

Chapter 4

Business Torts Litigation

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Chapter 4

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4.1 Negligent Misrepresentation -- *Rodowicz v. Massachusetts Mutual Life Ins. Co.*, 2002 WL 122823 (1st Cir. Feb. 4, 2002)(Construing Mass. Law).

Construing Massachusetts law, the First Circuit vacated a jury award in favor of the plaintiff in a negligent and fraudulent misrepresentation case. Because the court held that plaintiff to prove a negligent misrepresentation case, the court did not reach the fraud case:

Because the degree of culpability a plaintiff must show to establish liability for negligent misrepresentation, we use the elements for negligent misrepresentation. *Cummings v. HPG Int'l Inc.*, 244 F.3d 16, 24-25 (1st Cir. 2001). Under Massachusetts law,

To sustain a claim of misrepresentation, a plaintiff must show a false statement of a material fact made to induce the plaintiff to act, together with reliance on the false statement by the plaintiff to the plaintiff's detriment.... The speaker need not know "that the statement is false if the truth is reasonably susceptible of actual knowledge, or otherwise expressed, if, through a modicum of diligence, accurate facts are available to the speaker."

Zimmerman v. Kent, 31 Mass. App. Ct. 72, 575 N.E.2d 70, 74 (1991) (quoting *Acushnet Fed. Credit Union v. Roderick*, 26 Mass. App. Ct. 604, 530 N.E.2d 1243, 1244 (1988)) (footnote omitted). As we have noted previously, "in general, Massachusetts courts treat negligent misrepresentation claims more as negligence actions than deceit actions, focusing on the degree of care exercised by the speaker in making the statement." *Cummings*, 244 F.3d at 25.

Rodowicz, at *4

The court found that the plaintiffs had failed to prevent sufficient evidence to meet "a basic element of negligent misrepresentation, that there be 'false information for the guidance of others.'" *Id.* (citing *Cummings*, 244 F.3d at 24).

In order of a representation about a future occurrence to be actionable negligent misrepresentation, there must be evidence that the statement was false at the time made, and that the defendant could have learned of the falsity with reasonable care. A simple change of mind by a defendant does not render an earlier statement false. *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 563 N.E.2d 188, 192 & n. 4 (1990). Without evidence of the contrary intent, the statement is not considered false at the time it is made. *Id.*

Rodowicz, at *6

While the jury may draw an inference that defendants the statements were false when made, "under Massachusetts law, a jury cannot infer contrary intent at the time of the representation from the mere fact that the company took contrary action at a later date." *Id.* at 7 (citing *Zhang v. Mass. Inst. of Tech.*, 46 Mass. App. Ct. 597, 708 N.E.2d 128, 134-35 (1999); other citations omitted).

4.2 Tort of Bad Faith—Jones v. Secura Insurance Co., 2002 WL 126630 (Wis. Feb. 1, 2002).

In *Secura*, the Wisconsin Supreme Court held an insurer that acts in bad faith “is liable to the insured in tort for any damages which are the proximate result of that conduct,” even damages that were otherwise recoverable in a breach of an insurance contract claim that had expired under the applicable statute of limitations. *Id.* at *1 (quoting *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 571, 547 N.W.2d 592 (1996)). Wisconsin first recognized the tort of bad faith in *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 686, 271 N.W.2d 368 (1978):

We explicitly recognized a bad faith claim sounding in tort, although arising out of a contractual relationship. (citing *Anderson*). ‘By virtue of the relationship between the parties created by the contract, a special duty arises, the breach of which duty is a tort and is unrelated to contract damages.’ *Id.* The duty referred to is the special duty of good faith and fair dealing arising out of the contractual relationship. *Id.* at 686, 689, 271 N.W.2d 368 (citing Restatement (Second) of Contracts § 231)). This court also made it clear that ‘the tort of bad faith is not for the breach of contract. It is a separate tort.’ *Id.* at 696.

In adopting the tort of bad faith, the Wisconsin Supreme Court relied upon the rationale stated in *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (Cal. 1973) and prior Wisconsin decisions. In these cases, the courts “acknowledged that an insurer owes a duty to the insured, analogous to that of a fiduciary.”

In *Gruenberg*, the California Supreme Court concluded that an insurance company “has a duty to deal fairly and in good faith with its insured.” *Secura* at *4 (quoting *Gruenberg*, 108 Cal. Rptr. 480, 510 P.2d at 1037). In *Anderson*, the Wisconsin Supreme Court “expressly adopted the following statement from *Gruenberg* as the law in Wisconsin:

It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of the third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

Secura, at *3-4 (quoting *Anderson*, 85 Wis.2d at 689, 271 N.W.2d 368 (quoting *Gruenberg*, 108 Cal. Rptr. 480, 510 P.2d at 1038)). To prove a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant’s knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

Secura, at *4 (quoting *Anderson*, at 691, 271 N.W.2d 368).

The tort of bad faith is an intentional one, which may “result in not only compensatory damages, but also punitive damages and damages for emotional injury.” *Id.*

Recovery for emotional distress is only allowed “for severe distress, and when substantial other damage is suffered apart from the loss of contract benefits.” *Id.* Punitive damages are only available where there is a showing of “evil intent” or of a “special ill-will or wanton disregard of duty.” *Id.*

4.3 Fraud, Aiding and Abetting, Tortious Interference and Civil Conspiracy -- Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395, ___ P.3d ___, 2002 WL 65636 (Ariz. banc Jan. 18, 2002).

In *Wells Fargo*, the Arizona Supreme Court issued an opinion that serves virtually as a treatise on business torts law in Arizona. Aiding and abetting liability is discussed in detail, as are and sets forth the elements of a number of significant business torts.

Wells Fargo involved a triparty agreement between First Interstate Bank (the “Bank”), various union pension funds (the “Funds”), and a developer of a strip shopping mall. After various disputes and a foreclosure, the Bank brought a declaratory judgment action against the Funds and they counterclaimed alleging (1) aiding and abetting fraud, (2) breach of the implied covenant of good faith and fair dealing, (3) intentional interference with contractual relations, (4) fraudulent concealment, and (5) civil conspiracy. The trial court entered summary judgment for the Bank on all claims and awarded fees, finding that the Bank owed no fiduciary or contractual duty to the Funds to disclose information about the developers financial condition. The court of appeals affirmed. The Arizona Supreme Court granted the Funds petition for review and affirmed in part and reversed in part.

4.3.1 Intentional Torts Require No Duty and Are Distinct from Negligence Cases

The Arizona Supreme court first addressed whether a duty existed, and distinguished negligent nondisclosure cases from intentional concealment. 2002 WL 65635 at ¶¶18-19 (publication page references not available)(citing *United States v. Colton*, 231 F.3d 890, 899 (4th Cir. 2000). “Unlike simple nondisclosure, a party may be liable for acts taken to conceal, mislead or otherwise deceive, even in the absence of a fiduciary, statutory, or other legal duty to disclose. *Wells Fargo*, at ¶19 (citing *Colton*, at 898; W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 106 (5th ed. 1984)).

“Moreover, duty, in the traditional sense, is a specific concept applicable to the law of negligence, not to intentional torts.” *Wells Fargo*, at ¶20 (citations omitted).

One of the basic elements of a negligence cause of action is that the defendant owed the plaintiff a duty of care. (citation omitted). Case law is replete with illustrations of this basic concept. *Purvis v. Hamwi*, 828 F.Supp. 1479, 1483 (D.Colo.1993) (“[A] finding of duty is necessary only for ... claims in negligence; ... claims for intentional torts require no traditional finding of duty ...”); see also *Almand v. Benton County, Ark.*, 145 B.R. 608, 617 (W.D.Ark.1992) (an attorney would be liable for negligence only to those to whom he owed a duty but would be liable for intentional misrepresentation or

fraud to anyone); *Taylor v. California State Auto. Ass'n Inter-Ins. Bureau*, 194 Cal.App.3d 1214, 240 Cal.Rptr. 107, 113 (1987) (distinguishing negligent infliction of emotional distress from intentional infliction of emotional distress, as the former must be predicated on the existence of a duty); *Waters v. Autuori*, 236 Conn. 820, 676 A.2d 357, 367 (1996) (Berdon, J., dissenting) ("Duty is an element of negligence, but is not an element of an intentional tort."), citing PROSSER V § 30 (italics in original); *Smith v. Calvary Christian Church*, 233 Mich.App. 96, 592 N.W.2d 713, 721 (1998) (plaintiff need not prove duty in proving intentional torts), appeal granted, 461 Mich. 947, 607 N.W.2d 721 (2000), judgment rev'd on other grounds, 462 Mich. 679, 614 N.W.2d 590 (2000).

As the Purvis court most appropriately stated, "[I]t would be anomalous to invoke a lack of a specific duty in dismissing a complaint for an intentional act.... The duty, if it must be so named, is obviously to refrain from intentional harm to others. At the level of intent, reference to duty becomes ... needlessly academic...." 828 F.Supp. at 1483-84.

Wells Fargo, at ¶¶20-21.

The court went on to add that, even if the Funds' claims were dependent upon a duty to disclose, a duty to disclose may have existed. The court looked to a Minnesota Supreme Court opinion, *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 244 N.W.2d 648 (1976), which recited the rule that generally a party to a transaction has no duty to disclose material facts to the other party unless a "special circumstance" exists. *Wells Fargo*, at ¶26 (citing *Richfield* at 650). Special circumstances "are typically those where there is a fiduciary or confidential relationship, or where one party has special knowledge of material facts to which the other party has no access, or where one party has spoken, but has not said enough to prevent his words from being misleading." *Id.* (citing *Richfield* at 650).

But the court added that there are additional situations in which special circumstances give rise to an obligation to disclose. One of those "special circumstances" arises "when a bank has actual knowledge of the fraud, it has a concomitant 'affirmative duty to disclos[e] those facts' before it engages in transactions with the customer which 'further[ed] the fraud.'" *Id.* at ¶27 (citing *Richfield* at 652; *Barnett Bank of West Florida v. Hooper*, 498 So.2d 923 (Fla. 1986)(special circumstances requiring disclosure may be found where bank has actual knowledge of fraud being perpetrated)).

Another such situation exists when an escrow agent, "notwithstanding the duty of confidentiality, must disclose information when the agent " 'knows that a fraud is being committed.' " *Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345, 353, 813 P.2d 710, 718 (1991) (quoting *Berry v. McLeod*, 124 Ariz. 346, 352, 604 P.2d 610, 616 (1979)). Although the agent does not have a duty to investigate, she must disclose where she has "substantial evidence" of fraud. *Wells Fargo*, at ¶28 (citing *Burkons* at 355, 813 P.2d at 720).

The court also discussed special circumstances in the context of a real estate transaction:

In *Lombardo v. Albu*, 199 Ariz. 97, 100, 14 P.3d 288, 291 ¶ 13 (2000), we held explicitly that a buyer's agent in a real estate transaction must disclose to the seller evidence known to him that is material to buyer's inability to

perform. Here, the Funds allege and have presented evidence that the Bank knew [the real estate developer] was advancing false and misleading financial information, both to the Bank and to the Funds, regarding his ability to perform the permanent loan obligations.

Wells Fargo, at ¶29. Thus the court concluded that the trial court's reliance on an alleged lack of duty was erroneous.

4.3.2 Aiding and Abetting

The Arizona Supreme Court turned next to the specific tort claims alleged, the first of which was the Funds' claim for aiding and abetting fraud. Arizona recognizes aiding and abetting as embodied in Restatement § 876(b), "that a person who aids and abets a tortfeasor is himself liable for the resulting harm to a third person." *Wells Fargo*, at ¶31 (citing *GemstarLtd. V. Ernst & Young*, 183 Ariz. 148, 159, 901 P.2d 1178, 1189 n. 7 (App. 1995), *vacated on other grounds*, 185 Ariz. 493, 917 P.2d 222 (1996); *Gomez v. Hensley*, 145 Ariz. 176, 178, 700 P.2d 874, 876 (App. 1984); Restatement (Second) of Torts § 876(b)(1977)).

"[A]iding and abetting liability does not require the existence of, nor does it create, a pre-existing duty of care.... Rather, aiding and abetting liability is based on proof of a scienter ... the defendants must *know* that the conduct they are aiding and abetting is a tort." *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 186 (Minn. 1999); *Pacific Mut. Life Ins. Co. v. Ernst & Young & Co.*, 10 S.W.3d 798, 804 (Tex.App. 2000) (to the extent that duty may be considered a part of the scienter element of a fraud claim, such duty extends to all persons the fraud defendant intends or has reason to expect will rely on its misrepresentations (citing Restatement (Second) of Torts § 531)), *judgment rev'd*, 51 S.W.3d 573 (Tex. 2001).

Claims of aiding and abetting tortious conduct require proof of three elements:

- (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff;
- (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and
- (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach.

Wells Fargo, at ¶ 34 quoting *Gomez*, 145 Ariz. at 178, 700 P.2d at 876 (citing Restatement (Second) of Torts § 876(b)).

Because aiding and abetting is a theory of secondary liability, the party charged with the tort must have knowledge of the primary violation, and such knowledge may be inferred from the circumstances. *Wells Fargo*, at ¶ 36 (citing *In re American Continental Corp./Lincoln Sav. and Loan Sec. Litig.*, 794 F.Supp. 1424, 1436 (D.Ariz. 1992)). Since the Bank was aware of the developers contractual duty to provide accurate financial information to the Funds and the Triparty Agreement references those requirements, the court found that, together with other evidence an inference could be drawn that the Bank had sufficient knowledge for aiding and abetting liability. *Id.*

The Arizona Supreme Court went on to explain that actual and complete knowledge of the tort is unnecessary:

A showing of actual and complete knowledge of the tort is not uniformly necessary to hold a secondary tortfeasor liable under an aiding and abetting theory. *FDIC v. First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423 (8th Cir.1989) (bank can be held liable for aiding and abetting a customer who defrauded another bank if bank has a "general awareness" of the customer's fraudulent scheme, notwithstanding the fact that the bank may not have had actual knowledge of the scheme or an intent to participate in the fraud; general awareness of the fraudulent scheme can be established though circumstantial evidence). "The knowledge requirement" can be met, "even though the bank may not have known of all the details of the primary fraud--the misrepresentations, omissions, and other fraudulent practices." *Aetna Cas. and Sur. Co. v. Leahey Const. Co., Inc.*, 219 F.3d 519, 536 (6th Cir.2000) ("Leahey") (citing *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1012 (11th Cir.1985) ("Woods") (internal citations omitted)).

Wells Fargo, at ¶45.

The third requirement, substantial assistance by an aider and abettor, can take many forms, but means more than "a little aid." *Id.* at ¶46 (citing *In re American Continental*, 794 F.Supp. at 1435 (quoting *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 496 (7th Cir.1986); see also *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 514 N.E.2d 116 (1987) (broker aided and abetted primary fraud by providing false financial information used to present "enhanced financial picture to others"))).

The legal elements of aiding and abetting a tortfeasor have been explored most comprehensively by the federal courts in the context of aiding and abetting securities fraud. See *Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir.1991); *Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646 (9th Cir.1988); *Metge v. Baehler*, 762 F.2d 621 (8th Cir.1985); *Monsen v. Consolidated Dressed Beef Co., Inc.*, 579 F.2d 793 (3d Cir.1978). *But cf. Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (aiding and abetting liability abolished under § 10(b) of the Securities and Exchange Act of 1934, but secondary actors not completely absolved from liability).

Wells Fargo, at ¶46.

The court then pointed to the Eighth Circuit's reason's in *Metge* that "[a]lthough the facts ... are unremarkable taken in isolation, we find that taken together, they present what should have been a jury issue on the question of aiding-and-abetting liability." *Wells Fargo*, at ¶47 (citing 762 F.2d at 630). The court explained:

Metge involved a suit by investors against a lender for aiding and abetting an issuer of securities who ultimately filed for bankruptcy. The investors alleged that the lender engaged in a series of banking strategies to keep a failing securities issuer in business. In evaluating the record, the court sought to

determine whether the lender knew that the thrift certificates being issued were worthless and that because of the lender's involvement, the financial life of the issuer was prolonged in the lender's own interest and at the expense of the certificate holders. The court noted that, viewed separately, most of the banking transactions were unremarkable events, but viewed in conjunction with other evidence, they suggest an unusual pattern of extraordinary attempts to prolong the issuer's financial viability to the detriment of the investors.

Wells Fargo, at ¶47 (citing *Metge* at 626, *K & S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 979 (8th Cir.1991)).

Even ordinary course transactions have the potential to constitute substantial assistance where there is “an extraordinary economic motivation to aid in the fraud.” *Wells Fargo*, at ¶48 (citing *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir.1983) (broker's processing of transactions with knowledge of fraudulent nature was done to generate commissions); *IIT, an Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 921-22 (2d Cir.1980) (defendant performed challenged transaction knowing it violated client's policy, with heightened economic motive to do so)).

Because the Bank “had a heightened economic motive to assist” the real estate developer, the Court found this evidence probative toward reaching a conclusion of substantial assistance. *Wells Fargo*, at ¶49.

Moreover, “if [a] ... method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.” *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir.1975); *see also Woods* at 1012 (for purposes of establishing liability as an aider and abettor, knowing assistance of a securities violation can be inferred from atypical business actions).

Wells Fargo at ¶51.

The Arizona Supreme Court added that the substantial assistance test does not require this assistance to be “necessary” to the successful completion of the fraud. *Id.* at ¶54 (citing *Leahey* at 537): “The test is whether the assistance makes it easier for the violation to occur, not whether the assistance was necessary.” *Wells Fargo*, at ¶54 (citing *Leahy* at 537 (quoting *Camp v. Dema*, 948 F.2d 455, 462 (8th Cir.1991) (internal quotations omitted))).

Given all of the facts the Court held that sufficient inferences were raised to make the issue triable to a jury. *Wells Fargo*, at ¶ 58. The standard at trial for aiding and abetting is preponderance of the evidence. *Wells Fargo*, ¶58, n. 16 (citing *York v. In Trust Bank, N.A.*, 265 Kan. 271, 962 P.2d 405, 422 (1998) (because jury ruled in favor of defendant on fraud count which required higher burden of proof does not mean evidence was insufficient to prove aiding and abetting fraud); *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W.2d 369 (Iowa 1997) (preponderance of the evidence is the proper standard of proof for aiding and abetting securities fraud under Iowa law); *State, Dep't of Finance v. Tenney*, 124 Idaho 243, 858 P.2d 782 (App.1993) (aiding and abetting securities violation must be proven by preponderance of the evidence under Idaho law)).

4.3.3 Tort of Bad Faith

Arizona recognizes the covenant of good faith and fair dealing in contract. *Wells Fargo*, at ¶ 59 (citing *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 985 P.2d 556, ¶ 14 (1998) (citing *Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986); see also *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985)).

Such implied terms are as much a part of a contract as are the express terms. *Golder v. Crain*, 7 Ariz.App. 207, 437 P.2d 959 (1968). The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement. The duty arises by operation of law but exists by virtue of a contractual relationship. *Rawlings* at 153-54, 726 P.2d at 569-70.

Wells Fargo, at ¶59

The Arizona Supreme Court proceeded to discuss the circumstances under which breach of the implied covenant of good faith and fair dealing is a tort:

A party may bring an action in tort claiming damages for breach of the implied covenant of good faith, but only where there is a "special relationship between the parties arising from elements of public interest, adhesion, and fiduciary responsibility." *Id.* at 355, 813 P.2d at 720; see also *Wagenseller* at 383, 710 P.2d at 1038; *McAlister v. Citibank (Arizona), a Subsidiary of Citicorp*, 171 Ariz. 207, 829 P.2d 1253 (App.1992) (a special relationship must exist in order to support a *tortious* breach of the implied covenant of good faith and fair dealing).

Wells Fargo, at ¶60. Because the Funds conceded they too did not have the required "special relationship," the Court held that the tort of bad faith did not apply in this case. *Id.*

4.3.4 Intentional Interference With Contractual Relations

The Arizona Supreme Court's own language describes succinctly that the tort of intentional interference with contract in that state:

Intentional interference with contract is, as its name suggests, an intentional tort. *Snow v. Western Sav. & Loan Ass'n*, 152 Ariz. 27, 34, 730 P.2d 204, 211 (1986); see also Restatement (Second) of Torts § 767 cmt. d (1979) (interference with contractual relations is an intentional tort). In addition, "[t]he duty not to interfere with the contract of another arises out of law, not contract." *Bar J Bar Cattle Co. Inc. v. Pace*, 158 Ariz. 481, 486, 763 P.2d 545, 550 (App.1988) (emphasis added). We therefore examine the merits of the Funds' claim.

Arizona has long recognized the tort of intentional interference with contractual relations. See *Snow* at 33, 730 P.2d at 211. A prima facie case of intentional interference requires: (1) existence of a valid contractual relationship, (2) knowledge of the relationship on the part of the interferor, (3)

intentional interference inducing or causing a breach, (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly. *Id.*; Restatement (Second) of Torts § 766 (1977).

Wells Fargo, at ¶¶ 73-74.

The court added:

"There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract." Restatement (Second) of Torts § 766 cmt. k (1979).

Id. at ¶78. Intent is a question for the fact finder. *Id.* at 79 (citing *Snow* at 34, 730 P.2d at 211)

Arizona also follows the restatement approach for determining whether the alleged conduct is wrongful: [w]rongful conduct can be analyzed by considering seven factors previously advanced by this court: (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 interest 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. *Wells Fargo*, at ¶81, citing *Wagenseller* at 387, 710 P.2d at 1042 (quoting Restatement (Second) of Torts § 767); *see also Bar J Cattle Co.* at 484, 763 P.2d at 548. Factors deserving the most weight are the nature of the actor's conduct and the actor's motive. *G.M. Ambulance & Med. Supply Co., Inc. v. Canyon State Ambulance, Inc.*, 153 Ariz. 549, 551, 739 P.2d 203, 205 (App.1987)).

Conduct specifically in violation of statutory provisions or contrary to public policy may for that reason make an interference improper. *Id.* at ¶82 (citing Restatement (Second) of Torts § 767 cmt. c (1979)). "Because the Bank's conduct was "inconsistent with prudent and reasonable banking practices and inconsistent with the course of action previously prescribed by the loan's Special Credits Officer, the Court viewed the Banks conduct as sufficiently "wrongful" for purposes of stating a claim for tortious interference. *Wells Fargo*, at ¶82.

With respect to the justification element of a tortious interference claim, the court pointed out that, it is not justification to interfere knowingly with a contract where the defendant acts with an improper purpose and seeks to further his own interests. *Wells Fargo*, at ¶ 38 (citing *Community Title Co. v. Roosevelt Fed. Sav. and Loan Ass'n*, 796 S.W.2d 369 (Mo.1990)). Thus the court held that summary judgment on the Funds' tortious interference with contract claim was improper. *Id.*

The court also noted:

"Intentional interference with contract requires the preponderance standard. *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 761 A.2d 1268, 1273-75 (2000) (Com Tronics must prove claim of tortious interference with contractual relations by a preponderance of the evidence); *Examination Mgmt. Serv., Inc. v. Kirschbaum*, 927 P.2d 686, 697 (Wyo.1996) (in claim for intentional interference with contract, defendant has burden of proving elements by a preponderance of the evidence); *see also Collins v. Collins*, 625

So.2d 786, 791 (Miss.1993) (elements of tortious interference need to be proven only by a preponderance of the evidence).

Wells Fargo, at ¶34, n. 21

4.3.5 Fraudulent Concealment

Arizona recognizes the tort of fraudulent concealment:

One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

Wells Fargo at ¶87 (quoting Restatement (second) of Torts § 550 (1976); see also *King v. O'Rielly Motor Co.*, 16 Ariz.App. 518, 521, 494 P.2d 718, 721 (1972). Where failure to disclose a material fact is calculated to induce a false belief, "the distinction between concealment and affirmative misrepresentation is tenuous." *Schock v. Jacka*, 105 Ariz. 131, 133, 460 P.2d 185, 187 (1969))

In Arizona, whether a duty to speak exists at all is determined by reference to all the circumstances of the case. *National Hous. Indus., Inc., v. E.L. Jones Dev. Co.*, 118 Ariz. 374, 379, 576 P.2d 1374, 1379 (App.1978) (citing 37 AM.JUR. 2d, *Fraud & Deceit* § 146 (1968)). On the issue of duty in a fraudulent concealment claim, we are persuaded by and affirm the reasoning articulated by the court of appeals decision in *King v. O'Rielly Motor Co.*

Wells Fargo, at ¶92.

In *King*, a car buyer sued a car dealer for fraudulently representing that the car the buyer purchased was "as good as new" when in fact the car had been in an accident and, unbeknownst to the buyer, had been repaired by the dealer. The car dealer argued that because the buyer's claim existed under § 551 of the Restatement of Torts (Liability for Nondisclosure), the dealer could not be liable to the buyer because the dealer was under no duty to disclose. The court refused to limit its consideration of the plaintiff's claim to § 551, stating "[w]ith these facts in mind we feel that a consideration of §§ 529 and 550 of Restatement of Torts ... is necessary for the determination of the question at hand." *King* at 521, 494 P.2d at 721. The court further stated that, while "[i]t is often difficult to distinguish misleading representations and fraudulent concealment from mere nondisclosure and the classification of the act or acts in question must, of course, depend on the facts of each case," it was nevertheless true that "the facts of this case ... would be supportive of a finding of misleading representation as set forth in Restatement § 529 or fraudulent concealment as set forth in § 550." *King* at 521-22, 494 P.2d at 721-22 (emphasis added). An Oregon court advanced similar reasoning in

Paul v. Kelley, 42 Or. App. 61, 599 P.2d 1236 (1979), concluding that a duty to disclose is not necessary to prevail on a fraudulent concealment claim.

Wells Fargo, at ¶94.

"[T]he common law clearly distinguishes between concealment and nondisclosure. The former is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. The latter is characterized by mere silence." *United States v. Colton*, 231 F.3d 890, 899 (4th Cir.2000). "Thus, fraudulent concealment--without any misrepresentation or duty to disclose--can constitute common law fraud." *Id.* at 899.

Wells Fargo, at ¶95.

In the final analysis, we reach two conclusions as to the fraudulent concealment claim: there are reasonable inferences from which a jury could find (1) the Bank had knowledge of false information being given the Funds, and (2) the Bank took measures intended to prevent the Funds from learning the truth. These inferences are grounded in fact and are sufficient to take the concealment theory to the jury under the applicable clear and convincing standard.

Wells Fargo, at ¶98.

4.3.6 Civil Conspiracy to Commit Fraud

"For a civil conspiracy to occur two or more people must agree to accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, causing damages." *Wells Fargo* at ¶99 (quoting *Baker v. Stewart Title & Trust of Phoenix*, 197 Ariz. 535, 542, 5 P.3d 249, 256 ¶ 30 (App.2000) (quoting *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 306, 757 P.2d 105, 110 (1988)); see also Restatement (Second) of Torts § 876). "A mere agreement to do a wrong imposes no liability; an agreement plus a wrongful act may result in liability." *Id.* (quoting *Baker* at 542, 5 P.3d at 256 (citations omitted)). In short, liability for civil conspiracy requires that two or more individuals agree and thereupon accomplish "an underlying tort which the alleged conspirators agreed to commit." *Id.* (quoting *Baker* at 545, 5 P.3d at 259.)

A claim for civil conspiracy must include an actual agreement, proven by clear and convincing evidence. *Wells Fargo*, at ¶100. While the court found the Bank's conduct to be suspicious, there was insufficient evidence of an agreed upon conspiratorial arrangement to the clear and convincing level. *Wells Fargo* at ¶100 (citing *Elliott v. Videan*, 164 Ariz. 113, 116, 791 P.2d 639, 642 (App.1989)). The evidence of aiding and abetting, alone, did not establish the existence of the required agreement. *Id.*

4.3.7 Slander - *Graves v. Iowa Lakes Community College, 2002 WL 87339 (Iowa Jan. 24, 2002)*

The Iowa Supreme Court, in this slander case, viewed the plaintiff's evidence as going "no further than a routine claim for breach of contract." *Graves* at *3. "The court found lacking ... the essential element for this intentional tort [slander]: an improper purpose on defendants' part "to financially injure or destroy the plaintiff." *Graves*, at *3 (quoting *Fischer v. UNIPAC Serv. Corp.*, 519 N.W.2d 793, 800 (Iowa 1994)).

Graves challenged the slander jury instruction requiring a finding that the plaintiff be "injured" in the "maintenance of her occupation." She contends the word "injure" should have been changed to "affect," the word we used in *Lara v. Thomas*, 512 N.W.2d 777, 785 (Iowa 1994). In *Lara* this court defined statements which are slanderous per se as "attack[s] on the integrity and moral character of a party," and "imputations *affecting* a person in his or her business, trade, [or] profession." *Lara*, 512 N.W.2d at 785 (emphasis added). *Graves* contends that but for the use of "injure" rather than "affect" in the jury instruction, the jury would have found Wiegman's statements slanderous per se.

Our use of the word "affect" in *Lara* was not intended to allow recovery in a defamation action where there is no injury. Spoken words are actionable as slander because they injure a person's reputation and good name. *Id.* There must be some harm to a person's reputation. This requirement is suggested by the use of the word "injured" in uniform instruction 2100.2 and Restatement (Second) of Torts sections 570 and 573 (1977). Section 570(6) states spoken defamatory matter is actionable without any showing of special harm if it imputes to its victim "matter incompatible with his business, trade, profession, or office, as stated in section 573...." Restatement (Second) of Torts § 570(6), at 186. Slanderous statements affecting a business or occupation "ascribe[] to another conduct, characteristics or a condition that would *adversely* affect his fitness for the proper conduct of his lawful business...." *Id.* § 573, at 191 (emphasis added). Such concepts of harm to reputation are not conveyed by mere use of the word "affect."

The word "affect" in *Lara* should be understood to connote an injury by way of being adversely affected. The court committed no error by submitting the uniform instruction.

Graves at * 3-4. And to make clear the obvious, the Court said: "In no event would damages for emotional or reputational harm be recoverable for breach of this kind of contract." *Graves* at *5 (citing *Bossuyt v. Osage Farmers Nat'l Bank*, 360 N.W.2d 769, 777 (Iowa 1985); see generally Dan B. Dobbs, *The Law of Remedies* § 12.5(1), at 107-08 (2d ed.1993)).

The Iowa Supreme Court also noted that punitive damages are available in a breach of contract case where the breach is a tort and is committed maliciously. Punitive damages for breach of contract are only upheld if the "breach (1) constitutes an intentional tort, and (2)

is committed maliciously...." Graves at *6 (quoting *Magnusson Agency v. Pub. Entity Nat'l Co.--Midwest*, 560 N.W.2d 20, 29 (Iowa 1997)).

4.4 Tortious Interference with Contract -- Northwest Bec-Corp v. Home Living Service, 2002 WL 63486 (Idaho Jan. 18, 2002)

The Idaho Supreme Court recently set forth its view of the elements of a claim for tortious interference with contract:

To establish a claim of tortious interference with a contract, the plaintiff must establish the existence of a contract, knowledge of the contract on the part of the defendant, defendant's intentional interference that causes a breach of the contract, and injury to the plaintiff as a result of the breach. *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 72, 878 P.2d 762, 771 (1994) (citing *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 283-84, 824 P.2d 841, 858-59 (1991)). The plaintiff must establish these elements before the burden switches to the defendant to explain the interference with the plaintiffs' contracts. *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893, 522 P.2d 1102, 1114 (1974).

Northwest Bec-Corp, at *5

4.5 Tortious Interference with Contract and Business Relations -- Awtrey Realty Company, Inc. v. Awtrey Realty Company, Inc., 2001 WL 1658318 (Ala. Dec. 28, 2001) (Not Yet Released for Publication)

The Alabama Supreme Court also recently set forth the elements of a tortious interference claim:

The elements of the tort of interference with contractual or business relations are: "1) the existence of a contract or business relation; 2) the defendant's knowledge of the contract or business relation; 3) intentional interference by the defendant with the contract or business relation; 4) the absence of justification for the defendant's interference; and 5) damage to the plaintiff as a result of the interference."

Soap Co. v. Ecolab, Inc., 646 So.2d 1366, 1371 (Ala.1994). "The general rule firmly meshed into the law of most jurisdictions today is that one who, without justification to do so, *induces* a third person not to perform a contract with another, is liable to the other for the harm caused thereby." *Gross v. Lowder Realty Better Homes & Gardens*, 494 So.2d 590, 596 (Ala.1986)(emphasis added).

Awtrey Realty, at *4

4.6 Tortious Interference -- *Thawley v. Turtell*, _____ N.Y.S.2d ____, 2001 WL 1658062 (Dec. 27 2001)

The New York Supreme Court, Appellate Division, recently decided that at-will employees may not sue for interference with an at-will employment relationship:

In New York State, the at-will employment doctrine is a judicially created common-law rule (see, *Wieder v. Skala*, 80 N.Y.2d 628, 633, 593 N.Y.S.2d 752, 609 N.E.2d 105). It is well settled that "where an employment is for an indefinite term it is presumed to be a hiring at-will which may be freely terminated by either party at any time for any reason or even for no reason" (*Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 300, 461 N.Y.S.2d 232, 448 N.E.2d 86; accord, *Wieder, supra*; see also, *Sabetay v. Sterling Drug Inc.*, 69 N.Y.2d 329, 333, 514 N.Y.S.2d 209, 506 N.E.2d 919). In holding that there is no cause of action in tort for abusive or wrongful discharge of an at-will employee, the Court of Appeals has declined to allow a plaintiff "to evade the employment at-will rule and relationship by recasting his cause of action in the garb of a tortious interference with his employment" (*Ingle v. Glamore Motor Sales*, 73 N.Y.2d 183, 188-89, 538 N.Y.S.2d 771, 535 N.E.2d 1311). Where, as here, the parties are all employees of the same company, the case law is clear that at-will agreements are classified as only "prospective contractual relations" and therefore cannot support a claim for tortious interference with existing contracts (see, *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191-92, 428 N.Y.S.2d 628, 406 N.E.2d 445; *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 299, 684 N.Y.S.2d 235; *American Preferred Prescription, Inc. v. Health Management, Inc.*, 252 A.D.2d 414, 417, 678 N.Y.S.2d 1). Since plaintiff cannot "bootstrap the threshold deficiency in a wrongful discharge claim" to his instant claim for tortious interference with an employment relationship (see, *Ingle, supra*, at 188, 538 N.Y.S.2d 771, 535 N.E.2d 1311), the Supreme Court properly granted defendants' motion to dismiss the complaint.

4.7 Tortious Interference With A Contract -- *UST Corporation v. General Road Trucking Corp.*, 783 A.2d 931 (R.I. 2001)

The Supreme Court of Rhode Island recently set forth the elements of a tortious interference case:

To prevail on a claim alleging tortious interference with contract, a plaintiff must show "(1) the existence of a contract; (2) the alleged wrongdoer's

knowledge of the contract; (3) his [her, or its] intentional interference; and (4) damages resulting therefrom." *Belliveau Building Corp. v. O'Coin*, 763 A.2d 622, 627 (R.I.2000) (quoting *Smith Development Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203, 211, 308 A.2d 477, 482 (1973)). After the plaintiff establishes these prima facie elements, "[t]he burden of proving sufficient justification for the interference shifts to the defendant." *Id.* To demonstrate intentional interference, a claimant need not show actual malice or ill will. Legal malice, " 'an intent to do harm without justification,' " is sufficient. *Jolicoeur Furniture Co. v. Baldelli*, 653 A.2d 740, 753 (R.I.1995). See also *Mesoella v. City of Providence*, 508 A.2d 661, 669-70 (R.I.1986). To prevail, then, the plaintiff must prove that, ultimately, the defendant acted "without justification" or for an "improper" purpose. *Belliveau*, 763 A.2d at 628 (citing W. Page Keeton et. al., *Prosser & Keeton on the Law of Torts* ch. 24, § 129 at 978-79 (5th ed.1984)).

Many factors are instructive in determining whether an alleged interference with contract occurred without justification or was otherwise improper. These include the nature of the actor's conduct, the interests of the party with whom the actor's conduct interferes, and the relations between the parties. Restatement (Second) *Torts* § 767 (1979). Because the application of these factors is necessarily fact-specific, their utility and relevance in determining justification will vary on a case-by-case basis.

UST Corp., at 937

4.8 Tortious Interference With Contract or Business Expectancy - -Vowell v. Fairfield Bay Community Club, Inc., 346 Ark. 270, 58 S.W.3d 324 (Oct. 18, 2001)

The Supreme Court of Arkansas recently set forth the elements of this claims:

To establish a claim of tortious interference, appellee must prove: (1) the existence of a valid contractual relationship or a business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 444, 47 S.W.3d 866, 875 (2001) (citing *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997); *Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *United Bilt Homes, Inc. v. Sampson*, 310 Ark. 47, 832 S.W.2d 502 (1992)).

We also require that the defendant's conduct be at least "improper." We have considered the factors outlined in the Restatement (Second) of Torts § 767 (1979), for guidance about what is improper. *Dodson*, 345 Ark. at 445, 47

S.W.3d at 875 (citing *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998)). In particular, section 767 states that in determining whether an actor's conduct is improper or not, we should consider: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) the relations between the parties. *Dodson*, 345 Ark. at 445 n. 2, 47 S.W.3d at 875-76 n. 2 (citing *Mason*, 333 Ark. at 14, 969 S.W.2d at 160).

Although recovery will not be denied merely because the amount of damages is hard to determine, damages must not be left to speculation and conjecture. *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 258, 987 S.W.2d 722, 728-29 (1999) (citing *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996); *Morton v. Park View Apartments*, 315 Ark. 400, 868 S.W.2d 448 (1993)).

Vowell, 58 S.W.2d at 329-330.

4.9 Breach of Fiduciary Duty -- Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704 (Supreme Court of North Carolina (July 20, 2001))

A fiduciary relationship has been broadly defined by the North Carolina Supreme Court as one in which

"there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence ..., [and] 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other.*' " *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (quoting 25 C.J. *Fiduciary* § 9, at 1119 (1921)) (emphasis added), *quoted in Patterson v. Strickland*, 133 N.C.App. 510, 516, 515 S.E.2d 915, 919 (1999). However, the broad parameters accorded the term have been specifically limited in the context of employment situations. Under the general rule, "the relation of employer and employee is not one of those regarded as confidential." *King v. Atlantic Coast Line R.R. Co.*, 157 N.C. 44, 72 S.E. 801 (1911); *see also Hiatt v. Burlington Indus., Inc.*, 55 N.C.App. 523, 529, 286 S.E.2d 566, 569, *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 365 (1982).

548 S.E.2d at 708

The court sought to make it clear that there is no separate claim for breach of the duty of loyalty:

To the extent that the holding in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F.Supp. 1224 (M.D.N.C.1996), can be read to sanction an independent action for breach of duty of loyalty, *see id.* at 1229 ("There is a cause of action for violation of the duty of loyalty."), we conclude that the federal district court incorrectly interpreted our state case law by assuming that: (1) "[s]ince the [state's] courts recognize the existence of the duty of loyalty, it follows that they *would* recognize a claim for breach of that duty," *id.* (emphasis added); and (2) the "North Carolina ... Supreme Court [] *likely would* recognize a broader claim" for a breach of fiduciary duty, *id.* (emphasis added). As previously explained, although our state courts recognize the existence of an employee's duty of loyalty, we do not recognize its breach as an independent claim. Evidence of such a breach serves only as a justification for a defendant-employer in a wrongful termination action by an employee. Moreover, an examination of our state's case law fails to reveal support for the federal district court's contention that this Court would broaden the scope of fiduciary duty to include food-counter clerks employed by a grocery store chain.

548 S.E.2d at 709.

As for the holding in *Long*, we note that the corporate employer in that case was awarded damages for "a material breach of ... fiduciary duty of good faith, fair dealing and loyalty" by its employees. 113 N.C.App. at 604, 439 S.E.2d at 802. Essentially, the *Long* court determined that the employees, who originally founded the company in question and served respectively as its president and senior vice president, owed a fiduciary duty to the parent firm and that they breached that duty by taking actions contrary to the parent firm's best interests. Thus, the claim and damages awarded in *Long* resulted from: (1) a showing of a fiduciary relationship, (2) thereby establishing a fiduciary duty, and (3) a breach of that duty. No such fiduciary relationship or duty is evidenced by the circumstances of the instant case.

548 S.E.2d at 709.

The North Carolina Supreme Court reiterated its prior holding that "interfere[nce] with a man's business, trade or occupation by maliciously inducing a person not to enter a contract with a third person, which he would have entered into but for the interference, is actionable if damage proximately ensues." 548 S.E. 2d at 709 (quoting *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965); *see also Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C.App. 414, 440, 293 S.E.2d 901, 917 (affirming view that plaintiff must show that contract would have ensued but for defendant's interference), *appeal dismissed and disc. rev. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982)).