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CCM Condo. Ass'n v. Petri Positive Pest Control, Inc.

Supreme Court of Florida

September 9, 2021, Decided

No. SC19-861

Reporter
2021 Fla. LEXIS 1458 *; 2021 WL 4096926

CCM CONDOMINIUM ASSOCIATION, INC., etc., Petitioner, vs. PETRI POSITIVE PEST CONTROL, INC., etc., Respondent.

Notice: NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Prior History: [*1] Application for Review of the Decision of the District Court of Appeal Certified Great Public Importance/Certified Direct Conflict of Decisions. Fourth District - Case No. 4D18-1290. (Broward County).

Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n, 271 So. 3d 1001, 2019 Fla. App. LEXIS 6639, 2019 WL 1926276 (Fla. Dist. Ct. App. 4th Dist., May 1, 2019)

Core Terms

attorney's fees, costs, obtain a judgment, prejudgment interest, post-offer, calculation, damages, pre-offer, taxable costs, settlement offer, final judgment, settlement, formula, clearly erroneous, threshold, recede

Case Summary

Overview
HOLDINGS: [1]-Because the supreme court could not conclude that its prior interpretation of § 768.79, Fla. Stat. (2014), was clearly erroneous, it declined to recede from White v. Steak & Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002). Post-offer prejudgment interest was excluded from the "judgment obtained" that was compared to a rejected settlement offer when determining attorneys' fees under § 768.79. The supreme court answered the certified question of whether a property owners met the threshold amount of difference between an offer of judgment and the judgment entered for purposes of § 768.79 in the affirmative. It approved Petri Positive Pest Control, Inc. v. CCM Condominium Ass'n, 271 So. 3d 1001 (Fla. 4th DCA 2019), and disapproved Perez v. Circuit City Stores, Inc., 721 So. 2d 409 (Fla. 3d DCA 1998), and Phillips v. Parrish, 585 So. 2d 1038 (Fla. 1st DCA 1991).

Outcome
Certified question answered in the affirmative.

LexisNexis® Headnotes

Governments > Courts > Judicial Precedent

HN1 **Courts, Judicial Precedent**

In a case where the supreme court is bound by a higher legal authority, whether it be a constitutional provision, a statute, or a decision of the United States Supreme Court, its job is to apply that law correctly to the case before it. And when the supreme court is convinced that a precedent clearly conflicts with the law it is sworn to uphold, precedent normally must yield. But once the supreme court has chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason why not to recede from that precedent. When determining whether there is a valid reason not to recede, the critical consideration ordinarily will be reliance.

Civil Procedure > Settlements > Offers of Judgment > Rejection

Civil Procedure > Settlements > Offers of Judgment > Time Limitations

HN2[] Offers of Judgment, Rejection

Section 768.79(1), Fla. Stat. (2014), provides that if a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. Similarly, § 768.79(6)(b) provides that if a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expense, and attorney's fees incurred from the date the offer was served. Section 768.79(6) explains that judgment obtained in § 768.79(6)(b) means the amount of the net judgment entered, plus any post-offer settlement amounts by which the verdict was reduced.

Civil Procedure > Settlements > Offers of Judgment > Acceptances

Torts > Procedural Matters > Settlements > Settlement Offers

Civil Procedure > Settlements > Offers of Judgment > Rejection

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Civil Procedure > Settlements > Offers of Judgment > Making of Offers

HN3[] Offers of Judgment, Acceptances

In determining whether attorney's fees are to be awarded under § 768.79, Fla. Stat. (2014), settlement offers should be compared to what would be included in judgments if the judgments were entered on the date of the settlement offers because these amounts are the ones that are evaluated when determining the amount of offers and whether to accept offers. In determining both the amount of the offer and whether to accept the offer, the party necessarily must evaluate not only the amount of the potential jury verdict, but also any taxable costs, attorneys' fees, and prejudgment interest to which the party would be entitled if the trial court entered the judgment at the time of the offer or demand. Any offer of settlement shall be construed to include all damages, attorney fees, taxable costs, and prejudgment interest which would be included in a final judgment if the final judgment was entered on the date of the offer of settlement.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Civil Procedure > Settlements > Offers of Judgment > Rejection

HN4[] Judgment Interest, Prejudgment Interest

In the context of § 768.79, Fla. Stat. (2014), the plaintiff's recovery must be added to its attorney fees, costs, and prejudgment interest accrued up to the date of the offer to determine the total judgment. It is this judgment to which the offer must be compared in determining whether to award fees and costs.

Civil Procedure > Settlements > Offers of Judgment > Rejection

HN5[] Offers of Judgment, Rejection

The "judgment obtained" pursuant to § 768.79, Fla. Stat. (2014), includes the net judgment for damages and any attorneys' fees and taxable costs that could have been included in a final judgment if such final judgment was entered on the date of the offer. Thus, in calculating the "judgment obtained" for purposes of determining whether the party who made the offer is entitled to attorneys' fees, the court must determine the total net judgment, which includes the plaintiff's taxable costs up to the date of the offer and, where applicable, the plaintiff's attorneys' fees up to the date of the offer.

Civil Procedure > Settlements > Offers of Judgment > Making of Offers

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Civil Procedure > Settlements > Offers of Judgment > Rejection

HN6[] Offers of Judgment, Making of Offers

The term "judgment" under the offer of judgment statute must be defined, as it is under § 627.428, Fla. Stat., to

include not only the plaintiff's damages award, but also any attorney's fees, taxable costs, and prejudgment interest to which the plaintiff would have been entitled when the offer was made. It is this judgment to which the offer must be compared in determining whether to award fees and costs under both the offer of judgment statute and *§ 627.428*.

Civil Procedure > Settlements > Offers of Judgment > Rejection

HN7 **Offers of Judgment, Rejection**

Further, *§768.79(2), Fla. Stat.* (2014), provides that the offer shall be construed as including all damages which may be awarded in a final judgment. Attorney's fees and costs are not damages.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN8 **Standards of Review, Clearly Erroneous Review**

Because the supreme court cannot conclude that the supreme court's prior interpretation of *§ 768.79, Fla. Stat.* (2014), is clearly erroneous, it declines to recede from the formula the supreme court set forth in *White v. Steak & Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002)*.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN9 **Judgment Interest, Prejudgment Interest**

Post-offer prejudgment interest is excluded from the judgment obtained that is compared to a rejected settlement offer when determining entitlement to attorneys' fees under *§ 768.79, Fla. Stat.* (2014). Accordingly, the supreme court approves the Fourth District Court of Appeal's decision in *Petri Positive Pest Control, Inc. v. CCM Condominium Ass'n, 271 So. 3d 1001 (Fla. 4th DCA 2019)*, and disapproves the Third District Court of Appeal's decision in *Perez v. Circuit City Stores, Inc., 721 So. 2d 409 (Fla. 3d DCA 1998)*, and the First District Court of Appeal's decision in *Phillips v. Parrish, 585 So. 2d 1038 (Fla. 1st DCA 1991)*.

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Mark D. Tinker, Tampa, Florida, and Sanaz Alempour of Cole, Scott & Kissane, P.A., Fort Lauderdale, Florida, for Respondents.

Judges: POLSTON, J. LABARGA, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur. CANADY, C.J., dissents with an opinion, in which LAWSON, J., concurs.

Opinion by: POLSTON

Opinion

POLSTON, J.

We review the Fourth District Court of Appeal's decision in *Petri Positive Pest Control, Inc. v. CCM Condominium Ass'n, 271 So. 3d 1001 (Fla. 4th DCA 2019)*, in which the Fourth District certified the following question of great public importance:

> FOR PURPOSES OF CALCULATING WHETHER A PLAINTIFF HAS MET THE THRESHOLD AMOUNT OF DIFFERENCE BETWEEN AN OFFER OF JUDGMENT AND THE JUDGMENT ENTERED FOR PURPOSES OF *SECTION 768.79, FLORIDA STATUTES*, MUST POST-OFFER PREJUDGMENT INTEREST BE EXCLUDED FROM THE AMOUNT OF THE "JUDGMENT OBTAINED"?

Id. at 1007. In its **[*2]** decision, the Fourth District also certified conflict with the Third District Court of Appeal's decision in *Perez v. Circuit City Stores, Inc., 721 So. 2d 409 (Fla. 3d DCA 1998)*, and the First District Court of Appeal's decision in *Phillips v. Parrish, 585 So. 2d 1038 (Fla. 1st DCA 1991)*. *Petri, 271 So. 3d at 1007*.[1]

Based upon this Court's precedent and as explained below, we answer the certified question in the affirmative, approve the Fourth District's decision in *Petri*, and disapprove the Third District's decision in

[1] We have jurisdiction. *See art. V, § 3(b)(4), Fla. Const.*

Perez and the First District's decision in *Phillips* to the extent they are inconsistent with our decision today.

I. BACKGROUND

The Fourth District described the background of this case as follows:

> In 2013, the appellee/plaintiff, CCM Condominium Association, Inc., sued the appellant/defendant, Petri Positive Pest Control, Inc., for negligence and breach of contract regarding the parties' contract for Petri to address a termite problem at CCM's property. Petri answered, denying the allegations. CCM served an amended offer of judgment in 2014, pursuant to *section 768.79, Florida Statutes*. It offered to settle all of CCM's claims for damages, including punitive damages, attorney's fees, costs, and interest, for $500,000. Petri rejected the offer.
>
> Following a trial in 2016, the jury found in favor of CCM on its breach of contract claim, and it awarded **[*3]** CCM $551,881 in damages. CCM submitted a proposed final judgment, requesting $551,881 in damages, and an additional $84,295.60 in prejudgment interest calculated by an accountant, with a per diem rate for each day. This amount included both pre-offer of settlement and post-offer of settlement interest. The court entered judgment based on those calculations for a total of $636,326.90. CCM then moved to tax costs, which the court granted in the amount of $73,579.21.
>
> CCM moved for attorney's fees pursuant to *section 768.79, Florida Statutes*, the offer of judgment statute, contending that its judgment of $636,326.90, inclusive of interest, exceeded the offer by more than 25%. Thus, CCM was entitled to an award of attorney's fees incurred. Petri objected, contending that in accordance with *White v. Steak & Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002)*, the amount of the plaintiff's total recovery included only its attorney's fees, costs, and prejudgment interest accrued up to the date of the offer of judgment. Without the post-offer prejudgment interest and costs, CCM had not met the threshold amount of $625,000.
>
> The court granted CCM's motion for attorney's fees. It concluded that *White* addressed only pre-offer costs in relation to a plaintiff's "judgment obtained," not prejudgment **[*4]** interest. Relying on *Perez v. Circuit City Stores, Inc., 721 So. 2d 409 (Fla. 3d DCA 1998)*, the court ruled that prejudgment interest is included in the "judgment obtained" for *section 768.79* purposes. The court held a hearing to determine the amount of attorney's fees, and the parties ultimately agreed on the amount, leaving the issue of entitlement for this appeal.

Petri, 271 So. 3d at 1002-03.

On appeal, the Fourth District reversed the award of attorney's fees based upon this Court's precedent, although it concluded that the plain meaning of *section 768.79* did not support the precedent. The Fourth District held that this Court's decisions in *White* and *Shands Teaching Hospital & Clinics, Inc. v. Mercury Insurance Co. of Florida, 97 So. 3d 204 (Fla. 2012)*, required the exclusion of post-offer prejudgment interest from the "judgment obtained" when determining entitlement to attorney's fees pursuant to *section 768.79*. The Fourth District explained that its conclusion, that only pre-offer prejudgment interest is included in the calculation, conflicts with the Third District's decision in *Perez* and the First District's decision in *Phillips*. Therefore, the Fourth District certified conflict with *Perez* and *Phillips*, both pre-*White* cases. It also certified the above question of great public importance.

II. ANALYSIS

CCM argues that the plain meaning of *section 768.79* does not exclude post-offer prejudgment interest from the "judgment obtained" that is **[*5]** compared to a rejected settlement offer when determining whether to award attorneys' fees under the offer of judgment statute. Petri counters that this Court in *White* already held that post-offer prejudgment interest is to be excluded and that the *White* formula has been consistently and workably applied and reaffirmed for nearly two decades. Because this Court's precedent is not clearly erroneous, we decline to recede from the *White* formula.

HN1[↑] This Court recently explained that "[i]n a case where we are bound by a higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court—our job is to apply that law correctly to the case before us." *State v. Poole, 292 So. 3d 694, 713 (Fla. 2020)*. And "[w]hen we are convinced that a precedent clearly conflicts with the law we are sworn to uphold, precedent normally must yield." *Id.* "But once we have chosen to reassess a precedent

and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent." *Id.* When determining whether there is a valid reason not to recede, "[t]he critical consideration ordinarily will be reliance." *Id.*

HN2[↑] Section 768.79(1), Florida Statutes (2014) (emphasis added), provides **[*6]** that "[i]f a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a *judgment* in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand." Similarly, section 768.79(6)(b), Florida Statutes (2014) (emphasis added), provides that "[i]f a plaintiff serves an offer which is not accepted by the defendant, and if the *judgment obtained* by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expense, and attorney's fees . . . incurred from the date the offer was served." Section 768.79(6), Florida Statutes (2014) (emphasis added), explains that "judgment obtained" in subsection (6)(b) "means the amount of the *net judgment entered*, plus any postoffer settlement amounts by which the verdict was reduced."

HN3[↑] In *White* this Court concluded that, in determining whether attorney's fees are to be awarded under section 768.79, settlement offers should be compared to what would be included in judgments if the judgments were entered on the date of the settlement offers because these amounts are the ones that are evaluated when determining **[*7]** the amount of offers and whether to accept offers. *See* 816 So. 2d at 550-51. This Court in *White* reasoned as follows:

> In determining both the amount of the offer and whether to accept the offer, the party necessarily must evaluate not only the amount of the potential jury verdict, but also any taxable costs, attorneys' fees, and prejudgment interest to which the party would be entitled if the trial court entered the judgment at the time of the offer or demand. As we stated in Danis Industries Corp. v. Ground Improvement Techniques, Inc., 645 So. 2d 420, 421-22 (Fla. 1994):
>
> > [A]ny offer of settlement shall be construed to include all damages, attorney fees, taxable costs, and prejudgment interest which would be included in a final judgment if the final judgment was entered on the date of the offer of settlement.
>
> Id. at 421-22. We reaffirmed this principle in our recent decision in Scottsdale Insurance. Co. v. DeSalvo, 748 So. 2d 941, 944 n.3 (Fla. 1999), where we explained***HN4***[↑] that the plaintiff's "recovery" must be added to its "attorney fees, costs, and prejudgment interest" accrued up to the date of the "offer" to determine the total "judgment." It is this judgment to which the offer must be compared in determining whether to award fees and costs. *Id.*
>
> ***HN5***[↑] In summary, we conclude that the "judgment obtained" pursuant to section 768.79 includes the net judgment for damages and any attorneys' fees and taxable **[*8]** costs that could have been included in a final judgment if such final judgment was entered on the date of the offer. Thus, in calculating the "judgment obtained" for purposes of determining whether the party who made the offer is entitled to attorneys' fees, the court must determine the total net judgment, which includes the plaintiff's taxable costs up to the date of the offer and, where applicable, the plaintiff's attorneys' fees up to the date of the offer.

Id. (footnotes omitted).

Then, in State Farm Mutual Automobile Insurance Co. v. Nichols, 932 So. 2d 1067, 1074 (Fla. 2006), this Court reaffirmed the *White* formula, which we described as follows:

> In White v. Steak & Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002), ***HN6***[↑] we held that the term "judgment" under the offer of judgment statute must be defined—as it is under section 627.428—to include not only the plaintiff's damages award, but also any attorney's fees, taxable costs, and prejudgment interest to which the plaintiff would have been entitled when the offer was made. Id. at 551. "It is this judgment to which the offer must be compared in determining whether to award fees and costs" under both the offer of judgment statute and section 627.428. *Id.* (citing DeSalvo, 748 So. 2d at 944 n.3).

Additionally, in Shands, 97 So. 3d at 213, this Court held that a trial court properly calculated the "judgment obtained" as including pre-offer prejudgment interest pursuant to the *White* ***[*9]*** formula.

Following the formula that this Court first set forth in

White, the district courts have consistently excluded amounts that were not present on the date of the offer, including damages for claims that had not yet been added. *See* Palmentere Bros. Cartage Serv. v. Copeland, 277 So. 3d 729, 733 (Fla. 1st DCA 2019) ("Because punitive damages were not part of the case on the date of the offer of settlement, the calculation of the 'net judgment' and 'judgment obtained' required in section 768.79(6)(b), could not include the amount of the punitive damages verdict."); R.J. Reynolds Tobacco Co. v. Lewis, 275 So. 3d 747, 749 (Fla. 5th DCA 2019) (explaining that "it is clear that under *White*, a court may only properly consider those costs that were already taxable on the date the PFS was filed," and holding that the experts' costs were not taxable because they had not been deposed and did not testify); Diecidue v. Lewis, 223 So. 3d 1015, 1017 n.2 (Fla. 2d DCA 2017) ("The majority of this cost award was not considered when calculating the necessary twenty-five percent margin in section 768.79(1) because the costs were not incurred on [the date of the offer]."); UCF Athletics Ass'n v. Plancher, 121 So. 3d 616, 618-19 (Fla. 5th DCA 2013) (explaining that "[f]or the purpose of the offer of judgment statute, the judgment obtained includes the net judgment for damages and any attorney's fees and taxable costs that could have been included in a final judgment if such final judgment was entered on the day of the offer," **[*10]** and reversing the award of attorneys' fees because "[h]ad the trial court properly ruled [on the issue of sovereign immunity], on the day the offer was made, the most Appellee would have been entitled to recover from UCFAA was $200,000, an amount much less than the offer Appellee made to settle the case"); Nilo v. Fugate, 30 So. 3d 623, 625 (Fla. 1st DCA 2010) ("Only those costs incurred pre-demand may be considered in determining whether the total judgment meets the statutory threshold."); Segundo v. Reid, 20 So. 3d 933, 938 (Fla. 3d DCA 2009) ("[T]o require the defendant to pay attorney's fees as a sanction for 'unreasonably' rejecting the plaintiff's proposal for settlement would penalize the defendant for damages not pled nor proven until after the proposal for settlement was rejected and permit the plaintiff to benefit from the changing nature of his claim after the proposal for settlement expired."); Segui v. Margill, 864 So. 2d 518, 518 (Fla. 5th DCA 2004) ("[*White*] do[es] not support the award of attorney's fees in the instant case because no attorney's fees had accrued as of the date of the offer of settlement."); *Amador v. Walker, 862 So. 2d 729, 731 (Fla. 5th DCA 2003)* (rejecting the argument that "[t]he lesson and holding of *White* is that all taxable costs, pre-offer and post-offer, are to be included in determining the 'judgment obtained'").

In fact, as Petri notes, CCM does not cite a decision **[*11]** after *White* that stands for the proposition that post-offer prejudgment interest is included in the "judgment obtained." Even the two decisions with which the Fourth District certified conflict are pre-*White* decisions. *See* Petri, 271 So. 3d at 1007 (certifying conflict with *Perez*, which was decided by the Third District in 1998, and *Phillips*, which was decided by the First District in 1991). Moreover, as Petri argued during oral argument, the *White* formula appears somewhat uniquely clear and consistently applied in Florida's related jurisprudence.

When considering the text of section 768.79 as a whole and in context, we cannot conclude that this Court's precedent setting forth the *White* formula is "clearly erroneous." Poole, 292 So. 3d at 713. We simply do not have a definite and firm conviction that this Court's prior interpretation of the offer of judgment statute and the terms "judgment," "judgment obtained," and "net judgment entered" is wrong. *Cf.* United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948) ("A finding [in an action tried without a jury] is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."); Branch v. Sec'y, Fla. Dep't of Corr., 638 F.3d 1353, 1356 (11th Cir. 2011) ("A finding is clearly erroneous when we are left **[*12]** with the definite and firm conviction that it is wrong."); Tropical Jewelers Inc. v. Bank of Am., N.A., 19 So. 3d 424, 426 (Fla. 3d DCA 2009) (same).

CCM claims that the language of section 768.79(6) defining "judgment obtained" as the "net judgment entered," means that all amounts awarded in any judgment in the case are to be used for comparison to the offer, including all prejudgment interest, all costs, and all attorney's fees. However, the term "net judgment entered" does not automatically include attorney's fees, interest, or costs. ***HN7***[⬆] Further, section 768.79(2) provides that "[t]he offer shall be construed as including all damages which may be awarded in a final judgment." Attorney's fees and costs are not damages. *See* First Specialty Ins. Co. v. Caliber One Indem. Co., 988 So. 2d 708, 714 (Fla. 2d DCA 2008); Golub v. Golub, 336 So. 2d 693, 694 (Fla. 2d DCA 1976). It was only by interpreting the phrase "net judgment entered," which is not defined in the statute, that this Court determined that pre-offer attorneys' fees, pre-offer costs, and pre-offer prejudgment interest should be included in the "judgment obtained."

Accordingly, HN8[↑] because we cannot conclude that this Court's prior interpretation of section 768.79 is clearly erroneous, we decline to recede from the formula this Court set forth in *White*. *See* Poole, 292 So. 3d at 713.

III. CONCLUSION

HN9[↑] Based upon this Court's precedent from which we decline to recede, we hold that post-offer prejudgment interest is excluded from the **[*13]** "judgment obtained" that is compared to a rejected settlement offer when determining entitlement to attorneys' fees under section 768.79. Accordingly, we answer the certified question in the affirmative, approve the Fourth District's decision in *Petri*, and disapprove the Third District's decision in *Perez* and the First District's decision in *Phillips* to the extent they are inconsistent with this decision.

It is so ordered.

LABARGA, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur. CANADY, C.J., dissents with an opinion, in which LAWSON, J., concurs.

Dissent by: CANADY

Dissent

CANADY, C.J., dissenting.

The majority rest its decision on the conclusion that the question presented is settled by our precedents and there is not an adequate basis for disturbing those precedents. But as the Fourth District correctly acknowledged, this Court "has never squarely addressed [the] issue" presented for decision here. Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n, 271 So. 3d 1001, 1002 (Fla. 4th DCA 2019). Because we have no applicable precedent and the result reached by the majority is detached from the text of the statute, I dissent. I would conclude that post-offer prejudgment interest must be included in calculating the "judgment obtained" under section 768.79, answer the certified question in the negative, and quash the decision on review. **[*14]**

"Not all text within a judicial decision serves as precedent. That's a role generally reserved only for holdings: the parts of a decision that focus on the legal questions actually presented to and decided by the court." Bryan A. Garner et al., *The Law of Judicial Precedent* 44 (2016). "A decision's authority as precedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome. The assumptions a court uses to reach a particular result do not themselves create a new precedent or strengthen existing precedent." *Id.* at 84.

Here, the primary authority on which the majority relies, White v. Steak & Ale of Florida, Inc., 816 So. 2d 546 (Fla. 2002), stated that the "question presented" was "whether a prevailing party's *pre-offer taxable costs* are included for purposes of calculating the 'judgment obtained.'" Id. at 549 (emphasis added). The framing of the issue by the petitioner and the Court in *White* left aside the issue of post-offer taxable costs. So the Court had no occasion to decide whether post-offer taxable costs—much less post-offer prejudgment interest—should be included in the calculation of the amount of the judgment obtained. Of course, in *White* any argument over post-offer costs would have been meaningless, **[*15]** since the 25%-of-offer threshold was crossed once pre-offer costs were included in the calculation of the judgment obtained. In *White*, the holding of the Court turned on its rejection of decisions that had excluded *all costs* from the calculation of the judgment obtained. Id. at 550. The Court reasoned that costs were properly considered in "determining the judgment threshold because a prevailing party is entitled to a judgment for taxable costs." *Id.* That resolved the issue presented to the Court for decision in *White*.

What *White* went on to say about costs, fees and interest "to which the party would be entitled if the trial court entered the judgment at the time of the offer or demand," *id.*, was not necessary to decide the issue presented. *See* id. at 550-51. Indeed, the issue presented effectively assumed at least that post-offer costs would not be included in the calculation of the judgment obtained. But such an assumption that is not necessary to the resolution of the issue actually presented is not transformed into a holding even if the court adopts the assumption.

The majority's reliance on Shands Teaching Hospital & Clinics, Inc. v. Mercury Insurance Co. of Florida, 97 So. 3d 204 (Fla. 2012), is similarly misplaced. There is no indication in the *Shands* opinion that any argument was presented to the Court **[*16]** regarding post-offer costs and post-offer prejudgment interest. In any event, the award of fees sought under section 768.79 was defeated without any need to consider post-offer costs

or post-offer prejudgment interest. *See* *id. at 214*. So—just as in *White*—that issue was irrelevant to the disposition of the *section 768.79* issue in the case.

In *State Farm Mutual Automobile Insurance Co. v. Nichols, 932 So. 2d 1067, 1074 (Fla. 2006)*, the Court did refer to the pre-offer language of *White* in providing background, but the reference had no bearing on the issues actually presented and decided. *Nichols* held "that the offer of judgment statute applies to PIP suits" but that the offer at issue was invalid because it "was too ambiguous." *Id. at 1080*. Given the invalidity of the offer, there was no need for the Court to consider the question presented in this case or any other question concerning the calculation of the judgment obtained. *Nichols* by no means established or reaffirmed any precedent relevant to the issue in this case.

A fair reading of the text of the statute cannot support the interpretation articulated in the statements from *White* relied on by the majority. As the Fourth District explains, the authorities cited in *White* to support its discussion that is relevant to post-offer fees, costs and interest are cases interpreting **[*17]** a different statute, *section 627.428, Florida Statutes*, which provides for the award of prevailing party fees to an insured in litigation against an insurer. That statute is structured in an entirely different manner than *section 768.79*. There is no relevant textual similarity and thus no basis for applying the interpretation of one statute to the other statute. The pertinent statements from *White* thus are of very dubious provenance. In issuing those statements, the *White* opinion simply did not engage the relevant provisions of *section 768.79*.

There is no path from the statutory language of *section 768.79*—"net judgment entered"—to the meaning adopted by the majority—a hypothetical judgment equivalent to "what would be included in judgments if the judgments were entered on the date of the settlement offers." Majority op. at 6. The legislature certainly could have enacted a statute with such a meaning. Indeed, the legislature has enacted a statute containing a very similar provision. *Section 45.061, Florida Statutes* (2020), which applies to offers of settlement for causes of action that accrued on or before the effective date of the statute in 1990, contains a provision defining "the amount of the judgment" as "the total amount of money damages awarded plus the amount of costs and expenses **[*18]** reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer." *§ 45.061(2)(b), Fla. Stat.* So the legislature certainly knows how to clearly exclude post-offer costs and expenses from the definition of the amount of judgment used to determine whether an award is to be made under an offer of judgment statute.

In previously rejecting particular statutory interpretations, "we have pointed to language in other statutes to show that the Legislature 'knows how to' accomplish what it has omitted in the statute in question." *Cason v. Fla. Dep't of Mgmt. Servs., 944 So. 2d 306, 315 (Fla. 2006)*. "[W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent." *Olmstead v. F.T.C., 44 So. 3d 76, 82 (Fla. 2010)* (alteration in original) (quoting 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 51:2 (7th ed. 2008)). The omission from *section 768.79* of a provision similar to the pre-offer provision of *section 45.061* strongly militates against the result reached by the majority.

LAWSON, J., concurs.

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Garcia v. Ins. Exch. of Am. Corp.

Court of Appeal of Florida, Third District

September 8, 2021, Opinion Filed

No. 3D21-387

Reporter
2021 Fla. App. LEXIS 12795 *; 2021 WL 4073052

Arays D. Granada Garcia, Appellant, vs. The Insurance Exchange of America Corporation, Appellee.

Notice: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Prior History: [*1] An Appeal from a non-final order from the Circuit Court for Miami-Dade County, David C. Miller, Judge. Lower Tribunal No. 20-13091.

Core Terms

arbitration

Counsel: Annesser Armenteros, PLLC, and John W. Annesser and Megan Conkey Gonzalez, for appellant.

Jason M. Wandner, P.A., and Jason M. Wandner, for appellee.

Judges: Before FERNANDEZ, C.J., and LOGUE and BOKOR, JJ.

Opinion

PER CURIAM.

A party may waive its contractual right to arbitration by participating in litigation concerning an arbitrable issue. *See* *Fine Decorators, Inc. v. Argent Glob. (Bermuda), Ltd., 919 So. 2d 604, 605-06 (Fla. 3d DCA 2006)*. "Waiver in this connection does not depend on timing of the motion to compel arbitration . . . but rather on the prior taking of an inconsistent position by the party moving therefor." *Ojus Indus., Inc. v. Mann, 221 So. 2d 780, 782 (Fla. 3d DCA 1969)*.

Affirmed.

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Burke v. Soles

Court of Appeal of Florida, Fourth District

August 18, 2021, Decided

No. 4D20-1968

Reporter
2021 Fla. App. LEXIS 12082 *; 46 Fla. L. Weekly D 1854; 2021 WL 3641448

TERRI BURKE, Appellant, v. MICHELLE SOLES, Appellee.

Notice: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Prior History: **[*1]** Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Stefanie C. Moon, Judge; L.T. Case No. DVCE 20-4131.

Core Terms

trial court, excusable neglect, injunction, final judgment, motion for rehearing, evidentiary hearing, final hearing, grant relief, violence, repeat, failure to appear, requested relief, deny a motion, pro se, technological, authorizes, conducting, scheduled, awry, gone

Counsel: Jason H. Haber of Haber Blank, LLP, Fort Lauderdale, for appellant.

No appearance for appellee.

Judges: DAMOORGIAN, J. LEVINE and KUNTZ, JJ., concur.

Opinion by: DAMOORGIAN

Opinion

DAMOORGIAN, J.

Terri Burke challenges the trial court's final judgment of injunction for protection against repeat violence entered against her at the behest of appellee Michelle Soles and the denial of her motion for rehearing of that injunction. Concluding that the trial court erred in denying the motion for rehearing without conducting a hearing, we reverse and remand for further proceedings.

On July 23, 2020, appellee filed a petition for injunction for protection against repeat violence against Burke. That same day, the trial court issued a temporary injunction and set the matter for final hearing on August 3, 2020. Due to the ongoing COVID-19 pandemic, the final hearing was scheduled as a Zoom hearing. Following the scheduled Zoom hearing, which Burke did not attend, the trial court issued the final judgment of injunction for protection against repeat violence. Burke, acting pro se, thereafter filed **[*2]** a timely motion for rehearing and to vacate or set aside the final judgment. Therein, Burke asserted: "I was on Zoom it appears that there may have been a tech[nological] problem. I was there." The trial court denied the motion for rehearing without conducting a hearing.

Florida Rule of Civil Procedure 1.540(b) authorizes a trial court to grant a party relief from a final judgment for excusable neglect. *Fast Funds, Inc. v. Aventura Orthopedic Care Ctr., 279 So. 3d 168, 171 (Fla. 4th DCA 2019)*. *Rule 1.530*, which governs motions for rehearing, also authorizes a trial court to grant a party relief for excusable neglect. *Id.* ("[E]xcusable neglect causing a party to fail to appear for a final hearing has been grounds for granting relief under *rule 1.530*."). "Excusable neglect" as a ground for granting relief from judgment is found "[w]here 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." *Locke v. Whitehead, 2021 Fla. App. LEXIS 9401, 46 Fla. L. Weekly D1485, D1486 (Fla. 4th DCA June 23, 2021)* (alteration in original) (emphasis removed) (quoting *Lloyd's Underwriter's at London v. Ruby, Inc., 801 So. 2d 138, 139 (Fla. 4th DCA 2001)*). If a motion sets forth a colorable entitlement to relief based on excusable neglect, the trial court should either conduct a limited evidentiary hearing on the motion or grant the requested relief. *Waters v. Childers, 198 So. 3d 1007, 1008 (Fla. 1st DCA 2016)* ("If the motion is facially sufficient and not refuted by the record, the trial court should **[*3]** either hold an evidentiary hearing on the motion or grant relief.").

Here, Burke explained in the motion for rehearing that her failure to appear for the Zoom hearing was due to technological problems. A claim that the failure to appear was caused by technological difficulties is the type of "system gone awry" that may constitute excusable neglect. Thus, although Burke's pro se motion does not specifically reference *rule 1.540* or *rule 1.530*, and does not include the words "excusable neglect," the motion nonetheless suggests a case of excusable neglect. *See* *Chancey v. Chancey, 880 So. 2d 1281, 1282 (Fla. 2d DCA 2004)* ("We realize that [appellant's] allegations in support of setting aside the default and judgment are buried within numerous letters and motions and are not artfully stated. But he is a pro se litigant and his pleadings should be liberally construed. At the least, [appellant's] filings may suggest a case of excusable neglect." (internal citations omitted)). Accordingly, we reverse the denial of the motion for rehearing and remand with instructions for the trial court to either conduct a limited evidentiary hearing on the motion or grant the requested relief.

Reversed and remanded.

LEVINE and KUNTZ, JJ., concur.

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