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Reports of Death of Fla. Economic Loss Rule Are Exaggerated

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Depending on how you read it, the Florida Supreme Court's recent Tiara Condominium[1] opinion renouncing the contractual privity branch of the economic loss rule either threw open the courthouse doors to plaintiffs seeking to bolster purely contractual disputes with tort claims or simply renounced a relatively recent judge-made doctrine in favor of long-standing common law principles that do the same job under a different label.

We believe a close reading of the opinion and relevant precedents better support the latter conclusion. Nevertheless, the practical effect is that defense counsel will need to be careful to articulate their arguments more precisely now that lower courts may no longer dismiss tort claims, as they have done for the past 25 years, with a simple cite to the "economic loss rule."[2]

The Opinion

The court in Tiara renounced the "contractual privity" branch of the rule, a judicially created doctrine that barred parties in contractual privity from asserting tort claims for purely economic loss where the defendant had not breached an independent duty apart from the breach of contract.[3]

Tiara arose out of a federal case where a condominium association sued its insurance broker alleging the broker had failed to properly advise it with respect to its insurance needs. The plaintiff asserted claims for breach of contract, negligent misrepresentation, breach of the implied duty of good faith and fair dealing, negligence and breach of fiduciary duty, all of which were dismissed on summary judgment by the district court.[4]

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1 Tiara Condo. Ass'n Inc. v. Marsh & McLennan Cos. Inc., __ So.3d __, 2013 WL 828003 (Fla. Mar. 7, 2013).

2 The Supreme Court first adopted the contractual privity branch of the economic loss rule in AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987). The majority in Tiara also stated that the application of the contractual privity branch of the rule is "best exemplified" by its AFM decision. 2013 WL 828003, at *3.

3 Id. at *2.

4 Id. at *1.

On appeal, the Eleventh Circuit found that two of the tort claims turned on an unsettled interpretation of the economic loss rule under Florida law — namely, the scope of the "professional services" exception whereby, if the contract allegedly breached was one for professional services, the rule's traditional bar on asserting tort claims based on that contract is inapplicable.[5] The Eleventh Circuit certified a question to the Florida Supreme Court "to determine whether the economic loss rule prohibits recovery, or whether an insurance broker falls within the professional services exception that would allow Tiara to proceed with the claims."[6]

Rather than answer the relatively narrow certified question about the scope of the "professional services" exception, the court restated the question, then renounced entirely the broader contractual privity branch of the economic loss rule, holding that "the application of the economic loss rule is limited to products liability cases."[7]

The court explained that the reason it had adopted the contractual privity branch of the rule in the first place was "to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort."[8] In Tiara — most notably in the concurring opinion of Justice Barbara J. Pariente — the court went out of its way to reaffirm its commitment to this core principle and the prior case law supporting it, even while holding the principle is no longer good law if advanced under the "economic loss rule" label. The reason for this shift was a desire to clear up confusion among lower courts trying to interpret the rule and its many exceptions. After reviewing a string of its precedents that gradually expanded the rule across more than 20 years[9], the majority held:

> Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context … Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that the expansion of the rule beyond its origins was unwise and unworkable in practice.[10]

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[5] Tiara Condominium Ass'n Inc. v. Marsh & McLennan Cos. Inc., 607 F.3d 742, 748-49 (11th Cir. 2010).

[6] Id.

[7] Id. at *8. The products liability branch of the doctrine "preclud[es] recovery of economic damages in tort where there is no property damage or personal injury." Id. at *5.

[8] Id.

[9] The cases discussed in Tiara include Indem. Ins. Co. of N. Am. V. Am. Aviation Inc., 891 So.2d 532 (2004); Moransais v. Heathman, 744 So.2d 973 (Fla. 1999); HTP, Ltd. v. Lineas Aereas Costarricences, S.A., 685 So.2d 1238 (Fla. 1996); and Casa Clara Condo. Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244 (Fla. 1993).

[10] Tiara, 2013 WL 828003, at *7.

Interpreting Tiara

Following Tiara, practitioners are left wondering whether they can still eliminate duplicative contract claims dressed up as tort claims. It is a question on which the justices disagree strongly. According to Chief Justice Ricky Polston:

> [T]he majority obliterates the use of the doctrine when the parties are in contractual privity, greatly expanding tort claims and remedies available, without deference to contract claims. Florida contract law is seriously undermined by this decision.[11]

Justice Charles T. Canady added that "[w]ith today's decision, we face the prospect of every breach of contract claim being accompanied by a tort claim."[12]

Justice Pariente, in a concurring opinion joined by Justices R. Fred Lewis and Jorge Labarga, insisted the decision is far from a game changer and, instead, simply abandoned an unwieldy rule in favor of bedrock contract principles that accomplish the same result. She wrote:

> Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and, contrary to the assertions raised in dissent, our clarification of the economic loss rule's applicability does nothing to alter these common law concepts. For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim.[13]

Pariente wrote that, post-Tiara, tort claims still "should be considered and dismissed as appropriate based on basic contractual principles [that] … 'when the parties have negotiated remedies for non-performance pursuant to a contract, one party may not seek to obtain a better bargain than it made by turning a breach of contract into a tort for economic loss.'"[14]According to Pariente, "[t]he majority's decision does not change this statement of the law, but merely explains that it is common law principles of contract, rather than the economic loss rule, that produce this result."[15] To the extent Justice Pariente is correct, Florida law would be consistent with the law of several other states where courts often apply these same principles, but without employing the term "economic loss rule" or "economic loss doctrine."[16]

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[11] Id. at *11 (Polston, C.J., dissenting).

[12] Id. at *14 (Canady, J., dissenting).

[13] Id. at *9 (Pariente, J., concurring).

[14] Id. (quoting Am. Aviation, 891 So.2d at 542).

[15] Id. at *9.

[16] See Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law Of Torts (2d ed. 2011), § 613 at p. 482 ("Even today, the rule or its principles may be applied without referring to the economic loss rule by name, or even by identifying some versions by other names entirely or by deciding that the 'gist' of the action is contract, not tort."; citing decisions from Minnesota, New York, Pennsylvania, and Vermont).

"Basic Common Law Principles" in Prior Case Law

So what are these "fundamental contractual principles" and "basic common law principles" to which the concurrence kept referring? Justice Pariente cited Lewis v. Guthartz[17] and Elec. Sec. Sys. Corp. v. Southern Bell Tel. & Tel. Co.[18] Of these, Electronic Security Systems is more directly on point.[19]

In Electronic Security Systems, the plaintiff sued Southern Bell when its advertising did not appear in the telephone directory, as required under the parties' contract. In addition to breach of contract, the plaintiff asserted claims for negligence and intentional tort. The Third DCA affirmed the trial court's dismissal of the tort claims, citing what appear to be those basic contractual principles cited by Justice Pariente.

The court held: "[s]ince a breach of contract, alone cannot constitute a cause of action in tort, the trial court properly dismissed the negligence count," adding "[i]t is only when the breach of contract is attended by some additional conduct which amount to an independent tort that such breach can constitute negligence."[20] Thus, Electronic Security Systems is an example of an appellate court dismissing tort claims on common law grounds without reference to the "economic loss rule." In fact, the case was decided the year before the Florida Supreme Court adopted the economic loss rule.

There are other examples dating back even further. More than 40 years ago, in Belford Trucking Co. Inc. v. Zagar, the Fourth DCA observed that "an action in tort is inappropriate where the basis of the suit is a contract, either express or implied."[21] The court affirmed a jury verdict in favor of the defendant on a conversion claim on the ground that "it is readily apparent that the basis of the dispute is a determination of the rights and obligations of the parties under the agreement."[22] A year earlier, in Weimar v. Yacht Club Point Estates Inc., the Fourth DCA noted that "it has been frequently declared to be a rule that no cause of action in tort can arise from a breach of a duty existing by virtue of contract."[23] The court then affirmed dismissal of the

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[17] 428 So.2d 222 (Fla. 1982).

[18] 482 So. 2d 518 (Fla. 3d DCA 1986).

[19] In Lewis, the Supreme Court reaffirmed the rule that punitive damages are not recoverable for breach of contract, but noted that "where the acts constituting a breach of contract also amount to a cause of action in tort there may be a recovery of exemplary damages upon proper allegations and proof." Lewis, 428 So. 2d at 223. As such, Lewis is more properly viewed as a case about the availability of punitive damages.

[20] Elec. Sec. Sys., 482 So.2d at 519.

[21] 243 So.2d 646, 647 (Fla. 4th DCA 1970).

[22] Id.

[23] 223 So.2d 100, 103 (Fla. 4th DCA 1969).

plaintiff's negligence claim on the ground that "he does not assert that there was a breach of a duty apart from the contract."[24]

Other courts have reached similar results, but framing the key inquiry in terms of the damages sought for the tort claims, rather than the source of the underlying duty that was breached. For example, in Rosen v. Marlin, the appellant appealed the award of treble damages in an action for breach of contract, fraud, and conversion.[25] On appeal, the court held that the trial court's finding of liability on the tort claims "cannot stand as a matter of law" because "the trial court found no separate compensatory damages stemming from a conversion or theft apart from the $138,704.82 found to be owing as payment pursuant to the contract and the claim for breach of contract."[26]

Conclusion

These cases support the view that Florida courts — long before adoption of the contractual privity branch of the economic loss rule — had, in fact, applied "basic common law principles" to dismiss tort claims that merely duplicated plaintiffs' breach of contract claims. This body of case law, coupled with the language in the Tiara concurrence expressing support for the continued viability of these principles, should provide ample support for lower courts to dismiss these piggyback tort claims, even if they can no longer base those dismissals on the "economic loss rule."

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* The headline of this article is a variation on the quote by Mark Twain: "The report of my death was an exaggeration." JOHN BARTLETT, FAMILIAR QUOTATIONS, at p. 528 (Justin Kaplan, ed., 16th ed. 1992).

[24] Id. at 104.

[25] 486 So.2d 623, 624 (Fla. 3d DCA 1986)

[26] Id. at 626.