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Abstract

The Florida Supreme Court during the Survey period of January 1 through November 30, 1985, decided cases involving a wide variety of contracts: insurance, antenuptial, employment, sale of goods, sale of real property, mortgage, option and settlement.

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I. Introduction

The Florida Supreme Court during the Survey period of January 1 through November 30, 1985, decided cases involving a wide variety of contracts: insurance, antenuptial, employment, sale of goods, sale of real property, mortgage, option and settlement. The variety of clauses considered was also broad: covenants not to compete, due-on-sale, choice of law, and others.

Insofar as one emerges at all, two themes are discernible. First, the court appears strongly inclined to enforce contracts as the parties have written them. In 1985 it enforced contracts according to their literal terms despite lower court cases of long-standing, despite statutes that purported to amend such contracts, and in the face of public policy arguments of considerable force.

Second, a lawyer trained in the common law tradition will be surprised at the extent to which the cases reflect the growing impact of statutes on private contracts. Nearly half of the thirteen cases discussed in this article raised substantial statutory issues.

II. Contracts, Fraud and Duties to Disclose

Fraud, although a tort, is probably the most frequent ground upon which cancellation of a contract is sought.[1] Rules concerning fraud may be changed either by judicial decision or by legislation. The 1985 Florida cases include examples of both means. Two cases in this area

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* A survey article of this type requires some streamlining of the primary material. Emphasis here will be given to changes and clarifications of the law as enunciated by the Florida Supreme Court during the Survey period; procedural complexities and non-relevant issues of the cases will be largely disregarded.

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1. *See generally* W. PROSSER & P. KEETON, THE LAW OF TORTS § 105 at 726 (5th ed. 1984). Although formally a tort, the development of fraud and contract have been closely related: "in the great majority of the [fraud] cases which have come before the courts the misrepresentations have been made in the course of a bargaining transaction between the parties."

concern a contracting party's duty to disclose material facts to the other party to the transaction. In a third, the court reduced the standard of proof necessary to establish fraud.

A. *Creation of a Duty to Disclose Material Defects: Johnson v. Davis*

As recently as 1982, a Florida district court had upheld the traditional rule, generally called caveat emptor, that the seller of a home could remain silent as to material defects in the home without fear of liability.[2] In *Johnson v. Davis*,[3] the Florida Supreme Court unanimously imposed a new duty on the seller of a home: the duty to disclose to a purchaser material defects in the home. Where the new duty is not fulfilled, a purchaser injured by the seller's silence will have a cause of action in "fraudulent concealment."[4]

The case under review was brought by the Davises, the purchasers of the defendants' home. The Johnsons' home was three years old when in 1982, they entered into a contract with the Davises to sell it for over $300,000. The contract was signed and the Davises paid the $5,000 to the Johnsons. Before the next, larger down payment was made, Mrs. Davis noticed some ceiling stains and some buckling and peeling in the house, all suggesting water damage. When questioned, Mr. Johnson explained that these resulted from several causes, none having to do with the roof or water damage. The Johnsons assured the Davises that there were no problems with the roof.[5]

The Davises then made an additional payment. Several days later Mrs. Davis discovered water "gushing" from at least five areas of the ceiling and windows, including the light fixtures. The roof in fact was full of "problems." The Davises sought rescission of the contract on the grounds of fraud and misrepresentation.

The court had little difficulty in finding that the Johnsons had committed fraud by representing that there were "no problems" with the roof. Since the second down payment had been made after this misrepresentation, traditional rules of fraud applied and restitution was granted.

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2. *See* Banks v. Salina, 413 So. 2d 851 (Fla. 4th Dist. Ct. App. 1982). *Accord*, Ramel v. Chasebrook Constr. Co., 135 So. 2d 876 (Fla. 2d Dist. Ct. App. 1961).

3. 480 So. 2d 625 (Fla. 1985).

4. *Id.* at 629.

5. *Id.* at 626.

The more difficult question was whether the Davises should be able to recover the $5,000 payment made *before* the misrepresentation. The issue required the court to reconsider the traditional Florida rule that the seller of a home has no affirmative duty to disclose "latent material defects" to a buyer.

Like most common law jurisdictions, Florida had traditionally imposed liability for affirmative acts of deceit and harm (misfeasance) but not for simply remaining silent (nonfeasance).[6] In *Johnson*, however, the court observed that both misfeasance and nonfeasance could result in a false belief and were therefore equally "violative of the principles of fair dealing and good faith. . . ."[7]

Finding earlier Florida cases relying on caveat emptor "unappetizing,"[8] the court noted that numerous other jurisdictions — including California, Illinois, and New Jersey — had rejected the caveat emptor tradition and imposed a duty on the seller of a home to disclose latent material defects. The court decreed that Florida should join these states, and accordingly laid down a new rule: "[W]here the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer."[9]

The court added, "This duty is equally applicable to all forms of real property, new and used." That is, both the developer-builder and the individual owner have the same obligation toward a purchaser.

Having formulated its new rule of law, the court held that the Davises were entitled to the return of the initial $5,000 deposit since "the Johnsons were aware of roof problems prior to entering into the contract of sale and receiving the $5,000 deposit payment."[10]

B. *Antenuptial Agreements and the Duty to Disclose: Stregack v. Moldofsky*

The result could hardly have been more different in *Stregack v. Moldofsky*.[11] Here the supreme court held not only that prospective

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6. *Id.* at 628.

7. *Id.*

8. *Id.* The court referred specifically to *Banks*, 413 So. 2d at 851, and *Ramel*, 135 So. 2d at 876.

9. 480 So. 2d at 629.

10. *Id.*

11. 474 So. 2d 206 (Fla. 1985).

spouses in Florida have no duty of disclosure when entering into antenuptial agreements, but — more astoundingly — that even concealment or active misrepresentation will not invalidate such an agreement. That is, no cause of action exists by which a surviving spouse can seek to set aside an antenuptial agreement on the ground of fraud in the inducement.

Before their marriage, the Moldofskys had both signed a written agreement in which each waived all rights in the other's estate. Mr. Moldofsky made no provisions for his wife in his will, inserting only a reference to the antenuptial agreement. When her late husband's will was admitted to probate, Mrs. Moldofsky filed both for an elective share and cancellation of their antenuptial agreement. Mrs. Moldofsky alleged her husband had committed fraud at the time the agreement was signed by claiming that he had no assets when he in fact possessed assets worth approximately $250,000.[12]

The supreme court precluded Mrs. Moldofsky from pursuing her fraud action by strictly applying Florida Statute section 732.02, which provides that *no* disclosure of assets need be made before entering into an antenuptial agreement: "No disclosure shall be required for an agreement, contract, or waiver executed before marriage."[13] The statute was clear enough on its face, but the Third District Court of Appeal had held that one loophole existed — that disclosure itself need not be made but, where it was, it must be made truthfully.[14] Mrs. Moldofsky alleged not that her husband had remained silent (failed to disclose) but that he had affirmatively misled her (made a false disclosure).

The supreme court brushed aside this distinction, saying that such an interpretation would reward the "silent spouse" but punish a spouse who "attempts" some disclosure.[15] The court further stated that the legislative intent was clear: in Florida there is to be no duty of disclos-

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12. *Id.*

13. FLA. STAT. § 737.702(2) (1983). The reader should note that the statute makes quite opposite provisions for postnuptial agreements: "Each spouse *shall* make a fair disclosure to the other of his or her estate if the agreement, contract or waiver is executed *after* marriage." *Id.* (emphasis added).

14. *See* Moldofsky v. Stregack, 449 So. 2d 918, 920 (Fla. 3d Dist. Ct. App. 1984) (reversed in the case under discussion): "A would-be spouse is under no duty to make any disclosure. . . . The statute, however, cannot and should not protect one who voluntarily averts the truth and thereby misleads a party into contracting the marriage."

15. 474 So. 2d at 207.

ure — truthful or otherwise — concerning antenuptial agreements.

Finally, the court did describe one ground upon which an antenuptial agreement could still be set aside in Florida. Where the surviving spouse had been misled as to the nature of the document being signed — for example, a marriage license application instead of an antenuptial agreement — cancellation of the antenuptial agreement may be sought.[16]

In a case of lesser significance, *Evered v. Edsell*,[17] the court again faced a surviving spouse's challenge to an antenuptial agreement and again dismissed the suit. In this case, Mrs. Edsell sought to have an antenuptial agreement set aside on the ground of overreaching. The crucial issue here was the applicability of the Second District's *Lutgert* presumption. Under *Lutgert v. Lutgert*,[18] once a spouse has submitted certain evidence suggesting unfairness,[19] a presumption of undue influence or overreaching comes into existence. The presumption shifts the burden to the other spouse to show voluntariness. The supreme court held that *Lutgert* had no applicability in probate proceedings, apparently accepting petitioners' argument that such a presumption is not warranted in light of section 732.702.[20]

Clearly, the court construes section 732.702 as a virtually impenetrable shield protecting antenuptial agreements from subsequent attack. In *Edsell*, as in *Moldofsky*, the court cited *Estate of Roberts*[21] for the proposition that such an agreement may be set aside only on such narrow grounds as coercion, incompetence, or a signature "otherwise improperly obtained."[22]

16. *Id.* (citing Estate of Roberts, 388 So. 2d 216 (Fla. 1980)).

17. 464 So. 2d 1197 (Fla. 1985).

18. 338 So. 2d 1111 (Fla. 2d Dist. Ct. App. 1976). By its own terms, *Lutgert* had previously applied only to antenuptial agreements contested in a dissolution of marriage.

19. Specifically, the spouse must: (1) demonstrate that an antenuptial agreement benefited one party in a grossly disproportionate manner, and (2) submit evidence that the circumstances surrounding the execution of the agreement were coercive. *Id.* at 1115-16.

20. 464 So. 2d at 1198.

21. 388 So. 2d 216, 217 (Fla. 1980).

22. 464 So. 2d at 1199 n.2.

C. *Standard of Proof in a Fraud Case: Wieczorck v. H & H Builders, Inc.*

The parties had already settled the case, but the supreme court nonetheless retained jurisdiction over *Wieczorck v. H & H Builders, Inc.*[23] in order to clarify a murky[24] but highly significant area of law: the standard of proof applicable in a fraud action. Specifically, the question presented was whether in an action seeking equitable relief, fraud need be proven by only a preponderance of the evidence or by clear and convincing evidence.

The court chose the former standard. Fraud, in Florida, need be proven only by a preponderance or the "greater weight" of the evidence, not necessarily by "clear and convincing" evidence.[25] The *Wieczorck* opinion is cryptic and scarcely addresses the rationale for this decision. The court did, however, cite and rely on the 1981 case of *Rigot v. Bucci*,[26] in which it had adverted briefly to the historical development of differing standards for actions at law and actions in equity. The *Rigot* court found that, since the "law and equity sides of the court" had been merged in modern times, there was no longer "sound reason" for a distinction concerning the proof requisite to establish fraud.[27]

As Justice Overton noted in his dissent in *Wieczorck*, the holding represents a "substantial modification of a well-established rule of law."[28] Justice Overton also stressed the potential practical disadvantages of the newly-clarified rule. The traditional requirement of "clear and convincing evidence" in equity was based upon "the need for strength and reliability of written agreements in the market place." The older rule had also recognized that equitable remedies with respect to written documents — cancellation, reformation, rescission — are

23. 475 So. 2d 227 (Fla. 1985).

24. The court had created uncertainty by its own conflicting pronouncements in the past. *Id.* at 228. In 1971, in Rigot v. Bucci, 245 So. 2d 51 (Fla. 1971), the court held that "only a preponderance or greater weight of the evidence is required to establish fraud, whether the action is at law or in equity." *Id.* at 53. Much more recently, however, the court had stated that "proof of fraud must be by clear and convincing evidence." Canal Authority v. Ocala Mfg., Ice and Packing Co., 332 So. 2d 321, 327 (Fla. 1976).

25. 475 So. 2d at 228.

26. 245 So. 2d at 51.

27. *Id.* at 52-53.

28. 475 So. 2d at 228 (Overton, J., dissenting).

generally regarded as "much harsher" than the award of mere damages.[29]

The dissenting justice predicted unfortunate consequences would flow from the new standard, urging that "the strength, reliability, and viability of written documents" in property and commercial transactions would be substantially weakened.[30]

II. Commercial Contracts: Parties' Choice of Law, Private Limitations Period and Public Policy

The case of *Burroughs Corp. v. Suntogs of Miami, Inc.*[31] is of interest for at least two reasons. First, it has important implications for the Florida lawyer drafting a commercial contract for an interstate transaction. The second reason is related: *Burroughs* presented the supreme court with the year's only major Uniform Commercial Code issue.

Specifically, *Burroughs* set up a conflict between two provisions of Florida law. A provision of the Florida UCC permits contracting parties to agree that the law of another state will apply to their transaction; another Florida statute specifically prohibits the parties from contractually diminishing the Florida period of limitation of actions. What happens when the parties choose the law of another state and then agree, in accordance with the laws of that state, to a diminished limitations period?

The Burroughs Corporation, a Michigan entity, had sold computer equipment to a Florida clothing manufacturer, Suntogs of Miami. The written sales contract stipulated, *inter alia*, that the law of Michigan would govern the effect and interpretation of the contract. It also contained a two-year limitation of action provision, as is specifically sanctioned by Michigan law.[32]

Suntogs subsequently found that the computers did not function as expected, and eventually ceased using them. It did not, however, bring its suit against Burroughs within two years of the accrual of its cause of action, as required by the contract. Thus, its contractual cause of action would be dismissed if the Florida courts upheld the validity of the choice of Michigan law and, in particular the two-year limitations

29. *Id.* at 229.
30. *Id.*
31. 472 So. 2d 1166 (Fla. 1985).
32. *Id.* at 1167 (citing MICH. COMP. LAWS, § 440.2725 (1970)).

period grounded in Michigan legislation.

Each party was able to marshall Florida law to its support. On the one hand, Burroughs invoked Florida commercial legislation which explicitly permits parties to choose the law of another state so long as that state bears a "reasonable relation" to the transaction.[33] The provision was facially applicable here, as Michigan was clearly "reasonably related" to the contract. And, its law unquestionably permitted parties to choose a two-year limitations period.

Suntogs, on the other hand, relied on two Florida statutes in support of its position that the court should deny enforcement of the contractual limitations clause. One provision renders void any contractual limitations period shorter than that provided by the applicable Florida statute of limitations;[34] the applicable statute, in turn, provides for a five-year limitations period.[35]

Faced with these conflicting results, the district court plausibly held that (a) the choice of Michigan law in general was permissible, but that (b) the Florida statute of limitations embodied a "strong public policy" and therefore took precedence in Florida over the more flexible Michigan provisions.[36]

The supreme court reversed and ruled the shorter period enforceable. In order to reach this result, the court first turned to a rather elaborate test for identifying "strong public policies."[37] Applying it to the

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33. FLA. STAT. § 671.105(1) (1975) is part of the Florida version of the Uniform Commercial Code. That section provides: "[W]hen a transaction bears a *reasonable relation* to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." (Emphasis added).

This "party authority" principle has been approved by the Florida Supreme Court in Morgan Walton Properties, Inc. v. Int'l City Bank & Trust Co., 404 So. 2d 1059 (Fla. 1981), and Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981).

34. FLA. STAT. § 95.03 (1975) renders void any contractual limitations period shorter than that provided by the applicable statute of limitations.

35. FLA. STAT. § 95.11(2)(b) (1975), provides a five-year limitations period for actions based on written contracts.

36. *See* Suntogs of Miami, Inc. v. Burroughs Corp., 433 So. 2d 581, 584 (Fla. 3d Dist. Ct. App. 1983), *rev'd*, 472 So. 2d at 1166 (holding that § 95.03 expresses a "strong public policy" of the State of Florida, so as to prevail over the "party autonomy").

37. *Burroughs*, 472 So. 2d at 1168. The court had previously elaborated and applied this test in *Continental Mortgage*, 395 So. 2d at 509-10.

The *Burroughs* court found that the legislation on limitations periods failed every part of the test for a "strong public policy." Primary among the criteria used for identi-

statutes at issue, the court held that the limitations provisions of Florida law do not embody a "strong policy."[38]

The court did not, however, end its analysis there. It added that the Florida limitations provisions "must be read *in pari materia* with other [Florida] laws," in particular commercial legislation.[39] In permitting parties to choose the laws of another state to govern their rights and duties, the legislature "recognized the need for parties to interstate commercial transactions to know in advance which state's laws were to apply. . . . This advance knowledge serves to reduce confusion and encourage quicker, easier resolutions."[40] The court held, then, that the contractual provision shortening the period for bringing a suit was fully enforceable in Florida.

By virtue of its adoption of the Uniform Commercial Code, Florida law had previously granted to parties to a contract for the sale of goods[41] the right to have their contract interpreted according to the law of a state bearing a "reasonable relationship" to the transaction. Through *Burroughs*, the court has made clear that parties may adopt the limitations provisions of such a state as well.

III. Insurance Contracts

A. *Unconstitutional Impairment of Contracts: State Farm Mutual Automobile Insurance Co. v. Gant*

The Supreme Court invoked the prohibition against the impairment of contracts contained in the Florida Constitution in *State Farm Mutual Automobile Insurance Co. v. Gant*.[42] In consequence, it upheld the strict terms of an automobile insurance policy and refused to apply a Florida statute purportedly changing the terms of the policy.

The parties in *Gant* were a well-known insurance company and the holders of two insurance policies. Defendant State Farm insured the Gants' automobiles under two separate policies. By their express terms,

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fying such a policy are: (1) a relative lack of exceptions to the law or rule in question; (2) few or no amendments to the rule or statute, reflecting a fairly rigid policy; (3) a characterization of the rule or law as "fundamental to the legal system"; and (4) the "effect" of the rule or law on the contract — that is, whether limited or broad.

38. *Burroughs*, 472 So. 2d at 1168-69.
39. *Id.* at 1168.
40. *Id.* at 1168-69.
41. FLA. STAT. § 671.105(1) (1975) quoted *supra* at note 33.
42. 478 So. 2d 25 (Fla. 1985).

the policies forbade "stacking" of uninsured motorist coverage — that is, cumulating the coverage of both policies in recovering for a single automobile accident.

The Gants sought to overcome the language of the two contracts by relying on a Florida legislative enactment[43] which allows an insured to cumulate ("stack") uninsured motorist coverage. State Farm pointed out that the legislation had not come into effect until after the policies were issued. Since stacking would greatly increase the company's liability to the Gants, State Farm argued that the legislation impaired its obligations of contract in violation of the Florida Constitution.[44]

The potential effect of the legislation on State Farm's obligations was substantial. If the policies were enforced according to their terms, State Farm would owe the Gants nothing, having already paid the maximum recovery allowable on one of the policies.[45] However, if the post-policy legislation were applied, the coverage would stack and the company would be liable for an additional $30,000 to $100,000.[46]

The supreme court held that the Florida Constitution prohibited application of the newly-amended statute to the contracts in issue. Any other result would "violate the constitutional restriction on the impairment of contracts" by subjecting State Farm to a "loss exposure" entirely unforeseeable at the time it had issued the two policies.[47]

The *Gant* case does not break new ground in Florida law, as the impairment-of-obligations clause has been applied before under conceptually similar circumstances.[48] Its immediate interest lies, of course, in the application of the clause to this particular type of insurance policy. More generally, perhaps, *Gant* has a fascination of its own as an example of that relatively rare breed, a true impairment of the obligations of a contract.

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43. The legislation at issue consisted of an amendment, effective October 1, 1980, to FLA. STAT. § 627.4312. Prior to the effective date of this amendment, stacking was prohibited.

44. FLA. CONST. art. I, § 10, provides: "*Prohibited laws.* — No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

45. 478 So. 2d at 26.

46. A secondary issue of the proceeding below was whether the uninsured motorist coverage of the second policy should be $100,000 per accident or the $30,000 listed. The Gants alleged that they had not knowingly rejected the higher limit. *Id.*

47. 478 So. 2d at 27.

48. The court found that *Gant* was controlled by its earlier decision in Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978) (then-new anti-stacking statute inapplicable to insurance policy which specifically provided for stacking).

B. *Breach of Notice Clauses: Bankers Insurance Co. v. Macias*

The *Macias* case, like *Gant*, is certain to gladden the hearts of Florida insurance counsel. In *Bankers Insurance Co. v. Macias*,[49] the Florida Supreme Court held that a presumption of prejudice to an insurance company arises when an insured fails to give timely notice of an accident to the company, in breach of the policy's express terms.

Ms. Macias personal injury policy required that she give her insurer notice of an auto accident within a stated period. She was injured in an accident in 1980, but the insurer was not notified until Ms. Macias brought a declaratory judgment against it two years later.[50]

The supreme court ruled that in Florida the insurer is presumed to have been prejudiced when the insured has not complied with the notice requirement of an insurance contract. Under this presumption, the burden is placed on the insured to rebut the presumption — in other words, to show that no prejudice to the insurer has occurred. Since plaintiff Macias failed to present any evidence on the prejudice issue, judgment had properly been entered against her.[51]

Apart from this primary holding, two additional features of the opinion are noteworthy. First, the court acknowledged that its decision was contrary to the "modern trend" under which breach of the notice clause is disregarded except where the insurer can show that "substantial prejudice" resulted.[52] Here the court particularly noted the purpose of the notice provision — to enable the insured to conduct a "timely and adequate investigation of all circumstances surrounding the accident." Plaintiff Macias, through her failure to give notice, had deprived State Farm of the opportunity to conduct any investigation into her claims.

The court also indulged in a bit of dicta based on the classic contract distinction concerning "conditions precedent" to a contractual obligation and "conditions subsequent." Very different procedural consequences flow depending on what type of condition has been breached. According to the court, the party seeking to avoid a condition precedent, such as a notice requirement, should have the burden of showing

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49. 475 So. 2d 1216 (Fla. 1985).

50. *Id.* at 1218.

51. *Id.* ("If the insured breaches the notice provision, prejudice to the insurer will be presumed, but may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice."). *Id.*

52. *Id.* (citing Annot., 32 A.L.R. 4TH 151 (1984)).

lack of prejudice if he or she has failed to fulfill the condition.[53] This rule was, of course, applied to *Macias*.

The rule is otherwise, the court added, for a condition subsequent — for example, the cooperation clause of an insurance policy. There, the party seeking to avoid liability (an insurer, for example) will bear the burden of affirmatively showing prejudice due to the other party's failure to fulfill the condition subsequent.[54]

C. *Intended verses Incidental Beneficiaries: Metropolitan Life Insurance Co. v. McCarson*

The greatest significance of *Metropolitan Life Insurance Co. v. McCarson*[55] unquestionably sounds in tort, for here the Florida Supreme Court recognized for the first time the tort of intentional infliction of emotional distress. A supreme court dictum on the contracts issue, however, may come as "a surprise and disappointment"[56] in future contracts cases in the State.

Briefly, the court in *McCarson* said that in Florida dependents covered by a group medical insurance policy are "incidental" and not intended beneficiaries of the insurance contract. A dependent who is wrongfully denied coverage under such a policy will, therefore, have no independent cause of action against the insurer.[57]

IV. Contractual Issues and Employees

The supreme court decided two cases involving contracts of employment. In the first, it dealt with the contract status of special employees supplied by a temporary agency, and the second with temporary injunctions upholding covenants not to compete.

A. *Contract Status of Employee Supplied by Temporary Agency: Booher v. Pepperidge Farm, Inc.*

The case of *Booher v. Pepperidge Farm, Inc.*[58] stands alone in this

53. *Macias*, 475 So. 2d at 1217-18.
54. *Id.* at 1218.
55. 467 So. 2d 277 (Fla. 1985).
56. *Id.* at 281 (Shaw, J., concurring in part and dissenting in part).
57. *Id.* at 278-80 ("It is axiomatic in contract law that an incidental beneficiary cannot enforce the contract."). *Id.*
58. 468 So. 2d 985 (Fla. 1985).

article as the sole case in which the supreme court held ineffective the express language of a contract. Faced with the question whether a temporary employee was an "employee" for worker's compensation purposes, the court held that the facts and circumstances surrounding the employment take precedence over contractual language designed to determine the issue.

The plaintiff, Mr. Booher, had sued Pepperidge Farm in tort for injuries he sustained while working as a temporary employee on Pepperidge Farm's premises. The company's ordinary employees would, of course, be barred from bringing such a suit due to the worker's compensation statute.[59] However, Mr. Booher had been provided to Pepperidge Farm as a temporary employee by Dixie Driving Service, an agency in the business of providing employees on a temporary basis.

Mr. Booher insisted he was employed by Dixie and not by Pepperidge Farm. He relied in great part on the written agreement between the agency and Pepperidge Farm, which provided that Mr. Booher would remain the agency's employee "for all purposes."[60] If enforced, the contractual language would permit the suit against Pepperidge Farm to go forward.

The supreme court found that, regardless of the language used in the contract, Mr. Booher had consented to an implied contract of hire with Pepperidge Farm and thus became its employee for purposes of the worker's compensation statute. Here, "[t]he actual employment relationship" should control. Neither the written contract nor the subjective intent of the parties could overcome the facts.[61]

Although it affirmed the lower court's decision, the supreme court pointedly did not adopt that forum's suggestion that virtually any temporary employee is barred from suing his special employer for on-the-job injuries.[62] Rather, the supreme court appears to have retained the test previously established in the cases for determining the question. Under that test, the primary issue is whether the temporary employee has consented, expressly or impliedly, to a contract of hire with the non-agency employer.[63] *Booher* does not amend the earlier case law,

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59. Florida's Worker's Compensation statute limits an employer's liability to payment of worker's compensation benefits. FLA. STAT. § 440.11 (1985).

60. *See* Pepperidge Farm v. Booher, 446 So. 2d 1132, 1132-33 (Fla. 4th Dist. Ct. App. 1984), *rev'd*, 468 So. 2d at 985.

61. 468 So. 2d at 985.

62. *See Booher*, 446 So. 2d at 1133.

63. *See, e.g.*, Shelby Mut. Ins. Co. v. Aetna Ins. Co., 246 So. 2d 98, 101 (Fla. 1971); Stuyvesant Corp. v. Waterhouse, 74 So. 2d 554 (Fla. 1954). *See also* Rainbow

but establishes instead that the facts of the case will prevail over any attempt by the employers to control the outcome through their written agreement.

B. *Temporary Relief for Violation of Covenant Not to Compete: Capraro v. Lanier Business Products, Inc.*

In *Capraro v. Lanier Business Products, Inc.*[64] the court approved a presumption of "irreparable injury" to an employer seeking temporary relief against a former employee who violates a covenant not to compete. Thomas Capraro, the defendant, had been employed by plaintiff Lanier Business Products. His written contract with Lanier contained a covenant that Capraro would not engage in "competition" with Lanier for one year after leaving their service. Subsequent to leaving Lanier, Capraro violated the terms of the covenant and Lanier sought a temporary injunction.

Underlying the lawsuit was a Florida statute sanctioning covenants not to compete and permitting enforcement by injunction.[65] In preliminary proceedings, Lanier adequately alleged a valid covenant and breach by Capraro. The remaining pre-trial issue was whether "irreparable injury" could be presumed or whether Lanier had to shoulder the burden of proving such injury in order to have Capraro enjoined from pursuing his new employment.

The supreme court affirmed the lower court's holding that irreparable injury to Lanier would be presumed. To force the employer to wait until irreparable injury had occurred, said the court, would often "defeat the purpose" of both the covenant and the action.[66] Where suit is brought on an anti-competition covenant, "[i]mmediate injunctive relief is [of] the essence."[67]

Justice Overton's dissent is valuable in that it points out the degree to which Florida law will protect an anti-competition agreement, in derogation of the common law rule.[68] Defendant Capraro, for example, had sold only one kind of product for Lanier and his sales territory had

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Poultry Co. v. Ritter Rental System, Inc., 140 So. 2d 101, 103 (Fla. 1962) (main factors in determining existence of employment relationship for worker's compensation purposes).

64. 466 So. 2d 212 (Fla. 1985).
65. FLA. STAT. § 542.33 (1981).
66. 466 So. 2d at 213.
67. *Id.*
68. *Id.* at 213-14 (Overton, J., dissenting).

been confined to just one Florida county. The covenant in issue not only prohibited Capraro from selling an entire array of products, but also designated a five-county area as prohibited territory. Nonetheless, the temporary injunction was issued.

Given the equities of this particular case, Justice Overton thought that "At the very least, the employer should be required to prove that irreparable harm will result to his business if a former employee is allowed to work in a new territory not serviced by him in his prior employment." The justice also entered a plea that the legislature "modify or repeal" the state's law so that judges would be free to apply proper equitable principles to anti-competition agreements such as this one.[69]

V. Miscellaneous

Several other cases decided by the court during the Survey period are worthy of mention both for their individual holdings and as illustrations of the court's strong tendency to enforce contracts as written.

A. *Due-on-Sale Clause in a Mortgage: Weiman v. McHaffie*

In *Weiman v. McHaffie*[70] the Florida Supreme Court held that a due-on-sale clause in a mortgage is enforceable in Florida. In order to reach this result, the court was required to disapprove the earlier *Lockwood* rule that a due-on-sale clause was enforceable only if the mortgage lender could show impairment of security resulting from the sale to another party.[71] The *Lockwood* rule requiring impairment of security prior to enforcement was based on a balancing of equities and public policy.

The supreme court appeared to agree with none of the reasoning

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69. *Id.* at 214. Justice Overton had made the same plea, namely, that the legislature modify or repeal § 542.33, in an earlier case. *See* Keller v. Twenty-Four Collection, Inc., 419 So. 2d 1048, 1050-51 (Fla. 1982) (Overton, J., dissenting).

70. 470 So. 2d 682 (Fla. 1985). Note that the court in *Weiman* also answered a question certified to it by the First District Court of Appeal involving the applicability in Florida of the provision concerning due-on-sale clauses of the federal Garn-St. Germain Depository Institutions Act, Pub. L. No. 97-320. 12 U.S.C. §§ 1701 *et seq.* (1982). Not only is that portion of the opinion beyond the scope of this article, but the court's holding in *Weiman* that such clauses are enforceable in Florida renders its discussion of Garn-St. Germain essentially academic.

71. *See* First Fed. Sav. & Loan Ass'n. of Englewood v. Lockwood, 385 So. 2d 156, 160 (Fla. 2d Dist. Ct. App. 1980).

behind *Lockwood*. Rather, it thought that the application of the impairment rule might enable an individual mortgagor to avoid a reasonable contract provision, and thus work an injustice to a given mortgage lender.[72] Apart from creating unfairness at the individual level, the court predicted that judicial refusal to enforce due-on-sale clauses could also result in a shortage of mortgage money in Florida, with negative consequences for both buyers and sellers in the state and for the economy of Florida as a whole.[73]

At least one other case on the court's 1985 calendar was disposed of by reference to *Weiman*,[74] and presumably other cases and controversies now current in the state will also be settled by application of that decision.

B. *Gifts of Real Property to Non-Relatives: Chase Federal Savings and Loan Association v. Schreiber*

According to the dissenting opinion of Justice Overton, the supreme court in *Chase Federal Savings and Loan Association v. Schreiber*[75] created a "gigolo-mistress relief rule."[76] A judicial opinion calling forth such a ringing condemnation is surely worthy of brief examination.

The *Schreiber* plaintiff had, as a woman ninety years of age, transferred title to her home to a much younger man. The deed recited that "[t]his quitclaim deed is being given with the consideration being love and affection." The younger man in turn had sold the property to third parties for $50,000, after which the elderly grantor sought cancellation of both her deed of gift and the deed of sale to the third parties.[77]

The issue presented was whether "a deed given to a non-relative in return only for 'love and affection' is without consideration" and therefore invalid, as was held by the court below.[78] The supreme court's

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72. *Weiman*, 470 So. 2d at 684.

73. *Id.*

74. Pioneer Fed. Sav. & Loan Ass'n., 474 So. 2d 783 (Fla. 1985) (in *Weiman* "we held that due-on-sale clauses are enforceable in Florida").

75. 479 So. 2d 90 (Fla. 1985).

76. *Id.* at 104 (Overton, J., concurring in part and dissenting in part).

77. *Id.* at 94.

78. *Id.* at 95-96. In its discussion the supreme court cited and quoted from both Florida Nat'l Bank & Trust Co. v. Havris, 366 So. 2d 491, 496 (Fla. 3rd Dist. Ct. App. 1979), and Schreiber v. Chase Fed. Sav. & Loan Ass'n, 422 So. 2d 911 (Fla. 3rd Dist. Ct. App. 1982) (en banc). The latter opinion had in turn adopted an earlier dis-

examination of the issue took it back to the recondite origins of the so-called "English rule" on which the lower court had relied and to the Statute of Uses of 1535 from which it is derived.[79] Although clearly fascinated with the arcana of both the rule and the Statute, the court could find no basis in Florida equitable principles or in the state's legislation for making consideration an absolute prerequisite to a binding deed.

On these and other grounds, the court concluded that lack of consideration does not by itself make voidable a gift of real property to a non-relative.[80] Rather, lack of consideration in such circumstances should be merely a factor "to be considered along with others in deciding whether fraud, undue influence, violation of confidence or unconscionable advantage exists."[81]

The court cautioned that its opinion should not be construed too broadly, and did not "in any way affect the existing law of Florida" requiring consideration to support contractual undertakings.[82] Rather, the court held only that "a deed, sufficient in form, voluntarily executed by a competent grantor, is effective to convey the owner's legal title regardless of whether he receives a contractual consideration."[83]

Despite the court's care in thus circumscribing its holding, Justice Overton issued a dissent which surely ranks among history's most sharply worded: "In my view the majority's decision provides a means to protect title for gigolos, mistresses, and con artists, and alters four and one-half centuries of common law in the process."[84] He saw — perhaps correctly — the decision as likely to have extremely negative effects on "the aged, infirm, and semiliterate members of our society" for whom protective principles of law would no longer be in force.[85]

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senting opinion of Judge Schwartz. Ross v. Chase Fed. Sav. & Loan Ass'n., 424 So. 2d 779 (Fla. 3d Dist. Ct. App. 1981). In both *Schreiber* and *Havris*, the Third DCA had avoided a deed because no consideration had been given by the non-relative grantee.

79. *Schreiber*, 479 So. 2d at 97-99.

80. *Id.* at 100.

81. *Id.* at 99 (quoting 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 11.01 (1984)).

82. *Id.* at 101.

83. *Id.*

84. *Id.* at 102 (Overton, J., concurring in part and dissenting in part).

85. *Id.* at 104.

C. *Option Contracts: Robbinson v. Central Properties, Inc.*

Another case reviewed by the court presented a quite tantalizing issue under the rather dull garb of a contractual right of first refusal. The plaintiffs in *Robbinson v. Central Properties, Inc.*[86] alleged that strict interpretation of their right of first refusal would effectively eviscerate the right. They argued that the contractual language should be construed expansively so as to protect their opinion. The supreme court rejected the argument, stating rather pointedly that parties will be held to the "unambiguous" language of their contracts.

Under the contract at issue, plaintiff Central Properties had a "right of first refusal" with respect to the defendant-optionor's water and sewer system. The optionor's stockholders proposed to transfer the system to another party but not through the direct means of an outright sale. Rather, they were exploring transfer through an indirect means, namely sale of their capital stock. Since the company's primary asset was the water and sewer system, a sale of the stock was tantamount to a sale of the system itself.[87]

As holder of the option, Central Properties brought a suit premised on the notion that, under the circumstances, its right of first refusal should extend to the stock transfer. The lower court accepted this reading of the contract, since otherwise the purpose of the right of first refusal "could be circumvented quite easily."[88]

The supreme court, however, agreed with the optionor that the contract right could not be extended beyond its literal terms.[89] Here, the contractual language was unambiguous: the right of first refusal referred to the water and sewer system, and made no reference at all to the corporate stock. The contract contained no language upon which an expansive reading could be based, nor any wording that rendered the optionee's right ambiguous. Therefore, the right of first refusal was restricted to the water and sewer system; Central Properties was helpless to prevent the transfer of the system by sale of the stock.

As to Central Properties' argument that this holding allowed the optionor's shareholders to "frustrate and circumvent" the purpose of the option contract, the court found "no merit" in the contention: "the parties were free at the time of entering into the contract to extend the

86. 468 So. 2d 986 (Fla. 1985).
87. *Id.* at 988.
88. *Id.* at 987.
89. *Id.*

right of first purchase to stock sales and transfers. . . ."[90]

The case sounds a clear warning to draftsmen of Florida contracts to anticipate at the outset the various means through which a contractual purpose may be undercut. The warning may, however, be one which the human drafter of a contract is simply unable fully to heed: to foresee and make provision for the twists and turns that fate will present during the lifetime of the document.

D. *Settlement Agreements: Robbie v. City of Miami*

It seems fitting that a review of Florida contracts cases should end — as do the great majority of lawsuits — with a settlement agreement. The supreme court reviewed a disputed settlement agreement in *Robbie v. City of Miami*.[91]

The court upheld the agreement and, in doing so, reiterated several well-established black-letter principles. For example, settlements are "highly favored" and will be enforced "whenever possible." Their existence as enforceable agreements is, moreover, to be determined by an "objective test" which looks to "external signs" rather than to a subjective meeting of the minds.[92]

More pertinently to the case under review, the court held that a settlement becomes enforceable when objective evidence shows that the parties have said the same thing as to the "essential elements" of the agreement, regardless of whether agreement has been reached on all "contingencies." The court cited with approval an earlier case where it had written: "Even though all the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them."[93]

If ever a term represented a contingency, it was the disputed provision in the *Robbie* agreement. The Miami Dolphins and the City of Miami had agreed to settle a contract dispute concerning the Dolphins' use of the City's stadium. At the last minute, the Dolphins objected to a single term of the agreement: the amount the team would owe if an

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90. *Id.* at 988.

91. 469 So. 2d 1384 (Fla. 1985).

92. *Id.* at 1385 (citing Pearson v. Ecological Science Corp., 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976), and Blackhawk Heating and Plumbing Co. v. Data Lease Fin. Corp., 302 So. 2d 404 (Fla. 1974)).

93. *Blackhawk Heating*, 302 So. 2d at 408.

"Act of God" prevented it from playing the last game of the season. The court's approach to the problem was extremely practical — the settlement would be enforced; if an Act of God prevents the last game from being played, "the parties can litigate" the Dolphins' liability.[94]

The *Robbie* opinion does not expand, but certainly affirms the principle that Florida courts will enforce settlements even when some terms are still open, so long as the "essential elements" have been agreed upon.

VI. Conclusion

The contracts cases of the Survey period are not necessarily typical of the supreme court's rulings in any given year. Taken by themselves, however, the 1985 cases do reveal a single overwhelming trend: enforcement of consensual agreements according to their terms, against all manner of inducements to the contrary. The Florida Supreme Court showed itself careful to protect the expectations of the parties, highly respectful of the legislature, yet individualistic in its own approach. Undoubtedly the single greatest change in Florida contract law for 1985 comes out of *Johnson v. Davis*,[95] the landmark case in which the court overruled centuries of common law to create a duty of disclosure in sale-of-home transactions.

94. *Robbie*, 469 So. 2d at 1386.
95. 480 So. 2d 625 (Fla. 1985). *See supra* notes 2-10 and accompanying text.