DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PHILIP MORRIS USA, INC.,
Appellant,

v.

JAMES NAUGLE as Personal Representative of the Estate of **LUCINDA NAUGLE,**
Appellee.

Nos. 4D20-953 and 4D20-1287

[March 2, 2022]

Consolidated appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack B. Tuter, Judge; L.T. Case No. CACE-07-036736 (07).

Geoffrey J. Michael of Arnold & Porter Kaye Scholer LLP, Washington, DC, and Andrew S. Brenner and Ryan B. Witte of Boies, Schiller & Flexner, LLP, Miami, for appellant.

Kara Rockenbach Link and Daniel M. Schwarz of Link & Rockenbach, PA, West Palm Beach, and John Uustal of Kelley Uustal, PLLC, Fort Lauderdale, for appellee.

KUNTZ, J.

Philip Morris USA, Inc. appeals the circuit court's Final Judgment on Attorneys' Fees and Costs. We agree the court erred when it relied on the testimony of James Naugle's expert witness. So we reverse the final judgment and remand for further proceedings consistent with this opinion.

Background

In 2012, we affirmed a final judgment for James Naugle, as personal representative of Lucinda Naugle, as to liability for compensatory and punitive damages but reversed the $300 million damages award. *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944, 949 (Fla. 4th DCA 2012),

disapproved of by Philip Morris USA, Inc. v. Russo, 175 So. 3d 681 (Fla. 2015).[1]

After we remanded the case for a new trial on damages, the jury returned a second verdict for Naugle for over $11 million. Then Naugle moved for attorney's fees and costs based on a proposal for settlement under section 768.79, Florida Statutes (2008).

The parties stipulated that they would not call their lawyers to testify at the fee hearing and would limit their witnesses to their respective fee experts.

i. *Naugle's Fee Expert*

Naugle's fee expert was a retired circuit court judge. At a deposition, the expert testified that the $1,000-$1,500 rates Naugle requested were reasonable. He explained that under *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), the "extraordinary" time and labor devoted to the case impacted his determination of the "hourly rates" Naugle's attorneys charged. When asked how the time and labor impacted his determination, he testified:

> I didn't analyze it in that fashion. I didn't say, okay, a lot of novelty, a lot of difficulty, let's jump [the rate] to $50 an hour. I didn't do that . . . I reviewed everything, everything, and made a determination as to whether or not those rates were reasonable, and I found them to be reasonable even though my initial impression when I saw the numbers, I thought [the rates were] high.

He also explained that the novelty and difficulty of the case justified "the rates" Naugle's attorneys requested. He stated that the "contingent nature of the fee justifies the award of a higher fee."

Other factors contributed to the expert's fee determination. The expert stated that the "[w]inners should make at least what the losers [make] . . . they should get at least the hourly rate that the highest paid lawyer on the defense team gets." He considered the number of lawyers

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[1] This is the fifth case in this Court arising from the underlying circuit court case. *Philip Morris USA, Inc. v. Naugle*, 225 So. 3d 828 (Fla. 4th DCA 2017); *Philip Morris USA, Inc. v. Naugle*, 182 So. 3d 885 (Fla. 4th DCA 2016); *Naugle v. Philip Morris USA, Inc.*, 133 So. 3d 1235 (Fla. 4th DCA 2014); *Philip Morris USA, Inc. v. Naugle*, 103 So. 3d 944 (Fla. 4th DCA 2012).

representing both parties. He also considered the punitive nature of fees for rejected proposals for settlement under section 768.79.

Philip Morris moved to preclude the expert's testimony on the basis that the expert's deposition testimony revealed that he relied on factors *Rowe* precluded and other factors Florida law did not recognize. Without relying on proper factors, Philip Morris argued that the expert's testimony was neither supported nor based on a reliable methodology, and therefore he was not qualified to testify at the fee hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court decided that Philip Morris had to challenge the expert's testimony "as you go along."

At the later hearing on Naugle's fee motion, the expert testified that Naugle's requested rates were "reasonable and fair." On direct examination, the expert attempted to clarify his deposition testimony:

> Q: [W]e know that the *Rowe* case suggests that some of the factors from both . . . the rule regulating the Florida Bar and the Rules of Civil Procedure don't apply to the fee, to establishing the hourly rate.
>
> A: The rate, that's correct.
>
> Q: Okay. All right. [Philip Morris] keeps suggesting to the Court that you considered those [factors] anyway in setting the rate. Is that true?
>
> A: I did not. You know, you can consider those particular [factors] that [Philip Morris] raised and should consider it for the total fee. Not for the rate . . . I didn't read my deposition . . . so I may have said "rate," but I apologize if I did. The *Rowe* factors can be considered, all of them can be considered for the total fee . . . Not the rate.
>
> Q: And that includes the reasonableness of the number of hours to which Philip Morris is objecting, right?
>
> A: Correct . . . And the novelty and the difficulty, things of that nature.

On cross-examination, the expert confirmed that the time and labor required; the novelty, complexity, and difficulty of the questions involved; the results obtained; and whether the fee was fixed or contingent were

factors under *Rowe* that could *not* be considered in determining the reasonable rate. He testified that he considered those factors "as [they] related to the total fee." He also acknowledged that he was incorrect in opining that a contingency fee justifies a higher rate but stated that the factors *Rowe* precluded as to the rate "should not be taken out of any analysis as to the total fee."

The expert reiterated his position that "winners should make at least what the losers make," stating, "that's my theory. I think that should be the case. There's no case law on it." He again testified that he considered the number of lawyers representing the parties as a factor affecting whether "the fee," not the rate, "goes up or down[.]" Finally, he confirmed his opinion that the fee award should be punitive based on the rejected proposal for settlement.

ii. *The Circuit Court's Rulings*

At the end of the fee hearing, the circuit court first determined the date it would use to decide the amount of reasonable fees. The court selected April 27, 2017—the date this Court affirmed the judgment adopting the jury's second damages award—as the date to determine the reasonable rate of fees. The court "consider[ed] the low rate it would have been in 2009, and the high rate it would have been if I used today's rates of 2019. So I'm making somewhat of a compromise in between. . . ."

As to the reasonableness of the fees, the circuit court explained:

> I think the truth probably lies somewhere between where [Naugle's expert fee witness] is on the really high end of this and where [Philip Morris's expert fee witness] is.
>
> Again, it's not like I can decide these things just on expert witnesses in these cases . . . I saw most every one of these lawyers who are on these spreadsheets work. I saw them all in the courtroom, both tobacco and the plaintiff's lawyers.
>
> So I do approach this from a unique perspective because I don't think I ever saw anybody in an *Engle* tobacco case, at least appear in front of me, that wasn't extraordinarily crafty at what they were doing.
>
> These were extraordinarily difficult issues that, as I said before, never before had I had to tackle. So the expertise by

> everybody involved, I thought everybody that appeared in front of me was extraordinary.

The court then issued rulings on the rates of Naugle's attorneys. Multiplying the reasonable hours expended by the reasonable hourly rates, the court awarded Naugle $5,328,725 in attorney's fees excluding prejudgment interest. The court later assessed $1,792,401.18 in prejudgment interest against Philip Morris.

Analysis

Philip Morris appeals the circuit court's fee judgment. We address one issue: whether the court erred when it denied Philip Morris's motion to exclude the testimony of Naugle's fee expert. We conclude error occurred and reverse.

First, Philip Morris argues that *Daubert* applies to expert testimony on attorney's fees. Naugle disagrees. But even if *Daubert* applies, he argues the circuit court need not have assessed the reliability of his expert's testimony given the trial court's relaxed "gatekeeping" function in bench trials.

We agree with Philip Morris that *Daubert* applies to expert testimony on attorney's fees, as the plain language of section 90.702, Florida Statutes (2019), does not offer any basis to decide otherwise. Furthermore, the United States Supreme Court addressed this exact issue in *Kumho Tire Co., Ltd. v. Carmichael*, holding that *Daubert*'s gatekeeping function applies to all expert testimony. 526 U.S. 137, 147-49 (1999); *see also Kemp v. State*, 280 So. 3d 81, 88 (Fla. 4th DCA 2019) (a court's "basic gatekeeping obligation applies not only to scientific testimony, but 'to all expert testimony'") (quoting *Kumho Tire Co., Ltd.*, 526 U.S. at 147).

We also partially agree with Naugle that the procedure followed by the gatekeeper can vary during a bench trial. *See, e.g.*, *United States v. Brown*, 415 F.3d 1257, 1268-69 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."). But even when that relaxed approach is taken, at some point the court must determine whether the evidence is admissible. *See, e.g.*, *Kan. City. S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (citing *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010)) ("Where a trial judge conducts a bench trial, the judge need not conduct a *Daubert* (or Rule 702) analysis before presentation of the evidence, even though [they] must

determine admissibility at some point."); *Cristin v. Everglades Corr. Inst.*, 310 So. 3d 951, 957 (Fla. 1st DCA 2020) ("[T]his does not mean that the trial court—even during a bench trial—has the discretion to decide not to perform the gatekeeper function at all.").

Ultimately, the circuit court needed to assess the relevance and reliability of Naugle's expert's testimony. At the hearing, Philip Morris noted that its *Daubert* objections challenged the reliability of the expert's methodology, not his qualifications. But the court found that Naugle's expert could testify because he had a "lifetime of experience" and "no one else" could testify about reasonable hourly rates "in a particularly complex case or a trial except for a lawyer or a judge." At no point after Philip Morris presented its *Daubert* objections did the court assess the reliability of Naugle's proposed expert testimony. Nor did the court consider whether the expert's testimony related to matters requiring his specialized knowledge.

The substance of the expert's testimony is revealing. Naugle's expert stated at his deposition that he did not analyze how the *Rowe* factor for time and labor expended impacted his opinion of the reasonableness of Naugle's requested rates. Instead, the expert explained that he "reviewed everything" and found the rates to be reasonable. He also failed to explain how the *Rowe* factors for the novelty and difficulty of the case and the contingency fee impacted his decision, stating only that those factors "justified" the rates requested.

At trial, the expert attempted to clarify his deposition testimony but failed to sufficiently do so. The expert testified that he considered the *Rowe* factors as to the total fee, not the rate, but again did not explain how those factors impacted his opinion. Nor did the expert explain how his position that "winners should make at least what the losers make" factored into his decision, stating only "that's my theory. I think that should be the case. There's no case law on it."

The circuit court correctly observed that the expert provided "pure opinion testimony based on a lifetime of experience." But the law requires more than experience alone; it requires the court to assess whether the expert's "reasoning or methodology properly can be applied to the facts in issue." *Kemp*, 280 So. 3d at 88-89 (citations and quotation marks omitted). Here, the expert "provide[d] no insight into what principles or methods were used to reach his opinion." *Giaimo v. Fla. Autosport, Inc.*, 154 So. 3d 385, 388 (Fla. 1st DCA 2014). With no insight into the principles, and with clear errors in methodology, the

court had little to assess. As a result, the court erred in refusing Philip Morris's request to exclude the testimony.

Finally, we recognize that a "judge as finder of fact is presumed to have disregarded any inadmissible evidence or improper argument." *Guzman v. State*, 868 So. 2d 498, 510–11 (Fla. 2003) (citing *First Atl. Nat'l Bank of Daytona Beach v. Cobbett*, 82 So.2d 870, 871 (Fla. 1955)). Here, however, the record does not allow us to conclude the court ignored the inadmissible testimony. On the contrary, the record shows that the court relied on it.[2]

Conclusion

The circuit court's attorney's fees and cost judgment is reversed, and the case is remanded for further proceedings.

Reversed and remanded.

LEVINE and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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[2] Our reversal renders the remaining issues moot. But, on remand, we caution the parties to avoid double compensation when determining the date used to set the rate of attorney's fees and any award of prejudgment interest. *See, e.g.*, *Gray ex rel. Alexander v. Bostic*, 613 F.3d 1035, 1046 (11th Cir. 2010) ("The district court effectively double-compensated the plaintiffs for delay in payment, and that is never appropriate."). We defer to the circuit court to resolve those issues, once again, on remand.

Third District Court of Appeal

State of Florida

Opinion filed February 23, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-1471
Lower Tribunal No. 16-27442

New Horizons Condominium Master Association, Inc.,
Appellant,

vs.

Robert Harding, et al.,
Appellees.

An appeal from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Scott J. Edwards, P.A., and Scott J. Edwards (Boca Raton), for appellant.

Mark Perlman, P.A., and Mark Perlman (Hollywood), for appellees.

Before SCALES, MILLER, and BOKOR, JJ.

MILLER, J.

In this garden-variety condominium dispute over assessments, appellant, New Horizons Condominium Master Association, Inc., challenges a final summary judgment granting declaratory relief and awarding monetary damages in favor of appellees, Robert Harding and Fifth Horizons Condominium, Inc. By way of the final judgment, the trial court compelled the disclosure of several years of audits and invalidated a budgetary allocation for cable services as ultra vires. On appeal, the Master Association contends that factual issues precluded summary judgment, and, regardless, the trial court erred in failing to consider whether the actions of its directors were protected from review as the product of a valid exercise of business judgment. We affirm in part and reverse in part.

BACKGROUND

The Master Association governs a condominium development in North Miami, Florida. It is comprised of seven member subdivisions, one of which is Fifth Horizons. Each subdivision has a separate community association. The Master Association provides common services to the sub-associations, including asphalt and parking lot maintenance, clubhouse and pool area amenities, common area lighting, landscaping, irrigation, and, as pertinent to this case, bulk cable and telecommunications services. These services are funded by assessments collected from the sub-associations.

The sub-associations have the authority to designate residents to serve as directors on the Master Association's Board (the "Board"). During the time period relevant to these proceedings, Harding was designated by Fifth Horizons to serve on the Board.

In late 2009, the Master Association entered into a contract with Comcast for the provision of cable services. Pursuant to the contractual terms, Comcast was obligated to provide cable services to all seven sub-associations. Each sub-association was charged with proportionally satisfying the cable costs, as assessed by the Master Association.

Several years into the contract, a dispute arose regarding payment, and Comcast demanded over $300,000.00 in arrearages from the Master Association. In early 2016, the Board convened to discuss a potential settlement. During the meeting, the Board drafted a budget which included a line-item expense for Comcast services in the amount of $248,000.00. After two subsequent meetings were prematurely terminated, purportedly due to Harding's conduct and a correlating inability to obtain a quorum, approval of the budget was delayed.

In the summer of 2016, the Board met and approved a settlement with Comcast in the amount of $100,000.00. Despite this approval, the Board

ratified the previously drafted budget allocating $248,000.00 for Comcast costs.[1]

Harding and Fifth Horizons then brought suit in the circuit court. In the operative complaint, they sought declaratory relief, alleging the budget, as developed, was ultra vires because it included assessments beyond that required to defray reasonable expenses.[2] Fifth Horizons further asserted it overpaid assessments for 2016 by $3,791.62. The Master Association counterclaimed, asserting claims of breach of contract and unjust enrichment and alleging Fifth Horizons engaged in a pattern of underpayment and withholding of assessments.

Harding and Fifth Horizons moved for final summary judgment. The Master Association countered with verified opposition and further raised the legal argument that the actions of its directors warranted business-judgment deference. Relying upon the evidentiary record, along with the failure by the Master Association to plead business-judgment deference as an affirmative defense, the trial court granted final summary judgment in favor of Fifth

[1] The settlement documents were executed several months later and retroactively terminated the contract.

[2] The complaint also sought injunctive relief, the disposition of which is not subject to this appeal.

Horizons and Harding on both the claims and counterclaims.[3] The instant appeal followed.

STANDARD OF REVIEW

We review both the grant of summary judgment and the application of the business judgment rule de novo. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

ANALYSIS

We affirm the compelled disclosure of audits without further discussion and turn our examination to whether the failure by the Master Association to plead the business judgment rule as an affirmative defense precluded its application. "[B]orn of the recognition that directors are, in most cases, more qualified to make business decisions than are judges," Royal Harbour Yacht Club Marina Condo. Ass'n, Inc. v. Maresma, 304 So. 3d 1268, 1269 (Fla. 3d DCA 2020) (quoting Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1458 n.20 (11th Cir. 1989)), "[t]he business judgment rule has been part of English and American common law for more than 200 years." Gerard V. Mantes & Emily S. Fields, The Business Judgment Rule, 99 Mich. B.J. 30, 30 (Jan. 2020). While "[t]he precise verbal formulation of [the] rule varies from jurisdiction to

[3] The lower court excised all purported overages from the projected 2016 budget, which had the effect of reducing Fifth Horizons' annual assessment by $3,791.62.

jurisdiction, and there are some substantive differences among the various versions of the rule . . . the essence of the rule is clear." Mark A. Sargent & Dennis R. Honabach, D&O Liability Handbook § I:3 (Sept. 2020) (footnote omitted). The rule protects officers and directors from judicial review of their acts, provided that "business judgments are made in good faith based on reasonable business knowledge." Action Against Directors and Officers—Business Judgment § 12:7.50 (2021).

In Florida, the business judgment rule has been codified by statute for corporations, limited liability companies, and not-for-profit corporations. See § 607.0831(1), Fla. Stat. (2021) ("A director is not personally liable for monetary damages to the corporation or any other person for any statement, vote, decision to take or not to take action, or any failure to take any action, as a director . . . ."); § 605.04093(1), Fla. Stat. ("A manager in a manager-managed limited liability company or a member in a member-managed limited liability company is not personally liable for monetary damages to the limited liability company, its members, or any other person for any statement, vote, decision, or failure to act regarding management or policy decisions . . . ."); § 617.0834(1), Fla. Stat. (extending business-judgment deference to nonprofit officers and directors). As drafted, these statutes protect directors

from liability under most circumstances, absent a showing of bad faith, self-dealing, or a violation of criminal law.

In conformity with these statutory and common law tenets, Florida courts have extended business-judgment deference to common interest associations, uniformly shielding "a condominium association's decision if that decision is within the scope of the association's authority and is reasonable—that is, not arbitrary, capricious, or in bad faith" from judicial review. Hollywood Towers Condo. Ass'n, Inc. v. Hampton, 40 So. 3d 784, 787 (Fla. 4th DCA 2010).

There are no reported Florida decisions holding that a party seeking to invoke business-judgment deference must raise the rule as an affirmative defense. Indeed, both the statutory language and a survey of persuasive authority from other jurisdictions suggest the contrary.

The statutes affording business-judgment protection render directors immune unless there is a showing of bad faith, self-dealing, or criminal conduct. Although the Florida Legislature could have defined the business judgment rule as an affirmative defense that the defendant must raise, it did not do so. See State v. Ellis, 723 So. 2d 187, 190 (Fla. 1998). Instead, it enacted a presumptive framework consistent with that adopted in other jurisdictions.

In this regard, whether formally codified or not, the business judgment rule is generally viewed as a historically accepted principle of managerial prerogative. See Bruce T. Rosenbaum, The Presumptions and Burdens of the Duty of Loyalty Regarding Target Company Defensive Tactics, 48 Ohio St. L.J. 273, 274 (1987); see also Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693, 701 (Wis. 2014) (second alteration in original) (quoting Reget v. Paige, 626 N.W.2d 302, 310 (Wis. Ct. App. 2001)) ("[T]he business judgment rule 'immunize[s] individual directors from liability and protects the board's actions from undue scrutiny by the courts.'"). Consistent with this view, the rule does not need to be raised in defensive pleadings to shield corporate conduct from judicial review. Instead, it applies presumptively by operation of law. See In re Great Lakes Comnet, Inc., 586 B.R. 718, 725 (Bankr. W.D. Mich. 2018) ("The business judgment rule is not an affirmative defense. Rather, it is a substantive and procedural presumption . . . ."); Kaye v. Lone Star Fund V (U.S.), L.P., 453 B.R. 645, 679 (N.D. Tex. 2011) ("[D]escribing the presumption created by the business judgment rule as an affirmative defense is, at best, a dubious characterization of the rule."); Marsalis v. Wilson, 778 N.E.2d 612, 616 (Ohio Ct. App. 2002) ("Civ.R. 8(B) [General rules of pleading] suggests that the defendants might be obligated to plead the business judgment rule as a

defense, though that is probably not required, since a presumption in defendants' favor exists by operation of law, whether or not it is pleaded."). Several cases even stand for the proposition that a party seeking to challenge a business decision must first establish facts rebutting the presumption of reasonableness. See Cuker v. Mikalauskas, 692 A.2d 1042, 1046 (Pa. 1997) (quoting Rosenfield v. Metals Selling Corp., 643 A.2d 1253, 1262 (Conn. 1994)) ("The fact is that liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labeled the business judgment rule. Shareholders challenging the wisdom of a business decision taken by management must overcome the business judgment rule."); Solomon v. Armstrong, 747 A.2d 1098, 1111–12 (Del. Ch. 1999) ("Under the business judgment rule, the burden of pleading and proof is on the party challenging the decision to allege facts to rebut the presumption."); Ferris Elevator Co., Inc. v. Neffco, Inc., 674 N.E.2d 449, 453 (Ill. App. Ct. 1996) ("The burden is on the party challenging the decision to present facts rebutting the presumption."); Oliveira v. Sugarman, 152 A.3d 728, 736 (Md. 2017) (quoting Boland v. Boland, 31 A.3d 529, 549 (Md. 2011)) ("To overcome the 'dangerous terrain' of the business judgment rule presumption, the plaintiff must assert facts that suggest the corporate

directors did not act in accordance with the rule."); Gantler v. Stephens, 965 A.2d 695, 706 (Del. 2009) ("Procedurally, the plaintiffs have the burden to plead facts sufficient to rebut that presumption."); Powell v. W. Ill. Elec. Coop., 536 N.E.2d 231, 235 (Ill. App. Ct. 1989) ("[T]he directors' decision is presumed proper, and the burden is properly placed on the shareholder plaintiffs to show that the directors are not now acting in good faith and independently in desiring to prosecute the lawsuit."); see also 13 Summ. Pa. Jur. 2d, Business Relationships § 8:75 (2021) ("Where there is a prima facie showing that the directors or majority shareholders have a self-interest in a particular corporate transaction, or that the board has acted fraudulently or in bad faith, the business judgment rule does not apply and the burden shifts to the directors to demonstrate that the transaction is intrinsically fair."). Against this weight of authority and in the absence of any controlling precedent to the contrary, we decline to engraft a pleading requirement into the law. See Lori McMillan, The Business Judgment Rule as an Immunity Doctrine, 4 Wm. & Mary Bus. L. Rev. 521, 569 (2013) ("As long as the conditions for the application of the business judgment rule are met, the courts will not assess the quality of the decision. This has a direct parallel to immunity.").

Here, the Master Association sought protection in the rule in its opposition to summary judgment, specifically alleging its quorum of directors acted with authority, neutrality, and good faith. Under this circumstance, the Board was not required to raise business-judgment deference as an affirmative defense.

Fifth Horizons alternatively argues, however, that the Board's actions were ultra vires, therefore not subject to business-judgment deference. In support of its position, it contends the amount allocated for cable within the budget exceeded that necessary to defray the costs of the settlement.

We reject this proposition on two grounds. First, because the parties sharply disputed the chronology of the settlement, development of the budget, and necessity for collecting assessments, the competing evidence of record created a factual issue incapable of resolution on summary judgment. Second, irrespective of the factual issues, this position overlooks a critical legal distinction.[4] Ultra vires acts are those performed without legal authority. They are therefore characterized as void on the basis that no power to act existed, even where proper procedural requirements are

[4] Two of our sister courts have determined that "the business judgment rule applies to ultra vires claims against the corporation itself." Share v. Broken Sound Club, Inc., 312 So. 3d 962, 971 (Fla. 4th DCA 2021); see also Yarnall Warehouse & Transfer, Inc. v. Three Ivory Bros. Moving Co., 226 So. 2d 887, 892 (Fla. 2d DCA 1969).

followed. See Liberty Couns. v. Fla. Bar Bd. of Governors, 12 So. 3d 183, 191–92 (Fla. 2009). Conversely, acts by a corporation that are within its realm of power, albeit imprudent or violative of a clear directive, are intra vires. See Hollywood Towers, 40 So. 3d at 787.

Here, the governing documents grant the Master Association "all of the powers and privileges granted to corporations not for profit" including "all of the powers incidental and reasonably necessary to implement and effectuate the purposes of the corporation." The bylaws further authorize the Master Association to adopt an annual budget, "contain[ing] the estimates of the cost of performing the functions of the [corporation]," and "[to] make, levy, and collect assessments against each condominium to defray the costs of the [corporation], and to use the proceeds of said assessment in the exercise of the powers and duties granted to the corporation." Because the Master Association was authorized to develop a budget and collect assessments from the sub-associations, inclusion of the challenged assessments in the budget constituted an intra vires act, and business-judgment deference was a salient consideration.

Accordingly, we affirm the compelled disclosure of past audits but reverse those portions of the judgment declaring the actions of the board ultra vires, dispensing with the Master Association's counterclaims, and

awarding damages to Fifth Horizons. Upon remand, the trial court is constrained to "look to the circumstances surrounding the [Master] Association's exercise of [business] judgment as they existed when the action was taken," rather than at the time suit was filed. Miller v. Homeland Prop. Owners Ass'n, Inc., 284 So. 3d 534, 538 (Fla. 4th DCA 2019).

Affirmed in part and reversed in part.

Third District Court of Appeal

State of Florida

Opinion filed March 2, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-0464
Lower Tribunal Nos. 19-AP-007-K, CE18090032

Nicholas Sheckler,
Petitioner,

vs.

Monroe County, Florida,
Respondent.

A Writ of Certiorari to the Circuit Court for Monroe County, Appellate Division, Timothy J. Koenig, Judge.

Andrew M. Tobin, P.A., and Andrew M. Tobin, for petitioner.

Peter H. Morris, Assistant Monroe County Attorney, for respondent.

Before LINDSEY, HENDON and BOKOR, JJ.

BOKOR, J.

Petitioner, Nicholas Sheckler, seeks second-tier certiorari relief from the circuit court appellate division's January 8, 2021 order. Because this court determines that the lower court's January 8, 2021 order did not apply the correct law and essentially denied Sheckler his day in court to argue the merits of this claim, we grant the petition.

In February 2018 Sheckler purchased a Hurricane Irma-damaged property in Big Pine Key, Florida. After an inspection by the county, the Big Pine Key property was declared unsafe and Sheckler was ordered to demolish the structure or seek permits to bring the structure up to code. Sheckler both applied for a building permit and submitted sealed building plans seeking approval to repair the property. While Sheckler's permit application was still pending, the Monroe County Code Enforcement Department notified Sheckler of five code violations. The notice set a hearing before a code compliance special magistrate. Neither Sheckler nor his attorney appeared. On June 27, 2019, the special magistrate entered a final order which: (1) assessed a $100.00 fine for each violation; (2) required compliance on or before August 26, 2019; and (3) provided for further fines if compliance was not achieved by that date. The next day, the final order was recorded as a lien. On August 29, 2019, Sheckler's building permit for the Big Pine Key property issued.

Some eight months later, Monroe County Code Compliance advised Sheckler by letter of the lien on the Big Pine Key property and that, because the violations had not been cured, the daily fines, accrued for 247 days, totaled $123,500.00, and continued to increase every day they were not paid. On February 18, 2020, Sheckler appealed the special magistrate's final order before the circuit court sitting in its appellate capacity. Sheckler's appeal argued, *inter alia*, that the final order was unconstitutional and violated due process. [1]

On the morning of November 4, 2020, notwithstanding the pendency of the appeal before the circuit court, Sheckler paid all outstanding fines. Later that day, the circuit court rendered a decision on Sheckler's appeal reversing the portion of the June 27, 2019 final order which imposed the fines and the lien based on those fines. The circuit court agreed with Sheckler and found that the procedure employed by the special magistrate "bypassed the statutory requirements of Fla. Stat. § 162.09" and violated the procedure

[1] Specifically, Sheckler argued that the special magistrate's final order violated due process because: (1) it was recorded as a lien on Sheckler's property without a compliance hearing; (2) it failed to notify Sheckler as to what was required to comply; (3) the fine was not authorized by law or was otherwise excessive; and (4) the multiple fines were unconstitutional as they resulted from essentially one violation.

to impose fines established by statute and confirmed by Massey v. Charlotte County, 842 So. 2d 142, 144 (Fla. 2d DCA 2003).

However, on December 4, 2020, Monroe County filed an amended motion for rehearing arguing that Sheckler's voluntary payment in full of the fine, prior to the court's determination, mooted Sheckler's appeal. The circuit court agreed, determining that Sheckler's payment of the lien rendered the due process challenge moot. Thus, in an opinion dated January 8, 2021, the circuit court vacated the November 4, 2020 opinion in favor of Sheckler and dismissed Sheckler's appeal as moot. Sheckler now seeks second-tier certiorari review of the circuit court's January 8, 2021 opinion, arguing that the court applied the incorrect law, resulting in a denial of due process.

On second-tier certiorari review, this court's inquiry is "limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law." Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995). Here, the circuit court, relying on Montgomery v. Department of Health & Rehabilitative Services, vacated its November 2020 opinion based on a finding that Sheckler's payment of the lien, in full, rendered his constitutional due process challenge moot. 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985) (explaining that "[a] case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the

appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief"). However, as explained below, the trial court applied the incorrect legal principle, which resulted in a denial of due process.

As Sheckler correctly notes, the law clearly establishes that the involuntary nature of his payment precludes a finding of mootness.[2] "Payment to avoid onerous penalties is generally considered [to be] involuntary or compulsory." Clements v. Roberts, 10 So. 2d 425, 427 (Fla. 1942); see also North Miami v. Seaway Corp., 9 So. 2d 705, 706 (Fla. 1942) (holding that payment of an illegal tax "to avoid a cloud on the real estate or to avoid the imposition of substantial burdens upon property rights of the owner is not a voluntary payment"); see also Broward County v. Mattel, 397 So. 2d 457, 460 (Fla. 4th DCA 1981) (holding that "payment of a tax is deemed involuntary where the penalty exacted for nonpayment is so severe that it constitutes coercion and duress").

Because of the coercive effect of a lien on the property, and the availability of relief in the form of a refund, unlike in Montgomery, Sheckler's

[2] "Clearly established law" includes "recent controlling case law, rules of court, statues, and constitutional law." City of Coral Gables Code Enf't Bd. v. Tien, 967 So. 2d 963, 965 (Fla. 3d DCA 2007) (quoting Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003)).

certiorari challenge presents a live case and controversy. Involuntary or compulsory payments are recoverable. Clements, 10 So. 2d at 427; see also Bill Stroop Roofing, Inc. v. Metro. Dade Cnty., 788 So. 2d 365, 368 (Fla. 3d DCA 2001) (concluding that "our governments are required to refund taxes and fees illegally exacted").[3] A payment made to avoid the imposition of a substantial burden on his property rights amounts to coercion and duress sufficient to justify recovery of the illegally exacted fees. See Ves Carpenter Contractors, Inc., 422 So. 2d at 345; see also New Smyrna Inlet Dist. v. Esch, 137 So. 1, 4 (Fla. 1931) (explaining that "[w]here the levy of an illegal tax may become a cloud upon title to real estate, payment of the tax to avoid the cloud or to avoid the imposition of substantial burdens upon property rights of the owner is not a voluntary payment"); North Miami, 9 So. 2d at 706 (same).

Therefore, the finding of mootness by the circuit court both fails to apply the correct law and amounts to a violation of due process because the circuit court dismissed Sheckler's appeal and did not consider his arguments

[3] For purposes of our analysis here, we treat the imposition of an illegal fee the same as an illegal tax. See Bill Stroop Roofing, Inc., 788 So. 2d at 367 (explaining that "once the illegality of either [a tax or a fee] is established, the prerequisites for recovery are the same") (citing Ves Carpenter Contractors, Inc. v. City of Dania, 422 So. 2d 342 n.2 (Fla. 4th DCA 1982)).

on the merits. See Heggs, 658 So. 2d at 531 (citing approvingly to the district court's analysis that second-tier certiorari review is appropriate where the appellate court's decision is "so erroneous that justice requires that it be corrected"). Accordingly, we grant the petition for certiorari, quash the January 8, 2021 opinion of the circuit court, and remand for proceedings consistent with this opinion.

Petition granted.

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.