneys' trust accounts are subject to setoff for past legal services rendered in unrelated cases so long as the client's funds which are entrusted to the attorney are not being held in trust for a specific purpose. *Urich & Shenkman, P.A. v. Horizon Insurance Company*, 491 So.2d 1195 (Fla. 1st DCA 1986).

3. **Common Law Origin:** Both retaining liens and charging liens arose under common law. *Daniel Mones, P.A. v. Smith*, 486 So.2d 559, 561 (Fla. 1986). *See also Andrew Hall and Associates v. Ghanem*, 679 So.2d 60, 61 (Fla. 4th DCA 1996).

4. **Retaining Lien Compared:** An attorney's retaining lien on a client's papers and files is a possessory lien that the attorney holds until the fee has been paid or until adequate security for payment has been posted. Derived from the common law, the existence of the lien does not depend on any agreement between the lawyer and the client. *The Flush*, 277 F. 25, 29 (2d Cir. 1921) (retaining lien "established on general principles of justice"), *cert. denied*, 257 U.S. 657, 42 S.Ct. 184, 66 L.Ed. 421 (1922). A retaining lien differs from a charging lien, which is placed upon any money recovery or fund due the client at the conclusion of the lawsuit. A retaining lien is a passive one; it cannot be enforced through foreclosure and rests wholly upon the right to retain possession until the bill is paid. The pressure exerted by a retaining lien is directly proportional to the client's need and desire for the things in the attorney's possession. Standing alone, the client's lack of funds to pay the outstanding bill does not defeat the lien. The lien may not be impaired by the client securing the right to inspect and copy the papers or compelling their production by subpoena. Only under rare circumstances will the files be released without payment or the furnishing of adequate security: where there is a clear necessity in a criminal case and a defendant cannot post security or where the lawyer's misconduct caused his withdrawal. *See also Quinn v. Headley*, 637 F. Supp. 707 (S.D.N.Y. 1986) (attorney's request for retaining lien denied where he had assumed representation of client knowing that she was insolvent, able to pay attorney only if client received award in lawsuit). If there is a dispute between the lawyer and client as to the fee owed, the trial court may hold a hearing to liquidate the amount

and determine the terms of an adequate security. *Andrew Hall and Associates v. Ghanem*, 679 So.2d 60, 61 (Fla. 4th DCA 1996).

5. **Settlement Without Notice to Attorney:** While we do not discourage litigants from settling their controversies out of court, any such settlement without the knowledge of or notice to counsel, and the payment of their fees is a fraud on them whether there was an intent to do so or not. *Gaebe, Murphy, Mullen & Antonelli v. Bradt*, 704 So.2d 618, 619 (Fla. 4th DCA 1997). *See also Brown v. Vermont Mutual Insurance Co.*, 614 So.2d 574, 580 (Fla. 1st DCA 1993). For a discussion of the procedures applicable to enforcing a charging lien in cases where there has been a settlement, *see* footnote 4 in *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So.2d 88, 92 (Fla. 3d DCA 1987), *rev. denied*, 525 So.2d 879 (Fla. 1988).

§15:20 LIEN, EQUITABLE

§15:20.1 Elements of Cause of Action — Florida Supreme Court

Our study of the cases indicates that the award of an equitable lien based on unjust enrichment or "general consideration of right and justice" has in each instance been predicated on factors such as Mistake or Material misrepresentation beyond the circumstances described by the complaint in the present case.

We hold that a party may successfully maintain a suit under the theory of equitable estoppel only where there is proof of fraud, misrepresentation, or other affirmative deception. To hold otherwise would inject an unnecessary amount of uncertainty into the construction loan industry.

Source

Rinker Materials Corp. v. Palmer First National Bank and Trust Co. of Sarasota, 361 So.2d 156, 158 (Fla. 1978) (*But see Emerald Designs, Inc. v. Citibank F.S.B.,* 626 So.2d 1084, 1085 (Fla. 4th DCA 1993) where the court limited the application of this rule to cases where the claimant is seeking priority over a recorded mortgage but not where there are only undisbursed construction loan funds.). Note: Equitable liens are necessarily based on the doctrine of estoppel.

See Also

1. *Palm Beach Savings & Loan Assoc. v. Fishbein*, 619 So.2d 267 (Fla. 1993) (equitable circumstances include the prevention of unjust enrichment).
2. *Merritt v. Unkefer*, 223 So.2d 723 (Fla. 1969) ("Our study of the cases indicates that the award of an equitable lien based on unjust enrichment or "general consideration of right and justice" has in each instance been predicated on factors such as mistake or material misrepresentation beyond the circumstances described by the complaint in the present case.").
3. *Crane Co. v. Fine*, 221 So.2d 145, 149 (Fla. 1969), *proceedings following remand*, 222 So.2d 36 (Fla. 3d DCA 1969) ("We emphasize that this opinion is not to be interpreted as holding that a materialman is entitled to seek an equitable lien merely because his materials are incorporated in the improvement. We hold only that, because of the special and peculiar equities shown by the record in this particular case, the plaintiff should not be foreclosed from seeking an equitable lien merely because he was entitled to but failed to perfect his statutory materialman's lien.").
4. *Hullum v. Bre-Lew Corp.*, 93 So.2d 727, 730 (Fla. 1957).
5. *Lewinson v. Shaw*, 56 So.2d 449 (Fla. 1952).
6. *Ross v. Gerung*, 69 So.2d 650, 652 (Fla. 1954) ("[Equitable] liens may arise from written contracts which show an intention to charge some particular property with a debt or obligation, or they may be declared by a court of equity out of general consideration of right and justice as applied to the relations of the parties and the circumstances of their dealings.").

§15:20.1.1 Elements of Cause of Action — 1st DCA

An "equitable lien" is a right, enforceable only in equity, to have a demand satisfied from a particular fund or specific property, without having possession of the fund or property; equitable liens become necessary on account

of the absence of similar remedies at law. The basis of equitable liens may be estoppel or unjust enrichment. "In Florida, an equitable lien is an appropriate remedy to prevent unjust enrichment between family members or those with close personal relationships."

Source

Golden v. Woodward, 15 So.3d 664, 669-70 (Fla. 1st DCA 2009).

See Also

1. *Wal-Mart Stores, Inc. v. Ewell Industries, Inc*., 694 So.2d 756, 757 (Fla. 1st DCA 1997).
2. *Whigham v. Muehl*, 511 So.2d 717, 718 (Fla. 1st DCA 1987).
3. *Westburne Supply, Inc. v. Community Villas Partners, Ltd.*, 508 So.2d 431, 433 (Fla. 1st DCA 1987).
4. *Imler Earthmovers, Inc. v. Schatten*, 240 So.2d 76, 78 (Fla. 1st DCA 1970).

§15:20.1.2 Elements of Cause of Action — 2nd DCA

In order to establish an equitable lien on real property, this court has required "circumstances such as fraud or misrepresentation of essential facts upon which the lender or contractor relied in good faith, or there must be an agreement by the owner of the property to have certain property stand as security for a specific obligation."

Source

Zaleznik v. Gulf Coast Roofing Co., Inc., 576 So.2d 776, 779 (Fla. 2d DCA 1991). Further clarified in *Spridgeon v. Spridgeon*, 779 So.2d 501 (Fla. 2d DCA 2000) (equitable circumstances, including the prevention of unjust enrichment, are proper grounds for imposing equitable liens on homesteads).

See Also

1. *Pegram v. Pegram*, 821 So.2d 1264, 1266 (Fla. 2d DCA 2002).
2. *J. G. Plumbing Service, Inc. v. Coastal Mortgage Co.*, 329 So.2d 393, 395 (Fla. 2d DCA 1976), *cert. dismissed*, 339 So.2d 1169 (Fla. 1976) (discussed in *Rinker Materials Corp. v. Palmer First National Bank and Trust Co. of Sarasota*, 361 So.2d 156, 158 (Fla. 1978)).
3. *Jennings v. Connecticut General Life Ins., Co*. 177 So.2d 66, 68 (Fla. 2d DCA 1965), *certiorari discharged by*, 185 So.2d 169 (Fla. 1966) (discussed in *Rinker Materials Corp. v. Palmer First National Bank and Trust Co. of Sarasota*, 361 So.2d 156, 158 (Fla. 1978)).
4. *R. J. Marshall v. C. B. Scott*, 277 So.2d 546, 547 (Fla. 2d DCA 1973) ("The mere fact that a promise to pay is subsequently broken does not give rise to a cause of action for equitable relief. Otherwise any breach of contract would call for such a remedy.").
5. *Phelps v. T. O. Mahaffey, Inc.*, 156 So.2d 900, 903 (Fla. 2d DCA 1963).
6. *Armstrong v. Blackadar*, 118 So.2d 854 (Fla. 2d DCA 1960).
7. *Roth v. Roth,* 973 So.2d 580, 587 (Fla. 2d DCA 2008) ("A court can impose an equitable lien on homestead property when there is evidence of fraud or material misrepresentation.").

§15:20.1.3 Elements of Cause of Action — 3rd DCA

[E]quitable liens arise from two sources:

1. a written contract which shows an intention to charge some particular property with a debt or obligation; and
2. is declared by a court of equity out of general consideration of rights and justice as applied to the relations of the parties and the circumstances of their dealings in the particular case.

Source

Singer v. Tobin, 201 So.2d 799, 801 (Fla. 3d DCA 1967), *cert. denied*, 209 So.2d 672 (Fla. 1968) (This case should be read along with *Rinker Materials Corp. v. Palmer First National Bank and Trust Co. of Sarasota*, 361 So.2d 156, 159 (Fla. 1978) and *Emerald Designs, Inc. v. Citibank F.S.B.,* 626 So.2d 1084, 1085 (Fla. 4th DCA 1993).

See Also

1. *Wichi Management LLC v. Masters,* 193 So.3d 961, 963 (Fla. 3d DCA 2016).
2. *Gordon v. Flamingo Holding Partnership*, 624 So.2d 294, 297 (Fla. 3d DCA 1993), *rev. denied*, 637 So.2d 234 (Fla. 1994).
3. *Edd Helms Electrical Contracting, Inc. v. Barnett Bank of South Florida, N.A.,* 531 So.2d 238 (Fla. 3d DCA 1988) ("Having pleaded adequate legal remedies, the subcontractor cannot alternatively maintain an action in equity."). *Compare Crane Co. v. Fine*, 221 So.2d 145, 149 (Fla. 1969), *proceedings following remand*, 222 So.2d 36 (Fla. 3d DCA 1969).
4. *McPherson v. Redding*, 323 So.2d 687, 688 (Fla. 3d DCA 1976), *cert. denied*, 336 So.2d 603 (Fla. 1976), *affirmed following remand*, 357 So.2d 737 (Fla. 3d DCA 1978) ("An equitable lien on the property benefited arises where a person in good faith and under a mistake as to the condition of the title makes improvements, renders services, or incurs expenses that are permanently beneficial to another's property. There is no such lien where expenditures are made with knowledge of the real state of the title.").
5. *MCZ/Centrum Flamingo I, LLC v. AIMCO/Bethesda Holdings, Inc.*, 988 So.2d 89, 89 (Fla. 3d DCA 2008) ("An equitable lien may arise from a written contract which evidences an intention to charge property with a debt or obligation, and such a claim may support a lis pendens.").

§15:20.1.4 Elements of Cause of Action — 4th DCA

Equitable liens arise from either (1) a written contract which shows an intention to charge some particular property with a debt; or (2) when a court determines that out of considerations of right and justice as applied to the parties under the particular facts a lien should exist.

Source

Sunshine Meadows Condo. Ass'n, Inc. v. Bank One, Dayton, N.A., 599 So.2d 1004, 1007 (Fla. 4th DCA 1992); *Rinker Materials Corp. v. Palmer First National Bank and Trust Co. of Sarasota*, 361 So.2d 156, 159 (Fla. 1978); and *Emerald Designs, Inc. v. Citibank F.S.B.,* 626 So.2d 1084, 1085 (Fla. 4th DCA 1993). Although reversed, the quoted language may continue to have relevance provided it is considered in relation to the holdings in subsequent decisions.

See Also

1. *Della Ratta v. Della Ratta*, 927 So.2d 1055, 1059-60 (Fla. 4th DCA 2006).
2. *Epstein v. Epstein*, 915 So.2d 1272, 1274-75 (Fla. 4th DCA 2005) ("An equitable lien is a right granted by a court of equity, arising by reason of the conduct of the parties affected which would entitle one party as a matter of equity to proceed against certain property.").
3. *Emerald Designs, Inc. v. Citibank F.S.B*., 626 So.2d 1084, 1085 (Fla. 4th DCA 1993)….(Instruction: Also include language already written next to this case in the book.)
4. *Hagen v. Florida Drug, Inc*., 402 So.2d 57, 58 (Fla. 4th DCA 1981).
5. *Hallmark Manufacturing Inc. v. Lujack Construction Co., Inc*., 372 So.2d 520, 522 (Fla. 4th DCA 1979).
6. *Phillips Petroleum Co. v. Schun Co*., 222 So.2d 491, 492 (Fla. 4th DCA 1969).

§15:20.1.5 Elements of Cause of Action — 5th DCA

A court may declare that a person is entitled to an equitable lien, based on general considerations of right and justice as applied to the relationship of parties and the circumstances of their dealings.

Source

McLane v. Musick, 792 So.2d 702, 705 (Fla. 5th DCA 2001).

See Also

1. *Troiano v. Troiano*, 549 So.2d 1053, 1057 (Fla. 5th DCA 1989), *rev. denied*, 562 So.2d 345 (Fla. 1990).
2. *Hutchens v. Maxicenters, U.S.A.*, 541 So.2d 618 (Fla. 5th DCA 1988).
3. *Zureikat v. Shaibani*, 944 So.2d 1019, 1024 (Fla. 5th DCA 2006) ("Trial courts may impose equitable liens in proceedings supplementary where there has been a showing of fraud, misrepresentation, or affirmative deception.").

§15:20.2 Statute of Limitations

N/A; *but see* Fla. Stat. §95.11(5)(b) (One-year statute of limitations to enforce an equitable lien arising from the furnishing of labor, services, or material for the improvement of real property).

§15:20.3 References

1. 34 Fla. Jur. 2d *Liens* §§4–11, 50 (2000).
2. 51 Am. Jur. 2d *Liens* §§18, 30–51 (2000).
3. 53 C.J.S. *Liens* §§16–24, 55 (2005).
4. Boyer & Kutun, *The Equitable Lien in Florida*, 20 Miami L. Rev. 731 (1965).
5. Greta K. Kolcon, *Common Law Equity Defeats Florida's Homestead Exemption,* 68 Fla. Bar J. (1994).

§15:20.4 Defenses

1. **Construction, Incomplete:** Unjust enrichment cannot be established by alleging merely "substantial completion." *Edd Helms Electrical Contracting, Inc. v. Barnett Bank of South Florida, N.A.,* 531 So.2d 238, 239 (Fla. 3d DCA 1988).

2. **Homestead Property:** The transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors is not one of the three exceptions to the homestead exemption provided in article X, section 4. Nor can we reasonably extend our equitable lien jurisprudence to except such conduct from the exemption's protection. We have invoked equitable principles to reach beyond the literal language of the exceptions only where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead. *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018, 1028 (Fla. 2001). Under basic rules of construction, statutory laws enacted by legislative bodies cannot impair rights given under a constitution. The legislature is powerless to affect the rights provided under the homestead exemption through statutory enactments. *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018, 1029 (Fla. 2001). According to the plain and unambiguous wording of article X, section 4, a homestead is *only* subject to forced sale for: (1) the payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement or repair thereof; or (3) obligations contracted for house, field or other labor performed on the realty. *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018, 1022 (Fla. 2001).

3. **Nexus between the Property and the Dispute:** The court in *Avalon* explained that when an equitable lien is sought, the requester must establish a sufficient nexus between the property and the dispute in the law suit pursuant to *Chiusolo.* The court in *Avalon* held that under *Chiusolo* the contract at issue established a sufficient nexus between the property and the issues in the lawsuit to meet the standard to maintain a lis pendens. The court went on to explain that although not entitled to a lien of right, Avalon was entitled to maintain a lis pendens under the control of the trial court. *Aryeh Trading v. Trimfast Group, Inc*., 778 So.2d 336, 338 (Fla. 2d DCA 2000).

§15:20.5 Related Matters

1. **Equitable Lien Defined:** An equitable lien is not an estate or property in the thing itself nor a right to recover the thing; that is, a right which may be the basis of a possessory action. It is neither a jus ad rem nor a jus in re. It is simply a right of a special nature over the thing, which constitutes a charge or incumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists. It is the very essence of this condition that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the incumbrance. *Havoco of America, Ltd. v. Hill*, 790 So.2d 1018, 1025 (Fla. 2001).

2. **Quasi In Rem Action:** This action to foreclose an equitable lien arising out of the furnishing of materials incorporated into real property is a *quasi in rem* action. *Westburne Supply, Inc. v. Community Villas Partners, Ltd*., 508 So.2d 431, 433 (Fla. 1st DCA 1987).

3. **Time Lien Arises:** An equitable lien arises at the time of the transaction from which it springs. *Westburne Supply, Inc. v. Community Villas Partners, Ltd.*, 508 So.2d 431, 434 (Fla. 1st DCA 1987).

4. **Vendee's Lien:** The concept of a vendee's lien is premised on the doctrine of equitable conversion. All that is required of the non-defaulting buyer of a defaulting seller, in order to claim an equitable lien to secure the payments made, is that he establish his right to recover the money paid under the contract. The buyer is entitled to claim the lien even if the contract provides that he is entitled only to the return of his deposit. *Posnansky v. Breckenridge Estates Corp.*, 621 So.2d 736, 737 (Fla. 4th DCA 1993).

§15:30 LIEN, RETAINING

§15:30.1 Elements of Cause of Action — Florida Supreme Court

A retaining lien covers the balance due for all legal work done on behalf of the client regardless of whether the property is related to the matter for which the money is owed to the attorney.

Source

Daniel Mones, P.A. v. Smith, 486 So.2d 559 (Fla. 1986).

§15:30.1.1 Elements of Cause of Action — 1st DCA

An attorney's retaining lien on a client's papers and files is a possessory lien that the attorney holds until the fee has been paid or until adequate security for payment has been posted.

Source

Smith v. Patton, 562 So.2d 859, 860 (Fla. 1st DCA 1990).

§15:30.1.2 Elements of Cause of Action — 2nd DCA

An attorney's retaining lien is a possessory interest in a client's papers and files that the attorney holds until his fee has been paid.

Source

Foreman v. Behr, 866 So.2d 705, 706 (Fla. 2d DCA 2003).

§15:30.1.3 Elements of Cause of Action- 3rd DCA

A 'retaining lien' is a passive lien and rests entirely on the right of an attorney to retain possession of his client's papers, money, securities, and files as security for payment of the fees and costs earned by the law firm to that point.

Source

Brickell Place Condo. Ass'n, Inc. v. Joseph H. Ganguzza & Assoc., P.A., 31 So.3d 287, 289-90 (Fla. 3d DCA 2010) ("[A] 'retaining lien' is a passive lien and rests entirely on the right of an attorney to retain possession of his client's papers, money, securities, and files as security for payment of the fees and costs earned by the law firm to that point. An attorney may file and maintain a retaining lien against a client or former client's legal files until the lawyer's fees have been paid or an adequate security for payment has been posted. An attorney or law firm may not assert a retaining lien for fees allegedly owed in a contingent fee case unless and until the contingency has occurred.").

See Also

1. *Conde & Cohen, P.L. v. Grandview Palace Condominium Ass'n, Inc.,* 201 So.3d 64, 65 (Fla. 3d DCA 2015).

§15:30.1.4 Elements of Cause of Action — 4th DCA

An attorney's retaining lien on a client's papers and files is a possessory lien that the attorney holds until the fee has been paid or until adequate security for payment has been posted. Derived from the common law, the existence of the lien does not depend on any agreement between the lawyer and the client.

Source

*Fingar v. Braun and May Realty, Inc., 8*07 So.2d 202, 202 (Fla. 4th DCA 2002).

See Also

1. *Macci v. Jaeger*, 232 So.3d 420 (Fla. 4th DCA 2017).

§15:30.1.5 Elements of Cause of Action — 5th DCA

An attorney's retaining lien is a possessory interest in a client's papers and files that the attorney holds until his fee has been paid.

Source

Ghannam v. Shelnutt, 199 So.3d 295, 298 (Fla. 5th DCA 2016) (noting "when an attorney sues his client for payment of unpaid fees, he abandons the passivity of the retaining lien, and his client is permitted to discover the attorney's file").

§15:30.2 References

1. 4 Fla. Jur. 2d *Attorneys at Law* §§426–429 (2002).
2. 7 Am. Jur. 2d *Attorneys at Law* §§333–341 (1997).
3. 7A C.J.S. *Attorney and Client* §445 (2004).
4. 10 Williston on Contracts §1285B (3d ed. 1967).
5. Gary L. Garrison, Annotation, *Alimony or Child-Support Awards as Subject to Attorneys' Lien*, 49 ALR 5th 595 (1997).
6. Thomas G. Fischer, Annotation, *Attorney's Retaining Lien: What Items of Client's Property or Funds are not Subject to Lien*, 70 ALR 4th 827 (1989).
7. Janet Fairchild, Annotation, *Attorney's Retaining Lien as Affected by Action to Collect Legal Fees*, 45 ALR 4th 198 (1986).
8. John H. Derrick, Annotation, *Priority Between Attorney's Lien for Fees Against a Judgment and Lien of Creditor Against Same Judgment*, 34 ALR 4th 665 (1984).
9. K. R. Newell, Annotation, *Funds in Hands of His Attorney as Subject of Attachment or Garnishment by Client's Creditor*, 35 ALR 3d 1094 (1971).
10. J. C. Vance, Annotation, *Sufficiency of Notice to Opposing Party (or of Serving or Filing Thereof) Required to Establish Attorney's Lien Upon Client's Claim or Cause of Action*, 85 ALR 2d 859 (1962).
11. W. R. Habeeb, Annotation, *What Constitutes Acceptance or Ratification of, or Acquiescence In, Services Rendered by Attorney so as to Raise Implied Promise to Pay Reasonable Value Thereof*, 78 ALR 2d 318 (1961).
12. E. H. Schopler, Annotation, *Conflict of Laws as to Attorneys' Liens*, 59 ALR 2d 564 (1958).
13. Annotation, *Rights and Remedies of Client as Regards Papers and Documents on Which Attorney has Retaining Lien*, 3 ALR 2d 148 (1949).
14. Annotation, *Attorney's Lien on Property Recovered for His Client*, 93 ALR 667 (1934).
15. Tom Spahn, *A Lawyer's Right to Retain Files—An Ethics Analysis*, 21 Va. B. J., Winter 1995, at 7.
16. Note, *Attorney's Retaining Lien Over Former Client's Papers*, 65 Colum. L. Rev. 296 (1965).

§15:30.3 Defenses

1. **Charging Lien v. Retaining Lien:** A charging lien filed by a law firm retained to serve as co-counsel was superior to a retaining lien of the firm originally retained by the client and related back and attached to proceeds paid to the original firm pursuant to a settlement agreement. The original firm failed to file a charging

lien and its reliance upon a passive retaining lien to establish its claim against the settlement proceeds would have denied the law firm that participated in the creation of the funds payment for services. *Leiby Taylor Stearns Linkhorst and Roberts, P.A. v. Wedgewood Air Conditioning, Inc*., 801 So.2d 127 (Fla. 4th DCA 2001), *rev. dismissed*, 817 So.2d 844 (Fla. 2002).

2. **Exceptions:** Absent a clear necessity in a criminal case where the defendant cannot post security for payment of the indebtedness or a situation where the lawyer possessing the lien is entirely at fault causing his withdrawal, the erstwhile client is entitled to delivery of his papers or other property subject to the lien only if he pays the amount due or secures the payment thereof. *Wintter v. Fabber*, 618 So.2d 375, 377 (Fla. 4th DCA 1993). In *Bratton* we ruled that an attorney cannot impose a valid retaining lien on client's funds entrusted to the attorney for a specific purpose where the parties have not agreed that fees should be paid out of the entrusted funds. *Daniel Mones, P.A. v. Smith*, 486 So.2d 559, 561 (Fla. 1986). An attorney who brought an action against client for fees was not entitled to a retaining lien to prevent the client from seeking discovery of the files on which the fee was claimed in the lawsuit. *Fingar v. Braun and May Realty, Inc*., 807 So.2d 202 (Fla. 4th DCA 2002). *See also Foreman v. Behr*, 866 So.2d 705, 707 (Fla. 2d DCA 2003).

3. **Insufficient Funds:** Standing alone, the client's lack of funds to pay the outstanding bill does not defeat the lien. *Andrew Hall and Associates v. Ghanem*, 679 So.2d 60, 62 (Fla. 4th DCA 1996).

4. **Motion to Compel Production:** The value of a retaining lien rests entirely upon the attorney's right to retain possession until the bill is paid; thus, courts may not impair that lien by compelling disclosure of the papers or items. The forced disclosure of those statements could improperly impinge upon petitioner's retaining lien, just as forced disclosure of her file's contents could do. *Rathburn v. Policastro*, 703 So.2d 537 (Fla. 4th DCA 1997). *See also Rutherford, Mulhall & Wargo, P.A., v. Antidormi*, 695 So.2d 1300, 1301 (Fla. 4th DCA 1997); *Wintter v. Fabber*, 618 So.2d 375, 376 (Fla. 4th DCA 1993). The right to retain the papers is valuable to the attorney in proportion as denial of access to them causes inconvenience to the client. Where the adversary has access to documents to which the client does not, the inconvenience to the client is increased, thus enhancing the value of the lien. However, while access to the documents must be provided to the former client's adversary, such documents were not to be made available to the former client until the fee dispute was resolved or security to cover the fee claim posted. *Smith v. Patton*, 562 So.2d 859, 860 (Fla. 1st DCA 1990). *See also Rutherford, Mulhall & Wargo, P.A. v. Antidormi*, 695 So.2d 1300, 1301 (Fla. 4th DCA 1997); *Foreman v. Behr*, 866 So.2d 705, 706 (Fla. 2d DCA 2003).

5. **Rules Regulating the Florida Bar, Rule 5-1.1 Trust Accounts:** Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counter-claim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This does not preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections. *See* Comment.

§15:30.4 Related Matters

1. **Accountants:** While no statute expressly allows accountants to assert a retaining lien, Florida Administrative Code Rule 61H1-23.002 precludes them from doing so. *Blum v. Blum*, 769 So.2d 1142, 1143 (Fla. 4th DCA 2000).

2. **Attorneys' Trust Accounts:** The Supreme Court in *Mones v. Smith*, 486 So.2d 559 (Fla. 1986), held that attorneys' trust accounts are subject to setoff for past legal services rendered in unrelated cases so long as the client's funds which are entrusted to the attorney are not being held in trust for a specific purpose. *Urich & Shenkman, P.A. v. Horizon Insurance Company*, 491 So.2d 1195 (Fla. 1st DCA 1986).

3. **Common Law Origin:** Both retaining liens and charging liens arose under common law. *Daniel Mones, P.A. v. Smith*, 486 So.2d 559, 561 (Fla. 1986). *See also Andrew Hall and Associates v. Ghanem*, 679 So.2d 60, 61 (Fla. 4th DCA 1996).

4. **Fees and Costs:** The rule as generally stated is that an attorney's retaining lien attaches to all property of the client that comes into the attorney's possession, to secure payment of all debts–including fees *and costs*–owed by the client to the attorney. *Boroff v. Bic Corp.*, 718 So.2d 348, 349 (Fla. 2d DCA 1998).

5. **Historical Background:** It is, of course, well-established law that such a retaining lien exists, both in England and in the United States. Such a lien was enforced in England as early as 1734. Ex parte Bush, 7 Viner's Abr. 74. And in 1779 Lord Mansfield, in *Wilkins v. Carmichael*, 1 Doug. 101, 104, declared that it was recognized in courts both of law and equity and was established on general principles of justice. In this country the federal courts have long held that such a lien exists, and that the attorney can retain them until his fees are paid. *The Flush*, 277 F. 25, 29 (2d Cir. 1921). *See also Fingar v. Braun and May Realty, Inc.*, 807 So.2d 202, 203 (Fla. 4th DCA 2002).

6. **Retaining Lien Defined:** An attorney's retaining lien on a client's papers and files is a possessory lien that the attorney holds until the fee has been paid or until adequate security for payment has been posted. Derived from the common law, the existence of the lien does not depend on any agreement between the lawyer and the client. *The Flush*, 277 F. 25, 29 (2d Cir. 1921) (retaining lien "established on general principles of justice"), *cert. denied*, 257 U.S. 657, 42 S.Ct. 184, 66 L.Ed. 421 (1922). A retaining lien differs from a charging lien, which is placed upon any money recovery or fund due the client at the conclusion of the lawsuit. A retaining lien is a passive one; it cannot be enforced through foreclosure and rests wholly upon the right to retain possession until the bill is paid. The pressure exerted by a retaining lien is directly proportional to the client's need and desire for the things in the attorney's possession. Standing alone, the client's lack of funds to pay the outstanding bill does not defeat the lien. The lien may not be impaired by the client securing the right to inspect and copy the papers or compelling their production by subpoena. Only under rare circumstances will the files be released without payment or the furnishing of adequate security: where there is a clear necessity in a criminal case and a defendant cannot post security or where the lawyer's misconduct caused his withdrawal. *See also Quinn v. Headley*, 637 F. Supp. 707 (S.D.N.Y. 1986) (attorney's request for retaining lien denied where he had assumed representation of client knowing that she was insolvent, able to pay attorney only if client received award in lawsuit). If there is a dispute between the lawyer and client as to the fee owed, the trial court may hold a hearing to liquidate the amount and determine the terms of an adequate security. *Andrew Hall and Associates v. Ghanem*, 679 So.2d 60, 61 (Fla. 4th DCA 1996).

7. **Writ of Certiorari:** Smith appealed this non-final order [granting access to documents on which Smith claims a retaining lien]. This court thereafter ruled that, although the trial court order was not appealable, the notice of appeal and initial brief would be construed as a petition for writ of certiorari. *Smith v. Patton*, 562 So.2d 859 (Fla. 1st DCA 1990).

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CHAPTER 16

CONSUMER PROTECTION, DEBT COLLECTION CASES

§16:10 FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT
- §16:10.1 Florida Statutes
- §16:10.2 Elements of Cause of Action — Florida Supreme Court
  - §16:10.2.1 Elements of Cause of Action — 1st DCA
  - §16:10.2.2 Elements of Cause of Action — 2nd DCA
  - §16:10.2.3 Elements of Cause of Action — 3rd DCA
  - §16:10.2.4 Elements of Cause of Action — 4th DCA
  - §16:10.2.5 Elements of Cause of Action — 5th DCA
- §16:10.3 Statute of Limitations
- §16:10.4 References
- §16:10.5 Defenses
- §16:10.6 Related Matters
- §16:10.7 Related Causes of Action
- §16:10.8 Sample Cause of Action

§16:20 COLLECTIONS, WORTHLESS CHECKS, DRAFTS, ORDERS OF PAYMENT
- §16:20.1 Fla.R.Civ.P. Form 1.942
- §16:20.2 Florida Statutes
- §16:20.3 Statute of Limitations
- §16:20.4 References
- §16:20.5 Related Matters

§16:30 FLORIDA CONSUMER COLLECTION PRACTICES ACT
- §16:30.1 Florida Statutes
- §16:30.2 Elements of Cause of Action — Florida Statutes
  - §16:30.2.1 Elements of Cause of Action — Fla. Stat. §559.72, et seq.
  - §16:30.2.2 Elements of Cause of Action — Fla. Stat. §559.72(5)
  - §16:30.2.3 Elements of Cause of Action — Fla. Stat. §559.72(7)
  - §16:30.2.4 Elements of Cause of Action — Fla. Stat. §559.72(9)
- §16:30.3 Statute of Limitations
- §16:30.4 References
- §16:30.5 Defense
- §16:30.6 Related Matters
- §16:30.7 Related Causes of Action
- §16:30.8 Sample Cause of Action

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§16:10 FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

The following statutes are excerpts from Florida's Deceptive and Unfair Trade Practices Act. Practitioners should consult the entirety of the Act when litigating FDUTPA claims.

§16:10.1 Florida Statutes

F.S. §501.204 Unlawful Acts and Practices

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a(1)of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) as of July 1, 2017.

Fla. Stat. § 501.204 (2017). (Current through Chapter 269 of the 2022 Legislative Session.)

F.S. §501.2041 Unlawful Acts and Practices by Social Media Platforms

(1) As used in this section, the term:

(a) "Algorithm" means a mathematical set of rules that specifies how a group of data behaves and that will assist in ranking search results and maintaining order or that is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of such content or material.

(b) "Censor" includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.

(c) "Deplatform" means the action or practice by a social media platform to either permanently or temporarily delete or ban a user from the social media platform for more than 14 days.

(d) "Journalistic enterprise" means an entity doing business in Florida that:

1. Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;
2. Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
3. Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or
4. Operates under a broadcast license issued by the Federal Communications Commission.

(e) "Post-prioritization" means action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or in search results. The term does not include post-prioritization of content and material of a third party, including other users, based on payments by that third party, to the social media platform.

(f) "Shadow ban" means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform. This term includes acts of shadow banning by a social media platform which are not readily apparent to a user.

(g) "Social media platform" means any information service, system, Internet search engine, or access software provider that:

1. Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
2. Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
3. Does business in the state; and
4. Satisfies at least one of the following thresholds:
   a. Has annual gross revenues in excess of $100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
   b. Has at least 100 million monthly individual platform participants globally.

(h) "User" means a person who resides or is domiciled in this state and who has an account on a social media platform, regardless of whether the person posts or has posted content or material to the social media platform.

(2) A social media platform that fails to comply with any of the provisions of this subsection commits an unfair or deceptive act or practice as specified in s. 501.204.

(a) A social media platform must publish the standards, including detailed definitions, it uses or has used for determining how to censor, deplatform, and shadow ban.

(b) A social media platform must apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform.

(c) A social media platform must inform each user about any changes to its user rules, terms, and agreements before implementing the changes and may not make changes more than once every 30 days.

(d) A social media platform may not censor or shadow ban a user's content or material or deplatform a user from the social media platform:

1. Without notifying the user who posted or attempted to post the content or material; or
2. In a way that violates this part.

(e) A social media platform must:

1. Provide a mechanism that allows a user to request the number of other individual platform participants who were provided or shown the user's content or posts.
2. Provide, upon request, a user with the number of other individual platform participants who were provided or shown content or posts.

(f) A social media platform must:

1. Categorize algorithms used for post-prioritization and shadow banning.
2. Allow a user to opt out of post-prioritization and shadow banning algorithm categories to allow sequential or chronological posts and content.

(g) A social media platform must provide users with an annual notice on the use of algorithms for post-prioritization and shadow banning and reoffer annually the opt-out opportunity in subparagraph (f)2.

(h) A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate as defined in s. 106.011(3)(e), beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate. Post-prioritization of certain content or material from or about a candidate for office based on payments to the social media platform by such candidate for office or a third party is not a violation of this paragraph. A social media platform must provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user's qualification by reviewing the website of the Division of Elections or the website of the local supervisor of elections.

(i) A social media platform must allow a user who has been deplatformed to access or retrieve all of the user's information, content, material, and data for at least 60 days after the user receives the notice required under subparagraph (d)1.

(j) A social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast. Post-prioritization of certain journalistic enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation of this paragraph. This paragraph does not apply if the content or material is obscene as defined in s. 847.001.

(3) For purposes of subparagraph (2)(d)1., a notification must:

(a) Be in writing.

(b) Be delivered via electronic mail or direct electronic notification to the user within 7 days after the censoring action.

(c) Include a thorough rationale explaining the reason that the social media platform censored the user.

(d) Include a precise and thorough explanation of how the social media platform became aware of the censored content or material, including a thorough explanation of the algorithms used, if any, to identify or flag the user's content or material as objectionable.

(4) Notwithstanding any other provisions of this section, a social media platform is not required to notify a user if the censored content or material is obscene as defined in s. 847.001.

(5) If the department, by its own inquiry or as a result of a complaint, suspects that a violation of this section is imminent, occurring, or has occurred, the department may investigate the suspected violation in accordance with this part. Based on its investigation, the department may bring a civil or administrative action under this part. For the purpose of bringing an action pursuant to this section, ss. 501.211 and 501.212 do not apply.

(6) A user may only bring a private cause of action for violations of paragraph (2)(b) or subparagraph (2)(d)1. In a private cause of action brought under paragraph (2)(b) or subparagraph (2)(d)1., the court may award the following remedies to the user:
   (a) Up to $100,000 in statutory damages per proven claim.
   (b) Actual damages.
   (c) If aggravating factors are present, punitive damages.
   (d) Other forms of equitable relief, including injunctive relief.
   (e) If the user was deplatformed in violation of paragraph (2)(b), costs and reasonable attorney fees.

(7) For purposes of bringing an action in accordance with subsections (5) and (6), each failure to comply with the individual provisions of subsection (2) shall be treated as a separate violation, act, or practice. For purposes of bringing an action in accordance with subsections (5) and (6), a social media platform that censors, shadow bans, deplatforms, or applies post-prioritization algorithms to candidates and users in the state is conclusively presumed to be both engaged in substantial and not isolated activities within the state and operating, conducting, engaging in, or carrying on a business, and doing business in this state, and is therefore subject to the jurisdiction of the courts of the state.

(8) In an investigation by the department into alleged violations of this section, the department's investigative powers include, but are not limited to, the ability to subpoena any algorithm used by a social media platform related to any alleged violation.

(9) This section may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. s. 230(e)(3), and notwithstanding any other provision of state law.

(10) (a) All information received by the department pursuant to an investigation by the department or a law enforcement agency of a violation of this section is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the investigation is completed or ceases to be active. This exemption shall be construed in conformity with s. 119.071(2)(c).
   (b) During an active investigation, information made confidential and exempt pursuant to paragraph (a) may be disclosed by the department:
      1. In the performance of its official duties and responsibilities; or
      2. To another governmental entity in performance of its official duties and responsibilities.
   (c) Once an investigation is completed or ceases to be active, the following information received by the department shall remain confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:
      1. All information to which another public records exemption applies.
      2. Personal identifying information.
      3. A computer forensic report.
      4. Information that would otherwise reveal weaknesses in a business's data security.
      5. Proprietary business information.
   (d) For purposes of this subsection, the term "proprietary business information" means information that:
      1. Is owned or controlled by the business;
      2. Is intended to be private and is treated by the business as private because disclosure would harm the business or its business operations;
      3. Has not been disclosed except as required by law or a private agreement that provides that the information will not be released to the public;
      4. Is not publicly available or otherwise readily ascertainable through proper means from another source in the same configuration as received by the department; and
      5. Includes:
         a. Trade secrets as defined in s. 688.002.
         b. Competitive interests, the disclosure of which would impair the competitive advantage

of the business that is the subject of the information.

(e) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

Fla. Stat. § 501.2041 (2022). (Current through Chapter 269 of the 2022 Legislative Session.)

F.S. §501.2105 Attorney's Fees

(1) In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge may award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party rea- sonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other nonjudicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the cost thereof to the enforcing authority for the time spent in the investigation and litigation of the case plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of such costs may be made by stipulation of the parties a part of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of such order or decree.

Fla. Stat. § 501.2105 (2022). (Current through Chapter 269 of the 2022 Legislative Session.)

F.S. §501.211 Other Individual Remedies

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

(2) In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105. However, damages, fees, or costs are not recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(3) In any action brought under this section, upon motion of the party against whom such action is filed alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may, after hearing evidence as to the necessity therefor, require the party instituting the action to post a bond in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorney's fees. This subsection shall not apply to any action initiated by the enforcing authority.

Fla. Stat. §501.211 (2001). (Current through Chapter 269 of the 2022 Legislative Session.)

F.S. §501.212 Application

This part does not apply to:

(1) An act or practice required or specifically permitted by federal or state law.

(2) Except as provided in s. 501.2041, a publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter, insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this part.
(3) A claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction.
(4) Any person or activity regulated under laws administered by:
  (a) The Office of Insurance Regulation of the Financial Services Commission;
  (b) Banks, credit unions, and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission;
  (c) Banks, credit unions, or savings and loan associations regulated by federal agencies; or
  (d) Any person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services.
(5) Any activity regulated under laws administered by the Florida Public Service Commission.
(6) An act or practice involving the sale, lease, rental, or appraisal of real estate by a person licensed, certified, or registered pursuant to chapter 475, which act or practice violates s. 475.42 or s. 475.626.
(7)(a) Causes of action pertaining to commercial real property located in this state if the parties to the action executed a written lease or contract that expressly provides for the process of resolution of any dispute and the award of damages, attorney's fees, and costs, if any; or
(7)(b) Causes of action concerning failure to maintain real property if the Florida Statutes:
  1. Require the owner to comply with applicable building, housing, and health codes;
  2. Require the owner to maintain buildings and improvements in common areas in a good state of repair and maintenance and maintain the common areas in a good state of appearance, safety, and cleanliness; and
  3. Provide a cause of action for failure to maintain the real property and provide legal or equitable remedies, including the award of attorney's fees.

  However, this subsection does not affect any action or remedy concerning residential tenancies covered under part II of chapter 83, nor does it prohibit the enforcing authority from maintaining exclusive jurisdiction to bring any cause of action authorized under this part.

Fla. Stat. §501.212 (2021). (Current through Chapter 269 of the 2022 Legislative Session.)

F.S. §501.213 Effect on Other Remedies

(1) The remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law.
(2) This part is supplemental to, and makes no attempt to preempt, local consumer protection ordinances not inconsistent with this part.

§16:10.2 Elements of Cause of Action — Florida Supreme Court

[No citation for this edition.]

§16:10.2.1 Elements of Cause of Action — 1st DCA

In order to assert a claim for damages under FDUTPA, a plaintiff must establish: (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages.

Source

State v. Beach Blvd Automotive Inc., 139 So.3d 380, 393 (Fla. 1st DCA 2014).

See Also

1. *W.S. Badcock Corp. v. Myers,* 696 So.2d 776 (Fla. 1st DCA 1996) ("A finding of fraud is not necessary to sustain a violation under the DUTPA" *citing Urling v. Helms Exterminators, Inc.*, 468 So.2d 451, 453 (Fla. 1st DCA 1985); *Rollins, Inc. v. Heller*, 454 So.2d 580, 584 (Fla. 3d DCA 1984), review denied, 461 So.2d 114 (Fla.1985).

2. *Rensin v. State, Office of Atty. Gen., Dept. of Legal Affairs*, 18 So.3d 572, 575 (Fla. 1st DCA 2009) ("In order to proceed against an individual using a Florida Deceptive and Unfair Trade Practices Act (FDUTPA) violation theory an aggrieved party must allege that the individual was a direct participant in the improper dealings.").
3. *Taubert v. Office of the AG*, 79 So. 3d 77, 79 (Fla. 1st DCA 2011) (defrauded consumers of phony invoices sent out did not have to be listed by name for the complaint to be legally sufficient).

§16:10.2.2 Elements of Cause of Action — 2nd DCA

"[A] consumer claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages."

Source

Rollins, Inc., v. Butland, 951 So.2d 860, 869 (Fla. 2d DCA 2006); *Vintage Motors of Sarasota, Inc. v. MAC Enterps. of North Carolina, LLC*, 336 So.3d 374, 376 n. 1 (Fla. 2d DCA 2022) ("In construing the statute, courts have concluded that the elements of a private FDUTPA claim are: (1) a deceptive or unfair practice; (2) causation; and (3) actual damages.").

§16:10.2.3 Elements of Cause of Action — 3rd DCA

A claim for damages under Florida Deceptive and Unfair Trade Practices Act (FDUTPA) has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.

Source

Miami Automotive Retail, Inc. v. Baldwin, 97 So.3d 846, 858 (Fla. 3d DCA 2012); *Kia Motors Am. Corp. v. Butler*, 985 So.2d 1133, 1140 (Fla. 3d DCA 2008).

See Also

1. *Macias v. HBC of Fla., Inc.,* 694 So.2d 88, 90 (Fla. 3d DCA 1997).
2. *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So.3d 178, 179 (Fla. 3d DCA 2010) ("When a plaintiff in her complaint fails to allege a recoverable loss under Florida Deceptive and Unfair Trade Practices Act (FDUTPA), the complaint fails to state a cause of action under FDUTPA.").

§16:10.2.4 Elements of Cause of Action — 4th DCA

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) provides for a civil cause of action for "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." A consumer claim for damages under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.

Source

DFG Group, LLC. v. Stern, 220 So.3d 1236, 1238 (Fla. 4th DCA 2017); *City First Mortg. Corp. v. Barton*, 988 So.2d 82, 86 (Fla. 4th DCA 2008).

See Also

Stewart Agency, Inc. v. Arrigo Enters., Inc., 266 So.3d 207 (Fla. 4th DCA 2019); *General Motors Acceptance Corp. v. Laesser*, 718 So.2d 276, 277 (Fla. 4th DCA 1998).

§16:10.2.5 Elements of Cause of Action — 5th DCA

Although not specifically identified in the statute, there are basically three elements that are required to be alleged to establish a claim pursuant to the FDUTPA: 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages.

Source

KC Leisure, Inc. v. Haber, 972 So.2d 1069, 1073 (Fla. 5th DCA 2008).

§16:10.3 Statute of Limitations

The statute of limitations for a FDUPTA claim is four (4) years from the time of the injury. Fla. Stat. §95.11(3)(f)(defining statute of limitations for an action "founded on a statutory liability," which applies to FDUTPA); *Yusuf Mohamad Excavation, Inc. v. Ringhaver Equipment, Co.,* 793 So.2d 1127, 1128 (Fla. 5th DCA 2001).

§16:10.4 References

1. *Damages Under FDUTPA*, 78 Fla. B.J. 20, David J. Federbush, (2004).
2. *Entitlement To Attorneys' Fees Under FDUTPA*, 78-Jan. Fla. B.J. 26, David J. Federbush (2004).
3. *The Extraterritorial Application Of The Florida Deceptive And Unfair Trade Practices Act: State Appellate Cases Addressing The Issue*, 28 Nova L. Rev. 817, Jennifer C. Erdelyi (2004).
4. *Per Se Violations Of The Florida Deceptive And Unfair Trade Practices Act*, 76-May Fla. B.J. 62, Mark S. Fistos (2002).
5. *FDUPTA For Civil Antitrust Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76-Dec. Fla. B.J. 52, 61, David J. Federbush, (2002).
6. *Obtaining Relief For Deceptive Practices Under FDUTPA*, 75-Nov. Fla. B.J. 22 , David J. Federbush (2001).
7. *The Unclear Scope of Unconscionability in FDUTPA*, 74 Fla. B.J. 49, David J. Federbush, (2000).
8. *The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act*, David J. Federbush, 73 Fla. B.J. 26 (1999).

§16:10.5 Defenses

1. **Excluded from FDUTPA:** The conduct at issue is specifically excluded from the Act. Section 501.212, Fla. Stat. For example, FDUTPA excludes from civil liability "[a]ny person or activity regulated under laws administered by . . . The Office of Insurance Regulation of the Financial Services Commission." Section 501.212(4)(a), Fla. Stat. (emphasis added).

2. **Conduct Permissible Under Other Law:** FDUPTA does not cover "act[s] or practice[s] required or specifically permitted by federal or state law." Section 501.212(1), Fla. Stat.

3. **Good Faith Defense for Retailers:** "[D]amages, fees, or costs are not recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part." Section 501.211(2), Fla. Stat.

§16:10.6 Related Matters

1. **Purpose of the Act:** "FDUTPA provides that an aggrieved party may initiate a civil action against a party who has engaged in "[u]nfair methods of competition, unconscionable acts or practices," and "unfair or deceptive acts or practices in the conduct of any trade or commerce." §501.204(1), Fla. Stat. (2003). A primary purpose of FDUTPA is "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." §501.202(2), Fla. Stat. (2003); *see Marshall v. W & L Enters. Corp.,* 360 So.2d 1147, 1148 (Fla. 1st DCA 1978) (the statute's purpose is to "make consumers whole for losses caused by fraudulent consumer practices"), *rev'd on other grounds, Hubbel v. Aetna Cas. & Surety Co.,* 758 So.2d 94 (Fla.2000). To give the statute life, the Legislature conferred the right to bring an individual action on any "consumer who has suffered a loss as a result of a violation" of FDUTPA to "recover actual damages, plus attorney's fees and court costs." §501.211(2), Fla. Stat. (2003).… FDUTPA authorizes a person "who has suffered a loss" as a consequence of a violation of the statute to recover "actual damages." §501.211(2), Fla. Stat. (2003)." *Collins v. DaimlerChrysler Corp.*, 894 So.2d 988, 989 - 990 (Fla. 5th DCA 2004). *See also Law Office of David J. Stern, P.A. v. Dep't of Legal Affairs*, 83 So. 3d 847, 848 (Fla. 4th DCA 2011) (numerous complaints received by aggrieved homeowners that banks' attorneys were presenting misleading and false documents in the utilization of foreclosure proceedings did not come within the rubric of "trade and commerce" as required for civil investigative subpoenas under FDUTPA).

2. **Defining Unfair and Deceptive Practices:** "An unfair practice is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 499 (Fla. 4th DCA 2001) (quoting *Spiegel, Inc. v. Fed. Trade Comm'n,* 540 F.2d 287, 293 (7th Cir.1976)); *Stewart Agency*, 266 So.3d at 212 (same), citing *Caribbean Cruise Line, Inc. v. Better Business Bureau of Palm Beach County, Inc.*, 169 So.3d 164, 169 (Fla. 4th DCA 2015); *see Millennium Communications & Fulfillment, Inc. v. Office of the Attorney Gen.,* 761 So.2d 1256, 1263 (Fla. 3d DCA 2000) (stating that deception occurs if there is a " 'representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.' ") (quoting *Southwest Sunsites, Inc. v. Fed. Trade Comm'n,* 785 F.2d 1431, 1435 (9th Cir.1986))." *PNR, Inc. v. Beacon Property Management, Inc.* 842 So.2d 773, 777 (Fla. 2003). *See also Samuels*, 782 So.2d at 499 (An unfair practice is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " *quoting Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 293 (7th Cir.1976)).

3. **Though Liberally Construed, "Deception" Must be Probable, Not Merely Possible:** Although FDUTPA does not explicitly define the term "deception," the provisions of the Act are to be "construed liberally." Fla. Stat. § 501.202. Courts have determined that a deceptive practice occurs when there is "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Zlotnick v. Premier Sales Group*, 480 F.3d 1281, 1284 (11th Cir. 2007) (citation and quotation omitted); see also, *Rollins*, 951 So. 2d at 869 ("A deceptive practice is one that is 'likely to mislead' consumers."). "This standard requires a showing of 'probable, not possible, deception' that is 'likely to cause injury to a reasonable relying consumer.'" *Zlotnick*, 480 F.3d at 1284 (quoting *Millennium Commc'ns & Fulfillment, Inc. v. Office of the Att'y Gen*., 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000)).

4. **Actual Reliance Not Required:** "A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." *Davis v. Powertel, Inc.*, 776 So.2d 971, 973 (Fla. 1st DCA 2000). Rather, an objective test is used to determine whether "the alleged practice was likely to deceive a consumer acting in the same circumstances." *Carriuolo v. Gen. Motors Co*., 823 F.3d 977, 983-84 (11th Cir. 2016) (internal citations omitted).

5. **Damages:** "In the context of FDUTPA, "actual damages" have long been defined as " 'the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.' "*Rollins, Inc. v. Heller,* 454 So.2d 580, 585 (Fla. 3d DCA 1984) (quoting *Raye v. Fred Oakley Motors Inc.,* 646 S.W.2d 288, 290 (Tex. Ct.App.1983)); *see Smith v.2001 S. Dixie Highway, Inc.,* 872 So.2d 992, 994 (Fla. 4th DCA 2004); *H & J Paving of Fla., Inc. v. Nextel, Inc.,* 849 So.2d 1099 (Fla. 3d DCA 2003) (recognizing that measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the parties' contract).

   In *Davis v. Powertel,* 776 So.2d 971 (Fla. 1st DCA 2000), the First District Court of Appeal determined that FDUTPA allows for damages based on diminution of value. There, the class plaintiff alleged that Powertel sold cellular telephones without informing the purchasers that the phones were programmed to work only with Powertel's communication services. The class plaintiff alleged that although these phones appeared to be the same as other Nokia and Motorola models, they contained a chip that rendered them inoperable when used with any other wireless phone service. The circuit court dismissed the class plaintiff's FDUTPA claim. However, on appeal, the appellate court agreed that the class plaintiff adequately stated a claim for damages under FDUTPA, recognizing "[t]he [claim], according to the plaintiffs, was that Powertel's alleged nondisclosure had reduced the value of the phone in each case." *Id.* at 973. Accordingly, the court allowed the case to proceed because the "*alleged deceptive practice reduced the value of the telephones.*" *Id.* at 974-75 (emphasis added); *see also Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati,* 715 So.2d 311, 313 (Fla. 4th DCA 1998)." *Collins v. DaimlerChrysler Corp.*, 894 So.2d 988, 990 (Fla. 5th DCA 2004). *See also Gen. Motors Acceptance Corp. v. Laesser*, 718 So.2d 276, 278 (Fla. 4th DCA 1998) (The measure of "actual damages" recoverable under the statute has been defined generally as "the

difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties" citing *Urling v. Helms Exterminators, Inc.*, 468 So.2d 451, 454 (Fla. 1st DCA 1985)).

In a FDUPTA claim where a plaintiff receives a worthless product or a product rendered valueless due to a defect, his damages will be equal to the full purchase price of the product. *Debernardis v. IQ Formulations, L.L.C.*, 942 F.3d 1076, 1084 (11th Cir. 2019); *Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. 3d DCA 1984) (same).

A double recovery based on the same element of damages is prohibited where a claim is brought under FDUTPA and a breach of contract. *Laufen, Inc. v. Andrew*, 83 So. 3d 898, 899 (Fla. 5th DCA 2012) (when the same measure of damages applies to both theories of recovery, the final judgment must make clear that the defendant is only entitled to a single recovery of the damage amount).

The Eleventh Circuit affirmed (per curiam) a jury award of FDUTPA damages award and fraudulent misrepresentation damages based on misrepresentations related to promissory notes exchanged as part of a business sale. The Court recognized that: "FDUTPA does allow the Whites to recover the damages they incurred by receiving consideration at closing that was less valuable than was represented." The decision has a helpful explanation of the difference between recoverable actual damages under FDUTPA and fraud consequential damages. *See White v. Grant Mason Holdings, Inc.,* 8:14-cv-02975, 2018 WL 3323473 (11th Cir. Jul. 6, 2018).

6. **Consequential Damages Not Compensable:** Consequential damages are not available under the Act. *E.g., City First Mortg. Corp. v. Barton*, 988 So.2d 82, 86 (Fla. 4th DCA 2008) (indicating consequential or special damages are not recoverable as "actual damages" under FDUTPA); *Urling v. Helms Exterminators, Inc.,* 468 So.2d 451, 454 (Fla. 1st DCA 1985).

7. **Entity Can Pursue Equitable Relief, Even Without "Actual Damages":** "To state a claim for equitable relief, an entity must show: (1) that it is aggrieved, in that its rights have been, are being, or will be adversely affected, by (2) a violation of FDUTPA, meaning an unfair or deceptive practice which is injurious to consumers. Further, 'for someone to be aggrieved, the injury claimed to have been suffered cannot be merely speculative.'" *Stewart Agency*, 266 So.3d at 214 (noting that "[t]he requirement for an entity to show an invasion of legal rights to seek equitable relief under 501.211(1) is not synonymous with the requirement to show entitlement to actual damages under section 501.211(2), because entities frequently do not suffer actual damages from unfair and deceptive practices of competitors.").

8. **Single Transactions:** "FDUTPA applies to private causes of action arising from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract." *PNR, Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773, 777 (Fla. 2003).

9. **Breach of Contract:** "To the extent an action giving rise to a breach of contract or breach of lease may also constitute an unfair or deceptive act, such a claim is and has always been cognizable under the FDUTPA." *PNR, Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773, 777, n.2 (Fla. 2003); *see also Advanced Protection Technologies, Inc. v. Square D Co.,* 390 F.Supp.2d 1155, 1164-5 (M.D.Fla.2005) (denying summary judgment on a FDUPTA claim based on claims of breach of contract, breach of confidentiality agreement, etc.); *Sun Prot. Factory, Inc. v. Tender Corp.*, 2005 U.S. Dist. LEXIS 35623 (M.D. Fla. Oct. 7, 2005) (denying summary judgment on both a claim for a breach of a settlement agreement and a FDUPTA claim based on the breach); *H & J Paving v. Nextel*, 849 So.2d 1099, 1101 (Fla. 3d DCA 2003) (denying summary judgment on a breach of contract claim and a FDUPTA claim based on the breach).

10. **Unreasonable Pricing:** An uninsured patient's allegations that she paid approximately six times what it cost hospital to treat her was sufficient for unreasonable pricing claim against hospital under Florida's Deceptive and Unfair Trade Practices Act. *Colomar v. Mercy Hosp., Inc.*, 461 F. Supp. 2d 1265 (S.D. Fla. 2006).

11. **Specificity:** An act need not violate a specific rule or regulation to be considered deceptive under FDUTPA. *State v. Tenet Healthcare Corp.,* 420 F.Supp.2d 1288 (S.D. Fla. 2005).

12. **Trademark:** Florida Deceptive and Unfair Trade Practices Act is not applicable to cause of action alleging trademark infringement. *Babbit Electronics, Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1182, n. 7. (11th Cir. 1994).

13. **Class Actions:** FDUTPA claims are amenable to class treatment. *E.g., Baptist Hosp., Inc. v Baker*, 84 So.3d 1200 (Fla. 1st DCA 2012) (numerosity, commonality, typicality, adequacy requirements of Fla.R. Civ.P. 1.220(a), and one element of subsection (b) must be met); *Equity Residential Properties Trust v. Yates*, 910 So.2d 401, 402 (Fla. 4th DCA 2005) (certifying a FDUTPA class consisting of a class of tenants that each of which suffered damages to a different degree and noting that "[f]or purposes of class certification, though, liability—not damages—is the focus of the inquiry") (citing *Oce Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.*, 760 So.2d 1037, 1043 (Fla. 2d DCA 2000); *Turner Greenberg Associates, Inc. v. Pathman*, 885 So.2d 1004, 1005, 1009 (Fla. 4th DCA 2004) (certifying a FDUTPA class for the recovery of deceptive freight shipping costs that were added in various amounts); *Latman v. Costa Cruise Lines, N.V.*, 758 So.2d 699, 703 (Fla. 3rd DCA 2000) (reversing denial of class certification based on overcharging cruise ship passengers for port charges); *Miami Auto Retail, Inc. v. Baldwin*, 2011 Fla. App. LEXIS 8932, at *21 (Fla. 3d DCA July 15, 2011) (reversing lower court's certification under Fla. R. Civ. P. 1.220(a) and (b) because individual questions of law and fact predominated and class representation was not superior to other available methods for the fair and efficient adjudication of the case).

14. **Reliance in Class Actions:** Individual class members need not prove individual reliance on misrepresentations for a class to be certified under Florida's Deceptive and Unfair Trade Practices Act. *See, e.g., Latman v. Costa Cruise Lines, N.V.*, 758 So.2d 699, 703 (Fla. 3rd DCA 2000).

15. **Arbitration Clause:** "It does not logically follow that the mere fact that the FDUTPA creates a statutory claim that such a claim is not subject to arbitration. Arbitration clauses have repeatedly been held to apply to statutory claims. *See, e.g., Great Western Fin. Sec., Corp. v. Grandison,* 701 So.2d 1202 (Fla. 5th DCA 1997) (reversing the trial court's order denying appellants' motion to compel arbitration of statutory civil theft claim); *Ronbeck Constr. Co. v. Savanna Club Corp.,* 592 So.2d 344 (Fla. 4th DCA 1992) (same); *Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc.,* 543 So.2d 359 (Fla. 1st DCA 1989) (enforcing arbitration provision to statutory claims under Florida's Franchise Fraud Act); *Richardson Greenshields Sec., Inc. v. McFadden,* 509 So.2d 1212 (Fla. 2d DCA 1987) (enforcing arbitration provision to statutory claims alleging violations of Florida's wiretap statute); *Oppenheimer & Co. v. Young,* 475 So.2d 221 (Fla.1985) (enforcing arbitration provision to claims under the Florida Securities Act). The trial court's "extrapolation" of *Management* is erroneous. *See also World Vacation Travel, S.A., de C.V. v. Brooker,* 799 So.2d 410 (Fla. 3d DCA 2001), *rev. denied*, 821 So.2d 292 (Fla. 2002) (distinguishing *Management* and finding that a venue clause in a contract designating Cancun, Mexico as the applicable forum does apply to an unfair trade claim because the claim arose solely out of the agreement)." *Aztec Medical Services, Inc. v. Burger*, 792 So.2d 617, 622 (Fla. 4th DCA 2001).

16. **Long Arm Jurisdiction:** FDUTPA claims can be brought against nonresident Internet businessman who had 4% of sales in Florida, as such was sufficient minimum contacts without offending due process notions. *Caiazzo v. Am. Royal Arts Corp.*, 73 So.3d 245 (Fla. 4th DCA 2011). Similarly, a FDUTPA claim can be brought by non-Florida residents under appropriate circumstances, as "all of the federal courts in the Southern District of Florida that have considered this issue have ... held that 'FDUTPA applies to non-Florida residents if the offending conduct took place predominantly or entirely in Florida.'" *Felice v. Invicta Watch Co. of Am., Inc.*, No. 16-62772, 2017 WL 3336715, at *2–3 (S.D. Fla. Aug. 4, 2017) (quoting *Karhu v. Vital Pharm., Inc.*, No. 13-60768, 2013 WL 4047016, at *10 (S.D. Fla. Aug. 9, 2013)).

17. **Florida Courts and Federal Courts:** Florida courts often cite federal decisions interpreting the FDUTPA as persuasive authority. *Stewart Agency*, 266 So.3d at 213 n. 2; *see also, Tymar Distrib. LLC v. Mitchell Group USA, LLC*, 558 F.Supp.3d 1275, 1284 n.3 (S.D. Fla. 2021) (same).

§16:10.7 Related Causes of Action

✓ Antitrust, §4:30

- ✓ Breach of Contract, §3:10
- ✓ Breach of Fiduciary Duty, §4:50
- ✓ Breach of Implied Covenant of Good Faith & Fair Dealing
- ✓ Civil Conspiracy, §4:70
- ✓ Fraud, §8:10
- ✓ Tortious Interference with Advantageous Business Relationship, §4:180
- ✓ Tortious Interference With a Contractual Relationship, §3:60

§16:10.8 Sample Cause of Action

COUNT FOR VIOLATION OF FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") renders unlawful unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Section 501.204, Fla. Stat.
At all relevant times, Defendant solicited, advertised, offered, and provided goods and services by [INSERT DESCRIPTION OF CONDUCT AT ISSUE] and thereby was engaged in trade or commerce as defined in Section 501.203, Fla. Stat.
At all relevant times, Plaintiff and the members of the Class were consumers as defined by Section 501.203, Fla. Stat.
Defendant's practice, as described in detail in paragraphs __-__ above, is unfair and deceptive.
As a result of Defendant's unfair and deceptive practices, Plaintiff was damaged.

WHEREFORE, Plaintiff demands a declaratory judgment that Defendant violated the Act and an injunction enjoining future violations of the Act pursuant to Section 501.211(1), Fla. Stat., actual damages for violation of the Act pursuant to Section 501.211(2), Fla. Stat., monetary damages, an award of attorneys' fees and costs pursuant to Sections 501.211(2) and 501.2105, Fla. Stat., and such other relief that this Court deems just and proper.

§16:20 COLLECTIONS, WORTHLESS CHECKS, DRAFTS, ORDERS OF PAYMENT

§16:20.1 Fla.R.Civ.P. Form 1.942

COMPLAINT

Plaintiff, A.B., sues defendant, C.D., and alleges:

1. This is an action for damages that (insert jurisdictional amount).
2. On _____(date)_____, defendant executed a written order for the payment of $_____, commonly called a check, a copy being attached, payable to the order of plaintiff and delivered it to plaintiff.
3. The check was presented for payment to the drawee bank but payment was refused.
4. Plaintiff holds the check and it has not been paid.
5. Defendant owes plaintiff $_____ that is due with interest from _____(date)_____, on the check.

WHEREFORE plaintiff demands judgment for damages against defendant.

NOTE: A copy of the check must be attached. Allegations about endorsements are omitted from this form and must be added when proper.

Committee Notes: 1980 Amendment. Paragraph 4 is divided into 2 paragraphs to properly accord with rule 1.110(f).

See *Amendments to the Florida Rules of Civil Procedure*, 773 So.2d 1098 (Fla. 2000).

§16:20.2 Florida Statutes

Florida Statutes §68.065 Actions to collect worthless checks, drafts, or orders of payment; attorney's fees and collection costs: (See full text of statute).

(1) As used in this section, the term "payment instrument" or "instrument" means a check, draft, order of payment, debit card order, or electronic funds transfer.

(2) In lieu of a service charge authorized under subsection (3), s. 832.062(4)(a), or s. 832.07, the payee of a payment instrument, the payment of which is refused by the drawee because of lack of funds, lack of credit, or lack of an account, or where the maker or drawer stops payment on the instrument with intent to defraud, may lawfully collect bank fees actually incurred by the payee in the course of tendering the payment, plus a service charge of $25 if the face value does not exceed $50; $30 if the face value exceeds $50 but does not exceed $300; $40 if the face value exceeds $300; or 5 percent of the face value of the payment instrument, whichever is greater. The right to damages under this subsection may be claimed without the filing of a civil action.

(3) (a) In any civil action brought for the purpose of collecting a payment instrument, the payment of which is refused by the drawee because of lack of funds, lack of credit, or lack of an account, or where the maker or drawer stops payment on the instrument with intent to defraud, and where the maker or drawer fails to pay the amount owing, in cash, to the payee within 30 days after a written demand therefor, as provided in subsection (4), the maker or drawer is liable to the payee, in addition to the amount owing upon such payment instrument, for damages of triple the amount so owing. However, in no case shall the liability for damages be less than $50. The maker or drawer is also liable for any court costs and reasonable attorney fees incurred by the payee in taking the action. Criminal sanctions, as provided in s. 832.07, may be applicable.

(b) The payee may also charge the maker or drawer of the payment instrument a service charge not to exceed the service fees authorized under s. 832.08(5) or 5 percent of the face amount of the instrument, whichever is greater, when making written demand for payment. In the event that a judgment or decree is rendered, interest at the rate and in the manner described in s. 55.03 may be added toward the total amount due. Any bank fees incurred by the payee may be charged to the maker or drawer of the payment instrument.

(4) Before recovery under subsection (3) may be claimed, a written demand must be delivered by certified or registered mail, evidenced by return receipt, or by first-class mail, evidenced by an affidavit of service of mail, to the maker or drawer of the payment instrument to the address on the instrument, to the address given by the drawer at the time the instrument was issued, or to the drawer's last known address. The form of such notice shall be substantially as follows:

"You are hereby notified that a check, draft, order of payment, debit card order, or electronic funds transfer numbered _____ in the face amount of $_____ issued by you on (date) , drawn upon (name of bank) , and payable to _____, has been dishonored. Pursuant to Florida law, you have 30 days from receipt of this notice to tender payment in cash of the full amount of the dishonored payment instrument, plus a service charge of $25 if the face value does not exceed $50, $30 if the face value exceeds $50 but does not exceed $300, $40 if the face value exceeds $300, or 5 percent of the face amount of the dishonored instrument, whichever is greater, the total amount due being $_____ and _____ cents. Unless this amount is paid in full within the 30-day period, the holder of the dishonored payment instrument may file a civil action against you for three times the amount of the dishonored instrument, but in no case less than $50, in addition to the payment of the dishonored instrument plus any court costs, reasonable attorney fees, and any bank fees incurred by the payee in taking the action."

Fla. Stat. §68.065 (2013). (Current through the 2021 First Regular Session of the 27th Legislature.)

Florida Statutes §673.4011 Signature:

(1) A person is not liable on an instrument unless:

(a) The person signed the instrument; or

(b) The person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under s. 673.4021.

(2) A signature may be made:

(a) Manually or by means of a device or machine; and
(b) By the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.

Florida Statutes §673.4021 Signature by representative: (See full text of statute).

(3) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person.

Florida Statutes §673.4111 Refusal to pay cashier's checks, teller's checks, and certified checks: (See full text of statute).

(2) If the obligated bank wrongfully refuses to pay a cashier's check or certified check, wrongfully stops payment of a teller's check, or wrongfully refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

§16:20.3 Statute of Limitations

Five Years. Fla. Stat. §95.11(2)(b); *Leavitt Communications, Inc. v. Quality Communications of America, Inc.*, 939 So.2d 257, 258 (Fla. 1st DCA 2006).

§16:20.4 References

1. 8 Fla. Jur. 2d *Bills, Notes & Other Commercial Paper* §§277–285 (2004).
2. 12 Am. Jur. 2d *Bills and Notes* §627–667 (1997).
3. 10 C.J.S. *Bills and Notes* §§251–297 (1995).

§16:20.5 Related Matters

1. **Florida Statutes §68.065:** Pursuant to section 68.065(1), Florida Statutes (2001), appellant Velecta Paramount brought an action against appellee Michael Gilbert, in his individual capacity. Section 68.065(1) applies in "any civil action brought for the purpose of collecting a check." Appellant's "civil action" to collect the check was based on section 673.4011(1), Florida Statutes (2001), which creates liability "on an instrument." The check at issue is an instrument. *See* §673.1041(5)-(6), Fla. Stat. (2001). In this case, section 673.4021(3), Florida Statutes (2001) operates to relieve Gilbert of personal liability on the check. *See Serna v. Milanese, Inc.,* 643 So.2d 36, 38 (Fla. 3d DCA 1994). If Gilbert is not liable on the check, section 68.065(1) does not create a separate cause of action which can be the basis of liability. *Paramount v. Gilbert*, 867 So.2d 642 (Fla. 4th DCA 2004).

2. **Treble Damages under §68.065(3)(a):** "Section 68.065(3)(a) of the worthless check statute allows for treble damages in addition to the amount owing if a maker stops a check with intent to defraud and fails to make payment." *Sanders Farm of Ocala, Inc. v. Bay Area Truck Sales, Inc.*, 235 So.3d 1010, 1012 (Fla. 2d DCA 2017) (further noting that "stopping payment on a check does not conclusively establish the intent to defraud"). *See also BEO Mgmt Corp. v. Horta*, 314 So.3d 434, 437 (Fla. 3d DCA 2020) (noting that Section 68.065(3)(a) "provides for the payment of the face amount of a worthless check, plus treble damages").

3. **Economic Hardship:** Florida Statutes section 68.065(6) provides that "[i]f the court or jury determines that the failure of the maker or drawer to satisfy the dishonored check was due to economic hardship, the court or jury has the discretion to waive all or part of the statutory damages." *Hutson v. Plantation Open MRI, LLC*, 66 So.3d 1042 (Fla. 4th DCA 2011) (summary judgment was improper where person who wrote the dishonored check testified that actions of Plantation MRI led to the insufficient funds).

§16:30 FLORIDA CONSUMER COLLECTION PRACTICES ACT

The following statutes are excerpts from Florida's Consumer Collection Practices Act. Practitioners should consult the entirety of the Act when litigating FCCPA claims.

§16:30.1 Florida Statutes

F.S. §559.72 Prohibited Practices Generally

In collecting consumer debts, no person shall:

(1) Simulate in any manner a law enforcement officer or a representative of any governmental agency.

(2) Use or threaten force or violence.

(3) Tell a debtor who disputes a consumer debt that she or he or any person employing her or him will disclose to another, orally or in writing, directly or indirectly, information affecting the debtor's reputation for credit worthiness without also informing the debtor that the existence of the dispute will also be disclosed as required by subsection (6).

(4) Communicate or threaten to communicate with a debtor's employer before obtaining final judgment against the debtor, unless the debtor gives her or his permission in writing to contact her or his employer, or acknowledges in writing the existence of the debt after the debt has been placed for collection. However, this does not prohibit a person from telling the debtor that her or his employer will be contacted if a final judgment is obtained.

(5) Disclose to a person other than the debtor or her or his family information affecting the debtor's reputation, whether or not for credit worthiness, with knowledge or reason to know that the other person does not have a legitimate business need for the information or that the information is false.

(6) Disclose information concerning the existence of a debt known to be reasonably disputed by the debtor without disclosing that fact. If a disclosure is made before such dispute has been asserted and written notice is received from the debtor that any part of the debt is disputed, and if such dispute is reasonable, the person who made the original disclosure must reveal upon the request of the debtor within 30 days the details of the dispute to each person to whom disclosure of the debt without notice of the dispute was made within the preceding 90 days.

(7) Willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family.

(8) Use profane, obscene, vulgar, or willfully abusive language in communicating with the debtor or any member of her or his family.

(9) Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist.

(10) Use a communication that simulates in any manner legal or judicial process or that gives the appearance of being authorized, issued, or approved by a government, governmental agency, or attorney at law, when it is not.

(11) Communicate with a debtor under the guise of an attorney by using the stationery of an attorney or forms or instruments that only attorneys are authorized to prepare.

(12) Orally communicate with a debtor in a manner that gives the false impression or appearance that such person is, or is associated with, an attorney.

(13) Advertise or threaten to advertise for sale any debt as a means to enforce payment except under court order or when acting as an assignee for the benefit of a creditor.

(14) Publish or post, threaten to publish or post, or cause to be published or posted before the general public individual names or any list of names of debtors, commonly known as a "deadbeat list," for the purpose of enforcing or attempting to enforce collection of consumer debts.

(15) Refuse to provide adequate identification of herself or himself or her or his employer or other entity whom she or he represents if requested to do so by a debtor from whom she or he is collecting or attempting to collect a consumer debt.

(16) Mail any communication to a debtor in an envelope or postcard with words typed, written, or printed on the outside of the envelope or postcard calculated to embarrass the debtor. An example of this would be an envelope addressed to "Deadbeat, Jane Doe" or "Deadbeat, John Doe."

(17) Communicate with the debtor between the hours of 9 p.m. and 8 a.m. in the debtor's time zone without the prior consent of the debtor.
   (a) The person may presume that the time a telephone call is received conforms to the local time zone assigned to the area code of the number called, unless the person reasonably believes that the debtor's telephone is located in a different time zone.
   (b) If, such as with toll-free numbers, an area code is not assigned to a specific geographic area, the person may presume that the time a telephone call is received conforms to the local time zone of the debtor's last known place of residence, unless the person reasonably believes that the debtor's telephone is located in a different time zone.

(18) Communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the debtor's attorney fails to respond within 30 days to a communication from the person, unless the debtor's attorney consents to a direct communication with the debtor, or unless the debtor initiates the communication.

(19) Cause a debtor to be charged for communications by concealing the true purpose of the communication, including collect telephone calls and telegram fees.

Fla. Stat. §559.72 (2010). (Current through the 2021 First Regular Session of the 27th Legislature.)

But see Williams v. Educational Credit Management Corp., 88 F.Supp.3d 1338 (M.D. Fla. 2015) (holding that Plaintiff's claim under Fla. Stat. § 559.72(18) is preempted by the federal collection requirements set forth in 34 C.F.R. § 682.410(b)(6)).

F.S. §559.77(1) Civil Remedies

A debtor may bring a civil action against a person violating the provisions of s. 559.72 in the county in which the alleged violator resides or has his or her principal place of business, or in the county where the alleged violation occurred.

F.S. §559.552 Relationship of State and Federal Law

Nothing in this part shall be construed to limit or restrict the continued applicability of the federal Fair Debt Collection Practices Act to consumer collection practices in this state. This part is in addition to the requirements and regulations of the federal act. In the event of any inconsistency between any provision of this part and any provision of the federal act, the provision which is more protective of the consumer or debtor shall prevail.

§16:30.2 Elements of Cause of Action — Florida Statutes

§16:30.2.1 Elements of Cause of Action — Fla. Stat. §559.72, et seq.

The Florida Consumer Collection Practices Act (FCCPA) provides that a debtor may bring a civil action against a person violating the provisions of F.S. §559.72 in the conduct of collection of consumer debt. *See* §§559.77 & 559.72, Fla. Stat. (2011). The statute does not define the elements of such an action under §559.77; however, it does provide that in applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act (FDCPA). *See, e.g., Polanco v. Igor & Co., Inc.*, Case No: 18-cv-60932-SMITH/VALLE, 2019 WL 3999633, at *4 (S.D. Fla. July 31, 2019) ("[T]o prevail on an FCCPA claim, a plaintiff must demonstrate the same three elements needed for a cause of action under the FDCPA."); *Ziemniak v. Goede & Adamczyk, PLLC*, Case No: 11-cv-62286, 2012 WL 5868385, at *2 (S.D. Fla. Nov. 19, 2012) ("The FCCPA has parallel requirements [to the FDCPA] to state a claim.").

In order to prevail on a FDCPA claim, a plaintiff must prove that: (1) the plaintiff has been the object of collection activity arising from a consumer debt; (2) the defendant is a debt collector as defined by the FDCPA; and (3) the defendant has engaged in an act or omission prohibited by the FDCPA. *See Sibley v. Firstcollect, Inc.*, 913 F.Supp. 469, 470 (M.D. La. 1995).

Under the FCCPA, these elements are similar but distinguishable. *See, e.g., Ali v. LH Alliance, Inc.*, Case No. 19-cv-61387-BLOOM/VALLE, 2019 WL 3997124, at *3 (S.D. Fla. Aug. 23, 2019) ("Notwithstanding the similarity, the elements are distinguishable in certain respects."). The first prong is substantially identical as the

FCCPA only applies to consumer debt, which is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." Fla. Stat. §559.55(1). *See Acciard v. Whitney, et al.*, 2008 U.S. Dist. LEXIS 98131 (M.D. Fla. 2008).

The second prong differs from the FDCPA in that the FCCPA prohibits acts of "persons" and, accordingly, is not limited to "debt collectors." *See Bacelli v. MFP, Inc., et al.*, 729 F.Supp.2d 1328 (M.D. Fla. 2010), *citing Schauer v. Gen. Motors Acceptance Corp.*, 819 So.2d 809, 811-12 (Fla. 4th DCA 2002). The third prong would consist of an act or omission prohibited by the FCCPA.

In addition to these elements, several subsections of §559.72 require an allegation of knowledge or intent by the defendant in order to state a cause of action. *Polanco*, 18-cv-60932-SMITH/VALLE, 2019 WL 3999633, at *4 ("Unlike the FDCPA, however, 'the FCCPA requires an [additional] allegation of knowledge or intent by the debt collector in order to state a cause of action.'"), citing *Kaplan v. Assetcare, Inc.*, 88 F.Supp.2d 1355, 1363 (S.D. Fla. 2000).

Source

Kaplan v. Assetcare, Inc., 88 F.Supp.2d 1355 (S.D. Fla. 2000).

§16:30.2.2 Elements of Cause of Action — Fla. Stat. §559.72(5)

The FCCPA provides a narrower and more specific constraint than does the FDCPA on collection conduct involving contact with third parties. *See* Fla. Stat. §§559.72(4)-(6). Subsection (5) prohibits a person from disclosing "to a person other than the debtor or her or his family information affecting the debtor's reputation, whether or not for credit worthiness, with *knowledge or reason to know* that the other person does not have a legitimate business need for the information or that the information is false." *See* Fla. Stat. §559.72(5). (Emphasis added.)

In order to demonstrate a violation of §559.72(5), a plaintiff must show that: (1) there was a disclosure of information to a person other than a member of plaintiff's family; (2) the person did not have a legitimate business need for the information; and (3) the information affected plaintiff's reputation. *See Heard v. Mathis*, 344 So.2d 651, 655 (Fla. 1st DCA 1977).

Source

Niven v. National Action Financial Services, Inc. et al., 2008 U.S. Dist. LEXIS 69037, at *6 (M.D. Fla. September 10, 2008).

§16:30.2.3 Elements of Cause of Action — Fla. Stat. §559.72(7)

"In collecting consumer debts, no person shall willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family." Fla. Stat. §559.72(7).

In order to show that a defendant violated §559.72(7), the plaintiff must allege that defendant willfully engaged in conduct that harassed the consumer. *See Locke v. Wells Fargo Home Mortg.*, 2010 U.S. Dist. LEXIS 126140, at *6 (S.D. Fla. Nov. 30, 2010).

The statute does not define what constitutes harassment; however, Florida courts have placed that determination within the jury's province. "Ordinarily, whether conduct harasses, oppresses, or abuses will be a question for the jury." *Jeter v. Credit Bureau*, 760 F.2d 1168, 1179 (11th Cir. Ga. 1985).

Source

Ortega v. Collectors Training Inst. of Ill., Inc., 2011 U.S. Dist. LEXIS 6282, 29-30 (S.D. Fla. Jan. 21, 2011).

See Also

1. *Story v. J. M. Fields, Inc.*, 343 So.2d 675, 677 (Fla. 1st DCA 1977).
2. *Ortiz v. Accounts Receivable Mgmt, Inc.*, 2010 U.S. Dist. LEXIS 20944, at *9 (S.D. Fla. Feb. 12, 2010).

3. *Pollock v. Bay Area Credit Svc, LLC*, 2009 U.S. Dist. LEXIS 71169, at *9 (S.D. Fla. Aug. 13, 2009) (factual question whether 187 telephone calls were willful and harassing).

§16:30.2.4 Elements of Cause of Action — Fla. Stat. §559.72(9)

"*Section 559.72(9) of the FCCPA* prohibits persons, in collecting consumer debts, from "claim[ing], attempt[ing], or threaten[ing] to enforce a debt when such person knows that the debt is not legitimate, or assert[ing] the existence of some other legal right when such person knows that the right does not exist." Fla. Stat. §559.72(9).

The *knowledge* requirement must be actual knowledge of the impropriety or overreach of a claim and would not be satisfied by constructive knowledge. *Williams v. Streeps Music Co., Inc*., 333 So.2d 65, 67 (Fla. 4th DCA 1976) (striking allegation that debt collector "should have known" the claim was not legitimate).

In order to state a claim pursuant to Fla. Stat. §559.72(9), a plaintiff must allege: (1) that either a debt that did not exist or a legal right that did not exist was asserted; and (2) that the person had actual knowledge that the right did not exist. *See* §559.72(9).

Source

Ortega, *supra*, 2011 U.S. Dist. LEXIS at 6229-30; *McCorriston v. L.W.T., Inc.*, 536 F.Supp.2d 1268, 1279 (M.D. Fla. 2008); *Cooper v. Litton Loan Servicing (In re Cooper)*, 253 B.R. 286, 290 (Bankr. N.D. Fla. 2000); *Ortiz v. Accounts Receivable Mgmt., Inc.*, 2010 U.S. Dist. LEXIS 20944 (S.D. Fla. Feb. 12, 2010); *Ramos v. CACH, LLC,* 183 So.3d 1149 (Fla. 5th DCA 2015).

§16:30.3 Statute of Limitations

An action brought under this section must be commenced within two years after the date the alleged violation occurred. Fla. Stat. §559.77(4).

§16:30.4 References

1. *Please Leave A Message After The Tone: How Florida Lawyers Should Approach The "Mini-Miranda" Warning Requirement Of the Fair Debt Collection Practices Act*, 32 Nova L. Rev. 245, Shera Erskine (2007).
2. *2006-2007 Survey of Florida Law Affecting Business Owners*, 32 Nova L. Rev. 21, Barbara Landau (2007).

§16:30.5 Defense

1. **Bona Fide Error Defense:** A person may not be held liable in any action brought under this section if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error. Section 559.77(3), Fla. Stat. *But see Desmond v. Accounts Receivables Mgmt.*, 72 So.3d 179 (Fla. 2d DCA 2011) (a debtor means not only the "actual debtor" but the "alleged debtor," even one mistaken in identity). If the creditor "[is] knowingly employing methods that did not permit [] an alleged debtor to return any of the eighteen telephone calls to explain that the calls were being made in error, we believe that a jury could conclude that [the creditor] 'willfully engage[d] in other conduct which can reasonably be expected to abuse or harass' such an alleged debtor." §559.72(7). *Desmond*, 72 So.3d at 181.

§16:30.6 Related Matters

1. **Purpose of the Act:** The FCCPA closely mirrors the federal statute (FDCPA), the purpose of which is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. §1692(e) (2009). *Beeders v. Gulf Coast Collection Bureau, Inc.*, 2010 U.S. Dist. LEXIS 66984, at *6-7 (M.D. Fla. July 6, 2010).

2. **Application of FCCPA:** For FCCPA to apply to a transaction, the obligation must meet the definition of "debt" under section 559.55(6), which states:

   "Debt" or "consumer debt" means any obligation or alleged obligation of a consumer to pay money *arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes,* whether or not such obligation has been reduced to judgment. (Emphasis added.)

   Whether a transaction is a "debt" under section 559.55(6) depends on what gave rise to the obligation. In addition, the "subject of the transaction" must be "primarily for personal, family, or household purposes." Fla. Stat. § 559.55(6). *See Korkmas v. Onyx Creative Group*, 298 So.3d 690, 692 (Fla. 1st DCA 2020).

3. **Damages:** "Any person who fails to comply with any provision of s. 559.72 is liable for actual damages and for additional statutory damages as the court may allow, but not exceeding $1,000, together with court costs and reasonable attorney's fees incurred by the plaintiff. In determining the defendant's liability for any additional statutory damages, the court shall consider the nature of the defendant's noncompliance with *s. 559.72*, the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional." Fla. Stat. §559.77(2).

4. **Punitive Damages:** A court may award punitive damages if the plaintiff can establish malicious intent. Fla. Stat. §559.77(2); *Story v. J. M. Fields, Inc.*, 343 So.2d 675 (Fla. 1st DCA 1977); *Tallahassee Title Co. v. Dean*, 411 So.2d 204 (Fla. 1st DCA 1982). *Critchlow v. Sterling Jewelers, Inc.*, Case No: 8:18-cv-96-T-30JSS, 2018 WL 7291070, at *3 (M.D. Fla. Nov. 13, 2018) ("Under Florida law, punitive damages may be imposed upon clear and convincing evidence of 'intentional misconduct or gross negligence.' Intentional misconduct means 'that the defendant had the actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that court of conduct.'"), citing Fla. Stat. §768.72.

5. **Injunctive Relief:** A court may provide such equitable relief as it deems necessary or proper, including enjoining the defendant from further violations of the FCCPA. Fla. Stat. §559.77(3).

6. **Class Actions:** "In a class action lawsuit brought under this section, the court may award additional statutory damages of up to $1,000 for each named plaintiff and an aggregate award of additional statutory damages up to the lesser of $500,000 or 1 percent of the defendant's net worth for all remaining class members; however, the aggregate award may not provide an individual class member with additional statutory damages in excess of $1,000." Fla. Stat. §559.77(3).

7. **Creditor Broadly Defined:** Fla. Stat. §559.77(3). A debt collector is not the only party to whom the FCCPA applies. Section 559.72 provides that "no person" shall engage in certain practices while attempting to collect a consumer debt. *Morgan v. Wilkins*, 74 So.3d 179 (Fla. 1st DCA 2011) (FCCPA includes attorneys to whom a former client owes a debt, even if there was no extension of credit).

8. **Preemption:** Consumer's claim that student loan guarantor violated provision of the Florida Consumer Collection Practices Act (FCCPA) prohibiting a person who is attempting to collect on a debt from communicating with the debtor if the person knows that the debtor is represented by an attorney with respect to that debt was preempted by federal regulation, promulgated pursuant to the Higher Education Act (HEA), governing collection procedures on defaulted student loans; it was impossible to comply with both the FCCPA and the federal regulation, as the regulation mandated, without exception, direct communications with the borrower. *See Williams v. Educational Credit Mgt. Corp.,* 88 F.Supp.3d 1338, 1347 (M.D. Fla. 2015).

9. **Florida Courts and Federal Courts:** Although not binding, federal court decisions are given great weight when construing the Florida Consumer Collection Practices Act (FCCPA). *Williams v. Salt Springs Resort Association, Inc*., 298 So.3d 1255 (Fla. 5th DCA 2020).

§16:30.7 Related Causes of Action

- ✓ Fair Credit Reporting Act
- ✓ Fair Debt Collection Practices Act
- ✓ Florida Deceptive and Unfair Trade Practices Act, §16:10
- ✓ Invasion of Privacy (Intrusion Upon Seclusion), §9:60

§16:30.8 Sample Cause of Action

COUNT FOR VIOLATION OF
FLORIDA CONSUMER COLLECTION PRACTICES ACT

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

The Florida Consumer Collections Practices Act prohibits any person, in collecting consumer debts, from [INSERT STATUTORY LANGUAGE FROM SUBSECTION].
At all relevant times, Defendant was a person as defined by Section 559.55, Fla. Stat.
At all relevant times, Defendant was seeking to collect, from Plaintiff, a debt arising from a [INSERT FACTS REGARDING TRANSACTION], a transaction incurred primarily for personal, family, or household purposes.
At all relevant times, in seeking to collect a consumer debt from Plaintiff, Defendant knowingly and willfully [INSERT FACTUAL DESCRIPTION OF CONDUCT AT ISSUE] in violation of the [INSERT SUBSECTION] of the Florida Consumer Collection Practices Act.
As a result of Defendant's actions, Plaintiff has sustained damages.

WHEREFORE, Plaintiff demands that the Court enter a judgment against Defendant declaring that Defendant violated the Act and an injunction enjoining Defendant from future violations of the Act, actual damages, statutory damages of up to $1,000.00, attorney's fees, court costs, and such other relief as this court deems just and proper.

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CHAPTER 17

PROCEDURAL REMEDIES

§17:10 INJUNCTION, PERMANENT

§17:10.1 Annotation
§17:10.2 Elements of Cause of Action — Florida Supreme Court
§17:10.2.1 Elements of Cause of Action — 1st DCA
§17:10.2.2 Elements of Cause of Action — 2nd DCA
§17:10.2.3 Elements of Cause of Action — 3rd DCA
§17:10.2.4 Elements of Cause of Action — 4th DCA
§17:10.2.5 Elements of Cause of Action — 5th DCA
§17:10.3 Statute of Limitations
§17:10.4 References
§17:10.5 Defenses
§17:10.6 Related Matters
§17:10.7 Sample Complaint

§17:20 INJUNCTION, TEMPORARY

§17:20.1 Elements of Cause of Action — Florida Supreme Court
§17:20.1.1 Elements of Cause of Action — 1st DCA
§17:20.1.2 Elements of Cause of Action — 2nd DCA
§17:20.1.3 Elements of Cause of Action — 3rd DCA
§17:20.1.4 Elements of Cause of Action — 4th DCA
§17:20.1.5 Elements of Cause of Action — 5th DCA
§17:20.2 Statute of Limitations
§17:20.3 References
§17:20.4 Defenses
§17:20.5 Related Matters
§17:20.6 Sample Cause of Action

§17:30 DECLARATORY JUDGMENT

§17:30.1 Elements of Cause of Action — Florida Supreme Court
§17:30.1.1 Elements of Cause of Action — 1st DCA
§17:30.1.2 Elements of Cause of Action — 2nd DCA
§17:30.1.3 Elements of Cause of Action — 3rd DCA
§17:30.1.4 Elements of Cause of Action — 4th DCA
§17:30.1.5 Elements of Cause of Action — 5th DCA
§17:30.2 Statute of Limitations
§17:30.3 References
§17:30.4 Defenses
§17:30.5 Related Matters

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§17:10 INJUNCTION, PERMANENT

§17:10.1 Annotation

The standard for issuance of a permanent injunction is essentially the same as that for the issuance of a preliminary injunction, except that a plaintiff seeking the former relief must show actual success on the merits, rather than a mere likelihood of success on the merits. *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317 (M.D. Fla. 1998). *See also Del Pino v. AT&T Information Systems, Inc.*, 921 F.Supp. 761 (S.D. Fla. 1996).

In order to be entitled to injunction, movant must establish: substantial likelihood of success on the merits; that movant will suffer irreparable harm unless injunction issues; that threatened injury to movant outweighs any threatened harm injunction may cause opposing party; and that injunction, if issued, will not disserve the public interest. *Gross v. Barnett Banks, Inc.*, 934 F.Supp. 1340 (M.D. Fla. 1995). *See also Gangloff v. Poccia*, 888 F.Supp. 1549 (M.D. Fla. 1995).

Note: Federal cases have been cited because state court cases have not clearly commented on this issue. For a state court case, *see Eastern Federal Corp. v. State Office Supply Co., Inc.*, 646 So.2d 737, 741 (Fla. 1st DCA 1994), *rev. denied*, 659 So.2d 271 (Fla. 1995).

See Also

1. *Weekley v. Pace Assembly Ministries, Inc.*, 671 So.2d 220 (Fla. 1st DCA 1996) (To state a cause of action for injunctive relief, plaintiff must allege ultimate facts which, if true, would establish irreparable injury, that is, injury which cannot be cured by money damages, clear legal right, lack of adequate remedy at law, and that requested injunction would not be contrary to interest of public generally.).

§17:10.2 Elements of Cause of Action — Florida Supreme Court

To obtain a permanent injunction, the petitioner must establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief.

Source

Liberty Counsel v. Florida Bar Bd. Of Governors, 12 So.3d 183, 186 n.7 (Fla. 2009).

§17:10.2.1 Elements of Cause of Action — 1st DCA

To obtain a permanent injunction, the petitioner must establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief.

Source

Fla. Dep't of Transportation v. Tropical Trailer Leasing, LLC, 308 So. 3d 242, 246 (Fla. 1st DCA 2020).

See Also

1. *Horne v. Endres*, 61 So. 3d 428, 432 (Fla. 1st DCA 2011).

§17:10.2.2 Elements of Cause of Action — 2nd DCA

In order to establish entitlement to a mandatory injunction there must be a clear legal right which has been violated, irreparable harm must be threatened, and there must be a lack of an adequate remedy at law.

Source

Riviera-Fort Myers Master Ass'n, Inc. v. GFH Invs., LLC, 313 So. 3d 760, 764-65 (Fla. 2d DCA 2020).

§17:10.2.3 Elements of Cause of Action — 3rd DCA

[No citation for this edition.]

§17:10.2.4 Elements of Cause of Action — 4th DCA

To obtain a permanent injunction, the petitioner must establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief.

Source

K.W. Brown and Co. v. McCutchen, 819 So.2d 977, 979 (Fla. 4th DCA 2002).

See Also

1. *Point Conversions, LLC v. WPB Hotel Partners, LLC*, 324 So.3d 947, 956 (Fla. 4th DCA 2021).
2. *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So.3d 784, 786 (Fla. 4th DCA 2010).

§17:10.2.5 Elements of Cause of Action — 5th DCA

[No citation for this edition.]

§17:10.3 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p); based on the underlying cause of action, *see e.g.*, *Pond Apple Place III Condo. Assoc., Inc. v. Russo*, 841 So.2d 526, 527 (Fla. 4th DCA 2003) (5-year statute of limitation for injunctive relief based on contractual obligation).

§17:10.4 References

1. 29 Fla. Jur. 2d *Injunctions* §§3, 72–89 (1998).
2. 42 Am. Jur. 2d *Injunctions* §§10, 231–270, 286, 312 (2000).
3. 43A C.J.S. *Injunctions* §§28, 284–333, 393–397 (2004).
4. Florida Statutes §§60.05, 60.06, 823.05 (2005) (action to enjoin a nuisance).
5. Florida Statutes §542.33 (2005) (contracts in restraint of trade).
6. Florida Statutes §741.30 (2005) (action to enjoin domestic violence).
7. Fla.R.Civ.P. 1.610 (2005) (temporary injunctions).
8. Fla.R.App.P. 9.130(a)(3)(B) (2005).
9. Restatement (Second) of Torts §§933–951 (1979).
10. Linda Dakis, *Injunctions for Protection*, 68 Fla. Bar J. 48 (Oct. 1994).
11. Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. Fla. L. Rev. 346 (Spring 1981).
12. Jay M. Zitter, Annotation, *Recovery of Damages Resulting from Wrongful Issuance of Injunction as Limited to Amount of Bond*, 30 A.L.R.4th 273 (1984).
13. Ferdinard S. Tinio, Annotation, *Propriety of Permanently Enjoining One Guilty of Unauthorized Use of Trade Secret from Engaging in Sale or Manufacture of Device in Question*, 38 A.L.R.3d 572 (1971).
14. K. H. Larsen, Annotation, *Dismissal of Injunction Action or Bill Without Prejudice as Breach of Injunction Bond*, 91 A.L.R.2d 1312 (1963).
15. H. C. Lind, Annotation, *Right to Enjoin Business Competitor from Unlicensed or Otherwise Illegal Acts or Practices*, 90 A.L.R.2d 7 (1963).
16. R. P. Davis, Annotation, *Duty to Minimize Damages for Wrongful Injunction*, 66 A.L.R.2d 1131 (1959).
17. L. S. Tellier, Annotation, *Necessary Parties Defendant to Independent Action on Injunction Bond*, 55 A.L.R.2d 545 (1957).
18. W. E. Shipley, Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715 (1956).
19. W. R. Habeeb, Annotation, *Mandatory Injunction Prior to Hearing of Case*, 15 A.L.R.2d 213 (1951).
20. J. E. Macy, Annotation, *Injunction by State Court Against Action in Court of Another State*, 6 A.L.R.2d 896 (1949).
21. Edward B. Maxwell II & Jack B. Jacobs, *How to Win an Injunction*, 10 Litigation 23 (Fall 1983).
22. Douglas Laycock, *The Death of the Irreparable Injury Rule* (1991) (ISBN 0-19-506356-2).

§17:10.5 Defenses

1. **Unclean Hands:** One who seeks the aid of equity must do so with clean hands. *Bradley v. Health Coalition, Inc.*, 687 So.2d 329 (Fla. 3d DCA 1997). This rule applies to the State when it becomes a litigant. *Valdez v. State*, 194 So. 388, 394 (Fla. 1940).

2. **Totality of the Circumstances:** In deciding whether to issue an injunction in a particular case, a trial court must consider the totality of the circumstances and determine whether injunctive relief is necessary to achieve justice between the parties. This well-settled maxim of equity jurisprudence is summarized in §936 of the Restatement (Second) of Torts (1979): The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors: (a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment. *Davis v. Joyner*, 409 So.2d 1193, 1195 (Fla. 4th DCA 1982).

§17:10.6 Related Matters

1. **Breach of Contract:** A request for an injunction to prevent a breach of contract is tantamount to a suit for specific performance, and, as such, the courts are more reluctant to issue injunctions of this type than prohibitory injunctions. *Gonzalez v. Benoit*, 424 So.2d 957, 959 (Fla. 3d DCA 1983), *receded from on other grounds*, 434 So.2d 51 (Fla. 3d DCA 1983). A mandatory temporary injunction may be issued requiring specific performance of a contract. *Wilson v. Sandstrom*, 317 So.2d 732, 736 (Fla. 1975), *cert. denied*, 96 S.Ct. 782 (1976).

2. **Covenant-Not-To-Compete Cases:** Injunction is the normal remedy for breach of a covenant not to compete. *Graphic Business Systems, Inc. v. Rogge*, 418 So.2d 1084, 1086 (Fla. 2d DCA 1982), *Cordis Corporation v. Prooslin*, 482 So.2d 486, 489 (Fla. 3d DCA 1986); *Miller Mechanical, Inc. v. Ruth*, 300 So.2d 11, 12 (Fla. 1974). With regard to covenants not to compete, the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury. However, use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined. Florida Statutes §542.33(2)(a) (2005).

3. **Domestic Violence—F.S. §741.30:** Action for an injunction for protection against domestic violence. The elements of this statutory cause of action are that petitioner is the victim of any act of domestic violence, or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence. *Baumgartner v. Baumgartner*, 691 So.2d 488, 489 (Fla. 2d DCA 1997), *appeal after remand*, 693 So.2d 84 (Fla. 2d DCA 1997).

4. **Evidence:** In the absence of a clear stipulation of counsel, argument of counsel alone does not constitute evidence from which the trial court can determine the propriety, *vel non*, of granting injunctive relief. *Brand v. Elliott*, 610 So.2d 37, 38 (Fla. 5th DCA 1992). A preliminary injunction should not be granted on a complaint sworn to on information and belief and unaccompanied by proper affidavit. *Zuckerman v. Professional Writers of Florida, Inc.*, 398 So.2d 870, 872 (Fla. 4th DCA 1981), *petition for rev. denied*, 411 So.2d 385 (1981).

5. **Futile Act:** Neither mandamus nor injunctive relief is available to require the performance of a futile act. *Migliore v. City of Lauderhill*, 415 So.2d 62, 65 (Fla. 4th DCA 1982), *approved*, 431 So.2d 986 (Fla. 1983).

6. **Irreparable Harm:** Irreparable harm does not exist where the potential loss is compensable by money damages. *Barclays American Mortgage Corp. v. Holmes*, 595 So.2d 104 (Fla. 5th DCA 1992), *Gonzalez*

v. Benoit, 424 So.2d 957, 959 (Fla. 3d DCA 1983), *receded from on other grounds*, 434 So.2d 51 (Fla. 3d DCA 1983). Irreparable means injury whether great or small, which is not reparable, that is able to be adequately repaired or redressed in a court of law by an award of money damages. Irreparable damage does not have reference to the amount of damage caused, but rather to the difficulty of measuring the amount of damages inflicted. Thus, an injury is irreparable where the damage is estimable only by conjecture, and not by any accurate standard. *Sun Elastic Corp. v. O.B. Industries*, 603 So.2d 516, 517 (Fla. 3d DCA 1992). See generally, Douglas Laycock, The Death of the Irreparable Injury Rule (1991) (ISBN 0-19-506356-2).

7. **Mandatory Injunction:** A preliminary mandatory injunction is proper where irreparable harm will result unless the status quo is maintained, where a party has a clear legal right to the relief and no adequate remedy at law, and, in certain cases, where the public interest is a factor. *Chicago Title Insurance Agency of Lee County, Inc. v. Chicago Title Insurance Co.*, 560 So.2d 296, 298 (Fla. 2d DCA 1990); *Department of Health and Rehabilitative Services v. Weinstein*, 447 So.2d 345 (Fla. 4th DCA 1984), *cause dismissed*, 451 So.2d 851 (Fla. 1984); *Gonzalez v. Benoit*, 424 So.2d 957, 959 (Fla. 3d DCA 1983), *receded from on other grounds*, 434 So.2d 51 (Fla. 3d DCA 1983); *Gulf Power Company v. Glass*, 355 So.2d 147, 148 (Fla. 1st DCA 1978). Mandatory injunctions, however, are particularly looked upon with disfavor and are granted sparingly and cautiously. *Eastern Federal Corp. v. State Office Supply Co., Inc.*, 646 So.2d 737, 741 (Fla. 1st DCA 1995), *rev. denied*, 659 So.2d 271 (Fla. 1995); *City of Indian Rocks Beach v. Tomalo*, 834 So.2d 341, 342 (Fla. 2d DCA 2003). Except in rare cases, where the right is clear and free from reasonable doubt, a mandatory injunction, commanding the defendant to do some positive act, will not be ordered except upon final hearing, and then only to execute the judgment or decree of the court. *Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So.2d 438, 443 (Fla. 1943).

8. **Notice:** While temporary injunction may be obtained on mere notice, and in certain circumstances even without notice, permanent injunction cannot be properly granted in suit simply on notice, without process duly issued and served, and without formality of pleading, or presentation of proof, in the absence of waiver. *Scarbrough v. Meeks*, 582 So.2d 95 (Fla. 1st DCA 1991).

9. **Order:** An injunctive order should never be broader than is necessary to secure the injured party, without injustice to the adversary, relief warranted by the circumstances of the particular case. The order should be adequately particularized, especially where some activities may be permissible and proper. Such an order should be confined within reasonable limitations and phrased in such language that its requirements can be met, without resort to portions of the record or facts outside the "four corners" of the injunction itself. One against whom an injunction is directed should not be left in doubt as to what he is required to do. *Clark v. Allied Associates, Inc.*, 477 So.2d 656, 657 (Fla. 5th DCA 1985).

10. **Prevent Party from Disposing Assets:** Injunctive relief may not be used to enforce money damages, or to prevent any party from disposing of assets until an action at law for an alleged debt can be concluded. *Hiles v. Auto Bahn Federation, Inc.*, 498 So.2d 997, 998 (Fla. 4th DCA 1986). Compare *Schwadel v. Uchitel*, 455 So.2d 401 (Fla. 3d DCA 1984).

11. **Procedure:** A court may enter a permanent injunction only after the case is at issue and the court has complied with the requirements of Rule 1.440. *Watkins v. Colonial Life & Acc. Ins. Co.*, 719 So.2d 934, 935 (Fla. 5th DCA 1998) (concluding that the trial court reversibly erred in entering a permanent injunction before the main cause was yet at issue where hearing resulting in issuance of permanent injunction was intended to determine only propriety of temporary injunction); *Scarbrough v. Meeks*, 582 So.2d 95, 96 (Fla. 1st DCA 1991) (holding that trial court abused its discretion by prematurely entering a permanent injunction in violation of Rule 1.440 when case was not yet at issue). *Skyway Trap & Skeet Club, Inc v. Southwest Florida Water Management Dist*., 854 So.2d 676, 679 (Fla. 2d DCA 2003).

12. **State a Party:** Where the state is concerned, the presence of actual injury is not an essential element of or prerequisite to chancery jurisdiction. *Valdez v. State*, 194 So. 388, 391 (Fla. 1940); *State v. Samscot Enters., Inc.*, 297 So.2d 69, 72 (Fla. 4th DCA 1974); *State of Florida Dep't of Envtl. Regulation v. Kaszyk*, 590 So.2d 1010, 1011 (Fla. 3d DCA 1991). Where the government seeks an injunction in order to enforce

its police power, any alternative legal remedy is ignored and irreparable harm is presumed. *Metropolitan Dade County v. O'Brien*, 660 So.2d 364, 365 (Fla. 3d DCA 1995). It is reasonably well established that, in the absence of fraud or a gross abuse of discretion, a court should not enjoin administrative action. *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So.2d 1295, 1297 (Fla. 4th DCA 1987).

13. **Sunshine Law:** In order to state a cause of action for injunctive relief under the Sunshine Law, the complaint must allege by name or sufficient description the identity of the public official with whom defendant public official has allegedly discussed public decision-making process in nonpublic forum without public notice in violation of law. *Deerfield Beach Pub., Inc. v. Robb*, 530 So.2d 510 (Fla. 4th DCA 1988).

14. **Temporary Injunction:** A temporary injunction does not purport to decide any material points in controversy, and a denial thereof does not preclude the granting of a permanent injunction at the conclusion of the case. *Adoption Hot Line, Inc. v. State, Dept. of Health and Rehabilitative Services*, 385 So.2d 682, 684 (Fla. 3d DCA 1980), *appeal after permanent injunction*, 402 So.2d 1307 (Fla. 3d DCA 1981).

15. **Test of Inadequacy of Remedy at Law:** An injunction will not lie where there is a choice between the ordinary processes of law and the injunction, the former being sufficient to furnish the full relief to which the complaining party is entitled. *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So.2d 735, 738 (Fla. 3d DCA 1982). The test of inadequacy of remedy at law is whether a judgment can be obtained, not whether once obtained, it will be collectible. *Mary Dee's, Inc. v. Tartamella*, 492 So.2d 815, 816 (Fla. 4th DCA 1986); *Airport Executive Towers v. CIG Realty, Inc.*, 716 So.2d 311, 313 (Fla. 3d DCA 1998).

§17:10.7 Sample Complaint

See Complaint Library, Form 17:10-7 (Emergency Injunctive Relief and Damages; Misappropriation of Trade Secrets; Breach of Contract; Tortious Interference With Business Relationship).

§17:20 INJUNCTION, TEMPORARY

§17:20.1 Elements of Cause of Action — Florida Supreme Court

To obtain a temporary injunction, the petitioner must satisfy a four-part test: a substantial likelihood of success on the merits; lack of an adequate remedy at law; irreparable harm absent the entry of an injunction; and that injunctive relief will serve the public interest.

Source

Liberty Counsel v. Florida Bar Bd. Of Governors, 12 So.3d 183, 186 (Fla. 2009).

See Also

1. *Fla. Dep't of Health v. Florigrown, LLC*, 317 So.3d 1101, 1110 (Fla. 2021).
2. *Gainesville Women Care, LLC v. State of Fla.*, 210 So.3d 1243, 1258 (Fla. 2017).
3. *Naegele Outdoor Advertising Co., Inc. v. City of Jacksonville*, 659 So.2d 1046, 1047 (Fla. 1995).
4. *Capraro v. Lanier Business Products, Inc.*, 466 So.2d 212 (Fla. 1985).
5. *Provident Management Corp. v. City of Treasure Island*, 796 So.2d 481, 485 (Fla. 2001).

§17:20.1.1 Elements of Cause of Action — 1st DCA

The party moving for a temporary injunction must make a showing sufficient to satisfy each of four prerequisites: likelihood of irreparable harm, lack of adequate legal remedy, substantial likelihood of success on the merits, and that the public interest supports the injunction.

Source

Fl. Fish and Wildlife Conservation Comm'n v. Daws, 256 So.3d 907, 928 (Fla. 1st DCA 2018) (in dissent).

See Also

1. *Green v. Alachua Cty*., 323 So.3d 246, 249 (Fla. 1st DCA 2021).
2. *DeSantis v. Fla. Educ. Ass'n*, 306 So. 3d 1202, 1213 (Fla. 1st DCA 2020).
3. *Scott v. Trotti*, 283 So. 3d 340, 343 (Fla. 1st DCA 2018).
4. *Sch. Bd. of Hernando County v. Rhea,* 2013 So.3d 1032, 1040 (Fla. 1st DCA 2017).
5. *State v. Gainesville Woman Care, LLC,* 187 So.3d 279, 281 (Fla. 1st DCA 2016).
6. *Weltman v. Riggs*, 141 So.3d 729, 730 (Fla. 1st DCA 2014).
7. *DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 938 (Fla. 1st DCA 2012).
8. *St. Johns Inv. Mgmt. Co. v. Albaneze*, 22 So.3d 728, 731 (Fla. 1st DCA 2009).
9. *Milin v. Northwest Florida Land, L.C*., 870 So.2d 135, 136 (Fla. 1st DCA 2003).
10. *Soud v. Kendale, Inc*., 788 So.2d 1051, 1052 (Fla. 1st DCA 2001).
11. *Glades Owners Association, Inc. v. Prentiss*, 768 So.2d 1245 (Fla. 1st DCA 2000).
12. *Tom v. Russ*, 752 So.2d 1250, 1251 (Fla. 1st DCA 2000).
13. *Spradley v. Old Harmony Baptist Church*, 721 So.2d 735, 737 (Fla. 1st DCA 1998).
14. *Taylor v. Cesery*, 717 So.2d 1112, 1114 (Fla. 1st DCA 1998).
15. *City of Jacksonville v. Naegele Outdoor Advertising Co.*, 634 So.2d 750, 752 (Fla. 1st DCA 1994), *approved*, 659 So.2d 1046 (Fla. 1995).
16. *Weekly v. Pace Assembly Ministries, Inc.*, 671 So.2d 220 (Fla. 1st DCA 1996).
17. *Thompson v. Planning Commission of the City of Jacksonville*, 464 So.2d 1231, 1236 (Fla. 1st DCA 1985).
18. *Hadi v. Liberty Behavioral Health Corp.*, 927 So.2d 34, 38 (Fla. 1st DCA 2006).

§17:20.1.2 Elements of Cause of Action — 2nd DCA

In order to obtain a temporary injunction, the moving party must make four showings. The movant must demonstrate that he will suffer irreparable harm without an injunction, that he has no adequate remedy at law, that he enjoys a substantial likelihood of success on the merits, and that an injunction would be in furtherance of the public interest.

Source

Dowdy v. Dowdy, 182 So.3d 807, 809 (Fla. 2d DCA 2016).

See Also

1. *Manatee County v. 1187 Upper James of FLA., LLC*, 104 So.3d 1118, 1121 (Fla. 2d DCA 2012).
2. *LaRose v. A.K.*, 37 So.3d 265 (Fla. 2d DCA 2009).
3. *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1014 (Fla. 2d DCA 2005).
4. *Santos v. Tampa Medical Supply*, 857 So.2d 315, 316 (Fla. 2d DCA 2003).
5. *Tobin v. Vasey*, 843 So.2d 376, 377 (Fla. 2d DCA 2003).
6. *Ksaibati v. Ksaibati*, 824 So.2d 219, 222 (Fla. 2d DCA 2002).
7. *Snibbe v. Napoleonic Society of America, Inc.*, 682 So.2d 568, 570 (Fla. 2d DCA 1996), *summary judgment vacated and appeal dismissed*, 696 So.2d 1243 (Fla. 2d DCA 1997).
8. *Duryea v. Slater*, 677 So.2d 79 (Fla. 2d DCA 1996).
9. *Liberty Financial Mortgage Corp. v. Clampitt*, 667 So.2d 880, 881 (Fla. 2d DCA 1996).
10. *Platinum Coast Financial Corp. v. Farino's, Inc.*, 662 So.2d 724 (Fla. 2d DCA 1995).
11. *Hasley v. Harrell*, 971 So.2d 149, 152 (Fla. 2d DCA 2007).
12. *Salazar v. Hometeam Pest Def., Inc.*, 230 So.3d 619, 621 (Fla. 2d DCA 2017).
13. *Phelan v. Trifactor Sols., LLC*, 312 So. 3d 1036, 1039 (Fla. 2d DCA 2021).
14. *Jackman v. Cebrink-Swartz*, 334 So.3d 653, 656 (Fla. 2d DCA 2021).
15. *Surgery Ctr. Holdings, Inc. v. Guirguis*, 318 So.3d 1274, 1277 (Fla. 2d DCA 2021).

§17:20.1.3 Elements of Cause of Action — 3rd DCA

The well-established requirements for the issuance of a temporary injunction are: (1) the likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) that the threatened injury to the petitioner outweighs any possible harm to the respondent; and, (4) the entry of the injunction will not disserve the public interest.

Source

Chevaldina v. R.K./FL Mgmt., 133 So. 3d 1086, 1089 (Fla. 3d DCA 2014).

See Also

1. *Fam. Heritage Life Ins. Co. of Am. v. Combined Ins. Co. of Am.,* 319 So.3d 680, 684 (Fla. 3d DCA 2021).
2. *AmeriGas Propane, Inc. v. Sanchez,* 335 So.3d 1253, 1257 (Fla. 3d DCA 2021).
3. *Namon v. Elder,* 331 So.3d 835, 837-38 (Fla. 3d DCA 2021).
4. *GFA Int'l, Inc. v. Trillas,* 327 So.3d 872, 876 (Fla. 3d DCA 2021).
5. *Miami-Dade County v. Miami Gardens, Square One, Inc.*, 314 So.3d 389, 392 (Fla. 3d DCA 2020).
6. *Quirch Foods LLC v. Broce*, 314 So. 3d 327, 338 (Fla. 3d DCA 2020).
7. *City of Miami v. Santos*, 278 So. 3d 822, 825 (Fla. 3d DCA 2019).
8. *St. Brendan High Sch., Inc. v. Neff*, 275 So. 3d 220, 222 (Fla. 3d DCA 2019), reh'g denied (July 17, 2019).
9. *Sammie Investments, LLC v. Strategica Capital Assoc., Inc.,* 247 So.3d 596, 599 (Fla. 3d DCA May 9, 2018).
10. *City of Miami v. FOP*, 98 So. 3d 1236, 1238 (Fla. 3d DCA 2012).
11. *Biscayne Park, LLC v. Wal-Mart Stores East, LP*, 34 So.3d 24 (Fla. 3d DCA 2010).
12. *Miami-Dade County v. Fernandez*, 905 So.2d 213, 215 (Fla. 3d DCA 2005).
13. *Florida High School Activities Assoc. v. Kartenovich*, 749 So.2d 1290, 1291 (Fla. 3d DCA 2000).
14. *In re Estate of Barsanti*, 773 So.2d 1206, 1208 (Fla. 3d DCA 2000).
15. *Mercado Oriental, Inc. v. Marin*, 725 So.2d 468, 469 (Fla. 3d DCA 1999).
16. *Airport Executive Towers v. CIG Realty, Inc.*, 716 So.2d 311, 313 (Fla. 3d DCA 1998).
17. *Miami-Dade County v. Church & Tower, Inc.*, 715 So.2d 1084, 1087 (Fla. 3d DCA 1998).
18. *Cosmic Corp. v. Miami-Dade County*, 706 So.2d 347, 348 (Fla. 3d DCA 1998), *rev. denied*, 722 So.2d 193 (Fla. 1998).
19. *Smith Barney Shearson, Inc. v. Berman*, 678 So.2d 376, 377 (Fla. 3d DCA 1996).
20. *U.S. 1 Office Corp. v. Falls Home Furnishings, Inc.*, 655 So.2d 209, 210 (Fla. 3d DCA 1995).
21. *Cajun & Grill of America, Inc. v. Jet International Cuisine, Inc.*, 646 So.2d 801 (Fla. 3d DCA 1994).
22. *State of Florida, Dept. of Transportation v. Kountry Kitchen of Key Largo, Inc.*, 645 So.2d 1086 (Fla. 3d DCA 1994).
23. *NRD Invs., Inc. v. Velazquez*, 976 So.2d 1, 3 (Fla. 3d DCA 2007).
24. *Angelino v. Santa Barbara Enterprises, LLC*, 2 So.3d 1100, 1100 (Fla. 3d DCA 2009).

§17:20.1.4 Elements of Cause of Action — 4th DCA

The party seeking the injunction must prove: (1) it will suffer irreparable harm unless the injunction is entered, (2) there is no adequate remedy at law, (3) there is a substantial likelihood that the party will succeed on the merits, and (4) that considerations of the public interest support the entry of the injunction.

Source

Bautista REO U.S., LLC v. ARR Investments, Inc., 229 So.3d 362, 364 (Fla. 4th DCA 2017); *TransUnion Risk and Alternative Data Solutions, Inc. v Reilly*, 181 So.3d 548, 550 (Fla. 4th DCA 2015); *Concerned Citizens for Judicial Fairness, Inc. v. Yacucci*, 162 So.3d 68, 72 (Fla. 4th DCA 2014).

See Also

1. *Point Conversions, LLC v. WPB Hotel Partners, LLC*, 324 So.3d 947, 956 (Fla. 4th DCA 2021).
2. *Shake v. Yes We Are Mad Grp., Inc.*, 315 So.3d 1223, 1226-27 (Fla. 4th DCA 2021).
3. *Hinners v. Hinners*, 312 So. 3d 938, 942 (Fla. 4th DCA 2021).
4. *Dubner v. Ferraro,* No. 4D17–1435, 242 So.3d 444, 447 (Fla. 4th DCA 2018).
5. *Jouvence Ctr. For Advanced Health, LLC v. Jouvence Rejuvenation*, 14 So.3d 1097, 1099 (Fla. 4th DCA 2009).
6. *Keystone Creations, Inc. v. City of Delray Beach*, 890 So.2d 1119, 1124 (Fla. 4th DCA 2004).
7. *Landinguin v. Carneal*, 837 So.2d 525, 527 (Fla. 4th DCA 2003).
8. *Net First Nat. Bank v. First Telebanc Corp*., 834 So.2d 944, 949 (Fla. 4th DCA 2003).
9. *Aerospace Welding, Inc. v. Southstream Exhaust & Welding, Inc*., 824 So.2d 226, 227 (Fla. 4th DCA 2002).
10. *Infinity Radio, Inc. v. Whitby*, 780 So.2d 248, 250 (Fla. 4th DCA 2001), *rev. denied*, 796 So.2d 539 (Fla. 2001).
11. *City of Dania Beach v. Konschnik*, 763 So.2d 555, 556 (Fla. 4th DCA 2000).
12. *Singletary v. Costello*, 665 So.2d 1099, 1102 (Fla. 4th DCA 1996).
13. *Gooding v. Gooding*, 602 So.2d 615, 616 (Fla. 4th DCA 1992).
14. *Greenwood v. City of Delray Beach*, 543 So.2d 451, 452 (Fla. 4th DCA 1989).

15. *South Florida Limousines, Inc. v. Broward County Aviation Dept.*, 512 So.2d 1059, 1061 (Fla. 4th DCA 1987).
16. *Hiles v. Auto Bahn Federation, Inc.*, 498 So.2d 997, 998 (Fla. 4th DCA 1986).
17. *D'Agostino v. Lethal Performance, Inc.*, 958 So.2d 605, 606 (Fla. 4th DCA 2007).

§17:20.1.5 Elements of Cause of Action — 5th DCA

A temporary injunction may be entered where the party seeking the injunction establishes: (1) the likelihood of irreparable harm; (2) the lack of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) considerations of the public interest.

Source

Dickerson v. Senior Home Care, Inc., 181 So.3d 1228, 1229 (Fla. 5th DCA 2015).

See Also

1. *Howell v. Orange Lake Country Club, Inc.*, 303 So. 3d 1009, 1011 (Fla. 5th DCA 2020).
2. *Colonial Bank, N.A. v. Taylor Morrison Serv., Inc.*, 10 So.3d 653, 655 (Fla. 5th DCA 2009).
3. *Cole v. City of Deltona*, 890 So.2d 480, 482 (Fla. 5th DCA 2004).
4. *Dragomirecky v. Town of Ponce Inlet*, 882 So.2d 495, 497 (Fla. 5th DCA 2004).
5. *Animal Rights Foundation of Florida, Inc. v. Siegel*, 867 So.2d 451, 454 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 624 (Fla. 2004).
6. *Florida High School Athletic Ass'n v. Melbourne Central Catholic High School*, 867 So.2d 1281, 1285 (Fla. 5th DCA 2004).
7. *Rollins, Inc. v. Parker*, 755 So.2d 839, 841 (Fla. 5th DCA 2000).
8. *City of Oviedo v. Alafaya Utilities, Inc.*, 704 So.2d 206, 207 (Fla. 5th DCA 1998).
9. *C.R. v. E.*, 573 So.2d 1088, 1089 (Fla. 5th DCA 1991).
10. *Hutchinson v. Kimzay of Florida, Inc.*, 637 So.2d 942, 944 (Fla. 5th DCA 1994).
11. *Hall v. City of Orlando*, 555 So.2d 963 (Fla. 5th DCA 1990).
12. *Langford v. Rotech Oxygen & Medical Equipment*, 541 So.2d 1267, 1268 (Fla. 5th DCA 1989).
13. *Dispoto v. Marion County*, 969 So.2d 423, 425 (Fla. 5th DCA 2007).
14. *Environmental Serv., Inc. v. Carter*, 9 So.3d 1258, 1261 (Fla. 5th DCA 2009) ("In order to establish entitlement to temporary injunctive relief, a party must prove: (1) the likelihood of irreparable harm, (2) the unavailability of an adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) that a temporary injunction will serve the public interest.").

§17:20.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p); *Hollywood Lakes Section Civic Ass'n, Inc. v. City of Hollywood*, 676 So.2d 500, 501 (Fla. 4th DCA 1996).

§17:20.3 References

1. 29 Fla. Jur. 2d *Injunctions* §§5–8, 72–83, 92, 102 (1998).
2. 42 Am. Jur. 2d *Injunctions* §§250–263 (2000).
3. 42A C.J.S. *Injunctions* §§6–10, 29, 30, 284–333 (2004).
4. Florida Statutes §§60.05, 60.06, 823.05 (2005) (action to enjoin a nuisance).
5. Florida Statutes §542.33 (2005) (contracts in restraint of trade).
6. Florida Statutes §741.30 (2005) (action to enjoin domestic violence).
7. Fla.R.Civ.P. 1.610 (2005).
8. Fla.R.App.P. 9.130(a)(3)(B) (2005).
9. Restatement (Second) of Torts §§933–951 (1979).
10. Linda Dakis, *Injunctions for Protection*, 68 Fla. Bar J. 48 (Oct. 1994).
11. Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. Fla. L. Rev. 346 (Spring 1981).

12. Jay M. Zitter, Annotation, *Recovery of Damages Resulting from Wrongful Issuance of Injunction as Limited to Amount of Bond*, 30 A.L.R.4th 273 (1984).
13. Ferdinard S. Tinio, Annotation, *Propriety of Permanently Enjoining One Guilty of Unauthorized Use of Trade Secret from Engaging in Sale or Manufacture of Device in Question*, 38 A.L.R.3d 572 (1971).
14. K. H. Larsen, Annotation, *Dismissal of Injunction Action or Bill Without Prejudice as Breach of Injunction Bond*, 91 A.L.R.2d 1312 (1963).
15. H. C. Lind, Annotation, *Right to Enjoin Business Competitor from Unlicensed or Otherwise Illegal Acts or Practices*, 90 A.L.R.2d 7 (1963).
16. R. P. Davis, Annotation, *Duty to Minimize Damages for Wrongful Injunction*, 66 A.L.R.2d 1131 (1959).
17. L. S. Tellier, Annotation, *Necessary Parties Defendant to Independent Action on Injunction Bond*, 55 A.L.R.2d 545 (1957).
18. W. E. Shipley, Annotation, *Injunction as Remedy Against Defamation of Person*, 47 A.L.R.2d 715 (1956).
19. W. R. Habeeb, Annotation, *Mandatory Injunction Prior to Hearing of Case*, 15 A.L.R.2d 213 (1951).
20. J. E. Macy, Annotation, *Injunction by State Court Against Action in Court of Another State*, 6 A.L.R.2d 896 (1949).
21. Edward B. Maxwell II & Jack B. Jacobs, *How to Win an Injunction*, 10 Litigation 23 (Fall 1983).
22. Douglas Laycock, *The Death of the Irreparable Injury Rule* (1991) (ISBN# 0-19-506356-2).

§17:20.4 Defenses

1. **Unclean Hands:** One who seeks the aid of equity must do so with clean hands. *See Williamson v. Williamson*, 367 So.2d 1016, 1018 (Fla. 1979); *PNC Bank, Nat'l Ass'n v. Smith*, 225 So.3d 294, 295-96 (Fla. 5th DCA 2017). This rule applies to the State when it becomes a litigant. *Valdez v. State*, 194 So. 388, 394 (Fla. 1940).

2. **Totality of the Circumstances:** In deciding whether to issue an injunction in a particular case, a trial court must consider the totality of the circumstances and determine whether injunctive relief is necessary to achieve justice between the parties. This well-settled maxim of equity jurisprudence is summarized in §936 of the Restatement (Second) of Torts (1979): The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors: (a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment. *Davis v. Joyner*, 409 So.2d 1193, 1195 (Fla. 4th DCA 1982).

§17:20.5 Related Matters

1. **Bond:** Where a court dispenses with a bond pursuant to the provisions of rule 1.610(b), the enjoined party is entitled to seek the full measure of the damages it sustained by reason of the wrongfully issued preliminary injunction. *Provident Management Corp. v. City of Treasure Island*, 718 So.2d 738, 739 (Fla. 1998).

2. **Breach of Contract:** A request for an injunction to prevent a breach of contract is tantamount to a suit for specific performance, and, as such, the courts are more reluctant to issue injunctions of this type than prohibitory injunctions. *Gonzalez v. Benoit*, 424 So.2d 957, 959 (Fla. 3d DCA 1983), *receded from on other grounds*, 434 So.2d 51 (Fla. 3d DCA 1983); *Sheoah Highlands, Inc. v. Daugherty*, 837 So.2d 579, 582 (Fla. 5th DCA 2003). A mandatory temporary injunction may be issued requiring specific performance of a contract. *Wilson v. Sandstrom*, 317 So.2d 732, 736 (Fla. 1975), *cert. denied*, 423 U.S. 1053, 96 S.Ct. 782 (1976).

3. **Covenant-Not-To-Compete Cases:** Injunction is the normal remedy for breach of a covenant not to compete. *Graphic Business Systems, Inc. v. Rogge*, 418 So.2d 1084, 1086 (Fla. 2d DCA 1982); *Cordis Corporation v. Prooslin*, 482 So.2d 486, 489 (Fla. 3d DCA 1986); *Miller Mechanical, Inc. v. Ruth*, 300 So.2d 11, 12 (Fla. 1974). With regard to covenants not to compete, the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable

covenant not to compete or where there is no showing of irreparable injury. However, use of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined. Florida Statutes §542.33(2)(a) (2005).

4. **Domestic Violence—F.S. §741.30:** Action for an injunction for protection against domestic violence. The elements of this statutory cause of action are that petitioner is the victim of any act of domestic violence, or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence. *Baumgartner v. Baumgartner*, 691 So.2d 488, 489 (Fla. 2d DCA 1997), *appeal after remand*, 693 So.2d 84 (Fla. 2d DCA 1997).

5. **Evidence:** In the absence of a clear stipulation of counsel, argument of counsel alone does not constitute evidence from which the trial court can determine the propriety, *vel non*, of granting injunctive relief. *Brand v. Elliott*, 610 So.2d 37, 38 (Fla. 5th DCA 1992). A preliminary injunction should not be granted on a complaint sworn to on information and belief and unaccompanied by proper affidavit. *Zuckerman v. Professional Writers of Florida, Inc.*, 398 So.2d 870, 872 (Fla. 4th DCA 1981), *petition for rev. denied*, 411 So.2d 385 (1981).

6. **Futile Act:** Neither mandamus nor injunctive relief is available to require the performance of a futile act. *Migliore v. City of Lauderhill*, 415 So.2d 62, 65 (Fla. 4th DCA 1982), *approved*, 431 So.2d 986 (Fla. 1983).

7. **Irreparable Harm:** Irreparable harm does not exist where the potential loss is compensable by money damages. *Barclays American Mortgage Corp. v. Holmes*, 595 So.2d 104 (Fla. 5th DCA 1992); *Gonzalez v. Benoit*, 424 So.2d 957, 959 (Fla. 3d DCA 1983), *receded from on other grounds*, 434 So.2d 51 (Fla. 3d DCA 1983). Irreparable means injury whether great or small, which is not reparable, that is able to be adequately repaired or redressed in a court of law by an award of money damages. Irreparable damage does not have reference to the amount of damage caused, but rather to the difficulty of measuring the amount of damages inflicted. Thus, an injury is irreparable where the damage is estimable only by conjecture, and not by any accurate standard. *Sun Elastic Corp. v. O.B. Industries*, 603 So.2d 516, 517 (Fla. 3d DCA 1992). See generally, Douglas Laycock, The Death of the Irreparable Injury Rule (1991) (ISBN 0-19-506356-2).

8. **Mandatory Injunction:** A preliminary mandatory injunction is proper where irreparable harm will result unless the status quo is maintained, where a party has a clear legal right to the relief and no adequate remedy at law, and, in certain cases, where the public interest is a factor. *Chicago Title Insurance Agency of Lee County, Inc. v. Chicago Title Insurance Co.*, 560 So.2d 296, 298 (Fla. 2d DCA 1990); *Department of Health and Rehabilitative Services v. Weinstein*, 447 So.2d 345 (Fla. 4th DCA 1984), *cause dismissed*, 451 So.2d 851 (Fla. 1984); *Gonzalez v. Benoit*, 424 So.2d 957, 959 (Fla. 3d DCA 1983); *Gulf Power Company v. Glass*, 355 So.2d 147, 148 (Fla. 1st DCA 1978). Mandatory injunctions, however, are particularly looked upon with disfavor and are granted sparingly and cautiously. *Eastern Federal Corp. v. State Office Supply Co., Inc.*, 646 So.2d 737, 741 (Fla. 1st DCA 1995), *rev. denied*, 659 So.2d 271 (Fla. 1995). Except in rare cases, where the right is clear and free from reasonable doubt, a mandatory injunction, commanding the defendant to do some positive act, will not be ordered except upon final hearing, and then only to execute the judgment or decree of the court. *Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So.2d 438, 443 (Fla. 1943).

9. **Notice:** While temporary injunction may be obtained on mere notice, and in certain circumstances even without notice, permanent injunction cannot be properly granted in suit simply on notice, without process duly issued and served, and without formality of pleading, or presentation of proof, in the absence of waiver. *Scarbrough v. Meeks*, 582 So.2d 95 (Fla. 1st DCA 1991). Rule 1.610 requires reasonable notice. Reasonable notice is defined as that notice that provides a meaningful opportunity to prepare and to defend against the allegations of the motion or complaint. It means the ability to offer evidence and to secure a record of the proceedings. *Harrison v. Palm Harbor MRI, Inc.*, 703 So.2d 1117, 1119 (Fla. 2d DCA 1997). After a trial court issues a temporary injunction, a defendant has two options. He may question the lack of prior notice by immediately appealing the injunctive order pursuant to Fla.R.App.P. 9.130(a)(3)(B), or he may file a motion to dissolve with the trial court. With the latter option notice becomes irrelevant

because the defendant is present, and the burden would be on the plaintiff to show that the complaint and supporting affidavits are sufficient to support the injunction. *State v. Beeler*, 530 So.2d 932, 934 (Fla. 1988). *See also City of Boca Raton v. Boca Raton Airport Authority*, 768 So.2d 1191, 1192 (Fla. 4th DCA 2000); *Charlotte County v. Vetter*, 863 So.2d 465, 469 (Fla. 2d DCA 2004).

10. **Order:** An injunctive order should never be broader than is necessary to secure the injured party, without injustice to the adversary, relief warranted by the circumstances of the particular case. The order should be adequately particularized, especially where some activities may be permissible and proper. Such an order should be confined within reasonable limitations and phrased in such language that its requirements can be met, without resort to portions of the record or facts outside the "four corners" of the injunction itself. One against whom an injunction is directed should not be left in doubt as to what he is required to do. *Clark v. Allied Associates, Inc.*, 477 So.2d 656, 657 (Fla. 5th DCA 1985).

11. **Permanent Injunction Compared:** The standard for issuance of a permanent injunction is essentially the same as that for the issuance of a preliminary injunction, except that a plaintiff seeking the former relief must show actual success on the merits, rather than a mere likelihood of success on the merits. *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317 (M.D. Fla. 1998).

12. **Prevent Party from Disposing Assets:** Injunctive relief may not be used to enforce money damages, or to prevent any party from disposing of assets until an action at law for an alleged debt can be concluded. *See Hiles v. Auto Bahn Federation, Inc.*, 498 So.2d 997, 998 (Fla. 4th DCA 1986); *Konover Realty Associates, Ltd. v. Mladen,* 511 So.2d 705, 706 (Fla. 3d DCA 1987); *United Auto. Ins. Co. v. Sanar Clinical Rehab Center, Inc*., 766 So.2d 356, 358 (Fla. 3d DCA 2000). Compare *Schwadel v. Uchitel*, 455 So.2d 401 (Fla. 3d DCA 1984).

13. **RICO Act:** The Florida RICO Act, §895.01, Fla. Stat. (2005), et seq., has been interpreted as permitting a court to issue a temporary injunction under section 895.05(6), even though the common law elements of an injunction are lacking. *Rodriguez v. Banco Industrial de Venezuela, C.A.*, 576 So.2d 870, 872 (Fla. 3d DCA 1991).

14. **State a Party:** Where the state is concerned, the presence of actual injury is not an essential element of or prerequisite to chancery jurisdiction. *Valdez v. State*, 194 So. 388, 391 (Fla. 1940); *State v. Samscot Enterprises, Inc.*, 297 So.2d 69, 72 (Fla. 4th DCA 1974), *State of Florida Department of Environmental Regulation v. Kaszyk*, 590 So.2d 1010, 1011 (Fla. 3d DCA 1991). Where the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed. *Metropolitan Dade County v. O'Brien*, 660 So.2d 364, 365 (Fla. 3d DCA 1995). It is reasonably well established that, in the absence of fraud or a gross abuse of discretion, a court should not enjoin administrative action. *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So.2d 1295, 1297 (Fla. 4th DCA 1987).

15. **Sunshine Law:** In order to state a cause of action for injunctive relief under the Sunshine Law, the complaint must allege by name or sufficient description the identity of the public official with whom defendant public official has allegedly discussed public decision-making process in nonpublic forum without public notice in violation of law. *Deerfield Beach Pub., Inc. v. Robb*, 530 So.2d 510 (Fla. 4th DCA 1988).

16. **Temporary Injunction:** A temporary injunction does not purport to decide any material points in controversy, and a denial thereof does not preclude the granting of a permanent injunction at the conclusion of the case. *Adoption Hot Line, Inc. v. State Dept. of Health and Rehabilitative Services*, 385 So.2d 682, 684 (Fla. 3d DCA 1980), *appeal after permanent injunction*, 402 So.2d 1307 (Fla. 3d DCA 1981).

17. **Temporary Mandatory Injunction:** To justify the granting of a temporary mandatory injunction, the party seeking relief must allege facts to clearly and unequivocally indicate that: (1) irreparable harm will otherwise result; (2) there is a clear legal right; and (3) the remedy at law is inadequate. *Gonzalez v. Benoit*, 424 So.2d 957, 959 (Fla. 3d DCA 1983), *receded from on other grounds*, 434 So.2d 51 (Fla. 3d DCA 1983).

18. **Test of Inadequacy of Remedy at Law:** An injunction will not lie where there is a choice between the ordinary processes of law and the injunction, the former being sufficient to furnish the full relief to which the complaining party is entitled. *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So.2d 735, 738 (Fla. 3d DCA 1982). The test of inadequacy of remedy at law is whether a judgment can be obtained, not whether once obtained, it will be collectible. *Mary Dee's, Inc. v. Tartamella*, 492 So.2d 815, 816 (Fla. 4th DCA 1986); *Airport Executive Towers v. CIG Realty, Inc.*, 716 So.2d 311, 313 (Fla. 3d DCA 1998).

19. **Wrongfully Issued Injunction:** A party against whom an injunction has been wrongfully issued is entitled to damages caused by the injunction. *E.g.*, §60.07, Fla. Stat. (2005) (providing that on dissolution of an injunction, "the court may hear evidence and assess damages to which a defendant may be entitled under any injunction bond"); *Jefferies & Co. v. Int'l Assets Holding Corp.*, 830 So.2d 256, 259 (Fla. 5th DCA 2002). The standard for determining whether an injunction was wrongfully issued is simply whether the petitioning party was unentitled to injunctive relief. *Parker Tampa Two, Inc. v. Somerset Dev. Corp.,* 544 So.2d 1018, 1021 (Fla. 1989); *Daiwa Products, Inc. v. Nationsbank, N.A*., 885 So.2d 884, 891 (Fla. 4th DCA 2004).

§17:20.6 Sample Cause of Action

COUNT FOR TEMPORARY INJUNCTION

[INSERT PARAGRAPH NUMBER - #]. Plaintiff realleges and incorporates the allegations set forth in paragraphs __-__ above as if set forth herein in full.

Plaintiff will suffer irreparable harm.
Plaintiff has no adequate remedy at law.
Plaintiff has a substantial likelihood of success on the merits.
A temporary injunction will serve the public interest.
[IN APPLICABLE JURISDICTIONS, ADD THE FOLLOWING: Plaintiff has a clear legal right to the relief sought.]

WHEREFORE, Plaintiff demands the entry of a temporary injunction against Defendant and such other relief this Court deems just and proper.

§17:30 DECLARATORY JUDGMENT

§17:30.1 Elements of Cause of Action — Florida Supreme Court

A party seeking declaratory relief must show:

> [T]here is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonist interest in the subject matter, either in fact or law; that the antagonistic and adverse interest[s] are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

Source

Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So.2d 400, 404 (Fla. 1996).

See Also

1. *Olive v. Maas*, 811 So.2d 644, 648 (Fla. 2002).
2. *Department of Revenue v. Kuhnlein,* 646 So.2d 717, 721 (Fla. 1994), *cert. denied*, 115 S.Ct. 2608 (1995).
3. *Santa Rosa County v. Administration Commission, Division of Administrative Hearings*, 661 So.2d 1190, 1192 (Fla. 1995).
4. *Martinez v. Scanlan*, 582 So.2d 1167, 1170 (Fla. 1991).
5. *Department of Revenue of State of Fla. v. Markham*, 396 So.2d 1120, 1122 (Fla. 1981), *superseded by statute on other grounds as stated in Crossings At Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So.2d 793 (Fla. 2008).
6. *Kendrick v. Everheart*, 390 So.2d 53, 59 (Fla. 1980).
7. *Lambert v. Justus*, 335 So.2d 818, 821 (Fla. 1976), *receded from on other grounds by Higgins v. State Farm Fire and Cas. Co*., 894 So.2d 5 (Fla. 2004).
8. *May v. Holley*, 59 So.2d 636 (Fla. 1952), *same case*, 75 So.2d 696 (Fla. 1954).

§17:30.1.1 Elements of Cause of Action — 1st DCA

The Florida Supreme Court explained: This Court has long held, however, that individuals seeking declaratory relief must show that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Source

MacNeil v. Crestview Hosp. Corp., 292 So.3d 840, 843 (Fla. 1st DCA 2020).

See Also

1. *Scott v. Francatti*, 214 So.3d 742, 747 (Fla. 1st DCA 2017).
2. *Ahearn v. Mayo Clinic*, 180 So.3d 165, 174 (Fla. 1st DCA 2015).
3. *Yell v. Healthmark of Walton, Inc.*, 772 So.2d 568, 570 (Fla. 1st DCA 2000).
4. *State v. Florida Consumer Action Network*, 830 So.2d 148, 151 (Fla. 1st DCA 2002), *rev. denied*, 852 So.2d 861 (Fla. 2003).
5. *Reinish v. Clark*, 765 So.2d 197, 203 (Fla. 1st DCA 2000*), rev. dismissed*, 773 So.2d 54 (Fla. 2000), *rev. denied*, 790 So.2d 1107 (Fla. 2001), *cert. denied*, 122 S.Ct. 458 (2001).
6. *Travelers Insurance Company v. Emery*, 579 So.2d 798, 800 n.1 (Fla. 1st DCA 1991).
7. *Register v. Pierce*, 530 So.2d 990, 992 (Fla. 1st DCA 1988), *rev. denied*, 537 So.2d 569 (Fla. 1988).
8. *Dent v. Belin*, 483 So.2d 61, 62 (Fla. 1st DCA 1986).
9. *Robinson's, Inc. v. Short*, 146 So.2d 108, 111 (Fla. 1st DCA 1962), *cert. denied*, 152 So.2d 170 (Fla. 1963), *cert. denied*, 155 So.2d 548 (Fla. 1963).
10. *The Tribune Co. Holdings, Inc., and Media Gen. Operations, Inc. v. State, Dept. of Revenue*, 34 So.3d 762 (Fla. 1st DCA 2010).

§17:30.1.2 Elements of Cause of Action — 2nd DCA

In order to invoke jurisdiction under the Declaratory Judgment Act, the complaint must show that there is a bona fide, actual, present and practical need for the declaration; that the declaration will deal with present, ascertained or ascertainable state of facts, or present controversy as to a state of facts; that some immunity, power, privilege or right is dependent upon facts or law applicable to facts; that there is some person or persons who have, or reasonably may have, an actual, present, adverse and antagonist interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court; and that the relief sought is not merely the giving of legal advice by the courts or the answers to questions propounded from curiosity. The test of the sufficiency of a complaint for declaratory action is not whether the complaint shows that plaintiff will succeed in getting a declaration of right in

accordance with his theory and contention, but whether he is entitled to a declaration of rights at all. The possibility that the court will rule adversely to the plaintiff on the merits does not preclude the right to a declaratory decree.

Source

Manatee Cty. v. Mandarin Dev., Inc., 301 So.3d 372, 376 (Fla. 2d DCA 2020).

See Also

1. *Ranucci v. City of Palmetto*, 317 So.3d 270, 274 (Fla. 2d DCA 2021).
2. *Touchton v. Woodside Credit, LLC*, 316 So.3d 392, 395 (Fla. 2d DCA 2021).
3. *Hedden v. Z Oldco, LLC*, 301 So.3d 1034, 1037 (Fla. 2d DCA 2019).
4. *Francis v. City of St. Petersburg*, 640 So.2d 149, 151 (Fla. 2d DCA 1994).
5. *Appel v. Scott*, 479 So.2d 800, 802 (Fla. 2d DCA 1985).
6. *Florida State Board of Dispensing Opticians v. Bayne*, 204 So.2d 34, 37 (Fla. 2d DCA 1967), *quashed on other grounds*, 212 So.2d 762 (Fla. 1968).
7. *Deen v. Tampa Port Authority*, 201 So.2d 755, 761 (Fla. 2d DCA 1967), *cert. denied*, 207 So.2d 688 (Fla. 1967).

§17:30.1.3 Elements of Cause of Action — 3rd DCA

A plaintiff is entitled to a declaratory judgment where: (1) there is a bona fide, actual, present practical need for the declaration; (2) the declaration sought deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; (3) an immunity, power, privilege or right of the plaintiff depends on the facts or the law that applies to the facts; (4) some persons have an actual, present, adverse and antagonistic interest in the subject matter; (5) all persons with an adverse and antagonistic interest are before the court; and (6) the declaration sought does not amount to mere legal advice.

Source

People's Tr. Ins. Co. v. Franco, 305 So. 3d 579, 583 (Fla. 2d DCA 2020).

See Also

1. *Crawley-Kitzman v. Hernandez*, 324 So.3d 968, 974 (Fla. 3d DCA 2021).
2. *Mandarin Lakes Cmty. Ass'n, Inc. v. Mandarin Lakes Neighborhood Homeowners Ass'n, Inc.*, 322 So.3d 1196, 1199 (Fla. 3d DCA 2021).
3. *Imperial Fire & Cas. Ins. Co. v. Acosta*, 2021 WL 5227095, *2 (Fla. 3d DCA Nov. 10, 2021).
4. *Bennett v. Mortgage Electronic Registration System, Inc.,* 230 So.3d 100, 107 (Fla. 3d DCA 2017).
5. *Citizens Property Ins. Corp. v. Ifergane*, 114 So.3d 190, 195 (Fla. 3d DCA 2012).
6. *Floyd v. Guardian Life Insurance Company of America*, 415 So.2d 103, 104 (Fla. 3d DCA 1982).
7. *Kelner v. Woody*, 399 So.2d 35, 37 (Fla. 3d DCA 1981).
8. *Tavares v. Allstate Insurance Company*, 342 So.2d 551, 553 (Fla. 3d DCA 1977).

§17:30.1.4 Elements of Cause of Action — 4th DCA

Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Source

Northwest Ctr. for Integrative Med. and Rehab., Inc. v. State Farm Mutual Auto. Ins. Co., 214 So.3d 679, 681-82 (Fla. 4th DCA 2017); *Harris v. Aberdeen Prop. Owners Ass'n, Inc.*, 135 So.3d 365, 368 (Fla. 4th DCA 2014).

See Also

1. *City of Hollywood v. Petrosino*, 864 So.2d 1175, 1177 (Fla. 4th DCA 2004).
2. *Golf Club of Plantation, Inc. v. City of Plantation*, 717 So.2d 166, 171 (Fla. 4th DCA 1998), *subsequent appeal*, 847 So.2d 1028 (Fla. 4th DCA 2003).
3. *City of Hollywood v. Florida Power & Light Company*, 624 So.2d 285, 286 (Fla. 4th DCA 1993).
4. *Jackson v. Federal Insurance Company*, 643 So.2d 56, 58 (Fla. 4th DCA 1994), *rev. denied*, 651 So.2d 1193 (Fla. 1995).
5. *Adelsperger v. Midlantic National Bank and Trust Co.,* 567 So.2d 444 (Fla. 4th DCA 1990).
6. *Robinson v. Town of Palm Beach Shores*, 388 So.2d 314, 315 (Fla. 4th DCA 1980).
7. *Milani v. Palm Beach County*, 973 So.2d 1222, 1226 (Fla. 4th DCA 2008).

§17:30.1.5 Elements of Cause of Action — 5th DCA

To obtain declaratory relief, a party must demonstrate that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with present ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of complaining party is dependent on fact or law applicable to facts; that there is some person or persons who have, or reasonably may have actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity.

While the existence of another available remedy does not preclude a judgment for declaratory relief, a viable declaratory claim must be asserted and *exceptional circumstances* must be shown for the prosecution of such a claim where there is a raised in the action can be resolved in the pending suit. … [Courts should follow] the almost universal rule … that if at the time the proceeding for a declaratory decree is initiated a suit is already pending which involves the same issues and in which litigation the plaintiff in the declaratory decree action may secure full, adequate and complete relief, such bill for declaratory decree will not be permitted to stand.

Source

MacKenzie v. Centex Homes, 208 So.3d 790, 793 (Fla. 5th DCA 2016); *Ramos v. CACH, LLC*, 183 So.3d 1149, 1153 (Fla. 5th DCA 2015).

See Also

1. *State Farm Mutual Automobile Insurance Company v. Marshall*, 618 So.2d 1377, 1380 (Fla. 5th DCA 1993), *disapproved on other grounds*, 630 So.2d 179, 182 (Fla. 1994).
2. *Wilson v. County of Orange*, 881 So.2d 625, 631 (Fla. 5th DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).
3. *Palumbo v. Moore*, 777 So.2d 1177, 1178 (Fla. 5th DCA 2001) ("The standard for testing the sufficiency of a declaratory judgment complaint is found in *May v. Holley*, 59 So.2d 636, 639 (Fla. 1952).").

§17:30.2 Statute of Limitations

Four Years. Fla. Stat. §95.11(3)(p); *Hollywood Lakes Section Civic Assoc. v. City of Hollywood*, 676 So.2d 500, 501 (Fla. 4th DCA 1996).

§17:30.3 References

1. 19 Fla. Jur. 2d *Declaratory Judgments* §§7–18, 52–56 (2005).
2. 22A Am. Jur. 2d *Declaratory Judgments* §§221–230 (2003).
3. 26 C.J.S. *Declaratory Judgments* §§136–143 (2001).
4. Florida Statutes ch. 86 (2005).
5. Gregor J. Schwinghammer, Jr., *Insurance Litigation in Florida: Declaratory Judgments and the Duty to Defend*, 50 U. Miami L. Rev. 945 (1996).
6. I. J. Slomowitz, *Declaratory Judgments in Florida*, 23 Fla. L. J. 281 (Oct. 1949).
7. Dianne K. Ericsson, *Declaratory Judgment: Is It a Real or Illusory Solution?*, 23 Tort & Ins. L.J. 161 (1987).

8. Jean E. Maess, Annotation, *Right to Jury Trial in Action for Declaratory Relief in State Court*, 33 A.L.R. 4th 146 (1984).
9. Jane M. Draper, Annotation, *Insured's Right to Recover Attorneys' Fees Incurred in Declaratory Judgment Action to Determine Existence of Coverage Under Liability Policy*, 87 A.L.R. 3d 429 (1978).
10. E. R. Tan, Annotation, *Availability and Scope of Declaratory Judgment Actions in Determining Rights of Parties, or Powers and Exercise thereof by Arbitrators, under Arbitration Agreements*, 12 A.L.R. 3d 854 (1967).
11. Walter H. Anderson, *Actions for Declaratory Judgments* (2d ed. 1951).
12. Edwin Borchard, *Declaratory Judgments* (1934).

§17:30.4 Defenses

1. **Advisory Opinion:** Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, and rest in the future. *Santa Rosa County v. Administration Commission, Division of Administrative Hearings*, 661 So.2d 1190, 1193 (Fla. 1995). *See also State v. Florida Consumer Action Network*, 830 So.2d 148, 152 (Fla. 1st DCA 2002), *rev. denied*, 852 So.2d 861 (Fla. 2003).

2. **Public Official:** As a general rule, a public official may only seek a declaratory judgment when he is willing to perform his duties, but prevented from doing so by others. *Department of Revenue of State of Fla. v. Markham*, 396 So.2d 1120, 1121 (Fla. 1981), *superseded by statute on other grounds as stated in Crossings At Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So.2d 793 (Fla. 2008).

3. **Resolving Issues of Fact:** The declaratory judgment statutes authorize declaratory judgments in respect to insurance policy indemnity coverage and defense obligations in cases in which it is necessary to resolve issues of fact in order to decide the declaratory judgment action, and [we] recede from *Columbia Casualty* to the extent that it is inconsistent with this holding. *Higgins v. State Farm Fire and Cas. Co*., 894 So.2d 5, 15 (Fla. 2004).

4. **Taxpayer:** It has long been the rule in Florida that, in the absence of a constitutional challenge, a taxpayer may bring suit only upon a showing of special injury which is distinct from that suffered by other taxpayers in the taxing district. *Department of Revenue of State of Fla. v. Markham*, 396 So.2d 1120, 1121 (Fla. 1981), *superseded by statute on other grounds as stated in Crossings At Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So.2d 793 (Fla. 2008).

5. **Unauthorized Practice of Law:** The Florida Bar is exclusively vested with the authority to prosecute claims for the unauthorized practice of law. *Sigma Financial Corp. v. Investment Loss Recovery Services, Inc.*, 673 So.2d 572, 573 (Fla. 4th DCA 1996).

§17:30.5 Related Matters

1. **Declaratory Statement:** Petitions for declaratory statements are similar to petitions for declaratory judgments, and appellate courts are guided by decisions issued under the declaratory judgments statute. The purpose of a declaratory statement is to set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in a particular set of circumstances. *Sutton v. Department of Environmental Protection*, 654 So.2d 1047, 1048 (Fla. 5th DCA 1995).

2. **Fact Issues:** This court has recognized that "the more recent trend in the case law is to accord broader scope to the declaratory judgment act in reaching fact issues." *Higgins*, 788 So.2d at 999. In fact, *Columbia Casualty* proscribes reaching fact issues in a declaratory judgment action only where there is no question as to the contract's construction. 62 So.2d at 340. Therefore, here, it was appropriate for the trial court to reach factual issues where it was done in conjunction with a construction of the contract. *Argus Photonics Group, Inc. v. Dickenson*, 841 So.2d 598, 600 (Fla. 4th DCA 2003).

3. **History, Statutory:** As originally enacted, the Declaratory Judgment Statute, chapter 7857, Laws of Florida (1919), was considered and its scope first defined in *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (Fla. 1930). Later, that statute was replaced with the uniform Declaratory Judgment Act, chapter 21820, Laws of Florida (1943) (Act), which was considered and its scope defined in *Ready v. Safeway Rock Company*, 157 Fla. 27, 24 So.2d 808 (Fla 1946). In *Ready,* the Court stated that the amended Act enlarged the scope of substantive and remedial remedies and was a legislative attempt to extend procedural remedies to comprehend relief in cases where technical or social advances have tended to obscure or place in doubt one's rights, immunities, status, or privileges. *Id.* at 808–09. Although the Act was later transferred to chapter 86 of the Florida Statutes and a few of its provisions were amended, *see* ch. 67-254, §38, Laws of Fla., the language of the provisions quoted above and the purpose of the Act have remained largely unchanged since 1943. *Higgins v. State Farm Fire and Cas. Co*., 894 So.2d 5, 11 (Fla. 2004).

4. **Insurance Policies:** Bona fide disputes over the coverage of an insurance policy have been traditionally considered a proper subject for declaratory judgment relief. *Tavares v. Allstate Insurance Company*, 342 So.2d 551, 553 (Fla. 3d DCA 1977). *See also Britamco Underwriters, Inc. v. Central Jersey Investments*, 632 So.2d 138, 139 (Fla. 4th DCA 1994).

5. **Intent:** The legislature has expressly stated its intent that the declaratory judgment act be liberally construed to settle and afford relief from insecurity and uncertainty with respect to rights, status and other equitable or legal relations. *Kendrick v. Everheart*, 390 So.2d 53, 59 (Fla. 1980). The notion of a broad construction of the Declaratory Judgment Act was aptly stated in *X Corp. v. Y Person*, 622 So.2d 1098 (Fla. 2d DCA 1993), where the district court reasoned: The goals of the Declaratory Judgment Act are to relieve litigants of the common law rule that a declaration of rights cannot be adjudicated unless a right has been violated and to render practical help in ending controversies which have not reached the stage where other legal relief is immediately available. To operate within this sphere of anticipatory and preventive justice, the Declaratory Judgment Act should be liberally construed. *Olive v. Maas*, 811 So.2d 644, 648 (Fla. 2002). *See also State v. Florida Consumer Action Network*, 830 So.2d 148, 152 (Fla. 1st DCA 2002), *rev. denied*, 852 So.2d 861 (Fla. 2003); *Higgins v. State Farm Fire and Cas. Co*., 894 So.2d 5 (Fla. 2004).

6. **Purpose:** The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 404 (Fla. 1996). *See also Santa Rosa County v. Administration Commission, Division of Administrative Hearings*, 661 So.2d 1190, 1192 (Fla. 1995).

7. **Statutory Remedy:** A declaratory judgment is a statutorily created remedy. *Martinez v. Scanlan*, 582 So.2d 1167, 1170 (Fla. 1991).

8. **Test of Sufficiency of Complaint:** The test of the sufficiency of a complaint for declaratory action is not whether the complaint shows that plaintiff will succeed in getting a declaration of right in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all. *City of Sarasota v. Mikos*, 613 So.2d 566, 567 (Fla. 2d DCA 1993). *See also Wilson v. County of Orange*, 881 So.2d 625, 631 (Fla. 5th DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).

9. **Third-Party Declaratory Action:** A "third party declaratory action" refers to the circumstances in which an insured defendant brings a third-party complaint for liability coverage against its insurer as part of the underlying personal injury action. *Higgins v. State Farm Fire and Cas. Co*., 894 So.2d 5, 15 (Fla. 2004).

10. **Validity of Statute:** Generally speaking, individuals may challenge the validity of a statute in a declaratory judgment action. *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991). *See also Wilson v. County of Orange*, 881 So.2d 625, 631 (Fla. 5th DCA 2004), *rev. denied*, 895 So.2d 406 (Fla. 2005).

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CHAPTER 18

LEGAL THEORIES & DEFENSES

§18:10 FLA. R. CIV. P. 1.110(D) AND OTHER STANDARD DEFENSES

§18:20 ACCORD AND SATISFACTION—COMMON LAW
- §18:20.1 Elements — Florida Supreme Court
  - §18:20.1.1 Elements — 1st DCA
  - §18:20.1.2 Elements — 2nd DCA
  - §18:20.1.3 Elements — 3rd DCA
  - §18:20.1.4 Elements — 4th DCA
  - §18:20.1.5 Elements — 5th DCA
- §18:20.2 Florida Statutes
- §18:20.3 Fla.R.Civ.P. Form 1.967. Defense. Accord and Satisfaction
- §18:20.4 References
- §18:20.5 Related Matters

§18:30 ACCORD AND SATISFACTION—ARTICLE 3 OF THE UCC
- §18:30.1 Florida Statutes
- §18:30.2 Fla.R.Civ.P. Form 1.967. Defense. Accord and Satisfaction
- §18:30.3 Elements — 5th DCA
- §18:30.4 References
- §18:30.5 Related Matters

§18:40 AGENCY, ACTUAL
- §18:40.1 Elements — Florida Supreme Court
  - §18:40.1.1 Elements — 1st DCA
  - §18:40.1.2 Elements — 2nd DCA
  - §18:40.1.3 Elements — 3rd DCA
  - §18:40.1.4 Elements — 4th DCA
  - §18:40.1.5 Elements — 5th DCA
- §18:40.2 References
- §18:40.3 Related Matters

§18:50 AGENCY, APPARENT (A.K.A. AGENCY BY ESTOPPEL)
- §18:50.1 Elements — Florida Supreme Court
  - §18:50.1.1 Elements — 1st DCA
  - §18:50.1.2 Elements — 2nd DCA
  - §18:50.1.3 Elements — 3rd DCA
  - §18:50.1.4 Elements — 4th DCA
  - §18:50.1.5 Elements — 5th DCA

§18:50.2 References
§18:50.3 Related Matters

§18:60 PIERCING THE CORPORATE VEIL
§18:60.1 Elements — Florida Supreme Court
§18:60.1.1 Elements — 1st DCA
§18:60.1.2 Elements — 2nd DCA
§18:60.1.3 Elements — 3rd DCA
§18:60.1.4 Elements — 4th DCA
§18:60.1.5 Elements — 5th DCA
§18:60.2 References

§18:70 COMMERCIAL BRIBERY
§18:70.1 Elements — Florida Supreme Court
§18:70.1.1 Elements — 1st DCA
§18:70.1.2 Elements — 2nd DCA
§18:70.1.3 Elements — 3rd DCA
§18:70.1.4 Elements — 4th DCA
§18:70.1.5 Elements — 5th DCA
§18:70.2 References
§18:70.3 Related Matters

§18:80 CONTRACTORS, UNLICENSED CIVIL REMEDY
§18:80.1 Florida Statutes
§18:80.2 References
§18:80.3 Defenses
§18:80.4 Related Matters

§18:90 DURESS
§18:90.1 Elements — Florida Supreme Court
§18:90.1.1 Elements — 1st DCA
§18:90.1.2 Elements — 2nd DCA
§18:90.1.3 Elements — 3rd DCA
§18:90.1.4 Elements — 4th DCA
§18:90.1.5 Elements — 5th DCA
§18:90.2 References
§18:90.3 Defenses
§18:90.4 Related Matters

§18:100 EQUITABLE SUBROGATION
§18:100.1 Elements — Florida Supreme Court
§18:100.1.1 Elements — 1st DCA
§18:100.1.2 Elements — 2nd DCA
§18:100.1.3 Elements — 3rd DCA
§18:100.1.4 Elements — 4th DCA
§18:100.1.5 Elements — 5th DCA
§18:100.2 References
§18:100.3 Defenses
§18:100.4 Related Matters

§18:110 COLLATERAL ESTOPPEL (ESTOPPEL BY JUDGMENT)
§18:110.1 Elements — Florida Supreme Court
§18:110.1.1 Elements — 1st DCA
§18:110.1.2 Elements — 2nd DCA

§18:110.1.3 Elements — 3rd DCA
§18:110.1.4 Elements — 4th DCA
§18:110.1.5 Elements — 5th DCA
§18:110.2 References
§18:110.3 Defenses
§18:110.4 Related Matters

§18:120 ESTOPPEL, EQUITABLE
§18:120.1 Elements — Florida Supreme Court
§18:120.1.1 Elements — 1st DCA
§18:120.1.2 Elements — 2nd DCA
§18:120.1.3 Elements — 3rd DCA
§18:120.1.4 Elements — 4th DCA
§18:120.1.5 Elements — 5th DCA
§18:120.2 References
§18:120.3 Defenses
§18:120.4 Related Matters

§18:130 ESTOPPEL, JUDICIAL
§18:130.1 Elements — Florida Supreme Court
§18:130.1.1 Elements — 1st DCA
§18:130.1.2 Elements — 2nd DCA
§18:130.1.3 Elements — 3rd DCA
§18:130.1.4 Elements — 4th DCA
§18:130.1.5 Elements — 5th DCA
§18:130.2 References
§18:130.3 Defenses
§18:130.4 Related Matters

§18:140 GRATUITOUS ASSUMPTION OF DUTY
§18:140.1 Elements — Florida Supreme Court
§18:140.1.1 Elements — 1st DCA
§18:140.1.2 Elements — 2nd DCA
§18:140.1.3 Elements — 3rd DCA
§18:140.1.4 Elements — 4th DCA
§18:140.1.5 Elements — 5th DCA
§18:140.2 References
§18:140.3 Defenses

§18:150 LACHES, DEFENSE OF
§18:150.1 Elements — Florida Supreme Court
§18:150.1.1 Elements — 1st DCA
§18:150.1.2 Elements — 2nd DCA
§18:150.1.3 Elements — 3rd DCA
§18:150.1.4 Elements — 4th DCA
§18:150.1.5 Elements — 5th DCA
§18:150.2 References
§18:150.3 Defenses
§18:150.4 Related Matters

§18:160 NOVATION
§18:160.1 Elements — Florida Supreme Court
§18:160.1.1 Elements — 1st DCA
§18:160.1.2 Elements — 2nd DCA

§18:160.1.3 Elements — 3rd DCA
§18:160.1.4 Elements — 4th DCA
§18:160.1.5 Elements — 5th DCA
§18:160.2 References
§18:160.3 Defenses

§18:170 REFORMATION
§18:170.1 Elements — Florida Supreme Court
§18:170.1.1 Elements — 1st DCA
§18:170.1.2 Elements — 2nd DCA
§18:170.1.3 Elements — 3rd DCA
§18:170.1.4 Elements — 4th DCA
§18:170.1.5 Elements — 5th DCA
§18:170.2 References
§18:170.3 Defenses
§18:170.4 Related Matters

§18:180 RES JUDICATA (DOCTRINE OF CLAIM PRECLUSION)
§18:180.1 Elements — Florida Supreme Court
§18:180.1.1 Elements — 1st DCA
§18:180.1.2 Elements — 2nd DCA
§18:180.1.3 Elements — 3rd DCA
§18:180.1.4 Elements — 4th DCA
§18:180.1.5 Elements — 5th DCA
§18:180.2 References
§18:180.3 Defenses
§18:180.4 Related Matters

§18:190 RESTITUTION
§18:190.1 Elements — Florida Supreme Court
§18:190.1.1 Elements — 1st DCA
§18:190.1.2 Elements — 2nd DCA
§18:190.1.3 Elements — 3rd DCA
§18:190.1.4 Elements — 4th DCA
§18:190.1.5 Elements — 5th DCA
§18:190.2 References
§18:190.3 Related Matters

§18:200 UNCONSCIONABILITY, COMMON LAW
§18:200.1 Elements — Florida Supreme Court
§18:200.1.1 Elements — 1st DCA
§18:200.1.2 Elements — 2nd DCA
§18:200.1.3 Elements — 3rd DCA
§18:200.1.4 Elements — 4th DCA
§18:200.1.5 Elements — 5th DCA
§18:200.2 References
§18:200.3 Related Matters

§18:210 VEXATIOUS LITIGANT
§18:210.1 Florida Statutes
§18:210.2 References
§18:210.3 Related Matters

§18:220 WAIVER
§18:220.1 Elements — Florida Supreme Court
§18:220.1.1 Elements — 1st DCA
§18:220.1.2 Elements — 2nd DCA
§18:220.1.3 Elements — 3rd DCA
§18:220.1.4 Elements — 4th DCA
§18:220.1.5 Elements — 5th DCA
§18:220.2 Definitions
§18:220.3 References
§18:220.4 Defenses
§18:220.5 Related Matters

§18:230 *COBLENTZ* AGREEMENTS
§18:230.1 Elements — Florida Supreme Court
§18:230.1.1 Elements — 1st DCA
§18:230.1.2 Elements — 2nd DCA
§18:230.1.3 Elements — 3rd DCA
§18:230.1.4 Elements — 4th DCA
§18:230.1.5 Elements — 5th DCA
§18:220.2 Definitions
§18:230.3 Statute of Limitations
§18:230.4 Related Matters

§18:240 IN PARI DELICTO
§18:240.1 Elements — Florida Supreme Court
§18:240.1.1 Elements — 1st DCA
§18:240.1.2 Elements — 2nd DCA
§18:240.1.3 Elements — 3rd DCA
§18:240.1.4 Elements — 4th DCA
§18:240.1.5 Elements — 5th DCA
§18:240.2 Defenses to the Usage of the Defense
§18:240.3 Related Matters

§18:250 SPLITTING CAUSES OF ACTION
§18:250.1 Elements — Florida Supreme Court
§18:250.1.1 Elements — 1st DCA
§18:250.1.2 Elements — 2nd DCA
§18:250.1.3 Elements — 3rd DCA
§18:250.1.4 Elements — 4th DCA
§18:250.1.5 Elements — 5th DCA
§18:250.2 Related Matters

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§18:10 FLA. R. CIV. P. 1.110(D) AND OTHER STANDARD DEFENSES

1. **Fla. R. Civ. P. 1.110(d) (pleading affirmative defenses):** a party must set forth affirmatively accord and satisfaction, arbitration and award, assumption of the risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, waiver, and any other matter constituting avoidance or an affirmative defense; *JAK Cap., LLC v. Adams*, 306 So. 3d 1285, 1287 (Fla. 2d DCA 2020); *Migilazzo v. Wells Fargo Bank, N.A.*, 290 So.3d 577, 579 (Fla. 2d DCA 2020).

2. **Accord and satisfaction** requires **(a)** a preexisting dispute between the parties, **(b)** the parties' mutual intent to settle the dispute by agreement, and **(c)** the tender and acceptance of a settlement agreement as full satisfaction and discharge of the parties disputed obligation. *Rocka Fuerta Constr., Inc. v. Southwick, Inc.*, 103 So.3d 1022, 1025 (Fla. 5th DCA 2012); *Chassan Professional Wallcovering, Inc. v. Victor Frankel, Inc.*, 608 So.2d 91, 93 (Fla. 4th 1992); see Fla. R. Civ. P. 1.110(d), discussed in (1), above.

3. **Arbitration and Award:** the right to compel arbitration is waived when the defendant fails to demand arbitration and instead answers the complaint, even when the right to arbitration is asserted as an affirmative defense. *See Chaikin v. Parker Waichman LLP*, 253 So.3d 640, 643 (Fla. 2d DCA 2017); *Bared and Co., v. Specialty Maintenance and Construction, Inc.*, 610 So.2d 1, 3 (Fla. 2d DCA 1992); see also Fla. R. Civ. P. 1.110(d), discussed in (1), above.

4. **Assumption of the risk** precludes recovery when the plaintiff voluntarily consented to exposure to the injury-causing harm. *See Kuehner v. Green*, 436 So.2d 78 (Fla. 1983); *McNichol v. South Florida Trotting Ctr., Inc.*, 44 So.3d 253, 257 (Fla. 4th DCA 2010). *See also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

5. **Collateral Estoppel** precludes re-litigation of issues when the identical issue has been litigated between the same parties. *See Ervin v. Smith*, 312 So. 3d 995, 999 (Fla. 1st DCA 2021); *Florida Bar v. Clement*, 662 So.2d 690, 697 (Fla. 1995), U.S. cert. denied, 517 U.S. 1210 (1996). Fla. R. Civ. P. 1.110(d), discussed in (1), above.

6. **Contributory Negligence**. *Hoffman v. Jones*, 280 So.2d 431, 432 (Fla. 1973) (abolishing contributory negligence as complete bar to recovery in favor of comparative negligence; see §768.81, Fla. Stat.; see also Fla. R. Civ. P. 1.110(d), discussed in (1), above.

7. **Corporate Veil:** Plaintiffs cannot pierce the corporate veil to hold a corporation's shareholders individually liable for the corporation's debts **absent a showing "that the corporation was organized or employed to mislead creditors or to work a fraud upon them."** *See Parisi v. Kingston*, 314 So. 3d 656, 664 (Fla. 3d DCA 2021); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1116 (Fla. 1984).

8. **Discharge in Bankruptcy**. *See* 28 U.S.C. §§727 (Chapter 7 Debtor), 1141(d) (Chapter 11 Debtor), 1228 (Chapter 12 Debtor), 1328 (Chapter 13 Debtor); *Kalmanson v. Adams*, 988 So.2d 1121, 1122 (Fla. 5th DCA 2008) (explaining that "discharge in bankruptcy is an affirmative defense."); *In re Bentley*, 599 B.R. 369 (Bankr. M.D. Fla. 2019); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

9. **Duress** is severe pressure or other influence that destroys the defendant's free will and forces the defendant to do an act or enter into a contract. *See Ziegler v. Natera*, 279 So. 3d 1240, 1242 (Fla. 3d DCA 2019); *Franklin v. Wallock*, 576 So.2d 1371, 1373 (Fla. 5th DCA 1991) (J. Sharp, dissenting); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

10. **Equitable Estoppel** "is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property or of contract, or of remedy, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or of contract or of remedy." *United Auto. Ins. Co. v. Chiropractic Clinics of S. Fla.*, No. 3D21-111, 2021 WL 2447804, at *3 (Fla. 3d DCA June 16, 2021); *Major League Baseball v. Morsani*, 790 So.2d 1071, 1076 (Fla. 2001).

11. **Equitable Tolling** may delay the running of the statute of limitations "based on the plaintiff's blameless ignorance and lack of prejudice to the defendant. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1076, n. 11 (Fla. 2001).

12. **Failure of Consideration**. A defense to the contract because it is a fundamental principle of contract law that a promise must be supported by consideration to be enforceable. *See 1700 Rinehart, LLC v. Advance Am., Cash Advance Ctrs.*, 51 So.3d 535 (Fla. 5th DCA 2010); *Vichaikul v. S.C.A.C. Enters., Inc.*, 616 So.2d 100, 100 (Fla. 2d DCA 1993); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

13. **Failure to Exhaust Administrative Remedies:** a plaintiff cannot seek judicial relief when a statute or employment contract requires the plaintiff to first seek relief through an administrative process or forum. *See Rousseau v. Miami-Dade Cty.*, No. 3D21-0057, 2021 WL 2447819, at *1 (Fla. 3d DCA June 16, 2021); *Bal Harbour Village v. City of North Miami*, 678 So.2d 356, 364 (Fla. 3d DCA 1996).

14. **Failure to Satisfy Prima Facie Elements:** the plaintiff's inability to satisfy one or more of the prima facie elements of a claim is an absolute bar to that claim. *See Caldwell v. Florida Dep't of Elder Affairs*, 121 So.3d 1062, 20163 (Fla. 1st DCA 2013); *Donald S. Zuckerman, P.A. v. Alex Hofrichter*, 676 So.2d 41, 43 (Fla. 3d DCA 1996).

15. **Fraud**. *See* §26, discussing the elements of fraud; *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above. Further, Fla.R.Civ.P. 1.120(b) mandates that 'in all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with such particularity as the circumstances may permit.' Failure to allege a specific element of fraud in a complaint is fatal when challenged by a motion to dismiss. *See JAK Cap., LLC v. Adams*, 306 So. 3d 1285, 1287 (Fla. 2d DCA 2020); *Parra de Rey v. Rey*, 114 So.3d 371, 386 (Fla. 3d DCA 2013).

16. **Illegality:** courts will refuse to enforce, as a matter of public policy, illegal contracts. *See Armco Drainage and Metal Products, Inc. v. County of Pinellas*, 137 So.2d 234, 238 (Fla. 2d DCA 1962) (describing in detail rationale of illegality defense); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

17. The **"injury by fellow servant"** defense precludes an employee's recovery for damages where an injury is **(a)** caused by the negligence of the employee and in part through the negligence of a fellow employee, **(b)** both employees are jointly performing the act causing the injury and **(c)** the employer is not contributorily negligent. *Smith v. Ryder Truck Rentals, Inc.*, 182 So.2d 422, 424 (Fla. 1966); *Atlanta & St. Andrews Bay Ry. Co. v. Pittman*, 130 Fla. 624, 178 So. 297, 298 (1938); *see* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

18. **Judicial Estoppel** precludes a party from asserting a proposition that is inconsistent with that alleged or admitted under oath in prior proceeding. *See Marrero v. Rea*, 312 So. 3d 1041, 1049 (Fla. 5th DCA 2021); *Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 960 (Fla. 2020); *Blumberg v. USAA Casualty Ins. Co.*, 790 So.2d 1061, 1066 (Fla. 2001).

19. **Laches** is established when **(a)** conduct on the part of the defendant gives rise to the subject matter of the complaint; **(b)** the plaintiff has knowledge or notice of the conduct, but delays in bringing the complaint; **(c)** the defendant lacks knowledge or notice that plaintiff would assert the right on which he or she bases the complaint; and **(d)** the defendant will suffer injury or prejudice if relief is awarded to the plaintiff. *See Delgado v. Delgado*, No. 3D20-1119, 2021 WL 1897091, at *5 (Fla. 3d DCA May 12, 2021); *Florida Bar v. Lipman*, 497 So.2d 1165, 1167 (Fla. 1986); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

20. **License** is the right to take action that would otherwise be illegal. *See Pilafjian v. State*, 210 So.3d 738, 740 (Fla. 5th DCA 2017); *Wyman v. Robbins*, 513 So.2d 230, 231 (Fla. 1st DCA 1987); see also Fla. R. Civ. P. 1.110(d), discussed in (1), above.

21. **Litigation privilege** is an absolute immunity that covers both defamatory statements and other tortuous behavior during a judicial proceeding. *See Gursky Ragan, P.A. v. Ass'n of Poinciana Villages, Inc.*, 314 So. 3d 594, 595 (Fla. 3d DCA 2020); *Davis v. Bailynson*, 268 So.3d 762, 769-70 (Fla. 4th DCA 2019).

22. **Mootness** requires that issues before the court remain "live," and that parties maintain a legally cognizable interest in the outcome throughout the litigation. See *Waters v. Dep't of Corr.*, 306 So. 3d 1264, 1266 (Fla. 1st DCA 2020); *Montgomery v. Dept. of Health and Rehab. Servs.*, 468 So.2d 1014, 1016 (Fla. 5th DCA 1985).

23. **Payment** is when the defendant has already satisfied the plaintiff's claim through payment of money or discharge of obligation. See generally Blacks Law Dictionary, pg. 1129 (6th Ed. 1990); *see Bergstein v. Palm Beach County Sch. Bd.*, 97 So.3d 878 (Fla. 1st DCA 2012); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

24. **Federal Preemption:** The Supremacy Clause (U.S. Const. Art. VI, cl. 2) provides that state law claims are not available when preempted by federal law. *See R.J. Reynolds Tobacco Co. v. Marotta*, 214 So.3d 590, 596 (Fla. 2017); *Vreeland v. Ferrer*, 71 So. 3d 70, 75-76 (Fla. 2011); *Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1341 (11th Cir. 1995), *cert. denied*, 516 U.S. 1087 (1996).

25. **Ratification** occurs when a party with full knowledge of the material facts takes action to adopt an act or contract entered without authority. *See Domino v. Nielsen*, No. 4D20-986, 2021 WL 2559499, at *1 (Fla. 4th DCA June 23, 2021); *ABC Salvage, Inc. v. Bank of Am., N.A.*, 305 So.3d 725, 729 (Fla. 3d DCA 2020).

26. **Release** is the waiver or relinquishment of the right to bring a claim against a person or entity. See generally Blacks Law Dictionary, pg. 1289 (6th Ed. 1990); *see also Russell Post Properties, Inc. v. Leaders Bank*, 159 So.3d 348, 349 (Fla. 3d DCA 2015); *Bruce v. Heiman*, 392 So.2d 1026, 1028 (Fla. 5th DCA 1981); Fla. Civ. P. 1.110(d). To be enforceable, the contractual language of a pre-injury release must be clear and unequivocal, and clearly indicate the intentions of the parties. *In re Royal Caribbean Cruises Ltd.*, 403 F. Supp. 2d 1168, 1170 (S.D. Fla. 2005). The Florida legislature enacted an amendment to Florida Statute §744.301 which became effective on April 27, 2010. Fla. Stat. Ann. §744.301 (West 2010). This new legislation resulted from the Florida Supreme Court's decision in *Kirton v. Fields*, 997 So.2d 349 (Fla. 2008). In *Kirton*, the Supreme Court held that when a pre-injury release is executed by a parent on behalf of a minor child to allow the minor child's participation in a commercial activity, the pre-injury release is unenforceable against the minor or the minor's estate in a tort action for injuries resulting from participation. *Id.* at 359. The new law amends Florida Statute 744.301 by creating a new subsection (3) which authorizes natural guardians "on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a commercial activity provider, which would accrue to the minor child for personal injury, including death, resulting from an inherent risk in the activity." §744.301(3). Thus, Florida Statute §744.301 renders enforceable a pre-injury release executed by parents and natural guardians on behalf of their minor children, but only for those dangers inherent in the activity. *Id.* In addition, when a pre-injury release is executed by a parent on behalf of a minor child to allow the minor child's participation in a community-supported or school-based activity, the pre-injury release is enforceable against the minor or the minor's estate in a tort action for injuries resulting from participation. *Krathen v. School Bd. of Monroe Cty.*, 972 So.2d 887, 888 (Fla. 3d DCA 2007); *Gonzalez v. City of Coral Gables*, 871 So.2d 1067, 1067-68 (Fla. 3d DCA 2004).

27. **Res Judicata** bars a second litigation when the same cause of action has already been litigated between the same parties by rendering the first judgment conclusive as to all matters that were or could have been adjudicated in the first action. *See Amiri v. McGreal*, No. 2D20-953, 2021 WL 2385392, at *2 (Fla. 2d DCA June 11, 2021); *Acadia Partners, L.P. v. Tompkins*, 759 So.2d 732, 738 (Fla. 5th DCA 2000); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

28. **Standing** requires that the plaintiff have a sufficient interest at stake in the controversy that will be affected by the litigation's outcome. *See U.S. Bank, N.A. v. Mink*, 301 So. 3d 386, 388 (Fla. 2d DCA 2020) (holding "a plaintiff who is not the original lender may establish standing to foreclose a mortgage loan by submitting a note with a blank or special [e]ndorsement, an assignment of the note, or an affidavit otherwise proving the plaintiff's status as the holder of the note."); *City of Opa-Locka, Fla. v. Suarez*, 314 So. 3d 675, 679-80 (Fla. 3d DCA 2021); *DeSantis v. Fla. Educ. Ass'n*, 306 So. 3d 1202, 1214 (Fla. 1st DCA 2020); **Standing must be asserted as an affirmative defense or the defense is waived.** *See Broward Cty. v. Fla. Carry, Inc.*, 313 So. 3d 635, 641 (Fla. 4th DCA 2021); *Cowart v. City of West Palm Beach*, 255 So. 2d 673, 674-675 (Fla. 1971); see also Fla. R. Civ. P. 1.210 (parties).

29. **Statute of Frauds:** The Statute of Frauds bars the enforcement of oral contracts that cannot be performed within one year. *See DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So.3d 85, 91-3 (Fla. 2013); *Smith v. Royal Automotive Group, Inc.*, 675 So.2d 144, 154-155 (Fla. 5th DCA 1996) (discussing Florida's statute of frauds); *see also* §§678.319 (sale of securities), 680.201 (leasing), 672.201, 206 (Florida U.C.C.), 725.201 (payment of another's debt), Fla. Stat.; RESTATEMENT (SECOND) OF CONTRACTS §§110, 130 (1981); Fla. R. Civ. P. 1.110(d), discussed in (1), above.

30. **Doctrine of Unclean Hands:** Plaintiffs who seek a remedy in equity with "unclean hands," which does not require the commission of a crime but only acts "condemned by honest and reasonable" persons, will be denied relief. *See 21st Mortg. Corp. v. TSE Plantation, LLC*, 301 So. 3d 1120, 1122 (Fla. 1st DCA 2020); *McMichael v. Deutsche Bank Nat'l Trustee Co.*, 241 So.3d 179, 181 (Fla. 4th DCA 2018); *Roberts v. Roberts*, 84 So.2d 717, 720 (Fla. 1956).

31. **Waiver** requires that the plaintiff **(a)** possesses, at the time of the waiver, a right, privilege, advantage, or benefit (the "right"), which may be waived; **(b)** has actual or constructive knowledge of the right; and **(c)** has the intention to relinquish the right. *State Farm Fla. Ins. Co. v. Nordin*, 312 So. 3d 200, 203 (Fla. 1st DCA 2021); *Zurstrassen v. Stonier*, 786 So.2d 65, 70 (Fla. 4th DCA 2001); *see also* Fla. R. Civ. P. 1.110(d), discussed in (1), above.

32. **Worker's Compensation** is an employee's sole remedy for claims of injury or death absent intentional conduct by employer that is substantially certain to result in injury or death. *Merlien v. JM Fam. Enterprises, Inc.*, 301 So. 3d 1, 7 (Fla. 4th DCA 2020); *McNair v. Dorsey*, 291 So.3d 607, 609 (Fla. 1st DCA 2020), *reh'g denied* (Mar. 13, 2020); *Gil v. Tenet Healthsystem North Shore, Inc.*, 204 So.3d 125, 127 (Fla. 4th DCA 2016); *Seaboard Coast Line R. Co. v. Smith*, 359 So.2d 427, 428 (Fla. 1978); *see* §440.11, Fla. Stat.

§18:20 ACCORD AND SATISFACTION—COMMON LAW

§18:20.1 Elements — Florida Supreme Court

An accord is "an agreement for the settlement of some previously existing claim by a substituted performance." 6 A. Corbin, *Corbin on Contracts* §1278 (1962). Discharge of a claim by accord and satisfaction means "a discharge by the rendering of some performance different from that which was claimed as due and the acceptance of such performance by the claimant as full satisfaction of his claim." *Id.* §1276. It is not a prerequisite to an accord that the creditor's claim be doubtful or in dispute, but where it is, the agreement for substituted performance is "compromise" and the rendering of the performance is "settlement." *Id.* §1278.

SOURCE

Jacksonville Electric Authority v. Draper's Egg and Poultry Co., 557 So.2d 1357 (Fla. 1990).

§18:20.1.1 Elements — 1st DCA

The defense of accord and satisfaction requires proof of two elements: first, that the parties mutually intended to settle an existing dispute by entering into a superseding agreement, and, second, that there was actual performance with satisfaction of the new agreement discharging the debtor's prior obligation.

SOURCE

U.S. v. Morrison, 28 So.3d 94, 100-01 (Fla. 1st DCA 2009).

SEE ALSO

1. *Morton v. Rifai*, 339 So.2d 707, 708 (Fla. 1st DCA 1976).
2. *State Road Department v. Houdaille Industries, Inc.*, 237 So.2d 270, 274 (Fla. 1st DCA 1970).
3. *Pogge v. Department of Revenue, State of Florida*, 703 So.2d 523, 526 (Fla. 1st DCA 1997).

§18:20.1.2 Elements — 2nd DCA

[No citation for this edition.]

See Also

1. *Madison at Soho II Condo. Ass'n, Inc. v. Devo Acquisition Enter., LLC*, 198 So.3d 1111, 1118 (Fla. 2d DCA 2016); *Wolowitz v. Thoroughbred Motors, Inc*., 765 So.2d 920, 923 (Fla. 2d DCA 2000).

§18:20.1.3 Elements — 3rd DCA

An accord and satisfaction results when: (1) the parties mutually intend to effect a settlement of an existing dispute by entering into a superseding agreement; and (2) there is actual performance in accordance with the new agreement. Compliance with the new agreement discharges the prior obligations.

Source

Martinez v. South Bayshore Tower, L.L.L.P., 979 So.2d 1023 (Fla. 3d DCA 2008).

See Also

1. *Goslin v. Racal Data Communications, Inc.*, 468 So.2d 390, 392 (Fla. 3d DCA 1985), *rev. denied*, 479 So.2d 117 (Fla. 1985).
2. *Rudick v. Rudick*, 403 So.2d 1091, 1093 (Fla. 3d DCA 1981).
3. *W.C. Murphy Architect, P.A. v. W.P. Austin Construction Corp.*, 547 So.2d 302, 303 (Fla. 3d DCA 1989).
4. *San Hueza v. National Foundation Life Insurance Co.*, 545 So.2d 321 (Fla. 3d DCA 1989).

§18:20.1.4 Elements — 4th DCA

An accord and satisfaction results when: (1) the parties mutually intend to effect a settlement of an existing dispute by entering into a superseding agreement; and (2) there is actual performance in accordance with the new agreement. Compliance with the new agreement discharges the prior obligations. The "superseding agreement" can take the form of either an executory accord that requires actual performance before the original obligation of the parties is satisfied, or a "substituted agreement" that results in immediate discharge of the original claim. In other words, the superseding agreement can either require future performance to constitute a satisfaction or can be taken itself as a satisfaction.

Source

Cirrus Design Corp. v. Sasso, 95 So.3d 308, 311 (Fla. 4th DCA 2012).

See Also

1. *Chassan Professional Wallcovering, Inc, v. Victor Frankel, Inc.*, 608 So.2d 91, 93 (Fla. 4th DCA 1992).

§18:20.1.5 Elements — 5th DCA

Accord and satisfaction results when there is an existing dispute as to the proper amount due from one party (the debtor) to another party (the creditor) and the parties mutually intend to effect settlement of the existing dispute by a superceding agreement and the debtor tenders, and the creditor accepts, performance of the new agreement in full satisfaction and discharge of the debtor's prior disputed obligation.

Source

Rocka Fuerta Constr., Inc. v. Southwick, Inc., 103 So.3d 1022, 1025 (Fla. 5th DCA 2012).

See Also

1. *Republic Funding Corp. of Florida v. Juarez*, 563 So.2d 145, 146 (Fla. 5th DCA 1990).

§18:20.2 Florida Statutes

Florida Statutes §671.207 Performance or acceptance under reservation of rights

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.
(2) Subsection (1) does not apply to an accord and satisfaction.

Florida Statutes §725.05

When the amount of any debt or obligation is liquidated, the parties may satisfy the debt by a written instrument other than by endorsement on a check for less than the full amount due.

§18:20.3 Fla.R.Civ.P. Form 1.967. Defense. Accord and Satisfaction

On _____(date)_____, defendant delivered to plaintiff and plaintiff accepted from defendant (specify consideration) in full satisfaction of plaintiff's claim.

§18:20.4 References

1. 10 Fla. Jur. 2d *Compromise, Accord, and Release* §§1–10 (2003).
2. 1 Am. Jur. 2d *Accord and Satisfaction* §§1–25, 51–54 (2005).
3. 1 C.J.S. *Accord and Satisfaction* §§1–17, 71–81 (2005).
4. Fla.R.Civ.P. 1.110(d).
5. Restatement (Second) of Contracts §281 (1981).
6. William D. Hawkland & Larry Lawrence, *UCC Series* §3-311 (Rev. Art. 3, 1993).
7. Andrew J. Dolson, *Accord and Satisfaction Under Article 3A of the UCC: A Trap for the Unwary*, 21 Va. B. Ass'n. J., Winter 1995, at 9.
8. Michael D. Floyd, *How Much Satisfaction Should You Expect from an Accord? The U.C.C. Section 3-311 Approach*, 26 Loy. U. Chi. L.J., Fall 1994, at 1.
9. Jay Winston, Note, *The Evolution of Accord and Satisfaction: Common Law; U.C.C. Section 1-207; U.C.C. Section 3-311*, 28 New Eng. L. Rev. 189 (1993).
10. Scott J. Burnham, *A Primer on Accord and Satisfaction*, 47 Mont. L. Rev. 1 (1986).
11. James L. Buchwalter, Annotation, *Conveyance or Surrender of Property as an Accord and Satisfaction of Contract Obligation*, 59 A.L.R.5th 665 (1998).
12. John P. Ludington, Annotation, *Creditor's Retention without Negotiation of Check Purporting to be Final Settlement of Disputed Amount as Constituting Accord and Satisfaction*, 42 A.L.R.4th 117 (1985).
13. Vitauts M. Gulbis, Annotation, *Creditors Certification of Check Purporting to be Final Settlement of Disputed Amount as Constituting Accord and Satisfaction*, 42 A.L.R.4th 95 (1985).
14. Vitauts M. Gulbis, Annotation, *Modern Status of Rule that Acceptance of Check Purporting to be Final Settlement of Disputed Amount Constitutes Accord and Satisfaction*, 42 A.L.R.4th 12 (1985).
15. Vitauts M. Gulbis, Annotation, *Application of UCC §1-207 to Avoid Discharge of Disputed Claim upon Qualified Acceptance of Check Tendered as Payment in Full*, 37 A.L.R.4th 358 (1985).
16. *Burke Co. v. Hilton Development Co.*, 802 F.Supp. 434 (N.D. Fla. 1992).

§18:20.5 Related Matters

1. **Acceptance by Creditor:** An accord and satisfaction results as a matter of law only when the creditor accepts payment tendered on the expressed condition that its receipt is deemed to be a complete satisfaction of a disputed issue. *See Republic Funding Corp. of Florida v. Juarez,* 563 So.2d 145, 146 (Fla. 5th DCA 1990). *See also St. Mary's Hosp., Inc. v. Schocoff*, 725 So.2d 454, 456 (Fla. 4th DCA 1999).

2. **Acts of the Parties:** An accord and satisfaction agreement is often implied from the acts of the parties after the resolution of disputed issues of fact by trial. *Republic Funding Corp. of Florida v. Juarez*, 563 So.2d 145, 147 (Fla. 5th DCA 1990).

3. **Florida Statutes §725.05:** This section does no more than codify prior case law which holds that payment of part of an undisputed debt does not discharge the whole in the absence of an agreement by both parties to that effect. *Berman v. U.S. Financial Acceptance Corp.*, 669 So.2d 1116, 1117 (Fla. 4th DCA 1996).

4. **Impeaching Validity of a Prior Satisfaction:** A party may not maintain a cause of action that inherently impeaches the validity of a prior satisfaction without first setting aside the satisfaction by a direct challenge to its validity. *Watson v. Domecki*, 436 So.2d 1036, 1037 (Fla. 4th DCA 1983). The appropriate method to attack the validity of a satisfaction is by motion pursuant to Rule 1.540(b), Fla.R.Civ.P., in the original action or by an independent action brought specifically for that purpose in the court that entered the judgment. *Morris North American, Inc. v. King*, 430 So.2d 592, 593 (Fla. 4th DCA 1983).

5. **Material Alteration:** The crossing out of restrictive language by a payee in an attempt to avoid an accord and satisfaction is ineffective to change the contract of a party to the check and so does not constitute a material alteration of the check, as defined in U.C.C. §3-407(1). *City of Deerfield Beach v. Florida National Bank of Palm Beach County*, 428 So.2d 779, 780 (Fla. 4th DCA 1983).

6. **Presumption:** If the claim is disputed or unliquidated, the presumption should be that there is a substituted agreement rather than an executory contract of accord; if the obligations are liquidated, it will generally be presumed that the creditor did not intend to surrender his prior rights unless and until the new agreement is actually performed. *Rudick v. Rudick*, 403 So.2d 1091, 1094 (Fla. 3d DCA 1981).

7. **Returning Part of the Consideration:** The rule, that an accord partially performed does not constitute a settlement, is not applicable where the complaining party unilaterally attempted to return a portion of the consideration two or three weeks after agreement had been reached but did not see fit to tender a return of the entire consideration. *Rosenfeld v. Glickstein*, 159 So.2d 670, 672 (Fla. 1st DCA 1964).

8. **Scope of §673.3111:** Section 673.3111 deals with accord and satisfaction by use of instrument. "Instrument" is defined in section 673.1041(2), Florida Statutes (1993), as a negotiable instrument. The memorandum of agreement in this case which constitutes the release is not a negotiable instrument within the meaning of section 673.1041(2), and thus section 673.3111 does not apply to its terms. Additionally, section 725.05 deals with liquidated debts, whereas section 673.3111 deals with disputed debts. *Berman v. U.S. Financial Acceptance Corp.*, 669 So.2d 1116, 1117 (Fla. 4th DCA 1996).

9. **Statute Prevails:** Section 2.01 of the Florida Statutes (1993), declares that the common law as it existed on July 4, 1776, is to be of force in this state to the extent that it is not inconsistent with the acts of the Legislature of the state. Therefore, where a conflict exists, the statute prevails. *International Shoe* predates the enactment of section 725.05 by over eleven years, and to the extent that the case is inconsistent with the statute, the statute prevails. *Berman v. U.S. Financial Acceptance Corp.*, 669 So.2d 1116, 1117 (Fla. 4th DCA 1996).

§18:30 ACCORD AND SATISFACTION—ARTICLE 3 OF THE UCC

§18:30.1 Florida Statutes

Florida Statutes §673.3111. Accord and satisfaction by use of instrument.

(1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(3) Subject to subsection (4), a claim is not discharged under subsection (2) if either paragraph (a) or paragraph (b) applies:

(a) The claimant, if an organization proves that:
1. Within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office or place; and
2. The instrument or accompanying communication was not received by that designated person, office, or place.

(b) The claimant, whether or not an organization, proves that, within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with subparagraph (a)1.

(4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Florida Statutes §671.207 Performance or acceptance under reservation of rights.

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient.
(2) Subsection (1) does not apply to an accord and satisfaction.

Florida Statutes §725.05. Satisfaction for less than amount due.

When the amount of any debt or obligation is liquidated, the parties may satisfy the debt by a written instrument other than by endorsement on a check for less than the full amount due.

§18:30.2 Fla.R.Civ.P. Form 1.967. Defense. Accord and Satisfaction

On _____(date)_____, defendant delivered to plaintiff and plaintiff accepted from defendant (specify consideration) in full satisfaction of plaintiff's claim.

§18:30.3 Elements — 5th DCA

Section 673.3111(4) of the Florida Statutes (2001) sets forth the elements of statutory accord and satisfaction

Source

Mayfair International, Inc. v. Del Gardo, 864 So.2d 1239, 1240 (Fla. 5th DCA 2004).

§18:30.4 References

1. 10 Fla. Jur. 2d *Compromise, Accord, and Release* §§1–10 (2003).
2. 1 Am. Jur. 2d *Accord and Satisfaction* §§1–25, 51–54 (2005).
3. 1 C.J.S. *Accord and Satisfaction* §§1–17, 71–81 (2005).
4. Fla.R.Civ.P. 1.110(d).
5. Restatement (Second) of Contracts §281 (1981).
6. William D. Hawkland & Larry Lawrence, *UCC Series* §3-311 (Rev. Art. 3, 1993).
7. Andrew J. Dolson, *Accord and Satisfaction Under Article 3A of the UCC: A Trap for the Unwary*, 21 Va. B. Ass'n. J., Winter 1995, at 9.
8. Michael D. Floyd, *How Much Satisfaction Should You Expect from an Accord? The U.C.C. Section 3-311 Approach*, 26 Loy. U. Chi. L.J., Fall 1994, at 1.
9. Jay Winston, Note, *The Evolution of Accord and Satisfaction: Common Law; U.C.C. Section 1-207; U.C.C. Section 3-311*, 28 New Eng. L. Rev. 189 (1993).
10. Scott J. Burnham, *A Primer on Accord and Satisfaction*, 47 Mont. L. Rev. 1 (1986).
11. James L. Buchwalter, Annotation, *Conveyance or Surrender of Property as an Accord and Satisfaction of Contract Obligation*, 59 A.L.R.5th 665 (1998).

12. John P. Ludington, Annotation, *Creditor's Retention without Negotiation of Check Purporting to be Final Settlement of Disputed Amount as Constituting Accord and Satisfaction*, 42 A.L.R.4th 117 (1985).
13. Vitauts M. Gulbis, Annotation, *Creditors Certification of Check Purporting to be Final Settlement of Disputed Amount as Constituting Accord and Satisfaction*, 42 A.L.R.4th 95 (1985).
14. Vitauts M. Gulbis, Annotation, *Modern Status of Rule that Acceptance of Check Purporting to be Final Settlement of Disputed Amount Constitutes Accord and Satisfaction*, 42 A.L.R.4th 12 (1985).
15. Vitauts M. Gulbis, Annotation, *Application of UCC §1-207 to Avoid Discharge of Disputed Claim upon Qualified Acceptance of Check Tendered as Payment in Full*, 37 A.L.R.4th 358 (1985).
16. *Burke Co. v. Hilton Development Co.*, 802 F.Supp. 434 (N.D. Fla. 1992).

§18:30.5 Related Matters

1. **Florida Statutes §725.05:** This section does no more than codify prior case law which holds that payment of part of an undisputed debt does not discharge the whole in the absence of an agreement by both parties to that effect. *Berman v. U.S. Financial Acceptance Corp.*, 669 So.2d 1116, 1117 (Fla. 4th DCA 1996).

2. **Impeaching Validity of a Prior Satisfaction:** A party may not maintain a cause of action that inherently impeaches the validity of a prior satisfaction without first setting aside the satisfaction by a direct challenge to its validity. *Watson v. Domecki*, 436 So.2d 1036, 1037 (Fla. 4th DCA 1983). The appropriate method to attack the validity of a satisfaction is by motion pursuant to Rule 1.540(b), Fla.R.Civ.P., in the original action or by an independent action brought specifically for that purpose in the court that entered the judgment. *Morris North American, Inc. v. King*, 430 So.2d 592, 593 (Fla. 4th DCA 1983).

3. **Material Alteration:** The crossing out of restrictive language by a payee in an attempt to avoid an accord and satisfaction is ineffective to change the contract of a party to the check and so does not constitute a material alteration of the check, as defined in U.C.C. §3-407(1). *City of Deerfield Beach v. Florida National Bank of Palm Beach County*, 428 So.2d 779, 780 (Fla. 4th DCA 1983).

4. **Scope of §673.3111:** Section 673.3111 deals with accord and satisfaction by use of instrument. "Instrument" is defined in section 673.1041(2), Florida Statutes (1993), as a negotiable instrument. The memorandum of agreement in this case which constitutes the release is not a negotiable instrument within the meaning of section 673.1041(2), and thus section 673.3111 does not apply to its terms. Additionally, section 725.05 deals with liquidated debts, whereas section 673.3111 deals with disputed debts. *Berman v. U.S. Financial Acceptance Corp.*, 669 So.2d 1116, 1117 (Fla. 4th DCA 1996).

5. **Statute Prevails:** Section 2.01 of the Florida Statutes (1993), declares that the common law as it existed on July 4, 1776, is to be of force in this state to the extent that it is not inconsistent with the acts of the Legislature of the state. Therefore, where a conflict exists, the statute prevails. *International Shoe* predates the enactment of section 725.05 by over eleven years, and to the extent that the case is inconsistent with the statute, the statute prevails. *Berman v. U.S. Financial Acceptance Corp.*, 669 So.2d 1116, 1117 (Fla. 4th DCA 1996).

§18:40 AGENCY, ACTUAL

§18:40.1 Elements — Florida Supreme Court

As stated by this Court in *Goldschmidt v. Holman*, 571 So.2d 422, 424 n.5 (Fla. 1990), "Essential to the existence of an actual agency relationship is:

1. acknowledgment by the principal that the agent will act for him;
2. the agent's acceptance of the undertaking; and
3. control by the principal over the actions of the agent.

Restatement (Second) of Agency §1 (1958)." *Id.* at 424 n. 5.

Source

Villazon v. Prudential Health Care Plan, Inc., 843 So.2d 842, 853 (Fla. 2003).

See Also

1. *Holman v. Goldschmidt*, 550 So.2d 499, 504 (Fla. 1st DCA 1989), *quashed with directions*, 571 So.2d 442 (Fla. 1990).
2. *Mathieson v. General Motors Corp.,* 529 So.2d 761, 762 (Fla. 3d DCA 1988); "Although the term *agency* is a conclusion of law rather than an allegation of fact, that conclusion appears here to be so elemental as to constitute a permissible pleading. *See* H. Trawick, *Florida Practice and Procedure* §6-6 (1987) (citing *Panama Realty, Inc. v. Robinson,* 305 So.2d 34 (Fla. 1st DCA 1974), *cert. denied,* 320 So.2d 395 (Fla. 1975))."

§18:40.1.1 Elements — 1st DCA

The essential elements of an actual agency relationship are:
1. acknowledgement by the principal that the agent will act for him or her;
2. the agent's acceptance of the undertaking, and
3. control by the principal over the actions of the agent.

Source

Robbins v. Hess, 659 So.2d 424, 427 (Fla. 1st DCA 1995).

§18:40.1.2 Elements — 2nd DCA

In order to establish the existence of an agency relationship, three elements are necessary:
1. acknowledgement by the principal that the agent will act on his or her behalf;
2. acceptance by the agent; and
3. control by the principal over the agent's actions.

Source

Graham v. Lloyd's Underwriters at London, 964 So.2d 269, 275 (Fla. 2d DCA 2007).

See Also

1. *Ilgen v. Henderson Properties, Inc.*, 683 So.2d 513, 515 (Fla. 2d DCA 1996), *rev. denied*, 686 So.2d 578 (Fla. 1996).
2. *Rodriguez v. Tombrink Enterprises, Inc*., 870 So.2d 117, 120 (Fla. 2d DCA 2003).

§18:40.1.3 Elements — 3rd DCA

To establish an actual agency relationship, the plaintiff must establish: (1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent.

Source

Merriman Investments, LLC v. Ujowundu, 123 So.3d 1191, 1193 (Fla. 3d DCA 2013).

See Also

1. *Banco Cont'l, S.A. v. Transcom Bank (Barbados), Ltd.*, 922 So.2d 395, 400 (Fla. 3d DCA 2006).
2. *Fernandez v. Florida Nat. Coll., Inc.*, 925 So.2d 1096, 1101 (Fla. 3d DCA 2006).
3. *Gillet v. Watchtower Bible & Tract Soc'y of Pennsylvania, Inc.*, 913 So.2d 618, 620 (Fla. 3d DCA 2005).
4. *Archdiocese of Detroit v. Green*, 899 So.2d 322 (Fla. 3d DCA 2004).

§18:40.1.4 Elements — 4th DCA

To establish an actual agency relationship, the following elements must be established:
1. acknowledgement by the principal that the agent will act for it;
2. the agent's acceptance of the undertaking; and
3. control by the principal over the actions of the agent.

Source

Rubin v. Gabay, 979 So.2d 988, 990 (Fla. 4th DCA 2008).

See Also

1. *State v. American Tobacco Company*, 707 So.2d 851, 854 (Fla. 4th DCA 1998).
2. *Hickman v. Barclay's Intern. Realty, Inc.*, 5 So.3d 804, 806 (Fla. 4th DCA 2009) ("The key element in establishing actual agency is the control by the principal over the actions of the agent. And it is the right of control, not actual control or descriptive labels employed by the parties, that determines an agency relationship.")

§18:40.1.5 Elements — 5th DCA

Under Florida law, the elements of an agency relationship are:

1. acknowledgment by the principal that the agent will act for it;
2. the agent's acceptance of the undertaking; and
3. control by the principal over the action of the agent.

Source

J.P. Morgan Securities, LLC v. Geveran Investments Limited, 224 So.3d 316, 329 (Fla. 5th DCA 2017); *Roman v. Bogle*, 113 So.3d 1011, 1016 (Fla. 5th DCA 2013).

See Also

1. *Amstar Ins. Co. v. Cadet*, 862 So.2d 736, 741 (Fla. 5th DCA 2003).
2. *Font v. Stanley Steemer Intern., Inc*., 849 So.2d 1214, 1216 (Fla. 5th DCA 2003).

§18:40.2 References

1. 2 Fla. Jur. 2d *Agency and Employment* §1 (2005).
2. 3 Am. Jur. 2d *Agency* §§70–74, 320–341 (2002).
3. 3 C.J.S. *Agency* §§133, 470–507 (2003).
4. Restatement (Second) of Agency §§1, 5, 8, 14N (1958).
5. Florida Standard Jury Instruction (Civ.) 3.3a.

§18:40.3 Related Matters

1. **Employer/Employee Relationship:** The existence of an employer/employee relationship depends upon the facts of each particular case. *Stevens v. International Builders of Florida, Inc.*, 207 So.2d 287 (Fla. 3d DCA 1968). However, the Florida Courts have adopted a number of criteria, as formulated by Restatement (Second) of Agency §220 (1958), to aid in making this determination. *See Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966); *D.O. Creasman Electronics, Inc. v. State, Dept. of Labor*, 458 So.2d 894 (Fla. 2d DCA 1984). This criteria includes:
    1. the extent of the control by the employer over the details of the work;
    2. whether the person employed is engaged in a distinct occupation or business;
    3. the kind of occupation involved, and whether the work is done under the direction of the employer or by a specialist without supervision;
    4. the skill required in the particular occupation;
    5. whether the employer supplies the instrumentalities, tools, and the place of work;
    6. the length of time the person is employed;
    7. whether or not the work is a part of the regular business of the employer.

    Carroll v. Kencher, Inc., 491 So.2d 1311, 1312 (Fla. 4th DCA 1986).

2. **Independent Contractor:** "[T]he right of control, not actual control or descriptive labels employed by the parties, determines an agency relationship." *Hickman v. Barclay's Intern. Realty, Inc.*, 5 So.3d 804, 806 (Fla. 4th DCA 2009). The nature of the parties' relationship is not determined by the descriptive labels employed by the parties themselves. *Villazon; Parker v. Domino's Pizza, Inc.,* 629 So.2d 1026 (Fla. 4th DCA 1993), *rev. denied*, 639 So.2d 977 (Fla. 1994). Rather the test is one of control: Whether one

party is a mere agent rather than an independent contractor as to the other party is to be determined by measuring the right to control and not by considering only the actual control exercised by the latter over the former … If the employer's right to control the activities of an employee extends to the manner in which a task is to be performed, then the employee is not an independent contractor. *Parker v. Domino's Pizza, Inc.*, 629 So.2d 1026, 1027 (Fla. 4th DCA 1993), *rev. denied*, 639 So.2d 977 (Fla. 1994). *See also Font v. Stanley Steemer Intern., Inc*., 849 So.2d 1214, 1216 (Fla. 5th DCA 2003); *Villazon v. Prudential Health Care Plan, Inc*., 843 So.2d 842, 853 (Fla. 2003); *Nazworth v. Swire Fla., Inc.,* 486 So.2d 637, 638 (Fla. 1st DCA 1986); *Ortega v. General Motors Corp.*, 392 So.2d 40, 41 (Fla. 4th DCA 1980).

3. **Question of Fact:** "Generally, the existence of an agency relationship is a question of fact; however, when the moving party fails to produce any supportive evidence or when the evidence presented is so unequivocal that reasonable persons could reach but one conclusion, that question of fact becomes a question of law to be determined by the court. *Rubin v. Gabay,* 979 So.2d 988, 990 (Fla. 4th DCA 2008) (citing *Fernandez v. Fla. Nat'l Coll., Inc.,* 925 So.2d 1096, 1100 (Fla. 3d DCA 2006))." *Hickman v. Barclay's Intern. Realty, Inc.*, 5 So.3d 804, 806 (Fla. 4th DCA 2009).

§18:50 AGENCY, APPARENT (A.K.A. AGENCY BY ESTOPPEL)

§18:50.1 Elements — Florida Supreme Court

Our law is well settled that an apparent agency exists only if each of three elements are present:
1. a representation by the purported principal;
2. a reliance on that representation by a third party; and
3. a change in position by the third party in reliance on the representation.

Source

Mobil Oil Corporation v. Bransford, 648 So.2d 119, 121 (Fla. 1995).

See Also

1. *Almerico v. RLI Ins. Co.*, 716 So.2d 774, 777 (Fla. 1998).
2. *Orlando Executive Park, Inc. v. Robbins,* 433 So.2d 491, 494 (Fla. 1983), *receded from on other grounds by Mobil Oil Corp. v. Bransford*, 648 So.2d 119 (Fla. 1995).
3. *Mathieson v. General Motors Corp.,* 529 So.2d 761, 762 (Fla. 3d DCA 1988) ("Although the term *agency* is a conclusion of law rather than an allegation of fact, that conclusion appears here to be so elemental as to constitute a permissible pleading. *See* H. Trawick, *Florida Practice and Procedure* §6-6 (1987) (citing *Panama Realty, Inc. v. Robinson,* 305 So.2d 34 (Fla. 1st DCA 1974), *cert. denied,* 320 So.2d 395 (Fla. 1975)).").
4. *Fidelity & Casualty Co. of New York v. D. N. Morrison Const. Co., Inc., of Virginia*, 156 So. 385 (Fla. 1934).

§18:50.1.1 Elements — 1st DCA

An agency relationship based on apparent authority exists only if the party asserting the existence of the relationship proves all three of the following elements: (a) a representation by the purported principal; (b) reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation.

Source

Florida State Oriental Medical Ass'n, Inc. v. Slepin, 971 So.2d 141, 145 (Fla. 1st DCA 2007).

See Also

1. *Security Union Title Insurance Co. v. Citibank (Florida), N.A.*, 715 So.2d 973, 975 (Fla. 1st DCA 1998).
2. *Robbins v. Hess*, 659 So.2d 424, 427 (Fla. 1st DCA 1995).
3. *Robinson v. Volusia County Council On Aging*, 568 So.2d 55 (Fla. 1st DCA 1990).
4. *Federal Insurance Co. v. Western Waterproofing Company of America*, 500 So.2d 162, 165 (Fla. 1st DCA 1986).
5. *Sapp v. City of Tallahassee,* 348 So.2d 363, 367 (Fla. 1st DCA 1977), *cert. denied*, 354 So.2d 985 (Fla. 1977).
6. *Jones v. Tallahassee Mem'l Reg'l Healthcare, Inc.*, 923 So.2d 1245, 1247 (Fla. 1st DCA 2006).

§18:50.1.2 Elements — 2nd DCA

An apparent agency exists only if all three of the following elements are present:
1. a representation by the purported principal;
2. a reliance on that representation by a third party; and
3. a change in position by the third party in reliance on the representation.

Apparent authority does not arise from the subjective understanding of the person dealing with the purported agent or from appearances created by the purported agent himself. Rather, apparent authority exists only where the principal creates the appearance of an agency relationship.

Source

Jackson Hewitt, Inc. v. Kaman, 100 So.3d 19, 32 (Fla. 2d DCA 2011); *Roessler v. Novak*, 858 So.2d 1158, 1161 (Fla. 2d DCA 2003).

See Also

1. *Ilgen v. Henderson Properties, Inc.*, 683 So.2d 513, 514 (Fla. 2d DCA 1996), *rev. denied*, 686 So.2d 578 (Fla. 1996).
2. *Black v. Marine Engineering Specialists*, 574 So.2d 283, 284 (Fla. 2d DCA 1991).
3. *Rodriguez v. Tombrink Enter., Inc.,* 870 So.2d 117, 120 (Fla. 2d DCA 2003).

§18:50.1.3 Elements — 3rd DCA

An apparent agency exists only if all three of the following elements are present: (a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation.

Source

Saralegui v. Sacher, Zelman, Van Sant Paul, Beily, Hartman & Waldman, P.A., 19 So.3d 1048, 1051-52 (Fla. 3d DCA 2009).

See Also

1. *Gillet v. Watchtower Bible & Tract Soc'y of Pennsylvania, Inc.*, 913 So.2d 618, 620 (Fla. 3d DCA 2005).
2. *Ramos v. Preferred Medical Plan, Inc*., 842 So.2d 1006, 1008 (Fla. 3d DCA 2003).
3. *Robison By and Through Bugera v. Faine*, 525 So.2d 903, 906 (Fla. 3d DCA 1987).
4. *Smith v. American Auto. Ins. Co*., 498 So.2d 448, 449 (Fla. 3d DCA 1986), *rev. denied*, 503 So.2d 328 (Fla. 1987).
5. *Spence, Payne, Masington & Grossman, P.A. v. Philip M. Gerson, P.A.*, 483 So.2d 775, 777 (Fla. 3d DCA 1986), *rev. denied*, 492 So.2d 1334 (Fla. 1986).
6. *Guadagno v. Lifemark Hospitals of Florida, Inc.*, 972 So.2d 214, 218 (Fla. 3rd DCA 2007).
7. *Ocana v. Ford Motor Co.,* 992 So.2d 319, 326 (Fla. 3d DCA 2008).
8. *Prince Lobel Glovsky & Tye, LLP v. Zalis*, 938 So.2d 7, 8 (Fla. 3d DCA 2006).
9. *Fernandez v. Florida Nat. Coll., Inc.*, 925 So.2d 1096, 1101 (Fla. 3d DCA 2006).
10. *Vermeulen v. Worldwide Holidays, Inc.*, 922 So.2d 271, 275 (Fla. 3d DCA 2006).

§18:50.1.4 Elements — 4th DCA

To establish that an apparent agency exists, the following elements must be present:
1. a representation by the purported principal;
2. reliance on that representation by a third party; and
3. a change in position by the third party in reliance upon such representation.

Source

MDVIP, Inc. v. Beber, 222 So.3d 555, 563 (Fla. 4th DCA 2017); *Ginsberg v. Northwest Med. Ctr., Inc.,* 14 So.3d 1250, 1252 (Fla. 4th DCA 2009).

See Also

1. *Stone v. Palms West Hospital,* 941 So.2d 514, 519 (Fla. 4th DCA 2006).
2. *National Indemnity Company of the South v. Consolidated Insurance Services*, 778 So.2d 404, 407 (Fla. 4th DCA 2001), *dismissed*, 791 So.2d 1096 (Fla. 2001).
3. *Radison Properties, Inc. v. Flamingo Groves, Inc.*, 767 So.2d 587, 590 (Fla. 4th DCA 2000).
4. *Lensa Corporation v. Ponciana Gardens Association, Inc.*, 765 So.2d 296, 298 (Fla. 4th DCA 2000).
5. *State, Dept. of Transp. v. Heckman*, 644 So.2d 527, 529 (Fla. 4th DCA 1994), *rev. denied*, 651 So.2d 1194 (Fla. 1995).
6. *H. S. A., Inc. v. Harris-In-Hollywood, Inc.*, 285 So.2d 690, 693 (Fla. 4th DCA 1973), *cert. dismissed*, 290 So.2d 493 (Fla. 1974).
7. *Rubin v. Gabay*, 979 So.2d 988, 990 (Fla. 4th DCA 2008).
8. *Cambridge Credit Counseling Corp. v. 7100 Fairway, LLC*, 993 So.2d 86, 90 (Fla. 4th DCA 2008).
9. *Blunt v. Tripp Scott, P.A.*, 962 So.2d 987, 989 (Fla. 4th DCA 2007).

§18:50.1.5 Elements — 5th DCA

In order to determine the existence of apparent agency, it must be determined that:

1. there was a representation by the principal;
2. the injured party relied on that representation; and
3. the injured party changed position in reliance upon the representation and suffered detriment.

A principal may be liable for the acts of his or her apparent agent that are committed within the scope of the apparent agency.

Source

J.P. Morgan Securities, LLC v. Geveran Investments Limited, 224 So.3d 316, 329 (Fla. 5th DCA 2017); *Fi-Evergreen Woods, LLC v. Estate of Robinson*, 172 So.3d 493, 496 (Fla. 5th DCA 2015).

See Also

1. *Amstar Ins. Co. v. Cadet*, 862 So.2d 736, 742 (Fla.5th DCA 2003).
2. *Orlando Executive Park, Inc. v. P.D.R.,* 402 So.2d 442, 449 (Fla. 5th DCA 1981), *rev. denied*, 411 So.2d 384 (Fla. 1981), *approved*, 433 So.2d 491 (Fla. 1983).
3. *Orlando Executive Park, Inc. v. Robbins,* 433 So.2d 491, 494 (Fla. 1983).
4. *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So.2d 416, 418 (Fla. 5th DCA 1982).

§18:50.2 References

1. 2 Fla. Jur. 2d *Agency and Employment* §§50–54 (2005).
2. 2A C.J.S. *Agency* §§7–10, 140–145, 470–507 (2003).
3. 3 Am. Jur. 2d *Agency* §§75–79 (2002).
4. Restatement (Second) of Agency §§8, 14N, 27, 125–137, 159, 265–267 (1958).
5. Florida Standard Jury Instructions §3.3b(2).
6. Florida Statutes §768.1355 (2005) (Florida Volunteer Protection Act).

§18:50.3 Related Matters

1. **Definition:** By apparent authority is meant, such authority as the principal wrongfully permits the agent to assume or which the principal by his actions or words holds the agent out as possessing. Apparent authority rests on the doctrine of estoppel and arises from the fact of representations or actions by the principal and a change of position by a third party who in good faith relies on such representations or actions. *Security Union Title Insurance Co. v. Citibank (Florida), N.A.*, 715 So.2d 973, 975 (Fla. 1st DCA 1998).

2. **Question of Fact:** "[T]he question of agency and/or apparent agency is generally a question of fact which must be determined by a jury." *Horning-Keating v. Employers Ins. Of Wausau*, 969 So.2d 412, 421 (Fla. 5th DCA 2007); *See also Sears Roebuck and Co. v. Williams*, 877 So.2d 5 (Fla. 3d DCA 2004).

3. **Employer/Employee Relationship:** The existence of an employer/employee relationship depends upon the facts of each particular case. *Stevens v. International Builders of Florida, Inc.*, 207 So.2d 287 (Fla. 3d DCA 1968). However, the Florida Courts have adopted a number of criteria, as formulated by Restatement (Second) of Agency §220 (1958), to aid in making this determination. *See Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966); *D.O. Creasman Electronics, Inc. v. State, Dept. of Labor*, 458 So.2d 894 (Fla. 2d DCA 1984). This criteria includes:
   1. the extent of the control by the employer over the details of the work;
   2. whether the person employed is engaged in a distinct occupation or business;
   3. the kind of occupation involved, and whether the work is done under the direction of the employer or by a specialist without supervision;
   4. the skill required in the particular occupation;
   5. whether the employer supplies the instrumentalities, tools, and the place of work;
   6. the length of time the person is employed;
   7. whether or not the work is a part of the regular business of the employer.

   Carroll v. Kencher, Inc., 491 So.2d 1311, 1312 (Fla. 4th DCA 1986).

4. **Reliance Upon the Principal's Actions:** The reliance of a third party on the apparent authority of a principal's agent must be reasonable and rest in the actions of or appearances created by the principal, and not by agents who often ingeniously create an appearance of authority by their own acts. *Radison Properties, Inc. v. Flamingo Groves, Inc.*, 767 So.2d 587, 590 (Fla. 4th DCA 2000). *See also Rushing v. Garrett*, 375 So.2d 903, 906 (Fla. 1st 1979); *Taco Bell of California v. Zappone*, 324 So.2d 121, 124 (Fla. 2d DCA 1975).

5. **Trademark Symbols:** In *Mobil Oil Corp. v. Bransford,* 648 So.2d 119, 121 (Fla. 1995), the Supreme Court held that logos or trademark symbols alone cannot create an apparent agency. *Ilgen v. Henderson Properties, Inc*., 683 So.2d 513, 514 (Fla. 2d DCA 1996), *rev. denied*, 686 So.2d 578 (Fla. 1996).

§18:60 PIERCING THE CORPORATE VEIL

§18:60.1 Elements — Florida Supreme Court

Piercing the corporate veil requires a showing that the corporation was organized or employed to mislead creditors or to defraud them.

Source

Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1117 (Fla. 1984).

See Also

1. *Levenstein v. Sapiro,* 279 So.2d 858 (Fla. 1973).
2. *Aztec Motel, Inc. v. State ex rel. Faircloth,* 251 So.2d 849 (Fla. 1971).
3. *Stuyvesant Corp. v. Stahl*, 62 So.2d 18 (Fla. 1952).
4. *Barnes v. Liebig,* 1 So.2d 247 (Fla. 1941).
5. *Mayer v. Eastwood-Smith & Co.,* 164 So. 684 (Fla. 1935).

§18:60.1.1 Elements — 1st DCA

The supreme court made it clear that to pierce the corporate veil under Florida law, it must be shown not only that the wholly-owned subsidiary is a mere instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them.

Source

USP Real Estate Investment Trust v. Discount Auto Parts, Inc., 570 So.2d 386, 390 (Fla. 1st DCA 1990).

See Also

1. *U-Can-II, Inc. v. Setzer*, 870 So.2d 99 (Fla. 1st DCA 2003).

§18:60.1.2 Elements — 2nd DCA

The leading Florida case on the piercing of corporate veils is *Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So.2d 1114 (Fla. 1984). In *Dania Jai-Alai,* the Florida Supreme Court held that to pierce the corporate veil one must prove *both* that the corporation is a "mere instrumentality" or alter ego of the defendant, *and* that the defendant engaged in "improper conduct" in the formation or use of the corporation.

Source

Bellairs v. Mohrmann, 716 So.2d 320, 323 (Fla. 2d DCA 1998).

See Also

1. *Pagan v. Sarasota County Public Hosp. Bd*., 884 So.2d 257, 270 (Fla. 2d DCA 2004).

§18:60.1.3 Elements — 3rd DCA

To "pierce the corporate veil" three factors must be proven:

(1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation;
(2) the corporate form must have been used fraudulently or for an improper purpose; and
(3) the fraudulent or improper use of the corporate form caused injury to the claimant.

Source

Gasparini v. Pordomingo, 972 So.2d 1053, 1055 (Fla. 3d DCA 2008).

See Also

1. *Merkin v. PCA Health Plans of Florida, Inc*., 855 So.2d 137, 141 (Fla. 3d DCA 2003).
2. *Hilton Oil Transport v. Oil Transport Co., S.A*., 659 So.2d 1141, 1152 (Fla. 3d DCA 1995).
3. *Lipsig v. Ramlawi*, 760 So.2d 170, 187 (Fla. 3d DCA 2000), *rev. denied*, 786 So.2d 579 (Fla. 2001).
4. *American Exp. Ins. Serv. Europe Ltd. v. Duvall*, 972 So.2d 1035, 1039 (Fla. 3d DCA 2008) ("To support some alter-ego theory of liability, [one] would have to allege that the corporations were formed or used for some illegal, fraudulent, or other unjust purpose.")
5. *Phelan v. Lawhon*, 229 So.3d 853, 859 (Fla. 3d DCA 2017) (discussing an exception to the corporate shield doctrine).
6. *Parisi v. Kingston*, 314 So. 3d 656, 664 (Fla. 3d DCA 2021).

§18:60.1.4 Elements — 4th DCA

Generally, the rule is that the corporate veil will not be pierced absent a showing of improper conduct. Three factors must be proven by a preponderance of the evidence:

1. the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation;
2. the corporate form must have been used fraudulently or for an improper purpose; and
3. the fraudulent or improper use of the corporate form caused injury to the claimant.

Source

Beltran v. Miraglia, 125 So.3d 855 (Fla. 4th DCA 2013); *Priskie v. Missry*, 958 So.2d 613, 614-15 (Fla. 4th DCA 2007) ("Stated succinctly, in order to pierce the corporate veil, a plaintiff is required to prove both that the corporation is a mere instrumentality or alter ego of the defendant and that the defendant engaged in 'improper conduct.'" (quoting *Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So.2d 1114, 1120-21 (Fla. 1984))).

See Also

1. *McFadden Ford, Inc. v. Mancuso*, 766 So.2d 241, 242 (Fla. 4th DCA 2000) ("*Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So.2d 1114, 1119-20 (Fla. 1984), sets forth the rule that the corporate veil will not be pierced, unless it is shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them. The rule requiring a showing of improper conduct has been consistently followed.").

2. *Seminole Boatyard, Inc. v. Christoph*, 715 So.2d 987, 990 (Fla. 4th DCA 1998).
3. *Steinhardt v. Banks*, 511 So.2d 336, 339 (Fla. 4th DCA 1987), *rev. denied*, 518 So.2d 1273 (Fla. 1987).
4. *Symons Corporation v. Tartan-Lavers Delray Beach, Inc.,* 456 So.2d 1254, 1256 (Fla. 4th DCA 1984) ("The corporate veil may not be pierced unless it is shown not only that one business entity dominated or was the alter ego of the other, but that the relationship was created or used in order to mislead or defraud creditors.").
5. *Curcio v. Cessna Finance Corporation,* 424 So.2d 868, 871 (Fla. 4th DCA 1982).
6. *P & S & Co. LLC v. SJ Mak, LLC*, 254 So.3d 535, 538 (Fla. 3d DCA 2018).

§18:60.1.5 Elements — 5th DCA

The corporate veil may be pierced if the plaintiff can prove "both that the corporation is a 'mere instrumentality' or alter ego of the defendant, and that the defendant engaged in 'improper conduct' in the formation or use of the corporation." *Bellairs v. Mohrmann,* 716 So.2d 320, 323 (Fla. 2d DCA 1998) (*emphasis supplied*) (citing *Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So.2d 1114, 1120–21 (Fla. 1984)). *Merkin v. PCA Health Plans of Florida, Inc.,* 855 So.2d 137 (Fla. 3d DCA 2003).

Source

XL Vision, LLC. v. Holloway, 856 So.2d 1063, 1066 (Fla. 5th DCA 2003).

See Also

1. *Walton v. Tomax Corp*., 632 So.2d 178, 180 (Fla. 5th DCA 1994).

§18:60.2 References

1. 8A Fla. Jur. 2d *Business Relationships* §§13–18 (2002).
2. 3 Am. Jur. 2d *Agency* §§3, 292 (2002).
3. 18 Am. Jur. 2d *Corporations* §§46–60, 63 (2004).
4. 18 C.J.S. *Corporations* §§12–18 (1990).

§18:70 COMMERCIAL BRIBERY

[Restatement (Second) of Agency §312 (1958).]

§18:70.1 Elements — Florida Supreme Court

[No citation for this edition.]

§18:70.1.1 Elements — 1st DCA

[No citation for this edition.]

§18:70.1.2 Elements — 2nd DCA

[No citation for this edition.]

§18:70.1.3 Elements — 3rd DCA

The general rule as to the remedies available in a situation like this is stated as follows in comment d, Restatement of Agency (Second) §312 (1958): A person who intentionally causes a servant or other agent to violate a duty to the principal is subject to liability in tort for the harm he has caused the principal or in a restitutional action for any profit he derived from the transaction.

Source

Phillips Chemical Co. v. Morgan, 440 So.2d 1292, 1295 (Fla. 3d DCA 1983), *petition for rev. denied*, 450 So.2d 486 (Fla. 1984).

§18:70.1.4 Elements — 4th DCA

Where a third party deals with another's agent with knowledge that the agent is acting in violation of his fiduciary obligation to his principal the third party may be held jointly liable with the agent for secret profits.

Source

Martin Company v. Commercial Chemists, Inc., 213 So.2d 477, 480 (Fla. 4th DCA 1968), *cert. denied*, 225 So.2d 523 (Fla. 1969).

§18:70.1.5 Elements — 5th DCA

[No citation for this edition.]

§18:70.2 References

1. 16A Fla. Jur. 2d *Commercial Law* §§4528, 4529 (2001).
2. 12 Am. Jur. 2d *Bribery* §23 (1997).
3. 11 C.J.S. *Bribery* §§3, 9 (1995).
4. Restatement (Second) of Agency §§312, 313, 315, 403 (1958).
5. Restatement (Second) of Torts §876 (1979).
6. Fla. Stat. §838.016: Unlawful compensation or reward for official behavior.
7. Annotation, *Validity and Construction of Statutes Punishing Commercial Bribery*, 1 A.L.R.3d 1350 (1965).
8. *Niagara Mohawk Power Corp. v. Freed*, 696 N.Y.S.2d 600, 602 (S.Ct. N.Y. 1999). Contrary to defendants' contention, commercial bribery can constitute a civil cause of action. … Plaintiff sufficiently pleaded all the elements of that cause of action, i.e., that defendants conferred a benefit upon plaintiff's employee, without plaintiff's consent and with the intent to influence the employee's conduct.
9. *Excel Handbag, Co., Inc., v. Edison Bros. Stores, Inc.*, 630 F.2d 379, 385 (5th Cir. 1980). When an agent receives money, gifts, or other compensation from one doing business with the principal, and the payment, unknown to the principal, arises out of the employment relationship, the principal has an equitable action against the agent and the third-party payor to recover those secret profits. … While we are reluctant to say how the Florida Supreme Court would resolve the question, we believe the public policy of that state regarding fraud in general suggests that commercial bribery would be recognized as a defense. We also believe that the Florida courts would define the elements of commercial bribery [as a defense] in the same manner as the district court did in this case, i.e., secret payments to an agent inducing the purchase of goods for the principal from the party making those payments.
10. *ITT Community Development Corp. v. Barton*, 457 F.Supp. 224, 230 (M.D. Fla. 1978).
11. Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. Miami L. Rev. 365 (1987).
12. *Franklin Medical Associates v. Newark Public Schools*, 828 A.2d 966, 975 (N.J. 2003). A person who bribes an agent of a principal has "aided and abetted" the agent in the breach of the agent's fiduciary duty of loyalty to the principal. In such an instance, the principal, without demonstrating an actual loss, may recover damages from the aider and abettor measured by the amount of the bribe so long as it is not a double recovery of the bribe.

§18:70.3 Related Matters

1. **Bribe, Defined:** Bribe is defined as "a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment of or influence the action of a person in a position of trust." Black's Law Dictionary (8th ed. 2004).

2. **Public Servants:** It seems quite clear that when a public servant's performance of his public duty is corruptly "bought" as contemplated by Section 838.016(1), then a fraud has been committed on the members of the public who have the right to expect their public servants to perform their public duties uninfluenced by such actions. … We also observe that a public servant stands in a special relationship of trust and responsibility to the public, which rightly expects the public servant to perform in the public's

best interest. *Alvarez v. State*, 800 So.2d 237, 238 (Fla. 3d DCA 2001). What sort of damage proof must the Government make when it sues the briber … the defendant-counterclaimant, [says] it is enough to show the fact and amount of the bribes - nothing further need be alleged or proved by way of specific or direct injury. We accept that position. Assuming (as we do) that the predicate for a nonstatutory civil remedy is the probability that damage will flow from the giving of the bribe, we think it clear from common experience that such probability ordinarily accompanies the subversion of public officials. In normal course the briber deprives the Government of the loyalty of its employees, upon which the Government and the public must rely for the impartial and rigorous enforcement of government programs. See, e.g., *City of Findlay v. Pertz*, 66 F. 427, 434 - 35 (6th Cir. 1895). Bribery of officials can also cause a diminution in the public's confidence in the Government, upon which the Government must also rely. *See United States v. Mississippi Valley Generating Co*., 364 U.S. 520, 562, 81 S.Ct. 294, 5 L.Ed.2d 820 (1961). The Government likewise incurs the administrative costs of firing and replacing the venal employees and the costs of investigation, all of which are compensable in fraud cases. *See United States v. Rex Trailer Co*., 218 F.2d 880, 884 (7th Cir. 1955), *affirmed on other grounds*, 350 U.S. 148, 76 S.Ct. 219, 100 L.Ed. 149 (1956). *Continental Management, Inc. v. U. S*., 527 F.2d 613, 617 (Ct.Cl. 1975).

3. **Unenforceable Contract:** Although the contract being sued upon is not itself illegal, a contract would be unenforceable in a suit brought by the wrongdoer if there were a direct connection between the illegal bribe and the obligation sued upon. *Bankers Trust Co. v. Litton Systems, Inc*., 599 F.2d 488, 491 (1979).

4. **Unfair Trade Practice:** Commercial bribery is often understood to be an independent tort as well as a form of unfair trade practice. *Augusta News Co. v. Hudson News Co*., 2000 WL 1772466 (U.S. Dist. Ct. Me. 2000) (citing *Seaboard Supply Co. v. Congoleum Corp*., 770 F.2d 367, 372 (3d Cir. 1985)). *See also, American Distilling Co. v. Wisconsin Liquor Co*., 104 F.2d 582, 585 (7th Cir. 1939).

§18:80 CONTRACTORS, UNLICENSED CIVIL REMEDY

§18:80.1 Florida Statutes

Florida Statutes §768.0425 Damages in actions against contractors for injuries sustained from negligence, malfeasance, or misfeasance:

(1) For purposes of this section only, the term "contractor" means any person who contracts to perform any construction or building service which is regulated by any state or local law, including, but not limited to, chapters 489 and 633; and the term "consumer" means a person who contracts for the performance of any construction or building service which is regulated by any state or local law, including, but not limited to, chapters 489 and 633.

(2) In any action against a contractor for injuries sustained resulting from the contractor's negligence, malfeasance, or misfeasance, the consumer shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorney's fees if the contractor is neither certified as a contractor by the state nor licensed as a contractor pursuant to the laws of the municipality or county within which she or he is conducting business.

Source

Florida Statutes §768.0425 (2005).

Florida Statutes §489.128 Contracts entered into by unlicensed contractors unenforceable:

(1) As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor.

(a) For purposes of this section, an individual is unlicensed if the individual does not have a license required by this part concerning the scope of the work to be performed under the contract. A business organization is unlicensed if the business organization does not have a primary or secondary qualifying agent in accordance with this part concerning the scope of the work to be performed under the contract.

(b) For purposes of this section, an individual or business organization shall not be considered unlicensed for failing to have an occupational license certificate issued under the authority of chapter 205. A business organization shall not be considered unlicensed for failing to have a certificate of authority as required by ss. 489.119 and 489.127.

(c) For purposes of this section, a contractor shall be considered unlicensed only if the contractor was unlicensed on the effective date of the original contract for the work, if stated therein, or, if not stated, the date the last party to the contract executed it, if stated therein. If the contract does not establish such a date, the contractor shall be considered unlicensed only if the contractor was unlicensed on the first date upon which the contractor provided labor, services, or materials under the contract.

(2) Notwithstanding any other provision of law to the contrary, if a contract is rendered unenforceable under this section, no lien or bond claim shall exist in favor of the unlicensed contractor for any labor, services, or materials provided under the contract or any amendment thereto.

(3) This section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. This section shall not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed for purposes of this section.

Source

Florida Statutes §489.128 (2005).

§18:80.2 References

1. 8 Fla. Jur. 2d *Businesses and Occupations* §§206–221 (2002).
2. Florida Statutes §489.101 ("The Legislature deems it necessary in the interest of the public health, safety, and welfare to regulate the construction industry.").
3. Florida Statutes §489.113(2) ("No person who is not certified or registered shall engage in the business of contracting in this state. However, for purposes of complying with the provisions of this chapter, a person who is not certified or registered may perform construction work under the supervision of a person who is certified or registered, provided that the work is within the scope of the supervisor's license and provided that the person being supervised is not engaged in construction work which would require a license as a contractor under any of the categories listed in s. 489.105(3)(d)–(o). This subsection does not affect the application of any local construction licensing ordinances.").
4. Florida Statutes §489.119(3)(a) ("The qualifying agent shall be certified or registered under this part in order for the business organization to be issued a certificate of authority in the category of the business conducted for which the qualifying agent is certified or registered. If any qualifying agent ceases to be affiliated with such business organization, he or she shall so inform the department.").
5. Florida Statutes §489.140 (Florida Homeowners' Construction Recovery Fund).
6. Fla. Stat. ch. 558 (2005).
7. Florida Statutes §558.003 (2005) ("A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter. If a claimant files an action alleging a construction defect without first complying with the requirements of this chapter, on timely motion by a party to the action the court shall abate the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements.").
8. Florida Statutes §713.015 (2005) (Mandatory provisions for direct contracts).
9. Vitauts M. Gulbis, Annotation, *Statutes of Limitations: Actions by Purchasers or Contractees Against Vendors or Contractors Involving Defects in Houses or Other Buildings Caused by Soil Instability*, 12 A.L.R.4th 866 (1982).
10. Maurice T. Brunner, Annotation, *Liability of Builder or Subcontractor for Insufficiency of Building Resulting from Latent Defects in Materials Used*, 61 A.L.R.3d 792 (1975).
11. Annotation, *Construction Contractor's Liability to Contractee for Defects or Insufficiency of Work Attributable to the Latter's Plans and Specifications*, 6 A.L.R.3d 1394 (1966).
12. Gail E. Ferguson, Note, *Murthy v. N. Sinha Corp.—Does Florida's Construction Contracting Statute Create a Private Cause of Action Against Individual Qualifying Agents?* 18 Nova L. Rev. 651 (1993).
13. Kevin R. Sido, *Damages Recoverable on Tort Theories in Construction Cases*, 62 Def. Couns. J. 78 (1995).
14. Larry R. Leiby, Florida Construction Law Manual, 2006 ed.

§18:80.3 Defenses

1. **Estoppel:** It is fundamental that the doctrine of estoppel will not apply to transactions that are forbidden by statute or that are contrary to public policy. *Reedy Creek Improvement District v. State of Florida Department of Environmental Regulation*, 486 So.2d 642, 647 (Fla. 1st DCA 1986). *See also Montsdoca v. Highlands Bank & Trust Co.*, 95 So. 666, 668 (Fla. 1923).

2. **Exemptions:***See* Florida Statutes §§489.103, 489.105(6), 489.113(2), 489.117(4)(e), 489.119(8) (2005).

3. **In Pari Delicto:** The defense that parties to a contract are in pari delicto is not available to an unlicensed contractor. *Earth Trades, Inc. v. T&G Corp*., 108 So.3d 580, 587 (Fla. 2013). "The fault of the person or entity engaging in unlicensed contracting is not substantially equal to that of the party who merely hires a contractor with knowledge of the contractor's unlicensed status. Thus, even if proven, the other party's knowledge is insufficient as a matter of law to place the parties in pari delicto." *Id*. at 587 (parties were not in pari delicto where general contractor knew that subcontractor was unlicensed since any fault of general contractor in hiring an unlicensed subcontractor was less than the fault of the subcontractor in engaging in unlicensed contracting).

§18:80.4 Related Matters

1. **Certificate of Insurance:** "Any insurer shall, upon request, verify a certificate of insurance on any contractor, as defined in s. 768.0425." Florida Statutes §624.447 (2005).

2. **Illegal Contract:** An agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice. For courts have no right to ignore or set aside a public policy established by the legislature or the people. Indeed, there rests upon the courts the affirmative duty of refusing to sustain that which by the valid statutes of the jurisdiction, or by the constitution, has been declared repugnant to public policy. *Local No. 234 of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada v. Henley & Beckwith, Inc.*, 66 So.2d 818, 821 (Fla. 1953). *See also Deep South Systems, Inc. v. Heath*, 843 So.2d 378, 381 (Fla. 2d DCA 2003); *John Hancock-Gannon Joint Venture II v. McNully*, 800 So.2d 294, 297 (Fla. 3d DCA 2001); *Steinberg v. Brickell Station Towers, Inc.*, 625 So.2d 848, 850 (Fla. 3d DCA 1993), *rev. denied*, 637 So.2d 237 (Fla. 1994); *D & L Harrod, Inc. v. U.S. Precast Corporation*, 322 So.2d 630, 631 (Fla. 3d DCA 1975); *City of Leesburg v. Ware*, 153 So. 87 (Fla. 1934).

3. **Legislative History:** The legislative history of chapter 489 does not reveal an intent to create a cause of action against a qualifying agent either. On the contrary, the sole provision in chapter 489 authorizing private suits, section 489.5331, Florida Statutes (1987), authorized them only against unlicensed or uncertified contractors. In 1988, legislators moved this provision to section 768.0425 and, thereby, removed from chapter 489 any reference to a private cause of action against a contractor. *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 986 (Fla. 1994).

4. **Subsequent Procurement of License (North Carolina Case):***See Brady v. Fulghum*, 308 S.E.2d 327, 331-32 (N.C. 1983), *superseded by statute on other grounds as stated in Hall v. Simmons*, 407 S.E.2d 816 (N.C. 1991) ("[W]e adopt the rule that a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license. … Further, if a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate our statutes, the contractors themselves bear both the responsibility and the blame.").

§18:90 DURESS

§18:90.1 Elements — Florida Supreme Court

[No citation for this edition.]

§18:90.1.1 Elements — 1st DCA

In order to show duress, a plaintiff must show:
1. that one side involuntarily accepted the terms of another;
2. that circumstances permitted no other alternative; and
3. that said circumstances were the result of coercive acts of the opposite party.

Source

McLaughlin v. State of Florida Department of Natural Resources, 526 So.2d 934, 936 (Fla. 1st DCA 1988), *appeal after remand*, 581 So.2d 968 (Fla. 1st DCA 1991).

See Also

1. *Riedel v. NCNB National Bank of Florida, Inc.,* 591 So.2d 1038, 1040 (Fla. 1st DCA 1991) ("We hold that appellant has failed to allege facts sufficient to support a cause of action for 'economic duress,' which is not recognized as an independent cause of action in Florida. Economic duress has been recognized as an affirmative defense.").
2. *Spillers v. Five Points Guaranty Bank,* 335 So.2d 851, 852-53 (Fla. 1st DCA 1976) ("As a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case.").

§18:90.1.2 Elements — 2nd DCA

[No citation for this edition.]

§18:90.1.3 Elements — 3rd DCA

Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition. It is now well settled that two factors must be proven to establish duress: (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side. Duress involves a dual concept of external pressure and internal surrender or loss of volition in response to outside compulsion. As such, the party claiming duress must establish that the effects of the alleged coercive behavior affected the party's subjective intent to act.

Source

Bank of New York Mellon v. Simpson, 227 So.3d 669, 671 (Fla. 3d DCA 2017); *Parra de Rey v. Rey*, 114 So.3d 371, 387 (Fla. 3d DCA 2013).

See Also

1. *NN Investors Life Insurance Co. v. Professional Group, Inc.,* 468 So.2d 532, 533 (Fla. 3d DCA 1985), *rev. denied*, 479 So.2d 118 (Fla. 1985) ("Traditionally duress is not a tort of any kind, though the act that amounts to duress may also amount to some other tort.").
2. *City of Miami v. Kory,* 394 So.2d 494, 497 (Fla. 3d DCA 1981), *petition for rev. denied*, 407 So.2d 1104 (Fla. 1981).

§18:90.1.4 Elements — 4th DCA

Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition. To

establish duress, two factors must be proven: (1) that the act was effected involuntarily and was not an exercise of free choice or will, and (2) that this condition of mind was caused by some improper and coercive conduct by the other side. Duress involves a dual concept of external pressure and internal surrender or loss of volition in response to outside compulsion. Moreover, as a general rule, a contract may not be set aside on the basis of duress or coercion unless the improper influence emanated from one of the contracting parties—the actions of a third party will not suffice.

Source

Gort v. Gort, 185 So.3d 607, 613 (Fla. 4th DCA 2016); *AMS Staff Leasing, Inc v. Taylor*, 158 So.3d 682, 687 (Fla. 4th DCA 2015).

See Also

1. *Gort v. Gort*, 185 So.3d 607 (Fla. 4th DCA 2016).

§18:90.1.5 Elements — 5th DCA

Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition.

[I]n order to set aside an act based on duress, it must be shown: (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will, and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side. "[U]nderlying all definitions of 'duress' is the dual concept of external pressure and internal surrender or loss of volition in response to outside compulsion."

Source

Mullan v. Bishop of the Diocese of Orlando, 540 So.2d 174, 176 (Fla. 5th DCA 1989).

See Also

1. *W.T. v. Department of Children and Families*, 846 So.2d 1278, 1281 (Fla. 5th DCA 2003) (In order to prove duress, it must be shown: (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will; and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side.).

§18:90.2 References

1. 11 Fla. Jur. 2d *Contracts* §§56–64 (2003).
2. 25 Am. Jur. 2d *Duress and Undue Influence* §§1–4, 32–35 (2004).
3. 17 C.J.S. *Contracts* §§175–186 (1999).
4. Annotation, *Ratification of Contract Voidable for Duress*, 77 A.L.R.2d 426 (1961).
5. Restatement (Second) of Contracts §§174, 175 (1981).

§18:90.3 Defenses

1. **Legal Right:** It is not improper and therefore not duress to threaten what one has a legal right to do. *City of Miami v. Kory*, 394 So.2d 494, 498 (Fla. 3d DCA 1981*). See also Spillers v. Five Points Guaranty Bank,* 335 So.2d 851, 852 (Fla. 1st DCA 1976); *W.T. v. Department of Children and Families*, 846 So.2d 1278, 1281 (Fla. 5th DCA 2003).

2. **Third Party Insufficient:** As a general rule, under Florida law, a contract or settlement may not be set aside on the basis of duress or coercion unless the improper influence emanated from one of the contracting parties—the actions of a third party will not suffice. *See Cronacher v. Cronacher*, 508 So.2d 1270, 1271 (Fla. 3d DCA 1987). *See also Herald v. Hardin*, 116 So. 863 (Fla. 1928); *Bubenik v. Bubenik*, 392 So.2d 943, 944 (Fla. 3d DCA 1980); *Vitakis-Valchine v. Valchine*, 793 So.2d 1094, 1096 (Fla. 4th DCA 2001).

§18:90.4 Related Matters

1. **Undue Influence - Requirements:** The *Carpenter* test requires the court to consider the evidence in three steps: (1) whether the beneficiary enjoyed a confidential relationship with the grantor; (2) whether the beneficiary actively procured the instrument, and (3) if the second factor is positive, a presumption of undue influence arises placing upon the beneficiary the burden of giving a reasonable explanation for the active role in the affairs of the grantor. Once the defendant comes forward with responsive evidence, the presumption ceases to exist. The evidence giving rise to the presumption may still be considered together with contrary evidence and may support a permissible inference of undue influence depending on the facts of each case. Undue influence must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and willpower. *Jordan v. Noll*, 423 So.2d 368, 369 (Fla. 1st DCA 1982), *rev. denied*, 430 So.2d 451 (Fla. 1983).

§18:100 EQUITABLE SUBROGATION

§18:100.1 Elements — Florida Supreme Court

Equitable subrogation is generally appropriate where: (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party.

Source

Holmes Reg'l Med. Ctr., Inc. v. Allstate Ins. Co., 225 So.3d 780, 785 (Fla. 2017).

See Also

1. *Dixie National Bank of Dade County v. Employers Commercial Union Insurance Company of America*, 463 So.2d 1147, 1151 (Fla. 1985); "In order to state a cause of action, the subrogation claimant must affirmatively establish superior equities in himself over the one against whom subrogation is sought to be enforced. … Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. Subrogation arises by operation of law, where one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is, in equity, entitled to the security or obligation held by the creditor whom he has paid. This is called "legal subrogation." Conventional subrogation depends upon a lawful contract, and occurs where one having no interest in or relation to the matter pays the debt of another, and by agreement is entitled to the securities and rights of the creditor so paid."
2. *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702, 704 (Fla. 1980).
3. *Furlong v. Leybourne*, 171 So.2d 1, 5 (Fla. 1964), *appeal following remand*, 171 So.2d 207 (Fla. 3d DCA 1965).
4. *Trueman Fertilizer Co. v. Allison*, 81 So.2d 734, 737 (Fla. 1955).
5. *Dantzler Lumber & Export Co. v. Columbia Casualty Co.*, 156 So. 116, 120 (Fla. 1934).
6. *Perera v. United States Fidelity and Guar. Co.*, 35 So.3d 893. 900 (Fla. May 6, 2010).

§18:100.1.1 Elements — 1st DCA

Subrogation, a creation of equity, is founded on the proposition of doing justice without regard to form, and was designed to afford relief where one is required to pay a legal obligation which ought to have been met, either wholly or partially, by another.

Source

Ulery v. Asphalt Paving, Inc., 119 So.2d 432, 436 (Fla. 1st DCA 1960).

See Also

1. *McKenzie Tank Lines, Inc. v. Empire Gas Corporation*, 538 So.2d 482 (Fla. 1st DCA 1989), *rev. denied*, 544 So.2d 200 (Fla. 1989).
2. *Aurora Loan Serv. LLC v. Senchuk*, 36 So.3d 716 (Fla. 1st DCA 2010).

§18:100.1.2 Elements — 2nd DCA

Equitable subrogation is an equitable remedy rooted in the legal consequence of the actions and relationship between the parties. The policy behind the doctrine is to prevent unjust enrichment by assuring that the person who in equity and good conscience is responsible for the debt is ultimately answerable for its discharge. The doctrine places one party into the shoes of another so that the substituting party retains the rights, remedies, or securities that would otherwise belong to the original party. Use of this equitable remedy is appropriate when the subrogee:

(1) made the payment to protect its own interest,
(2) did not act as a volunteer,
(3) was not primarily liable for the debt,
(4) paid off the entire debt, and
(5) works no injustice to the rights of a third party by its equitable subrogation claim.

Source

Tank Tech, Inc.v. Valley Testing, L.L.C., 244 So.3d 383, 389 (Fla. 2d DCA 2018).

See Also

1. *Rubio v. Rubio*, 452 So.2d 130, 132 (Fla. 2d DCA 1984) ("However, one is not entitled to be subrogated to the right of a creditor until the claim of the creditor against the debtor has been paid in full.").
2. *Welch v. Complete Care Corp*., 818 So.2d 645, 648 (Fla. 2d DCA 2002).
3. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 18 So.3d 1099, 1100 (Fla. 2d DCA 2009).
4. *Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, No. 2D19-422, 2021 WL 2212092, at *2 (Fla. 2d DCA June 2, 2021).

§18:100.1.3 Elements — 3rd DCA

To properly allege a count for equitable subrogation, a party must allege that (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party.

Source

Biscayne Inv. Group, Ltd. v. Guarantee Management Services, Inc., 903 So.2d 251, 255 (Fla. 3d DCA 2005).

See Also

1. *Pacific Ins. Co., Ltd. v. Botelho*, 891 So.2d 587, 590 (Fla. 3d DCA 2004).
2. *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. KPMG Peat Marwick*, 742 So.2d 328, 332 (Fla. 3d DCA 1999), *rev. granted,* 749 So.2d 503 (Fla. 1999), *affirmed*, 765 So.2d 36 (Fla. 2000), *receded from on other grounds by Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755 (Fla. 2005).
3. *Garal Corp. v. Poceiro*, 888 So.2d 681 (Fla. 3d DCA 2004).
4. *Brickell Biscayne Corp. v. WPL Associates, Inc.*, 671 So.2d 247, 249 (Fla. 3d DCA 1996), *connected case*, 683 So.2d 168 (Fla. 3d DCA 1996).
5. *Kala Investments, Inc. v. Sklar*, 538 So.2d 909, 917 (Fla. 3d DCA 1989), *rev. denied*, 551 So.2d 460 (Fla. 1989), *and rev. denied*, 551 So.2d 461 (Fla. 1989) ("Because the application of equitable subrogation depends upon the facts and circumstances of each case, *United States Fidelity & Guaranty Co. v. Bennett*, 96 Fla. 828, 119 So. 394, 'having for its basis the doing of complete and perfect justice between the parties without regard to form,' *Dantzler Lumber & Export Co. v. Columbia Casualty Co.*, 115 Fla. 541, 551, 156 So. 116, 119 (1934), there is no general rule or test for its invocation. However, one important prerequisite to its application is that the party who made the payment must have some right or interest of his own to protect and must not be a mere volunteer acting without obligation.").
6. *Eastern National Bank v. Glendale Federal Savings and Loan Assoc.*, 508 So.2d 1323, 1324 (Fla. 3d DCA 1987).
7. *Allstate Life Insurance Co. v. Weldon*, 213 So.2d 15, 18 (Fla. 3d DCA 1968).

§18:100.1.4 Elements — 4th DCA

To state a cause of action for equitable subrogation, the allegations of the complaint must demonstrate that: (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party.

Source

Villa Maria Nursing and Rehab. Ctr., Inc. v. South Broward Hosp. Dist., 8 So.3d 1167, 1169 (Fla. 4th DCA 2009).

See Also

1. *Benchwarmers, Inc. v. Gorin*, 689 So.2d 1197, 1199 (Fla. 4th DCA 1997).
2. *In re Forfeiture of United States Currency in the Amount of Ninety-One Thousand Three Hundred Fifty-Seven and 12/100 Dollars*, 595 So.2d 998, 1000 (Fla. 4th DCA 1992), *rev. denied*, 601 So.2d 552 (Fla. 1992).
3. *West American Insurance Co. v. Best Products Co., Inc.*, 541 So.2d 1302 (Fla. 4th DCA 1989) (See dissent).
4. *Hollywood Lakes Country Club. Inc. v. Community Association Services, Inc.,* 770 So.2d 716, 718 (Fla. 4th DCA 2000).
5. *Goldberg v. State Farm Auto. Mut. Ins. Co.*, 922 So.2d 983, 984 (Fla. 4th DCA 2006).
6. *Vigilant Ins. Co. v. Continental Cas. Co.*, 33 So.3d 734 (Fla. 4th DCA 2010).

§18:100.1.5 Elements — 5th DCA

Equitable subrogation is generally appropriate where: (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party. As a result of equitable subrogation, the party discharging the debt stands in the shoes of the person whose claims have been discharged and thus succeeds to the right and priorities of the original creditor.

Source

Florida Farm Bureau General Ins. Co. v. Insurance Co. of North America, 763 So.2d 429, 436 (Fla. 5th DCA 2000).

See Also

1. *Transamerica Ins. Co. v. Barnett Bank of Marion County, N.A.,* 524 So.2d 439, 445 (Fla. 5th DCA 1988), *decision quashed on other grounds*, 540 So.2d 113 (Fla. 1989).
2. *Mortoro v. Maloney*, 580 So.2d 822, 823 (Fla. 5th DCA 1991).
3. *West American Insurance Co. v. Yellow Cab Company of Orlando, Inc.*, 495 So.2d 204, 206 (Fla. 5th DCA 1986), *rev. denied*, 504 So.2d 769 (Fla. 1987).
4. *Jones v. Williams Steel Industries, Inc.*, 460 So.2d 1004, 1006 (Fla. 5th DCA 1984), *petition for rev. denied*, 467 So.2d 1000 (Fla. 1985).

§18:100.2 References

1. 12 Fla. Jur. 2d *Contribution, Indemnity, and Subrogation* §§45–70 (2005).
2. 73 Am. Jur. 2d *Subrogation* §§10–27, 83 (2001).
3. 83 C.J.S. *Subrogation* §§1–22, 96 (2000).
4. Cappucio, *Subrogation in Florida,* 21 U. Miami L. Rev. 240, 243 (1966).

§18:100.3 Defenses

1. **Insured and Additional Insured:** The equitable nature of subrogation does not permit an insurer to exercise a right of subrogation against its own insured or an additional insured. … The rational for this rule is that the insurer "accepts not only the risk that some third party may cause the casualty but also that its own insured may negligently cause the loss. *Dixie National Bank of Dade County v. Employers Commercial Union Insurance Company of America*, 463 So.2d 1147, 1153 (Fla. 1985).

2. **Own Debt:** Equitable Subrogation is not available to one who simply pays his own debt. *Mortoro v. Maloney*, 580 So.2d 822, 823 (Fla. 5th DCA 1991).

3. **Should Not Deny Legal Right:** Courts of equity will not apply the doctrine of subrogation where to do so would be to deprive a party of a legal right. *United States Fidelity & Guaranty Co. v. Bennett*, 119 So. 394, 396 (Fla. 1928); *Boley v. Daniel*, 72 So. 644, 645 (Fla. 1916).

4. **Statutes of Limitation:** *See Jones v. Williams Steel Industries, Inc.*, 460 So.2d 1004, 1006 (Fla. 5th DCA 1984), *petition for rev. denied*, 467 So.2d 1000 (Fla. 1985).

5. **Volunteer:** The doctrine of equitable subrogation does not apply to mere volunteers. *Eastern National Bank v. Glendale Federal Savings and Loan Assoc.*, 508 So.2d 1323, 1324 (Fla. 3d DCA 1987).

6. **Settlements:** In Florida, when a person is injured by the wrongful act of one tortfeasor and that injury is subsequently aggravated by the wrongful act of another tortfeasor, the law considers the negligence of the initial tortfeasor to be the proximate cause of the negligence of the subsequent tortfeasor. The rationale is to prevent: (1) the victim from receiving double recovery; and (2) the subsequent tortfeasor from being exposed to double liability to both the victim for damages and the initial tortfeasor under the doctrine of equitable subrogation. Therefore, the initial tortfeasor is subject to the total financial burden of the victim's injuries, including those caused by subsequent healthcare providers. This is true, although the original tortfeasor and the subsequently negligent healthcare providers are independent tortfeasors and not joint tortfeasors jointly and severally liable for one common injury. *University of Miami v. Francois*, 76 So.3d 360 (Fla. 3d DCA 2011) (where a settlement agreement with the first or initial torfeasor did not specifically reserve the remaining claims against the second or subsequent torfeasor by stating that the compensation received did not relate to the negligence of the subsequent torfeasor, the cause of action against the subsequent tortfeasor had to be dismissed).

§18:100.4 Related Matters

1. **Insurers:** Florida adheres to the general rule that an insurer is entitled to subrogation to recover from any third party who is legally liable for the actual loss sustained by its insurer. *Dixie National Bank of Dade County v. Employers Commercial Union Insurance Company of America*, 463 So.2d 1147, 1151 (Fla. 1985).

2. **Liberal Application:** Our court is committed to a liberal application of the rule of equitable subrogation. *Dantzler Lumber & Export Co. v. Columbia Casualty Co.*, 156 So. 116, 120 (Fla. 1934).

3. **Policy:** Equitable subrogation is founded on the proposition of doing justice without regard to form. The doctrine exists to prevent unjust enrichment. The policy behind the doctrine is to prevent unjust enrichment by assuring that the person who in equity and good conscience is responsible for the debt is ultimately answerable for its discharge. *Gortz v. Lytal, Reiter, Clark, Sharpe, Roca, Fountain & Williams*, 769 So.2d 484, 486 (Fla. 4th DCA 2000).

4. **Right Accrues:** The right to equitable subrogation or indemnification accrues when payment is made. *McKenzie Tank Lines, Inc. v. Empire Gas Corporation*, 538 So.2d 482, 486 (Fla. 1st DCA 1989), *rev. denied*, 544 So.2d 200 (Fla. 1989).

5. **Separate Action:** A subrogation suit is a separate, independent action against a subsequent tortfeasor by the initial tortfeasor. The injured party, having received full compensation for all injuries, is not a party to the litigation and is spared the trauma of an extensive malpractice trial. *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So.2d 702, 704 (Fla. 1980).

6. **Volunteer:** The right of subrogation is not necessarily confined to those who are legally bound to make payments, but extends as well to persons who pay the debt in self protection, since they might suffer loss if the obligation is not discharged. … One should have the right to settle a lawsuit in which there is a reasonable doubt concerning liability and not be required to incur all of the expenses of litigation to conclusion before being entitled to seek subrogation. To hold otherwise would be to discourage settlements and to promote litigation, a concept which should be discouraged by the courts. *Kala Investments, Inc. v. Sklar*, 538 So.2d 909, 917 (Fla. 3d DCA 1989), *rev. denied*, 551 So.2d 460 (Fla. 1989), *and rev. denied*, 551 So.2d 461 (Fla. 1989).

§18:110 COLLATERAL ESTOPPEL (ESTOPPEL BY JUDGMENT)

§18:110.1 Elements — Florida Supreme Court

Collateral estoppel requires that: (1) the identical issue was presented in a prior proceeding; (2) the issue was a critical and necessary part of the prior determination; (3) there was a full and fair opportunity to litigate the issue; (4) the parties to the prior action were identical to the parties of the current proceeding; and (5) the issue was actually litigated.

Source

Marquardt v. State, 156 So.3d 464, 481 (Fla. 2015).

See Also

1. *Florida Bar v. Clement*, 662 So.2d 690, 697 (Fla. 1995), *cert. denied*, 517 U.S. 1210 (1996).
2. *Seaboard Coast Line Railroad Co. v. Cox*, 338 So.2d 190, 191 (Fla. 1976).
3. *Mobil Oil Corporation v. Shevin*, 354 So.2d 372, 374 (Fla. 1977).
4. *Stogniew v. McQueen*, 656 So.2d 917, 919 (Fla. 1995).
5. *Field v. Field*, 91 So.2d 640, 643 (Fla. 1956).
6. *Universal Const. Co. v. City of Fort Lauderdale*, 68 So.2d 366, 369 (Fla. 1953).
7. *Gordon v. Gordon*, 59 So.2d 40, 44 (Fla. 1952), *cert. denied*, 344 U.S. 878 (1952).

§18:110.1.1 Elements — 1st DCA

The essential elements of the doctrine are: (1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issue[ ] must have been actually litigated.

Source

Ritch v. State, 14 So.3d 1104, 1107 (Fla. 1st DCA 2009).

See Also

1. *State, Dept. of Corrections v. Chesnut*, 894 So.2d 276 (Fla. 1st DCA 2005).
2. *Weigh Less for Life, Inc. v. Barnett Bank of Orange Park*, 399 So.2d 88, 90 (Fla. 1st DCA 1981).
3. *Clean Water, Inc. v. State of Florida Department of Environmental Regulation*, 402 So.2d 456, 458 (Fla. 1st DCA 1981).
4. *Newport Division, Tenneco Chemicals, Inc. v. Thompson*, 330 So.2d 826, 828 (Fla. 1st DCA 1976).
5. *Felder v. State Dep't. of Mgmt. Servs.*, 993 So.2d 1031, 1034-35 (Fla. 1st DCA 2008).
6. *Ervin v. Smith*, 312 So. 3d 995, 999 (Fla. 1st DCA 2021).

§18:110.1.2 Elements — 2nd DCA

To claim the benefit of collateral estoppel, the party relying on the doctrine must show that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Source

Gawker Media, LLC v. Bollea, 129 So.3d 1196, 1204 (Fla. 2d DCA 2014).

See Also

1. *Campbell v. State*, 906 So.2d 293, 295 (Fla. 2d DCA 2004).
2. *Goodman v. Aldrich & Ramsey Enterprises, Inc*., 804 So.2d 544, 546 (Fla. 2d DCA 2002).
3. *Holt v. Brown's Repair Service, Inc.*, 780 So.2d 180, 182 (Fla. 2d DCA 2001).
4. *Essenson v. Polo Club Associates*, 688 So.2d 981, 983 (Fla. 2d DCA 1997).

5. *Jones v. UpJohn Company*, 661 So.2d 356, 357 (Fla. 2d DCA 1995).
6. *Munsey v. General Telephone Company of Florida*, 538 So.2d 1328, 1330 (Fla. 2d DCA 1989).
7. *Argerenon v. St. Andrews Cove I Condominium Association, Inc.*, 507 So.2d 709, 710 (Fla. 2d DCA 1987).

§18:110.1.3 Elements — 3rd DCA

Collateral estoppel, also known as issue preclusion, applies only where: (1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceedings were identical; and (5) the issues were actually litigated in the prior proceeding.

Source

Pearce v. Sandler*, 219 So.3d 961, 965 (Fla. 3d DCA 2017); Professional Roofing and Sales, Inc. v. Flemmings*, 138 So.3d 524, 527 (Fla. 3d DCA 2014).

See Also

1. *Poer v. Calder Race Course, Inc*., 775 So.2d 970, 971 (Fla. 3d DCA 2000), *rev. dismissed*, 823 So.2d 739 (Fla. 2002).
2. *Weiss v. Courshon*, 768 So.2d 2, 4 (Fla. 3d DCA 2000), *rev. denied*, 790 So.2d 1111 (Fla. 2001).
3. *Daniel Intern. Corp. v. Better Const., Inc*., 593 So.2d 524, 527 (Fla. 3d DCA 1991), *rev. denied*, 602 So.2d 941 (Fla. 1992).
4. *R & S Partnership v. Martin Schaffel Enterprises, Inc*., 529 So.2d 794, 795 (Fla. 3d DCA 1988).
5. *West Point Construction Co. v. Fidelity and Deposit Company of Maryland*, 515 So.2d 1374, 1376 (Fla. 3d DCA 1987), *cause dismissed*, 523 So.2d 579 (Fla. 1988).
6. *Nationwide Mutual Fire Insurance Co. v. Race*, 508 So.2d 1276, 1278 (Fla. 3d DCA 1987), *approved*, 542 So.2d 347 (Fla. 1989).
7. *Pennsylvania Insurance Co. v. Miami National Bank*, 241 So.2d 861, 863 (Fla. 3d DCA 1970).
8. *Prudential Insurance Co. of America v. Turkal*, 528 So.2d 487, 488 (Fla. 3d DCA 1988).
9. *Paresky v. Miami-Dade County Bd. Of County Com'rs.*, 893 So.2d 664, 665-66 (Fla. 3d DCA 2005) ("Collateral estoppel applies when the identical issue has been litigated between the same parties and the particular matter was fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction.").

§18:110.1.4 Elements — 4th DCA

The doctrine of collateral estoppel—which is also known as issue preclusion and estoppel by judgment—bars re-litigation of identical issues between identical parties in two proceedings. The doctrine is intended to prevent repetitious litigation of what is essentially the same dispute. For the doctrine to apply, the following elements must be met: (1) an identical issue must be presented in a prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate the issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated.

Source

Lambert Bros., Inc. v. Mid-Park, Inc., 185 So.3d 1266, 1269 (Fla. 4th DCA 2016).

See Also

1. *Provident Life and Accident Inc. Co. v. Genovese*, 138 So.3d 474, 477 (Fla. 4th DCA 2014).
2. *GLA and Associates, Inc. v. City of Boca Raton*, 855 So.2d 278, 281 (Fla. 4th DCA 2003).
3. *E.C. v. Katz*, 711 So.2d 1155, 1156 (Fla. 4th DCA 1998), *quashed on other grounds*, 731 So.2d 1268 (Fla. 1999).
4. *State v. Freund*, 626 So.2d 1043, 1044 (Fla. 4th DCA 1993).
5. *Lorf v. Indiana Insurance Company*, 426 So.2d 1225, 1226 (Fla. 4th DCA 1983).
6. *Stevens v. Len-Hal Realty, Inc.*, 403 So.2d 507, 508 (Fla. 4th DCA 1981).
7. *Wise v. Tucker*, 399 So.2d 500, 502 (Fla. 4th DCA 1981).
8. *Pickett v. Woods*, 360 So.2d 45, 46 (Fla. 4th DCA 1978).

§18:110.1.5 Elements — 5th DCA

For the doctrine of collateral estoppel to apply to bar relitigation of an issue, five elements must be present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated.

Source

Ortiz v. State, 287 So.3d 678, 680 (Fla. 5th DCA 2019).

See Also

1. *Criner v. State*, 138 So.3d 557, 558 (Fla. 5th DCA 2014).
2. *Acadia Partners, L.P. v. Tompkins*, 759 So.2d 732, 738 (Fla. 5th DCA 2000).
3. *All Pro Sports Camp, Inc. v. Walt Disney Co*., 727 So.2d 363, 366 (Fla. 5th DCA 1999).
4. *Husky Industries, Inc. v. Griffith*, 422 So.2d 996, 999 (Fla. 5th DCA 1982).
5. *Real Estate Corporation of Florida, N.V. v. Dawn Developers, Inc.*, 677 So.2d 366, 368 (Fla. 5th DCA 1996).
6. *State v. Carter*, 452 So.2d 1137, 1139 (Fla. 5th DCA 1984).

§18:110.2 References

1. 32A Fla. Jur. 2d *Judgments and Decrees* §§112, 113 (2003).
2. 46 Am. Jur. 2d *Judgments* §§514–639 (1994).
3. 50 C.J.S. *Judgments* §§779–827 (1997).
4. Florida Statutes §772.14 (2005) (Estoppel of Defendant).
5. Restatement (Second) of Judgments §§27–29 (1980).
6. Comment Note, *Judgment as Res Judicata in a Subsequent Action Upon a Different Cause of Action, as Affected by Inability of Party Without His Fault to Obtain Review of Former Judgment,* 157 A.L.R. 1038 (1945).

§18:110.3 Defenses

1. **Manifest Injustice:** Collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice. *State v. McBride*, 848 So.2d 287, 292 (Fla. 2003).
2. **Unanticipated Subsequent Events:** We note that the doctrine of estoppel by judgment does not apply where unanticipated subsequent events create a new legal situation. *Krug v. Meros*, 468 So.2d 299, 303 (Fla. 2d DCA 1985), *petition for rev. denied*, 480 So.2d 1295 (Fla. 1985).

§18:110.4 Related Matters

1. **Administrative Proceedings:** Collateral estoppel is available in administrative proceedings in the same manner as it is available in judicial proceedings. *Loeffler v. Florida Dept. of Business and Professional Regulation*, 739 So.2d 150, 153 (Fla. 1st DCA 1999).

2. **Federal Court Rule:** Federal principles of collateral estoppel preclude relitigation of issues actually litigated in a prior proceeding, where the issues at stake are identical, and where determination of those issues was a critical and necessary part of the first litigation … Identity of parties is not required when collateral estoppel is used defensively. *Hochstadt v. Orange Broad.*, 588 So.2d 51, 52 (Fla. 3d DCA 1991), *abrogated on other grounds*, 830 So.2d 120 (Fla. 3d DCA 2002).

3. **Mutuality:** The well-established rule in Florida has been and continues to be that collateral estoppel may be asserted only when the identical issue has been litigated between the same parties or their privies. … We are unwilling to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality in the application of collateral estoppel. *Stogniew v. McQueen*, 656 So.2d 917, 919 (Fla. 1995). Two things are clear pursuant to a fair reading of *Stogniew*: (1) the requirement of mutuality of parties is a general rule that applies to its defensive use; and (2) the sole

exception to this rule carved out in attorney malpractice suits following resolution of ineffective assistance of counsel claims is to be read as narrowly as possible. *E.C. v. Katz*, 731 So.2d 1268, 1270 (Fla. 1999). *See also Dempsey v. Law Firm of Cauthen & Odham, P.A.*, 752 So.2d 107, 109 (Fla. 5th DCA 2000). See narrow exception in *Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989).

4. **Res Judicata Compared:** Before entering upon a discussion of it, we will review the elements of the doctrine of res judicata and its relation to the doctrine of estoppel by judgment. Briefly, under the first a judgment on the merits of a controversy is conclusive as to the parties and their privies and will bar a subsequent action between the same parties on the same cause of action. *R.J. Reynolds Tobacco Co. v. Brown*, 70 So.3d 707 (Fla. 4th DCA 2011) (issue preclusion in earlier Engle cases prevented the relitigation of findings already made with regard to duty and breach of duty by tobacco manufacturers, leaving only unlitigated remaining elements of causation, comparative fault, and damages for plaintiffs to prove). In *Gordon v. Gordon*, 59 So.2d 40, 44 (Fla. 1952), we undertook to distinguish between the two doctrines and said that under res judicata a final judgment or decree not only bars a later suit "between the same parties based upon the same cause of action" but also upon matters that "could have been raised" while under the doctrine of estoppel by judgment, the two causes of action might be different and the judgment or decree in the first would only estop the parties from litigating in the second suit issues - that is to say points and questions - common to both causes of action and which were actually adjudicated in the prior litigation. *Youngblood v. Taylor,* 89 So.2d 503, 505 (Fla. 1956).

5. **Section 772.14, Florida Statutes:** Section 772.14 is a codification of the doctrine of collateral estoppel. Collateral estoppel, which is also known as estoppel by judgment, serves as a bar to relitigation of issues that have been determined by a valid judgment. *Stogniew v. McQueen*, 656 So.2d 917 (Fla. 1995). Florida has long required that there be a mutuality of parties in order for the doctrine to be applied. *See, e.g., Yovan v. Burdine's*, 81 So.2d 555 (Fla. 1955). The rule in Florida has been that unless both parties are bound by the prior judgment, neither can use the judgment as an estoppel against the other in a subsequent action. This is particularly true when the doctrine is used offensively, that is, by a plaintiff to estop a defendant from relitigating issues that the defendant litigated and lost in a prior proceeding against another plaintiff. *Stogniew; Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano,* 450 So.2d 843 (Fla. 1984). This rule of mutuality precluded the victim of a crime from using a criminal conviction to estop the defendant from contesting the facts underlying the conviction in a subsequent civil action. *Romano,* 450 So.2d at 845.

   Section 772.14 abrogates the requirement of mutuality of parties in the context of civil actions brought by crime victims under chapter 772. *Stogniew; Board of Regents v. Taborsky*, 648 So.2d 748, 754 (Fla. 2d DCA 1994), *rev. denied*, 654 So.2d 920 (Fla. 1995). The statute abrogates the requirement by allowing a plaintiff in a chapter 772 civil suit to use as an estoppel a "final judgment or decree rendered in favor of the state" in a prior criminal proceeding that concerned the conduct at issue in the civil action. Thus, the question we are asked to resolve here is whether a final judgment of conviction entered pursuant to a plea of nolo contendere is a "final judgment" within the meaning of section 772.14. *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064, 1067 (Fla. 1995).

   It is clear that a final judgment in favor of the State was rendered in this case. Cohen was adjudicated guilty of petit theft under section 812.014 in a judgment entered on May 1, 1990. This judgment of conviction was a "final judgment" despite the fact that it was entered pursuant to a plea of nolo contendere. *Demps v. State, 874 So.2d 737 (Fla. 4th DCA 2004)* (final judgment of conviction entered pursuant to plea of nolo contendere), *rev. denied*, 659 So.2d 272 (Fla. 1995); *Doyle v. State,* 644 So.2d 1041 (Fla. 3d DCA 1994); *Wheatley v. State*, 629 So.2d 896 (Fla. 1st DCA 1993). A "final judgment" is not exempt from the plain language of the estoppel statute simply because it was entered pursuant to a plea of nolo contendere. Moreover, the district court's concern that the judgment of conviction was entered without a determination of the underlying facts giving rise to the charge is misplaced.

   The district court appears to have based its conclusion on federal decisions addressing the collateral estoppel effect of a judgment of conviction entered pursuant to a nolo plea. *See, e.g., Satterfield,* 743

F.2d 827 (criminal conviction giving rise to restitution order will not be given collateral estoppel effect if conviction is based on plea of nolo contendere); *In re Raiford,* 695 F.2d 521 (11th Cir. 1983) (federal criminal defendant wishing to avoid collateral estoppel effect of criminal proceeding may plead nolo contendere). However, unlike the Federal Rules of Criminal Procedure, which make no provision for a judicial determination of the factual basis of a nolo contendere plea, the Florida Rules of Criminal Procedure require the trial court to satisfy itself that there is a factual basis for such a plea before it can be accepted. Fla.R.Crim.P. 3.172(a). Thus, in Florida before a defendant can be adjudicated guilty pursuant to a plea of nolo contendere, the facts underlying the offense pled to must be judicially determined. We believe that this requirement affords an adequate safeguard to ensure there has been a reliable determination of the facts underlying a final judgment entered pursuant to a nolo plea. *Accord Raiford*, 695 F.2d at 521 (Federal Rule of Criminal Procedure 11(f), which provides that federal court cannot enter judgment on guilty plea unless it determines that factual basis for plea exists, provides sufficient safeguard to give collateral estoppel effect to prior judgment based on guilty plea).

The fact section 90.410, Florida Statutes (1991), precludes the admission of a nolo plea in any civil or criminal proceeding does not mandate that we ignore the express language of the civil remedies estoppel statute. There must be a hopeless inconsistency between two statutes before rules of construction are applied to defeat the plain language of one of the statutes in favor of the other. *State v. Parsons*, 569 So.2d 437 (Fla. 1990). These statutes are not hopelessly inconsistent. Section 90.410 speaks only to the admission into evidence of the plea itself. It does not address the collateral estoppel effect of a final judgment resulting from the plea. *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064, 1067 (Fla. 1995).

§18:120 ESTOPPEL, EQUITABLE

§18:120.1 Elements — Florida Supreme Court

The elements of equitable estoppel are:
1. a representation as to a material fact that is contrary to a later-asserted position;
2. reliance on that representation; and
3. a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.

Source

State v. Harris, 881 So.2d 1079, 1084 (Fla. 2004).

See Also

1. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1076 (Fla. 2001).
2. *State Department of Revenue v. Anderson*, 403 So.2d 397, 400 (Fla. 1981), *on remand*, 405 So.2d 242 (Fla. 3d DCA 1981).
3. *Noble v. Yorke*, 490 So.2d 29, 31 (Fla. 1986).

§18:120.1.1 Elements — 1st DCA

The elements of estoppel are: (1) a representation by the party to be estopped to the party claiming estoppel as to some material fact which is contrary to the position later asserted by the estopped party; (2) a reasonable reliance on the present representation by the party claiming estoppel; and (3) a detrimental change in position by the party claiming estoppel caused by the representation and the reliance thereon.

Source

Campbell v. Department of Transp., 267 So.3d 541, 547 (Fla. 1st DCA 2019).

See Also

1. *McNair v. Dorsey*, 291 So. 3d 607, 609 (Fla. 1st DCA 2020).
2. *Riverwood Nursing Ctr., LLC v. Gilroy*, 219 So.3d 996, 999 (Fla. 1st DCA 2017).

3. *Department of Revenue ex rel. Thorman v. Holley*, 86 So.3d 1119, 1203-1204 (Fla. 1st DCA 2012).
4. *Associated Industries Ins. Co., Inc. v. State, Dept. of Labor and Employment Sec.*, 923 So.2d 1252, 1255 (Fla. 1st DCA 2006).
5. *Specialty Employee Leasing v. Davis*, 737 So.2d 1170, 1172 (Fla. 1st DCA 1999).
6. *Rissman on Behalf of Rissman Investment Co. v. Kilbourne*, 643 So.2d 1136, 1139 (Fla. 1st DCA 1994).
7. *Council Brothers, Inc. v. City of Tallahassee*, 634 So.2d 264, 266 (Fla. 1st DCA 1994).
8. *Wirth v. McGurn*, 598 So.2d 238, 239 (Fla. 1st DCA 1992).
9. *Killearn Acres Homeowners Association, Inc. v. Keever*, 595 So.2d 1019, (Fla. 1st DCA 1992).
10. *Dolphin Outdoor Advertising v. Department of Transportation*, 582 So.2d 709, 710 (Fla. 1st DCA 1991).
11. *Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc.*, 744 So.2d 482, 485 (Fla. 1st DCA 1999).

§18:120.1.2 Elements — 2nd DCA

Those elements are:

1. the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts;
2. the party claiming estoppel must have relied on that representation; and
3. the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it.

Source

Winans v. Weber, 979 So.2d 269 (Fla. 2d DCA 2007).

See Also

1. *Watson Clinic, LLP v. Verzosa*, 816 So.2d 832, 834 (Fla. 2d DCA 2002).
2. *State Department of Transportation v. Firstmerit Bank*, 711 So.2d 1217, 1218 (Fla. 2d DCA 1998).
3. *Appalachian, Inc. v. Olson*, 468 So.2d 266, 269 (Fla. 2d DCA 1985), *pet. for rev. denied*, 482 So.2d 347 (Fla. 1985), *pet. for rev. denied*, *Commander*, *Legler, Werber, Dawes & Sadler, P.A. v. Olsen*, 482 So.2d 347 (Fla. 1985).
4. *Meyer v. Meyer,* 25 So.3d 39, 43 (Fla. 2d DCA 2009) ("'In this state, equitable estoppel is a defensive doctrine rather than a cause of action.' *Agency for Health Care Admin. v. MIED, Inc.,* 869 So.2d 13, 20 (Fla. 1st DCA 2004). Florida has long recognized that equitable estoppel is not designed to aid a litigant in gaining something, but only in preventing a loss.").

§18:120.1.3 Elements — 3rd DCA

The elements of "equitable estoppel" are as follows: (1) a representation by the party estopped to the party claiming the estoppel as to some material fact, which representation is contrary to the condition of affairs later asserted by the estopped party; (2) a reliance upon this representation by the party claiming the estoppel; and (3) a change in the position of the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon.

Source

Flagship Resort Dev. Corp. v. Interval Intern., Inc., 28 So.3d 915, 923 (Fla. 3d DCA 2010).

See Also

1. *United Auto. Ins. Co. v. Chiropractic Clinics of S. Fla.*, No. 3D21-111, 2021 WL 2447804, at *3 (Fla. 3d DCA June 16, 2021).
2. *Nationstar Mortg. LLC v. LHF Hudson, LLC*, 271 So.3d 1073, 1077 (Fla. 3d DCA 2019).
3. *Lennar Homes, Inc. v. Gabb Construction Services, Inc.*, 654 So.2d 649, 651 (Fla. 3d DCA 1995).
4. *Monroe County v. Hemisphere Equity Realty, Inc.*, 634 So.2d 745, 747 (Fla. 3d DCA 1994), *rev. denied*, 645 So.2d 455 (Fla. 1994).
5. *Wright v. Douglas N. Higgins, Inc.*, 617 So.2d 460, 461 (Fla. 3d DCA 1993), *rev. denied*, 626 So.2d 204 (Fla. 1993).
6. *Francoeur v. Pipers, Inc.*, 560 So.2d 244, 245 (Fla. 3d DCA 1990).
7. *Rayborn v. Department of Management*, 803 So.2d 747, 748 (Fla. 3d DCA 2001), *rev. denied*, 823 So.2d 125 (Fla. 2002).

§18:120.1.4 Elements — 4th DCA

The essential elements of estoppel are: (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.

Source

Tome v. State Farm Fire and Cas. Co., 125 So.3d 864, 867 (Fla. 4th DCA 2013).

See Also

1. *Sun Cruz Casinos, L.L.C. v. City of Hollywood, Fla.*, 844 So.2d 681, 684 (Fla. 4th DCA 2003).
2. *Cosman v. Bea Morley Real Estate Group, Inc.*, 820 So.2d 1040, 1042 (Fla. 4th DCA 2002).
3. *Harris v. National Judgment Recovery Agency, Inc*. 819 So.2d 850, 855 (Fla. 4th DCA 2002).
4. *Zurstrassen v. Stonier*, 786 So.2d 65, 68 (Fla. 4th DCA 2001).
5. *Barnes v. Resolution Trust Corporation*, 664 So.2d 1171, 1173 (Fla. 4th DCA 1995).
6. *Jewett v. Leisinger*, 655 So.2d 1210, 1212 (Fla. 4th DCA 1995).
7. *Lewis v. State of Florida, Department of Health and Rehabilitative Services*, 659 So.2d 1255, 1256 (Fla. 4th DCA 1995).
8. *Abuznaid v. Sirhal*, 638 So.2d 188, 189 (Fla. 4th DCA 1994).
9. *Parker v. Estate of Bealer*, 890 So.2d 508, 511 (Fla. 4th DCA 2005).
11. *WSG W. Palm Beach Dev., LLC v. Blank*, 990 So.2d 708, 715 (Fla. 4th DCA 2008).
12. *Marcus v. Florida Bagels, LLC*, 112 So.3d 631, 634 (Fla. 4th DCA 2013).

§18:120.1.5 Elements — 5th DCA

The elements of estoppel are: (1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it.

Source

Goodwin v. Blu Murray Ins. Agency, Inc., 939 So.2d 1098, 1103 (Fla. 5th DCA 2006).

See Also

1. *Lyon v. Lake County*, 765 So.2d 785, 791 (Fla. 5th DCA 2000), *rev. denied*, 790 So.2d 1105 (Fla. 2001).
2. *Warren v. Dep't of Administration*, 554 So.2d 568, 570 (Fla. 5th DCA 1989), *rev. dismissed*, 562 So.2d 345 (Fla. 1990), *appeal after remand on other grounds*, 590 So.2d 514 (Fla. 5th DCA 1991).
3. *Wooten v. Rhodus*, 470 So.2d 844 (Fla. 5th DCA 1985).

§18:120.2 References

1. 22 Fla. Jur. 2d *Estoppel and Waiver* §§35, 36 (2005).
2. 28 Am. Jur. 2d *Estoppel and Waiver* §§27–42 (2000).
3. 31 C.J.S. *Estoppel* §§73–89 (1996).
4. Restatement (Second) of Torts §894 (1979).
5. Craig A. Jaslow, *Understanding the Doctrine of Equitable Estoppel in Florida*, 38 U. Miami L. Rev. 187 (1984) (focusing on zoning and building permits).

§18:120.3 Defenses

1. **Affirmative Deception Required:** A party may successfully maintain a suit under the theory of equitable estoppel only where there is proof of fraud, misrepresentation, or other affirmative deception. *Rinker Materials Corp. v. Palmer First National Bank and Trust Company of Sarasota*, 361 So.2d 156, 159 (Fla. 1978). *See also Lennar Homes, Inc. v. Gabb Construction Services, Inc.*, 654 So.2d 649, 652 (Fla. 3d DCA 1995).

2. **Equal Knowledge:** Estoppel based upon silence cannot exist where the parties have equal knowledge of the facts or the same means of ascertaining that knowledge. *Pelican Island Property Owners Association, Inc. v. Murphy*, 554 So.2d 1179, 1181 (Fla. 2d DCA 1989).

3. **Estoppel against the State:** As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances. Another general rule is that the state cannot be estopped through mistaken statements of the law. *State Department of Revenue v. Anderson*, 403 So.2d 397, 400 (Fla. 1981), *on remand*, 405 So.2d 242 (Fla. 3d DCA 1981); *Dolphin Outdoor Advertising v. Department of Transportation*, 582 So.2d 709, 710 (Fla. 1st DCA 1991); *Warren v. Dep't of Administration*, 554 So.2d 568, 571 (Fla. 5th DCA 1989), *rev. dismissed*, 562 So.2d 345 (Fla. 1990), *appeal after remand on other grounds*, 590 So.2d 514 (Fla. 5th DCA 1991); *State v. Harris*, 881 So.2d 1079, 1085 (Fla. 2004). One seeking to invoke the doctrine of estoppel against the government first must establish the usual elements of estoppel, and then must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence, must show that the government conduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest. *Council Brothers, Inc. v. City of Tallahassee*, 634 So.2d 264, 266 (Fla. 1st DCA 1994). *See also Lyon v. Lake County*, 765 So.2d 785, 795 (Fla. 5th DCA 2000), *rev. denied*, 790 So.2d 1105 (Fla. 2001). The cases in which this doctrine has been applied against a government agency involve potentially severe economic consequences to the person who relied on a government agent's misstatement of fact, or situations in which the conduct of the government was unbearably egregious - a classic example of bureaucratic ineptitude and indifference coupled with a supremely adverse effect on an innocent citizen. The doctrine appears to be somewhat more leniently applied in permit and zoning matters. *Sutron Corp. v. Lake County Water Authority*, 870 So.2d 930, 933 (Fla. 5th DCA 2004).

4. **Preventing Loss vs. Gaining Something:** Florida has long recognized that "[e]quitable estoppel is not designed to aid a litigant in gaining something, but only in preventing a loss." *Kerivan v. Fogal*, 22 So.2d 584, 586 (Fla. 1945); *State, Agency for Health Care Admin. v. MIED, Inc*., 869 So.2d 13, 20 (Fla. 1st DCA 2004).

5. **Statutory Rights and Defenses not Exempt:** Absent specific statutory provision, there is no rule of law which in general exempts statutory rights and defenses from the operation of the doctrine of equitable estoppel. *Noble v. Yorke*, 490 So.2d 29, 31 (Fla. 1986).

§18:120.4 Related Matters

1. **Affirmative Defense:** Equitable estoppel is an affirmative defense. *Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc.*, 744 So.2d 482, 485 (Fla. 1st DCA 1999).

2. **Background:** The doctrine of equitable estoppel has been a fundamental tenet of Anglo American jurisprudence for centuries: "Estoppe," says Lord Coke, "cometh of the French word *estoupe,* from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead [otherwise]." Lancelot Feilding Everest, *Everest and Strode's Law of Estoppel* 1 (3d ed. 1923). The doctrine, which was part of the English common law when the State of Florida was founded, was adopted and codified by the Florida Legislature in 1829. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1076 (Fla. 2001).

3. **Probate:** In the probate context, estoppel also requires a showing of affirmative deception. *American & Foreign Ins. Co. v. Dimson*, 645 So.2d 45, 48 (Fla. 4th DCA 1994) (citing *Rinker*, 361 So.2d at 159); *Castro v. East Pass Enterprises, Inc*., 881 So.2d 699, 700 (Fla. 1st DCA 2004).

4. **Silence:** "[Her] 'silence when it is [her] duty to speak,' should estop [her] from 'asserting a right which [s]he otherwise would have had.'" *Rubman v. Honig,* 817 So.2d 1001, 1002 (Fla. 4th DCA 2002) (*quoting Taylor,* 465 So.2d at 586). *See also Parker v. Estate of Bealer*, 890 So.2d 508, 511 (Fla. 4th DCA 2005).

5. **Statute of Limitations:** Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position. Equitable estoppel is the

effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property or of contract, or of remedy, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or of contract or of remedy. The doctrine of estoppel is applicable in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury. *State ex rel. Watson v. Gray*, 48 So.2d 84, 87 (Fla. 1950) (quoting 3 Pomeroy's Equity Jurisprudence §804 (5th ed. 1941). *Major League Baseball v. Morsani,* 790 So.2d 1071 (Fla. 2001); *Delco Oil, Inc. v. Pannu*, 856 So.2d 1070, 1073 (Fla. 5th DCA 2003). While continuing negotiations regarding settlement do not toll the running of a statute of limitation, such negotiations, if infected with an element of deception, may create an estoppel. This is true even subsequent to the 1975 enactment of subsection (2) of section 95.051 which states that "no disability or other reason shall toll the running of any statute of limitations except those specified in this section." *Cape Cave Corp. v. Lowe*, 411 So.2d 887, 889 (Fla. 2d DCA 1982) (A defendant may by its actions become estopped from claiming the benefit of a statute of limitations.); *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1339 (Fla. 3rd DCA 1979) (There can be no doubt that one may in fact be estopped from claiming the benefit of the statute of limitations.) *Florida Dept. of Health and Rehabilitative Services v. S.A.P.*, 835 So.2d 1091, 1098 (Fla. 2002).

6. **Tolling vs. Equitable Estoppel:** Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. *Morsani v. Major League Baseball*, 739 So.2d 610, 614 (Fla. 2d DCA 1999), *approved*, 790 So.2d 1071 (Fla. 2001).

§18:130 ESTOPPEL, JUDICIAL

§18:130.1 Elements — Florida Supreme Court

The rule applicable to judicial estoppel is stated in 21 C.J. 1228 et seq., as follows:

"A claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party.

"In order to work an estoppel the position assumed in the former trial must have been successfully maintained. In proceedings terminating in a judgment, the positions must be clearly inconsistent, the parties must be the same and the same questions must be involved. So the party claiming the estoppel must have been misled and have changed his position; and an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it unjust to him to allow the first party to change his position. There can be no estoppel where both parties are equally in possession of all the facts pertaining to the matter relied on as an estoppel; where the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel; or where the positions taken involved solely a question of law. And in no event can estoppel be extended beyond the natural and reasonable import of the acts or conduct relied on to create the estoppel. … A party cannot deny the validity of steps taken by him in another proceeding which would impute to him fraud upon administration of justice in such other proceeding."

Source

Chase & Co. v. Little, 156 So. 609, 610-611 (Fla. 1934) (*cf. Ed Ricke & Sons, Inc. v. Green*, 609 So.2d 504, 506 (Fla. 1992)) (*Chase* is cited favorably in *Blumberg v. USAA Cas. Ins. Co*., 790 So.2d 1061, 1066 (Fla. 2001)).

See Also

1. *Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 960 (Fla. 2020).
2. *Blumberg v. USAA Cas. Ins. Co*., 790 So.2d 1061, 1066 (Fla. 2001). Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings. *Smith v. Avatar Properties, Inc.*, 714 So.2d 1103, 1107 (Fla. 5th DCA 1998). The doctrine prevents parties from "making a mockery of justice by inconsistent pleadings."
3. *Ed Ricke & Sons, Inc. v. Green*, 609 So.2d 504, 506 (Fla. 1992) ("We find that *Palm Beach* was an equity case, decided in a different era and under different rules. In *Palm Beach*, the court adhered to a philosophy that original pleadings could not be amended.").
4. *Ed Ricke & Sons, Inc. v. Green*, 609 So.2d 504, 507 (Fla. 1992) ("The admission of this evidence should be prevented only in those circumstances where a party is misled to his or her prejudice by that party's adversary.").
5. *Lee v. Fowler*, 155 So. 647 (Fla. 1934).
6. *Palm Beach Co. v. Palm Beach Estates*, 148 So. 544, 548 (Fla. 1933) (*cf. Ed Ricke & Sons, Inc. v. Green*, 609 So.2d 504, 506 (Fla. 1992)).

§18:130.1.1 Elements — 1st DCA

Florida recognizes the equitable doctrine of judicial estoppel, which prevents litigants from taking totally inconsistent positions in separate judicial proceedings to the prejudice of the adverse party. . For the doctrine to apply, the party sought to be estopped must have successfully maintained a position in one proceeding while taking an inconsistent position in a later proceeding, and the other party was misled and changed its position in such a way that it would be unjust to allow the party to take the inconsistent position. A party has successfully maintained a claim or position if, in the prior proceeding, the court adopted the claim or position either as a preliminary matter or as part of a final disposition. Furthermore, the positions taken or claims made must be inherently inconsistent. Judicial estoppel is an equitable doctrine that may be invoked by a court at its discretion.

Source

Fleming v. Swisher Intern., Inc./Broadspire Kemper Ins. Group, 120 So.3d 160, 161-162 (Fla. 1st DCA 2013).

See Also

1. *Dubois v. Osborne*, 745 So.2d 479, 480 (Fla. 1st DCA 1999).
2. *Williams v. Kloeppel*, 537 So.2d 1033, 1036 (Fla. 1st DCA 1988), *rev. denied*, 545 So.2d 1367 (Fla. 1989) ("[W]hen a court accepts a party's allegation in one suit, that party will be estopped to assert a contrary position in a later action involving the same parties and subject matter.").
3. *Moore v. State of Florida, Department of Revenue*, 536 So.2d 1050, 1052 (Fla. 1st DCA 1988), *rev. denied*, 542 So.2d 989 (Fla. 1989) ("The prejudice necessary for equitable estoppel is a factor which may also be considered in addressing the applicability of judicial estoppel.").
4. *McCurdy v. Collis*, 508 So.2d 380, 384 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1274 (Fla. 1987) ("The doctrine provides that a party who assumed a certain position in a legal proceeding may not thereafter assume a contrary position, especially if it is prejudicial to the party who acquiesced in the former position.").
5. *Lambert v. Nationwide Mutual Fire Insurance Company*, 456 So.2d 517 (Fla. 1st DCA 1984).
6. *Pearson v. Harris*, 449 So.2d 339, 343 (Fla. 1st DCA 1984).
7. *Grauer v. Occidental Life Insurance Company of California*, 363 So.2d 583, 584 (Fla. 1st DCA 1978), *cert. denied*, 372 So.2d 468 (Fla. 1979) (referring to the applicable legal concept as equitable estoppel).
8. *Davidson v. Eddings*, 262 So.2d 232, 234 (Fla. 1st DCA 1972), *cert. denied*, 269 So.2d 371 (Fla. 1972) ("It will be noted this doctrine is applicable only if the former pleadings are under oath.").

§18:130.1.2 Elements — 2nd DCA

The rule applicable to judicial estoppel is stated in 21 C.J. 1228 et seq., as follows:

Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings. Judicial estoppel applies when the following elements are met: (1) the party against whom estoppel is sought must have asserted a clearly inconsistent or

conflicting position in a prior judicial proceeding; (2) the position assumed in the former proceeding must have been successfully maintained; (3) both proceedings must involve the same parties and same questions; (4) the party claiming estoppel must have relied on or been misled by the former position; and (5) the party seeking estoppel must have changed his or her position to his or her detriment based on the representation.

Source

Chittim v. Chittim, 230 So.3d 966, 968 (Fla. 2d DCA 2017); *Fintak v. Fintak*, 120 So.3d 177, 186 (Fla. 2d DCA 2013).

See Also

1. *Nunez v. Gonzalez*, 456 So.2d 1336, 1338 (Fla. 2d 1984) ("This so-called doctrine of judicial estoppel would not apply here because Ms. Nunez did not enter her plea under oath.").
2. *Zeeuw v. BFI Waste Sys. of North Am., Inc.*, 997 So.2d 1218, 1220 (Fla. 2d DCA 2008) ("Judicial estoppel" is an equitable doctrine that prevents litigants from taking inconsistent positions in separate judicial or quasi-judicial proceedings. Judicial estoppel applies only when the position assumed in the earlier proceeding was successfully maintained; to find that a party to be estopped has successfully maintained a claim or position requires that the first court adopt the claim or position, either as a preliminary matter or as part of a final disposition.).

§18:130.1.3 Elements — 3rd DCA

The doctrine of judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial proceedings. Importantly, an estoppel is not raised by conduct of one party to a suit, unless by reason thereof the other party has been so placed as to make it act in reliance upon it unjust to him to allow that first party to subsequently change his position.

Source

Stettner v. Richardson, 143 So.3d 987, 991 (Fla. 3d DCA 2014).

See Also

1. *Federal Deposit Ins. Corp. v. Nationwide Equities Corp.*, 304 So.3d 1240, 1246 (Fla. 3d DCA 2020) (Scales, J., concurring).
2. *State Farm Mutual Automobile Insurance Company v. Smalley Transport Company*, 696 So.2d 522 (Fla. 3d DCA 1997).
3. *Khan v. Simkins Industries, Inc.*, 687 So.2d 16, 18 (Fla. 3d DCA 1996) ("Thus, the identities of the real parties in interest requirement is missing and judicial estoppel cannot apply.").
4. *Dunne v. Somoano*, 550 So.2d 5, 7 (Fla. 3d DCA 1989) ("Those doctrines prevent a party from pleading a position inconsistent with prior contentions."), *rev. denied*, 563 So.2d 631 (Fla. 1990).
5. *Leitman v. Boone*, 439 So.2d 318, 322 (Fla. 3d DCA 1983), *disagreed with on other grounds by Gibson v. Courtois*, 539 So.2d 459 (Fla. 1989).
6. *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1338 (Fla. 3d DCA 1979), *cert. denied*, 378 So.2d 342 (Fla. 1979).

§18:130.1.4 Elements — 4th DCA

Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings. The elements of judicial estoppel are the same as equitable estoppel, with the added elements of successfully maintaining a position in one proceeding, while taking an inconsistent position in a later proceeding, in which the same parties and questions are involved. The elements of equitable estoppel are (1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.

Source

Bueno v. Workman, 20 So.3d 993, 997 (Fla. 4th DCA 2009).

See Also

1. *Grau v. Provident Life and Accident Ins. Co*., 899 So.2d 396, 400, (Fla. 4th DCA 2005) (the general rule of judicial estoppel in Florida appears to be this: A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions, subject to the "special fairness and policy considerations" exception to the mutuality of parties requirement. … The "prejudice" component of judicial estoppel occurs when "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).
2. *Bernard Berman, P.A. v. P. Gary Stern, M.D., P.A.*, 731 So.2d 148, 149 (Fla. 4th DCA 1999).
3. *V.I.P. Real Estate Corporation v. Florida Executive Realty Management Corp.*, 650 So.2d 199, 200 (Fla. 4th DCA 1995) ("[T]he rule of estoppel which forbids the successful assertion of inconsistent positions in litigation only applies where the inconsistent position first asserted was successfully asserted or where the party against whom the positions are asserted relied to its detriment on the earlier inconsistent position.").
4. *Kaufman v. Lassiter*, 616 So.2d 491, 493 (Fla. 4th DCA 1993), *rev. denied*, 624 So.2d 267 (Fla. 1993), *appeal after remand*, 666 So.2d 164 (Fla. 4th DCA 1995).
5. *MacKay v. Florida Power & Light Company*, 524 So.2d 1068 (Fla. 4th DCA 1988) (referring to the applicable legal concept as equitable estoppel).
6. *Palm Beach County v. Boca Development Associates, Ltd.*, 485 So.2d 449 (Fla. 4th DCA 1986), *rev. denied*, 492 So.2d 1330 (1986).
7. *JSZ Fin. Co., Inc. v. Whipple,* 939 So.2d 1189, 1191 (Fla. 4th DCA 2006).

§18:130.1.5 Elements — 5th DCA

In general, the doctrine of estoppel prevents a person from unfairly asserting inconsistent positions. One who assumes a particular position or theory in a case is judicially estopped in a later phase of that same case, or in another case, from asserting any other or inconsistent position toward the same parties and subject matter. In practice, this means when a court accepts a party's allegation in one suit, the doctrine of estoppel will not permit that party to unfairly assert a contrary position in a later action involving the same parties and subject matter. Hence, a party who accepts the benefit of an order is estopped from urging error upon the same order. While estoppel does not validate an otherwise invalid decree, it prevents a party who sought and benefitted from an order from questioning its validity.

Source

In re Adoption of D.P.P., 158 So.3d 633, 638-639 (Fla. 5th DCA 2014).

See Also

1. *Smith v. Avatar Properties, Inc.*, 714 So.2d 1103, 1107 (Fla. 5th DCA 1998) ("Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings. The doctrine is 'designed to prevent parties from making a mockery of justice by inconsistent pleadings.' ").
2. *Wooten v. Rhodus*, 470 So.2d 844, 847 (Fla. 5th DCA 1985) ("[A] party will not be allowed to assert and assume inconsistent positions in successive lawsuits, where to do so prejudices the other party, and where it is manifestly unjust to allow the change of position to prevail.").
3. *Hadden v. State Farm Fire & Cas. Co.*, 37 So.3d 918 (Fla. 5th DCA 2010) (Judicial estoppel is "an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings.").
4. *Marrero v. Rea*, 312 So. 3d 1041, 1049 (Fla. 5th DCA 2021).

§18:130.2 References

1. 22 Fla. Jur. 2d *Estoppel and Waiver* §§62, 63 (2005).
2. 28 Am. Jur. 2d *Estoppel and Waiver* §§71–79 (2000).
3. 31 C.J.S. *Estoppel* §§137–152 (1996).

4. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988) ("We are also mindful of the equitable concept of judicial estoppel. This doctrine, distinct from that of equitable estoppel, applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior litigation."), *cert. denied*, 488 U.S. 967, 109 S.Ct. 495 (1988).
5. Marney C. Sims, Note, *Estop It! Judicial Estoppel and Its Use in Americans with Disabilities Act Litigation*, 34 Hous. L. Rev. 843 (1997).
6. Andrea C. Luby, Note, *Estopping Enforcement of the Americans with Disabilities Act*, 13 J.L. & Pol. 415 (1997).
7. Anne E. Beaumont, Note, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. Rev. 1529 (1996).
8. Eric A. Scheiber, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions*, 30 Loy. L.A. L. Rev. 323 (1996).
9. Heather Hamilton, Note, *Judicial Estoppel, Social Security Disability Benefits and the ADA: The Circuits Diverge*, 9 DePaul Bus. L.J. 127 (1996).
10. Douglas W. Henkin, Comment, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711 (1991).
11. Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409 (1987) (The article proposes a definition "gleaning the most well-accepted and well-reasoned elements" of the various cases on the subject: "Judicial estoppel should bar the introduction of a party's factual assertions to a court when these assertions are inconsistent with some other version of the facts that inured to the party's benefit in some other judicial proceeding.").
12. Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244 (1986).
13. Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946).
14. T. H. Malone, *The Tennessee Law of Judicial Estoppel*, 1 Tenn. L. Rev. 1 (1922).

§18:130.3 Defenses

1. **Application of Defense:** The doctrine of judicial estoppel does not elevate mere prior inconsistent statements into a case busting equitable defense. *Grau v. Provident Life and Accident Ins. Co*., 899 So.2d 396, 401 (Fla. 4th DCA 2005).

2. **Prior Pleadings not before the Court** *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A., v. Weiss*, 704 So.2d 214, 216 (Fla. 2d DCA 1998) ("Because the Dade County pleadings were not before the court on proper grounds, the trial court had no basis to determine the judicial estoppel issue.").

§18:130.4 Related Matters

1. **Law of the Case:** The doctrine of the law of the case is a principle of judicial estoppel. *Drdek v. Drdek*, 79 So.3d 216, 218-19 (Fla. 4th DCA 2012); *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 102 (Fla. 2001). It applies when "successive appeals are taken in the same case." *Id.* It requires that questions of law actually decided on appeal must govern the case in the appellate court and in the lower tribunal in all subsequent stages of the proceeding. *Id.* Its purpose is "to lend stability to judicial decisions and the jurisprudence of the state, as well as to avoid 'piecemeal' appeals and to bring litigation to an end as expeditiously as possible." *Strazzulla v. Hendrick*, 177 So.2d 1, 3 (Fla. 1965). Although the doctrine is "a self-imposed restraint that courts abide by," *State v. Owen*, 696 So.2d 715, 720 (Fla.1997), once made by the appellate court, such decisions "will seldom be reconsidered or reversed, even though they appear to have been erroneous." *McGregor v. Provident Trust Co. of Philadelphia*, 162 So. 323, 327 (Fla. 1935). Reconsideration will occur only when "'manifest injustice' will result from a strict and rigid adherence to the rule." *Strazzulla,* 177 So.2d at 4. "Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be

the facts of the case." *Juliano,* 801 So.2d at 102. *Parker,* 804 So.2d at 497. *Wise v. Wise*, 834 So.2d 887, 888 (Fla. 1st DCA 2002).

2. **Successfully Assume a Position:** In order to work an estoppel, the parties must be the same, the same issues must be involved, and the position assumed in the former trial must have been successfully maintained. *Olmsted v. Emmanuel*, 783 So.2d 1122, 1126 (Fla. 1st DCA 2001).

§18:140 GRATUITOUS ASSUMPTION OF DUTY

§18:140.1 Elements — Florida Supreme Court

Section 324A of the Restatement sets forth the following standard for assessing liability in such cases: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:

1. his failure to exercise reasonable care increases the risk of such harm; or
2. he has undertaken to perform a duty owed by the other to the third person; or
3. the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts §324A (1965).

Source

Wallace v. Dean, 3 So.3d 1035, 1052 (Fla. 2009).

See Also

1. *Pollock v. Florida Dept. of Highway Patrol*, 882 So.2d 928, 942 (Fla. 2004).
2. *Kerfoot v. Waychoff*, 501 So.2d 588, 589 (Fla. 1987) (The district court recognized the principle that "an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care.").
3. *Slemp v. City of North Miami*, 545 So.2d 256, 259 (Fla. 1989).
4. *Gooding v. University Hospital Building, Inc.* 445 So.2d 1015, 1019 (Fla. 1984).
5. *Banfield v. Addington*, 140 So. 893, 896 (Fla. 1932) ("where a man interferes gratuitously, he is bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case.").
6. *Clay Elec. Co-op., Inc. v. Johnson*, 873 So.2d 1182, 1186 (Fla. 2003).

§18:140.1.1 Elements — 1st DCA

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:

1. his failure to exercise reasonable care increases the risk of such harm; or
2. he has undertaken to perform a duty owed by the other to the third person; or
3. the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts, §324A (1965).

Source

Johnson v. Lance, Inc., 790 So.2d 1144, 1146 (Fla. 1st DCA 2001), *approved by*, *Clay Elec. Co-op., Inc. v. Johnson*, 873 So.2d 1182, 1186 (Fla. 2003).

See Also

1. *White v. City of Waldo*, 659 So.2d 707, 710 (Fla. 1st DCA 1995), *cause dismissed*, 666 So.2d 901 (Fla. 1996), *rev. denied*, 667 So.2d 774 (Fla. 1996).
2. *Hartley v. Floyd*, 512 So.2d 1022, 1024 (Fla. 1st DCA 1987), *rev. denied*, 518 So.2d 1275 (Fla. 1987).
3. *Klonis v. Armstrong*, 436 So.2d 213, 218 (Fla. 1st DCA 1983), *pet. for rev. denied*, 449 So.2d 264 (Fla. 1984).
4. *Padgett v. School Board of Escambia County*, 395 So.2d 584, 585 (Fla. 1st DCA 1981).
5. *Fruehauf Corporation v. Aetna Insurance Company*, 336 So.2d 457, 460 (Fla. 1st DCA 1976).

§18:140.1.2 Elements — 2nd DCA

Pursuant to the "undertaker's doctrine," one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:

(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts, §324A (1965).

Source

Estate of Johnson ex rel. Johnson v. Badger Acquisition Of Tampa LLC, 983 So.2d 1175, 1186 (Fla. 2d DCA 2008).

See Also

1. *Chiang v. Wildcat Groves, Inc.*, 703 So.2d 1083, 1086 (Fla. 2d DCA 1997), *rev. denied*, 717 So.2d 536 (Fla. 1998) ("We note that the appellees did not directly attack Dr. Chiang's theory of liability premised on their gratuitous assumption of a common law duty of care to Kitschke. … Restatement (Second) of Torts §323 (1965). Accordingly, we do not address the sufficiency of the complaint's allegations to state a cause of action.").
2. *Barfield v. Langley*, 432 So.2d 748, 749 (Fla. 2d DCA 1983) ("It is axiomatic that an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care.").
3. *Blackmon v. Nelson, Hesse, Cyril, Weber & Sparrow*, 419 So.2d 405, 406 (Fla. 2d DCA 1982).
4. *Fidelity and Casualty Company of New York v. L.F.E. Corporation*, 382 So.2d 363, 367 (Fla. 2d DCA 1980).
5. *Blackmon v. Nelson, Hesse, Cyril, Weber & Sparrow*, 419 So.2d 405, 406 (Fla. 2d DCA 1982).

§18:140.1.3 Elements — 3rd DCA

In *Clay Electric Cooperative, Inc. v. Johnson,* 873 So.2d 1182, 1185 (Fla. 2003), the Court used the standard set forth in section 324A of the Restatement (Second) of Torts (1965):

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or
(c) the harm suffered because of reliance of the other or the third person upon the undertaking.

This standard is commonly referred to as the undertaker doctrine.

Source

Travelers Ins. Co. v. Securitylink from Ameritech, Inc., 995 So.2d 1175, 1177 (Fla. 3d DCA 2008).

See Also

1. *State of Florida, Department of Highway Safety and Motor Vehicles, Division of Highway Patrol v. Kropff*, 491 So.2d 1252, 1255 (Fla. 3d DCA 1986).
2. *Kaufman v. A-1 Bus Lines, Inc.,* 416 So.2d 863, 864 (Fla. 3d DCA 1982) ("An action undertaken for the benefit of another must be performed in accordance with a duty to exercise due care.").
3. *Sheridan v. Greenberg*, 391 So.2d 234, 236 (Fla. 3d DCA 1980).
4. *Riedel v. Sheraton Bal Harbour Assoc*., 806 So.2d 530, 532 (Fla. 3d DCA 2001).
5. *Archbishop Coleman F. Carroll High School, Inc. v. Maynoldi*, 30 So.3d 533, 541-42 (Fla. 3d DCA 2010) ("Florida's common law 'undertaker's doctrine' is detailed in a recent decision by our Supreme Court, *Wallace v. Dean,* 3 So.3d 1035 (Fla. 2009). This 'well-developed, entrenched aspect of Florida tort law' essentially follows sections 323, 324, and 324A of the Restatement (Second) of Torts (1965). 3 So.3d

at 1051. The application of the doctrine to this case involves a series of separate inquiries. First, did the school undertake to render services to Gabriel and his parents regarding the off-premises 'party' which the school should have recognized as necessary for Gabriel's protection? If so, and second, did the school fail to exercise reasonable care in rendering those services? If so, and third, did the school's failure to exercise such care increase the risk of harm to Gabriel *or* did Gabriel and his parents suffer harm because of their reliance on the school's undertaking?").

§18:140.1.4 Elements — 4th DCA

It is axiomatic that an action undertaken for the benefit of another, even gratuitously, must be performed in accordance with an obligation to exercise reasonable care.

Source

Kerfoot v. Waychoff, 469 So.2d 960, 963 (Fla. 4th DCA 1985), *approved*, 501 So.2d 588 (Fla. 1987).

See Also

1. *Gunlock v. Gill Hotels Company, Inc.*, 622 So.2d 163, 164 (Fla. 4th DCA 1993) ("We do not agree with appellants' second contention that their allegations are sufficient to state a cause of action based on breach of a gratuitous assumption of duty. The law does not recognize a cause of action for breach of a gratuitous assumption of duty where performance of the assumed duty has not commenced.").
2. *Manors of Inverrary XII Condominium Association, Inc. v. Atreco-Florida, Inc.*, 438 So.2d 490, 492 (Fla. 4th DCA 1983), *pet. for rev. dismissed*, 450 So.2d 485 (Fla. 1984).
3. *Shealor v. Ruud*, 221 So.2d 765, 769 (Fla. 4th DCA 1969) ("Since the assumed duty herein was purely proprietary in nature, if the assumed duty is performed in a negligent manner, the municipality would be liable under the basic ancient learning that one who assumes to act may thereby become subject to the duty of acting carefully if he acts at all.").

§18:140.1.5 Elements — 5th DCA

[No citation for this edition.]

§18:140.2 References

1. 38 Fla. Jur. 2d *Negligence* §§21–23 (2005).
2. 57A Am. Jur. 2d *Negligence* §§104–109 (2004).
3. 65 C.J.S. *Negligence* §35 (2000).
4. Restatement (Second) of Torts §§323, 324A (1965).
5. Florida Statutes §768.13 (2005) (Good Samaritan Act).

§18:140.3 Defenses

1. **Good Samaritan Act:** *See* Florida Statutes §768.13 (2005). In addition, *see* Florida Statutes §§768.1345–768.137 (2005).

2. **Performance has not Commenced:** The law does not recognize a cause of action for breach of a gratuitous assumption of duty where performance of the assumed duty has not commenced. *Gunlock v. Gill Hotels Company, Inc.*, 622 So.2d 163, 164 (Fla. 4th DCA 1993).

3. **Prosecutorial Immunity:** American law has long recognized that prosecutorial immunity from suit rests on the same footing as the immunity conferred upon judges and grand juries. *Office of the State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So.2d 1097, 1098 (Fla. 1993).

4. **Sovereign Immunity:** *See Pollock v. Florida Dept. of Highway Patrol*, 882 So.2d 928 (Fla. 2004).

§18:150 LACHES, DEFENSE OF

§18:150.1 Elements — Florida Supreme Court

A suit is held to be barred on the ground of laches where, and only where, the following appear:
1. Conduct on the part of the defendant, or one under whom he claims, giving rise to the situation of which complaint is raised;
2. delay in asserting the claimant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute the suit;
3. lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and
4. injury or prejudice to the defendant in the event relief is accorded to the complainant.

Source

The Florida Bar v. McCain, 361 So.2d 700, 705 (Fla. 1978).

See Also

1. *The Florida Bar v. Lipman*, 497 So.2d 1165, 1167 (Fla. 1986) (citing to *McCain*).
2. *Van Meter v. Kelsey*, 91 So.2d 327, 330 (Fla. 1956).
3. *Stephenson v. Stephenson*, 52 So.2d 684 (Fla. 1951).
4. *Cone v. Benjamin*, 27 So.2d 90, 105 (Fla. 1946).
5. *P. W. Wilkins & Co. v. Groves*, 19 So.2d 834 (Fla. 1944).
6. *Lightsey v. Lightsey,* 8 So.2d 399, 400 (Fla. 1942).
7. *Sample v. Natalby*, 162 So. 493, 496 (Fla. 1935) (Unreasonable delay in enforcing a right, coupled with a disadvantage to another, are the elements of the estoppel against the assertion of the right which is called laches.).

§18:150.1.1 Elements — 1st DCA

In order for a defendant to avail himself of the defense of laches, the evidence must show:
1. conduct on the part of the defendant, or on the part of one under whom he claims, giving rise to the situation of which the complaint is made;
2. the plaintiff, having had knowledge of the defendant's conduct, and having been afforded the opportunity to institute suit, is guilty of not asserting his rights by suit;
3. lack of knowledge on the defendant's part that the plaintiff will assert the right on which he bases his suit; and
4. injury or prejudice to the defendant in the event relief is accorded to the plaintiff or the suit is held not to be barred.

Source

McIlmoil v. McIlmoil, 784 So.2d 557, 563 (Fla. 1st DCA 2001).

See Also

1. *Jackmore v. Jackmore*, 71 So.3d 912 (Fla. 1st DCA 2011).
2. *State, Dept. of Revenue ex rel. Dees v. Petro*, 765 So.2d 792, 793 (Fla. 1st DCA 2000).
3. *Nowell v. Nowell*, 634 So.2d 235, 237 (Fla. 1st DCA 1994).
4. *Wing v. Wing*, 464 So.2d 1342, 1344 (Fla. 1st DCA 1985).
5. *Devine v. Department of Professional Regulation*, 451 So.2d 994, 996 (Fla. 1st DCA 1984).
6. *Vassallo v. Goldwire*, 18 So.3d 670, 672 (Fla. 1st DCA 2009) ("Laches is a doctrine asserted as a defense, which requires proof of (1) lack of diligence by the party against whom the defense is being asserted, and (2) prejudice to the party asserting the defense.").
7. *Zaldivar v. Okeelanta Corp.,* 877 So.2d 927, 931 (Fla. 1st DCA 2004).

§18:150.1.2 Elements — 2nd DCA

The elements of laches are:
1. conduct on the part of the defendant, or one under whom he claims, giving rise to the situation of which complaint is made;

2. delay in asserting the plaintiff's rights, he having had an opportunity to institute suit;
3. lack of knowledge or notice on the part of defendant that the plaintiff would assert the right on which he bases his suit; and
4. injury or prejudice to the defendant in event relief is accorded to the plaintiff.

Source

Blumin v. Ellis, 186 So.2d 286, 294 (Fla. 2d DCA 1966), *cert. denied*, 189 So.2d 634 (1966).

§18:150.1.3 Elements — 3rd DCA

In order for the defendant to establish the defense of laches in an action of this nature, the defendant must prove the following elements:

1. Conduct on the part of the defendant, or on the part of one under whom he/she claims, giving rise to the situation of which the complaint is made;
2. The plaintiff, having had knowledge of the defendant's conduct, and having been afforded the opportunity to institute suit, is guilty of not asserting his/her rights by filing suit;
3. Lack of knowledge on the defendant's part that the plaintiff will assert the right on which he/she bases the suit; and
4. Injury or prejudice to the defendant in the event relief is accorded to the plaintiff or the suit is held not be barred.

   Although the defendant must prove each of the elements of laches, the elements are closely related and are somewhat dependent on each other.

   The "true test" in determining whether delay in bringing an action constitutes laches so as to bar the action is whether the delay has resulted in injury, embarrassment, or disadvantage to any person and particularly to the person against whom relief is sought.

Source

Lennar Homes, Inc. v. Dorta-Duque, 972 So.2d 872, 879 (Fla. 3rd DCA 2007).

See Also

1. *Delgado v. Delgado*, No. 3D20-1119, 2021 WL 1897091, at *5 (Fla. 3d DCA May 12, 2021).
2. *Ticktin v. Kearin*, 807 So.2d 659, 664 (Fla. 3d DCA 2001).
3. *Garcia v. Guerra*, 738 So.2d 459, 462 (Fla. 3d DCA 1999) (citing *Dean v. Dean,* 665 So.2d 244, 247 (Fla. 3d DCA 1996), *rev. denied*, 675 So.2d 926 (Fla. 1996)).
4. *Dean v. Dean,* 665 So.2d 244, 247 (Fla. 3d DCA 1996), *rev. denied*, 675 So.2d 926 (Fla. 1996) ("The 'true test' in determining whether delay in bringing an action constitutes laches so as to bar the action is whether the delay has resulted in injury, embarrassment, or disadvantage to any person and particularly to the person against whom relief is sought.").
5. *G.Sharp, Inc. v. Doric Marine, Inc*., 544 So.2d 228, 229 (Fla. 3d DCA 1989) ("In contrast to the statute of limitations which is applicable at law, the equitable doctrine of laches is not based solely on the passage of time.").
6. *Corona Properties of Florida, Inc. v. Monroe County*, 485 So.2d 1314, 1318 (Fla. 3d DCA 1986).
7. *Niagara Fire Insurance Co. v. Allied Electrical Co.*, 319 So.2d 594, 595 (Fla. 3d DCA 1975), *cert. dismissed*, 322 So.2d 925 (Fla. 1975).
8. *Winston v. Dura-Tred Corp.*, 268 So.2d 426, 427 (Fla. 3d DCA 1972).
9. *Tower v. Moskowitz*, 262 So.2d 276, 279 (Fla. 3d DCA 1972), *cert. denied*, 268 So.2d 906 (Fla. 1972).

§18:150.1.4 Elements — 4th DCA

To establish the affirmative defense of laches, a defendant must prove:

1. conduct on the part of the defendant giving rise to the situation of which complaint is made;
2. failure of the plaintiff, having had knowledge or notice of the defendant's conduct, to assert [her] rights by suit;
3. lack of knowledge on the part of the defendant that plaintiff will assert the right on which [s]he bases [her] suit; and
4. injury or prejudice to the defendant in event relief is accorded to the plaintiff.

Source

Corya v. Sanders, 155 So.3d 1279, 1285 (Fla. 4th DCA 2015); *Gaines v. Gaines*, 870 So.2d 187, 188 (Fla. 4th DCA 2004).

See Also

1. *Greene v. Bursey*, 733 So.2d 1111, 1116 (Fla. 4th DCA 1999).
2. *Brumby v. Brumby,* 647 So.2d 330 (Fla. 4th DCA 1994), *cause dismissed*, 651 So.2d 1192 (Fla. 1995).
3. *Smith v. Town of Bithlo*, 344 So.2d 1288 (Fla. 4th DCA 1977), *cert. denied*, 355 So.2d 517 (Fla. 1978).
4. *Francis v. State*, 31 So.3d 285, 287 (Fla. 4th DCA 2010) ("Laches is a defense requiring proof of lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense.").

§18:150.1.5 Elements — 5th DCA

[No citation for this edition.]

§18:150.2 References

1. 35 Fla. Jur. 2d *Limitations and Laches* §§115–122 (2005).
2. 27A Am. Jur. 2d *Equity* §§140–206 (1996).
3. 30A C.J.S. *Equity* §§128–156 (1992).
4. Florida Statutes §95.11(6). "Laches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law." For a case interpreting this statute *see Corinthian Investments, Inc. v. Reeder*, 555 So.2d 871 (Fla. 2d DCA 1989), *rev. denied*, 563 So.2d 631 (Fla. 1990).
5. S. Nilsson, *Does Common-Law Laches Control the Timeliness of Equitable Actions Commenced After the Statute of Limitations Have Run?* 67 Fla. Bar J. 32 (March 1993).
6. Note, *The Doctrine of Laches in Florida: A Statutory Hybrid?* 13 Stetson L. Rev. 446 (1984).
7. Michael J. Yaworsky, Annotation, *Laches as Defense in Suit by Governmental Entity to Enjoin Zoning Violation*, 73 A.L.R.4th 870 (1989).
8. Noralyn O. Harlow, Annotation, *Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke or Suspend License to Practice Medicine*, 51 A.L.R.4th 1147 (1987).
9. M. C. Dransfield, Annotation, *Applicability of Statute of Limitations or Doctrine of Laches to Proceeding to Revoke License to Practice Medicine*, 63 A.L.R.2d 1080 (1959).

§18:150.3 Defenses

1. **Excuse:** There is a well-established rule affecting more directly the pleadings in a court of equity to the effect that where a bill upon the face of its allegations shows long acquiescence and laches by the complainants in the assertion of their claims, then it becomes necessary for them, by way of excuse for such apparent acquiescence and laches, to allege and prove some actual hindrance or impediment to the seeking of their rights, such as concealment of, or faultless want of knowledge of facts, and if they fail to allege or prove such excuse or reason for the long delay, laches will be imputed to them, and the courts will refuse their aid by reason thereof. *Norton v. Jones*, 90 So. 854, 860 (Fla. 1922).

2. **Infants:** Laches in not imputable to an infant. *Watkins v. Watkins*, 166 So. 577, 589 (Fla. 1936).

3. **Statutory Laches:** The courts have decided that periodic alimony and child support do not have a legal counterpart for purposes of statutory laches. *Brumby v. Brumby,* 647 So.2d 330, 331 (Fla. 4th DCA 1994), *cause dismissed*, 651 So.2d 1192 (Fla. 1995).

4. **Time Alone Insufficient:** Time alone is not enough to establish a claim on the doctrine of laches. *Budnick v. Silverman*, 805 So.2d 1112, 1114 (Fla. 4th DCA 2002), *rev. dismissed*, 828 So.2d 389 (Fla. 2002). *See also Tower v. Moskowitz*, 262 So.2d 276, 279 (Fla. 3d DCA 1972), *cert. denied*, 268 So.2d 906 (Fla. 1972).

§18:150.4 Related Matters

1. **Administrative Proceedings:** The sovereign, through its administrative agencies, should not be prevented from invoking the affirmative defense of laches, in the interest of protecting the public from unqualified persons practicing their profession, where failure to apply laches would effectively deprive an administrative agency of its most effective evidence to rebut an applicant's argument. *Devine v. Department of Professional Regulation*, 451 So.2d 994, 997 (Fla. 1st DCA 1984).

2. **Affirmative Defense:** Laches is an affirmative defense. As such, the burden of proving it is on those who assert it, and it must be proved by very clear and positive evidence. *Van Meter v. Kelsey*, 91 So.2d 327, 330 (Fla. 1956). *See also Bankers Insurance Co. v. Thomas*, 684 So.2d 246, 247 (Fla. 2d DCA 1996), *rev. denied*, 694 So.2d 740 (Fla. 1997). The statute of limitations and laches are affirmative defenses which should be raised by answer rather than by a motion to dismiss the complaint; and only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law, should a motion to dismiss on this ground be granted. *Rigby v. Liles*, 505 So.2d 598, 601 (Fla. 1st DCA 1987).

3. **Child Support Arrearage Cases:** In the context of child support arrearage cases, the defense of laches is only applied in extraordinary circumstances where the facts clearly show extreme prejudice. *Ticktin v. Kearin*, 807 So.2d 659, 663 (Fla. 3d DCA 2001). *See also Gaines v. Gaines*, 870 So.2d 187, 188 (Fla. 4th DCA 2004).

4. **Laches Defined:** The doctrine of laches is to actions in equity what statutes of limitations are to actions in law. *Corona Properties of Florida, Inc. v. Monroe County*, 485 So.2d 1314, 1318 (Fla. 3d DCA 1986). Laches, however, will take into consideration the prejudicial effects towards a party while a statute of limitation will not. *Reed v. Fain*, 122 So.2d 322, 325 (Fla. 2d DCA 1960), *abrogated by* 145 So.2d 858 (Fla. 1961). Laches is an unexcused delay in asserting rights during a period of time in which adverse rights in the premises have been acquired under circumstances that make it inequitable to displace such adverse rights for the benefit of those who are bound by the delay. The very great delay in this case is not excused, and it operated to prejudice the rights of others who cannot now be put in status quo. Laches is a neglect to do something that, by law, a man is obligated or in duty bound to do. The application by the courts of the doctrine of laches depends upon the circumstances of each particular case. *Norton v. Jones*, 90 So. 854, 860 (Fla. 1922). The rule is well-settled that the bar of laches will not be raised solely because of the passage of time. *Tower v. Moskowitz*, 262 So.2d 276, 279 (Fla. 3d DCA 1972), *cert. denied*, 268 So.2d 906 (Fla. 1972).

5. **Motion to Dismiss:** In order to prevail on such a motion, the appellees must establish that even taking the allegations of the four corners of the appellant's complaint as true, the complaint on its face shows "clear and positive evidence" of laches. *Bankers Ins. Co. v. Thomas*, 684 So.2d 246, 247 (Fla. 2d DCA 1996), *rev. denied*, 694 So.2d 740 (Fla. 1997).

6. **Prejudice:** Prejudice can be shown by loss of evidence on account of the unreasonable delay in bringing the claim. *Garcia v. Guerra*, 738 So.2d 459, 462 (Fla. 3d DCA 1999). In determining whether prejudice has occurred, should the JCC reach that question, the JCC must apply the general equitable tenet that delay rises to prejudice where the party defending the claim establishes that enforcement would be inequitable or unjust. *Zaldivar v. Okeelanta Corp*., 877 So.2d 927, 931 (Fla. 1st DCA 2004).

§18:160 NOVATION

§18:160.1 Elements — Florida Supreme Court

[No citation for this edition.]

See Also

1. *Mills v. McMillan,* 82 So. 812 (Fla. 1919).

§18:160.1.1 Elements — 1st DCA

Parties form a novation or new contract, only where there is a mutual agreement to substitute an existing valid obligation with a new valid obligation. Four factors are necessary to prove the parties intended to create a novation:

1. the existence of a previously valid contract;
2. the agreement of all the parties to a new contract;
3. the extinguishment of the original contractual obligation; and
4. the validity of the new contract.

Source

Seawell v. Hargarten, 28 So.3d 152, 155 (Fla. 1st DCA 2010).

See Also

1. *Young v. Morris Realty Co.* 569 So.2d 813, 814 (Fla. 1st DCA 1990) (citing to *Sans Souci v. Division of Florida Land Sales and Condominiums,* 421 So.2d 623, 630 (Fla. 1st DCA 1982)).
2. *United Bonding Insurance Co. v. Southeast Regional Builders, Inc.,* 236 So.2d 460, 463 (Fla. 1st DCA 1970).
3. *Taines v. Capital City First National Bank,* 344 So.2d 273 (Fla. 1st DCA 1977), *cert. denied*, 355 So.2d 517 (Fla. 1978).
4. *Sans Souci v. Division of Florida Land Sales and Condominiums,* 421 So.2d 623, 630 (Fla. 1st DCA 1982), *reversed after remand on other grounds,* 448 So.2d 1116 (Fla. 1st DCA 1984).

§18:160.1.2 Elements — 2nd DCA

To prove the substitution of the new contract for the old, four elements must be shown:

1. the existence of a previously valid contract;
2. the agreement of the parties to cancel the first contract;
3. the agreement of the parties that the second contract replace the first; and
4. the validity of the second contract.

Whether a novation takes place is dependent upon the intention of the parties.

Source

Thompson v. Jared Kane Co., Inc., 872 So.2d 356, 361 (Fla. 2d DCA 2004).

See Also

1. *Pinnacle Holding Inc. v. Biologics, Inc.,* 643 So.2d 642, 644 (Fla. 2d DCA 1994).

§18:160.1.3 Elements — 3rd DCA

There are four essential elements necessary to form a substitute contract or novation:

1. the existence of a previously valid contract;
2. the agreement of the parties to cancel and extinguish the first contract;
3. the agreement of the parties that the second contract takes the place of the first; and
4. the validity of the new contract.

Source

Jakobi v. Kings Creek Village Townhouse Assoc., Inc., 665 So.2d 325, 327 (Fla. 3d DCA 1995).

See Also

1. *Ades v. Bank of Montreal,* 542 So.2d 1013, 1014 (Fla. 3d DCA 1989), *rev. denied*, 551 So.2d 460 (Fla. 1989).
2. *Miami National Bank v. Forecast Construction Corp.,* 366 So.2d 1202, 1204 (Fla. 3d DCA 1979).
3. *De Las Cuevas v. Nat'l Enters., Inc.,* 927 So.2d 41, 43 (Fla. 3d DCA 2006).

§18:160.1.4 Elements — 4th DCA

The four elements necessary to demonstrate a novation are:

1. the existence of a previously valid contract;
2. the agreement to make a new contract;
3. the intent to extinguish the original contractual obligation; and
4. the validity of the new contract.

Source

Sink v. Abitibi-Price Sales Corporation, 602 So.2d 1313, 1316 (Fla. 4th DCA 1992), *rev. denied*, 613 So.2d 1 (Fla. 1992).

See Also

1. *Elmore v. Florida Power & Light Co*., 760 So.2d 968, 971 (Fla. 4th DCA 2000).
2. *S.N.W. Corporation v. Hauser*, 461 So.2d 188 (Fla. 4th DCA 1984), *petition for rev. denied*, 471 So.2d 43 (Fla. 1985).

§18:160.1.5 Elements — 5th DCA

A novation is a mutual agreement between the parties for the discharge of a valid existing obligation by the substitution of a new valid obligation. A statute in effect at the time of a novation will determine the rights and obligations of the parties to the novation even if the statute was not in effect at the inception of the original contract.

There are four essential elements necessary to form a substitute contract or novation:

1. the existence of a previously valid contract;
2. the agreement of the parties to cancel and extinguish the first contract;
3. the agreement of the parties that the second contract takes the place of the first; and
4. the validity of the new contract.

Source

Holiday Square Owners Ass'n, Inc. v. Tsetsenis, 820 So.2d 450, 455 (Fla. 5th DCA 2002).

See Also

1. *Brown v. Kelly,* 545 So.2d 518, 520 (Fla. 5th DCA 1989).
2. *U.S. Home Acceptance Corp. v. Kelly Park Hills, Inc.,* 542 So.2d 463, 464 (Fla. 5th DCA 1989).
3. *Electro-Protective Corp. v. Creative Jewelry by Kempf, Inc.,* 513 So.2d 190, 192 (Fla. 5th DCA 1987).

§18:160.2 References

1. 11 Fla. Jur. 2d *Contracts* §§225–229 (2003).
2. 58 Am. Jur. 2d *Novation* §§3–27 (2002).
3. 66 C.J.S. *Novation* §§4–10 (1998).
4. Restatement (Second) of Contracts §280 (1981).

§18:160.3 Defenses

1. **Consideration:** A novation like any other contract, must be supported by a valid consideration. *U.S. Home Acceptance Corp. v. Kelly Park Hills, Inc.,* 542 So.2d 463, 464 (Fla. 5th DCA 1989).

§18:170 REFORMATION

§18:170.1 Elements — Florida Supreme Court

In the case of *Franklin v. Jones*, 22 Fla. 526, this court held that while equity would reform a written instrument, when by a mistake it did not contain the true agreement of the parties, yet it would only do so when the mistake was plain and the proof was full and satisfactory; that the writing should be deemed to be the sole expositor of the intent of the parties until the contrary was established beyond reasonable controversy; that such relief would not be granted where the evidence was loose, contradictory, or equivocal.

Source

Jacobs v. Parodi, 39 So. 833, 837 (Fla. 1905). Note: Clear-and-convincing evidence is now required in Florida.

See Also

1. *Providence Square Ass'n, Inc. v. Biancardi*, 507 So.2d 1366, 1369 (Fla. 1987) (A court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument. This principle is applicable to instruments of conveyance of real property as well as to contracts and can be applied to correct an erroneous land description in order to protect a person's rights in real property. Notably, in reforming a written instrument, an equity court in no way alters the agreement of the parties. Instead, the reformation only corrects the defective written instrument so that it accurately reflects the true terms of the agreement actually reached.).
2. *Hopkins v. Mills*, 156 So. 532, 533 (Fla. 1934) (Where a written contract, conveyance, or discharge owing to the fraud or misrepresentation of one party and the mistake of the other fails to express the agreement which they had manifested an intent that the writing should express, the latter can get a decree for reformation of the writing, unless precluded by the statute of frauds.).
3. *Horne v. J.C. Turner Cypress Lumber Co*., 45 So. 1016, 1017 (Fla. 1908) (To reform an instrument for a mistake in writing, it must be shown that the reform sought is according to the agreement of both parties at the time the instrument was written and the mistake made. When an instrument is written as one party understands it, and not as the other party understands it, there is no ground for reform. A reformation cannot make a new instrument which the parties never agreed to make. In other words: The reformation is, not to make a new agreement between the parties, but to establish and perpetuate the old one.).
4. *Jackson v. Magbee*, 21 Fla. 622 (Fla. 1885) (Courts of Equity have not hesitated to entertain jurisdiction to reform all contracts where a fraudulent omission or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control contracts, wisely deeming such cases to be a proper exception to the rule and proving its general soundness; again, it is upon the same ground that equity interferes in the case of an *innocent* omission or insertion of a material stipulation, contrary to the intention of both parties and under a mutual mistake. To allow it to prevail in such a case would work a surprise or fraud on both parties, and certainly upon the one who is the sufferer.).

§18:170.1.1 Elements — 1st DCA

The equitable remedy of reformation is available where, due to mutual mistake, the written instrument does not accurately express the true intention or agreement of the parties. The principle is applicable to instruments of conveyance of real property as well as to contracts. In addition, reformation is proper for unilateral mistake on one side of the transaction, and inequitable conduct on the other. The underlying rationale is that - in reforming a written instrument, an equity court in no way alters the agreement of the parties. Instead, the reformation only corrects the defective written instrument so that it accurately reflects the true terms of the agreement actually reached. In a suit for reformation, the evidence of mistake, whether mutual or unilateral, must be clear and convincing.

Source

Ayers v. Thompson, 536 So.2d 1151, 1154 (Fla. 1st DCA 1988).

See Also

1. *Bevis Const. Co. v. Grace*, 134 So.2d 516, 519 (Fla. 1st DCA 1961).

§18:170.1.2 Elements — 2nd DCA

Equity may reform an instrument to express the true intent of the parties and in so doing will give consideration to equities arising from facts completely alien to the sense and construction of the instrument itself. A court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument. A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument. The fact that one party drafts the document does not preclude reformation on the grounds of mutual mistake. The rationale for reformation is that a court sitting in equity does not alter the parties' agreement, but allows the defective instrument to be corrected to reflect the true terms of the agreement the parties actually reached. Although ordinarily a writing will be looked to as the only expression of the parties' intent, in a reformation action in equity, parol evidence is admissible to demonstrate that the true intent was other than as expressed in the writing.

Source

Megiel-Rollo v. Megiel, 162 So.3d 1088, 1094 (Fla. 2d DCA 2015); *Roberts v. Pfeiffer*, 135 So.2d 246, 249 (Fla. 2d DCA 1961), *cert. denied*, 140 So.2d 116 (Fla. 1962).

See Also

1. *Federal Ins. Co. v. Donovan Indus., Inc.*, 75 So.3d 812 (Fla. 2d DCA 2011)
2. *Enterprise Leasing Co. v. Demartino*, 15 So.3d 711, 715 (Fla. 2d DCA 2009) ("When an instrument is drawn and executed which is intended to carry into execution an agreement but which by mistake of the draftsman violates or does not fulfill that intention, equity will reform the instrument so as to conform to the intent of the parties.").

§18:170.1.3 Elements — 3rd DCA

Reformation is an equitable remedy which acts to correct an error not in the parties' agreement but in the writing which constitutes the embodiment of that agreement. Thus, where the alleged mistake in the writing is the product of the parties' mutual mistake, or unilateral mistake on the part of one party and inequitable conduct by the other, the writing should be reformed to accurately reflect the parties' agreement. The underlying rationale is that in reforming the instrument the agreement of the parties is in no way altered but merely corrects the defect in the written document to reflect the true terms of the parties' agreement.

Source

Kolski ex rel. Kolski v. Kolski, 731 So.2d 169, 173 (Fla. 3d DCA 1999).

See Also

1. *Department of Transp. v. Ronlee, Inc*., 518 So.2d 1326, 1328 (Fla. 3d DCA 1987), *rev. denied*, 528 So.2d 1183 (Fla. 1988).
2. *KT Holdings USA, Inc. v. Akerman, Senterfitt & Eidson*, 34 So.3d 61 (Fla. 3d DCA 2010).

§18:170.1.4 Elements — 4th DCA

A court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument. A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument. The fact that one party drafts the document does not preclude reformation on the grounds of mutual mistake. The rationale for reformation is that a court sitting in equity does not alter the parties' agreement, but allows the defective instrument to be corrected to reflect the true terms of the agreement the parties actually reached. Although ordinarily a writing will be looked to as the only expression of the parties' intent, in a reformation action in equity, parol evidence is admissible to demonstrate that the true intent was other than as expressed in the writing.

Source

Circle Mortg. Corp. v. Kline, 645 So.2d 75, 77 (Fla. 4th DCA 1994).

See Also

1. Losner v. HSBC Bank USA, N.A., 190 So.3d 160 (Fla. 4th DCA 2016).
2. *Steffens v. Steffens*, 422 So.2d 963, 964 (Fla. 4th DCA 1982) (When an instrument is drawn and executed which is intended to carry into execution an agreement but which by mistake of the draftsman violates or does not fulfill that intention, equity will reform the instrument so as to conform to the intent of the parties. Relief should be given where, through a mistake of the scrivener, the instrument contains a clerical error or fails to define the terms as agreed on by the parties.).

§18:170.1.5 Elements — 5th DCA

Reformation is an equitable remedy. The Supreme Court of Florida summarized the doctrine in the 1905 case of *Jacobs v. Parodi*, 39 So. 833 (Fla. 1905), stating: Where an agreement has been actually entered into, but the contract, deed, or other instrument in its written form does not express what was really intended by the parties thereto, equity has jurisdiction to reform the written instrument so as to conform to the intention, agreement, and understanding of all the parties. *Id.* Reformation, at its essence, acts to correct an error not in the parties' agreement but in the writing which constitutes the embodiment of that agreement. Thus the Florida courts have consistently held that where a mistaken writing is the product of the parties' mutual mistake, or unilateral mistake on the part of one party and inequitable conduct by the other, the writing should be reformed to accurately reflect the parties' agreement. *See e.g.*, *Providence Square Ass'n, Inc. v. Biancardi*, 507 So.2d 1366, 1372 & n. 3 (Fla. 1987); *Hopkins v. Mills*, 156 So. 532 (Fla. 1934); *Brown v. Brown*, 501 So.2d 24, 26 (Fla. 5th DCA 1986), *rev. denied*, 511 So.2d 297 (Fla. 1987); 9 Fla. Jur. 2d *Cancellation, Reformation, and Rescission of Instruments* §65 (1979). Equity will decree reformation only where it is established that an agreement exists to which a writing may be made to conform. *See, e.g., Langley v. Irons Land & Dev. Co.*, 114 So. 769 (Fla. 1927); *Mills v. Mills*, 339 So.2d 681 (Fla. 1st DCA 1976).

Source

Smith v. Royal Automotive Group, Inc., 675 So.2d 144, 150 (Fla. 5th DCA 1996).

See Also

1. *Schroeder v. Gebhart*, 825 So.2d 442, 445 (Fla. 5th DCA 2002), *rev. denied*, 845 So.2d 892 (Fla. 2003).

§18:170.2 References

1. 9 Fla. Jur. 2d, *Cancellation, Reformation, and Rescission of Instruments* §§52–81 (2004).
2. 66 Am. Jur. 2d *Reformation of Instruments* §§10–27, 69–75, 100–111 (2001).
3. 76 C.J.S. *Reformation of Instruments* §§12–33, 77–79 (1994).
4. Restatement (Second) of Contracts §§154–156 (1979).
5. Thomas E. Baynes, Jr., *More than you Wanted to Know about the Doctrine of Reformation*, 78 Fla. Bar. J. 58 (2004).
6. George E. Palmer, *Reformation and the Statute of Frauds*, 65 Mich. L. Rev. 421 (1967).

§18:170.3 Defenses

1. **Bona Fide Purchaser for Value:** Reformation is generally allowed against all persons except a bona fide purchaser for value and without notice. Notice sufficient to eliminate the transferee as a bona fide purchaser for value without notice can be either "actual" or "constructive." In *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932), the supreme court instructed that notice is of two kinds, actual and constructive. Constructive notice has been defined as notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes. Actual notice is also said to be of two kinds: (1) express, which includes what might be called direct information; and (2) implied, which is said to include notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use, or, as it is sometimes called, implied actual notice. Constructive notice is a legal inference, while implied actual notice is an inference of fact, but the same facts may sometimes be such as to prove both constructive and implied actual notice. *Florida Masters Packing, Inc. v. Craig*, 739 So.2d 1288, 1290 (Fla. 4th DCA 1999).

2. **Burden on Party Seeking Reformation:** The burden was on the plaintiff to show that a different contract was entered into from that which was reduced to writing. *Fidelity Phenix Fire Ins. Co. v. Hilliard*, 62 So. 585, 586 (Fla. 1913); *Samet v. Prudential Ins. Co. of America*, 294 So.2d 35, 36 (Fla. 3d DCA 1974).

3. **Mistake of Law:** Reformation is generally appropriate only to cure a mistake of fact, not a mistake of law, as to the legal effect of the parties' agreement. *Sander v. Ball*, 781 So.2d 527, 530 (Fla. 5th DCA 2001).

4. **Mistake at Time of Contract:** It is universally held that in order for a trial court to reform a contract, the evidence must clearly and convincingly show a mutual mistake of fact. Otherwise, the court will not be able to overcome the strong presumption that the contract expresses the intent of the parties. *Boston Old Colony Insurance Company v. Popple*, 305 So.2d 877, 879 (Fla. 1st DCA 1974). Moreover, the mutual mistake must be determined to have existed at the time the contract was reduced to writing. *Old Colony Insurance Company v. Trapani*, 118 So.2d 850, 852 (Fla. 2d DCA 1960); *Canal Ins. Co. v. Hartford Ins. Co.*, 415 So.2d 1295, 1297 (Fla. 1st DCA 1982), *rev. denied*, 424 So.2d 761 (Fla. 1983).

5. **Negligence Insufficient:** The party seeking reformation must be free from negligence. *Continental Casualty Co. v. City of Ocala*, 149 So. 381, 386 (Fla. 1933).

6. **No Consideration:** The general rule is that a court of equity will not undertake to reform an instrument which is merely voluntary and based upon no consideration. *Burleson v. Brogdon*, 364 So.2d 491, 493 (Fla. 1st DCA 1978), *appeal after remand*, 389 So.2d 11 (Fla. 1st DCA 1980).

§18:170.4 Related Matters

1. **Clear and Convincing Evidence Required:** Even though a unilateral mistake is a sufficient ground for reforming a trust which was created without any consideration, the burden is nonetheless on the party seeking reformation to establish by clear-and-convincing evidence the mistake. *Schroeder v. Gebhart*, 825 So.2d 442, 446 (Fla. 5th DCA 2002), *rev. denied*, 845 So.2d 892 (Fla. 2003). Since reformation is a well-established branch of equity jurisprudence, it seems most appropriate to apply the test generally used in this type of equitable action, that of "clear and convincing evidence," rather than the "beyond a reasonable doubt" test erroneously applied by the trial court and which is the highest degree of proof, applicable to criminal matters. The higher degree of clear and convincing evidence is an exception to the usual civil burden of the greater weight of the evidence. *Allstate Ins. Co. v. Vanater*, 297 So.2d 293, 295 (Fla. 1974).

2. **Bid on Public Contract:** Where a contractor makes a unilateral error in formulating his bid for a public contract, the remedy is rescission of the contract. Jones, *The Law of Mistaken Bids*, 48 U. Cin. L. Rev. 43, 49 (1979); Annotation, *Right of Bidder for State or Municipal Contract to Rescind Bid on Ground that Bid was Based Upon His Own Mistake or that of His Employee,* 2 A.L.R.4th 991 (1980). Florida courts have permitted a contractor to *withdraw* a bid on a public contract, subject to certain equitable conditions. In *State Board of Control v. Clutter Construction Corp.*, 139 So.2d 153 (Fla. 1st DCA 1962), *cert. denied*,146 So.2d 374 (Fla. 1962), a contractor was permitted to withdraw a bid on a showing of the following equitable factors: (1) the bidder acted in good faith in submitting the bid; (2) in preparing the bid there was an error of such magnitude that enforcement of the bid would work severe hardship upon the bidder; (3) the error was not a result of gross negligence or willful inattention; (4) the error was discovered and communicated to the public body, *along with a request for permission to withdraw the bid,* before acceptance. No reported Florida decision has permitted reformation by belated request of a bid contract for a public project in order to make it profitable to the contractor. *Department of Transportation v. Ronlee, Inc*., 518 So.2d 1326, 1327 (Fla. 3d DCA 1987), *rev. denied*, 528 So.2d 1183 (Fla. 1988).

3. **Defensive use of Reformation:** Reformation may be used defensively. *Chase v. Sullivan*, 126 So. 359, 360 (Fla. 1930).

4. **Insurance Contracts:** The decisive question before this court is whether the plaintiff established sufficient evidence to justify the granting of reformation and judgment in its favor by the lower court. To justify the

reformation of an insurance contract or policy it must appear that by inadvertence, fraud, or mutual mistake of the parties, the policy or contract fails to express, or conform to the contemplation of the parties. Where one of these grounds exists, equity will grant relief or reformation if it can be demonstrated that the contract, as reduced to writing, does not accurately set forth the meeting of the minds of the parties. In ascertaining whether a mistake actually exists, it is essential to determine the contemplations of the parties at the time the contract was reduced to writing. *Old Colony Ins. Co. v. Trapani*, 118 So.2d 850, 852 (Fla. 2d DCA 1960).

5. **Mutual Mistake:** A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument. *Federal Ins. Co. v. Donovan Indus., Inc.*, 75 So.3d 812 (Fla. 2d DCA 2011); *Gee v. U.S. Bank Nat. Assoc.*, 72 So.3d 211 (Fla. 5th DCA 2011) (an equitable remedy to express true intent); *Providence Square Ass'n, Inc. v. Biancardi*, 507 So.2d 1366, 1372 (Fla. 1987).

6. **Parol Evidence Rule:** The right of reformation, wherever allowed, is necessarily an invasion or limitation of the parol evidence rule, since when equity reforms a writing, it enforces an oral agreement at variance with the writing which the parties had agreed upon as a memorial of their bargain. *Mathews v. Florida Crossbreeds, Inc*., 330 So.2d 183, 185 (Fla. 2d DCA 1976); *Roberts v. Pfeiffer*, 135 So.2d 246, 249 (Fla. 2d DCA 1961), *cert. denied*, 140 So.2d 116 (Fla. 1962).

7. **Reformation - Remedy for Mistake:** Cancellation will not be decreed for mistake, where reformation of the instrument will furnish an adequate remedy. *Shell Creek Land Co. v. Watson*, 133 So. 621 (Fla. 1931).

8. **Relation Back:** A reformation relates back to the time the instrument was originally executed and simply corrects the document's language to read as it should have read all along. *Providence Square Ass'n, Inc. v. Biancardi*, 507 So.2d 1366, 1371 (Fla. 1987).

9. **Signature:** Given that equity regards as done that which ought to be done, there is no compelling reason why a court may not reform a written instrument to reflect the intentions of the parties, including a party's omitted signature. Restatement (Second) of Contracts §156. *Smith v. Royal Automotive Group, Inc*., 675 So.2d 144, 154 (Fla. 5th DCA 1996). The decisions from this and other jurisdictions are replete with instances in which written instruments have been reformed on the ground of mutual mistake so as to include land erroneously omitted; to delete land which had been erroneously included; to add signatures of witnesses and seals to instruments which were inadvertently omitted. Research reveals only one decision, however, which squarely confirms the power of a court of equity to reform a mortgage by adding the signature of a mortgagor inadvertently omitted therefrom by reason of mutual mistake so as to evidence the true agreement of the parties. *Tri-County Produce Distributors, Inc. v. Northeast Production Credit Ass'n*, 160 So.2d 46, 49 (Fla. 1st DCA 1963).

10. **Unilateral Mistake:** Reformation is proper for unilateral mistake on one side of the transaction, and inequitable conduct on the other. *Ayers v. Thompson*, 536 So.2d 1151, 1154 (Fla. 1st DCA 1988).

§18:180 RES JUDICATA (DOCTRINE OF CLAIM PRECLUSION)

§18:180.1 Elements — Florida Supreme Court

The doctrine of res judicata applies when all four of the following conditions are present:
1. identity of the thing sued for;
2. identity of the cause of action;
3. identity of persons and parties to the action; and
4. identity of quality in persons for or against whom claim is made.

Source

Marquardt v. State, 156 So.3d 464, 481 (Fla. 2015); *The Florida Bar v. Rodriguez*, 959 So.2d 150, 158 (Fla. 2007).

See Also

1. *Albrecht v. State of Florida,* 444 So.2d 8, 12 (Fla. 1984), *superseded by statute on other grounds as stated in Bowen v. Florida Dept. of Envtl. Regulation*, 448 So.2d 566 (Fla. 2d DCA 1984).
2. *Youngblood v. Taylor,* 89 So.2d 503, 505 (Fla. 1956).
3. *W. E. Avant v. Hammond Jones, Inc.*, 79 So.2d 423, 424 (Fla. 1955).
4. *Donahue v. Davis,* 68 So.2d 163, 169 (Fla. 1953).

§18:180.1.1 Elements — 1st DCA

Under the doctrine of res judicata, a subsequent action is barred if there is (1) identity of the thing sued for, (2) identity in the cause of action, (3) identity of persons and parties to the actions, and (4) identity of the quality or capacity of the person for or against whom the claim is made. Res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also of claims that could have been raised.

Source

Seminole Tribe of Florida v. State, Dept. of Revenue, 202 So.3d 971, 973 (Fla. 1st DCA 2016); *Miller v. Florida Dept. of Corrections*, 153 So.3d 392, 393 (Fla. 1st DCA 2014).

See Also

1. *Keller Kitchen Cabinets v. Holder,* 586 So.2d 1132, 1142 (Fla. 1st DCA 1991), *reversed on other grounds*, 610 So.2d 1264 (Fla. 1992).
2. *State of Florida, Dept. of Environmental Protection v. Burgess,* 667 So.2d 267, 269 (Fla. 1st DCA 1995).
3. *St. Joseph Hospital v. Causey,* 667 So.2d 464, 468 (Fla. 1st DCA 1996), *rev. denied*, 675 So.2d 121 (Fla. 1996).
4. *Evans v. Evans,* 595 So.2d 988 (Fla. 1st DCA 1992).
5. *Peeples v. Peeples*, 871 So.2d 945, 946 (Fla. 1st DCA 2004).
6. *Weaver v. McNeil*, 42 So.3d 805 (Fla. 1st DCA 2010).
7. *AMEC Civil, LLC v. DOT*, 41 So.3d 235 (Fla. 1st DCA 2010).

§18:180.1.2 Elements — 2nd DCA

The doctrine of res judicata applies when four identities are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made.

Under res judicata a final decree of judgment bars a subsequent suit between the same parties based on the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised But a claim is not barred by res judicata simply because it could have been raised in the first action if it does not otherwise meet the four identities required by the doctrine.

Source

Harllee v. Procacci, 154 So.3d 1145, 1148-1149 (Fla. 2d DCA 2014).

See Also

1. *Amiri v. McGreal*, No. 2D20-953, 2021 WL 2385392, at *2 (Fla. 2d DCA June 11, 2021).
2. *Jones v. State ex rel. City of Winter Haven*, 870 So.2d 52, 55 (Fla. 2d DCA 2003).
3. *Holt v. Brown's Repair Service, Inc.*, 780 So.2d 180, 181 (Fla. 2d DCA 2001).
4. *Cole v. First Development Corporation of America*, 339 So.2d 1130, 1131 (Fla. 2d DCA 1976).
5. *M.C.G. v. Hillsborough County School Board,* 927 So.2d 224, 227 n.2 (Fla. 2d DCA 2006).
6. *Campbell v. State*, 906 So.2d 293, 295, (Fla. 2d DCA 2004).

§18:180.1.3 Elements — 3rd DCA

The doctrine of res judicata, also known as claim preclusion, applies where four elements are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim in made.

Source

Pearce v. Sandler, 219 So.3d 961, 965 (Fla. 3d DCA 2017); *Professional Roofing and Sales, Inc. v. Flemmings*, 138 So.3d 524, 527 (Fla. 3d DCA 2014).

See Also

1. *Otto's Heirs v. Kramer*, 797 So.2d 594, 596 (Fla. 3d DCA 2001), *rev. denied*, 821 So.2d 297 (Fla. 2002).
2. *Chimerakis v. Sentry Ins. Mut. Co*., 804 So.2d 476, 479 (Fla. 3d DCA 2001).
3. *Gomez-Ortega v. Dorten, Inc.,* 670 So.2d 1107, 1108 (Fla. 3d DCA 1996).
4. *B & V Limited v. All Dade General Construction, Inc.,* 662 So.2d 413, 415 (Fla. 3d DCA 1995).
5. *Maison Grande Condominium Assoc. Inc. v. Dorten, Inc.*, 621 So.2d 762, 764 (Fla. 3d DCA 1993), *rev. denied*, 634 So.2d 625 (Fla. 1994).
6. *Personnel One, Inc. v. John Sommerer & Company, P.A.,* 564 So.2d 1217, 1218 (Fla. 3d DCA 1990).
7. *Baxas Howell Mobley, Inc. v. BP Oil Co.*, 630 So.2d 207, 209 (Fla. 3d DCA 1993).
8. *Jenkins v. Lennar Corp.*, 972 So.2d 1064, 1065 (Fla. 3rd DCA 2007).

§18:180.1.4 Elements — 4th DCA

In order for res judicata to bar subsequent claims, four identities must be established: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the actions; and (4) identity of the quality or capacity of the persons for or against whom the claim is made.

Source

Dougan v. Bradshaw, 198 So.3d 878, 883 (Fla. 4th DCA 2016); *Sena v. Pereira*, 179 So.3d 433, 435 (Fla. 4th DCA 2015).

See Also

1. *Jasser v. Saadeh*, 103 So.3d 982 (Fla. 4th DCA 2014).
2. *Zikofsky v. Marketing 10*, Inc., 904 So.2d 520, 523 (Fla. 4th DCA 2005).
3. *Tyson v. Viacom, Inc*., 890 So.2d 1205, 1209 (Fla. 4th DCA 2005), *rev. denied*, 912 So.2d 1219 (Fla. 2005).
4. *Selim v. Pan American Airways Corp*., 889 So.2d 149, 153 (Fla. 4th DCA 2004),
5. *U.S. Project Management, Inc. v. Parc Royale East Development, Inc*., 861 So.2d 74, 76 (Fla. 4th DCA 2003).
6. *Lefler v. Lefler,* 776 So.2d 319, 323 (Fla. 4th DCA 2001).
7. *State Street Bank and Trust Company v. Badra*, 765 So.2d 251, 253 (Fla. 4th DCA 2000), *rev. denied*, 786 So.2d 1183 (Fla. 2001).
8. *Hittel v. Rosenhagen,* 492 So.2d 1086, 1089 (Fla. 4th DCA 1986).
9. *Capricorn Marble Company v. George Hyman Construction Co.,* 462 So.2d 1208, 1209 (Fla. 4th DCA 1985).
10. *Signo v. Florida Farm Bureau Casualty Insurance Co.,* 454 So.2d 3, 4 (Fla. 4th DCA 1984).
11. *Seaboard Coast Line Railroad Co. v. Industrial Contracting Co.,* 260 So.2d 860, 862 (Fla. 4th DCA 1972).
12. *Zamora v. Florida Atlantic University Board of Trustees*, 969 So.2d 1108, 1112 (Fla. 4th DCA 2007).
13. *Gilbert v. Florida Power & Light Co.*, 981 So.2d 609, 613 (Fla. 4th DCA 2008).

§18:180.1.5 Elements — 5th DCA

For res judicata to apply, there must be four identities:

1. identity of the thing sued for;
2. identity of the cause of action;
3. identity of persons and parties; and
4. identity of the quality or capacity of the persons for or against whom the claim is made.

Source

Wildflower, LLC v. St. Johns River Water Management Dist., 179 So.3d 369, 374 (Fla. 4th DCA 2015).

See Also

1. *Hicks v. Hoagland*, 953 So.2d 695, 698 (Fla. 5th DCA 2007).
2. *Costello v. The Curtis Bldg. Partnership*, 864 So.2d 1241, 1244 (Fla. 5th DCA 2004).

3. *T & G Constructors, Inc. v. Pro-Tech Conditioning and Heating Service, Inc*., 834 So.2d 258, 260 (Fla. 5th DCA 2002).
4. *State Farm Mut. Auto. Ins. Co. v. Yenke*, 804 So.2d 429, 431 (Fla. 5th DCA 2001).
5. *Acadia Partners, L.P. v. Tompkins*, 759 So.2d 732, 738 (Fla. 5th DCA 2000).
6. *Lobato-Bleidt v. Lobato*, 688 So.2d 431, 434 (Fla. 5th DCA 1997).
7. *Husky Industries, Inc. v. Griffith,* 422 So.2d 996, 999 (Fla. 5th DCA 1982).

§18:180.2 References

1. 32A Fla. Jur. 2d *Judgments and Decrees* §110–115 (2003).
2. 46 Am. Jur. 2d *Judgments* §§514–561 (1994).
3. 50 C.J.S. *Judgments* §§702–707 (1997).
4. Restatement (Second) of Judgments §§13–20 (1982).

§18:180.3 Defenses

1. **Injustice:** The doctrine of res judicata will not be invoked where it will work an injustice. *State Street Bank and Trust Company v. Badra*, 765 So.2d 251, 253 (Fla. 4th DCA 2000), *rev. denied*, 786 So.2d 1183 (Fla. 2001). When a choice must be made, we apprehend that the State, as well as the courts, is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation. *Chimerakis v. Sentry Ins. Mut. Co*., 804 So.2d 476, 479 (Fla. 3rd DCA 2001).

2. **Ripeness:** A premature claim not ripe for adjudication when a prior judgment or order was made is not subject to the doctrine of res judicata because an unripe claim cannot meet the required elements of identity in the things sued for or identity of the cause of action. *Keller Kitchen Cabinets v. Holder,* 586 So.2d 1132, 1142 (Fla. 1st DCA 1991), *reversed on other grounds*, 610 So.2d 1264 (Fla. 1992).

3. **Voluntary Dismissal Insufficient:** A voluntary dismissal without prejudice will not support a claim of res judicata. *Froman v. Kirland*, 753 So.2d 114, 116 (Fla. 4th DCA 1999), *rev. denied*, 766 So.2d 221 (Fla. 2000).

§18:180.4 Related Matters

1. **Issue Preclusion:** Review the theory of issue preclusion. For example, *see Baxas Howell Mobley, Inc. v. BP Oil Co.*, 630 So.2d 207, 209 (Fla. 3d DCA 1993).

2. **Affirmative Defense:** The issue of res judicata is an affirmative defense. *Britt v. City of Jacksonville*, 770 So.2d 257 (Fla. 1st DCA 2000). However, compare *Lefler v. Lefler,* 776 So.2d 319, 323 (Fla. 4th DCA 2001).

3. **Cause of Action:** A test frequently used to determine whether causes of action are identical is whether the evidence in both cases is in essence the same. *Hittel v. Rosenhagen,* 492 So.2d 1086, 1090 (Fla. 4th DCA 1986). When other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action. The applicability of the doctrine in each case turns on the particular facts alleged in each action and the particular disposition of the allegations in the first action. *State Street Bank and Trust Company v. Badra*, 765 So.2d 251, 253 (Fla. 4th DCA 2000), *rev. denied*, 786 So.2d 1183 (Fla. 2001).

4. **Degree of Proof Required:** For there to be "identity of cause of action," within the meaning of the doctrine, the degree of proof required in the second suit must be at least as great as that required to support recovery in the first suit. *M.C.G. v. Hillsborough County School Board*, 927 So.2d 224, 227 n.2 (Fla. 2d DCA 2006).

5. **Doctrine of Estoppel by Judgment:** See doctrine of estoppel by judgment. Before entering upon a discussion of it, we will review the elements of the doctrine of res judicata and its relation to the doctrine of estoppel by judgment. Briefly, under the first a judgment on the merits of a controversy is conclusive as to the parties and their privies and will bar a subsequent action between the same parties on the same cause

of action. In *Gordon v. Gordon*, 59 So.2d 40, 44, we undertook to distinguish between the two doctrines, and said that under res judicata a final judgment or decree not only bars a later suit "between the same parties based upon the same cause of action" but also upon matters that "could have been raised" while under the doctrine of estoppel by judgment, the two causes of action might be different and the judgment or decree in the first would only estop the "parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation." *Youngblood v. Taylor,* 89 So.2d 503, 505 (Fla. 1956).

6. **Former Adjudication:** In addition to the four identities necessary to establish res judicata, the party claiming the benefit of the former adjudication has the burden of establishing, with sufficient certainty by the record or by extrinsic evidence, that the matter was formerly adjudicated. *State Street Bank and Trust Company v. Badra*, 765 So.2d 251, 253 (Fla. 4th DCA 2000), *rev. denied*, 786 So.2d 1183 (Fla. 2001).

7. **Law of the Case Compared:** The doctrines of the law of the case and res judicata differ in two important ways. First, law of the case applies only to proceedings within the same case, *see Beverly Beach,* 68 So.2d at 607, while res judicata applies to proceedings in different cases. *See Strazzulla,* 177 So.2d at 3. Second, the law of the case doctrine is narrower in application in that it bars consideration only of those legal issues that were actually considered and decided in a former appeal, *see U.S. Concrete,* 437 So.2d at 1063, while res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. *Florida Dept. of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001); *Delta Prop. Mngmt. v. Profile Investments, Inc.*, 87 So.3d 765, 770 (Fla. 2012).

8. **Rule Against Splitting Causes of Action Compared:** The rule against splitting causes of action is "an aspect of the doctrine of res judicata." *Froman*, 753 So.2d at 116 (citing *Alvarez v. Nestor Salesco, Inc.*, 695 So.2d 941 (Fla. 4th DCA 1997)). The rule provides that: "[A]s a general rule the law mandatorily requires that all damages sustained or accruing to one as a result of a single wrongful act must be claimed and recovered in one action or not at all." *Id.* (quoting *Gaynon v. Statum*, 10 So.2d 432, 433 (1942), *superseded by statute on other grounds as stated in, Goldman v. Kent Cleaners & Laundry, Inc.*, 110 So.2d 50 (Fla. 3d DCA 1959)). Res judicata and impermissible splitting of causes of action are not interchangeable concepts barring the bringing of claims. Because the rule against splitting causes of action is only an aspect of res judicata, it logically follows that if res judicata is not a bar to the bringing of a claim, impermissible splitting of causes of action is not either. Said another way, one who impermissibly splits causes of action may run afoul of res judicata, but one who runs afoul of res judicata may not have done so by impermissibly splitting causes of action, as the claim could be barred based on another aspect of res judicata. *See State v. Freund*, 626 So.2d 1043, 1045 n.1 (Fla. 4th DCA 1993) (stating that collateral estoppel is an aspect of res judicata); *Saenz v. Saenz*, 602 So.2d 973, 974 n. 1 (Fla. 3d DCA 1992) (stating that the "change of circumstance" rule is an aspect of res judicata). *Tyson v. Viacom, Inc.*, 890 So.2d 1205, 1210 (Fla. 4th DCA 2005), *rev. denied*, 912 So.2d 1219 (Fla. 2005).

§18:190 RESTITUTION

§18:190.1 Elements — Florida Supreme Court

[No citation for this edition.]

§18:190.1.1 Elements — 1st DCA

"Restitution" is defined as the "act of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification." *Black's Law Dictionary* 1313 (6th ed. 1990). The primary purpose of restitution is to restore the plaintiff to the position in which he or she was before the defendant received the benefit which gave rise to the obligation to restore; hence the plaintiff is entitled to recover that which he or she parted with, or that which the defendant has received. 11 Fla. Jur. 2d Contracts @ 246, at 548-49 (1979). As a result, one so aggrieved has a right of action pursuant to a quasi

contract, or contract implied by law, based primarily upon the theory that the defendant has received a benefit or has been unjustly enriched, and accordingly should be required to compensate the plaintiff. 11 Fla. Jur. 2d Contracts @ 236, at 538 (1979).

Source

Sun Coast International, Inc. v. Dept. of Business Regulation, 596 So.2d 1118, 1120 (Fla. 1st DCA 1992).

See Also

1. *Mann v. Thompson,* 118 So.2d 112, 114 (Fla. 1st DCA 1960) ("As explained by Justice Cardozo, a cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.").

§18:190.1.2 Elements — 2nd DCA

[No citation for this edition.]

§18:190.1.3 Elements — 3rd DCA

"Restitution" is defined as the "[a]ct of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification." *Black's Law Dictionary* 1313 (6th ed. 1990).

Source

Mitchel v. Cigna Property and Casualty Insurance Co., 625 So.2d 862, 864 (Fla. 3d DCA 1993).

See Also

1. *Fito v. Attorneys' Title Ins. Fund, Inc.*, 83 So.3d 755, 758 (Fla. 3d DCA 2011).

§18:190.1.4 Elements — 4th DCA

The first count of the counterclaim seeks a judgment for monies wrongfully received by Moore Handley, and in our position that count successfully states a cause of action, whether one labels it with the terminology of the old common count "for money had and received" (indebitatus assumpsit) or the more current "restitution" to prevent "unjust enrichment."

"An action for money had and received may, in general, be maintained whenever one has money in his hand belonging to another, which in equity and good conscience, he ought to pay over to that other." *Love v. Brown Development Co. of Michigan*, 100 Fla. 1373, 131 So. 144, 147 (1930).

There can be no strict rule as to what constitutes unjust enrichment, nor can an exhaustive list be given of elements which must be alleged in pleading in order to state a cause of action for restitution. Everything depends on the circumstances of the individual case and whether or not the pleader has alleged facts which show that an injustice would occur if money were not refunded.

Source

Moore Handley, Inc. v. Major Realty Corp., 340 So.2d 1238 (Fla. 4th DCA 1976).

§18:190.1.5 Elements — 5th DCA

Whether the action be referred to as one for restitution or one for "money had and received," an action may, in general, be maintained whenever one has money in his hands belonging to another which in equity and good conscience, he ought to pay over to that other.

Source

Deco Purchasing & Distributing Co., Inc. v. Panzirer, 450 So.2d 1274, 1275 (Fla. 5th DCA 1984).

§18:190.2 References

1. 11 Fla. Jur. 2d *Contracts* §§282–285 (2003).
2. 66 Am. Jur. 2d *Restitution and Implied Contracts* §§1–12 (2001).
3. 17B C.J.S. *Contracts* §604 (1999).
4. 28A C.J.S. *Election of Remedies* §10 (1996).
5. Restatement of the Law of Restitution §§1 et seq. (1937).
6. Restatement (Second) of Contracts §§370–377 (1981).
7. Comment, *Restitution: Concept and Terms*, 19 Hastings L. J. 1167 (1968) (Symposium on Restitution).

§18:190.3 Related Matters

1. **Imposition:** This court, however, has defined "imposition" as something less than coercion, stating that "imposition" occurs when the payee takes advantage of his position, or the circumstances in which another is placed, and exacts a greater price for services rendered than is fair and reasonable. *Greene v. Alachua General Hosp., Inc*., 705 So.2d 953 (Fla. 1st DCA 1998). When money is obtained through imposition, express or implied, or extortion or oppression, or an undue advantage is taken of the plaintiff's situation, the payment is not voluntary and does not bar an action for money had and received. *See Cullen v. Seaboard Air Line R.R. Co.*, 58 So. 182, 184 (Fla. 1912) (an action for imposition is an action for money had and received to recover "excess" payments coercively exacted from a plaintiff where only a reasonable compensation is allowable). The Florida Supreme Court has held that charging an unreasonable price under certain circumstances constitutes an imposition for purposes of an action on an implied contract to recover money. *See Southern States Power Co. v. Ivey*, 160 So. 46, 47 (Fla. 1935). The court reasoned that where a person taking advantage of his position, or the circumstances in which another is placed, exacts a greater price for services rendered than is fair and reasonable, where such a compensation only is allowable, the exaction of the unreasonable price for the serv-ice rendered may be said to be an imposition. Such an imposition would support an action of assumpsit for money received. *Hall v. Humana Hospital Daytona Beach*, 686 So.2d 653, 656 (Fla. 5th DCA 1996).

2. **Generally Recognized Remedies:** Restitution may be sought either in a court of law before a jury or in an equitable proceeding. There are three generally recognized remedies at equity by which a person who has been unjustly deprived of his property may seek restitution: (1) by impressing a constructive trust; (2) by imposing an equitable lien; and (3) by subrogating him to the rights of the obligee or lien holder. *Circle Finance Co. v. Peacock*, 399 So.2d 81, 85 (Fla. 1st DCA 1981), rev. denied, 411 So.2d 380 (Fla. 1981).

§18:200 UNCONSCIONABILITY, COMMON LAW

§18:200.1 Elements — Florida Supreme Court

Unconscionability is a common law doctrine that courts have used to prevent the enforcement of contractual provisions that are overreaches by one party to gain an unjust and undeserved advantage that would be inequitable to permit that party to enforce.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party. The absence of meaningful choice when entering into the contract is often referred to as procedural unconscionability, which relates to the manner in which the contract was entered, and the unreasonableness of the terms is often referred to as substantive unconscionability, which focuses on the agreement itself.

When analyzing unconscionability, courts must bear in mind the bargaining power of the parties involved and the interplay between procedural and substantive unconscionability. In the typical case of consumer adhesion contracts, where there is virtually no bargaining between the parties, the commercial enterprise or business responsible for drafting the contract is in a position to unilaterally create one-sided terms that are oppressive to the consumer, the party lacking bargaining power. On the other hand, if two sophisticated commercial enterprises or businesses negotiate a contract where both sides are on equal footing, absent some high degree of procedural

unconscionability (such as a party "hiding the ball"), the chance that the terms of the contract are unduly oppressive is lessened given the circumstances of the contract formation.

Given that the doctrine of unconscionability is not a rigid construct where the procedural aspects are separate from the substantive aspects, we conclude that both the procedural and substantive aspects of unconscionability must be present, although not necessarily to the same degree, and both should be evaluated interdependently rather than as independent elements.

Source

Basulto v. Hialeah Automotive, 141 So.3d 1145, 1157-1161 (Fla. 2014).

See Also

1. *St Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla. 1982).

§18:200.1.1 Elements — 1st DCA

Before a court may hold a contract unconscionable, it must find that it is *both* procedurally and substantively unconscionable. *E.g., Bellsouth Mobility LLC v. Christopher*, 819 So.2d 171, 173 (Fla. 4th DCA 2002); *Powertel*, 743 So.2d at 574; *Complete Interiors, Inc. v. Behan*, 558 So.2d 48, 52 (Fla. 5th DCA 1990); *Steinhardt*, 422 So.2d at 889; *Kohl*, 398 So.2d at 867. To determine whether a contract is procedurally unconscionable, a court must look to the "circumstances surrounding the transaction" to determine whether the complaining party had a "meaningful choice" at the time the contract was entered. *Williams*, 350 F.2d at 449. *Accord Steinhardt*, 422 So.2d at 889; *Kohl*, 398 So.2d at 869. Among the factors to be considered are whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract, or whether the terms were merely presented on a "take-it-or-leave-it" basis; and whether he or she had a reasonable opportunity to understand the terms of the contract. As one Florida court has noted, while this may "require an examination into a myriad of details including [the complaining party's] experience and education and the sales practices that were employed by the [other party] …, the basic concept is 'an absence of meaningful choice.'" *Kohl*, 398 So.2d at 869. To determine whether a contract is substantively unconscionable, a court must look to the terms of the contract, itself, and determine whether they are so "outrageously unfair" as to "shock the judicial conscience." *See, e.g., Belcher v. Kier*, 558 So.2d 1039, 1043 (Fla. 2d DCA 1990) (declining to equate "unconscionability" with mere "unreasonableness").

Source

Gainesville Health Care Center, Inc. v. Weston, 857 So.2d 278, 284 (Fla. 1st DCA 2003).

See Also

1. *Brasington v. EMC Corp*., 855 So.2d 1212, 1218 (Fla. 1st DCA 2003).
2. *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999), *rev. denied*, 763 So.2d 1044 (Fla. 2000).
3. *Southworth & McGill, P.A. v. Southern Bell Telephone and Telegraph Co.,* 580 So.2d 628, 631 (Fla. 1st DCA 1991) ("If appellants wished to avoid the plain provisions of the clause limiting liability, it was incumbent upon them to plead 'unconscionability,' and at least an outline of the basic facts upon which they intended to base such claim, which they failed to do.").
4. *Coastal Cmty. Bank v. Jones*, 23 So.3d 757, 759 (Fla. 1st DCA 2009) ("Under Florida law, unconscionability is an affirmative defense which must be raised by proper pleading.").

§18:200.1.2 Elements — 2nd DCA

To succeed in claiming that a contractual provision is unconscionable, a party must demonstrate both procedural and substantive unconscionability. Procedural unconscionability addresses the manner in which the contract was entered, including consideration of facts such as the relative bargaining power of the parties and their ability to understand the contract terms. Substantive unconscionability, on the other hand, requires assessment of the contract's terms to determine whether they are so outrageously unfair as to shock the judicial conscience. Where the party alleging unconscionability establishes only one of the two prongs, the claim fails.

Source

Zephyr Haven Health & Rehab Center, Inc. v. Hardin ex rel. Hardin, 122 So.3d 916, 920 (Fla. 2d DCA 2013).

§18:200.1.3 Elements — 3rd DCA

At common law, an unconscionable, and thus unenforceable, contract or term therein was defined as one which "[n]o man in his senses and not one under delusion would make on the one hand, and as no honest and fair man would accept on the other." … In a more modern contest, " '[m]ost courts take a 'balancing approach' to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability.' "… Procedural unconscionability focuses on those factors surrounding the entering of the contract which add up to absence of meaningful choice on the part of one of the parties to the contract as to the terms therein; substantive unconscionability, on the other hand, focuses directly on those terms of the contract itself which amount to an outrageous degree of unfairness to the same contracting party.

Source

Steinhardt v. Rudolph, 422 So.2d 884 (Fla. 3d DCA 1982), *petition for rev. denied*, 434 So.2d 889 (Fla. 1983).

See Also

1. *Beeman v. Island Breakers, A Condominium, Inc.*, 577 So.2d 1341 (Fla. 3d DCA 1990), *rev. denied*, 591 So.2d 180 (Fla. 1991), *republished to correct scrivener's error*, 591 So.2d 1031 (Fla. 3d DCA 1991).
2. *Legree v. Legree*, 560 So.2d 1353, 1355 (Fla. 3d DCA 1990) (separation agreement).
3. *Amerifirst Federal Savings and Loan Assoc. of Miami v. Century 21 Commodore Plaza, Inc.*, 416 So.2d 45, 47 (Fla. 3d DCA 1982). ("The evidence before the trial court indisputably supported Century 21's affirmative defense of unconscionability, making summary judgment proper.").

§18:200.1.4 Elements — 4th DCA

The authorities appear to be virtually unanimous in declaring (or assuming) that two elements must coalesce before a case for unconscionability is made out. The first is referred to as substantive unconscionability and the other procedural unconscionability.

A very recent case, *Bennett v. Behring Corp.*, 466 F.Supp. 689, 696 (S.D.Fla. 1979), further refined this analysis: "The dual requirements called for by *Walker* are the "absence of meaningful choice … *together with* contract terms which are unreasonably favorable to the other party."

The first requirement under *Walker,* "absence of meaningful choice," is determined by analyzing the respective bargaining powers of the contracting parties, and the ability of the particular contracting party, in light of his education, intelligence, or lack thereof, to understand the terms of the contract.

This is referred to as "procedural unconscionability."

The onerous contract term from which a party seeks relief is commonly referred to as "substantive unconscionability."

A case is made out for substantive unconscionability by alleging and proving that the terms of the contract are unreasonable and unfair.

Procedural unconscionability, on the other hand, speaks to the individualized circumstances surrounding each contracting party at the time the contract was entered into. This is thoughtfully discussed by the court in *Johnson v. Mobile Oil Corp.*, 415 F.Supp. 264, 268 (E.D.Mich. 1967).

The various factors considered by the courts in deciding questions of unconscionability have been divided by the commentators into "procedural" and "substantive" categories. See J. White & R. Summers, *supra*, at 118-30. Under the "procedural" rubric come those factors bearing upon what in the *Weaver* case was called the "real and voluntary meeting of the minds" of the contracting parties: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question. The "substantive" heading embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable. According to J. White & R. Summers, *supra,* at 128:

Most courts take a "balancing approach" to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability.

Source

Kohl v. Bay Colony Club Condominium, Inc., 398 So.2d 865, 867 (Fla. 4th DCA 1981), *petition for rev. denied*, 408 So.2d 1094 (Fla. 1981).

See Also

1. *Voicestream Wireless Corp. v. U.S. Communications, Inc*., 912 So.2d 34 (Fla. 4th DCA 2005).
2. *Fonte v. AT&T Wireless Services, Inc*., 903 So.2d 1019, 1025 (Fla. 4th DCA 2005).
3. *Romano ex rel. Romano v. Manor Care, Inc*., 861 So.2d 59, 62 (Fla. 4th DCA 2003), *rev. denied*, 874 So.2d 1192 (Fla. 2004).
4. *Muns v. Shurgard Income Properties Fund 16 Limited Partnership,* 682 So.2d 166 (Fla. 1996) ("The unconscionability of the clause would have been an avoidance of that affirmative defense which should have been pleaded in a reply."), *appeal after remand*, 761 So.2d 340 (Fla. 4th DCA 1999), *rev. denied*, 767 So.2d 459 (Fla. 2000).
5. *Capital Associates, Inc. v. Hudgens,* 455 So.2d 651, 653 (Fla. 4th DCA 1984) ("We also note that unconscionability is a good defense to a contract action under Florida case law. See, e.g., *Peacock Hotel v. Shipman,* 103 Fla. 633, 138 So. 44, 46 (1931), where the Supreme Court stated that when 'one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, … a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness.' ").
6. *Garrett v. Janiewski,* 480 So.2d 1324, 1326 (Fla. 4th DCA 1985), *rev. denied*, 492 So.2d 1333 (Fla. 1986) ("Synonyms for the term unconscionable include 'shocking to the conscience' and 'monstrously harsh.' ").
7. *Garrett v. Janiewski,* 480 So.2d 1324, 1326 (Fla. 4th DCA 1985), *rev. denied*, 492 So.2d 1333 (Fla. 1986) ("It must be shown that the rental being paid by the complaining tenants grossly exceeds that being paid by similarly situated tenants for lots of equal value.").
8. *Premier Real Estate Holdings, LLC v. Butch*, 24 So.3d 708, 711-12 (Fla. 4th DCA 2009) ("To support a finding of unconscionability sufficient to invalidate an arbitration clause, Seller had to establish *both* procedural and substantive unconscionability. [The] two types of unconscionability [are] as follows: Procedural unconscionability relates to the manner in which a contract is made and involves consideration of issues such as the bargaining power of the parties and their ability to know and understand the disputed contract terms; substantive unconscionability, on the other hand, requires an assessment of whether the contract terms are so outrageously unfair as to shock the judicial conscience. A substantively unconscionable contract is one that no man in his senses and not under delusion would make on one hand, and as no honest and fair man would accept on the other. Here, there was no procedural unconscionability, as the underlying transaction involved sophisticated parties dealing with a large amount of money for the purchase of commercial property. Nothing in the record reflects evidence of disparity between the parties' education, age or competency. As noted by Buyer, the arbitration provision could have been deleted or modified. Indeed, the contract reflects that other modifications were made…. As Seller has not demonstrated that the arbitration provision is procedurally unconscionable, this court need not decide whether the provision is substantively unconscionable. In any event, there are no terms in the arbitration provision that appear to be so 'outrageously unfair' as to 'shock the judicial conscience.' Rather, the arbitration provision is neutral and fair to both parties.").

§18:200.1.5 Elements — 5th DCA

Florida courts may properly decline to enforce a contract on the ground that it is unconscionable. *See Steinhardt v. Rudolph*, 422 So.2d 884 (Fla. 3d DCA 1982). To support a determination of unconscionability, however, the court must find that the contract is both procedurally unconscionable and substantively unconscionable. *See Belcher v. Kier,* 558 So.2d 1039 (Fla. 2d DCA 1990); *Complete Interiors v. Behan*, 558 So.2d 48 (Fla. 5th DCA 1990). The procedural component of unconscionability relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms. For example, the court might find that a contract is procedurally unconscionable if important terms were "hidden in a maze of fine print and minimized by deceptive sales practices." *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). In contrast, the substantive component focuses on the agreement itself. As the court explained in *Kohl v. Bay Colony Club Condominium, Inc.*, 398 So.2d 865, 868 (Fla. 4th DCA 1981), a case is made out for substantive unconscionability by showing that "the terms of the contract are unreasonable and unfair." *Id.* at 574. Admittedly, the wording of the arbitration clause in *Powertel* was not one-sided or discretionary; it applied to "any unresolved dispute, controversy or claim …" However, the court's unconscionability analysis lends itself equally well to unilateral or discretionary arbitration clauses. Such an analysis provides a more reasoned and flexible framework for determining the enforceability of arbitration provisions.

Source

Avid Engineering, Inc. v. Orlando Marketplace Ltd., 809 So.2d 1, 4 (Fla. 5th DCA 2001).

See Also

1. *Fotomat Corp. of Florida v. Chanda*, 464 So.2d 626 (Fla. 5th DCA 1985).
2. *Complete Interiors, Inc. v. Behan*, 558 So.2d 48 (Fla. 5th DCA 1990), *rev. denied*, 570 So.2d 1303 (Fla. 1990).
3. *Thomas v. Jones*, 524 So.2d 693 (Fla. 5th DCA 1988), *reversed on other grounds*, 541 So.2d 112 (Fla. 1989).
4. *State v. De Anza Corp.*, 416 So.2d 1173 (Fla. 5th DCA 1982), *petition for rev. denied*, 424 So.2d 763 (Fla. 1982).
5. *Estate of Perez v. Life Care Ctr. of Am., Inc.*, 23 So.3d 741, 742 (Fla. 5th DCA 2009) ("To invalidate an arbitration agreement under Florida law, a court must find that the contract is both procedurally and substantively unconscionable. The party seeking to avoid the arbitration provision has the burden to establish unconscionability. To determine whether a contract is procedurally unconscionable, a court must look to the manner in which the contract was entered into and consider factors such as 'whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract or whether the terms were merely presented on a 'take-it-or-leave-it' basis; and whether he or she had a reasonable opportunity to understand the terms of the contract.' A party to a contract is not 'permitted to avoid the consequences of a contract freely entered into simply because he or she elected not to read and understand its terms before executing it, or because, in retrospect, the bargain turns out to be disadvantageous.' In the present case, the personal representative makes a convincing argument that the arbitration agreement is procedurally unconscionable, given the circumstances surrounding its execution. However, no argument is made regarding the agreement's substantive unconscionability and consequently, the unconscionability argument must fail.").

§18:200.2 References

1. 11 Fla. Jur. 2d *Contracts* §12 (2003).
2. 17A Am. Jur. 2d *Contracts* §§277–279 (2004).
3. 17 C.J.S. *Contracts* §4 (1999).
4. 17B C.J.S. *Contracts* §673 (1999).
5. Restatement (Second) of Contracts §208 (1981).
6. Melvin A. Eisenberg, *The Bargain Principle and its Limits*, 95 Harv. L. Rev. 741 (1982).
7. M. N. Kniffin, *A Newly Identified Contract Unconscionability: Unconscionability of Remedy*, 63 Notre Dame L. Rev. 247 (1988).
8. Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. Cin. L. Rev. 845 (1988).

§18:200.3 Related Matters

1. **Florida Statutes §672.302** (Uniform Commercial Code: Sales - Unconscionable contract or clause.)

2. **Florida Statutes §672.719** (Uniform Commercial Code: Sales - Contractual modification or limitation of remedy.)

3. **Florida Statutes §718.122** (Condominium Act - Unconscionability of certain leases; rebuttable presumption.)

4. **Florida Statutes §718.4015** (Condominium Act - Condominium leases; escalation clauses.)

5. **Florida Statutes §719.112** (Cooperative Act - Unconscionability of certain leases; rebuttable presumption.)

6. **Florida Statutes §723.033** (Florida Mobile Home Act - Unreasonable lot rental agreements; increases, changes.) *See Colonial Acres Mobile Homeowners Assoc., Inc. v. Wallach,* 558 So.2d 25 (Fla. 3d DCA 1989).

7. **Adhesion Contract:** An adhesion contract is defined as a standardized contract form offered to consumers of goods and services on essentially a take it or leave it basis without affording the consumer a realistic

opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract. *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999), *rev. denied*, 763 So.2d 1044 (Fla. 2000). The fact that a contract is one of adhesion is a strong indicator that the contract is procedurally unconscionable because it suggests an absence of meaningful choice. *Gainesville Health Care Ctr., Inc. v. Weston,* 857 So.2d 278, 285 (Fla. 1st DCA 2003) (quoting *Powertel*, 743 So.2d at 574). However, the presence of an adhesion contract alone does not require a finding of procedural unconscionability. *Voicestream Wireless Corp. v. U.S. Communications, Inc*., 912 So.2d 34 (Fla. 4th DCA 2005).

8. **Affirmative Defense:** Unconscionability is an affirmative defense which must be raised by proper pleading. *Barakat v. Broward County Housing Authority*, 771 So.2d 1193, 1194 (Fla. 4th DCA 2000).

9. **Application of Analysis:** The contract should have been reviewed in the light of the circumstances that existed when it was made. *Fotomat Corp. of Florida v. Chanda*, 464 So.2d 626 (Fla. 5th DCA 1985).

10. **Arbitration Clause:** In order to invalidate an arbitration clause as unconscionable, the court must find that the clause is both procedurally and substantively unconscionable. *Chapman v. King Motor Co. of S. Fla.*, 833 So.2d 820 (Fla. 4th DCA 2002). The county court should hold an evidentiary hearing to determine whether the Agreement is unconscionable before deciding whether to compel the parties to arbitration. *Rappa v. Island Club West Development, Inc*., 890 So.2d 477, 480 (Fla. 5th DCA 2004). *See also Avid Engineering, Inc. v. Orlando Marketplace Ltd*., 809 So.2d 1, 4 (Fla. 5th DCA 2001).

11. **Bad Bargains:** The concept of unconscionability does not mean, however, that a court will relieve a party of his obligations under a contract because he has made a bad bargain containing contractual terms which are unreasonable or impose an onerous hardship on him. Indeed, the entire law of contracts, as well as the commercial value of contractual arrangements, would be substantially undermined if parties could back out of their contractual undertakings on that basis. "'People should be able to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.'" *Steinhardt,* 422 So.2d at 890 (quoting from 14 Samuel Williston, A Treatise on the Law of Contracts §1632 (3d ed. 1972)). *Accord Fotomat,* 464 So.2d at 630; *Gainesville Health Care Center, Inc. v. Weston*, 857 So.2d 278, 284 (Fla. 1st DCA 2003).

12. **Evidentiary Hearing:** Because procedural unconscionability is an individualized inquiry concerning the circumstances of the parties at the time of contracting, it requires an evidentiary hearing to be properly reflected upon by the court. *Freedom Life Ins. Co. of America v. Wallant*, 891 So.2d 1109, 1114 (Fla. 4th DCA 2004).

13. **Mortgage Foreclosures:** This procedural-substantive analysis is, however, only a general approach to the unconscionability question and is not a rule of law. For example, the Florida decisions concerning unconscionability as applied to a mortgage foreclosure case are entirely devoid of this analysis. *Steinhardt v. Rudolph,* 422 So.2d 884 (Fla. 3d DCA 1982), *petition for rev. denied*, 434 So.2d 889 (Fla. 1983).

14. **Payday Loans:** See Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589 (2000); Charles A. Bruch, Comment, *Taking the Pay Out of Payday Loans: Putting An End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. Cin. L. Rev. 1257 (2001); Lisa Blaylock Moss, Commentary, *Modern Day Loan Sharking: Deferred Presentment Transactions & The Need for Regulation,* 51 Ala. L. Rev. 1725 (2000); *McKenzie Check Advance of Fla., L.L.C. v. Betts*, 928 So.2d 1204, 1205 (Fla. 2006).

15. **Question of Law:** In *Garrett v. Janiewski*, 480 So.2d 1324 (Fla. 4th DCA 1985), the court noted that the question of unconscionability is one of law for the court but that the court's decision will be based on the factual circumstances surrounding the transaction in question. *Complete Interiors, Inc. v. Behan*, 558 So.2d 48 (Fla. 5th DCA 1990), *rev. denied*, 570 So.2d 1303 (Fla. 1990).

16. **Test for Substantive Unconscionability:** The test for substantive unconscionability is to determine if the terms of a contract are so outrageously unfair as to shock the judicial conscience. *See Weston,* 857 So.2d at 285; *Voicestream Wireless Corp. v. U.S. Communications, Inc*., 912 So.2d 34 (Fla. 4th DCA 2005).

§18:210 VEXATIOUS LITIGANT

§18:210.1 Florida Statutes

Florida Statutes 68.093. Florida Vexatious Litigant Law

(1) This section may be cited as the "Florida Vexatious Litigant Law."

(2) As used in section, the term:

(a) "Action" means a civil action governed by the Florida Rules of Civil Procedure and proceedings governed by the Florida Probate Rules, but does not include actions concerning family law matters governed by the Florida Family Law Rules of Procedure or any action in which the Florida Small Claims Rules apply.

(b) "Defendant" means any person or entity, including a corporation, association, partnership, firm, or governmental entity, against whom an action is or was commenced or is sought to be commenced.

(c) "Security" means an undertaking by a vexatious litigant to ensure payment to a defendant in an amount reasonably sufficient to cover the defendant's anticipated, reasonable expenses of litigation, including attorney's fees and taxable costs.

(d) "Vexatious litigant" means:

1. A person as defined in s. 1.01(3) who, in the immediately preceding 5 - year period, has commenced, prosecuted, or maintained, pro se, five or more civil actions in any court in this state, except an action governed by the Florida Small Claims Rules, which actions have been finally and adversely determined against such person or entity; or
2. Any person or entity previously found to be a vexatious litigant pursuant to this section.

An action is not deemed to be "finally and adversely determined" if an appeal in that action is pending. If an action has been commenced on behalf of a party by an attorney licensed to practice law in this state, that action is not deemed to be pro se even if the attorney later withdraws from the representation and the party does not retain new counsel.

(3) (a) In any action pending in any court of this state, including actions governed by the Florida Small Claims Rules, any defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion shall be based on the grounds, and supported by a showing, that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action against the moving defendant.

(b) At the hearing upon any defendant's motion for an order to post security, the court shall consider any evidence, written or oral, by witness or affidavit, which may be relevant to the consideration of the motion. No determination made by the court in such a hearing shall be admissible on the merits of the action or deemed to be a determination of any issue in the action. If, after hearing the evidence, the court determines that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action against the moving defendant, the court shall order the plaintiff to furnish security to the moving defendant in an amount and within such time as the court deems appropriate.

(c) If the plaintiff fails to post security required by an order of the court under this section, the court shall immediately issue an order dismissing the action with prejudice as to the defendant for whose benefit the security was ordered.

(d) If a motion for an order to post security is filed prior to the trial in an action, the action shall be automatically stayed and the moving defendant need not plead or otherwise respond to the complaint

until 10 days after the motion is denied. If the motion is granted, the moving defendant shall respond or plead no later than 10 days after the required security has been furnished.

(4) In addition to any other relief provided in this section, the court in any judicial circuit may, on its own motion or on the motion of any party, enter a prefiling order prohibiting a vexatious litigant from commencing, pro se, any new action in the courts of that circuit without first obtaining leave of the administrative judge of that circuit. Disobedience of such an order may be punished as contempt of court by the administrative judge of that circuit. Leave of court shall be granted by the administrative judge only upon a showing that the proposed action is meritorious and is not being filed for the purpose of delay or harassment. The administrative judge may condition the filing of the proposed action upon the furnishing of security as provided in this section.

(5) The clerk of the court shall not file any new action by a vexatious litigant pro se unless the vexatious litigant has obtained an order from the administrative judge permitting such filing. If the clerk of the court mistakenly permits a vexatious litigant to file an action pro se in contravention of a prefiling order, any party to that action may file with the clerk and serve on the plaintiff and all other defendants a notice stating that the plaintiff is a pro se vexatious litigant subject to a prefiling order. The filing of such a notice shall automatically stay the litigation against all defendants to the action. The administrative judge shall automatically dismiss the action with prejudice within 10 days after the filing of such notice unless the plaintiff files a motion for leave to file the action. If the administrative judge issues an order permitting the action to be filed, the defendants need not plead or otherwise respond to the complaint until 10 days after the date of service by the plaintiff, by United States mail, of a copy of the order granting leave to file the action.

(6) The clerk of a court shall provide copies of all prefiling orders to the Clerk of the Florida Supreme Court, who shall maintain a registry of all vexatious litigants.

(7) The relief provided under this section shall be cumulative to any other relief or remedy available to a defendant under the laws of this state and the Florida Rules of Civil Procedure, including, but not limited to, the relief provided under s. 57.105.

§18:210.2 References

1. 1 Fla. Jur. 2d *Actions* §137 (2004).
2. 42 Am. Jur. 2d *Injunctions* §191 (2000).
3. 1A C.J.S. *Actions* §73 (2005).
4. Trawick, Fla. Prac. and Proc. §1-20.

§18:210.3 Related Matters

1. **Abuse of the Judicial System:** In dismissing *Sibley v. Wilson*, Judge Moreno said that it is "the court's recognized right and duty, in both Federal and Florida state courts, to protect their jurisdiction from vexatious litigants and abuse of the judicial system." We agree. *Sibley v. Sibley*, 885 So.2d 980, 988 (Fla. 3d DCA 2004), *rev. denied*, 901 So.2d 120 (Fla. 2005), cert. denied, 126 S.Ct. 335 (2005).
2. **Notice:** If the clerk of the court mistakenly permits a vexatious litigant to file an action pro se in contravention of a prefiling order, any party to that action may file with the clerk and serve on the plaintiff and all other defendants a notice stating that the plaintiff is a pro se vexatious litigant subject to a prefiling order. The filing of such a notice shall automatically stay the litigation against all defendants to the action. The administrative judge shall automatically dismiss the action with prejudice within 10 days after the filing of such notice unless the plaintiff files a motion for leave to file the action. *May v. Barthet*, 886 So.2d 324, 325 (Fla. 4th DCA 2004).
3. **Prefiling Order Prohibiting New Actions:** Even Florida's Vexatious-Litigant Law only permits a circuit court to enter an order prohibiting a vexatious litigant from commencing any new actions without leave in that particular court. §68.093(4), Fla. Stat. (2004). *Weaver v. School Bd. Of Leon County*, 896 So.2d 929, 931 (Fla. 1st DCA 2005).

§18:220 WAIVER

§18:220.1 Elements — Florida Supreme Court

"In order to constitute a valid waiver the right or privilege waived must be in existence; there can be no waiver of a nonexistent right. A 'waiver' is an intentional relinquishment of a known right."

Source

Jonas v. City of West Palm Beach, 79 So. 438 (Fla. 1918).

See Also

1. *Gilman v. Butzloff,* 22 So.2d 263, 265 (Fla. 1945).
2. *Blair v. Edward J. Gerrits, Inc.*, 193 So.2d 172, 175 (Fla. 1966).
3. *Mason v. State of Florida,* 176 So.2d 76, 78 (Fla. 1965).

§18:220.1.1 Elements — 1st DCA

This court has recognized that three circumstances give rise to a waiver:

1. the existence at the time of the waiver of a right, privilege, advantage, or benefit that may be waived;
2. the actual or constructive knowledge thereof; and
3. an intention to relinquish that right, privilege, advantage or benefit.

Source

Cullum v. Packo, 947 So.2d 533, 537 (Fla. 1st DCA 2006).

See Also

1. *Destin Savings Bank v. Summerhouse of FWB, Inc.,* 579 So.2d 232, 235 (Fla. 1st DCA 1991) (citing to 22 Fla. Jur. 2d *Estoppel and Waiver* §89 (1980)).
2. *Taylor v. Kenco Chemical & Mfg. Corp.,* 465 So.2d 581, 587 (Fla. 1st DCA 1985) (citing to *Gulf Life Insurance Co. v. Green,* 80 So.2d 321 (Fla. 1955)). In *Taylor v. Kenco Chemical & Mfg. Corp.,* 465 So.2d 581, 587 (Fla. 1st DCA 1985), the court identified the elements as: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and; (3) the intention to relinquish the right.
3. *Wilds v. Permenter,* 228 So.2d 408 (Fla. 4th DCA 1969).
4. *Choctawhatchee Electric Cooperative, Inc. v. Gulf Power Co.,* 265 So.2d 417, 421 (Fla. 1st DCA 1972) ("One may waive only a legal right it possesses but cannot waive one that it is powerless to assert or enforce.").
5. *Salinas v. C.A.T. Concrete, LLC*, 46 So.3d 600 (Fla. 1st DCA 2010) ("Waiver, by definition, is the intentional relinquishment of a known legal right.").
6. *Lynch v. Solid Waste Haulers Florida, LLC*, 15 So.3d 919, 920 (Fla. 1st DCA 2009) ("Waiver has been defined as the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right.").
7. *State Farm Fla. Ins. Co. v. Nordin*, 312 So. 3d 200, 203 (Fla. 1st DCA 2021).

§18:220.1.2 Elements — 2nd DCA

The elements that must be established to prove waiver are the existence at the time of the waiver of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage.

Source

Tara Woods, LLC v. Cashin, 116 So. 3d 492 (Fla. 2d DCA 2013); *Winans v. Weber*, 979 So.2d 269 (Fla. 2d DCA 2007).

See Also

1. *Continental Real Estate Equities, Inc. v. Rich Man Poor Man, Inc.,* 458 So.2d 798, 799 (Fla. 2d DCA 1984) ("A waiver is an intentional or voluntary relinquishment of a known right. … It may be inferred from one's conduct but does not arise from forbearance for a reasonable time.").

2. *Fireman's Fund Insurance Co. v. Vogel,* 195 So.2d 20, 24 (Fla. 2d DCA 1967).
3. *Green Tree Servicing, LLC v. McLeod*, 15 So.3d 682, 687 (Fla. 2d DCA 2009) ("Waiver has been defined as the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right.").

§18:220.1.3 Elements — 3rd DCA

A waiver is the intentional relinquishment of a known right and may be express or implied. … A party may waive any rights to which he or she is legally entitled, by actions or conduct warranting an inference that a known right has been relinquished.

Source

Torres v. K-Site 500 Associates, 632 So.2d 110, 112 (Fla. 3d DCA 1994).

See Also

1. *Peninsula Federal Savings and Loan Association v. DKH Properties, Ltd.,* 616 So.2d 1070 (Fla. 3d DCA 1993), *rev. denied*, 626 So.2d 204 (Fla. 1993).
2. *Genet Company v. Annheuser-Busch, Inc.,* 498 So.2d 683, 685 (Fla. 3d DCA 1986) ("an essential element of waiver is the intentional relinquishment of a known right or privilege.").
3. *Caraffa v. Carnival Corp.*, 34 So.3d 127, 130 (Fla. 3d DCA 2010) ("Waiver is the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right.").
4. *Sacred Family Inv., Inc. v. Doral Supermarket, Inc.*, 20 So.3d 412, 415 (Fla. 3d DCA 2009) ("Waiver is the voluntary and intentional relinquishment of a known right or conduct which infers the relinquishment of a known right. When a waiver is implied, the acts, conduct or circumstances relied upon to show waiver must make out a clear case.").

§18:220.1.4 Elements — 4th DCA

Waiver is the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right. Breaking down waiver into elements, this court has recognized that three circumstances give rise to a waiver:

1. the existence of a right which may be waived;
2. actual or constructive knowledge of the right; and
3. the intent to relinquish the right.

E.g., Capital Bank v. Needle, 596 So.2d 1134, 1138 (Fla. 4th DCA 1992). Proof of these elements may be express, or implied from conduct or acts that lead a party to believe a right has been waived.

Source

Bueno v. Workman, 20 So.3d 993, 998 (Fla. 4th DCA 2009).

See Also

1. *Zurstrassen v. Stonier*, 786 So.2d 65, 70 (Fla. 4th DCA 2001).
2. *Leonardo v. State Farm Fire and Casualty Co.,* 675 So.2d 176, 178 (Fla. 4th DCA 1996).
3. *Capital Bank v. Needle,* 596 So.2d 1134, 1138 (Fla. 4th DCA 1992) (citing to *Taylor v. Kenco Chemical & Mfg. Corp.,* 465 So.2d 581, 587 (Fla. 1st DCA 1985)).
4. *First Pennsylvania Bank, N.A. v. Oreck*, 357 So.2d 743 (Fla. 4th DCA 1978), *cert. denied*, 368 So.2d 1371 (Fla. 1979).
5. *Wilds v. Permenter*, 228 So.2d 408 (Fla. 4th DCA 1969).
6. *LeNeve v. Via South Florida, L.L.C.*, 908 So.2d 530 (Fla. 4th DCA 2005).
7. *Husky Rose, Inc. v. Allstate Ins. Co.*, 19 So.3d 1085, 1087 (Fla. 4th DCA 2009).

§18:220.1.5 Elements — 5th DCA

Waiver is the intentional or voluntary relinquishment of a known right, or conduct which infers the relinquishment of a known right. The essential elements of waiver are:

1. the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived;
2. the actual or constructive knowledge of the right; and
3. the intention to relinquish the right.

Waiver may be express, or implied from conduct or acts that lead a party to believe a right has been waived. However, when waiver is to be implied from conduct, the acts, conduct, or circumstances relied upon to show waiver must make out a clear case.

Source

Woodlands Civic Ass'n, Inc. v. David W. Darrow, D.C., P.A., 765 So.2d 874, 877 (Fla. 5th DCA 2000).

See Also

1. *Bishop v. Bishop*, 858 So.2d 1234, 1237 (Fla. 5th DCA 2003).
2. *State Farm Mut. Auto. Ins. Co. v. Yenke*, 804 So.2d 429, 432 (Fla. 5th DCA 2001).
3. *Mizell v. Deal,* 654 So.2d 659, 663 (Fla. 5th DCA 1995) (citing to *Taylor v. Kenco Chemical & Mfg. Corp.,* 465 So.2d 581, 587 (Fla. 1st DCA 1985)).
4. *Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So.2d 1098, 1104 (Fla. 5th DCA 2006).

§18:220.2 Definitions

1. Waiver is defined as an intentional relinquishment or abandonment of a known right or privilege, or conduct that warrants an inference of the intentional relinquishment of a known right. *Destin Savings Bank v. Summerhouse of FWB, Inc.,* 579 So.2d 232, 235 (Fla. 1st DCA 1991) (citing to *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)); *Gilman v. Butzloff,* 22 So.2d 263 (Fla. 1945); *Jonas v. City of West Palm Beach,* 79 So. 438 (Fla. 1918).
2. Waiver is the intentional or voluntary relinquishment of a known right, or conduct which implies the relinquishment of a known right. *Mizell v. Deal,* 654 So.2d 659, 663 (Fla. 5th DCA 1995).

§18:220.3 References

1. 22 Fla. Jur. 2d *Estoppel and Waiver* §§113–125 (2005).
2. 28 Am. Jur. 2d *Estoppel and Waiver* §§201–209 (2000).
3. 31 C.J.S. *Estoppel and Waiver* §74 (1996).

§18:220.4 Defenses

1. **Specific Statutory Requirement:** A statute or administrative rule may require the waiver to conform to specific requirements or standards such as requiring that any waiver be by "express and informed consent." *Community Psychiatric Centers of Florida, Inc. v. Bevelacqua*, 673 So.2d 948 (Fla. 4th DCA 1996).

§18:220.5 Related Matters

1. **Implied by Conduct:** Waiver may be implied by conduct, but that conduct must be clear. *See Am. Somax Ventures v. Touma*, 547 So.2d 1266, 1268 (Fla. 4th DCA 1989). Thus, while forbearance for a reasonable time alone cannot constitute waiver, *see id.* at 1268, conduct leading one to believe that a right has been waived may imply such a waiver. *Arbogast v. Bryan*, 393 So.2d 606, 608 (Fla. 4th DCA 1981) (quoting 22 Fla. Jur. 2d, *Estoppel & Waiver* §89) (parties' failure to timely speak out and enforce a claim to commissions due from a transaction constituted waiver). *Zurstrassen v. Stonier*, 786 So.2d 65, 70 (Fla. 4th DCA 2001). *See also Arvilla Motel, Inc. v. Shriver*, 889 So.2d 887, 892 (Fla. 2d DCA 2004).

2. **Issue for the Fact Finder:** Generally speaking, the issue of waiver is one for the fact finder. *Popular Bank of Florida v. R.C. Asesores Financieros, C.A.*, 797 So.2d 614, 619 (Fla. 3d DCA 2001).

3. **State's Interest in Finality:** Waiver is a doctrine of limitation that defines the area in which the state's interest in finality and procedural regularity outweighs the individual's interest in asserting his or her constitutional rights. *See* Wagner, *Wavering Over the Scope of Waiver: The Burger Court and the Out-of-court*

Waiver of Fourth, Fifth and Sixth Amendment Rights, 6 J. Crim. Def. 1, 4 (1980) (general discussion of the waiver doctrine in the context of constitutional rights). *Alvarez v. State*, 827 So.2d 269, 275 (Fla. 4th DCA 2002), *rev. denied*, 845 So.2d 887 (Fla. 2003).

4. **Statute of Limitations:** The statute of limitations can be waived. *See, e.g., Kissimmee Util. Auth. v. Better Plastics, Inc.*, 526 So.2d 46, 48 (Fla. 1988) ("The Authority waived the statute of limitations defense by electing not to plead it even though the Authority claims to have been aware the defense was available."). *See also Major League Baseball v. Morsani*, 790 So.2d 1071, 1077 (Fla. 2001).

5. **Waiver of Arbitration:** Waiver is the intentional or voluntary relinquishment of a known right or conduct which warrants an inference of the relinquishment of a known right. A party claiming waiver of arbitration must show: (1) knowledge of an existing right to arbitrate; and (2) active participation in litigation or other acts inconsistent with the right. *Breckenridge v. Farber*, 640 So.2d 208, 211 (Fla. 4th DCA 1994). *See also Marine Environmental Partners, Inc. v. Johnson*, 863 So.2d 423, 426 (Fla. 4th DCA 2003).

§18:230 *COBLENTZ* AGREEMENTS

When an insurance company wrongfully fails to defend and indemnify its insured, the plaintiff and the defendant insured in the underlying case may enter a *Coblentz* Agreement, through which the defendant stipulates to a judgment and assigns to the plaintiff its claim against its insurer in the amount of the unpaid judgment. *Coblentz v. American Surety Co. of New York*, 416 F.2d 1059, 1062-63 (5th Cir. 1969). The Fifth Circuit described the ability of the assignee to proceed with the claim as follows: where the insurer had "notice of a proceeding against his indemnitee or insured, and is afforded an opportunity to appear and defend, a judgment rendered against the indemnitee or insured, in the absence of fraud or collusion, is conclusive against the indemnitor or insuror as to all material matters determined therein." *Id*. A party must show that: (a) the insurer was obligated to provide coverage; (b) the insurer wrongfully refused to defend the underlying litigation; and (c) the settlement reached was reasonable and in good faith. The amount of the settlement may exceed the amount of the insurance policy. *E.g., Thomas v. W. World Ins. Co.*, 343 So.2d 1298 (Fla. 2d DCA 1977).

"[T]here are two prongs to the coverage element in an action to recover under a *Coblentz* agreement: (1) the facts alleged in the underlying complaint must state a claim that fell within the coverage of the policy (i.e., that the insurer had a duty to defend); and (2) notwithstanding the allegations in the underlying complaint or stipulated facts in the consent judgment, the plaintiff's underlying claims must actually come within the coverage of the policy (i.e., on the merits, the insurer has a contractual duty to indemnify)." *Sinni v. Scottsdale Ins. Co.*, 676 F.Supp.2d 1319, 1324 (M.D. Fla. 2009).

SOURCE

Coblentz v. American Surety Co. of New York, 416 F.2d 1059, 1062-63 (5th Cir. 1969); *Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260-61 (11th Cir. 2007); *Sinni v. Scottsdale Ins. Co.*, 676 F.Supp.2d 1319, 1324 (M.D. Fla. 2009).

SEE ALSO

1. *Allstate Ins. Co. v. Andrews Florist on 4th St., Inc.*, Case No. 8:08-CV-2253, 2011 U.S. Dist. LEXIS 16654, at *3 n.3 (M.D. Fla. Feb. 17, 2011).
2. *State National Ins. Co. v. City of Miami*, Case No. 09-23273-CIV, 2010 U.S. Dist. LEXIS 105621, at *19-20 (S.D. Fla. Sept. 21, 2010).

§18:230.1 Elements — Florida Supreme Court

"The opportunity for a settlement without the agreement of the insurer traditionally has occurred where an insurer breaches its duty to defend, leaving the insured 'to its own devices' to settle the case or proceed to trial. In those circumstances, the insured is left unprotected and may enter into a reasonable settlement agreement with the third-party claimant and consent to an adverse judgment for the policy limits that is collectable only against the insurer." *Perera v. United States Fidelity & Guaranty Co.*, 35 So.3d 893, 899-900 (Fla. 2010) (citations omitted).

§18:230.1.1 Elements — 1st DCA

"An indemnitor, to become bound by a settlement agreement in a suit against the indemnitee, must have (1) notice of the claim, and (2) an opportunity to appear and defend the claim. Further, the settlement must not be the result of fraud or collusion." *Bagley v. Western Casualty & Surety, Co.*, 505 So.2d 678, 680 (Fla. 5th DCA 1987).

See Also

Heapy Engineering, LLP v. Pure Lodging, Ltd., 849 So.2d 424, 425 (Fla. 1st DCA 2003).

§18:230.1.2 Elements — 2d DCA

The plaintiff must show that: (a) the insurer was given an opportunity to defend but wrongfully declined to do so; (b) the claim falls within the coverage provided; and (c) the consent agreement between the other parties may not be "unreasonable in amount or tainted by bad faith." Even though the ultimate burden of proof will be on the carrier, the plaintiff must make a *prima facie* case that the settlement was not unreasonable or entered into in bad faith.

Source

Steil v. Florida Physicians' Ins. Reciprocal, 448 So.2d 589, 592 (Fla. 2d DCA 1984).

See Also

1. *Hyatt Legal Services v. Ruppitz*, 620 So.2d 1134, 1136 (Fla. 2d DCA 1993) ("The consent judgment and accompanying assignment in this case are frequently referred to as a *Coblentz* agreement … The rule announced in *Coblentz* … is a judicially created rule to cope with cases in which a party with a duty to defend another abandons that person's defense.").

§18:230.1.3 Elements — 3d DCA

"Where an injured party wishes to recover under a *Coblentz* agreement, 'the injured party must bring an action against the insurer and prove coverage, wrongful refusal to defend, and that the settlement was reasonable and made in good faith.'" *Chomat v. Northern Insurance Co.*, 919 So.2d 535, 537 (Fla. 3d DCA 2006). "The claimant must 'assume the burden of initially going forward with the production of evidence sufficient to make a prima facie showing of reasonableness and lack of bad faith, even though the ultimate burden of proof will rest upon the carrier.'" *Id*.

See Also

1. *In re Estate of Arroyo v. Infinity Indemnity Ins. Co.*, 211 So.3d 240, 247 (Fla. 3d DCA 2017)
2. *Quintana v. Barad*, 528 So.2d 1300, 1301 n.1 (Fla. 3d DCA 1988).

§18:230.1.4 Elements — 4th DCA

"An insurer will be bound to a settlement agreement/consent judgment negotiated between its insured and a claimant where (1) the damages are covered by the policy; (2) the insurer wrongfully refuses to defend; and (3) the settlement is reasonable and made in good faith." *United States Fire Ins. Co. v. Hayden Bonded Storage Co.*, 930 So.2d 686, 690-91 (Fla. 4th DCA 2006).

Source

Mid-Continent Casualty Co. v. Royal Crane, LLC, 169 So.3d 174, 180 (Fla. 4th DCA 2015); *Wilshire Ins. Co. v. Birch Crest Apartments, Inc.*, 69 So.3d 975 (Fla. 4th DCA 2011); *Shook v. Allstate Ins. Co.*, 498 So.2d 498, 500-01 (Fla. 4th DCA 1986), *review denied*, 508 So.2d 13 (Fla. 1987).

§18:230.1.5 Elements — 5th DCA

"To enforce a consent judgment … [the Plaintiff] must demonstrate: (1) coverage, (2) a wrongful refusal to defend, and (3) that the settlement was reasonable and made in good faith." The indemnitor or liability insurer must have had notice of the claim and an opportunity to appear and defend.

Source

Gallagher v. Dupont, 918 So.2d 342, 348 (Fla. 5th DCA 2005).

§18:230.2 Defenses

"[A]n unjustified failure to defend does not require the insurer to pay a settlement where no coverage exists." *Keller Indus., Inc. v. Employers Mut. Liab. Ins. Co. of Wis.*, 429 So.2d 779, 780 (Fla. 3d DCA 1983).

Source

Jennings Construction Services Corp. v. Ace American Ins. Co., Case No. 6:10-cv-1671-Orl, 2011 U.S. Dist. LEXIS 49999, at *10 (M.D. Fla. May 10, 2011); *Sinni v. Scottsdale Ins. Co.*, 676 F.Supp.2d 1319, 1324 (M.D. Fla. 2009).

The insurer may defend against the claim by asserting that the plaintiff and underlying defendant engaged in fraud or collusion in settling the underlying claim. Collusion could be shown based on an agreement by the plaintiff to share the recovery with the underlying defendant.

Source

Coblentz v. American Surety Co. of New York, 416 F.2d 1059, 1062-63 (5th Cir. 1969); *Chomat v. Northern Insurance Co.*, 919 So.2d 535, 538 (Fla. 3d DCA 2006); *Gallagher v. Dupont*, 918 So.2d 342, 348 (Fla. 5th DCA 2005).

The insurer may defend against the claim by demonstrating that the underlying settlement was not reasonable or not in good faith.

Source

Chomat v. Northern Insurance Co., 919 So.2d 535, 537 (Fla. 3rd DCA 2006); *Gallagher v. Dupont*, 918 So.2d 342, 348 (Fla. 5th DCA 2005) (enforcement of the judgment is subject to a hearing on the reasonableness and amount of the judgment); *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So.2d 589, 592 (Fla. 2d DCA 1984) (the plaintiff must make *prima facie* showing of "reasonableness and lack of bad faith").

§18:230.3 Statute of Limitations

The case law to date has not addressed the issue of which statute of limitations applies to claims brought pursuant to *Coblentz* Agreements. The statute of limitations for breach of written contracts (including insurance agreements) is five years. Fla. Stat. §95.11(2)(b). "The time period for measuring a statute of limitations for breach of an insurer's duty to defend commences at the time a litigant's liabilities or rights have been finally and fully adjudicated," which is the date on which judgment is entered in the underlying litigation. *Morales v. Zenith Insurance Co.*, Case No. 8:10-cv-00733-T, 2010 U.S. Dist. LEXIS 56174, at *4 (M.D. Fla. June 8, 2010) (*citing Grissom v. Commercial Union Ins. Co.*, 610 So.2d 259, 264 (Fla. 1st DCA 1992)).

The statute of limitations for claims for common law bad faith is four years under Fla. Stat. §95.11(3)(a) for claims based on negligence and Fla. Stat. §95.11(3)(p) for other actions not mentioned in the statute. A claim against an insurer for failing to settle in bad faith does not accrue until the completion of the underlying litigation, at the determination of the existence and extent of liability. *Morales v. Zenith Insurance Co.*, Case No. 8:10-cv-00733-T, 2010 U.S. Dist. LEXIS 56174, at *5-6 (M.D. Fla. June 8, 2010) (*citing Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So.2d 1289, 1291 (Fla. 1991) *and Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1275 (Fla. 2000)). "[O]nce the existence of liability on the part of the uninsured tortfeasor and the extent of the insured's damages are determined, there is no impediment to recovery of damages dating from the date of the proven violation" and the statute begins to run. *Morales v. Zenith Insurance Co.*, Case No. 8:10-cv-00733-T, 2010 U.S. Dist. LEXIS 56174, at *6 (M.D. Fla. June 8, 2010) (*citing Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1275 (Fla. 2000)).

§18:230.4 Related Matters

1. **Standard for Determining Reasonableness of Underlying Settlement:** "The determination of whether a settlement is reasonable is made by a 'reasonable person' standard." *Chomat v. Northern Insurance Co.*, 919 So.2d 535, 538 (Fla. 3d DCA 2006).

2. **Elements of Reasonableness:** To determine the reasonableness of a consent judgment entered by an insured, the court should consider "the degree of probability of the insured's success and the size of the possible recovery." I*ndependent Fire Ins. Co. v. Paulekas*, 633 So.2d 1111, 1114 (Fla. 3d DCA 1994).

3. **Underlying Settlement Itself Not Evidence of Fraud or Collusion:** The mere settlement by the underlying defendant is not evidence of fraud or collusion. *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So.2d 589, 592 (Fla. 2d DCA 1984).

4. **Estoppel of Insurer's Challenge to Form of Consent Judgment:** Defendant insurers are estopped from challenging the form of the consent judgment because, under Florida law, where an insurer has wrongfully refused to defend, "an insured is entitled to make a reasonable settlement without requiring the suit to be carried to judgment even though the policy purports to avoid liability for a settlement made without the insurer's consent." *Steil*, 448 So.2d at 591; *Nationwide Mutual Fire Ins. Co. v. Beville*, 825 So.2d 999, 1001 (Fla. 4th DCA 2002) (explaining that "[i]t is well established in Florida law that '[i]f an insurance company breaches its contractual duty to defend, the insured can take control of the case, settle it, and then sue the insurance company for the damages it incurred in settling the action'").

5. **Notice to Insurer of Impending Settlement Not Required:** The trial court in the underlying matter cannot require the parties to give notice to the insurer prior to entering judgment pursuant to the "*Coblentz* Agreement." *Quintana v. Barad*, 528 So.2d 1300, 1301-02 (Fla. 3d DCA 1988).

6. **Waiver of Attorney-Client Privilege:** The filing of the action against the insurer and the plaintiff's initial burden of going forward do not in and of themselves result in a waiver of the attorney-client privilege. *Chomat v. Northern Insurance Co.*, 919 So.2d 535, 538 (Fla. 3d DCA 2006). However, the privilege can be waived if the pleading alleges that the parties entered into the underlying settlement based on disclosed substantive advice of counsel. *Chomat*, 919 So.2d at 539 (settlement agreement recited that the defendants "have been advised by their personal counsel, that in their opinion, the case, if tried before a jury, would result in a verdict of *liability*" resulted in limited waiver).

7. **Insurer Cannot Assert Substantive Defenses:** In response to a suit by the assignee under a *Coblentz* Agreement, the insurer cannot raise any affirmative defenses which could have been raised by the insured in the underlying action because the insurer is deemed to have waived the defenses by wrongfully refusing to defend. *Sinni v. Scottsdale Ins. Co.*, 676 F.Supp.2d 1319, 1332 (M.D. Fla. 2009); *see also Independent Fire Ins. Co. v. Paulekas*, 633 So.2d 1111, 1114 (Fla. 3d DCA 1994) (in attacking reasonableness, the insurer is "not permitted to assert all of the defenses which could have been asserted in the underlying cause of action").

   > "[A]n insurer's unjustified refusal to defend a suit against the insured relieves the insured of his contract obligation to leave the management of such suit to the insurer and justifies him in assuming the defense of the action on his own account. Also, the right to intervene is lost by the insurer by its wrongful refusal to defend." *Carrousel Concessions, Inc. v. Fla. Ins. Guar. Ass'n*, 483 So.2d 513, 517-18 (Fla. 3d DCA 1986) (*citing* 14 *Couch on Insurance* 2d §51:161 (rev. ed. 1982)).
   >
   > A defendant insurer cannot relitigate the issues in the underlying action after having abandoned its insured:
   >
   > > [W]here, as here, an insurer wrongfully refuses to defend its insured[,] … the insured's liability has been established by the settlement and the insurer may not later relitigate this issue. An indemnitor will be bound by a settlement agreement in a suit against the indemnitee if the indemnitor had notice of the suit and an opportunity to defend, and the settlement was not the product of fraud or collusion.
   > >
   > > To hold otherwise would mean that the surety company … may refuse to defend that suit and stand by while that issue is definitely presented and tried, and then, upon judgment being entered against the defendant, and the defendant being found unable to respond in damages, and execution being returned *nulla bona*, may again, when the plaintiff seeks to recover in the right of the insured under the terms of the policy from the surety company, present the same issues, which have been once tried and determined, for another trial and determination in the same court.
   >
   > *Ahern v. Odyssey Re (London) Ltd.*, 788 So.2d 369, 372 (Fla. 4th DCA 2001).

"[T]he insured need not establish actual liability to the party with whom it has settled 'so long as … a potential liability on the facts known to the [insured is] shown to exist.'" *Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986).

8. **Insurer Can Assert Coverage Defenses:** However, conversely, policy exclusions can be asserted as defenses, because those issues have neither been litigated nor waived. *Sinni v. Scottsdale Ins. Co.*, 676 F.Supp.2d 1319, 1332 (M.D. Fla. 2009).

9. **Damages:** In Florida, a party can recover an excess judgment from an insurer based on the insurer's breach of the insurance contract without the need to prove bad faith. *Thomas v. W. World Ins. Co.*, 343 So.2d 1298 (Fla. 2d DCA 1977) (court rejected position that bad faith was "an absolute prerequisite to a recovery of excess damages" where, due to a breach of the insurance contract, an insurer "exercised no faith at all."); *see also Caldwell v. Allstate Ins. Co.*, 453 So.2d 1187, 1190 n.1 (Fla. 1st DCA 1984) (damages under breach of contract theory could exceed policy limits even without showing of bad faith); *but see Perera v. United States Fidelity & Guaranty Co.*, 35 So.3d 893, 900 (Fla. 2010) (noting in *dicta* that that the law "allow[s] agreements by the insured to a judgment in excess of the policy limits against an insurer who wrongfully refuses to defend and acts in bad faith").

   Because the duty to defend is broader than the duty to indemnify, it may be possible to recover the amounts expended to defend the claim even if the court determines that the insurer had no duty to indemnify. *Keller Indus., Inc. v. Employers Mut. Liab. Ins. Co. of Wis.*, 429

   So.2d 779, 780-81 (Fla. 3d DCA 1983) ("the trial court properly granted Keller attorney's fees for the insurer's unjustified refusal to defend" where some of the allegations in the complaint "arguably fell within coverage of the policy") (citations omitted); *see also Robinson v. State Farm Fire & Cas. Co.*, 583 So.2d 1063 (Fla. 5th DCA 1991). The party claiming coverage has the obligation to present the evidence to apportion the amount expended in the defense of the case. *See Keller Indus.*, 429 So.2d at 780-81.

§18:240 IN PARI DELICTO

"In pari delicto" means in *equal* fault. The phrase appears in the legal maxim, "Where both parties are equally in the wrong, the position of the defendant is the stronger." It is similar to the equitable doctrine of unclean hands: "the one desiring equity must do equity." In pari delicto refers to the plaintiff's participation in the same wrongdoing as the defendant. The defense of in pari delicto is both an affirmative defense and an equitable defense. Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing. The defense of in pari delicto is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.

§18:240.1 Elements — Florida Supreme Court

The common law defense of in pari delicto refers to "[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." Black's Law Dictionary 806 (8th ed. 2004). This principle is based on the relative circumstances of the parties at the time of the execution or performance of the contract and generally may be raised in an action at law or in equity. The defense of in pari delicto, however, does not require simply that both parties be to some degree wrongdoers. Rather, the parties must participate in the same wrongdoing. And they must be "[e]qually at fault." Black's Law Dictionary at 806. The Supreme Court explained this principle as follows: The common-law defense … derives from the Latin, in pari delicto potior est conditio defendentis: "In a case of equal or mutual fault … the position of the [defending] party … is the better one." The defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality. In its classic formulation, the in pari delicto defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury, because "in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto; for there may

be, and often are, very different degrees in their guilt. Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306–07, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985) (footnotes and citation omitted). Accordingly, that both plaintiff and defendant may be wrongdoers does not mean that the parties stand in pari delicto. By definition, if the wrong of the party seeking to enforce the contract is not substantially equivalent to the wrong of the defendant, the defense of in pari delicto does not defeat the cause of action. Finally, the defense of in pari delicto is not woodenly applied in every case where illegality appears somewhere in the transaction; since the principle is founded on public policy, it may give way to a supervening public policy. And where to allow in pari delicto defense to prevail would be to defeat some legislatively declared policy, the defense will not prevail.

Source

Earth Trades, Inc. v. T & G Corp., 108 So.3d 580, 583-584 (Fla. 2013).

See Also

1. *Martin County v. Edenfield*, 609 So.2d 27 (Fla. 1992).
2. *Brandt v. Brandt*, 167 So. 524 (Fla. 1936).
3. Uniform Contribution Among Tortfeasors Act, Florida Statutes §768.31 et seq.

§18:240.1.1 Elements — 1st DCA

[No citation for this edition.]

§18:240.1.2 Elements — 2nd DCA

"In pari delicto" means in equal fault. The phrase appears in the legal maxim, "Where both parties are equally in the wrong, the position of the defendant is the stronger." In pari delicto refers to the plaintiff's participation in the same wrongdoing as the defendant. The defense of in pari delicto is both an affirmative defense and an equitable defense. Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing. The defense of in pari delicto is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality. In its classic formulation, the in pari delicto defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury, because in cases where both parties are in delicto, concurring an illegal act, it does not always follow that they stand in pari delicto; for there may be, and often are, very different degrees in their guilt.

The in pari delicto doctrine is a corollary of the doctrine of unclean hands which requires that no one shall be permitted to profit from his own fraud or wrongdoing, and that one who seeks the aid of equity must do so with clean hands. Application of the in pari delicto doctrine may yield to public policy considerations: The defense of in pari delicto is not woodenly applied in every case where illegality appears somewhere in the transaction; since the principle is founded on public policy, it may give way to a supervening public policy.

Source

O'Halloran v. PricewaterhouseCoopers, LLP, 969 So.2d 1039 (Fla. 2d DCA 2007).

See Also

1. *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543 (Fla. 2d DCA 2003).
2. *P.C.B. Partnership v. Largo*, 549 So.2d 738, 741-42 (Fla. 2d DCA 1989).

§18:240.1.3 Elements — 3rd DCA

One who himself engages in a fraudulent scheme—that is, acts in pari delicto—may forfeit his right to any legal remedy against a co-perpetrator. In situations where both parties are guilty of some form of wrongdoing, as the courts pontifically say in the law, the parties are in pari delicto, and a court will not lend its aid to either party, but will leave the parties where they place themselves.

However, where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral

fault, and where to apply the rule would be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.

The policy interests behind the ordinance violated are but one of a host of factors that must be considered before this judicial penalty of absolute nonenforcement of a contract is tacked on to a legislative instrument. To determine whether the public policy behind a licensing provision clearly outweighs the interest in allowing enforcement of a promise, a number of factors should be taken into account. In weighing the interest in the enforcement of a term, account is taken of: (a) the parties' justified expectations; (b) any forfeiture that would result if enforcement were denied; and (c) any special public interest in the enforcement of the particular term. In weighing a public policy against enforcement of a term, account is taken of: (a) the strength of that policy as manifested by legislation or judicial decisions; (b) the likelihood that a refusal to enforce the term will further that policy; (c) the seriousness of any misconduct involved and the extent to which it was deliberate; and (d) the directness of the connection between that misconduct and the term.

Source

MGM Constr. Servs. Corp. v. Travelers Cas. & Sur. Co. of Am., 57 So.3d 884 (Fla. 3d DCA 2011); *Kulla v. E.F. Hutton & Co.*, 426 So.2d 1055, 1057 n.1 (Fla. 3d DCA 1983).

See Also

1. *John Hancock-Gannon Joint Venture II v. McNully*, 800 So.2d 294 (Fla. 3d DCA 2001).
2. *Chaykin v. Kant*, 327 So.2d 793, 795 (Fla. 3d DCA 1976).

§18:240.1.4 Elements — 4th DCA

The "in pari delicto" doctrine is the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing. In cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto; for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offense. And besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be.

In determining the applicability of in pari delicto, a court first determines whether plaintiff's guilt is far less in degree than defendant's, so as to make the doctrine inapplicable. If plaintiff's guilt is not far less, the court inquires if applying the doctrine would be contrary to public policy.

The defense of in pari delicto is not woodenly applied in every case where illegality appears somewhere in the transaction; since the principle is founded on public policy, it may give way to a supervening public policy.

Source

Dorestin v. Hollywood Imps., Inc., 45 So.3d 819 (Fla. 4th DCA 2010); *Turner v. Anderson*, 704 So.2d 748 (Fla. 4th DCA 1998).

See Also

1. *Maybarduk v. Bustamante*, 294 So.2d 374 (Fla. 4th DCA 1974)
2. *Bortell v. White Mts. Ins. Group., Ltd.*, 2 So.3d 1041 (Fla. 4th DCA 2009).

§18:240.1.5 Elements — 5th DCA

In situations where both parties are guilty of some form of wrongdoing, as the courts pontifically say in the law, the parties are in pari delicto, and a court will not lend its aid to either party, but will leave the parties where they place themselves. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule would be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.

Source

Alan B. Garfinkel, P.A. v. Mager, 57 So.3d 221 (Fla. 5th DCA 2010).

See Also

1. *Hertz v. R.I. Hosp.*, 784 So.2d 506 (Fla. 5th DCA 2001)
2. *Franklin v. Wallack*, 576 So.2d 1371 (Fla. 5th DCA 1991) (split decision).

§18:240.2 Defenses to the Usage of the Defense

1. **Application of the Defense:** The defense of in pari delicto is not woodenly applied in every case where illegality appears somewhere in the transaction; since the principle is founded on public policy, it may give way to a supervening public policy. *MGM Constr. Servs. Corp. v. Travelers Cas. & Sur. Co. of Am.*, 57 So.3d 884 (Fla. 3d DCA 2011); *Turner v. Anderson*, 704 So.2d 748 (Fla. 4th DCA 1998).

2. **Fault Is Not Equal:** Even if both parties concurred in an illegal act, it does not always follow that they stand in pari delicto; for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offense. *Dorestin v. Hollywood Imps., Inc.*, 45 So.3d 819 (Fla. 4th DCA 2010); *Turner v. Anderson*, 704 So.2d 748 (Fla. 4th DCA 1998); *Burton v. McMillan*, 42 So. 849 (Fla. 1907).

3. **Failure to Establish Guilt/Illegality of Plaintiff's Conduct:** *Kulla v. E.F. Hutton & Co.*, 426 So.2d 1055, 1057 n.1 (Fla. 3d DCA 1983) (even though plaintiff should have been on notice that she was receiving non-public information, court still allowed a complaint seeking recission of stock purchase to proceed where there was nothing in the complaint to show that defendants were "insiders," such that plaintiff was not barred by being in pari delicto in relying on defendants' bad stock tip).

4. **Indemnity for the Passive/Vicarious Tortfeasor:** Generally, one of two joint tortfeasors cannot have contribution from the other. But there are exceptions to this rule, one of which is for that class of cases where although both parties are at fault and both liable to the person injured, such as an employee of one of them, yet they are not in pari delicto as to each other, as where the injury has resulted from a violation of the duty which one owes the other, so that as between themselves, the act or omission of the one from whom indemnity is sought is the primary cause of the injury. *Maybarduk v. Bustamante*, 294 So.2d 374 (Fla. 4th DCA 1974) (the surgeon claimed passive negligence to the actions of the assistant physician and hospital in negligently leaving a hemostat in the abdomen of a patient).

   One of the exceptions or limitations to the general rule prohibiting contribution from one joint tortfeasor to another rests solely upon a difference between the kinds of negligence of two tortfeasors, and comes into play when the active negligence of one tortfeasor and the passive negligence of another tortfeasor combine and proximately cause an injury to a third person. In such case, the passively negligent tortfeasor, who is compelled to pay damages to the injured person on account of the injury, is entitled to indemnity from the actively negligent tortfeasor. *Hertz v. R.I. Hosp.*, 784 So.2d 506 (Fla. 5th DCA 2001) (automobile lessor Hertz, which would have been liable under the dangerous instrumentality doctrine, could recover indemnity from the employer, Rhode Island Hospital, of the negligent lessee when the lessee was driving the rental vehicle in the course and scope of his employment, as the employer would then not be a passive tortfeasor, while Hertz was purely passive).

§18:240.3 Related Matters

1. **Attorney Fees Contract That Violates the Rules Regulating the Florida Bar:** *See Alan B. Garfinkel, P.A. v. Mager*, 57 So.3d 221 (Fla. 5th DCA 2010); *King v. Young, Berkman, Berman & Karpf, P.A.*, 709 So.2d 572 (Fla. 3d DCA 1998), *rev. denied*, 725 So.2d 111 (Fla. 1998) (when fee agreement between attorney and client is void because it fails to comply with the Rules regulating the Florida Bar, the attorney is entitled to recover on the basis of quantum meruit); *Patterson v. Law Office of Lauri J. Goldstein, P.A.*, 980 So.2d 1234 (Fla. 4th DCA 2008) (an innocent paralegal allowed to recover despite bar rules against sharing fees with nonlawyers); *Turner v. Anderson*, 704 So.2d 748 (Fla. 4th DCA 1998) (in pari delicto barred client's claim against attorney for convincing him to commit perjury, but did not bar claim that

attorney's dual "conflicted" representation of client and client's employer improperly shifted liability away from employer and onto client).

2. **Deed Illegally Procured:** *Burton v. McMillan*, 42 So. 849 (Fla. 1907) (the legal threat to bring criminal prosecution against a spouse of an innocent person, made to that person to obtain a deed or mortgage, can constitute duress):

> The maxim 'In pari delicto,' should not be applied to a case where a married woman sues to set aside a deed of her separate property made by her under express or implied threats of the prosecution of her husband, and to save him from prosecution whether the threatened prosecution was lawful or unlawful, when she was sick and nervous, and when she does not appear to have had abundant opportunity for consideration and consultation with disinterested advisors.

Burton, 42 So. at 854; *see also Loew v. Freidman*, 80 So.2d 672 (Fla. 1955) and *Sheldon v. Wilfore*, 186 So. 508 (Fla. 1939). *But see Franklin v. Wallack*, 576 So.2d 1371 (Fla. 5th DCA 1991) (split decision) (majority finding no duress on part of husband, and allowing foreclosure on mortgage) and compare *Chaykin v. Kant*, 327 So.2d 793, 795 (Fla. 3d DCA 1976) (where plaintiff sought to foreclose on note that was delivered to him for inadequate consideration by decedent in order to avoid IRS tax lien, the court was "correct in not aiding Chaykin by enforcing the mortgage, but instead leaving Chaykin where he placed himself and dismissing his suit").

3. **Estoppel in the Area of Securities/Stocks:** Estoppel is applicable only where the purchaser himself is in pari delicto or participates in the management of the issuing corporation, or where some unusual circumstances exist justifying application of the doctrine of estoppel. *Data Lease Financial Corp. v. Barad*, 291 So.2d 608 (Fla. 1974); *Kulla v. E.F. Hutton & Co.*, 426 So.2d 1055, 1057 n.1 (Fla. 3d DCA 1983) (allowing a complaint seeking recission of stock purchase to proceed where there was nothing in the complaint to show that defendants were "insiders," such that plaintiff was not barred by being in pari delicto in relying on defendants' stock tip).

4. **Estoppel in the Context of Allegedly Void Marriages:** It is well within the trial court's equitable power to apply the rule in pari delicto melior defendentis est and leave the original record closed to correction, where no positive rule of law, or consideration of public policy, requires the presumptively valid decree to be rendered void ab initio by setting it aside for jurisdictional objections shown to lie dehors the record and brought to the attention of the court for the first time after other substantial equities have arisen on the strength of the record as it was originally made through the fault, connivance or fraud of the subsequently complaining party in occasioning the false record in the first instance. *Arnold v. Arnold*, 500 So.2d 739 (Fla. 3d DCA 1987).

> **Restatement (Second) of Conflict of Laws §74 (1971),** states:
>
> A person may be precluded from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him to do so.
>
> The Committee Note explains the scope of the rule as follows:
>
> The rule may be applied whenever, under all the circumstances, it would be inequitable to permit a particular person to challenge the validity of a divorce decree. Such inequity may exist when action has been taken in reliance on the divorce or expectations are based on it or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party.
>
> **Restatement (Second) of Conflict of Laws §74 comment b** (1971).
>
> In *Dawson v. Dawson*, 164 So.2d 536 (Fla. 1st DCA 1964), the court held that the wife knew of a "meretricious beginning" to her "marriage" when she went to Mexico with the husband, with knowledge of his intent to procure a Mexican divorce from his prior wife, following which, she engaged in

a Mexican marriage ceremony, following which they paraded as husband and wife for eight years. Because they were both guilty of bad faith—in pari delicto—estoppel would not prevent the husband from disputing alimony.

Good faith is not to be presumed on the part of a mature woman who, as in the instant case, enters into a marriage with a man whom she knows to have been recently married to a living spouse, who has no evidence of a lawful divorce having been granted, and who is aware of a surreptitious attempt on the part of the prospective husband to shake off the bonds of his prior marriage by a cooked-up Mexican decree of divorce. In pari delicto potior est conditio defendentis. It was error to award alimony to appellee under the circumstances of this case.

Dawson, 164 So.2d at 540. *Compare Keller v. Keller*, 521 So.2d 273 (Fla. 5th DCA 1988) (where appellee second wife did not in any way participate in the divorce from first wife, and the parties were married approximately 20 years, with no allegation of the marriage being void until a claim was made for alimony and property by the wife in the dissolution proceeding, then appellant husband is estopped to assert its invalidity); *Alexander v. Colston*, 66 So.2d 673 (Fla. 1953) (since the second wife was an innocent party, and the husband would have been estopped from denying the validity of the marriage, his heirs from his first marriage likewise were estopped from claiming rights to property owned by the second wife and their father, as husband and wife); *Brandt v. Brandt*, 167 So. 524 (Fla. 1936) (the fact that a woman falsely represented to a man with whom she had sexual intercourse that she was pregnant by him, and thereby persuaded him to marry her, was not a sufficient ground to warrant an annulment of the subsequent marriage, as the husband was in pari delicto with the wife in consensual pre-marital sex).

5. **Inheritance of the Defense of In Pari Delicto:** *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543 (Fla. 2d DCA 2003): Although a receiver receives his or her claims from the entities in receivership, a receiver does not always inherit the sins of his predecessors. Under certain circumstances, defenses such as unclean hands do not apply against a receiver when they would have applied against the entity that was placed into receivership. The receiver may also pursue certain claims that would be barred by the defense of in pari delicto if pursued by the corporation that has been placed in receivership.

   In *Chaykin v. Kant*, 327 So.2d 793, 795 (Fla. 3d DCA 1976), where plaintiff sought to foreclose on note that was delivered to him for inadequate consideration by decedent in order to avoid IRS tax lien, the court was "correct in not aiding Chaykin by enforcing the mortgage, but instead leaving Chaykin where he placed himself and dismissing his suit," and allowing Kants' heirs to use the defense of in pari delicto.

6. **Illegal Contracts:** Contracts violating public policy designed for public welfare are illegal and will not be enforced by the courts. *John Hancock-Gannon Joint Venture II v. McNully*, 800 So.2d 294 (Fla. 3d DCA 2001). The doctrine that a contract offensive to public policy is void and unenforceable is based upon the principle that "'[w]here the parties to such an agreement are in pari delicto the law will leave them where it finds them; relief will be refused in the courts because of public interest.'" *Patterson v. Law Office of Lauri J. Goldstein, P.A.*, 980 So.2d 1234 (Fla. 4th DCA 2008). The corollary to that principle being "if the wrong of the party seeking to enforce the contract is not substantially equivalent to the wrong of the defendant, the defense of in pari delicto does not defeat the cause of action." *Earth Trades, Inc. v. T&G Corp*., 108 So.3d 580, 584 (Fla. 2013) (parties were not in pari delicto where general contractor knew that subcontractor was unlicensed since any fault of general contractor in hiring an unlicensed subcontractor was less than the fault of the subcontractor in engaging in unlicensed contracting). Courts cannot allow one to invoke the judicial process when, for his own financial benefit, he has participated in the very activity the law precludes, with the resulting danger that the law seeks to avoid. A foreign contract which violates a provision of the Florida constitution or a Florida statute is void and illegal, and, will not be enforced in Florida courts. Where the parties to such an agreement are in pari delicto the law will leave them where it finds them; relief will be refused in the courts because of public interest. *Harris v. Gonzalez*, 789 So.2d 405 (Fla. 4th DCA 2001).

7. **Public's Interest Is Weak:** *MGM Constr. Servs. Corp. v. Travelers Cas. & Sur. Co. of Am.*, 57 So.3d 884 (Fla. 3d DCA 2011):

   A statute clearly may protect against fraud and incompetence. Yet, in very many cases the situation involves neither fraud nor incompetence. The unlicensed party may have rendered excellent service or delivered goods of the highest quality. The noncompliance with the statute may be nearly harmless. The real defrauder may be the defendant who will be enriched at the unlicensed party's expense by a court's refusal to enforce the contract. Although courts have yearned for a mechanically applicable rule, most have not made one in the present instance. Justice requires that the penalty should fit the crime. The statute fixes its own penalties, usually a fine or imprisonment of a minor character with a degree of discretion in the court. The added penalty of unenforceability of bargains is a judicial creation. In many cases, the court may be wise to apply this additional penalty. When nonenforcement causes great and disproportionate hardship, a court must avoid nonenforcement. All violations of licensing statutes are not created equally, and the courts faced with whether to add the penalty of non-enforceability to a violation of a licensing provision, where the statute or ordinance does not provide for such a penalty, must take a flexible approach. The violation of a licensing provision does implicate concerns over whether the other party and the public at large are sufficiently protected from shoddy workmanship. However, the mere existence of a violation, standing alone, is insufficient to automatically trigger the judicial penalty of unenforceability. A trial court cannot add the penalty of non-enforceability to a licensing ordinance based on the mere fact that there was a violation.

   To determine whether the public policy behind a licensing provision clearly outweighs the interest in allowing enforcement of a promise, a number of factors should be taken into account. In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term. In weighing a public policy against enforcement of a term, account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.

8. **Ultra Vires Contracts:** A party entering into a contract with a municipality is bound to know the extent of the municipality's power to contract, and the municipality will not be estopped to assert the invalidity of a contract which it had no power to execute. 56 Am.Jur.2d §529. In addition, a party generally may not seek to enforce an illegal contract. *P.C.B. Partnership v. Largo*, 549 So.2d 738, 741-42 (Fla. 2d DCA 1989). Where a contract is within the scope of the municipal powers but is void and unenforceable as an express contract because of irregularities in execution or performance, recovery may still be had for the value of benefits received by the municipality on a theory of implied contract. However, a distinction has been drawn between cases in which the express contract involves an irregular exercise of a corporate power to contract, and those in which the express contract is ultra vires because the power of the municipality to contract is absent. In the latter cases, the municipality may not be bound, even in implied contract, for the value of benefits received.

9. **Unlicensed Persons Contracts:** *MGM Constr. Servs. Corp. v. Travelers Cas. & Sur. Co. of Am.*, 57 So.3d 884 (Fla. 3d DCA 2011) (the mere existence of a violation by an unlicensed subcontractor, standing alone, is insufficient to automatically trigger the judicial penalty of unenforceability).

   The broad basis for the doctrine that contracts of certain unlicensed persons are unenforceable is that the courts should not lend their aid to the enforcement of contracts where performance would tend to deprive the public of the benefits of regulatory measures. The general rule is subject to the exception that where the parties are not in pari delicto, the innocent party may recover. "If the wrong of the party seeking to enforce the contract is not substantially equivalent to the wrong of the defendant, the defense of in pari delicto does not defeat the cause of action." *Earth Trades, Inc. v. T&G Corp.*, 108 So.3d 580, 584 (Fla. 2013) (parties were not in pari delicto where general contractor knew that subcontractor was unlicensed

since any fault of general contractor in hiring an unlicensed subcontractor was less than the fault of the subcontractor in engaging in unlicensed contracting). *Vista Designs, Inc. v. Silverman*, 774 So.2d 884 (Fla. 4th DCA 2001) (unlicensed practice of law where out of state attorney had to reimburse client); *Chandris, S.A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995) (ships operator who settled separately with injured seamen was allowed defend an interference with contract claim by seaman's Massachusetts-barred maritime attorney by claiming that attorney-(seaman)client contract was void ab initio on grounds of unauthorized practice of law); *Cooper v. Paris*, 413 So.2d 772 (Fla. 1st DCA 1982) (unlicensed real estate broker's commission fee agreement void ab initio); *Edwards v. Trulis*, 212 So.2d 893 (Fla. 1st DCA 1968) (since appellant was not registered dealer or salesman, sale of registered securities was contrary to state securities law, and therefore, contract for brokerage commissions was void and unenforceable); *Bortell v. White Mts. Ins. Group., Ltd.*, 2 So.3d 1041 (Fla. 4th DCA 2009) (an insurance agent had no standing to sue an insurer he represented under §624.155(2), Fla. Stat., for operating without a certificate of authority because the statute only allowed a "party" to bring such a suit, and, under the statutory framework, "party" meant a party to an insurance contract, nor did the statute let him sue related individuals; insurance agent was a participant in the illegal conduct, thus, the in pari delicto doctrine barred his claim).

10. **Usury:** Florida has expressly disapproved the "pari delicto" theory as applied to usury. *Chakford v. Sturm*, 65 So.2d 864, 866 (Fla. 1953). Under a statute providing that usurious interest shall be forfeited, a mortgagor "does not waive his right to recover usurious payments by paying the mortgage debt, including usury, without protest."

11. **Whistleblowers Who Participate in Some Wrongdoing:** *Martin County v. Edenfield*, 609 So.2d 27 (Fla. 1992) (whistleblower's own misconduct in the act complained/reported of, did not create a complete defense for the county to warrant summary judgment dismissal).

§18:250 SPLITTING CAUSES OF ACTION

§18:250.1 Elements — Florida Supreme Court

The rule against splitting causes of action flows from the doctrine of res judicata. The rule against splitting causes of action makes it incumbent upon plaintiffs to raise all available claims involving the same circumstances in one action. The rule against splitting causes of action is predicated on the following basic policy considerations: (1) finality in court cases promotes stability in the law; (2) multiple lawsuits arising out of a single incident are costly to litigants and an inefficient use of judicial resources; and (3) multiple lawsuits cause substantial delay in the final resolution of disputes.

Source

Department of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc., 570 So.2d 892, 901 (Fla. 1990).

See Also

1. *Larson & Larson, P.A. v. TSE Indus.*, 22 So.3d 36 (Fla. 2009).
2. *Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061 (Fla. 2001)
3. *Mims v. Reid*, 98 So.2d 498, 500-01 (Fla. 1957) ("The law does not permit the owner of a single or entire cause of action or an entire indivisible demand to divide or split that cause of action so as to make it the subject of several actions, without the consent of the defendant. All damages sustained or accruing to one as a result of a single wrongful act must be claimed or recovered in one action or not at all. The law presumes that a single cause of action can be tried and determined in one suit, and will not permit the plaintiff to maintain more than one action against the same party for the same cause. This rule is founded on the plainest and most substantial justice—namely, that litigation should have an end, and that no person should be unnecessarily harassed with a multiplicity of suits. If the first suit is effective and available, and affords ample remedy to the plaintiff, the second suit is unnecessary and consequently vexatious. The rule against splitting causes of action is closely related to the doctrine of res judicata in this respect.").

§18:250.1.1 Elements — 1st DCA

The law does not permit the owner of a single or entire cause of action or an entire indivisible demand to divide or split that cause of action so as to make it the subject of several actions, without the consent of the defendant. All damages sustained or accruing to one as a result of a single wrongful act must be claimed or recovered in one action or not at all. The law presumes that a single cause of action can be tried and determined in one suit, and will not permit the plaintiff to maintain more than one action against the same party for the same cause. This rule is founded on the plainest and most substantial justice—namely, that litigation should have an end, and that no person should be unnecessarily harassed with a multiplicity of suits. If the first suit is effective and available, and affords ample remedy to the plaintiff, the second suit is unnecessary and consequently vexatious. The rule against splitting causes of action is closely related to the doctrine of res judicata in this respect.

Source

Amec Civil, LLC v. DOT, 41 So.3d 235, 238 (Fla. 1st DCA 2010).

§18:250.1.2 Elements — 2nd DCA

The rule against splitting causes of action is an aspect of the doctrine of res judicata. It makes it incumbent upon plaintiffs to raise all available claims involving the same circumstances in one action. The rule against splitting causes of action is based on the principles that there should be finality in court cases, and multiple lawsuits arising out of a single incident are costly, inefficient, and cause substantial delay in resolving disputes.

Source

Brewster v. Castano, 937 So.2d 1268 (Fla. 2d DCA 2006).

§18:250.1.3 Elements — 3rd DCA

The doctrine of res judicata forbids splitting a cause of action. When the plaintiffs initially sue defendants, it is incumbent upon them then to raise all available claims or demands for relief arising out of the alleged breach. Their failure to do so precludes subjecting those defendants to another successive action based on the same conduct.

Source

Greenstein v. Greenbrook, 443 So.2d 296 (Fla. 3d DCA 1983).

§18:250.1.4 Elements — 4th DCA

The law does not permit an owner of a single or entire cause of action or an entire indivisible demand to divide or split that cause of action so as to make it the subject of several actions, without the consent of the defendant. All damages sustained or accruing to one as a result of a single wrongful act must be claimed or recovered in one action or not at all. The law presumes that a single cause of action can be tried and determined in one suit, and will not permit the plaintiff to maintain more than one action against the same party for the same cause. This rule is founded on the plainest and most substantial justice—namely, that litigation should have an end, and that no person should be unnecessarily harassed with a multiplicity of suits. If the first suit is effective and available, and affords ample remedy to the plaintiff, the second suit is unnecessary and consequently vexatious. The rule against splitting causes of action is closely related to the doctrine of res judicata in this respect.

Source

Leahy v. Batmasian, 960 So.2d 14, 18 (Fla. 4th DCA 2007).

SEE ALSO

1. *Eckert Realty Corp. v. Eckert*, 941 So.2d 426 (Fla. 4th DCA 2006).
2. *Land v. GMC*, 906 So.2d 1154 (Fla. 4th DCA 2005).
3. *Tyson v. Viacom, Inc.*, 890 So.2d 1205 (Fla. 4th DCA 2005).
4. *Froman v. Kirland*, 753 So.2d 114 (Fla. 4th DCA 1999).

§18:250.1.5 Elements — 5th DCA

"The rule against splitting a cause of action requires that all damages sustained by a party as a result of a single wrongful act are lost if not claimed or recovered in one action."

Source

Scovell v. Delco Oil Co., 798 So.2d 844 (Fla. 5th DCA 2001); *State Farm Mut. Auto. Ins. Co. v. Yenke*, 804 So.2d 429 (Fla. 5th DCA 2001).

§18:250.2 Related Matters

1. **Res Judicata:** Res judicata and impermissible splitting of causes of action are not interchangeable concepts barring the bringing of claims. Because the rule against splitting causes of action is only an aspect of res judicata, it logically follows that if res judicata is not a bar to the bringing of a claim, impermissible splitting of causes of action is not either. Said another way, one who impermissibly splits causes of action may run afoul of res judicata, but one who runs afoul of res judicata may not have done so by impermissibly splitting causes of action, as the claim could be barred based on another aspect of res judicata.

   Res judicata defines a cause of action in terms of identical facts. The rule against **splitting causes of action** defines a cause of action in terms of a single wrongful act. Within one set of identical facts, three wrongful acts could exist. In such a circumstance, bringing separate claims in separate complaints based on each wrongful act would not run afoul of the rule against **splitting causes of action**. However, this factual scenario would still run afoul of res judicata because the three separate claims would be based on identical facts. This hurdle is overcome where there are three separate sets of facts in addition to three separate wrongful acts. In such a circumstance there are three claims, each of which constitutes an independent cause of action capable of being raised in separate complaints. Therefore, neither res judicata nor the rule against **splitting causes of action** will bar a second complaint including two claims in such a circumstance. Tyson v. Viacom, Inc., 890 So.2d 1205 (Fla. 4th DCA 2005).

2. **Consent to/Waiver of the Defense:** One consents to the splitting of a cause of action where "in none of the actions does the defendant make the objection that another action is pending based upon the same claim." *Rosenthal v. Scott*, 150 So.2d 433 (Fla. 1963), *citing* Restatement, Judgments, Sec. 62, p. 257. Where a party raises res judicata or improper splitting of a cause of action in an answer to an amended complaint, there is no waiver of the affirmative defense for not having raising it earlier in the original answer to the original complaint. *Rosenthal*, 150 So.2d at 435-36.

3. **Ends of Justice Are Defeated:** *Bettcher v. Wadsworth*, 825 So.2d 438, 441 (Fla. 2d DCA 2002) ("The rule against splitting causes of action is based on the principle that defendants should not be harassed by multiple lawsuits when all claims arise from an alleged wrong that could be litigated in a single action. The rule rests on principles of fairness and equity. We are concerned that strict compliance with the rule in automobile accident litigation under today's law fails to accomplish these principles of fairness and equity … where the result could be all law and no justice."). *See also Petito v. A.H. Robins Co.*, 750 So.2d 103, 106 (Fla. 3d DCA 1999), *citing Rosenthal v. Scott*, 150 So.2d 433, 439 (Fla. 1963) (on rehearing; holding that the rule against splitting causes of action "should not be declared rigid, inflexible and inexorable when such declaration would in many, many instances, for the sake only of convenience to a putative wrongdoer, defeat the ends of justice"); *Tucker v. John Galt Ins. Agency Corp.*, 743 So.2d 108, 110 n.3 (Fla. 4th DCA 1999) ("the rule should not be mindlessly and inflexibly applied without regard to the reasons for its application, when to do so would defeat the ends of justice").

4. **Separate Wrongful Acts, Not Single Wrongful Acts:** In landlord tenant disputes, the summary possession procedure statutes envision an expedited process to determine the right to possession of real property promptly without the necessity of deciding all other issues between the parties. While the tenant may assert all equitable defenses in a landlord/tenant dispute, there is no obligation to do so in the summary procedure action. Just as the landlord does not have to assert all its claims in the action to remove the

tenant, the tenant does not have to assert all its defenses. The tenant may await the landlord's action for damages to assert any monetary claims by way of affirmative defenses or counterclaims. *Scovell v. Delco Oil Co.*, 798 So.2d 844 (Fla. 5th DCA 2001) (the failure to install the new petroleum lines which led to the eviction was an act separate from the subsequent failure to remove the petroleum equipment, and thus, the rule against splitting a cause of action was inapplicable). In an insurance coverage context, *see State Farm Mut. Auto. Ins. Co. v. Yenke*, 804 So.2d 429, 432 (Fla. 5th DCA 2001) ("[t]he fact that the underinsured coverage provision and the uninsured coverage are contained in the same paragraph of the instant policy does not change the fact that such claims involve separate and distinct coverage issues"); *see also Bryant v. Allstate. Ins. Co.*, 584 So.2d 194 (Fla. 5th DCA 1991) (a breach of each coverage provision gives rise to a separate cause of action and may be separately asserted from the tortfeasor's tort).

5. **Subsequent Claim Unavailable at the Time of the Initial Filing:** The rule does not require the joinder of a cause of action that is not "available" because it has not accrued with a cause of action that has accrued. Under the rule against splitting a cause of action, a new claim for damages is not barred if the underlying cause of action had not accrued at the time of filing the previous lawsuit. *Larson & Larson, P.A. v. TSE Indus.*, 22 So.3d 36 (Fla. 2009); *Tucker v. John Galt Ins. Agency Corp.*, 743 So.2d 108 (Fla. 4th DCA 1999) (claim was not barred by rule against splitting causes of action because the later order was not an available claim at the time of the final judgment in the first lawsuit and the cause of action did not accrue until judge of compensation fixed assignee's liability to appellant); *Lobato-Bleidt v. Lobato*, 688 So.2d 431 (Fla. 5th DCA 1997) (the rule against splitting causes of action and the doctrine of res judicata do not apply here because the causes of action are different and because the actions had not occurred or were not discovered until after the Colorado and the initial Florida proceedings).

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CHAPTER 19

TRUSTS & ESTATES

§19:10 REVOCATION OF PROBATE BASED ON LACK OF TESTAMENTARY CAPACITY
§19:10.1 Florida Statutes
§19:10.2 Elements of Cause of Action — Florida Supreme Court
§19:10.2.1 Elements of Cause of Action — 1st DCA
§19:10.2.2 Elements of Cause of Action — 2nd DCA
§19:10.2.3 Elements of Cause of Action — 3rd DCA
§19:10.2.4 Elements of Cause of Action — 4th DCA
§19:10.2.5 Elements of Cause of Action — 5th DCA
§19:10.3 Statute of Limitations
§19:10.4 References
§19:10.5 Defenses
§19:01.6 Related Matters

§19:20 REVOCATION OF PROBATE BASED ON UNDUE INFLUENCE
§19:20.01 Florida Statutes
§19:20.1 Elements of Cause of Action- Florida Supreme Court
§19:20.1.1 Elements of Cause of Action — 1st DCA
§19:20.1.2 Elements of Cause of Action — 2nd DCA
§19:20.1.3 Elements of Cause of Action — 3rd DCA
§19:20.1.4 Elements of Cause of Action — 4th DCA
§19:20.1.5 Elements of Cause of Action — 5th DCA
§19:20.2 Statute of Limitations
§19:20.3 References
§19:20.4 Defenses
§19:20.5 Related Matters
§19:20.5.1 Burden of Proof and Presumption of Undue Influence
§19:20.6 Related Causes of Action

§19:30 REMOVAL OF PERSONAL REPRESENTATIVE: SURCHARGE
§19:30.1 Florida Statutes and Florida Probate Rules
§19:30.2 Elements of Cause of Action — Florida Supreme Court
§19:30.2.1 Elements of Cause of Action — 1st DCA
§19:30.2.2 Elements of Cause of Action — 2nd DCA
§19:30.2.3 Elements of Cause of Action — 3rd DCA
§19:30.2.4 Elements of Cause of Action — 4th DCA
§19:30.2.5 Elements of Cause of Action — 5th DCA
§19:30.3 Statute of Limitations
§19:30.4 References
§19:30.5 Related Matters
§19:30.6 Sample Cause of Action

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§19:10 REVOCATION OF PROBATE BASED ON LACK OF TESTAMENTARY CAPACITY

§19:10.1 Florida Statutes

Fla. Stat. §732.501 Who May Make a Will

"Any person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a will."

§19:10.2 Elements of Cause of Action — Florida Supreme Court

To prove that a testator lacks a sound mind to execute a valid will, the attorney must prove that he lacked the ability to mentally understand, in a general way, (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from the will, or (3) the practical effect of the will as executed.

Additionally, "where there is an insane delusion in regard to one who is the object of the testator's bounty, which causes him to make a will which he would not have made but for that delusion, such will cannot be sustained."

Source

Newman v. Smith, 82 So. 236, 241, 249 (Fla. 1918).

A study of the pertinent cases reveals that the precise condition of the testator's mental health at the time he executed his will may be established in more ways than one. It may be established by direct proof as to his condition when the will was executed, or it may be established by inferences from proof of his mental condition leading up to and following the execution of the will when such proof is properly related and connected.

Source

In re Estate of Zimmerman, 84 So. 2d 560, 562 (Fla. 1956).

See also

1. *In re Weihe's Estate*, 275 So. 2d 244, 245 (Fla. 1973) (referencing *In re Zimmerman's Estate*, 84 So. 2d 560 (Fla. 1956) for the idea that "a probate judge may consider 'beforehand' or 'afterward' proof of a testator's mental behavior as to whether a will was made during a testator's lucid interval.").
2. *In re Ziy's Estate*, 223 So. 2d 42, 43 (Fla. 1969) ("The fact of an adjudication of incompetency shifts the burden of going forward with the evidence from the contestant of the will to the proponent of the will.").
3. *Zinnser v. Gregory*, 77 So. 2d 611, 614-15 (Fla. 1955) ("An insane delusion has been defined as a spontaneous conception and acceptance as a fact, of that which has no real existence except in imagination. The conception must be persistently adhered to against all evidence and reason. It has also been defined as a conception originating spontaneously in the mind without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality, and springing from a diseased or morbid condition of the mind. Numerous other definitions might be cataloged, but the ultimate test applied by all is that the aberration must be such as indicates a diseased or deranged condition of the mind." *citing Hooper v. Stokes*, 145 So. 855, 856 (Fla. 1933)).
4. *In re Kiggins' Estate*, 67 So. 2d 915, 918 (Fla. 1953) ("The burden of overthrowing a will on the ground of lack of testamentary capacity is a heavy one and must be sustained by a preponderance of the evidence.")
5. *In re Wilmott's Estate*, 66 So. 2d 465, 468 (Fla. 1953) ("The question whether one has testamentary capacity is determined solely by mental capacity of testator at time he executes instrument.").
6. *Schaefer v. Voyle*, 102 So. 7, 8 (Fla. 1924) ("The testator is presumed sane at the time the will is made. The burden of rebutting this presumption and establishing incompetency to make a valid will rests upon petitioners.").

§19:10.2.1 Elements of Cause of Action — 1st DCA

Testamentary capacity "requires that a testator understand in a general way the nature and extent of his property to be disposed of, the testator's relation to those who would naturally claim a substantial benefit from his will, and the effect his disposition will have."

Source

Koshenina v. Buvens, 130 So. 3d 276, 280 (Fla. 1st DCA 2014).

An attorney may destroy testamentary capacity by showing an insane delusion.

Source

York v. Smith, 385 So. 2d 1110, 1111 (Fla. 1st DCA 1980).

§19:10.2.2 Elements of Cause of Action — 2nd DCA

To prove a lack of testamentary capacity the attorney must show that at the moment the will was executed the testator lacked the ability to (1) mentally understand in a general way the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from the will, or the practical effect of the will as executed.

Source

In re Coles' Estate, 205 So. 2d 554, 555 (Fla. 2d DCA 1968).

See also

1. *In re Hodtum's Estate*, 267 So. 2d 686, 688 (Fla. 2d DCA 1972). "A will should be held invalid for lack of testamentary capacity if it is executed as a result of an insane delusion."
2. *In re Supplee's Estate*, 247 So. 2d 488, 490 (Fla. 2d DCA 1971) (providing that "although an incompetency adjudication creates a presumption of lack of testamentary capacity as to any will thereafter executed during the continuance of such adjudication, that such presumption may be overcome on proof that the will was executed by the adjudged incompetent during a lucid interval.").
3. *In re Dunson's Estate,* 141 So. 2d 601, 604 (Fla. 2d DCA 1962) ("Mere old age, physical frailty, sickness, failing memory, or vacillating judgment are not inconsistent with testamentary capacity if the testamentary prerequisites were possessed by the testator.").
4. *In re Bailey's Estate*, 122 So. 2d 243, 246 (Fla. 2d DCA 1960) ("The burden of overthrowing a will because of lack of testamentary capacity is a heavy one and must be sustained by a preponderance of the evidence.").
5. *Chapman v. Campbell*, 119 So. 2d 61, 64 (Fla. 2d DCA 1960) ("A testator under guardianship as a person of unsound mind is presumed to lack testamentary capacity. This presumption is one of fact and may be rebutted.").
6. *Heasley v. Evans*, 104 So. 2d 854, 856 (Fla. 2d DCA 1958) ("Eccentricities of habit, peculiarities in appearance or behavior, or penuriousness do not of themselves establish lack of testamentary capacity; but on the question of testamentary capacity, it is generally permitted to show in connection with other evidence of incapacity such behavior and characteristics.").

§19:10.2.3 Elements of Cause of Action — 3rd DCA

To prove a lack of testamentary capacity the attorney must show that the testator lacked the ability to (1) mentally understand in a general way the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from the will, or (3) the practical effect of the will as executed.

Source

Am. Red Cross v. Estate of Haynsworth, 708 So. 2d 602, 605 (Fla. 3d DCA 1998).

See also

1. *Miami Rescue Mission, Inc. v. Roberts*, 943 So. 2d 274, 276 (Fla. 3d DCA 2006) ("Where there is an insane delusion in regard to one who is the object of the testator's bounty, which causes him to make a will he would not have made but for that delusion, the will cannot be sustained." *citing Newman v. Smith*, 82 So. 236 (Fla. 1918)).
2. *Raimi v. Furlong*, 702 So. 2d 1273, 1286 (Fla. 3d DCA 1997) ("To execute a valid will, the testator need only have testamentary capacity (i.e. be of "sound mind") which has been described as having the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed.").

§19:10.2.4 Elements of Cause of Action — 4th DCA

To prove a lack of testamentary capacity the attorney must show by a preponderance of the evidence that at the time he executed his will the testator lacked the ability to (1) mentally understand in a general way the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from the will, or (3) the practical effect of the will as executed.

Source

Hendershaw v. Estate of Hendershaw, 763 So. 2d 482, 483 (Fla. 4th DCA 2000).

See also

1. *McCabe v. Hanley*, 886 So. 2d 1053, 1055 (Fla. 4th DCA 2004) ("[A] will should be held invalid for lack of testamentary capacity if it is executed as a result of an insane delusion. An insane delusion is a 'spontaneous conception and acceptance as a fact, of that which has no real existence adhered to against all evidence and reason").
2. *Allen v. Gore*, 387 So. 2d 535, 537 (Fla. 4th DCA 1980) (providing that a testatrix did not lack testamentary capacity at the time her will was executed because "although some evidence was presented relating to some of her eccentricities, at the time she made her Will, the decedent was aware of the nature and extent of her property, the natural objects of her bounty, and knew and understood the nature and act of making a Will.").

While a settlor is alive and the trust remains revocable, remainder beneficiaries of that trust lack standing to challenge the settlor's revocation of the instrument. Only the guardian of an incapacitated settlor may do so. This does not prevent a challenge to the revocation of a trust which has become irrevocable by its terms. *Habal v. Habal*, 303 So.3d 960 (Fla. 4th DCA 2020).

§19:10.2.5 Elements of Cause of Action — 5th DCA

To prove a lack of testamentary capacity the attorney must show that the testator lacked the ability to (1) mentally understand in a general way the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from the will, or (3) the practical effect of the will as executed.

Source

In re Estate of Edwards, 433 So. 2d 1349, 1350 (Fla. 5th DCA 1983).

See also

1. *Grimes v. Estate of Stewart*, 506 So. 2d 465, 467 (Fla. 5th DCA 1987) ("Although a declared incompetent may have sufficient lucid moments during which to execute a valid will, nevertheless, adjudication of incompetency of a testator creates a prima facia case against the proponent of such a will.").
2. *In re Lamberson's Estate*, 407 So. 2d 358, 361 (Fla. 5th DCA 1981) ("[T]estamentary capacity to make a will has reference to the condition of the testator at the time the will is executed, and even if made by one insane the will is valid if made during a lucid interval.").

§19:10.3 Statute of Limitations

Fla. Stat. §733.103(2)

In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence; and that the will was unrevoked on the testator's death.

Fla. Stat. §733.109

A proceeding to revoke probate of a will may be commenced by any interested person, including a beneficiary under a prior will, unless barred under s. 733.212 or s. 733.2123 before final discharge of the personal representative.

Fla. Stat. §733.212(3)

Any interested person on whom a copy of the notice of administration is served must object to the validity of the will … by filing a petition or other pleading requesting relief in accordance with the Florida Probate Rules on or before the date that is 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred.

However, a proceeding regarding the construction of a will is not within the scope of this statute and therefore not subject to the same limitations period. *Tendler v. Johnson*, 332 So.3d 521 (Fla. 4th DCA 2021); see also *Gundlach v. Gundlach*, 339 So.3d 997 (Fla. 4th DCA 2022).

Fla. Stat. §733.2123

Adjudication before issuance of letters.—A petitioner may serve formal notice of the petition for administration on interested persons. A person who is served with such notice before the issuance of letters or who has waived notice may not challenge the validity of the will, testacy of the decedent, venue, or jurisdiction of the court, except in the proceedings before issuance of letters.

§19:10.4 References

See Fla. Prob. R. 5.040(a) (stating that when formal notice is given, such as is described in Fla. Stat. §733.2123, any response or objection to the matter to which such notice applies must be made within 20 days of service thereof).

§19:10.5 Defenses

[No citation for this edition.]

§19:10.6 Related Matters

Undue Influence, §19:20
Duress, §18:90

§19:20 REVOCATION OF PROBATE BASED ON UNDUE INFLUENCE

§19:20.01 Florida Statutes

Fla. Stat. §732.5165 Effect of Fraud, Duress, Mistake, and Undue Influence

"A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void."

Fla. Stat. §733.107 Burden of Proof in Contests; Presumption of Undue Influence

(1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.

(2) In any transaction or event to which the presumption of undue influence applies, the presumption implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304."

In 2002, Section 733.107 was amended. Commenting on the effect of this amendment, the Fifth District wrote, in *Hack v. Janes*, 878 So.2d 440 (Fla. 5th DCA 2004):

The 2002 amendment to section 733.107, adding subsection 2, was intended to incorporate sections 90.301 - 90.304 of the Florida Evidence Code, and require a shifting of the burden of proof after the presumption of undue influence arises in a will contest. The new statute supersedes [*In re Carpenter's Estate*, 253 So.2d 697 (Fla. 1971)] and *Cripe v. Atlantic First National Bank*, 422 So.2d 820 (Fla. 1982), to the extent that they prohibit a shifting of the burden of proof in presumption of undue influence in cases … Because section 733.107(2) specifically mandates that the presumption shifts the burden of proof under sections 90.301 through 90.304 when a presumption of undue influence arises … the alleged wrongdoer [bears] the burden of proving that there was no undue influence. Nonetheless, *Carpenter* and *Cripe* live on, at least in part … Those portions of *Carpenter* and *Cripe* that explain the circumstances giving rise to the presumption of undue influence are not superseded by statute. *Hack*, 878 So. 2d 440, 443 (Fla. 5th DCA 2004).

§19:20.1 Elements of Cause of Action — Florida Supreme Court

The existence of undue influence is not presumed merely from confidential relations between the testator and the beneficiary. This is the rule to which the Florida courts incline, but the existence of confidential relations is a circumstance which may be considered on this issue. If it can be proved that a beneficiary who is charged with undue influence occupied a confidential relation towards the testator and was active in procuring the execution of the will in which he is a substantial beneficiary, a presumption of undue influence will arise, and the burden of proof will be shifted to the propounder of the will.

Source

In re Estate of Aldrich, 3 So.2d 856, 858 (Fla. 1941).

The presumption of undue influence arises when (1) a substantial beneficiary under a will (2) occupies a confidential relationship with the testator and (3) is active in procuring the contested will.Source

In re Carpenter's Estate, 253 So.2d 697 (Fla. 1971).

Carpenter notes that undue influence occurs within a broad sphere of factual circumstances, and that some *non-exhaustive* factors for courts to consider on the issue of undue influence or active procurement include:

(a) presence of the beneficiary at the execution of the will;
(b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will;
(c) recommendation by the beneficiary of an attorney to draw the will;
(d) knowledge of the contents of the will by the beneficiary prior to execution;
(e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;
(f) securing of witnesses to the will by the beneficiary; and
(g) safekeeping of the will by the beneficiary subsequent to execution

See also

1. *Cripe v. Atl. First Nat. Bank of Daytona Beach*, 422 So. 2d 820, 823 (Fla. 1982) (noting that under *Carpenter*, "when a person who is a primary beneficiary of a will had a confidential relationship with the testator and there was active procurement of the bequest, a presumption of undue influence arises.").
2. *Gardiner v. Goertner*, 149 So. 186, 190 (Fla. 1932). Undue influence is not usually exercised openly in the presence of others, so that it may be directly proved, hence it may be proved by indirect evidence of facts and circumstances from which it may be inferred.

§19:20.1.1 Elements of Cause of Action — 1st DCA

Undue influence over a testator is presumed when (1) a person with a confidential relationship with the testator, (2) was active in procuring or securing the preparation or execution of the devise and (3) is a substantial beneficiary thereof.

Source

Estate of Kester v. Rocco, 117 So.3d 1196 (Fla. 1st DCA 2013).

Florida law recognizes that transactions and documents other than wills—including those memorializing *inter vivos* transfers, revocable trusts, preneed guardian designations, pay-on-death and transfer-on-death documents—are subject to the *Carpenter* analysis and can be invalidated on grounds of undue influence.

Source

Keul v. Hodges Blvd. Presbyterian Church, 180 So.3d 1074 (Fla. 1st DCA 2015).

See also

1. *Estate of Brock*, 692 So. 2d 907, 911 (Fla. 1st DCA 1996) ("A presumption of undue influence arises upon a showing that a party who (1) occupied a confidential relationship with the testator, (2) was a substantial beneficiary under the will, and (3) was active in procuring the instrument.").
2. *Keul v. Hodges Blvd. Presbyterian Church*, 180 So. Ed 1074, 1075 (Fla. 1st DCA 2015) (noting that under Carpenter, "if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in the contested will, the presumption of undue influence arises").

§19:20.1.2 Elements of Cause of Action — 2nd DCA

If a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises.

Source

RBC Ministries v. Tompkins, 974 So.2d 569 (Fla. 2nd DCA 2008).

See also

1. *Ballard v. Ballard*, 549 So. 2d 1176, 1178 (Fla. 2d DCA 1989) ("If the plaintiff is able to establish that a confidential relationship existed between the beneficiary and the grantor and that the beneficiary actively procured the deed, then a presumption of undue influence arises placing upon the beneficiary the burden of giving a reasonable explanation for the active role in the affairs of the grantor.").
2. *Williamson v. Kirby*, 379 So. 2d 693, 695 (Fla. 2d DCA 1980).
3. *In re Estate of Murphy*, 184 So.3d 1221, 1229 (Fla. 2d DCA 2016) (noting that under RBC Ministries, "undue influence cases involve situations where the decedent's intent has been impaired, destroyed, or overridden by someone else.").
4. *Henry v. Jones*, 202 So.3d 129 (Fla. 2d DCA 2016) (holding "undue influence must amount to 'over persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator.").

§19:20.1.3 Elements of Cause of Action — 3rd DCA

A presumption of undue influence arises if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will.

Source

Estate of Madrigal v. Madrigal, 22 So.3d 828 (Fla. 3rd DCA 2009).

See also

1. *Sun Bank/Miami, N.A. v. Hogarth*, 536 So. 2d 263, 266 (Fla. 3d DCA 1988) ("Under Carpenter, a presumption of undue influence arises when a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will.").

§19:20.1.4 Elements of Cause of Action — 4th DCA

In a will contest, a presumption of undue influence arises if the plaintiff establishes that the defendant: (1) occupied a confidential relationship with the testator; (2) was a substantial beneficiary under will; and (3) was active in processing the instrument.

Source

Newman v. Brecher, 887 So.2d 384 (Fla. 4th DCA 2004).

See also

1. *Blinn v. Carlman*, 159 So. 3d 390, 391 (Fla. 4th DCA 2015). When a will is challenged on the grounds of undue influence, the influence must amount to persuasion, duress, force, coercion, or artful or fraudulent contrivances to such an extent that there is a destruction of free agency and willpower of the testator. .
2. *Levin v. Levin*, 60 So. 3d 1116, 1118 (Fla. 4th DCA 2011) (holding that in order to raise presumption of undue influence, the contestant must demonstrate that the defendant: (1) was a substantial beneficiary; (2) who occupied a confidential relationship; and (3) was active in procuring the will and trust).
3. Blinn, 159 So.3d at 391 (internal citations omitted). Undue influence is not usually exercised openly in the presence of others, so that it may be directly proved, hence it may be proved by indirect evidence of facts and circumstances from which it may be inferred.

§19:20.1.5 Elements of Cause of Action — 5th DCA

If a substantial beneficiary under a will occupies a confidential relationship with a testator and is active in procurement of the contested will, the presumption of undue influence arises.

Source

In re Lamberson's Estate, 407 So.2d 358 (Fla. 5th DCA 1981).

See also

1. *Hack v. Janes*, 878 So. 2d 440, 442 (Fla. 5th DCA 2004) ("A rebuttable presumption of undue influence arises when someone in a fiduciary or confidential relationship actively procures a devise or gift in his or her favor."). The *Hack* case describes in detail the evidentiary effects of the legislative amendment to Fla. Stat. §733.107, writing:

   > The 2002 amendment to section 733.107, adding subsection 2, was intended to incorporate sections 90.301 - 90.304 of the Florida Evidence Code, and require a shifting of the burden of proof after the presumption of undue influence arises in a will contest. The new statute supersedes *Carpenter* and *Cripe v. Atlantic First National Bank*, 422 So.2d 820 (Fla. 1982), to the extent that they prohibit a shifting of the burden of proof in presumption of undue influence in cases … Because section 733.107(2) specifically mandates that the presumption shifts the burden of proof under sections 90.301 through 90.304 when a presumption of undue influence arises … the alleged wrongdoer [bears] the burden of proving that there was no undue influence. Nonetheless, *Carpenter* and *Cripe* live on, at least in part … Those portions of Carpenter and Cripe that explain the circumstances giving rise to the presumption of undue influence are not superseded by statute. *Hack*, 878 So. 2d at 443.

§19:20.2 Statute of Limitations

Florida Statutes §95.11(3)(j): The statute of limitations for a legal or equitable action founded on fraud is four years.

Running of the Statute of Limitations: Undue influence is a species of fraud, but differs in that it can exist "even where all the facts surrounding a transaction infected with undue influence have been truthfully and fully represented." *In re Guardianship of Rekasis*, 545 So. 2d 471, 473 (Fla. 2d DCA 1989). In *Rekasis*, the Second DCA joined jurisdictions outside of Florida and held that "as a matter of law, facts giving rise to a cause of action based on undue influence do not become discoverable by the exercise of reasonable diligence until the termination of the influence." *Id.* at 474.

It has been held that actions to void a testamentary instrument on grounds of undue influence are treated as other claims for fraud insofar as determining the applicable limitations period. More specifically, in *Flanzer v.*

Kaplan, 230 So.3d 960 (Fla. 5th DCA 2017), the Fifth District, in concluding that claims of undue influence were subject to the "delayed discovery doctrine" codified at Fla. Stat. §95.031, stated as follows:

> [A] review of section 95.11 reveals that undue influence claims can only fall under subsection 95.11(3)(j), "[a] legal or equitable action founded on fraud." *See Peacock v. DuBois*, 90 Fla. 162, 105 So. 321, 322 (Fla. 1925) ("Fraud and undue influence are not, strictly speaking, synonymous, though undue influence has been classified as either a species of fraud or a kind of duress, and in either instance is treated as fraud in general."); *In re Guardianship of Rekasis*, 545 So. 2d 471, 473 (Fla. 2d DCA 1989) (describing undue influence as a "species of fraud" and holding that statute of limitations on undue influence claim did not begin to run until the influence terminated or someone on Rekasis' behalf became aware of the influence).

Fla. Stat. §733.212(3)

Any interested person on whom a copy of the notice of administration is served must object to the validity of the will … by filing a petition or other pleading requesting relief in accordance with the Florida Probate Rules on or before the date that is 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred.

As to persons not served with notice of administration, "all objections to the validity of a will, venue, or the jurisdiction of the court must be filed no later than the earlier of the entry of an order of final discharge of the personal representative or 1 year after service of the notice of administration."

In 2020, Fla. Stat. §733.212 was amended to, among other things, add subsection (2)(f), which provides that "[U]nder certain circumstances and by failing to contest the will, the recipient of the notice of administration may be waiving his or her right to contest the validity of a trust or other writing incorporated by reference into a will." *See* Fla. Stat. §732.512 (detailing the concept of incorporation by reference as it pertains to wills); *see also Pasquale v. Loving*, 82 So.3d 1205 (Fla. 4th DCA 2012) (explaining that challenge to trust which is incorporated by reference into a will cannot succeed unless contestant timely challenges validity of both will and trust).

Fla. Stat. §733.2123

Providing:

> A petitioner may serve formal notice of the petition for administration on interested persons. A person who is served with such notice before the issuance of letters or who has waived notice may not challenge the validity of the will, testacy of the decedent, venue, or jurisdiction of the court, except in the proceedings before issuance of letters.

Formal notice is a method of service of papers in probate and guardianship actions. See Fla. Prob. R. 5.040. Upon service of *formal notice*, the party receiving such service has twenty (20) days to raise objection or otherwise oppose relief sought in the petition or paper served by formal notice. Once this twenty (20) day window closes, the party seeking affirmative relief may apply to the court for an order or judgment without further notice to parties served with formal notice. *Id.*

§19:20.3 References

1. Florida Statutes §732.5165.
2. 17 Fla. Jur. 2d *Decedents' Property* §§167–190.
3. West's Key Number Digest, Wills 151–158, 161–166(12)
4. 79 Am. Jur. 2d. *Wills* §§356–378.
5. 154 A.L.R. 583.

§19:20.4 Defenses

1. **Insufficient Showing of Undue Influence:** In order to set aside a will on the ground of undue influence, the contestant must demonstrate that the free agency and willpower of the decedent was destroyed. *See, e.g.*, *Swiss v. Flanagan*, 329 So. 3d 199, 202 (Fla. 3d DCA 2021); *Derovanesian v. Derovanesian*, 857

So. 2d 240, 243 (Fla. 3d DCA 2003); *Jordan v. Noll*, 423 So. 2d 368, 370 (Fla. 1st DCA 1982). Thus, the contestant must present evidence that is legally sufficient to support a finding that the decedent's free agency and willpower were destroyed by the actions of the defendant.

2. **Evidentiary Burden:** In Florida, once a party offering a will for probate has proved the formal execution and attestation of the will, the burden of proof shifts to the person challenging the will to prove facts sufficient to justify revocation of probate. *In re Estate of Flohl*, 764 So. 2d 802, 803 (Fla. 2d DCA 2000). The person challenging the will then must prove undue influence by the greater weight of the evidence. *Id.*

§19:20.5 Related Matters

§19:20.5.1 Burden of Proof and Presumption of Undue Influence

The starting point to determine whether a will has been procured by the exercise of undue influence is the analysis required by *In re: Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971). Under Carpenter, if a will contestant shows that a substantial beneficiary who occupied a confidential relationship with the testator was active in procuring the will, a presumption arises that the will is the product of undue influence. *Id*. At 701.

When Carpenter was decided, the rule of law in Florida held that if the will contestant was able to implicate the presumption of undue influence, the burden shifted to the proponent of the will to come forward with a reasonable explanation as to his or her role in the decedent's affairs. *Id*. at 704.

As explained by the *Third District in Diaz v. Ashworth*, 963 So.2d 731 (Fla. 3rd DCA 2007), this is no longer the law with respect to burden shifting because of a legislative amendment to Fla. Stat. §733.107:

Subsequent to Carpenter … the legislature enacted an amendment to §733.107, Fla. Stat., to prohibit the shifting of the burden of proof in presumption of undue influences cases. *See, e.g., Hack v. Janes*, 878 So. 2d 440, 443 (Fla. 5th DCA 2004). As it now stands, in those cases where the proponent of a will satisfies, prima facie, the will is facially proper, and the contestant thereafter satisfies, prima facie, a presumption of undue influence in the making of the will, the proponent of the will has the burden of proving the will was not the product of undue influence. *Hannibal v. Navarro*, 317 So. 3d 1179, 1182 (Fla. 3d DCA 2021). That burden must be met by a preponderance of the evidence as determined by the trier of fact. *Id.*

1. **Presumption of Undue Influence and Spouses:** The *presumption* of undue influence in the execution of a will cannot arise when the alleged influencer is the spouse of the decedent. *Tarsagian v. Watt*, 402 So.2d 471 (Fla. 3d DCA 1981); *see also Jacobs v. Vaillancourt*, 634 So. 2d 667, 672 (Fla. 2d DCA 1994) ("[T]he presumption cannot arise in the case of a husband and wife.") While husband and wife typically exert influence over each other, such influence cannot be considered *undue* influence. Therefore, "the confidential relationship which exists between a husband and wife is not one which may be considered in the law governing will contests." *Jacobs*, 634 So. 2d at 672. If courts did not recognize this spousal exemption, "the presumption would arise in nearly every case in which the spouse is a substantial beneficiary because the requirement of active procurement would almost always be present." *Id.*

2. **Confidential Relationship:** Under Florida law, the concept of "confidential relationship" encompasses a broad array of technical, fiduciary, and informal relationships in which one person trusts in and relies upon another. *Allen v. Gore*, 387 So. 2d 535, 538 (Fla. 4th DCA 1980). Thus, under Florida law, the term "confidential relationship" is broad and embraces both technical fiduciary relations and informal relations. *Blades v. Ward*, 475 So. 2d 935, 937 (Fla. 3d DCA 1985). Stated differently, "[a] confidential relationship exists between parties where there is a relation of trust and confidence between them; that is where confidence is reposed by one party and a trust accepted by the other" *In re Gay's Estate*, 201 So. 2d 807, 811 (Fla. 4th DCA 1967).

3. **Active Procurement:** Under Florida common law, the presumption of undue influence arises when a confidential relationship between decedent and recipient exists, and when that recipient "has *actively procured* the transfer." *Davis v. Foulkrod*, 642 So. 2d 1129, 1134 (Fla. 4th DCA 1994) (emphasis added). Courts define "active procurement" with reference to the definition of "procure," namely: "to get by

special effort; to obtain or acquire; to bring about; to effect." *Metro. Life Ins. Co. v. Carter*, 3:04-CV-668-J32HTS, 2005 WL 2810699, at *15 (M.D. Fla. 2005) (quoting *Foulkrod*, 642 So. 2d at 1134) (alterations omitted). In the will context, the Florida Supreme Court has enumerated several nonexclusive factors that are pertinent to the determination of whether active procurement exists: "(a) presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to execution." *In re Carpenter's Estate*, 253 So. 2d 697, 702 (Fla. 1971).

4. **Mental and Physical Condition of Testator:** Florida courts determining whether a testator was subject to undue influence tend to look at the mental and physical condition of testator. For example, in *Derovanesian v. Derovanesian*, the Third DCA deemed important the fact that the testator was "a fiercely remarkable person who was of the first female physicians in Florida, was an indomitable, fiercely independent individual, who was peculiarly unsusceptible to influence of others, and who retained that individuality and strength of mind … up to and perhaps only a few weeks before her death." 857 So. 2d 240, 242–42 (Fla. 3d DCA 2003); *see also Swiss v. Flanagan*, 329 So. 3d 199, 203 (Fla. 3d DCA 2021) (testator's declining health and frailties were concerning enough to warrant request for competency evaluation by his long-serving estate planning attorney in comparison to able-bodied mentally firm partner who had assumed control over testator's personal affairs and restricted lines of communication with his children).

5. **Degree of Influence:** The undue influence required for invalidation of a will or other testamentary document must amount to duress, force, or coercion to such an extent that the free agency and willpower of the testator is vitiated or destroyed. *Zoldan v. Zohlman*, 915 So. 2d 235, 237 (Fla. 3d DCA 2005).

6. **Partial or Total Invalidity:** "Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons." §732.5165, Fla. Stat. Ann.; *see also In re Estate of Lane*, 492 So. 2d 395, 397 (Fla. 4th DCA 1986) (invalidating part of a will and finding the invalid bequest severable without interfering with the general scheme of distribution).

7. **Dependent Relative Revocation:** Under Florida law (Fla. Stat. §732.5165), only the portion of a will procured by undue influence is void. Accordingly, it is possible for a will to be partially invalid but nevertheless revoke a prior will. Nevertheless, Florida law imposes a presumption of law that where a (partially) invalidated will is similar to a prior will, the prior will is revived upon a showing that the later will is the product of undue influence. "In cases of undue influence over a testator, the presumption from the doctrine of dependent relative revocation requires only a showing of broad similarity between a decedent's testamentary instruments." *Rocke v. Am. Research Bureau (In re Estate of Murphy)*, 184 So.3d 1221, 1235 (Fla. 2nd DCA 2016). The *Rocke* court further held that a probate court "may consider any admissible extrinsic evidence when measuring similarity for purposes of the doctrine's application … [W]hen the doctrine's presumption arises the burden of proof then shifts to the opponent of the presumption to show that the testator held an independent, unaffected intention to revoke the otherwise affected will." *Id.*

§19:20.7 Related Causes of Action

Fla. Stat. §736.0406 Effect of fraud, duress, mistake, or undue influence.

If the creation, amendment, or restatement of a trust is procured by fraud, duress, mistake, or undue influence, the trust or any part so procured is void. The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

In practice, the above-cited decisional authorities which pertain to the execution of a will are routinely cited in cases involving challenges to the validity of trust instruments, power of attorney documents, deeds, and bank account documents.

Fla. Stat. §732.805 Spousal rights procured by fraud, duress, or undue influence.

(1) A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the following rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent, unless the decedent and the surviving spouse voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence, or both spouses otherwise subsequently ratified the marriage:
   (a) Any rights or benefits under the Florida Probate Code, including, but not limited to, entitlement to elective share or family allowance; preference in appointment as personal representative; inheritance by intestacy, homestead, or exempt property; or inheritance as a pretermitted spouse.
   (b) Any rights or benefits under a bond, life insurance policy, or other contractual arrangement if the decedent is the principal obligee or the person upon whose life the policy is issued, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the bond, life insurance policy, or other contractual arrangement.
   (c) Any rights or benefits under a will, trust, or power of appointment, unless the surviving spouse is provided for by name, whether or not designated as the spouse, in the will, trust, or power of appointment.
   (d) Any immunity from the presumption of undue influence that a surviving spouse may have under state law.

(2) Any of the rights or benefits listed in paragraphs (1)(a)-(c) which would have passed solely by virtue of the marriage to a surviving spouse who is found to have procured the marriage by fraud, duress, or undue influence shall pass as if the spouse had predeceased the decedent.

(3) A challenge to a surviving spouse's rights under this section may be maintained as a defense, objection, or cause of action by any interested person after the death of the decedent in any proceeding in which the fact of marriage may be directly or indirectly material.

(4) The contestant has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence. If ratification of the marriage is raised as a defense, the surviving spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both spouses.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorney's fees. When awarding taxable costs and attorney's fees, the court may direct payment from a party's interest, if any, in the estate, or enter a judgment that may be satisfied from other property of the party, or both.

(6) An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless, before payment, it received written notice of a claim pursuant to this section.
   (a) The notice required by this subsection must be in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice. Permissible methods of notice include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message.
   (b) To be effective, notice to a financial institution or insurance company must contain the name, address, and the taxpayer identification number, or the account or policy number, of the principal obligee or person whose life is insured and shall be directed to an officer or a manager of the financial institution or insurance company in this state. If the financial institution or insurance company has no offices in this state, the notice shall be directed to the principal office of the financial institution or insurance company.
   (c) Notice shall be effective when given, except that notice to a financial institution or insurance company is not effective until 5 business days after being given.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or equity.

(8) Unless sooner barred by adjudication, estoppel, or a provision of the Florida Probate Code or Florida Probate Rules, an interested person is barred from bringing an action under this section unless the action is commenced within 4 years after the decedent's date of death. A cause of action under this section accrues on the decedent's date of death.

Tortious Interference with an Expectancy/Inheritance (Common Law Doctrine)

Tortious interference is a tort designed to remedy instances where, due to the actions of a third party, an individual is deprived of an inheritance or expectancy interest that would have otherwise been realized upon another's death.

The elements of this evolving tort include: (1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages. *Whalen v. Prosser*, 719 So.2d 2 (Fla. 2nd DCA 1998).

One of the indispensable components of a claim for tortious interference in the context of inheritance disputes is that the party seeking relief must show the inadequacy or unavailability of a remedy through a probate or trust proceeding. That is, if challenging the validity of a testamentary document (i.e., a will or trust) would produce an identical result or remedy, then the plaintiff must pursue that remedy. If the plaintiff's lack of available remedy through a probate or trust proceeding results from the plaintiff's own inaction or conduct, then the plaintiff's claim for tortious interference may be barred. *See DeWitt v. Duce*, 408 So.2d 216 (Fla. 1981).

To plead and prove a claim for tortious interference with an expectancy or inheritance, the plaintiff must plead and prove that the defendant engaged in tortious conduct and that such conduct was directed at the testator. *Whalen*, 719 So.2d at 6; *see also Schilling v. Herrera*, 952 So.2d 1231, 1234-35 (Fla. 3rd DCA 2007).

§19:30 REMOVAL OF PERSONAL REPRESENTATIVE: SURCHARGE

§19:30.1 Florida Statutes and Florida Probate Rules

Fla. Stat. §733.619: Individual Liability of Personal Representative

733.619(2) "A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if personally at fault."

733.619(4) "Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding."

Fla. Stat. §733.609(1): Improper Exercise of Power; Breach of Fiduciary Duty

"A personal representative's fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty."

Fla. Prob. R. 5.025: Adversary Proceedings

A proceeding to surcharge a personal representative is an adversary proceeding; accordingly, a petitioner seeking such relief must serve formal notice. Fla. Prob. R. 5.025(a); (c). *See also* Fla. Prob. R. 5.040 (Formal Notice).

§19:30.2 Elements of Cause of Action — Florida Supreme Court

"[I]f the estate is required to pay a claim because of the negligence of a personal representative, the remedy of the estate lies in surcharging the personal representative's account."

Source

Goggin v. Shanley, 81 So. 2d 728, 731 (Fla. 1955).

§19:30.2.1 Elements of Cause of Action — 1st DCA

[No citation for this edition.]

§19:30.2.2 Elements of Cause of Action — 2nd DCA

A personal representative breaching his fiduciary duty may be liable to the interested persons for damage or loss resulting from that breach.

Source

In re Estate of Wejanowski, 920 So. 2d 190, 192 (Fla. 2d DCA 2006).

See also

1. *Merkle v. Guardianship of Jacoby*, 862 So. 2d 906, 907 (Fla. 2d DCA 2003) ("A 'surcharge' is the amount that a court may charge a fiduciary that has breached its duty.").

2. *Lawyers Sur. Corp. v. Saltz*, 658 So. 2d 1152, 1153 (Fla. 2d DCA 1995) ("When a Guardian fails to comply with the law and such failure results in a loss or damage to the ward, the Guardian is liable.").

§19:30.2.3 Elements of Cause of Action — 3rd DCA

A surcharge is appropriate where (1) a fiduciary has neglected her duty to obtain income for the estate, which (2) caused damages by reducing the benefit to beneficiaries under a testamentary trust created by a decedent's will.

Source

In re Feldstein's Estate, 292 So. 2d 404 (Fla. 3d DCA 1974).

See also

1. *Wohl v. Lewy*, 505 So. 2d 525, 526 (Fla. 3d DCA 1987) ("A personal representative is held to the same standard of care as a trustee, that is, he must act as a prudent trustee would act in dealing with the property of another.")

§19:30.2.4 Elements of Cause of Action — 4th DCA

"A 'surcharge' is the amount that a court may charge a fiduciary that has breached its duty."

Source

Kozinski v. Stabenow, 152 So.3d 650, 652 (Fla. 4th DCA 2014). *See also, Black's Law Dictionary*.

"The purpose of such an award is to make the estate whole when the fiduciary's actions cause loss or damage to the estate." *Id.* at 653 (*quoting Reed v. Long*, 111 So.3d 237, 238 (Fla. 4th DCA 2013)).

Source

Kozinski v. Stabenow, 152 So.3d 650, 652 (Fla. 4th DCA 2014). *See also, Black's Law Dictionary*.

In order to obtain a surcharge, an attorney "would need to show both (1) the existence of a fiduciary duty and the breach of that duty such that it is the proximate cause of damages to the ward."

Source

Reed v. Long, 111 So. 3d 237, 239-40 (Fla. 4th DCA 2013).

See also

1. *Harding v. Rosoff*, 951 So. 2d 912, 914 (Fla. 4th DCA 2007) (defining a surcharge as "a charge against a fiduciary to compensate a beneficiary for the breach of fiduciary duty.").
2. *State v. Lahurd*, 632 So. 2d 1101, 1104 (Fla. 4th DCA 1994) ("The personal representative may be liable to interested persons for damage or loss resulting from a breach of his fiduciary duty when the personal representative exercises his power improperly or in bad faith.").
3. *In re Estate of Winston*, 610 So. 2d 1323, 1325 (Fla. 4th DCA 1992) ("[T]he personal representative is subject to surcharge for any improper or excessive payments.").
4. *In re Estate of Pearce*, 507 So. 2d 729, 731 (Fla. 4th DCA 1987) (providing that the usual law respecting surcharge "is payment by a trustee of damages to a beneficiary out of the trustee's own funds for breach of trust.").
5. *Kozinski v. Stabenow*, 152 So. 3d 650 (Fla. 4th DCA 2014) (discusses requirement that the fiduciary being surcharged be served in its *individual* capacity). *See also* Fla. Stat. §733.619(4) (issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding).

§19:30.2.5 Elements of Cause of Action — 5th DCA

"A surcharge action seeks to impose personal liability on a fiduciary for breach of trust through either intentional or negligent conduct."

Source

Miller v. Miller, 89 So. 3d 962 (Fla. 5th DCA 2012), reh'g denied (May 30, 2012).

§19:30.3 Statute of Limitations

Fla. Stat. §733.901 provides that after the administration of the estate has been completed, the personal representative shall be discharged. After such discharge, all actions against the personal representative are generally barred. Additionally, an interested person served with an interim or final accounting must file any objection within 30 days or the accounting will be approved as filed. *See Florida Probate Rule* 5.345. If the alleged mismanagement is reflected on an interim or final accounting and the interested person fails to file a timely objection, he or she may be barred from pursuing the personal representative.

§19:30.4 References

1. *Removal of Personal Representative and Surcharge*, Litigation Under the Florida Probate Code C0901, James G. Pressly, Jr. (2013).
2. 7A Fla. Pl. & Pr. Forms §54:23.
3. 18 Fla. Jur. 2d *Decedents' Property* §532, 534. m

§19:30.5 Related Matters

1. **Removal of Personal Representative:** Wasting or maladministration of the estate is grounds for removal of a personal representative under Fla. Stat. §733.504(5).

2. **Surety Bond:** Unless the bond requirement has been waived by the will or by the court, every fiduciary to whom letters are granted must execute and file a bond with surety. Fla. Stat. §733.402(1). The surety is liable in accordance with the terms of the bond for all acts and omissions of the fiduciary.

3. **Objection to Appointment of Personal Representative (challenge to appointment):** From *Schleider v. Estate of Schleider*, 770 So. 2d 1252 (Fla. 4th DCA 2000):

   > Section 733.301, Florida Statutes (1999) (formerly §732.44, Fla. Stat. (1973)), does not bestow an absolute right upon those who are given preference to be appointed personal representative under this statute. See Estate of Snyder, 333 So. 2d at 520. This is especially true in intestate estates. *See, e.g., Long v. Willis*, 100 So. 3d 4, 9 (Fla. 2nd DCA 2011).
   >
   > "To hold that only insanity, conviction of an infamous crime, and minority bar the appointment of appellants as administrators would give the statute an absurd construction."
   >
   > Where the record supports the conclusion that a person occupying the position of statutory preference does not have the qualities and characteristics necessary to properly perform the duties of an administrator, it would be an anomaly to hold that a probate court, which has historically applied equitable [**6] principles in making its judgments, does not have the discretion to refuse to appoint him simply because he did not fall within the enumerated list of statutory disqualifications.

§19:30.6 Sample Petition

Petitioner, *[name of petitioner]*, brings this proceeding against respondents, *[name of respondent 1]* and *[name of respondent 2]*, and alleges:

1. This is a petition to surcharge respondent *[name of personal representative]* for the value of estate assets wrongfully converted by *[him/her]* and to recover on *[his/her]* bond. This proceeding is brought pursuant to section 733.619(4) of the Florida Statutes and Rule 5.025(a) and (d) of the Florida Probate Rules.
2. Petitioner is, and at all times mentioned in this petition was, a resident of *[name of county]*, Florida. Petitioner is the beneficiary of the estate of *[name of decedent]*, deceased, and brings this proceeding as beneficiary.

3. Respondent *[name of personal representative]* is, and at all times mentioned in this petition was, a resident of *[name of county]*, Florida, and the personal representative of the estate of *[name of decedent]*, deceased.
4. Respondent *[name of surety]* is, and at all times mentioned in this complaint was, a licensed surety company organized and existing under the laws of the State of Florida, with its principal place of business located at *[address of surety], [name of county of surety]*, Florida.
5. On *[date of death]*, *[name of decedent]* died in *[name of county]*, Florida. Decedent left a will designating respondent *[name of personal representative]* personal representative of *[his/her]* estate. A copy of the will, marked "Exhibit *[designation of exhibit]*," is attached.
6. On *[date of admission to probate]*, the court admitted to probate the will described above and appointed respondent *[name of personal representative]* personal representative of the estate of *[name of decedent]*. At that time, the court set *[name of personal representative]*'s bond at $*[dollar amount of bond]* and ordered *[him/her]* to execute and file a bond with surety in that amount pursuant to section 733.402(1) of the Florida Statutes. A copy of the order, marked "Exhibit *[designation of exhibit]*," is attached.
7. On *[date of execution of bond]*, respondent *[name of personal representative]* executed the required bond with respondent *[name of surety]* as surety. On *[date of filing of bond]*, *[title of officer approving bond]* approved and filed the bond. A copy of the bond, marked "Exhibit *[designation of exhibit]*," is attached.
8. On *[date of issuance of letters]*, the court issued letters to respondent *[name of personal representative]* and shortly after that date respondent took possession of the property of the estate of *[name of decedent]* and otherwise began the duties of personal representative. A copy of the letters, marked "Exhibit *[designation of exhibit]*," is attached.
9. Between *[date of commencement]*, and *[date of end]*, respondent *[name of personal representative]* wrongfully misappropriated and converted to *[his/her]* own use property of the estate having a value of $*[dollar amount of real property]*. The property so misappropriated and converted consisted of the following: *[list of items converted by personal representative with value of each item]*.
10. The conduct of respondent *[name of personal representative]* as described above constituted a breach of *[his/her]* duties as personal representative for which *[he/she]* should be surcharged by the court.
11. The conduct of respondent *[name of personal representative]* as described above also constituted a breach of the following conditions of the bond given by respondent *[name of personal representative]* for the faithful performance of *[his/her]* duties as personal representative: *[Statement of conditions of bond breached by personal representative's wrongful conduct]*.
12. As a result of respondent's *[name of personal representative]* breach of the conditions of the bond, respondent *[name of surety]* is liable for the penal sum of the bond.
13. Petitioner has retained the services of the undersigned counsel to represent *[him/her]* in this proceeding and has agreed to pay counsel a reasonable attorney's fee. Pursuant to section 733.609 of the Florida Statutes, in all actions challenging the proper exercise of a personal representative's powers the court must award taxable costs as in chancery actions, including attorney's fees.

WHEREFORE, petitioner requests that the court enter an order:

1. Surcharging respondent *[name of personal representative]* for $*[dollar amount of wrongfully converted estate assets]*, the value of the estate assets wrongfully converted by *[him/her]* while acting as personal representative of the estate of *[name of decedent]* as alleged in this complaint;
2. Finding respondent *[name of surety]* liable for the penal sum of the bond of respondent *[name of personal representative]* and ordering respondent *[name of surety]* to pay that sum to petitioner;
3. Awarding petitioner the costs of this proceeding, including attorney's fees, in accordance with **section 733.609 of the Florida Statutes**; and
4. Awarding petitioner other and further relief as the court may deem proper.

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INDEX

—A—

Abuse of Process
- Counterclaim, §11:10.5
- Defenses, §11:10.4
- Elements of cause of action
  - 1st DCA, §11:10.1.1
  - 2nd DCA, §11:10.1.2
  - 3rd DCA, §11:10.1.3
  - 4th DCA, §11:10.1.4
  - 5th DCA, §11:10.1.5
- Maintenance and champerty, §11:10.5
- References, §11:10.3
- Statute of limitations, §11:10.2

Accord and Satisfaction
- Generally, §18:10
- Common law
  - Defense (Fla.R.Civ.P. Form 1.967), §18:20.3
  - Elements of cause of action, §§18:20.1-18:20.1.5
  - Florida statutory law, §§18:20.2-18:20.1.3
  - References, §18:20.4
  - Related matters, §18:20.5
  - Statutory authority, §18:20.2
- Florida statues, §18:20.2
- UCC Article 3
  - Defense (Fla.R.Civ.P. Form 1.967), §18:30.2
  - Elements of cause of action, §18:30.3
  - Florida statutory authority, §18:30.1
  - References, §18:30.4
  - Related matters, §18:30.5

Accounts and Accounting
- Account stated
  - Complaint (Fla.R.Civ.P. Form 1.933), §4:10.6
- Defenses, §4:10.4
- Elements of cause of action, §§4:10.1-4:10.1.4
- Open account compared, §4:140.4
- Open account compared to account stated, §4:10.5
  - References, §4:10.3
  - Related matters, §4:10.5
  - Statute of limitations, §4:10.2
- Attorneys' trust accounts. See Attorneys' Trust Accounts
- Equitable accounting
  - Cause of action, pattern language, §4:20.6
  - Defenses, §4:20.4
  - Elements of cause of action, §§4:20.1, 4:20.1.3
  - References, §4:20.3
  - Related matters, §4:20.5
  - Special master, §4:20.5
  - Statute of limitations, §4:20.2
- Open account
  - Account stated compared, §4:140.4
  - Complaint (Fla.R.Civ.P. Form 1.921), §4:140.5
  - Elements of cause of action, §4:140.1.5
  - References, §4:140.3
  - Related matters, §4:140.4
  - Statute of limitations, §4:140.2

Act, Failure To. See Failure to Act

Actual Agency. See Agents and Agency

Adhesion Contracts
- Unconscionability, §18:200.3

Administrative Proceedings
- Collateral estoppel (estoppel by judgment), §18:110.4
- Laches, §18:150.4

Advantageous Business Relationship. See Tortious Interference with Advantageous Business Relationship

Advertising (Misleading)
- Pleadings, sufficiency of, §4:120.3
- Related matters, §4:120.3
- Statute of limitations, §4:120.2
- Statutory law, §4:120.1

Advice of Counsel, Reliance on
- Malicious prosecution, reliance on advice of counsel not absolute defense, §11:20.4

Agents and Agency
- Actual agency
  - Elements of cause of action, §§18:40.1-18:40.1.5
  - Employers-employee relationship, §18:40.3
  - Independent contractor, control test, §18:40.3

References, §18:40.2
Related matters, §18:40.3
Apparent agency (agency by estoppel)
Elements of cause of action, §§18:50.1-18:50.1.5
References, §18:50.2
Related matters, §18:50.3
Bribery. See Bribes and Bribery (Commercial)
Fraudulent misrepresentation, liability of agent for, §8:40.5
Implied warranty of authority, §5:40.5
Negligence of state agencies, effect of sovereign immunity, §2:40.4
Question of law or fact, agency relationship as, §18:40.3
Amusement Parks
Slip and fall cases, §2:50.4
Anticipatory Repudiation
Breach of contract, §3:10.5
Antitrust Act (Florida), Violations of
Defenses, §4:30.5
Elements of cause of action, §§4:30.2.1, 4:30.2.3, 4:30.2.4
Per se violations, §4:30.6
References, §4:30.4
Related matters, §4:30.6
Statute of limitations, §4:30.3
Statutory law, §4:30.1
Apparent Agency (Agency by Estoppel). See Agents and Agency
Appeals
Legal malpractice, §2:20.4
Appropriation
Defenses, §4:40.4
References, §4:40.3
Statute of limitations, §4:40.2
Statutory law,§4:40.1
Arbitration
Deceptive and Unfair Trade Practices Act (Florida), effect of arbitration clause, §16:10.6
Demand and waiver, §18:10
Unconscionable arbitration clause, §18:200.3
Waiver of, §18:220.5
Arrest
Excessive force, battery, §12:20.5
False arrest. See False Imprisonment
Resisting arrest, battery, §12:20.4
Arrest Warrants
Negligent swearing out of arrest warrant, §12:30.5
Assault
Defenses, §12:10.4
Elements of cause of action
1st DCA, §12:10.1.1
2nd DCA, §12:10.1.2
4th DCA, §12:10.1.4
Florida Supreme Court, §12:10.1
References, §12:10.3
Related matters, §12:10.5
Sample Complaint, §12:10.6
Statute of limitations, §12:10.2
Assumption of Risk
Generally, §18:10
Negligence, §2:40.4
Negligent security, §2:170.3
Attorney-Client Relationship
Legal malpractice, §2:20.4
Attorneys' Fees
Charging lien. See Charging Lien
Collecting worthless checks, drafts, or orders of payment, §16:20.2
Deceptive and Unfair Trade Practices Act (Florida), §16:10.1
False imprisonment, §12:40.5
Pleadings for, §1:40
Retaining lien. See Retaining Lien
Slander of title (disparagement of property), §13:40.5
Theft, civil, §10:30.2
Warranties, breach under Florida UCC, §5:10.5
Attorneys' Trust Accounts
Charging lien, §§15:10.4, 15:10.5
Retaining lien, §§15:30.3, 15:30.4
Automobile Accidents. See Motor Vehicle Collisions

—B—

Bad Faith
Fraud, §8:10.4
Health insurer's bad faith and intentional infliction of severe emotional distress, damages for, §10:10.5
Banks
Attorneys' trust accounts. See Attorneys' Trust Accounts
Fiduciary duty, breach of, §4:50.5
Battery
Defenses, §12:20.4
Elements of cause of action
2nd DCA, §12:20.1.2
3rd DCA, §12:20.1.3
4th DCA, §12:20.1.4
5th DCA, §12:20.1.5
References, §12:20.3
Related matters, §12:20.5
Sample Complaint, §12:20.6
Statute of limitations, §12:20.2
Bidding Statutes

Promissory estoppel, effect of violation of bidding statute, §3:50.4
Reformation, error in bid for public contract, §18:170.4
Blacklisting Employees
Conspiracy (civil), §4:70.4
Bonds and Undertakings
Temporary injunctions, §17:20.5
Vexatious litigant, §18:210.1
Wrongful garnishment, posting bond, §7:60.4
Breach of Contract
Anticipatory repudiation, §3:10.5
Attorney's fees, §3:10.5
Deceptive and Unfair Trade Practices Act (Florida), §16:10.6
Defenses, §3:10.4
Discharge of liability, breach as, §3:10.4
Elements of cause of action
1st DCA, §3:10.1.1
2nd DCA, §3:10.1.2
3rd DCA, §3:10.1.3
4th DCA, §3:10.1.4
5th DCA, §3:10.1.5
Florida Supreme Court, §3:10.1
Implied-in-fact contracts, §3:20
Implied-in-law contracts, §3:30
Oral contracts, §3:10.5
Permanent injunctions, §17:10.6
References, §3:10.3
Related matters, §3:10.5
Rescission. See Rescission
Statute of limitations, §3:10.2
Temporary injunctions, §17:20.5
Third party beneficiary contracts. See Third Party Beneficiary Contracts, Breach of
Breach of Fiduciary Duty. See Fiduciary Duty
Breach of Joint Venture Agreement
Generally, §4:210
Bribes and Bribery (Commercial)
Elements of cause of action, §§18:70.1.3-18:70.1.4
References, §18:70.2
Related matters, §18:70.3
Building Code Violations
Negligence of landlord, knowledge of dangerous code violation, §2:40.5
References, §14:10.3
Related matters, §14:10.4
Statute of limitations, §14:10.2
Statutory civil action, §14:10.1
Burden of Proof
See also Evidence
Agency relationship, §18:40.3
Cancellation of deed, presumption of undue influence, §4:60.4
Dedication of roadway to public use, §13:10.5
Employment discrimination based on disability, §7:10.5
Laches, §18:150.4
Motor vehicle rear-end collisions, effect of sudden stop on rebuttable presumption of negligence, §2:80.4
Negligence, alternative liability, §2:40.5
Prescriptive easements, §13:10.4
Promissory note, §4:150.4
Reformation, §18:170.3
Res ipsa loquitur in medical malpractice, §2:30.5
Res judicata, former adjudication, §18:180.4
Resulting trust, §4:200.5
RICO (civil), proving mail or wire fraud, §4:170.6
Slip and fall cases, §2:50.4
Spoliation of evidence, Valcin doctrine, §2:120.5
Theft, civil, §10:30.6
Tortious interference with advantageous business relationship, §4:180.5
Usurious transactions, §3:100.4
Whistle-Blower's Act (Public Sector), retaliatory discharge, §7:30.6
Workers' compensation claim, retaliatory discharge, §7:50.5

—C—

Cancellation of Deed
Confidential relationship, §4:60.4
Elements of cause of action, §§4:60.1-4:60.1.1
References, §4:60.3
Related matters, §4:60.4
Causes of Action, Pattern Language
Accounting (equitable), sample complaint form, §4:20.6
Conspiracy (civil), §4:70.5
Constructive trust, §4:190.7
False imprisonment, sample form, §12:30.6
Fiduciary duty, breach of, §4:50.6
Legal malpractice, §2:20.6
Slander of title (disparagement of property), sample complaint, §13:40.6
Slip and fall cases, §2:50.1
Temporary injunctions, sample complaint form, §17:20.6
Unjust enrichment, sample complaint form, §3:90.6
Certiorari, Writ of
Retaining lien, §15:30.4
Charging Lien
Defenses, §15:10.4

Elements of cause of action
1st DCA, §15:10.1.1
2nd DCA, §15:10.1.2
3rd DCA, §15:10.1.3
4th DCA, §15:10.1.4
Florida Supreme Court, §15:10.1
Priority, §15:10.4
Related matters, §15:10.5
Settlement without notice to attorney, §15:10.5
Statute of limitations, §15:10.2

Child Custody, Interference with
Defenses, §10:20.4
Elements of cause of action, §§10:20.1-10:20.1.4
References, §10:20.3
Related matters, §10:20.5
Statute of limitations, §10:20.2

Civil Procedure, Florida Rules of. See Pleadings

Class Actions
Consumer Collection Practices Act (Florida), §16:30.6
Deceptive and Unfair Trade Practices Act (Florida), §16:10.6
Fraud, §8:10.4
Fraud in the inducement, §8:30.4

***Coblentz* Agreements**
Defenses, §18:230.2
Elements of cause of action, §§18:230.1-18:230.1.5
Related matters, §18:230.4
Statute of limitations, §18:230.3

Collateral Estoppel (Estoppel by Judgment)
Generally, §18:10
Defenses, §18:110.3
Elements of cause of action, §§18:110.1-18:110.1.5
References, §18:110.2
Related matters, §18:110.4

Collecting Worthless Checks, Drafts, or Orders of Payment
Complaint (Fla.R.Civ.P. Form 1.942), §16:20.1
References, §16:20.4
Related matters, §16:20.5
Statute of limitations, §16:20.3
Statutory law, §16:20.2

Commercial Bribes. See Bribes and Bribery (Commercial)

Common Law
Charging lien, §15:10.5
Child custody, interference with, §§10:20.1, 10:20.5
Dedication to public use, §13:10.5
Equitable estoppel, §18:120.4
Fraud, §8:10.5
Implied warranty, §5:40.5
Implied way of necessity, dedication to public use, §13:60.6
Professionals, negligence of, §2:40.5
Quantum meruit, §3:90.5
Retaining lien, §15:30.4
Retaliatory discharge not recognized in Florida common law, §7:40.6
School employees, negligent hiring, supervision, or retention, §2:60.5
Unconscionability. See Unconscionability
Warranties. See Warranties
Wrongful death, §2:140.5

Common Law Indemnity
Defenses, §6:10.4
Elements of cause of action
1st DCA, §6:10.1.1
2nd DCA, §6:10.1.2
3rd DCA, §6:10.1.3
4th DCA, §6:10.1.4
5th DCA, §6:10.1.5
Florida Supreme Court, §6:10
References, §6:10.3
Related matters, §6:10.5
Special relationship, §6:10.4
Statute of limitations, §6:10.2
Vouching in rule, §6:10.5

Comparative Negligence
Generally, §2:40.4
Assumption of risk, §2:40.4
Common law warranty, defense of comparative negligence, §5:20.4
Fraudulent misrepresentation, no defense of comparative negligence, §8:40.5
Medical malpractice, §2:30.4
Motor vehicle collisions, seat belt defense and sudden emergency doctrine, §2:80.4
Negligent security, §2:170.3

Complaints
Account stated (Fla.R.Civ.P. Form 1.933), §4:10.6
Conversion (Fla.R.Civ.P. Form 1.939), §4:80.6
Ejectment (Fla.R.Civ.P. Form 1.940), §13:20.1
Eviction (Fla.R.Civ.P. Form 1.947), §4:90.1
Forcible entry and detention (Fla.R.Civ.P. Form 1.938), §12:40.1
Foreclosure (Fla.R.Civ.P. Form 1.944), §4:100.6
Goods sold (Fla.R.Civ.P. Form 1.935), §4:110.1
Implied warranty (Fla.R.Civ.P. Form 1.949), §5:40.1
Money lent (Fla.R.Civ.P. Form 1.936), §4:130.1
Motor vehicle collisions, plaintiff unable to determine who is responsible, §2:90.1
Pleadings, sample complaint form, §1:50
Promissory note (Fla.R.Civ.P. Form 1.934), §4:150.1
Replevin (Fla.R.Civ.P. Form 1.937), §4:160.6
Specific performance, Fla.R.Civ.P. Form 1.941, §3:70.1

Concealment

Fiduciary duty, silence as fraudulent concealment, §4:50.5
Fraud. See Fraudulent Misrepresentation
Spoliation of evidence, effect of concealment of evidence, §2:120.3
Condominium Statutory Warranty. See Warranties
Consent
Conversion, effect of consent, §4:80.4
Consideration
Accord and satisfaction, returning part of consideration, §18:20.5
Breach of contract, failure of consideration, §3:10.4
Contractual indemnity, §6:20.4
Novation, §18:160.3
Rescission, inadequacy of consideration, §3:10.5
Conspiracy
Civil conspiracy
Antitrust Act (Florida), §4:30.6
Cause of action, sample language, §4:70.5
Elements of cause of action, §§4:70.1-4:70.1.5
Independent tort, §4:70.4
Joint and several liability, §4:70.4
References, §4:70.3
Related matters, §4:70.4
Statute of limitations, §4:70.2
Defamation, §9:10.5
Interference with advantageous business relationship, §4:180.5
Racketeer Influenced and Corrupt Organization (RICO) Act (Florida), §4:170.6
Constitutional Law
Discrimination. See Employment Discrimination Based on Disability
False imprisonment, §12:30.5
First Amendment issues
Appropriation, §4:40.4
Defamation, §9:10.4
Tortious interference with advantageous business relationship, §4:180.4
Privacy. See Privacy, Right to
Replevin, due process protection, §4:160.5
Supremacy Clause (U.S. Constitution), §18:10
Construction and Interpretation
Breach of settlement agreements, §3:10.5
Builder's risk insurance, §5:30.4
Building Code violations, agency's interpretation, §14:10.4
Contractual indemnity, §6:20.4
Declaratory judgment, liberal construction, §17:30.5
Employment discrimination based on disability, construing Florida Civil Rights Act, §7:10.5
Materials supplied under Florida condominium statutory warranty, §5:30.4
Negligence, foreseeable zone of risk, §2:40.5
Public figures, defamation of, §9:10.4
Racketeer Influenced and Corrupt Organization (RICO) Act (Florida), §§4:170.5-4:170.6
Scope of Section 673.3111, accord and satisfaction by use of instrument, §18:20.5
Section 772.14, collateral estoppel, §18:110.4
Security of Communications Act, strict construction of, §9:40.5
Trespass on the case, meaning of immediate and consequential, §13:50.4
Whistle-Blower's Act (Private Sector), individual liability, §§7:40.5-7:40.6
Whistle-Blower's Act (Public Sector), §7:30.6
Wrongful death, §2:140.5
Construction Cases
Breach of contract, defenses to, §3:10.4
Building Code violations. See Building Code Violations
Implied warranty of substantial compliance with plans and specifications, §5:40.5
Latent defects. See Latent Defects
Unlicensed contractors. See Unlicensed Contractors (Civil Remedy)
Constructive Fraud
Defenses, §8:20.4
Elements of cause of action
1st DCA, §8:20.1.1
2nd DCA, §8:20.1.2
3rd DCA, §8:20.1.3
4th DCA, §8:20.1.4
5th DCA, §8:20.1.5
Florida Supreme Court, §8:20.1
References, §8:20.3
Related matters, §8:20.5
Statute of limitations, §8:20.2
Constructive Trust
Cause of action, sample language, §4:190.7
Defenses, §4:190.4
Elements of cause of action, §§4:190.1-4:190.1.5
Fraud, §8:10.5
Fraud in the inducement, §8:30.5
References, §4:190.3
Related matters, §4:190.5
Statute of limitations, §4:190.2
Consumer Collection Practices Act (Florida)
Defenses, §16:30.5
Elements of cause of action, §§16:30.2.1-16:30.2.4
Florida statutory law, §16:30.1
References, §16:30.4
Related causes of action, §16:30.7
Related matters, §16:30.6
Statute of limitations, §16:30.3
Consumer Protection

Collecting on worthless checks. See Collecting Worthless Checks, Drafts, or Orders of Payment
Florida Deceptive and Unfair Trade Practices Act. See Deceptive and Unfair Trade Practices Act (Florida)
Implied warranty, effect of Magnuson-Moss Act, §5:40.5

Contracts
Adhesion contracts, §18:200.3
Breach. See Breach of Contract
Bribes, unenforceable contract, §18:70.3
Champerty, doctrine of as defense, §11:10.5
Consideration. See Consideration
Illegality. See Illegality
Implied-in-fact, breach of, §3:20
Implied-in-law, breach of, §3:30
Interference with. See Tortious Interference with Advantageous Business Relationship
Novation. See Novation
Oral contracts. See Oral Contracts
Performance. See Performance
Privity
Common law warranty, §5:20.5
Implied warranty, §5:40.4
Warranties, breach under Florida UCC, §12:30.5
Promissory estoppel, effect of express contract on, §3:50.4
Reformation. See Reformation
Rescission. See Rescission
Voidable. See Void or Voidable Actions
Warranty as contract, §5:10.5

Contractual Indemnity
Defenses, §6:20.4
Elements of cause of action
2nd DCA, §6:20.1.2
4th DCA, §6:20.1.4
5th DCA, §6:20.1.5
Florida Supreme Court, §6:20
References, §6:20.3
Related matters, §6:20.5
Statute of limitations, §6:20.2
Vouching in rule, §6:20.5

Contractual Relationship, Tortious Interference with
Defenses, 3:80.4
Elements of cause of action
1st DCA, §3:80.1.1
2nd DCA, §3:80.1.2
3rd DCA, §3:80.1.3
4th DCA, §3:80.1.4
5th DCA, §3:80.1.5
Florida Supreme Court, §3:80.1
Proving interference, §3:80.4
References, §3:80.3
Related matters, §3:80.5
Statute of limitations, §3:80.2

Contribution
Common law indemnity distinguished from contribution, §6:10.5

Contributory Negligence
Generally, §18:10
Common law warranty, defense of contributory negligence, §5:20.4
Implied warranty, §5:40.4
Strict liability, §2:130.4
Trespass on the case, §13:50.4
Warranties, breach of under Florida UCC, §5:10.4

Conversion
Complaint (Fla.R.Civ.P. Form 1.939), §4:80.6
Damages, §4:80.5
Defenses, §4:80.4
Demand, failure to make, §4:80.4
Elements of cause of action, §§4:80.1-4:80.1.5
References, §4:80.3
Related matters, §4:80.5
Statute of limitations, §4:80.2

Corporations
Conspiracy, §4:70.4
Corporate veil, §18:10
Directors and officers, breach of fiduciary duty, §4:50.5

Counterclaims
Abuse of process, §11:10.5
Malicious prosecution, §11:20.5

Covenant-Not-To-Compete
Permanent injunctions, §17:10.6
Temporary injunctions, §17:20.5

Credit and Creditors
Accord and satisfaction, creditor's acceptance of payment, §18:20.5

Criminal Actions
False imprisonment, §12:30.5
Legal malpractice in defense of criminal case, §2:20.5
RICO, standard jury instructions in criminal cases, §4:170.7

—D—

Damages
See also Punitive Damages
Breach of contract, §3:10.4
Conspiracy (civil), blacklisting employees, §4:70.4
Consumer Collection Practices Act (Florida), §16:30.6
Conversion, §4:80.5

Deceptive and Unfair Trade Practices Act (Florida), §16:10.6
Economic loss, §§2:40.4-2:40.5
False imprisonment, §12:40.5
Fraud, §8:10.4
Implied warranty, effect of Magnuson-Moss Act, §5:40.5
Injurious falsehood claims, protection of economic interests, §9:10.5
Intentional infliction of severe emotional distress, §10:10.5
Interest. See Interest on Money
Medical malpractice, §2:30.5
Negligence, §§2:40.4-2:40.5
Permanent injunctions, §17:10.6
Prejudgment interest. See Interest on Money
Slander of title (disparagement of property), special damages, §13:40.4
Temporary injunctions, §17:20.5
Unlicensed contractors, §18:80.1
Wrongful eviction, §4:90.5
Wrongfully issued injunction, §17:20.5

Deceptive and Unfair Trade Practices Act (Florida)
Class actions, §16:10.6
Defenses, §16:10.5
Elements of cause of action
1st DCA, §16:10.2.1
2nd DCA, §16:10.2.2
3rd DCA, §16:10.2.3
4th DCA, §16:10.2.4
Purpose of Act, §16:10.6
References, §16:10.4
Related causes of action, §16:10.7
Related matters, §16:10.6
Statute of limitations, §16:10.3
Statutory law, §16:10.1

Declaratory Judgment
Declaratory statements, §17:30.5
Defenses, §17:30.4
Elements of cause of action
1st DCA, §17:30.1.1
2nd DCA, §17:30.1.2
3rd DCA, §17:30.1.3
4th DCA, §17:30.1.4
5th DCA, §17:30.1.5
Florida Supreme Court, §17:30.1
Purpose of, §17:30.5
References, §17:30.3
Related matters, §17:30.5
Statute of limitations, §17:30.2

Dedication
Implied way of necessity, dedication to public use, §13:60.6
Roadway dedicated to public use, §13:10.5

Deed, Cancellation of. See Cancellation of Deed

Defamation
Conspiracy to defame, §9:10.5
Defenses, §9:10.4
Doctrine of compelled self-defamation, §12:10.5
Elements of cause of action, §§9:10.1-9:10.1.5
Intentional infliction of severe emotional distress, defamation privilege, §10:10.4
Jury instructions, §9:10.6
Publishers, §9:10.4
References, §9:10.3
Related matters, §9:10.5
Statute of limitations, §9:10.2

Defects
Breach of contract, defenses to, §3:10.4
Breach of warranty under Florida UCC, §5:10.5
Common law warranty, §5:20.5
Condominium statutory warranty, 5:30.4
Implied warranty, §5:40.4
Strict liability, §2:130.4

Defenses
Abandonment of contract as affirmative defense, §3:10.4
Abuse of process, §11:10.4
Accord and satisfaction. See Accord and Satisfaction
Accounting (equitable), §4:20.4
Account stated, §4:10.4
Advice of counsel. See Advice of Counsel, Reliance on
Antitrust Act (Florida), violations of, §4:30.5
Appropriation, §4:40.4
Assault, §12:10.4
Battery, 12:20.4
Bona fide occupational qualification as affirmative defense to employment based disability discrimination, §7:10.4
Breach of contract, §3:10.4
Charging lien, §15:10.4
Child custody, interference with, §10:20.4
Coblentz agreements, §18:230.2
Collateral estoppel (estoppel by judgment), §18:110.3
Common law indemnity, §6:10.4
Constructive trust, §4:190.4
Consumer Collection Practices Act (Florida), §16:30.5
Contractual indemnity, §6:20.4
Conversion, §4:80.4
Deceptive and Unfair Trade Practices Act (Florida), §16:10.5
Declaratory judgment, §17:30.4
Duress. See Duress

Employment discrimination based on disability, §7:10.4
Equitable estoppel. See Equitable Estoppel
Equitable lien, §15:20.4
Eviction, §4:90.4
False imprisonment, §12:30.4
Fiduciary duty, breach of, §4:50.4
Fraud, §§8:10.4-8:10.5
Fraud in the inducement, §8:30.4
Fraudulent misrepresentation, §8:40.4
Gratuitous assumption of duty, §18:140.3
Immunity. See Immunity
Implied indemnity, §6:30.4
Implied warranty, §5:40.4
Implied way of necessity, §13:60.5
Injury by fellow servant defense, §18:10
Intentional infliction of severe emotional distress, §10:10.4
Inverse condemnation, §13:30.4
Judicial estoppel, §18:130.3
Labor organization membership, wrongful discharge claims preempted by NLRA, §7:20.5
Laches. See Laches
Legal malpractice, §2:20.4
List of defenses, §18:10
Malicious prosecution, §11:20.4
Medical malpractice, §2:30.4
Minor's tort, parental liability for, §2:110.4
Mortgage foreclosure, §4:100.4
Motor vehicle collisions, negligence, §2:80.4
Motor vehicle collisions, plaintiff unable to determine who is responsible, §2:90.4
Negligence, §2:40.4
Negligent hiring or retention, §2:60.4
Negligent infliction of emotional distress, §2:10.4
Negligent misrepresentation, §2:70.4
Negligent security, §2:170.3
Novation, §18:160.3
Permanent injunctions, §17:10.5
Pleading affirmative defenses, §18:10
Privacy, invasion of, §9:40.4
Promissory estoppel, §3:50.4
Promissory note, §4:150.3
Quantum valebant, §3:90.4
Racketeer Influenced and Corrupt Organization (RICO) Act (Florida), §4:170.5
Reformation, §18:170.3
Replevin, §4:160.4
Rescission, §3:60.4
Res judicata, §18:180.3
Resulting trust, §4:200.4
Retaining lien, §15:30.3
Security of Communications Act, violations of, §9:40.4
Slander of title (disparagement of property), §13:40.4
Spoliation of evidence, §2:120.4
Statutory way of necessity, §13:70.5
Stillbirth, negligent, §2:100.4
Strict liability, §2:130.4
Temporary injunctions, §17:20.4
Theft, civil, §10:30.5
Third party beneficiary contracts, breach of, §3:40.2
Tortious interference with advantageous business relationship, §4:180.4
Trespass on the case, §13:50.4
Unconscionability. See Unconscionability
Unjust enrichment, §3:90.4
Unlicensed contractors. See Unlicensed Contractors (Civil Remedy)
Usurious transactions, §3:100.4
Whistle-Blower's Act (Private Sector), §7:40.5
Whistle-Blower's Act (Public Sector), retaliatory discharge, §7:30.5
Workers' compensation claim, retaliatory discharge for, §7:50.3

Definitions
Actual damages under FDUTPA, §16:10.6
Apparent agency (agency by estoppel), §18:50.3
Bribe, §18:70.3
Commercial purpose (appropriation), §4:40.4
Common counts, §3:90.5
Common law indemnity, §6:10.5
Confidential relationship, §4:60.4
Consumer, §18:80.1
Contract implied in fact, §3:90.5
Contract implied in law, §3:90.5
Contractor, §18:80.1
Declaratory statement, §17:30.5
Derivative liability, §2:40.5
Duress, §18:10
Employer, §7:10.5
Equitable estoppel, §18:10
Equitable lien, §15:20.5
Foreseeable zone of risk, §2:40.5
Gross negligence, §2:40.5
Handicap, §7:10.5
Implied indemnity, §6:30.5
Instrument, §18:20.5
Inverse condemnation, §13:30.5
Irreparable harm, §17:10.6
Laches, §§18:10, 18:150.4
Legal malice, §11:20.5
License to take action, §18:10
Malice in fact, §11:20.5
Misleading advertising, §4:120.1
Oral communications, §9:40.5
Probable cause (malicious prosecution), §11:20.5

Property (inverse condemnation), §13:30.5
Quantum meruit, §3:90.5
Quasi contract, §3:90.5
Release, §18:10
Remainderman, §13:50.5
Res judicata, §18:10
Retaining lien, §15:30.4
Taking, §13:30.5
Third-party declaratory judgment, §17:30.5
Transitory foreign substances (slip and fall), §2:50.4
Unborn viable fetus, §2:140.5
Unfair and deceptive practices under FDUTPA, §16:10.6
Vexatious litigant, §18:210.1
Vouching in rule (common law indemnity), §6:10.5
Waiver, §18:220.2
Wire communication, §9:40.5
Wrongful birth, §2:100.5
Wrongful death, §2:100.5

Destruction of Evidence. See Spoliation of Evidence (Negligent Destruction of Evidence)

Disabled Persons
Employment discrimination. See Employment Discrimination Based on Disability

Disclaimers. See Warranties

Disclosure
Fiduciary duty, §4:50.5

Discovery
Privacy, invasion of, §9:40.5
Spoliation of evidence, discovery sanctions, §2:120.5

Discrimination. See Employment Discrimination Based on Disability

Dismissal of Proceedings
Laches, motion to dismiss, §18:150.4
Malicious prosecution, when dismissal constitutes favorable termination, §11:20.4
Res judicata, effect of voluntary dismissal without prejudice, §18:180.3

Disparagement of Property. See Slander of Title (Disparagement of Property)

Doctrine of Claim Preclusion. See Res Judicata

Doctrine of Promissory Estoppel. See Promissory Estoppel

Dog Bite
Common law claim, §2:160
Statutory claim, §2:150

Domestic Violence
Permanent injunctions, §17:10.6
Temporary injunctions, §17:20.5

Duress
See also Undue Influence
Breach of contract, defense to, §3:10.4
Defenses, §18:90.3
Defining, §18:10
Elements of cause of action,
1st DCA, §18:90.1
3rd DCA, §18:90.3
4th DCA, §18:90.4
5th DCA, §18:90.5
References, §18:90.2
Related matters, §18:90.4
Threats, §3:10.3

Duty to Defend
Contractual indemnity, §6:20.5

—E—

Easements
Prescriptive easements. See Prescriptive Easements
Remedy for disturbance of easement, §13:50.5
Statutory way of necessity. See Statutory Way of Necessity

Ejectment
Complaint (Fla.R.Civ.P. Form 1.940), §13:20.1
References, §13:20.3
Related matters, §13:20.4
Statute of limitations, §13:20.2

Eminent Domain
Inverse condemnation, compensation, §13:30.5

Emotional Distress
Intentional. See Intentional Infliction of Severe Emotional Distress
Negligent. See Negligent Infliction of Emotional Distress
Privacy, invasion of, §9:40.5

Employment Cases
Actual agency, employer-employee relationship, §18:40.3
Apparent agency (agency by estoppel), §18:60.3
Conspiracy (civil), blacklisting employees, §4:70.4
Discrimination. See Employment Discrimination Based on Disability
Injury by fellow servant defense, §18:10
Labor organization membership. See Retaliatory Discharge
Negligent hiring or retention. See Negligent Hiring or Retention
Retaliatory discharge. See Retaliatory Discharge
Whistle-Blower's Act. See Retaliatory Discharge
Workers' compensation claim. See Retaliatory Discharge
Wrongful discharge. See Wrongful Discharge
Wrongful garnishment. See Wrongful Garnishment

Employment Discrimination Based on Disability
Burden of producing evidence, §7:10.5
Defenses, §7:10.4

Elements of cause of action, §7:10
Federal Rehabilitation Act, three classes of cases under, §7:10.5
Pregnancy, §7:10.3
References, §7:10.3
Related matters, §7:10.5
Statute of limitations, §7:10.2
Stereotype-free assessment of person's abilities, §7:10.4

Equitable Accounting. See Accounts and Accounting

Equitable Estoppel
Affirmative deception requirement, §18:120.3
Defenses, §18:120.3
Defining, 18:10
Elements of cause of action, §§18:120.1-18:120.1.5
References, §18:120.2
Related matters, §18:120.4
Statute of limitations, §18:120.4
Tolling compared to equitable estoppel, §18:120.4

Equitable Lien
Defenses, §15:20.4
Elements of cause of action
1st DCA, §15:20.1.1
2nd DCA, §15:20.1.2
3rd DCA, §15:20.1.3
4th DCA, §15:20.1.4
5th DCA, §15:20.1.5
Florida Supreme Court, §15:20.1
References, §15:20.3
Related matters, §15:20.5
Statute of limitations, §15:20.2
Vendee's lien, §15:20.5

Equitable Subrogation
Defenses, §18:100.3
Elements of cause of action, §§18:100.1-18:100.1.5
References, §18:100.2
Related matters, §18:100.4

Estates
Removal of Personal Representative: Surcharge, §19:30

Estoppel
Agency by estoppel. See Agents and Agency
Collateral. See Collateral Estoppel (Estoppel by Judgment)
Equitable. See Equitable Estoppel
Judicial. See Judicial Estoppel
Promissory. See Promissory Estoppel
Unlicensed contractors, 18:80.3

Eviction
Complaint (Fla.R.Civ.P. Form 1.947), §4:90.1
Defenses, §4:90.4
References, §4:90.3
Related matters, §4:90.5
Statute of limitations, §4:90.2
Wrongful eviction, damages, §4:90.5

Evidence
See also Burden of Proof
Account rendered, evidence of, §4:10.4
Agency relationship, §18:40.3
Cancellation of deed, presumption of undue influence, §4:60.4
Conspiracy (civil), circumstantial evidence, §4:70.4
Constructive trust, §4:190.4
Fraudulent misrepresentation, proving, §8:40.4
Hearsay. See Hearsay
Laches, §18:150.4
Medical malpractice, §2:30.5
Parol evidence. See Parol Evidence Rule
Permanent injunctions, §17:10.6
Presumptions. See Presumptions and Inferences
Privacy, invasion of, §9:40.4
Promissory estoppel, §3:50.4
Reformation, §18:170.4
Resulting trust, §4:200.5
Slip and fall cases, circumstantial evidence, §2:50.4
Spoliation of. See Spoliation of Evidence (Negligent Destruction of Evidence)
Stipulations. See Stipulations
Temporary injunctions, §17:20.5
Theft, civil, §§10:30.2, 10:30.4
Unconscionability, evidentiary hearing, §18:200.3
Vexatious litigant, §18:210.1

Exculpatory Clauses
Advertising (misleading), §4:120.3
Contractual indemnity, §6:20.5
Negligence, effect of public interest on exculpatory clause, §2:40.4

Exhaust Administrative Remedies, Failure To, 18:10

Experts and Expert Witnesses
Building Code violations, §14:10.4

—F—

Failure of Consideration. See Consideration

Failure To Act
Assault, defense to, §12:10.4

Failure to Exhaust Administrative Remedies. See Exhaust Administrative Remedies, Failure To

Failure To Warn. See Warn, Failure To

Falling Down. See Slip and Fall Cases

False Imprisonment
Baker Act, §12:30.5
Cause of action, sample language, §12:30.6
Defenses, §12:30.4
Elements of cause of action

1st DCA, §12:30.1.1
2nd DCA, §12:30.1.2
3rd DCA, §12:30.1.3
4th DCA, §12:30.1.4
5th DCA, §12:30.1.5
Florida Supreme Court, §12:30.1
References, §12:30.3
Related matters, §12:30.5
Statute of limitations, §12:30.2
Federal Courts
Collateral estoppel (estoppel by judgment), §18:110.4
Federal Preemption
Labor organization membership, retaliatory discharge for, §7:20.5
Supremacy Clause (U.S. Constitution), §18:10
Whistle-Blower's Act, no preemption by FAAAA, §7:40.6
Wiretaps, §§9:40.4-9:40.5
Fiduciary Duty
Accounting (equitable), right to an accounting, §4:20.5
Breach of
Cause of action, sample form, §4:50.6
Defenses, §4:50.4
Elements of cause of action, §§4:50.1, 4:50.1.2
Intentional tort, §4:50.5
References, §4:50.3
Related matters, §4:50.5
Statute of limitations, §4:50.2
Constructive fraud, effect of assignment of fiduciary duty, §8:20.5
Negligent hiring or retention of church official, §2:60.5
Fiduciary Relationship
Bribery. See Bribes and Bribery
Firearms
Strict liability, §2:130.4
Flooding
Inverse condemnation, §13:30.5
Florida Bar Rules
Generally, §7:40.6
Unauthorized practice of law, exclusive authority to prosecute claims for, §17:30.4
Florida Civil Rights Act
Whistle-Blower's Act, protection against retaliation, §7:40.6
Forcible Entry and Detention
Complaint (Fla.R.Civ.P. Form 1.938), §12:40.1
References, §12:40.3
Statute of limitations, §12:40.2
Verdict, form of, §12:40.4
Foreclosure
Complaint (Fla.R.Civ.P. Form 1.944), §4:100.6
Defenses, §4:100.4
Elements of cause of action, §§4:100.1-4:100.1.5
References, §4:100.3
Related matters, §4:100.5
Statute of limitations, §4:100.2
Unconscionability, §18:200.3
Foreseeability
Negligence, §§2:40.4-2:40.5
Negligent security, §2:170.3
Fraud
Generally, §18:10
Advertising. See Advertising (Misleading)
Breach of contract, contract induced by fraud, §3:10.4
Constructive fraud. See Constructive Fraud
Defenses, §8:10.4
Elements of cause of action
1st DCA, §8:10.1.1
2nd DCA, §8:10.1.2
3rd DCA, §8:10.1.3
4th DCA, §8:10.1.4
5th DCA, §8:10.1.5
Florida Supreme Court, §8:10.1
Equitable estoppel, §18:120.3
Fraud in the inducement. See Fraud in the Inducement
Fraudulent misrepresentation. See Fraudulent Misrepresentation
Promissory estoppel, preventing fraud or injustice, §3:50.5
References, §8:10.3
Statute of limitations, §8:10.2
Fraud in the Inducement
Defenses, §8:30.4
Elements of cause of action
1st DCA, §8:30.1.1
2nd DCA, §8:30.1.2
3rd DCA, §8:30.1.3
4th DCA, §8:30.1.4
5th DCA, §8:30.1.5
Pleading with particularity, §8:30.5
References, §8:30.3
Related matters, §8:30.5
Rescission, election of remedies, §3:60.5
Statute of limitations, §8:30.2
Fraudulent Misrepresentation
Defenses, §8:40.4
Elements of cause of action
1st DCA, §8:40.1.1
2nd DCA, §8:40.1.2
3rd DCA, §8:40.1.3
4th DCA, §8:40.1.4
5th DCA, §8:40.1.5
Florida Supreme Court, §8:40.1
Fraudulent concealment, §8:40.5
Negligent misrepresentation, §8:40.5

Negligent misrepresentation compared to, §2:70.5
References, §8:40.3
Statute of limitations, §8:40.2

—G—

Garnishment. See Wrongful Garnishment
Good Faith
Arrest, good faith presumption regarding police officer's use of force, §12:20.5
Deceptive and Unfair Trade Practices Act (Florida), good faith defense for retailers, §16:10.5
False imprisonment, defense of good faith mistake, §12:30.4
Legal malpractice, §2:20.4
Security of Communications Act, violations of, §9:40.4
Unjust enrichment, money received in good faith, §3:90.4
Usury savings clause, §3:100.4
Goods Sold
Complaint (Fla.R.Civ.P. Form 1.935), §4:110.1
Governmental Entities and Officials
See also State of Florida
Antitrust Act (Florida) applicable to local governments, §4:30.6
Bribes, §18:70.3
Defamation of public official, §9:10.4
Negligence actions, §2:40.5
Negligent hiring or retention, §2:60.4
Permanent injunctions, Sunshine Law regarding discussions of public officials, §17:10.6
Temporary injunctions and Sunshine Law, §17:20.5
Promissory estoppel, §3:50.4
Slip and fall cases, §2:50.4
Whistle-Blower's Act, effect on employees of independent contractors of state agencies, §7:40.6
Whistle-Blower's Act (Public Sector), §7:30.6
Governmental Intrusion
Elements of cause of action, §§9:20.2-9:20.2.4
Related matters, §9:20.4
Statute of limitations, §9:20.3
Statutory law, §9:20.1
Governmental Tort Liability
Fraudulent misrepresentation, common law or statutory duty of care, §8:40.4
Gratuitous Assumption of Duty
Defenses, §18:140.3
Elements of cause of action, §§18:140.1-18:140.1.4
References, §18:140.2
Guaranty and Guarantor
Common law indemnity contract distinguished from contract of guaranty, §6:10.5
Contractual indemnity distinguished from contract of guaranty, §6:20.5
Implied indemnity, §6.30.5

—H—

Handicapped Persons. See Employment Discrimination Based on Disability
Health Insurers
Intentional infliction of severe emotional distress and bad faith of insurer, damages for, §10:10.5
Hearsay
Conspiracy, hearsay exception, §4:70.4
Highways. See Streets, Roads, and Highways
Historical Background
See also Legislative Intent
Child custody, interference with, §10:20.5
Contractual relationship, tortious interference with, §3:80.5
Declaratory judgment, §17:30.5
Equitable estoppel, §18:120.4
Replevin, §4:160.5
Retaining lien, §§15:30.3, 15:30.4
Homestead Property
Equitable lien, effect of homestead on, §15:20.4

—I—

Illegality
Generally, §18:10
Breach of contract, contract void for illegality, §3:10.4
Bribes. See Bribes and Bribery
Contract in violation of constitution or statute, §18:80.4
Promissory estoppel, no estoppel against governmental entity for illegal result, §3:50.4
Immunity
Absolute immunity defense
Abuse of process, §11:10.4
Contractual relationship, tortious interference with, §3:80.4
Malicious prosecution, §11:10.4
Tortious interference with advantageous business relationship, §4:180.4
Judicial immunity, false imprisonment, §12:30.4
Legal malpractice, immunity for error of judgment, §2:20.4
Implied-in-Fact Contract
Breach of, §3:20

Implied-in-Law Contract
Breach of, §3:30
Implied Warranty. See Warranties
Implied Way of Necessity
Defenses, §13:60.5
Elements of cause of action
1st DCA, §13:60.2.1
2nd DCA, §13:60.2.2
4th DCA, §13:60.2.4
References, §13:60.4
Related matters, §13:60.6
Statute of limitations, §13:60.3
Statutory law, §13:60.1
Indemnity
Common law. See Common Law Indemnity
Contractual. See Contractual Indemnity
Implied indemnity
Defenses, §6:30.4
Elements of cause of action, 2nd DCA, §§6:30.1.2, 6:30.1.4
References, §6:30.3
Related matters, §6:30.5
Special relationship, §6:30.4
Statute of limitations, §6:30.2
Independent Contractors
Control test to determine actual agency, §18:40.3
Negligence, §2:40.4
Negligent hiring or retention, §2:60.5
Unlicensed contractors. See Unlicensed Contractors (Civil Remedy)
Whistle-Blower's Act, effect on employees of independent contractors of state agencies, §7:40.6
Injunctions
Irreparable harm, preliminary mandatory injunction, §17:10.6
Permanent injunctions
Annotation, §17:10.1
Defenses, §17:10.5
References, §17:10.4
Related matters, §17:10.6
Statute of limitations, §17:10.3
Temporary injunctions
Cause of action, sample language, §17:20.6
Defenses, §17:20.4
Elements of cause of action, §§17:20.1-17:20.1.5
References, §17:20.3
Related matters, §17:20.5
Statute of limitations, §17:20.2
Temporary mandatory injunction, §17:20.5
Wrongfully issued injunction, damages, §17:20.5
Injurious Falsehood Claims
Protection of economic interests, §9:10.5
Injury by Fellow Servant Defense
Employee precluded from recovering damages, §18:10
In Pari Delicto
Defenses, §18:240.2
Elements of cause of action, §§18:240.1-18:240.1.5
Fraud, §8:10.4
Fraud in the inducement, §8:30.4
Related matters, §18:240.3
Unlicensed contractors, §18:80.3
Insanity
Assault, defense to, §12:10.4
Battery, defense to, §12:20.4
Inspection of Goods
Florida UCC, effect of pre-purchase inspection of goods on breach of warranties under Florida UCC, §5:10.4
Insurance
Builder's risk insurance, §5:30.4
Comprehensive general liability policy, §5:30.4
Contractor's certificate of insurance, §18:80.4
Declaratory judgment, disputes over insurance coverage, §§17:30.4, 17:30.5
Equitable subrogation, §§18:100.3-18:100.4
Health insurers. See Health Insurers
Promissory estoppel, creating insurance coverage to prevent fraud or injustice, §3:50.5
Reformation of insurance contracts, §18:170.4
Spoliation of evidence, §2:120.5
Uninsured/underinsured motorist coverage, §2:91
Intent
See also Legislative Intent
Battery, §12:20.5
Constructive fraud, §8:20.5
Fraud and deceit, §8:10.5
Fraud in the inducement, §8:30.4
Fraudulent concealment, §8:20.5
Fraudulent misrepresentation, §8:40.4
Statutory way of necessity, §13:70.6
Theft, civil, §10:30.6
Third party beneficiary contracts, third party intended to benefit, §3:40.4
Usury savings clause as factor, effect of intent, §8:80.4
Warranties, breach under Florida UCC, §12:30.5
Intentional Infliction of Severe Emotional Distress
Defenses, §10:10.4
Elements of cause of action
1st DCA, §10:10.1.1
2nd DCA, §10:10.1.2
3rd DCA, §10:10.1.3
4th DCA, §10:10.1.4
5th DCA, §10:10.1.5
Florida Supreme Court, §10:10.1
Gross negligence, §10:10.5
References, §10:10.3

Related matters, §10:10.5
Statute of limitations, §10:10.2
Interest on Money
See also Usurious Transactions
Breach of contract, prejudgment interest, §3:10.5
Interpretation of Cases and Statutes. See Construction and Interpretation
Interrogatories
Security of Communications Act, §9:40.5
Invasion of Privacy. See Privacy, Invasion of
Inverse Condemnation
Defenses, §13:30.4
Elements of cause of action
1st DCA, §13:30.1.1
2nd DCA, §13:30.1.2
4th DCA, §13:30.1.4
5th DCA, §13:30.1.5
Florida Supreme Court, §13:30.1
Statute of limitations, §13:30.2
Investigations
Employment discrimination based on disability, time for EEOC investigation, §7:10.2
Fraudulent misrepresentation, §8:40.5
Medical malpractice, presuit investigation, §2:30.4
Whistle-Blower's Act (Public Sector), investigative procedures under Florida statutory law on retaliation, §7:30.1
Investigative Stops
False imprisonment, §12:30.4

—J—

Joint Venture Agreement
Breach of, §4:210
Judicial Estoppel
Generally, §18:10
Defenses, §18:130.3
Elements of cause of action, §§18:130.1-18:130.1.5
References, §18:130.2
Related matters, §18:130.4
Jurisdiction
Charging lien, §15:10.4
Defamation, out-of-state telephone call, §9:10.5
Pleading, §1:40
Security of Communications Act, violations of, §9:30.4
State of Florida as party in permanent injunction action, §17:10.6
Jury Instructions
Breach of warranty under Florida UCC, jury instruction for product liability, §5:10.6
Defamation, §9:10.6
Implied warranty, product liability, §5:40.6
Negligent misrepresentation, §2:70.5
RICO Act (Florida), standard instructions in criminal cases, §4:170.7
Jury Trial
Accounting (equitable), jury trial impracticable, §4:20.5
Rescission, jury trial improper, §3:60.5

—K—

Knowledge
Contractual relationship, tortious interference with, §3:80.4
Equitable estoppel, §18:120.3
Fraud, §8:10.5
Fraudulent misrepresentation, §8:40.5
Negligence of landlord, knowledge of dangerous code violation, §2:40.5
Slip and fall cases, constructive knowledge, §2:50.4

—L—

Labor Organizations
Party to actions in name of labor organization, §7:20.1
Retaliation for membership in. See Retaliatory Discharge
Laches
Generally, §18:10
Constructive trust, §4:190.4
Defenses, §18:150.3
Elements of cause of action, §§18:150.1-18:150.1.5
References, §18:150.2
Related matters, §18:150.4
Landlords and Tenants
Eviction. See Eviction
Negligence of landlord, knowledge of dangerous code violation, §2:40.5
Negligent hiring or retention of independent contractors, §2:60.5
Latent Defects
Building Code violations, §14:10.4
Law Enforcement. See Police Officers
Legal Malpractice
Cause of action, sample language, §2:20.6
Criminal cases, §2:20.5
Defenses, §2:20.4
Elements of cause of action, §§2:20.1-2:20.1.5
References, §2:20.3
Related matters, §2:20.5
Statute of limitations, §2:20.2
Legislative Intent

See also Historical Background
Declaratory judgment, §17:30.5
Medical malpractice claims, pre-suit investigation and notice, §2:30.4
Security of Communications Act, §9:40.5
Unlicensed contractors, §18:80.4
Wrongful death, §2:140.5
Libel
Florida statutory law, §9:10.5
Media defendant, §9:10.5
Licenses and Permits
Unlicensed contractors, effect of subsequent procurement of license, §18:80.4
Liens
Charging. See Charging Lien
Equitable. See Equitable Lien
Retaining. See Retaining Lien
Limitation of Actions. See Statute of Limitations
Loans
Complaint for money lent (Fla.R.Civ.P. Form 1.936), §4:130.1
Payday loans, unconscionability, §18:200.3
Lost Profits
Breach of contract, §3:10.5
Promissory estoppel, effect of violation of bidding statute, §3:50.4

—M—

Malice
Conversion, §4:80.4
Defamation, §9:10.4
False imprisonment, §12:30.5
Interference with contractual or business relationship, §4:180.4
Malicious prosecution, §11:20.5
Privacy, invasion of, §9:40.4
Slander of title (disparagement of property), §13:40.5
Malicious Prosecution
Attorneys, standard for, §11:20.5
Defenses, §11:20.4
Elements of cause of action
1st DCA, §11:20.1.1
2nd DCA, §11:20.1.2
3rd DCA, §11:20.1.3
4th DCA, §11:20.1.4
5th DCA, §11:20.1.5
Florida Supreme Court, §11:20.1
References, §11:20.3
Related matters, §11:20.5
Statute of limitations, §11:20.2
Malpractice
Legal. See Legal Malpractice
Medical. See Medical Malpractice
Media
Appropriation, exception of news media from liability, §4:40.4
Libel, §9:10.5
Medical Malpractice
Defenses, §2:30.4
Elements of cause of action, §§2:30.1-2:30.1.5
References, §2:30.3
Related matters, §2:30.5
Res ipsa loquitur, §2:30.5
Statute of limitations, §2:30.2
Stillborn, §2:100.5
Valcin doctrine regarding missing records, presumption of negligence, §2:30.5
Medical Treatment
Assault and battery, liability for treating patient after refusal of medical treatment, §12:20.5
Health insurers. See Health Insurers
Unreasonable pricing for medical care, Florida Deceptive and Unfair Trade Practices Act, §16:10.6
Merger Clause
Fraud in the inducement, effect of merger clause on action, §8:30.4
Minor's Tort, Parental Liability for
Defenses, §2:110.4
Elements of cause of action, §§2:110.1-2:110.1.4
Loco parentis, §2:110.5
References, §2:110.3
Related matters, §2:110.5
Misleading Advertising. See Advertising (Misleading)
Misrepresentation
Equitable estoppel, §18:120.3
Fraudulent. See Fraudulent Misrepresentation
Negligent. See Negligent Misrepresentation
Mistake
False imprisonment, defense of good faith mistake, §12:30.4
Reformation, mistake of law or mutual mistake, §§18:170.3-18:170.4
Unjust enrichment, effect of money received in good faith mistake of facts, §3:90.4
Money Lent. See Loans
Monopoly Power
Conspiracy, §4:70.4
Mootness, §18:10
Mortgages
Deeds. See Cancellation of Deed
Foreclosure. See Foreclosure
Motor Vehicle Collisions
Negligence
Complaint (Fla.R.Civ.P. Form 1.945), §2:80.6

Defenses, §2:80.4
Elements of cause of action, §2:80.1
Lending vehicle, dangerous instrumentality doctrine, §2:80.4
References, §2:80.3
Related matters, §2:80.5
Seal belt defense, contributory negligence, §2:80.4
Statute of limitations, §2:80.2
Strict vicarious liability, §2:80.4
Sudden emergency doctrine, §2:80.4
Sudden stop, rebuttable presumption, 2:80.4
Unlicensed tortfeasor, §2:80.4
Plaintiff unable to determine who is responsible
Complaint (Fla.R.Civ.P. Form 1.946), §2:90.1
Defenses, §2:90.4
References, §2:90.3
Related matters, §2:90.5
Statute of limitations, §2:80.2

Mutuality
Collateral estoppel, §18:110.4

—N—

Negligence
Arrest warrant, negligently swearing out, §12:30.5
Assumption of risk, §2:40.4
Building Code violations as evidence of negligence, §14:10.4
Comparative negligence. See Comparative Negligence
Contractual indemnity for own negligence, §6:20.4
Contributory negligence. See Contributory Negligence
Defenses, §2:40.4
Derivative liability distinguished from vicarious liability, §2:40.5
Destruction of evidence. See Spoliation of Evidence (Negligent Destruction of Evidence)
Duty, §2:40.5
Economic damages, §2:40.5
Elements of cause of action, §§2:40.1-2:40.1.5
Emotional distress, negligent infliction. See Negligent Infliction of Emotional Distress
Exculpatory clauses. See Exculpatory Clauses
Foreseeability, §§2:40.4-2:40.5
Fraudulent misrepresentation, §8:40.5
Governmental entity, §2:40.5
Hiring or retention. See Negligent Hiring or Retention
Implied indemnity, §6:30.4
Indemnitee's own negligence, §6:10.5
Intervening cause, §2:40.4
Legal malpractice. See Legal Malpractice
Medical malpractice. See Medical Malpractice
Misrepresentation. See Negligence
References, §2:40.3
Related matters, §12:40.5
Res ipsa loquitur. See Res Ipsa Loquitur
Slip and fall cases. See Slip and Fall Cases
Statute of limitations, §2:40.2
Stillbirth. See Negligent Stillbirth
Violations of statutes and ordinances, §2:40.5

Negligent Hiring or Retention
Defenses, §2:60.4
Derivative liability, §2:60.5
Elements of cause of action, §§2:60.1-2:60.1.5
References, §2:60.3
Related matters, §2:60.5
Respondeat superior compared, §2:60.5
Statute of limitations, §2:60.2

Negligent Infliction of Emotional Distress
Defenses, §2:10.4
Elements of cause of action, §§2:10.1-2:10.1.5
Impact rule, §2:10.4
References, §2:10.3
Related matters, §2:10.5
Statute of limitations, §2:10.2

Negligent Misrepresentation
Defenses, §2:70.4
Elements of cause of action, §§2:70.1-2:70.1.6
False information negligently supplied, §2:70.4
Fraudulent misrepresentation compared to, §2:70.5
Jury instructions, §2:70.5
References, §2:70.3
Related matters, §2:70.5
Statute of limitations, §2:70.2

Negligent Security
Defenses, §2:170.3
Elements of cause of action, §§2:170.1- 2:170.1.5
References, §2:170.5
Related matters, §2:170.4
Statute of limitations, §2:170.2

Negligent Stillbirth
Defenses, §2:100.4
Elements of cause of action, §§2:100.1, 2:100.4
References, §2:100.3
Related matters, §2:100.5
Statute of limitations, §2:100.2

News Media. See Media

Nolle Prosequi (Declination to Prosecute)
Malicious prosecution, §11:20.5

Note. See Promissory Note

Notice and Notification
Charging lien, §15:10.4

Medical malpractice, pre-suit notice, §2:30.4
Permanent injunctions, §17:10.6
Temporary injunctions, §17:20.5
Whistle-Blower's Act, written notice to employer issue, §7:40.6
Novation
Consideration, §18:160.3
Elements of cause of action, §§18:160.1.1-18:160.1.5
References, §18:160.2

—O—

Omission
Assault, defense to, §12:10.4
Battery, defense to, §12:20.4
Fraud, §8:10.5
Open Account. See Accounts and Accounting
Oral Contracts
Breach of, §3:10.5
Promissory estoppel, §3:50.4

—P—

Parent Child Relationship
Child custody, interference with. See Child Custody, Interference with
Governmental intrusion, §9:20.4
Minor's torts. See Minor's Tort, Parental Liability for
Parol Evidence Rule
Reformation, §18:170.4
Resulting trust, §4:200.5
Parties
Contractual relationship, tortious interference with, §3:80.4
Labor organizations as parties, §7:20.1
Multiple defendants in negligence actions, alternative theory, §2:40.5
Rescission, indispensable parties, §3:60.4
State as party. See State of Florida
Third parties. See Third Parties
Wrongful death, §2:140.5
Partnerships
Accounting (equitable), §4:20.5
Payday Loans. See Loans
Payment
Defense of, §18:10
Performance
Breach of contract, impossibility of performance or hindering other's performance, §3:10.4
Specific performance. See Specific Performance
Pets
Negligent infliction of emotional distress, §2:10.5
Pet dealer's statutory warranty. See Warranties
Photographs
Privacy, invasion of, §9:40.5
Physical Torts
Assault. See Assault
Battery. See Battery
False imprisonment. See False Imprisonment
Forcible entry and detention. See Forcible Entry and Detention
Piercing the Corporate Veil
Elements of cause of action, §§18:60.1-18:60.1.5
References, §18:60.2
Pleadings
Causes of action, pattern language, see Causes of Action
Complaints. See Complaints
Defenses. See Defenses
Indemnity, common law, §6:10.5
Related matters, §1:40
Rules of Civil Procedure
Pleadings and motions, Rule 1.100, §1:10.1
Rule 1.110, general rules of pleading, §1:10.2
Rule 1.120, special matters, §1:10.3
Rule 1.130, attaching copy of cause of action and exhibits under, §1:10.4
Rules of Judicial Administration
Paper under Rule 2.520, §1:20.2.1
Signature of attorneys and parties, Rule 2.515, §1:20.1
Statutory law, §1:30
Pledge, Breach of
Promissory estoppel, effect of death of donor, §3:50.5
Police Officers
Arrest warrants. See Arrest Warrants
Force used during arrest. See Arrest
Negligent retention or supervision, §2:60.5
Preemption. See Federal Preemption
Prejudice
Laches, loss of evidence, §18:150.4
Premises Liability
Slip and fall cases, §2:50.4
Prescriptive Easements
Defenses, §13:10.4
Elements of cause of action
1st DCA, §13:10.1.1
4th DCA, §13:10.1.4
5th DCA, §13:10.1.5
Florida Supreme Court, §13:10.1
References, §13:10.3
Related matters, §13:10.5
Statute of limitations, §13:10.2

Presumptions and Inferences
Absence of person, presumption of death, §2:140.5
Accord and satisfaction, presumption of substituted agreement if claim disputed or unliquidated, §8:20.5
Account stated, presumption of correctness, §4:10.4
Advertising (misleading), §4:120.1
Arrest, good faith presumption regarding police officer's use of force, §12:20.5
Cancellation of deed, presumption of undue influence, §4:60.4
Conspiracy (civil), inference created by circumstantial evidence, §4:70.4
Constructive trust, presumption of ownership, §4:190.5
Implied way of necessity, §13:60.6
Medical malpractice, presumption of negligence under Valcin doctrine regarding missing records, §2:30.5
Motor vehicle rear-end collisions, effect of sudden stop on rebuttable presumption of negligence, §2:80.4
Prescriptive easements, presumption another's use of land with owner's permission, §13:10.5
Promissory note, §4:150.4
Res ipsa loquitur, inference of negligence, §2:30.5
Slip and fall cases, §2:50.4
Spoliation of evidence, Valcin doctrine, §2:120.5
State enforcing police power with injunction, presumption of irreparable harm, §17:10.6
Privacy, Invasion of
Appropriation, §§4:40.4, 9:70
Defenses, §9:40.4
Elements of cause of action, §§9:40.1-9:40.1.5
Intrusion, §9:60
Public disclosure of private facts, §9:50
References, §9:40.3
Related matters, §9:40.5
Statute of limitations, §9:40.2
Wiretaps. See Security of Communications Act, Violation of
Privacy, Right to
See also Privacy, Invasion of
Governmental intrusion. See Governmental Intrusion
Interception of communications. See Security of Communications Act, Violation of
Scope under Florida law, §9:20.4
Privileges
Defamation, §§9:10.4, 10:10.4
Interference with contractual or business relationship, §4:180.4
Litigation privilege, §18:10
Slander of title (disparagement of property), §13:40.4
Privity. See Contracts
Probable Cause
False imprisonment, §12:30.4
Malicious prosecution, §11:20.5
Probate
Revocation of, Based on Lack of Testamentary Capacity, §19:10
Revocation of, Based On Undue Influence, §19:20
Tortious interference with an expectancy/inheritance, §19:20.7
Procedural Remedies
Declaratory judgment. See Declaratory Judgment
Injunctions. See Injunctions
Procedural Torts
Abuse of process. See Abuse of Process
Malicious prosecution. See Malicious Prosecution
Professionals
Negligence of, §2:40.5
Profits, Loss of. See Lost Profits
Promissory Estoppel
Defenses, §3:50.4
Elements of cause of action
1st DCA, §3:50.1.1
2nd DCA, §3:50.1.2
3rd DCA, §3:50.1.3
4th DCA, §3:50.1.4
Florida Supreme Court, §3:50.1
Oral contracts, §3:50.4
References, §3:50.3
Related matters, §3:50.5
Statute of limitations, §3:50.2
Third parties asserting, §3:50.5
Promissory Note
Complaint (Fla.R.Civ.P. Form 1.934), §4:150.1
Defenses, §4:150.3
Discharge of instrument, §4:150.3
Documentary taxes, §4:150.3
Related matters, §4:150.4
Statute of limitations, §4:150.2
Public Officials. See Governmental Entities and Officials
Punitive Damages
Assault, §12:10.5
Battery, §12:20.5
Consumer Collection Practices Act (Florida), §16:30.6
Intentional infliction of severe emotional distress, §10:10.5
Pleading for, §1:40
Slander of title (disparagement of property), §13:40.5
Theft, civil, §10:30.2
Workers' compensation claim, wrongful discharge, §7:50.5

—Q—

Quantum Meruit
Historical background, §3:90.5
Quasi In Rem Actions
Equitable lien, §15:20.5
Questions of Law or Fact
Agency relationship as, §18:40.3
Agents of state, §2:40.4
Intentional infliction of severe emotional distress, outrageous conduct, §10:10.5
Minor's tort, loco parentis, §2:110.5
Motor vehicle collisions, seat belt defense, §2:80.4
Unconscionability, §18:200.3
Quiet Title
Defenses, §13:80.5
Elements of cause of action
1st DCA, §13:80.2.1
2nd DCA, §13:80.2.2
4th DCA, §13:80.2.4
5th DCA, §13:80.2.5
Florida Statutes, 13:80.1
Related matters, §13:80.6
Statute of limitations, §13:80.3

—R—

Racketeer Influenced and Corrupt Organization (RICO) Act (Florida)
Civil remedies
Defenses, §4:170.5
Elements of cause of action, §§4:170.2-4:170.2.5
Florida statutory law, §4:170.1
References, §4:170.4
Related matters, §4:170.6
Statute of limitations, §4:170.3
Federal RICO Act compared to Florida's RICO Act, §4:170.6
Jury instructions in criminal cases, §4:170.7
Temporary injunctions, §17:20.5
Ratification
Defining, §18:10
Real Property
Cancellation of deed. See Cancellation of Deed
Charging lien, limits on, §15:10.4
Equitable lien, §§15:20.4, 15:20.5
Eviction. See Eviction
Homestead. See Homestead Property
Implied way of necessity. See Implied Way of Necessity
Inverse condemnation. See Inverse Condemnation
Prescriptive easements. See Prescriptive Easements
Right of access. See Right of Access; Streets, Roads, and Highways
Slander of title. See Slander of Title (Disparagement of Property)
Trespass on the case. See Trespass on the Case
Records and Reports
Medical malpractice, presumption of negligence under Valcin doctrine regarding missing records, §2:30.5
Spoliation of evidence, Valcin doctrine, §2:120.5
Reformation
Defenses, §18:170.3
Elements of cause of action, §§18:170.1-18:170.1.5
References, §18:170.2
Related matters, §18:170.4
Release
Defining, §18:10
Reliance
Advice of counsel. See Advice of Counsel, Reliance on
Apparent authority of principal's agent(agency by estoppel), third party's reliance on, §18:50.3
Deceptive and Unfair Trade Practices Act (Florida), individual class members not required to prove reliance for certification, §16:10.6
Negligent misrepresentation, §2:70.4
Promissory estoppel, effect of donee's reliance on deceased donor's pledge, §3:50.5
Security of Communications Act, violations of, §9:40.4
Warranty, common law, §5:20.5
Reliance on Advice of Counsel. See Advice of Counsel, Reliance on
Remainderman
Trespass on the case, §13:50.5
Rental Equipment
Warranties, breach under Florida UCC, §5:10.4
Replevin
Complaint (Fla.R.Civ.P. Form 1.937), §4:160.6
Conversion compared to, §4:80.5
Defenses, §4:160.4
Elements of cause of action, §§4:160.1-4:160.1.1
References, §4:160.3
Related matters, §4:160.5
Statute of limitations, §4:160.2
Reports. See Records and Reports
Rescission
Breach of contract
Defenses to, §3:10.4
Distinguishing breach from rescission, §3:10.5
Defenses, §3:60.4
Elements of cause of action
2nd DCA, §3:60.1.2
4th DCA, §3:60.1.4

References, §3:60.3
Related matters, §3:60.5
Statute of limitations, §3:60.2
Res Ipsa Loquitur
Medical malpractice, §2:30.5
Negligence, §2:40.5
Res Judicata
Collateral estoppel, §18:110.4
Defenses, §18:180.3
Defining, §18:10
Elements of cause of action, §§18:180.1-18:180.1.5
Law of case compared to, §18:110.4
References, §18:180.2
Related matters, §18:180.4
Splitting causes of action, rule against, §18:110.4
Respondeat Superior
Negligent hiring or retention compared to, §2:60.5
Restitution
Elements of cause of action, §§18:190.1-18:190.1.5
References, §18:190.2
Related matters, §18:190.3
Resulting Trust
Defenses, §4:200.4
Elements of cause of action, §§4:200.1-4:200.1.5
References, §4:200.3
Related matters, §4:200.5
Statute of limitations, §4:200.2
Retaining Lien
Defenses, §15:30.3
Defined, §15:30.4
References, §15:30.2
Related matters, §15:30.4
Retaliatory Discharge
See also Wrongful Discharge
Labor organization membership
Defenses, §7:20.5
Florida statutory law, §7:20.1
References, §7:20.4
Statute of limitations, §7:20.3
Title VII action, prima facie claim for retaliation, §7:10.5
Whistle-Blower's Act (Private Sector)
Defenses, §7:40.5
Elements of cause of action,
2d DCA, §7:40.2.2
4th DCA, §7:40.2.4
Florida statutory law, §7:40.1
References, §7:40.4
Related matters, §7:40.6
Whistle-Blower's Act (Public Sector)
Defenses, §7:30.5
Demotions, §7:30.6
Florida statutory law, §7:30.1
References, §7:30.4
Related matters, §7:30.6
Statute of limitations, §7:30.3
Workers' compensation claim
Defenses, §7:50.5
Elements of cause of action
2nd DCA, §7:50.2.2
3rd DCA, §7:50.2.3
5th DCA, §7:50.2.5
Florida statutory law, §7:50.1
Related matters, §7:50.6
Statute of limitations, §7:50.3
RICO. See Racketeer Influenced and Corrupt Organization (RICO) Act (Florida)
Right of Access
Implied way of necessity. See Implied Way of Necessity
Inverse condemnation, right of access diminished, §13:30.5
Statutory way of necessity. See Statutory Way of Necessity
Ripeness
Res judicata, §18:180.3
Roads. See Streets, Roads, and Highways
Rules of Civil Procedure. See Pleadings
Rules of Judicial Administration. See Pleadings

—S—

Sanctions
Spoliation of evidence, discovery sanctions, §2:120.5
Satisfaction. See Accord and Satisfaction
Schools and Students
Negligent hiring, supervision, or retention of school employees, §2:60.5
Search and Seizure
Investigative stop, false imprisonment, §12:30.4
Security of Communications Act, Violation of
Defenses, §9:30.4
Florida statutory law, §9:30.1
References, §9:30.3
Related matters, §9:30.5
Statute of limitations, §9:30.2
Wiretaps, Federal preemption, §§9:30.4-9:30.5
Self-Defense
Assault, §12:10.4
Battery, §12:20.4
Setting Aside
Cancellation of deed, presumption of undue influence, §4:60.4
Duress or coercion by third party, effect on setting aside contract, §18:90.3
Settlement

Breach of settlement agreements, rules of interpretation, §3:10.5
Charging lien, effect of settlement without notice to attorney, §15:10.5
Legal malpractice, settlement of underlying claim as abandonment of malpractice claim, §2:20.4
Malicious prosecution, settlement as defense, §11:20.4
Sexually Transmitted Diseases (STDs)
Battery, §12:20.5
Signatures
Collecting worthless checks, drafts, or orders of payment, effect of signature, §16:20.2
Reformation to include omitted signature, §18:170.4
Slander of Title (Disparagement of Property)
Complaint, sample form, §13:40.6
Defenses, §13:40.4
Elements of cause of action
1st DCA, §13:40.1.1
2nd DCA, §13:40.1.2
3rd DCA, §13:40.1.3
4th DCA, §13:40.1.4
5th DCA, §13:40.1.5
Florida Supreme Court, §13:40.1
References, §13:40.3
Related matters, §13:40.5
Statute of limitations, §13:40.2
Slip and Fall Cases
Complaint (Fla.R.Civ.P. Form 1.951), §2:50.6
Defenses, §2:50.4
Elements of cause of action, §2:50.1
Premises liability, §2:50.4
References, §2:50.3
Statute of limitations, §2:50.2
Transitory foreign substances, §2:50.4
Sovereign Immunity
See also State of Florida
Breach of contract, §3:10.4
Building Code violations, §14:10.4
Negligence, §2:40.4
Negligent security, §2:170.3
Spoliation of evidence, §2:120.5
Statutory way of necessity, §13:70.5
Special Master
Accounting (equitable), §4:20.5
Special Relationship
Common law indemnity, §6:10.4
Implied indemnity, §6:30.4
Negligent hiring or retention, §2:60.4
Public servants, bribes, §18:70.3
Specific Performance
Complaint (Fla.R.Civ.P. Form 1.941), §3:70.6
Defenses, §3:70.3
Element of cause of action, §3:70.1
Related matters, §3:70.4
Statute of limitations, §3:70.2
Splitting Causes of Action, Rule Against
Comparison to res judicata, §18:110.4
Elements of cause of action, §§18:250.1-18:250.1.5
Related matters, §18:250.2
Spoliation of Evidence (Negligent Destruction of Evidence)
Defenses, §2:120.4
Discovery sanctions, §2:120.5
Elements of cause of action, §§2:120.1.2-2:120.1.4
References, §2:120.3
Related matters, §2:120.5
Statute of limitations, §2:120.2
Valcin doctrine, §2:120.5
Spousal Support
Charging lien depriving former spouse of minimal necessities of life, §15:10.4
Standing
Generally, §18:10
Racketeer Influenced and Corrupt Organization (RICO) Act (Florida), §4:170.5
Stated Account. See Accounts and Accounting
State of Florida
See also Governmental Entities and Officials
Equitable estoppel against State, §18:120.3
Sovereign immunity. See Sovereign Immunity
State enforcing police power with injunction, presumption of irreparable harm, §17:10.6
Temporary injunctions, §17:20.5
Statute of Frauds
Generally, §18:10
Promissory estoppel, §3:50.4
Statute of Limitations
Accounting (equitable), §4:20.2
Account stated, §4:10.2
Antitrust Act (Florida), violations of, §4:30.3
Appropriation, §4:40.2
Assault, §12:10.2
Battery, §12:20.2
Breach of contract, §3:10.2
Building Code violations, §14:10.2
Charging lien, §15:10.2
Child custody, interference with, §10:20.2
Coblentz agreements, §18:230.3
Collecting worthless checks, drafts, or orders of payment, §16:20.3
Common law indemnity, §6:10.2
Condominium statutory warranty, 5:30.2
Conspiracy (civil), §4:70.2
Constructive fraud, §8:20.2
Constructive trust, §4:190.2
Consumer Collection Practices Act (Florida), §16:30.3

Contractual indemnity, §6:20.2
Conversion, §4:80.2
Deceptive and Unfair Trade Practices Act (Florida), §16:10.3
Declaratory judgment, §17:30.2
Defenses, §§13:30.4, 15:10.4
Equitable estoppel, §18:120.4
Equitable lien, §15:20.2
Equitable tolling, §18:10
Eviction, §4:90.2
False imprisonment, §12:30.2
Fiduciary duty, breach of, §4:50.2
Fraud, §8:10.2
Fraud in the inducement, §8:30.2
Fraudulent misrepresentation, §8:40.2
Governmental intrusion, §9:20.3
Implied indemnity, §6:30.2
Implied warranty, §5:40.2
Implied way of necessity, §13:60.3
Intentional infliction of severe emotional distress, §10:10.2
Inverse condemnation, §13:30.2
Legal malpractice, §2:20.2
Malicious prosecution, §11:20.2
Medical malpractice, §2:30.2
Mortgage foreclosure, §4:100.2
Motor vehicle collisions, §2:80.2
Negligence, §2:40.2
Negligent hiring or retention, §2:60.2
Negligent misrepresentation, §2:70.2
Negligent security, §2:170.2
Negligent stillbirth, §2:100.2
Open account, §4:140.2
Permanent injunctions, §17:10.3
Pet dealer's statutory warranty, §5:50.2
Prescriptive easements, §13:10.2
Privacy, invasion of, §9:40.2
Promissory estoppel, §3:50.2
Promissory note, §4:150.2
Racketeer Influenced and Corrupt Organization (RICO) Act (Florida), §4:170.2
References, §§13:50.3, 15:10.3
Related matters, §8:40.5
Replevin, §4:160.2
Rescission, §3:60.2
Resulting trust, §4:200.2
Security of Communications Act, violations of, §9:40.1
Slander of title (disparagement of property), §13:40.2
Slip and fall cases, §2:50.2
Spoliation of evidence, §2:120.2
Strict liability, §2:130.2
Temporary injunctions, §17:20.2
Theft, civil, §10:30.3
Third party beneficiary contracts, breach of, §3:40.2
Tortious interference with advantageous business relationship, §4:180.2
Trespass on the case, §13:50.2
Uninsured/underinsured motorist coverage, §2:91
Unjust enrichment, §3:90.2
Usurious transactions, §3:100.2
Waiver of, §18:220.5
Whistle-Blower's Act (Public Sector), retaliatory discharge, §7:30.3
Workers' compensation claim, retaliatory discharge for, §7:50.3
Wrongful death, Definitions, §2:140.2

Statutory Way of Necessity
Defenses, §13:70.5
Elements of cause of action
1st DCA, §13:70.2.1
5th DCA, §13:70.2.5
Florida Supreme Court, §13:70.2
References, §13:70.4
Related matters, §13:70.6
Statute of limitations, §13:70.3
Statutory law, §13:70.1

STDs. See Sexually Transmitted Diseases (STDs)

Stillbirth. See Negligent Stillbirth

Stipulations
Permanent injunctions, §17:10.6
Temporary injunctions, §17:20.5

Streets, Roads, and Highways
Dedication of roadway to public use, §§13:10.5, 13:60.6
Implied way of necessity. See Implied Way of Necessity
Inverse condemnation, right of access diminished, §13:30.5
Statutory way of necessity. See Statutory Way of Necessity

Strict Liability
Defenses, §2:130.4
Elements of cause of action, §§2:130.1-2:130.1.5
References, §2:130.3
Related matters, §2:130.5
Statute of limitations, §2:130.2

Students. See Schools and Students

Subrogation
Distinguished from common law indemnity, §6:10.5
Equitable subrogation. See Equitable Subrogation

Suicide
Medical malpractice, limits on, §2:30.4

—T—

Taxpayer Actions

Declaratory judgment, special injury showing, §17:30.4
Teachers. See Schools and Students
Telephones
Defamation, out-of-state telephone call, §9:10.5
Wiretaps, Security of Communications Act, §§9:40.4-9:40.5
Testamentary Expectation
Interference with, §10:40
Theft, Civil
Defenses, §10:30.5
Elements of cause of action, §§10:30.1-10:30.1.5
Evidence, proof of theft, §10:30.6
Florida statutory law, §10:30.2
References, §10:30.4
Related matters, §10:30.6
Statute of limitations, §10:30.3
Third Parties
Apparent authority of principal's agent(agency by estoppel), third party's reliance on, §18:50.3
Breach of third party beneficiary contracts. See Third Party Beneficiary Contracts, Breach of
Compelled self-defamation, doctrine of, §9:10.5
Declaratory judgment, §17:30.5
Duress or coercion by third party, effect on setting aside contract, §18:90.3
Privacy, invasion of, §9:40.5
Promissory estoppel asserted by third parties, §3:50.5
Third Party Beneficiary Contracts, Breach of
Defenses, §3:40.4
Elements of cause of action
1st DCA, §3:40.1.1
2nd DCA, §3:40.1.2
3rd DCA, §3:40.1.3
4th DCA, §3:40.1.4
5th DCA, §3:40.1.5
Florida Supreme Court, §3:40.1
Intent test, §3:40.4
References, §3:40.3
Statute of limitations, §3:40.2
Title, Slander of. See Slander of Title (Disparagement of Property)
Title VII of Civil Rights Act
Retaliation claim, §7:10.5
Tortious Interference with Advantageous Business Relationship
Defenses, §4:180.4
Elements of cause of action, §§4:180.1-4:180.1.5
Key terms, §4:180.5
References, §4:180.3
Related matters, §4:180.5
Statute of limitations, §4:180.2
Torts. see specific tort by name
Trade Secrets and Trademarks
Apparent agency (agency by estoppel), effect of trademark symbols, §18:50.3
Deceptive and Unfair Trade Practices Act (Florida), §16:10.6
Trespass on the Case
Defenses, §13:50.4
Elements of cause of action
2nd DCA, §13:50.1.2
3rd DCA, §13:50.1.3
Florida Supreme Court, §13:50.1
References, §13:50.3
Related matters, §13:50.5
Statute of limitations, §13:50.2
Trusts
Attorneys' trust accounts. See Attorneys' Trust Accounts
Constructive trusts. See Constructive Tru**st**

—U—

Ultimate Facts
Pleading, §1:40
Unauthorized Practice of Law
Florida Bar, exclusive authority to prosecute claims for, §17:30.4
Unclean Hands
Generally, §18:10
Permanent injunctions, §17:10.5
Temporary injunctions, §17:20.4
Unconscionability
Breach of contract, raising affirmative defense of unconscionability, §3:10.4
Elements of cause of action, §§18:200.1-18:200.1.5
Evidentiary hearing, §3:10.3
References, §18:200.2
Related matters, §18:200.3
Underinusred Motorist Coverage. See Underinsured/Underinsured Motorist Coverage
Undertakings. See Bonds and Undertakings
Undue Influence
See also Duress
Cancellation of deed, presumption of undue influence, §4:60.4
Requirements for, §18:90.4
Unfair Trade Practices
Bribes and bribery (commercial), §18:70.3
Deceptive and Unfair Trade Practices Act (Florida). See Deceptive and Unfair Trade Practices Act (Florida)
Unions. See Labor Organizations
Uninsured/Underinsured Motorist Coverage
Defenses, §2:91.4

References, §2:91.3
Related matters, §2:91.5
Statute of Limitations, §2:91.2
Unjust Enrichment
Cause of action, sample language, §3:90.6
Defenses, §3:90.4
Elements of cause of action
1st DCA, §3:90.1.1
2nd DCA, §3:90.1.2
3rd DCA, §3:90.1.3
4th DCA, §3:90.1.4
5th DCA, §3:90.1.5
Florida Supreme Court, §3:90.1
Equitable subrogation, policy to prevent unjust enrichment, §18:100.4
Historical background, §3:90.5
References, §3:90.3
Related matters, §3:90.5
Statute of limitations, §3:90.2
Unlicensed Contractors (Civil Remedy)
Florida statutory law, §18:80.1
References, §18:80.2
Related matters, §18:80.4
Subsequent procurement of license or expiration of license, effect of, §18:80.4
Unreasonable Pricing
Deceptive and Unfair Trade Practices Act (Florida), §16:10.6
Usurious Transactions
Defenses, §3:100.4
Related matters, §3:100.5
Elements of cause of action
1st DCA, §3:100.1.1
2nd DCA, §3:100.1.2
3rd DCA, §3:100.1.3
4th DCA, §3:100.1.4
5th DCA, §3:100.1.5
Florida Supreme Court, §3:100.1
References, §3:100.3
Statute of limitations, §3:100.2

—V—

Verdicts
Forcible entry and detention, form of verdict, §12:40.4
Vexatious Litigant
Florida statutory law, §18:210.1
Prefiling order preventing vexatious litigant from commencing action without leave of judge, §18:210.1
References, §18:210.2
Related matters, §18:210.3
Void or Voidable Actions
Breach of contract, contract induced by fraud or illegal, §3:10.4
Contractual relationship, tortious interference with, §3:80.4
Tortious interference with advantageous business relationship, §4:180.5

—W—

Waiver
Arbitration, §§18:10, 18:220.5
Defenses, §18:220.4
Defining, §§18:10, 18:220.2
Elements of cause of action, §§18:220.1-18:220.1.5
Finality, state's interest in, §18:220.5
Implied by conduct, §18:220.5
Related matters, §18:220.5
Statute of limitation, waiver of, §18:220.5
Warn, Failure To
Strict liability, §2:130.4
Warranties
Breach under Florida UCC
Defenses, §5:10.4
Disclaimer, §5:10.5
Elements of cause of action, §§5:10.1.3, 5:10.1.4
Product liability, standard jury instruction, §5:10.6
References, §5:10.3
Related matters, §5:10.5
Rental equipment, §5:10.4
Statute of limitations, §5:10.2
Building Code violations, owner's implied warranty of suitability, §14:10.4
Common law warranty
Defenses, §5:20.4
Elements of cause of action, §§5:20.1.1, 5:20.1.4
References, §5:20.3
Related matters, §5:20.5
Statute of limitations, §5:20.2
Condominium statutory warranty
References, §5:30.3
Related matters, §5:30.4
Section 718.203 warranties, §5:30.1
Statute of limitations, §5:30.2
Implied warranty
Complaint (Fla.R.Civ.P. Form 1.949), §5:40.1
Defenses, §5:40.4
Product liability, jury instruction, §5:40.6
References, §5:40.3
Related matters, §5:40.5
Statute of limitations, §5:40.2
Implied warranty of authority, §5:40.5

Pet dealer's statutory warranty
References, §5:50.3
Section 828.29, §5:50.1
Statute of limitations, §5:50.2
Warrants
Arrest warrants. See Arrest Warrants
Whistle-Blower's Act. See Retaliatory Discharge
Wiretaps
Federal preemption, §§9:30.4-9:30.5
Withdrawal of Attorney
Charging lien, effect of withdrawal on, §15:10.4
Workers' Compensation Claim
Employee's sole remedy, §18:10
Retaliatory discharge for. See Retaliatory Discharge
Writs. See Certiorari, Writ of
Wrongful Death
Damages, §2:140.5
Defenses, §2:140.4
Elements of cause of action, §§2:140.1-2:140.1.5
Felony, death during commission of, §2:140.4
Negligence, §2:40.5
References, §2:140.3
Related matters, §2:140.5
Statute of limitations, §2:140.2
Stillborn, §2:100.5
Wrongful Discharge
See also Retaliatory Discharge
Labor organization membership, wrongful discharge
claims preempted by NLRA, §7:20.5
Wrongful Garnishment
Elements of cause of action,
§§7:60.1.1, 7:60.1.2, 7:60.1.4
Wrongful Life, §2:100.5

—Z—

Zoning
Taking, §13:30.5

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