CARLTON FIELDS

Top 10 Florida Appellate Business Decisions of 2010

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Our personal pick of the top 10 Florida appellate business decisions of 2010: 1. *CIMA Capital/Partners, LLC v. PH Cellular, Inc.*, __ So. 3d __, 2010 WL 1222773, 35 Fla. L. Weekly D738 (Fla. 3d DCA March 31, 2010): The Third District Court of Appeal reversed a decision granting specific performance for breach of contract for the purchase of shares in a closely held company, where the amount of damages was quantifiable as of the date of the breach. The court held that the plaintiff should have received the value of the shares at the time of the breach, rather than the shares themselves, which had declined in value in the interim period reasoning, "the purpose of money damages is not merely to restore the plaintiff to its former position, as in tort, but to award a sum that is equivalent to the performance of the bargain; the attempt is to place the plaintiff in the position he would have been in had the contract been fulfilled." 2. *Kolsky v. Jackson Square, LLC,* 28 So. 3d 965 (Fla. 3d DCA 2010): The Third District Court of Appeal held that "in order for a claim to be submitted to arbitration, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself and there must be some nexus· between the claim and the contract containing the arbitration clause." The court held the claims against the defendant signatory fell within the arbitration agreement. Moreover, the non-signatories to the agreement also could compel arbitration because the complaint raised "allegations of ... substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." 3. *Attorneys' Title Insurance Fund. Inc. v. Gorka*, 36 So. 3d 646 (Fla. 2010): Resolving a split between the First and Second District Courts of Appeal, the Supreme Court held that a joint settlement offer conditioned on mutual acceptance by all joint offerees is invalid and unenforceable for purposes of awarding attorneys' fees under Florida Statute 768.79 and Florida Rule of Civil Procedure 1.442. Affirming the decision of the Second District, the Supreme Court held that such a joint offer is invalid and unenforceable because "[I]t is conditioned such that neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal." 4. *James Crystal Licenses, LLC v. Infinity Radio, Inc.*, 43 So. 3d 68 (Fla. 4th DCA 2010) (pending review by Florida Supreme Court): The Fourth District Court of Appeal reversed an award of compensatory and punitive damages for the wrongful interference and breach of a non-compete agreement, and remanded for entry of judgment for the defendants, rather than for entry of nominal damages. The court held that intentionally inducing a competitor's employee to breach an

enforceable covenant not to compete, causing only economic damages among competitors, was not sufficiently reprehensible to support a punitive damages award as a matter of federal due process. In so holding, the Court said it "diminish[ed] the nature of the harm" from the breach of a non-compete agreement.[1] 5. *Rayfield Investment Co. v. Kreps*, 35 So. 3d 63 (Fla. 4th DCA 2010): In a case involving a dispute between creditors over security interests in a painting found in a failed art gallery, the Fourth District Court of Appeal held that a lender to the gallery had priority over the consigner who placed the painting with the gallery but failed to perfect his interest by filing a UCC-1, affixing a tag, or some other method, where there was no evidence that the lender knew this painting was on consignment or that the gallery was "generally known by its creditors to be substantially engaged in selling the goods of others" under Fla. Stat. S. 679.1021 (t)1c. The court held that under Florida law, a perfected security interest in goods takes priority over all subsequently perfected and unperfected security interests in the same goods. 6. *DK Arena. Inc. v. EB Acquisitions I, LLC*, 31 So. 3d 313 (Fla. 4th DCA 2010) (review pending in Florida Supreme Court): In a dispute over a failed real estate contract, the Fourth District ruled that (1) an oral agreement to extend the due diligence period did not violate the statute of frauds where the defendant changed its position in reliance on the oral agreement, and (2) an agreement to agree was legally insufficient to create a joint venture. 7. *Nationwide Mutual Fire Insurance Co. v. Pollinger,* 42 So.3d 890 (Fla. 4th DCA 2010): A proposal of settlement which failed to identify the claim being settled was so vague that it could not support an award of attorneys' fees under the offer of judgment statute. *Id.* at 891. The insurer hired one law firm to defend against a PIP claim and another firm to handle the UM claim. *Id.* The Fourth District explained that Rule 1.442(c)(2)(B) & (C) requires that settlement proposals identify the claim the proposal is attempting to resolve and state with particularity the relevant conditions. *Id.* The proposal failed to satisfy the particularity requirement because of the latent ambiguity within the proposal created by the fact that two different firms represented the insurer, and the offer was presented by only one of the firms. *Id.* 8. *Bosem, et al. v. Musa Holdings, Inc., et al.*, 46 So. 3d 42 (Fla. 2010): In a suit for injunctive relief, fraud, and false advertising arising out of the alleged unauthorized use of plaintiff's likeness in violation of the Lanham Act, 15 USC 1125, the Florida Supreme Court quashed a Fourth District Court of Appeal decision holding that plaintiff was not entitled to prejudgment interest on a lost profits claim because the amount of damages was not liquidated. The Supreme Court expressly held that in all cases, tort or contract, where the loss is wholly pecuniary, and may be fixed as of a definite time, interest should be allowed as a matter of right, whether the loss is liquidated or unliquidated. 9. *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, --- So. 3d ---, 2010 WL 4257559 (Fla. 5th DCA October 29, 2010) (review pending in Florida Supreme Court). In a suit arising out of a dispute over defects in private roadways, drainage systems, retention ponds, and underground pipes in a residential subdivision, the Fifth District Court of Appeal held that the implied warranties of fitness for a particular purpose, habitability, and merchantability apply to structures in common areas of a subdivision that immediately support the residence in the form of essential services. The court also held that the services were essential to the habitability of the home for purposes of application of the implied warranties. 10. *Nourachi v. First American Title Insurance Company*, 44 So.3d 602 (Fla. 5th DCA 2010): The Fifth District Court of Appeal held that when a

party does not rely upon a title insurance company to advise it of encumbrances prior to acquiring title, it may not recover on a title defect of which it had actual knowledge and which it failed to disclose to the insurance company at the time it applied for insurance. The court explained that title insurance policies are typically relied upon by prospective purchasers when making a decision to purchase the property. When a party is already aware of the loss, he cannot insure against the loss. [1]

Carlton Fields is counsel for the plaintiff in this case.

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