ROETZEL

ROETZEL & ANDRESS: 2019 APPELLATE YEAR IN REVIEW

Jan 27, 2020 | Stephen Funk

The Appellate Team of Roetzel & Andress LPA is regularly trusted to handle appeals for their clients in federal and state courts in a wide variety of cases ranging from business litigation, construction law, family law, medical malpractice, land use and zoning and more. Roetzel is pleased to feature a sampling of some of its appellate cases that highlight the professional excellence and top-notch skills consistently displayed by the appellate team.

Appellate Jurisdiction: Reviewability of Order Granting Rehearing
Watermark Realty, Inc. v. Vacca, 267 So.3d 375 (Fla. 2d DCA 2019)

After initially having summary judgment granted against him, the client successfully moved for rehearing. Defendant moved in the trial court to vacate the order granting rehearing. When that was unsuccessful, defendant petitioned for certiorari review. The client moved to dismiss certiorari on two grounds: First, Roetzel's attorneys argued that an order granting rehearing is not immediately reviewable because it is not an error causing irreparable harm that cannot be corrected on final appeal. Second, Roetzel's attorneys argued that certiorari was untimely because defendant's motion for relief did not toll the deadline to petition for certiorari review. The appellate court agreed and dismissed the petition, which again saved the client significant funds by avoiding the need to prepare briefs and a potential oral argument.

Appellate Jurisdiction: Reviewability of Partial Final Summary Judgment
Criswell v. City of Naples, No. 2D19-0787 (Fla. 2d DCA Apr. 4, 2019) (unpublished order)

The case in the trial court concerned whether the City of Naples has authority to regulate riparian side-yard setbacks and, if so, whether a homeowner should be permanently enjoined from violating those setbacks. Both parties moved for summary judgment. The trial court denied the homeowner in an allegedly final order, granted the City's summary judgment by dismissing the homeowner's claims, but reserved jurisdiction for a trial on the City's permanent-injunction counterclaim. The homeowner appealed, and the City moved to dismiss the appeal. It argued that orders merely granting summary judgment were not appealable because no actual judgment had been entered. Further, the City contended that even if an actual partial judgment could be entered, it was still not appealable until all inter-related claims were resolved, such as the trial on the permanent-injunction claim. Agreeing with the City, the appellate court dismissed the appeal as a nonfinal, nonappealable order, which saved the City substantial funds in preparing briefs and potential oral argument.

Business Litigation: Breach of Contract and Legal Standards For Granting Motion to Dismiss
Masco Corporation v. Wojcik, ___ Fed. Appx. ___, 2019 WL 6954335 (6th Cir. Dec. 19, 2019)

This case involved a claim for breach of contract filed by a former executive officer who alleged that he was entitled to pension benefits under a supplemental pension plan. The breach of contract dispute centered on the language of the agreement that provided that the officer would be entitled to compensation only if he "remained" with the company for "at least five years." It was the employee's position that the five-year requirement included employment that occurred prior to the execution of the supplemental pension plan, but Roetzel successfully argued that the plain language of the agreement only applied to employment that occurred after the supplemental pension plan was signed, and that the former officer was not entitled to any benefits because he left his employment approximately two years after the agreement was signed. In the proceedings below, the district court granted Roetzel's motion to dismiss the breach of contract claim for failure to state a claim. Upon review, the Sixth Circuit affirmed based upon the plain language of the contract itself, holding that it was unambiguous and rejecting the argument made by the former officer that extrinsic evidence should be considered in determining the meaning of the agreement.

Business Litigation: Breach of Alleged Oral Contract
Armatas v. Hoeprich, 5th Dist. Stark No. 2018-CA-00102, 2019-Ohio-1214 (Ohio App. 5th Dist. Mar. 11, 2019)

This case involves a claim for breach of an alleged oral agreement with a physician to provide medical services. In the proceedings below, the plaintiff alleged that he entered into a contract with Roetzel's client to provide a "full and complete advisory opinion" for a patient that was under the care of a different physician at Aultman Hospital. Roetzel's client denied that he entered into any contract at all, and was successful in obtaining a dismissal of the claim based upon a finding that there was no "meeting of the minds" and thus no contract between the parties. Upon appeal, the Fifth District Court of Appeals affirmed the trial court's ruling, concluding that there was competent evidence in the record that there was no contract between the parties.

Construction Law: Wrongful Termination of Construction Agreement For Cause and Assignment of Claims
Mid-American Construction, L.L.C. v. Univ. of Akron, 10th Dist. Franklin No. 18AP-846, 2019-Ohio-3863 (Ohio App. 10th Dist. Sept. 24, 2019)

This case involved the Tenth District's affirmance of a favorable judgment in favor of our client in the amount of $2,258,700 for damages arising from the wrongful breach of a construction agreement by The University of Akron. In proceedings below, the University argued that there was cause for termination of the construction contract based upon alleged delays in completing the project, but the Ohio Court of Claims rejected this argument and found that our client was not responsible for the alleged project delays. Upon review, the Tenth District Court of Appeals affirmed the judgment in our client's favor, finding that the weight of the evidence supports the trial court's findings that the University did not have cause to terminate the contract. Moreover, the Tenth District affirmed the trial court's calculation of damages and dismissal of the University's counterclaims, and rejected the argument that the bonding company did not have the right to assign its claims for damages under a takeover agreement that the bonding company entered into with the University after the original agreement was wrongfully terminated.

Family Law: Business Valuation for Purposes of Equitable Distribution
Pino v. Blume, 266 So.3d 839 (Fla. 2d DCA 2019)

In valuing one spouse's stock in a minority-owned business for purposes of equitable distribution, can the dissolution court deduct the potential tax and cost consequences from a sale of that stock even if no sale is imminent? The trial court answered yes and, based on husband's expert witness's testimony, reduced the book value of husband's multi-million-dollar stock in a private company by 31% to account for the taxes and costs he will have to pay when and if it is sold one day. Former wife appealed, arguing that the trial court could not consider the tax and cost effect as a matter of law unless an actual sale was imminent. Husband argued that the value of property is a question of fact—not law—and that competent, substantial evidence supported the trial court's valuations. The appellate court agreed and affirmed.

Foreclosures: Business Record Exception & Indispensable Parties
Hickey Creek Dev., LLC v. Edgewater Opportunity Fund III, LLC, 261 So.3d 535 (Fla. 2d DCA 2019)

This case involved a relatively straightforward commercial foreclosure with two issues. The first concerned whether the current noteholder should have called all prior noteholders to prove the total amount due and owing on promissory note. The appellate court agreed with our client's argument that he relied on the prior lenders' business records to purchase the loan, independently checked them for accuracy, and then fully integrated them with his records. This was sufficient to prove all outstanding amounts under the business-record exception to the hearsay rule. The more interesting issue was the borrower's contention that our client could not foreclose without joining as an allegedly indispensable party an unrelated entity that purportedly owned 1.74 acres of the mortgaged property. The appellate court agreed with our client's argument that, while this unrelated entity may constitute a necessary party, it was not an indispensable party to a foreclosure between a lender and its borrower.

International Torts/Discrimination: Motion for Summary Judgment/Motion to Amend Complaint/Motion to Compel/Motion for Sanctions
Lloyd v. Cleveland Clinic Foundation, et al., 8th Dist. Cuyahoga No. 107214, 2019-Ohio-1885, (May 16, 2019)

Ms. Lloyd sued our clients for defamation, disability discrimination, and intentional infliction of emotional distress. These claims arose from her 2016 visit to the Cleveland Clinic Express Clinic in Solon, Ohio. Ms. Lloyd also filed several motions, including a motion to compel discovery, two motions seeking leave to amend the complaint, a motion for sanctions, and a motion to disqualify Roetzel as counsel. We moved for summary judgment on all claims. The trial court granted summary judgment in favor of our clients and denied the remainder of Ms. Lloyd's motions. Ms. Lloyd appealed raising seven (7) assignments of error. In reviewing the grant of summary judgment under a de novo standard, the Eighth District Court of Appeals affirmed the trial court's order because, even in construing the evidence most strongly in Ms. Lloyd's favor, Ms. Lloyd could not prove the elements necessary to establish her claims of defamation, disability discrimination, and intentional infliction of emotional distress. Further, in affirming the remaining trial court orders, the Eighth District Court of Appeals held the trial court did not abuse its discretion in denying Ms. Lloyd's motions for sanctions, to amend the complaint pursuant to Civ. R. 15(A), and to compel discovery. Ms. Lloyd appealed to the Supreme Court of Ohio, however, the Court declined to accept jurisdiction.

Land Use And Zoning Law: Regulatory Takings Claims
State ex rel. OC Lorain v. City of Cleveland, 2019-Ohio-1531, 129 N.E.3d 532 (Ohio App. 8th Dist. Mar. 14, 2018)

This case involves a regulatory *Penn Central* taking claim that was based upon the denial of conditional use approval for a proposed fast food restaurant in Cleveland. Roetzel represented the City of Cleveland and was successful in winning a bench trial in the trial court. Upon review, the Eighth District Court of Appeals affirmed the trial court's ruling, holding that the Appellant failed to show that the denial of conditional use approval effectuated a taking of the property. In so doing, the Eighth District held that "a Penn Central taking does not arise merely because a regulatory action deprives the property owner of one proposed use, even if it is the most profitable use of the property." Thus, the Eighth District's opinion establishes a significant legal precedent that generally forecloses regulatory takings claims based upon a zoning decision that denies one proposed use of a property.

Land Use and Zoning: Mootness Upon Construction of Project
Kent Investors L.L.C. v. City of Kent Planning Commission, 2019-Ohio-410, 130 N.E.3d 987 (Ohio App. 11th Dist. Feb. 8, 2019)

This case involves an administrative appeal that was filed to challenge the Kent Planning Commission's denial of site plan approval for a proposed commercial development. In the trial court proceedings, Roetzel's attorneys were successful in convincing the trial judge to reverse the Planning Commission's denial of site plan approval for the project. A number of the neighbors then filed an appeal from the trial court's judgment with the Eleventh District Court of Appeals. While the appeal was pending, however, Roetzel's client proceeded with construction of the new building, and moved to dismiss the appeal on mootness grounds. Upon review, the Court of Appeals agreed with Roetzel's position that where, as here, "an appeal involves the construction of a building and the appellant fails to obtain a stay of execution of the trial court ruling, and construction commences, the appeal is rendered moot." Thus, given that construction of the building had commenced, and the neighbors had not obtained a stay pending appeal, the Eleventh District dismissed the appeal on mootness grounds.

Medical Malpractice: Rule 10(D) Affidavit of Merit Requirement
May v. Donich Neurosurgery and Spine, L.L.C., 9th Dist. Summit No. 29215, 2019-Ohio-4246 (Ohio App. 9th Dist. Oct. 16, 2019)

This case involved the dismissal of a medical malpractice claim for failing to present a proper affidavit of merit, as required by Rule 10(D) of the Ohio Rules of Civil Procedure. In proceedings below, the district court granted a motion to dismiss after it rejected two prior attempts by the plaintiffs to present an affidavit of merit from a physician who admitted in a prior deposition that he was not actively practicing medicine and was not licensed to

practice medicine was “delinquent” at the time that he executed his second affidavit, and rejected the request by plaintiffs to substitute deposition testimony in lieu of an affidavit. Although the plaintiffs argued that the trial court erred by considering extrinsic evidence in determining whether to strike the two affidavits, the Ninth District Court of Appeals rejected this argument on the ground that it only governed a Rule 12(B)(6) motion to dismiss, not a motion to strike an affidavit that failed to comply with the requirements of Rule 10(D). Moreover, the Ninth District held that the plain language of Rule 10(D) did not permit the filing of a deposition in lieu of an affidavit. Accordingly, the Ninth District affirmed the trial court’s decision to strike both affidavits, and concluded that the complaint was properly dismissed by the trial court in accordance with the procedures set forth in Rule 10(D).

Medical Malpractice: Admissibility of Medical Literature
Brahm v. DHSC, L.L.C., 2019-Ohio-766, 132 N.E.3d 266 (Ohio App. 5th Dist. Mar. 4, 2019)

This case involves a medical malpractice claim arising from the performance of a cardiac catheterization procedure. In the trial court proceedings, Roetzel’s medical malpractice defense team was successful in obtaining a defense verdict on behalf of the physician who performed the procedure. On appeal, the plaintiff sought a new trial based upon a number of evidentiary arguments, including the argument that the trial court erred in allowing the physician and his expert to testify about the relevant medical literature and observations of other medical conferences during their testimony. Upon review, the Fifth District rejected Brahm’s arguments, holding that the challenged testimony was specifically allowed under Evid. R. 803(18), which permits a witness to refer to existing medical literature and other out-of-court educational materials in explaining the basis for their medical opinions. Thus, the Fifth District overruled Appellant’s evidentiary objections and affirmed the jury verdict in favor of Roetzel’s client.

Medical Malpractice: Civil Manifest Weight of the Evidence
Dyer v. Arthur Dalton, M.D., et al., 9th Dist. Summit No. 28892, 2019-Ohio-602, (Feb. 20, 2019)

Ms. Dyer sued our clients for medical malpractice in connection with the performance of laparoscopic cholecystectomy, or gallbladder removal. At trial, Roetzel’s medical malpractice team was successful in obtaining a favorable jury verdict for our clients that found no negligence. Ms. Dyer appealed citing one assignment of error: “the jury’s verdict was against the manifest weight of the evidence.” Upon review, the Ninth District Court of Appeals affirmed the jury’s verdict, finding that the jury’s verdict was not against the manifest weight of the evidence. Ms. Dyer appealed to the Supreme Court of Ohio but the Court declined to accept jurisdiction.

Probate: Tortious Interference With An Expectancy & Overcoming Statutory Presumption of Joint Ownership on Jointly Titled Bank Accounts
Zeidel v. Cohen, No. 2D18-2769, 2019 WL 3063906, at *1 (Fla. 2d DCA July 12, 2019)

To make it easier to care for her, the decedent put her bank accounts in her name and one of her three daughter’s names. But throughout her life and in her will, the decedent had expressed an intent for her three daughters to divide her estate equally on her death—including her bank accounts. When the caregiving daughter refused to turn over the accounts’ funds for probate, the other two daughters successfully sued for tortious interference with an expectancy. In affirming our client’s judgment, the appellate court rejected the caregiving daughter’s argument that this tort only exists when the interference occurs before the testator dies, rather than, as in this case, after death. The Court also rejected the caregiving daughter’s argument that the funds in the bank accounts are presumed hers since the decedent made her a joint titleholder. Section 655.79, Florida Statutes, recognizes that this presumption of ownership can be overcame with proof of contrary intent, which competent, substantial evidence showed existed.

Shareholder Dispute: Failure to Prove Authenticity of Corporate Bylaws
Sticky Holsters, Inc. v. Wagner, 277 So. 3d 1067, 1068 (Fla. 2d DCA 2019), review denied, SC19-1623, 2019 WL 6327418 (Fla. Nov. 26, 2019)

Summary judgment was entered against our corporate client when plaintiff—despite voluntarily selling his minority interest several years earlier—now claimed that he was still a shareholder because the stock transfer had not strictly complied with the corporate bylaws. Reversing summary judgment, the appellate court agreed with our client's contention that plaintiff failed to conclusively prove that the bylaws attached to the complaint were authentic and binding. Plaintiff sought further review to the Florida Supreme Court, which denied review based on our client's contention that it lacked jurisdiction.

If you have any questions, please contact any of the listed Roetzel attorneys.

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