DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

KYLE DALE,
Appellant,

v.

VIKTORIA SCHAUB and
STATE FARM AUTOMOBILE INSURANCE COMPANY,
Appellees.

No. 4D19-900

[August 19, 2020]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Janet C. Croom, Judge; L.T. Case No. 312018CA000021XXXXXX.

Chad A. Barr and Virginia E. Davis Horton of the Law Office of Chad A. Barr, P.A., Altamonte Springs, for appellant.

Warren B. Kwavnick of Cooney Trybus Kwavnick Peets, Fort Lauderdale, for appellee Viktoria Schaub.

WARNER, J.

An attorney sent a proposal for settlement to an insurance company, seeking the policy limits of $100,000. Instead of making the proposal for $100,000, the proposal erroneously stated $10,000. The attorney realized the mistake when the defendant sent a check for $10,000 the next day. Despite the obvious error, the court denied a motion to withdraw the proposal and later denied a motion for reconsideration which was based upon the fact that the attorney did not have authority from the client to settle the claim for $10,000. We reverse both because the court erred in denying the motion to withdraw due to a unilateral mistake and because there was no authority to settle the claim for the erroneous amount set forth in the proposal for settlement.

Plaintiff Kyle Dale filed suit against Defendant Viktoria Schaub for a motor vehicle collision. Plaintiff also sued his own uninsured/underinsured motorist (UM) carrier for breach of contract.

Schaub carried bodily injury insurance with limits in the amount of $100,000. Plaintiff carried UM insurance limits in the amount of $10,000.

Plaintiff's attorney decided to send a proposal for settlement (PFS). He directed his paralegal to send one to each insurance company for their insurance policy limits. Unfortunately, the paralegal misconstrued the instructions and sent one to Schaub for $10,000 when the policy limit was $100,000.

Immediately upon receiving the $10,000 PFS, Schaub filed a notice of acceptance and issued a check for $10,000. On the following business day, Plaintiff's attorney filed a motion to withdraw the proposal because of the inadvertent error in preparing the offer. Attached to the motion was an email chain between the attorney and paralegal, as well as the paralegal's affidavit in which she admitted drafting the PFS for $10,000 instead of $100,000. The motion also pointed out that $10,000 was an obvious error, because Plaintiff's medical bills were in excess of $58,000 already, and Schaub had already made offers to settle in excess of $10,000.

At a hearing on the motion, Plaintiff's attorney advised the court of the facts set forth in the motion and the emails sent to the paralegal. The attorney also stated that he "prepared these proposals for settlement" and did not have the paralegal prepare them: "I don't have my paralegal prepare them because I don't want errors like this to happen. I am not sure how she got confused in preparing her own and then filing them and serving them without my initial approval." Schaub's counsel objected because he claimed, "[t]here was an offer, acceptance[,] and valid consideration."

The trial court denied the motion, because "[t]he Fourth DCA requires a trial court to accept a proposal [for settlement] on its face when it is clear and unequivocal on its face. Your signature is on the document. You have the ultimate responsibility to review what goes out of your office."

After the denial, Plaintiff filed a motion for rehearing, stating in the motion that, not only was the PFS for $10,000 sent in error, but that Plaintiff had never authorized his attorney to make a $10,000 offer. An affidavit from Plaintiff himself was attached stating his lack of authorization. Plaintiff's attorney also filed an affidavit explaining the error in the amount of the PFS as well as the fact that he never recommended settling the case for $10,000, nor did Plaintiff ever authorize him to settle the claim or send a PFS for $10,000. Schaub offered no responsive pleading to the motion for rehearing, and the trial court

summarily denied it. Subsequently, the court entered an order "deem[ing] this matter settled" and dismissing the action with prejudice. Plaintiff appeals the rulings of the trial court.

Plaintiff challenges the denial of the motion to withdraw the PFS and the subsequent denial of the motion for reconsideration for lack of client authorization. Because the trial court erred in the application of the law to the motion to withdraw the settlement, our review is de novo. As to the court's denial of the motion to reconsider which raised the lack of authority to settle, the standard for our review is abuse of discretion. *See Commercial Garden Mall v. Success Acad., Inc.,* 453 So. 2d 934, 935-36 (Fla. 4th DCA 1984).

On appeal, Plaintiff argues that the trial court misapplied the law regarding settlements when the court stated at the hearing that it had to accept Plaintiff's PFS because it was "clear and unequivocal on its face." We agree that the trial court's interpretation of the law as applied to these facts was erroneous.

"Although the plain meaning of the [PFS] statute and the [PFS] rule of procedure clearly contemplate strict compliance, the statute and the rule implementing the statute apply only when there has been a rejection of a [PFS] and the case goes to trial resulting in a judgment." *Baratta v. Bradford Elec., Inc.*, 9 So. 3d 694, 696 (Fla. 4th DCA 2009) (footnote omitted); *see also Sosnick v. McManus*, 815 So. 2d 759, 762 (Fla. 4th DCA 2002) (stating "[f]or the purposes of enforcement of a settlement, as opposed to imposing sanctions for failing to accept a proposal for settlement, it is irrelevant that the offer and acceptance in the instant case were made pursuant to [the PFS statute and rule]. The principles for enforcing a settlement are the same regardless of the form in which the offer and acceptance are conveyed."). The court misapprehended the law in consideration of Plaintiff's motion to withdraw the PFS.

Plaintiff sought to withdraw the offer and set aside the acceptance based upon his attorney's mistake in sending the offer for one-tenth of the policy limits. In Florida, "a contract [can] be set aside on the basis of *unilateral mistake* unless (a) the mistake is the result of an inexcusable lack of due care or (b) the other party has so changed its position in reliance on the contract that rescission would be unconscionable." *BMW of N. Am., Inc. v. Krathen*, 471 So. 2d 585, 588 (Fla. 4th DCA 1985) (*citing Maryland Cas. Co. v. Krasnek*, 174 So. 2d 541 (Fla. 1965)). In *Krasnek*, a liability insurer negotiated a settlement with an injured party who was involved in an auto accident with a vehicle that at one time had been covered by the insurer. 174 So. 2d at 542. Prior to payment, the liability

insurer discovered that the policy covering the vehicle in question had lapsed and stopped payment on the check. *Id.* The injured party filed suit and the insurance company defended in part based on a unilateral mistake which made the settlement contract subject to rescission. *Id.* The supreme court held that rescission of a contract may be permitted in Florida based on unilateral mistake when the mistake is not the result of an inexcusable lack of due care, and where the other party to the contract has not so far relied upon the payment that it would be inequitable to require repayment. *Id.* at 543. In its review, the supreme court noted that the insurer had at one time insured the vehicle involved in the accident, that the policy had lapsed, and that the settlement negotiations were carried out by a branch office on the basis of information received from the home office. *Id.* The court concluded:

> It seems to us not unreasonable for the trial judge to have seen in these ingredients the making of this kind of mistake, whether by clerical error, bad communications, or otherwise. No doubt there was some degree of negligence involved here. *But, after all, mistakes do not ordinarily result from the exercise of due care.*

Id. at 543 (emphasis added). The court also found that the injured party had not "so changed his position as to make rescission of the settlement contract unconscionable." *Id.* at 544.

An example of what this court termed an "inexcusable lack of due care" is found in *BMW of North America*. There, a proposal for settlement was sent by BMW to the plaintiff to settle a dispute over a vehicle purchased from BMW. 471 So. 2d at 587. The written offer stated that BMW would allow the plaintiff to take judgment against it for $20,500 plus reasonable attorney's fees and costs. The plaintiffs promptly accepted the offer "as written." *Id.* After a final judgment on the settlement was entered, BMW moved to clarify or vacate the judgment, because it contended that the return of the vehicle was always a condition precedent to settlement negotiations so the judgment should be clarified to reflect that understanding.

The trial court denied relief, and on appeal this court agreed, because BMW "cannot now be heard to complain that a condition precedent should be read into the offer merely because the attorney who drafted the offer 'assumed' that both parties contemplated return of the vehicle in exchange for the $20,500." *Id.* We explained that this neglect of counsel in failing to add what appeared to be a critical element of settlement to the offer fell below acceptable professional standards. *Id.* at 588.

On the other hand, a clerical error in a settlement offer constituted a unilateral mistake which authorized rescission of the settlement in *Florida Insurance Guaranty Association, Inc. v. Love*, 732 So. 2d 456 (Fla. 2d DCA 1999). The plaintiff had offered to settle a claim for $210,000. In a letter response, the insurance company stated that it must "respectfully reject your $210,000 demand," but then offered to settle for $215,000. *Id.* at 456. The plaintiff accepted and moved to confirm the settlement. The insurance company opposed and sought to withdraw the offer, contending that it had meant to offer $115,000. The Second District reversed the trial court's confirmation of the settlement. Citing to *Krasnek*, the court found that "[w]hile FIGA's error certainly involved some degree of negligence, the evidence was not sufficient to support a finding of an inexcusable lack of due care." *Id.* at 457. *See also Fla. Cranes, Inc. v. Fla. E. Coast Props., Inc.*, 324 So. 2d 721, 722 (Fla. 3d DCA 1976) (finding "equity can correct a unilateral mistake where said mistake is committed by an employee of the appellant, and constitutes a simple but honest mistake which could lead to an unconscionable result.") (citations omitted).

Similarly, in this case, while there appears to be some negligence in the sending of the offer for only $10,000, this is simply the result of miscommunication between the paralegal and the attorney, not inexcusable negligence. The attorney had asked the paralegal to file/serve a PFS for the policy limits, which were $100,000. Offers from Schaub for more than $10,000 had been already turned down. Just as in *Love*, a clerical error occurred. The court erred in denying the motion to withdraw the PFS based upon a mistake.

In addition, Plaintiff filed a motion for rehearing in which he alleged that he, as the client, never authorized the $10,000 settlement offer. While titled a motion for rehearing, this motion was in fact a motion for reconsideration, because it was directed at a nonfinal order. *See Seigler v. Bell*, 148 So. 3d 473, 479 (Fla. 5th DCA 2014). A trial court's discretion in reconsidering a nonfinal order is far greater than in considering a motion for rehearing of a final order. That is because of the trial court's "inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action[.]" *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998) (citations omitted).

A settlement of a case requires the consent of the client. In *Nehleber, v. Anzalone*, 345 So. 2d 822 (Fla. 4th DCA 1977), this court set forth the rules of law which apply to a settlement involving an attorney:

(1) A party seeking judgment on the basis of compromise and settlement has the burden of establishing assent by the opposing party[.]

(2) The mere employment of an attorney does not of itself give the attorney the implied or apparent authority to compromise his client's cause of action[.]

(3) An exception to the general rule is a situation in which the attorney is confronted with an emergency which requires prompt action to protect his client's interest and consultation with the client is impossible[.]

(4) A client may give his attorney special or express authority to compromise or settle his cause of action, but such authority must be clear and unequivocal[.]

(5) An unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client[.]

Id. at 822-23 (citations omitted). These rules also apply where an attorney files a PFS. *See Sosnick v. McManus*, 815 So. 2d 759, 762 (Fla. 4th DCA 2002) (citing *Nehleber*, 345 So. 2d at 822).

Applying *Nehleber*, it is clear that the trial court erred as a matter of law in denying the motion based upon the lack of authority to settle the case by the terms of the PFS. To the extent that the court refused to address the issue in the motion for reconsideration, the court abused its discretion. The motion and affidavits clearly and unequivocally stated that Plaintiff did not authorize his attorney to make an offer to settle his case for $10,000, and his attorney did not have authority to file the PFS for that amount. In fact, he had rejected larger offers from Schaub. There was no emergency requiring the attorney's action, and the client never ratified the settlement.

For the foregoing reasons, we reverse with directions to strike the acceptance of the offer of settlement and to grant the motion to withdraw the offer. We do not remand for further proceedings on these motions, as requested by Schaub. The record is clear that this PFS was never authorized by Plaintiff and that it was the result of a simple mistake such that further proceedings on this issue would be a waste of time and pursued in bad faith.

Reversed and remanded.

MAY, J., and HILAL, JENNIFER, Associate Judge, concur.

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Not final until disposition of timely filed motion for rehearing.