IN THE SUPREME COURT OF FLORIDA

Case No.: SC21-369

SUAREZ TRUCKING FL CORP. and
PROGRESSIVE EXPRESS INSURANCE
COMPANY,

Petitioners,

v.

ADAM J. SOUDERS,

Respondent.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Petitioner SUAREZ TRUCKING FL CORP., by and through its undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.225, submits as supplemental authority Williams v. Fernandez, Case No. 2D21-802 (Fla. 2d DCA Mar. 4, 2022), a copy of which is attached to this notice. Pages 10 and 11 of the supplemental authority are pertinent to the issues as appeal and argued in the briefs.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was uploaded and served in the E-PORTAL to: **Jody M. Valdes, Esq.**, Weekley Schulte Valdes, LLC, 1635 N. Tampa Street, Suite 100, Tampa, FL 33602-2646, (service@wsvlegal.com, kvservice@wsvlegal.com); **Jennifer C. Worden, Esq., and Daniel A. Martinez, Esq.**, Martinez Denbo, LLC, 2935 First Ave. North, 2nd Floor, St. Petersburg, FL 33713, (ServiceSTP@civillit.com); **Chris M. Kavouklis, Esq., Brennan Holden & Kovouklis, P.A.**, 115 S. Newport Ave., Tampa. FL 33606-1943, (chris@bhklawfirm.com, christine@bhklawfirm.com); **Joel D. Eaton, Esq.**, Podhurst Orseck, P.A., SunTrust International Center, One S.E. Third Ave., Suite 2300, Miami, FL 33131 (jeaton@podhurst.com, dricker@podhurst.com); **Elaine D. Walter, Esq.**, Boyd Richards Parker Colonnelli, 100 SE 2nd St, Ste 2600, Miami, FL 33131 (ewalter@boydlawgroup.com); on this 4th day of March, 2022.

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DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

TARRA WILLIAMS,

Appellant,

v.

CHAD JOSEPH FERNANDEZ and
CHRISTOPHER JOSEPH FERNANDEZ,

Appellees.

No. 2D21-802

March 4, 2022

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Pinellas County; Cynthia J. Newton, Judge.

Kevin M. Cooper of Justin C. Johnson & Associates, P.A.; and Brandon S. Vesely of The Florida Appellate Firm, P.A., St. Petersburg, for Appellant.

Elizabeth C. Wheeler of Elizabeth C. Wheeler, P.A., Orlando, for Appellee Christopher Joseph Fernandez.

No appearance for Appellee Chad Joseph Fernandez.

CASANUEVA, Judge.

This appeal stems from an automobile negligence action filed by Tarra Williams against Christopher Joseph Fernandez and Chad Joseph Fernandez. Christopher Fernandez submitted a proposal for settlement to Ms. Williams, which she accepted. Christopher and Chad Fernandez then sought and were granted relief from such proposal. Because we conclude that the evidence presented to the trial court was insufficient to grant relief, we reverse.

I. PROCEDURAL HISTORY

During litigation of the underlying negligence action, Ms. Williams accepted a proposal for settlement submitted to her by defendant, Christopher Fernandez. The proposal did not reference nor include the codefendant, Chad Fernandez. Thereafter, Christopher and Chad Fernandez filed a motion and an amended motion seeking relief from the proposal, claiming that the omission of Chad Fernandez was done in error. They asserted that the error was caused by trial counsel's computer system, which generated a "shell" document. This shell document included the name of only one defendant when it was generated. They asserted further that the shell document was inadvertently filed and that the intended proposal included both Christopher and Chad Fernandez. Neither

the initial motion nor the amended motion referenced a specific rule entitling Christopher Fernandez to relief, and neither motion was sworn to.

At the hearing on Christopher Fernandez's motion, he argued that he should not be bound by the terms of the proposal based on the theory of unilateral mistake. However, neither party presented witnesses or sworn affidavits at the hearing. Ultimately, the trial court held that the proposal submitted by Christopher Fernandez was the result of inadvertence on the part of defense counsel and an e-filing error. The trial court granted relief from the proposal and ordered that the Fernandezes may submit their intended proposal. This appeal ensued.

II. DISCUSSION

A. Excusable Neglect

In rendering its order, the trial court relied upon *Maryland Casualty Co. v. Krasnek*, 174 So. 2d 541 (Fla. 1965). In *Krasnek*, the Florida Supreme Court set forth the following rule:

> There is no doubt that the law was correctly stated therein as preventing equitable relief on ground of unilateral mistake in instances in which the mistake is the result of a lack of due care or in which the other

> party to the contract has so far relied upon the payment that it would be inequitable to require repayment.

Id. at 543.

We note that the above stated rule flows from the concept of unilateral mistake as defined in contract law. Under contract law, "[r]elief can be granted for a 'unilateral' mistake if '(1) the mistake did not result from an inexcusable lack of due care, and (2) defendant's position did not so change in reliance that it would be unconscionable to set aside the agreement.' " *Passport Leasing Corp. v. Zimmerman*, 945 So. 2d 660, 661 (Fla. 4th DCA 2007) (quoting *Stamato v. Stamato*, 818 So. 2d 662, 664 (Fla. 4th DCA 2002)).

To demonstrate that a mistake is the result of excusable neglect, a proponent must put forth evidence of such. Excusable neglect cannot be established through counsel's unsworn statements. *See Leon Shaffer Golnick Advert., Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) ("It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the

basis for making factual determinations; and this court cannot so consider them on review of the record."); *see also DiSarrio v. Mills*, 711 So. 2d 1355, 1356-57 (Fla. 2d DCA 1998) (stating that in order to prove excusable neglect, a movant must provide sworn statements or affidavits and that "[a]rgument by counsel who is not under oath is not evidence"). Here, Christopher Fernandez failed to provide either sworn statements or affidavits to the trial court.

We also note that Florida Rule of Civil Procedure 1.540(b)(1) affords the trial court the authority to relieve a party from "a final judgment, decree, order, or proceeding" upon a demonstration of "excusable neglect." "Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir.' " *Quest Diagnostics, Inc. v. Haynie*, 320 So. 3d 171, 175 (Fla. 4th DCA 2021) (quoting *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985)). In this instance, the thrust of Christopher and Chad Fernandez's contention is "a system gone awry."

Further, a general assertion, without more factual development, is insufficient to establish excusable neglect. In *Geer*

v. Jacobsen, 880 So. 2d 717 (Fla. 2d DCA 2004), this court discussed a situation in which an attorney's sworn testimony was insufficient to establish excusable neglect. In *Geer*, defense counsel filed a notice of appearance and a motion for extension of time to respond to the plaintiff's complaint but did not set the motion for hearing and did not otherwise respond to the complaint. *Id.* at 718. After defense counsel failed to respond to plaintiff's amended complaint and motion for default, the trial court entered default judgment against the defendants. *Id.* at 718-19. Defense counsel then filed an unsworn motion to set aside default judgment. *Id.* at 719. At the hearing on his motion, defense counsel testified that the contents of his motion were true and "that the meritorious defense was '[t]hat there is no basis for any fees and that [section] 57.105 applies in this case. That was the matter I was researching to find.' " *Id.* (alteration in original). This court concluded that his proffered testimony "fell woefully short of establishing excusable neglect." *Id.* at 720. This court stated that an "attorney's errors, even if constituting mistakes of law, tactical errors, or judgmental mistakes, do not constitute excusable neglect." *Id.* at 720-21.

Our review of the record indicates that counsel's assertions were not supported by admissible evidence. There was no testimony explaining the cause of the erroneous proposal, when the error was discovered, when it was cured, or whether counsel proofread the document before sending it to Ms. Williams.

Therefore, we reverse the trial court's order for two independent reasons. First, the movants failed to present any sworn evidence to support their excusable neglect claim. Second, the explanation presented to the trial court by counsel, even if sworn to, was woefully insufficient to establish excusable neglect.

We recognize that on remand, Christopher Fernandez again may seek relief from the proposal for settlement. We offer a brief discussion on the issue but do not seek to provide an answer in advance.

B. Section 798.79

We first note that when a proposal for settlement has been made and accepted, a court's decision to rescind it should not be made lightly. It has long been recognized that the statutory purpose of section 768.79, Florida Statutes (2018), is to encourage the settlement and resolution of civil lawsuits. *United Servs. Auto.*

Ass'n. v. Behar, 752 So. 2d 663, 664 (Fla. 2d DCA 2000). To achieve this purpose, courts may award attorney fees against a party who declined to accept a reasonable offer and who unnecessarily continues the existing litigation. *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 222 (Fla. 2003).

In order to determine if the sanction is legally authorized, our courts "are required to strictly construe the provisions of the offer of judgment statute, section 768.79, and [Florida Rule of Civil Procedure] 1.442." *Atl. Civ., Inc. v. Swift*, 271 So. 3d 21, 24 (Fla. 3d DCA 2018). This court has noted that proposals for settlement "made under the offer of judgment statute must strictly conform to the requirements of the statute and rule" because an award thereunder is in derogation of the common law. *Bright House Networks, LLC v. Cassidy*, 242 So. 3d 456, 458-59 (Fla. 2d DCA 2018).

Because proposals for settlement are governed by section 768.79, the statute must be examined to determine whether it allows a party to rescind the proposal. The answer to this question is critical because it impacts the idea that "proposals for settlement are intended to end judicial labor, not create more." *Lucas v.*

Calhoun, 813 So. 2d 971, 973 (Fla. 2d DCA 2002), *cited with approval in State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1079 (Fla. 2006).[1]

In interpreting a statute to discern its meaning this court is first required to examine its text. The words used to craft the statute matter as "[t]he words in the statute are the best guide to legislative intent." *Nichols* at 1076; *see also State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) ("When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. . . . Instead, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent." (citing *Lee Cty. Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002))).

Here, Christopher Fernandez seeks to rescind or cancel an offer for settlement validly extended to Ms. Williams pursuant to section 768.79 on the basis of unilateral mistake. However, "unilateral mistake" is not statutorily identified as an escape hatch

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[1] Section 768.79 does not require a party to make an offer of judgment in a civil action for damages.

for offers extended pursuant to section 768.79. The legislature has specified one means of sanction avoidance by the party who did not accept the offer. Section 768.79(7)(a) expressly provides: "If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith." We make no assessment as to the application of this provision to the instant civil action.

Section 768.79(5) provides an offeror the ability to withdraw an offer: "An offer may be withdrawn in writing which is served before the date a written acceptance is filed." Thus, the statutory text provides a process for canceling an offer which must be accomplished prior to its acceptance. In the present case, Ms. Williams accepted the offer.

Further, considering these express statutory provisions, it follows that a party seeking relief from such provisions must identify the source of its authority to escape the legislatively crafted system.

Finally, we note that in the context of textual reading, the canon of construction *expressio unius est exclusio alterius* asserts that the express inclusion of one thing in a statute implies the

exclusion of other things from similar treatment.[2] In sum, context is critical.

C. Proposals for Settlement and Contract Law

> A contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing.
>
> An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction, making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding.

Contracts, Black's Law Dictionary (11th ed. 2019).

Nowhere in section 768.79 can the word "contract" be found. Its absence may suggest that the legislature did not intend for an offer pursuant to this statute to create a contract but rather only a sanction mechanism. Or perhaps a contract may be implied from the factual situation.

We observe that the requirements of section 768.79 are different from the process regularly found in contract formation. First, the terms of the process are dictated by the legislature. The

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[2] William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 208 (2d ed. 1997).

legislature also created a possible sanction when a party refuses to accept an offer. The sanction is not a bargained for term of a contract.

Further, when a party files an offer of judgment, the settlement terms are not subject to further negotiation. The responding party has but two alternatives, acceptance or rejection. The latter course creates an exposure to a financial sanction. The proposing party faces no similar sanction.

Finally, section 768.79 benefits the state more than the parties. The reduction of the number of civil cases results in a lessening demand of judicial services and, it is hoped, a lessening of a greater appropriation of tax dollars. The benefit to the parties to the civil litigation is but a collateral benefit.

III. CONCLUSION

In conclusion, we reverse the trial court's order and remand for further proceedings.

Reversed and remanded.

KHOUZAM and LUCAS, JJ., Concur.

Opinion subject to revision prior to official publication.