April 25, 2019

Roetzel & Andress: 2018 Appellate Year in Review

By Christopher D. Donovan, Stephen Funk and Denise M. Hasbrook

2018 was an outstanding year for Roetzel's appellate team. We represented our clients in an incredibly wide variety of cases in both state and federal courts, appealing adverse trial court rulings and successfully defending lower court victories on appeal. The firm's strength in this area is bolstered by the fact that so many of our attorneys have served as judicial law clerks and bring a wealth of experience in appellate cases. Our team consists of skilled brief writers and effective oral advocates well-versed in the intricacies of the appellate process and navigating a case through the courts.

The cases below provide a sampling of some of our work and highlight the professional excellence and top-notch skills consistently displayed by our appellate team:

§ 1983 & Civil Rights Actions

Stepanovich v. City of Naples, 728 Fed. Appx. 891 (11th Cir. 2018)

Plaintiff sued our client, the City of Naples, for alleged civil-rights violations. He argued, among other things, that the City's internal system by which police supervisors reviewed officers' arrest reports was flawed, cumbersome, and ultimately resulted in plaintiff's malicious prosecution. The Federal Eleventh Circuit Court of Appeals affirmed the dismissal of plaintiff's claim. The court agreed with our argument that the plaintiff had failed to sufficiently plead a pattern of similar constitutional violations caused by the City's internal system. Without this pattern, the plaintiff could not state a plausible claim under the Civil Rights Act that the City was deliberately indifferent to and culpable for any custom or practice that led to plaintiff's alleged malicious prosecution.

Civil Procedure: Insufficiency of Service of Process And Amendment of Pleadings Under Civ. R. 15(D)

Evans v. Akron Gen. Med. Ctr., 9th Dist. No. 28340, 2018-Ohio-3031, (Ohio App. 9th Dist. Aug. 1, 2018)

Evans sued Akron General Medical Center and our client, General Emergency Medical Specialists ("GEMS"), for a negligent hiring and negligent supervision claim arising from a sexual assault that was allegedly committed by an emergency room physician. The original complaint was timely filed against Akron General and John Doe defendants within the two-year statute of limitations, and then plaintiffs sought leave to amend the complaint to add GEMS as a defendant after the expiration of the statute of limitations under the relation back doctrine in Civ. R. 15(C). In response, GEMS filed a motion to dismiss and then a motion for summary judgment that argued that the amended complaint naming GEMS as a defendant did not relate back to the original complaint because Evans had failed to comply with Civ.R. 15(D). The trial court judge agreed with this argument, and then the Ninth District affirmed this decision on appeal. In its opinion, the Ninth District agreed that service of the amended complaint upon GEMS did not relate back to the filing of her original complaint because Evans did not comply with the specific requirements of Civ. R. 15(D), which required service of a summons for the original complaint that included the words "name unknown" in the summons. Moreover, the Ninth District rejected the argument

that this insufficiency of service of process defense had been waived because the defense was specifically raised in a Rule 12(B) motion to dismiss.

Damages: Depreciation of Indirect Costs

Ohio Edison Co. v. Royer, 9th Dist. No. 28468, 2018-Ohio-75, 92 N.E.3d 912, appeal not allowed, 153 Ohio St. 3d 1442, 2018-Ohio-2834, 102 N.E.3d 500 (1/10/18)

The issue in this appeal involved the amount of recoverable damages to be awarded for repair of a utility pole and related equipment as the result of the negligence of another. Our client, the utility company, argued that because the utility pole has no fair market value, the measure of damages is the cost to repair it, less depreciation on the pole only, as opposed to other line items for the repair such as labor or indirect costs. Because the pole is a small percentage of the overall cost for the job as compared to labor and indirect costs, depreciation on the pole only would result in a much higher damage award for the affected utility.

The trial court did not accept the utility's position and ordered that depreciation must be applied across the entire cost of repair, including labor, indirect and other costs. On appeal, the 9th District Court of Appeals reversed, establishing valuable precedent for the utility industry that depreciation must only be limited to the pole and related equipment, thus resulting in a significantly higher damage award in favor of the utility on these and other related claims.

Family Law; Judicial Disqualification

Pino v. Blume, No. 2D18-2036 (Fla. 2d DCA June 14, 2018) (prohibition denied by unpublished order)

This was a heavily contested dissolution action. After hearing evidence and ruling against our client, who was the former husband, the trial judge commented that there had been "a lot of shenanigans going on" in the case and that the judge did not believe the former wife was using her best efforts to fulfill the terms of a marital settlement agreement. Despite ultimately prevailing at the hearing, the former wife tried to disqualify the judge, claiming that the judge's comments showed bias against her. Agreeing with our arguments on appeal, the appellate court denied disqualification because, among other reasons, the comments did not objectively show bias since the former wife had ultimately prevailed at the hearing.

Florida Public Records Law

Bracci v. Patton, 244 So. 3d 219 (Fla. 2d DCA 2018)

Can a negligent delay in responding to a public records request constitute a per se violation of the Florida Public Records Law as a matter of law? Our client, the Collier County School Board, had complied with a large public records request, but only after several months due to an internal miscommunication. The appellate court agreed with our argument that whether unintentional conduct amounts to an "unlawful refusal" is a factual question—not a per se violation—and that the evidence here supported the trial court's finding that a violation had not occurred.

Florida Sunshine Law

Florida Citizens Alliance, Inc. v. Sch. Bd. of Collier County, 247 So. 3d 720 (Fla. 2d DCA 2018)

Parents sought to enjoin our client, the Collier County School Board, from purchasing new textbooks for the upcoming school year because their selection had allegedly not occurred in a duly noticed, public meeting in violation of the Florida Sunshine Law. The trial court denied the injunction because any alleged earlier violations were cured by several later public meetings before the full school board. The appellate court ultimately dismissed the appeal after a full briefing based on our argument that it was moot since the textbooks had been purchased shortly after the trial court's denial.

Foreclosure Deficiencies

Gates v. Gulf Eagle, LLC, 242 So. 3d 380 (Fla. 2d DCA 2018)

Are guaranties self-authenticating under the Uniform Commercial Code and the Florida Evidence Code? Our client sued for a deficiency judgment against a guarantor of a $1.5 million loan. The guarantor claimed at trial that we failed to prove that he had actually executed the guaranty. The trial court rejected this argument because under the Uniform Commercial Code and the Florida Evidence Code, commercial paper is presumed authentic unless a guarantor pleads forgery with specificity in the answer, which this guarantor did not do. The appellate court affirmed, rejecting the guarantor's argument that this evidentiary rule applied only to promissory notes and not guaranties.

Guardianship; Right Against Self-Incrimination

In re Guardianship of W.P., 259 So. 3d 87 (Fla. 2d DCA 2018)

Our client's senior living facility brought a guardianship action against our client to declare him incapacitated and to become guardian of his property. The facility was represented by the same law firm that had prepared the client's estate documents. When the client sought to disqualify the law firm, it subpoenaed the client to testify at a hearing on his motion. Our client objected because Florida law gives allegedly incapacitated persons the right to remain silent in all guardianship hearings. The trial court overruled the objection and ordered our client to testify. He immediately petitioned for certiorari review to quash the order. Rather than respond, the retirement facility voluntarily withdrew its subpoena and even voluntarily dismissed the underlying guardianship action.

Labor and Employment: Termination Under FMLA and ERISA

Stein v. Atlas Indus., Inc., 730 F. Appx 313 (6th Cir. 2018)

In this case, the Plaintiff claimed that termination of his employment violated the Family and Medical Leave Act (FMLA) and was retaliatory under the Employee Retirement Income Security Act (ERISA). The Sixth Circuit Court of Appeals affirmed the lower court's decision to dismiss the FMLA claim, finding that there was no causal connection between the alleged retaliatory action of termination and the employee's use of FMLA. The 6th Circuit reversed the lower court and reinstated the ERISA retaliation claim. However, recoverable damages for ERISA retaliation are far more restrictive than those allowable under FMLA as an employee is not entitled to back pay, front pay and punitive damages that would have been potentially recoverable under an FMLA claim. In light of the limited type of damages that could have been recovered under the sole remaining ERISA claim, a reasonable settlement was reached shortly after the Sixth Circuit's Opinion was issued.

Land Use: Plat Approval & Density Cap

Harper-Wylie v. City of Naples, No. 17-AP-01 (Fla. 20th Jud. Cir. Feb. 20, 2018)

Had our client, the City of Naples, properly interpreted the 12-units-per-acre density cap in its code? A developer sought a plat approval for a 1.33-acre parcel that intended to build a 14-unit condo on one acre and two single-family homes on the other .33 acres. Our client approved the plat because it interpreted the code's density cap as being the average of 12-units-per-acre across the entire 1.33-acre parcel, which would allow for up to 16 units, regardless of the configuration. Neighbors argued that this interpretation violated the code's literal meaning, which allegedly limited density to 12 acres per one-acre and prohibited the developer's configuration. The appellate court agreed with our argument that it must give great deference to the City's interpretation of its own code unless that interpretation was unreasonable or clearly erroneous, neither of which was the case here.

Land Use: Variance Denial

Criswell v. City of Naples, No. 17-AP-11 (Fla. 20th Jud. Cir. June 26, 2018)

Did our client, the City of Naples, violate the law by denying a variance to a property owner who wished to park his oversized yacht in the bay behind his home even though its bow jutted into the City's setbacks and hindered a neighbor's view? The appellate court agreed with our argument that the denial was proper because the owner never presented evidence establishing the eleven legal criteria in the City's code for a variance.

Limitation of Actions

G.G. Marck & Assocs., Inc. v. Peng, No. 18-3399, 2019 WL 460404 (6th Cir. Feb. 6, 2019)

This case arose following a 13 year dispute alleging Lanham Act and other customs violations against our client that resulted in a settlement agreement that Plaintiff maintained was also breached by our client. Once the underlying case concluded successfully in our client's favor, Plaintiff filed a second lawsuit in federal district court claiming entitlement to attorney's fees of almost $2,000,000, again allegedly due our client's breach of the 2005 settlement agreement. A motion to dismiss was filed on behalf of our client alleging that the second claim was barred by the applicable statute of limitations and the doctrine of res judicata. The district court granted the motion, holding that the alleged breach of the oral settlement agreement in 2005 was barred by the six-year statute of limitations. The Sixth Circuit Court of Appeals unanimously affirmed to fully resolve the final pending claim in our client's favor.

Municipal Law: Regulatory Takings and Breach of Contract

State ex rel. Maher v. City of Akron, 9th Dist. Summit No. 28761, 2018-Ohio-4310 (Ohio App. 9th Dist. Oct. 24, 2018)

This case involved a regulatory takings and breach of contract claim against our client, the City of Akron, Ohio. The plaintiffs were five homeowners in the City of Akron who alleged that the value of their residential properties was significantly diminished by a large sewer construction project, known as the Tunnel Project. The complaint further alleged that the City of Akron was liable for breach of contract because the city allegedly failed to disclose the Tunnel Project when they sold the residential lots to the

homeowners. Upon review, however, the trial court dismissed the claims for failure to state a claim, and then the Ninth District Court of Appeals affirmed the judgment on appeal. In its opinion, the Ninth District held that the complaint failed to state a valid regulatory takings claim because the Tunnel Project was not a "regulation" that restricted the use of the plaintiffs' land in any manner. Maher, 2018-Ohio-4310, at ¶ 14. Moreover, the Ninth District held that the complaint failed to state a valid breach of contract claim because it failed to identify any particular term of the real estate purchase agreements that had been breached. Id. at ¶ 21. In so doing, the Ninth District held that the entire agreement clause in the real estate contracts barred any claims that were based upon conditions that were not set forth in the agreement, and that any claims for breach of the implied duty of good faith and fair dealing must be based upon a breach of a specific term in the agreement itself. Accordingly, the Ninth District affirmed the judgment in our client's favor.

Municipal Law: Res Judicata and Release

Stephens v. City of Akron, 9th Dist. Summit No. 28701, 2018-Ohio-941, (Ohio App. 9th Dist. Mar. 14, 2018)

This case involves an effort by three dissenting union members to challenge a settlement agreement between the City of Akron and the Fraternal Order of Police ("FOP"). After the FOP executed a settlement agreement that expressly released all claims on behalf of the union and its members, three of the FOP members filed a civil action to challenge the settlement. In the trial court proceedings, we were successful in persuading the court to dismiss the complaint on the grounds of res judicata and release. Plaintiff then filed an appeal to the Ninth District Court of Appeals, which affirmed the judgment.

Municipal Law: Section 1983 Liability/Class Actions

Williams v. City of Cleveland, 907 F. 3d 924 (6th Cir. Nov. 2, 2018)

This case involved a multi-million dollar class action against our client, the City of Cleveland, Ohio, relating to allegations of unconstitutional group strip searches and delousing of incoming jail detainees upon entry to the city's detention facility. In the proceedings below, the district court granted summary judgment in the plaintiff's favor and issued a permanent injunction against the City of Cleveland. Our firm was then retained to appeal this adverse judgment to the United States Court of Appeals for the Sixth Circuit. On appeal, we were successful in persuading the Sixth Circuit to reverse the trial court's permanent injunction and remanding with instructions to enter summary judgment in the City of Cleveland's favor. In the opinion, the Sixth Circuit held that the lead plaintiff lacked standing to seek declaratory and injunctive relief, and that the city's witnesses had advanced legitimate penological reasons to justify their intake procedures. Accordingly, the court held that the City of Cleveland was entitled to summary judgment in its favor. This appellate decision turned a huge loss for our client into a major victory that put an end to nine years of protracted litigation for the City of Cleveland.

Personal Jurisdiction & Personal Injury

Knapp v. Speedway LLC, 251 So. 3d 858 (Fla. 2d DCA 2018)

Plaintiff claimed she was injured at a Speedway gas station in Kentucky. Rather than immediately sue our client, Speedway LLC, in Kentucky, she instead sued a different company, Speedway Inc., in Florida over a year later. After realizing she sued the wrong company, she tried to bring our client into the Florida

action. The appellate court affirmed our client's dismissal, agreeing with our argument that Florida lacked personal jurisdiction over our client because it did not own any gas stations or conduct any business in Florida when either the injury occurred or the lawsuit was first filed.

Prevailing Party Attorney's Fees

Horne v. Schnare, 260 So. 3d 245 (Fla. 2d DCA 2018)

Florida common law has long recognized that purchasers of real property are entitled to attorney's fees against sellers if, through the seller's misconduct, purchasers must defend their possession or title of the property against third parties. Our client successfully convinced the trial court to expand this common law rule to when he, as a purchaser, successfully defended his possession or title against the seller, who wrongfully sued to eject him from the property. The appellate court affirmed, rejecting the seller's argument that the common law rule applies only when third parties—and not sellers—improperly sue purchasers.

Questions may be addressed to any of the listed Roetzel attorneys.

Christopher D. Donovan
239.213.3865 | cdonovan@ralaw.com

Stephen Funk
330.849.6602 | sfunk@ralaw.com

Denise M. Hasbrook
Shareholder-in-Charge of Toledo Office
419.254.5243 | dhasbrook@ralaw.com